THE PARTICIPATION OF NONGOVERNMENTAL ORGANIZATIONS IN INTERNATIONAL JUDICIAL PROCEEDINGS

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Nongovernmental organizations are playing an increasingly important role in international litigation. This study will analyze the participation of nongovernmental organizations, primarily as amici curiae, in the proceedings of four permanent international courts: the International Court of Justice, the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights. After discussing the impact of amici in national and regional courts, it recommends that the International Court of Justice expand its acceptance of submissions from nongovernmental organizations in appropriate cases. The Court has a jurisdictional basis to do so and amici have usefully contributed to cases before other courts.

I. OVERVIEW

International public interest organizations, like their domestic counterparts, sometimes contribute to the development of international law through litigation. They may institute cases or intervene as parties, serve as court- or party-appointed experts for fact finding or legal analysis, testify as witnesses, or participate in proceedings as amici curiae. Amici, with permission, suggest to a court matters of fact and law within their knowledge.

The role of amicus offers certain advantages compared to other forms of participation.[1] It is generally less costly and time-consuming than mounting a full case, allowing the organization to share the litigation burden with the parties; amici are not bound by the decision and not prevented from relitigating issues in the case should the holding be unfavorable; unlike experts or witnesses, they generally may raise any issue the court could raise on its own motion and are not limited by questions presented to them or to matters pleaded by the parties; and finally, it is usually easier for them to participate because the interest required for amicus status is less than that required for intervention. An intervenor must have a direct, personal interest in the *res* of the suit, an interest that will entail a gain or loss by

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[1] This assumes that a clear distinction is maintained between the different forms of participation, which is not always the case in either national courts or international ones. *See* Jewell Ridge Coal Corp. v. Local 6167, 3 F.R.D. 251 (W.D. Va. 1943) (right to participate in trial, present arguments and file briefs as an amicus is a substitute for permissive intervention under Federal Rule of Civil Procedure 24(b), where the applicant's general economic interest in the question at issue as the representative of its members justified its participation even in the absence of that direct personal or pecuniary interest normally required of intervenors). In Canada amici are referred to as "non-party intervenors." Protocol 11 to the European Convention on Human Rights *infra* note 122, will add a new Article 36 entitled "Third-party intervention," permitting nonstate intervention. The explanatory notes add that the new article is based on the current amicus practice under Rule 37(2) of the Rules of Court, discussed *infra* in text at note 20, and clarifies that, in spite of the heading to Article 36, the intervenors are not parties to the proceedings.

the direct legal operation of the judgment. In contrast, courts usually permit an amicus to participate on the basis of a general interest, including the desire to prevent a collusive suit, to protect unrepresented persons or the public interest, or to point out error to the court.

There are also disadvantages to being an amicus. Unlike parties, including intervenors, amici cannot control the direction or management of the action; they generally are not served papers or other documents in the case; they cannot offer evidence, examine witnesses or cross-examine them; and they cannot be heard without special leave of the court. Also important, amici are not entitled to any compensation or costs as may be allowed to a party. Although some groups may find that the disadvantages outweigh the advantages, amicus status may be the only available avenue of participation in many international cases.

The ability of a nongovernmental organization to initiate an international case or intervene as a party is limited because in many international courts only states may be parties to proceedings.[2] From the start, the project for a permanent court for the League of Nations explicitly limited the competence of the court to cases between states.[3] The jurisdiction of the International Court of Justice is similarly restricted.[4] At the regional level, the European Court of Justice grants standing to individuals or other nonstate actors for certain types of cases,[5] but neither the European Court of Human Rights[6] nor the Inter-American Court of Human

[2] The short-lived (1907–1918) Central American Court of Justice was an early exception. The court's jurisdiction extended to cases between a government and a national of another state, if the cases were of an international character or concerned alleged violations of a treaty or convention. Convención para el Establecimiento de una Corte de Justicia Centroamericana, Dec. 20, 1907, Art. 2, 1 ANALES DE LA CORTE DE JUSTICIA CENTROAMERICANA 3 (1911). *See* MANLEY O. HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 49 (1943). Modern examples include various claims tribunals, e.g., the Iran–United States Claims Tribunal and the United Nations Compensation Commission established after the 1990–1991 Persian Gulf crisis. *See* David Caron, *The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL 104 (1990). NAFTA and its side agreements also afford standing to individuals and other nonstate actors.

[3] JAMES BROWN SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS 92 (1920).

[4] INTERNATIONAL COURT OF JUSTICE, STATUTE Art. 34(1) ("Only states may be parties in cases before the Court."). In addition, Articles 62 and 63 give a right to intervene only to states. *See also* SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 75 (1st bilingual ed. 1991).

[5] Treaty on European Union, Feb. 7, 1992, Arts. 173, 175, 178, 179, 1992 O.J. (C 224) 1, 31 ILM 247 (1992). The Court is the judicial arm of the European Union, whose 12 member states are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

[6] The Court was established pursuant to the European Convention on Human Rights. Article 48 of the Convention provides that only the European Commission of Human Rights or a state party may bring a case before the Court. The state bringing the case may be only the state whose national is alleged to be a victim, the state that referred the case to the Commission or the state against which the complaint was lodged. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221, COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 3 (1987). Convention Protocol 9 will give individuals, groups and nongovernmental organizations that have filed petitions the right to refer cases to the Court after proceedings have been completed before the Commission. Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, 30 ILM 693 (1991). As of July 1, 1993, 8 of the 10 ratifications necessary for the Protocol to enter into force had been received. COUNCIL OF EUROPE, INFORMATION SHEET No. 32, Jan.–June 1993, at 2.

Rights[7] as yet permits petitioners to refer cases from their respective Commissions.

When the Permanent Court of International Justice (PCIJ) was established, nonstate access to international courts conflicted with the doctrine that excluded individuals as subjects of international law.[8] It also was deemed unnecessary, on the assumption that cases submitted to the PCIJ would be generally, if not always, claims presented by a state on behalf of its citizens or subjects for denials of their rights.[9] Other claims could be raised if the practice of nations, by treaty or special agreements, allowed states to extend protection to non-nationals. The rights accorded to racial, religious and linguistic minorities by treaties at the end of World War I were cited as a case in point.[10]

In practice, states do not often litigate the international rights of their citizens or citizens of other states. Although advisory proceedings at the PCIJ frequently concerned minority or trade union rights,[11] contentious cases more often involved issues of jurisdiction, treaty law, boundaries and territorial acquisition.[12]

[7] The jurisdiction of the Inter-American Court is modeled after that of the European Court. Article 61 of the American Convention on Human Rights limits the Court's competence to cases brought by the Inter-American Commission or by a state party. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 UNTS 123, *reprinted in* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, OEA/Ser.L/V/II.71, doc. 6, rev.1 (1988).

[8] *See* LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362–69 (2d ed. 1912) ("Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations."). By 1955, Lauterpacht's eighth edition of Oppenheim modified this view:

> The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law.

Id. at 639 (Hersch Lauterpacht ed., 8th ed. 1955).

[9] SCOTT, *supra* note 3, at 94. This assumption may have been based on the number of direct claims previously brought by individuals to international commissions. For example, the United States-Mexican Mixed Claims Commission of 1868 heard more than two thousand claims between 1871 and 1876. 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 299–349 (1898).

[10] SCOTT, *supra* note 3, at 94–95.

[11] Six of the 27 PCIJ advisory opinions concerned the International Labour Organisation and 11 concerned rights in Poland and/or Danzig. On labor, see, e.g., Advisory Opinion No. 1, Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, 1922 PCIJ (ser. B) No. 1 (July 31); Advisory Opinion No. 2, Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, 1922 PCIJ (ser. B) No. 2 (Aug. 12); Advisory Opinion No. 13, Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer, 1926 PCIJ (ser. B) No. 13 (July 23); Interpretation of the Convention of 1919 concerning Employment of Women during the Night, 1932 PCIJ (ser. A/B) No. 50 (Nov. 15). Minority rights opinions include Advisory Opinion No. 6, German Settlers in Poland, 1923 PCIJ (ser. B) No. 6 (Sept. 10); Advisory Opinion No. 17, Greco-Bulgarian "Communities," 1930 PCIJ (ser. B) No. 17 (July 31); Access to German Minority Schools in Upper Silesia, 1931 PCIJ (ser. A/B) No. 40 (May 15).

[12] *E.g.*, Territorial Jurisdiction of the International Commission of the River Oder, 1929 PCIJ (ser. A) No. 23 (Sept. 10); Legal Status of Eastern Greenland, 1933 PCIJ (ser. A/B) No. 43 (Apr. 5); Diversion of Water from the Meuse, 1937 PCIJ (ser. A/B) No. 70 (June 28). *But see* Mavrommatis Palestine Concessions (Jurisdiction), 1924 PCIJ (ser. A) No. 2 (Aug. 30); Mavrommatis Jerusalem Concessions (Merits), 1925 PCIJ (ser. A) No. 5 (Mar. 26).

The successor International Court of Justice has been especially occupied, until recently, with delimiting land and maritime boundaries.[13] The development of specialized human rights procedures and courts may have contributed to the lack of recourse to the International Court of Justice for such matters.[14]

The amount of litigation has steadily increased in all international courts.[15] Human rights cases, in particular, are growing in number and being litigated in all tribunals, not only those established specifically for that purpose.[16] In addition, new issues of widespread concern, such as environmental cases, are being presented for decision.[17] In this litigation framework, issues of broad public interest can and do arise apart from the questions submitted to courts by the parties or by international institutions. Rarely is international litigation a matter of private concern or interest affecting only the parties. Even where narrow issues are presented, there may be broad human rights impacts. For example, a boundary dispute litigated on the basis of historical title or other international doctrine on

[13] *See, e.g.*, Keith Highet, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AJIL 646 (1991).

[14] However, states also have shown little enthusiasm for bringing interstate complaints before human rights bodies. Between 1955 and 1992, the European Commission of Human Rights opened 63,065 files based on individual applications, registering complaints in one-third of them (21,077). During this same period, there were 11 interstate filings concerning 6 cases (Greece v. United Kingdom (I and II); Austria v. Italy; Denmark, Norway, Sweden and the Netherlands v. Greece (I and II); Ireland v. United Kingdom (I and II); Cyprus v. Turkey (I, II and III); and Denmark, France, the Netherlands, Norway, and Sweden v. Turkey). EUR. COMM'N H.R., SURVEY OF ACTIVITIES AND STATISTICS 18, 22 (1992) [hereinafter SURVEY]. Politics, other priorities, lack of resources, and the availability of direct access for individuals all contribute to this situation.

[15] In 1991–1992, the International Court of Justice had the largest number of cases in its history: there were 12 contentious cases before the full Court and one case in chambers. 1992 Y.B. ICJ 148–49. Between 1961 and 1989, the European Court of Justice decided nearly 4,000 cases, 1,858 of them preliminary rulings and 2,061 direct actions. *See* Christian Kohler, *The Court of Justice of the European Communities and the European Court of Human Rights, in* SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 20 (Igor I. Kavass ed., 1992). The European Court of Justice has used chambers with increasing frequency as its caseload has risen. *See* GEORGE A. BERMANN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, EUROPEAN COMMUNITY LAW 70 (1993). In 1986 the Single European Act created a Court of First Instance for the European Community, in part to alleviate the caseload burden on the Court; it began operating in September 1989. *Id.* at 72–73. Both the European and the Inter-American Human Rights Courts have seen similar increases in recent years. In 1992 the European Court of Human Rights received 50 new cases, 45 referred by the Commission and 5 by governments. SURVEY, *supra* note 14, at 6. The Inter-American Court has issued five advisory opinions and decided matters in six contentious cases since 1989.

[16] Genocide, war crimes and other human rights violations are central to the ICJ case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia/Herzegovina v. Yugoslavia (Serbia and Montenegro)). *See, e.g.*, Provisional Measures, 1993 ICJ REP. 3 (Order of Apr. 8); Provisional Measures, 1993 ICJ REP. 325 (Order of Sept. 13). In a proceeding combining both human rights and environmental issues, the Director General of the World Health Organization filed a request for an advisory opinion on August 27, 1993. Based on World Health Assembly Res. WHO 46/40, May 14, 1993, it asks: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1993 ICJ REP. 467, 468 (Order of Sept. 13).

