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**NON-GOVERNMENTAL ORGANISATIONS AS *AMICUS CURIAE* IN
INTERNATIONAL COURT PROCEEDINGS**

Master's Thesis

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INTRODUCTION

ICJ judge P. H. Kooijmans has said that “gone are the days when international litigation was invariably either inter-State dispute settlement or commercial arbitration with a sparse mixture of the two in [the] case of State contracts. The post-World War II mechanisms give access to a great variety of non-state actors, be it individuals, corporations, business firms, minorities and indigenous peoples, non-governmental organizations and inter-governmental organizations.”¹ His quote emphasises issues that relate to globalisation nowadays. It further highlights one of the most highly debated issues in international law in the past, present and most probably also in the future – the problem of who can be the subjects of international law.

This issue is not that simple as it might seem at first sight. In the current rapidly changing, globalising and highly complex world, many actors have some kind of impact on international law. Traditionally, only States were and sometimes still are considered as full actors of international law. However, in today’s world also many transnational organisations, governmental organisations and NGOs might have a considerable impact. For instance, NGOs have played an important role in international conferences and in the processes of adopting international conventions (*e.g.* Convention on Biodiversity², Convention on the Rights of a Child³). Furthermore, some are of the view that NGOs exert the major source of pressure on states to comply with human rights treaties since some NGOs collect funds from people who care about human rights and then these NGOs monitor and put pressure on the perpetrators.⁴

Nevertheless, there are many ways in which one can contribute to the process of international law. One of many possibilities is by way of the institution called *amicus curiae*. *Amicus curiae* is literally translated as a friend of the Court. Many dictionaries define this term in a slightly different manner. Nevertheless, the essence of the definition is usually the same. For instance, the Black’s Law Dictionary defines this term as “[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”⁵. Hence, the main objectives of an *amicus* is that it should not be a party to the case and must have interest in the subject matter.

¹ P. H. Kooijmans. *The Role of Non-State Actors and International Dispute Settlement*. – W.P. Heere (ed). From Government to Governance. The Hague: T.M.C. Asser Press 2004, p 21.

² G. K. Rosendal. *The Convention on Biological Diversity and Developing Countries*. Kluwer Academic Publishers 2000, p 93 *et seq.*

³ C. P. Cohen. *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*. - *Human Rights Quarterly* Vol 12, No 1, February 1990, p 139 *et seq.*

⁴ E. A. Posner. *The Twilight of Human Rights Law*. Oxford University Press 2014, p 82.

⁵ B. A. Garner. *Black’s Law Dictionary*. 8th edition, 2004, p 93.

Moreover, that raises the question as to which institutions and under which circumstances *amici* are allowed. Therefore, the aim of the current thesis is to investigate if INGOs can participate as *amicus curiae*, if the answer is affirmative then under which conditions and why are NGOs allowed to participate as *amicus curiae*? Furthermore, in the cases where *amici curiae* have been allowed, this master's thesis will investigate whether *amicus* briefs by NGOs have helped courts in deciding the case and if the briefs are taken into account in the first place.

The current thesis originates from two hypothesis. Firstly, there are no common rules in different institutions regarding NGO *amicus curiae* participation. Secondly, the author of the current thesis assumes that *amici* has an impact on the judgments and are taken into account.

There is no general definition of NGO in international law. The notion NGO refers to the fact that NGOs should be outside of governmental influence. However, in reality, many NGOs take donations from governments and in some occasions have cooperative status with one (e.g. World Wildlife Fund⁶). Therefore, they are not completely independent from governmental influences. If one eliminates governmental funding factor, there would not be left many NGOs to analyse. Therefore, in this thesis NGOs are considered as organisations that are established by private initiative and do not aim to make profit.

The current thesis is innovative in the researched field. Compared to other conducted studies on the same topic, this thesis is investigating specifically in depth of *amicus curiae* participation. Many other studies focus on the NGO legal status in the international law and therefore give only a brief essential overview of *amici* participation. In addition, this thesis gives new perspectives that the author of the current thesis have not come across in previous analyses. Furthermore, this thesis goes further into the practice and investigates only certain institutions from the NGO *amicus curiae* participation perspective (excluding *locus standi* participation and other forms of participation in international law). In addition, it provides more recent perspectives on the issue. Moreover, the selection of the case examples is novel regarding the papers written on the matter before the current thesis. For example, under the current thesis chapter about the *amici* participation in ECtHR, the thesis analyses NGO participation in the *Delfi vs Estonia* case⁷, which is one of the most far reaching cases for Estonia in the international field.

⁶ Homepage of the World Wildlife Fund. Financial info. Available online: <http://www.worldwildlife.org/about/financials> (27.04.2016).; Homepage of World Wide Fund for Nature. Our donors and partners. Available online: http://www.wwf.eu/about_us/donors_and_partners/ (27.04.2016).

⁷ ECtHR 64569/09, 16 June 2015, *Delfi vs Estonia*.

In order to gain answers to the questions the current thesis aims to solve, different methods are to be used. The primarily utilised methods can be categorised into four different types. Firstly, regarding the evolution of the provisions and establishing an *amicus curiae* participation, the historical development of law and court practice will be analysed. It is necessary to establish the roots of the provision and thus the initial source of *amicus curiae* participation. That will give an insight to the essence of the provisions. Secondly, based on the detailed court cases, the current thesis aims to find some general guidelines and tendencies regarding NGOs. Thus, the inductive method is applied. Thirdly, in order to be able to draw some general guidelines about *amicus curiae* participation, this thesis will empirically study the experiences of courts and their general practices. Finally, the thesis will compare different institutions and systems by applying the comparative method. It is necessary in order to draw a general conclusion and highlight similarities and differences in the NGO participation as *amici* in different judicial and quasi-judicial institutions.

The current thesis is going to analyse the practices of the three types of international courts. Furthermore, some of them are State-centric in their nature and some of them protect directly the interest of individuals or the public as whole. That was the main reason for choosing these institutions. This gives the current thesis the opportunity to investigate general guidelines and tendencies regarding NGO participation in international law as a whole. Moreover, in the current thesis state-centric institutions have been deliberately chosen. While both being state-centric in their nature, they have quite different views regarding NGO *amicus curiae* participation. Further, there is one type of institution that safeguards individual rights and the other type that safeguards the public interest by prosecuting perpetrators. In the current thesis, the regional human rights courts are viewed to be a subcategory of international courts. The analysed institutions are the ICJ (also including its predecessor the PCIJ), the WTO, the ICC, the international criminal tribunals (analysed tribunals include the ICTY and the SCSL), the ECHR and the IACHR.

The structure of the current thesis is established mainly by the categories of the chosen institutions. The first section of the current thesis gives a general overview and introduction to the heated debate in the international field from a more theoretical viewpoint. A further three paragraphs empirically investigate the respective chosen institutions categorised by their nature. The first are the state-centric ICJ and the WTO. In this chapter, the ICJ's contentious and advisory cases will be analysed. As there are two legal grounds for participating in contentious proceedings as *amicus curiae*, they will both be discussed. Further WTO practice and the basis of *amicus curiae* will be analysed separately in the Panel Proceedings and Appellate Body

Proceedings. In the next main chapter, international criminal proceedings will be examined. The author will analyse here the ICC, the ICTY and the SCSL. The ICTR has been excluded, since the rules and procedures are similar to the ICTY, therefore there is no reason to mention it twice. In addition, the ICTY was established before the ICTR. A further chapter investigates the field of the regional protection of human rights, through the ECtHR and the IAcHR. Under the IAcHR, two different types of proceedings are to be analysed, since the practice and legal basis are not the same.

The main bibliography contains the Statutes of the Courts and institutions and their rules of procedure, since these are the principal legal grounds for *amicus curiae* participation. Further, the respective judicial settlement bodies practice is to be regarded since that establishes the general guidelines and tendencies in *amicus curiae* participation. The chapter on WTO is based on a previous analysis that the author of the current thesis did during the University of Tartu's course "International Courts and Tribunals". The aim of the analysis was to elaborate further on the master's thesis topic. The current analysis about WTO compared to previously done analysis gives a new perspective to issues and goes further in the examination of the practise. The current thesis will also be illustrated by some of the most highly qualified legal scholars' opinions and criticism. These mentioned scholars are for example Dinah Shelton, Judge Kooijmans, Shabtai Rosanne, Judge Jennings and Antonio Cassese.

The Estonian Subject Thesaurus provides the following keywords that characterise this thesis: non-state actors, non-governmental organisations, international courts of law and public international law.

1. Theoretical Perspective on the Subjects of International Law

1.1. Subjects of International Law: Then and Now

The inter-State model of normative order was introduced in 1648, during the Peace of Westphalia.⁸ After this, States were considered subjects of international law and individuals only as its objects.⁹ From that point on, the States have lead the international arena. However, it cannot be forgotten that at least in democratic States governments operate by virtue of the will of individuals and the individuals are, therefore, authorities of the ultimate source. It is, however, so firmly rooted in international law that people think of the state as the ultimate authority and sole actor.¹⁰

Moreover, some lawyers see States as the dominant (or sole) lawmakers and the primary subjects of international law. However, according to policy-oriented jurisprudence, individuals are the ultimate actor of world policy processes, however, states are the dominant actors. This characterises the “global process of effective power”, where the major participant is the nation-state, although the power of many “functional groups” is increasing.¹¹ That suggests clearly to the tendencies occurring in the international arena. Mainly that what used to be the situation before, may not be anymore the case.

In the current era, international law is characterised by processes of globalisation. That means that the relationships between the state and society as well as between different states and societies are transforming.¹² Changes can be noticed for instance if one compares the Soviet attitudes and Russia’s current relations to international law. Initially, Soviet scholars were against the idea of accepting international organisations as subjects of international law.¹³ Moreover, the statist accepted international governmental organisations as subjects of international law, but remained faithful to emphasizing the role of states. Nevertheless, now some scholars in Russia argue that human beings, NGOs and transnational corporations should be recognized as subjects of international law.¹⁴ Thus, it can be seen that even though the

⁸ R. Falk. *The Interplay of Westphalia and Charter Conception of International Legal Order*. – R. Falk., C. Black (ed). *The Future of International Legal Order*. Vol 1. Princeton University Press 1969, p 43.

⁹ P. C. Jessup. *A Modern Law of Nations: an introduction*. The Macmillan Company New York 1948, p 15.

¹⁰ P. C. Jessup, p 18.

¹¹ A.-K. Lindblom. *Non-Governmental Organisations in International Law*. Cambridge University Press 2005, p 111.

¹² A.-K. Lindblom. *The Legal Status of Non-Governmental Organisations in International Law*. Uppsala Universitet 2001, p 19.

¹³ A. Ya. Kapustin. „Kontseptsia mezhdunarodnoi organizatsii. Sovremennye tendentsii i protivorechivye tolkovania“ - V. S. Bakhin (ed). *Mezhdunarodnoe publichnoe i chastnoe pravo. Problemy i perspektivy*. St Petersburg: St Petersburg State University 2007, p 97.

¹⁴ L. Mälksoo. *Russian Approaches to International Law*. Oxford 2015, p 104.

Russian legal opinion emphasizes state sovereignty as a high value, it has become a little bit more flexible in time regarding the subjects of international law.

One difference between Western and Russian scholarship is that the first one is inclusive of individuals and non-state actors in becoming predominant, while states tend to dominate in the Russian debate.¹⁵ Furthermore, Shaw has found that increased participation and personality in international law is especially relevant in the field of human rights law, the law relating to armed conflicts and international economic law.¹⁶ These fields are most interesting to the non-state actors. For instance, many NGOs are interested in having an impact in the protection of human rights (*e.g.* Amnesty International) or helping victims of armed conflicts such as wounded, civilians, non-combatants (*e.g.* the International Committee of the Red Cross). Thus, globalisation can be seen strongly in these fields.

It can be concluded that for today's international law, it has a wide range of participants. These include *inter alia* states, international organisations, regional organisations, non-governmental organisations, public companies, private companies and individuals.¹⁷

Not only legal scholars acknowledge a wider range of participants. For instance, in the case of *LaGrand*, the ICJ also concluded that nowadays individuals have become subjects of international law.¹⁸ In the case of *Reparations for Injuries*, the ICJ concluded that the organisation of the UN is an international person. Furthermore, the Court explained in the matter that the organisation is a subject of international law and capable of possessing international rights and obligations, also it has a capacity to maintain its rights by bringing international claims in front of the ICJ. However, the Court emphasises that this does not mean that the organisation is on the same level as a State. It is certainly not the case.¹⁹ Further, business actors have stepped foot into the international arena, mainly through investor-state arbitrations that follow from multilateral investment treaties and BITs.²⁰ Thus, the international arena has become more diverse than it was before.

Not regarding the increasing range of actors and participants in the international legal system, States remain important legal persons. Furthermore, States retain their attraction as the primary

¹⁵ L. Mälksoo, pp 105-106.

¹⁶ M. N. Shaw. *International Law*. 6th edition. Cambridge 2008, p 197.

¹⁷ M. N. Shaw, p 196.

¹⁸ ICJ, 27. June 2001, *LaGrand (Germany vs United States of America)*, Judgment, ICJ Reports 2001, p 466.

¹⁹ ICJ, 11. April 1949, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p 174, p 179.

²⁰ J. Klabbbers, A. Peters, G. Ulfstein. *The Constitutionalization of International Law*. Oxford University Press 2011, p 258.

focus of the social activity of humankind and thus of international law, notwithstanding globalisation and all that this entails.²¹ Thus, the current analysis does not suggest that States are not important actors in the field of international law, but that they are not the only ones that contribute to the development and interpretation of the field. There are many different actors of which NGOs will be discussed further in detail.

Although, it has been viewed that an NGO enjoys legal personality in municipal law²², in the late 1980s, there have been attempts to give NGOs legal status in the international law field. For instance, Marcel stated that giving NGOs legal status would be one solution in order to fill the gaps arising from the various national provisions juxtaposition and strengthen the position of the NGOs vis-à-vis the inter-governmental organisations. This would guarantee NGOs minimum rights and freedom of action vis-à-vis the various national or international authorities.²³ Another suggestion was made by Sir Dudley Smith to give European NGOs legal status.²⁴

Nowadays NGOs play an increasingly important role on the international and national arena. From the social perspective, NGOs have been proven beneficial. NGOs can promote democratical aspects and countries' developments. However, they need support to do so. For example, in the case of Bangladesh, the NGOs have been credited with the capability to give value to the country's development progress. The lack of support, however, has resulted in such NGOs being in a minority and not that powerful in exerting an influence. This has resulted in Bangladesh being left with a paradox: the country has made great progress on the reduction of poverty and social development but, on the contrary, it has failed to achieve basic levels of integrity and accountability in public life.²⁵ This case shows explicitly what role NGOs can play in the development and what there is to gain from them. NGOs have also been beneficial from an environmental perspective. For instance, from the viewpoint of the conservation of biodiversity in wetland, NGOs have been useful in raising greater awareness of the conservational necessities and in educating the public on wetlands conservation and

²¹ M. N. Shaw, p 197.

²² K. Martens. Examining the (Non-)Status of NGOs in International Law. - Indiana Journal of Global Legal Studies Vol 10, Issue 2, Summer 2003, p 1.

²³ M. Marcel. International Non-governmental Organizations and their Legal Status. – Union of International Associations. Commentaries on Legal Status of International Non-Governmental Associations. International Associations Statutes Series. *sine loco*, 1988. Available online: <http://www.uia.org/archive/legal-status-3-5> (16.04.2016).

²⁴ D. Smith. Non-Governmental Associations. Legal Status of International Non-Governmental Organizations in Europe. – Union of International Studies. Commentaries on Legal Status of International Non-Governmental Associations. International Association Statutes Series. *sine loco*, 1988. Available online: <http://www.uia.org/archive/legal-status-3-6> (16.04.2016).

²⁵ N. Kabeer, S. Mahmud, J. G. Isaza Castro. NGOs and the Political Empowerment of Poor People in Rural Bangladesh: Cultivating the Habits of Democracy? - World Development Vol 40, Issue 10, October 2012, p 2061.

management issues. Furthermore, it was found in this conservation case that NGOs' roles should be encouraged and supported by governments.²⁶ NGOs have also had an impact in the protection of global public interests by protecting biodiversity.

Furthermore, due to the representation of global civil society, NGOs are important members in the international community.²⁷ In earlier times, NGOs were characterised as observers or as possessing consultative status, now they are regarded more as partners.²⁸ Furthermore, in 2003 the Council of Europe provided for a possibility for INGOs to acquire participatory status in the organisation.²⁹ The preamble of the Resolution on participatory status for international non-governmental organisations with the Council of Europe stipulates that an active civil society and its NGOs are essential to European society and democracy.³⁰ In the United States, NGOs have been given cooperative status.³¹ Thus, it is clear that in recent decades NGOs' status in the international legal arena has grown.

Moreover, NGOs have also participated in international law-making in different ways: firstly, in an informal way, *e.g.* through lobby work at inter-governmental conferences;³² secondly, by participating in secondary law making for the implementation of the respective regimes.³³ Thus, NGOs are able to give their input into international treaties. Nevertheless, it should be noted that alongside the NGOs, States still have a power in treaty making. However, if one considers, following democratic theory, that individuals are ultimate power and States are dominate power, then State gains its authority from its people. Meaning the governments have to consider their peoples' wishes. Meanwhile NGOs have to do the same with their members, who are often also individuals. Overall, it seems that both are dependent in a way from individuals. Thus, it seems unreasoned to exclude NGOs from the actor status in international law if in a large sense

²⁶ I. Ibrahim, N. A. Aziz. The Roles of International NGOs in the Conservation of Bio-Diversity of Wetlands. – *Procedia: Social and Behavioral Sciences* Vol 42, 2012, p 247.

²⁷ J. Klabbers, A. Peters, G. Ulfstein, p 219.

²⁸ J. Klabbers, A. Peters, G. Ulfstein, p 221.

²⁹ Committee of Ministers. Res(2003)8, 19 November 2003. Participatory status for international non-governmental organisations with the Council of Europe.

Available online:

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Res\(2003\)8&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Res(2003)8&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true) (24.04.16).

³⁰ Committee of Ministers. Res(2003)8, 19 November 2003. Participatory status for international non-governmental organisations with the Council of Europe.

Available online:

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Res\(2003\)8&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Res(2003)8&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true) (24.04.2016).

³¹ Permanent Council of the Organization of American States. CP/CAJP-962/94. Non-Governmental Organizations with which the Organization of American States has Established Cooperative Relations. Available online: http://www.oas.org/en/ser/dia/civil_society/Status.shtml (24.04.2016).

³² J. Klabbers, A. Peters, G. Ulfstein, p 225.

³³ J. Klabbers, A. Peters, G. Ulfstein, p 225.

State power and NGO power comes from the same ultimate source. Despite that NGOs are sometimes limited to participate in the international arena. Nevertheless, NGOs are persistent to participate. For example, even if NGOs are unable to access international treaty making, they find another way. For instance, they have sought to contribute by drafting or publishing codes of conduct, guidelines, interpretive commentaries to treaties *etc*³⁴.

Furthermore, the great amount of donations to INGOs shows that the international community is supporting NGO's persistence to participate in the international arena. For instance, in 2014, Amnesty International received 247 million euros in donations. Individuals made up 74% (183 million) of the donations. There is no governmental support for Amnesty International.³⁵ The World Wildlife Fund received 98 million dollars in donations from individuals, which is 34% of its total income. It also received support from governments: 48 million dollars, which is 17% of its total income.³⁶ That shows explicitly that civil society itself supports INGOs' activities. Even States do so on some occasions.

There now exists no customary rule providing for NGO participation in legal processes³⁷, however NGOs have also played their role in law-enforcement. One way they have done so is through *amicus curiae* status.³⁸ This will be further discussed in the forthcoming chapters.

