NGO Participation in Regional Human Rights Systems

A Comparison of Europe and the Americas

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ABSTRACT

While the participation of NGOs in international institutions has been extensively researched by constructivist theory and legal scholarship, many of the researches have been limited to the examination of NGOs as norm entrepreneurs. The rather puzzling variation in NGO participation in the European and Inter-American Human Rights System can therefore not be explained by existing theories. While the European Human Rights System follows its initial institutional design of limited NGO participation, the Inter-American System has been confronted with more NGO involvement over the last decades, even though the institutional designs of the systems are similar. This thesis tries to answer the question what could explain this variation by looking at the structural differences of the level of autonomy and the resources of the institutions. The NGO participatory roles of (1) lobbying for greater support for the institutions among member states, or lobbying for reform at the Court on behalf of the member states; (2) providing assistance in investigations; and (3) as *amicus curiae* are examined. It is concluded that the low level of autonomy and poor resources of the Inter-American Human Rights System have created many participatory opportunities for NGOs. Similarly, the high level of autonomy of the European Human Rights System has created little opportunities for NGOs to participation. However, the level of resources of the European System is not sufficient to deal with its workload, but this has not created many opportunities for NGOs. Further research is required to provide a more extensive image of what explains the variation in NGO participation in the regional human rights systems.

Contents

Introduction

The traumas of the Second World War initiated the creation of a universal document specifying the rights to which individuals are inherently entitled. The United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights in 1948, which has since served as a blueprint for international treaties and human rights instruments. It was considered to be the first global expression of human rights and it has assisted to create a universal human rights system which is, in theory, accessible to all individuals around the world. Over the past decades, regional human right systems have been created to ensure the protection and promotion of human rights in specific parts of the world. Currently, 68 states are subject to the decisions of the two major established regional human rights systems, which both aim to safeguard against repetitions of mass-scale human rights abuses[1].

The European and Inter-American Human Rights Systems are the two major regional human rights organs and are both part of regional integration systems which have a broader mandate than solely the protection of human rights – for the Inter-American human rights system, the Organization of American States (OAS) carries its mandate; the European system is part of the Council of Europe (CoE). The systems are most-similar: they have comparable initial institutional designs, they both have treaty-based courts and they were both set up in similar historical periods. The threat of communism in Eastern Europe provoked the creation of the European Court of Human Rights (ECtHR) in 1959, while the establishment of the Inter-American Commission on Human Rights (IACHR) was triggered by the Cuban revolution and the dictatorship in the Dominican Republic. While universal human rights institutions face the challenge of advancing human rights in states that may resist supranational institutions and decisions, regional human rights systems have managed to circumvent this challenge by being an enforcement mechanism which can resonate better with local conditions than global, universal systems.

With an increasingly important role for civil society in the international political arena, non-governmental organizations (NGOs) have become essential in the advancement of human rights norms. Today they are well known actors in the development and implementation of international human rights law and they can pressure for large-scale changes in international norms and standards. Santivasa, in her research on the role of NGOs at the International Court of Justice, states that "… their [NGOs] contribution to the development of international law is undeniably remarkable. Over the past decades, international NGOs are increasingly taking part in various steps of the legal order, such as elaboration of rules, law enforcement and litigation" [2]. Extensive research has been conducted over

[1] Cavallaro, J.L. and Brewer, S.E. (2008). Never Again? The Legacy of the Argentine and Chilean Dictatorship for the Global Human Rights Regime. *Journal of Interdisciplinary History*, 39(2): 233-244, p. 238 (hereinafter Cavallaro and Brewer 2008)

[2] Santivasa, S. (2012). The NGOs Participation in the Proceedings of the International Court of Justice. *Journal of East Asia & International Law*, 5(2): 377-406, p. 378 (hereinafter Santivasa 2012)

the past decades to explore the increasingly important role that NGOs can play in international institutions.

While research on the influence of NGOs has been extensive, research on the participation of NGOs specifically in regional human rights systems has been limitedly extended beyond the norm emergence phase. This can to some extend be explained by the nature of the regional human rights systems: the initial (legal) institutional design of both the European and Inter-American human rights system limits and even excludes NGOs from participating. The early exclusion of NGOs is not unexpected as they were not yet major global actors at the time of the creation of the regional human rights systems. However, while NGOs have more and more become important global actors, the development of NGO participation within the systems has not equally evolved. Today, NGO participation at the European Court of Human Rights follows its initial institutional design with limited formal NGO participation – only four percent of the decisions on the merits had direct NGO involvement in the role of a NGO acting as a representative[3]. Contrastingly, the frequency of participation of NGOs in the Inter-American system is much greater: over half of the decisions involved direct NGO participation[4]. Even though there is no measurement that allows to specifically determine the numbers on the informal participation of NGOs, reports from major human rights NGOs such as Amnesty International and Human Rights reflect that, over the last decades, their activities have been more frequent in the Americas than in Europe[5].

The difference in NGO participation seems to be puzzling: the European human rights system is considered to be the strongest regional human rights system. It would therefore be a perfect venue for NGOs to further their goals: its institutions are stable and the member states are willing to cooperate in order to protect and promote human rights. Additionally, with the adoption of Protocol 11[6], NGOs are now allowed to formally participate in the European System. Contrastingly, the less developed Inter-American Human Rights System could incite NGOs to utilize a different mechanism. Furthermore, the system has not changed the venues for NGO participation since the last amendment of the Rules of the

[3] Mayer, L. (2011). NGO Standing and Influence in Regional Human Rights Courts and Commissions. *Brooklyn Journal of International Law,* 36(3): 911-946, p. 923 (hereinafter Mayer 2011)
[4] *Id.*, p. 923
[5] While the formal participation of NGOs in the regional human rights system is easily measurable, the measurement of informal participation is dependent on the reports of the human rights institutions and human rights NGOs. However, as the major global human rights NGOs participate in both regional systems, it has been derived from their annual reports that their participation is more frequent in the Inter-American System. Taking this as a starting point, this research will step-by-step examine to what extent which participatory roles vary among the regional systems. Amnesty International, *Amnesty International Report 2014/2015: The State of the World's Human Rights.* Retrieved from https://www.amnesty.org/en/documents/pol10/0001/2015/en/; Human Rights Watch, *Human Rights Watch World Report 2013: Events of 2012.* Retrieved from: https://www.hrw.org/sites/default/files/wr2013_web.pdf
[6] Protocol No. 11 to the Convention of the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155 (hereinafter Protocol 11)

Commission in the 1965[7]. Additionally, there is a similarity among the regional human rights systems that could influence the participation of NGOs: the number of cases filed at the ECtHR and IACHR do not greatly differ, thus not creating any incentives for NGOs to participate in the system that faces most human rights abuses. This research will further examine the variation by aiming to answer the following question: *What explains the variation across the European and Inter-American Human Rights Systems as to the participation of NGOs?*

In order to answer this question, I will first establish the participatory roles that NGOs can play. This will be followed by an examination of the current literature on NGO participation in order to determine whether there is a theory that can help explain the variation. As previously stated, the research on NGO participation in regional human rights systems seems to limitedly extend beyond the norm emergence phase. After examining constructivist and legal scholarship theories, it can be concluded that there is no theory that can explain the variation. However, a first insight in the variation is provided by the conclusion of Scholte's research that institutional structures are important to NGO participation[8].

The lack of a readily available explanation to the variation in NGO participation the importance of this research: there is little existing literature on the participation of NGOs at regional human rights systems beyond norm emergence. This research will contribute to theory building by examining whether the structural differences of the autonomy and resources of the institutions are important indicators for the level of NGO participation in the regional human rights systems. The concepts of institutional autonomy and resources will be further operationalized in the theoretical framework.

The operationalization of the concepts will be followed by an examination of the regional human rights systems. Both the European and Inter-American Human Rights system will be examined by further going into detail on the workings of the institutions and the possibilities for NGOs to participate formally. An analysis of the autonomy and resources of both systems will then be provided, which both will be linked to the participatory roles that NGOs can play. This will be done by looking at the participatory roles of lobbying for reform, providing assistance to the institutions and the filing of *amicus curiae* briefs.

It will be concluded that both the level of autonomy and resources have an influence on the participatory role of NGOs. The Inter-American Human Rights System has dealt with a lack of autonomy since its creation and that is reflected in the important role that NGOs play in the reform process. The independence of the European System is better respected by its member states, which leaves little possibilities for NGOs to provide assistance. The effects of resources on the participation

[7] Padilla, D.J. (1993). The Inter-American Commission on Human Rights of the Organization of American States: A Case Study. *American University Law Review,* 9(1): 95-115, p. 96 (hereinafter Padilla 1993)
[8] Scholte, J.A. (2013). Civil Society and Financial Markets: What is Not Happening and Why. *Journal of Civil Society,* 9(2): 129-147, p. 130 (hereinafter Scholte 2013)

of NGOs are not as straightforward as the effects of the level of autonomy. While both the European and Inter-American System have been dealing with lacking funds, the role of NGOs is far more apparent in the Inter-American System. The possibilities for NGOs related to the lack of resources to the ECtHR are limited as the European member states want to preserve the independence of the Court and therefore deal with the lack of funding in a more regulated manner.

This research will have its limitations. There is no database from which data on the participation of NGOs in the human rights systems can be collected. The data therefore needs to be collected from reports issued by major human rights NGOs and the regional systems. In order to verify the gathered information, I will interview representatives of Amnesty International, Human Rights Watch, and the Dutch Ministry of Foreign Affairs (Directorate Western Hemisphere). For pragmatic reasons, I will not be able to interview the number of people in order to be able to draw conclusions from their statements. It will, however, allow me to confirm the facts previously established. Additionally, even though the regional human rights systems are similar on most parts, the major difference lies in the dual-structure of the Inter-American System. While individuals can file their complaints directly at the ECtHR, they have to go through the Commission at the Inter-American system. This influences the possibilities for the participation of NGOs. I believe however that this will not create any difficulties for this research: the ECtHR has largely taken over the task of the European Commission on Human Rights and therefore now receives all complaints, which leaves only one institution for NGOs to participate at. Furthermore, I am aware that domestic factors can influence the decisions that member states make concerning their international obligations. However, as this research focuses on the autonomy and resources of the institutions, rather than why this level differs among the systems, I do believe that this will not limit me to draw any conclusions on the variation in NGO participation.

Framework of analysis

Before being able to determine what causes the participatory role of NGOs to vary among the regional human rights systems, the participatory roles of NGOs need to be established. The formal role of filing *amicus curiae*[9] briefs is restricted or promoted by the statutes of the Commission and the Courts and would therefore be too limited to only consider.

According to Haddad[10], five different roles for NGOs can be distinguished: (1) formal roles in trials; (2) advisory roles; (3) representative roles; (4) providing information; and (5) operational support roles. There is no readily available database with data on these participatory roles at the regional human rights systems. Researches done on NGO participation[11] have been conducted through the extensive process of collecting data by going through all the decisions made by the Courts and all the documents filed by (major) NGOs. This process is fairly time-consuming and since not all roles have been as extensively researched by scholars to provide all the data for this research, I will limit myself to the following three participatory roles:

1. Lobbying for greater support for the institutions among member states, or lobbying for reform at the Court on behalf of the member states
2. Providing assistance in investigations
3. As *amicus curiae*

Theories on NGO Participation

An overview of the existing literature on NGO participation will be provided. Following the examination of the literature of constructivism and legal scholarship, it can be concluded that there is no theory that explains the variation in participation. Scholte's research suggests that institutional structures are an important indicator to NGO participation[12]. However, the institutional structures influencing the participation of NGOs for the regional human rights systems are not examined and therefore still need to be established.

[9] An *amicus curiae* (friend of the court) is a person who is not a party to a lawsuit but who petitions the court is requested by the court to file a brief in the action because that person has strong interests in the subject matter
[10] Haddad, H.N. (2012). Judicial Institution Builders: NGOs and International Human Rights Courts. *Journal of Human Rights,* 11(1): 126-149 (hereinafter Haddad 2012)
[11] Mayer 2011, *supra* note 3; Mohammed, A. (1999). Individual and NGO participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons From the European and Inter-American Court. *Journal of African Law*, 43(2): 201-213 (hereinafter Mohammed 1999); Wilkowska-Landowska, A. (2006). 'Friends of the Court': The Role of Human Rights Non-Governmental Organisations in the Litigation Process. *Human Rights Law Commentary*, 2: 99-119
[12] Scholte 2013, *supra* note 8

Constructivism

The international relations theory of constructivism views the course of international relations as an interactive process in which the ideas of and communications among agents serve to create structures. The created structures, in turn, influence the ideas and communications of the agents. Most important for the research of NGO participation is that constructivism sees, in contrast to realism, not only states as key actors in world politics. They believe that NGOs and Inter-Governmental Organizations (IGOs) are equally important and that an international political arena exists outside of states[13]. Constructivist theory focuses both on Transnational Advocacy Networks (TANs) and NGOs.

Finnemore and Sikkink have defined NGOs as agenda setters, democratic difference makers and promoters of new norms[14]. In this respect, NGOs can either preserve or alter the status quo and can be found to operate interdependently with the core organizations of global governance, e.g. the regional human rights courts. While their conducted research reflects the importance of NGOs in international politics, it does not sufficiently demonstrate the reciprocal relationship that NGOs and international courts can have. Additionally, they do not go into detail on NGO participation on the operational side of international institutions – it is solely focused on NGOs as norm entrepreneurs.

