

IUCN's Amicus Curiae Submission in the Climate Change Advisory Opinion: Wind of Changing Practice at the ICJ?

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Abstract:

Globally, there has been a phenomenal rise in the number of non-governmental organizations (NGOs). Apparently, there is an increasingly relaxed approach to receiving *amicus curiae* briefs from non-state actors, particularly non-governmental organizations. The International Court of Justice (ICJ) has remained quite restrictive, balking against the general trend. It is not only that the Statute of the ICJ bars non-governmental organizations from invoking contentious and advisory jurisdiction of the Court, but the Court, through its Rules, has virtually shut the door for them to submit *amicus curiae* briefs. In light of the recent submission by the International Commission for Conservation of Nature (IUCN), by analyzing the various legal and policy issues, this article suggests that the Rules of the Court should be amended to allow *amicus curiae* briefs by NGOs. It finds that such an amendment does not require any changes in the Statute and is well within the powers of the ICJ.

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Introduction:

On 29 March 2023, the United Nations General Assembly adopted resolution 77/276 entitled “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change” and decided to seek an advisory opinion from the International Court of Justice.¹ In particular, the UNGA asks the ICJ to answer the following questions:

(a.) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b.) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i.) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii.) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?²

The ICJ accepted the application of the International Union for Conservation of Nature (IUCN) to participate in the advisory proceedings.³ IUCN is not the only body to have

1. G.A. Res. 77/276, at 3 (Mar. 29, 2023).

2. *Id.*

3. Press Release, Int'l Ct. of Just., The Court authorizes the International Union for Conservation of Nature to participate in the proceedings, U.N. Press Release ICJ/29 (June 14, 2023).

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approached the ICJ to participate in the proceedings.⁴ There are other actors such as the African Union; European Union (EU); the Commission of Small Island States on Climate Change and International Law; the Alliance of Small Island States; the Organization of the Petroleum Exporting Countries; the Organisation of African, Caribbean and Pacific States the Melanesian Spearhead Group; the Forum Fisheries Agency; the Pacific Island Forum (PIF); the Pacific Community and Parties to the Nauru Agreement; and the World Health Organization have also approached the ICJ to take part in the proceedings.⁵ But unlike the others, the IUCN, in this case, is the only party that is neither a state nor a fully intergovernmental international organization.⁶ IUCN has submitted a written statement pursuant to Article 66(2) of the Statute of the Court (as stated in the Press Release of 14 June),⁷ placing IUCN in a unique position.⁸ This could arguably be an exemplary decision of the ICJ in terms of amicus curiae submissions by NGOs and perhaps welcome further climate related disputes before the Court to enforce climate justice.⁹

Unlike international organizations, which are created by states (generally through treaties) under international law, NGOs are created by the action of individuals and set up under national laws.¹⁰ The membership of NGOs can be diverse—it may consist of private individuals,

4. Earth Negots. Bull., Int'l Inst. for Sustainable Dev., Summary report, 2–13 December 2024: INTERNATIONAL COURT OF JUSTICE HEARINGS ON THE OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE at 158 (2024).

5. *Id.* at 8, 158.

6. *Id.* at 169.

7. Int'l Ct. of Just., *supra* note 3.

8. Danilo B. Garrido Alves, *The Concept of Int'l Org. in the practice of the Int'l Ct. of Just.*, EJIL: TALK! (July 27, 2023), <https://www.ejiltalk.org/the-concept-of-international-organization-in-the-practice-of-the-international-court-of-justice/> [<https://perma.cc/RR96-Y5E7>].

9. *Id.*

10. See Kerstin Martens, *Examining the (Non-) Status of NGOs in International Law*, 10 IND. J. GLOB. L. STUD. 1, 3 (2003).

individuals who are public officials, or a group protecting the interest of businesses.¹¹ Globally, there has been a phenomenal rise in the number of NGOs.¹² India, alone is believed to have more than one million NGOs.¹³ They are also playing different roles on the international plane.¹⁴ Some private NGOs such as the International Olympic Committee, the Global Fund to Fight Aids, Tuberculosis and Malaria, International Air Transport Agency, *etc.*, behave almost like intergovernmental organizations.¹⁵ The key role played by the International Committee of Red Cross in the development and crystallization of the International Committee of the Red Cross is well-known.¹⁶ Surmounting the opposition of major powers such as the USA, Russia and China; it was the NGOs who successfully pushed forward the Landmine Ban Treaty.¹⁷ In the environmental arena, NGOs helped inter alia, drafting the treaty of the 1979 Convention on the Conservation of Migratory Species of Wild Animals.¹⁸ Even for drafting major conventions like the U.N Convention on the Rights of the Child, NGOs have played a vital role in shaping obligatory international laws.¹⁹ This article will deal with IUCN's role as an *amicus curiae* in the case before the ICJ. It argues that the ICJ's rules on the *amicus curiae* brief restricting submissions by NGOs are not in sync with the contemporary world and should be modified.

11. *See id.* at 3–4.

12. *See id.* at 4.

13. *India*, ICNL, <https://www.icnl.org/resources/civic-freedom-monitor/india> [<https://perma.cc/33GJ-LNKJ>].

14. *SEE* METTE EILSTRUP-SANGIOVANNI & J.C. SHARMAN, *VIGILANTES BEYOND BORDERS: NGOs AS ENFORCERS OF INTERNATIONAL LAW* at 3–4 (2022); Steve Charnovitz, *Nongovernmental Orgs. and International Law*, 100 AM. J. INT'L L. 348, 352 (2006) (detailing NGOs' role on the international plane); *see also* Martens, *supra* note 10.

15. WILLIAM WORSTER, *CASES AND MATERIALS ON THE LAW OF INTERNATIONAL ORGANIZATIONS* at 56 (2021).

16. Cordula Droege & Eirini Giorgou, *How international humanitarian law develops*, 104 INT'L REV. RED CROSS 1798, 1827 (2022).

17. Kenneth Anderson, *The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 104–05 (2000).

18. *See* M. J. Bowman, *International Treaties and the Global Protection of Birds: Part II*, 11 J. ENV'T L. 281, 299–300 (1999).

19. *See* Karen A. Polonko & Lucien X. Lombardo, *Non-Governmental Organisations and the UN Convention on the Rights of the Child*, 23 INT'L J. CHILDREN'S RIGHTS 133, 133 (2015).

This article only deals with amicus curiae briefs before the ICJ, such briefs before national courts or other international courts are beyond its scope.²⁰ While various interest groups, legal academe, and politically engaged lawyers may submit amici briefs, the focus of this article is on the amicus curiae briefs by NGOs. The next section of the paper discusses the legal status of the IUCN and its activities. Then, Section III analyzes the meaning and role of the amicus curiae. Section IV discusses the law and practice of the ICJ regarding amicus curiae submissions in contentious proceedings. Section V analyzes the law and practice of the ICJ regarding amicus curiae briefs in advisory opinion proceedings. Section VI discusses the benefits of amicus curiae briefs (particularly by NGOs). Section VII discusses the concerns with such amicus curiae briefs. Section VIII surmises the role of the IUCN in the case at hand and its potential impact. Section IX analyzes the concerns that are often raised about NGOs having greater access to the Court. Section X analyzes the reasons why NGOs should be given greater access to the Court and the means to do it. Section XI concludes the article.

20. See generally Laurence Boisson De Chazournes & Makane Moïse Mbengue, *The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 205, 209 (2003); See Chen Yu, *Amicus Curiae Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation*, 35 ICSID REV. 224, 224 (2020); Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in Intentional Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L. J. 510, 514 (2012); Sarah Williams & Hannah Woolayer, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 INT'L CRIM. L. REV. 151, 151 (2006); Laura Van Den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETH. Q. H. R. 271, 271 (2013); See Sahar Abi-Hassan et. al., *The Ideologies of Organized Interests and Amicus Curiae Briefs: Large-Scale, Social Network Imputation of Ideal Points*, 31 POL. ANALYSIS 396, 396 (2023); Maria E. Doerfler, *Bishops and Friends: History and Legal Interpretation Recent Amicus Curiae Briefs before the Supreme Court*, 38 J. L. & RELIG. 55, 55 (2023); David S. Clark, *Use of the "Amicus Curiae" Brief in American Judicial Procedure in Comparative Perspective*, 80 RABELZ 328, 329 (2016); Steven Kochaver, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L. J. 1652, 1653–1654 (2013); Christelle Coslin & Delphine Lapillonne, *France and the Concept of Amicus Curiae: What Lies Ahead?*, 4 PARIS INT'L LITIG. BULL. 14, 15–16 (2012); Benjamin R.D. Alarie & Andrew J. Green, *Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance*, 48 OSGOODE HALL L. J. 381, Abstract (2010); Zelditie O'Brien, *The Courts Make a New Friend? Amicus Curiae Jurisdiction in Ireland*, 7 TRINITY C. L. REV. 5, 11–26 (2004); Edward Clark, *The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand*, 36 VICT. U. WELLINGTON L. REV. 71, 84 (2005); S. Chandra Mohan, *The Amicus Curiae: Friends No More?*, SING. J. L. STUD. 352, 352 (2010); Christina Murray, *Litigating in the Public Interest: Intervention and the Amicus Curiae*, 10 S. AF. J. H. R. 240, 240 (1994); Joseph D. Kearney & Thomas W. Merrill, *Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745 (2000).

II. The Legal Status of IUCN and Its Activities

The IUCN was created in 1948.²¹ The French government played a major role in its creation, and it is a rare hybrid NGO²² that is made up of national and international conservation groups, as well as states and other public law entities such as universities and research institutes.²³ Thus, it is not necessarily an international intergovernmental organization solely consisting of states as its members.²⁴ One of the most efficacious ways of deciphering IUCN is understanding its vision and goals.²⁵ The International Union for Conservation of Nature is one of the leading international organizations devoted to working on climate change, biodiversity loss and pollution.²⁶ It has become the most widely recognized platform for keeping watch of nature and protecting it (be it through publishing the IUCN Red List of Threatened Species for locating and protecting endangered species or by being the official advisory body on nature under the World Heritage Convention and proposing solutions that influence national and global policy).²⁷ “IUCN congresses have produced several key international environmental agreements including the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the World Heritage Convention, and the Ramsar Convention on Wetlands.”²⁸ As an official United Nations Observer and a one-of-a-kind membership union, IUCN influences, encourages, and assists societies to conserve nature and ensure

21. *The International Union for Conservation of Nature (IUCN)*, U.N. ENVIRONMENT PROGRAMME, <https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/partners/international-union> [<https://perma.cc/4DFQ-NDK8>].

