# ‘Friends of the Court’:
# The Role of Human Rights Non-governmental Organisations in the Litigation Proceedings

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## Abstract

In recent decades the number of NGOs and the scope of their activity have increased significantly. It is commonly acknowledged that the power of NGOs–at least at international level–is growing. This article introduces the concept of NGOs’ role in the judicial proceedings at the international courts or tribunals. It focuses on the issues that represent the most crucial aspects of the work of NGOs in the field of human rights litigation. Most of all, the paper analyses the impact of *amicus curiae* briefs on the litigation proceedings, particularly at the European Court of Human Rights in Strasbourg. It also looks at the issue which is very closely connected with the activities undertaken by NGOs in the judicial sphere, as their activity and influence grows, namely the notion of accountability of human rights NGOs. The organisations are slowly becoming to consider the questions of their own legitimacy and accountability. This article briefly discusses whether there is at all the need for accountability and what are the findings and analyses of those issues provided in the literature so far.

## 1. Introduction

> It must be understood that democracy is not a model to be copied from certain states but a goal to be reached by all peoples. NGOs have a crucial role to play in this area. They can help develop effective ways of spreading the ideas of peace and democracy. They can take part in the birth and development of democratic institutions within states. They can also serve as vigilant monitors, helping to guarantee respect for democracy throughout the world.[1]

These words of the former Secretary General of the United Nations, Boutros-Ghali, reiterate the commonly recognised and acknowledged power of non-governmental organisations (NGOs)[2] in the process of building democratic foundations at the national as well as international level. No one would question that in recent decades both the number of NGOs and the scope of their

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[1] Willets (ed.), *The Conscience of the World: The Influence of Non-Governmental Organisations in the U.N. System* (London: Hurst & Company, 1996) at 275.

[2] There are various definitions of ‘NGO’. According to Willets, an NGO may be defined as ‘an independent voluntary association of people acting together on a continuous basis, for some common purpose, other than achieving government office, making money or illegal activities’. Therefore, the most characteristic features of NGOs include: 1) independence from the direct control of any government; 2) no status as a political party; 3) a non-profit-making structure; and 4) a non-criminal - including non-violent – purpose. Blitt, ‘Who Will Watch the Watchdogs? Human Rights Non-Governmental Organisations and the Case for Regulation’, (2004) 10 *Buffalo Human Rights Law Review* 261 at 280.

activity have increased significantly. It is believed that particularly the work of human rights NGOs[3] has a visible impact on the situation in the area of human rights promotion and protection.

This article introduces the concept of the role of NGOs, and human rights NGOs in particular, in the judicial proceedings of regional tribunals. To build the case for NGO presence in litigation, the first part of this article sketches the role assigned to human rights NGOs and briefly describes various types of activities these organisations perform.

This article then moves on to the concept and practice of NGOs acting as *amicus curiae* and filing written submissions. It focuses on that aspect of human rights NGOs litigating actions particularly with regard to the performance of these organisations that is extensively used at the European Court of Human Rights. It presents various examples of cases when human rights organisations[4] acted as third-party intervenors in Strasbourg. In addition, it also gives a short overview of the major issues related to the practice of *amicus curiae* occurring in the Inter-American Court of Human Rights, as they may have an influence on the future development of human rights adjudication before this and other courts (i.e. African Court of Human Rights).

The final part of this article tries to touch upon the notion of accountability of human rights NGOs, the issue that is very closely connected also with the activities undertaken by NGOs in the judicial sphere. NGOs generally are slowly beginning to consider questions of their own legitimacy and accountability. But as the debate on legitimacy and accountability is currently ongoing, the aim of this article is to briefly discuss the analyses of the above issues, which are provided in the literature so far as well as their significance to the further development of NGO participation in the litigation proceedings.

## 2. The Emergence of Human Rights NGOs – Brief Overview of Their Activities

The human rights movement is spread out around the world. The first human rights groups appeared only at the national level,[5] and preceded the birth of internationally recognised organisations. Amnesty International was the first and the most prominent organisation in the field, then the Lawyers Committee for Human Rights and Human Rights Watch, based in the United States, and ARTICLE 19 and INTERIGHTS, based in the United Kingdom, as well as Helsinki Committees developed in various countries in Eastern Europe.[6]

[3] As specified by Martin Olz, '[a]n entity is deemed to be a human rights NGO as long as its 'private' character is unquestionable and its work is guided by the idea of international human rights as set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other instruments of international law.' He further says that '[f]or an organisation to qualify as a 'human rights NGO', substantive criteria play a more important role than formal ones. It is not crucial whether the organisation's members are individuals or corporate bodies, and it does not matter in how many countries the organisation is active or what kind of infrastructure is at its disposal. An NGO is deemed a 'human rights NGO' when it has the promotion and protection of human rights as its primary concern, when it is not established by a government, and when its officers have not been appointed by a government. A human rights NGO is not funded by a single government and must ensure that donor governments have no influence on the decision-making process of the organisation. Furthermore, it must pursue goals other than profit, and it must work for the benefit of the whole society rather than solely to improve the situation of its members.' Olz, 'Non-Governmental Organisations in Regional Human Rights Systems', (1997) 28 *Columbia Human Rights Law Review* 308 at 320.

[4] I use terms 'human rights non-governmental organisation' and 'human rights organisation' interchangeably.

[5] I.e. LIBERTY was founded in 1934. See infra n. 34 for description of the organisation.

[6] Steiner, 'Diverse Partners. Non-Governmental Organisations in the Human Rights Movement', in *The Report of a Retreat of Human Rights Activists* (Harvard Law School Human Rights Program and Human Rights Internet, 1991).

The creation of the United Nations (UN) inevitably contributed to further development of the non-governmental human rights movement. The UN established a framework for action by providing the universal standards in the area of human rights protection (through adoption of the International Bill of Human Rights)[7] and expressing commitment to the promotion of those rights.[8] Those measures of implementation, known as international enforcement mechanisms or procedures, enable human rights activists to become vociferous, to inform relevant bodies about the violations and to make perpetrators liable for their actions.

NGOs, sometimes referred to as a 'curious grapevine'[9] or a 'magic bullet',[10] are increasingly becoming more and more important. Yet, as 'outside actors' they were not always perceived as particularly serious by governments, and only their proactive presence in the international forum has persuaded States of the emerging power of NGO community.

Before turning to the issue of participation of human rights NGOs in litigation proceedings, this author would like to discuss other forms of involvement of human rights organisations in the work for promotion and protection of universal standards. Unquestionably, NGOs perform a variety of activities. It is increasingly recognised that NGOs working on the international, regional or national levels have been building up a system of international pressure on the development of human rights. They are the initiators of projects, they press national delegations to act, they influence intergovernmental staff who prepare documents and studies, they provide material and information about human rights problems and situations, and they give legal aid to victims of violations of human rights.[11]

It has also been repeatedly highlighted that these organisations function as 'unofficial ombudsmen' safeguarding human rights against governmental infringement by such techniques as diplomatic initiatives, reports, public statements, efforts to influence the deliberations of human rights bodies established by intergovernmental organisations, campaigns to mobilise public opinion, and attempts to affect the foreign policy of some countries with respect to their relations to States, which are regularly responsible for human rights violations.[12] The role of NGOs acting as ombudsmen is also mentioned by Korey, when he refers to intervening on behalf of 'prisoners of conscience' or on behalf of the oppressed.[13] He furthermore points out that the initial operations of human rights NGOs included standard-setting[14] and fact finding, and it was

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[7] International Bill of Human Rights is comprised of the Universal Declaration of Human Rights, International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as measures of implementation that are part of the Optional Protocol to the Covenant on Civil and Political Rights.