The introduction of the spiral model by Risse and Sikkink[15] also demonstrates the tendency to classify NGOs as norm entrepreneurs. In this model, NGOs are given a central role in the process of human rights norm creation, alongside individuals, states and international organizations. This research likewise solely focuses on the norm emergence phase of the institutions. Even though it cannot be stated that each and every human right is universally accepted and respected by all signatories to human rights conventions, the norm emergence phase of the creation of the regional human rights institutions has ended. The pressure for norm creation at the institutions is therefore no longer needed. NGOs can now extend their influence to the operational side and this research should therefore be extended.

This extension of the research has in part been done by Keck and Sikkink, who have identified circumstances under which NGOs can exercise influence on international institutions: (1) issue creation; (2) influence on discursive positions; (3) influence on institutional procedures; (4) influence on policy change; and (5) influence on state behavior[16]. These areas of influence are similar to the participatory roles that will be examined in this thesis: lobbying for support and providing assistance to the institutions are related to the influence on policy change in 'target actors' and influence on

[13] Slaughter, A. (2011). International Relations, Principal Theories. In *Max Planck Encyclopedia of Public International Law.* Oxford: Oxford University Press
[14] Finnemore, M. and Sikkink, K. (1998). International Norm Dynamics and Political Change. *International Organization,* 52(4): 887-917, p. 890
[15] Risse, T, Ropp, S, and Sikkink, K. (1999). *The Power of Human Rights. International Norms and Domestic Change.* Cambridge: Cambridge University Press
[16] Keck, M. and Sikkink, K. (1998). *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell University Press, p. 98 (hereinafter Keck and Sikkink 1998)

institutional procedures. While this classification shows that constructivist research on NGOs is extending beyond the phase of norm creation, it does not provide any further explanation to why these possibilities are utilized differently in the various human rights systems.

The varying strategies towards the adoption of sanctions have been researched by Klotz. She examined the sanctions adopted by international institutions against the apartheid regime, which have contradicted the strategic and economic interest of some. She concludes that the emergence of the norm of 'racial equality', triggered by NGO pressure, forced IOs to change their views[17]. This research shows that norms can play a role that is equally important as strategic concerns in policy formulation and it confirms the importance of NGOs at the norm emergence stage. However, is lacks the next step by not explaining *why* the norms varied among the institutions in addition to the explanation to what triggered the acceptance of norms at some IOs.

Further research on the influence of TANs on the creation of institutions has also been researched has been done by Struett. He explored the impact of TANs on the creation of the International Criminal Court and argued that TANs played an important role in shaping the key provisions in the Court's statute and in achieving quick ratification of the Statute[18]. He concludes that TANs were able to achieve this predominantly through the use of arguments, implying that argumentation is one of the most powerful tools of participation for TANs[19]. This argument is further supported in Haddad's research on the norm emergence of the prosecution of sex crimes at the Rwandan and Yugoslav tribunals[20]. In this research she concludes that TANs helped to general the necessary political will to adopt and implement legal norms regarding the crimes of sexual violence at both tribunals.

Focusing more specifically on institutions that are already in force, Kelly researched the influence of TANs on IGOs and concluded that the effects of their pressure should not be taken as a given[21]. While the World Bank responds functionally to NGO pressure, the IMF responds defensively and therewith marginalizes the effects of NGO pressure. This variation in civil society participation is further confirmed by Scholte who researched why financial markets have attracted relatively little effective civil society mobilization[22]. He has attributed the lack of civil society participation in the IMF to the secrecy of the financial sector, the public ignorance of financial capital and its governance and the low

[17] Klotz, A. (1995). Norms Reconstructing Interests: Global Racial Equality and U.S. Sanctions Against South Africa. *International Organization*, 49(3): 451-478, p. 476
[18] Struett, Michael J. (2008). *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency.* New York: Palgrave Macmillan, p. 85
[19] *Id.* p. 86
[20] Haddad, H.N (2011). Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals. *Human Rights Review*, 12(1): 109-132
[21] Kelly, R.E. (2005). *'A Lot More than the NGOs Seem to Think': The Impact of Non-Governmental Organizations on the Bretton Woods Institutions* (Unpublished doctoral dissertation). The Ohio State University
[22] Scholte 2013, *supra* note 8

institutional capacity for mutual engagement[23]. He concludes that the organizational structures negatively influence the possibilities for civil society participation, which provides a starting point for the examination of NGO participation in this research.

While these studies go further than previous research by looking at the participation of NGOs beyond the norm emergence phase, there is no clear explanation provided to why the participation of NGOs could potentially differ among the regional human rights institutions. The specificity of the researches does not allow inducting conclusions to the broader relational patterns between international courts and NGOs: how the relationships have formed over time and how NGOs can influence the operational side of international courts. However, it does provide the starting point of looking at the structures of the institutions to find an explanation.

Legal Scholarship

Legal scholarship more directly acknowledges the possibilities for NGO participation at international courts. However, it limits itself to the formal roles associated with representing victims as a party or as a third-party participant. NGOs often do not have legal standing as claimants at international courts and are considered to be non-legal actors. Legal advocates of NGO participation view NGOs as stakeholders in the international judicial process while at the same time being a potentially legitimizing and democratizing influence at the institution[24]. On the other hand, skeptics argue that NGOs are not democratic organizations and should therefore not be characterized as legitimate participating organizations[25].

While the participation of NGOs at international courts is often only studied regarding the creation of the norms and institutions, social movement theory examines NGO participation at constitutional and domestic courts. One of the main focuses of research in this field is the study of the benefits of using courts as a means to advance civil or human rights claims. While constitutional courts are criticized by many on the grounds that they offer 'hollow hope' for civil rights[26], some scholars have argued in favor of the utilization of constitutional courts. The emerging work in comparative politics that questions what benefits courts may receive in return for allowing NGO participation could be helpful for the examination of the variation of NGO participation. Moustafa[27] argues, by examining the Egyptian Constitutional Court, that domestic courts and civil society groups are in a symbiotic relationship whereby the court provides an opportunity for NGOs to challenge the state. In return, civil

[23] *Id.* p. 145
[24] Lindblom, A. (2005). *Non-Governmental Organizations in International Law*. Cambridge: Cambridge University Press
[25] Simmons, B. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. New York: Cambridge University Press
[26] Rosenberg, G.N. (2008). *The Hollow Hope. Can Courts Bring About Social Change?* Chicago: The University of Chicago Press
[27] Moustafa, T. (2009). *The Struggle for Constitutional Power. Law, Politics, and Economic Development in Egypt.* Cambridge: Cambridge University Press

society provides the court services, which includes monitoring, initiating litigation, and documenting violations. These findings could be an initial step in explaining the variation in NGO participation. The Egyptian Court and NGOs seem to cooperate to be able to form a front against the undemocratic Egyptian regime. This reciprocal relationship should then be more apparent in a region with less mature democratic states, from which it could be argued that NGO participation in the Inter-American Human Rights System should be greater than in the European System. However, as these findings are mainly focused on the domestic conditions of the states rather than the conditions at the institutions, it will not be provided as an explanation to the variation in NGO participation. Furthermore, it needs to be kept in mind that the dynamics of the constitutional courts differ greatly from the international courts. International courts are supranational institutions, often having to deal with struggles concerning the enforceability of their decisions[28]. The need for NGO support is of a different nature than in a domestic court which could lead to different forms participation. While the findings of Moustafa support the variation in NGO participation, the research needs to be extended towards the variations in the institutions rather than the domestic nature of the member states.

Legal scholarship acknowledges that NGOs can and do participate at international courts beyond their formal involvement in litigation. They participate at the international courts by providing services such as information sharing and administrative support[29]. However, the conducted research is limited to establishing the fact that there are roles that NGOs can play, not aiming to provide any explanation to how these roles emerge and when NGOs get involved. The research done by legal scholarship on the formal participatory role of NGOs both in international and domestic courts is therefore too limited to draw conclusions on the variation in participatory roles.

[28] Helfer, L.R. and Slaughter, A. (1997). Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, 107(2): 273-391: p. 337 (hereinafter Helfer and Slaughter 1997)
[29] Mohammed 1999, *supra* note 11

Theoretical Framework

The participation of NGOs has been extensively researched: scholars have examined the presence of NGOs at international institutions, domestic courts, international tribunals and the UN. All research shows that NGOs can be of importance in the emergence of norms and the creation of institutions. The conducted research considers the NGO to be the central actor, examining why they participate and how far their influence extends. However, the aim of this research is to focus on the opportunities that are created within the institutions, while taking the willingness and resources of the NGOs as a given. The institutional design, the nature of the cases heard, and the time-frame of the creation of the institutions is similar in both systems and can therefore not be the variable that explains the variation in NGO participation.

Two major differences exist between the regional human rights systems: the support for the institutions and the funding it receives. Taking into consideration the three participatory roles that will be examined – lobbying for greater support, providing assistance and acting as *amicus curiae* – these structural differences could be an explanation to why these participatory roles of NGOs vary among the regional systems. I will now further argue why resources and autonomy are important to the functioning of the institutions, and therewith the creation of opportunities for NGOs to participate.

Autonomy of the institution

The autonomy of an institution is the degree to which the member states respect its independence. This can be negatively influenced by states that threaten the institution, through withdrawal of support from the human rights treaty or by not complying with judicial decisions. These threats can create opportunities for NGOs to provide assistance to either the institution or the member state to lobby for reforms. Following international organization literature that focuses on the relationship between member states and courts[30] I argue that institutional autonomy matters for the level of participation of NGOs.

HYPOTHESIS 1: The lack of autonomy of a regional human rights institution leads to more NGO participation in the form of lobbying for reform or lobbying for greater support

In order to determine whether the autonomy indeed influences the participatory role of NGOs, I will first establish the autonomy of the Courts and the Commission. To determine the relative support for the human rights institutions, I will first look at the number of signatories to the Conventions compared to the number of members to the parent-organizations. However, as research has established that the ratification of a human rights treaty is often used as an ideal response to criticism about a

[30] Hawkins, D.G., Lake, D.A., Nielson, D.L., and Tierney, M.J. (eds.) (2006). *Delegation and Agency in International Organizations.* Cambridge: Cambridge University Press

state's human rights practices[31], this will not be provide reliable information on the actual support of the member states to the institution. States with bad human rights records can ratify for the level of external legitimation by following 'global scripts'[32], rather than to fully commit to the treaty. To measure the autonomy of the institutions I will therefore examine the following indicators: (1) the nature of the reservations made with the ratification of the Conventions; (2) the number of denunciations and threats of withdrawal; and (3) the level of compliance with the judgments issued by the institutions.

First, I will look at the reservations that have been made to the Conventions– do they undermine the independence of the institutions? A reservation may "anticipate the extent to which the Contracting Party is going to apply the conventional obligations"[33], and therewith respect the autonomy of the institution. The types of reservations therefore provide more information on the intentions of the member states than their mere ratification. For the Inter-American System it will also be important to look at the recognition of jurisdiction of the Court, as this needs to be explicitly done.

The second step in determining the autonomy of the regional human rights system will be to look at the threats of withdrawal and the denunciations made by member states. This indicator will specifically look at the official denunciations filed with either the CoE or the OAS and the official threats that states have made to withdraw. These threats are counted through the official state declarations on a threat of withdrawal and supporting press releases and newspaper articles. The third step to determine the autonomy of the regional human rights system will be the examination of the compliance rate within the regional systems. As stated before, some states may only ratify the Convention for the benefits, with no intention to comply. The commitment of states to comply with the rulings issued by the institutions is crucial to the integrity of any legal system, both domestic and international as it carries a large normative priority[34]. The compliance rate thus provides a good indication of the respect of member states to the institutions. As the overall level of compliance with the system needs to be determined, I will not go into detail on the compliance rate of every member state. I will however provide more information on the biggest threats to the autonomy concerning compliance.

If the autonomy of the institutions indeed appears to be low at either one of the systems, I will look at the opportunities that emerge for NGOs. To be able to determine whether the level of autonomy indeed has an influence, I examine whether NGOs participate in the following roles: (1) lobby for

[31] Hafner-Burton, E.M., Tsutsui, K., and Meyer, J.W. (2008). International Human Rights Law and the Politics of Ligitimation. *International Sociology,* 23(1): 115-141, p. 118 (hereinafter Hafner-Burton 2008)
[32] *Id.* p. 135
[33] Montalvo, A.E. (2001). Reservations to the American Convention on Human Rights: A New Approach. *American University Law Review,* 16(2): 269-313, p. 289 (hereinafter Montalvo 2001)
[34] Huneeus, A.V. (2011). Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights. *Cornell International Law Journal,* 44(3): 494-531, p. 506

more support for the institutions; (2) lobby for reform of the institutions on behalf of the member states; (3) assistance in investigations; and (4) the filing of *amicus curiae* briefs.

First, lobbying for support can refer to the lobby for retracting of reservations, to urging member states to sign the Convention and to urging states to comply with the judgments of the institutions. The required information will be attained from the annual reports of the major human rights NGOs and the country reports that they have issued. Additionally, I will consider newspaper articles that have been published concerning the threats of member states to the institutions. The second participatory role that will be examined is the lobby for reform. This can be for the interests of either side of the reform process. The assistance of NGOs will be measured by looking at the filing of joint NGO statements, their recommendations in the reform process, and their attendance in reform deliberations.