22. See SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 74 (3rd ed. 2018).

23. *The International Union for Conservation of Nature (IUCN)*, *supra* note 21.

24. *Id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *Id.*

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proper distribution of natural resources.²⁹

Unlike other international organizations that solely comprise of States as Members, the membership system of IUCN sets it apart from the traditional definition.³⁰ It was created with respect to Article 60 of the Swiss Civil Code, as an international association of governmental and non-governmental members.³¹ As stated in Article 4 of the IUCN Statutes (including Rules of Procedure of the World Conservation Congress, and Regulations);³² “it is a network of different kinds of contributors of policy-making and implementation, divided categorically into 4 parts: Category A. consisting of States, government agencies and subnational governments; and political and/or economic integration organizations; Category B. consisting of national & international non-governmental organizations; Category C. of Indigenous peoples’ organizations; and finally, Category D. consists of affiliates (government agencies, national and international non-governmental organizations, which are not in Categories A., B., or C.).”³³

Over 1,400 Member organizations make up the democratic union.³⁴ Fourteen percent of IUCN’s Membership consists of State and government agency members—given that the States are Members of the United Nations or any of its Specialized Agencies, or of the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice.³⁵ “IUCN

29. Int’l Union for Conservation of Nature [IUCN], *Statutes, including Rules of Procedure of the World Conservation Congress, and Regulations* art. 2.

30. *See id.* at art. 4.

31. *Id.* at art. 1.

32. *Id.* at art. 4.

33. *Id.* at art. 4–5.

34. *IUCN Members*, IUCN, <https://www.iucn.org/our-union/members> (last visited July 20, 2024) [<https://perma.cc/QV6V-KFDA>].

35. *State and Government Members*, IUCN, <https://www.iucn.org/our-union/members/iucn-member/state-and-government-members> (last visited July 18, 2024) [<https://perma.cc/5QUD-4ZFN>]; Int’l Union for Conservation of Nature [IUCN], *supra* note 29 at art. 5(a).

provides these Members with valuable international data and analysis that can help better formulate, target and legitimise policy decisions in the environmental arena and beyond.”³⁶ International and national non-governmental organisations make up the largest percentage of membership at the IUCN.³⁷ Later, in 2016, institutions and associations established by Indigenous peoples for the advancement of their communities or the Indigenous Peoples’ Organisations joined, and since 2021, local governments have taken part in the IUCN congresses too and made up the membership to provide their inputs, upholding inclusivity.³⁸ Approximately 16,000+ volunteer scientists and other experts are working for the international union across 160+ countries, while the staff members are that of 1,000+ in fifty countries.³⁹ The experts make up seven specialized commissions for performing different tasks of undertaking research and other technical work for their greater enforceability and make up the IUCN body: Commission on Education and Communication; Commission on Environmental, Economic and Social Policy; World Commission on Environmental Law; Climate Crisis Commission; Commission on Ecosystem Management; Species Survival Commission; and World Commission on Protected Areas.⁴⁰ The World Commission on Environmental Law (WCEL) and the Environmental Law Centre (ELC) make up the IUCN Environmental Law Programme (ELP), which works in tandem with the IUCN Academy of Environmental Law.⁴¹ The ELP is an ‘integrated program of activities that assists

36. *State and Government Members*, *supra* note 35.

37. *IUCN Members*, *supra* note 34.

38. *Id.*

39. *About IUCN*, IUCN, <https://iucn.org/about-iucn> (last visited July 20, 2024) [<https://perma.cc/PX2R-9XXP>]; *IUCN expert Commissions*, IUCN, <https://www.iucn.org/our-union/expert-commissions> [<https://perma.cc/YGX7-SLZW>].

40. *IUCN expert Commissions*, *supra* note 39.

41. Aaron Laur et al., 19. *International Union for Conservation of Nature (IUCN)*, 28 Y.B. INT’L ENV’T L., 527, 527 (2016).

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decision makers with information, legal analysis, advisory services, legislative drafting, mentoring, and capacity building at national, regional, and global levels';⁴² WCEL is a global network of environmental law and policy experts who provide their expertise to IUCN programs,⁴³ particularly those of the ELP; and the ELC serves as the Secretariat for the WCEL and collaborates with the entire IUCN as well as numerous other partners from around the world.⁴⁴

Apart from governance, IUCN has also assisted courts and taken part in their litigation processes in the form of an amicus curiae as a means to safeguard nature.⁴⁵ In the first IUCN World Environmental Law Congress: Environmental Rule of Law, Justice and Planetary Sustainability in 2016, the Global Judicial Institute for the Environment was formed as the platform for the international convergence of judges and environmental law, marking a tremendous success for the WCEL.⁴⁶ It began its mission to support the role of international courts and tribunals trying to enforce climate justice worldwide by applying and enforcing environmental laws, promoting the environmental rule of law and trying to ensure the fair distribution of environmental benefits and burdens.⁴⁷ IUCN has maintained an exchange and knowledge-sharing among judges by facilitating cooperation and linkages among judges with the agents or stakeholders involved in environmental compliance and enforcement.⁴⁸

42. *Id.*

43. *World Commission on Environmental Law A Volunteer Global Environmental Law Network*, IUCN, <https://www.iucn.org/our-union/commissions/world-commission-environmental-law/world-commission-environmental-law> [<https://perma.cc/QET7-JWVM>].

44. Laur et al., *supra* note 41, at 528.

45. *See World Commission on Environmental Law About & How We Engage*, IUCN, <https://iucn.org/our-union/commissions/iucn-world-commission-environmental-law-2021-2025> [<https://perma.cc/S3NV-HVP9>].

46. *2016 Rio de Janeiro International Environmental Law Conference*, IUCN (Apr. 27, 2016), <https://iucn.org/events/iucn-event/2016-rio-de-janeiro-international-environmental-law-conference> [<https://perma.cc/B33Z-Y2ES>].

47. *World Commission on Environmental Law About & How We Engage*, *supra* note 45.

48. *IUCN WCEL Global Judicial Institute on the Environment Task Force*, Int'l Union for Conservation of Nature, <https://iucn.org/our-union/commissions/group/iucn-wcel-global-judicial-institute-environment-task-force> [<https://perma.cc/4YHE-ZETG>].

The institute is composed of sitting judges from around the world and is led by an elected council directing and overseeing activities.⁴⁹ As an initiative directed by judges, the GJIE is a forum for convening judges on environmental issues and will provide opportunities for information exchange, collaboration, strengthening capacity, and providing research and analysis for environmental adjudication, court practices, and the environmental rule of law.⁵⁰

It has often submitted written statements in the International Tribunal for the Law of the Sea (ITLOS) as an *amicus curiae* pursuant to Article 138, paragraph 3 and Article 133, paragraph 3 of the Rules of the Tribunal; most recently, in Case No. 31 “Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)” on June 13, 2023.⁵¹ Prior to that, on the Advisory Opinion on “Responsibility and Liability for International Seabed Mining” (ITLOS Case No. 17), the Court had requested an *amicus* brief from the IUCN, and deliberated on its admissibility.⁵²

III. Who Are *Amicus Curiae*?

The term *amicus curiae* is defined 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.”⁵³ The term has been used for centuries, but precise origin

49. *Id.*

50. *Id.*

51. See Int’l Union for Conservation of Nature [IUCN], *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal)*, Case No. 31 (June 13, 2023).

52. Anna Dolidze, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17) and the Future of NGO Participation in the International Legal Process*, 19 ILSA J. INT’L & COMP. L. 1, 26 (2012).

53. *Amicus Curiae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

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of the term is not undisputed.⁵⁴ Some scholars think that it originated in ancient Roman Law.⁵⁵ *Abbott's Dictionary of Terms and Phrases* has explained that it is a "term applied to a bystander, who without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."⁵⁶ According to *Holthouse's Law Dictionary*, "[w]hen a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiae*. Counsel in court frequently act in this capacity when they happen to be in possession of a case which the judge has not seen or does not at the moment remember."⁵⁷ At least in theory, if not in practice, the objective of an amicus curiae brief "is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation."⁵⁸

In international law, there does not appear to be an agreed upon definition of amicus curiae. An International Centre for Settlement of Investment Disputes (ICSID) tribunal has observed that:

An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. Its role in other fora and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and

54. See Use of the "Amicus Curiae" Brief in American Judicial Procedure in Comparative Perspective, *supra* note 20 at 330–31; Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy* 72 YALE L. J. 694, 694 (1963); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1243–44 (1992); Cf. Frank M. Covey Jr., *Amicus Curiae: Friend of the Court*, 9 DEPAUL L. REV. 30, 33–34 (1959).

55. See Krislov, *supra* note 54.

56. *Id.*

57. *Id.* at 695.

58. State v. Finley, 264 N.W.2d 769, 773 (Minn. 1954).

expertise that the litigating parties may not provide. In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.⁵⁹

Another ICSID tribunal has described *amicus curiae* as recognized in certain legal systems and, more recently, in a number of international proceedings.⁶⁰ In such cases, a nonparty to the dispute, as “a friend, offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission.”⁶¹

An *amicus* brief may serve as a signal to the court that the case at hand may impinge on rights and interests broader than those of the litigating parties.⁶² Generally, *amicus* briefs are a feature in appellate courts or in proceedings where arguments and paper-based evidence dominate the proceedings.⁶³ It is not just lawyers, but also government officials, law professors, law clinics, high school students, business units, employers and labor force, groups in industry and economic occupations, political parties, etc., who may submit *amici* briefs.⁶⁴ In some cases, lawyers who are in the leading position of the Bar, may devote their time *sua sponte* as a voluntary service to the indigent sections.⁶⁵ But in some cases, there can be the motive of gaining prominence through participation as *amicus curiae*.⁶⁶ Whatever the motive may be, it is clear that *amicus*

59. *Aguas Provinciales de Santa Fe S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae*, ¶ 13 (Mar. 17, 2006), <http://icsidfiles.worldbank.org/icsid/pdf> [<https://perma.cc/F5MD-44RC>].

60. *Aguas Argentinas, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ¶ 8 (May 19, 2005), 21 ICSID Rev.—FILJ 342 (2006).

61. *Id.*

62. Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, 80 WIS. LAW. 10, 11 (2007).

63. Paul M. Collins, *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 L. & SOC'Y REV. 807, 807 (2004); Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523, 524 (2003).

64. Shai Farber, *The Amicus Curiae Phenomenon – Theory, Causes and Meanings*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 1, 4 (2019); Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, U. RIC. L. REV. 361, 362 (2015); Ernest Angell, *The Amicus Curiae American Development of English Institutions*, 16 INT'L & COMP. L. Q. 1017, 1019 (1967).