[17] In July 1993, the International Court announced the creation of a seven-member chamber of the Court for environmental matters. The Court noted that of the 11 cases on its docket at that time, 2 had important implications for international law on matters relating to the environment. ICJ Communiqué No. 93/20 (July 19, 1993).

acquisition of territory may directly and seriously affect the right of self-determination of the inhabitants of the disputed region even if the issue is not raised by the parties. The law on self-determination and the appropriateness of its application to the case could be presented by an interested and informed nongovernmental organization acting as amicus to provide full information to the court. Similarly, a case concerning utilization of transboundary waters may have dramatic impact on individuals on both sides of the watercourse, without discussion by either party of the human rights implications of its activities.[18]

There are several reasons why a state may omit certain issues from international proceedings. It may consider them subordinate or tangential to the major points it wishes to raise, or litigation strategy may dictate the omission. A state may find it difficult or impossible to obtain evidence about the consequences of the other state's activities within the latter's territory. It may lack litigation resources or expertise.[19] Finally, a state may feel that raising certain sensitive issues, such as human rights, will exacerbate the dispute between the parties or be counterproductive to the improvement sought.

Gaps in either the facts or the law may also be found in international human rights cases brought against states parties by the European and Inter-American Commissions. In neither system does the individual have direct access to the Court. The European Commission is not even considered a party to the case but participates in the proceedings as "defender of the public interest."[20] In the inter-American system, where the Court's Statute provides that the Commission shall appear as a party before the Court in all cases within the latter's adjudicatory jurisdiction, the role of the Commission is analogized to that of Public Prosecutor (*Ministerio Público*).[21] Although in both systems the role of amicus could be partially filled by the Commissions, they generally act as advocates for the victims before the Court. In addition, both institutions suffer chronically from inadequate resources, including a shortage of staff attorneys. Individual victims may lack attorneys or resources to assist in the gathering of evidence and preparation of legal arguments, although in the inter-American system this problem is partly overcome by the fact that standing to initiate proceedings at the Commission, a prerequisite to any Court case, is not limited to victims; in the European system only victims may file complaints. Finally, political changes may make the defend-

[18] *E.g.*, Gabčíkovo-Nagymaros Project (Hung. v. Slovakia), announced by the Court in ICJ Communiqué No. 92/17 (July 5, 1993). For the basic documents of the dispute, see 32 ILM 1247 (1993). *See further* text at and notes 88–89 *infra*.

[19] On November 1, 1989, the Secretary-General of the United Nations announced the creation of a trust fund to aid states that "are prepared to seek settlement of their disputes through the International Court of Justice, but cannot proceed because of the lack of legal expertise or funds." UN Doc. A/44/PV.43 (1989), *reprinted in* 28 ILM 1590 (1989). *See* Mary Ellen O'Connell, *International Legal Aid, in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 96 (1992); Peter H. F. Bekker, *International Legal Aid in Practice: The ICJ Trust Fund*, 87 AJIL 659 (1993).

[20] J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 5, 41 (1988).

[21] *In re* Gallardo, Decision of Nov. 13, 1981, Inter-Am. Ct. H.R. No. G 101/81, para. 22, *reprinted in* 20 ILM 1424, 1428 (1981). The statutory mandate appears to have been read narrowly by the Commission to apply only to contentious cases; the Commission failed to appear or present its views in the important advisory proceeding concerning the legal status of the American Declaration of the Rights and Duties of Man. *See* Advisory Opinion OC–10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, 10 Inter-Am. Ct. H.R. (ser. A) (1990).

ant government sympathetic to the petitioner's position, leaving other important interests unrepresented and undermining the adversarial nature of the case.[22]

In sum, international courts increasingly face the same problems as many national courts: an ever-increasing caseload, which reduces the time available to judges to do their own research; staff attorneys that are overworked, underpaid and sometimes politically biased; lawyers that are unprepared owing to lack of resources or expertise; and litigation strategies that deliberately omit significant issues of broad public interest. The result can be judicial errors that undermine confidence in the courts and the legal system. In response to these problems and the efforts of NGOs, international courts are developing innovative practices to take broader public concerns into consideration. One positive development is the acceptance of amicus participation by nongovernmental organizations in international cases, a manifestation of the growing role of nonstate actors in international law generally. The value of this participation can be evaluated in light of the growth and impact of amicus participation in national courts.

II. The Role of Amicus Curiae in National Courts

While the practice of amicus participation is ancient, it has rapidly grown during recent decades. Recent studies indicate that amici have had a significant impact on the development of constitutional and environmental law within the United States; the subject does not seem to have been researched in other countries whose courts accept amici in their proceedings.

Amicus curiae, the "friend of the court," was known in Roman law.[23] Incorporated into the English common law, the amicus is cited in numerous seventeenth-century cases, where references are made to both government and private representatives.[24] The development of amicus participation may be seen in large part as a result of the common law procedures that made third-party intervention difficult, if not impossible. "The proposition that the common law knew no intervenors as parties—a proposition regularly advanced by the courts—may be too sweeping; but if there were exceptions they were in fringe areas, paralleling equity cases, as in proceedings involving heirs."[25]

In contrast to the common law view that "parties to a controversy shall have the right to litigate the same, free from the interference of strangers,"[26] the position of France and other civil law countries is to grant broad rights of intervention. Associations and organizations concerned with the environment or human rights participate in cases as intervenors, serving the same purpose as amici in common law countries.[27] In addition, groups from civil law countries participate as amici in cases at the European Court of Human Rights.

[22] *See, e.g.,* Young, James & Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) (1981) (an attack on closed union shops in the United Kingdom). The case and the intervention of the Trades Union Congress are discussed in text at note 127 *infra.*

[23] *See* Ernest Angell, *The Amicus Curiae: American Development of English Institutions,* 16 Int'l & Comp. L.Q. 1017 (1967).

[24] *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 Yale L.J. 694, 695 n.4 (1963). *Year Book* cases as early as 1353 reveal an accepted practice of taking information from amici. Y.B. (Hil.) 26 Edw. 3, fol. 58, pl. 165 (1353).

[25] Krislov, *supra* note 24, at 696.

[26] Consolidated Liquor Corp. v. Scotello & Nizzi, 155 P. 1089, 1093, 21 N.M. 485, 494–95 (1916).

[27] The intervention of the government as amicus curiae is said to be analogous to the role of the Commissaire du Gouvernement in the French Conseil d'Etat. *See* Angell, *supra* note 23, at 1017.

Federal systems greatly increase the number of potentially unrepresented interests in litigation. The United States Supreme Court shapes the rights and duties of states, organizations and individuals throughout the country, yet the requirements for intervention remain as strict as those of English common law.[28] On major constitutional questions, the Government often has no right to participate as a party. The amicus and other forms of third-party participation developed in response, through exercise of "the inherent power of a court of law to control its processes,"[29] with submissions accepted "by leave of the court." Indeed, all courts probably have the inherent power to request anyone to assist their deliberations or to refuse volunteers.

The first suggestion of amicus participation at the U.S. Supreme Court was by the Attorney General of the United States who intervened in an admiralty suit.[30] Subsequently, the Department of Justice asserted the rights and interests of African-Americans in various courts[31] and a minority group first appeared for itself as amicus curiae.[32] Today, legal representatives of the Government and its agencies participate in cases before state and federal courts as amici, as do associations and organizations serving professional or public interests.

Supreme Court Justice Arthur Goldberg, later ambassador of the United States to the United Nations, described the function of the amicus:

> A traditional function of an *amicus* is to assert "an interest of its own separate and distinct from that of the [parties]," whether that interest be private or public. It is "customary for those whose rights [depend] on the outcome of cases . . . to file briefs *amicus curiae,* in order to protect their own interests.". . . This Court has recognized the power of federal courts to appoint "*amici* to represent the public interest in the administration of justice."[33]

The attitude of most courts is that "in cases involving questions of important public interest, leave is generally granted to file a brief as *amicus curiae.*"[34] As this suggests, almost all courts require that an amicus request permission to participate. On the other hand, a court may appoint an amicus when it deems it appropriate, without the filing of a request.

The very discretion of courts to accept or reject amici has stimulated efforts to develop criteria for the exercise of this discretion in view of the tension between the ideal of correct judgment and the economies of judicial administration. Courts may require novelty or originality of presentation. Others may permit

[28] The same situation has presented itself in Canada, which admits amicus briefs from associations. In Morgentaler v. The Queen, [1976] 1 S.C.R. 616, an appeal from a conviction for performing an illegal abortion, the Chief Justice of the Canadian Supreme Court accepted submissions from the Canadian Civil Liberties Association, the Foundation of Women in Crisis, and the Alliance for Life. *See* Bernard M. Dickens, *A Canadian Development: Non-Party Intervention,* 40 MOD. L. REV. 666 (1977).

[29] Kirppendorf v. Hyde, 110 U.S. 276, 283 (1884). As discussed below, the U.S. Supreme Court began accepting amicus briefs in 1904, although no rule was drafted on the practice until 1937. *See* Krislov, *supra* note 24, at 694, 707.

[30] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Significantly, the case was one of the first to present international law questions to the Court. The use of the term "amicus curiae" came with the case Green v. Biddle, 21 U.S. (8 Wheat.) 1, 17 (1821).

[31] Angell, *supra* note 23, at 1018.

[32] Ah How v. United States, 193 U.S. 65 (1916).

[33] United States v. Barnett, 376 U.S. 681, 738 (1964).

[34] Grand Rapids v. Consumers' Power Co., 185 N.W. 852, 854, 216 Mich. 409, 415 (1921).

amici to reinforce arguments made weakly or inadequately by the parties and to support novel arguments. Some tests focus on the amicus itself and whether it has sufficient economic, legal or public interest or expertise to be of assistance to the court. A more generous approach leaves it to the court to permit filings in any case when justified by the circumstances. In contrast, some courts only allow amici to file with the consent of the parties. Finally, many systems that permit amicus participation require only that the court consider the interests of justice, leaving the matter to the complete discretion of the judges. Because of the multiplicity of types of litigation and interests involved, the last may be the best rule, although the judges could usefully consider the other factors mentioned.

As a procedural step, potential amici generally must request leave of the court to file, setting forth reasons for believing that the questions of law the organization will address have not been or will not be adequately presented by the parties, or otherwise showing how the submission will assist in resolving the case. Issues of fact may be presented in an amicus brief, although this may raise difficult evidentiary problems. Certainly, the parties should be able to respond to assertions by amici and, when appropriate, amici could be required to participate in oral proceedings where they would be subject to examination by the court or the parties.

Amicus briefs add to the workload of courts, but they are accepted because of the benefits they bring.[35] First, they often supplement or provide detailed analysis of points of law, including discussion and citation of authority not contained in the parties' arguments. Second, they can supply detailed legislative or jurisprudential history, a scholarly exposition of the law. Amici may present arguments the parties are unable or unwilling to make because of political pressure or other tactical considerations. Amici frequently discuss the broader implications of decisions that the main parties have either purposefully or inadvertently failed to address. Finally, they assist when courts are expanding into areas of novel and complex litigation. They may assemble expert knowledge and expertise. In such cases, amici may help to explain complex issues and perhaps deal with the broader implications of a decision, beyond the particular interests of the parties.

The percentage of amicus filings has grown substantially in recent decades. In 1969 Nathan Hakman reported that interest groups had filed amicus curiae briefs at the United States Supreme Court in only 18.6 percent of the 1,175 "noncommercial cases" decided by the Court between 1928 and 1966.[36] Recent studies have found that Hakman's conclusions, if valid for their time, are no longer so.[37] Amicus participation accelerated very rapidly in the late 1960s and 1970s, amounting to 63.8 percent of noncommercial cases.[38] During that period, the highest percentage of filings was in cases involving labor union rights, freedom of the press, racial discrimination, and church-state relations.[39] Recently, amicus

[35] It is said that the Supreme Court accepts amicus briefs because these actually assist the Justices in dealing with their workload by providing information with which to formulate their opinions. Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST. SYS. J. 35, 35–36 (1983).

