ARTICLES

INTERNATIONAL DISPUTE RESOLUTION AS POLYPHONY? AMICUS CURIAE INTERVENTIONS BEFORE INTERNATIONAL COURTS AND TRIBUNALS

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Abstract

The proliferation of amicus curiae participation in international courts and tribunals has received considerable scholarly attention yet has remained undertheorized. The central question in relation to the phenomenon remains unanswered and undertheorized: Does the fact that there are often multiple and diverse actors now engaged with judges in the capacity of amici curiae in any way influence the character of judicial proceedings?

Traditionally, international dispute resolution process has been represented as a triadic dialogue: that is, a dialogue between two parties and a judge. This Article argues that with the increasing participation of amici curiae in international litigation, the nature of dispute resolution itself has changed.

This Article traces a new emerging pattern in the international courtroom dynamic. Multiple and diverse participants in courtrooms have reshaped how international dispute resolution processes take place. Drawing on the work of the Russian literary scholar Mikhail Bakhtin, the Article argues that we are witnessing a move away from the triadic dialogue model of international dispute resolution to the emergence of polyphony in international trials. Polyphony in international dispute resolution has significant normative, theoretical, and practical consequences. As a new and distinct theoretical lens, polyphony in international dispute resolution sets ground for future thinking on the changing nature of international law-making by international courts and tribunals.

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I. INTRODUCTION

On October 25, 2021, the European Court of Human Rights delivered a judgment in the case *Big Brother Watchers v. the United Kingdom*. The case concerned the degree of electronic surveillance conducted by the U.K. government. Seventeen non- governmental organizations submitted amicus curiae briefs.[1] In the Grand Chamber, the leave to intervene was also granted to the governments of France, Norway, and the Netherlands, and to the United Nations (U.N.) Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression.[2]

International law scholarship has explored the role of amicus curiae participation in international law.[3] Nevertheless, the central question in relation to the phenomenon of amicus curiae participation in

1. *See* Big Brother Watch v. United Kingdom, App. Nos. 58170/13, 62322/14 and 24960/15, ¶ 4 (May 25, 2021), https://hudoc.echr.coe.int/eng?i=001-210077.

2. *Id.* ¶ 9.

3. *See generally, e.g.*, ASTRID WIIK, AMICUS CURIAE BEFORE INTERNATIONAL COURTS AND TRIBUNALS (Burkhard Hess et al. eds., 1st ed., 2018) (discussing amicus curiae in international courts and tribunals); *see also* Rachel Cichowski, *The European Court of Human Rights, Amicus Curiae and Violence Against Women*, 50 L. & SOC'Y REV. 890, 891 (2016) (discussing the participation of advocacy organizations and individuals in international law); *see also* Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals*, 5 NON-STATE ACTORS & INT'L L. 209, 256 (2005) (detailing how the WTO opened the door to amicus briefs); JORGE LUÍS MIALHE, THE NGOS AS AMICI CURIAE IN THE INTERNATIONAL TRIBUNALS 2 (2011); *see also* Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK J. INT'L L. 911, 936 (2011) (discussing the role of NGOs in European human rights courts); *see also* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 611 (1994) (stating that NGOs are "placing an increasingly important role in international litigation).

international tribunals remains undertheorized: in what way do they impact the process of international dispute resolution? Does the fact that there are often multiple and diverse actors acting as amici and engaging with judges in any way influence the character of judicial proceedings?

Traditionally, the international courts and tribunals (ICTs) have been represented by scholars as a triadic dialogue: that is, a dialogue between two parties and a judge. Figure 1 illustrates the triadic dispute resolution model.

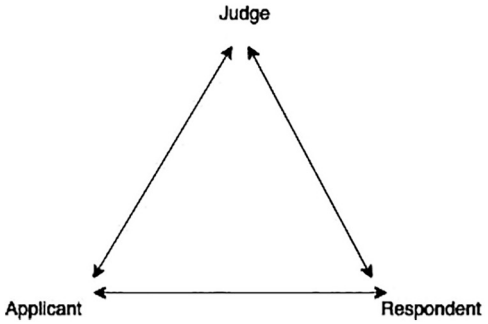

FIGURE 1: Triadic Dispute Resolution.