In conclusion, it is evident from the current chapter that a strictly inter-State centric world view is not prevalent anymore. During the Westphalian times, the States might have been the most important or the sole actors in international law, however in the contemporary globalised world that is not entirely true anymore. Many other actors have entered the arena, which have their impact in international law and upon the international community. Thus, the circle of participants in international law has widened. Nevertheless, it is wrong to conclude that States have abolished their role. They still influence international law enormously, but not solely.

1.2. *Amicus Curiae* - Threat or Benefit?

It is common that various interests affect different actors other than parties. For instance, interests in economic values, natural resources or human rights protection.³⁹ In addition, notwithstanding the private and public interests in the outcome of the proceedings, the court

³⁴ A. Boyle, C. Chinkin. *The Making of International Law*. Oxford University Press 2007, pp 88-89.

³⁵ Homepage of the Amnesty International. Global financial report 2014. Available online: <https://www.amnesty.org/en/2014-global-financial-report/> (25.04.2016).

³⁶ Homepage of the World Wildlife Fund. Financial info. Available online: <http://www.worldwildlife.org/about/financials> (25.04.2016).

³⁷ J. Klabbers, A. Peters, G. Ulfstein, p 223.

³⁸ J. Klabbers, A. Peters, G. Ulfstein, p 229.

³⁹ A.-K. Lindblom 2001, p 283.

has an interest to access the fullest information possible on the matter.⁴⁰ That is where *amici curiae* can be beneficial. For example, it has been viewed that in nowadays technical world, *amici* can provide the court with the technical support that is highly valued.⁴¹ However, there remain many counter-arguments for allowing *amici* participation. That is why this chapter will further discuss the advantages and disadvantages of NGO *amicus curiae* participation.

As can be seen from the previous chapter, States are not the sole actors in the international community. NGOs also have a great impact upon and contribution towards international law.⁴² Furthermore, INGOs are seen as the most prolific in interpreting international law.⁴³ They have been found to be particularly remarkable in the circumstances where the protection of collective interests is at stake.⁴⁴ In academic writings, it has been observed that NGOs' efforts to be involved in proceedings concern the issues related to human rights, environmental law and humanitarian law.⁴⁵ Furthermore, NGOs have been active as *amici curiae* in the regional human rights systems of the America and in Europe.⁴⁶ Hence, NGOs have expertise in a specific field that they deal with daily. Therefore, their submission comes from their experience. Judges are not experts and professionals in every possible issue that might arise during the proceedings. Furthermore, it is not reasonable to demand this from them. More technically speaking, information furnished by NGOs contributes to better informed and more acceptable judgments.⁴⁷ Thus, in some aspects INGOs might be helpful.

Since INGOs are also important players in the enforcement of international law⁴⁸, they are the best actors to help the court. The best example of this function is in environmental law.⁴⁹ Powerful environmental NGOs pressure society to apprise environmental values and to think about future generations. Furthermore, it has been viewed that in the international system, the state is losing its formerly dominant position, while other organisations representing

⁴⁰ A.-K. Lindblom 2001, p 284.

⁴¹ L. Vierucci. NGOs before international courts and tribunals. – P. M. Dupuy, L. Vierucci (ed). NGOs in International Law: efficiency in flexibility? E. Elgar 2008, p 165.

⁴² P.- M. Dupuy. Art 34/5. – A. Zimmermann (ed). The Statute of International Court of Justice: A Commentary. Oxford University Press 2006.; R.Y. Jennings. The International Court of Justice after Fifty Years. - The American Journal of International Law Vol 89, No 3, July 1995, p 504.; S. Santivasa. The NGOs' Participation in the Proceedings of the International Court of Justice. – Journal of East Asia & International Law Vol 5, Issue 2, September 2012, p 402.

⁴³ S. Charnovitz. Nongovernmental Organizations and International Law. - The American Journal of International Law Vol 100, No 2, April 2006, p 352.

⁴⁴ S. Santivasa, p 406.

⁴⁵ S. Santivasa, p 400.

⁴⁶ K. Nowrot. Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law. - Indiana Journal of Global Legal Studies Vol 6, Issue 2, Spring 1999, pp 631-632.

⁴⁷ J. Klabbers, A. Peters, G. Ulfstein, p 231.

⁴⁸ S. Hobe. Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations. - Indiana Journal of Global Legal Studies Vol 5, Issue 1, Fall 1997, p 205.

⁴⁹ S. Hobe, p 205.

community interests are becoming increasingly important.⁵⁰ On the other hand, Kamminga has emphasised that NGOs have no capacity like States to address all relevant interests.⁵¹ Kamminga has made a good point. INGOs legal capacity and status in the contemporary international law is debatable. INGOs are not experts in every field, but they are specialised in some specific questions. That is their value in front of the State. Furthermore, States might not always be interested in bringing up all the relevant interests in the case. Especially when these interests do not support their position or are threat to their power.

Moreover, INGOs as actors in international civil society are a force for democratizing international relations and international institutions. They are the authoritative bearers of world opinion. Hence, they can be viewed as the representatives of people in the international arena, in a way in which their states, even democratic states, and their state representatives are not. The reason for this is that NGOs cannot exist without social acceptance and funding.⁵² Thus, in order to gain acceptance and therewith the funding, NGOs must take into account the societies' values and opinions to some extent. In establishing the objectives of INGOs and planning their activities, they take into consideration these values in a generalised form. Otherwise, they risk having no future.

Looking at Amnesty International and the World Wildlife Fund's funding, it is evident that society values the work of such INGOs. Furthermore, the majority of INGO members are interested individuals themselves⁵³, who are gathered together to safeguard and develop certain values. For example, behind Amnesty International, 7 million people fight against injustice and human rights violations.⁵⁴ Behind the World Wildlife Fund, 5 million people fight globally for natural conservation.⁵⁵ Since the members of INGOs are different individuals from different countries, they can be regarded as a world opinion in a way States cannot. States do not have such diverse membership. INGOs, therefore, have authenticity, legitimacy and the authority of the people that states do not have. Thus, in short, NGOs should have a seat at the table of power

⁵⁰ S. Hobe, p 208.

⁵¹ M. T. Kamminga. *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* - G. Kreijen (ed). *State, Sovereignty and International Governance*. Oxford University Press 2004, p 338.

⁵² J. Klabbers, A. Peters, G. Ulfstein, p 237.

⁵³ W. W. Powell, R. Steinberg. *The Nonprofit Sector: A Research Handbook*. 2 ed. Yale University Press New Haven & London 2006, p 337.

⁵⁴ Homepage of the Amnesty International. Who we are. Available online: <https://www.amnesty.org/en/who-we-are/> (25.04.2016).

⁵⁵ Homepage of World Wildlife Fund. About us. Available online: <http://www.worldwildlife.org/about> (25.04.2016).

for these reasons⁵⁶, since they can provide a common platform for diversity.⁵⁷ On the other hand, the NGOs' funders are the Western rich people, who might not always represent the interests of developing area people. Furthermore, the interest of developing countries is not always equivalent with the West.

Based on NGOs' ability to provide common diverse platform, sometimes NGOs have been seen as neutral regarding different interests, sectors of society and objectives.⁵⁸ This is not always a correct assumption. There are many INGOs that specialise in certain issues (*e.g.* Human Rights Watch deals with human right issues, the World Wildlife Fund deals with natural conservation). They do not deal with a wide range of issues. Probably one of the most severe threats of NGO *amicus* participation is that the powerful NGOs might circumvent the law when they want to achieve their objectives. For instance, this was the case with Greenpeace, which boycotted the Shell Oil Company in order to put pressure on the firm to withdraw its planned dumping of an oil platform into the North Sea.⁵⁹ Therefore, NGOs cannot always be regarded as neutral or as safeguarding societal values.

Furthermore, legal academics have considered that the exclusion of NGOs from international proceedings (especially in the case of the ICJ) is based on considerations of expediency rather than law.⁶⁰ The caseload that comes with NGO *amicus* participation will definitely increase in the Courts. Moreover, such participation will require more resources, *e.g.* mostly time and money. Nevertheless, in United States, where *amici* are often used, has been found that allowing *amici curiae* to give its expert opinion in the proceedings is the most cost-effective way.⁶¹ In a way it is true. If one has *amici* in the proceedings to elaborate on the topic, it does not need a further assistance from other experts on the same topic. However, the question remains whether *amici* is being unbiased.

In addition, allowing NGOs to submit briefs may make some States more reluctant to submit disputes to it. States may be averse to NGOs being involved in a bilateral dispute, in particular if the views presented are not to their liking. This argument certainly should not be taken lightly, although it should be noted that it would not apply to advisory proceedings.⁶² This view reflects

⁵⁶ K. Anderson. The Ottawa Convention banning landmines, the role of international non-governmental organizations and the idea of international civil society. - European Journal of International Law Vol 11, Issue 1, January 2000, p 111.

⁵⁷ A.-K. Lindblom 2005, p 526.

⁵⁸ A.-K. Lindblom 2005, pp 525-526.

⁵⁹ S. Hobe, p 198.; K. Nowrot, p 597.

⁶⁰ S. Santivasa, p 406.

⁶¹ G. A. Caldeira, J. R. Wright. Organized Interests and Agenda Setting in the U.S. Supreme Court. - The American Political Science Review Vol 82, No 4, December 1988, p 1122.

⁶² P. H. Kooijmans, p 26.; I. Rossi. Legal Status of Non-Governmental Organizations in International Law. Intersentia: Antwerp-Oxford-Portland 2010, p 294.

the question of the power of States. They want to be in charge; however, letting non-state actors participate in the proceedings will render the outcome for States more blurry. Thus, this will take away, in some way, States power in their view.

Furthermore, since the actual decision-making power in international law lies with States, they have to decide whether non-state actors can contribute to international dispute settlements. For instance, States helped to develop the ICC Rules of Evidence and Procedure and to a lesser extent in the development of the ICTY and ICTR Rules.⁶³ Bartholomeusz concluded that since the States themselves were interested in providing for a procedure regarding *amicus curiae* participation in the named rules, it is possible to conclude that in these dispute settlement proceedings, *amici* are valuable.⁶⁴ Hence, even if it is clear that NGO *amici* are allowed to participate in these proceedings, it can be further concluded that the initial permission for their participation relies on States' willingness even if the the Court has the discretionary power to decide whether to approve or reject the request to leave a grant to submit an *amicus curiae* brief.

Contrary to this view, Judge Kooijmas agreed with Shelton in saying that in the case of human rights tribunals, where *amici* usually do not express support for the defendant State's position but are opposed to it, there has hardly been any opposition by States to the admission of *amicus* briefs.⁶⁵ The author of this thesis is on the opinion of that this might be influenced by the state's wish to maintain their reputation in the international field. They do not like to be seen as against greater good or against protection of human rights. If democratic states do not aim for human rights protection and therefore greater justice, they will be judged by other states. Thus, in a long perspective, they might lose their reputation in the eyes of other states.

Every argument about who is and ought to be recognized as a subject of international law is underpinned by a normative vision of what makes international law legitimate and what purpose should be served by it (peace, justice, order *etc*).⁶⁶ What happens if States are not interested in the matter and therefore do not address it (however, the matters can be influential for a small group of people, *i.e.* minorities) in the proceedings? *Amici* has been viewed as a way to represent the public interest that has not brought up by anyone else in the case.⁶⁷ Adopting Ottawa Convention on banning landmines for example highlights the issue:

⁶³ L. Bartholomeusz. The Amicus Curiae before International Courts and Tribunals. – Non-State Actors and International Law Vol 5, Issue 3, 2005, p 281.

⁶⁴ L. Bartholomeusz, p 281.

⁶⁵ P. H. Kooijmans, p 26.

⁶⁶ N. Bhuta. The Role International Actors Other Than States can Play in the New World Order. – A.Cassese (ed). Realizing Utopia The Future of International Law. Oxford University Press 2012, p 61.

⁶⁷ L. Vierucci, p 166.

“Governments were initially entirely uninterested; it was regarded by governments everywhere as pie-in-the-sky, even if they were not actively hostile to the idea.”⁶⁸ Governments eventually began to come on board the landmines ban cause for three principal reasons. NGO pressure, first, brought them to an awareness of the genuine extent of the problem and put it on their policy agendas.⁶⁹ /.../ NGOs are actively promoting the protection of human rights in areas beyond State control. A telling example is the important role that NGOs play in the battle against child pornography on the Internet.”⁷⁰

Hence, when States are not interested, the NGOs can play important role in highlighting the issues. By that, the NGOs contribute to the problem solving. Therefore, some important issues will not be left without the needed attention.

The aim of NGO *amicus curiae* participation has been considered to be the promotion of transparency and the legitimacy of the international process⁷¹ and a further contribution to general transparency⁷². Society has a possibility to give its opinion in the matter by way of INGOs. Thus, it improves communication between the Court and the international community.⁷³ The Court will have an input from society, which means that the result is more practical than theoretical. Even if NGO participation cannot make international law democratic, it can to some extent contribute to strengthening its legitimacy.⁷⁴ Co-operation with NGOs also helps to bring information and expertise into intergovernmental fora and inform the public of decisions taken there.⁷⁵ However, it is evident that the question of what type of participation and which NGOs should be entitled to participate should be regulated by international law.⁷⁶

On the contrary, several procedural principles would be put in danger. First of all, it has been considered that judges are the ultimate guardians of justice, thus they can ensure a fair trial without the assistance of *amici curiae*.⁷⁷ From this perspective it can be summarized that NGOs cannot possibly have anything additional to bring to the Court that concerns the law. Furthermore, may be they should not, since it might shift the powers in the litigation. Since

⁶⁸ K. Anderson, p 105.

⁶⁹ K. Anderson, p 107.

⁷⁰ K. Nowrot, p 597.

⁷¹ H. Mann, A. Cosbey, L. Peterson, K. von Moltke. Comments on ICSID Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration, *sine loco*, December 2004, p 9.

⁷² B. Stern. L'entrée de la société civile dans l'arbitrage entre Etat et Investisseur. – W. Kluwer (ed). Revue de l'arbitrage No 2, 2002, p 345.

⁷³ S. Santivasa, p 406.

⁷⁴ K. Anderson, pp 91-120.; A. Alkoby. Non-State actors and the legitimacy of international environmental law. - Non-State Actors and International Law Vol 3, No 1, 2003, p 97.

⁷⁵ A.-K. Lindblom 2005, p 36.

⁷⁶ A.-K. Lindblom 2005, p 36.

⁷⁷ S. Zappalà. Human Rights in International Criminal Proceedings. Oxford University Press 2003, p 63; L. Bartholomeusz, p 282.

participation of the *amici* might create structural inequality. For example in the case of ICC, where there are already 3 parties in the pleadings (additional party is the victims' representatives) and *amici* protects the right by arguments that do not differ in its essence from the prosecutors' arguments. Therefore, the necessity to include NGOs as *amici curiae* to add a valuable element of justice seems unreasoned when the judges themselves are professionals and independent. Furthermore, taking into consideration the fact that this principle has been found to play a continuously important role in international dispute settlement⁷⁸ and adding to it that in some cases the ECHR, the ICTY and the ICTR have permitted *amicus* intervention on legal issues that are in the judge's competence⁷⁹, it is clear that the principle *juria novit curiae* is violated. The ground principles of the trial should be followed in order to guarantee a fair trial.

In addition to the *juria novit curiae* principle, the equality of arms and parties autonomy may be endangered due to the fact that an *amicus* does not have to prove the veracity of their brief.⁸⁰ The rights are the basis of the fair trial, therefore such a threat is a serious intervention in guaranteeing a fair trial. Therefore, in the case of the *amicus* submission benefitting one party, the evidence is stronger but not proven in the ordinary sense of the procedural requirements and rules. Furthermore, the value of unproven submissions is controversial. It is also possible that NGOs will abuse their *amici curiae* submissions; in cases where they have their own agendas at stake. That is also supported by the sometimes expressed view that NGOs are self-appointed, single-issue-oriented and often not accountable to the people on whose behalf they claim to speak.⁸¹ Thus, if they are not accountable, they have nothing to lose by abusing their *amicus curiae* status. However, in terms of the proceedings, such behaviour might lead to significant changes in the final judgment. That will definitely not result in more valuable elements of justice. Nevertheless, as stated above, if NGOs want to remain their fundings, they have to follow some values supported by their donors. Otherwise, they would risk to have no future.

In conclusion, it can be seen that there are many benefits to the *amicus curiae* participation. They are able to contribute to more just outcomes of the proceedings. Furthermore, the INGOs are usually more diverse in their memberships than States. Thus, they represent the opinions of the civil society. Nevertheless, there are also many threats to *amici* participation. One cannot be sure if the NGOs are biased or not. Notwithstanding, *amici* participation might have a serious threats to the principles of the fair trial, *e.g. juria novit curiae*. Furthermore, States are the actual decision makers in the international law and therefore, allowing *amicus curiae* to participate in

⁷⁸ L. Bartholomeusz, p 282.

⁷⁹ L. Bartholomeusz, p 282.

⁸⁰ J. Klabbers, A. Peters, G. Ulfstein, p 231.

⁸¹ A.-K. Lindblom 2005, p 525.

their proceedings, may make States reluctant to enter their cases in the international courts. Especially, in case of state-centric courts. However, the concrete threats depend on the cases and NGOs that want to participate.

2. State-Centric Court Proceedings

2.1. Permanent Court of International Justice and International Court of Justice

2.1.1. Contentious cases

2.1.1.1. *Amicus Curiae* as “Public International Organisation”

ICJ Statute Art 30 (1) gives the Court right to frame its rules in order to carry out its functions. In particular, the Court has right to lay down rules of procedure.⁸² However, in establishing its rules, the Court has to stay within the limits of the ICJ Statute and its jurisdictional system, which is based on State consent.⁸³ Thus, the Court has to take into consideration what States think. First, in order to allow *amicus curiae* participation, States must be on board.

According to Art 34 (1) of the ICJ Statute, only states may be parties to contentious cases in front of the ICJ. There is no explicit right in the rules of procedure nor in the ICJ Statute, which allows the participation of *amicus curiae*. However, Art 34(2) ICJ Statute provides for an exception to sole State participation by stating: “the Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative”. Therefore, additional to the States, the parties may be also public international organisations in a limited manner. The Statute of the ICJ, however, does not state what a public international organisation is. Nevertheless, in this case, the organisation has to have relevant information and this organisation shall present the information to the Court of its own initiative.

Shabtai Rosanne established that “/.../ in a contentious case non-governmental international organizations have no access to the Court whatsoever. From the point of view of the procedure in contentious cases, they are regarded as individuals.”⁸⁴ Furthermore, the Statute contains no provision by which an individual may be given access to the Court, in the sense that an individual, whether a natural or a juridical person, may be a party in a case before the Court or may acquire the status of non-party intervener.⁸⁵ The practice of the Court also does not envisage the legal representatives of an individual appearing before the Court, holding briefs, receiving copies of the pleadings, and being allowed perhaps as *amicus curiae* to represent his

⁸² Statute of the International Court of Justice. 26. June 1945. 33 UNTS 993.

⁸³ P.H. Kooijmans, p 23.

⁸⁴ S. Rosanne. The law and practice of the international court 1920-1996. Volume II Jurisdiction. 3rd edition. Martinus Nijhoff Publishers 2000, p 653.

⁸⁵ S. Rosanne, p 654.

own case.⁸⁶ Hence, according to Rosanne, there are no means possible by which individuals can participate in the proceedings. The same applies by analogy to NGOs.