[36] Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOC'Y REV. 311, 313 (1981–82).

[37] "Virtually all recent research . . . has found evidence of a significant systematic organizational role in Supreme Court litigation." *Id.*

[38] *Id.* at 315, 317.

[39] *Id.* at 317. In a landmark case concerning the definition of racial discrimination, 57 amicus briefs were submitted. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

participation has been particularly strong in environmental cases, reaching 86 percent during the 1980s.[40]

Although more difficult to quantify, amicus briefs in public interest litigation apparently have also had a significant impact.[41] In *Epperson v. Arkansas,*[42] the Supreme Court decided the case on a claim raised only in the joint amicus brief of the American Jewish Committee and the American Civil Liberties Union.[43] The issue, whether a state statute that forbids instructors from teaching evolution or any theory denying the biblical story of Divine Creation of man violates the First Amendment's ban on laws respecting the establishment of religion, had not been argued in the courts below. Amici have raised new issues in other cases as well: in *Mapp v. Ohio,*[44] the parties had not discussed the exclusion of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. The amici, in a short concluding paragraph, argued the point on which the Supreme Court's holding in the case was based.

A recent study on the impact of amicus participation on decision making in environmental cases at the Supreme Court found that amici had participated in approximately one-third of the eight or nine environmental cases decided annually between 1958 and 1965.[45] The Court cited the amicus briefs in 14 percent of the cases where they were filed; in five cases (5 percent of the filings) the arguments were cited and rejected, and in an equal number there was positive reliance.[46] The small percentage of textual references probably underrepresents the contribution of amici to the resolution of cases. Amicus briefs may have shaped judicial decisions in more cases than is commonly realized, courts often relying on factual information, cases or analytical approaches provided by an amicus.[47] Even if the percentages cited above accurately reflect the number of cases in which amici affected the outcome, the impact is significant. As the examples of *Epperson* and *Mapp* indicate, statistical measures do not reflect the nature or importance of the decisions to which amici have contributed. In this regard, amici can be said to have left an imprint on the U.S. legal system.

III. The International Court of Justice

Nongovernmental organizations have rarely participated in proceedings before the International Court of Justice.[48] The legal basis for their doing so depends on

[40] Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court,* 10 VA. ENVTL. L.J. 187 (1991).

[41] *See id.;* Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties,* 58 YALE L.J. 576 (1949) (reviewing the role of the ACLU, the NAACP and the American Jewish Committee in efforts to achieve civil rights, showing different litigation and lobbying strategies pursued); Leo Pfeffer, *Amici in Church-State Litigation,* LAW & CONTEMP. PROBS., Spring 1981, at 83. One measure of impact is citation of amicus briefs. O'Connor and Epstein found that nongovernmental amicus briefs were cited in majority, concurring or dissenting opinions in 18% of the cases decided by the Court from 1969 to 1981. O'Connor & Epstein, *supra* note 35, at 42.

[42] 393 U.S. 97 (1968).

[43] *See* Pfeffer, *supra* note 41, at 107.

[44] 367 U.S. 643, 673 nn.5, 6 (1961).

[45] Hedman, *supra* note 40, at 101. Environmental cases account for approximately 5% of the Supreme Court's docket.

[46] *Id.* at 193.

[47] *See* Bruce J. Ennis, *Effective Amicus Briefs,* 33 CATH. U. L. REV. 603 (1984).

[48] State recourse to the Court is itself limited. During its 25 years from 1921 to 1945, the PCIJ issued 31 judgments and 27 advisory opinions. From 1946 to 1990, the ICJ rendered 52 judgments

the nature of the proceeding. The ICJ Statute provides that, when a request for an advisory opinion is received,[49] all states entitled to appear, and "any international organization" considered likely to be able to furnish information on the question, shall be notified by the Registrar "that the Court will be prepared to receive . . . written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question."[50] Paragraph 4 of Article 66 also allows organizations that have presented written or oral statements to comment on the statements made by states or other organizations, as the Court decides in each particular case.

The parallel provision of the Statute governing contentious proceedings contains a significant difference in language. It provides that the Court, "subject to and in conformity with its Rules, may request of *public* international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative."[51] The Rules of Court define "public international organization" as "an international organization of States."[52]

The background and drafting history of the Statute is sparse on the meanings of "public international organization" and "international organization" in Articles 34 and 66(2) of the Statute. At the San Francisco Conference, the United States proposed draft Article 34: "The Court may, subject to and in conformity with its own rules, request of public international organizations information relevant to cases before it, and it shall receive such information voluntarily presented by such organizations."[53]

In discussions concerning this draft, Gerald Fitzmaurice of the United Kingdom, chairman of the legal committee, called attention to Article 26 of the PCIJ Statute, which provided that, "[i]n labor cases, the International Office shall be at liberty to furnish the Court with all relevant information."[54] Fitzmaurice "explained that the second part of the American proposal *was probably meant* to embrace that provision relating to the I.L.O., thus permitting organizations to offer information without a previous request from the Court."[55] Fitzmaurice subsequently noted that only states could be parties before the Court and that, if it was desired to extend the jurisdiction to individuals or international organizations

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and 21 advisory opinions. 1988–89 Y.B. ICJ 173–85; ICJ Communiqué No. 89/14 (July 31, 1989); ICJ Communiqué No. 90/20 (Nov. 20, 1990). States may intervene in contentious proceedings either as of right under Article 62 of the Statute or with the Court's permission under Article 63. States also may participate, as amici curiae, in advisory proceedings. They have rarely done so. *See* John T. Miller, Jr., *Intervention in Proceedings before the International Court of Justice, in* 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 542, 550 (Leo Gross ed., 1976).

[49] Article 96 of the Charter of the United Nations provides that the "General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Upon authorization of the General Assembly, other organs of the United Nations and specialized agencies "may also request advisory opinions of the Court on legal questions arising within the scope of their activities." UN CHARTER Art. 96.

[50] ICJ STATUTE Art. 66(2); ROSENNE, *supra* note 4, at 87.

[51] ICJ STATUTE Art. 34(2) (emphasis added); ROSENNE, *supra* note 4, at 55.

[52] Rules of Court, Art. 69(4), adopted April 14, 1978, *reprinted in* 73 AJIL 748, 770 (1979); ROSENNE, *supra* note 4, at 249. Article 69(2) provides that public international organizations may furnish information relevant to a case before the Court in the form of a memorial. The Court retains the right to require supplemental information, either orally or in writing. The parties may comment on the information furnished.

[53] Doc. US Jur 1, G–1, 14 U.N.C.I.O. Docs. 326, 337 (1945).

[54] 1926 PCIJ, STATUTE AND RULES OF COURT (ser. D) No. 1, at 14–15.

[55] Doc. Jurist 30, G/22, 14 U.N.C.I.O. Docs. 131, 133.

as parties, this question should be separately considered.[56] United States Solicitor General Charles Fahy observed that the proposal extended to all public international organizations the standing provided the ILO under the PCIJ Statute.

Representatives of both Mexico and Egypt questioned the scope of the term "public international organization." Dr. Moneim-Riad Bey (Egypt) asked whether the term included learned academies and the like. Professor John Siropoulos (Greece) was of the view that the Court would decide the question, but that groups such as the Danube River Commission should be included.[57] Fitzmaurice, as chairman, expressed his understanding "that the term included only those organizations having States as members, and thus excluded scientific societies and other such international groups; the drafting committee might make this interpretation clearer, if there was general agreement on it." Without further discussion, a vote was then taken on whether public international organizations should have the right to submit information to the Court and the proposal was adopted.[58] The drafting committee made only minor linguistic changes in the article.[59]

There was no discussion of Article 66 on advisory opinions and no objection to the proposal that international organizations be permitted to participate.[60] Article 66 of the ICJ Statute repeats the provisions of Article 66 of the 1929 Revised Statute of the PCIJ, originally Article 73 of the 1922 Rules of Court.[61] The term "international organization" was never precisely defined.[62] Although some thought only official organizations were included, in practice there was a tendency to give the term a broad interpretation.[63]

The difference between Articles 34 and 66 of the ICJ Statute thus derives from the different language used in the PCIJ sources, Articles 26 and 66 of the PCIJ Statute, respectively. However, the difference in practice was lessened because of the tripartite structure of the ILO and the fact that Article 26 conferred standing on the International Labour Office, not the Organisation as a whole.[64] The Office, according to the Constitution of the ILO, consists of the Director General, appointed by the Governing Body, and the staff. Article 9(4) guarantees the independence of the Director General and staff from any government or any other authority external to the Organisation. Members of the Organisation undertake to respect the exclusively international character of the responsibilities of the Director General and staff and not to seek to influence them in the discharge of their responsibilities.[65] The Office is subject to the control of the Governing

[56] *Id.* at 136–37.

[57] *Id.* at 137.

[58] *Id.*

[59] Doc. Jurist 47, G/36, 14 U.N.C.I.O. Docs. 485, 491.

[60] Doc. Jurist 45, G/34, *id.* at 175, 183.

[61] Article 73(2) of the Rules provided that, where a request for an advisory opinion was received by the Registrar, "notice of such request shall . . . be given to any international organizations which are likely to be able to furnish information on the question." 1926 PCIJ (ser. D) No. 1, at 81. The 1929 draft revised Statute would have omitted any reference to international organizations. The Director General of the ILO protested and, after lengthy discussion, the Conference of Signatories maintained the reference as it was in Article 73 of the Rules of Court. Minutes of the 1929 Conference of Signatories, League of Nations Doc. C.514.M.173.1929.V, at 42–46, 49.

[62] Judge Anzilotti thought the term should be defined but did not press the issue in 1926. 1926 PCIJ (ser. D) No. 2, at 224–25 (1st add.).

[63] National political organizations were thought to be excluded. *Id.* at 702.

[64] The provision giving the ILO *locus standi* in contentious labor cases was included at the insistence of the ILO Director General. *See* HUDSON, *supra* note 2, at 175–77.

[65] INTERNATIONAL LABOUR ORGANISATION, CONST. Art. 9(5), as amended.

Body, which consists of twenty-eight governmental representatives, fourteen employer representatives and fourteen worker representatives.[66] Consequently, in this renowned tripartite structure, agents of major nongovernmental groups constitute half the Governing Body and can present their views to the Court rather directly. It is not clear, then, that Article 26 should be considered a precedent restricting the term "public international organization" to organizations that are only composed of or contain states represented by governments.

As the ILO example indicates, the distinction between "public" and "private" organizations has not been firm. Close to four hundred permanent associations or organizations came into being between 1840 and World War I, including the Anti-Slavery Society (1840), the International Committee of the Red Cross (1863) and the International Chamber of Commerce (1919). In 1910 the Union of International Associations was created to coordinate their activities and to establish conditions of membership. The conditions were that (1) there be a permanent organ; (2) the object must be of interest to all or some nations and not involve profit; and (3) the membership must be open to individuals or groups from different countries. As noted by Bowett,

> many demonstrated by their membership the artificiality of a rigid distinction between "public" and "private" unions based upon function; membership sometimes comprised States, municipal authorities, national groups and societies and private individuals. Today, bodies like the International Council of Scientific Unions, the International Commission for Scientific Exploration of the Mediterranean Sea, the International Statistical Institute, and the International Hospital Federation demonstrate the cooperation of States and individuals within the same association.[67]

To this list may be added the IUCN (World Conservation Union). Although considered nongovernmental, the IUCN comprises member states and governmental organizations, as well as several hundred nongovernmental associations.[68]

The advisory proceedings of the PCIJ support the view that "international organizations" was intended to include nongovernmental organizations.[69] In its first advisory proceeding in 1922, concerning workers' delegates to the International Labour Conference, the Court permitted participation by any unofficial

[66] *Id.*, Art. 7. Although 1986 amendments not yet in force propose to double the number of representatives, half the controlling body of the Office remains nongovernmental in nature.

[67] DEREK W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 5 (3d ed. 1975).

[68] ALEXANDRE CHARLES KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 45 (1991).