[8] Posner and Whittome, 'The Status of Human Rights NGOs', (1994) 25 *Columbia Human Rights Law Review* 267 at 285.

[9] The phrase 'curious grapevine' is used by Korey, *NGOs and the Universal Declaration of Human Rights: 'A Curious Grapevine'* (New York: St. Martins's Press, 1998) at 50.

[10] The phrase 'magic bullet' with regard to NGOs appears in Edwards and Hulme (eds), *Non-Governmental Organisations – Performance and Accountability. Beyond the Magic Bullet* (London: Earthscan Publications Ltd, 1998).

[11] Ermacora, 'Non-Governmental Organisations as Promoters of Human Rights', in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension* (Koln: Carl Heymanns Verlag KG, 1988) at 180.

[12] Weissbrodt, 'The Contribution of International Non-Governmental Organisations to the Protection of Human Rights', in Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Vol. II (Oxford: Clarendon Press, 1984) at 403-4.

[13] Korey, supra n. 9 at 3.

[14] That is the establishment of international norms by which the conduct of states can be measured or judged. Theo van Boven notes that the involvement of NGOs in the process of human rights standard-setting is a recent phenomenon. Nevertheless, there are examples of NGOs, which have been active for a long time in international campaigns against slavery, and against trafficking in women or children. NGOs created a climate favourable to the

only later that organisations would become actively involved in the creation of various types of implementing agencies or institutions.[15]

The significance of the existence of NGOs and their role at both international and regional levels has been recognised through various initiatives resulting in the adoption of documents which provided for a possibility of acquiring a consultative status with the United Nations Economic and Social Council (ECOSOC)[16] and the adoption of a European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, which was a regional effort to facilitate the work of European international NGOs by granting them some sort of international legal status.[17]

As described earlier, the access of NGOs to promotion and protection of human rights under international law may take various forms. Martin Olz divides them into three groups. The first group is connected with the implementation of international agreements; the second is related to working relations with intergovernmental agencies; and the third concerns 'soft' control of the application of international human rights norms.[18] For our purposes the first group is of the greatest relevance.

Here the access to promotion and protection of human rights is related to the involvement

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conclusion of international conventions in these areas. See van Boven, 'The Role of Non-Governmental Organisations in International Human Rights Standard-Setting: A Prerequisite of Democracy', in Coomans et al. (eds), *Human Rights from Exclusion to Inclusion: Principles and Practice: An Anthology from the Work of Theo van Boven* (The Hague: Kluwer Law International, 2000) at 349.

[15] Ermacora divides the work of NGOs into 7 categories, which include:

1) active participation of NGOs in functional commissions by drafting proposals, making statements, submitting written memoranda, contributing to the setting of human rights norms;
2) active contribution of NGOs to revealing situations of gross, massive and systematic violations of human rights;
3) active participation of members of NGOs in international working groups;
4) passive participation of NGOs in the work of functional committees by submitting human rights material to members of such committees and thereby influencing their work;
5) offering legal assistance in international or national procedures;
6) acting as claimants in petition proceedings; and
7) contributing to build up an atmosphere of trust in human rights, as well as criticising the work of international governmental organisations. Ermacora, supra n. 11 at 173-4.

[16] ECOSOC Resolution 1296 (XLIV), 23 May 1968, governs relations between NGOs and the United Nations. In order to gain consultative status, an organisation must be 'of representative character and of recognised international standing; it shall represent a substantial proportion, and express the views of major sections of the population or of the organized persons within the particular field of competence, covering, where possible, a substantial number of countries in different regions of the world'. National organisations are permitted only 'after consultations with the Member State concerned in order to help achieve a balanced and effective representation of non-governmental organisations reflecting major interests of all regions and areas of the world, or where they have special experience upon which the Council may wish to draw'. NGOs awarded consultative status are placed in one of three categories: Category I, Category II or the Roster. See Posner and Whittome, supra n. 8 at 285. The new Resolution 1996/31 stresses the importance of non-governmental organisations and expands the criteria set forth in Resolution 1296. An organisation is considered to be an NGO when is 'is not established by a governmental entity or intergovernmental agreement'. And it shall be 'of recognised standing within the particular field of its competence or of a representative character'. See Olz, supra n. 3 at 316-7. Also on the same topic Blitt, supra n. 2 at 275-9.

[17] Olz, supra n. 3 at 318-9.

[18] As to the third field of access, international standards are used as a tool to fight human rights abuses. Relying on the Universal Declaration of Human Rights and other instruments, such as regional human rights conventions, NGOs are able to remind States of their obligations and to hold them responsible by publicly disclosing human rights violations. Raising public awareness, fact-finding missions, reporting, human rights education and publication, lobbying decision makers on the domestic and international level, legal assistance, and domestic human rights litigation, are only a few examples of activities falling in this category. Olz, supra n. 3 at 329-31.

of NGOs in State reporting procedures.[19] But most importantly, it is connected also with monitoring the compliance with international human rights norms through complaints procedures: inter-State complaints and individual complaints. Individual communications are frequently brought under several human rights treaties at the universal and regional levels and under procedures based on the UN Charter.[20] NGOs may be involved as individual complainants when a NGO itself is a victim of a human rights violation, or they file complaints on behalf of individuals whose rights have been violated, and NGOs can provide legal assistance and expertise to individual claimants. Another form of NGO participation in international human rights proceedings is the submission of *amicus curiae* briefs.[21]

The above-mentioned role of human rights NGOs in implementation of international agreements through individual complaints procedures raises the issue of the increasingly crucial role of NGOs in international litigation, which consequently can contribute to the development of international law. Human rights NGOs 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*.[22] The latter aspect of NGO participation in the litigation seems to be used in the most extensive way before regional tribunals particularly. Next, we turn to an examination of the concept of *amicus curiae* and the experiences of the European Court of Human Rights in that regard. Then this paper will shortly present the major issues that are connected with this subject arising before the Inter-American Court of Human Rights.

## 3. Human Rights NGOs as 'Friends of the Court'

### *A. The Concept of Amicus Curiae*[23]

Madeleine Schachter quotes in her essay that '[n]o longer a mere friend of the court, the *amicus* has become a lobbyist, an advocate, and, most recently, the vindicator of the politically

[19] The inclusion of NGOs in the process can either be based on explicit treaty language or on a established practice by a treaty body. See Olz, supra n. 3 at 326-7. On the issue of NGO participation in the treaty bodies, see O'Flaherty, 'Non-governmental Organisations and the Reporting Procedures under the International Human Rights Instruments', in *Human Rights and the UN: Practice before the Treaty Bodies* (The Hague: Kluwer Law International, 2002) 1.

[20] These are: European Court of Human Rights, Inter-American Commission on Human Rights who can submit the complaint to the Inter-American Court of Human Rights, African Commission on Human Rights and African Court Of Human And Peoples' Rights (ACHPR), UN Human Rights Committee, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), and the Committee against Torture (CAT).

[21] Olz, supra n. 3 at 327.

[22] Shelton, 'The Participation of Non-Governmental Organisations in International Judicial Proceedings', (1994) 88 *American Journal of International Law* 611 at 611.