Third, the assistance in investigations will be examined. While this participatory role is largely related to the resources of the institution, the level of autonomy can have an influence on the initial stages of investigations. The respect for the independence of the Court from the member states is an important indicator for the relationship of trust between the institutions and the High Contracting Parties. Mistrust from the institution to its member states is increased if the independence of the institution is not respected[35]. The lack of trust can influence the acceptance of previously domestically established facts in cases that are brought before the Commission or Court. If the autonomy of the institutions is high, the likelihood that it will accept the established facts in cases is bigger. The acceptance of the facts will reduce the investigative burden for the Court or Commission and therewith reduce the opportunities for NGOs to participate. Fourth, the filing of *amicus* briefs can increase if the autonomy of the institutions is low. NGOs may feel more called to file the briefs to make sure that the trial is fair and all information is provided to the institutions, as member states may feel less called to take the responsibility if they do not fully support the institutions.

Resources of the institution

The resources of the institution refer to the financial support it receives from the parent organization. To be able to function adequately and effectively, the institutions require proper funding to finance both the legal processes and the administrative apparatus. As the member states have to approve the budgets of the OAS and the CoE, the funds of the institutions can be negatively influenced by the states against which complaints are filed. If member states feel threatened by the complaints filed against them, they could intend to undermine the effectiveness of the institution by opposing the proposed budget[36]. A well-funded institution can function more effectively than an under-funded one[37]

[35] Mohammed 1999, *supra* note 11, p. 210
[36] Hayman, M. (2013, 27 March). ALBA-Backed Proposals for IACHR Reform Could Undermine the System. *World Politics Reviews.* Retrieved from http://www.worldpoliticsreview.com/articles/12821/alba-backed-proposals-for-iachr-reform-could-undermine-the-system

and the less-functioning human rights institution could create opportunities for NGOs to provide assistance in investigations and administrations that are otherwise under-funded. I therefore argue that the funds of the regional human rights systems are important to the level of NGO participation.

HYPOTHESIS 2: The lack of funding for the human rights institutions leads to more NGO participation through the provision of investigative and monetary assistance

To determine the level of resources of the institutions, I will examine the following indicators: (1) the overall budget; (2) the allocation of the resources; and (3) availability of legal aid assistance. To start, the overall budget over the last two decades will be analyzed. The most important information that can be derived from this is whether the budgets of the institutions have increased along the increase in the workload of the Courts and the Commission. The budgets will be displayed in euros, which will for the Inter-American system be calculated from its exchange rate to dollars at the time of the issuing of the budget. However, the determination of the total budget provides little information on the efficiency of the allocation of the resources. The effective functioning of the court is dependent on the administrative apparatus and a well-funded legal process, which can be accomplished with smaller resources as well. Therefore, I will secondly look at the allocation of the budget. The legal processes and administrative apparatus need to be adequately funded – this is where NGOs can step in and provide assistance. To determine whether the allocation of the budgets is effective, I will look at which areas are underfunded. As both regional human rights systems do not provide specific budgets of their human rights organs, I will derive this information from the statements of both the institutions and member states on the necessary increase of budgets. Both the institutions and member states have called for the reform of the funding system and have specified the resources required for the institutions to function adequately.

Thirdly, I will consider the availability of legal aid for individuals filing a complaint. Both systems provide financial and legal aid, but the effectiveness is not guaranteed. If the resources available for legal assistance are not sufficient to cover the costs of the legislation of those individuals in need, NGOs can provide the necessary legal assistance. This will be measured by looking at the number of cases in which NGOs have functioned as a representative for an individual.

If the allocation of the budgets appears to suggest that the institutions are under-funded, I will determine whether NGOs have filled this gap. The following participation of NGO will be considered: (1) NGO participation in conducting investigative legwork; (2) providing monetary assistance to the institutions; and (3) filing of *amicus curiae* briefs.

[37] Shelton, Dinah (2006). *Remedies in International Human Rights Law*. Oxford: Oxford University Press, p. 326 (hereinafter Shelton 2006)

First, the participatory role of providing assistance will be looked at through the participation of NGOs in conducting investigative legwork. If the institutions lack the resources to conduct investigations necessary to report on human rights abuses occurring in a member state, NGOs can provide assistance through conducting their own investigations. This will be through country visits, assistance in on-site visits and the composition of country and annual reports.

Second, I will consider the direct monetary contributions that NGOs make. To be able to establish whether the quest for external funding has increased NGO participation, it is important to consider whether the additional resources were directly located to the institutions. If the NGO funding is allocated towards the parent organization, it will not be considered as NGO participation at the regional human rights system. Additionally, I will consider whether this external funding has been provided upon request of the institutions – through this, the institutions confirm their own lack of resources. Third, I will consider the participatory role of *amicus curiae* at the regional courts. An increase in the filing of these briefs can be explained by the lack of resources. Following the reasoning on the operation support of the NGOs to the court, the lack of funding to conduct proper research may instigate NGOs to step in and provide that information through the formal route. This will both be at the request of the institutions and providing time and resource costly comparative law studies.

The European Human Rights System

In a desire to protect themselves from the horrors of the Second World War, the countries of Western Europe agreed to establish the CoE in 1949. The Council's tasks are succinctly explained in the Convention's preamble: "to promote the signatories belief in individual freedom, political liberty and the Rule of Law"[38]. To achieve this goal, the CoE created a system for the guarantee of the human rights in Europe. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") was signed in 1950 and came into force in 1953. Even though the Convention included the creation of the Commission and the Court to monitor and enforce the human rights, it was initially a symbolic document aiming to preserve and safeguard the values of Western Europe[39].

The entry into force of the European Convention was followed by the creation of the European Commission on Human Rights (ECHR) in 1954 and the ECtHR in 1959. During the first forty years, it continued to function with this dual-institutional structure: on the basis of a Commission having quasi-judicial functions and a non-permanent Court. The eleventh Protocol of the Convention[40] changed the structure of the system by giving the Court a permanent character and abolishing the Commission. Any individual claiming to be a victim of a violation of a human right enshrined in the Convention can now directly lodge a complaint against a member state at the ECtHR[41].

NGO Participation in the European Human Rights System

NGOs were not prominent global players when the European Convention was drafted. While NGOs did exist, their numbers were small and their impact was limited, which was due to Cold War politics and a weak status at the UN[42]. The number of NGOs began to rapidly grow in the 1970s and the count of human rights NGOs has grown from fifty in the 1940s to over four-hundred in the early 2000s[43].

At the time of the creation of the European institutions, individuals and private groups did not have the right to appear before the Court. They were able to, with the agreement of the member state concerned, to file their complaints with the ECHR and if the Commission deemed the complaint admissible and irresolvable by friendly settlement, the Commission could refer the case to the Court. However, even in instances where the Commission brought the cases before the Court, the Commission was the party before the ECtHR, and not the individual or the group that had filed the

[38] Council of Europe , *European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, E.T.S. No. 5 (hereinafter European Convention)
[39] Simpson, A. (2004). *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. Oxford: Oxford University Press (hereinafter Simpson 2004)
[40] Protocol 11, *supra* note 6
[41] European Convention, *supra* note 38, art. 46(1)
[42] Charnovitz, S. (1996). Nongovernmental Organizations and International Law. *The American Journal of International Law*, 100(2): 348-372
[43] Robinson, M. (2010). *A Voice for Human Rights.* Philadelphia: University of Pennsylvania Press, p. 374

complaint[44]. The initial institutional design of the European system strongly confirmed the member states as the main protectors of human rights and left little possibilities for NGOs to participate.

From 1989 onward, individuals and groups were given the possibility to ask the President of the Court for the opportunity to intervene in any given case[45]. Additionally, the Court slowly evolved to permit non-state participation into its proceedings through the filing of *amicus curiae* briefs[46]. The adoption of Protocol 11 had the biggest influence on the procedures as it expanded the entities that have the possibility to bring a case before the Court. The European Convention was amended to provide that "the Court may receive applications from any person, non-governmental organization or group of individual claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto"[47]. An NGO claiming to be a victim needs to meet the threshold requirements, such as exhausting all domestic remedies and being the personal victim of the violated rights.

Recently, the ECtHR has developed towards allowing NGOs to file a complaint on behalf of an individual who is not capable of doing so him or her-self. In the case of *Center for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*[48], the Center For Legal Resources filed a complaint on behalf of an individual with disabilities in whose case there was no one else to seek justice. Even though this is too recent of a development to be examined in the participatory roles of NGOs in this research, it does confirm that the acceptance of NGOs at the ECtHR is an ongoing process.

Autonomy and NGO participation

The development of the European Human Rights System occurred within Western European countries that were like-minded when it came to the protection of liberal values. Even though the initial symbolic character of the European Convention created a calm and supportive climate, the system was at first characterized by limited institutional autonomy[49]. Not all contracting states were willing to fully accept the Commission and the Court. Resulting from a disbelief in supranational control mechanisms concerning public freedom, France was hesitant to fully commit to the Convention. It did not accept the jurisdiction of the Court until 1974 when it ratified the Convention and it waited until

[44] Simpson 2004, *supra* note 39
[45] European Court of Human Rights, *Rules of the Court A*, art. 37 (2)
[46] Eynde, v.d, L. (2013). An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights. *Netherlands Quarterly of Human Rights*, 31(3): 271-313, p. 274
[47] Protocol 11, *supra* note 6, art. 34
[48] *Center for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, (App no. 47848/08) ECHR 17 July 2014. Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577
[49] Madsen, M. (2007). From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics. *Law and Social Inquiry* 32(1): 137 – 159, p. 138 (hereinafter Madsen 2007)

1981 to declare that French citizens could directly apply to the ECtHR. Greece waited respectively until 1979 and 1985, while Turkey was the last state to approve both in 1990 and 1987[50].

The first decades of the Commission and the Court were marked by 'negotiated justice' rather than a universal commitment: the Commission rarely found the filing of complaints to be admissible, the friendly settlements that were produced were not publicly denounced and many reports were kept behind closed doors until 1998[51]. In the 1990s, the challenge to improve the autonomy was taken up by the member states and the institutions. With the creation of the permanent ECtHR as the sole protector of human rights in Europe, the European system was no longer a significant threat to the domestic laws concerning the security of human rights and justice[52]. The ECtHR was respected by all member states and the willingness for improved legal practices of human rights was reflected in the domestic politics of the states, where national human rights institutions were set up.

Signatories, reservations and denunciations

The signing of the European Convention is a prerequisite for states to join the CoE and new member states are expected to ratify the Convention at the earliest opportunity[53]. The accession of the Eastern European states to the CoE left the ECtHR to integrate a substantial number of new member states into its institutional framework while monitoring human rights in legal systems that had only recently been developed[54]. While this was a challenge to the European system, the mandatory acceptance of the compulsory jurisdiction of the Court has, to a large extent, secured the independence of the ECtHR. The signing of the Convention has however not been a guarantee for a perfect compliance rate with the ECtHR rulings.

While the signing of the Convention is mandatory to CoE member states, they are not required to sign the following Protocols. States may voluntarily decide to accept these documents and it appears that the Protocols come to be after careful deliberations between the member states as the majority of Protocols have been signed and ratified by all states. The only exception is Protocol 12[55], the anti-discrimination treaty of the Convention, which has not been signed nor ratified by ten states[56]. This,

[50] Voeten, E. (2007). The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights. *International Organization* 61(4): 669-701, p. 673 (hereinafter Voeten 2007)
[51] Helfer, L. (2008). Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *The European Journal of International Law,* 19(1): 125-159, p. 141 (hereinafter Helfer 2008)
[52] Madsen 2007, *supra* note 47, p. 151
[53] Council of Europe: Parliamentary Assembly, *Resolution 1031 – On the Honoring of Commitments Entered into by Member States when Joining the Council of Europe,* 14 April 1994, art. 8. Retrieved from http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta94/ERES1031.htm
[54] Madsen 2007, *supra* note 49, p. 155
[55] Protocol No. 12 to the Convention to the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000 (2005) (hereinafter Protocol No. 12)
[56] Council of Europe Treaty Office, Status of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved from: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG

however, has not had an influence on the functioning and the autonomy of the Court and therewith NGO participation.

The European Convention provides for the possibility to "… make a reservation in respect of any particular provision of the Convention to the extent that any law when in force in its territory is not in conformity with the provision"[57]. The Convention does not allow for reservation of a general character[58] and when making a reservation, the state needs to provide the domestic law which is not compatible with the Convention. The purpose of the reservations under the European Convention is to be accommodating in respect to minor differences which otherwise may prevent a state from ratifying the Convention[59]. Convinced by the presupposition that the signing of the Convention was merely symbolic, the reservations made with the ratification of the European Convention were of a confirmative rather than a restrictive nature. The Netherlands, Denmark and the United Kingdom supported the Convention by expanding it to their colonies and dependencies. The autonomy of the ECHR and the ECtHR has not been in question through the reservations made to the European Convention[60].

The European Convention allows for "… a High Contracting Party [to] denounce the present Convention"[61] in case a state does no longer want to be bound by the rules of the ECtHR. Even though the member states have not always agreed on the procedures of the Court, and many have pressured for reforms, the European system has only faced a small number of threats of withdrawal and one actual denunciation. After being faced with a highly critical report, finding allegations of torture and ill-treatment to be factual, Greece decided to denounce the Convention[62]. The fear of being expelled from the CoE made Greece decide to forestall the events by withdrawing. However, Greece recognized the necessity of being a member of the CoE and rejoined the Convention in 1974. As Greece's denunciation occurred in the 1970s, when the global role of NGOs was still limited, the level of NGO participation is not representative of the difference in NGO participation that can be found among the regional human rights systems today.

