

Luring NGOs to International Courts:

A Comment on *CLR v. Romania*

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Abstract

Non-Governmental Organizations (NGOs) can contribute to the success of international courts by bringing important cases to these courts, publicizing their judgments, and monitoring the enforcement of their judgments. However, NGOs serve their own strategic interests, which do not necessarily concur with the goals of international courts. This essay explores the rules of standing and third party intervention in the European Court of Human Rights (ECtHR) in light of a recent ECtHR judgment that expanded the ability of NGOs to serve as applicants. The essay suggests changes to the rules for NGOs' intervention that can maximize the benefit the ECtHR will obtain from interacting with NGOs. Lessons learned from this analysis are then applied to other international courts.

I. Introduction

International courts interact with Non-Governmental Organizations and use them in order to promote their goals. The participation of NGOs in the proceedings of international courts is regulated by rules of standing and other procedural rules. This essay reviews the procedures that regulate NGO interaction with the European Court of Human Rights in light of the recent ECtHR case of *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania (CLR v. Romania)*.¹ This case created a new avenue for NGOs to bring cases to the ECtHR in an effort to protect especially vulnerable individuals. The analysis in this essay suggests procedures that would allow the ECtHR to shape its interaction with NGOs in ways that would help the ECtHR fulfill its goals. This analytic framework is later applied to other international courts that can also improve their interaction with NGOs.

NGOs that have been a victim of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)² have standing before the ECtHR. Unfortunately, the requirement that an NGO be a victim of a violation prevents NGOs in some cases from serving as applicants. Additionally, when the victims are dead or uncooperative, the case will not reach the ECtHR at all and the violation will not be redressed. The recent judgment in *CLR v. Romania* attempts to remedy this problem

¹ *CLR v. Romania*, 17.7.2014, Reports of Judgments and Decisions ECtHR 2014.

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, 213 U.N.T.S. 222.

by allowing, in exceptional circumstances, NGOs that do not have a formal legal power to act on behalf of the victims to be nevertheless recognized as their representatives after the victims' deaths.

The ECtHR can also allow NGOs to file *amicus curiae* briefs in applications by other victims and to participate in the case as a third party. In addition, NGOs can decide to participate informally by offering funds or legal advice to other applicants. The ECtHR's procedures give it substantial discretion to deny or set conditions to the submission of an *amicus curiae* brief. These briefs are often disregarded by the ECtHR and do not help NGOs gain publicity. For these reasons, NGOs submit *amicus curiae* briefs in relatively few cases, minimizing opportunities for ECtHR benefit.

NGOs can help the ECtHR in three main ways: by submitting applications and exposing the ECtHR to information, by providing publicity for the ECtHR and lobbying for its interests, and by monitoring compliance with ECtHR judgments. NGOs that serve as applicants have a stake in the proceedings and have already invested in studying the facts. This essay argues that if NGOs serve as applicants, they are more likely to help the ECtHR by providing publicity and by monitoring compliance than if they intervene as a friend of the court. If NGOs intervene as a friend of the court, they are more likely to help the ECtHR than if they intervene informally. But even informal intervention will render NGOs more likely to contribute to the ECtHR's publicity and enforcement interests than if they do not intervene at all in the application. NGO intervention also raises several problems, however, that can damage the interests of the ECtHR or of others. Appropriate procedures should be adopted to maximize the benefits and reduce the costs generated by NGO intervention. Even without amending the Convention, the ECtHR can use its discretion to change some of the conditions regulating NGO intervention, as it did in *CLR v. Romania*.

Part II. describes the ECtHR's doctrines of standing and third party intervention, and the NGOs that interact with the court. Part III. discusses the benefits of NGO intervention for the ECtHR. Part IV. presents potential problems raised by NGO intervention. Part V. describes possible alternative doctrines to regulate NGO intervention. Part VI. recommends how to shape the doctrines of standing and third party intervention in order to help the ECtHR fulfill its goals. Part VII. applies the lessons of this analysis to other international courts. Part VIII. concludes.

II. The ECtHR and Its Interaction with NGOs

1. The Doctrines of Standing and Intervention at the ECtHR

Any individual, NGO, or group of individuals who were victims of a violation of the Convention by a state party may lodge an application to the ECtHR.³ A state party may also refer to the ECtHR any violation of the Convention by another state party, even if the referring state is not a victim of this violation.⁴ Only very few of the ECtHR judgments, however, have originated from a referral by a state.⁵

The number of cases brought before the ECtHR has increased rapidly over the years. While from 1955 to 1998 45,000 applications were allocated to judicial formations,⁶ in 2011 alone 64,500 new applications were allocated to judges, and the number of pending applications exceeded 150,000.⁷ The state parties reformed the procedures of the Convention by ratifying amending protocols, in part to address the growing number of applications. Protocol 11, accepted on 1.11.1998, abolished the European Commission that was screening cases before they reached the court. This protocol also allowed individuals to petition the court and made its jurisdiction compulsory with no need for a special agreement by the accused state. Protocol 14, which came into force on 1.6.2010, made several procedural changes to help process cases more rapidly and avoid clearly inadmissible cases.⁸ Consequently, in 2012 and 2013, despite the continuous growth in the number of applications, the court managed to process more cases than it received. In 2013 alone more than 90,000 applications were disposed of judicially and by the end of the year the court's backlog of cases was reduced to less than

³ Convention (note 2), Art. 34.

⁴ Convention (note 2), Art. 33.

⁵ See *D. Popovic*, Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights, *Creighton L. Rev.* 42 (2009), 361, 372 (estimating that more than 95 % of the court's work originated in individual applications).

⁶ See ECtHR – Annual Report 2009, available at <<http://www.echr.coe.int>>.

⁷ See ECtHR Analysis of Statistics 2011, available at <<http://www.echr.coe.int>>.

⁸ Protocol 14 allows single judges to reject plainly inadmissible cases and three judges committees to declare admissible and decide on the merits cases that are clearly well-founded. The protocol also allows declaring cases inadmissible if they create no significant disadvantage to the applicant and raise no important legal question. This new inadmissibility criterion will not be applied to cases already declared admissible. In the first two years after the protocol's acceptance it can only be applied by a Chamber or the Grand Chamber. See Fact Sheet – Protocol 14 – The Reform of the ECtHR, available at <<http://www.echr.coe.int>> [hereinafter Fact Sheet – Protocol 14].

100,000 cases.⁹ Around 60 % of the applications that reach the ECtHR are “repetitive cases”, cases that arise from a structural defect that leads to violations affecting numerous applicants.¹⁰ To better address such cases, the ECtHR adopted a procedure of so called pilot judgments that requires states to take specific actions prescribed by the ECtHR to remedy the violation.¹¹

As mentioned above, any NGO whose rights were violated by one of the state parties can serve as an applicant before the ECtHR. Some NGOs pursued cases in the ECtHR as direct applicants. The ECtHR prevented some NGOs from serving as applicants, however, since they were not considered to be the victims of the alleged violation.¹² The court’s judgments stress that in order to be considered a victim, an applicant must show a direct link to a harm suffered from the violation. The status of the NGO as a victim will be determined without consideration to its domestic standing.¹³

CLR v. Romania changed all that. The case concerned *Valentin Câmpeanu*, a boy of Roma descent who was suffering both from a severe intellectual disability and from HIV-AIDS. He was hospitalized in the Poina Mare Neuropsychiatric hospital in Romania and received a visit from a representative of the Centre for Legal Resources (CLR), a Romanian based NGO, on the day of his death at the age of 18. The CLR representatives reported that *Câmpeanu* was kept in an isolated room, helpless because of his sickness and ignored by the staff who were afraid to be infected by HIV. All indications suggest that *Câmpeanu* did not receive proper treatment. Moreover, other patients were improperly treated as well and many have died in the same hospital. The CLR attempted to initiate domestic proceedings to investigate and find those accountable for *Câmpeanu*’s death. After these proceedings failed, the CLR brought an application before the ECtHR arguing that Romania violated the victim’s right to life and other rights.

Despite the human tragedy involved, the ECtHR judgment indicates that none of the traditional exceptional categories that make cases admissible at

⁹ See ECtHR Analysis of Statistics 2013, available at <<http://www.echr.coe.int>>.

¹⁰ See Fact Sheet – Protocol 14 (note 8), 1.

¹¹ See *Broniowski v. Poland*, 22.6.2004, Reports of Judgments and Decisions ECtHR 2004-V.

¹² See *L. Vierucci*, NGOs before International Courts and Tribunals, in: P.-M. Dupuy/L. Vierucci (eds.), *NGOs In International Law – Efficiency In Flexibility?*, 2008, 155, 158 (referring to the example of *Conka v. Belgium*, 13.3.2011 (decision on admissibility) in this case FIDH was not recognized as an applicant because the other applicants could represent themselves).