[23] The Latin phrase *amicus curiae* means 'friend of the court'. According to Black's Law Dictionary, it means a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter. Garner (ed.), *Black's Law Dictionary*, 8th Edition, (St. Paul, MN: Thomson West 2004) at 93. The *amicus* is a bystander who, without direct interest in the litigation, intervenes on his own initiative 'to make a suggestion to the court on matters of fact and law within his own knowledge'. *Amici* provide information, at the court's discretion, in areas of law in which the courts had no expertise or information. The English common law developed the practice of *amicus* participation as a means of 'helping judges avoid errors and in maintaining judicial honour and integrity by acting as the judiciary's impartial friend; providing information beyond the court's expertise'. Schachter, 'The Utility of Pro Bono Representation of U.S.-Based *Amicus Curiae* in Non-U.S. and Multi-National Courts as a Means of Advancing the Public Interest', (2004) 28 *Fordham International Law Journal* 88 at 89-90.

powerless'.[24] This statement could easily serve as a summary of the reasons for such a wide usage of *amicus* submissions by human rights NGOs.

In order to introduce the concept, this article briefly describes the various useful functions of *amicus curiae* submissions. Firstly, the *amicus* brief may provide for legal arguments or facts/aspects of the case, which the parties failed to address before the court. Secondly, the *amicus* may supplement or provide detailed analysis of points of law, including citation and discussion not contained in the parties' arguments for political and/or tactical reasons. Thirdly, the *amicus* brief may assist the court in areas of novel and complex litigation. The *amicus* thus brings expertise, which is not available to the parties (for example due to a lack of resources) and helps to explain difficult issues, that could eventually help the court to make a decision on the case. Finally, the *amicus curiae* brief may inform the court about the broader interests, beyond the particular interests of the parties, and may introduce to the court the broader impacts of its judgments.[25] In short, *amici* assist the court by presenting alternative or supplementary arguments or factual information and play an important role in judicial analysis.[26]

All courts require that an *amicus* request permission to participate.[27] Certain criteria have been developed regarding acceptance or rejection of *amicus* briefs by the courts. Courts may require novelty or originality of presentation, they may permit *amici* to reinforce arguments made weakly or inadequately by the parties, or require sufficient economic, legal or public interest or expertise to be of assistance to the court. Some courts permit filings in any case when justified by the circumstances, other courts only allow *amici* to file with the consent of the parties.[28]

There are certain advantages and disadvantages of filing *amicus curiae* briefs. One of the positive elements of this form of participation in the legal proceedings are low costs and better time-effectiveness in comparison with preparing the whole case, as the litigation responsibilities are shared with the parties. As the *amici* are not bound by the judgments, they can bring the case forward once again if the outcome of a particular case was unfavourable. *Amici* are generally not limited as to the issues to be raised and they ought to participate in the proceedings on the basis of a general interest, including protection of underrepresented persons or the public interest, or in order to point out error to the court.

The major disadvantages include lack of control as to the direction or management of the legal action. *Amici* generally are not served papers or other documents in the case and they cannot be heard without special leave of the court. Moreover, *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.[29] That seems to be proved in practice. It is said that individuals and human rights NGOs in Europe and the Americas have exploited the concept of

[24] Schachter, supra n. 23 at 90.

[25] Mohamed, 'Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights', 1999 *Michigan State University - DCL Journal of International Law* 377 at 382-383. See also Shelton, supra n. 22 at 618.

[26] Schachter, supra n. 23 at 88.

[27] 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 organisation 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. When appropriate, *amici* could be required to participate in oral proceedings where they would be subject to examination by the court or the parties. Ibid.

[28] Ibid.

[29] Shelton, supra n. 22 at 611-2.

the *amicus curiae* as a mechanism for participating in and shaping the course of human rights adjudication before the European Court of Human Rights and the Inter-American Court of Human Rights.[30]

### *B. Human Rights NGOs as 'Friends' of the European Court of Human Rights*

There are two provisions in the European Convention of Human Rights (the Convention) now (after amendments introduced by Protocol 11)[31] which are of great importance to NGOs. The first provision is included in Article 34 of the Convention and it concerns individual applications. It provides that:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Furthermore, there is Article 36, which gives the President of the European Court of Human Rights (the Court) the discretionary power to allow for 'third party intervention'. It provides that:

> 1. In all cases before the Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
> 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

It is worth mentioning that before the entry into force of Protocol 11, the Court had developed the criteria (on the basis of Article 38(1), and then Article 37(2) of the Rules of Court),[32] according to which it permitted non-State participation in its proceedings.[33] First, just as it is under current regulations, the discretion whether to grant or refuse leave to intervene and also to specify the grounds of such intervention was left to discretion of the President. Second, the intervention had to be in the 'interests of justice' in the sense that it was most likely to assist the Court in carrying out its task. Therefore the Court has rejected *amicus* briefs when the connection between them and the case before the Court was too remote to meet the proper administration of justice test.[34] The Court has accepted or rejected third party participation and the filing of briefs if there existed a clear precedent on the issue under review; and, as such, the Court has viewed such participation unnecessary. The aim has been to not increase the workload of the Court if there were no innovative and important grounds for the Court to consider in the

[30] Mohamed, supra n. 25 at 384.
[31] Protocol 11 was adopted in May 1994, and since its entry into force on 1 November 1998, this Protocol forms an integral part of the Convention.
[32] With regard to the previous regulations on the 'third party intervention', see Shelton, supra n. 22 at 630-2.
[33] Mohamed, supra n. 25 at 384-5.
[34] Ibid.

particular case.[35]

One of the very first cases in which a human rights NGO (the National Council for Civil Liberties (NCCL)),[36] asked permission to file a written memorandum and make oral submissions was the *Tyrer* case.[37] The Council's request was refused by the Chamber of the Court without discussion. As Anthony Lester rightly pointed out, '[i]t was a harsh decision in the light of the fact that the NCCL had represented Mr Tyrer before he withdrew his application and his instructions, and that the NCCL's stated purpose was that his initial and unambiguous position should be presented to the Court, whether in its own right, on behalf of Mr Tyrer's family, as amicus curiae, or in such other form as might assist the Court'.[38]

In the later *Malone* case,[39] which concerned the interception of telecommunications, the Post Office Engineering Union (whose members were involved in the interception of telecommunications complained of by the applicant) requested leave to submit written observations. It indicated that it had 'specific occupational interest' in the case and it would want to develop five themes in the written comments. The President granted leave, but subject to terms narrower than those contained in the request, limiting the submissions only to those matters which 'relate to the particular issues of alleged violation of the Convention'. According to Anthony Lester, the Union was assisted in preparing their written comments by INTERIGHTS[40] and JUSTICE (the British section of the International Commission of Jurists)[41] and the intervention had an important effect on the judgment of the Court.[42]

The most significant third-party intervention, as emphasised by Anthony Lester, occurred in the *Lingens* case[43] brought against Austria. The case concerned a journalist convicted of defamation, who claimed that his conviction violated Article 10 of the Convention respecting freedom of expression. The President of the plenary Court permitted the International Press Institute (IPI) through INTERIGHTS to submit written observations subject to certain conditions,

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[35] Ibid.

[36] LIBERTY (National Council For Civil Liberties - NCCL) is one of the UK's leading human rights and civil liberties organisations. It was founded as the National Council for Civil Liberties in 1934 and has campaigned for equal rights for over 70 years. LIBERTY is a pressure group that campaigns for human rights and civil liberties. LIBERTY acts as a watchdog, lobbies Parliament, is involved in research, organises conferences, and publishes fact-sheets, newsletter and other publications. LIBERTY deals with test cases challenges unjust laws, by taking test cases to UK courts and the European Court of Human Rights. LIBERTY is a membership organisation, and relies on the support of thousands of individuals who want to protect and promote civil liberties and human rights.