The threats of withdrawal have been more recent. The Tories in the United Kingdom (UK) have threatened to denounce the European Convention, stating that it is time for the UK to "quit the

[57] European Convention, *supra* note 38, art. 64(1)
[58] European Convention, *supra* note 38, art. 64(2)
[59] MacDonald, R. (1988). Reservations Under the European Convention of Human Rights. *Revue Belge de Droit International* 4295, 429-450: p. 435
[60] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, List of declarations made with respect to treaty No. 005. Retrieved from: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&NT=005&VL=1
[61] European Convention, *supra* note 38, art. 58(1)
[62] Shelton 2006, *supra* note 37, p. 143

jurisdiction" of a "supranational quango"[63]. They claim that the ECtHR has lost all democratic acceptability by crafting domestic laws for member states based on small cases brought forward by individuals, which undermines the sovereignty of the UK. A possible withdrawal would threaten the European Union (EU) membership of the UK, as membership of the CoE is a requirement for the member states of the EU. Furthermore, the exit of the UK would be an offense of the system, having a Court that gets more respect in Ukraine and Russia than in one of the most prominent European countries[64]. Thus far, the UK has not taken any steps towards an actual denunciation.

The threats of the UK have been too recent to conclude with certainty that these threats have led to an increase in NGO participation. The course of action does however follow the hypothesis on the influence of autonomy on NGO participation. A noticeable increase can be found in the issuing of press releases from (European) human rights NGOs related to the ECtHR[65]. Even though it would be expected that these press releases would mainly concern the threats of the UK and therewith a call for their increased support, it is interestingly more a shift back of the attention of NGOs to the overall reform process of the Court. The threats of withdrawal of the UK have only reinvigorated the debates on the reforms of the system. The lack of pressure from NGOs to the UK to not withdraw from the European Convention reflects the fear of 'hollow' ratification[66] of the European Convention. The system thrives better if all states comply with the issued judgments. Pressure for ratification may result in states accepting the Convention for the wrong reasons[67], which jeopardizes the likelihood that the state will comply with the provisions laid out.

Compliance

While the autonomy of the European Human Rights System has been largely uncontested over the last decades, the biggest threat to the autonomy of the European Human Rights System today comes from the poor compliance rate of some of the member states. After the Court judges on a case, the Committee of Ministers asks the state concerned to engage in a type of reparation: financial compensation to the victims; symbolic measures; retrials and holding perpetrators to account; and

[63] Bowcott, O. (2015, March 10). UK Rights Watchdog Attacks Tory Policy to Quit European Human Rights Court. *The Guardian*. Retrieved from: http://www.theguardian.com/society/2015/mar/20/uk-rights-watchdog-attacks-tory-policy-to-quit-european-human-rights-court

[64] Young, F. (2015, January 9). European Court of Human Rights Becomes UK Electoral Battleground. *Newsweek*. Retrieved from: http://www.newsweek.com/2015/01/16/european-court-human-rights-back-dock-297747.html

[65] Sehmer, A. (2014, April 21). Threat to Scrap Human Right Act could see UK follow Nazi Example, Warns UN Official. *The Independent.* Retrieved from: http://www.independent.co.uk/news/uk/threat-to-scrap-human-rights-act-could-see-uk-follow-nazi-example-warns-un-official-10287557.html; Emerson. (2015, May 13). A Most Serious Threat to Our Human Rights. *Amnesty International.* Retrieved from: http://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/most-serious-threat-human-rights-act-british-bill-rights-gove; The Economist. (2014, October 11). Human Rights and Europe: Playing to the Right. Retrieved from: http://www.economist.com/news/britain/21623769-conservatives-plans-reform-human-rights-laws-are-muddle-playing-right

[66] Goodman, R. and Jinks, D. (2003). Measuring the Effects of Human Rights Treaties. *European Journal of International Law*, 14(1): 171-183, p. 177

[67] Hafner-Burton 2008, *supra* note 31

general measures that changes policies and procedures[68]. During the first decades of its existence, the rate of compliance with the ECtHR rulings was high and its judgments were described as being "as effective as those of any domestic court"[69]. The Convention has been largely incorporated into domestic law in the member states[70] and human rights standards in Europe have been substantially influenced by rulings of the ECtHR[71]. Prior to the accession of the Eastern European states, the compliance level in Europe was taken as an example for other regional systems[72] and the levels of compliance among member states were fairly equal. However, the political climate of the CoE largely changed with the accession of the Eastern European states, therewith changing the compliance rate of the system. The ECtHR Annual Report of 2007[73] shows that five member states – Russia, Turkey, Romania, Ukraine and Poland – account for 59% of the Court's caseload[74]. As many of these cases are considered to be repetitive and therefore inadmissible, it reflects the unsuccessful change of domestic policies and practices after previous ECtHR rulings. The compliance supervision executed by the Committee of Ministers of the CoE has in the previous decade only included Eastern European states and Turkey[75]. The domestic conditions of the member states that resulted in an almost perfect compliance rate in the beginning of the European system greatly differ from the states in which the rate of non-compliance is now problematic. Research conducted by Hillebrecht has shown that countries with few or weak democratic institutions and general suspicion of the ECtHR, tend to engage in *à la carte* compliance, choosing between different components of a ruling[76]. The overall compliance level of the ECtHR has worsened over the last decades.

Russia has proven to be one of the major challengers to the independence of the ECtHR. In April 2014 it threatened to pull out completely from the European Convention after being suspended from the Council of Europe over the crisis in Crimea. Alexander Pushkov stated that some European countries had adopted a "pathologically biased approach" and had threatened Russia in a condescending manner[77], leaving Russia no choice but to consider the termination of the membership of the CoE. Over the last decades, Russia has repeatedly alleged the political institutions of the CoE to have an

[68] Hillebrecht, C. (2014, April 23). The Rocky Relationship Between Russian and the European Court of Human Rights. *The Washington Post.* Retrieved from: http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/23/the-rocky-relationship-between-russia-and-the-european-court-of-human-rights/
[69] Helfer and Slaughter 1997, *supra* note 28, p. 296
[70] *Id.* p. 295
[71] Wildhaber, L. (2007), The European Court of Human Rights: The Past, The Present, The Future. *American University International Law Review,* 22(4): 521-538
[72] Helfer and Slaughter 1997, *supra* note 28
[73] European Court of Human Rights, *Annual Report of the European Court of Human Rights 2007.* Retrieved from: http://www.echr.coe.int/Documents/Annual_report_2007_ENG.pdf (hereinafter ECtHR Annual Report 2007)
[74] *Id.* p.13
[75] Cavallaro and Brewer 2008, *supra* note 1, p. 773
[76] Hillebrecht, C. (2012). Implementing International Human Rights Law at Home: Domestic Politics and the Eropean Court of Human Rights. *Human Rights Review,* 13(3): 279-301
[77] Harding, L. (2014, April 10). Russia Delegation Suspended from Council of Europe over Crimea. *The Guardian.* Retrieved from: http://www.theguardian.com/world/2014/apr/10/russia-suspended-council-europe-crimea-ukraine

anti-Russian bias, while the Court blames Russia for bogging it down with a disastrously high number of repeat petitions[78]. While Russia has complied comparatively well concerning financial reparations, its record concerning the implementation of general measures is much worse. This has resulted in the large number of repetitive petitions alleging the same abuses[79].

The poor compliance rate of some of the member states to the ECtHR has increased the participation of NGOs through the lobbying. In May 2011, a handbook was issued by Cali and Bruch, which focused on NGOs that aim to monitor the implementation of the judgments issued by the ECtHR[80]. This handbook shows the need for NGOs to closely monitor compliance and step in to provide assistance to states whose compliance rates are troubling. NGOs have been active in many CoE member states to pressure for reforms in areas that align with their interest, most actively in states with bad human rights records. In Russia, human rights NGOs have been of great importance to the domestic education on ECtHR case law and the citing of ECtHR case law in their rulings[81]. A group of NGOs took the UK to the ECtHR in 2014 concerning surveillance practices after their domestic pressure did not change the practices[82]. However, as with the threat of UK's withdrawal, the focus of NGOs in the European system has largely been on the pressuring for reforms at the Court rather than support with the member states, in order to have a fully effective human rights system.

Calls for Reform of the System

Member states of the CoE have repeatedly called for reforms of the ECtHR in the last decades. The rapid growth of the number of individual complaints has put pressure on the Court that it has not been able to deal with, which has urged member states to pressure for reforms of the procedures of the Court. A first major step was taken with the implementation of Protocol 11. However, further reforms are required to ensure the efficiency of the system. This was recognized in 2005 with the creation of a Group of Wise Persons to investigate the long-term effectiveness of the control mechanism of the ECtHR[83].

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[78] In 2013, 20.000 petitions were filed against Russia alone (ECtHR (April 2015). Press Country Profile - Russia. Retrieved from: http://echr.coe.int/Documents/CP_Russia_ENG.pdf])

[79] *Burdov v. Russia* (App. No 35509/04) ECHR 4 May 2009

[80] Cali, B. and Bruch, N. (2011) Monitoring the Implementation of Judgments of the European Court of Human Rights. Retrieved from: https://metranet.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Handbook%20for%20NGOs%20on%20monitoring%20imp%20ECHR%20judg.pdf]

[81] McIntosh-Sundstrom, L. (2012). Advocacy Beyond Litigation: Examining Russian NGO Efforts on Implementation of European Court of Human Rights Judgments. *Communist and Post-Communist Studies*, 45(3-4): 255-268, p. 266

[82] Amnesty International, (2015, April 10). Amnesty International takes UK to European Court over mass surveillance. Retrieved from: https://www.amnesty.org/en/articles/news/2015/04/amnesty-international-takes-uk-government-to-european-court-of-human-rights-over-mass-surveillance/

[83] Egli, P. (2008). Another Step in the Reform of the European Court of Human Rights: The Report of the Group of Wise Persons. *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 68: 155-173

This increase in the requests for reform has provided opportunities for NGOs to participate at the court through lobbying for reform on behalf of and with the member states. Over the last years, NGOs have often urged states to take their fair share in the responsibility of the protection and promotion of human rights in Europe. While member states call for the reform of the ECtHR, the call of NGOs is rather towards the "…political will by the 47 member states of the CoE to respect the European Convention, to implement and ensure the implementation of the Court's judgments and to adequately resource the ECtHR and the Department of Execution of judgments"[84]. This statement touches upon the biggest challenges to the European Human Rights System: its compliance rate and a lack of resources. The proposal of the member states, which would limit the Court to a solely constitutional role[85], has been heavily criticized by NGO, as this reform would serve to undermine the legitimacy and fundamental purpose of the Convention by limiting the right to issue individual complaints. In a joint statement of 156 NGOs in 2002, they argued for the Court to keep its adjudicative function in order to become maintain its efficiency[86]. This joint statement shows the possibilities for NGOs to take up a different role in the reform process, primarily as the advocate of the individuals who the system is meant to serve. This form of participation is not specifically a result of the lack of autonomy of the institution, but rather an expression of the general interests and mandates of human rights NGOs.

The other avenues for NGOs to influence the Court's reform process are fairly limited. Every two years, the President of the Court invites NGOs for a consultation in Strasbourg[87]. Thisbi-annual meeting has been followed by multiple meetings with NGOs, Court officials and member states' permanent representations to focus on specific issues. While these consultative meetings are helpful for NGOs to voice their concerns and discuss matters with Member State representatives, the real influence in the reform process is limited to the NGOs that have Observer States at the Steering Committee for Human Rights (CDDH). While the number of human rights NGOs has grown to over 200 in the last decade, only three NGOs have the possibility to observe and participate in the deliberations about reform: Amnesty International, the International Commission of Jurists and the International Federation for Human Rights[88]. These NGOs do not have any decision making power,

[84] Equality and Human Rights Commission (2012). Research Report 83, *The UK and the European Court of Human Rights.* Retrieved from: http://www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf

[85] Bates, E. (2010). *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights.* Oxford: Oxford University Press

[86] Human Rights in Europe: Decision Time on the European Court of Human Rights. AI Index: IOR61/009/2009 Retrieved from: http://www.iccl.ie/attachments/download/115/Joint_NGO_pre_interlaken_Statement_ENG_with_signatories.pdf (hereinafter Joint Statement 2009)

[87] Council of Europe, Steering Committee for Human Rights, *Drafting Group 'E' on The Reform of the Court,* GT-GDR-E(2013)005. Retrieved from: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-E/GT-GDR-E%282013%29005_observations-by-OSJI.pdf

[88] Haddad 2012, *supra* note 9, p. 131

but this status does provide them with the possibility to voice their opinion directly with the CDDH. The limited possibilities for other NGOs to participate in the reform process forces them to collaborate with one of the NGOs with Observer Status – this is often done through the issuing of joint statements which are then presented at the meetings. In the negotiation process of Protocol 12[89], a group of ten human rights NGOs issued a joint statement. AIRE Center, Amnesty International, Human Rights Watch, the International Commission of Jurists and others gathered to express their concerns about the potential weakening of the system if the reform process were to be continued as it was initiated[90]. While these statements show that NGOs put great value on the adequate functioning of the ECtHR, the value of these statements is limited to the voicing of their concerns.

The possibilities for NGOs to participate at the ECtHR related to a lack of autonomy are limited. While they do have the possibilities to voice their concerns in the reform process, their influence on the actual reforms is minimal. However, the NGOs have become of bigger importance to the domestic practices of member states related to compliance with the judgments of the ECtHR.