In the practice of the ICJ's contentious proceedings, the Court has never allowed an NGO to participate as *amicus curiae*. Nevertheless, NGOs have tried to receive leave to submit *amicus* briefs. On the 7th of March in 1950, Robert Delson, a member of the Board of Directors of the International League for the Rights of Man, asked the Registrar for the possibility to submit a brief from The International League for the Rights of Man as a public international organization pursuant to Art 34 of the ICJ Statute in the Asylum case.⁸⁷ The Registrar declined such a request by stating that the International League of Rights of Man cannot be characterized as a public international organization as envisaged by the Statute.⁸⁸ The Registrar gave no further explication.⁸⁹ Hence, from this one can conclude that public international organisations are not INGOs and therefore, INGOs should not be considered as *amici curiae* according to Art 34 ICJ Statute.

Furthermore, Art 69 (4) of the Rules of the Court established that the term "public international organization" in Art 34(2) denotes an international organization of States.⁹⁰ In the NAFTA Tribunal in the *Methanex case*, the tribunal commented, "[The ICJ's] jurisdiction in contentious cases is limited solely to disputes between States; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene."⁹¹ Hence, there are no rules under which non-state actors can enter the Court. Such a viewpoint is in accordance with the legal instruments and the case practice, notwithstanding the standpoints of other judicial UN established inter-state judicial settlement bodies, e.g. ITLOS.

In comparison, ITLOS, which is also a UN established institution like the ICJ, has elaborated upon the same kind of question, whether NGOs could be viewed in the tribunal as *amicus curiae*. ITLOS does not mention *amicus curiae* in its regulation. ITLOS has solved the issue in Art 84 (1) of its Rules by emphasizing that only intergovernmental organizations can, by the

⁸⁶ S. Rosanne, p 654.

⁸⁷ ICJ, 20. November 1950, *Colombian-Peruvian asylum case*, ICJ Reports 1950, p 266, Part IV Correspondence, Mr Robert Delson to Registrar, 7. March 1950, p 227.

⁸⁸ ICJ, 20. November 1950, *Colombian-Peruvian asylum case*, ICJ Reports 1950, p. 266, Part IV Correspondence, The Registrar to Mr. Robert Delson, 16 March 1950, p 228.

⁸⁹ ICJ, 20. November 1950, *Colombian-Peruvian asylum case*, ICJ Reports 1950, p. 266, Part IV Correspondence, The Registrar to Mr. Robert Delson, 16 March 1950, p 228.

⁹⁰ Rules of the International Court of Justice. 14 April 2005. 1978 ICJ Acts & Docs 4. Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (12.12.2015).

⁹¹ Arbitration under Chapter 11 of the North American Free Trade Agreement and UNICITRAL Arbitration Rules, 15. January 2001, *Methanex Corporation and United States of America*, Decision of the Tribunal on petitions from third persons to intervene as „*amici curiae*“, para 34.

request of a party or *proprio motu*, furnish information relevant to the case.⁹² Moreover, Art 84 (4) of these Rules defines an intergovernmental organisation as an intergovernmental organisation other than any organisation which is a party or intervenes in the case concerned.⁹³ Thus, in its Rules ITLOS already excludes the possibility of an NGO possessing *amicus* status. However, in its practice in the Sunrise Arctic case an NGO, Greenpeace, has for the first time made an *amicus curiae* submission in the context of contentious proceedings.⁹⁴ The Tribunal rejected the submission⁹⁵, although it was previously sent to the parties to give their opinion of the admissibility of the brief⁹⁶ and resulted in asking Greenpeace to appear at the hearing as a witness.⁹⁷ Hence, from this one can see clearly that even if an inter-state dispute settlement body explicitly excludes NGO participating as *amicus curiae*, it is still possible that inter-state bodies, in some cases, find it relevant to hear from NGOs. This might be their way to contribute to the overall justice that is in accordance with the aim of establishing the institution of *amicus curiae*.

Compared to the ICJ, the ITLOS is more precise in its regulation regarding NGO *amicus curiae* participation. The ICJ provision is looser, leaving space for interpretation. Moreover, there is no certain definition of public international organisation in the context of ICJ contentious proceedings. It can still be regarded from case law that a public international organisation is not an NGO in its essence.

On the other hand, not all agree to this kind of interpretation. Some most highly qualified publicists consider Art 34 (2, 3) to be viewed more broadly to encompass “international public interest organizations”, seen as those with consultative status to the UN.⁹⁸ According to this definition, Art 34(2) would include any organisation that aims to deal with and protect the public interest. It has been stated in academic writings that NGOs as *amicus* are efficient in

⁹² ITLOS/8, 17 March 2009, Rules of the Tribunal.

Available online: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (12.12.2015).

⁹³ ITLOS/8, 17 March 2009, Rules of the Tribunal.

Available online: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (12.12.2015).

⁹⁴ ITLOS Case No 22, 22. November 2013, *The “Arctic Sunrise” case (Kingdom of the Netherlands v Russian federation)*, para 15.

⁹⁵ ITLOS Case No 22, 22. November 2013, *The “Arctic Sunrise” case (Kingdom of the Netherlands v Russian federation)*, para 18.

⁹⁶ ITLOS Case No 22, 22. November 2013, *The “Arctic Sunrise” case (Kingdom of the Netherlands v Russian federation)*, para 16.

⁹⁷ ITLOS Case No 22, 22. November 2013, *The “Arctic Sunrise” case (Kingdom of the Netherlands v Russian federation)*, para 28.

⁹⁸ D. Shelton. *The International Court of Justice and Nongovernmental Organizations*. - *The International Community Law Review* Vol 9, Issue 2, 2007, p 149.; D. Shelton. *The Participation of Nongovernmental Organizations in International Judicial Proceedings*. - *The American Journal of International Law* Vol 88, No 4, October 1994, p 625.

human rights law, environmental law and humanitarian law.⁹⁹ All these areas protect the universal interest. Universal interests are public interests, since they usually aim to improve the public well-being rather than protect some specific rights of some small group or a certain State. Hence, the INGOs that are aiming to protect human rights, environmental or humanitarian rights are international public interest organisations in their essence.

Furthermore, Shelton found that the ICJ's institutional interests favour non-governmental *amicus* participation. She stated that even if additional materials are submitted to the Court, these materials aim to provide relevant information to the Court, concerning broader issues of public interest and legal analysis. This assists the Court in reaching its decision and promotes the further development of the law.¹⁰⁰ Thus, by helping the Court to reach a just and transparent decision, NGOs are useful to the ICJ and through their own goals provide assistance to the Court to meet their aims. According to this interpretation, NGOs could be *amici curiae* in front of the ICJ. Nevertheless, there might still be doubts if the State would be willing to broaden their disputes to include non-state actors.

The contrary is the case if one considers the historical interpretation method of the Statute. The ICJ Statute is in many aspects the same as the PCIJ Statute and the PCIJ was a predecessor to the ICJ. Thus, PCIJ regulation in regarding the issue of NGOs as *amici curiae* should be taken into consideration.

Art 34 of the PCIJ Statute states, “*only States or Members of the League of Nations can be parties in cases before the Court.*”¹⁰¹ That was the only sentence in this article, there were no subparagraphs like in the current ICJ Statute. Therefore, the previous wording of the same article was narrower than in the current provision. It gives the party status only to States and to the League of Nations. It provides for no possibility to submit NGO briefs. However, the PCIJ Statute, in its Art 26, included the possibility for the ILO to submit voluntary information concerning labour cases in front of the Court.

Hence, the ILO was provided with special status in front of the Court. Nevertheless, the ILO is an inter-state organisation, not an INGO but it has a relationship to NGOs. Firstly, NGOs have regional and general consultative status in ILO.¹⁰² Secondly, in addition to the consultative

⁹⁹ S. Santivasa, p 400.

¹⁰⁰ D. Shelton 1994, p 625.

¹⁰¹ PCIJ, Series D No 1, Permanent Court of International Justice Statute.

¹⁰² Homepage of the International Labour Organisation. Non-governmental international organizations having general consultative status with the ILO. Available online: http://www.ilo.org/pardev/partnerships/civil-society/ngos/WCMS_201411/lang--en/index.htm (27.04.2016).; Homepage of the International Labour Organisation. Non-governmental international organizations having regional consultative status with the ILO.

status, ILO integrates NGOs in itself to provide better working conditions. The means for that are social dialogue and tripartism.¹⁰³

In 1929 during the revision process of the PCIJ Statute, Art 34 was discussed. Judge Francisco José Urrutia Olano raised a question considering practical aspects, whether the League of Nations should be provided with the right to plead before the Court. During these discussions, it was mentioned that the term “only” suggests that only States may be parties, not individuals.¹⁰⁴ Furthermore, in 2005 the Rules of Court were amended and now Art 69(4) states that the term public international organisation denotes an organisation of States.¹⁰⁵

In the *Gabčíkovo-Nagymaros Dam Project* case¹⁰⁶, some NGOs, such as Fondation Cousteau, proposed their help directly to the government of Hungary.¹⁰⁷ Afterwards the Hungarian government submitted an *amicus* brief prepared by the INGO World Wildlife Fund.¹⁰⁸ This NGO brief submitted in the Hungarian memorial has been considered the first *amicus* brief by an NGO that the Court accepted.¹⁰⁹ However, the Hungarian memorials do not mention such *amicus curiae* briefs in the ICJ documentation.¹¹⁰ Furthermore, these NGO contributions cannot be considered as *amicus curiae* briefs by NGOs, since NGOs do not participate in their own capacity.¹¹¹ The author of the current thesis is of the opinion that these NGO aids are merely a help to the government and most probably these NGOs never intended to be *amicus curiae* before the ICJ. Nevertheless, there is no doubt that they wanted to give their contribution to the issue discussed in the *Gabčíkovo-Nagymaros Dam Project* case. Moreover, this can be viewed as another way of an NGO contributing to international justice without being an *amicus curiae* nor a party to the case.

Available online: http://www.ilo.org/pardev/partnerships/civil-society/ngos/WCMS_201416/lang--en/index.htm (27.04.2016).

¹⁰³ Homepage of the International Labour Organisation. Tripartism and social dialogue. Available online: <http://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/index.htm> (27.04.2016).

¹⁰⁴ League of Nations. Committee of Jurists on the Statute of the Permanent Court of International Justice. Minutes of the Session held at Geneva, 11th-19th March 1929, Ninth meeting, p 58. Available online: http://www.icj-cij.org/pcij/serie_D/D_minutes_statut_PCIJ_11au19march_1929.pdf (20.02.2016).

¹⁰⁵ Rules of the International Court of Justice. 14 April 2005. 1978 ICJ Acts & Docs 4. Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (12.12.2015).

¹⁰⁶ ICJ, 25. September 1997, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, p 7, Judgment.

¹⁰⁷ P.- M. Dupuy. Art 34/41, fn 104.

¹⁰⁸ ICJ, 25. September 1997, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, p 7, Memorial of the Republic of Hungary, Annex 20, p 841 *et seq.*

¹⁰⁹ D. Schacht, L. Pottinger. Devastating the Danube and Drave with Dams – World Rivers Review Vol 10, No 4, January 1996.

¹¹⁰ ICJ, 25. September 1997, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, p 7, Written Proceedings.

¹¹¹ Y. Ronen. Participation of Non-State Actors in ICJ Proceedings. - The Law and Practice of International Courts and Tribunals Vol 11, Issue 1, 2012, p 84.

To sum up, it seems that Art 34(2) was and still is not meant for non-state actors, and therefore NGO participations are rejected, nor has the Court ever allowed a NGO to participate as *amicus curiae* in the course of contentious proceedings. However, the wording of this provision gives a wide area of discretion as to the interpretation. Even though the Rules of Court were amended in 2005 and they now establish what the term public international organisation means, the interpretational issues remain. In order to avoid interpretational misunderstandings, the ICJ Statute itself should be amended.

2.1.1.2. *Amicus Curiae* as “Any Other Organisation”

An alternative way for an *amicus curiae* to enter the court’s pleading has been seen via Art 50 ICJ Statute.¹¹² Moreover, the expert participation necessity under Art 50 has also been advised in Court practice: in the Gabčíkovo-Nagymaros Project case¹¹³ and in the Pulp Mills on the River Uruguay case.¹¹⁴ NGOs would be qualified based on their special knowledge to give such assistance to the Court. Furthermore, most probably they would be willing to do so.

Art 50 Statute states: “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.” The subject circle in the following article is wide: any individual, body, bureau, commission, or other organization. Thus, NGOs are also included. Moreover, three aspects seem particularly relevant in order to apply Art 50.¹¹⁵

Firstly, by using this article, the Court can enjoy a wide margin of discretion.¹¹⁶ However, in the opinion of the author of the current thesis, it should be noted that according to the wording of the current provision, this provision gives the Court the possibility to invite NGOs to give their expertise on the case if necessary. This provision does not give the possibility to an NGO to submit a brief on its own initiative. Therefore, one must consider how loosely or narrowly, the term “*amicus curiae*” should be interpreted. By translating it from Latin to English, it means the friend of the court. However, the question regarding the entering remains, since “a friend” can be one who is invited and also one who enters by himself. However, usually if one considers that an *amicus curiae* can be an expert, e.g. an NGO, established by the Court and in doing so contribute to the case, then it can be that *amicus curiae* enter to the proceedings in a wider sense via Art 50.

¹¹² D. Shelton 2007, pp 150-151.; L. Bartholomeusz, pp 214-215.

¹¹³ D. Shelton 1994, p 625.

¹¹⁴ ICJ, 20. April 2010, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010, p 14, Judgment, p 167.

¹¹⁵ C. J. Tams. Art 50/9.

¹¹⁶ C.J. Tams. Art 50/10.

Nevertheless, compared to Art 34 (2), which reflects the so to say classical view for *amicus curiae* submissions and is in accordance with the definition given previously, to Art 50, it is clear that in the last provision there is no “on its own initiative” aspect, since the Court invites the NGO as an expert. Likewise, a party may request the participation of an expert according to Art 67 (1) of the Rules of Court¹¹⁷. However, the author of the current thesis recognises that this is a way for NGOs to have their impact on international law. However, it is not up to NGOs to decide whether to use Art 50 or not. The use of this provision is in the realm of the Court’s discretion. Therefore, it should be not regarded as a way in for *amicus curiae*.

Secondly, the procedure governing by Art 50 has to take into account Art 67 (1) of the Rules of Court. The named provision foresees that if an enquiry is conducted or an expert opinion called upon, then parties have a right to be heard on the matter at hand. Furthermore, after that an order to this effect is given with specific further guidelines.¹¹⁸ This provision gives two opportunities: appoint the experts directly or set out the procedure by which they are appointed.¹¹⁹ Furthermore, by hearing the parties out, the parties have a right to object to the appointing of an expert. Therefore, depending on the states’ willingness, NGOs might or might not get to the Court. Probably, it is highly dependent on many factors. Nevertheless, through this, States give their input and the Court does not have to worry about the willingness of the State to engage non-state actors in the proceedings.

Thirdly, considerations about the status of experts or persons carrying out enquiries have to be taken into account. Pursuant to the GA Res. 90 (I) of 11 December 1946 Art 5 (a) (iii) witnesses, experts and persons performing missions by order of the Court in conducting their mission have a right to enjoy the privileges and immunities provided for in Art VI section 22 Convention on the privileges and immunities of the UN.¹²⁰

Furthermore, Art 50 does not prescribe for evidential value being attached to expert opinions or enquiries. Thus, the Court is free to assess the importance of the given information in terms of law.¹²¹ Hence, regarding this provision the real value of the *amicus curiae* is not certain. It is up to the Court to decide the value of the expertise in every separate case. Nevertheless, Art 50 has proven to be effective in cases involving complex technical, scientific or other issues

¹¹⁷ Rules of the International Court of Justice. 14 April 2005. 1978 ICJ Acts & Docs 4. Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (12.12.2015).

¹¹⁸ Rules of the International Court of Justice. 14 April 2005. 1978 ICJ Acts & Docs 4. Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (12.12.2015).

¹¹⁹ C.J. Tams. Art 50/15.

¹²⁰ GA Res. 90 (I), 11 December 1946, Privileges and immunities of members of the International Court of Justice, The Registrar, Officials of the Registry, Assessors, The agents and counsel of the parties and of witnesses and experts. Available online: <http://www.un.org/documents/ga/res/1/ares1.htm> (12.12.2015).

¹²¹ C.J. Tams. Art 50/11.

beyond the judges' expertise.¹²² This opportunity has been used in the Corfu Channel case in order to verify the facts and solve the question of States' responsibility¹²³ and in the Gulf of Maine case to assist in the delimitation of the maritime boundary.¹²⁴

There is some debate as to whether Art 50 can be used also in advisory proceedings. The PCIJ considered the function in the context of the Court's advisory proceedings and found that: "The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy".¹²⁵ Furthermore, Art 68 ICJ Statute states that in the advisory functions the Court is guided by the provisions of the ICJ Statute that apply in contentious cases to the extent to which it recognizes them to be applicable.¹²⁶ Therefore, it is evident that the Court may rely on the contentious proceedings' rules in advisory proceedings if appropriate.

In the Western Sahara case, Judge de Castro in his Separate opinion concluded, "even if Article 68 of the Statute is interpreted in the broadest manner, it would not seem that in advisory proceedings the Court is entitled to make arrangements connected with the taking of evidence (Statute, Art. 48) or to entrust anyone with the task of carrying out an enquiry or giving an expert opinion (Statute, Art. 50)".¹²⁷ He explained it as follows, nowadays, when advisory opinions' case facts are disputed or controversial, the Court is not competent to decide upon the issue. Mainly this is the case, since the Court cannot satisfy itself with such evidence. Furthermore, the Court can collaborate with the requesting body only when the Court itself has verified facts' accuracy. It is the Court's responsibility to verify the factual data on which the opinion will be based. Further the Judge found that the means for conducting an investigation is not provided to the Court.¹²⁸ Thus, he was concerned with the Court not having the competence to do it. Nevertheless, it seems to the author of the current thesis that Art 50 may be on the contrary helpful in that context to establish the uncertainties of advisory proceedings. Therefore, having an expert verifying anomalies, will increase the quality of the advisory

¹²² C. J. Tams. Art 50/25.

¹²³ ICJ, 9. April 1949, *Corfu Channel*, ICJ Reports 1949, p 4, Judgment, p 124 *et seq.*

¹²⁴ ICJ, 12. October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports 1984, p 246, Judgment, p 165 *et seq.*

¹²⁵ PCIJ, 23. July 1923, *Status of Eastern Carelia*, Advisory Opinion, PCIJ Series B, No 5, p. 28.

¹²⁶ Statute of the International Court of Justice. 26. June 1945. 33 UNTS 993.

¹²⁷ ICJ, 16. October 1975, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p 12, Separate opinion of de M. de Castro, p 138.

¹²⁸ ICJ, 16. October 1975, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p 12, Separate opinion of de M. de Castro, p 138.

opinion. Academics have concluded that Art 50 is applicable also in the context of advisory opinions.¹²⁹

Hence, Art 50 ICJ Statute can be viewed as an alternative way for an NGO to enter ICJ proceedings as *amicus curiae*. However, it seems more like a provision for the Court to decide if and when additional expert help is needed. It does not give an NGO the possibility to intervene on its own initiative. Furthermore, there are two differing opinions as to whether the provision is also applicable to advisory proceedings or not.

