

## **The growing participation of International Organizations and Non-State Actors in International Litigation: an Empirical Map of the International Court of Justice**

*A expansão da participação de Organizações Internacionais e Atores não-estatais na litigância internacional: um mapa empírico da Corte Internacional de Justiça*

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**ABSTRACT:** Over the last decades, Intergovernmental organizations have increased their involvement in the process of international law-making. Recent changes also include the participation of new actors and a more influential role of the judicial bodies attached to Intergovernmental organizations (IGOs). Having the International Court of Justice (ICJ) as a focus, this analysis will address the potential and limits of the participation of IGOs and Non-State Actors (NSAs) in contentious and advisory proceedings. *Amici curiae* 'are those actors who do not themselves have a legally protected interest in the particular case and yet want to intervene', thereby opening bilateral litigation to issues of public or general interest. The ICJ Statute and Rules of Court contain no provision providing for *amicus curiae* participation in contentious cases. A similar situation occurs as far as advisory proceedings are concerned: there is no express provision for *amicus curiae* participation. There is no doubt that ICJ procedural law remains outdated and disconnected from the contemporary developments characterizing the international community nowadays. The participation of members of the international society in law-making has become one of the basic features of international law. By applying empirical research methodology for mapping the ICJ practice concerning the submission of relevant information to the Court, this research aims to discuss the limits and the potentials of the available mechanisms for ensuring the participation of IGOs and NSAs in contentious cases and advisory proceedings.

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**Keywords:** International Court of Justice; participation; *amicus curiae*; NSA; IGO.

**RESUMO:** Nas últimas décadas, as organizações intergovernamentais aumentaram seu envolvimento no processo de elaboração do direito internacional. Mudanças recentes incluem a participação de novos atores e um papel mais influente dos órgãos judiciais ligados às organizações internacionais. Tendo como foco a Corte Internacional de Justiça (CIJ), esta análise abordará o potencial e os limites da participação de organizações intergovernamentais (OI) e atores não estatais em processos contenciosos e consultivos. *Amici curiae* “são aqueles atores que não têm um interesse legalmente protegido no caso particular e intencionam intervir”, abrindo assim o litígio bilateral para questões de interesse público ou geral. O Estatuto da CIJ e o seu Regulamento não contêm nenhuma disposição que preveja a participação como *amicus curiae* em casos contenciosos. Situação semelhante ocorre no que se refere aos procedimentos consultivos: não há previsão expressa de participação. Não há dúvida de que os procedimentos da CIJ permanecem desatualizados e desconectados dos desenvolvimentos contemporâneos que caracterizam a comunidade internacional atualmente. A participação dos membros da sociedade internacional no processo legislativo tornou-se uma das características básicas do direito internacional. Ao aplicar metodologia de pesquisa empírica para mapear a prática da CIJ no que diz respeito ao envio de informações relevantes ao Tribunal, esta pesquisa visa discutir os limites e as potencialidades dos mecanismos disponíveis para garantir a participação de OIs e atores não estatais em casos contenciosos e procedimentos consultivos.

**Palavras-chave:** Corte Internacional de Justiça; participação; *amicus curiae*; ator não estatal; organização internacional intergovernamental.

## 1. Introduction

International law is not only a tool for co-existence among States, but also, and ultimately, a mechanism for the production and protection of community interests. Despite a continuous discussion about the features and means of establishment of community interests, their existence is now accepted in International Law<sup>5</sup>. As a component of the international governance structure, international courts and tribunals (ICTs) can be considered a key element to the promotion of the international rule of law<sup>6</sup>, including the provision of global public goods<sup>7</sup>.

Indeed, the International Court of Justice (ICJ) has a prominent role in the protection of the interests of the international community by adjudicating inter-State claims. After a so-called first phase marked by 'hesitation and constraint', to borrow Judge Simma's words, the ICJ has indeed become more concerned with human rights in recent years<sup>8</sup>. The case law of the ICJ also deals with issues involving public interest or individual's rights, particular the cases regarding diplomatic protection<sup>9</sup>. This illustrates the growing tendency that international litigation has rarely been a matter of private concern or interest affecting exclusively the parties in dispute<sup>10</sup> and would indirectly stimulate public interest in

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5 WOLFRUM, 2011, p. 1132.

6 ULFSTEIN, 2014, p. 859-860.

7 NOLLKAMPER, 2012, p. 769-770.

8 SIMMA, 2013, p. 579-85. Regarding the use of Public interest litigation as a vehicle to advance human rights, see SALVADOR, 2015, p. 199-220. For recent studies, see THIN, 2021, 35-59; BONAFÉ, 2021, 164-169.

9 RAZZAQUE, 2005, p. 216.

10 SHELTON, 1994, p. 614-5.

the work of the Court, among other advantages<sup>11</sup>. ICTs play an increasingly important role in the promotion, recognition and application of community interests' norms, together with the growing 'participation' of Intergovernmental organizations (IGOs) and non-State actors (NSAs), *i.e.* non-governmental organizations (NGOs) and individuals<sup>12</sup>.

While public interest litigation can be understood as a way to adjudicate matters of broad public interest, only States can be parties to a dispute at the ICJ, even in cases that transcend purely bilateral inter-State interests. Nonetheless, other actors can participate as non-parties in proceedings in the ICJ's current procedural framework. Even though the ICJ Statute explicitly rejects direct participation of entities other than States in disputes brought before it<sup>13</sup>, the Court has been increasingly confronted with NSAs participation in both contentious and advisory proceedings<sup>14</sup>. NSAs may

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11 ROSENNE, 1997, p. 654-5.

12 The broad concept of "participants" and "participation" was adopted in this article for two reasons. First, because it comprises a notion of actors that expands the scope of the classical vision of subjectivity and may not fit into existing formal categories of international law. Second, because it aims to access all forms of submitting an opinion to the Court, including those that are not provided for in the ICJ's regulations and does not relate to a particular right or obligation.

13 Generally, the particular interests of third States in an ongoing dispute before the Court may be pursued via intervention proceedings under Art. 62 (*discretionary intervention*) or Art. 63 (*intervention 'as of right'*) of the Statute. If both types of third-party intervention have the potential to be applied whenever community interests are at issue, intervention 'as of right' seems to represent a natural avenue for States, other than the contending parties, to raise the Court's awareness with respect to matters of common interests which remain subjacent to the interpretation of apparently 'bilateralized' provisions of international treaties. However, the infrequent use of intervention under Art. 63, combined with the Court's reluctance to provide the necessary clarification of its rules has compromised the potential of intervention 'as of right' as an avenue for third States to invoke bilateral and community interests (ALMEIDA, 2019, p.342-345).

14 DE BRABANDERE, 2011, p. 91; HERNÁNDEZ, 2011, p. 140.

participate and influence international dispute-settlement in various capacities<sup>15</sup>, both formally and informally<sup>16</sup>. Nonetheless, for the purpose of this research, only formal and direct participations of IGOs and NSAs were taken into account.

In most ICTs' procedural rules, *amicus* participation will assist the tribunal in its work<sup>17</sup>. In some instances, ICTs have invited *amicus* participation to provide information or make arguments that might not otherwise be available to the tribunal<sup>18</sup>. This indicates that *amici curiae* can serve to open bilateral litigation to matters of public interest, and to introduce an avenue for raising community interests in inter-State procedure<sup>19</sup>.

Despite being accepted and regulated by many courts and tribunals, there remains considerable disagreement within the ICJ in regards to participation of NSAs. The ICJ appears still reluctant to expand the dispute beyond the

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15 The role of non-State actors in litigation has increased, mainly with their participation in the form of NGOs. As put by Wagner, they can directly participate in proceedings as a party (sometimes as a third-party), participate as *amicus curiae* or influence competent actors to bring cases. See WAGNER, 2013, para. 22.

16 See ILA, 2012, p. 19: 'It is rather exceptional, however, that procedural rules provide ius standi rights to NSAs to initiate proceedings, and thus become full parties to a case'. Whereas their formal role has only very exceptionally been recognized, their informal participation in international dispute settlement cannot be ignored (DE BRABANDERE, 2011, p. 86, 89. See also p.112: 'The traditional limitation of access to international dispute settlement mechanisms to states is increasingly being challenged by the multifaceted participation of non-state actors therein').