¹³ See *Gorraiz Lizarraga and others v. Spain*, 27.4.2004, Reports of Judgments and Decisions ECtHR 2004-III, para. 35.

the ECtHR can give the CLR standing in this case.¹⁴ But to avoid contradicting the very spirit of the Convention and allowing Romania to escape accountability, the court nevertheless decided to allow the CLR to act as a representative of *Câmpeanu*. The court reached this conclusion in light of the exceptional circumstances of the case and although the CLR isn't formally capable to act as *Câmpeanu's* attorney and the application was lodged only after *Câmpeanu's* death.¹⁵

NGOs can also serve as third party interveners in cases. But the court can set very strict rules on how NGOs intervene in this way. According to article 36(2) of the Convention, the President of the ECtHR may invite any person concerned who is not an applicant to submit written comments or to take part in the hearings. This article allows NGOs to intervene as third parties and provide the ECtHR with information as a "friend of the court – amicus curiae". Intervention as a friend of the court was recognized in the rules of the court adopted in 1982, but similar interventions were accepted even before that.¹⁶ The rules of the court instruct the President of the Chamber to allow the intervention if it is in the interests of the proper administration of justice and to allow interveners to take part in the hearings in exceptional circumstances. These rules leave the president substantial discretion on which interventions to accept. She can also set conditions for the intervention and decide not to include the brief in the case file if these conditions are not met,¹⁷ or she can limit the issues the intervener can address. Parties who seek to intervene must file a written duly-reasoned request no later than twelve weeks after the respondent state was given notice of the case.¹⁸ The ECtHR will not grant them legal aid to cover their costs.¹⁹

NGOs can intervene in ECtHR cases informally – that is, they can advise applicants about what cases to litigate and how to pursue them, they can provide legal representation and they can help applicants by funding their legal and other costs.

¹⁴ *CLR v. Romania* (note 1), para. 105.

¹⁵ *CLR v. Romania* (note 1), para. 112.

¹⁶ See *L. Hodson*, NGOs and the Struggle for Human Rights in Europe, 2011, 37 et seq.

¹⁷ ECtHR – Rules of Court, Rule 44(4). See also *L. Vierucci* (note 12), 172.

¹⁸ ECtHR – Rules of Court, Rule 44(2).

¹⁹ See <<http://www.pict-pcti.org>>.

2. NGOs Interacting with the ECtHR

NGOs are organizations that are not established by a government or by an intergovernmental organization. Many have grappled with the problem of defining NGOs and have suggested that some of their core characteristics are a nonprofit aim and a concern with issues of a public nature that have an international character and are not limited to one state.²⁰

The requirement that the NGO itself be a victim of the violation usually prevents NGOs from serving as applicants before the ECtHR, resulting in very few cases in which NGOs directly participated as applicants.²¹ Furthermore, while the number of cases before the ECtHR has grown tremendously, the number of third party interventions has not changed significantly. Third party intervention is therefore used in a smaller and smaller fraction of the cases before the ECtHR.²² It is important to note in this respect that most requests to intervene before the ECtHR as a third party have come from NGOs,²³ and that the ECtHR usually accepts requests of third parties to intervene, especially requests by human rights organizations.²⁴ Some NGOs choose to influence cases informally by representing applicants, assisting with funding or submitting affidavits that support an application.²⁵ A substantial part of the effect NGOs have on the ECtHR is a result of these informal measures.²⁶

Most of the interventions by NGOs as friends of the court are made by a relatively small number of NGOs that intervene repeatedly.²⁷ A prominent example is *Liberty*, an NGO that appears very often before the ECtHR and is concerned with human rights violations within the United Kingdom (UK).²⁸ Some NGOs with worldwide influence have also participated in many ECtHR cases. An example is *Amnesty International*.²⁹ Other NGOs have addressed cases of repeated and severe violations of human rights be-

²⁰ C. Bakker/L. Vierucci, Introduction: a Normative or Pragmatic Definition of NGOs? in: P.-M. Dupuy/L. Vierucci (note 12), 1, 13 et seq.

²¹ See L. Hodson (note 16), 47.

²² See L. Hodson (note 16), 50 et seq.

²³ See L. Hodson (note 16), 39.

²⁴ See Y. Ronen/Y. Naggan, Third Parties, in: C. Romano/K. Alter/Y. Shany (eds.), Oxford University Press Handbook of International Adjudication, 2013, 824.

²⁵ See L. Hodson (note 16), 56.

²⁶ See L. Hodson (note 16), 43 et seq., 56.

²⁷ See L. Hodson (note 16), 51, 57.

²⁸ See L. Hodson (note 16), 107, 105.

²⁹ See D. Zagorac, International Courts and Compliance Bodies: The Experience of Amnesty International, in: T. Treves/M. Frigessi di Rattalma/A. Tanzi/A. Fodella/C. Pitea/C. Ragni (eds.), Civil Society, International Courts and Compliance Bodies, 2005, 11.

fore the ECtHR. An example is the Kurdish Human Rights Project (*KHRP*), an organization based in London dedicated to the protection of the rights of people in the Kurdish populated regions.³⁰ NGOs who participate in ECtHR cases can greatly further their causes.³¹

NGOs have concentrated their efforts to get involved in the ECtHR proceedings mainly on several states – these include the United Kingdom and Turkey.³² Many NGOs that interact with the ECtHR are based in the United Kingdom, some are based in the United States, and some are funded by American foundations.³³ NGOs have been especially involved in cases that deal with severe human rights violations such as violations of the right to life and actions of torture and degrading treatment. They have also been involved in cases where domestic authorities allowed human rights violations or interfered with the right to petition to the ECtHR. NGOs are more likely to get involved in cases before the Grand Chamber, which usually addresses more serious issues, than in cases heard only by the Chambers.³⁴

III. The Types of NGOs' Contributions to the ECtHR

The ECtHR can shape the procedures that regulate its interaction with NGOs to promote its goals, such as increasing NGOs involvement in cases. According to recent scholarship, the main goals of international courts are: promoting compliance with the international norms they are tasked with applying, solving specific problems or disputes, supporting the international regime they are part of, and legitimizing the relevant norms and institutions.³⁵ If courts can fulfill these goals, they will be considered effective or successful. Accordingly, for the ECtHR to be effective it must be able to ensure that the states under its jurisdiction protect the human rights enshrined in the Convention. It must strive to redress violations of human rights by the states, to help the success of the European Council and its institutions, and to gain legitimacy for itself and for the norms it applies.³⁶ These goals can also be gleaned from the preamble of the Convention that stresses securing effective recognition, observing the human rights protected

³⁰ *L. Hodson* (note 16), 57, 73.

³¹ See Part VI., 1.

³² *L. Hodson* (note 16), 59 et seq.

³³ *L. Hodson* (note 16), 51, 59 et seq.

³⁴ *L. Hodson* (note 16), 61 et seq.

³⁵ *Y. Shany*, *Assessing the Effectiveness of International Courts – A Goal-Based Approach*, *AJIL* 106 (2012), 225, 244 et seq.

³⁶ *Shany* lists these specific goals at *Y. Shany* (note 35), 263 et seq.

by the Convention, and achieving greater European unity. The ECtHR should form its procedures and decisions specifically to fulfill these goals by granting itself the capacity to address violations of human rights in Europe, and to do so in a legitimate and timely fashion. Furthermore, the ECtHR must ensure that its judgments are being complied with so that violations will be remedied and will not recur.³⁷

NGOs can help the ECtHR in three ways. So far this essay has addressed the function of NGOs in bringing cases to the ECtHR or participating in cases formally and informally. This is the “input side” of the interaction with NGOs. In addition, NGOs can contribute to the ECtHR by publicizing the court’s judgments and supporting its interests in forums they participate in. This is the “public relations” function of NGOs. Finally, NGOs can also monitor the enforcement of the ECtHR’s judgments and help ensure compliance with the ECtHR. This is the contribution NGOs make in the “output side”. This part will discuss these three different aspects of NGOs’ contributions to the ECtHR and then offer some reasons why NGOs are well positioned to help the ECtHR fulfill its goals.

This essay argues that NGOs that serve as applicants or friends of the court and even NGOs that intervene informally are more likely to subsequently contribute to the fulfillment of the ECtHR goals through the aforementioned means than are NGOs that did not intervene in the case. In fact, the greater the NGO’s involvement, the more likely they are to help the court down the line. NGOs that serve as applicants are more likely to lobby for the ECtHR and monitor enforcement than NGOs that serve as friends of the court. NGOs that intervene as friends of the court are more likely to contribute to the ECtHR in these ways than NGOs that intervene informally. There are several reasons for this phenomenon. NGOs that serve as applicants build a reputation that is connected to the ECtHR generally and to the violation addressed in this case specifically. Such NGOs will build their fundraising and publicity strategy around the progress of the cases they took part in. It is in their interest to show that they are producing results, and this interest will make them more likely to monitor compliance. NGOs will also connect their public relations activity with the ECtHR, which makes it beneficial for them to help the ECtHR’s publicity interests and promote its success.

³⁷ See *S. Dothan*, Reputation and Judicial Tactics: A Theory of National and International Courts, 2015 (suggesting a strategy for national and international courts to build reputational capital that would ultimately lead to higher reputational sanctions on noncomplying states and consequently improve the chances of compliance); *S. Dothan*, Judicial Tactics in the European Court of Human Rights, *Chi. J. Int’l L.* 12 (2011), 115 (exploring this strategy in the ECtHR’s judgments).