65. Angell, *supra* note 64, at 1043.

66. TOMMASO SOAVE, *THE EVERYDAY MAKERS OF INTERNATIONAL LAW: FROM GREAT HALLS TO BACK ROOMS* 272 (Larissa

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curiae briefs are on the rise, and some argue that this is attributable to the increasing involvement of courts in the terrain such as religious freedoms, equal rights, migration, and the environment which were hitherto not within the domain of courts, in both municipal and international legal systems.⁶⁷

Amicus curiae needs to be distinguished from third parties or intervening parties who have some direct interest in the subject matter of the dispute and may intervene in the case as the judgment may affect that interest.⁶⁸ In other words, an intervening party would need to be able to establish that it has something to lose or gain from the court proceedings.⁶⁹ Thus, the amicus not being directly involved in the case may provide perspectives that the disputing parties may not be capable of or interested in presenting before a court.⁷⁰ Alluding to the objective nature of the amicus curiae, the ICJ in *Tunisia v. Libya* has observed that Malta sought to participate “as a closely interested participant in the proceedings intent upon seeing those issues resolved in the manner most favourable to Malta,” and “not objectively as a kind of *amicus curiae*.”⁷¹ While many amicus curiae briefs may be submitted *proprio motu*, a court or tribunal may also seek amici briefs.⁷²

van den Herik & Jean d’Aspremont eds., 2022).

67. See Farber, *supra* note 64, at 21–23.

68. See ALEXANDRU TĂNASE & GEORGE PAPUASHVILI, ORG. FOR SEC. AND COOP. IN EUR., AMICUS CURIAE CONCEPT IN MODERN JUSTICE 4 (2022).

69. Statute of the International Court of Justice, art. 62, 59 Stat. 1055 (Oct. 24, 1945).

70. See Schweitzer, *supra* note 63, at 527.

71. Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1981 I.C.J. 3, ¶ 32 (Apr. 14).

72. For instance, the International Criminal Tribunal for the Former Yugoslavia and also the International Tribunal for the Rwanda sought amicus curiae briefs, a similar practice is also prevalent in the municipal court of some states. For example, the Supreme Court of Bangladesh, in many cases of public importance, appoints amicus curiae. See *Khan v. Bangladesh*, 64 DLR (AD) 169 (2012); *Tayeb v. Bangladesh*, Civil Appeal Nos. 593-594 of 2001 (2001); *Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh*, Writ Pet. No. 5916 (2009). Apparently, the purpose of this type of appointment is to obtain a broader representation of different viewpoints. Similar trend also exists in the UK where generally, the involvement of amici curiae has tended to be based on invitation from the court. See John Bellhouse & Anthony Lavers, *The Modern Amicus Curiae: A Role in Arbitration?*, 23 CIV. JUST. Q. 187, 188–90 (2004).

But the traditional role of amicus from a more objective (at least ostensibly) and disinterested position to a more assertive and somewhat interested position is generally evident not just in the contemporary world but was sometimes evident in the last century.⁷³ However, in a normative subject like law, a dispute being litigated at the court could perhaps hardly be ever fully value-free or neutral. Having said all this, ideally, the interest and outlook of the amicus curiae in a case should be broader than the parties.⁷⁴ Perhaps in the contemporary era, the best description of the role of the amicus curiae is “to act directly and officially as counsel for one not formally a party to the case.”⁷⁵ Challenging the notion that amicus curiae briefs are often less important, a work claims that indeed they are “very important; [it is wrong to assume] that they are at best only icing on the cake. . . [i]n reality, they are often the cake itself. Amicus briefs have shaped judicial decisions in many more cases than is commonly realized.”⁷⁶

IV. Law and Practice of the ICJ on Amicus Curiae Brief in Contentious Proceedings

The Court’s rules on contentious and advisory proceedings are not identical. Article 34(2) of the Statute of the ICJ states that “[t]he 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.”⁷⁷ Article 34(3) further provides that when “the construction of the constituent instrument of a public international organization or of an international convention adopted there-under is in question in a case

73. Krislov, *supra* note 54, at 697, 699, 701–03.

74. See Nettesheim & Ryan, *supra* note 62.

75. Krislov, *supra* note 54, at 697.

76. Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

77. Statute of the International Court of Justice, arts. 34(2), 66(2), 59 Stat. 1055 (Oct. 24, 1945).

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before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.”⁷⁸ Arguably, the word “information” would imply factual information only, not legal arguments, and thus any amicus curiae briefs, but the ICJ practice does not lend credence to this narrow interpretation.⁷⁹ The use of Article 34(2) by the ICJ to seek information from international organizations, has been few and far between, for example, the Court invited the International Civil Aviation Organization (ICAO) to furnish factual information about ICAO Council proceedings following the aerial incident.⁸⁰

Rule 69 (4) of the Court provides that “the term ‘public international organization’ denotes an international organization of States”, thus, the text clearly excludes submissions by NGOs.⁸¹ In the *Asylum Case*, resorting to Article 34, the International League for the Rights of the Man applied for leave of the Court to participate in the proceedings.⁸² The court did not grant the leave.⁸³ In his letter, the Registrar of the Court clarified that the International League of Rights of Man could not be characterized as a public international organisation as envisaged by the Statute required for contentious proceedings.⁸⁴ But in the *Gabcikovo-Nagymaros* case, the court seems to have acknowledged that it received an amicus curiae brief from NGOs.⁸⁵

Arguably, Article 50 of the ICJ Statute may also be a point of reference regarding the

78. *Id.* at art. 34(3).

79. Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT’L L. 209, 213 (2005).

80. *See* Aerial Incident of 3 July 1988 (Iran v. U.S.), Preliminary Objections, Observations of the International Civil Aviation Organization, I.C.J. Pleadings, Vol. II, Case No. 79, 618 (1992) [<https://perma.cc/ZSQ2-KVYF>].

81. Rules of Court, art. 69(4), 1978 I.C.J. Acts & Docs.

82. *See id.*

83. *Asylum* (Colombia v. Peru), Order of 20 October 1950, I.C.J. Pleadings, Vol. II, at 227–28 (1950).

84. *Id.* at 228.

85. *See* *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” ¶ 34 (Jan. 2001) (noting that written submissions were received by the ICJ, unofficially, in *Case Concerning the Gabcikovo-Nagymaros Project*, 1997 I.C.J. Rep. 7).

acceptance of amicus curiae brief by the Court.⁸⁶ This is because it appears to give the ICJ a blanket power to seek inputs from virtually anyone by stating that “[t]he 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.”⁸⁷ Rule 67 of the ICJ Rules provides the procedural details for this Article 50.⁸⁸ Rule 67(1) states that when the Court considers it necessary to arrange for an inquiry or an expert opinion, it shall, upon consulting the parties, “issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed.”⁸⁹ It further provides that the Court may require persons appointed to conduct an enquiry, or to give an expert opinion, to make a solemn declaration.⁹⁰ Under Rule 67(2), every report or record of an inquiry and every expert opinion will be communicated to the parties, and they would be afforded the opportunity of commenting upon it.⁹¹ But this avenue has so far remained unexplored.⁹² And it is important to note that this is a power conferred on the Court to seek inputs, not a power given to third parties to submit inputs to the Court.⁹³

86. See Statute of the International Court of Justice, art. 50, 59 Stat. 1055 (Oct. 24, 1945).

87. *Id.*

88. Rules of Court, arts. 67(1)–(2), 1978 I.C.J. Acts & Docs.

89. *Id.* at 67(1).

90. *Id.*

91. *Id.* at 67(1).

92. See *id.*

93. See *id.*

V. Law and Practice of the ICJ on Amicus Curiae Brief in Advisory Proceedings

Unlike clear limits on amicus curiae briefs from NGOs in contentious proceedings, there is no explicit stipulation regarding advisory opinions. But the ICJ views its advisory function as a judicial function and has generally followed mostly similar practices.⁹⁴ Despite this, the ICJ has rarely received amicus curiae briefs from NGOs.⁹⁵ In the advisory opinion of South-West Africa however, on March 16, 1950, with respect to Article 66(2) of the ICJ Statute, the Registrar agreed to Robert Delson, a board member of the League, seeking permission to participate in the oral or written statement in the proceedings, after the President of the Court had set the deadline of March 20, 1950 for the reception of written statements from the participating parties. The President had further advised to be limited to the legal questions of this advisory opinion only (not that of the *asylum* or any other such matter) and file it before April 10, 1950.⁹⁶ The NGO submitted that “it would further the purposes of the Court and the extensions and preservation of human rights if the Court authorized it to furnish a written or oral statement.”⁹⁷ According to the ICJ pleadings, the League was notified accordingly, but it did not send any brief within the time limit prescribed.⁹⁸ It is said that the League sent in its official filing more than a month after the time set by the Court, and included statements from several people. The statement was received too late to be considered in the proceedings—the Court retorted.⁹⁹ This could also be debated

94. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. Rep. 177, 178, 187 (Dec. 15).

95. See Dinah Shelton, *The Participation of NonGovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611, 611–42 (1994).

96. International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, 130 (July 11).

97. Bartholomeusz, *supra* note 79, at 221.

98. International Status of South-West Africa, at 130.

99. Roger S. Clark, *The International League for Human Rights and South-West Africa 1947–1957: The Human Rights NGO as Catalyst in the International Legal Process*, 3 HUM. RTS. Q. 101, 116 (1981); Shelton, *supra* note 95 at 623–24.

that the Court did not subsequently extend the deadline for non-governmental organizations to submit information.¹⁰⁰ They were not allowed to hence participate in the oral proceedings either.¹⁰¹

Later, in the 1970–1971 advisory proceedings, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council resolution 276*, the League again requested permission to participate but was subsequently refused.¹⁰² In the same proceedings, the ICJ rejected the application to furnish a statement made by the American Committee on Africa, another NGO affiliated with the League.¹⁰³ As the Court did not assign any specific reason for the refusal, the exact reason for the refusal is open to interpretation.¹⁰⁴ In a similar pattern, in the U.N. Administrative Tribunal case, the Court did not permit the Federation of International Civil Servants' Association to submit its view, either orally or written, as this was not an “international organization.”¹⁰⁵ But subsequent to these proceedings, the Court's Rules were amended in 1978, and that might imply that the Court's reason was regarding the status of these bodies as non-intergovernmental organizations.¹⁰⁶

On July 30, 2004, the ICJ adopted Practice Direction XII, stating that any written statement or document submitted by an international non-governmental organization in advisory proceedings

100. Shelton, *supra* note 95, at 623–24.

101. International Status of South-West Africa, at 130.

102. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), Written Statements, I.C.J. Pleadings 16, 640, 644, 672, 678–79 (Dec. 1970).