Resources and NGO participation

The ECtHR receives its budget from the CoE[91], which covers the judges' remuneration, staff salaries and operational expenditures. The overall CoE budget comes from the 47 member states, whose contributions are fixed according to scales which take into account the population and gross national product. The budget of the ECtHR is part of the general budget of the CoE and as such, it is subject to the approval of the Committee of Ministers[92]. The contributions of the EU to the European Joint Program will not be taken into consideration for the resources of the Court as it is funded directly to the CoE, which then allocates it towards the Court. Furthermore, the funds that the EU provides come from cooperation between the European institutions rather than a lack of resources.

The protection and promotion of human rights is one of the main pillars of the CoE and that is reflected in the in its ratio budget. In 1989, the combined budget of the Court and the Commission represented 10% of the CoE budget, which was increased to 15,8% solely for the ECtHR in 2001[93]. The €217.017.900,- budget of 2011-2012 was for nearly half allocated towards the protection and promotion of human rights, reflecting the dedication of the CoE member states to maintain the ECtHR to be an efficient institution.

Even though the CoE allocates a large portion of its funds towards the ECtHR, more resources are required for the Court to remain efficient and deal with the backlog of cases. The budgetary

[89] Protocol No. 12, *supra* note 55
[90] Interights, *Joint Statement on the Reform of the European Court of Human Rights,* (13 April 2012). Retrieved from: http://www.interights.org/document/212/index.html]
[91] European Convention, *supra* note 38, art. 50
[92] Zimmermann, D. (2014). *The Independence of International Courts: The Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice.* London: Bloomsbury Publishing, p. 489
[93] Haddad 2012, *supra* note 9, p. 137

predicament facing the Court, and the CoE as a whole, remains a significant "stumbling block"[94] and the Committee of Ministers has stated that "the current budgetary situation in Member States does not make it possible to increase the budget of the Organization"[95]. However, both member states and the Court have recognized the necessity to increase the budgets of the Court in order for it to function effectively. The yearly contribution of fifteen member states to the CoE does not even equal the annual costs of a judge, which are approximately €333.667,-[96] - and they therefore do not contribute further to the functioning of the ECtHR. Moreover, every time the budget of the Court increases, money has often been transferred from the CoE Programs of Activity budget to the Court[97], which has undermined the impact of the other activities of the CoE, including the human rights training programs.

The growth of the budget over the last years has not been able to keep up with the increasing number of judgments that the Court has delivered. Over the last 50 years, the Court has delivered more than 10.000 judgments, and the staff of the Registry has grown exponentially to be able to effectively and fairly investigate the allegations brought before the Court. In 1989, the Court employed 74 permanent positions, which has grown to 630 in 2010[98]. Even though its staff has grown, the system is still challenged with finding the means to effectively manage the influx of cases. Currently, much of both the human and financial resources are taken up by the repetitive and imbalanced cases brought before the Court[99]. The quest for increased funding has led the ECtHR to ask member states for voluntary contributions to reform the institutional structures in order to deal with these challenges. To instigate the member states to voluntarily contribute, the ECtHR has provided the states with the possibility to stipulate that they want their funds to be spent specifically on cases against them[100]. The contributions made by the member states will be "used where they will have the most effect, that is on the cases which have the most impact in terms of identifying and correcting serious human rights abuses throughout the Council of Europe countries"[101]. The voluntary contributions to the ECtHR will not address the wider budgetary predicaments facing the Court, as they are not constant and to be

[94] Council of Europe, Parliamentary Assembly, *The Future of the European Court of Human Rights and the Brighton Declaration*, 3 December 2012, art. 63
[95] Council of Europe, Parliamentary Assembly, Budgets and Priorities of the Council of Europe for the biennium 2014-2015, *Text adopted by the Standing Committee* (31 May 2013). Retrieved from: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19762&lang=en
[96] Mayer 2011, *supra* note 3
[97] Council of Europe, Committee of Ministers (2010). Information Document CM/Inf(2010)28, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Elements for a Roadmap*. Retrieved from: https://wcd.coe.int/ViewDoc.jsp?id=1626425&Site=CM
[98] Helfer 2008, *supra* note 51
[99] ECtHR Annual Report 2007, *supra* note 72
[100] Beckford, M. (2012). European Court of Human Rights 'gets out begging bowl'. *The Telegraph*. Retrieved from: http://www.telegraph.co.uk/news/uknews/law-and-order/9347478/European-Court-of-Human-Rights-gets-out-begging-bowl.html
[101] Council of Europe Secretary General and European Court of Human Rights President, 'Statement on the Special Account Opened for the European Court of Human Right'. (21 June, 2012)

depended on yearly. They will only be used to help reduce the number of pending cases[102]. This has been, combined with reforms concerning the possibilities for individual applications, seemingly effective[103]. The voluntary contributions to the ECtHR may only come from member states which leaves little possibilities for NGOs to provide direct monetary assistance.

Another avenue for NGOs to participate is by providing assistance in investigations. This can be done both on-site in member states that are suspected to be violating human rights and in cases that have already been brought before the court by individuals. The ECtHR relies to a great extent on its member states to address human rights violations and does therefore not have as extensive of an investigative procedure as the IACHR. Additionally, the required investigations for the cases that are brought before the Court are kept to a minimum, due to the fact that the ECtHR heavily trusts the judgments of its member states. Before a complaint can be filed at the Court, all domestic remedies must have been exhausted – the national courts thus have to have investigated the abuses and must have established all the facts to the case. The Court appreciates and trusts the European legal system[104] and is therefore left to evaluate the facts that have already been thoroughly investigated domestically. The level of autonomy is clearly reflected here: the relationship between the ECtHR and its member states is reciprocal. Since the member states respect the independence of the Court, the Court more easily accepts the judgments of the member states. This reciprocal relationship however limits the possibilities for NGOs to provide assistance to the Court. Since NGOs often follow cases of grave violations from the beginning of the complaint-filing process[105], their knowledge and information in investigations is more likely required to be able to determine whether the facts of the case are straight. If NGOs suspect that national courts have deficiently established the facts of the case, they can decide to intervene and warn the court[106].

The limited role for NGOs in assisting in investigations is also reflected in the number of *amicus curiae* briefs that are filed at the ECtHR. *Amicus* briefs often reiterate facets of international law that the lawyers at the court are already familiar with. Additionally, it often only serves as a symbolic representation of the various positions on controversial topics such as abortion and euthanasia. They are therefore only occasionally regarded as helpful[107] and are usually only requested upon when a comparative law study is required for the Court to judge on a case. The last request for a study was done by the ECtHR to Liberty, when it asked to conduct a comparative law study on the European

[102] O'Boyle, M. (2011). The Future of the European Court of Human Rights. *German Law Journal*, 12(10): 1862-1877
[103] From September 1, 2011 to July 1, 2014, the backlog of cases at the ECtHR dropped from over 150.000 to 84.515 (European Court of Human Rights (2014, October 24). Register of the Court, Press Release: *Reform of the Court: Filtering of Cases Successful in Reducing Backlog*)
[104] Santivasa 2012, *supra* note 2
[105] *Id.*
[106] Hawkins, D. and Jacoby, W. (2008). Agent Permeability, Principal Delegation and the European Court of Human Rights. *The Review of International Organizations*, 3(1): 1-28, p.23
[107] Brunt, M. Amnesty International Netherlands, Personal Communication, 21 April 2015

laws concerning transgender[108] - a controversial topic concerning a new legal system which the registry lawyers were unfamiliar with. The comparative law studies are conducted at the request of the Court and are therefore not increased by the lack of funding of the institution.

Possibilities for Legal Aid

Another avenue for NGOs to be involved is to represent victims at the ECtHR. This is dependent on the possibilities for legal aid provided at the Court[109]. The European Human Rights System has early on recognized the necessity for the provision of legal aid to those individuals that do not have the financial resources to file a complaint. The European Convention guarantees the right to a fair trial in both civil and criminal proceedings[110], which has been interpreted as providing for a general requirement of some measure of "equality of arms" between the state and the individual in the case[111]. To be able to guarantee this, the Resolution on Legal Aid[112] was adopted, which incorporated a budget for legal representation into the budget of the CoE. With the introduction of this budget, the representation of NGOs was no longer needed to help individuals finance the costs of litigation. The numbers of NGO representation confirm this: of the over 10.000 cases that have been ruled on from 2000-2009, only 305 had an NGO as representative[113]. The less than one percent of the cases where NGOs represent an individual shows that this is not an avenue that is heavily utilized by NGOs in Europe.

Even though there have been calls for reform of the budget of the Court because of the backlog of cases, the allocation of the resources has allowed to Court to continue to carry out its own investigative and legal legwork. The financial difficulties facing the ECtHR appear to not have an influence on the possibilities for NGO participation. NGOs have not been able to provide any direct monetary assistance, their assistance in investigations is not required as the system allocates enough budgets for the ECtHR to do so itself, and the legal assistance fund of the ECtHR functions well enough for NGOs to not have to represent victims at the Court. Due to the general beliefs of member states that they are the main protectors of human rights in Europe, the support of NGOs has not been asked for.

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[108] Liberty, The Amicus Brief from Liberty, *Integrating Transsexual and Transgendered People – A Comparative Study of European, Commonwealth and International Law.* December 2010. Retrieved from: http://www.pfc.org.uk/caselaw/Libertys%20amicus%20brief%20Part%201.pdf

[109] McQuoid-Mason, D., et al. (2009). *Making Legal Aid a Reality: A Resource Book for Policy Makers and Civil Society.* Budapest: Public Interests Law Institute

[110] European Convention, *supra* note 38, art. 6

[111] Voeten 2007, *supra* note 50, p. 677

[112] Council of Europe (1963). Committee of Ministers, Resolution (63) 18 - Grant of Free Legal Aid to Individuals Who Have Submitted an Application to the European Commission of Human Rights. Retrieved from: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=581098&SecMode=1&DocId=622906&Usage=2

[113] Mayer 2011, *supra* note 3, p. 924

The Inter-American Human Rights System

In 1948, during the Ninth International Conference on American States, the members of the Pan American Union adopted the American Declaration of the Rights and Duties of Man ("American Declaration")[114], the first of two major instruments that protect and define human rights principles among the American States. The American Declaration created the IACHR and functions as a default instrument that can be applied to the states that are not party to the American Convention on Human Rights ("American Convention")[115]. The second of the two instruments, the American Convention, was adopted in 1969 and created the Inter-American Court of Human Rights (IACtHR) which has jurisdiction over the member states concerning the respect for human rights. To this day, the Inter-American system continues to have this two-part structure.

The Inter-American Commission on Human Rights

The IACHR has a quasi-judicial and promotional mandate. It was established primarily as a consultative organ to promote and defend human rights by creating awareness, making recommendations to member states on domestic legislation, preparing reports, and conducting on-site investigations[116]. Initially, the possibilities for individuals to file a complaint with the IACHR were limited. In 1965, the statute was amended which empowered the IACHR to receive and process individual complaints alleging human rights violations[117]. The right of petition now extends to any individual, group of individuals, or non-governmental entity within an OAS member state[118]. The conditions for filing a complaint are that all domestic remedies must be exhausted[119], the petitioner must observe a strict time limit to file the complaint[120], and must avoid duplication of procedures[121].

Under the American Convention, the Commission has an obligation to encourage the involved parties to reach a friendly settlement[122]. If a friendly settlement cannot be reached, the IACHR can refer the case to the Court. However, for the Commission to refer a case to the Court, the member state in question needs to be party to the American Convention and it must have accepted the jurisdiction of the Court. While individuals can file a complaint with the Commission if the member state is not party to the Convention, its options are limited if a friendly settlement cannot be reached as it cannot be referred to the Court.

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[114] Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man,* 2 May 1948. Retrieved from: http://www.refworld.org/pdfid/50bc8cf72.pdf
[115] Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica,* 22 November 1969, art. 11 (hereinafter American Convention)
[116] Medina, C. (1990). The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture. *Human Rights Quarterly*, 12(4): 439-464, p. 449
[117] Padilla 1993, *supra* note 7, p. 96
[118] American Convention, *supra* note 115
[119] Organization of American States, *Regulations of the Inter-American Commission on Human Rights,* 1992, art. 37 (hereinafter Regulations Inter-American Commission on Human Rights)
[120] *Id*, art. 38
[121] *Id*, art. 39
[122] American Convention, *supra* note 115, art. 51

The Inter-American Court of Human Rights

The main functions of the IACtHR are adjudicatory and advisory, aiming to interpret and apply the provisions that are laid out in the American Convention. The advisory function of the IACtHR allows the Court to respond to consultations which have been submitted by the agencies and the member states of the OAS regarding the interpretation of the American Convention[123]. Furthermore, it allows the Court to give advice on domestic laws and legislation to be able to clarify whether or not these are compatible with the provisions of the Convention. While the judiciary function of the Court is limited to the states that have ratified the Convention and that have recognized the jurisdiction of the Court, the advisory function of the IACtHR is available to all OAS member states[124].

NGO Participation in the Inter-American Human Rights System

The OAS has recognized civil society and NGOs as key participants to reach its mandated goals[125]. Through dialogue, NGOs play an active role in contributing ideas and recommendations to the institutions. The OAS has established funds for the participation of civil society in some OAS activities such as the General Assembly (GA) and Permanent Council, but this has neither included the IACtHR nor the IACHR[126].