[37] *Tyrer v United Kingdom* A 26 (1978); (1980) 2 EHRR 1. The case concerned the issue of corporal punishment. The Court had to consider whether the existence of such a punishment was in conformity with the prohibition of degrading treatment or punishment. The Court concluded that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention.

[38] Lester, '*Amici Curiae*: Third Party Interventions Before the European Court of Human Rights', in Matscher and Petzold (eds), *Protecting Human Rights: The European Dimension* (Koln: Carl Heymanns Verlag KG, 1988) 342.

[39] *Malone v United Kingdom* A. 82 (1984); (1985) 7 EHRR 14. The Court held that there was a breach of Article 8 of the Convention.

[40] INTERIGHTS is a UK-registered charity established in 1982. It aims to enforce human rights through law, providing protection and redress, in particular regions and on issues of strategic focus; to strengthen human rights jurisprudence and mechanisms through the use of international and comparative law; and to empower legal partners and promote their effective use of law to protect human rights. It supports lawyers, judges, NGOs and victims on the ground by tailoring activities in response to the needs of each group and region.

[41] JUSTICE is an independent legal human rights organisation. It was founded in 1957, following the visit of a group of British lawyers to observe treason trials in South Africa and Hungary. It was set up to promote the rule of law and to assist the fair administration of justice.

[42] Lester, supra n. 38 at 345.

[43] *Lingens v Austria* A 103 (1986); (1986) 8 EHRR 103. The Court found a violation of Article 10 of the Convention.

meaning that the comments should be as concise as possible and strictly limited to specific matters defined in the INTERIGHTS' letter to the Court.[44]

The *Monnell and Morris* case,[45] which involved detention of convicted prisoners by the United Kingdom, was decided by a chamber, which, in a divided vote, found no violation. JUSTICE 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 unrivalled 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.[46]

In the *Informationsverein Lentia* case,[47] which concerned the impossibility of setting up and operating private radio or television stations, the President of the Chamber authorised ARTICLE 19 (International Centre Against Censorship)[48] and INTERIGHTS to submit written observations on specific aspects of the case. The Court unanimously found a violation under Article 10 of the Convention.

*Amicus* briefs have had a significant impact on the adjudication of human rights before the European Court. According to Dinah Shelton, this impact is difficult to measure, although the judicial references to them and quotes from them, indicate that they can be influential. In the *Lingens* case the Court, without referring to the submission, discusses at length issues addressed in the INTERIGHTS material. In the well-known *Soering* case[49] concerning the responsibility of the United Kingdom for extraditing an accused charged with a capital offence 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[50] was permitted to file written comments, which are partly quoted and adopted in the Court's opinion.[51]

In the *Brogan* case[52] a highly divided plenary Court found a violation of fair trial

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[44] INTERIGHTS wanted to include evidence of law and practice in certain member states of the Council of Europe and North America on how far it is necessary in a democratic society to restrict the expression of opinion in the press in order to protect the reputation of the individual affected, where the individual is a politician and holds public office. See Lester, supra n. 38 at 346-7.

[45] *Monnell and Morris v United Kingdom* A. 115 (1987); (1988) 10 EHRR 205. The Court found no violations of the rights claimed by the applicants.

[46] Shelton, supra n. 22 at 635.

[47] *Informationsverein Lentia and Others v Austria* A. 276 (1993); (1994) 17 EHRR 93.

[48] ARTICLE 19 is an international human rights organisation, which defends and promotes freedom of expression and freedom of information all over the world. ARTICLE 19 believes that freedom of expression and access to information is not a luxury but a fundamental human right. The full enjoyment of this right is the most potent force to pre-empt repression, conflict, war and genocide; it is central to achieving individual freedoms and developing democracy.

[49] *Soering v United Kingdom* A 161 (1989); (1989) 11 EHRR 439.

[50] Amnesty International (AI) is a world-wide movement of people who campaign for internationally recognised human rights. AI's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. AI's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.

[51] Shelton, supra n. 22 at 635-6.

[52] *Brogan and Others v United Kingdom* A 145-B (1988); (1989) 11 EHRR 117.

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.

Also, in the famous cases of *Observer and The Guardian* as well as *The Sunday Times* (also known as *Spycatcher* cases)[53] which concerned the publication of a book, ARTICLE 19 requested and was allowed to file written comments. In its opinion in the first case, the Court observed, '[f]or 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 (dealing with the right to freedom of expression) does not in terms prohibit the imposition of prior restraints on publication as such'. The central issue in this case was that of prior restraint imposed upon freedom of expression and the Court obviously relied on ARTICLE 19's brief in finding that there was a violation. Even the dissenting opinion (of Judge Morenilla) made use of the written comments of ARTICLE 19.[54]

The same tendency is noticeable in the *Brannigan and McBride* case.[55] The applicants challenged the validity of the United Kingdom derogation under Article 15 of the Convention and their detention in Northern Ireland. The Northern Ireland Standing Advisory Commission on Human Rights, Amnesty International and three organisations (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 former Article 37(2). The contentions of the various groups on the legal standard to be applied to reviewing derogations by States Parties were discussed in the Court's opinion at much greater length than in prior cases. The plenary Court upheld the derogation and found no violation. However, Judge Pettiti's dissenting opinion, in particular, uses the brief filed by Amnesty International, as does the concurring opinion of Judge Martens.[56]

In the *Chahal* case,[57] Amnesty International, JUSTICE and LIBERTY in conjunction with the AIRE Centre[58] and the Joint Council for the Welfare of Immigrants (JCWI) were granted leave to submit observations. The Court in its judgments referred to Amnesty

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[53] *Observer and The Guardian v United Kingdom* A 216 (1991); (1992) 14 EHRR 153; and *The Sunday Times v United Kingdom* A 217 (1991); (1992) 14 EHRR 229.

[54] Mohamed, supra n. 25 at 387.

[55] *Brannigan and McBride v United Kingdom* A 258-B (1993); (1994) 17 EHRR 539.

[56] Judge Martens stated that: '[f]or my part, I found Amnesty International's arguments against so deciding persuasive, especially where Amnesty emphasised 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 criticised 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'.

[57] *Chahal v United Kingdom* 1996-V1831; (1997) 23 EHRR 413. The Court found a violation of Article 3 (it concluded that if a decision to deport the applicant to India was being implemented, this would be a violation of Article 3), Article 5(4) and Article 13.

[58] The AIRE Centre (Advice on Individual Rights in Europe) is a registered charity. The Centre's advice, information and representation service covers all aspects of the rights of individuals in Europe under international law.

International's reports on the situation in India and Amnesty's submissions. It noted that: 'The intervenors were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State'.

In the *MC v Bulgaria* case INTERIGHTS filed a brief that reviewed the laws of eight States concerning the necessity of proof of use of physical force or the victim's resistance in establishing rape. MC complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively are prosecuted. The Court found violations of Articles 3 and 8 of the Convention.[59]

The very recent *Nachova* case[60] concerned the allegedly racist killing of two Roma youth by state officials in Bulgaria. Third-party written submissions were filed by INTERIGHTS, the European Roma Rights Centre and the Open Society Justice Initiative. In July 2005 the Grand Chamber of the European Court of Human Rights affirmed in substantial part its first ever finding of racial discrimination in breach of Article 14 of the Convention. The Court's ruling makes clear that States Parties have an obligation to investigate possible racist motives behind acts of violence. In addition, the judgment also affirmed in part the earlier finding of racial discrimination in breach of Article 14. In doing so, it broke new ground in European human rights law. The Grand Chamber unanimously held that the prohibition of discrimination under Article 14 has a procedural component, which required the States Parties to investigate. Six judges dissented from the majority's finding of no substantive violation of Article 14, and that the government's conduct taken as a whole disclosed a breach of Article 14. The judgment of the Court summarised all the submissions made by human rights NGOs as intervenors. The Court also mentioned that '[n]on-governmental organisations, such as Human Rights Project and Amnesty International have reported in the last several years numerous incidents of alleged racial violence against Roma in Bulgaria, including by law enforcement agents'.