103. Bartholomeusz, *supra* note 79, at 221.

104. *See id.*

105. Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Reps. 47, 48–49 (Jul. 13); Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO, Advisory Opinion, 1956 I.C.J. Rep. 77, 79–80 (Oct. 23).

106. Bartholomeusz, *supra* note 79, at 222.

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will “not be considered as part of the case file,” however, that may “be referred to by States and intergovernmental organizations presenting written and oral statements”, and “will be placed in a designated location in the Peace Palace.”¹⁰⁷ All states and intergovernmental organizations that will present written or oral statements before the Court would be informed of the location where submissions by international NGOs could be consulted.¹⁰⁸ In other words, these documents are not part of the official records to be used by the Court, but may be used by states and intergovernmental organizations in the course of their pleadings.¹⁰⁹ As the practice direction only refers to “international non-governmental organization”, apparently, it excludes national non-governmental organizations.¹¹⁰ But the Court’s practice would imply that it targeted all organizations which are not “inter-governmental” *i.e.*, both international NGOs and national NGOs would fall in this category.¹¹¹ But if the states or any inter-governmental organizations make use of these NGO briefs, then it is likely that they will be considered by the ICJ.¹¹²

Post-Direction XII, in the Nuclear Weapons Advisory Opinion, an NGO submitted an amicus curiae brief, but that was only placed in the Court’s library, not made a part of its record.¹¹³ Thus, in essence, the reliance or non-reliance on those submissions would be left to the choice of the states or inter-governmental organizations that make formal submissions to the Court.¹¹⁴ Thus, they may assist a court by conveying information to the Court so as to enable it to render a

107. ICJ Practice Direction XII, ¶¶ 1–3 (2024).

108. *Id.* at ¶ 3.

109. *See id.* at ¶¶ 1–3.

110. *See id.*

111. *See id.*

112. Bartholomeusz, *supra* note 79, at 224.

113. Eduardo Valencia-Ospina, *Opinion: Court Clarification: Letters to the Editor*, N.Y. TIMES (Nov. 15, 1995), <https://www.nytimes.com/1995/11/15/opinion/IHT-court-clarification-letters-to-the-editor.html> [<https://perma.cc/MF7Z-CR9E>].

114. *See id.*

more informed decision of high quality.¹¹⁵ But in the *Wall* case, though Palestine was not a state or intergovernmental organization, it was allowed to present arguments before the Court.¹¹⁶ The Court explained its participation in the following words:

[I]n the light of resolution ES-10114 and the report of the Secretary-General transmitted with the request and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question.¹¹⁷

In the *Kosovo* case too, the ICJ accepted that nonstate actors directly concerned could present written statements before the Court.¹¹⁸ Intergovernmental organizations not only may submit written briefs, but also can make oral statements in advisory proceedings before the ICJ.¹¹⁹ It's not surprising that selected international organizations seek the Court's authoritative opinion on legal questions in advisory proceedings; an authoritative judicial pronouncement can shape public opinion.¹²⁰ Indeed, there is already evidence that NGOs can use public international law to shape public opinion.¹²¹

Interestingly, the ICJ's approach is much more restrained than that of the Permanent Court of International Justice. The PCIJ took a broad view of the meaning of the term "international organizations" to include NGOs.¹²² In a 1922 case that involved determining the competence of

115. Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, 43 J. AFR. L. 201, 201–13 (1999).

116. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 131, at 141 (July 9).

117. *Id.*

118. Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order, 2008 I.C.J. 409, at 410 (Oct. 17) [<https://perma.cc/7DPJ-WYZZ>].

119. Shelton, *supra* note 95, at 620.

120. *See id.* at 625.

121. M. N. S. SELLERS ET AL., *PAROCHIALISM, COSMOPOLITANISM, AND FOUNDATIONS OF INTERNATIONAL LAW* 23 (M. N. S. Sellers ed., 2012).

122. *See* Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, ¶ 5 (Dec. 4) (noting that the PCIJ expanded its domain, and stating that it may allow anyone direct access to participate in advisory opinions "through the appropriate channel, that if they [the authors of the petition] desired to supplement the statement contained in the petition, the Court would be prepared to receive an explanatory note from them . . .") [<https://perma.cc/E9TK-8H43>];

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the International Labour Organization (ILO) in international regulation of the conditions of persons employed in agriculture. Upon request of the Council of the League of Nations, posing the question—“[w]as the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference nominated in accordance with the [Treaty of Versailles]?”—both organizations representing employers and workers participated in PCIJ proceedings.¹²³ In particular, international trade unions submitted their briefs to the Court in advisory proceedings before the PCIJ.¹²⁴

VI. The Benefits of Amicus Curiae by NGOs

One obvious benefit of an amicus curiae brief is that it does not necessitate the full involvement of financial and other resources that would generally be required for filing a case as a party.¹²⁵ Litigation can be a costly affair. Thus, for less affluent sections of the community, a public interest-oriented NGO may serve as an alternative avenue for their interest to be heard

Designation of the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 1, ¶ 5 (July 31) [<https://perma.cc/B3MA-GC98>]; The Registrar to the Secretary-General of the League of Nations, Correspondence, 1926 P.C.I.J. (ser. C) No. 12, at 259, 262, 269–87; Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion, 1926 P.C.I.J. (ser. B) No. 13, ¶ 4 (July 23) (observing that in cases involving the ILO, employers’ and workers’ organizations are likely eligible to file amicus briefs [in contrast to the ICJ’s stance, considering that the South West Africa amicus brief was unsuccessful]) [<https://perma.cc/3YR4-EA2K>]; Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, at 365, 367 (Nov. 15); 1922 P.C.I.J. (ser. B) No. 1, at 11 (citing Memorandum from Netherlands General Confederation of Trades Unions); Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) Nos. 2 & 3, at 13 (Aug. 12) (citing a letter from the Central Association of French Agriculturalists).

123. 1922 P.C.I.J. (ser. B) No. 1, at 11 (July 31) [<https://perma.cc/HH7B-D43X>]. This case saw participation from The International Association for the Legal Protection of Workers, the International Federation of Christian Trades Unions, and the International Federation of Trades Unions. Apart from States and the ILO, it also received a memorandum from the Netherlands General Confederation of Trades Unions (the Algemeen Nederlandsch Vakverbond).

124. Third Annual Report, 1927 P.C.I.J. (ser. E) No. 3, at 225 (June 15). The organizations listed in the reports are the International Labour Organization, International Agricultural Commission, International Federation of Trades Unions, International Association for Legal Protection of Workers, International Institute of Agriculture (Rome), International Confederation of Agricultural Trades Unions, International Federation of Land workers, International Organization of Industrial Employers, International Federation of Christian Trades Unions of Land workers, and International Confederation of Christian Trades Unions.

125. Shelton, *supra* note 95, at 611.

before a court.¹²⁶ Of course in some fora they may do so as a party as well, but the cost would be higher. As they are not parties before the court, they are not bound by the *res judicata*; provided that they can meet the jurisdictional threshold, they could bring a subsequent case on their own.¹²⁷ They are also not experts or witnesses who would be limited to answering questions by the parties or the court.¹²⁸ And unlike experts, their submissions need not be put to examination.¹²⁹ In many scientific or highly technical matters, amicus briefs can be helpful no matter how vast the legal knowledge of the bench. As Judge Stephen Breyer explains, “briefs play an important role in educating the judges on potentially relevant technical matters, helping to make us, not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.”¹³⁰ Of course, experts appointed by the parties may play a role, but being nominated by the parties may make their impartiality more susceptible to challenges.

Sometimes the parties to a case may have a more parochial and limited interest in resolving a dispute and the way they may seek to resolve a dispute may not necessarily be in the best interest of the wider society. To take a hypothetical scenario, in an investment dispute, an investor may be interested in obtaining a remedy from the host state, and the government may be interested in settling the claim of the investor but not necessarily some sections of the community who may be affected by the investment project in its entirety. This is where a truly public-minded NGO’s

126. ALLAN C. HUTCHINSON, *IS EATING PEOPLE WRONG? GREAT LEGAL CASES AND HOW THEY SHAPED THE WORLD* 219 (2011).

127. *Id.*

128. Rules of the Court, 1978 I.C.J. Acts & Docs, art. 57.

129. *Id.* at art. 65.

130. Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 26 (1998); Jeanne Powers, *On Separate Paths: The Mexican American and African American Legal Campaigns against School Segregation*, 121 AM. J. EDUC. 29, 35 (2014).

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amicus curiae participation may give voice to the otherwise voiceless.¹³¹ Historically, scholarly works have demonstrated that amici submissions from the National Association for the Advancement of the Colored People played a role in highlighting the negative role played by segregation.¹³² For example, the amicus curiae brief by Louis Brandeis, submitted to the U.S. Supreme Court regarding an Oregon law limiting the number of hours women could work in a laundry presented empirical evidence demonstrating the impact of long work hours on women's health.¹³³ His brief, instead of relying on legal theory or precedent, took an empirical and sociological approach to advancing arguments and served as a model for endangering social reform through law.¹³⁴

Due to their unique position in a dispute, amici curiae are well-positioned to convey information or bring fresh perspectives to the court which might otherwise be missing. The goal of amici curiae is to “introduce public interest considerations into the decision—and, indirectly, to impact the development of international law.”¹³⁵ Thus, they are positioned to inform a court of the broader implications of the case at hand beyond the immediate interests of the parties to the case. And through them, the interests of unrepresented or under-represented groups may reach the court.¹³⁶ In some areas of international law, such as in the case of international investment law, some amicus curiae briefs have already provided some sort of countervailing strength to the

131. Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. STATE U. L. REV. 315, 332 (2008).

132. Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1089 (1988).

133. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

134. *Id.*

135. Yaël Ronen & Yael Naggan, *Third Parties*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 89 (Cesare P.R. Romano et al. eds., 2013).

136. See Steven Ratner, THE THIN JUSTICE OF INTERNATIONAL LAW 235 (2015).

voice of those who are voiceless.¹³⁷ This arguably gives greater democratic legitimacy to international courts and tribunals.¹³⁸ Some NGOs may retain technical expertise that many states may not possess.¹³⁹ Thus, unless the amici curiae get beholden to narrow interest groups, their inputs may play a role in enhancing the overall breadth and quality of a decision of the court. The Court's decision to allow amicus curiae participation reflects a policy choice. Such choices help shape the domain of international law.