Furthermore, NGOs that serve as applicants gather expertise in addressing violations of the type that appear before the ECtHR. They train and recruit professionals. They establish personal ties and connections, and invest in facilities and abilities that can be used both for bringing cases and for monitoring enforcement. Most importantly, if an NGO is involved in submitting the case, they already invested in learning the relevant facts. They can afterwards reap the fruits of this investment by monitoring compliance with the ECtHR's judgment. For all those reasons, if the ECtHR finds a way to draw NGOs to intervene, it is likely to gain not only the benefits mentioned in the input side but also public relations and output side benefits.

1. Input Side

In order to affect the policy of the states in Europe, the ECtHR must receive applications in cases that relate to important policy issues. Therefore, the ECtHR depends on the individuals and NGOs that bring applications. By bringing new applications to the ECtHR, NGOs give it the tools to shape policy and serve its goals.

The ECtHR has limited resources, however, and finds it difficult to process the thousands of applications it receives every year. One may argue that making applications to the ECtHR easier for NGOs may lead to an increase in the ECtHR's caseload, an increase that it cannot accommodate with its current resources.

But this fear is unlikely to materialize. The main problem that the ECtHR faces in terms of coping with its caseload is that of repetitive cases – cases that deal with similar violations to the ones that already led to an application and are presented by another aggrieved individual.³⁸ Sometimes the same violation is brought by hundreds of different individuals. NGOs can actually help the court face this problem by screening the individual complaints and finding the circumstances that are best suited to present a convincing case that will lead to a finding of violation by the ECtHR. The ECtHR can use the cases that are prescreened by the NGOs to issue the main precedent in the case.³⁹ This case could then be transformed into a

³⁸ See Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights – Annual Report 2011, available at <<http://www.coe.int>>, 9 et seq. (discussing concerns about the problem of around 30,000 repetitive cases pending before the ECtHR).

³⁹ See more generally *A. van Aaken*, Making International Human Rights Protection More Effective: A Rational Choice Approach to the Effectiveness of *Ius Standi* Provisions,

“leading case”. The ECtHR and the Committee of Ministers group every leading case with the repetitive cases that raise the same violation. After the leading case is resolved, the repetitive cases can be more easily addressed in a similar judgment. The Committee of Ministers will then monitor the compliance with an entire group of cases together.

Sometimes the ECtHR takes an application that presents a general structural problem and issues a “pilot judgment”. A pilot judgment demands specific actions from the state to remedy a violation that harms many individuals. A successful pilot judgment can therefore help the ECtHR redress a violation that leads to hundreds of different applications and efficiently reduce its caseload.⁴⁰ Because of the NGOs’ resources and expertise, they can file applications that lead to successful pilot judgments better than individuals.

If NGOs become more active and submit many successful applications, individuals may change their litigation behavior for the better. If they are informed of positive results, individuals may understand that NGOs have a better chance to win cases and lead to effective remedies so they will submit fewer repetitive cases. Instead, they will try to pursue their cause through the help of an experienced NGO. Over time, the pool of cases that reach the court will improve in quality and cases will usually present facts that help the court address violations efficiently.

When NGOs submit applications, they not only choose the case and the aggrieved individuals, they also choose what legal and factual arguments to bring before the ECtHR. NGOs can invest resources in high-quality legal and investigative research that will provide the ECtHR with arguments and sources that will help it write well-reasoned judgments more easily. NGOs that submit briefs as a friend of the court also save the ECtHR time and resources by conducting legal research that the ECtHR can use and learn from. Even when an NGO participates informally by representing individuals or funding their litigation costs, it contributes to the quality of the legal arguments voiced before the ECtHR. This helps the ECtHR issue high-quality judgments with relative ease. NGOs are also experts in analyzing public opinion and the interests of states and powerful elites. NGOs can

Preprints of the Max Planck Institute for Research on Collective Goods, Bonn, 2005/16, available at <<http://www.papers.ssrn.com>>, 49 (arguing that allowing NGO complaints in human rights bodies in cases that concern the right of many is useful to let the court address together cases that concern the same violation. Such cases may also raise awareness of the problem and induce compliance which, in turn, will reduce the number of repetitive applications).

⁴⁰ In 2011 the number of repetitive cases has decreased for the first time in years, in part due to the effective use of pilot judgments, see note 38, 10.

convey this valuable information to the ECtHR with their applications and briefs – allowing the ECtHR to shape its judgments and decisions in ways that concur with the wishes of interest groups and help the court’s legitimacy interest.

2. Public Relations

NGOs depend on publicity to raise funds. If NGOs take part in ECtHR proceedings, they have a strong interest in highlighting this fact in their publications to show that they are active and influential. NGOs help the ECtHR by publicizing their litigation activity because they simultaneously improve the court’s visibility to the public. Furthermore, when NGOs take part in ECtHR proceedings, their own image becomes linked to that of the court. This incentivizes NGOs to present the ECtHR in as positive a light as possible. The NGOs’ publicity efforts will therefore improve public support for the ECtHR. This public support will increase the chances that states will comply with the ECtHR because they fear public criticism in case of noncompliance.

Besides helping the ECtHR to acquire public support, the publicity offered by NGOs makes more people aware of their rights and their ability to submit cases to the ECtHR, which improves the ECtHR’s ability to affect policy. This publicity may also improve the acquaintance of the public with the ECtHR’s previous judgments and its processes and lead to better quality applications by individuals, including fewer repetitive applications. The importance of publicity to the ECtHR is evident from the substantial efforts the ECtHR makes to issue press releases and other publications; NGOs can help the ECtHR save on these costs.

NGOs that cooperate with the ECtHR will fight to help it retain its effectiveness in forums where member states discuss amendments and reforms to the ECtHR’s processes. For example, when discussions regarding the Brighton Declaration on the future of the ECtHR led to several suggestions that could harm the jurisdiction and the power of the ECtHR, several important NGOs submitted a joint declaration that called on the states not to do anything that could damage the ECtHR’s effectiveness.⁴¹ The final Brighton Declaration proved to be far less damaging to the ECtHR than

⁴¹ See Joint NGO Input to the Ongoing Negotiations on the Draft Brighton Declaration on the Future of the European Court of Human Rights, 20.3.2012, available at <<http://www.hrw.org>>.

many initially feared.⁴² This indicates that NGOs may have a substantial impact on states' behavior and the decisions states make in such conferences. The ECtHR therefore has much to gain from giving NGOs an incentive to argue on its behalf.

3. Output Side

In order for the ECtHR to shape the behavior of states, states must comply with its judgments. Compliance, however, is notoriously hard to detect, especially when states need to undertake complex measures in order to comply in issues that are far from the public eye. NGOs can serve an important role in monitoring the enforcement of the ECtHR's judgments. They can conduct research to find out if the states are actually changing their practices to concur with the dictates of the ECtHR. NGOs can disseminate information about noncompliance and use it to shame states that fail to comply, thereby increasing the chances of compliance.

The ECtHR does not monitor the enforcement of its judgments itself. The Committee of Ministers of the Council of Europe is tasked with monitoring compliance with ECtHR judgments and is assisted by the Department of the Execution of Judgments of the Court (the Department). The Committee of Ministers and the Department constantly monitor the enforcement of judgments and can shame states who fail to comply by, for instance, issuing interim resolutions that point to their noncompliance. The limited resources of this enforcement mechanism make cooperation with NGOs incredibly important. In order to facilitate this cooperation, the Committee of Ministers can consider communications from NGOs and national institutions.⁴³ The delegation for the state is granted five days to respond to such communications and then the communication and the response are brought before the Committee of Ministers and published on its website.⁴⁴ The formal enforcement system can therefore serve as a focal point to coordinate efforts of many NGOs that learn from each other's re-

⁴² See *E. Bates*, The Brighton Declaration and the "Meddling Court", UK Human Rights Blog, 22.4.2012, available at <<http://www.ukhumanrightsblog.com>>; *L. R. Helfer*, The Burdens and Benefits of Brighton, ESIL Reflections, 1, 8.6.2012, available at <<http://www.esilsedi.eu>>.

⁴³ See Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of the Friendly Settlements, Rule 9(2).

⁴⁴ See Rules of the Committee of Ministers ... (note 43), Rule 9(3). See the part of the website dedicated to NGO reports: <<http://www.coe.int>>.

search and improve their methods of monitoring the states and shaming those who fail to comply.⁴⁵

4. The Benefits of NGOs' Intervention

The preceding sub-parts presented the different contributions that NGOs can bring to the success of the ECtHR. This sub-part will discuss the general attributes of NGOs that make them well positioned to aid the ECtHR.