2.1.2. Advisory opinions

In the course of advisory proceedings, the basis for intervention has been seen in Art 66 (4) ICJ Statute. The named provision establishes that “the Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question”. Art 66 (2) provides, therefore, that the Court decides which State or international organization is “likely to be able to furnish information on the question”. In practice, the court has showed an open attitude, both towards States and public international organisations. It enjoys great latitude to decide who to invite and also when. However, the Court may distinguish between written and oral proceedings.¹³⁰

Art 66 is less strict than Art 34 (2). It refers to international organisations, not to public international organisations. Therefore, the essence of the organisation may vary and it is possible to conclude that any international organisation could be a subject of this provision. Thus, even an NGO could be entitled to receive such information. Nevertheless, Art 66 in practice has the same meaning as Art 34 (2).¹³¹

Essentially, the provision was recreated from Art 73 of the PCIJ Rules of Court and later Art 66 PCIJ Statute. From the revision process, it is evident that the PCIJ was aware that this provision could encompass the participation of NGOs.¹³²

Anzilotti was reminding others that “Je rappelle ici la Résolution du Conseil du 17 mai 1922. En second lieu, ne conviendrait-il pas de définir un peu mieux quelles sont les organisations

¹²⁹ G. M. White. *The use of experts by international tribunals*. Syracuse University Press 1965, pp 43-46.

¹³⁰ A. Paulus. Art 66/11.

¹³¹ P. H. Kooijmans, p 25.

¹³² Y. Ronen, p 86.

internationales visées par l'article ? A mon avis, il ne saurait être question que des organes de la Société des Nations et des organes créés par une union internationale (Commissions et Bureaux internationaux). On se rappellera peut-être que la malheureuse expression (organisations internationales) fut adoptée pour ne pas mentionner particulièrement le Bureau international du Travail".¹³³ It is evident from this citation why the wording "international organisations" was used: to avoid saying directly that the ILO can give its submissions in the course of advisory proceedings concerning labour cases. Furthermore, it is clear that already in 1922, the term suggested that only organisations of States and States themselves could be parties in front of the ICJ.

Judge Dionisio Anzilotti was concerned that allowing any kind of international organisation to submit its views to the Court would be difficult and the Court might find itself in a complex situation. The main reason for this is that an unofficial organisation, in reality, did not incur responsibility. Although since the initiative would rest with the Court itself, Judge Anzilotti recognized that hypothetically this kind of danger would merely exist. Nevertheless, he was of the opinion that Art 50 ICJ Statute sufficed to enable the Court to apply it to private organisations capable of supplying useful information when these organisations were offering all the necessary guarantees.¹³⁴ It can be further interpreted from his standpoint that Art 66 did not need to encompass INGOs.

The only case where the ICJ has allowed an NGO as *amicus curiae* in the course of advisory proceedings was the case of the International Status of South-West Africa. Concerning the named case, the Human Rights League requested in March 1950 to be able to furnish information before the Court according to Art 66 (2).¹³⁵ The Court permitted the Human Rights League to give its opinion as *amicus curiae* in the named case and gave a deadline for such a submission.¹³⁶ However, the submission arrived after the given deadline and therefore, the Court could not accept it. Furthermore, the form of the written submission was not acceptable. Firstly, there was no reference to the pamphlet enclosed with the same envelope that the letter

¹³³ PCIJ, Series D Addendum to No 2, Acts and Documents concerning the Organization of the Court. Revision of the Rules of the Court. Detailed Minutes of the Meetings of the Court Concerning the Revision of the Rules of Court, 1926, p 290.

Available online: http://www.icj-cij.org/pcij/serie_D/D_02_acts_and_doc_serie_d_add_to_n2.pdf (10.02.2016).

¹³⁴ PCIJ, Series D Addendum to No 2, Acts and Documents concerning the Organization of the Court. Revision of the Rules of the Court. Detailed Minutes of the Meetings of the Court Concerning the Revision of the Rules of Court, 1926, p 224.

Available online: http://www.icj-cij.org/pcij/serie_D/D_02_acts_and_doc_serie_d_add_to_n2.pdf (10.02.2016).

¹³⁵ ICJ, 11 July 1950, *International Status of South West Africa*, Advisory Opinion, ICJ Reports 1950, p 128, Part III Correspondence, Robert Delson to Registrar, 7. March 1950, p 324.

¹³⁶ ICJ 11 July 1950, *International Status of South West Africa*, Advisory Opinion, ICJ Reports 1950, p 128, Part III Correspondence, The Registrar to Mr. Robert Delson, 16. March 1950, p 327.

was sent. Secondly, the pamphlet bore no signature for authentication, only the printed names of the International League for the Rights of Man and of several American, British and French lawyers, including that of Mr. Robert Delson, who first applied to the Court on the matter.¹³⁷ Therefore, it can be seen that the ICJ itself was willing to accept the brief; however, the NGO itself missed the chance.

Nevertheless, in its Rules, the PCIJ permitted the participation of NGOs in several advisory proceedings under Art 73 of its Rules.¹³⁸ Contrary to the ICJ's practice, the PCIJ has invited NGOs representing employers and employees in the ILO to furnish information in more than one case.¹³⁹ Notwithstanding that, the ILO had a special status before the PCIJ pursuant to PCIJ Statute Art 26. These cases are noteworthy because the PCIJ asked private entities for their observations through the ILO and not the ILO directly. This PCIJ practice might have been a consideration behind why the League for the Rights of Man was permitted to submit an *amicus* brief in the legal status of South-West Africa case in the first place. However, the strange aspect is that the PCIJ and the ICJ statutes are much alike; both see States as their subjects and not NGOs, but the PCIJ allowed private organisations to give their opinions in proceedings more than the ICJ.

In November 1970, the International League of the Rights of Man requested to be permitted to furnish information in the case of the Legal Consequences for States of the Continued Presence of South Africa in Namibia like the League was authorised to do in the case of South-West Africa. Furthermore, the League wanted to be able to hear the oral pleadings.¹⁴⁰ The Court denied the request.¹⁴¹ After the response, the League requested that only the written statements

¹³⁷ ICJ 11 July 1950, *International Status of South West Africa*, Advisory Opinion, ICJ Reports 1950, p 128, Part III Correspondence, The Deputy-Registrar to Mr. Asher Lans, 12. May 1950, p 346.

¹³⁸ A.-K. Lindbrom 2001, p 289.

¹³⁹ PCIJ, 31. July 1922, *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ Series B, No 1, p 9, p 11.; PCIJ, 12. August 1922, *Competence of the International Labour Organisation*, PCIJ Series B, Nos 2-3, p 10, p 11.; PCIJ, 15. November 1932, *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, PCIJ Series A/B, No 50, p 367.

¹⁴⁰ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Chairman of the Board of Directors of the International League for the Rights of Man to the Registrar, 10. November 1970, pp 639-640.

¹⁴¹ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the Chairman of the Board of Directors of the International League for the Rights of Man, 4. February 1971, p 672.

would be considered.¹⁴² The Registrar responded to that by stating the fact that the Court has not given leave to written nor oral submissions.¹⁴³

It is not known what the real considerations are behind the Court admitting the Human Rights League as *amicus curiae* in the one case and denying it in every other. It could have been that there was nothing to say on the matter by NGOs. Nevertheless, it might also be that the ICJ learned from the experience and just wanted to avoid the difficulties and complexity. However, if that is the case then the consideration to exclude NGOs from participation is not based on legal considerations and tendencies in the development of international law. The reasons are more selfish.

Nevertheless, in the same case, other organisations (among them the NGO, American Committee on Africa) also tried to submit their written statements, but were all denied.¹⁴⁴ On 13th of November 1970, George M. Houser, the executive director of the American Committee on Africa, submitted a request to the Registrar to be able to submit a statement in the matter. In the same request, Georg M. Houser referred to the Committee as an affiliate of the International League for the Rights of Man.¹⁴⁵ The Registrar, in the reply, denied such a request due to the American Committee on Africa not being an international organization and therefore it cannot exercise the right given in Art 66 (2) ICJ Statute.¹⁴⁶

In its further communication with the Court, the American Committee on Africa stated that it “believes that the refusal to accept its statement was unwarranted in law, inconsistent with prior practice, and incompatible with the best interests of the Court and of the people of Namibia.”¹⁴⁷

¹⁴² ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, The Chairman of the Board of Directors of the International League for the Rights of Man to the Registrar, 16. February 1971, p 678.

¹⁴³ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the Chairman of the Board of Directors of the International League for the Rights of Man, 18. March 1971, p 679.

¹⁴⁴ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the President of the American Committee on Africa, 4. February 1971, p 672.

¹⁴⁵ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Executive Director of the American Committee on Africa to the Registrar, 13. November 1970, p 643.

¹⁴⁶ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the Executive Director of the American Committee on Africa, 24. November 1970, p 647.

¹⁴⁷ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The President of the American Committee on Africa to the President of the International Court of Justice, 25. November 1970, p 649.

Incompatibility with the law refers to the case of the international status of South-West Africa. Furthermore, the Committee elaborates, “the rejection was unwarranted in law since Article 66 (2) of the Statute of the Court does not require the rejection of any statement, but merely specifies which ones the Court is bound to receive. No reasonable interpretation of the article compels the Court to reject valuable "information" merely because the Court was unaware of the existence of an organization prepared to present it.”¹⁴⁸ “The Committee is informed, moreover, that there does not appear to have been any formal communication addressed to the United Nations specifying the organizations from which a statement would be received. The Committee was aware only of a general notice concerning the request for the advisory opinion and the date for submission of statements (later extended by order of the Court): this notice was not addressed to any specified list of organizations, and the Committee had no reason to believe that any other communication had been sent out by the Court.”¹⁴⁹

The Committee is an international organisation, not affiliated to any government, thus, it is capable of bringing an insight to the Court, which no State is likely to present. It is able to set forth specific data and to make concrete proposals without concern for domestic repercussions, and it has no bureaucratic inhibitions. The Committee believes that it is in the interest of the Court and of the people of Namibia that the Court receive formal representations of as broad and inclusive a nature as possible on a question of such far-reaching significance as that now before the Court.¹⁵⁰ On 4th February 1971, the Court notified the Committee that the Court endorsed the refusal to accept the Committee’s written statement.¹⁵¹ The International League for the Rights of Man also submitted a request to be able to furnish the information before the Court in its written and oral proceedings, and was denied.¹⁵²

¹⁴⁸ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, the President of the American Committee on Africa to the President of the International Court of Justice, 25. November 1970, p 649.

¹⁴⁹ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The President of the American Committee on Africa to the President of the International Court of Justice, 25. November 1970, p 649.

¹⁵⁰ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The President of the American Committee on Africa to the President of the International Court of Justice, 25. November 1970, p 650.

¹⁵¹ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the President of the American Committee on Africa, 4. February 1971, p 672.

¹⁵² ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Correspondence, The Registrar to the Chairman of the Board of Directors of the International League for the Rights of Man, 4. February 1971, p 672.

It can be seen that concerning other organisations than the League for the Rights of Man, the explanation for refusal is the fact that these organisations are not international organisations in the sense of Art 66. However, the League on the Rights of Man does not have relevant information to give to the cases in which it was refused. That makes the line regarding the term “international organisations” blurry.

Before the adoption of the Practice Directions, the Court received several other requests for *amicus curiae* participation and denied them.¹⁵³ The great variety of *amicus curiae* requests led to the adoption of the Practice Directions.¹⁵⁴

In 2001 some clarity to this disputed term “public international organisation” with the adoption of the Practice Directions was provided. Direction No. XII states the guidelines in the case that an INGO submits an *amicus* brief. In its subsection 1, it foresees that in the case of a submission by an INGO occurring in an advisory opinion, it will not be the part of the case file.¹⁵⁵ Thus, it should be highlighted here that the wording of the practice direction does not forbid submitting NGO *amicus curiae* briefs but just states that they will not be considered in the case file. Subsection 3 of the same direction, however, states that these submitted briefs or documents will be archived in a designated location in the Peace Palace and all States and engaged intergovernmental organisations will be informed about the location of such a brief.¹⁵⁶ Therefore, in case they have an interest, the parties may actually get acquainted with the submissions and most probably take them into account in their own submissions and position regarding the issues under discussion. The question of whether they are interested to do it or not, is however, a separate question. Furthermore, in this case it has to be noted that Practice Direction XII gives guidelines only in cases of advisory opinions. It states nothing about contentious cases.

Contrary to its widespread practice, in 2003, the ICJ accepted directly concerned non-state actor to present written and oral statements before the Court. The Court has done so by way of relatively pragmatic considerations. The Court did not refer to a specific article of ICJ statute or of the Rules of the Court.¹⁵⁷

¹⁵³ ICJ, 21. June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, Pleadings Vol II, pp 642, 647, 649-650, 672 fn 29, 42, 45, 88, 89.

¹⁵⁴ A. Paulus. Art 66/24.

¹⁵⁵ ICJ, 21. March 2013, Practice Direction No 12.

Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (23.02.2016).

¹⁵⁶ ICJ, 21. March 2013, Practice Direction No 12.

Available online: <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (23.02.2016).

¹⁵⁷ ICJ, 19. December 2003, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, ICJ Reports p 428, p 429.

Hence, the ICJ compared to the PCIJ, is quite restrictive when allowing NGO *amicus curiae* participation. Nevertheless, both Courts are rather more conservative than liberal in granting these rights. There remain, however, many questions about the background of refusal decisions, since the Court usually did not elaborate on these issues in its responses to requests.

2.2. World Trade Organisation

2.2.1. The Panel Proceedings

The Uruguay round agreement: Art V (2) of the Marrakesh Agreement Establishing the WTO foresees consultation and cooperation with NGOs dealing with matters related to the WTO.¹⁵⁸ Furthermore, the WTO has adopted guidelines for arrangements on relations with NGOs.¹⁵⁹ Nevertheless, there is no provision that explicitly permits the submission of *amicus curiae* briefs by non-members, *i.e.* non-WTO members, international organisations, NGOs, or natural or legal persons in the instruments governing the procedure of the WTO system.¹⁶⁰ Furthermore, the DSU does not distinguish between NGO and International Organisation participation. Nevertheless, the DSU Art 1 (1) states firmly that the dispute procedure applies to WTO Member States.¹⁶¹ Thus, according to these rules it seems that NGOs could not be *amici* in front of the WTO DSB. The reason for that is a fact that NGOs are not members of WTO.¹⁶² Regarding the normative interpretation by the Panels and Appellate Body, the case is not that simple.

The WTO Appellate Body in the US-Shrimp case first addressed the issue of NGO participation in Panel Proceedings. The case stated that “the thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.”¹⁶³ Hence, the Appellate Body views Art 12 and 13 of the DSU as a means of *amicus curiae* participation. According to this interpretation, the DSB has the

¹⁵⁸ Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization. Available online: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (14.02.2016).

¹⁵⁹ WTO, WT/L/162, 23. July 1996, Guidelines for arrangements on relations with Non-Governmental Organizations. Available online: https://www.wto.org/english/forums_e/ngo_e/guide_e.htm (12.01.2016)

¹⁶⁰ J. Razzaque. Changing role of friends of the court in the International Courts and Tribunals. - Non-State Actors and International Law Vol 1, Issue 3, 2001, p 176 *et seq.*

¹⁶¹ Understanding on Rules and Procedures Governing the Settlement of Disputes. Annex 2 of the WTO Agreement. Available online: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. (7.11.2015)

¹⁶² Homepage of the World Trade Organisation. Members and Observers.

Available online: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (30.04.2016).

¹⁶³ WTO WT/DS58/AB/R, 12. October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para 106.

authority to establish its own process in order to be informed by the relevant facts and legal norms applicable to such facts.

Art 13 (1) of the DSU grants each panel the right to seek information and technical advice from any individual or body which it deems appropriate. This provision on the subject is quite loose. It gives the Panel a large discretion on the matter when choosing the type of advice and from whom. “Any individual body” is loose enough to include NGOs. In addition, the type of advice is quite large – information and technical advice. Moreover, the Appellate Body has explained that it is of the opinion that the word “seek” from Art 13 of the DSU can be read more broadly than in a strict manner.¹⁶⁴ Furthermore, from Art 13 (1), it is clear that *amicus* brief submissions are decidable case by case. All the benefits from the submissions have to be considered and evaluated before granting the leave or prohibiting the NGO participation, taking into consideration the complexity of the case. Although, there can be a right for an NGO to submit the brief, the Appellate Body emphasises that before submitting the brief, the NGO has to ask permission from the Panel. The Panel has the discretion to decide whether to enable it and on which conditions.¹⁶⁵

Furthermore, Art 13 (2) adds: “panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.” Hence, the information must be relevant to the case. Not every piece of information that an NGO wishes to submit may be considered admissible. The decision of the relevancy depends on the Panel’s discretion.

The Panel of the Shrimp case interpreted Art 13 only from an active solicitation perspective and stated nothing on the admission of unsolicited briefs.¹⁶⁶ On the contrary, the Appellate Body found that the Panel’s interpretation of the word “seek” is unnecessarily formal and technical.¹⁶⁷ Furthermore, it found that the Panel has a capacity to decide whether to accept

¹⁶⁴ WTO WT/DS58/AB/R, 12. October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para 107.

¹⁶⁵ WTO WT/DS58/AB/R, 12. October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body.

¹⁶⁶ WTO WT/DS58/R, 15. May 1998, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, para 7.8.

¹⁶⁷ WTO WT/DS58/AB/R, 12. October 1998, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para V 9.

such unsolicited briefs¹⁶⁸ or itself invite such briefs to be submitted¹⁶⁹. Therefore, it is clear that the Panel was stricter and interpreted the provision in a strictly according to its wording. That, however, is true. The provision does not explicitly state that an *amicus curiae* can give the information to the WTO DSB of its own initiative. Nevertheless, the Appellate Body, in its interpretation, granted such a right by interpreting the provision in a teleological manner and considered most probably the aims that these briefs could help the DSB to achieve.

In addition, India seemed surprised by the interpretation of the Appellate Body since the word “seek” already suggests that an *amicus curiae* cannot submit its observations of its own initiative. In conclusion, India found that the Appellate Body interpreted the provision loosely and wrongly.¹⁷⁰ Some other countries agreed (*i.e.* Thailand¹⁷¹, Pakistan¹⁷², Brazil¹⁷³, Mexico¹⁷⁴, Hong Kong¹⁷⁵ and Japan¹⁷⁶). On the other hand, others did not brought up this issue in the debate (*i.e.* the United States¹⁷⁷, European Communities¹⁷⁸, Australia¹⁷⁹, the Philippines¹⁸⁰ and Switzerland¹⁸¹). Since some of the countries did not bring up the issue, it can be concluded that they did not mind such an interpretation and are therefore in favour of unsolicited *amicus curiae* participation. Furthermore, it is an interesting tendency that economically strong countries favour *amicus curiae* participation of its own initiative, while countries with larger populations like transparency and the strictness of the rules. Most probably, the reason lies in the resources available. Economically stronger countries are more willing to risk having *amicus curiae* in the proceedings since they have more resources to deal with the outcome. While for the large population countries, these outcomes would be heavier to bear.

Art 12 of the DSU gives an overview of the Panel procedures and more precisely its Art 12 (1) provides for the obligation to follow the Working Procedures in Appendix 3 unless the Panel decides otherwise after consulting the parties to the dispute. Moreover, the DSU appendix 4 foresees special rules in the WTO dispute settlement system that are applicable to experts:

¹⁶⁸ WTO WT/DS58/AB/R, 12. October 1998, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para V 10.

¹⁶⁹ WTO WT/DS58/AB/R, 12. October 1998, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, para V 6.

¹⁷⁰ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 8.

¹⁷¹ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 3.

¹⁷² WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 5.

¹⁷³ WTO WT/GC/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 12.

¹⁷⁴ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 14.

¹⁷⁵ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, pp 15-16.

¹⁷⁶ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, pp 16-17.

¹⁷⁷ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 11.

¹⁷⁸ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, pp 11-12.

¹⁷⁹ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 13.

¹⁸⁰ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, pp 14-15.