For example, in his seminal writing on international conflicts, Terrence Hopmann conceptualizes international dispute resolution as a dialogue between two parties and an arbitrator: "[i]nternational courts, such as the International Court of Justice . . . are often introduced to arbitrate disputes. In this instance, the arbitrator listens to the arguments of the two sides and then renders a decision that is binding on the parties . . . ."[4]

Conceptualization of international dispute resolution as a triad, however, does not provide a full account of the dispute resolution process. This Article argues that the increasing participation of amicus curiae in international litigation has changed the nature of dispute resolution itself.

The Article examines the participation of amici curiae in international tribunals and traces a new emerging pattern in the international courtroom dynamic. Multiple and diverse participants in courtrooms have reshaped how international dispute resolution processes take place. Drawing on the work of the Russian literary scholar Mikhail

4. P. TERRENCE HOPMANN, THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS 228 (1996).

Bakhtin, I argue that we are witnessing a move away from the triadic dialogue model of international dispute resolution to the emergence of polyphony in international trials.

The proceedings in international tribunals allow many and diverse participants to voice their opinions as amici curiae. Numerous and various parties, including individuals, NGOs, corporations, international organizations, and governments, have more access than before to voice their opinions in the courtrooms of international tribunals in relation to a particular case. The judgments reflect their submissions, sometimes along with counterarguments and compliments from the judges.

Most ICTs, including the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the Dispute Resolution Panels of the World Trade Organization (WTO), the International Criminal Court (ICC), the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR), the International Tribunal for the Law of the Sea (ITLOS), North Atlantic Free Trade Agreement (NAFTA) Arbitration Rules and the International Convention for the Settlement of Investment Disputes (ICSID) arbitration proceedings, serve as points of convergence for multiple actors having different statuses and ideological positions. The tribunals' judgments reflect a dialogue between judges, NGOs, international organizations, states not party to the case, and individuals. Thus, the understanding of international dispute resolution processes can no longer be confined to capturing only the relationship between the judges and litigants. This shift has to be accounted for. Polyphony in international dispute resolution can be visualized as in Figure 2.

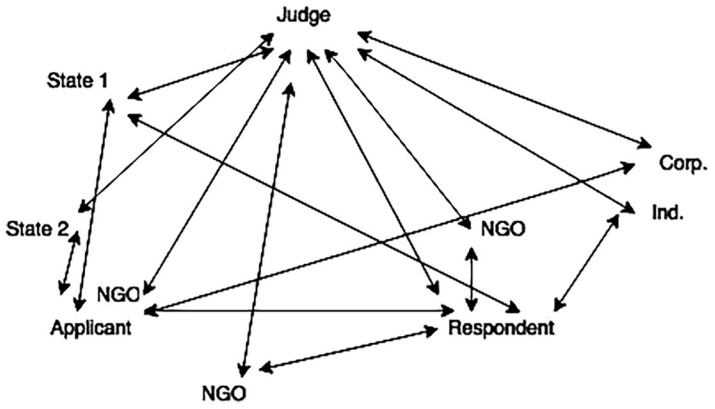

FIGURE 2: Polyphony in International Dispute Resolution.

Mikhail Bakhtin's work on Fyodor Dostoevsky's novels was first discovered in the 1950s in Moscow, when Bakhtin was in exile in Central Asia.[5] Bakhtin maintained that Dostoevsky created "a new artistic model of the world."[6] In the 1980s Bakhtin's scholarship enjoyed renewed attention in Western intellectual debates about the relationship between form and ideas.[7] Bakhtin envisaged that polyphony could be applied well beyond the novel and literature.[8] His ideas are relevant to philosophy, semiotics, cultural studies, environmental studies,[9] and many other disciplines,[10] and they have been transposed to political science[11] and to law.[12]

Based on Bakhtin's work, I identify two dimensions of a polyphonic courtroom: (A) multiple, unmerged voices coexisting in one space (coexistence), and (B) voices not only existing but informing and shaping each other through dialogue (dialogue).[13]

Bakhtin's notion of polyphony can serve as a conceptual lens for describing the presence and activity of multiple and diverse actors in the courtroom and the tribunals' sporadic and unsystematic engagement with them. I argue that adopting a polyphonic view can provide a new source of insight to understand international dispute resolution. Patterns and processes that have been present and influential are properly captured and accounted for from this theoretical perspective. The theory of polyphony is a most necessary update to the theoretical gap that has existed so far in the conceptualization of international dispute resolution. As scholarship on amicus curiae participation has proliferated,

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5. Caryl Emerson, *Editor's Preface* to MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, at xxix–xx (Caryl Emerson ed. & trans., 1984).

6. MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS 28 (Caryl Emerson ed. & trans., 1984). [hereinafter PDP].

7. *See* Wayne C. Booth, *Introduction* to MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, at xiii (Caryl Emerson ed. & trans., 1984).

8. *Id.*

9. *See generally* Nino Antadze, *Polyphonic Environmental Planning Processes: Establishing Conceptual Connections Between Procedural and Recognition Justice*, 23 LOC. ENV'T 239 (2018) (discussing Bakhtin's notion of polyphony in the context of environmental planning processes).

10. Pam Morris, *Introduction* to THE BAKHTIN READER: SELECTED WRITINGS OF BAKHTIN, MEDVEDEV AND VOLOSHINOV 1 (Pam Morris ed., 1994).

11. *See generally* Irakli Zurab Kakabadze, *Polyphonic Country: A Peace Zone in Georgia and South Caucasus*, CORNELL UNIV. REPPY INST. (Dec. 2010).

12. *See, e.g.*, Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2288 (1989) (applying Bakhtin's concept of "polyphony" to law and democracy); *see also* Charles Hersch, *Bakhtin and Dialogic Constitutional Interpretation*, 18 LEGAL STUD. F. 33, 33 (1994) (applying Bakhtin's theories to United States Supreme Court cases).

13. Nino Antadze has distilled these two criteria in relation to environmental planning. S*ee* Antadze, *supra* note 9, at 241–42.

the theoretical approaches to capturing their presence and activity in the process of international dispute resolution have remained outdated.

Therefore, this Article makes several contributions to scholarly accounts of international lawmaking. First, it contributes to scholarship on international dispute resolution by offering a theory of amicus curiae participation in international tribunals. The theory fills the existing gap in international law scholarship.

Second, this Article offers a new take on the nature of international dispute resolution. By foregrounding the phenomena of amicus curiae participation, it gives a fresh look on the nature of international dispute resolution and enriches the international dispute resolution scholarship with a new theoretical account.

Third, this Article draws on the concepts from literary studies and thus enhances the disciplinary dialogue between the literary studies and international law.

Fourth, the Article's findings present further ground for study, as polyphony raises important issues of the legality, fairness, and legitimacy of international tribunals which have to be tackled in theory as well as in practice. Its goal is not only to describe institutional change but also to evaluate what this change means for international tribunals, international actors, and international lawmaking at large. Does polyphony in dispute resolution increase the legitimacy of international tribunals? How do non-state actors benefit from the courts' shift to polyphonic proceedings? Can non-state actors gain recognition and voice as a result of this shift? This Article offers preliminary suggestions in this regard.

The Article proceeds as follows: in section II, I outline the main scholarly debates about the participation of amicus curiae in international lawmaking, illustrating that so far the participation of amici in international tribunals has remained undertheorized and that the shifts in the courtroom dynamic have been overlooked. While scholarship has rightfully assessed the growing influence of amici on international lawmaking, the accounts of dispute resolution processes have remained loyal to a perception of dispute resolution that is long outdated.

In section III, I explain Bakhtin's theory of polyphony and how its application to international dispute resolution can enrich our perspective. The section explains the significance of Bakhtin's linguistic work and foregrounds the two dimensions of polyphony that are relevant to this study.

Section IV offers a case study of amici curiae participation in international tribunals. It demonstrates how multiple state and non-state actors are present in courtrooms and how tribunals engage with them.

It explains how polyphony is an appropriate lens for capturing the tribunals' unsystematic and sporadic engagement with multiple, diverse voices in the courtroom.

Section V elaborates on the implications of conceptualizing international judicial dispute resolution as polyphony. It shows that this shift has theoretical, normative, and policy implications. Different consequences for scholarship, tribunals, and non-state actors flow from this new approach. This section also raises some issues for future research and policy approaches.

Section VI summarizes the Article's findings and its contribution to scholarship.