NGOs are not part of the ECtHR's structure and are therefore not necessarily committed to its success. In many respects this attribute of NGOs can play to the advantage of the ECtHR. When NGOs willingly choose to invest resources in litigating before the ECtHR they signal to other potential applicants their belief that the ECtHR is effective and can change states' policies for the better. This signal will make other applicants likely to consider bringing cases to the ECtHR as well. The signal also makes states believe that the ECtHR is usually complied with. This may put extra pressure on states to comply in the future, because if all states are expected by the international community to comply, every state that breaks this expectation will be subject to substantial reputational damage.⁴⁶

Albert Hirschman's famous framework of exit and voice can be fruitfully applied to the interaction between NGOs and the ECtHR.⁴⁷ NGOs can affect the ECtHR's behavior not only by investing in their applications and using them to convince the ECtHR to accept their position as a form of voice. NGOs can also threaten not to bring more cases to the ECtHR, or to commit exit. Because of the benefits that NGOs bring to the ECtHR this threat can convince it to change the nature of its judgments and accommodate the interests of NGOs. While the ECtHR becomes partly dependent on NGOs as a result of this dynamic, it can actually help the ECtHR for two reasons. First, as *Hirschman* suggested, when there is a pool of well-informed customers that are ready to commit exit when provoked, the organization that enjoys their business will be more alert to the wishes of cus-

⁴⁵ See *B. Cali/N. Bruch*, *Monitoring the Implementation of Judgments of the European Court of Human Rights – A Handbook for Non-Governmental Organizations*, 2011, available at <<https://ecthrproject.files.wordpress.com>> (providing guidance on how NGOs can use the system of the Council of Europe to help enforce ECtHR Judgments).

⁴⁶ See *S. Dothan* (note 37).

⁴⁷ See *A. O. Hirschman*, *Exit, Voice, and Loyalty – Responses to Decline in Firms, Organizations, and States*, 1970.

tomers and will improve in time to prevent a collapse.⁴⁸ Similarly, the threat of exit by NGOs will make the ECtHR more careful to constantly improve the quality of the legal services it provides to applicants. This will prevent the ECtHR from deteriorating and make it monitor its behavior and avoid bad choices before it is too late. Second, the main threat for the independence of the ECtHR is from states and not from NGOs. If NGOs constrain the ECtHR, they can help it credibly commit not to surrender to the interests of states in order to preserve its ability to attract NGOs' applications. The mild constraint imposed by NGOs can help the ECtHR loosen the more substantial constraint imposed by states.⁴⁹

The ECtHR's doctrine is grounded in the principle of subsidiarity. This principle implies that policy decisions should generally be made at the level of the states and that the ECtHR should show deference to the states' decisions. The ECtHR adopted a doctrine of deference termed "the margin of appreciation" which allows states to make their own policy as long as they do not digress from the latitude allowed them by the ECtHR. The deference to the states is often justified because of their democratic legitimacy. But this deference should perhaps retreat when the interests of minorities are at stake.⁵⁰ Minorities do not have a sufficient influence on the decisions of states due to democratic failures. Therefore, in order for the minorities' interests to be protected, the ECtHR must intervene. Many NGOs represent the interests of minorities. They can serve as a counterweight to the power of the states exactly where their power should be restrained to allow the convention system to fulfill the goal of protecting human rights.

NGOs are often able to protect minorities and can be a check on government when other actors tasked with this goal, such as national courts, may fail. Although independent national courts can prevent some infringements of human rights,⁵¹ they must be concerned about compliance with their judgments and their legitimacy. If they foresee that their judgment will

⁴⁸ A. O. Hirschman (note 47), 24.

⁴⁹ A similar situation where a principal constrains an agent but gives it greater bargaining power as a result is studied at R. D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, *International Organization* 42 (1988), 427, 440.

⁵⁰ See E. Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, N.Y. U. J. Int'l L. & Pol. 31 (1999), 843.

⁵¹ National courts can also collaborate with international courts to protect human rights, see E. Benvenisti/G. Downs, *National Courts, Domestic Democracy and the Evolution of International Law*, *EJIL* 20 (2009), 59, 68 (claiming that national courts that enjoy independence from their executive can collaborate and support each other. Collectively they can assist international courts to develop a more coherent set of international norms.).

face public resistance, they must refrain from intervening.⁵² NGOs are not limited in this way. They can risk fighting for a lost cause sometimes and can bring cases to the ECtHR even if they know the court will not find a violation, or will be unable to provide an effective remedy. This makes NGOs able to bring a variety of difficult cases to the ECtHR, cases in which human rights violations would not be remedied by national courts acting alone. NGOs therefore give the ECtHR the opportunity to make a stand against these violations of human rights.

Communication technology significantly enhanced the ability of NGOs to shape public opinion and generate social change. Due to the internet and the social networks formed within it, NGOs can discover violations more rapidly, learn from each other, and transmit their message to a wide audience. Because NGOs are numerous and can change more quickly than big organizations, such as governments, they are better able to face the challenges of the information age, to help the ECtHR to discover violations, and to shame states into remedying them.⁵³

IV. Possible Problems with NGOs' Intervention

Part III. argued that allowing NGOs to interact with the ECtHR has many benefits. However, there may also be costs and problems associated with the ECtHR-NGOs interaction. Some general risks can occur as a result of NGO intervention in international courts: Some relate to the issues that may reach the ECtHR despite its interests, some to the attributes of NGOs, and some to harmful systemic effects of NGO intervention. Many of these risks are unlikely to materialize with the current nature of ECtHR litigation, or alternatively can be avoided by shaping procedures correctly. In light of these problems, it is useful to address not whether to allow NGO intervention or not, and not only whether more or less intervention is beneficial. The important questions are: What types of NGOs should be encouraged to intervene? In what type of cases? And in what ways? Part VI. offers

⁵² See *A. M. Bickel*, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics*, 2nd ed. 1986, 239.

⁵³ The information age also poses dangers, however, see *M. Palma*, *The Possible Contribution of International Civil Society to the Protection of Human Rights*, in: A. Cassese, *Realizing Utopia – The Future of International Law*, 2012, 76, 83 (arguing that the free and rapid flow of information creates the risks of lowering the level of the public discourse, of losing important messages due to an excess of information, or of making the public slowly indifferent to severe violations).

several normative suggestions on how to shape procedural rules to maximize the benefits and minimize the costs of the interaction with NGOs.

1. Problems with What the ECtHR Should Address

If NGOs intervene more often, this may increase the caseload of the ECtHR beyond its capacity. However, Part III., 1. argues that this risk is unlikely to materialize. In fact, NGOs can help the ECtHR process cases efficiently. They can bring to the court cases which the ECtHR can use to form new precedents. These precedents can then be used to conclude many repetitive cases that deal with similar violations.

A related problem is the fear that allowing more NGO intervention will make the ECtHR shift its resources to the conclusion of cases initiated by NGOs, while individuals that do not have the support of NGOs will not be protected.⁵⁴ Individuals whose interests are not represented by NGOs may not succeed as much as NGOs do before the ECtHR. However, if NGOs help the ECtHR process cases more efficiently, the ECtHR will have more time and resources to address applications brought by individuals. Therefore, allowing NGOs to intervene will only improve the protection of the individuals' rights.

Another potential problem, from the ECtHR's perspective, is the fear that NGOs will bring specific cases that the court would rather avoid. For instance, some cases may force the ECtHR to make judgments that can damage its support from states or the public in Europe. Sometimes the ECtHR can try to avoid those cases, for example by finding that it has no jurisdiction. Take the *Bankovic* case, in which several citizens of the Former Federal Republic of Yugoslavia brought a case against the European members of NATO alleging a violation of the Convention due to the killing of citizens in a NATO airstrike.⁵⁵ The ECtHR managed to avoid deciding the case by narrowly construing its jurisdiction. This saved the ECtHR from confronting all the most powerful states in Europe, but led to severe criticism of the ECtHR's inconsistent legal reasoning.⁵⁶ The ECtHR may be able to defuse some cases by other means besides narrowing its jurisdiction. Such means may include: finding that domestic remedies were not exhausted, delaying the judgment until the issue is less publicly salient, finding no

⁵⁴ See *L. Vierucci* (note 12), 162.

⁵⁵ *Banković and Others v. Belgium and Others*, 12.12.2001, Reports of Judgments and Decisions ECtHR 2001-XII, 333.

⁵⁶ See *A. Ruth/M. Trilsch*, *Banković v. Belgium* (Admissibility), *AJIL* 97 (2003), 168, 172.

significant damage, or demanding no significant action from the state. Nevertheless, the ECtHR would rather not have these cases brought to its decision in the first place.

The risk that NGOs will bring these sensitive cases to the ECtHR, however, is not necessarily greater than the risk that private individuals will bring them. If anything, the opposite is the case – because NGOs are repeat players they are more likely to avoid filing applications that will be rejected on technical grounds. They will therefore be more careful not to bring cases that can damage the ECtHR. NGOs not only have a greater interest to avoid bringing such cases, they also have greater knowledge and experience and therefore a greater ability to recognize those harmful cases and avoid them.

The ECtHR stressed many times that individuals and NGOs cannot complain of violations that did not affect them directly; such complaints are termed by the ECtHR “*actio popularis*”. However, the ECtHR is not necessarily averse to any form of claim by a non-victim. Member states can bring a case against other states for any form of violation even if it doesn’t affect their interests.⁵⁷ Applications by member states have proved extremely rare, however, and did not play a major role in the development of the ECtHR’s jurisprudence.⁵⁸ In practice, therefore, most of the applications to the ECtHR originated from an applicant that was personally harmed by the violation. This practice may have conferred legitimacy on the ECtHR that it would lose if it were to decide instead cases based on the applications of non-victims.