[69] In this regard, both the PCIJ and the ICJ have had to determine the scope of standing in advisory opinions. Taking an expansive view, the PCIJ indicated it might allow direct access to individuals in advisory opinions: "if [the authors of the petition] desired to supplement the statement contained in the petition, the Court would be prepared to receive an explanatory note from them, provided that it was filed with the Registry not later than October 26th, 1935." Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935 PCIJ (ser. A/B) No. 65, at 43 (Advisory Opinion of Dec. 4). The ICJ has taken a more restrictive approach in administrative tribunal proceedings. In cases involving the UN Administrative Tribunal, the Court declined to hear from counsel who represented staff members of the United Nations, considering that Article 66 limits submissions to those coming from international organizations. *See* Effect of awards of compensation made by the U.N. Administrative Tribunal, 1954 ICJ REP. 47 (Advisory Opinion of July 13); Letter to the Registrar, 1954 ICJ Pleadings (U.N. Administrative Tribunal) 394–95; and Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 ICJ REP. 77, 80, 109, 114 (Advisory Opinion of Oct. 23).

organization that expressed the desire to be heard.[70] A similar practice was followed in later cases, all involving the ILO and employers' or workers' organizations.[71] In two instances, national organizations submitted information.[72] The participation of international trade unions in the Court's advisory proceedings was considerable: an early list of the international organizations permitted to submit information to the Court under Article 73 consists almost entirely of unions or trade representatives.[73]

In contrast to their active role at the PCIJ, nongovernmental international organizations have had limited success in participating in proceedings before the International Court of Justice. In the 1950 *South-West Africa* advisory proceeding, the Court advised the International League for Human Rights (until 1976 the International League for the Rights of Man) that it would be permitted to submit information. Robert Delson, a league board member, had written to the Registrar asking that the league be permitted to participate by oral or written statement in the proceedings, after the President of the Court had set March 20, 1950, for the receipt of written statements from states.[74] Delson also asked that the league be permitted to present material in the *Asylum* case, a contentious proceeding between Colombia and Peru.[75] On March 16, the Registrar responded that the Court was prepared to receive a written statement from the league of information likely to assist the Court in its examination of the legal questions put to it by the General Assembly in the *South-West Africa* proceeding. The league was instructed to confine its information to legal questions and not to include any statement of facts that the Court had not been asked to appreciate.[76] The Registrar rejected the league's participation in the *Asylum* case, relying on the difference in wording in the Statute between Article 66 ("international organization"), governing advisory opinions, and Article 34 ("public international organization"), on contentious proceedings. The Registrar concluded that the "International League of Rights of Man cannot be characterized as public international organization as envisaged by Statute."[77]

The league failed to comply with the Court's orders in the *South-West Africa* case, one reason, perhaps, why the Court has not subsequently extended permis-

[70] Advisory Opinion No. 1, Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, 1922 PCIJ (ser. C) No. 1, at 5, 449; (ser. B) No. 1, at 11 (July 31). Numerous trade unions filed statements in the proceedings.

[71] 1926 PCIJ (ser. C) No. 12, at 259, 262, 269–87; Advisory Opinion No. 13, Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer, 1926 PCIJ (ser. B) No. 13, at 8 (July 23); (ser. A/B) No. 50, at 367.

[72] *See* 1922 PCIJ (ser. B) No. 1, at 11 (Advisory Opinion of July 31) (citing Memorandum from Netherlands General Confederation of Trades Unions); 1922 PCIJ (ser. B) Nos. 2 & 3, at 13 (Advisory Opinion of Aug. 12) (citing Letter from the Central Association of French Agriculturalists).

[73] *See* THIRD ANNUAL REPORT, 1927 PCIJ (ser. E) No. 3, at 225. The organizations listed are: International Agricultural Commission, International Federation of Trades Unions, International Labour Organisation, International Association for Legal Protection of Workers, International Confederation of Agricultural Trades Unions, International Federation of Landworkers, International Institute of Agriculture (Rome), International Federation of Christian Trades Unions of Landworkers, International Organization of Industrial Employers, and International Confederation of Christian Trades Unions. Another organization that sought to intervene was denied permission because it was a member of one of the international trade unions.

[74] 1950 ICJ Pleadings (International Status of South West Africa) 324.

[75] Robert Delson, Letter to the Registrar, 1950 ICJ Pleadings (2 Asylum) 227 (Mar. 7, 1950).

[76] Letter from the Registrar, 1950 ICJ Pleadings (South West Africa) 327.

[77] *Id.*

sion to nongovernmental organizations to submit information.[78] In the 1970–1971 advisory proceedings *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276,*[79] the league again requested permission to participate but was refused.[80] Most recently, the International Physicians for the Prevention of Nuclear War asked to submit information in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* a request for an advisory opinion filed by the World Health Organization. In a letter dated March 28, 1994, the Registrar informed the group that the Court had "considered your offer with all the care it deserves," noting the physicians' close working relationship with the WHO and their contribution to a relevant publication. However, having regard to the circumstances of the case and the scope of the WHO's request, the Court had decided not to ask the organization to submit a written or oral statement.[81]

Apart from nongovernmental requests, individuals and national groups have sometimes sought to participate. In the *Namibia* proceeding, Professor Michael Reisman asked about the possibility of submitting "some form of *amicus curiae* brief" to the Court.[82] He cited the precedent of the league's filing in 1950 and noted that there is no explicit bar in the Statute or Rules of Court to accepting a document from an interested group or individual, "despite the fact that such group or individual could neither initiate a case nor plead orally."[83] The Registrar responded that the league's 1950 request was based on its being an international organization and that the express grant of power in Article 66 to receive statements from particular entities excludes the acceptance of material from others, applying the *expressio unius* doctrine.[84] The Registrar added his personal belief that the Court would be "unwilling to open the floodgates to what might be a vast amount of proffered assistance."[85]

The Court has a legitimate institutional concern about opening the floodgates to participation by every individual and association interested in its proceedings. Of course, any court accepting amicus participation retains discretion to deny permission to any or all petitioners. In addition, the Court's Statute clearly limits participation to international organizations, eliminating the possibility of submissions from individuals or national groups. As a further restriction, the Court could interpret the term "international organization" to mean nongovernmental

[78] The league submitted different statements by different individuals and its official submission was forwarded nearly one month past the deadline set by the Court. The Court responded that the statement had been received too late to be included in the proceedings. For a detailed discussion of the league's involvement in the *South West Africa* proceedings, see Roger S. Clark, *The International League for Human Rights and South West Africa 1947–1957: The Human Rights NGO as Catalyst in the International Legal Process,* HUM. RTS. Q., Fall 1981, at 101, 116–24.

[79] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

[80] 1970 ICJ Pleadings (2 Legal Consequences) 639, 640, 644, 672, 678, 679.

[81] Letter from the Registrar to Dr. Barry D. Levy (Mar. 28, 1994).

[82] *See* Clark, *supra* note 78, at 119–20 n.76.

[83] 1970 ICJ Pleadings, *supra* note 80, at 636–37.

[84] "With reference to your suggestion that there seems to be no explicit bar in the Statute or Rules to accepting a document from an interested group or individual," the Registrar wrote, "the Court's view would seem to have been that the expression of its powers in Article 66, paragraph 2, is limitative, and that *expressio unius est exclusio alterius.*" *Id.* at 639.

[85] *Id.*

organizations with consultative status at the United Nations.[86] This limitation would reduce the number of requests and also could serve as a test of the broad representation and interests, if not necessarily the competence, of the requesting organization.

For contentious cases, as discussed above, the predecessor to Article 34 of the Statute did not reflect a rigid "states only" policy, given the structure of the International Labour Office.[87] Other organizations, such as IUCN, have a "mixed" representation or membership similar to the ILO's and could fall within the narrow reading of Article 34. More broadly, "public" could be viewed as encompassing international public interest organizations, again seen as those with consultative status. In either case, the Rules of Court would need to be amended to allow nongovernmental participation in contentious cases.

The Court's institutional interests favor nongovernmental amicus participation. Although additional materials will be filed in a number of cases, these materials could serve to provide relevant information to the Court, especially concerning broader issues of public interest and legal analysis, which would assist it in reaching the best resolution of the dispute and thus further the rational development of the law. The stature of the Court and its opinions could also increase in public opinion if limited public participation—a fair hearing—were seen to be available. The long-term institutional interests of the Court may be best served by ensuring that its opinions are based upon the fullest available information and reflect consideration of the public interest, as well as the desires and concerns of the litigating parties.

The pending ICJ case brought by Hungary against Slovakia concerning the Gabčíkovo-Nagymaros dam project[88] exemplifies the need for amicus procedures and is the landmark case in which the Court should either accept amicus briefs or use nongovernmental organizations as independent experts to assess the facts, pursuant to Article 50. The case concerns a large hydropower facility being constructed by the Slovakian Government on the Danube River on the basis of a 1977 bilateral treaty. The completed project will result in diversion of over 85 percent of the Danube's flow. The case involves complicated issues of treaty law, state succession and the law of international watercourses of concern to the parties.[89] It also involves environmental and human rights considerations of larger concern to the people of the region and beyond. There are threats of contaminated drinking

[86] Article 71 of the United Nations Charter provides: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."

[87] The Advisory Committee of Jurists did not discuss this issue. *See* SCOTT, *supra* note 3.

[88] 1993 ICJ REP. 319 (Order of July 14) (setting date for filing of memorials).

[89] The former Communist regimes of Hungary and Czechoslovakia signed a bilateral treaty in 1977 to construct the Gabčíkovo-Nagymaros system of locks. In 1989, following widespread public protests over and increasing knowledge about the adverse environmental effects of the project, the new democratic Government of Hungary suspended construction. On March 24, 1992, the Hungarian parliament approved termination of the treaty and a diplomatic note to this effect was delivered to the Czech and Slovak Federal Republic on May 19, 1992. Slovakia announced it would proceed with unilateral construction and diversion of the river in spite of Hungarian requests to negotiate a solution to the problem. Slovakia began unilateral diversion of the Danube on October 23, 1992. The two parties signed a special agreement on April 7, 1993, to submit the dispute to the Court. The case was filed July 2, 1993. *See* note 18 *supra.*

water, the drying up of wells, damage to farmlands, deprivation of minority rights, and extinction of endangered species. The largest major inland delta in Europe, containing the continent's last remaining flood-plain forest, may suffer severe ecological damage. The dam sits on a geoseismic fault and is not designed to withstand a major earthquake. Flooding from collapse of the dam could be catastrophic to the downstream villages. These factors present enormously complicated technical issues of environmental risk and damage, which need to be fully explored and presented to the Court by expert and independent bodies.

The interests at stake are much larger than those of the two claimants. Moreover, it is not clear that the parties have the resources or information from long-term monitoring that would provide a full assessment of the potential environmental harm from the project. Such information is essential to the case, in part because the 1977 treaty itself called for its implementation to have regard for preservation of water quality and nature conservation, and in part because of the development of general international environmental law. Moreover, such information is available, from nongovernmental organizations that have been monitoring the river and flood plain for years.

This case presents the first opportunity for the ICJ to clarify the obligation of a state to protect the environment in its development, use and allocation of a shared natural resource. The Court's decision will have far-reaching implications for other regions of the world, as well as affected individuals and groups in the region. The decision will enunciate environmental law that will have a temporal effect as well, guiding future developments in the field. This law should be developed with the Court in possession of full information so as to preserve the rational evolution of the law. Here the Court may be assisted by friends of the court acting in the public interest.

Would broader nongovernmental amicus participation affect the willingness of states to appear before the Court? It has been suggested that the Court is reluctant to permit third-state intervention in contentious cases because it fears states will not submit their disputes if another state can intervene without permission of the parties.[90] This concern is understandable, since the Court's jurisdiction is consensual. However, the lack of state intervention at the Court seems to be "the result . . . of an apparent disinterest by states in exercising the rights available to them."[91] Moreover, there are clear differences between state intervention in contentious cases and nongovernmental amicus submissions. As noted earlier, intervenors become full parties to the dispute and can shape the direction of the litigation in addition to being bound by the judgment. Interstate proceedings inherently are politically charged, and may call into question the broad relations among all the parties. In contrast, the amicus plays a much more limited role; it provides specific information to the Court almost exclusively through written submissions, and neither controls developments in the case nor has the rights and duties of parties. States could view nongovernmental participation as less threatening than interstate intervention and potentially to their benefit, as it may lessen their litigation burden and show public support for the arguments they make. On the other hand, states that maintain strict views of state sovereignty may be offended by any role for nongovernmental organizations that would enhance their

[90] *See* Ian Brownlie, *Arbitration and International Adjudication: Comments on a Paper by Judge M. Lachs, in* INTERNATIONAL ARBITRATION: PAST AND PROSPECTS 60 (A. H. A. Soons ed., 1990).