¹⁸¹ WTO WT/DSB/M/50, 14. December 1998, Minutes of the Meeting, WTO Dispute Settlement Body, p 14.

mostly they consist of the regulation on how and when the information must be submitted. Thus, while satisfying the named provisions and interpreting the right to seek in a loose manner, *amicus* participation for NGOs could be acceptable. Despite that, it is important to notice that Art 13 of the DSU applies only to the Panel proceedings, and therefore the Appellate Body gave its opinion regarding *amicus curiae* regulation in Panel Proceedings.

Nevertheless, the Appellate Body's such approach was heavily criticised and this seemed to cause the Appellate Body to seek a lower profile for some time.¹⁸² The main criticism was that the WTO is an inter-governmental organisation. NGOs do not represent governments and therefore they should not be granted the status of *amicus curiae* in the WTO. Furthermore, the admissibility of *amicus* briefs is a substantive rather than a procedural issue, which should be decided by the WTO Members, not the Panel or the Appellate Body.¹⁸³ On the one hand, it is a valuable argument. The disputes in the WTO are State-centric and non-State actors cannot possibly have an interest in the matters. Therefore, there is no logical need to include them. On the other hand, while aiming for justice, NGO participation would be a way in. This criticism understands *amicus curiae* status narrowly. NGOs usually are specialised in some field and therefore care about it and by their participation, they can contribute to more just and equitable rulings. Moreover, NGOs can have a valuable insight to the matter that Panels and even States might not have. Therefore, the system should consider what the aims and goals in the dispute settlement are. However, the entirely different question is if States desire it or not. The participation of *amicus curiae* might make the outcome of the dispute unforeseeable, which States do not like. States do not want to lose power over the process and therefore are usually against NGO participation.

Despite this in 2000 in the Australia-Salmon case the Panel confirmed the Appellate Body's view from the US-Shrimp case and accepted the *amicus* briefs pursuant to the authority granted to the Panel under Art 13 (1) of the DSU.¹⁸⁴ Thus, this case shared the opinion of the Panel from the US-Shrimp case in desiring NGOs contribution.

In the European Communities-Asbestos case, the Panel received five written submissions from NGOs. Some of them the Panel took into account by referring also to the Appellate Body

¹⁸² W. J. Davey. The WTO dispute settlement system: the first ten years. - Journal of International Economic Law Vol 8, No 1, p 23.

¹⁸³ H. S. Gao. Amicus Curiae in WTO dispute settlement: theory and practice.- China rights forum No 1, 2006. Available online: http://www.hrichina.org/sites/default/files/PDFs/CRF.1.2006/CRF-2006-1_Amicus.pdf (8.11.2015).

¹⁸⁴ WTO WT/DS18/RW, 20. March 2000, *Australia - Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada*, Report of the Panel, paras 7.8-7.9.

decision in the US-Shrimp case. The Panel in this case also saw Art 13 of the DSU as a possibility to accept *amicus curiae* briefs from NGOs. One of the briefs was rejected due to it being submitted at the wrong stage of the proceedings when it could not be accepted.¹⁸⁵ Hence, in some cases the Panels have affirmed the Appellate Body's findings from the US-Shrimp case.

Furthermore, *amicus curiae* briefs have also been submitted by NGOs in other cases, and not in every case has the Panel elaborated on the issue of participation possibilities. For example in 2001 in the case European Communities-Anti-Dumping duties the Panel simply stated that it did not find it necessary to consider the *amicus curiae* brief submitted by an NGO.¹⁸⁶ No further elaboration on the reasons was given. However, as discussed above, part of the Panels discretion concerning NGO participation, is to decide if and on what terms a Panel may benefit from NGOs. The cited articles do not oblige the Panel to justify the rejection of *amicus* briefs by NGOs. It is a matter of the Panel's willingness and politeness to provide reasoning on the matter.

In the Canadian Softwood Lumber case, a Canadian NGO Interior Alliance was allowed to submit its *amicus curiae* observations to the Panel.¹⁸⁷ The role of the outcome of the NGO brief is not certain.¹⁸⁸ Nevertheless, it should be highlighted that in this case this was not an INGO but a regional NGO that was permitted to submit its observations in front of the DSB. However, in most cases in the area of international law, NGO *amici* are INGOs, and then there are rare cases like the one cited currently, which also allow regional NGOs to be *amici*.

To sum up, it can be seen that an NGO acting as an *amicus* may be a possibility in the context of the WTO. However, this possibility is highly debated. This possibility is quite difficult and not favoured by everyone.

2.2.2. The Appellate Body Proceedings

Similarly, to the Panel Proceedings, there is no explicit provision allowing for *amicus curiae* in the Appellate Body Proceedings neither in the DSU nor in the Working Procedures. On the other hand, there is no prohibition either.

¹⁸⁵ WTO WT/DS135/R, 18. September 2000, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, Report of the Panel, paras 8.12-8.14.

¹⁸⁶ WTO WT/DS141/R, 30. October 2000, *European Communities- Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*. Report of the Panel, para 6.1 and fn 10.

¹⁸⁷ WTO WT/DS236/R, 27. September 2002, *United States: Preliminary Determinations with respect to Certain Softwood Lumber from Canada*, Report of the Panel, para 7.2.

¹⁸⁸ C.L. Lim, *The Amicud Brief Issue at the WTO*. - Chinese Journal of International Law Vol 4 No 1, 2005, pp 85-120, p 94, fn 52.

This issue was discussed in the US-Carbon Steel case.¹⁸⁹ In this case, unsolicited *amicus* briefs were submitted by NGOs to the Appellate Body. The case cites as a basis for such participation Art 17 (9) of the DSU, which establishes that “working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information”. In the US-Carbon Steel case, the Appellate Body explains that this provision states clearly the broad authority of the Appellate Body in adopting procedural rules. These rules may not conflict with any rules and procedures in the DSU. However, the only restriction is the consultation obligation. In that sense, this links to the fact that by consulting with the Members (meaning the parties and third parties to the case), it is ensured that parties and decision-making authorities agree or at least have knowledge of such an intention. Neither the cited article nor the US-Carbon Steel case forbids NGO participation when the consultation results are negative (mostly when the consultants do not agree with NGO participation). Hence, on the discretion of the Appellate Body it is nevertheless possible to include NGOs in the matter. Thus, the Appellate Body is of the opinion that as long as they act in accordance with the provisions of the DSU and the covered agreements, they have the legal authority to decide whether to accept and consider any information that they believe is pertinent and useful in an appeal.¹⁹⁰

Furthermore, the Working Procedures gives a similar competence to the Appellate Body. According to Rule 16 (1), it is permitted to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the Working Procedures on the condition that it is not in contravention with the established Working Procedures and the DSU.¹⁹¹

In front of the Appellate Body in the European Communities-Asbestos case the participation of persons other than the parties and third parties to the dispute was also discussed. In this case, the Appellate Body decided to adopt the Additional Procedure pursuant to Rule 16 (1) of the Working Procedures for the purposes of this appeal only.¹⁹² In the Additional Procedure point 1 the reasoning for the need to adopt this procedure is cited as being in the interests of fairness

¹⁸⁹ WTO WT/DS138/AB/R, 10. May 2000, *United States- Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom*, Report of the Appellate Body.

¹⁹⁰ WTO WT/DS138/AB/R, 10. May 2000, *United States- Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom*. Report of the Appellate Body, para 39.

¹⁹¹ WTO WT/AB/WP/6, 16. August 2010, Working Procedures for Appellate Review.

¹⁹² WTO WT/DS135/AB/R, 12. March 2001, *European-Communities- Measures Affecting Asbestos And Asbestos-containing Products*. Report of the Appellate Body, para 51.

and orderly procedure.¹⁹³ The Appellate Body in this case gave a large scope for determining the persons who may submit briefs by stating that: “any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000.”¹⁹⁴ From this, it can be clearly seen that the Appellate Body accepts *amicus* briefs from everyone who has a wish to submit one. This interpretation does not narrowly permit only State actors to participate in WTO proceedings nor only NGOs. Even individuals as such could be subjected to submitting the briefs. Hence, the reasoning behind this is that it is most likely to guarantee just proceedings and therefore a just judgment and encourage anyone with the relevant information to come forward by contributing to the knowledge and outcome of the Appellate proceedings.

Nevertheless, many States (*e.g.* Mexico) criticised this WTO decision by highlighting that in the Uruguay Round the participation of *amici* was already discussed and rejected by States.¹⁹⁵ Furthermore, States found that in the named Asbestos case “by imposing such conditions, the Appellate Body had taken a decision that Members themselves had not adopted, thereby clearly contravening Art IX of the WTO Agreement and diminishing the rights and obligations of Members, in contravention of Art 19.2 of the DSU”.¹⁹⁶ States were concerned that in the case of a non-state actor’s participation, WTO Members would become observers rather than the main actors in establishing fundamental dispute settlement rules in the WTO.¹⁹⁷

On the other hand, not all the Appellate Body proceedings have allowed *amici* that are non-members in the context of the WTO. In the Carbon Steel case, the Appellate Body emphasised that in the WTO dispute settlement system, the DSU envisages participation only by parties and third parties to a dispute as a matter of legal rights. Furthermore, the Appellate Body cites Art 1 (1) of the DSU, according to which only Members have a legal right to participate as parties

¹⁹³ WTO WT/DS135/AB/R, 12. March 2001, *European-Communities- Measures Affecting Asbestos And Asbestos-containing Products*. Report of the Appellate Body, para 52.1.

¹⁹⁴ WTO WT/DS135/AB/R, 12. March 2001, *European-Communities- Measures Affecting Asbestos And Asbestos-containing Products*. Report of the Appellate Body, para 52.2.

¹⁹⁵ WTO WT/GC/M/60, 23. January 2001, *1. Communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities – Measures affecting asbestos and asbestos-containing products"*, Minutes of Meeting, para 53.

¹⁹⁶ WTO WT/GC/M/60, 23. January 2001, *1. Communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities – Measures affecting asbestos and asbestos-containing products"*, Minutes of Meeting, para 53.

¹⁹⁷ WTO WT/GC/M/60, 23. January 2001, *1. Communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities – Measures affecting asbestos and asbestos-containing products"*, Minutes of Meeting, para 83.

or third parties in a particular dispute.¹⁹⁸ The Appellate Body explains that non-WTO members, individuals and organisations have no legal right to make submissions to or to be heard by the Appellate Body. Thus, the Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by such individuals or organisations.¹⁹⁹ However, this decision did not deny the possibility of an NGO acting as *amici*. The Appellate Body states that it has the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which they find it pertinent and useful to do so. Although, in the current appeal, they did not find it necessary to take the two *amicus curiae* briefs filed into account in rendering their decision.²⁰⁰ Thus, they recognise their own right to decide whether to accept an NGO as *amici* or not. However, it is a right, not an obligation which came out in the case reasoning.

Furthermore, briefs have also been rejected due to the matter not being relevant to the tasks.²⁰¹ However, in this case the brief was addressing some legal issues arisen from the appeal.²⁰² It is clear that in the case that the NGO cannot contribute to the proceedings, there is no point including it. Therefore, from this the principle that NGOs should only be allowed to participate in the proceedings when they have relevant information can be derived. The relevance is the discretion of the Appellate Body to assess. Moreover, the prerequisite for NGOs having relevant information in the Appellate proceedings is not stated as being within the Appellate Body's discretion. In the Panel Proceedings regulation, it is explicitly stated that information must be relevant to the matter.

To sum up, there is a normative possibility to include NGOs as *amicus* in WTO dispute settlements. This possibility is also used in practice. However, it is not a common point of view.

¹⁹⁸ WTO WT/DS138/AB/R, 7. June 2000, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, para 40.

¹⁹⁹ WTO WT/DS138/AB/R, 7. June 2000, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, para 41.

²⁰⁰ WTO WT/DS138/AB/R, 7. June 2000, *United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, para 42.

²⁰¹ WTO WT/DS122/AB/R, 12. March 2001, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*, Report of the Appellate Body, para 78.

²⁰² WTO WT/DS122/AB/R, 12. March 2001, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*, Report of the Appellate Body, para 62.

3. Court Proceedings Protecting the Public Interest

3.1. International Criminal Court

The Statute of the International Criminal Court (also known as the Rome Statute) does not include a provision on the participation of *amicus curiae* in Court proceedings.²⁰³ However, Art 44(4) of the concerned Statute stipulates, “the Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or nongovernmental organizations to assist with the work of any of the organs of the Court.”

On the contrary, the ICC rules of procedure provide a basis for *amicus curiae* participation in Art 103 (1). This provision establishes that it may be useful for the proper determination of the case, invite or grant leave to a State, organization or person to submit any written or oral observation on any issue that the Chamber deems appropriate.²⁰⁴ Thus pursuant to this provision, the ICC can freely accept written and oral submissions from NGOs if it is considered desirable in order to achieve the proper administration of justice. However, Art 103 of the Rules of Procedure is a broad discretionary power in order to invite or, in the case of spontaneous submissions, to grant leave to submit observations.²⁰⁵

In the pre-trial of the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the Court received a request to submit *amicus curiae* comments written and orally by the NGO Women’s Initiatives for Gender Justice.²⁰⁶ The INGO wished to make a submission on the Pre-Trial Chamber I’s powers and duties interpretation of in Art 61 Rome Statute’s established confirmation hearing.²⁰⁷ The Defence strongly opposed this submission being accepted²⁰⁸ as did the Prosecutor²⁰⁹. The Prosecutor noted that this request went beyond the case since the *amicus curiae* wished the Prosecutor to change the charges. Furthermore, the *amicus* aimed to promote

²⁰³ Rome Statute of International Criminal Court. 17 July 1998. 2187 UNTS 90.

²⁰⁴ ICC-ASP/1/3 (Part.II-A), 9. September 2002, Rules of Procedure and Evidence. Available online: <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> (16.03.2016).

²⁰⁵ L. Bartholomeusz, p 242.

²⁰⁶ ICC 01/04-01/06, 7. September 2006, *The Prosecutor v. Thomas Lubanga*, Request submitted pursuant to Rule 103(1) of the Rules of Procedure and evidence for leave to participate as *amicus curiae* in the Article 61 confirmation proceedings (with confidential Annex 2), paras 1-2.

²⁰⁷ ICC 01/04-01/06-403, 7. September 2006, *The Prosecutor v. Thomas Lubanga*, Request submitted pursuant to Rule 103(1) of the Rules of Procedure and evidence for leave to participate as *amicus curiae* in the Article 61 confirmation proceedings (with confidential Annex 2), para 4.

²⁰⁸ ICC 01/04-01/06-442, 19. September 2006, *The Prosecutor v. Thomas Lubanga*, Defence Response to Request of the Women's Institute for Gender Justice to Participate as an Amicus Curiae, para 19.

²⁰⁹ ICC 01/04-01/06-478, 25. September 2006, *The Prosecutor v. Thomas Lubanga*, Prosecution's Response to Request Submitted pursuant to Rule 103 (1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings, para 22.

its interest, rather than demonstrate any links to the matter.²¹⁰ The Court decided to deny granting leave and invited the NGO to refile the submission in a more general case at issue.²¹¹ This is a notable situation. The invitation to refile the submission shows the Court's great willingness to have valuable outside input, also from NGOs. Moreover, the author of the current thesis has not come across other cases like this from the other courts, tribunals and organisations analysed.

The NGO submitted a new request²¹², to which the Prosecutor opposed for the same reasons as the NGO wished to add charges to the case.²¹³ However, the final decision on an *amicus curiae* submission is not available to the public; it has to be considered as being denied.²¹⁴ Therefore, it would be logical to conclude that it is not in the power of the *amicus curiae* to either change the charges or say anything about the severity of the charges. The *amicus*, therefore, could most probably give its expertise on the facts.

In the same case, the International Criminal Bar²¹⁵ and the Ordre des Avocats de Paris²¹⁶ wanted to submit their briefs as *amicus curiae*. The Registrar found that such participation must be in accordance with the "proper administration of justice", which was not the case in these submissions.²¹⁷ The Registrar also elaborated on the further requirements of the *amicus curiae* and stated that it has to be impartial and act in the interest of justice.²¹⁸ This also justifies why the previous submissions by Women's Initiatives for Gender Justice were denied. The intervention regarding the charges cannot be considered as being in the name of the proper

²¹⁰ ICC 01/04-01/06-478, 25. September 2006, *The Prosecutor v. Thomas Lubanga*, Prosecution's Response to Request Submitted pursuant to Rule 103 (1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings, para 12.

²¹¹ ICC 01/04-01/06-480, 26. September 2006, *The Prosecutor v. Thomas Lubanga*, Decision on Request pursuant to Rule 103 (1) of the Statute, p 4.

²¹² ICC-01/04-01-06, 10. November 2006, *The Prosecutor v. Thomas Lubanga*, Request submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae with Confidential Annex 2.

²¹³ ICC-01-04-316, 5. December 2006, *The Prosecutor v. Thomas Lubanga*, Reponse to Request Submitted Pursuant to Rule 103(1) of the Rules of the Procedure and Evidence for Leave to Participate as Amicus Curiae in the Situation in the Democratic Republic of Congo.

²¹⁴ I. Rossi, p. 296.

²¹⁵ ICC 01/04-01/06-918, 4. June 2007, *The Prosecutor v. Thomas Lubanga*, Motion and proposed Amicus Brief in relation to the pro se request for review of the Registry decision of 14 May 2007 by Thomas Lubanga Dyilo on behalf of the International Criminal Bar pursuant to Rule 103 of the Rules of Procedure and Evidence.

²¹⁶ ICC 01/04-01/06-917, 29. Mai 2007, *The Prosecutor v. Thomas Lubanga*, Demande d'intervention, à titre d'amicus curiae, de l'Ordre des Avocats de Paris (Règle 103 du Règlement de Procédure et de Preuve).

²¹⁷ ICC-01/04-01/06-923, 7. Juin 2007, *The Prosecutor v. Thomas Lubanga*, Observations du Greffier en application de la règle 20.1(d) du Règlement de procédure et de preuve relatives aux demandes d'intervention, à titre d'amicus curiae, paras 2-3.

²¹⁸ ICC-01/04-01/06-923, 7. Juin 2007, *The Prosecutor v. Thomas Lubanga*, Observations du Greffier en application de la règle 20.1(d) du Règlement de procédure et de preuve relatives aux demandes d'intervention, à titre d'amicus curiae, para 5.

administration of justice. Furthermore, such submissions will most probably raise the question of being partial. That is, however, not acceptable in the case of an *amicus curiae* participation.

Moreover, the Registrar gave guidelines for the successful admission of an *amicus curiae* intervention: firstly, the intervention has to be desirable for the proper administration of justice; secondly, the *amicus curiae* brief must deal with legal arguments and general legal points and not with factual arguments, and thirdly, it must enlighten the Court with a new legal issue relying on its proven expertise.²¹⁹ Thus, it is certain that *amicus curiae* participation cannot be random nor imprudent. The *amicus curiae* serves a certain value and certain aims. In the approving of *amicus curiae* submissions the Court, while exercising its discretion, must reckon with these guidelines highlighted in the Registrar's decision in order for the *amicus* participation to be in the proper administration of justice.

Furthermore, in the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen several *amici curiae* requests were submitted: the Uganda Victim's Foundation and the Redress Trust jointly submitted their request²²⁰ and Amnesty International submitted a second request²²¹.

The first request was allowed, however, the Court gave strict rules in doing so: the specific timeframe and issues on which the *amicus curiae* can elaborate.²²² Such a restriction fulfils the aim of getting the most needed information to the Court and restricting the misuse of the *amicus curiae* position. Within such restricted boundaries for giving an opinion, that which happened in the previously mentioned the Prosecutor v. Thomas Lubanga Dyilo case with the Women's Initiatives for Gender Justice cannot happen. A second request by Amnesty International was denied due to the Court not being sure if it needed assistance on the legal matters the INGO proposed.²²³

²¹⁹ ICC-01/04-01/06-923, 7. Juin 2007, *The Prosecutor v. Thomas Lubanga, Observations du Greffier en application de la règle 20.1(d) du Règlement de procédure et de preuve relatives aux demandes d'intervention, à titre d'amicus curiae*, para 6.