17 BARTHOLOMEUSZ, 2005, p. 274.

18 For example, 'academic lawyers have on a number of occasions been invited to seek leave to act as *amici* before international criminal' and 'individuals or institutions might seek leave to file an *amicus* brief on their own initiative, or may simply send an unsolicited submission to the court or tribunal concerned' (SANDS; MACKENZIE, 2009, para. 5).

19 BENZING, 2006, p. 401.

limits initially prescribed by the parties to the proceedings<sup>20</sup>. This research will empirically map and discuss participatory mechanisms applied by IGOs and NSAs, namely NGOs and individuals<sup>21</sup> for submitting relevant information to the Court akin to *amicus curiae* submissions in contentious cases (II) and advisory proceedings (III) before the ICJ<sup>22</sup>. It will assess all requests submitted to the Court (accepted and denied), the legal basis according to which each notification request was issued by the ICJ, the specific actor involved and, ultimately, their limits and potential contribution to judicial law-making in cases involving community interests<sup>23</sup>.

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20 See RONEN; NAGGAN, 2013, p. 823. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion: Separate Opinion of Judge Guillaume) [1996] ICJ Rep 287, para 5.

21 For the purposes of this article, the broadest definition of NSA includes 'all entities that are not States' (ILA, 2016, p. 4, para. 21). Not being a State is the crucial unifying feature capable of identifying all non-State entities (ILA, 2016, p. 6, para 30). Indeed, the increased participation of NSAs in the international arena includes actors that are NSAs in a 'loose form', such as non-governmental organizations, minority peoples, individuals, which 'have potential to have repercussions on virtually all areas of international life' (See HERNÁNDEZ, 2011, p. 140-64. See also ZYBERI, 2011, p. 165-78).

22 The research data was last updated in December 2019.

23 The classification of formal and informal participations follows the existence or inexistence of a legal basis in Statute or Rules of the Court for the participation. By direct participation, this article took into account participation initiatives directly presented to the Court by the relevant actor; while indirect participation refers to views presented within States' and IGOs' submissions, whenever these subjects acted 'on behalf of' other actors. In order to map indirect forms of participation, this empirical research also included the analysis of a variety of documents available in the Court's docket, which did not lead to formal submissions of information. Data was mostly obtained from the Court's correspondence (not available in all proceedings) or from sparse mentions in the dissenting or separate opinion of judges. It is important to stress that attempts to participate by different actors were also taken into account, regardless of being further denied by the Court.

## II. Formal avenues of participation in Contentious Proceedings

The ICJ Statute and Rules of Court contain no provision providing for *amicus curiae* participation in contentious cases. The lack of an express mention to *amici curiae* briefs does not indicate, however, that the referred practice would be proscribed by the Court, notably in contentious proceedings. This research describes and exemplifies formal mechanisms of participation in ICJ contentious cases.

The empirical analysis of IGOs and NSA participation in ICJ contentious cases focused on the Statute's legal basis for submission of observations by IGOs, NGOs and individuals. The research took off with a key-word research<sup>24</sup> in all culminated contentious cases available in the ICJ database, organised by year of judgment, and in the pending contentious cases, organised by year of request<sup>25</sup>.

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24 In order to map the participation of actors other than the main parties, the following keywords were applied: *amicus curiae*, *amici curiae*, non-governmental organization, NGO, individual, individuals, non-State and organization. However, these keywords did not return any results for the purpose of the research. The text of the Court's judgments mentions the notifications to the relevant actors to submit written statements and the participations in the oral proceedings. Therefore, information on the written statements was gathered directly via the ICJ website; while participation in the oral proceedings was extracted from the text of the verbatim record of the audiences. In practice, the ICJ Registrar issues notifications to inform States and international organizations of the case, giving the opportunity to furnish information to the Court via written and oral statements. For this reason, the legal basis for notifications to submit observations by the Registrar were also used as keywords: Articles 34 (2), 34 (3) and 50 of the Statute; and Articles 43 (2) and 69 of the Rules of Court.

25 See ICJ database, List of all cases <[icj-cij.org/en/list-of-all-cases](http://icj-cij.org/en/list-of-all-cases)> accessed 19 November 2019; Pending Cases <[icj-cij.org/en/pending-cases](http://icj-cij.org/en/pending-cases)> accessed 19 November 2019. For the purpose of this research, the pending cases were monitored by 9 December 2019. The documents analysed in this first step were the written statements, the orders, the judgments and the

In all 150 contentious cases (from 1947 to 2019), IGOs stand out as the most active actor, having received a total of 39 notifications from the ICJ **(A)**. Despite the Statute's formal limitation to 'public international organizations', under the avenue of Article 34 (2) of the Statute, NGOs have attempted to participate in ICJ contentious proceedings **(B)**. As to individuals, although not formally considered as *amicus curiae* submissions, expert opinions under Article 50 of the ICJ Statute could be another possibility to indirectly participate in ICJ proceedings **(C)**.

## A. IGOs

In contentious cases, most notifications received by IGOs were based on Article 34 (3) of the Statute, often combined with the procedural provision of Article 43 (2) of the Rules of Court. ICJ notifications were almost exclusively limited to IGOs via notifications under Articles 34 (3) of the Statute. This can be explained by the narrow interpretation of a 'public international organization', mentioned in Art. 34 (2) and (3), as 'an international organization of States', as defined in Art. 69 (4) of the Rules of Court, excluding therefore any submission made by NGOs.

Over the last 75 years, out of 150 contentious cases, the Court issued 40 notifications for IGOs to submit information. **[Figure No 1]:**

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'other documents' section. The section concerning 'other documents' contained the sole submission of a written Statement by an IGO. See ICJ, *Aerial Incident of 3 July 1988* (Iran v. United States) (Observations of the International Civil Aviation Organization) 4 December 1992 <[icj-cij.org/files/case-related/79/9699.pdf](https://www.icj-cij.org/files/case-related/79/9699.pdf)> accessed 25 November 2019 [617]-[622].

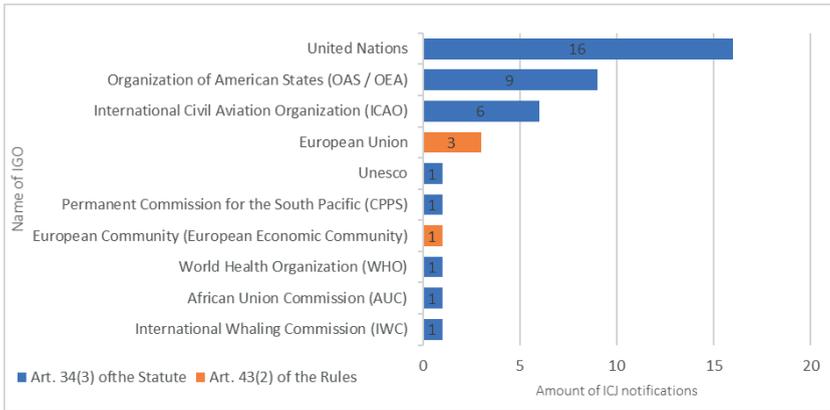


Figure No 1: IGOs notified by the ICJ in contentious cases.

Empirical data confirms that IGOs appear as the actor that has received the highest amount of notifications in ICJ contentious cases. However, despite the Court's effort to notify IGOs potentially interested to submit information, the avenue for participation in the contentious proceedings is yet underused by notified IGOs. There were several cases in which the ICJ could have used the legal basis of art. 34 (3) to address notifications to IGOs for the submission of observations, but failed to do so; this coupled with situations in which IGOs could have been more active in submitting information to the Court<sup>26</sup>. In addition, although important international organizations such as the United Nations and the OAS were the two most notified organizations under Art. 34 (3) of the Statute, they did not submit observations in any proceedings. In only one case has an Organization

26 See ICJ cases: *Aerial Incident of 27 July 1955* (Israel v. Bulgaria); *South West Africa* (Liberia v. South Africa); *Corfu Channel* (UK v. Albania); *U.S. Nationals in Morocco* (France v. USA); *East Timor* (Portugal v. Australia); *Fisheries Jurisdiction* (Spain v. Canada); *Breard* (Paraguay v. USA); *LaGrand* (Germany v. USA); *Avena* (Mexico v. USA); *Gabcikovo-Nagymaros* (Hungary v. Slovakia); *Aerial Incident of 10 August 1999* (Pakistan v. India); *Pulp Mills* (Argentina v. Uruguay); *Legality of Use of Force* cases.

responded positively to an ICJ notification. Yet, the impact of the ICAO observations on the Court's decision in the case *Aerial Incident of 3 July 1988* could not be assessed since the case was discontinued before judgment<sup>27</sup>.