[91] *Id.*

juridical standing in an interstate proceeding. On balance, states may find that the practical benefits of nongovernmental amicus participation justify expanding its role in international litigation. In any event, such participation seems to be in the Court's interest and in the public interest, and to conform to a general trend in international law toward affording greater rights and duties to nonstate actors.

If the Court accepts the principle of amicus submissions by nongovernmental organizations, it must still determine under what circumstances they should be permitted. In this regard, the experience of other courts is useful, although the unique attributes of the ICJ must be taken into account and may call for more restraint in granting amicus status. Thus, participation in proceedings should be afforded where the Court finds that amicus submissions will further the interests of justice, on the basis of the nature and degree of the public interest, the competence of the nongovernmental organization and the submissions of the parties. Particularly where obligations *erga omnes* are at issue, a role for nongovernmental amici would seem appropriate.

If Article 34 participation continues to be limited to organizations composed of states, nongovernmental organizations may still seek to submit information to the Court on the basis of other provisions of the Statute and the practice of the Court. These organizations could invoke Article 50 of the ICJ Statute to offer their opinions as experts.[92] Article 50 is derived from the former article of the same number in the PCIJ Statute.[93] The PCIJ Drafting Committee of the Advisory Committee of Jurists proposed that the Court be permitted to obtain views other than those submitted by the parties. The proposal was ultimately adopted as Article 50.[94] Article 57 of the 1936 Rules of Court provided that the Court, if it considered it necessary, could arrange for an expert report after duly hearing the parties. Some of the discussion concerned the Court's implied power to appoint experts and order inquiries *ex officio*.[95]

In practice, both the PCIJ and the ICJ have used this power to obtain information akin to that submitted by amici curiae in other tribunals. In the *Greco-Bulgarian "Communities"* case,[96] the PCIJ stated in an Order of June 30, 1930, that it was necessary to supplement the information furnished in the case. It drew up a series of questions to be answered by the President of the Greco-Bulgarian Mixed Commission. In *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*,[97] the Court expressed its willingness to hear experts in the baking industry selected by the International Federation of Trade Unions, although ultimately the federation did not present them.[98] Significantly, in this case the ILO had the right pursuant to Article 26 to submit information to the Court. As

[92] Article 50 of the ICJ Statute provides that the "Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."

[93] PCIJ STATUTE, *supra* note 54, at 24. The provision may be based upon Article 90 of the Hague Convention for the Pacific Settlement of Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577, and other provisions of arbitral agreements. Article 90 provided that "the Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."

[94] ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF PROCEEDINGS OF THE COMMITTEE (JUNE 16–JULY 24, 1920), ch 3, Procedure, Art. 11, at 561 (League of Nations 1920).

[95] 1936 PCIJ (ser. D) No. 2, at 243, 247–49 (3d add.).

[96] 1930 PCIJ (ser. C) No. 18–I, at 1077 (Order of June 30).

[97] 1926 PCIJ (ser. B) No. 13 (July 23).

[98] 1926 PCIJ (ser. C) No. 12, at 287–88.

Hudson commented, "even in such cases, however, the Court must remain at liberty to seek information elsewhere."[99] In view of these precedents, a nongovernmental organization with relevant and useful information could request that the Court appoint it to give its opinion pursuant to Article 50. A similar provision may have been the original basis for the acceptance of amicus briefs at the Inter-American Court of Human Rights.[100]

Finally, in *Nicaragua v. United States* the ICJ recognized that information could come to it "in ways and by means not contemplated by the Rules."[101] Although speaking of cases where one party does not appear, the Court cited the *Lotus* case for the principle *jura novit curia,* said to signify "that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law."[102] As to disputed facts, "in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties."[103] In the *Nicaragua* proceedings, the Court stated its awareness of the existence and contents of information not formally submitted by either party. A publication of the U.S. Department of State entitled *Revolution Beyond Our Borders*

> was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject.[104]

The Government of Nicaragua suggested during the oral proceedings that the document could not "properly be considered by the Court."[105] In its opinion, the Court rejected this view, stating that, "in view of the special circumstances of this case, it may, within limits, make use of information in such a publication."[106]

In sum, the International Court of Justice in its discretion may accept submissions from nongovernmental organizations in advisory proceedings. A change in the Rules of Court will be necessary for the Court to do so in contentious cases. However, even without amending the Rules, the Court could permit a nongovernmental organization that so requested to submit information in the form of an expert opinion. Organizations wishing to make their views known could also ask one of the parties to annex the information to its submissions without necessarily adopting the views as its own. As the practice of other international courts demonstrates, such information could play a significant role in the Court's judgments.

IV. THE EUROPEAN COURT OF JUSTICE

The Court of Justice of the European Union is endowed with competence beyond that traditionally afforded international courts. It entertains legal actions against the institutions (Arts. 173, 175, 178, 184 of the Treaty on European Union) and against the member states (Arts. 169 and 170) for breaches of Union law. Natural and legal persons may challenge the legality of acts and omissions of Community institutions and make compensation claims for damage arising out of the noncontractual liability of the Commission. The Court also has jurisdiction to

[99] HUDSON, *supra* note 2, at 378.

[100] *See* text at notes 172–75 *infra.*

[101] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 25, para. 31 (June 27).

[102] *Id.* at 24, para. 29 (citing S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 31).

[103] *Id.* at 25, para. 30.

[104] *Id.* at 44, para. 73.

[105] *Id.*

[106] *Id.*

render preliminary rulings on the interpretation and validity of European Union acts at the request of the courts of the member states.[107]

The European Court of Justice uses a unique system of Advocates General to represent the public interest. In *Costa v. Enel,*[108] a landmark case on the supremacy of Community law, the Advocate General appeared as "amicus curiae" before the Court.[109] The Commission, the Council and member states are often listed as amicus curiae in the Court's decisions.[110] In addition to participating as amici, member states and Union institutions are allowed to intervene in cases before the Court under Article 37.

Finally, "natural or legal persons establishing an interest in the result of any case submitted to the Court" may intervene as amici curiae.[111] Although the Court's decisions list those intervening as amici curiae, Article 37 does not use the term. It provides that submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties, making the role played narrower than that served by amici and intervening parties in other courts. The right does not extend to an action between member states, Community institutions or a member state and a Community institution.

Amicus status has been accorded, inter alia, to an unincorporated association,[112] the Italian National Union of Consumers,[113] the Federation of European Bearing Manufacturers Associations,[114] the Consultative Committee of the Bars and Law Societies of the European Communities,[115] and the European Council of Chemical Manufacturers' Federation.[116] Legal personality does not determine the capacity to participate, if there are indications of independence and responsibility.[117]

The purpose of the amicus intervention in the European Court of Justice is to enable a third party to protect an interest that may be affected by the result of the case. The interest is less than that normally required for intervention as a party, but it must be direct and specific or concrete.[118] The requirement has been broadly construed, especially with regard to representative bodies. Thus, the Italian National Union of Consumers could intervene in competition cases because of the beneficial effects of competition on consumers.[119] The Consultative Committee of the Bar Association intervened in a case where the issue concerned the mandatory disclosure of certain documents.[120] The decision only directly affected

[107] Treaty on European Union, *supra* note 5, Art. 177.

[108] Case 6/64, Costa v. ENEL, 1964 ECR 1143 (Fr. ed.), 1964 C.M.L.R. 425.

[109] Some authors analogize the role of the Advocate General in all cases to the amicus curiae. *See* LIONEL NEVILLE BROWN & FRANCIS GEOFFREY JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 55 (3d ed. 1989).

[110] LEXIS indicates 424 cases since 1967 in which amici curiae have participated in Court proceedings.

[111] Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, Art. 37, 298 UNTS 147, *as amended by* Council Decision 88/591, 1989 O.J. (C 215) 1.

[112] Cases 16 & 17/62, Confédération Nationale des Producteurs de Fruits et Légumes v. Council, 1962 ECR 471, 488–89, 2 C.M.L.R. 160 (1963).

[113] Cases 41, 43, 48, 50, 111, 113 & 114/73, Générale Sucrière SA v. Commission, 1973 ECR 1465, 1 C.M.L.R. 215 (1974).

[114] Case 113/77, NTN Toyt Bearing Co Ltd v. Council, 1979 ECR 1185, 2 C.M.L.R. 257 (1979).

[115] This unincorporated body represents lawyers' professional associations in the member states. *See* Case 155/79, A M & S Eur. Ltd v. Commission, 1982 ECR 1575, 2 C.M.L.R. 264 (1982).

[116] Case 236/81, Celanese Chem. Co Inc v. Council & Commission, 1982 ECR 1183.

[117] *See* Case 15/63, Lassalle v. European Parliament, 1964 ECR 31, 3 C.M.L.R. 259 (1964).

[118] Cases 116, 124, and 143/77, GR Amylum NV & Tunnel Refineries Ltd v. Council & Commission, 1978 ECR 893, para. 9, 2 C.M.L.R. 590 (1982).

[119] *See supra* note 113.

[120] *See supra* note 115.

the parties seeking and resisting disclosure. However, the CCBA intervened on the basis that the documents were alleged to be protected under the attorney/client privilege. The Court's decision could thus affect the rules governing the legal profession throughout the Community and, in turn, the rights and duties of lawyers.

In sum, amicus curiae intervention is permitted when the individual or group asserts that the result of the case will affect its legal position, economic position or freedom of action. Amicus participation is used by public interest groups in Europe to inform the Court of the broader implications of cases brought to it. There is little evidence on the impact of such participation.

V. THE EUROPEAN COURT OF HUMAN RIGHTS

Established pursuant to the European Convention on Human Rights, the European Court of Human Rights has jurisdiction over cases brought against a state party to the Convention. After proceedings are completed before the European Commission, either the Commission or the state involved may refer a case to the Court within three months of the Commission's report. Individual petitioners initially could appear before the Court only in the guise of rendering "assistance" to the delegates of the Commission. In 1982 the Rules of Court were amended, effective January 1983, to require that the applicant be informed and invited to be individually represented when a case is transmitted to the Court.[121] However, the applicant still is not considered a party to the case, pending entry into force of Protocol 11 to the Convention, adopted in May 1994.[122]

In view of the earlier restricted role for petitioners, it is understandable that the Court did not begin to receive requests by third persons to submit information to it in pending cases until the late 1970s. The first request came in the *Tyrer* case,[123] when the National Council for Civil Liberties asked permission to file a written memorandum and make oral submissions, noting that it had represented Tyrer earlier in the proceedings. A chamber of the Court refused the request without discussion.

The following year, in the *Winterwerp* case[124] against the Netherlands, the UK Government asked permission to submit a written statement on the interpretation of Article 5(4) of the Convention,[125] which it deemed of major importance because of cases pending against the United Kingdom.[126] The Government conceded that it had no right to intervene but asked whether Rule 38(1) of the Rules

[121] COUNCIL OF EUROPE, EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT A AND B (1994). The amendment may have been adopted in reaction to a well-known case when the applicant learned from the press that his complaint had been submitted to the Court for decision. *See* Andrew Drzemczewski, *The European Convention on Human Rights*, 2 Y.B. EUR. L. 327, 328 (1982).

[122] *See* COUNCIL OF EUROPE, PROTOCOL NO. 11 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EXPLANATORY REPORT, Art. 34, Doc. H(94)5 (1994), *reprinted in* 33 ILM 943 (1994).

[123] Tyrer Case, 26 Eur. Ct. H.R. (ser. A) (1978).

[124] Winterwerp v. Netherlands, 33 Eur. Ct. H.R. (ser. A) (1979).