VII. The Concerns with Amicus Curiae Briefs by NGOs

Of course, as they are not parties before the Court, any judgment rendered would not entitle an amicus to any benefit or any cost.¹⁴⁰ Unlike the parties, they would not retain the right to offer any evidence or examine or cross-examine the witnesses.¹⁴¹ Too many or too tedious briefs from the amicus curiae may delay the proceedings before the Court.¹⁴² The parties to a proceeding are free to strike, reject, withdraw a petition, or settle the case, but none of this is possible by an amicus curiae.¹⁴³

Another risk is that either of the parties before the Court or other vested quarters may, through direct financing or subsidizing part of the cost of an amicus brief, push their agenda.¹⁴⁴ Arguably, this type of concern may be more pronounced regarding NGOs with a narrow funding base

137. See John Linarelli et al., *THE MISERY OF INTERNATIONAL LAW* 105 (2018); Garcia, *supra* note 131.

138. See Sarah Williams, *Reviews of Books*, BRIT. Y.B. INT'L L. (2020) (reviewing ASTRID WIIK, *AMICUS CURIAE BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2018)).

139. Ratner, *supra* note 136.

140. See Mohan, *supra* note 20, at 372.

141. *Id.* at 365.

142. *Id.* at 373.

143. Farber, *supra* note 64.

144. Alexander Wohl, *Friends with Agendas: Amicus Curiae Briefs May Be More Popular than Persuasive*, 82 A.B.A. J. 46, 48 (1996); Stephanie Francis Ward, *Friends of the Court are Friends of Mine*, 93 A.B.A. J. 24, 24–25 (2007); Mohan, *supra* note 20 at 372.

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than an international NGO with a broader funding base. Some argue that, at the least, the amici briefs may be duplicitous and thus unhelpful, as Judge Posner writes, “[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief.”¹⁴⁵ There are concerns that amicus curiae briefs are susceptible to being ignored because they are not part of the official documents.¹⁴⁶ Unless parties meticulously go through the previous documents (which have not occurred in the series of recent advisory opinions) and include them in their submissions, they will go unnoticed.¹⁴⁷ Hence, it may be believed that NGOs stand a better chance at “truly” having their views presented via states¹⁴⁸ because ICJ has not expressly accepted the submissions in its rules.

There is a risk that an amicus brief may deploy scientifically unsound research methods or technical terminologies that are “too scientific”, and the court may not be able to examine or corroborate such information but still rely on it; this could undermine the credibility of amicus curiae participation entirely.¹⁴⁹ Expert information from an independent organization may not hold the similar weight as that from a state party or its officials in terms of its “importance” or legitimacy.¹⁵⁰ Some argue that amicus curiae briefs may mean politicizing courts and making courts for the venue of promoting political interests and the risk of the court being portrayed as too

145. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

146. *See* ASTRID WIIK, *AMICUS CURIAE BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 185–186 (2018).

147. *Id.*

148. For example, Amnesty International presented its views through Belgium in the form of an extensive study. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Counter Memorial of the Kingdom of Belgium, 2001 I.C.J. 104–05 (Sept. 28).

149. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1764 (2014).

150. Legitimacy is often associated with the idea of authority. *See International Organizations, Legitimacy, and Legitimation, in* LEGITIMATING INTERNATIONAL ORGANIZATIONS 14 (Dominik Zaum ed., 2013).

political.¹⁵¹

VIII. The Role of IUCN in the Current Case and Its Potential Impact

To what extent the amicus curiae brief impacts the decision making by the Judges is an intriguing question. While the mere absence of any reference may not indicate that they were not considered by the court, the reference by a court to the amicus submission is also not a definitive indicator that the submission has, *in fact, influenced* the decision of the court.¹⁵² At a bare minimum, the citation to amicus briefs should be treated as evidence of the fact that the court has considered them, even if not persuaded by them. That being said, at a minimum, it is perhaps axiomatic that an amicus submission gives the body submitting it a chance to directly present its views before the court, which it could not otherwise have. And despite the skepticism about some NGOs in some cases, due to the self-interested and parochial activity of most states, perhaps NGOs or a public-private association like IUCN is better suited to vigorously defend the public interest in a case regarding the protection of the global environment.¹⁵³ Anecdotal evidence seems to imply that when an amicus brief submits information which counters the factual incompleteness or inaccuracy of information submitted by the disputing parties, an international court or tribunal may rely on the amicus brief.¹⁵⁴

The questions posed to the ICJ in current cases are clearly broad, so much so that some may suggest that the ICJ, in this case, has been not only asked to answer legal questions but, in a way,

151. Michael E. Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. ONLINE 151, 154 (2016).

152. Farber, *supra* note 64.

153. Philippe Sands, *The Environment, Community, and International Law*, 30 HARV. INT'L L. J. 393, 394, 412 (1989).

154. *See, e.g.*, Yen-Chang Chang, *How Does the Amicus Curiae Submission Affect a Tribunal Decision?*, 30 LEIDEN J. INT'L L. 654, 657 (2017) (arguing that an amicus curiae brief submitted by the Chinese (Taiwan) Society of International Law helped settle the question of whether a particular place was a habitable island or mere rock).

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to create norms.¹⁵⁵ This appears to be in line with a pattern mentioned in the extra-curial writing of a former ICJ Judge that “[i]t has however been a feature of the use of the advisory jurisdiction hitherto that the questions asked of the Court tend to be laconic yet often somewhat abstract and therefore broad in scope.”¹⁵⁶ Again, the Court in *Western Sahara* has observed that the phrase any legal question “are not to be interpreted restrictively.”¹⁵⁷ It is important to note here that the Court would interpret the law, not create it, as the Court has explained in the *Fisheries Jurisdiction* that it “as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”¹⁵⁸ As one scholarly work puts, it “can be viewed as an ‘in-kind’ donation of information to courts.”¹⁵⁹ If the IUCN can provide “policy considerations, social-science data, and economic data that might otherwise not be brought to the attention” of the ICJ, then its contribution could be particularly valuable.¹⁶⁰ The Chair of the IUCN World Commission on Environmental Law, Professor Christina Voigt, presented IUCN’s written submission to the Registrar of the Court on March 19, 2024.¹⁶¹ IUCN has the ability to provide the Court with written comments on other parties’ submissions and to present its views during the oral proceedings, expected to have taken place in December 2024.¹⁶²

Indeed, in developing international environmental law (though through a soft law), it was the

155. See generally, Int’l Ct. of Just., *supra* note 3.

156. Robert Y. Jennings, *The International Court of Justice after 50 Years*, 89 AM. J. INT’L L. 493, 503 (1995).

157. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 18 (Oct. 16).

158. *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 53 (July 25).

159. Victor F. Lango et. al., *Amicus Curiae Briefs: The Court’s Perspective*, 27 JUST. SYS. J. 180, 181 (2006).

160. *Id.* at 185.

161. See generally *Explainer: International Court of Justice Considers Climate Change*, IUCN (Dec. 13, 2024), <https://iucn.org/story/202412/explainer-international-court-justice-considers-climate-change> [<https://perma.cc/4R7J-6UDM>].

162. See generally *id.*

IUCN who played a pivotal role.¹⁶³ And arguably, its expertise on environmental legal matters may be more than many states or international organisations.¹⁶⁴ Thus, it is one of those cases where due to its expertise, it may be more suited to make a greater meaningful contribution than states or intergovernmental organisations.¹⁶⁵ As it is already pointed out, IUCN's brief will form part of the Court's official record, not like the submission by purely private NGOs.¹⁶⁶ It may be mentioned that IUCN had also participated in advisory proceedings before the International Tribunal for the Law of the Sea (as mentioned previously) and the Inter-American Court of Human Rights.¹⁶⁷ Amici curiae are also mostly applicable when *erga omnes* obligations are at question.¹⁶⁸ If we look into the Intergovernmental Panel on Climate Change's 2001 Scientific Report, for years, it has been a setting stone proved by the scientific community sans arguments that humankind's industrial activities are causing global warming.¹⁶⁹ Environmental conservation is an essential state interest under Article 64 of the Vienna Convention on the Law of Treaties (emerging *jus cogens*).¹⁷⁰ As a result, environmental protection emerges as an emerging norm and a clear customary international law principle (particularly the principle of prevention), as evidenced by a wide range of state practices and *opinio juris* acts such as the Rio Declaration and the Paris Agreement.¹⁷¹ The importance given to environmental considerations is also reflected

163. See generally *id.*

164. See generally *id.*

165. See generally Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281 (1999).

166. See, Int'l Ct. of Just., *supra* note 3.

167. See Dolidze, *supra* note 52.

168. Paula Wojcikiewicz Almeida, *International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and Amicus Curiae before the ICJ*, 18 THE L. & PRAC. INT'L CTS. & TRIB. 163, 167 (2019).

169. See generally The Scientific Bias, IPCC, https://www.ipcc.ch/site/assets/uploads/2018/03/WGI_TAR_full_report.pdf [<https://perma.cc/8YXA-KZS7>].

170. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgement, 1997 I.C.J. Rep. 7, ¶ 53 (Sept. 25).

171. See generally Maksim Lavrik, *General Principles of International Environmental Law, and Assisted Migration as a Tool for Biodiversity Adaptation to Climate Change*, 4 JUS COGENS 99, 108 (2022).

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in the status of the no harm principle and ‘essential interest’ as a common concern of mankind that the ICJ has further granted protection of in the *Pulp Mills*¹⁷² and emphasized the great significance it attaches to respect the environment—for the whole of mankind in the *Nuclear Weapons* case.¹⁷³ If “the goal [of amici curiae] 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, such as *erga omnes* obligations, although practice tells a different story.¹⁷⁴ The case at hand could mark a new beginning.

The submission of the IUCN to the ICJ in the case at hand, is not yet available to the public. But certain points may be made based on the amicus brief as submitted to the ITLOS as a proxy.¹⁷⁵ In that brief, the IUCN made elaborate submissions on the various scientific evidence of the damaging effect of climate change on the marine environment.¹⁷⁶ It also submitted detailed and erudite expositions of the relevant international legal obligations of the states who are parties to the respective international treaties.¹⁷⁷ For instance, it may be noteworthy that the IUCN brief underscored that “[i]n recent years there have been important developments in both legal systems and jurisprudence to extend reparations to breaches of environmental obligations.”¹⁷⁸ This point would appear to be directly linked to this question before the ICJ, “[w]hat

172. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Provisional Measure, 2006 I.C.J. 113, 132 ¶ 72 (July 13).

173. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Op., 1996 I.C.J. No. 92, ¶ 29 (July 8).