ICJ notifications to IGOs were mainly based under Art. 34 (3) of the Statute, but some cases also demonstrate some ICJ notifications to IGOs addressed under Article 43 (2) of the Rules of Court<sup>28</sup> [Figure No 2]:

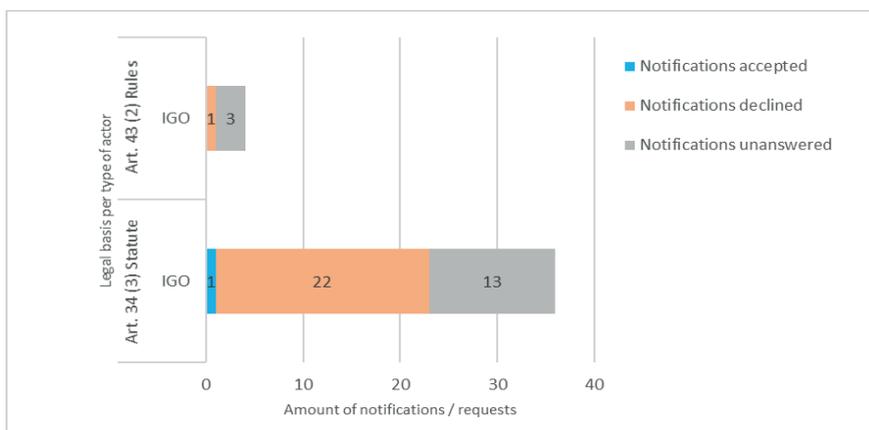


Figure No 2: Amount of ICJ notifications to IGOs in contentious cases.

27 On 22 February 1996, the parties to the dispute jointly notified the ICJ that their Governments had entered into a Settlement Agreement and agreed to the discontinuance of the case. See ICJ, *Aerial Incident of 3 July 1988* (Iran v. United States) (Settlement Agreement) 9 February 1996 <[icj-cij.org/files/case-related/79/11131.pdf](http://icj-cij.org/files/case-related/79/11131.pdf)> accessed 25 November 2019 [649]; (Order of 22 February) [1996] ICJ Rep 9.

28 According to an amendment to Article 43 (2) of the Rules, which entered into force in 2005, the Court may direct the Registrar to notify any public international organization that is party to a convention the construction of which is at issue in a case (see also, for comparison, the procedure provided for in Articles 69 (2) and 43 (3) of the Rules of Court). The idea behind the new Art. 43 is to consider that both States and international organizations may hold a comparable interest in taking part in the proceedings in which the construction of a convention is discussed before the Court (see DUPUY; HOSS, 2019, para 2).

The Court referred to Art 34 (3) to issue 36 notifications for IGOs to submit observations<sup>29</sup>; out of which 22 notifications were formally declined<sup>30</sup> and 13 were left unanswered<sup>31</sup> by the relevant IGOs to which they were addressed. Conversely, one notification under Art. 34 (3) was positively answered, motivating the submission of an observation in the *Aerial Incident of 3 July 1988*<sup>32</sup>. Art. 43 (2) of the Rules of Court was mentioned as the legal basis for four ICJ notifications to IGOs; out of which three were left unanswered<sup>33</sup>; and

29 See the following ICJ contentious cases: *ICAO Council; Border and Transborder; Aerial Incident of 3 July 1988; Lockerbie cases; Legality of Use of Force cases; Armed Activities New Application; Territorial and Maritime Dispute (v. Honduras); Bosnian Genocide; Navigational and Related Rights; Application of the ICERD; Territorial and Maritime Dispute (v. Colombia); Whaling in the Antarctic; Maritime Dispute (Peru v. Chile); Croatian Genocide; Nuclear Disarmament; Obligation to Negotiate; Certain Activities; Armed Activities; Continental Shelf; Alleged Violations; Immunities and Criminal Proceedings; Terrorist Financing.*

30 Four in *Armed Activities New Application (DRC v. Rwanda)*; three in *Armed Activities (DRC v. Uganda)*; two in *Maritime Dispute (Peru v. Chile)*; two in the *Lockerbie cases* (same notification replicated in the proceedings against UK and USA; and one in each of the following cases: *ICAO Council; Border and Transborder; Territorial and Maritime Dispute (v. Honduras); Territorial and Maritime Dispute (v. Colombia); Croatian Genocide; Application of the ICERD; Obligation to Negotiate; Alleged Violations; Continental Shelf; Whaling in the Antarctic; Immunities and Criminal Proceedings.*

31 One in each of the following cases: *Legality of Use of Force* (same notification replicated in the proceedings against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and UK); *Bosnian Genocide; Navigational and Related Rights; Certain Activities; Nuclear Disarmament; and Terrorist Financing.*

32 Observation submitted by the International Civil Aviation Organization (ICAO). ICJ, *Aerial Incident of 3 July 1988 (Iran v. United States) (Observations of the International Civil Aviation Organization)* 4 December 1992 <icj-cij.org/files/case-related/79/9699.pdf> accessed 25 November 2019, p. 617-622.

33 See ICJ cases: ICJ, *Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Judgment)* [2009] ICJ Rep 61 (to the European Community, before absorption by the EU in 2009); ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) (Judgment)* [2018] ICJ Rep 139 (the same notification replicated to the European Union in both cases, which were

the fourth notification, to the European Union in *Maritime Delimitation (Somalia v. Kenya)*<sup>34</sup>, was formally declined.

These observations demonstrate, primarily, that the Court has rarely used the instruments at its disposal to broaden the proceedings in a way to include the interests of the international community. Secondly, the lack of interest from the IGOs to submit observations is also evident. Several occasions conferred possibilities for IGOs to submit relevant observations, although the Court and the relevant actors have remained silent in this regard.

## B. NGOs

In practice, the Court has never received *amicus curiae* submissions from NGOs in contentious cases. However, some relevant observations can be drawn from the *Asylum* case<sup>35</sup>. During the proceedings, an NGO – the International League for the Rights of Man – made an unsuccessful attempt to obtain leave to participate pursuant to Art 34 (2) of the ICJ Statute<sup>36</sup>. In order to take advantage of Art 34 (2) of the Statute, the League requested the Court to determine whether it would be considered as a public international organization within the meaning of Article 34<sup>37</sup>.

Although it was contended that its recognition as a public international organization entitled to present information would further the purpose of the ICJ and would preserve international human rights<sup>38</sup>, the League's request

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joined in February 2017).

34 ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgment: Preliminary Objections) [2017] ICJ Rep 3.

35 ICJ, *Asylum (Colombia v. Peru)* (Judgement) [1950] ICJ Rep 266.

36 ICJ, *Asylum (Colombia v. Peru)* (Part IV, Correspondence) 7 March 1950 <[icj-cij.org/files/case-related/7/8909.pdf](https://www.icj-cij.org/files/case-related/7/8909.pdf)> accessed 21 November 2019 [227], doc. 63.

37 ICJ, *Asylum (Colombia v. Peru)* (Judgement) [1950] ICJ Rep 266.

38 ICJ, *Asylum (Colombia v. Peru)* (Judgement) [1950] ICJ Rep 266.

was denied by the Court, which did not fix a time-limit for the submission of observations<sup>39</sup>. Indeed, the Registrar made it clear that Article 34 of the Statute finds no application since the League 'cannot be characterized as public international organization as envisaged by Statute'<sup>40</sup>.

Since the *Asylum* case, there appears to exist no subsequent attempts by NGOs to submit information to the ICJ in contentious proceedings<sup>41</sup>.