On certain occasions, the Court has rejected requests to file *amicus* briefs and has done so on various grounds, which seem to cover situations, according to Shelton,[61] where the requests bore no proximate connection with the case under adjudication; where *amici* were filled too late;[62] where there was already clear precedent concerning the issue at stake;[63] and where similar

[59] *MC v Bulgaria* 2003-XII 651; (2005) 40 EHRR 20. The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. As INTERIGHTS had submitted, victims of sexual abuse - in particular, girls below the age of majority - often failed to resist for a variety of psychological reasons or through fear of further violence from the perpetrator. Given contemporary standards and trends, Member States' positive obligation under Articles 3 and 8 of the Convention requires the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

[60] *Nachova and Others v Bulgaria* 2004 - 90; (2004) 39 EHRR 37. In February 2004, a chamber of the Court held a violation of the applicants' right to life and, in a landmark finding, their right to non-discrimination under Article 14 of the Convention. It was the first time that the Court had found a violation of Article 14 in conjunction with the right to life. Upon the request of the Bulgarian authorities, the case was deferred to the Grand Chamber of the Court for reconsideration.

[61] Shelton, supra n. 22 at 632-3.

[62] In *Goddi v Italy* A 76 (1984); (1984) 6 EHRR 457. The Court refused the request of the Council of the Rome Bar Association to file in the case brought against Italy because the request had come too late in the proceedings.

[63] In *Caleffi v Italy* A 206-B (1991); and *Vocaturo v Italy* A 206-C (1991). The issues concerning the length of civil proceedings were straightforward. Five trade associations asked to submit information and were denied. The Court did not give its reason for the denial.

material had been already submitted.[64] However, with regard to *amici* filed by international human rights NGOs, their submissions have been generally accepted by the Court. Furthermore, the Court acknowledges the expertise these organisations possess and has found written observations very useful, especially when the cases concern complex and sensitive issues.

In conclusion, the cases in which the Court has permitted human rights NGOs participation make clear that such participation, particularly in the form of *amicus curiae* intervention, has a significant influence on the human rights adjudication process.[65] Shelton points out that the impact of *amicus curiae* briefs is difficult to evaluate. However, she also notes that 'because non-governmental organisations intervene in the more important cases before the plenary Court where there is no clear precedent and where the Court may be divided, they fulfil the role of assisting the Court in new areas of law where the impact is particularly broad'. *Amicus* briefs have also provided comparative law analysis and practical information that the parties may be unable to submit and the Court would otherwise be unable to acquire, and therefore facilitating the decision-making process.[66]

The emergence of NGOs acting as *amicus curiae* is a good example of how the European human rights system improved and developed through the Court's dynamic interpretation of the Convention. Protocol 11 undoubtedly codified the practice and thrown the doors wide open for more NGO participation in human rights adjudication before the Court.

As we can observe on the basis of the examples presented above, *amici* intervene most often in major cases involving rights of freedom of information, privacy, fair trial and arbitrary detention. It is also obvious that there are several repeat players among *amici*. INTERIGHTS and ARTICLE 19, both international human rights law groups based in the United Kingdom, have participated in many cases, not only involving the UK Government, but many other States. JUSTICE, LIBERTY and Amnesty International file *amicus curiae* briefs quite often.[67]

### *C. Evolving Role of Human Rights NGOs as 'Friends' of the Inter-American Court of Human Rights*

There is no space here for a longer discussion about other systems of human rights protection and participation of NGOs in the litigation proceedings before the courts or tribunals in those systems, but this article briefly mentions the experiences of the Inter-American Court of Human Rights. NGOs play a significant role as *amicus curiae* in proceedings before that Court. In fact, the Inter-American Court has the most extensive *amicus curiae* practice among the existing

[64] 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 *Capuano v Italy* A 119 (1987); (1987) 13 EHRR 271. The 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 authorise the Rome Bar Association but not the others. The Chamber was unanimous in finding a breach.

[65] A survey conducted by Dinah Shelton shows that in 1994 the Court found violations in 12 of the 16 cases in which *amicus* briefs were filed. According to her, with *amicus* participation, the court found violations in 75 per cent of the cases, but without such participation violations were found in only 50 per cent of the cases. Shelton, supra n. 22 at 637.

[66] Ibid.

[67] *Amici* can be also submitted by individuals, professional organisations, like bar associations or consumer groups, labour unions and even governments (in the case *Ruiz-Mateos v Spain* A 26 (1993); (1993) 16 EHRR 505, two governments filed *amici curiae* briefs: Germany and Portugal submitted their observations on the applicability of Article 6(1) of the Convention to constitutional courts. See Shelton, supra n. 22 at 634.

international tribunals. It has accepted *amicus* briefs in all proceedings from its first case.

But what is particularly interesting here is the fact that neither the Inter-American Convention nor the Statute of the Inter-American Court and its Rules of Procedure expressly provide for the filing of *amicus curiae* briefs. The former President of the Court, Professor Thomas Buergenthal, reiterated that all of these documents are silent on the issue of *amicus* briefs, and do not mention them in connection with contentious cases or in connection with advisory proceedings.[68] However, Buergenthal suggested that Article 34(1) of the Court's Rules of Procedure contains some language touching on the issue of *amicus* briefs.[69] 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. Therefore the Court welcomes briefs both in contentious cases and in advisory proceedings, the latter under Article 34(3) of its Rules of Procedures.[70] In contrast to the European Court, the Inter-American Court appears never to have rejected *amicus* submissions.[71]

Since the Inter-American Court was established, over 100 *amicus* briefs have been filed. Among the human rights NGOs that consistently submitted *amicus* briefs are Human Rights Watch/Americas Watch, the International Human Rights Law Group, Lawyer Committee for Human Rights, the International League, Amnesty International and the International Commission of Jurists. Other briefs have come from university-based groups (such as the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law), the Netherlands group SIM, bar association human rights committees (from New York and Minnesota), or the press (the International Herald Tribune and the Wall Street Journal). Again, the Inter-American Court seems to appreciate the expertise provided by NGOs in the form of *amicus* briefs. In addition to submitting written briefs, authors have also participated in oral hearings on questions related to their briefs. Furthermore, NGOs participated by requesting provisional measures and the protection of witnesses and by monitoring compliance with decisions of the Court.[72]

As with other courts, the impact of the *amicus curiae* submissions at the Inter-American Court is difficult to assess. The Inter-American Court rarely refers expressly to information or viewpoints contained in *amicus* briefs. Nevertheless, it cannot be denied that consistent intervention by NGOs has impacted positively on the Inter-American Court's decisions.[73] Although the influence of submissions is rather impossible to evaluate, this practice of the Inter-American Court of Human Rights continues to evolve, with much greater participation of NGOs.

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[68] Lester, supra n. 38 at 344.

[69] Article 34(1) states: '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.'

[70] Article 34(3) states: 'The Court may, at any time during the proceedings, designate any person, office, commission or authority of its choice to obtain information, express an opinion or make a report on any given point.'