²²⁰ ICC-02/04-01/05-330, 31. October 2008, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Application by the Uganda Victims' Foundation and the Redress Trust for leave to submit observations to the Pre-Trial Chamber II of the International Criminal Court, pursuant to Rule 103 of the Rules of Procedure and Evidence.

²²¹ ICC-02/04-01/05-335, 7. November 2008, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Request pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to submit observation as *amicus curiae* in the proceedings under Article 19(1) of the Rome Statute of the International Criminal Court in the case of the Prosecutor.

²²² ICC-02/04-01/05-333, 5. November 2008, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on application for leave to submit observations under Rule 103.

²²³ ICC-02/04-01/05-342, 10. November 2008, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on application for leave to submit observations under Rule 103 dated 7 November 2008, paras 11-12 and p 6.

In 2009 in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Amnesty International sought leave to submit an *amicus curiae* submission²²⁴ as did Women's Initiative for Gender Justice²²⁵. Both INGOs were granted leave to submit their briefs and specific guidelines were provided. For Amnesty International, the issues were specified.²²⁶

Hence, from these examples it can be seen that the ICC is strict when providing permission to submit *amicus curiae* briefs. In addition, as can be seen from these examples, the Court has the competence to limit the issues that the *amicus curiae* can submit to the Court.

3.2. International Criminal Tribunal for former Yugoslavia

The Statute of the ICTY does not establish the possibility of *amicus* participation.²²⁷ However, Art 74 of the Rules of Procedure states “a Chamber may if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber”.²²⁸ Furthermore, in order to assist the submissions of an *amicus curiae*, the Court amended the document “Information concerning the submission of *amicus curiae* briefs” in February 2015. According to this document, an application can be submitted for leave to file an *amicus curiae* brief or to appear as *amicus curiae* unsolicited or in response to an invitation from the Chamber. This Chamber's invitation can be specific (*i.e.*, directed at an individual State, organisation or person(s)) or general.²²⁹ Notwithstanding the basis for the submission, the *amicus curiae* submissions shall be limited to questions of law and cannot include factual evidence relating to elements of a crime charged.²³⁰ The Chamber at its sole discretion may invite *amicus curiae* to participate in the oral argument.²³¹

²²⁴ ICC-01/05-01/08-399, 6. April 2009, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Application for leave to submit *amicus curiae* observations pursuant to rule 103 of the rules of procedure and evidence.

²²⁵ ICC-01/05-01/08-447, 13. July 2009, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Request for leave to submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence.

²²⁶ ICC-01/05-01/08-401, 9. April 2009, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, p 6; ICC-01/05-01/08-45, 17. July 2009, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, p 6.

²²⁷ ICTY, September 2009, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia. Available online: <http://www.icty.org/en/documents/statute-tribunal> (14.03.2016).

²²⁸ ICTY IT/32/Rev.50, 8. July 2015, Rules of Procedure and Evidence.

Available online: <http://www.icty.org/en/documents/rules-procedure-evidence> (10.02.2016).

²²⁹ ICTY IT/122/Rev.1., 16. February 2015, Information concerning the submission of *amicus curiae* briefs, para 3.

²³⁰ ICTY IT/122/Rev.1., 16. February 2015, Information concerning the submission of *amicus curiae* briefs, para 9a.

²³¹ ICTY IT/122/Rev.1., 16. February 2015, Information concerning the submission of *amicus curiae* briefs, para 9d.

In the Milošević case, Milošević did not recognize the ICTY and refused to defend himself in person or to appoint defence counsel.²³² In response, the Chamber adopted an innovative solution by deciding to appoint *amicus curiae* to assist the Chamber in ensuring a fair trial.²³³ It has been found that this solution is not persuasive for several reasons, *inter alia* that the judges are the guardians of justice and it is not clear how they need assistance for ensuring a fair trial and furthermore in criminal matters there is a debate between two parties before an impartial arbiter. Nevertheless, the essence of the trial requires that the charges must be examined by way of confrontation between these parties.²³⁴ The role of *amicus curiae* in the current case is blurry and uncertain. Usually, the *amicus* has to be impartial; however, in the current case, it seems that the Tribunal wants *amici* to represent the accused. That, in the opinion of the author of the current thesis, goes beyond the main aims of *amicus*. Zappalà, in his opinion, also found that an *amicus* does not fulfil the named criteria and therefore can hardly be considered a Party.²³⁵

The first *amicus curiae* briefs before the ICTY were submitted in the Tadić Case.²³⁶ These briefs were filed by Christine Chinkin and a joint *amicus curiae* brief was submitted by Rhonda Copeland, Jennifer M. Green, Felice Gaer and Sara Hossain on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, the Center for Constitutional Rights, the International Women's Human Rights Law Clinic of the City University of New York, the Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services.²³⁷ Later in the same case, the NGO, Juristes sans Frontières, wanted to submit a brief and was granted such leave to file a written brief as *amicus curiae* in the appeal.²³⁸ However, although the briefs were allowed, there is no reference to the content of the *amicus* briefs in the judgments of the case, nor can the influence of the briefs on the judgments be seen. Therefore, it cannot be analysed whether the Tribunal took submissions into consideration while deciding the case.

Furthermore, in the Furundžija case, on 9 November 1998 the Trial Chamber received an application to file an *amicus curiae* brief from eleven applicants who were scholars of the

²³² S. Zappalà, p 63.

²³³ ICTY IT-02-54, 30. August 2001, *Prosecutor v. Slobodan Milošević*, Order inviting designation of *amicus curiae*.

²³⁴ S. Zappalà, pp 63-64.

²³⁵ S. Zappalà, p 64.

²³⁶ ICTY IT-94-1-T, 7. May 1997, *Prosecutor v Duško Tadić*, Opinion and Judgement of Trial Chamber II, para 11.

²³⁷ ICTY IT-94-1-T, 7. May 1997, *Prosecutor v Duško Tadić*, Opinion and Judgement of Trial Chamber II, para 11.

²³⁸ ICTY IT-94-1-T, 7 May 1997, *Prosecutor v Duško Tadić*, Opinion and Judgement of Trial Chamber II, para 15.

international human rights of women or representatives of NGOs.²³⁹ The applicants requested the Tribunal to reconsider its decision having regard to the rights of witness "A" to equality, privacy, personal security and to representation by counsel.²⁴⁰ Furthermore, in the granting order, the Trial Chamber found that the Trial Chamber for the purposes of the judgment would duly consider any relevant parts of briefs.²⁴¹ This suggests that briefs are to some extent to be considered when deciding the case. However, once again there is no solid proof of that.

In the case of Blaškić, Judge Gabrielle Kirk McDonald invited the submission of *amicus curiae* briefs on the issues raised in the case.²⁴² Leave to submit briefs was granted to many individual experts on international law (e.g. Bruno Simma) and organisations, including some NGOs such as the Max Planck Institute for Comparative Public Law and International Law, Juristes sans Frontières, the Lawyer's Committee for Human Rights and the Coalition for International Justice.²⁴³ The Court invited all that were granted leave to attend the hearing on 11th April 2011 in order to respond to the questions of Judges and give further assistance if needed.²⁴⁴ Nevertheless, the *amicus curiae* briefs were not mentioned in the judgment of the Trial Chamber.²⁴⁵

Furthermore, the Erdemović case has been seen as a sample case for persons and organisations who/which sought to appear as *amicus curiae* in proceedings.²⁴⁶ Nevertheless, there is not a Tribunal Order granting leave, nor mentioning *amicus* participation in the judgments.²⁴⁷ Hence, Anna-Karin Lindblom concluded that it may be assumed that leave was refused.²⁴⁸

To sum up, it is clear that the Tribunal is willing to accept *amicus curiae* in the proceedings and it is not highly selective on the question of who can be *amici*, meaning they allow individuals

²³⁹ ICTY IT-95-17/1-T, 10. December 1998, *Prosecutor v. Anto Furundzija*, Judgement of the Trial Chamber, para 35.

²⁴⁰ ICTY IT-95-17/1-T, 10. November 1998, *Prosecutor v. Anto Furundzija*, Order granting leave to file *amicus curiae* brief.

²⁴¹ ICTY IT-95-17/1-T, 10. November 1998, *Prosecutor v. Anto Furundzija*, Order granting leave to file *amicus curiae* brief.

²⁴² ICTY IT-95-14, 14. March 1997, *Prosecutor v. Tihomir Blaškić*, Order Submitting the Matter to Trial Chamber II and Inviting *Amicus Curiae*.

²⁴³ ICTY IT-95-14, 11. April 1997, *Prosecutor v. Tihomir Blaškić*, Order Granting Leave to Appear as *Amicus Curiae* (twelve orders); ICTY IT-95-14, 14. April 1997, *Prosecutor v. Tihomir Blaškić*, Order Granting Leave to Appear as *Amicus Curiae*.

²⁴⁴ ICTY IT-95-14, 11. April 1997, *Prosecutor v. Tihomir Blaškić*, Order Granting Leave to Appear as *Amicus Curiae*.

²⁴⁵ ICTY IT-95-14, 3. March 2000, *Prosecutor v. Tihomir Blaškić*, Judgement of the Trial Chamber.

²⁴⁶ A/52/375, 18. September 1997, Report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, para 50. Available online: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1997_en.pdf (30.03.2016).

²⁴⁷ ICTY IT-96-22, *The Prosecutor v. Dražen Erdemović*, Case-related documentation.

²⁴⁸ A.-K. Lindblom 2001, p 294.

and NGOs. However, it is not certain to what extent and if the Tribunal takes into consideration the submissions filed by *amici*. Maybe it does.

3.3. Special Court for Sierra Leone

Unlike the ICTY and the ICTR, the SCSL was established by an agreement between the UN and Sierra Leone. The Special Court was established with the aim of the prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30th November 1996.²⁴⁹

Similar to the Statutes of the ICTR and the ICTY, the Statute of the SCSL does not foresee *amicus curiae* participation²⁵⁰. Nevertheless, SCSL Rule 74 states that the Chamber have a right to invite or grant leave to any State, organization or person to make submissions on any issue specified by the Chamber.²⁵¹ Hence, there is no limitation against NGOs submitting briefs.

In the case of *Morris Kallon*, the SCSL allowed NGOs (*i.e.* the Lawyers Committee for Human Rights and the International Commission of Jurists) to submit written briefs and present oral submissions.²⁵² In the decision, the Court explained that these NGOs are distinguished international organisations, which have experience in dealing with issues relating to torture, international law and war crimes. The Court found that these organisations did not seek leave to intervene due to an ulterior motive (*e.g.* to gain publicity for themselves or to use the Court's privileges and immunities to put declarations on the record or to promote some hidden agenda). On the contrary, they offered competent guidance on the complex issues.²⁵³ Therefore, in order to be successful in gaining permission to submit written and/or oral submissions, an NGO cannot be a random. It has to be an expert in the field with a wish to contribute to justice. However, as highlighted by the Court, the organisations wanting to intervene might, in some cases, have agendas of their own. That is a threat to the *amicus curiae*'s purpose to contribute to justice and hence has to be avoided.

²⁴⁹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002. Available online: <http://www.rscsl.org/Documents/scsl-agreement.pdf> (15.03.2016).

²⁵⁰ Statute of the Special Court for Sierra Leone. 16. January 2002. 2178 UNTS 138.

²⁵¹ SCSL Rules of Procedure and evidence. 31. May 2012.

Available online: <http://www.rscsl.org/Documents/RPE.pdf> (15.03.2016).

²⁵² SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *amicus curiae* brief and to present oral submissions.

²⁵³ SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *amicus curiae* brief and to present oral submissions, para 7.

Furthermore, in the named case, the Court gave general guidance on the interpretation of Rule 74. It emphasised that an *amicus curiae* is usually invited because of its experience on the legal subject in question, *amicus curiae* will be expected to present all relevant materials and if appropriate to express a view on the law. However, the counsel for the parties should have no inhibitions in examining or challenging that view.²⁵⁴ Moreover, it emphasises that intervening parties may have a direct or an indirect interest: direct in the sense that the decision will be likely to create a precedent affecting them in the future and indirect in the sense that an *amicus* may wish to have the law clarified, declared or developed in a particular way.²⁵⁵ The Special Court does not grant leave for *amicus* submissions according to its subjects. Every third person that is in possession of material and wishes to submit a brief should properly convey this to the Prosecution or the Defence.²⁵⁶

While deciding on the admissibility of *amicus curiae* brief, the Trial Chamber considered the jurisprudence of other criminal tribunals, and in conclusion listed three grounds for admissibility. Firstly, the applicant wanting to become *amicus curiae* has to have a strong interest in or a strong view on the subject matter before the Court. Secondly, it is desirable to enlighten the Tribunal on the occurred events. Finally, it might be effective “to gather additional legal views with respect to the legal principles involved, not with respect to the particular circumstances” of the concerned case.²⁵⁷ Hence, the submissions of the potential amici have to be efficient in order to render a just decision on the matter. Notwithstanding the revision of other criminal tribunals, contrary to the precedent set by the ICTR, *amicus* briefs will be admissible in the context of the SCSL regardless of whether all of the submissions relate to “live issues”.²⁵⁸ Judge Robertson stated, in order to highlight some problematic aspects, that “it may be, as the Prosecution protest, that these submissions will go wider than the issues before the Court, but if so, such inappropriate breadth will be ignored and will not be examined in the course of the short oral hearing they will be allocated. In any event, the Prosecution will have every

²⁵⁴ SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for leave to file *amicus curiae* brief and to present oral submissions, para 3.

²⁵⁵ SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for leave to file *amicus curiae* brief and to present oral submissions, para 4.

²⁵⁶ SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for leave to file *amicus curiae* brief and to present oral submissions, para 10.

²⁵⁷ SCSL-2002-07-PT, 17 July 2003, *The Prosecution against Morris Kallon*, Decision on the application for leave to submit *amicus curiae* briefs, para 9.

²⁵⁸ S. Williams. H. Woolaver. The Role of the *Amicus curiae* before International Criminal Tribunals. - International Criminal Law Review Vol 6, Issue 2, 2006, p 177.

opportunity to refute or confound their arguments as of course will the defence”.²⁵⁹ Thus, he recognised the possibility that the NGOs’ submissions might not always be appropriate. Mainly these submissions may address the issues that are not with the relevant importance to the proceedings. However, in these cases the Chambers are allowed to reject the case, since the judges are the guardians of justice. Thus, the issues, which the *amici* can elaborate on, must be verified by the court. In the end, the court decides on what matters it needs additional information.

Not in every case has the submission been allowed by the SCSL. In the Fulana and Kondewa case (CDF case), the Court denied Human Rights Watch leave to appear as *amicus curiae*.²⁶⁰ The Court explained that the information that the NGO would have been able to give was unnecessary for the Court since it was already available before the brief. Furthermore, it stated that the Court is composed of Judges with sufficient professional standing and experience to deal with the issues.²⁶¹ Thus, it can be seen, that in this case the Court used its right to decide which matters are useful and need further assistance.

In conclusion, the SCSL is welcoming in granting leave to submit briefs and participate in oral proceedings as *amicus curiae*. However, this decision is highly dependent on the discretion of the judges sitting in the case; there are at least three criteria, which are mentioned above, to be considered while accepting NGOs or other persons to submit briefs. Mainly, the aim of the *amicus* in the SCSL is to render the proceedings more just.

²⁵⁹ SCSL-2003-07, 1. November 2003, *The Prosecution Against Morris Kallon*, Decision on application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *amicus curiae* brief and to present oral submissions, para 7.

²⁶⁰ SCSL-2004-14-A, 21. January 2008, *The Prosecutor v Fulana and Kondewa (CDF case)*, Decision on the Request by Human Rights Watch for leave to appear as *Amicus Curiae* Pursuant to Rule 74.

²⁶¹ SCSL-2004-14-A, 21. January 2008, *The Prosecutor v Fulana and Kondewa (CDF case)*, Decision on the Request by Human Rights Watch for leave to appear as *Amicus Curiae* Pursuant to Rule 74, para 8.

4. Human Rights Court Proceedings Protecting Individual Interests at the Regional Level

4.1. European Court of Human Rights

The ECHR does not refer explicitly to *amicus curiae* participation but to third party participation. Art 36(2) ECHR establishes that “the President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any contracting State which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional circumstances, to take part in an oral hearing”.²⁶² Thus, according to this article, an NGO could fall under “any concerned person” since the article does not distinguish between persons. However, such a kind of *amicus curiae* participation has to serve the interests of the proper administration of justice. The aim is that the Court can have all available information before rendering a judgment in the case.²⁶³

The detailed guidelines of such an intervention are established in Art 44 of the Rules of Court.²⁶⁴ Furthermore, ECHR Rule 61(3) states: “requests for leave for this purpose must be duly reasoned and submitted in one of the official languages, within a reasonable time after the fixing of the written procedure.” Thus, it is evident that the NGO, who wants to be granted a leave to submit *amicus curiae* submissions, has to give its reasons for that. The reasoning, however, has to fulfil the criteria named in the provision.

In human rights related cases *amicus curiae* intervention by NGOs has been seen to seek five main objectives: to reinforce the position of individual applicants by giving external and objective support to the arguments invoked; to put forward common interests not represented; to contribute to the development of international law; to promote fundraising; and to raise the attention of the public opinion.²⁶⁵ Hence, the considerations behind what form of *amicus curiae* participation is allowed before the ECtHR are ambiguous and suggest that *amicus curiae* participation must have a value and effect to the proceedings. Moreover, *amicus curiae* interventions have achieved important goals in the ECtHR proceedings. For instance, in the case of *Soering v. United Kingdom* Amnesty International, acting as *amicus curiae*, convinced the Court that the “death row phenomenon” constituted inhuman treatment in violation of the

²⁶² Convention for the Protection of Human Rights and Fundamental Freedoms. 3. September 1953. ETS 5.

²⁶³ A.-K. Lindblom 2001, p 307.

²⁶⁴ Rules of Court, 1. January 2016. Available online: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (26.03.2016).

²⁶⁵ M. F. di Rattalma. NGOs before the European Court of Human Rights: beyond *amicus curiae* participation? - T. Treves. M. F. di Rattalma *et alii*. Civil Society, International Courts and Compliance Bodies. TMC Asser Press: The Hague 2005, p 58.

European Convention.²⁶⁶ Nevertheless, before 1998 private applicants were not considered full parties to the ECtHR, hence there were limited possibilities for *amicus* submissions.²⁶⁷

The first ever known request to submit information to the Court as *amicus curiae* was in the Tyrer case²⁶⁸, in which the request was denied without explanation. The request to submit written and oral submissions was filed by the National Council for Civil Liberties.²⁶⁹

Furthermore, in the case of Winterwerp, the British Government asked if the information could be submitted according to Rule 38 (1) and got the response that “[t]he Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear /.../ in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task”.²⁷⁰ Thus, the Court established that it has the capacity to decide, of its own initiative or by request, on the participation of *amicus curiae*. Furthermore, the current position of the Court does not limit the circle of persons. Therefore, according to it, NGOs could also be *amicus curiae* before the Court.