### C. Individuals

The Court applied Art. 50 of the Statute as the sole legal basis for requesting expert opinions from individuals in three expert opinions produced by five individuals in three cases<sup>42</sup> [Figure No. 3]:

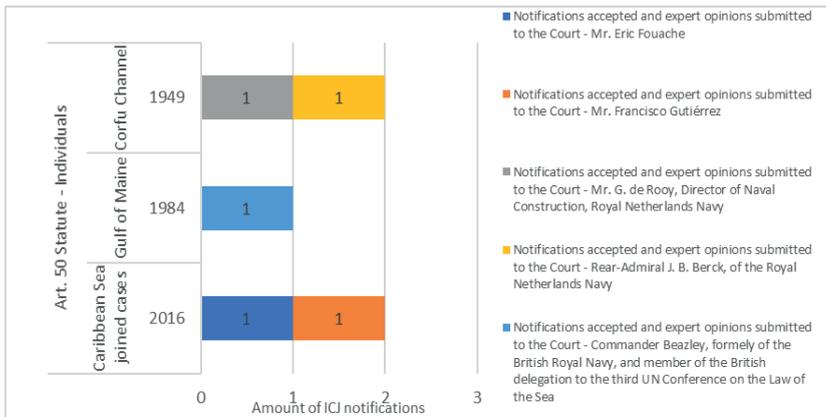


Figure No 3: Amount of ICJ notifications to individuals in contentious cases.

39 See in this regard RAZZAQUE, 2005, p. 172.

40 ICJ, *Asylum* (Colombia v. Peru) (Part IV, Correspondence) 7 March 1950 <[icj-cij.org/files/case-related/7/8909.pdf](http://icj-cij.org/files/case-related/7/8909.pdf)> accessed 21 November 2019 [228], doc. 66.

41 DUPUY; HOSS, 2019, para. 41.

42 See ICJ, *Corfu Channel and the Caribbean Sea cases: Maritime Delimitation in the Caribbean Sea and the Pacific Ocean; Land Boundary in the Northern Part of Isla Portillos*.

In the *Corfu Channel* case<sup>43</sup>, instituted in 1947, the Court adopted three orders concerning the appointment of experts<sup>44</sup>. In the *Gulf of Maine* case<sup>45</sup>, as provided for in the Special Agreement between the Parties, the Chamber appointed an expert to assist it in technical matters<sup>46</sup>. Although the Agreement, when determining the use of an expert opinion, made no reference to Article 50 of the Statute, the Court explicitly referred to it in the Order of 30 March 1984<sup>47</sup>. In the *Caribbean Sea* cases between Costa Rica and Nicaragua (*Maritime Delimitation*<sup>48</sup> and *Isla Portillos*<sup>49</sup>), which were joined by the order of 2 February 2017<sup>50</sup>, the Court decided to seek an expert opinion, by reference to Articles 48 and 50 of the Statute<sup>51</sup>. The Court adopted two orders concern-

43 ICJ, *Corfu Channel* (United Kingdom v. Albania) (Judgment: Assessment of Compensation) [1949] ICJ Rep 244.

44 TORRES BERNÁRDEZ; MBENGUE, 2019, para. 70.

45 ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v USA) (Judgment: Merits) ICJ Rep [1984], p. 246.

46 ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v USA) (Judgment: Merits) ICJ Rep [1984], p. 253 (art II.3 of the Compromis); See also TORRES BERNÁRDEZ; MBENGUE, 2019, para. 71; PEAT, 2014, p. 9.

47 ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v USA) (Order of 30 March) [1984] ICJ Rep 165; See also PEAT, 2014, p. 9.

48 ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean – Land Boundary in the Northern Part of Isla Portillos* (Costa Rica v. Nicaragua) (Expert Opinion) 30 April 2017 <icj-cij.org/files/case-related/157/157-20170430-WRI-01-00-EN.pdf> accessed 25 November 2019 [1]-[88].

49 ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean – Land Boundary in the Northern Part of Isla Portillos* (Costa Rica v. Nicaragua) (Judgment) [2018] ICJ Rep 167-73, para 71-73, 77, 80, 86. The full text of the Expert Opinion is available in the proceedings of *Maritime Delimitation* (Costa Rica v. Nicaragua).

50 ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean – Land Boundary in the Northern Part of Isla Portillos* (Costa Rica v. Nicaragua) (Order of 2 February) ICJ Rep [2017] p. 91.

51 ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean – Land*

ing the appointment of experts. Apparently a *proprio motu* decision of the ICJ, this case could represent a response to the recent criticisms of the Court's underuse of Art. 50 of the Statute concerning the exercise of its fact-finding powers<sup>52</sup>. In the *Armed Activities (DRC v Uganda)* case<sup>53</sup>, after having heard the Parties, by the order of 12 October 2020<sup>54</sup>, the Court appointed four experts to submit an opinion. According to Judge Yusuf's speech on the 75th session of the United Nations General Assembly, held on 2 November 2020<sup>55</sup>, the Court considered that the estimates submitted by the Democratic Republic of the Congo (DRC) in the case raised questions of a technical nature for which the Court could benefit from the assistance of experts.

Except from the cases mentioned above, this empirical research confirms that no further participation of individuals was sought. The Court has either rejected the Parties' requests to commission an expert opinion or has concluded *proprio motu* that such an appointment was unnecessary<sup>56</sup>. These situations could be seen as missed opportunities of formal participation by individuals as the Court could have resorted to the legal basis of art. 50 of the Statute<sup>57</sup>. Indeed,

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*Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* (Order of 31 May) ICJ Rep [2016] p. 235 *et seq.*; and (Order of 16 June) ICJ Rep [2016] p. 240 *et seq.*; See also TORRES BERNÁRDEZ; MBENGUE, 2019, para. 73.

52 TAMS; DEVANEY, 2019, para. 10.

53 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (Judgment: Merits) ICJ Rep [2005] 168.

54 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (Order of 12 October) ICJ Rep [2020] 295.

55 See ICJ database, Press Releases, available at: <<https://www.icj-cij.org/public/files/press-releases/0/000-20201102-STA-01-00-EN.pdf>>.

56 TAMS; DEVANEY, 2019, para. 9.

57 See ICJ cases: *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment: Merits) [1962] ICJ Rep 6; *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment: Merits) [1999] ICJ Rep 1045; *Maritime Delimitation and Territorial*

in some cases, judges in their dissenting or separate opinions suggest the use of this provision in order to evaluate factual evidence<sup>58</sup>.

Also, scholars suggest that the Court should take advantage of its existing powers to allow individuals directly concerned to participate before ICJ contentious proceedings in order to provide the Court with their own version of the facts and legal opinion<sup>59</sup>. Therefore, existing mechanisms could enable the Court to accept some form of participation by individuals, although, to date, Art. 50 of the Statute has only been used to pursue technical evidence.

### III. Formal avenues of participation in Advisory Proceedings

There is no express provision for *amicus curiae* participation in ICJ advisory proceedings. However, Article 66 (2) of the ICJ's Statute determines that the Court shall 'notify any State entitled to appear before the Court or international organization considered by the Court' that it will be able to receive written statements or oral statements concerning the question. As opposed to Article 34 (2) of the Statute, there is no express limitation to 'international organizations of States'<sup>60</sup>.

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*Questions Between Qatar and Bahrain* (Qatar v Bahrain) (Judgment: Merits) [2001] ICJ Rep 40; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Judgment: Merits) [1986] ICJ Rep 14; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14, p. 77-78, para 190; *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening) (Judgment: Merits) [2014] ICJ Rep 226; *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) (Judgment: Merits) [1997] ICJ Rep 7.

58 PEAT, 2014, p. 13

59 ROSENNE, 1967, p. 244.

60 Article 66 of the ICJ Statute repeats the provisions of former Art. 66 of

For the purposes of this research, participation under Art. 66 (2) of the Statute is deemed both formal and direct since the Registrar notifies States or international organizations, by means of a special and direct communication, to furnish information via written or oral statements on the question submitted to the Court<sup>61</sup>. This empirical research was able to map 410 submissions by States, IGOs and NSAs, such as NGOs and individuals<sup>62</sup>.