174. Almeida, *supra* note 168.

175. *Id.*

176. Written Statement of the International Union for the Conservation of Nature and Natural Resources – World Commission on Environmental Law, Ocean Law Specialist Group, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, June 13, 2023, pp. 4–12.

177. *Id.* at 15–63.

178. *Id.* at 61 (referring to: *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. No. 150, ¶¶ 41–42 (Feb. 2) (full reparation can require compensation for “damage caused to the environment, in and of itself”).

are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment.”¹⁷⁹ The written statement also highlighted the obligation owed by the international community to developing states.¹⁸⁰

Although theoretically, advisory opinions are not technically binding on the bodies that request them, they are respected as authoritative pronouncements of law and, in general, accepted.¹⁸¹ In some cases, such as the *Reparations* Case, by holding the legal personality of the UN, the ICJ has played an important role in the development of international law.¹⁸² That being said, even a basic pronouncement such as the one that “the obligation involved . . . [Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons] is an obligation to achieve a precise result—nuclear disarmament in all its aspects” by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith has been ignored by the nuclear states.¹⁸³ While detractors may point to this and other opinions, such as the *Wall* Case, where Israel has paid little attention to the ICJ’s holdings, it is important to bear that these pronouncements have at least clarified what the law is.¹⁸⁴ And only when we have laws on a point, can

179. G.A. Res. A/77/L.58, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, at 3 (Mar. 1, 2023).

180. See generally G.A. Res. 77/276, *supra* note 1.

181. See generally Vahid Rezadoost, *Unveiling the ‘author’ of international law — The ‘legal effect’ of ICJ’s advisory opinions*, 15 J. INT’L DISP. SETTLEMENT 506, 507 (2024), cf. Anthony Aust, *Advisory Opinions*, 1 J. INT’L DISP. SETTLEMENT 123, 127 (2010) (although certain instruments consider it to be binding like The Convention on the Privileges and Immunities of the United Nations (Section 30) states that the ‘opinion given by the Court shall be accepted as decisive by the parties [of the Convention]’).

182. See generally Jennings, *supra* note 156.

183. See generally Dr. Mohamed ElBaradei, *Nuclear Non-Proliferation: Global Security In A Rapidly Changing World*, INT’L ATOMIC ENERGY AGENCY (IAEA) (June 21, 2004) <https://www.iaea.org/newscenter/statements/nuclear-non-proliferation-global-security-rapidly-changing-world> [<https://perma.cc/BEW9-H49V>].

184. See Legal Consequences of the Construction of a Wall, *supra* note 116.

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deviation from them be treated as a breach and condemned.¹⁸⁵ For that reason, even when a norm of international law may be ignored, the fact that it exists is not devoid of significance.¹⁸⁶

Previously, several attempts have been made to bring forth climate litigations before the court.¹⁸⁷ Given the preexisting difficulties of ensuring environmental justice in the economically globalizing world, developing states have feared the reprisal of economic superpowers.¹⁸⁸ In 2002, Tuvalu, a small island developing state (SIDS) vulnerable to sea level rise (that it could be washed away in the next thirty years), once considered bringing claims against the United States and Australia—two of the biggest emitters of greenhouse gases (GHG).¹⁸⁹ Another SIDS, Palau, in 2011, gathered the support of thirty more countries and led an attempt to request the UNGA to seek an advisory opinion from the ICJ to clarify the biggest emitters' legal obligations on climate change.¹⁹⁰ This approach, however, did not see the light of day when the US resisted, and Palau was in fear of losing out on the billions of foreign aid for education, healthcare, and other major projects from the country.¹⁹¹ Amicus curiae from an NGO like IUCN, sans any direct political agenda or links, could truly help the developing nations without having to become a party to the

185. Md. Rizwanul Islam, *Is the Doomsday of International Law Looming around in the Twenty First Century?: A Response to the Sceptics of Efficacy of International Law*, 78 NORDIC J. INT'L L. 293, 303 (2009).

186. *See generally id.*

187. Fred Lewsey, *Seeking Climate Justice at the 'World Court'*, U. OF CAMBRIDGE (Mar. 9, 2023), <https://www.cam.ac.uk/stories/climate-ICJ> [<https://perma.cc/CJ5P-YMJZ>].

188. Stella Capek, *The "Environmental Justice" Frame: A Conceptual Discussion and an Application*, 40 SOC. PROBS. 5, 8 (1993) (“[E]nvironmental justice is premised on the notion that the rights of toxic contamination victims have been systematically usurped by more powerful social actors and that ‘justice’ resides in the return of these rights.”); *see also* William A. Shutkin, *The Concept of Environmental Justice and A Reconciliation of Democracy*, 14 VA. ENV'T L.J. 579, 580 (1995) (“Conversely, the persistence of environmental injustice – the exclusion and unequal treatment of low-income and minority communities in matters concerning the distribution of environmental benefits and burdens – fundamentally undermines our democratic faith and commitments.”).

189. *Tiny Pacific Nation Takes on Australia*, BBC NEWS (Mar. 4, 2002), <http://news.bbc.co.uk/2/hi/asia-pacific/1854118.stm> [perma.cc/95Q4-BHLQ].

190. Lisa Friedman, *Island States Mull Risks and Benefits of Suing Big Emitters*, POLITICO: CLIMATEWIRE (Nov. 16, 2012), <https://subscriber.politicopro.com/article/eenews/1059972615> [<https://perma.cc/37FY-XCRX>].

191. *Id.*

court themselves or risk ‘angering’ any other nations.

IX. Concerns about Greater Access to the ICJ and International Courts

There are, of course, some good reasons for being somewhat skeptical about the scope of amicus curiae briefs. The cacophony of voices before the Court may also delay, if not complicate the settlement of disputes. There is a further and perhaps more fundamental question about the NGOs often being mostly funded by economically advanced countries, and thus they often concentrate more on issues of pressing interest to these countries, such as radiation due to the depleting ozone layers, in preference to matters of interests of the people of developing countries, such as universal access to safe drinking water.¹⁹² Unlike states, who as monolithic actors are bound by treaties, national laws, and diplomatic considerations, NGOs may often push their agenda much more aggressively.¹⁹³ In many states, NGOs may be beset with problems in terms of their lack of legitimacy, lack of internal democratic processes, and limited representativeness.¹⁹⁴ Many developing countries also have often resented the scope of private amicus curiae submissions that they feel further tilt the power balance in favour of the developed countries.¹⁹⁵ It is also probable that as they are not parties before the Court and the judgment is not binding on them, they may not be fully committed to an efficient resolution of the case.¹⁹⁶

In non-judicial international fora, sometimes some so-called GONGOs (government-organized

192. Murphy, *supra* note 22, at 76.

193. ORDE F. KITTRIE, LAW AS A WEAPON OF WAR: LAWFARE 47 (2016).

194. MD. RIZWANUL ISLAM, CSO ASSESSMENT STUDY: LEGAL AND POLITICAL ENVIRONMENT OF DEVELOPMENTAL/RURAL DEVELOPMENT NGOS IN BANGLADESH (2022), https://angoc.org/wp-content/uploads/2022/11/Legal-and-Political_BANGLADESH.pdf [perma.cc/G3DV-C2WU]; Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-STATE ACTORS IN INT'L L. 7, 12 (2001).

195. Wiik, *supra* note 146, at 70; Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 350–352 (2004).

196. Pham, *supra* note 195, at 352.

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NGOs) from states with not-so-good records of protection of human rights may, in the name of advocating for good causes, promote parochial interests of the governments sponsoring them.¹⁹⁷

In particular, some such organizations have presented fabricated pictures of human rights in countries notorious for violation of human rights.¹⁹⁸ Clearly, such motivated advocacy would not only reduce the time for legitimate NGOs to make their presentations, but arguably an affront to the accreditation of NGOs.¹⁹⁹ But none of this should deter the NGOs from having more inclusive access to the proceedings, as this paper discusses in the next section of the article that these challenges are possible to be addressed.

X. Why There Should be a Greater Access to the ICJ and How May It Take Place?

Commenting about the role of the NGOs within the system, a scholar once wrote that “the Temple of States [The UN] would be a rather dull place without nongovernmental organisations.”²⁰⁰ Thus, in the contemporary world, there appears to be no compelling policy reason for shutting the door of amicus curiae submissions in proceedings before the principal judicial organ of the United Nations. The concern regarding information used not obtained through unscientific methods is not unique to the amicus, and this may be allayed by the court requiring detailed scientific explanation of methods, and scientific reviews of the information presented in the briefs.²⁰¹

By adopting the United Nations Economic Commission for Europe (UNECE) Convention on

197. Martens, *supra* note 10, at 8.

198. *Id.* at 8–9.

199. *Id.* at 9.

200. Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs*, 16 *THIRD WORLD Q.* 421, 421 (1995).

201. Larsen, *supra* note 149, at 1811–12.

Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998 (Aarhus Convention), the stature of environmental NGOs in international environmental matters has been augmented.²⁰² In particular, it requires that states recognize environmental groups and associations and should not penalize them for seeking access to information and should enable the public to participate in the decision making process on environmental matters.²⁰³ The Convention has also broadened the scope for NGOs to file claims against the EU, both through the European Court of Justice and national courts of European States.²⁰⁴ The Convention even allows NGOs to take part in meetings of the parties and also nominate candidates for election to the Convention's implementation committee.²⁰⁵ This Aarhus Convention seems to have substantially expanded the access for NGOs to bring in environmental cases in several European countries.²⁰⁶ Kofi Annan, the former Secretary-General has observed that "[a]lthough regional in scope, the significance of the Aarhus Convention is global . . . It is the ambitious venture in the area of 'environmental democracy' so far undertaken under the

202. 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

203. The right to seek information, of course, is not unqualified, and on grounds of national security or privacy, or analogous grounds, information may be denied. *Id.* at art. 4(4).

204. *Id.* at art. 9 (1).

205. *Id.* at art. 10 (5).

206. Eilsstorp-Sangiovanni & Sharman, *supra* note 14, at 91–92; *see generally* HR 20 December 2019, ECLI:NL:HR:2019:2006, 19/00135 m.nt (Urgenda Foundation/Netherlands) (Neth.) (footnotes omitted) (“Urgenda, which in this case, . . . , represents the interests of the residents of the Netherlands with respect to whom the obligation [to take effective measures against climate change] applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit. Especially in cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective. This is also in line with Article 9 (3) in conjunction with Article 2 (5) of the Aarhus Convention, which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR.”). This case appears to have given impetus to around 100 similar climate change related cases around the world; *see also* Kenza Bryan & Alice Hancock, *The pensioners and babies behind a new era of climate lawsuits*, FIN. TIMES ASIA (Apr. 13, 2024), <https://www.ft.com/content/5be99340-e847-488c-b901-b6e260faff8e> [<https://perma.cc/8R5C-MH4J>].