For the first time, in 1981, the ECtHR accepted the NGO Trades Union Congress (TUC)’s *amicus curiae* brief in the Young, James and Webster v. United Kingdom case and used the same procedure as in the case of Winterwerp.²⁷¹ The TUC representative was also allowed to participate in the oral proceedings.²⁷²

One of the landmark cases in the ECtHR for NGO *amicus curiae* participation is the Malone vs United Kingdom case. In the named case, the Post Office Engineering Union (also known as POEU) requested leave to submit written comments, indicating among other things its “specific occupational interest” in the case and five themes it would like to elaborate on in its written comments. The President of the ECtHR granted the leave. However, he did so on narrower terms than those the POEU requested. He established that “the comments should bear solely on certain [issues] of the matters referred to in the POEU’s list of proposed themes and then only “in so far as such matters relate to the particular issues of [the] alleged violation of the Convention which are before the Court [up] for decision in the Malone case”.²⁷³ Nevertheless, there is no further mention of the brief in the decision-making part of the judgment.²⁷⁴ However,

²⁶⁶ ECtHR, 7. July 1989, *Soering v United Kingdom*, 161 Ser. A.; M. F. di Rattalma, p 59.

²⁶⁷ A.-K. Lindblom 2005, pp 328-329.

²⁶⁸ ECtHR 5856/72, 1978, *Tyrer vs United Kingdom*.

²⁶⁹ D. Shelton 1994, p 630.

²⁷⁰ D. Shelton 1994, p 631.

²⁷¹ ECtHR 7601/76 and 7806/77, 13. August 1981, *Young, James and Webster vs United Kingdom*, para 8.; D. Shelton 1994, p 631.

²⁷² ECtHR 7601/76 and 7806/77, 13. August 1981, *Young, James and Webster vs United Kingdom*, paras 8-9.

²⁷³ ECtHR 8691/79, 2. August 1984, *Malone vs United Kingdom*, para 8.

²⁷⁴ ECtHR 8691/79, 2. August 1984, *Malone vs United Kingdom*.

from the named case, it is clear that submissions by NGOs have to be relevant to the case, meaning in the wider sense on the issues that are discussed in the court. Nevertheless, it may seem logical on a theoretical level but it may not always be the case in reality. If NGOs have their own agenda, it will not contribute to justice, which is the one of the main ideas of *amicus* participation. Thus, such a restriction is, in the opinion of this thesis' author, relevant. Similar to the Malone case, the Court allowed the National Association for Mental Health to participate as *amicus curiae* in the Ashingdane case. Furthermore, the Court established that *amicus* submissions should be strictly linked to certain case-connected matters.²⁷⁵

Amicus curiae briefs by NGOs have been allowed in many other cases.²⁷⁶ The most frequent *amici*, according to empirical studies, are the NGOs: Interights, the International Commission of Jurists, the AIRE Centre, the Helsinki Foundation for Human Rights, Liberty, Amnesty International, the Open Society Justice Initiative and Human Rights Watch.²⁷⁷ So from the empirical study conducted by Van Den Eynde, it is evident that the larger and powerful INGOs dealing with Human Rights are usually the ones that are interested in participating as *amici curiae*.

Regarding Estonian cases before the ECHR, several NGOs filed an *amicus curiae* submission in the Delfi case and their submissions are precisely mentioned in the judgment.²⁷⁸ The Helsinki Foundation for Human Rights highlighted the differences between the internet and traditional media. It explained that "online services like Delfi acted simultaneously in two roles: as content providers with regard to their own news and as host providers with regard to third-party comments."²⁷⁹ Furthermore, the *amicus* was of the opinion that authors of written comments should be liable.²⁸⁰

The INGO gave the opinion that the internet was an innovation that allowed any person to express his or her views to the world without needing permission from publishers. The aim of comment platforms is to enable and promote public debate. Furthermore, the NGO argued that making websites responsible for user made comments constitutes an unacceptable burden on

²⁷⁵ ECtHR 8225/78, 28. May 1985, *Ashingdane vs United Kingdom*, para 6.

²⁷⁶ The whole table of NGO participation as *amicus curiae* in ECtHR until 2013 is available in the L. van den Eynde study: L. van den Eynde. An empirical look at the *amicus curiae* practice of human rights NGOs before the European Court of Human Rights. - Netherlands Quarterly of Human Rights Vol 31/3, 2013, pp 295-313.

²⁷⁷ L. van den Eynde, p 285.

²⁷⁸ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*.

²⁷⁹ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 94.

²⁸⁰ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 95.

websites.²⁸¹ Furthermore, if they took all precautionary measures to remove content, they should not be held liable.²⁸²

According to the NGO Access, the fundamental rights of privacy and freedom of expression are supported by anonymity and pseudonymity. The regulatory prohibition of these is an interference with privacy and freedom of expression.²⁸³

The NGO Media Legal Defence Initiative also submitted its memorial by finding that through the possibility of commenting, readers could debate the news amongst themselves and with journalists. That turned commenting into the participatory form of speech which recognised the readers' voices.²⁸⁴ Furthermore, it established that a State has to ensure the necessary regulatory framework in order to protect and promote freedom of expression and also to guard other rights.²⁸⁵ This NGO also highlighted the tendencies in North America and Europe, in order to compare the situation with Delfi. Thus, monitoring before posting a comment was deemed unusual; post-publication moderation, however, a practical tendency.²⁸⁶

Such a wide range of references in the judgment suggests that the court took the *amici* submissions into consideration while rendering their judgement on the matter.

Overall, the ECtHR is generous in providing *amicus curiae* access to the proceedings to NGOs. However, the Court may limit the questions that the *amicus curiae* can raise. Nevertheless, the impact of the *amicus curiae* can be seen in some of the cases before the ECtHR.

4.2. Inter-American Court of Human Rights

4.2.1. Contentious cases

The Inter-American Court has an extensive *amicus curiae* practice, which differs between contentious and advisory proceedings.²⁸⁷ Regarding contentious cases, the Statute of the Inter-American Court of Human Rights does not contain an explicit legal basis for *amicus curiae* participation²⁸⁸ and neither does the American Convention on Human Rights²⁸⁹. The old Rules

²⁸¹ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 96.

²⁸² ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 97.

²⁸³ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 98.

²⁸⁴ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 101.

²⁸⁵ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 103.

²⁸⁶ ECtHR 64569/09, 16. June 2015, *Delfi vs Estonia*, para 104.

²⁸⁷ A.-K. Lindblom 2005, p 355.

²⁸⁸ The GA of the OAS, Resolution N° 448, October 1979, Statute of the Inter-American Court of Human Rights. Available online: <http://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp> (18.04.2016).

²⁸⁹ American Convention on Human Rights. 18. July 1978. OAS Treaty Series No. 36.

of Procedure also did not allow the participation of *amicus curiae*.²⁹⁰ The new Rules of Procedure established *amicus curiae* participation. The same Rules define the term “*amicus curiae*” as follows: “the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing”.²⁹¹ The basis for such participation has been seen in Art 45(1) of the Rules, which establishes that “*the Court may at any stage of the proceedings obtain on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant*”.²⁹² The current article does not explicitly allow for unsolicited *amicus curiae* participation; however this has been seen as a basis for it.²⁹³ It should be noted that in this rule the Court has not limited the circle of potential *amici*. Therefore, from the wording it can be concluded that NGOs could be subject to giving relevant information to the Court.

Art 44 of the Rules establishes the procedure for *amicus curiae* arguments. Its first subsection does not discriminate stating that *amici* can be any persons or institutions. Furthermore, the same provision states that the means are contained in Art 28(1) of these Rules of Procedure.²⁹⁴

The Inter-American Court of Human Rights has, in its contentious proceedings, admitted *amici curiae* briefs by NGOs many times. For instance, in the *Velásquez Rodríguez v. Honduras* case, the NGOs Amnesty International, the Association of the Bar of the City of New York, the Lawyers Committee for Human Rights and the Minnesota Lawyers International Human Rights Committee submitted their briefs to the Court.²⁹⁵ In the *Godínez Cruz v. Honduras* case some NGOs submitted their briefs: Amnesty International, the Asociación Centroamericana de Familiares de Detenidos-Desaparecidos, the Association of the Bar of the City of New York, the Lawyers Committee for Human Rights and the Minnesota Lawyers International Human Rights Committee.²⁹⁶ Furthermore, in the *Fairén Garbi and Solís Corrales v. Honduras* case, Amnesty International, the Asociación Centroamericana de Familiares de Detenidos Desaparecidos, the Association of the Bar of the City of New York, the Lawyers Committee

²⁹⁰ Rules of Procedure of the Inter-American Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1991, OAS Doc OEA/Ser.L/V/III.25 doc.7, p 18.

²⁹¹ The Rules of Procedure of the Inter-American Court of Human Rights, 16.-28. November 2009. Art 2(3). Available online: http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (23.03.2016).

²⁹² The Rules of Procedure of the Inter-American Court of Human Rights, 16.-28. November 2009. Available online: http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (23.03.2016).

²⁹³ I. Rossi, p 318.

²⁹⁴ The Rules of Procedure of the Inter-American Court of Human Rights, 16.-28. November 2009.

²⁹⁵ IACHR, 29. July 1988, *Case of Velásquez Rodríguez v. Honduras*, Judgment on merits, Series C No 4, para 38.

²⁹⁶ IACHR, 20. January 1989, *Case of Godínez Cruz v. Honduras*, Judgment on merits, Series C No 5, para 40.

for Human Rights and the Minnesota Lawyers International Human Rights Committee made their submissions to the Court.²⁹⁷ More recently in the case of *Espinoza González v Peru*, several NGOs appeared as *amici curiae*: the “Marisela Escobedo” Gender and the Justice Clinic of the Universidad Nacional Autónoma de Mexico and also Women’s Link Worldwide and the Legal Clinic of the Universidad de Valencia.²⁹⁸ However, in these named cases and in many other cases, there were no references to such submissions in the judgments themselves, beside the fact that they were submitted.

Nevertheless, NGOs in general have more rights before the IAcHR than they do elsewhere. For example, NGOs can also be parties in front of the Court. Nevertheless, there is a restriction that an NGO must be legally recognised by at least one member state (American Convention on Human Rights Art 44).²⁹⁹ However, in practice it has not been an issue.³⁰⁰ It can be concluded from this fact that American countries emphasise NGO rights and their protection more. Otherwise there is no explanation as to why NGOs can stand as parties in front of the IAcHR. Thus, it might also be that this society values NGO contribution to international law to the extent that it allows NGOs to protect their own rights. Nevertheless, there is no proof of this.

To sum up, it is clear that the IAcHR is eager to allow *amicus curiae* participation in its practice and has done so in many cases with NGOs. However, since there are neither citations nor references to the briefs in the judgments’ resolution parts or summaries of the *amici* observations in the briefs, the actual value of NGO participation is uncertain. Furthermore, many of the accepted NGOs are national NGOs rather than INGOs.

4.2.2. Advisory cases

Pursuant to Art 73(3) of the Rules of Procedure, the Presidency of the Court has a discretionary power to invite or authorise any interested party to submit a written opinion on the requested issues covered. Furthermore, Art 74 of the Rules allows the court to apply the rules governing contentious proceedings to advisory proceedings to the extent that it deems them appropriate.³⁰¹

The Court has allowed many NGOs to submit their briefs as *amici curiae*. Moreover, among the existing international tribunals, the Inter-American Court has the most extensive *amicus*

²⁹⁷ IAcHR, 15. March 1989, *Case of Fairén Garbí and Solís Corrales v. Honduras*, Judgment on merits, Series C No 6, para 47.

²⁹⁸ IAcHR, 20. November 2014, *Case of Espinoza González v. Peru*, Judgment on Preliminary Objections, Merits, Reparations and Costs, Series C No 289, para 13.

²⁹⁹ American Convention on Human Rights. 18. July 1978. OAS Treaty Series No. 36.

³⁰⁰ L. H. Mayer. NGO Standing and Influence in Regional Human Rights Courts and Commissions. - Scholarly Works 2011, paper 54, p 920.

³⁰¹ The Rules of Procedure of the Inter-American Court of Human Rights, 16.-28. November 2009. Available online: http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (23.03.2016).

curiae practice.³⁰² However, the Court rarely quotes the briefs in the judgments³⁰³, therefore, it is uncertain whether and to what extent the judgments take into account the opinions of the *amici*³⁰⁴.

Nevertheless, in the Advisory Opinion No 5 (Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism) some NGOs were allowed to submit their briefs. The NGOs that were allowed to participate as *amici curiae* in this case were: the Inter-American Press Association, the Colegio de Periodistas of Costa Rica, the World Press Freedom Committee, the International Press Institute, the Newspaper Guild and the International Association of Broadcasting, the American Newspaper Publishers Association, the American Society of Newspaper Editors and the Associated Press, the Federación Latinoamericana de Periodistas, the International League for Human Rights and the Lawyers Committee for Human Rights with the Americas Watch Committee and the Committee to Protect Journalists.³⁰⁵ The Inter-American Press Association and the Colegio de Periodistas of Costa Rica were also heard at the oral pleadings.³⁰⁶

Furthermore, the judgment also to some extent summarises their standpoints.³⁰⁷ The Colegio de Periodistas of Costa Rica pointed out that licensing guarantees journalists' independence and further emphasised that licensing existed in the organic laws of professional "colegios".³⁰⁸ Furthermore, the Federación Latinoamericana de Periodistas discussed that licensing guarantees the right to the freedom of expression of their ideas to societies.³⁰⁹ The Court rendered a judgement where it found that "*the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting*

³⁰² D. Shelton 1994, p 638.

³⁰³ D. Shelton. The Jurisprudence of the Inter-American Court of Human Rights. - American University International Law Review Vol 10, No 1, 1996, p 350.

³⁰⁴ A.-K. Lindblom 2001, pp 335-336.

³⁰⁵ IACHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, para 5.

³⁰⁶ IACHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, para 8.

³⁰⁷ IACHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, paras 60, 62.

³⁰⁸ IACHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, para 60.

³⁰⁹ IACHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, para 62.

information.”³¹⁰ Therefore, it can be concluded that, the Court took into consideration the standpoints of the permitted *amici* to the same extent.

In addition, in its Advisory Opinion 17, the Court also allowed three NGOs to participate as *amici* in the proceedings: Coordinadora Nicaragüense de ONG’s que trabajan con la Niñez y la Adolescencia (“CODENI”), Instituto Universitario de Derechos Humanos, A.C. of Mexico and Fundación Rafael Preciado Hernández, A.C. of Mexico.³¹¹ The Court made summaries of all the *amici* briefs and cited them in the judgment.³¹²

NGOs as *amici* were also allowed in advisory opinion 20³¹³ and advisory opinion 21³¹⁴. In advisory opinion 20, the brief summaries are stated in the judgement³¹⁵, however, in advisory opinion 21, they are added in the annexes which are only available in Spanish³¹⁶. Thus, in the most recent advisory opinion judgments, the briefs are usually mentioned in the judgment itself, however, in the previous advisory opinions that was not the case. This shows, most probably, the tendency of *amicus curiae* briefs starting to be more valuable in the judgment-making process than they were before. It might also be the case that only the content and the structure of the advisory opinion judgment has been changed. Thus, the influence of NGOs is not that evident.

To sum up, is certain that an NGO can appear as *amicus curiae* in front of the IAcHR. Usually the Court does not cite the brief in its judgments, however, in some cases this may be the case. The citing and the great number of briefs accepted most probably already shows their value to the proceedings and to the Court. Moreover, it can be seen from the examples (especially from their NGO names and titles) that some of the NGOs who were allowed to participate in the IAcHR proceedings were national NGOs.

³¹⁰ IAcHR OC-5/85, 13. November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion, Series A No 5, para 85.

³¹¹ IAcHR OC-17/02, 28. August 2002, *Juridical Condition and Human Rights of the Child*, Advisory Opinion, Series A No 17, para 9.

³¹² IAcHR OC-17/02, 28. August 2002, *Juridical Condition and Human Rights of the Child*, Advisory Opinion, Series A No 17, para 15.

³¹³ IAcHR OC-20/09, 29. September 2009, *Article 55 of the American Convention on Human Rights*, Advisory Opinion, Series A No 20, para 7.

³¹⁴ IAcHR OC-21/14, 19. August 2014, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion Series A No 21, para 6.

³¹⁵ IAcHR OC-20/09, 29. September 2009, *Article 55 of the American Convention on Human Rights*, Advisory Opinion, Series A No 20, para 11.

³¹⁶ IAcHR OC-21/14, 19. August 2014, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion, Series A No 21, para 15.

CONCLUSION

The aim of the current thesis was to investigate whether an NGO can participate as *amicus curiae* and if the answer is affirmative then, under which conditions and why NGOs are allowed to participate as *amicus curiae* in proceedings of international and regional courts and tribunals. Furthermore, in the cases where *amici curiae* have been allowed, this master's thesis investigated whether NGO *amicus* briefs have helped courts in deciding the case and if the briefs were taken into account in the first place. Overall, it is interesting to see whether there are any universal criteria for *amicus curiae* participation.

The current thesis originated from two hypotheses. Firstly, that there are no common rules in different institutions regarding NGO *amicus curiae* participation. Secondly, that *amici* has its impact on the judgment.

The substantive part of the current thesis was divided into three groups of institutions: state-centric dispute settlement proceedings, international criminal proceedings and regional human rights proceedings.

Compared to the other institutions, the ICJ has been most conservative and prohibitive regarding NGO *amicus curiae* participation. The results in the contentious and advisory proceedings are to some extent different, however, still conservative considering developments in the international law field.

It has been suggested that there are two possible basic provisions for NGO *amicus curiae* participation in the contentious proceedings: Art 34 (2) and Art 50 ICJ Statute. However, Art 50 seems more like the Court's opportunity to engage an expert, rather than an NGO's opportunity to intervene as *amicus curiae* of its own initiative. Notwithstanding, Art 50 is loose in its the circle of subjects and therefore, would most probably cause no problem for NGOs to give their expertise.

On the contrary, Art 34(2) is highly debated and restrictive as to the circle of subjects who can use it. The provision uses the term "public international organisation". However, from the grammatical interpretation, it is not clear who these organisations are. Furthermore, considering the historical interpretation of the provision, the drafting committee could not have meant NGOs at the time. However, in contemporary world it is debatable if the NGOs would be regarded as such organisations. The Court itself has never allowed an NGO to participate as an *amicus* in the course of contentious proceedings. The grounding case for such a refusal is the Asylum case, where the ICJ stated that an NGO is not a public international organisation.

Furthermore, the Rules of Procedure were amended and now they state that public international organisation denotes an organisation of states.

In its advisory proceedings, the ICJ has been more liberal than in contentious proceedings, but still conservative compared to other institutions analysed. The ICJ has once, in the advisory opinion of the Status of South West Africa, allowed the NGO League on the Rights of Man to submit its brief. However, this opportunity was missed since the INGO violated the time limit that was given by the Court. That could not be considered as a good start. This resulted in the Court not accepting the delayed brief. After that, the Court never allowed an INGO to intervene. Nevertheless, the ICJ's ancestor PCIJ itself invited an NGO to submit its observations in labour cases on at least two occasions.

Due to the wide range of INGO requests to submit *amicus curiae* briefs, the Court adopted Practice Directions that state that briefs submitted by NGOs are not part of the case file. This Direction does not explicitly forbid an NGO from entering. It simply does not give power to the brief. However, parties can still become acquainted with it and use it in their memorials and observations. This is the reason why it might be considered a loophole for INGOs to participate in ICJ proceedings.

The findings of this thesis suggest that in the case that provisions permitting *amicus curiae* are lacking, the WTO dispute settlement body may find a solution to include *amici* in the proceedings if they find it to be necessary. Nevertheless, there is no specific provision that explicitly allows or prohibits NGO participation as *amicus curiae* and the case law is highly dependable on the discretion of the dispute settlement body.

In the Panel Proceedings, the basis for NGO participation in the proceedings is Art 12 and Art 13 of the DSU. However, this is applicable only to the Panel Proceedings. The way in for NGO *amici* in the Appellate Body is by way of Art 17 (9) of the DSU and the Working Procedure Rule 16 (1). All the possibilities are used in practice.