In all 27 advisory proceedings (from 1948 to 2019), the ICJ called upon and received statements by a variety of actors other than the authors of the advisory opinions. Most submissions originated from States. Indeed, States entitled to appear before the Court represent the first group of participants informed by the Court of a request for an advisory opinion and, therefore, invited to submit statements under Art. 66(1) and (2)<sup>63</sup>. In practice, States have participated with the submission of statements in almost all ICJ advisory proceedings<sup>64</sup>.

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the 1929 Revised Statute of the PCIJ, in which the term 'international organization' was never precisely defined. See, for discussions concerning the drafting history of Art. 66 of the Statute: SHELTON, 1994, p. 621.

- 61 The empirical analysis first proceeded with a key-word research in all cases available in the ICJ database. The following keywords were applied: *amicus curiae*, *amici curiae*, non-governmental organization, NGO, individual, individuals, non-State and organization.
- 62 Overall, State submissions amount to 381 out of the total of 410 submissions. The other 29 submissions will be addressed in detail in the following sections of this paper.
- 63 PAULUS, 2019, para. 12.
- 64 Some proceedings received significantly more State submissions than others. The four advisory opinions that generated the highest amount of State submissions were: *Wall; Kosovo; Chagos; Threat or Use of Nuclear Weapons* (requested by the UNGA) and *Nuclear Weapons in Armed Conflict* (requested by the WHO). The only advisory opinion that did not receive State submissions was *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*. Furthermore, States' submissions in

Besides from States, the Registrar also notifies international organizations to furnish information on the question submitted to the Court **(A)**. The Court's restrictive understanding of Art. 66 (2) of the Statute as being limited to 'public international organizations' indicates that NGOs would hardly be authorized to furnish information **(B)**. Individuals have also sought to participate in ICJ advisory proceedings via the submission of statements directly **(C)**.

## A. IGOs

IGOs may not only request advisory opinions (Art. 65 of the Statute), but also furnish information on the question submitted to the Court (Art. 66 (2) of the Statute)<sup>65</sup>. The former kind of participation is not covered in this research. In the latter case, the Registrar notifies the organization considered by the Court, via special and direct communication, that it is prepared to receive written or oral statements. In theory, Art. 66 (2) leaves the choice of organizations invited to participate in advisory proceedings to the Court's exclusive discretion<sup>66</sup>. Noteworthy, this does not eliminate the possibility for the

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advisory opinions are not limited to addressing their own views about a specific legal issue before the ICJ. In some situations, States may indirectly present statements from other actors within their submissions, be they individuals or IGOs (see, *e.g.*, the *Chagos* opinion).

65 The same IGO that requested an advisory opinion under Art. 65 may also participate by furnishing information on the basis of Art. 66 (2). The double-role played by the UN Secretary-General is illustrative in this regard: 'representative of the United Nations in cases where it is involved, and as a more neutral representative of the public interest providing the Court with necessary information'. Therefore, the UNSG may simultaneously furnish documents as provided by Art. 65(2) and participates in the written and oral proceedings of Art. 66 (2). The first kind of participation takes a most neutral position, while the second one may take sides. See PAULUS, 2019, para. 19.

66 PAULUS, 2019, para. 16.

Court to modify its decision at any time<sup>67</sup> or even to allow organizations, not having been previously invited under Art. 66 (2), to submit written or oral statements<sup>68</sup>.

Overall, 27 out of 410 submissions to the Court in the framework of advisory proceedings originate from IGOs [Figure No 4]:

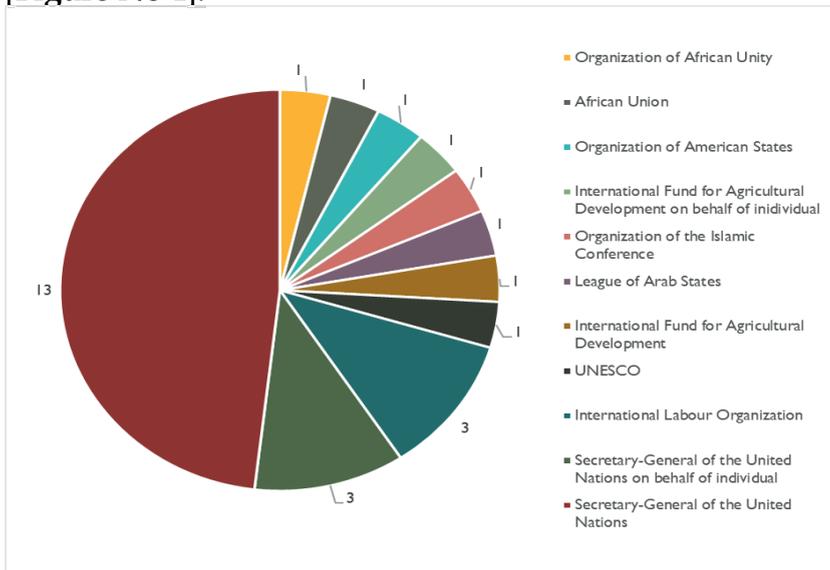


Figure No 4: International Organizations that submitted information in ICJ's Advisory Proceedings.

67 See Correspondence of the Registrar to Professor Reisman, 6 November 1970, in ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Correspondence)* 29 July 1970 <<https://www.icj-cij.org/files/case-related/53/11825.pdf>> accessed in 10 October 2019 [638]-[639]. The Court may also allow statements it had not previously admitted, such as those from the European Union in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep p. 142, para 9.

68 See statements submitted by the League of Arab States and the Islamic Conference in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep p. 142, para 6.

The collected data presents statements that were brought directly by IGOs with a view to provide information to the Court, regardless of their origin. IGOs may also be a useful vehicle to indirectly transmit information originally provided by other actors, such as individuals, which remain deprived of access to the Court<sup>69</sup>. The figure below presents the ICJ advisory proceedings that received requests from IGOs for the submission of information, whether in their own interest (directly) or 'on behalf of' other subjects (indirectly) [Figure No 5]:

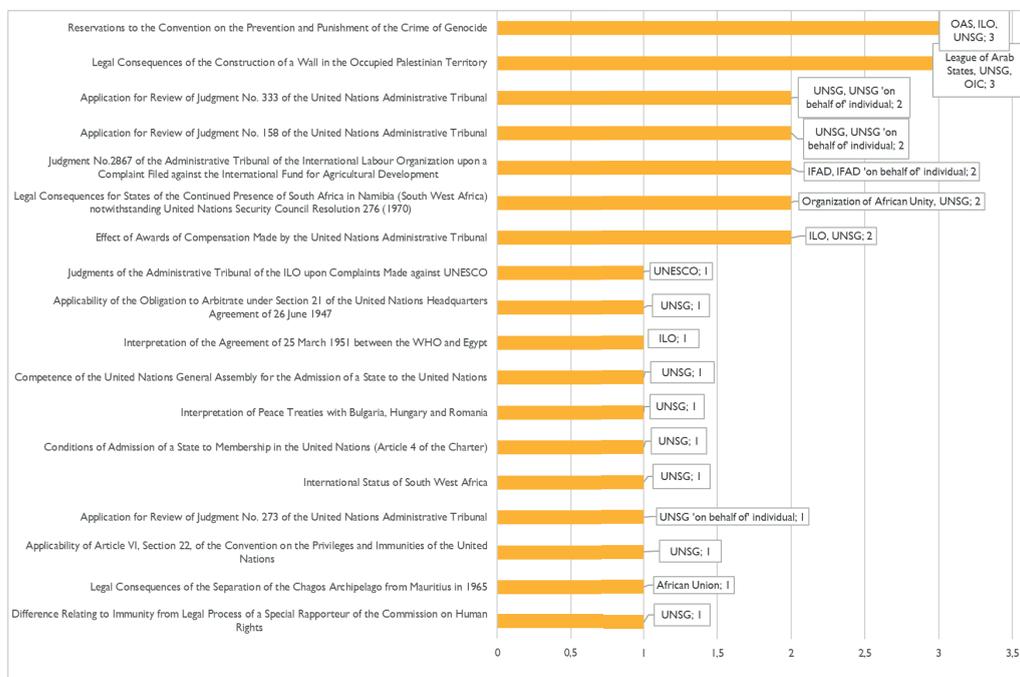


Figure No 5: ICJ's Advisory Proceedings containing IGOs' submissions

69 See section (2)(b)(i) bellow.

Both the *Wall*<sup>70</sup> and the *Genocide*<sup>71</sup> advisory opinions received three IGO submissions each. In the former, submissions were furnished by the United Nations (via Secretary-General's statement), the League of Arab States<sup>72</sup> and the Organization of Islamic Conference<sup>73</sup>. There was also a statement of Ireland 'on behalf of' the European Union, in which it was argued that although the *Wall* would be incompatibility with international law, the request for an Advisory Opinion from the ICJ would be inappropriate<sup>74</sup>. In the *Genocide* advisory opinion<sup>75</sup>, information was furnished by the United Nations Secretary-General<sup>76</sup>, the OAS<sup>77</sup> and the ILO<sup>78</sup>. Also, the figure presents five advisory opinions containing two