II. Amicus Curiae In International Law

The participation of amici curiae in international tribunals has been extensively explored.[14] However, the concept has not been theorized.[15] Previous scholarly works engage in the analysis and the evaluation of the impact of amicus curiae participation before the ICTs and do not offer an overarching theory that explains the phenomenon. There is a significant gap in scholarship that this Article aims to address.

Dinah Shelton's earlier work considered non-governmental organizations' (NGOs) involvement, primarily as amicus curiae, in international litigation within the International Court of Justice (ICJ), the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights (IACHR).[16] Shelton argues that expanding the role of non-State actors' participation in the amici submission process would be in the ICJ's interest because different perspectives can inform public policy issues, give the actors greater rights and duties, and give States the benefit of lightening their litigation burden and garnering visible support for their positions from non-State actors like NGOs.[17] However, the article does not present an overarching view on the nature of amicus curiae interventions in international tribunals.

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14. *See, e.g.*, John Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 Non-State Actors and Int'l L. 169, 169 (2002) (exploring the submission of amicus curiae in a range of international courts); Arnold N. Pronto, *Some Thoughts on the Making of International Law*, 19 Eur. J. Int'l L. 601, 603 (2008); *see generally* Cichowski, *supra* note 3 (exploring the intersection between the European Court of Human Rights, amicus curiae, and violence against women).

15. *See* Wiik, *supra* note 3, at 28–29.

16. Shelton, *supra* note 3, at 611.

17. *Id.* at 626–27.

Bartholomeusz compares the treatment of amicus curiae by six international tribunals and comes up with core features that they all share.[18] In particular, the author points out that participation of amicus curiae is more controversial when a jurisdiction has no express provisions for their participation.[19] The article considers the policy issues raised by amicus briefs.[20] Bartholomeusz finishes by arguing that the future of amicus participation can be enhanced by clarifying the judicial nature of amici curiae and developing conditions for their participation.[21] However, the phenomenon of amicus participation in international tribunals remains undertheorized.

While Luigi Crema's article primarily considers amici's role within European courts, the WTO, and investment arbitrations, there is some discussion of the Inter-American Court's approach to amicus briefs.[22] The author also notes that the submission process is much clearer within the Inter-American Court compared to the European Court because of the rules' public availability and time limit.[23] However, both courts do not require the publication of the names of the amici or whether the briefs were accepted, which leaves the issue of transparency unresolved.[24]

Astrid Wiik's manuscript provides a functional systematization of the amicus curie participation across a variety of tribunals and highlights the similarities and dissimilarities in the use of the concept by various ICTs.[25] It proposes the benefits of the reliance on amici by the tribunals.[26] However, the manuscript does not fill the preexisting gap in scholarship as it does not offer a theory of amicus participation.

Furthermore, the phenomenon has been overlooked by the scholarship about the nature of international dispute resolution. In fact, despite differences in many aspects, all theoretical accounts of international dispute resolution have presumed a triadic dialogue structure of the international dispute resolution; as explained below, they either explicitly treat the tribunals as triads or presume the triadic structure.

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18. *See generally* Bartholomeusz, *supra* note 3.

19. *Id.* at 275.

20. *Id.* at 281, 283.

21. *Id.* at 285–86.

22. Luigi Crema, *Testing Amici Curiae in International Law: Rules and Practice*, 22 ITAL. Y.B. INT'L L. 91, 98–100 (2012).

23. *Id.* at 102.

24. *Id.* at 129.

25. *See* WIIK, *supra* note 3, at 29.

26. *Id.* at 571–73.

In their seminal work on judicial function, Martin Shapiro and Alec Stone Sweet understand the process of judicial governance as a triadic relationship between the parties to the conflict and the judge.[27] Judges intervene in a conflict between two adversarial parties and their narratives, and justify their decision-making with reasons, explicating how parties should have behaved.[28] The "judicialization of dispute resolution" is the process by which a triadic dispute resolution (TDR) mechanism appears, stabilizes, and develops authority over the normative structure governing exchange in a given community.[29]

In their article on legalized international dispute resolution, Keohane, Moravscik, and Slaughter discuss interstate and transnational dispute resolution.[30] They maintain an underlying assumption that international dispute resolution functions as a triad. For instance, they state, "[D]elegation means that disputes must be framed as 'cases' between two or more parties, at least one of which, the defendant, will be a state or an individual acting on behalf of a state."[31] In their article on the independence of international courts, Eric Posner and John Yoo understand tribunals as triads,[32] as does Karen Alter.[33]

In his rational-choice analysis of the international courts, Professor Andrew Guzman conceptualizes an international tribunal as an interplay between third-party decision-makers and the parties.[34] He writes: "Reduced to its simplest components, a tribunal hears evidence and

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27. *See generally* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); *see also* Alec Stone Sweet, *Judicialization and Construction of Governance*, 32 COMPAR. POL. STUD. 147, 147 (1999) (naming the triad as "two contracting parties and a dispute resolver").