The most significant decision concerning NGOs was made in the US-Shrimp case in the framework of the WTO, which was the first to allow NGO participation as *amicus curiae*. The case interpreted Art 13 of the DSU in a loose manner so that NGOs could be permitted to file *amicus curiae* briefs. The case is cited in many other later cases to establish the possibility to admit NGO briefs. However, there are still Panels that do not accept *amici* due to different reasons and of course; there is criticism on the international level as to why an NGO should not be considered as an *amicus* in the WTO: mainly because the WTO is a inter-state organisation. However, the dispute settlement in the WTO is meant for the Members of the WTO, there are

Panels and Appellate Body that have accepted their discretion to decide upon NGO participation as *amicus curiae*. The reasons may vary but the main goal is justice.

Furthermore, the Appellate Body in the European-Communities – Asbestos case used its discretion widely by establishing the Additional Procedure for anyone who wishes to submit an *amicus* brief in the case: by anyone they did not exclude anybody, even individuals.

Hence, the answer to the research question whether an NGO can be viewed as *amicus curiae* in the WTO dispute settlement system is affirmative. Nevertheless, it is highly debatable and a criticised option, but in proceedings a utilised option.

The second chapter in the present thesis concerned international criminal proceedings and, more precisely, the proceedings of the ICC, the ICTY and the SCSL. All of the regulatory frameworks of the criminal tribunals are similar in permitting NGOs to participate in the proceedings. There are no issues with the normative grounds. These institutions analysed are also liberal in granting permission to submit briefs. In the case of the Prosecutor v. Thomas Lubanga Dyilo, the ICC suggested refiling the submission which the INGO did. From the same case the rule is derived that *amici curiae* cannot intervene in the charges and severity of them but has to give its expert opinion on certain aspects. Usually in criminal proceedings, the Court or Tribunals established explicitly the issues on which NGOs can elaborate. Thus, criminal proceedings are liberal on granting permission and strict on the subject matter.

In criminal proceedings, the issue lies in the question of the value of the briefs. From this thesis, it is evident that the briefs are not usually mentioned in the decision part of the judgments. Therefore, to know the actual value in the cases is hard if not impossible. While criminal institutions are liberal in granting permission to NGOs to submit their briefs, they are quite strict on the guidelines and the topic that NGOs can give their views on. In addition, it is interesting to note that international criminal bodies have allowed even individuals to participate.

The third part of this thesis concerned regional human right courts: the IACHR and the ECtHR. Both institutions are highly liberal and have ample NGO *amicus curiae* participation.

The ECtHR has established in Art 36(2) ECHR the grounds for *amicus curiae* intervention. However, the provision itself establishes third party intervention and not explicitly *amicus curiae* participation. Noteworthy is the fact that this provision states that any person who is not the applicant can submit a brief. Therefore, the ECtHR is very loose in terms of the subject circle. Likewise as with international criminal proceedings, the ECHR has limited its leave to grant permission to submit briefs. Depending on the case, the ECtHR sometimes has summaries

in its judgments of the submissions of the *amici*. The influence is there, however, is highly dependent on the case and the Court. For example, in the case of *Soering v. United Kingdom*, Amnesty International as *amicus curiae* convinced the Court that “death row phenomenon” constituted inhuman treatment in violation of the European Convention.

The ECtHR allowed several NGOs as *amicus curiae* in front of the Grand Chamber in the case of great importance to Estonia, the *Delfi vs Estonia*. All these briefs are precisely mentioned in the judgment: the briefs from the Helsinki Foundation for Human Rights, the INGO Article 19, the NGO Access and the NGO Media Legal Defence Initiative.

The IAcHR has accepted great variety of *amicus curiae* submissions in its contentious and advisory proceedings. The Rules of Procedure for the IAcHR establish the possibility of engaging an NGO as *amicus curiae*. There are no restrictions regarding permission and the Court has used this possibility in many cases in both types of proceedings. However, the interesting observation is that in advisory proceedings in some cases the Court has summarised the briefs but that is never the case in contentious proceedings. Therefore, it is hard to say if there is an influence by the *amicus* on the proceedings or if the judgment structure is just different.

From the thesis analysis, it can be seen that third party intervention may be based on the constitutive treaty (*e.g.* the ECHR) or internal rules (*e.g.* the ICTY, ICC and SCSL). Furthermore, in the analysis an interesting point arose. While every institution analysed allowed INGOs, despite this the IAcHR also allowed domestic NGOs. It was a rare case but is still noteworthy. Moreover, usually the NGOs that are interested to participate in the proceedings as *amicus curiae* are commonly known big INGOs, *e.g.* Amnesty International, Human Rights Watch. Nevertheless, less known or very specific NGOs also have tried and succeeded in having *amicus curiae* status in many cases in front of different institutions.

Coming back to the hypothesis of the current thesis, it can be concluded that it partly found affirmation. There are common tendencies in permitting the submission of briefs and in accepting them. Of the institutions that allow *amicus* participation, the fact that they all use their competency to restrict the circle of issues upon which NGOs can elaborate on, is similar. Furthermore, the institutions have published overall guidelines for submissions. Nevertheless, there are also many tendencies and rules that vary based on the institutions and the Court’s discretionary power. The ICJ has been most conservative and has almost never (with a few exceptions) allowed an NGO to participate as *amicus curiae*. Concerning the value of the hypothesis, it emerged that it is impossible to view the value from the judgments directly.

However, academic writings suggest that the value is there. That is also confirmed by the wide range of acceptance of NGOs in some institutions.

VALITSUSVÄLISED ORGANISATSIOONID *AMICUS CURIAENA* RAHVUSVAHELISTES VAIDLUSE LAHENDAMISE INSTITUTSIOONIDES RESÜMEE

Nii maailm kui ka rahvusvaheline õigus on pidevas muutumises. Alates Vestfaali rahust kehtis rahvusvahelisel tasandil riigikeskne teooria, mille alusel vaid riigid saavad olla õiguse subjektideks. Tollest ajast kuni tänapäevani on olukord muutunud. Nimelt on rahvusvahelisel tasandil laienenud osalejate ring. Tänapäeval on oma osa rahvusvahelisel areenil ka indiviididel, valitsusvälistel organisatsioonidel, äridel ja riikidevahelistel organisatsioonidel. Näiteks mõned ärid teevad koostööd valitsustega, samas kui valitsusvälised organisatsioonid on olulist rolli mänginud nii rahvusvahelistel konverentsidel kui ka rahvusvaheliste konventsioonide vastuvõtmisel (nt. Loodusliku mitmekesisuse konventsioon, Lapse õiguste konventsioon). Seoses sellise muutunud osalejate ringiga rahvusvahelisel areenil, satub kahtluse alla riigikeskne lähenemine rahvusvahelise õiguse subjektidele.

Rahvusvahelise õiguse arengule ning mõjutamisele saab kaasa aidata mitmel viisil. Üheks selliseks võimaluseks on läbi *amicus curiae* (otsetõlge lad. k. kohtu sõber) staatuse. *Amicus curiae* näol on tegemist pooltest sõltumatu institutsiooniga, kelle huvi kattub vaidluse all oleva vaidluse objektiga. Sellist huvi on nähtud rahvusvahelises avalikus õiguses eelkõige inimõiguste, keskkonnaõiguse ja humanitaarõiguse valdkonnas. Järelikult on *amicus curiae* huvi kaitsta teatud suuremat hüve ja õigusi kui pelgalt kaitsta ühte poolt ning tema hüve menetluses. Siinjuures tuleb rõhutada, et *amicus curiae* ei ole viis poole esindamiseks kohtus ega mõeldud ka valitsusvälise organisatsiooni kaasamiseks vaidluse pooleks. Tegemist on oma ala spetsialistiga, kes jagab menetluse hüvanguks oma nõu.

Käesolev magistr töö käsitleb ühe mõjugrupi, so valitsusväliste organisatsioonide, osalust *amicus curiaena* rahvusvaheliste vaidluse lahendamise kohtute ja tribunalide ees. Uurimisobjektist tulenevalt ongi võetud uurimiseks järgnevad probleemid. Esiteks, kas ja mis tingimustel valitsusvälised organisatsioonid saavad osaleda rahvusvahelises õiguses *amicus curiaena*. Kui vastus on jaatav, siis kas nendega arvestatakse ja milline on nende panus vaidluse lahendamisse.

Magistr töö lähtub hüpoteesist, et kuigi rahvusvaheline õigus on igas aspektis mõjutatud erinevatest osalejatest, pole võimalik leida ühiseid kriteeriume erinevates vaidluse lahendamise

institutsioonides *amicus curiae* lubatavuseks. Juhul kui *amicus curiae* on lubatud protsessi, siis nende panusega arvestatakse.

Analüüsi teostamisel on kasutatud peamiselt nelja meetodit: ajaloolist, induktiivset, empiirilist ning võrdlevat. Ajaloolise meetodi kaudu on tuvastatud ning analüüsitud vajalike sätete kujunemist ja põhjuseid, st eelkõige kuidas neid sätteid tõlgendada. Empiirilise meetodiga on uuritud kohtupraktikat ning kohtute seisukohti seoses valitsusväliste organisatsioonide kaasamisega. Nende empiiriliste järelduste põhjalt on induktiivse meetodiga tehtud üldisi järeldusi rahvusvahelise õiguse kohta seoses valitsusväliste organisatsioonide *amicus curiae* osalemisega. Töös on kasutatud ka võrdlevat meetodit, mille alusel on võrreldud erinevaid kohtuid ning nende seisukohti ning nende pinnalt tehtud taaskord induktiivseid järeldusi üldise olukorra kohta rahvusvahelisel areenil.

Käesoleva magistr töö autor analüüsib nelja erinevat vaidluse lahendamise instantsi valitsusväliste organisatsioonide *amicus curiae* osaluse valguses. Need institutsioonid on jagatud kolme gruppi: riigikeskseteks, avaliku huve ja indiviidi huve kaitsvateks kohtuteks. Riigikesksete institutsioonide alla on nii Rahvusvaheline Kohus kui ka Maailmakaubanduse organisatsioon. Kuigi mõlemad on riigikesksed vaidluse lahendamise instantsid, on nende praktika ja seisukohad valitsusväliste organisatsioonide *amicus curiae* kaasamises erinevad. See on ka põhjus, miks käesolevas töös valis autor just need organisatsioonid riigikesksete organisatsioonide esindajateks. Teise grupi moodustavad avaliku huve kaitsevad kohtud ja tribunal Rahvusvahelise Kriminaalkohtu ning Rahvusvaheliste Kriminaaltribunalide (Endise Jugoslaavia Rahvusvahelise Kriminaaltribunali ja Sierra Leone Tribunali) näol. Kolmanda grupi moodustavad regionaalsed inimõigusi kaitsvad kohtud, so Euroopa Inimõiguste Kohus ja Ameerika Inimõiguste Kohus.

Üldjuhul riigikesksetes organisatsioonides on *amicus curiae* kaasamine valitsusväliste organisatsioonide näol pigem mittesoositud. Peamise vastuargumendina on siin toodud asjaolud, et tegemist on riikidevaheliste suhetega ning riigid ei taha mitteriiklikke faktoreid kaasata. Olukorras, kus aga rahvusvahelisel areenil on riigid suurimad ja olulisemad mõjutajad, on tegemist päris tugeva argumendiga. Kuigi käimaks kaasas rahvusvahelise õiguse trendide muutmisega, oleks arengu perspektiivist oluline ka siinkohal kaugemale mõelda.

Riigikesksetest organisatsioonidest Rahvusvaheline Kohus pole oma asjades sisuliste kaasuste puhul kunagi lubanud valitsusväliste organisatsioonide osalema. Peamiselt põhjusel, et tegemist pole Rahvusvahelise Kohtu Statuudi artikli 34(2) alusel “rahvusvahelise avaliku organisatsiooniga”. Kohus ise on seda mõistet tõlgendanud riikidevahelise organisatsioonina.

Sellele vaatamata on õiguskirjanduses väidetud, et seda terminit tuleks tõlgendada kui rahvusvahelise avaliku huviga tegelev organisatsioon. Peamiseks sellise teooria pooldajaks on Dinah Shelton. Teise võimaliku alusena *amicus curiae* kaasamiseks protsessi on nähtud statuudi artiklit 50, mis annab avatud nimekirja subjektide ringile, kes võivad kohtus oma arvamust avaldada. Selle nimekirja alla läheks ka valitsusvälised organisatsioonid. Kuigi kuna artikkel 50 räägib kohtu õigusest kutsuda artikli nimekirjas olev subjekt kohtusse, siis pole käesoleva töö autori arvates õige siinkohal rääkida *amicus curiae* osalusest. Selle põhjuseks on asjaolu, et tavaliselt peab *amicus curiae* kohtusse pöörduma omal algatusel.

Rahvusvaheline kohus on Edela-Aafrika rahvusvahelise staatuse arvamuses lubanud valitsusvälise organisatsiooni Rahvusvahelise Inimõiguste Liidu *amicus curiaena* osalema. Kuigi luba osalemiseks saadi, siis ületati tähtaega, mille jooksul pidi kohtusse saabuma nimetatud organisatsiooni arvamus. Sellest tulenevalt Kohus lõpuks esitatud arvamust siiski vastu ei võtnud. Peale seda kaasust pole Rahvusvaheline Kohus enam kunagi lubanud valitsusväliseid organisatsioone osalema ning 2000ndate aastate alguses andis välja ka praktilise tõlgendamise juhise, kus on kirjas, et valitsusväliste organisatsioonide esitatud seisukohti ei loeta toimiku osaks. Seda on nähtud enamasti kui keeldu valitsusväliste organisatsioonide osalemiseks *amicus curiaena*.

Erinevalt Rahvusvahelisest Kohtust on Maailma kaubandusorganisatsioon olnud leebem valitsusvälistele organisatsioonidele *amicus curiae* staatuse andmisel. Maailma kaubandusorganisatsiooni aktides puudub sõnaselge alus *amicus curiaede* lubamiseks. Samas on kohtu paneelid seda vastavalt vajadusele siiski teinud. Esimese astme paneelis on *amicus curiae* alusena nähtud vaidluste lahendamist reguleerivate eeskirjade ja protseduuride käsitusleppe artikleid 12 ja 13. Vaidlustuse paneelis on aluseks võetud vaidluste lahendamist reguleerivate eeskirjade ja protseduuride käsitusleppe artikkel 17 ning töökorralduse reegel 16(1).

Oluliseks kaasuseks Maailma kaubandusorganisatsioonis *amicuse* lubamiseks on Ameerika Ühendriigid-Krevetid kaasus, mis oli esimene kaasus, mis tõlgendas nimetatud artiklit 13 laiendavalt. Sellest tulenevalt kaasati ka *amicus curiaed* protsessi. Hiljem on sama kaasust kasutatud mitmetes teistes kaasustes *amicuse* kaasamise õigustamiseks. Kuigi näha on ka peamise vastuargumendi säilimist. Nimelt selle organisatsiooni näol on tegemist riikidevahelise organisatsiooniga.

Vaidlustuse paneel läks oma tõlgendustes seoses *amicus curiae* lubatavusega kaugemale kaasuses Euroopa Ühnedus-Asbest. Selles kaasuses lubas kohus kõigil, kellel on soov oma

seisukoht esitada, seda teha. Sellega jättis kohus määratlemata isikute ringi, mistõttu sisuliselt võiks ka inividid oma seisukohti esitada. Osade riikide seas tekitab selline otsus pahameelt.

Nii Kriminaal Tribunalides kui ka Rahvusvahelises Kriminaalkohus pole probleemiks normatiivne alus *amicus curiae* osaluseks. See on olemas. Veelgi enam nimetatud instantsid on soosivad valitsusväliste organisatsioonide osalemisel ning on mitmetes kaasustes andnud neile *amicus curiae* staatuse. Soosivus on selgelt näha Rahvusvahelise Kriminaalkohtu praktikast. Samas tavaliselt seab kohus kindlad kriteeriumid *amicuse* seisukohtadele. Näiteks, et *amicus curiae* võib oma arvamust avaldada vaid teatud küsimuste osas. Kohus lõplikes lahendites *amicus curiae* panusele ega seisukohtadele üldjuhul ei viita.

Soosivad *amicus curiae* seisukohalt on ka regionaalsed inimõiguseid kaitsvad kohtud. Euroopa Inimõiguste ja Põhivabaduste kaitse konventsioon näeb artiklis 36(2) ette kolmanda isiku osalemise võimaluse asjas ja annab loa igale isikule asjas oma seisukoht esitada. Kuigi tegemist on kolmanda osapoole sekkumisõiguse sättega ning see säte ei räägi konkreetset *amicus curiae* osalusest, siis on just seda sätet nähtud *amicus curiaena* osalemise alusena. Erinevalt Kriminaalkohtust ning Kriminaal Tribunalidest on Euroopa Inimõiguste Kohus mõnedes kaasustes teinud oma lahendites kokkuvõttes protsessis osalenud *amicus curiaede* seisukohtadest. Samuti on nähtud nende osalemises kõrget väärtust. Näiteks Soering vs Suurbritannia kaasuses, Amnesty International *amicusena* veenis kohut, et surmanuhtlus on ebainimlik meede Euroopa Inimõiguste ja põhivabaduste kaitse konventsiooni valguses.

Ameerika Inimõiguste Kohus on lubanud suurel hulgal valitsusväliste organisatsioonide osalema läbi oma seisukohtade esitamise kohtuasjade lahendamisel. Seevastu oma sisulistes istungites ei viita kohus mitte kunagi nende seisukohtadele. Arvamuse avaldamise kaasustes on kokkuvõttes *amicuse* seisukohtadest leitavad lahenditest.

Analüüsi käigus selgus eelkõige, et *amicus curiae* alusena saab näha nii organi konstitutiivset lepingut (nt Euroopa inimõiguste ja põhivabaduste kaitse konventsioon) või organi enda sisemisi reegleid (nt Rahvusvaheline Kriminaalkohtu ja Kriminaaltribunalide protsessireegleid). Lisaks selgus analüüsi käigus, et enamasti lubatakse *amicus curiaena* osaleda rahvusvahelistele valitsusvälistel organisatsioonidel, kuid Ameerika Inimõiguste Kohus lubab osaleda ka regionaalsetel organisatsioonidel. Kuigi viimane on pigem erandlik juhtum.

Üldjuhul on *amicus curiaena* esineda soovivad valitsusvälised organisatsioonid rahvusvaheliselt üldtuntud ühingud, nagu nt Amnesty International, Human Rights Watch.

Kuigi ka vähem tuntud rahvusvahelised valitsusvälised organisatsioonid on sellisest võimalusest olnud huvitatud.

Üldkokkuvõttes on võimalik näha mõningaseid üldiseid jooni *amicus curiae* osalusel analüüsitud institutsioonides. Eelkõige selles osas, et need kohtud, kes lubavad valitsusvälistel organisatsioonidel *amicus curiae* osaleda, seavad sellele ka teatud piirid. Samas kõik kohtud seda ei luba, mistõttu on erinevates kohtutes erinev regulatsioon ja praktika. Teatud institutsioonides, kes annavad valitsusvälistele organisatsioonidele soovitava *amicuse* staatuse, on selliste organisatsioonide panuseid ka väärtustatud. Suures osas jääb aga väärtus tuvastamatuks.

ABBREVIATIONS

Art	Article
DSB	Dispute Settlement Body
DSU	World Trade Organisation's Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ETS	European Treaty Series
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
ILO	International Labour Organization
INGO	International non-governmental organization
ITLOS	International Tribunal for the Law of the Sea
NGO	Non-governmental organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
Res	Resolution
SCSL	Special Court for Sierra Leone
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nation Treaty Series
WTO	World Trade Organisation

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