[125] Article 5(4) of the Convention, *supra* note 6, provides that "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[126] The Commission's report in *Winterwerp* indicated that both the Commission and the Netherlands accepted without argument that "the control of lawfulness referred to in this provision should cover both the formal propriety of the detention procedure and the substantive justification for the deprivation of liberty." *Winterwerp*, 31 Eur. Ct. H.R. (ser. B) at 39 (1977). The UK Government disagreed with this interpretation.

of Court could provide a basis for the submission of information. The rule provided that "[t]he Chamber may, at the request of a Party or of Delegates of the Commission or *proprio motu,* decide to hear . . . in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task." The Chamber responded that the issue would require the full consideration of the plenary Court, for which there was not enough time. After further correspondence, the Chamber announced that it would accept written observations from the UK Government on the construction of Article 5(4) if the information was presented by delegates of the Commission. It also stated that the plenary Court would take up general problems raised by the request in regard to future proceedings before the Court.

After allowing this first, limited form of participation, the Court received new requests from nongovernmental organizations. In 1981 the Court accepted information submitted by the Trades Union Congress (TUC) in *Young, James and Webster v. United Kingdom,*[127] a case involving closed union shops.[128] The Court used the same indirect procedure it had established in *Winterwerp.* Noting that "[t]he Convention does not give a third party any possibility of intervening in the Court's proceedings," the Court thought the TUC might consider filing written observations with the Commission, "which, if it thought fit, could subsequently transmit them to the Court. If such a course were 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."[129]

Prior to the oral proceedings, the Court moved toward greater participation. It decided, *proprio motu,* on the basis of Rule 38(1) of the Rules of Court, that during the oral proceedings it would hear a TUC representative. During the hearings, the delegates of the European Commission filed a "memorial" of the Trades Union Congress with other documents presented to the Court. The Court decided to take the memorial into account regarding any factual information it contained, but would not consider arguments of law. In the subsequent plenary decision finding a violation of Article 11, the Court specifically referred to information given by the TUC.[130]

After *Young, James and Webster,* the Court amended Article 37(2) of its Rules of Court explicitly to permit third-party submissions. The revised rule states:

> The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant just leave to any person concerned other than the applicant.[131]

[127] Young, James & Webster, 44 Eur. Ct. H.R. (ser. A) (1981).

[128] TUC lawyers initially wrote to the Registrar expressing interest in participating because the unions involved in the case were TUC members and the judgment would be of great importance to the law and practice of British industrial relations. They indicated that the UK Government had shown itself unwilling to put forward all the submissions and arguments relevant to the case. In fact, the Thatcher Government did not appear interested in strongly defending the union shop laws. The application was made under Rules 38 and 41 of the Rules of Court, *supra* note 121. Alternatively, the TUC asked the Court for consideration under "its inherent jurisdiction." *See* Letter to Registrar, Young, James & Webster, 39 Eur. Ct. H.R. (ser. B) at 111 (1981).

[129] Letter from Registrar, *id.* at 151.

[130] *See* 44 Eur. Ct. H.R. (ser. A) at 14, 25–26, paras. 31, 64.

[131] Rules of Procedure, Art. 37(2). In May 1994, the rule was essentially incorporated in Protocol 11 to the Convention, *supra* note 122. In similar language, Protocol Article 36(2) provides that "[t]he

The requesting amicus must show that the submission will assist the Court in carrying out its task, that is, be "in the interests of justice."

Adding the three submissions before the adoption of Article 37(2), there have been twenty-four cases in which permission was requested to file material with the Court.[132] Amicus participation is not limited to cases filed against common law countries. Amici have sought to intervene in cases concerning Austria (2), Cyprus (1), France (2), Ireland (1), Italy (3), Spain (2), Sweden (1), and the United Kingdom (12). Submissions are coming more frequently; five of the twenty-four cases where amici sought to participate were heard during 1992.

Since the Court began accepting third-party participation, it has granted sixteen requests and denied nine. The grounds for denial are not always given but seem to include untimeliness in filing, efforts to submit information about a country not before the Court, simplicity of issues where there is clear precedent, and duplication of material already being submitted.

In the 1984 *Goddi* case,[133] the first to feature an amicus request after the adoption of Rule 37(2), the Court refused the request of the Council of the Rome Bar Association (Consiglio dell'ordine degli avvocati e procuratori di Roma) to file in the case brought against Italy. The Court stated that the request had come too late in the proceedings.[134]

Amicus status was refused in the *Leander, Glasenapp* and *Kosiek,* and *Ashingdane* cases because the amici sought to introduce information about states other than the defendant state. In *Ashingdane,* which concerned the detention of a mental patient, a lawyer requested leave to submit written comments in regard to another case pending before the Commission.[135] The request was denied. In 1986 the Court denied permission to outside groups to file in the *Glasenapp* and *Kosiek* cases, which concerned freedom of expression in Germany.[136] The UK Prison Officers' Association sought leave to submit information on restrictions imposed on prison officers' and other civil servants' freedom of expression in the United Kingdom. The Court refused for two reasons. First, the issues were not seen as having "a sufficiently proximate connection" with those before the Court.

> Secondly, in so far as the Prison Officers' Association or any of its members may feel that, in their capacity of civil servants in the United Kingdom, they have a grievance in relation to the enjoyment of their right to freedom of expression under the Convention, the appropriate channel for airing that grievance would be an application to the European Commission of Human Rights in accordance with Article 25 of the Convention.[137]

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."

[132] Statistical summaries sometimes show 25 cases, because in the *Capuano* case one amicus request was granted, while others were denied. It thus shows up under the listings both of petitions granted and of petitions denied.

[133] Goddi Case, 76 Eur. Ct. H.R. (ser. A) (1984).

[134] The unsolicited memorial arrived only three days before the opinion of the oral proceedings. Anthony Lester, Amici Curiae: *Third Party Interventions before the European Court of Human Rights, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341, 344 (Franz Matscher & Herbert Petzold eds., 1988).

[135] Ashingdane Case, 93 Eur. Ct. H.R. (ser. A) 7, paras. 5–6 (1985).

[136] Glasenapp Case, 104 Eur. Ct. H.R. (ser. A) (1986); Kosiek Case, 105 Eur. Ct. H.R. (ser. A) (1986).

[137] Kosiek, 88 Eur. Ct. H.R. (ser. B) at 63 (1985).

A similar situation was presented in *Leander v. Sweden* when the National Council for Civil Liberties, on behalf of three British trade unions representing government employees, requested permission to file information in the case, which concerned secret police registers. The application explained that the purpose was not to raise issues about UK practices, but to ensure that the Court had information about the situation in the United Kingdom before making a decision that would indirectly affect all members of the three unions. As in the *Kosiek* case, leave was refused because the connection was too remote to meet the proper administration of justice test and because any issues of UK practices could be raised in a complaint against the UK Government.[138]

As its jurisprudence has grown, the Court has denied amicus participation in some more recent cases because clear precedents make third-party participation unnecessary. In the 1991 *Caleffi* and *Vocaturo* cases, the issues were straightforward, concerning the length of civil proceedings:

> As regards the excessive workload, the Court points out that under Article 6 §1 of the Convention everyone has the right to a final decision within a reasonable time in the determination of his civil rights and obligations. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement . . . .[139]

In this chamber proceeding, five trade associations asked to submit information and were denied. The Court did not give its reason for the denial; however, it had previously decided the same issue and the case presented no complex questions. The Court probably denied the International Lesbian and Gay Alliance permission to file written comments in *Modinos v. Cyprus* for the same reason. On the precedent of the *Dudgeon* case, a chamber of the Court found a breach of the right to privacy resulting from Cypriot laws prohibiting adult consensual homosexuality.[140]

The Court also may deny participation if the issues are already being adequately presented by the parties or other amici. This seems to have occurred in the *Tyrer* proceeding and in *Capuano v. Italy*.[141] The latter case concerned the length of civil proceedings in a property dispute, still being litigated after eleven years. The Rome Bar Association, the Italian Federation of Law Societies and the Italian Association of Young Lawyers all asked to intervene. The President decided to authorize the Rome Bar Association but not the others. The Chamber was unanimous in finding a breach. Although, as noted above, amicus participation was denied in other cases concerning the length of civil proceedings, in this case the Government's defense was that the adversary process and litigation tactics of the lawyers were responsible for the delay.

Amicus briefs tend to be filed most often in plenary cases, those which are likely to be the most significant. Ten of the sixteen cases in which amici participated were decided by the plenary Court. All but one of the cases in which amici were

[138] Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) (1987). Perhaps through inadvertence, the opinion of the Court fails to refer to the amicus request. The amicus brief of the NCCL and the Court's reply appear in 99 Eur. Ct. H.R. (ser. B).

[139] Caleffi v. Italy and Vocaturo v. Italy, 206B–C Eur. Ct. H.R. (ser. A) at 20, para. 17 (1991).

[140] Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993). For *Dudgeon v. United Kingdom*, see 45 Eur. Ct. H.R. (ser. A) (1981).

[141] Capuano v. Italy, 119 Eur. Ct. H.R. (ser. A) (1987).

denied permission to file were cases decided by chambers.[142] Amici intervene most often in major cases involving rights of fair trial, freedom of information, privacy and arbitrary detention. There are several repeat players among amici. Interights and Article 19 (the International Centre against Censorship), both international human rights law groups based in the United Kingdom, have participated in many cases involving the UK Government and those of other states. Recently, in *Informationsverein Lentia v. Austria,*[143] concerning the impossibility of setting up and operating private radio or television stations, the President of the Chamber authorized Article 19 and Interights to submit written observations on specific aspects of the case. The Court unanimously found a violation under Article 10 of the Convention.

In other cases, the amici are national groups within the defendant state: bar associations, consumer groups and labor unions.[144] In one case, *Ruiz-Mateos v. Spain,*[145] two governments filed as amici curiae. Germany and Portugal submitted their observations on the applicability of Article 6(1) of the Convention to constitutional courts. Their arguments are considered by the Court in the plenary opinion, which notes that the amici supported the Spanish position.[146] The Court held by eighteen votes to six that there was a violation of Article 6(1) by the Constitutional Court.

The Court controls not only the permission for amici to file, but also the issues that may be addressed. In the *Malone* case[147] the plenary Court found a violation of Article 8 of the Convention due to wiretapping by the British Government. The Post Office Engineering Union requested leave to submit written comments on the matter, indicating its "specific occupational interest" in the case and five themes it wished to develop. The President of the Court permitted the filing, but narrowed the issues to which the Union could speak and called for discussion of them only "in so far as those matters relate to the particular issues of alleged violation of the Convention which are before the Court for decision in the Malone case."[148]

Similarly, in the *Lingens* case against Austria,[149] the President of the plenary Court permitted the International Press Institute through Interights to submit written observations subject to certain unspecified conditions.[150] The case

[142] In the *Glasenapp* and *Kosiek* cases, considered together by the plenary Court, British prison unions sought to file information about the United Kingdom. *See* 87 Eur. Ct. H.R. (ser. B) at 67 (1984), and 88 Eur. Ct. H.R. (ser. B) at 60 (1984).

[143] Informationsverein Lentia v. Austria, 276 Eur. Ct. H.R. (ser. A) (1993).

[144] X v. France, 234C Eur. Ct. H.R. (ser. A) (1992) (granting the request of the French Association of Hemophiliacs); Drozd & Janousek v. France & Spain, 240 Eur. Ct. H.R. (ser. A) (1992) (granting permission to the Executive Council of the Principality of Andorra); Y v. United Kingdom, 247A Eur. Ct. H.R. (ser. A) (1992). In the latter case, concerning corporal punishment in a British school, the parties achieved a friendly settlement and asked that the case be dismissed. The group Epoch Worldwide requested permission to file an amicus brief in opposition to dismissal and was denied. The case was dismissed.

[145] Ruiz-Mateos v. Spain, 262 Eur. Ct. H.R. (ser. A) (1993).

[146] *Id.*, para. 56.

[147] Malone Case, 82 Eur. Ct. H.R. (ser. A) (1984).