28. *See generally* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE

(2000); *see generally* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004); *see generally* Alec Stone Sweet, *Constitutional Dialogues in the European Community*, *in* THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 305 (Anne-Marie Slaughter et al. eds., 1998).

29. SHAPIRO & SWEET, *supra* note 27, at 71.

30. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG.

457, 459 (2000).

31. *Id.*

32. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 28–29 (2005).

33. *See generally* Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51 (2003).

34. Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 179 (2008).

arguments from the parties and issues a ruling regarding the relevant facts and law. At that point its job is done."[35]

The authoritative narrative theory, as Professor Timothy Waters calls it, is the dominant theory aspiring to explain the efficacy of international tribunals.[36] Waters sums up the harder version of this theory thus: "trials are or should be principally about generating transformative narratives, and are particularly good at it."[37] It is in the judgment that the Court produces the law's interpretation of the conflict between the parties.[38] As Waters indicates, the authoritative narrative theory is closely tied to common law and to the adversarial nature of trials.[39] As commentators note, the role of the judge in common law is akin to that of the "referee."[40] Nevertheless, the theory missed the opportunity to capture multiple and diverse voices and their dialogue that exists in addition to the two adversarial parties present in international courtrooms.

These accounts of the international dispute resolution process have fallen behind developments in the field. It is possible that they originate from the same state-centric view of international law that previously applied predominantly to international law at large. The theory of triadic dialogue, dominant today, evolved in relation to studying the dispute resolution process within the earliest of tribunals that decided interstate disputes. Early theoretical accounts of early international tribunals have persevered and remained dominant, although the real world of international lawmaking by international tribunals has changed. Polyphony is a theory that grasps the new trend and adapts to this change.

III. MIKHAIL BAKHTIN'S THEORY OF POLYPHONY

This Article presents Bakhtin's theory of polyphony as a lens for understanding international dispute resolution proceedings. The

35. *Id.*

36. *See* Timothy W. Waters, *A Kind of Judgment: Searching for Judicial Narratives After Death*, 42 GEO. WASH. INT'L L. REV. 279, 285–95 (2010) (discussing the theory as well as its criticisms).

37. *Id.* at 290; *see e.g.*, INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW: ON SEMANTIC CHANGE AND NORMATIVE TWISTS 29–37 (2012); *see also* Andrea Bianchi, *Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning, in Making Transnational Law Work in the Global Economy* 34 (Pieter H.F. Bekker et al. eds., 2010).

38. *See* Waters, *supra* note 36, at 281.

39. *Id.* at 287.

40. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 350 (1st ed., 2007).

literary concept of polyphony originates from the work of the Russian linguist Mikhail Bakhtin. Bakhtin's literary analysis of Fyodor Dostoevsky's novels as polyphonic has become an influential theory of narration.[41] According to Bakhtin, Dostoevsky's artistic mission was to revolutionize the tradition of monologism in European novels.[42] Bakhtin considered critics' attention to Dostoevsky's literary works to be misplaced because they accentuated its content while overlooking the richness offered by its unique artistic form.[43]

For the purposes of this Article, I identify two key dimensions of polyphony[44] and later examine the amicus curiae participation in international tribunals through these two dimensions.