There are more possibilities for NGOs to formally participate in the Inter-American Human Rights System than at the ECtHR. Foremost, they are able to lodge a complaint: "any person or group of persons, or any non-governmental entity legally recognized in one or more member states"[127] can file a petition with the IACHR. The person filing the petition at the Inter-American Court does not need to be the victim of the violation; instead, a claim may be filed on behalf of any specific victim. A NGO filing a complaint only needs to be organized in one member state and not even in the member state where the alleged violation took place – the petition only needs to meet certain threshold requirements, including the exhaustion of domestic remedies[128]. NGOs can serve as a representative of other petitioners before the IACHR as well. If the case is then referred to the IACtHR, the NGO remain the representative. The Rules of Procedure of the IACtHR permit the submission of pleaders, motions, and evidence by not only the alleged victims but also their authorized representatives[129].

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[123] Shelton, D. (1994). The Jurisprudence of the Inter-American Court of Human Rights. *American University International Law Review*, 10(1): 333-372, p. 337 (hereinafter Shelton 1994)
[124] American Convention, *supra* note 115, art. 64
[125] The International Center for Not-for-Profit Law, (2015, February 9). NGO Law Monitor: Organization of American States. Retrieved from: http://www.icnl.org/research/monitor/oas.html
[126] The Permanent Council of the Organization of American States, *Specific Fund to Support the Participation of Civil Society Organizations in OAS Activities and in the Summits of the Americas Process*, OEA/Ser.G/CP/RES.864 (1413/04), 27 April 2004. Retrieved from: http://www.oas.org/council/resolutions/res864.asp
[127] American Convention, *supra* note 115, art. 44
[128] Shelton 1994, *supra* note 123, p. 344
[129] OAS Rules of Procedure of the Inter-American Court of Human Right, art. 30. Retrieved from: http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf

As the cases at the Court are dependent on what the Commission refers to it, the possibilities for NGOs to participate at the IACtHR are limited. One of the ways in which NGOs participate is through the filing of *amicus curiae* briefs. Neither the American Convention nor the Statute of the Inter-American Court and its Rules of Procedure have expressly provided for the filing of the briefs, neither mentioning nor ignoring them[130].

Autonomy and NGO Participation

Contrary to the European Human Rights System, not all member states to the OAS are party to the American Convention and thus bound by the jurisdiction of the Court. This has posed challenges to the autonomy of the human rights system. As the American Declaration and the American are two separate documents which are not simultaneously signed by the OAS member states, some states may be subject to only one of the institutions. The OAS consists of 34 member states, of which 23 have signed and ratified the American Convention[131]. The jurisdiction of the Court has to be explicitly accepted by the states, which has been done by 20. The competence of the Commission is automatically recognized by the states upon the signing of the Convention[132].

Signatories, reservations and denunciations

There are three levels of acceptance within the Inter-American Human Rights System: (1) universal acceptance for all the member states of the OAS, under which people enjoy the protection of the rights recognized in both the American Declaration and the Charter of the OAS; (2) acceptance of the member states that have ratified the Convention but not recognized the jurisdiction of the Court; and (3) the member states that have ratified the Convention and accepted the jurisdiction of the Court[133]. There are only nine states that have accepted all the tools that the Inter-American system has to offer: Argentina, Costa Rica, Colombia, Ecuador, Mexico, Paraguay, Peru, Panama and Venezuela[134]. The most controversial non-ratifiers are the United States and Canada, which is condemned by multiple NGOs[135], which has led them to actively lobby with the governments of both states to ratify the American Convention.

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[130] Inter-American Court of Human Rights (2009). Rules of Procedure of the Inter-American Court of Human Rights, art. 34. Retrieved from: https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm (hereinafter IACtHR Rules of Procedure)

[131] American Convention on Human Rights "Pact of San Jose, Costa Rica", *Signatories and Ratifications.* Retrieved from: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_rights_sign.htm (hereinafter American Convention Signatories)

[132] IACtHR Rules of Procedure, *supra* note 130, art. 45(1)

[133] Inter-American Commission on Human Rights, Strategic Plan 2011-2015. Retrieved from: https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf (hereinafter Strategic Plan 2011-2015)

[134] American Convention Signatories, *supra* note 131

[135] Council on Foreign Relations, Issue Brief: *The Global Human Rights Regime.* Retrieved from: http://www.cfr.org/human-rights/global-human-rights-regime/p27450

The non-ratification of the U.S. and Canada has not only increased NGO participation domestically but it has also triggered the criticizing of the procedures and practices of the IACHR by other member states. There have been claims that the IACHR has acted as a tool for modern U.S. imperialism and as a U.S. contrivance[136], taking too progressive of a stand. It has furthermore been argued that the diplomatic support of the Inter-American human rights institutions is inadequate: 80% of the OAS budget is supplied by two states that are not a party to the Convention[137]. They financially dominate the human rights system while at the same time refusing to submit to the same level of scrutiny. This has led to an internal bloc of states – the Bolivarian Alliance for the Americas (ALBA)[138] - to repeatedly speak out on the lack of balanced support[139] due to the non-universal ratification. Following the persistent criticism of member states, one of the priorities of the OAS in the reform process of the Inter-American Human Rights System has been the advancement of the universalization of the ratification of the American Convention. This particular position has triggered the participation of NGOs in the reform process, calling not to implement universal ratification[140]. Research has shown that the mere ratification of a human rights treaty does not lead to better human rights practices[141], which would lead to states only enjoying the benefits related to the acceptance of the Convention[142] without adhering to the provisions. This could jeopardize the mandate of the American Convention as it may not have the effect of protecting the human rights in the American states and NGOs therefore argue not to implement universal ratification.

The American Convention allows for member states to make reservations. The reservation made needs to be in conformity with the provisions of the Vienna Convention on the Law of Treaties[143], which was more clearly established in the advisory opinion issued by the IACtHR[144]. The fairly liberal approach towards reservations has led to the adoption of a number of reservations, which all in principle have the effect of limiting the extent of particular rights[145]. Many of the reservations made have touched

[136] International Justice Resource Center, 2012, *Understanding the IACHR Reform Process.* Retrieved from: http://www.ijrcenter.org/2012/11/20/iachr-reform-process]
[137] Cassel, D. (2014). The Perfect Storm: Count and Balance. *Magazine of the Due Process of Law Foundation,* 19(7): 20-24. (hereinafter Cassel 2014)
[138] The Bolivarian Alliance for the Peoples of Our America, consisting of Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Grenada, Nicaragua, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Venezuela. For the purpose of this research, when speaking of the ALBA countries, it refers to Bolivia, Dominica, Cuba, Ecuador and Venezuela
[139] Hellinger, D.C. (2014). *Comparative Politics of Latin America: Democracy at Last?* London: Routledge. p.443
[140] Rivera Juaristi, F.J. (2013). U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System. *Human Rights Brief*, 20(2): 19-25, p. 20
[141] Hafner-Burton 2008, *supra* note 31
[142] Special Session of the OAS General Assembly, Sept. 20, 2014. Retrieved from: at https://www.youtube.com/playlist?list=PLkh9EPEuEx2tuit1IL9VmmISVKaaHvqvl
[143] American Convention, *supra* note 115, art. 75
[144] The Effect of Reservations on the Entry Into Force of the American Convention. Advisory Opinion OC-2/82 of Sept. 24, 1982 (1983)
[145] Montalvo 2001, *supra* note 33, p. 271

upon the integrity of the system[146], which has undermined its autonomy. As the reservations were adopted at the time of the ratifications, which was mostly done in the 1970s and 1980s, NGOs have not directly participated in the process of the adoption of the reservations. Over the last decades the reservations specifically related to the right to life, and correspondingly the death penalty, have triggered NGO participation[147]. As the reservations are legal under the American Convention, the efforts of the NGOs have been mainly focused on domestic lobbying for the retraction of the reservations[148].

The American Convention also provides for the option of withdrawal. States may denounce the Convention at the expiration of a five-year period from the date of its entry into force and with a one year notice[149]. The 1981 request of Peru to have the withdrawal take effect immediately confirmed that direct effect would undermine the integrity of the institutions and is therefore not possible[150]. While the European and Inter-American system do not differ on the institutional provisions on denunciations, the Inter-American system has been faced with more. Of the original 28 signatories to the American Convention, three states have withdrawn. Additionally, many have threatened to do so. The most recent serious threat occurred in 2011, when the IACHR issued interim measures concerning the construction of the Belo Monte hydroelectric dam project in Brazil. The Brazilian Ministry of Foreign Affairs called the recommendations "precipitous and unwarranted" and the Brazilian President in turn ordered an immediate cessation of all relations with the IACHR – recalling its ambassador from the OAS and withholding its financial contributions[151]. The Brazilian response to the measures made the Commission back down: it modified its decision and asked Brazil to implement measures to protect the human rights involved in the construction of the dam[152]. The Commission's decision to soften the measures negatively affected the level of respect it received from the member states: it was viewed to have overreached at first after which it had to back down. The participation of NGOs related to this threat are mainly apparent in the early stage of the investigations of the IACHR, which were initiated by the issuing of an NGO report[153].

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[146] *Id.*, p. 301

[147] Placais, A. (2015, April 22). Abolitionist NGOs Lobby to Educate UN Member States in Geneva. *World Coalition Against the Death Penalty.* Retrieved from: http://www.worldcoalition.org/Abolitionist-NGOs-lobby-to-educate-UN-member-states-in-Geneva.html

[148] In 2002, with the signing of the Strasbourg Declaration, the World Coalition Against the Death Penalty was created. Its purpose is to have abolitionist associations and campaigners united in order to strive for the universal abolition of the death penalty. Many Human Rights NGOs are member, showing the determination to strive for change.

[149] American Convention, *supra* note 115, art. 78

[150] *Constitutional Court v. Peru* (App no. 55) IACtHR September 24, 1999

[151] Hayman, M. (2011, May 3). Brazil Breaks Relations With Human Rights Commission over Belo Monte Dam. *Latin America News Dispatch.* Retrieved from: http://latindispatch.com/2011/05/03/brazil-breaks-relations-with-human-rights-commission-over-belo-monte-dam/

[152] Martins de Araujo, L.C. (2012). The Transnational Institutional Dialogue in Belo Monte Dam Case. *Veredas do Direito*, 9(18): 117-149, p. 132

[153] *Id.*

The first country to suspend its ratification was Trinidad and Tobago on May 26, 1998, providing the reason that the government considered the waiting time for death row inmates to be cruel and unusual punishment. Their proposal to speed up the process of death trial was prohibited under the American Convention and the government therefore decided to withdraw from the Convention in order to be able to determine its own course of action[154]. The most recent denunciation occurred in November 2014, when the Dominican Republic strongly responded against a IACtHR ruling concerning the discrimination of residents of Haitian descend in the country. The Dominican government claimed the ruling to be unconstitutional and called the allegations "out of season, biased and inappropriate"[155] and decided to withdraw from the Convention.

Even though the act of denunciating from a human rights convention is a threat to the effectiveness of the system, the 2013 Venezuelan government withdrawal was somewhat of a different nature. Rather than having its denunciation follow a disagreement with the direct findings of the IACHR or the judgments of the IACtHR, the government used its denunciation as a statement of protest concerning the lack of reforms. Venezuela has been repeatedly criticized for its human rights records, which includes the reports in Chapter IV[156] of the IACHR Annual Reports. President Chavez has persistently called to reform the system by limiting the authority because the IACHR and IACtHR had distanced themselves from the "sacred principles they are called upon to protect"[157]. The lack of a, in the eyes of Venezuela, proper response led the government to denounce. Since its denunciation, its human rights record has worsened[158]. The other ALBA countries have also taken issue with rulings by the Court and Commission that they have found to be unfavorable, leading them to threaten to withdraw from the Convention if the IACHR is not reformed[159]. The Venezuelan denunciation has triggered the participation of NGOs in the reform process in the last decade[160].

The Venezuelan denunciation is characteristic for the reform process of the Inter-American Human Rights System. Many of the proposed reforms by states are aimed at limiting the criticism they receive, therewith protecting the domestic practices. In the process of the drafting of the American Convention, some states were already aware of the possibility that states could bond together to

[154] Concepcion, N.P. (2001). The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights. *American University International Law Review,* 16(3): 847-890, p. 850
[155] Morris, A. (2014, November 6). Dominican Republic Leaves Inter-American Court of Human Rights. *Jurist.* Retrieved from: http://jurist.org/paperchase/2014/11/dominican-republic-leaves-inter-american-court-of-human-rights.php
[156] Chapter IV of the Annual Report of the IACHR reports on the countries which have been of special concern to the Commission concerning their human rights practices
[157] OAS, Text of Communication (2012, September 6). Minister of Popular Powers for Foreign Affairs of the Bolivarian Republic of Venezuela to the Secretary General of the Organization of American States. Retrieved from: http://www.oas.org/dil/Nota_Rep%C3%BAblica_Bolivariana_Venezuela_to_SG.English.pdf
[158] *Id.*
[159] The Economist, (2012, January 9). Human Rights in the Americas: Chipping at the Foundations. Retrieved from: http://www.economist.com/node/21556599
[160] Wolde, M. Dutch Ministry of Foreign Affairs, Directorate Western Hemisphere, Personal Communication, 7 May 2015

destroy the oversight bodies. A safety mechanism was therefore established: reforms to the statute of the Commission were only to be accepted by the GA of the OAS if the proposal would come directly from the IACHR[161]. The reform process of the last decades has however shown that countries have sidestepped this mechanism by backing their claims based on state sovereignty[162] - currently the system is faced with these threats from the ALBA countries[163]. The lack of integrity in the reform process has also been recognized by Human Rights Watch. It has issued a letter to the OAS GA in which it aimed to answer why its own member states had launched a campaign against the organization. The Americas division argues that "… it has touched the interests of the important governments that possess clear autocratic tendencies or are sufficiently powerful as to believe that they are entitled not to render accounts to a supervisory body"[164]. This is, inter alia, reflected in the efforts of the President of Ecuador, Rafael Correa, who has aimed to restrict the work of specifically the Special Rapporteur on Freedom of Expression after being criticized on its policies regarding the freedom of expression[165]. Additionally, the ALBA countries have attempted to eliminate the voluntary contributions that the IACHR now receives, jeopardizing the budget and effectiveness of the Commission[166].