[148] Letter to Registrar, Malone, 67 Eur. Ct. H.R. (ser. B) at 72, 73 (1983); Letter from Registrar, *id.* at 121.

[149] Lingens Case, 103 Eur. Ct. H.R. (ser. A) (1986).

[150] The request by the IPI (International Press Institute) is a good example of filings by nongovernmental groups. Its letter explained that the IPI is an organization of individuals dedicated to the principles of freedom of the press and journalists. Founded in 1951, it has approximately two thousand members in 66 countries, including almost all states in the Council of Europe. It has national

concerned a journalist convicted of defamation, who prevailed on a claim that his conviction violated Article 10 of the Convention respecting freedom of expression.

Monnell and Morris involved detention of convicted prisoners by the United Kingdom.[151] The case was decided by a chamber, which, in a divided vote, found no violation. JUSTICE, the British section of the International Commission of Jurists, received permission to file comments "strictly limited to matters directly concerned with the issues before the Court for decision in the case of Monnell and Morris." In its application, JUSTICE claimed unrivaled experience in conducting cases before the Criminal Division of the Court of Appeal, giving it a useful, broad view of the matters before the Court. The Court makes no reference to the amicus brief in the opinion. However, the UK Government wrote to the Registrar correcting statements in its memorial after the amicus brief called attention to errors made by the Government.[152]

The impact of amicus briefs is difficult to measure, although the judicial references to them and quotes from them indicate that they can be influential. In *Ashingdane,* the National Association for Mental Health (MIND) was granted leave to file on specified issues. MIND asked to submit comments as "the leading mental health organization in England and Wales," whose goal is to improve and develop services for people who are mentally ill or mentally handicapped. It specifically sought to submit on differences between the institutions of Broadmoor and Oakwood and on release of restricted patients, along with a comparison of regimes in other countries and, finally, amendments to the 1959 Mental Health Act, incorporated in the 1983 Mental Health Act. The decision contains some direct quotes from the brief, such as "[s]ecurity is a major concern at Broadmoor Hospital,"[153] as well as other material discussed in it.

In *Lingens* the Court, without referring to the submission, discusses at length issues addressed in the Interights material.[154] Significantly, the parties did not file

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committees in every member state, including Austria, and observer status with the Council of Europe, the United Nations and UNESCO. The IPI detailed its vital concern with freedom of expression, at the heart of the *Lingens* case:

> First, the Court's judgment in the case will clearly affect the defamation laws in Austria. Those are the laws under which the IPI's members work in that country in reporting the news and commenting on it. Accordingly, the decision of the Court in this case is of direct interest to them. Secondly, the Commission's report makes it clear that the case is concerned with the "exercise of freedom of expression in the sensitive area of political discussion" (paragraph 62). This is a broad issue of fundamental importance for the whole Council of Europe. The Court's interpretation of Article 10 as regards the freedom of the press in political matters will clearly affect how that freedom is secured within the other Contracting States. It will thereby affect the manner in which the IPI's members who are editors and journalists in those other Contracting States exercise their profession.

Request to Submit Written Comments, 86 Eur. Ct. H.R. (ser. B) at 42, 43 (1985). The IPI asked in particular for the opportunity to elaborate on the standard of defamatory comment permissible under Article 10, based on the laws and practices of member states and the United States: "(1) how far the protection afforded to 'public figures' differs from that afforded to other individuals under the law of defamation; and (2) how far a distinction is drawn between the expression of fact and the expression of opinion." *Id.* at 44.

[151] Monnell & Morris, 115 Eur. Ct. H.R. (ser. A) (1987).

[152] For the application from JUSTICE, see 98 Eur. Ct. H.R. (ser. B) at 100 (1986). The UK Government's letter of clarification appears in *id.* at 105. *See also* Lester, *supra* note 134, at 348.

[153] *Compare* Ashingdane, *supra* note 135, para. 24 *with* the pleadings, 76 Eur. Ct. H.R. (ser. B) at 117 (1984).

[154] Lingens Case, *supra* note 149, para. 41.

any memorials in the case and the Court's workload makes it probable that the amicus brief was utilized in the place of other submissions.

In *Brogan*[155] a highly divided plenary Court found a violation of fair trial proceedings by the United Kingdom in regard to persons suspected of involvement in terrorist acts in Northern Ireland. The Standing Advisory Commission on Human Rights, Belfast, sought and received permission to submit written comments. Although the majority opinion does not refer to the amicus submission, the dissent of Judge Martens discusses one of the issues raised in the case, as commented on by the Standing Advisory Commission.

In the well-known *Soering* case[156] concerning UK responsibility for extraditing an accused charged with a capital offense in the United States, the plenary Court unanimously found that there would be a violation of Article 3 of the Convention if a decision to extradite to the United States were implemented. Amnesty International was permitted to file written comments, which are partly quoted and adopted in the Court's opinion.[157]

Two further cases involving the United Kingdom, decided in 1991, concerned publication of the book *Spycatcher.* The plenary Court found violations due to censorship by the Government in both cases but accepted certain prepublication measures taken by the Government as justified by the exigencies of national security.[158] The organization Article 19 submitted written comments in both cases. In the first and longer opinion, Article 19's arguments are referred to in support of the Court's finding of a violation.[159] Most of the disagreement among members of the Court was over the issue of prior restraints. The partly dissenting judges and the majority discuss the issue at length[160] and the brief of Article 19 seems clearly to have had considerable impact on the Court. Judge Morenilla, in his partly dissenting opinion, discusses and quotes from "the United States case law cited by Article 19" in regard to prior restraints on publication.[161]

In the decision on *Pham Hoang v. France,*[162] a chamber of the Court reprints nearly three pages taken from the submission of the amicus Bar of the Conseil d'Etat and Court of Cassation.[163] The Court also refers to the comments of the bar in explaining the background situation that led to a breach of the Convention's Article 6(3).[164]

[155] Brogan, 145B Eur. Ct. H.R. (ser. A) (1988).

[156] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[157] The Court said, *id.*, para. 102:

> This "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No. 6 to the Convention, which provides for the abolition of the death penalty in time of peace.

[158] Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) (1991); Sunday Times v. United Kingdom, 217 Eur. Ct. H.R. (ser. A) (1991).

[159] "For the avoidance of doubt, and having in mind the written comments that were submitted in this case by 'Article 19' . . . the Court would only add to the foregoing that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such." *Observer & Guardian, supra* note 158, para. 60.

[160] See opinion of the Court, *id.*, paras. 61–65; the partly dissenting opinion of Judge de Meyer (concerning prior restraint), joined by Judges Pettiti, Russo, Foighel and Bigi; and the partly dissenting opinion of Judge Pekkanen. Of the 24 European Court judges, 10 dissented on the issue of prior restraints.

[161] Partly dissenting opinion of Judge Morenilla, *id.*, para. 6.

[162] Pham Hoang v. France, 243A Eur. Ct. H.R. (ser. A) (1992). The Bar of the Conseil d'Etat and Court of Cassation submitted comments, supplemented by its chairman.

[163] *Id.*, paras. 24–25.

[164] *Id.*, para. 40.

Two groups intervened in *Open Door and Dublin Well Woman v. Ireland,*[165] involving limitations on abortion information in Ireland. Both Article 19 and the Society for the Protection of Unborn Children filed written comments. This appears to be the first time a group has intervened to support the Government's position. The latter group also asked for, but was refused, permission to address the Court during oral proceedings; information submitted in its written comments is referred to in the plenary Court's decision, on whether the number of abortions was increasing in Ireland.[166]

In *Brannigan and McBride v. United Kingdom,*[167] the validity of the UK derogation under Article 15 and the detention of the applicants in Northern Ireland were challenged. The plenary Court upheld the derogation and found no violation. The Northern Ireland Standing Advisory Commission on Human Rights, Amnesty International and three organizations (Liberty, Interights and the Committee on the Administration of Justice, in a joint request) were granted leave to file submissions. Subsequently, the Government was granted permission "to file comments on certain aspects of the observations made by the *amici curiae.*" This is the first time such a response has been noted and the first time the Court has used the term "amicus curiae" in reference to filings under Article 37(2). The contentions of the various groups on the legal standard to be applied to reviewing derogations by states parties are discussed in the Court's opinion at much greater length than in prior cases.[168] Judge Pettiti's dissenting opinion, in particular, uses the brief filed by Amnesty International, as does the concurring opinion of Judge Martens. The latter states:

> for my part, I found Amnesty International's arguments against so deciding persuasive, especially where Amnesty emphasized developments in international standards and practice in answer to world-wide human rights abuses under cover of derogation and underlined the importance of the present ruling in other parts of the world. Consequently, I regret that the Court's only refutation of those arguments is its reference to a precedent which is fifteen years old. . . . [T]he old formula was also criticized as unsatisfactory *per se* both by Amnesty International and Liberty, Interights and the Committee on the Administration of Justice, the latter referring to the 1990 Queensland Guidelines of the ILA [International Law Association]. I agree with these criticisms.[169]

It is worth noting that the Court found violations in twelve of the sixteen cases in which amicus briefs were filed. In one case jurisdiction was lacking, and in the three remaining matters the Court found no violation. Two of the latter cases concerned Northern Ireland, where the Court has long showed deference to the British Government.[170] In contrast, of the eight cases where no amici were granted permission to intervene, the Court found no violations in three and violations in four; it dismissed one case when the parties reached a settlement. In sum, with amicus participation, the Court found violations in 75 percent of the cases; without such participation, violations were found in 50 percent of the cases.

[165] Open Door & Well Woman v. Ireland, 246 Eur. Ct. H.R. (ser. A) (1992).

[166] *Id.*, para. 40.

[167] Brannigan & McBride v. United Kingdom, 258B Eur. Ct. H.R. (ser. A) (1993).

[168] *Id.*, paras. 42, 45, 62.

[169] *Id.*, Concurring Opinion of Judge Martens, para. 3.

[170] The remaining case was *Ashingdane, supra* note 135, concerning the treatment of mental patients. The rights of the mentally ill have been a problem throughout Europe.

The significance is difficult to evaluate, because the overall rate of success for petitioners before the Court is greater than 75 percent.[171] However, the nature of cases in which amici intervene is also worth noting. Because nongovernmental organizations intervene in the more important cases before the plenary Court, where there is no clear precedent and where the Court may be divided, they fulfill a role of assisting the Court in new areas of law where the impact is particularly broad. They provide comparative law analysis and practical information that the parties may be unable to marshal and the Court would otherwise be unable to acquire, thus facilitating the decision-making process.

Because of the requirements of an interest and the proper administration of justice, it is unlikely that there will be a flood of applications in the future. As an additional deterrent, legal aid is not available to cover the costs of submitting an amicus brief. Nonetheless, groups with a strong interest and expertise in matters submitted to the Court do file and have shown that they can contribute significantly to the protection of human rights in the system.

V. The Inter-American Court of Human Rights

The most recently established Court has the most extensive amicus practice. Without specific authorization in either the Convention or the rules of court, the Inter-American Court has accepted amicus briefs in all proceedings from its first case; the practice is expansive in the exercise of the Court's contentious jurisdiction, as well as in advisory proceedings.

Former Court President Thomas Buergenthal cites Article 34(1) of the Court's Rules of Procedure as containing relevant language on the subject.[172] Like Article 50 of the Statute of the ICJ, it provides: "The Court may, at the request of a party or the delegates of the Commission, or *proprio motu,* decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function."[173] This provision applies to contentious cases, although it can be invoked in advisory proceedings, pursuant to Article 53 of the Rules of Procedure.[174] The Court has never explicitly relied upon Article 34(1) as the basis for accepting amicus briefs, but it has formally noted the briefs in each opinion it has issued.[175] In contrast to the European Court, the Inter-American Court appears never to have rejected an amicus filing.

In the first advisory opinion, interpreting the term "other treaties" subject to the advisory jurisdiction of the Court,[176] six member states submitted observations, and the pleadings include "Points of view received from various organizations as *amici curiae.*" The organizations submitting briefs were the Inter-American Institute of Human Rights, the International Human Rights Law Group, the International League for Human Rights and the Lawyers Committee for Interna-

[171] European Court of Human Rights, Survey of Activities (1959–1991) 37 (1992).