The current practice helps the ECtHR to present itself as protecting the rights of the aggrieved and deciding disputes, instead of trying to further certain policies. The ECtHR can obviously make important policy decisions even when it decides cases based on applications from victims. Yet the condition of victimhood helps the ECtHR deemphasize the fact that it is making policy by indicating that it cannot choose the cases that reach it. This can help the court’s legitimacy. The legitimacy argument must be considered when the procedures for standing are formed. If the applicant is accountable and represents important interests, then the condition of victimhood may be somewhat relaxed, as can be learned from the fact that member states are formally not subject to this condition. States are accountable for their actions and will not be considered as a tool that allows the ECtHR to make policy, even if they bring a case as a non-victim. The nature of NGOs must therefore be taken into account when shaping the rules of

⁵⁷ See *Klass and Others v. Germany*, 6.9.1978, Series A No. 28, para. 33.

⁵⁸ See note 5.

standing. The next sub-part will discuss the possible flaws in the nature of NGOs in this respect.

The intuition that the ECtHR should not get involved in a case without the participation of a victim, may be based on the premise that the ECtHR does not have the capacity to plan policy in complex cases that affect various parties and interests.⁵⁹ *Lon Fuller* described such issues as “polycentric” – issues in which decisions can lead to unexpected repercussions that a court cannot foresee and are therefore not amenable for judicial decision-making.⁶⁰ Increasing the ability of NGOs to bring cases will probably increase the risk that the ECtHR will be faced with complex issues of public policy. However, the view presented by *Fuller* that a court is necessarily an inappropriate institution to make such decisions is contested. *Owen Fiss* presented a contrasting argument, according to which adjudication is a process that should give meaning to the public values of the community. In his view, courts can make policy decisions.⁶¹

The question of the ability of adjudication to decide complex policy decisions cannot be answered abstractly. *Fuller* and *Fiss* argue even about the capacity of the American Supreme Court to undertake these functions.⁶² Currently, the ECtHR is veering towards policy setting instead of deciding specific disputes.⁶³ While the argument that the ECtHR is not fit to make general policy cannot be completely dismissed, the practice of the ECtHR indicates that it is already doing so with some success.

Whether the ECtHR adopts a policy of remedying specific wrongs or trying to shape general policy, it is committed to the project of protecting human rights. This project itself can be criticized as an inefficient method to protect the weak and a tool to legitimize and sustain the power of the

⁵⁹ See *D. G. Gifford*, The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court’s Mass Tort Jurisprudence, *Ariz. St. L. J.* 44 (2012), 1109, 1148 (presenting three similar arguments against public law adjudication in the US Supreme Court: limitations of judicial competence, lack of legitimacy conferred by petitioners and problems with the doctrine of separation of powers).

⁶⁰ *L. L. Fuller*, The Forms and Limits of Adjudication, *Harv. L. Rev.* 92 (1978), 353, 394 et seq.

⁶¹ *O. M. Fiss*, Forward: The Forms of Justice, *Harv. L. Rev.* 93 (1979), 1, 2. See also *A. Chayes*, The Role of the Judge in Public Law Litigation, *Harv. L. Rev.* 89 (1976), 1281, 1307 et seq. (presenting several arguments in favor of judicial policy making).

⁶² *D. G. Gifford* (note 59) joins this debate and takes the side of *Fuller* in his argument for bounded litigation in mass tort cases.

⁶³ See *J. L. Jackson*, *Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, *Conn. L. Rev.* 39 (2006), 759, 781 (arguing that the ECtHR is becoming a constitutional court that dispenses constitutional justice instead of individual justice).

strong.⁶⁴ While this criticism may sometimes be justified, this essay adopts a narrower scope. It is focused on how effective the ECtHR is as an institution that already adopted, for better or for worse, the agenda of protecting human rights.

2. Problems with the Characteristics of NGOs

The ECtHR tries to appear impartial to preserve its legitimacy. The court's legitimacy encourages states to comply with its judgments, even if they go against their interests, because the ECtHR does not seem to be biased against them.⁶⁵ This does not mean, however, that the applicants that bring the case are supposed to be impartial. Applicants take sides against the state that allegedly damaged their interests and may be biased against it. The requirement that the applicant will be a victim of a violation ensures that an applicant will not be able to bring the case, unless it can substantiate an alleged harm to its interests. This minimizes the ability of prejudiced parties to use the ECtHR as a tool to damage the interests of the states. Furthermore, an applicant that argues its own case against the state does not pretend to be impartial. The court can more easily take its arguments with a grain of salt and identify the parts of its argument that are a result of bias.

NGOs that serve as applicants may many times favor one side of the dispute, though they may try to hide their bias, making it difficult for the ECtHR to correctly assess the strength of their arguments. Even if the judges on the ECtHR are careful enough to give the arguments of NGOs the proper weight, the public may not be convinced that this is the case, and the legitimacy of the ECtHR will be damaged. If NGOs were allowed to serve as applicants even when they were not victims, this problem would escalate, since NGOs would be able to bring cases without showing an alleged harm, thereby increasing their ability to damage the state's interest. Biased NGOs also present a greater danger than biased individuals because they have greater institutional abilities that make them more likely to win judgments in their favor.⁶⁶

⁶⁴ See *D. Kennedy*, *The International Human Rights Movement: Part of the Problem?* *Harvard Human Rights Journal* 15 (2002), 101 (presenting a host of potential arguments against the human rights discourse and argues that under some situations this discourse can be less beneficial than the alternatives and cause more harm than good).

⁶⁵ See *S. Dothan*, *How International Courts Enhance Their Legitimacy*, *Theoretical Inquiries in Law* 14 (2013) 455, 461 et seq.

⁶⁶ See *G. Swain*, *Who Uses the European Court of Human Rights, and Who Wins?*, *Evidence from New Studies*, available at <<http://www.ejiltalk.org>> (arguing that organizational

The problem with the bias of NGOs may be lessened if the ECtHR were to learn to treat arguments by NGOs as one-sided, and the public were to perceive that it does so. However, another problem would remain. NGOs are not always accountable and representative. Applicants are not supposed to view equally both sides of the debate, but they should represent fairly at least one side. A possible justification for the rule in the Convention which allows member states to serve as applicants without being victims is that they accurately represent their public. NGOs may not do justice to the argument of the parties on behalf of which they bring the case. An NGO which serves the interests of a certain government (such organizations are often termed as Governmental Non-Governmental Organizations [GONGOs])⁶⁷ may even deliberately lose a case against its government or poorly represent the arguments against it to serve its interests.

NGOs usually present themselves as representing weak parties such as minorities and the poor. Running a successful NGO, however, is very expensive and the rich and powerful can easily adapt to using NGOs to their benefit. The relative strength of NGOs can therefore reproduce the power-relations inside and between the different states of Europe instead of aiding the weak. Even if the competition between NGOs did not exist in the legal arena, however, different parties would still compete with each other, and there is no reason to think the poor would fare any better.

Unlike other arenas, litigation before the ECtHR is not an arena for the competition of naked power. Material resources are important to succeed in court, but so are good arguments based on facts and the law. Weaker parties will still be at a disadvantage when they litigate against the strong before the ECtHR, but this disadvantage is smaller than the one they face in any other arena. Opening this arena may overall make them better off than if it remained closed.

There is a danger, however, that NGOs would become so successful that they would replace individuals as the main applicants in the ECtHR. NGOs might stop funding legal representation for individuals if they could bring the case themselves. Alternatively, they could submit briefs in favor of governments, making individuals less likely to win against them. These results could have harmful distributive consequences as individuals might be more likely to represent the interests of the disadvantaged than NGOs would. Individuals might also represent their own case more determinately and be more vigilant in bringing cases to the ECtHR than NGOs would. These

support by NGOs can substantially increase the chances of success of applicants at the ECtHR).

⁶⁷ See *M. Palma* (note 53), 81.

potential consequences must be taken into account when the procedures to regulate NGO participation are formed.

3. Systemic Problems and Inefficiencies

If NGOs are encouraged to participate at the ECtHR, some harmful side effects may result that could diminish the overall ability of the ECtHR to reach its goals. One risk is that because NGOs will fulfill certain tasks that relate to the operation of the ECtHR perfectly, the ECtHR may stop pursuing these tasks and, over time, could lose the institutional capacity to handle them. For instance, if NGOs regularly submitted briefs that provide the ECtHR with comprehensive research on the matters before it, the judges and other functionaries within the ECtHR would not develop the skills to conduct such research by themselves. This would render the ECtHR dependent on external help that might not always be available, or could be used as a tool by interested parties. Similarly, if NGOs regularly monitored compliance with ECtHR judgments, the Committee of Ministers could lose its own ability to enforce judgments. However, these dangers seem at the moment far-fetched. Even if NGOs were to lend some assistance to the ECtHR with relatively few cases, the ECtHR would probably still have to handle thousands of individual applications by itself, and would not lose the capacity to do so independently.