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70 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

71 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15

72 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement of the League of Arab States) 30 January 2004 <<https://www.icj-cij.org/files/case-related/131/1545.pdf>> accessed in 10 October 2019.

73 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement of the Organisation of the Islamic Conference) 30 January 2004 <<https://www.icj-cij.org/files/case-related/131/1615.pdf>> accessed in 10 October 2019.

74 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement of Ireland on behalf of the European Union) 30 January 2004 <<https://www.icj-cij.org/files/case-related/131/1615.pdf>> accessed in 10 October 2019.

75 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

76 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 77.

77 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

78 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 216.

IGO submissions each<sup>79</sup>. Finally, eight proceedings featured only one submission by the UN Secretary-General<sup>80</sup>; and three proceedings contained a sole submission from other IGOs: UNESCO<sup>81</sup>, ILO<sup>82</sup> and African Union<sup>83</sup>.

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79 1) Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (statements from the ILO and the UN Secretary-General); 2) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding United Nations Security Council Resolution 276 (1970) (statements from the Organization of African Unity and the UN Secretary-General); 3) Application for Review of Judgment No 333 of the United Nations Administrative Tribunal (statements from the UN Secretary-General 'on behalf of' the organization and 'on behalf of' Mr. Vladimir Victorovich Yakimetz); 4) Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (statements from the IFAD and the IFAD General Council 'on behalf of' Ms. Saez García); and 5) Application for Review of Judgment No 158 of the United Nations Administrative Tribunal (statements from the UN Secretary-General 'on behalf of' the organization and 'on behalf of' Mr. Mohamed Falsa).

80 ICJ cases: Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion) [1950] ICJ Rep 4; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62; Application for Review of Judgment No 273 of the United Nations Administrative Tribunal (Advisory Opinion) [1982] ICJ Rep 325; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion) [1988] ICJ Rep 12; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) [1950] ICJ Rep 65; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion) [1989] ICJ Rep 177; International Status of South West Africa (Advisory Opinion) [1950] ICJ Rep 128; Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion) [1948] ICJ Rep 57.

81 Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO (the statements also included commentaries 'on behalf of' the persons concerned by the judgments under review).

82 ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) [1980] ICJ Rep 73.

83 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from*

## B. NGOs

The submission of information akin to *amicus curiae* briefs by NGOs is not formally envisaged in the context of advisory proceedings (Article 66 (2) of the Statute)<sup>84</sup>. To date, NGOs have rarely directly participated in advisory proceedings before the ICJ<sup>85</sup>. In a few cases, NGOs attempted to participate in advisory proceedings before the Court by invoking the same legal basis as applicable to international organizations: whether under Art. 66 (2) or 66 (4) of the Statute. In any case, it is difficult to map the participation of NGOs because any written statement and/or document submitted by them is not to be considered as part of the case file (Practice Direction XII.1).

The figure below identifies NGOs' direct requests to submit information under Article 66 (2) or (4) of the Statute of the Court, the proceedings at hand and the Court's decision [**Figure No 6**]:

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*Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 1.

84 See Practice Direction XII. See also DE BRABANDERE, 2011, p. 93; BARTHOLOMEUSZ, 2005, p. 220-4.

85 See ICJ, *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128. The ICJ has, however, rejected the submission of *amici curiae* in contentious proceedings (*Asylum* case, in particular the attempt made by the International League for the Rights of Man). See, in this regard, RAZZAQUE, 2005, p. 172; BARTHOLOMEUSZ, 2005, p. 215. However, NGOs have played an informal role as far as initiation of cases before the ICJ are concerned (ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226). See DE BRABANDERE, 2011, p. 93; BARTHOLOMEUSZ, 2005, p. 220. The PCIJ has been more active in this regard. For an analysis of the cases in which the PCIJ permitted participation by non-governmental organizations, see SHELTON, 1994, p. 622-3.

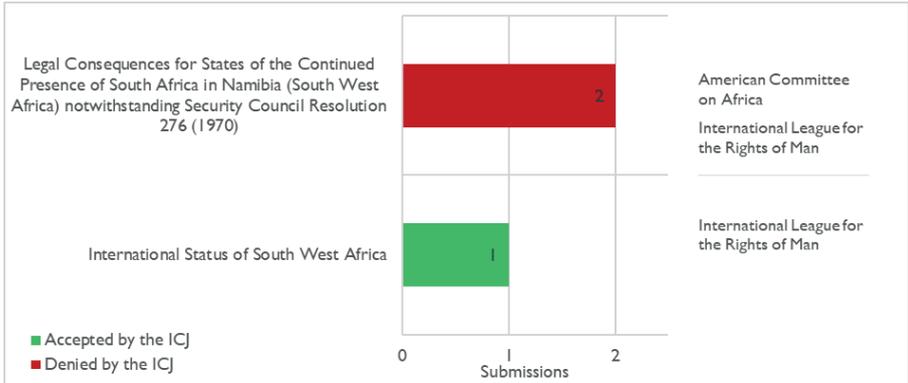


Figure No 6: Advisory Proceedings that have had NGOs attempted submissions

Overall, three NGO requests to submit information under Article 66 of the Statute were found, two of which were denied and one accepted by the ICJ. The advisory proceedings in which NGOs formally requested leave to submit information were the following: *Status of South West Africa*<sup>86</sup> (International League of the Rights of Man); and *Namibia (South West Africa)*<sup>87</sup> (International League of the Rights of Man “ILRM” and American Committee on Africa).

The sole situation in which the ICJ has formally accepted<sup>88</sup> an NGO submission was in *Status of South West Africa (1950)*<sup>89</sup>. The International League of the Rights of Man made a request under Article 66 (2) of the Statute and argued its relevance in the international arena for being recognized

86 ICJ, *International Status of South West Africa (Advisory Opinion)* [1950] ICJ Rep 128.

87 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16.

88 See ICJ, *International status of South-West Africa (Correspondence)* 16 December 1953 <<https://www.icj-cij.org/files/case-related/21/9039.pdf>> accessed in 10 October 2019 [327].

89 ICJ, *International Status of South West Africa (Advisory Opinion)* [1950] ICJ Rep 130.

as defenders of human rights and possessing a consultative status before the Economic and Social Council<sup>90</sup>. The Court decided that it would receive a written statement from the League and fixed time-limits<sup>91</sup>. However, no statement was received by the referred organization within the time-limit prescribed. According to the Registrar, since no written statement 'was received from your League within prescribed time-limit', the organization would not be authorized to participate in the oral hearings<sup>92</sup>.

The Court has formally denied two NGOs' requests to submit information in *Namibia (South West Africa)*<sup>93</sup>. The requests originated from the International League for the Rights of Man<sup>94</sup>, and from the American Committee on Africa, and have both mentioned Art. 66 of the Statute. The Registrar's response<sup>95</sup> to the American Committee on Africa may indicate that the ICJ appears to have reconsidered its

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90 ICJ, International status of South-West Africa (Correspondence) 16 December 1953 <<https://www.icj-cij.org/files/case-related/21/9039.pdf>> accessed in 10 October 2019 [324].