Compliance

The neglect of most OAS member states towards the development of the Inter-American Human Rights System in its initial stages has led the system to develop in an independent manner[167], lacking a persuasive enforcement mechanism. The poor compliance record of the system has been influenced by the failure of the political organs of the OAS to adequately support the human rights institutions[168]. The system has been faced with significant challenges concerning the compliance with the judgments issued by the institutions: in 2009, only 12,5% of the rulings of the IACHR were fully complied with by the member states[169]. The compliance rate of the IACtHR has been relatively better: to date, 221 cases have been ruled on by the IACtHR, of which 114 have been complied with[170].

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[161] *Id.*
[162] *Id.*
[163] Yepes, U. and Sanchez, N.C. (2012). Human Rights. New Threats in the Hemisphere. *Americas Quarterly* 6(4): 129-132, p. 130
[164] Pearlman, Alexander. "OAS Rights Body Facing Criticism, Dissolution" *Inter-American Security Watch,* June 8, 2012. Retrieved from: http://interamericansecuritywatch.com/oas-rights-body-facing-criticisms-dissolution/
[165] Council of Europe, DPP Open Thoughts Paper 12/2013. 'Recent Developments in Human Rights Protection Systems in Latin America'. Retrieved from: http://www.coe.int/t/policy-planning/Open_Thought_Papers/OTP12.pdf (hereinafter DPP Open Thoughts Paper 2013)
[166] *Id.*
[167] Cerna, C.M. (1996). International Law and the Protection of Human Rights in the Inter-American System. *Houston Journal of International Law,* 19: 731-756, p. 733
[168] Pasqualucci, J.M. (2003) *The Practice and Procedure of the Inter-American Court of Human Rights.* Cambridge: Cambridge University Press, p. 39
[169] Hillebrecht, C. (2012). The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System. *Human Rights Quarterly,* 34(4): 959-985, p. 962
[170] *Id.*

Colombia is one of the states with the worst compliance records concerning controversial topics such as forced disappearances. While the state has a relatively good compliance rate concerning the easier mandates such as financial reparations, it has failed to comply with the executive rulings concerning the adaption of its domestic human rights laws[171]. Another state that has shown few incentives to pursue compliance with the rulings of both the IACHR and the IACtHR is Brazil[172]. It appears to lack the political will to implement any changes to its domestic policies and practices. The overall challenge to the compliance with the rulings of the institutions can to some extent be ascribed to the lack of an enforcement control mechanism as the ECtHR does have. The IACtHR can inform the GA of the OAS about non-compliance, but the chances of punishment are slim as it acts by consensus[173].

The low compliance rate has led the human rights NGOs to more actively lobby on behalf of the Court to change domestic practices[174]. This is successfully reflected in the case of the Argentinian amnesty laws. The laws of the state were not in conformity with the judgments issued by the IACtHR and since there is no sanctioning mechanism to enforce the rulings, the Argentinian government saw no need to change its laws. Regional as well as international human rights bodies have criticized and lobbied for the elimination of the amnesty laws concerning human rights violations, with success in Argentina in 2005 when previous laws were declared unconstitutional[175]. Human Rights Watch stated, after striking down the laws, that "…no matter how many years go by, laws that block justice for gross abuses of human rights remain a thorn in the side of democratic governments"[176], thus leaving opportunities for NGOs to actively lobby.

The effects of the lack of respect for the institutions is clearly reflected in the acceptance of the IACHR's attempts to use its right to have *in loco* visits to assess the human rights situation in member states. Up until the 1990s, the main mechanism for the IACHR to report on the human rights practices of the member states was the publication of Country Reports. However, these were often not accepted by the member states: many of the states against which specific cases were opened did not participation in the litigation. They did not respond to the complaint, did not provide any comments on the draft of the reports and failed to present any evidence to deny charges[177] . In the instances in which the Commission was able to produce a report, responses have been overwhelmingly negative.

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[171] *Id.*, p. 983
[172] *Id.*, p. 983
[173] DPP Open Thoughts Paper 2013, *supra* note 161
[174] Sikkink, K. (1997). Reconceptualizing sovereignty in the Americas: Historical Precursors and Current Practices. *Houston Journal of International Law,* 19(3): 705-729
[175] Berman, P.S. (2012). *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders.* Cambridge: Cambridge University Press, p. 116
[176] Human Rights Watch (2005, June 15). Argentina: Amnesty Laws Struck Down. Supreme Court's Long-Awaited Ruling Allows Prosecuting of 'Dirty War' Crimes. Retrieved from: http://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down
[177] Wolde, M. Dutch Ministry of Foreign Affairs, Directorate Western Hemisphere, Personal Communication, 7 May 2015

The 1978 Commission Report on the human rights situation in Nicaragua was responded to by the government with the statement that "[it] does not correspond to the reality of Nicaragua"[178] and the government assumed presupposed political positions. The 2002 Report on the Situation of Human Rights in Venezuela was not accepted by the Venezuelan government. The Commission had unsuccessfully requested the consent of the government to visit the country again to observe the current situation, but the government has explicitly not permitted a second visit "until all [of the Commission] rectifies its biased position towards it [Venezuela]"[179]. This has limited the possibilities for the IACHR to conduct investigative research and the reluctance of member state cooperation has led the Commission to turn to hearings rather than on-site visits to assess the human rights situation.

While the Nicaraguan and Venezuelan responses to the report are fairly extreme, the responses to the Country Reports often involve smaller obstructions such as the failure to provide necessary information. The responses to the 2006 Bolivian Report has shown repeated requests by the government for the extension of deadlines[180], the Mexican responses to the 2011 report have shown to be patently inadequate in terms of preventing and redressing crimes[181], and the IACHR decided to visit Honduras in 2010 without its approval after the worsening of the human rights situation[182]. Often, in order to maintain a good international status, governments express the willingness to cooperate in the investigation, which is not followed by an actual improvement of the human rights practices.

The reluctance to accept the Country Reports issued by the IACHR does not only come from the member states which are targeted in the reports. There is a general reluctance among all member states and the political institutions of the OAS. The General Assembly rarely ever discusses the reports, in order to avoid disagreements with its member states[183]. Additionally, the Annual Reports of the IACHR are supposed to be collectively evaluated in order to produce a careful analysis of the progress of the Inter-American Human Rights System. However, the historical tension between the member states and the Commission created misunderstanding and mistrust on both sides which jeopardizes the effectiveness of these meetings[184].

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[178] Quiroga, C.M. (1988). *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System.* Boston: Martinus Nijhoff Publishers

[179] Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela,* OEA/Ser.L/V/II., doc. 54 (30 December 2009). Chapter I

[180] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2009*, OEA/Ser/L/V/II.135, doc. 40 (August 7, 2009). Chapter V: Follow-up of the Recommendations Formulated by the IACHR in Its Reports on the Situation of Human Rights in Member States.

[181] Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico 2013*, OEA/Ser/L/V/II., doc. 48/13 (30 December 2013).

[182] Inter-American Commission on Human Rights, *Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of Liberty in Honduras 2013,* OEA/Ser.L/V/II.147, doc. 6 (18 March 2013)

[183] Wolde, M. Dutch Ministry of Foreign Affairs, Directorate Western Hemisphere, Personal Communication, 7 May 2015

[184] De Zela, H. (2014). The Process of Strengthening the Inter-American Human Rights System. *Magazine of the Due Process of Law Foundation,* 19(7): 9-12 (hereinafter Zela 2014)

NGOs have become increasingly important for the issuing of the Country Reports. This is indirectly influenced by the lack of autonomy and the unwillingness of member states to cooperate in the investigative procedures. However, it is directly influenced by the lack of resources to the IACHR. The participation of NGOs in this area will therefore be discussed in the analysis of the resources of the institutions.

Calls for Reform of the System

The persistent lack of autonomy has initiated a reform process that has been ongoing over the last decades. This has created opportunities for NGOs to participate, advocating both on behalf of the institutions and the member states. One of the major possibilities for NGOs to participate in the reform process is through public consultations. The consultative procedure on the reform of the Rules of Procedure of the IACHR has led to more than 100 NGOs providing comments[185]. The fall 2003 Consultation Procedure was followed by a joint recommendation of eleven NGOs, which has been an effective way for NGOs to let their voices be heard[186]. In January 2012, following the OAS Permanent Council's approval of the recommendations of the Working Group[187], more than 90 NGOs signed a communiqué in which they voiced their opinions regarding the recommendations, urging for a dialogue to discuss them[188]. This was followed by a public hearing which was scheduled by the IACHR. The repetitious issuing of joint statements on all reform issues reflects that the influence of the documents issued by NGOs extends farther than in the European system, where the decision-making process is shielded to only the Court and the member states.

The mistrust between the IACHR and its Contracting Parties has not only initiated NGOs to lobby for institutional reforms, but it has also triggered NGOs to step in and provide assistance to individuals in order for them to be able to effectively utilize the protection mechanism. In 1991, a former director of Americas Watch created the Center for Justice and International Law (CEJIL) to exclusively take cases before the IACHR. Employing a strong intervention strategy, it has grown to be the representative in approximately 60% of the cases in which NGOs have represented individuals that have brought a case before the Commission[189]. Additionally, CEJIL has been of great importance for the reform process of the Court. As its mandate extends to the training and dissemination of lawyers and the strengthening of the Human Rights System, CEJIL has issued, up to this date, ten position

[185] Dulitzky, A. and Zarifis, I. (2003). Facing the Challenge: The Inter-American Commission on Human Rights' Adoption of New Rules of Procedure. *Mennesker and Rettigheter* 21(3), 257-276: p. 263 (hereinafter Dulitzky and Zarifis 2003)
[186] Mayer 2011, *supra* note 3
[187] Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System
[188] OAS, Inter-American Commission on Human Rights (2012). Reform Process – Consultation to Actors of the Inter-American System for the Protection of Human Rights. Retrieved from: http://www.oas.org/en/iachr/strengthening/consultation.asp
[189] Mayer 2011, *supra* note 3, p. 931

papers on specific issues concerning the reform of both the IACtHR and the IACHR[190]. The detailed analyses provided on the functioning of the institutions have been of great importance to the Working Group concerned with the reforms[191].

The autonomy of the Inter-American Human Rights System has been challenged since its creation. The dual document structure of the system has created difficulties for the OAS to have all member states to dedicate themselves to the system. The lack of respect for the independence of the institutions has created many opportunities for NGOs to participate – roles which they have actively filled. NGOs have actively lobbied within the Inter-American System, both with member states for greater respect and with the institutions for reforms, and they have been active in filing *amicus curiae* briefs.

Resources and NGO Participation

The funds of both the IACtHR and the IACHR are determined in the budget of the OAS[192]. The finances of the human rights institutions have been a struggle since their creation. This has caused them to heavily rely on Specific Funds over the last years, which are open to contributions from any source or country[193]. While the Specific Funds do allow for extra funds to the workings of the IACHR and IACtHR, these funds cannot be counted on each year. This has caused great distortions in the financing schemes of the institutions and creating difficulty in making mid- and long-term plans[194].

Inter-American Court of Human Rights

The initial establishment of the Court was not supported by any budgets from the OAS, which forced the judges to write the Rules of the Court, hire the staff and arrange a headquarters themselves[195]. The current budget of the Court provides it with the minimum resources that it needs to function, which restricts the IACtHR to provide any additional services to both member states and complainants[196]. In 2000, the Court proposed that it would need at least €1.739.700,- in order to adequately function, rather than the €1.100.000,- it received[197] – a significant increase. The increase of the funds of the Court were waited upon until 2003, when the budget of the Court was raised by 37%,. However, even

[190] CEJIL, Complete Catalogue. Retrieved from: https://cejil.org/en/publicaciones/catalogo?tid_2=All&tid=154&tid_1=All
[191] Shelton 2006, *supra* note 37
[192] American Convention, *supra* note 115, art. 72
[193] Report Prepared by the Office of the Secretary General of the Organization of American States for the Ad Hoc Working Group on Human Rights, *Financing the Inter-American Human Rights System* (28 April 2000) Retrieved from: http://www.derechos.org/nizkor/la/doc/fine.html (hereinafter Financing the Inter-American Human Rights System)
[194] Zela 2014, *supra* note 184, p. 10
[195] Buergenthal, T. (2004). Remembering the Early Years of the Inter-American Court of Human Rights. *New York University Journal of International Law and Politic*, 37(2): 259-280
[196] Financing the Inter-American Human Rights System, *supra* note 193
[197] Cassel 2014, *supra* note 137, p. 21

though the budgets have increased over the last decade, the current budget provided by the OAS covers only 47% of the total required resources[198].

Inter-American Commission on Human Rights

The biggest challenge to the budget of the IACHR has been the rapid growth of its workload. The increase of cases is reflected in its annual reports: the 1989-1990 report was 195 long[199], while the 1998[200] report already contained three volumes, a total of 1600 pages. Simultaneously, more personnel was hired to the IACHR, adding eight lawyers and four administrative employees to the staff[201]. The increase of the workload and therewith the personnel has forced the IACHR to spend over two-thirds of the €3.000.000,- it receives on the salaries of its employees[202]. This has left little money for its investigative mandate. The budget has increased from €1.114.900,- 2005 to €2.444.500,- in 2010[203], which has provided some relief for the finances of the IACHR. However, it still continues to depend on external funds. The current budget provided by the OAS provides for only 55% of the expenditures[204].