A. *Multiple and Diverse Voices Coexist (Coexistence)*

The first important dimension of Bakhtin's idea of polyphony is the coexistence of multiple and diverse voices. Bakhtin hails Dostoevsky's work for revolutionizing the western European novel by creating a new style in which alternative and competing normative interpretations do not evolve into a monologic narration but coexist side by side, creating both contradiction and harmony. According to Bakhtin, all fiction prior to Dostoevsky was monologic, in which "another person becomes the object of thinking, and not the one who can think himself."[45] Dostoevsky's characters, according to Bakhtin, do not evolve into a single "objective world" but continue to exist and relate to each other as a "plurality of consciousness with equal rights and each with its own world."[46] Polyphony is an alternative vision of combining, but not converging, different narratives. A grave mistake committed by critics and readers was to interpret Dostoevsky's work as "*a single* word, *a single* voice, *a single* accent . . . ."[47] They overlooked the complexity and uniqueness of the polyphonic novel.[48] Commentators define polyphony as occurring when "several contesting voices representing a variety

41. Qian Zhongwen, *Problems of Bakhtin's Theory about "Polyphony"*, 28 NEW LITERARY HIST.779, 779 (1997).

42. *Id.* at 780.

43. PDP, *supra* note 6, at 42–43.

44. Antadze, *supra* note 9, at 241–42.

45. Zhongwen, *supra* note 41, at 780.

46. PDP, *supra* note 6, at 6.

47. *Id.* at 43.

48. *Id.*

of ideological positions can engage equally in dialogue, free from authorial judgment or constraint."[49]

The key distinction of polyphony is that voices, as independent consciousnesses, do not merge but are combined—"they are temporarily connected in a dialogic way."[50]

In other words, it is not just the plurality of voices that can be heard but the deeper processes and traces that define different identities, perspectives, and, thus, voices.[51] Letiche provides:

> Polyphony demands more voices, perspectives, and subject positions, in a single interaction. Polyphony cannot bear one authorial voice, truth, strategy, or point of view; nor can it bear voices or perspectives that are incommensurable, do not interact, cannot relate to one another, or exert no influence on one another. Polyphony demands relationship and difference.[52]

B. *Multiple Voices Shape Each Other Through Dialogue (Dialogism)*

The other significant dimension of polyphony is the dialogic nature of the interaction of multiple and independent voices i.e. dialogism. In polyphony, multiple, diverse voices are not static. They not only coexist but interact. Voices remain different, yet they inform and shape each other. "Bakhtin believes that consciousnesses only manifest themselves when there is a dialogue with the Other."[53] Thus, the character's "truth only emerges in contact with, or anticipation of, another's truth."[54] Letiche explains that for Bakhtin, "the human subject emerges in the encounter with another and is an interactive product of relationship."[55] Thus, the intersubjective relationship that polyphony implies can be not only meaningful but also transformative for involved actors.[56]

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49. IRENA R. MAKARYK, ENCYCLOPEDIA OF CONTEMPORARY LITERARY THEORY: APPROACHES, SCHOLARS, TERMS 610 (1993).

50. Hannah Trittin & Dennis Schoeneborn, *Diversity as Polyphony: Reconceptualizing Diversity Management from a Communication-Centered Perspective*, 144 J. BUS. ETHICS 305, 310 (2017).

51. *See generally* John Shotter, *Dialogism and Polyphony in Organizing Theorizing in Organization Studies: Action Guiding Anticipations and the Continuous Creation of Novelty*, 29 ORG. STUD. 501 (2008).

52. Hugo Letiche, *Polyphony and Its Other*, 31 ORG. STUD. 261, 262 (2010).

53. Antadze, *supra* note 9, at 241.

54. SIMON DENTITH, BAKHTINIAN THOUGHT: AN INTRODUCTORY READER 42 (1995).

55. Letiche, *supra* note 52, at 275.

56. MAKARYK, *supra* note 49, at 610–11.

Interaction between voices is key for Bakhtin. He speaks of Dostoevsky's characters not as separate "ideas" but as separate "consciousnesses" that develop lives of their own yet remain in relationship with other consciousnesses.[57] Individual consciousness evolves in parallel with that of others and in continuous dialogue and interaction with them.