91 See ICJ, International Status of South West Africa (Advisory Opinion) [1950] ICJ Rep 130.

92 ICJ, International status of South-West Africa (Correspondence) 16 December 1953 <<https://www.icj-cij.org/files/case-related/21/9039.pdf>> accessed in 10 October 2019 [346]. See also LEROUX, 2006, p. 212-213.

93 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16.

94 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Correspondence) 29 July 1970 <<https://www.icj-cij.org/files/case-related/53/11825.pdf>> accessed in 10 October 2019 [672]. See BARTHOLOMEUSZ, 2005, p. 221-222.

95 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Correspondence) 29 July 1970 <<https://www.icj-cij.org/files/case-related/53/11825.pdf>> accessed in 10 October 2019 [647]-[650].

previous position with regards to the status of the League for the Rights of Man as an international organization under Art. 66 (2) of the Statute<sup>96</sup>. Afterwards, the ICJ Rules concerning advisory proceedings, adopted in 1978, clearly referred to 'public international organization', as opposed to the broader language of the Statute<sup>97</sup>.

### C. Individuals

Individuals have rarely participated with the submission of information akin to *amicus curiae* in advisory proceedings. The sole situation in which individuals have sought to participate directly in advisory proceedings concerns the *Unilateral declaration of independence*<sup>98</sup>. Requested by the UNGA, the proceeding dealt with matters of public interest and received a large number of external contributions<sup>99</sup>, among which the authors of the Kosovo's unilateral declaration of independence<sup>100</sup>.

The Court did not confer any particular status to the authors of the declaration, but appeared not limited by the

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96 BARTHOLOMEUSZ, 2005, p. 221-222.

97 BARTHOLOMEUSZ, 2005, p. 221-222. The practice of the ICJ seems to be more restrictive than the practice of PCIJ with regards to the participation of non-governmental organizations in advisory proceedings. For instance, five PCIJ advisory opinions concerning the ILO comprised the participation of international worker's organizations. See LA ROSA; GUILBAULT, 2011, para 5.

98 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

99 The *Kosovo* advisory opinion received 44 submissions.

100 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Contribution of the Authors of the Unilateral Declaration of Independence) 17 April 2009 <<https://www.icj-cij.org/files/case-related/141/15678.pdf>> accessed in 10 October 2019; see also (Further Written Contribution of the Authors of the Unilateral Declaration of Independence) 17 July 2009 <<https://www.icj-cij.org/files/case-related/141/15708.pdf>> accessed in 10 October 2019.

wording of Art. 66 (2). In any case, the authors of the declaration could neither be qualified as 'states' under the ICJ Statute (and 'the Court did not make such qualification') nor as international organizations<sup>101</sup>. It seems that the Court accepted such participation mostly due to the potential ability of the authors of the declaration to provide information which might assist its work<sup>102</sup>. Significantly, and for the first time in advisory proceedings, the Court applies a distinct terminology and expressly speaks of 'contributions' instead of its habitual wording 'statements' when referring to the authors of the declaration<sup>103</sup>. However, neither the Statute nor the Rules of Court contain the notion of 'contribution', whose relevance remains unclear<sup>104</sup>. The referred authors sent written contributions and participated in the oral proceedings<sup>105</sup>.

#### IV. Conclusion

Having the ICJ as a focus, this analysis addressed the potentials and limits of the participation of IGOs and NSAs, notably as 'friends of the Court', in ICJ contentious cases and advisory proceedings.

In contentious cases, there are various legal basis worth examining for IGOs and NSAs' submission of observations and requests for participation. In contrast to the ICJ scant practice on Art 34 (2), Art 34 (3) was referred to by the Court to issue most IGOs' notifications to submit observations.

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101 PAULUS, 2019, para. 14; HERNÁNDEZ, 2011, p. 151.

102 HERNÁNDEZ, 2011, p. 151.

103 PAULUS, 2019, para. 13.

104 PAULUS, 2019, para. 13.

105 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep p. 408-412 para 8-14.

However, even after notification by the Court, IGOs have rarely taken the opportunity to provide the Court with their observations. Efforts from the ICJ to notify every relevant actor to submit written statements could also demonstrate, on the one hand, the Court's openness to *amicus curiae* participation; and, on the other hand, the organizations' unwillingness to present observations.

Noteworthy, no NGO was notified under Art 34 (3). In practice, the Court has never received *amicus curiae* submissions from NGOs in contentious cases. Empirical research confirms the doctrinal hypothesis according to which 'art 34 is unlikely to be a means for NGOs to have access to the ICJ in contentious cases'<sup>106</sup>. Arguably, Art 34 seems to be outdated and certainly disconnected from the contemporary developments characterizing the international community nowadays. It appears that NGOs and NSAs would be more likely to have access to the ICJ by using Art 50 of the ICJ Statute.

Art 50 allows the Court to entrust any NSA to carry out an enquiry or give an expert opinion. NSAs, such as NGOs and individuals, would be able to contribute information indirectly, as expert witnesses, by requesting that the Court appoint them to give their opinion. The Court could also be more active in indicating independent experts whenever it deals with factually complex cases<sup>107</sup>, which have increased in the last decades. It is frequently argued that the Court's toolkit to deal with scientific or technical cases could be updated and used more often<sup>108</sup>. By adopting a practice direction in this regard, the Court could make greater use of its power to appoint experts under Art. 50 of the Statute, as

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106 BARTHOLOMEUSZ, 2005, p. 216.

107 MALINTOPPI, 2016, p. 436. See also PEAT, 2014, p. 10.

108 MALINTOPPI, 2016, p. 433.

a regular practice, whenever appropriate<sup>109</sup>. By appointing its own experts, the Court would 'establish itself as a careful, systematic court which can be entrusted with complex scientific evidence'<sup>110</sup>. In addition, the appointment of a Court-expert would allow parties to expose their views by commenting on such opinions, which would enhance their confidence in the technical and transparent evaluation by the Court<sup>111</sup>. More generally, ICTs could make more active use of their fact-finding powers whenever community interests are at stake<sup>112</sup>.

Scholars also suggest that Art 50, supplemented by Art 67 of the ICJ Rules, provides a potential avenue for the Court

109 The proposal of making greater use of the Court's power to appoint experts under Art. 50 of the Statute has been advanced by Loretta Malintoppi, Howard Wheeler and Laurence Boisson de Charzounes, on the occasion of the 70th Anniversary of the Court's first inaugural sitting (survey conducted in preparation for the Seminar in 2015), available in CRAWFORD; KEENE, 2016, p. 229.

110 See ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment: Joint Dissenting Opinion of Judges Al-Khasawneh and Simma) [2010] ICJ Rep 14, para. 1 and 17. In its declaration, Judge Yusuf has followed the same path and addressed the possibility of the Court making more active use of its powers to appoint its own experts to 'gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties.

111 See ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment: Declaration of Judge Yusuf) [2010] ICJ Rep 14, para. 7.

112 SIMMA, 2012, p. 232-3. Moreover, specifically with respect to the ICJ, the Court has not often made use of the appointment of experts in its case history. The Court has either rejected the Parties' requests to commission an expert opinion or has concluded that such an appointment was unnecessary (TAMS; DEVANEY, 2019, para. 9). However, in some cases judges in their dissenting or separate opinions suggested the use of this provision, contrary to the main understanding of the Court (PEAT, 2014, p. 13); e.g. ICJ cases: *Temple of Preah Vihear (Cambodia v Thailand)*; *Kasikili/Sedudu Island (Botswana v Namibia)*; *Maritime Delimitation (Qatar v Bahrain)*; *Military and Paramilitary (Nicaragua v. United States)*; *Pulp Mills (Argentina v. Uruguay)*; *Whaling in the Antarctic (Australia v. Japan)*; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*.

to invite IGOs or NSAs, NGOs and individuals included, to be heard in their limited capacity of experts<sup>113</sup>. Therefore, without any change in the Rules, the Court could permit NSAs that so requested to submit information via expert opinions. Judge Anzilotti suggested, during the debates surrounding the 1926 Revision of the Permanent Court of International Justice (PCIJ) Rules of Procedure that these experts could not only be individuals, but also private organizations<sup>114</sup>. However, in practice, neither IGOs and NSAs nor the Court have explored the potentials of this provision. The Court has been reluctant to appoint representatives of NGOs as experts, instead limiting itself to designating individuals. Furthermore, as far as individuals are concerned, the Court's scant practice does not indicate an intention to interpret expansively the scope of an individual's capacity under Art 50 to include the possibility to present *amicus curiae*<sup>115</sup>. In practice, individuals solicited by the Court acted exclusively in the capacity of technical experts.