[71] Shelton, supra n. 22 at 638.

[72] Olz, supra n. 3 at 360; and Shelton, supra n. 22 at 639.

[73] Mohamed, supra n. 25 at 392.

### *D. Other Forms of Participation in Litigation*

On 12 April 2005 the European Court of Human Rights delivered the judgement in the case of *Shamayev and Others v Georgia and Russia*, involving the secret extradition of a group of Russian nationals of Chechen origin. The victims were represented by Georgian lawyers from Union Article 42 of the Constitution (a human rights organisation in Tbilisi) and advised on their submissions on admissibility and merits by INTERIGHTS.[74]

Furthermore, INTERIGHTS has co-ordinated a group of seven international NGOs (consisting of Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, Open Society Justice Initiative and REDRESS) in submitting a third party intervention to the European Court of Human Rights in the case of *Ramzy v the Netherlands.*[75]

There are examples of other forms of the involvement of NGOs in litigation at the European Court. INTERIGHTS' lawyers have acted as advisors to the applicants' lawyers and assist them in writing submissions and preparing for oral presentations during the hearings. The cases, which the organisation chooses to take, raise important and contentious issues with regard to human rights safeguards protected by the Convention. Whether this will be a new way of making an impact on judicial participation – it is too soon to decide. However, it is already certain that these types of activities are perceived as important and influential. Here, unlike in the cases of third party interventions, the advisors are able to control the direction or management of the legal action. They are served papers and all the documents through the applicants' lawyers and are entitled to compensation of costs as lawyers acting on behalf of a client/applicant.

It is highly important that the experiences and expertise of the major human rights NGOs, recognised internationally as the strongest lobbyists for human rights protection, are not overlooked by the Court. As to the impact their actions could make, we shall see in the future how the role of NGOs further develops.

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[74] In *Shamayev and Others v Georgia and Russia*, Application No. 36378/02, Judgment of 12 April 2005, the Court found Georgia and Russia to have violated several rights guaranteed by the European Convention of Human Rights during the extradition process and the ensuing procedure before the Strasbourg Court. The judgment is of relevance far beyond these two countries, particularly as practices of extra-legal rendition have multiplied worldwide with devastating effect in the course of the global 'war on terror'. Following the judgment, both the Georgian and Russian governments requested that the case be referred to the Grand Chamber. On 12 October 2005, the Grand Chamber refused the request and confirmed the April judgment as final.

[75] The case concerns the proposed deportation of the applicant to Algeria where, he claims, he will be subject to torture or ill-treatment as a terrorist suspect. The UK and four other governments intervened as third parties in the case to challenge the absolute nature of the prohibition under the European Convention on Human Rights of deporting individuals to countries where there is a risk of torture or ill-treatment. They argue instead for the introduction of a 'balancing test' in deportation cases in light of national security concerns. As the brief by INTERIGHTS and partners demonstrates such an approach is at odds with established ECHR and other international and comparative legal standards. The brief also addresses important issues raised in the case regarding how the assessment of the risk of torture or ill-treatment should be made, and the onus on the applicant to prove such risk. This case is likely to prove critical to the protection against torture and ill-treatment under the European system and potentially beyond. The brief also benefited from the input of the World Organisation against Torture (OMCT), the Medical Foundation for the Protection of the Victims of Torture and the Harvard Law School Legal Clinic.

### *E. 'Friendship Ties' – Results*

The analysis of the *amicus* practices of the European Court and the Inter-American Court demonstrates the emerging role of NGOs in international human rights adjudication. Two possible reasons appear for this emerging judicial attitude to the role of organisations working in the human rights field. First, with respect to human rights promotion and protection, the 'old' paradigm of international law which assumed that States were the only subjects of international law is being discredited because it has become unworkable in practice. Second, there is an emerging realisation that international dispute settlement bodies may be out of touch with reality if they foreclose altogether the possibility of direct or indirect involvement by international civil society groups in international dispute settlement processes. Over the years, international human rights NGOs have demonstrated in no uncertain terms their resourcefulness in bringing to light evidence, the existence of which States have denied. Therefore, human rights courts have realised the need to use such resources in the interest of justice.[76] The lesson from the practices of the European and Inter-American Courts is that human rights tribunals can actually benefit from assistance provided by NGOs if the tribunals are willing to include such groups in the exercise of their jurisdiction.

Notwithstanding, both the European and Inter-American Courts have shown the usefulness of opening the judicial process to all shades of opinion. They have benefited immensely from NGO participation as they relied on information and viewpoints put forward by such individuals and NGOs in order to found conclusions of law and fact. It is also a sign of progress in international law–treating NGOs, together with individuals, as subjects of international law.

The experiences of the European Court and the Inter-American Court bear testimony to the important role that human rights NGOs have played and continue to play with regard to *amicus* intervention and their importance in enhancing protection and promotion of human rights.

## 4. Human Rights NGOs and Accountability

### *A. The Notion of 'Accountability'*

As the activities and influence of NGOs grow, the notion of accountability (closely connected with legitimacy)[77] has become more significant and has begun occurring in the debates concerning the future development of NGO community. Regrettably, however, those debates do not cover specifically human rights NGOs. Limited initiatives have been undertaken, which are still in a developmental phase, aimed at analysing the accountability issue with regard to this specific group of NGOs.[78]

Undoubtedly, human rights NGOs enjoy standing at the UN and other intergovernmental bodies and possess expanded mandates. They create networks monitoring the implementation of

[76] Mohamed, supra n. 25 at 393-4.

[77] This term refers to an organisation's legal status, or the legal justification for carrying out its work. In the context of human rights work, it can refer also to an organisation's reputation and credibility.

[78] There is a draft report prepared by the International Council on Human Rights Policy, 'Deserving Trust. Issues of Accountability for Human Rights NGOs', which is currently being widely consulted. This report does include interesting observations on the issues of NGOs' legitimacy and reasons for accountability. The report can be obtained at: http://www.ichrp.org.

human rights obligations and performance of international actors, and they are also able to disseminate their messages across a broad range of addresses.

Taking the UN level as an example, as former UN Secretary General Boutros-Ghali has noted, even a limited examination of the participation of NGOs in the decision-making systems and operational activities of the UN shows without any doubt that NGO involvement has far exceeded the original scope of the legal provisions under Article 71 of the UN Charter. Moving beyond the limits of the Charter has meant the creation of informal arrangements for incorporating NGO influence into UN affairs, resulting in much of the NGO input being made behind the scenes. Consequently, he says that it would be 'altogether wrong to measure the NGO contribution in terms of its formal volume just as it would be misleading to think that the most vocal NGOs are necessarily the most influential'. Viewed from this perspective, it is evident that human rights 'NGOs have the proverbial ear of the UN', yet the full extent of this influence has become pervasive enough to enable some to argue that the entire UN human rights system 'would quite simply cease to function without NGOs'.[79]

Significantly, these dramatic transformations have emerged despite the fact that human rights NGOs lack any international legal personality, or 'formal jurisdiction over specified domains', or a source of formal accountability within the international system or at international law.[80] As Peter Spiro notes, human rights NGOs today are able to 'use the system to advance their agendas, but are not answerable to the system. They can bring others to task, but themselves remain immune. NGOs have not been held responsible for their conduct'.[81]

The debate on accountability is a very complex one and leaves a lot of questions unanswered. But at least in the discussion that is being held, the main issue of what is accountability and how it can be defined remains central. Hence, accountability may be defined as being answerable to an authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.[82] Accountability is generally interpreted as the means by which individuals and organisations report to a recognised authority, or authorities, and are held responsible for their actions. Hugo Slim defines NGO accountability as, 'the process by which an NGO holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns'.[83] Moreover, with regard to NGOs,[84] Edwards and Hulme have identified the existence of 'multiple

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[79] General Review of Arrangements for Consultations with Non-Governmental Organisations: Report of the Secretary General, 26 May 1994, E/AC.70/1994/5 at para. 40.