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auspices of the United Nations.”²⁰⁷ If international law and courts are perceived as public good, then procedural rules might warrant widening greater access.²⁰⁸ But it should be remembered that EU countries are all economically advanced and their economic capacity does not apply to many of the economically backward states in other parts of the world.²⁰⁹

Arguably, before the United Nations Economic and Social Council's modus operandi of cooperation with the NGOs in 1968, often practice did not clearly demarcate between inter-governmental organizations and NGOs.²¹⁰ In compiling statistics on international organizations in the 19th and early 20th centuries, there was no segregation between inter-governmental organizations and private NGOs.²¹¹ This might connote that they were not treated as distinct categories.²¹² Since the inception of the United Nations and the promotion of the idea of human rights, the state-centric view of international law also changed.²¹³ While the impetus to this new inclusive community encompassing not just states but also non-state actors had its genesis in the notion of human rights, now it permeates to the wider international legal regime.²¹⁴ Since the end of the Cold War, the importance of NGOs seems to have increased even more.²¹⁵ Currently,

207. Kofi Annan, *Foreword*, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE (Stephen Stec & Susan Casey-Lefkowitz eds., 2001).

208. André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769, 781 (2012). For more on the concept of public good and arguing that there is such a public good, then legal obligation in relation to that is owed to the international community as a whole, see Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L., 651, 653–54 (2012).

209. See generally Murphy, *supra* note 22, at 65–69.

210. ANNE PETERS & SIMON PETER, *International Organizations: Between Technocracy and Democracy*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 170, 187–88 (Bardo Fassbender & Anne Peters eds., 2012).

211. Michael Wallace & David J. Singer, *International Organization in the Global System 1815–1964: A Quantitative Description*, 24 INT'L ORG. 239, 244 (1970).

212. Peters & Peter, *supra* note 210, at 188.

213. Sands, *supra* note 153, at 416–17.

214. *Id.*

215. Donini, *supra* note 200, at 423.

there are 6,784 NGOs with officially consultative status with the UN.²¹⁶

This is particularly important in an area such as the environment where states would often be violators of the law. There is even a suggestion that leading NGOs, such as Greenpeace, are among the most active guardians in protecting the global environment and they should be given access to bring contentious cases before international courts to pursue claims of violations of environmental obligations.²¹⁷ Such an argument may seem even more convincing when, due to a lack of financing or manpower, plenty of environmental violations in many jurisdictions—even economically advanced ones—go unpunished in EU states.²¹⁸ In the UK alone, one report estimates that between 2009 and 2019, public agencies entrusted with the responsibility of ensuring compliance with environmental standards have witnessed a cut in around thirty percent of their staff and around eighty percent fewer cases filed against business for violation of environmental violations.²¹⁹

But, due to the fundamental distinctions between contentious and advisory jurisdiction of the ICJ, such a proposal seems to be a bit far-fetched. This is because while the former is a binding judgment obliging states to do certain things (including to pay compensation) or refrain from certain things, the advisory jurisdiction only entails answering legal questions.²²⁰ If NGOs are given the access to the ICJ in contentious proceedings, there may be too many cases on the

216. *Consultative Status with ECOSOC and other accreditations*, UNITED NATIONS DEP'T OF ECON. AND SOC. AFFS. (Jan. 12, 2025), <https://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search> [perma.cc/EJV4-42PB].

217. Sands, *supra* note 153, at 417.

218. Pascal Hansens et al., *Infringement cold cases: member states left unpunished for dozens of EU law violations*, EU AFF. (Sep. 24, 2024), <https://www.investigate-europe.eu/posts/infringement-cold-cases-member-states-left-unpunished-for-dozens-of-eu-law-violations> [https://perma.cc/6UE5-AUGL].

219. EMMA ROSE, THE UK'S ENFORCEMENT GAP 2020 7–8 (2020), <https://www.unchecked.uk/wp-content/uploads/2020/11/The-UKs-Enforcement-Gap-2020.pdf>. [https://perma.cc/S87M-VBFW].

220. *Contentious Jurisdiction*, ICJ (Jan. 12, 2025), <https://icj-cij.org/contentious-jurisdiction> [https://perma.cc/UNX4-9KMA].

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Court's docket and that may expose states to unbearable costs.²²¹

Some argue that instead of having formally crafted rules on NGO participation in international fora even at the cost of raising issues of procedural fairness, a more piecemeal case-by case should be advisable.²²² According to this line of thinking, this would mean that loathed quarters such perpetrators of atrocities may get a seat.²²³ Even at a level of law and policy making, the desirability of the selective representation of NGOs is dubious. But, in a judicial setting it is far less desirable. Even the worst of perpetrators would be a party before a court. Thus, this type of question of conferring any semblance of legitimacy is not an issue in case of court proceedings.

The concern regarding vested interest groups pushing their agenda through funding or subsidizing amicus curiae briefs may partially be addressed by strict disclosure requirements as a precondition for filing a statement before a court. The concern of lengthy submissions may be addressed by following specific directions on the scope and length of the submission by the amicus. There are examples of international courts and tribunals resorting to this mechanism.²²⁴ Ultimately, without any reform of the ICJ Statute, only states and UN organs would be allowed to trigger the jurisdiction of the Court.²²⁵ Hence, the perennial control over matters that are

221. Take for example, a litigation in Ecuador in which a domestic court of Ecuador asked Chevron to pay \$9 billion damages for environmental damages; Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES (Feb. 14, 2011) <https://www.nytimes.com/2011/02/15/world/americas/15ecuador.html> [<https://perma.cc/8SJS-6AD2>].

222. Ratner, *supra* note 136, at 236–37.

223. *Id.*

224. *Electrabel SA v. Hungary*, Procedural Order No 4, ICSID Case No ARB/07/19, ¶¶ 24, 26 (April 28); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: Apr. 1, 2014), <https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency> [<https://perma.cc/F6JV-K6CL>]. Lays out extraordinary disclosure requirements for the amicus curiae petitioner. Specifically, amici are required to disclose any affiliations or relationships they may have with the parties, as well as disclose information on the source of any financial or other assistance they have received in preparing the brief or in the preceding two years of the submission.

225. *How The Court Works*, ICJ (JAN. 12, 2025), <https://icj-cij.org/how-the-court-works> [<https://perma.cc/8KWT-FV59>].

adjudicated before the Court would be controlled by them.²²⁶

Another oft-raised concern about the loss of secrecy and party autonomy, though it may be relevant in the context of arbitration proceedings, is not necessarily an issue in the ICJ as the proceedings of the Court are public.²²⁷ Any duplicitous, unhelpful amici briefs can easily be ignored by the court.²²⁸ Indeed, in a well-resourced court such as the ICJ, this should not necessarily be a big concern.

One might contend that existing rules give the ICJ some leeway to decide on amici curiae submissions on a somewhat ad hoc basis. But it has several limits.²²⁹ For instance, under the current rules, in every proceeding, a non-state party would have to seek leave of the Court to submit an amicus brief.²³⁰ Such an outcome is highly uncertain for the party and the Court would also have to dwell on the submission and spend time.²³¹ Thus, a formal definitive rule allowing access to the Court saves valuable time and resources. Potentially, when there would be a formal rule allowing amici submissions, the door being ajar, less well-resourced NGOs from developing countries may also be more willing to submit their briefs knowing that at least their views would be deliberated.

The need for a greater role of the NGOs has been voiced by very respected insiders of the

226. Md. Rizwanul Islam, *Creeping Private Interest in the WHO Undermining its Role as an International Inter-governmental Organization*, Cambridge Int'l L. J. (Mar. 10, 2021), <https://cilj.co.uk/2021/03/10/creeping-private-interest-in-the-who-undermining-its-role-as-an-international-inter-governmental-organization/> [<https://perma.cc/6HS8-46K2>].

227. *Attending a hearing/sitting*, ICJ (Jan. 12, 2025), <https://icj-cij.org/attending-a-hearing> [<https://perma.cc/SDP2-DC24>].

228. Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, U. WASHINGTON SCH. L. (2015), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1213&context=faculty-articles> [<https://perma.cc/D2WL-6QL3>].

229. Scott S. Harris, *Memorandum to Those Intending to File An Amicus Curiae Brief in the Supreme Court of the United States*, USSC (Jan., 2023), <https://www.supremecourt.gov/casehand/AmicusGuide2023.pdf> [<https://perma.cc/S7TY-536P>].

230. *Id.*

231. *Id.*

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UN.²³² In his Millennium report, Kofi Annan suggested that “give full opportunities to non-governmental organizations and other non-state actors to make their indispensable contribution to the Organization’s work.”²³³ Even though in the League of Nations, the predecessor to the UN, there was no formal recognition of NGOs but they often presented oral reports to its committees, submitted written reports, and took part in deliberations.²³⁴ Such a participatory approach in international law is not just a call of the present times as the ICJ has recognized this in the middle of the last century by pronouncing that “[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities *that are not states*.”²³⁵ And the rule-making potential of an advisory opinion is also clarified in the *Namibia* case by Judge De Castro where he states that “the reasoning and operative part of an advisory opinion are, at least potentially, clothed with a general authority, even vis-à-vis States which have not participated in the proceedings, and may therefore contribute to the formation of new rules of international law.”²³⁶

In some cases, international treaties as the lowest common denominator of the consensus

232. U.N. Secretary General, *We the People: The Role of the United Nations in the Twenty-First Century*, Rep. of The Secretary-General, ¶ 80, U.N. Doc. A/54/2000 (Mar. 27, 2000).

233. *Id.*

234. IDOWU MOPELOLA AJIBADE, A SYNOPSIS: RIGHTS, RESPONSIBILITIES AND ROLES OF HUMAN RIGHTS NGOS UNDER INTERNATIONAL LAW 4-5 (2008).

235. Hamid Behzadi, *Juridical Personality of the International Organization and the Legal Status of its Civil Servants*, 30 PAKISTAN HORIZON 3, 4 (1977) (citing *Reparations for Injuries Opinion*, 1949 I.C.J. Rep. 174, 178 [emphasis added], <https://jusmundi.com/en/document/decision/en-reparation-for-injuries-suffered-in-the-service-of-the-united-nations-advisory-opinion-including-the-text-of-the-declaration-of-judge-winiarski-monday-11th-april-1949> [<https://perma.cc/5VYG-WECH>]). One may contend that in this case, the court was dealing with the reparation for injuries to a person working for the UN, not an NGO, however, the observation of the Court does not appear to be a limiting one.