[172] *See* Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court,* 79 AJIL 1, 15 (1985).

[173] Rules of Procedure of the Inter-American Court of Human Rights, Art. 34(1), *in* Organization of American States, Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.60, doc. 28, at 159 (1983).

[174] *Id.*

[175] Only in its most recent opinion, the *Gangaram Panday* case (No. 10.274, Judgment of Jan. 21, 1994), did the Court fail to refer to the amicus briefs that were filed.

[176] "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), 1 Inter-Am. Ct. H.R. (ser. A) para. 5 (1982).

tional Human Rights, and the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law. Although the Court made no reference to the basis for accepting amicus briefs, two of the briefs addressed the issue. The brief for the International League for Human Rights and the Lawyers Committee for International Human Rights reviewed the practice of the PCIJ and ICJ in arguing that

> nothing in the Statute or the Rules of Procedure of the Inter-American Court . . . explicitly permits or prevents the filing of such briefs. Yet the powers of the Court under Article 60 of the American Convention to "adopt its own Rules of Procedure" and under Article 1, paragraph 2, of the Rules to "adopt such other Rules as are necessary to carry out its functions" provide ample authority for the Court to permit the filing of such documents.[177]

The Urban Morgan Institute was more affirmative, stating that

> [i]t is our considered opinion that the Statute of the Inter-American Court of Human Rights permits the Court to receive and consider this brief *amicus curiae* in the present case (see Art. 29, Statute of the Inter-American Court of Human Rights and Arts. 34 and 53, Rules of Procedure, Inter-American Court of Human Rights).[178]

The Urban Morgan Institute and the International Human Rights Law Group also filed briefs in the second and third proceedings. The third advisory proceeding, which concerned restrictions to the death penalty, attracted additional amicus briefs from the Washington Office on Latin America, Americas Watch, and the Institute for Human Rights of the International Legal Studies Program at the University of Denver College of Law.[179]

Several human rights groups have consistently submitted information to the Court. The Washington-based International Human Rights Law Group has appeared as amicus curiae in eight advisory proceedings and one contentious case. The International League, the Lawyers Committee for International Human Rights, Americas Watch, Amnesty International, and the International Commission of Jurists also have participated repeatedly. Other briefs have come from university-based groups (at Denver, Cincinnati and DePaul), the Netherlands group SIM, bar association human rights committees (New York and Minnesota), the press (the *International Herald Tribune* and the *Wall Street Journal*) and, in one case, a single individual.[180]

As with other courts, the impact of the amicus briefs at the Inter-American Court is difficult to assess. The Court rarely quotes them or refers to them explicitly. However, it may be possible to see a significant impact of amicus participation by comparing the opinions of the Court and the submissions of amici. In the first advisory opinion, the League/Lawyers Committee's brief contained considerable

[177] Brief for the International League for Human Rights and the Lawyers Committee for International Human Rights, *id.* (ser. B) 123, 128 (1982).

[178] Brief for Urban Morgan Institute for Human Rights, *id.* at 144, 151.

[179] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), 3 Inter-Am. Ct. H.R. (ser. A) para. 5 (1983).

[180] María Elba Martines, in her capacity as lawyer for the Argentine Foundation Justice and Peace, was accepted as amicus curiae in Advisory Opinion No. 13. This extremely important proceeding concerning the powers of the Inter-American Commission produced 11 amicus briefs. Advisory Opinion OC-13/93, Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), 13 Inter-Am. Ct. H.R. (ser. A) para. 9 (1993).

drafting history that is identically cited in the Court's opinion.[181] More apparent is the influence of the Morgan Institute's argument on the discretionary nature of advisory jurisdiction.[182]

In the Court's second advisory opinion, the Morgan Institute's brief is seemingly utilized in the Court's oft-quoted discussion of the nature of human rights obligations, as it differs from the traditional concept of a reciprocal exchange of rights in treaties for the mutual benefit of the contracting states.[183] The Court reprints the brief's quotation from a decision of the European Commission on Human Rights on the objective character of human rights obligations.[184]

In the fifth advisory opinion, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* the Court explicitly refers to the submissions of two of the amici in regard to the licensing requirement in question.[185]

The thirteenth request for an advisory opinion was brought by Argentina and Uruguay, implicitly attacking the work of the Inter-American Commission on Human Rights.[186] Owing to the importance of the issues, eleven groups filed amicus briefs and the Court for the first time permitted three amici to participate in the oral proceedings. The Centro por la Justicia y el Derecho Internacional, the International Human Rights Law Group, and Americas Watch joined the Commission, the Government of Mexico, and the Government of Costa Rica in presenting their views to the Court.

The practice of the Inter-American Court thus continues to evolve, with greater participation of nongovernmental organizations. In addition to filing amicus briefs, the groups have begun to participate in oral proceedings. In this manner, the public interest is broadly served and the work of the Inter-American Commission supplemented to ensure a full and fair hearing for all issues presented by cases before the Court.

VI. Evaluation and Conclusions

National and regional human rights tribunals have shown the usefulness of amicus briefs in reaching well-reasoned and accurate opinions. Such briefs have provided information to the courts beyond what the parties have been willing or able to submit. They also have aided in the resolution of new or technical issues and provided an alternative viewpoint where there is no true adversarial position between the petitioner and the respondent government.

[181] *Compare* the opinion, *supra* note 176, para. 17 *with* the amicus brief, *supra* note 177, at 134–40.

[182] *Compare* the opinion, *supra* note 176, paras. 18–31 *with* the amicus brief, *supra* note 177, at 165–69.

[183] *Compare* Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), 2 Inter-Am. Ct. H.R. (ser. A) paras. 18–19 (1982) *with id.* (ser. B) at 80–82.

[184] *See id.* (ser. B) at 82 (quoting Eur. Comm'n H.R. Application No. 788/60 (Aus. v. It.), 4 Y.B. Eur. Conv. on H.R. 116, 138, 140 (1961) (decision on admissibility)). The quotation in the opinion appears in *id.* (ser. A) para. 29.

[185] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), 5 Inter-Am. Ct. H.R. (ser. A) para. 60 (1985). Most of the 11 amicus briefs filed in the case came from professional journalists' associations: the Inter-American Press Association; the Colegio de Periodistas of Costa Rica; the World Press Freedom Committee; the International Press Institute; the Newspaper Guild and International Association of Broadcasting; the American Society of Newspaper Editors and Associated Press; the Federación Latinoamericana de Periodistas, the International League for Human Rights, the Lawyers Committee, Americas Watch and the Committee to Protect Journalism.

[186] *See* Certain Attributes of the Inter-American Commission on Human Rights, *supra* note 180.

It remains to be considered whether amicus briefs should be more widely accepted by the International Court of Justice. It may be argued that states would be more reluctant to submit their disputes to the ICJ if the Court opened the proceedings to nongovernmental organizations. However, many states may find their positions strengthened by the admission of additional information and arguments by expert nongovernmental groups. In this regard, there should be fewer objections at the ICJ, where states stand as equal litigants, than at human rights tribunals, where the positions taken by the amici virtually always support the individual petitioner against the government party. Yet no state has objected to the participation of nongovernmental organizations as amici in regional tribunals.

In essential respects, the role of the International Court of Justice is no different from that of the other courts. While human rights courts exist as part of the supervisory machinery established by human rights treaties, they must apply international law pursuant to their constitutive instruments. The dispute settlement function of the ICJ also requires it to apply international law (Article 38) and often to determine whether a state has breached its international obligations. In a sense, then, it too acts as an international supervisory organ. Judge Sir Robert Jennings emphasized this function and the broad impact of ICJ decisions in a message to the United Nations Conference on Environment and Development (UNCED):

> [The International Court of Justice] is readily and generally thought of as being well suited to the settlement of disputes. But in so doing, it has also a vital role in the development and elaboration of general law. A glance at, for example, the now near 90 volumes of the *International Law Reports* demonstrates very clearly the extent to which judicial decisions are now an important source of international law. Moreover, a glance at virtually any report of a decision by the International Court of Justice itself, will show the extent to which the decision is indebted to the "jurisprudence" of previous decisions. In this way, principles and rules of law are gradually developed and elaborated by the very process of interpreting and applying them to the specific and often unforeseen factual situations that arise in actual disputes brought before the Court.[187]

The Court, then, is aware of the impact that its decisions and pronouncements can have beyond the parties and narrow issues before it. In these circumstances, it would seem to be appropriate, or even essential due process, for the Court to ensure that, in cases where the broad public interest may be affected by its decision, some method of participation is provided.

As the ICJ moves into new areas of global public concern, it is crucial that the Court hear from all relevant interests. In his message to UNCED, Judge Jennings stressed the following point: "that new international law for the protection of the environment needs urgently to be developed cannot be a matter of doubt." In this regard, in light of the emphasis placed by UNCED on increasing public participation in international environmental issues, the submission of amicus memorials to the ICJ could be both timely and important.

In conclusion, although international cases bind only the states parties, often they have a much wider impact as strongly persuasive precedents on the obligations imposed by international law. For this reason, all international tribunals except the International Court of Justice have developed procedures to enable

[187] Statement of Judge Sir Robert Jennings, President of the International Court of Justice, read by the Registrar of the Court to the plenary session of the UN Conference on Environment and Development (June 11, 1992), *reprinted as The Role of the International Court of Justice in the Development of International Environment Protection Law*, 1 RECIEL 240 (1993).

third parties to submit statements or written observations on the case. As the judgments affect not only the rights and obligations of states parties to the dispute, but also increasingly the rights and obligations of individuals, justice requires that nongovernmental organizations representing the public interest have the opportunity to submit information and arguments to the Court. Such participation reinforces the concept of obligations *erga omnes* and can lead to enhancing the role of the Court and the long-term development of international law.

To accept amicus submissions in contentious cases, the Court would either need to amend its Rule of Court 69(4) without changing the Statute, or amend both Article 34(2) of the Statute and Rule 69(4). Using the first alternative, the Court could redefine the term "public international organization" in Rule 69(4) to mean "an international organization composed of states or a nongovernmental organization holding consultative status with the United Nations."

A possible advantage to pursuing the first alternative is that the Rules may be easier to amend than the Statute. However, it seems difficult to reconcile the new definition with the drafting history and limited purpose of Article 34(2), discussed above.[188] In addition, the language of Article 34(2) seems to oblige the Court to receive submissions of public international organizations ("the Court . . . shall receive such information presented by such organizations on their own initiative"). By expanding the definition of "public international organization" without amending the Statute, the Court could find itself forced to accept amicus briefs submitted from all organizations in all cases. The increased workload, coupled with a marginal value to the Court of duplicative or unnecessary submissions, would quickly outweigh any benefit that amicus participation could bring.

It would be better for the Court to amend Article 34(2) of its Statute to delete the word "public" and make participation discretionary. The revised article would provide that the Court, "subject to and in conformity with its Rules, may request of international organizations information relevant to cases before it, and *may* receive such information presented by such organizations on their own initiative." If this is done, the Rules of Court should also be amended to define the term "international organization." The definition could retain the reference to organizations composed of states, but add to it nongovernmental organizations holding consultative status with the United Nations. As noted earlier, such status provides some evidence of the broad representation and interests of the organization, as well as indicates a degree of familiarity with the international system. In addition, it provides a straightforward criterion to limit the potential pool of amicus participants to avoid flooding the Court with requests from every group in the world. The Court could provide unlimited access by not defining the term "international organization," but such a decision would substantially increase the work of the Court and is unnecessary to meet the objective of opening the proceedings to representative nongovernmental participation.

Without attempting the difficult process of amending its Statute and Rules, the Court has other means of accepting nongovernmental participation. It possesses and has exercised its discretion to admit amicus participation by nongovernmental organizations in advisory proceedings. It should expand this practice. In contentious cases, absent a formal amicus procedure, the Court could accept requests by nongovernmental organizations to prepare or submit expert opinions on appropriate issues before it, pursuant to Article 50 of the Statute. In sum, if the Court is willing to accept nongovernmental participation in its proceedings, it has the means to do so.

[188] *See* text at notes 53–59 *supra*.