Another risk to consider is that substantial involvement by NGOs may be monetarily inefficient in the sense that resources would be spent on a host of competing NGOs, and the total costs of all the parties involved may be higher than the benefit. NGOs might invest resources in intervention before the ECtHR that could be better invested in other ways, such as arguing before national courts or shaping public opinion.

The problem with addressing this argument is that it is difficult and maybe impossible to compare the benefits NGOs can gain from interacting with the ECtHR and from alternative venues. It should also be borne in mind that the interaction with the ECtHR may help NGOs gain publicity and recruit more funds and support that the NGOs can later use in other ways. The positive side effects of increased NGO intervention at the ECtHR may outweigh the costs of financially supporting the competition between NGOs.

Allowing NGOs to intervene may cause a discrepancy with the procedural rules of the states under the ECtHR's jurisdiction. Some national courts may give standing only to victims of violations. If NGOs can bring

the case before the ECtHR even if they are not victims, they may have to bring the case directly to the ECtHR since they have no standing in domestic courts. In this type of state, NGOs do not have proper domestic remedies to exhaust, and they instead turn directly to the ECtHR. Therefore, the principle that the ECtHR should be subsidiary to the national level and that domestic remedies must be exhausted will not be formally infringed.

Nevertheless, to the extent that the principle of subsidiarity implies that the ECtHR should not handle cases unless the states tried to deal with them and failed to remedy the violation, it may be breached. On the other hand, the ECtHR's doctrine interprets the victimhood requirement autonomously from national rules of standing.⁶⁸ This suggests that while victims who have standing before domestic courts should apply to them before they bring the case to the ECtHR, there is no significant problem with the ECtHR accepting applications from applicants who have no standing at all before domestic courts according to the court's doctrine.

V. Possible Rules to Regulate NGOs' Intervention

The current doctrine on the ways NGOs can acquire standing or intervene before the ECtHR represents one possible way to regulate the interaction between the ECtHR and NGOs. This Part will explore different ways to regulate standing, intervention as a friend of the court, and informal intervention.

1. Standing

The state parties to the Convention can change the rules of standing in the Convention in order to expand or to reduce the ability of NGOs to acquire standing before the ECtHR. Smaller changes can also be made by the ECtHR itself as it interprets the requirements of standing. This sub-part will discuss the main ways in which the rules of standing can be shaped. More complex combinations are also possible and can be easily extended from the alternatives presented here.

The main obstacle that prevents NGOs from acquiring standing before the ECtHR is the requirement that the NGO itself be a victim of the violation. This prevents NGOs from arguing before the ECtHR against the vio-

⁶⁸ See note 13.

lations of rights that do not concern their own interest. The requirement of victimhood, however, is a condition that can theoretically be abolished. The Convention can be amended to allow NGOs to acquire standing if they complain of a violation of human rights to any individual protected by the Convention.

Such an amendment would maximally increase the scope of standing for NGOs, a step that some states may resist. In order to assuage some of the fears that states may have regarding this procedure, certain limitations can be put in place. An illustrative example is the rule adopted by the African Court of Human Rights. In this court NGOs can acquire standing even if they are not victims of the violation, however, this privilege is allowed only to NGOs that are entitled by the court with a special “observer status”.⁶⁹ States must also make a specific declaration that accepts the African court’s competence to receive such cases regarding their alleged violations.⁷⁰ Only a few African states have made this declaration and this mechanism has not been frequently used.⁷¹ As another example, any NGO that is legally recognized in one or more of the states in the Organization of American States can lodge petitions with the American Commission on Human Rights.⁷² This opens the way for some non-victim NGOs to petition against violations. This power is limited, however, since the petitions are lodged to the commission and not directly to the Inter-American Court of Human Rights (IACHR).⁷³

The Convention can be changed to allow standing before the ECtHR, conditioned on the court’s discretion, for NGOs that are not victims. To make this change, the Convention can specify certain considerations that will support the acknowledgement of standing for NGOs.

Unless the Convention is amended, the ECtHR must retain the condition of victimhood, but it can try to change its meaning by ways of interpretation and by granting standing to non-victim NGOs in exceptional circumstances. This is exactly what the court did in the case of *CLR v. Romania*.

Theoretically, there is another alternative: The current doctrine adopted by the Convention, which allows only NGOs that were victims to acquire standing, could be changed to make it even more difficult for NGOs to act

⁶⁹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, (African Protocol) Art. 5(3).

⁷⁰ African Protocol, Art. 34(6).

⁷¹ See A. Clapham, *The Use of International Human Rights Law by Civil Society Organizations* (Forthcoming in *Routledge Handbook of International Human Rights Law*) available at <<http://www.papers.ssrn.com>>, 3.

⁷² American Convention on Human Rights, Art. 44.

⁷³ See A. Clapham (note 71), at 3.

as applicants. The Convention can possibly be amended in order to prevent NGOs from acquiring standing in the ECtHR altogether. A less extreme measure could be to condition the standing of NGOs both on their position as victims, and on the specific agreement of states to allow NGOs standing. Prior to the acceptance of Protocol 11 to the Convention, states could enter the ECtHR's jurisdiction without agreeing to allow individuals and NGOs to petition the ECtHR – the so called “individual petition” provision. Those parties could have standing against a state only if the state issued a specific declaration recognizing individual petition. Even before Protocol 11 was accepted, however, states were expected to agree to individual petition,⁷⁴ and it is widely considered as a vital condition for the ECtHR's effectiveness.⁷⁵ If only NGOs were to be excluded from having standing unless the respondent states specifically agreed, this might be less of a shock to the Convention system than making all petitions conditioned on the states' specific consent.

2. Friends of the Court

The current rules give the ECtHR discretion whether to accept the intervention of NGOs as friends of the court or not. An alternative rule could allow NGOs to acquire a status as friends of the court without conditioning this right on the discretion of the ECtHR. This rule could open the door for many more NGOs that want to participate in the ECtHR's proceedings, but are afraid that they will not be allowed to, want to avoid the costs of filing a request for intervention within twelve weeks of the notice sent to the respondent state, or fear that the ECtHR will set unfavorable conditions to their intervention or limit the issues they can address.

Currently, the discretion of the President of the ECtHR and the Presidents of the Chambers regarding the acceptance of *amicus curiae* briefs is almost absolute. They can decide if intervention is necessary for the proper administration of justice, a term that does not constrain significantly their ability to deny intervention. They can set conditions for the intervention and exclude the brief from the file if they are not followed. They can limit the issues that the intervention is allowed to address. They can also decide whether to allow participation of the intervener in the public hearing. These

⁷⁴ See C. Ovey/R. C. A. White, Jacobs & White The European Convention On Human Rights, 4th ed. 2006, 8 et seq.

⁷⁵ See A. Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, International Organization 54 (2000), 217, 231.

rules can theoretically be changed to constrain the discretion of the ECtHR and its functionaries and make them abide by certain rules and principles.

Participation as a friend of the court has become a prevalent phenomenon in many national courts. Some of the considerations national courts consider when they decide whether to allow participation as a friend of the court can also be relevant for the ECtHR. For instance, the main factor the US Supreme Court will consider when it approves an *amicus curiae* brief is whether the brief presents relevant information that was not presented by the parties. The rules of the Supreme Court require every party who is not an agency of the United States to seek the agreement of the parties or the authorization of the court and to disclose any monetary contribution to the preparation of the brief.⁷⁶ Similar guidelines could be adopted in the rules of the ECtHR. They would do little to constrain the ECtHR's discretion if it sincerely wished to accept the intervention. At the same time, they could help NGOs know in advance if their intervention would be granted, and even if their type of intervention were considered welcome by the ECtHR. NGOs could learn to identify what type of arguments were considered by the ECtHR as significant contributions, what type of organizations were considered appropriate to act as a friend of the court, and what weight was given to respondent states' position regarding intervention.

When parties decide whether to intervene or not they may consider not only the chances that their intervention will be granted, but also its impact on the proceedings and on the ECtHR's judgment. Parties may be more likely to invest the costs involved in intervention if they are able to participate in public hearings or if the judgment cites their brief and refers to their arguments. These issues are difficult to regulate in the rules of the court, but the judges could develop practices that would help NGOs foresee in advance whether their intervention would bear fruit by helping them gain publicity and impact the ECtHR's decision.

If for some reason the ECtHR views participation as a friend of the court as harmful, it could change its practices to grant this privilege in fewer cases. This could be easily achieved by the President of the court due to his wide discretion. If member states view this form of participation negatively, they could adopt the extreme measure of amending the Convention to exclude the institution of a friend of the court altogether.

⁷⁶ See United States Supreme Court Rules, Rule 37.