In advisory proceedings, a similar situation occurs: there is no express provision for *amicus curiae* participation. However, Article 66 (2) of the ICJ Statute allows States and international organizations to send written or oral statements to the Court, with no limitation to 'international organizations of States'. As discussed above, the *Wall* advisory opinion<sup>116</sup> engendered the highest amount of submissions by States (49 submissions), followed by the proceedings

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113 SIMMA, 2012, p. 214; PALCHETTI, 2002, p. 170.

114 PCIJ, Acts and Documents concerning the Organization of the Court, Series D. Addendum to No 2 Revision of the Rules of Court, Detailed Minutes of the Meetings of the Court Concerning the Revision of the Rules of Court (1926) 224-5. See also SHELTON, 1994, p. 627.

115 BARTHOLOMEUSZ, 2005, p. 216-7.

116 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

in *Kosovo*<sup>117</sup> (43 submissions), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*<sup>118</sup> (39 submissions); *Chagos*<sup>119</sup> (37 submissions); and *Legality of the Threat or Use of Nuclear Weapons (UNGA)*<sup>120</sup> (33 submissions). Interestingly, in the *Construction of a Wall* opinion, the Court allowed Palestine's participation in written and oral proceedings, accepting its statement under an unclear and controversial legal basis, as an example of non-State participation before the ICJ<sup>121</sup>. The Court did not base the right of Palestine to appear as a State nor as an international organization, under Article 66(2), and neither as an expert or a witness, under Articles 48, 50, 51 or 68 of the Statute, since none of them were mentioned<sup>122</sup>. That can be explained by Palestine's special status as observer before the UNGA and as co-sponsor of the resolution that requested the ICJ advisory opinion<sup>123</sup>.

Although States remain, by far, the most active participants in advisory proceedings, the Court has frequently invited public international organizations. Indeed, the involve-

117 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

118 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.

119 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 1.

120 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion: Separate Opinion of Judge Guillaume) [1996] ICJ Rep 287.

121 See, for instance, DE BRABANDERE, 2011, p. 91

122 See HERNÁNDEZ, 2011, p. 151; PAULUS, 2019, para. 13-14; BARTHOLOMEUSZ, 2005, p. 218

123 For the discussion concerning Palestine status and accessibility to ICJ proceedings, see PAULUS, 2019, para. 13; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 141, para 4; (Letter dated 29 January 2004 from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel) 30 January 2004, p. 13, para 2.14-2.15.

ment of IGOs is also representative since they submitted 27 statements to the Court, be they direct or indirect. IGOs may also be a useful vehicle to indirectly transmit information originally provided by other actors ('on behalf of'), such as individuals, which remain deprived of access to the Court. Arguably, a parallel can be found between IGO and State submissions: the advisory opinions presenting the highest amount of IGO submissions remain the same as those having received the larger amount of State submissions, which is probably due to issues concerning public interest.

Conversely, the ICJ has only once accepted a request from an NGO: in *International Status of South West Africa* (1950)<sup>124</sup>. Noteworthy, NGOs have indirectly influenced the ICJ by managing to integrate their briefs into State briefs or by inducing States to initiate proceedings. NGOs seem, therefore, more successful in informal means of participation in ICJ proceedings. This indirect participation has permitted NGOs to make their views known to the ICJ. Two advisory proceedings embody a remarkable example in which NGOs have indirectly participated before the Court: *Legality of the Threat or Use of Nuclear Weapons (UNGA)*<sup>125</sup> and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*<sup>126</sup>. In any case, it is difficult to map the participation of NGOs because any written statement and/or document submitted by them is not to be considered as part of the case file (Practice Direction XII.1). Based on the information at our disposal, no NGO has ever made use of Practice Direction

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124 ICJ, *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128.

125 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion: Separate Opinion of Judge Guillaume) [1996] ICJ Rep 287.

126 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.

XII for submitting a written statement or document in an advisory proceeding on its own initiative<sup>127</sup>.

Individuals have also sought to participate in ICJ proceedings via the submission of statements directly and, more frequently, via indirect submissions within written and/or oral statements from States or IGOs. A non-exhaustive analysis found five requests submitted by IGOs and two requests submitted by States 'on behalf of' individuals. Indeed, in some situations, States may indirectly present statements from individuals within their submissions, such as in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO)*<sup>128</sup> and in *Chagos* opinion<sup>129</sup>, requested by the UNGA; or from IGOs, such as in the *Wall* advisory opinion<sup>130</sup>. There appears to be a connection between the amount of statements submitted and the subjects dealt with, which concern community interest topics, such as self-determination<sup>131</sup>, ques-

127 The adoption of Practice Direction XII seems to reflect the recognition of the relevant role played by NGOs in advisory proceedings. However, instead of facilitating access to documents by the general public, para. 3 of Practice Direction XII indicates that written statements and documents submitted by NGOs will be closed away in a specific location at the Peace Palace and 'may be consulted' by States and IGOs. In order to ensure greater transparency, these documents should be placed on the Court's website in a manner to be accessible to the parties and the public at large (PAULUS, 2019, para. 27).

128 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Oral Statement: Verbatim Record 1995/32) 14 November 1995 <<https://www.icj-cij.org/files/case-related/93/093-19951114-ORA-01-00-BI.pdf>> accessed 27 January 2020 [32] para 14, [72].

129 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Oral Statements: Verbatim record 2018/20) 3 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180903-ORA-01-00-BI.pdf>> accessed 20 December 2019, [71]-[72], para 4.

130 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Written Statement of Ireland on behalf of the European Union) 30 January 2004 <<https://www.icj-cij.org/files/case-related/131/1615.pdf>> accessed in 10 October 2019.

131 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

tions related to frontiers and territorial integrity<sup>132</sup>; and the threat or use of force, armament, disarmament and nuclear weapons<sup>133</sup>. It might be argued, therefore, that ICJ advisory proceedings could ‘offer an adequate framework’<sup>134</sup> for expanding access to international justice, notably in cases concerning community interests.

The participation of members of the international society in the judicial law-making process has become one of the basic features of international law. Broadening the possibilities for participation of NSAs would imply the recognition of the plurilateral nature of international disputes. This would require not only the expansion of the active legitimacy for submitting *amicus curiae* briefs but also the enlargement of its scope, notably when community interests are at stake<sup>135</sup>.

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*Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 1.

132 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403.

133 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

134 ICJ, Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Separate Opinion of Judge Cançado Trindade) [2012] ICJ Rep para 113 and 114.

135 However, for *amici curiae* participation to be often associated with positive consequences, such as ensuring transparency, public participation and democracy (KENT; TRINIDAD, 2019, p. 235), it must be assumed that these are impartial, neutral or independent (LINDBLUM, 2005, p. 523-524). Yet, the practice of other ICTs shows that sometimes such interventions have served as voices for ‘narrow, Western vested interests’, ‘while the same possibilities are not available to less affluent groups’ (RAZZAQUE, 2005, p. 171); or have engaged in advocacy, instead of being ‘friends of the Court’ (KENT; TRINIDAD, 2019, p. 245). Other procedural drawbacks include an additional burden on registries, judges and parties to proceedings, a risk of unnecessarily prolonging proceedings or resulting in increased costs (SANDS; MACKENZIE, 2009, para. 30). There are also concerns

If the goal is to ‘introduce public interest considerations’, the ‘friends of court’ could also contribute to upholding rules aimed at protecting fundamental values of the international community and, ultimately, to strengthening the democratic legitimation of judicial decisions<sup>136</sup>

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that ‘opening the floodgates of courts’ might compromise the conduct of proceedings if a court receives a high level of submissions.

136 VON BOGDANDY; VENZKE, 2014, p. 41.

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