While the European Human Rights System only allows for voluntary contributions from its member states in order to preserve the independence of the system, the Inter-American account is open to any source. One of the most important requirements for the external funding of the IACHR is that it needs to be supplied by foundations and NGOs whose support will not threaten the independence of the Commission[205] . In 2011, the external funds of the IACHR added to over €4.000.000,-, which it received from twelve states and five major human rights NGOs[206]. Save the Children and SOS Children's Villages together financed over 10% of the voluntary contributions of that year[207]. A large portion of the external funds of the IACHR goes towards on-site visits[208], which makes a contribution to these funds a simple yet crucial avenue for NGOs to provide direct monetary assistance and to be indirectly involved in the IACHR investigations.

[198] *Id.*, p. 22
[199] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1989-1990,* OEA/SER.L/V/II.77 rev. 1, doc. 7 (May 17, 1990)
[200] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1998,* OEA/Ser.L/V/II.102, doc. 6 (April 16, 1999).
[201] Financing the Inter-American Human Rights System, *supra* note 193
[202] Orozco, J.J. (2014). The Process of the Strengthening of the Inter-American Human Rights System.. *Magazine of the Due Process of Law Foundation,* 19(7): 4-9
[203] Strategic Plan 2011-2015, *supra* note 133
[204] Cassel 2014, *supra* note 137
[205] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2009,* OEA/Ser.L/V/II., doc. 51, corr. 1 (30 December 2009)
[206] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2011,* OEA/SER/L/V/II., doc. 69 (30 December 2011) (hereinafter IACHR Annual Report 2011)
[207] *Id.*
[208] Financing the Inter-American Human Rights System, *supra* note 193

In its Annual Report of 2011, the IACHR has set up priority areas which should receive more resources if its funds were to increase. One of the main priorities is the budget allocated towards the on-site observations[209]. Over the last decades, the priorities of the Commission have been forced to shift towards the examination of individual complaints, rather than the investigation of gross human rights violations[210]. The investigatory mandate of the IACHR has been undermined by the lack of resources and the increase in the budget has not had an impact on the resources available for the investigations and on-site visits of the Commission, as the member states determined that the increase of the budget should be for other purposes[211]. Since the first visit in 1961, the Commission has employed 93 in-loco visits[212], of which only 11 have been conducted from 2000-2011. This is a decrease from the decade before, when on average four on-site visits were conducted per year. However, the requests for on-site visits have not correspondingly declined. The initiation of country visits comes from individual petitions that the IACHR receives[213], and the number of these petitions have increased by 170 percent from 1997-2003[214]. The shift of focus of the IACHR has allowed for NGOs to step in and provide operational assistance through conducting research, as the limited number of investigations has also negatively influenced the issuing of Country Reports.

Since the 1970s, Amnesty International and the Washington Office on Latin America (WOLA) have been of great importance to the IACHR[215]. They have approached the Commission with extensive documentation of human rights abuses occurring in Latin America. The annual country reports that have been issued by these NGOs have been a major asset for the IACHR in conducting investigative legwork[216]. Additionally, Commissioners have increasingly placed representatives of human rights NGOs on investigative teams to support the arrangement of interviews and to conduct fact-finding[217]. The knowledge of Commissioners often does not extend to the specificity of knowledge required for the investigation of the human rights abuses. The appointment of a NGO representative to the investigative team is a low-cost solution to gain the required knowledge. This has become a fairly easy way for NGOs to be involved in the processes of the IACHR.

[209] IACHR Annual Report 2011, *supra* note 206
[210] Dulitzky and Zarifis 2003, *supra* note 185
[211] Strategic Plan 2011-2015, *supra* note 133
[212] Inter-American Commission on Human Rights, Country Visits. Retrieved from: http://www.oas.org/en/iachr/activities/countries.asp
[213] Dulitzky and Zarifis 2003, *supra* note 185
[214] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1997*, OEA/Ser.L/V/II.98, doc. 6 rev. (13 April, 1998) and Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2003,* OEA/Ser.L/II.118, doc. 5 rev. 2 (29 December 2003)
[215] Burt, J. (2009). Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations. *The International Journal of Transitional Justice,* 3(3): 384-405
[216] Brunt, M. Amnesty International the Netherlands, Personal Communication, 21 April 2015
[217] Berman, J., Steinberg, G.M., and Herzberg, A. (2012). *Best Practices for Human Rights and Humanitarian NGO Fact-Finding.* Boston: Martinus Nijhoff Publishers

In order to gather the information required to monitor the human rights situation in all member states, the IACHR has extended its annual questionnaire from only being issued to its member states to including civil society in 2003[218]. In order to provide an overview of the most problematic areas of human rights in the Western hemisphere, the IACHR started in the 1980s to issue these questionnaires to its member states. The questions are mainly related to the compliance of states with the recommendations of the Commission, the decision of the Court and the overall human rights standards of the system[219]. These questionnaires are found to be important for the initial stages of investigations, in which either individuals or NGOs report on human rights abuses. This is then followed by the initiation of investigations by the Commission. In the initial stages of the IACHR, it was capable of providing information on these violations itself, but due to the lack of resources it has become to rely on individuals and NGOs to report these violations. The inclusion of NGOs in this early stage of the process shows that the Commission needs external support in order to adequately function[220] and be able to carry out its investigative mandate.

Possibilities for Legal Aid

The Inter-American System provides a Legal Assistance Fund for individuals that file a complaint. However, for the victim to be able to apply to the fund, the case must have been referred to the IACtHR. As many cases filed to the IACHR strand at the Commission, the availability of financial aid is fairly limited. Once a case has been submitted to the Court, any victim may expressly request access to the fund but there is no legal aid available for complaints issued at the IACHR. Furthermore, it often only covers aspects of the participation, as "the legal assistance benefit shall be granted on condition of available resources"[221]. Currently, the fund runs by voluntary contributions from Norway, Colombia and Denmark[222]. The lack of financial aid at the Commission results in costs of bringing a case before the IACHR still being too high for the majority of those the system is meant to serve[223]. The costs of a simple case, not involving more than one victim and one violation, are estimated at €119.400,-[224], which is unaffordable to many. The limited accessibility to financial aid jeopardizes the integrity of the system and the credibility of the member states as they are unwilling to provide an

[218] OAS. Inter-American Commission on Human Rights, Reports: Questionnaires. Retrieved from: http://www.oas.org/en/iachr/reports/questionnaires.asp
[219] Inter-American Commission on Human Rights, Questionnaire for States and Civil Society. Retrieved from: http://www.oas.org/en/iachr/docs/pdf/Questionnaire-ChapIV-en.pdf
[220] Adams, F. (2003). *Deepening Democracy: Global Governance and Political Reform in Latin America.* Santa Barbara: Greenwood Publishing Group
[221] Inter-American Commission on Human Rights, Legal Assistance Fund - Rules of the Inter-American Commission for Human Rights on the Legal Assistance Fund of the Inter-American Human Rights System, art. 3. Retrieved from: http://www.oas.org/en/iachr/mandate/basics/fund.asp
[222] Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights 2013,* OEA, SER/L/V/II. Doc. 50 Corr. 1 (31 December 2013)
[223] CEJIL (2006). Position Paper No. 4 – The Urgent Need for a Legal Fund in the Inter-American System for the Promotion and Protection of Human Rights. Retrieved from https://cejil.org/sites/default/files/position_paper_4.pdf (hereinafter Position Paper No. 4)
[224] *Id.*

effective system in which complaints can be filed against them. Currently, NGOS have become the actor to give meaning to the possibilities for victims of human rights abuses.

The representation of victims by NGOs differs greatly from the role played at the ECtHR. Currently, NGOs in the Inter-American Human Rights System take the responsibility of providing representation, training and advice to victims of human rights abuses. This is clearly reflected in the numbers on NGO representation: of the cases that have been judged on at the IACHR from 2000-2009, over 50% had a NGO to represent the individual at the Commission[225]. At the Court, the representation of NGOs extended to over 60%[226].The current lack of accessibility to the system for individuals jeopardizes the integrity of the system and there have been calls by both member states and NGOs for reform[227]. The Legal Assistance fund needs to be broadened to cover more of the expenses and it needs to have a regular budget, as it is now dependent on the voluntary contribution of three states alone.

The resources of the Inter-American System have had, similarly to its autonomy, an effect on the participation of NGOs. They have provided direct monetary assistance, have proven to be a critical asset to the investigations and they have often been the representative of individuals due to the lack of an efficient legal aid system.

[225] Mayer 2011, *supra* note 3, p. 929
[226] Mayer 2011, *supra* note 3, p. 930
[227] Position Paper No. 4, *supra* note 223

Conclusion

The aim of this research was to answer the following research question: *What explains the variation across the European and Inter-American Human Rights Systems as to the participation of NGOs?* After examining previously conducted research by constructivist scholars and legal scholarship, it was concluded that there is no theory available to explain the variation. This research therefore followed the assumption that institutional structures are an important indicator to NGO participation. Both regional human rights systems are most-similar in their design and mostly differ in their level of autonomy and their level of resources. The following two hypotheses have been tested:

HYPOTHESIS 1: The lack of autonomy of a regional human rights institution leads to more NGO participation in the form of lobbying for reform or lobbying for greater support

HYPOTHESIS 2: The lack of funding for the human rights institutions leads to more NGO participation through the provision of investigative and monetary assistance

The findings of this research confirm the first hypothesis. It was first of all established that the autonomy of the European Human Rights System is much stronger than that of the Inter-American Human Rights System. The European autonomy has been challenged by recent threats of withdrawal and poor compliance records of some member states, but its overall level of autonomy secures the independence of the ECtHR. NGOs were found to be limitedly participating in the roles that were linked to the level of autonomy: lobbying for greater support, lobbying for reform of the institutions, providing assistance in investigations and the filing of *amicus curiae* briefs. The influence of NGOs in the European system has been limited to voicing their concerns in the reform process, fact-finding in cases brought before the ECtHR in which the facts have been deficiently established, and the pressuring for increased support with member states with poor compliance records.

The first hypothesis is further confirmed by the Inter-American System: its independence has been more heavily contested and this has led to more NGO participation. The system been confronted with many reservations to the Convention, a number of threats of withdrawal, three official denunciations, and a poor overall compliance record. This is reflected in the possibilities for NGOs: they play an important role in the reform process of the system and due to the mistrust between the IACHR and the Contracting Parties, NGOs provide assistance in the investigations that are instigated against the member states. Furthermore, they have deliberately lobbied with the member states of the OAS to retract their reservations and they have actively lobbied for the implementation of IACtHR and IACHR judgments into domestic laws.

The hypothesis on the resources of the institutions is not as clearly confirmed by the findings of this research. The Inter-American Human Rights System is undoubtedly struggling with the lack of resources to adequately function which has created many opportunities for NGOs. The OAS has not

been able to effectively address the financial challenge which has jeopardized the system. NGOs have stepped in to provide assistance on many levels. Because the Specific Funds of the IACHR and IACtHR are open to any source, NGOs have been able to provide direct monetary assistance. Moreover, NGOs are of vital interest for the IACHR to conduct on-site visits and produce Country Reports as the funds of the IACHR are no longer sufficient to carry out its investigative mandate. Additionally, NGOs have on many occasions taken the opportunity to inform the IACHR and IACtHR on the facts of laws through the filing of *amicus curiae* briefs.

The second hypothesis is not confirmed with the findings on the European Human Rights System. Even though the majority of the budget of the CoE goes towards the protection and promotion of human rights, the ECtHR requires more resources to deal with the massive influx of its workload. The ECtHR's funds have been sufficient enough to conduct investigative legwork, which leaves limited NGO participation through this avenue. However, the ECtHR remains to have a large backlog of cases. The increase in funds over the last decades has proven to be effective, but it still has to deal with over 100.000 backlog cases. While the Inter-American Human Rights System has allowed NGOs to provide the resources and assistance, the member states of the CoE remain determined to preserve the independence of the Court by aiming to provide these resources themselves. The challenge to the funds is an issue that the CoE constantly addressing and it continues to find new ways to release funds to the ECtHR. The possibilities for NGOs will most likely not grow until the CoE has exhausted all its remedies. The European System however does not confirm that a lack of resources leads to more NGO participation.

In order to be able to convincingly determine what explains the variation in NGO participation, further research is required. This research has been limited to three participatory roles due to pragmatic reasons, and has moreover been limited to the data provided by the institutions and NGOs. A better and more stable image can be provided if more personal interviews can be conducted with human rights NGO representatives who can elaborate on the motives and possibilities of NGOs to participate. Furthermore, as can be seen with the level of resources, the domestic conditions and preferences of the member states have an influence on the level of resources and autonomy. To be able to form a complete picture on what factors influence the participation of NGOs, the domestic circumstances need to be more closely examined. Not only would further research provide a clearer picture of the participation of NGOs, it may influence the practices of NGOs as a better image will be provided on their possibilities, which may make their work more efficient. However, what has been confirmed by this research is that the weaknesses of the institutions are an important indicator to the participation of NGOs. In the Inter-American System, both institutional structures are weak and the system requires more external support. The European System places great value on the integrity of the system and keeps its own member states responsible for its functioning.