3. Informal Intervention

As described above, informal intervention by representation, consultation, and funding is a major route for NGOs to affect the ECtHR. The ECtHR may indirectly change the willingness and the ability of NGOs to intervene informally in various ways. For instance, if the reimbursement that successful applicants receive for their legal fees were to increase, this might increase the ability of poorly funded NGOs to represent or assist more applicants. If the ECtHR were to invest more in publicizing its judgments by press releases, NGOs might gain greater publicity for their effort, and would show greater willingness to support applicants. In contrast with formal participation as applicants or friends of the court, informal participation cannot be directly regulated by the rules of the ECtHR and its judgments and will therefore not be addressed further.

VI. Improving the Interaction between the ECtHR and NGOs

NGOs serve their own strategic interests that do not necessarily concur with the interests of the ECtHR.⁷⁷ Therefore, the ECtHR should give NGOs the proper incentives to intervene in ways that promote the court's interests.

1. NGOs Serve Their Own Strategic Interest

The main purposes of NGOs are to establish international norms, to provide information about infringement of those norms, to lobby for the protection of those norms and to provide assistance to victims of viola-

⁷⁷ Cf. *A. van Aaken* (note 39), 20 et seq. (arguing that in order to increase their publicity and ability to raise funds NGOs may file complaints before international human rights bodies in issues that concern the rights of others. Compared to individuals, NGOs have legal expertise which reduces their cost of application. At the same time they will be unlikely to bring frivolous suits in order not to damage their reputation. Therefore, allowing NGOs to have standing may increase the possibility of complaints in cases that affect the interest of many individuals. Individuals themselves may be reluctant to file such complaints since they must bear the entire costs of the complaint while they do not internalize fully the benefit to the protection of human rights, especially rights of a collective nature. Additionally, allowing the involvement of NGOs may help in bundling similar cases in the same complaint.)

tions.⁷⁸ In order to serve those purposes NGOs must fulfill two main secondary goals: They must be well funded and they must be well known to the public. Publicity is crucial for the fund-raising of most NGOs; it can also help them influence policy and create networks of cooperation with other NGOs, with powerful individuals, and with state officials. At the same time, material resources can help NGOs gain publicity. Funding and publicity are therefore closely linked to each other. When NGOs interact with the ECtHR, it is often to serve their secondary goals.⁷⁹ This may happen because NGOs need to fulfill their secondary goals to serve their purposes in the future. It can also happen because individuals who lead the NGO are not optimally constrained to fulfill the NGO's purposes, and instead put the strength and the influence of their own NGO as a higher priority than the purposes that the NGO is tasked with fulfilling.

If NGOs interact with the ECtHR, they can help it to fulfill its goals of protecting human rights in Europe, remedying violations, improving European unity, and gaining legitimacy. Though NGOs have expansive options for assisting the ECtHR, they will only intervene in ways that help them further their own goals. As an example, the ECtHR can gain much if NGOs monitor the enforcement of its judgments, but NGOs will only undertake this expensive operation if it will help them further their own goals. Proper procedures can give NGOs an incentive to help the court – by participating in cases, monitoring their enforcement, and lobbying for the court's interest – while minimizing the dangers inherent in NGO intervention.

2. How to Gain the Optimal Cooperation of NGOs

This essay discussed three ways in which NGOs can interact with the ECtHR: as applicants, as friends of the court and as informal aiders to other applicants. NGOs are most likely to help the interests of the ECtHR if they serve as applicants, because under these circumstances they have staked their reputation on the success of the case, they control the litigation strategy, and they already invested the greatest amount of costs to acquaint themselves with the facts. Participation as a friend of the court is likely to lead to greater willingness of NGOs to cooperate with the ECtHR than informal intervention, mainly because it gives NGOs a greater stake in the final re-

⁷⁸ See C. E. Welch Jr., Introduction, in: C. E. Welch, Jr., *NGOs and Human Rights – Promise And Performance*, 2001, 1, 3.

⁷⁹ See L. Hodson (note 16), 52.

sult. Even informal help to applicants in a case may increase the incentives of NGOs to help the ECtHR compared to a situation of complete non-involvement in the case. Based on these dynamics, the benefits of NGO intervention for both the organization and the court are higher when the NGO has greater control of the proceedings.

The more control NGOs have over the proceedings, however, the greater the risk generated by intervention. Procedures that try to maximize the benefits of NGO intervention must take into account the possible risks of this intervention. Another possible concern is that if NGOs have limited budgets, and they choose to serve as applicants, in some cases this may exhaust their resources and prevent them from participating in other cases as third parties or informally. Because participation as applicants is much more expensive than the other forms of intervention, NGOs with limited budgets may opt to serve as applicants in few cases instead of intervening in other ways in many more cases, leading to an overall lower benefit for the ECtHR. This concern is unlikely to materialize, however, since the budgets of NGOs are many times a factor of their activity and visibility. If NGOs serve as applicants in salient cases they may be able to draw funds that will allow them to continue, and even to expand their intervention as third parties or as informal assistants to other applicants.

This sub-part will offer some preliminary suggestions on how to optimize NGO intervention either through the judgments and practices of the ECtHR or through changing the Convention.

a) Interpreting Current Doctrine

The main obstacle that hinders NGOs from serving as applicants is the requirement of victimhood. This requirement is specified in the Convention and the ECtHR cannot overrule it by its judgments. Furthermore, abolishing this requirement completely may give an exaggerated amount of control over proceedings to NGOs and lead to harmful side effects. There is a possibility, however, that the ECtHR could relax the demands of victimhood and allow NGOs to intervene when no other potential applicant can reasonably bring the case. Adopting such a rule would allow NGOs to participate when they are most needed, and give them an incentive to monitor the most dangerous violations of human rights. This rule would also leave substantial discretion in the hands of the ECtHR. The ECtHR could use this discretion to prevent an exaggerated proliferation of cases, to avoid cases it would rather not decide and to close the doors to NGOs it thinks would

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poorly represent the cause they were arguing for. This route could therefore optimize the interaction between the ECtHR and NGOs. Indeed, this was the route chosen by the ECtHR in the case of *CLR v. Romania*.

The main consideration that can motivate the court to grant standing in exceptional cases such as *CLR v. Romania* are the vulnerability of the victims and their inability to bring the case themselves or through their relatives or other legal representatives.⁸⁰ Additional considerations are: the suitability of a certain NGO to represent the victims' interests before the ECtHR, and the need to decide the case in order to deal with important public policy issues.

This method of changing the rules by interpretation may be viewed as judicial law-making. Judge *Pinto de Albuquerque* wrote a concurring opinion in *CLR v. Romania* to that effect. He argued that judges are forced to make law when they interpret human rights treaties⁸¹ and he supported the result of the majority's interpretation, yet opposes their reasoning. In his view, the court should have grounded its decision in principle, the commitment to protect the equal rights of all individuals,⁸² and should have provided a clearer test: *De facto* representation should be granted to non-victims when the victims are extremely vulnerable and do not have relatives, guardians, or legal representatives.

Without entering the debate on the normative legitimacy of using expansive interpretation to manipulate the content of the Convention,⁸³ it is possible to address the court's strategic consideration – what form of rules would help the ECtHR fulfill its goals. In this respect, there is a tradeoff between the benefits of adopting a constrained doctrine: supporting the court's legitimacy and providing guidance to prospective applicants,⁸⁴ and the inevitable cost in reducing judicial discretion for the future. The court's majority's choice to, on the one hand, emphasize the special conditions of the victim's vulnerability and the goal of preventing states from escaping all accountability to their human rights violations and, on the other hand, limit

⁸⁰ According to the ECtHR's judgments prior to *CLR v. Romania*, relatives of a deceased victim can serve as applicants if they claim a violation of the right to life, see *Fairfield and Others v. the United Kingdom*, 8.3.2005, Reports of Judgments and Decisions ECtHR 2005-VI.

⁸¹ Judge *Pinto de Albuquerque*, Concurring Opinion, para. 12.

⁸² Judge *Pinto de Albuquerque* (note 81), para. 8-9.

⁸³ See *S. Dothan*, In Defence of Expansive Interpretation in the ECtHR, *Cambridge Journal of International and Comparative Law* 3 (2014), 508 (justifying normatively the use of expansive interpretation when it is needed to protect the rights of individuals that do not have proper democratic representation).

⁸⁴ See Judge *Pinto de Albuquerque* (note 81), para. 14.

the new avenue of representation to exceptional circumstances instead of setting clear guidelines is a reasonable balance of conflicting considerations.

Another current problem is that only few NGOs intervene in ECtHR cases as a friend of the court, although the ECtHR can accept almost any such intervention, usually using its discretion to allow intervention by NGOs.⁸⁵ *Loveday Hodson* suggests that the reasons for the scarcity of NGO interventions are practical not doctrinal – NGOs are not familiar enough with this process and do not get enough information about pending applications. Friends of the court are rarely allowed to present orally and their arguments are rarely mentioned by the ECtHR, which makes it difficult for them to discern the influence of their arguments and to serve their publicity interest.⁸⁶ The best way to tackle this problem is through small and local changes to the practices of the ECtHR.