[80] Blitt, supra n. 2 at 262.

[81] Spiro, 'The Democratic Accountability of Non-Governmental Organisations', (2002) 3 *Chicago Journal of International Law* 161 at 166.

[82] Fox and Brown (eds), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (Cambridge, Mass.: MIT Press, 1998) at 12.

[83] Slim, 'By What Authority? The Legitimacy and Accountability of Non-governmental Organisations', (2002) *The Journal of Humanitarian Assistance* 9, available at: http://www.jha.ac/articles/a082.htm.

[84] Rajesh Tandon mentions three dimensions of NGO accountability: (1) Accountability *vis-à-vis* its mission: as an institution oriented to social change within the framework of civil society, an NGO needs to define, refine and pursue a clear mission; (2) Accountability *vis-à-vis* its performance in relation to that mission: demonstrable performance, both in process and outcome terms, is essential to generate feedback to the programmes and approaches implemented in a given time-frame; and (3) Accountability *vis-à-vis* its role as an actor in civil society: norms, rules and styles of functioning that match standards of being a good civic institution. In all three aspects, the governance of an NGO is a critical element. An effective system of governance enables an NGO to formulate, review and reformulate its mission in a changing context. 'Good governance' ensures that programmes follow the requirements of the NGO's mission; promotes a performance orientation and accountability in the institution; and requires that the values (integrity, participation, professionalism, quality, commitment), statutes (reporting and legal

accountabilities': 'downwards' to NGO partners, beneficiaries, staff and supporters; and 'upwards' to their trustees, donors, and host governments.[85]

However, the debate does not sufficiently take into consideration the uniqueness of human rights NGOs. While it is true that no formal mechanisms are in place to regulate the output of human rights NGOs, activists point to a number of informal controls to defend their accountability and reliability. These informal restraints can be divided into two broad types: 1) internal to the NGO and thus subject to the NGO direct control; and 2) external to the NGO and consequently outside its capacity to directly influence.[86]

Many writers point to the fact that human rights NGOs hold responsibility to their membership and consequently must continually ensure that their conduct remains within acceptable boundaries (it is more than a moral accountability - in accordance with values of participation and empowerment). However, as Blitt argues, this type of internal accountability is ineffective for a number of reasons. First, some human rights NGOs do not operate on a membership-based structure. To give just one example, while Amnesty International members arguably have a direct say in the operation of the organisation and can potentially threaten the NGO by voting against its policies or ending their financial and moral support for the organisation, Human Rights Watch (HRW) is immune from the effects of such a potential sanction since they are not a membership-based organisation. Second, even if an organisation is membership-based, in many cases, the failure to introduce democratic internal structures makes them less effective and poses a particular problem for 'downward' accountability to members and beneficiaries.[87]

NGO activists may also argue that even if internal controls are insufficient on their own, they are safeguarded by a second layer of external informal mechanisms that deter NGOs from acting in an irresponsible or political manner.[88] The external control could be performed by the media, donors and intergovernmental organisations. However, with regard to the latter actor, the role is limited as intergovernmental organisations lack the time and resources to be able to control NGO performance at the international level. Their relationship with human rights NGOs is based mainly on mutual trust.

There are different solutions put forward in the existing literature as to how to effectively address the question of accountability with regard to the performance of NGOs.

Spiro argues that the question of accountability may be 'best answered by formally and fully recognising NGO power in international institutional architectures'. He contends that formalising NGO participation in international decision-making would concretise NGO power, serve a transparency objective and also bind NGOs to institutional bargains.[89] However, such arguments may risk diminishing the informal power these organisations possess. It is, in my opinion, rightly being argued that if deprived of the most effective informal means of pressure,

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standards and procedures) and norms of socially concerned civic institutions are articulated, practised and promoted. An effective structure and process of governance in an NGO is absolutely crucial for ensuring accountability in this wider sense. Tandon, 'Board Games: Governance and Accountability in NGOs', in Edwards and Hulme (eds), supra n. 10 at 47-8.

[85] Multiple accountability presents any organisation with problems, particularly the possibilities of having to 'over-account' (because of multiple demands), or being able to 'under-account', as each overseeing authority assumes that another authority is taking a close look at actions and results. Ibid.

[86] Blitt, supra n. 2 at 321.

[87] Ibid.

[88] Ibid.

[89] Spiro, supra n. 82 at 162.

NGOs could be prevented from effectively playing their advocacy role.[90]

Weissbrodt, on the other hand, seems to reason that human rights NGOs should be held less accountable than intergovernmental organisations insofar as they 'have generally less prestige and less visibility than intergovernmental organisations and thus proportionately more difficulty getting press comment on their human rights findings'.[91] But it seems to this author that this is not true anymore, especially as the internet and other media are widely accessible and extensively used by all human rights NGOs.

Finally, Blitt argues that there should be a self-initiated regulatory system,[92] which would provide the most effective and least intrusive means for promoting credibility, authoritativeness and transparency within the human rights NGO community.[93] Sikkink, whom Blitt quotes in his essay, also agrees that NGOs 'may need to think about mechanisms that other professions use to ensure accountability if they want to safeguard their role as social change professionals'. However, she remains ambivalent to 'credentialing, monitoring the behaviour of members, [or] setting standards for professional behaviour', since these prospects may 'undermine what is unique about NGOs – their flexibility to respond rapidly, their gadfly quality, and the informality of the global networks'.[94]

The system of self-regulation appears to be the best answer to the problems raised by NGO participation in intergovernmental processes. Informal participation is recognised here as an inherent pattern of intergovernmental and civil society interaction and the drawbacks of such informal participation are to be addressed by persuading NGOs to engage in self-commitments such as compliance with 'codes of conduct' drafted together by NGO and intergovernmental representatives. Encouraging voluntary engagement by NGOs to be more transparent about 'who they are and what they do' could greatly contribute to the issues of legitimacy and accountability. Any legal regulation in the system should be limited to establish some form of supervisory mechanism that would guarantee the respect of self-assumed obligations.[95]

### *B. Do Human Rights NGOs Need to be Accountable?*

There is a widespread attitude that NGOs consist of altruistic people campaigning in the general public interest. On issues such as human rights, this may generally be valid and NGOs are 'the conscience of the world'. However, as Willets argues, such an attitude should not be adopted as an unchallenged assumption. According to Willets, NGOs do not automatically deserve

[90] Rebasti and Vierucci, 'A Legal Status for NGOs in Contemporary International Law?' - paper prepared on the basis of the workshop held at the European University Institute (EUI) of Florence on 15 and 16 November 2002. Paper is available at: http://www.esil-sedi.org/english/pdf/VieruccіRebasti.PDF.

[91] Blitt, supra n. 2 at 340.

[92] According to Blitt, regulation of human rights organisations should serve to promote clarity with respect to how a given organisation may label itself as a human rights organisation, what activities fall within HRO mandates, and what guidelines are applied when collecting and disseminating information on human rights abuses. In this manner, he says, by promoting better definition, enhanced credibility, and greater accountability, NGOs assuredly can improve the value of their work and information they provide. Ibid. at 391). It is equally clear that any form of regulation cannot be imposed or enforced by government, as it would, as Sikkink mentions, undermine the very core of NGO activity – their flexibility of response to the human rights issues and problems. Ibid.