236. *Namibia (S.W. Africa)* (Sep. Op. De Castro), Advisory Opinion, 1970 I.C.J. 158, ¶ 174 (Aug. 5).

among states, can contain expressions which may need further interpretations.²³⁷ It is in these cases, NGOs as *amicus curiae* may play an important role²³⁸ in protecting the public interest. That is not to imply that states are any less capable of playing this role, but due to the public interest being subjugated to short-term prerogatives, in this type of case where the interest of states may not coalesce with public interest, the NGOs may play a more positive role. Again, from a policy point of view, there are compelling reasons for NGOs to be able to submit amici briefs before the ICJ as the judgments as well as advisory opinions affect not only the rights and obligations of states parties to the dispute, but also increasingly the rights and obligations of individuals²³⁹ as states are not always the defenders of the public interest.²⁴⁰ Thus, “justice requires that [NGOs] representing the public’s interest have the opportunity to submit information and arguments to the Court. Such participation reinforces the concept of obligations *erga omnes* and can lead to enhancing the role of the Court and the long-term development of international law.”²⁴¹

Thus, both in contentious and advisory proceedings, the ICJ should, as a matter of rule, allow *amicus curiae* submissions by NGOs. Allowing *amicus curiae* briefs before the Court may ensure a useful model like Rule 37 of the ICSID Arbitration Rules, which provides that, upon consulting both parties, the Tribunal may allow a third party to file a written submission regarding a

237. PHILIPPE SANDS, *LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES* 39 (1st ed. 2005). Where Sands recalls how Philip Allott, one of his law school teachers and a former UK Foreign Office legal advisor had explained that treaties are “just agreements to disagree, reduced into writing.” And the only reason treaties are treated differently by the mass people as well as dissenting judges is because of the ambiguity inherent to it.

238. GIORGIO GAJA, *A NEW WAY FOR SUBMITTING OBSERVATIONS ON THE CONSTRUCTION OF MULTILATERAL TREATIES TO THE INTERNATIONAL COURT OF JUSTICE* 670 (Ulrich Fastenrath et al. eds., 1st ed. 2011).

239. Shelton, *supra* note 95, at 642.

240. Oliver James, *Regulation Inside Government: Public Interest Justifications and Regulatory Failures*, 78 *PUB. ADMIN.* 327, 327 (2000).

241. Shelton, *supra* note 95, at 642.

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matter within the scope of the dispute.²⁴² Though consultation of the parties is required, their concurrence is not.²⁴³ In deciding whether to allow such a filing, the Tribunal shall consider, *inter alia*, the amicus submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge,²⁴⁴ or insight that is different from that of the disputing parties; whether the amicus submission would address a matter within the scope of the dispute; or, the third party has a significant interest in the proceeding.²⁴⁵ The Tribunal shall ensure that the amicus brief does not disrupt the proceeding, unduly burden, or unfairly prejudice either party and ensure that both parties are given an opportunity to present their observations on the amicus submission.²⁴⁶

Assuming that the amicus curiae briefs from non-state actors are to be allowed as a matter, of course, not on a case-by-case basis, the next question could be through what mechanism such briefs should be allowed. Although explicit change to the Statute of the ICJ may be an option, that option is difficult to achieve. This is because any amendment to the Statute is a complex procedure. Under Article 66 of the Statute, any amendment needs to be implemented by the same procedure as is provided by the UN Charter for amending that Charter, subject to any provisions which the General Assembly, upon recommendation of the Security Council, may adopt regarding the participation of states that are parties to the Statute but are not members of the

242. *Ch. IV Written and Oral Procedures*, ICSID (Jan. 14, 2025), <https://icsidfiles.worldbank.org/icsid/icsid/stat-icfiles/basicdoc/partf-chap04.htm#r37> [<https://perma.cc/S7E8-L4QQ>].

243. *Id.*

244. *Id.*

245. *Id.*

246. Statute of the International Court of Justice 1945 I.C.J Acts & Docs. art. 66.

United Nations.²⁴⁷ Under Article 108 of the UN Charter, the Charter can only be amended “by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council”.²⁴⁸ Thus, it is highly likely that any change to the Statute is extremely unlikely in the near future.

A more pragmatic and less contentious procedure would be to amend the Rules of the ICJ. Article 30(1) of the Statute provides the ICJ with the power to “frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.”²⁴⁹ As the amendment would only relate to amicus curiae briefs, the changes charted in this article would clearly appear to be a matter of procedure and not any substantive provision of the Statute. Thus, such a change should not raise any objection regarding its propriety. This line of argument is consistent with the observation of the Court in the *Nicaragua* Case whereby reiterating the finding of the PCIJ in *Mavrommatis Palestine Concessions*, it observed regarding its rule-making power under Article 30 of the Statute and dealing with complex procedural issues in settling disputes “that it was at liberty to adopt ‘the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.’”²⁵⁰ Arguably, the only real restraint on the rule-making power of the ICJ would be when a rule would contradict a provision of the Statute, as the

247. U.N. Charter art. 108 ¶ 1.

248. *Id.*

249. Statute of the International Court of Justice 1945 I.C.J. Acts & Docs. art. 30.

250. Iain Scobbie, *Discontinuance in the International Court: The Enigma*, 41 CAMBRIDGE U. PRESS 808, 809 (1992).

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rule-making power itself is derived from the Statute.²⁵¹ When an amendment to its Rules is necessary, the ICJ established a standing Committee for the Revision of the RoC in 1979 and this Committee meets several times a year to perform its task.²⁵²

It may be mentioned here that in some cases, the ICJ Judges have vented skepticism about NGO's roles.²⁵³ For instance, in the *Nuclear Weapons* case, in his dissenting opinion Judge Oda observed that the majority of the Court should have declined to render opinion, due to inter alia, "[t]he idea behind the resolution whereby the General Assembly (and also the WHO) requested advisory opinions, had previously been advanced by a handful of non-governmental organizations (NGOs)."²⁵⁴ He further observed that "the request for an advisory opinion which was made by the General Assembly in 1994 originated in ideas developed by some NGOs."²⁵⁵ He concluded that "a group of States stimulated by a few NGOs attempted to achieve a breakthrough by obtaining the Court's endorsement of an alleged legal axiom in order to move towards a worldwide anti-nuclear weapons convention."²⁵⁶ According to him, the request for an advisory opinion was made "not in order to ascertain the status of existing international law on the subject but to try to promote the total elimination of nuclear weapons—that is to say, with highly political motives."²⁵⁷

251. Paolo Palchetti, *Making and Enforcing Procedural Law at the International Court of Justice*, QUESTIONS OF INT'L L. (Jul. 31, 2019), <https://www.qil-qdi.org/making-and-enforcing-procedural-law-at-the-international-court-of-justice/> [<https://perma.cc/LJ5M-QUJ6>].

252. *Chambers and Committees*, ICJ (Jan. 14, 2025), <https://www.icj-cij.org/chambers-and-committees> [<https://perma.cc/9VUU-RLPQ>].

253. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 330, ¶ 332 (July 8).

254. *Id.* at 335.

255. *Id.* at 337.

256. *Id.* at 368.

257. *Id.*

Indeed, as states are political actors, if political motive is a ground for rejection of a request, then by that logic, many of the requests made to the ICJ may be liable to be dismissed. In the same case, Judge Guillaume, in his separate opinion, expressed the view the Court could have declined to render an advisory opinion because it had its genesis “in a campaign conducted by an association called International Association of Lawyers Against Nuclear Arms (IALANA), which in conjunction with various other groups launched in 1992 a project . . . in order to obtain from the Court a proclamation of the illegality of the threat or use of nuclear weapons.”²⁵⁸ But, like the dissenting opinion of Judge Oda, this opinion, too, does not spell out why the role of NGOs should or could have been a factor in declining the request.²⁵⁹ On this point, the submission of the Solomon Islands seems to be on the point that:

[T]he involvement of non-governmental organisations in lobbying efforts might in some way taint the bona fides or legitimacy of resolution 49/56K. The resolution was adopted by a majority of members of the United Nations which voted on the matter . . . The efforts of responsible non-governmental organisations, including associations of professional physicians, in raising public awareness and contribution to the processes of international law are to be welcomed.²⁶⁰

XI. Conclusion

Ultimately, all laws and institutions are for human beings. The Westphalian model of state-centric international law has undergone substantial change and increasingly, even individuals are allowed direct access to international courts such as the European Court of Human Rights.²⁶¹ Institutions are not immutable crystals that should not respond to the needs and circumstances of

258. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 287 (July 8) (separate opinion by Guillaume, J.).

259. *Id.*

260. Solom. Is., *Written Comments of the Government of the Solomon Islands*, Doc. 8724 (Sept. 20, 1995) <https://www.icj-cij.org/index.php/node/104365> [<https://perma.cc/78MC-J7HZ>].

261. Burke-White, William W. and Slaughter, Anne-Marie, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L. J. 327, 328 (2006).

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time. What was justified at the time of the founding of the Court or when its rules were changed in 2004, may not be so now. As Justice Cardozo has put it “[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.”²⁶² The changes to the Rules of the Court as charted in this article are not so radical to alter the jurisdiction of the Court, as amicus curiae brief by NGOs only come into play when at least a state has triggered the contentious jurisdiction or an authorized organization has triggered the advisory opinion jurisdiction.²⁶³ That is *not* to say that any change to the jurisdiction of the Court may not be in order. It is only to suggest that the Court, as a judicial body, functioning under its Statute, is not vested with that power. It is the state parties who retain such powers.

It is evident that there is a greater propensity to accept amicus submissions by most international courts and tribunals. Now perhaps the pressing question is not so much on whether the ICJ should accept amicus curiae briefs from international NGOs, but rather to what extent and on what conditions, if any, it would. Of course, not all NGOs would have similar objectives or may promote public interest. The ICJ should be well equipped to differentiate between any parochial-interest-driven brief and an amicus brief submitted in the best interest of the public. For it to be truly World's Court, the ICJ should give access to amicus curiae briefs by NGOs as a matter of defined right, not through any ad hoc discretionary choices, but through clearly defined rules. Many of the arguments typically advanced against a more relaxed approach to amicus curiae briefs are not per se against such briefs, but rather, against potential negative externalities of such briefs. Any fear of dilatoriness, though cogent, as already pointed out, can be mitigated by

262. BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 66 (YALE U. PRESS, 1921).

263. *Contentious Jurisdiction*, *supra* note 220.

imposing clearly defined limits on the length of submissions and the time allowed for presenting any oral statement.