The ECtHR should invest more resources in disseminating information about the option of intervention as friends of the court. Friends of the court should be allowed to intervene orally more often, even at the expense of lengthening procedures. The President of the ECtHR that has the discretion to accept third party intervention should adopt guidelines that are responsive to NGOs' needs regarding the format and the time limits for the submission of briefs. These guidelines should be public so that NGOs can conform to them in advance instead of facing the possibility that their brief will be rejected. ECtHR judges should try to learn from the briefs, and if possible, to indicate that they read them and considered them in their judgments. These small changes may make NGOs more willing to serve as friends of the court.

b) Amending the Convention

An amendment to the Convention could radically transform the procedures of the ECtHR. It might, for instance, allow NGOs standing even if they are not victims. Certain mechanisms can be put in place to reduce the risks of such a change. For example, the Convention could give standing only to NGOs that are granted a special status by the ECtHR or by the member states, even if they are not victims. However, it is doubtful that such mechanisms would be effective. NGOs are at their best when they represent the weak. Letting states dictate which NGOs would have standing and which would not, would shift the balance of power even more to-

⁸⁵ Judge *Pinto de Albuquerque* (note 81), 52.

⁸⁶ Judge *Pinto de Albuquerque* (note 81), 52 et seq.

wards the strong. On the other hand, if the ECtHR itself were to get the power to give NGOs special status, it would incur the wrath of states that disagree with its choices, which may damage its legitimacy. Furthermore, opening the negotiation to the Convention could lead many states to submit suggestions that could damage the ECtHR in other ways. Despite the scarcity of NGO intervention, the ECtHR is still a success story, and in order to improve it further it is best to make small changes whose long term effects are easier to predict, instead of more substantial reforms. Therefore an amendment to the Convention is not recommended.

VII. Improving the Interaction of Other International Courts with NGOs

Lessons learned from the analysis of NGO interaction with the ECtHR can be applied to other international courts. These courts have different characteristics that lead to different problems and potential benefits associated with interaction with NGOs. This part focuses on three main attributes of courts that affect the preferred form of interaction with NGOs: the focus of the court on state interest, the effectiveness of the court, and the divergence of states' interests regarding the issues under the court's jurisdiction.

The greater the focus of the international court on states' key interests, the less room should be given to the participation of NGOs. Issues that lie at the core of state's sovereignty, such as border delimitations or war and peace usually involve complex considerations and can lead to unforeseen repercussions. States are better placed to analyze these considerations and bring them to the attention of the court, while NGO participation may blur the picture with numerous biased and less systematic points of view. States are also better placed than NGOs to argue about these issues because they are accountable for their actions and will carry the burden of any decision issued by the court. States represent their citizens and therefore have greater legitimacy to address these issues than do NGOs.⁸⁷

An example of a typical international court that deals with issues at the core of states' sovereignty is the International Court of Justice (ICJ), when

⁸⁷ Yet states may not always represent all their citizens properly because of democratic failures, see *E. Benvenisti* (note 50), 848 et seq. (arguing that states may not represent the interests of discrete and insular minorities); *E. Benvenisti*, *Exit and Voice in the Age of Globalization*, *Mich. L. Rev.* 98 (1999), 167, 171 et seq. (arguing that states may be captured by small interests groups and fail to represent the interests of the majority).

it decides contentious cases. The theory recommends a lower level of participation of NGOs in these proceedings. The rules of the ICJ conform to this recommendation – they prevent NGOs from directly participating in contentious ICJ cases and from submitting *amicus curiae* briefs in these cases.⁸⁸

The less effective an international court is, the more it should allow NGOs to participate in its proceedings. NGOs can help international courts increase their effectiveness in the ways discussed in this essay. This may come at a cost of generating problems, such as the ones discussed in Part IV. Most of these problems, however, do not directly endanger the interests of the court. They affect the interests of states that may, for instance, be subject to biased judgments or an inefficient judicial process as a result of increased NGOs participation. The court and the states that created it should balance the immediate interests of the court and the long term interests of the states involved. The greater the danger to the court's effectiveness, the greater should be the effort to improve it even at the cost of damaging states' interests. An ineffective court, such as a court whose judgments are rarely complied with or that has a low legitimacy, should prefer its immediate interests over the problems that NGO participation may inflict on states.

The IACHR is widely regarded as an ineffective court, mainly because states often fail to comply with its judgments.⁸⁹ This suggests that the IACHR should put a great emphasis on the exposure its proceedings receive, which can help it improve the behavior of states even if they fail to

⁸⁸ According to Art. 34(1) of the Statute of the International Court of Justice only states may be parties in cases before the ICJ. Art. 34(2) allows the ICJ to receive information pertaining to the case from Public International Organizations, which are defined in Art. 69(4) of the Rules of the Court as an "international organization of states" – a definition which excludes NGOs. NGOs may still participate in the ICJ Advisory proceedings and may bring information to the ICJ in contentious cases in various indirect ways, see *D. Shelton*, The Participation of Nongovernmental Organizations in International Judicial Proceedings, *AJIL* 88 (1994), 611, 628 (arguing that NGOs can participate in ICJ contentious cases by submitting expert opinions and by requesting one of the parties to annex information to their submissions). See also *D. Shelton*, The International Court of Justice and Nongovernmental Organizations, *International Community Law Review* 9 (2007), 139, 155.

⁸⁹ See *E. A. Posner/J. C. Yoo*, Judicial Independence in International Tribunals, *Cal. L. Rev.* 93 (2005) 1, 43 (arguing that states often pay the compensation required by the IACHR but usually fail to comply with requirements to punish offenders or change their laws leading to a compliance rate of approximately 5 %); *J. L. Cavallaro/S. E. Brewer*, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, *AJIL* 102 (2008), 768, 786 (stating that as of 2007 the IACHR reported full compliance in 11.57 % of resolved cases); *A. Huneus*, Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights, *Cornell Int'l. L. J.* 44 (2011), 493, 504 (stating that as of 2008 states have fully implemented only one in ten of the IACHR judgments).

comply with direct judgments.⁹⁰ NGOs are especially useful to disseminate information about judicial proceedings and the IACHR should therefore grant them a greater ability to intervene. This recommendation is followed by the rules of the IACHR that allow even non-victim NGOs, which are recognized by one of the states in the Organization of American States, to file petitions in the American Commission on Human Rights, which can refer cases to the IACHR.⁹¹ The IACHR received *amicus curiae* briefs in about a third of its cases going back to its first contentious case, and has never refused to accept a brief.⁹²

In international courts that deal with issues that significantly affect the division of wealth and power among nations that greatly diverge in their resources, there are strong arguments both for and against increasing the participation of NGOs. As an example of these conflicting arguments, some NGOs represent well the interests of the weak and the poor and give these parties a greatly needed voice in the court. On the other hand, under different circumstances, NGOs can be captured by the rich and powerful and serve their interests at the expense of weaker parties. Therefore, courts of this type will witness the most intensive debate about the issue of interaction with NGOs, with strong arguments and powerful interests militating both for more and for less NGO intervention.

The World Trade Organization Appellate Body (WTO AB) serves as a good example of a court that affects global financial interests of states that differ substantially in their wealth. The WTO AB did not have clear rules for NGO participation, and instead shaped the rules by interpretation. The WTO AB decided in the *Shrimp Turtle* case to reject the WTO Panel's interpretation and to allow the submission of briefs by NGOs, even if they were not requested formally by the Panel.⁹³ This attempt to increase the participation of NGOs led to severe criticism of the WTO AB mainly by developing countries who thought that most NGOs that deal with issues of concern to the WTO were captured by developed states.⁹⁴

⁹⁰ See *J. L. Cavallaro/S. E. Brewer* (note 89), 792 et seq.

⁹¹ See notes 72-73 and the text near them.

⁹² See *Y. Ronen/Y. Naggan* (note 24), 824.

⁹³ WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (12.10.1998), para. 110.

⁹⁴ See *P. van den Bossche*, NGO Involvement in the WTO: A Comparative Perspective, *JIEL* 11 (2008) 717, 721.

VIII. Conclusion

This essay argues that NGOs can contribute to the success of international courts in many different ways. So far, NGOs have intervened in only a few cases of the ECtHR, which has much to gain from giving NGOs an incentive to intervene more often. NGO intervention can also cause certain problems, however, and the ECtHR should adopt procedures that minimize these problems. The ECtHR's decision in *CLR v. Romania* to allow a non-victim NGO to serve as an applicant in exceptional circumstances – when there is no other alternative to represent the victims of the violation and when the NGO adequately represents their interests – would serve the court's goals. An amendment to the Convention can make NGO intervention even easier, but may lead to unforeseen negative results.

NGOs can also be encouraged to intervene as a friend of the court by setting guidelines for this intervention that will accommodate their interests. This may incentivize NGOs that now participate only informally in ECtHR cases or do not participate at all to submit briefs and have a greater stake in the proceedings. NGOs that serve as applicants or friends of the court will later be more likely to contribute to the ECtHR in other ways, for instance by disseminating information about its decisions and monitoring their enforcement.

Intervention of NGOs in other international courts presents different challenges, which should be resolved while taking into account the unique characteristics of each court. This analysis of the ECtHR can help highlight the relevant considerations for tailoring the procedural rules to regulate NGO intervention in other international courts.