[93] Ibid.

[94] Ibid.

[95] Rebasti and Vierucci, supra n. 90 at 7.

support.[96]

Critics argue that NGOs, including human rights NGOs, are too influential, are not politically accountable, and, unlike governments, do not represent anyone except themselves. These criticisms, although not entirely true in my opinion, need to be examined with care. The right of human rights NGOs to monitor, criticise and protest against the behaviour of governments and other institutions is not based on the claim that they are 'representative' institutions. With very few exceptions, they are not elected and rarely have a wide membership base. Their legitimacy depends on the trust that others have in them and on the quality and honesty of their work. If that confidence of trust is jeopardised, then indeed NGOs are in danger. It goes to the very core of NGO accountability. Good intentions are important but not enough. Many activists feel that human rights NGOs are being required now to prove themselves, convince critics that their work is legitimate, demonstrate that their recommendations should be taken seriously, and prove that they are not just idealists.[97]

The authors of the draft report on accountability rightly claim that improving accountability could be a reasonable defensive strategy against political attack. Opening up to the process of 'being accountable' means that human rights NGOs will assess their performance more objectively and will not be limited in their assessment to any internal accountability, which refers to, as mentioned above, the staff and members of the organisation. It will cover also those organisations and individuals who are affected by their work, including those whom the organisation defend (people who are marginalised and excluded and at risk of retaliation).[98]

The ways of holding oneself accountable may be different. Effective accountability may require a clear statement of goals the organisation pursues (in case of a human rights NGO this would be adherence to certain key values and universal principles); it may require transparency of decision-making and relationships; honest reporting of what resources have been used and what has been achieved; adopting mechanisms on which to judge whether results are satisfactory and concrete rules for holding to account those responsible for performance. NGO accountability may be formal (for example, an evaluation of whether agreed objectives in a programme have been met) or informal (for example, ongoing discussions between partners). It may emphasise the honesty and efficiency with which resources are used (commonly referred to as 'probity'), or the impact and effectiveness of the work (commonly called 'performance'). There are also useful distinctions between short-term functional accountability (accounting for resources, resource use and immediate impacts) and strategic accountability (accounting for the impacts that NGOs' actions have on the actions of other organisations and the wider environment).[99]

The proposal put forward by Blitt in his essay seems to this author to be 'a last resort' solution. The danger is that there would be a potential loss of the unique features, which are inherently attached to human rights NGOs, if a strong regulatory system is established. However, some form of self-regulation could have a beneficial effect on the transparency and credibility of non-governmental NGOs.

The discussion on the issues of accountability is slowly creeping into broader academic discourse. The literature is rather silent on the matter with a few exceptions related to the NGO community as a whole or development or environmental groups. Consequently, there is also very little debate as to the issue of accountability of human rights NGOs that are involved in the

[96] Willets, supra n. 1 at 3.
[97] ICHRP's Report, supra n. 79 at paras 26-7.
[98] Ibid.
[99] Edwards and Hulme (eds), supra n. 10.

judicial proceedings, such as those mentioned earlier in this article (i.e. INTERIGHTS, LIBERTY or JUSTICE). Here, this author means the accountability, which concerns the area of *what it does and what it does not do?*, as presented by Slim, and more specifically in connection with judicial proceedings, the choices the organisations make when selecting cases to pursue at regional or international tribunals. It is rather difficult to pose any observations at this point, as there is hardly any debate on the issue. What seems to be the most crucial aspect with regard to that sphere of NGO activity, is the process of selecting cases. The procedure here should be really transparent and reflect the key objectives of the given organisation (*what it believes?* as described by Slim) – a broad consultation should be undertaken in order to avoid any controversial decisions and further complications which may occur when already pursuing the case.[100]

Moreover, what seems very important for maintaining the role of human rights NGOs in judicial proceedings is addressing an issue of representation (again connected with Slim's definition of accountability, where *NGO holds itself openly responsible […] in a way which shows it involving all concerned parties*). As pointed out by Rebasti and Vierucci, the crucial question of who NGOs represent remains largely unanswered today.[101] And the ability of NGOs to voice public or collective interests is the most valid argument in favour of the participation of these organisations in international proceedings. As both authors conclude, 'unless the representation issue is promptly addressed, the very quality of NGOs which makes them potentially unique, i.e. credibility based on knowledge and expertise is jeopardised'.[102] For this author it proves to be very true with regard to human rights NGOs. Human rights NGOs are voicing collective or general interests in judicial proceedings through using the practice of *amicus curiae* intervention described in detail above – and therefore the determination of their representativeness seems to be a crucial component of sustaining the level of credibility they have already acquired by enhanced, and in most cases valuable, participation in the judicial processes i.e. at the European Court of Human Rights.

NGOs are seen as essential components of the 'civil society'. They are supposed to act as a counterweight to State power – protecting human rights, opening up channels of communication and participation and promoting pluralism. Official agencies often see NGOs as a 'magic bullet', which can be fired off in any direction and, though often without very much evidence, will still find its target. Therefore, performing effectively and accounting transparently are essential components of responsible practice, on which legitimacy also depends. Moving 'beyond the magic bullet' would mean taking accountability much more seriously than has been the case amongst most NGOs.[103] NGOs, particularly human rights NGOs, have to be accountable for what they do. This is crucial to the future of NGOs as there is clearly a level at which the absence of accountability may lead to ineffective and illegitimate actions by an organisation.[104]

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[100] Weissbrodt describes the whole process of making strategic choices taking as an example a public interest organisation. He divides the process into certain levels: the decision to select 'clients' (client selection and rejection is perceived by some observers not only as a practical matter, but also an ethical strategy), the overall policy, choosing specific cases (test-case strategy), beyond the test-case, meaning focusing more on implementation of the changes achieved. Weissbrodt, 'Strategies for the Selection and Pursuit of International Human Rights Objectives', (1981) 8 *Yale Journal of World Public Order* 62 at 70-8.

[101] Rebasti and Vierucci, supra n. 91 at 12.

[102] Ibid.

[103] Edwards and Hulme (eds), supra n. 10 at 4-6.

[104] Ibid.

## 5. Conclusion

Human rights NGOs play a significant role in the process of building foundations of democracy where these are still absent or insufficiently developed, and safeguarding the achievements of democracy which take a form of universally accepted human rights standards. They are also increasingly building up a system of international pressure on the development of effective human rights mechanisms. The experiences of the European Court and Inter-American Court, which this author has tried to summarise in this paper with an emphasis on the European system, bear testimony to the important role that human rights NGOs have played, and continue to play, with regard to participation in the judicial proceedings. Through the *amicus curiae* the public interest is brought into international litigation proceedings and NGOs may play a role of 'contributors' to the fairness of the adjudication. It is also a genuine proof of the importance of such involvement as an instrument for enhancing protection and promotion of human rights.

However, while expanding so rapidly in the scope of their activities and emphasising their unique and significant role in the development of core standards, human rights NGOs cannot forget their responsibilities towards the others or 'outside world'. They need to remember about their legitimacy and accountability and undertake steps to secure their successful performance. That is why it is so important, while focusing on judicial proceedings, to look closely at the friends of the court and their status, in order to secure a safe and effective relationship with international or regional judicial bodies. The search for improvements must go on, as the work of human rights organisations must be continued.