Dostoevsky's novels, argues Bakhtin, do not evolve over time, as was the tradition in European literature.[58] They coexist, relate, and struggle "in space and not in time."[59] Evolution is substituted by "coexistence and interaction."[60] Dostoevsky's novels do not develop in stages but exist and engage with each other in parallel, on the same level of existence.[61]

Bakhtin contrasts monologism, the setting up of a novel as a "single consciousness," "absorbing other consciousness as objects in itself,"[62] with Dostoevsky's interplay of different consciousnesses, each remaining independent.[63] Dentith stresses that polyphony and monologism could be viewed as two opposing ends of a spectrum rather than as a binary. Some novels can be placed near one end of the spectrum; others are closer to the other end.[64]

The polyphonic nature of Dostoevsky's novels led other commentators to the revelation of the multiplicity and complexity of things, in places where they might otherwise be perceived simplistically. This is because contradictions emerging in polyphony are not dialectical. Voices in a polyphonic novel develop on the same level, spatially and not temporally. They constantly engage with one another, simultaneously creating "eternal harmony and . . . irreconcilable quarrel."[65]

The significance of Bakhtin's work transcends literary and language studies. As John Shotter noted, adopting Bakhtin's view of the literary world amounts to adopting a completely different view of the world at large: "it is to see it as a living, dynamic, indivisible world of events that is still coming into being."[66] This Article highlights two main dimensions of Bakhtin's concept of polyphony: the coexistence of multiple

57. PDP, *supra* note 6, at 32.
58. *See id.* at 26.
59. *Id.* at 28.
60. *Id.*
61. *Id.* at 31.
62. *Id.* at 18.
63. *Id.*
64. DENTITH, *supra* note 54, at 43.
65. PDP, *supra* note 6, at 30.
66. Shotter, *supra* note 51, at 501.

and diverse voices and their mutual influence through interaction and dialogue. These two dimensions, when applied to international dispute resolution processes, reveal its changed nature.

IV. Polyphony In International Dispute Resolution: Amicus Curiae As A Case Study

International dispute resolution processes involve a multiplicity of voices in addition to those of the adversarial parties. With its emphasis on unstructured and unsystematic communication, the concept of polyphony is appropriate for viewing such interactions. This Section shows how the two above-stated dimensions of polyphony manifest themselves in international dispute resolution in relation to amicus curiae submissions. Currently, amicus curiae participants are commonplace in international tribunals.[67] Amicus curiae participation submissions are a form of third-party intervention that involves presenting a view on points of law or fact by a party not represented before the judge.[68] Such intervention in judicial proceedings has rapidly expanded from common law systems, where it originated, to countries with civil law traditions and international adjudication.[69]

A. *Multiple and Diverse Voices Coexist*

International dispute resolution has become an avenue for many and varied participants from across the globe that aspire to put forward their positions in the capacity of amicus curiae. The International Court of Justice remains the last bastion in terms of not giving access to non-state actors to take part in the proceedings as amicus curiae. All other human rights, investment, and international criminal tribunals have already been accustomed to non-state actors' voices as amici curiae.

Participation by NGOs, international organizations, individuals, businesses, and states is highly prominent within the ECtHR.[70] Article 36(2) of the European Convention on Human Rights and Fundamental Freedoms grants intervention to states, individuals, and organizations

67. *See, e.g.*, Razzaque, *supra* note 14.

68. *See* Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 Am. U.L. Rev. 1243, 1243 n.1 (1992).

69. *See* Anna Dolidze, *The Arctic Sunrise and NGOs in International Judicial Proceedings*, 18 Am. Soc'y Int'l L. 1 (Jan. 3, 2014), https://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings.

70. *See* Cichowski, *supra* note 3, at 891.

that are not party to a proceedings.[71] And, most recently, with the adoption of Protocol 14, the Council of Europe's High Commissioner for Human Rights received the right to intervene in cases before the Court.[72] A study of amicus curiae participation within the ECtHR's Grand Chamber reveals that the number of Grand Chamber judgments that include an amicus curiae participant has grown over the years.[73] Though there are minor fluctuations over time, the general trend, that more Grand Chamber judgments include amicus briefs, has been stable.[74]

In 2009 the judges of IACtHR adopted two sets of changes to the Rules of Procedure.[75] Under the new rules, the Court moved to formalize the procedure for submitting amicus curiae interventions.[76] Amicus curiae interventions shall be sent to the Court and shall be admissible within fifteen days following a hearing.[77]

All international criminal tribunals accept amici curiae submissions.[78] The ICTY provided for such a possibility under Rule 74 of Roles of Procedure and Evidence (RPE).[79] Similarly, the ICTR accepted amicus curiae submissions based on Rule 74 of the Rules of Procedure and Evidence.[80] Under the Rule, the Chamber welcomed some submissions, engaging with their content and underscoring their value, and rejected others and provided specific rationale for the rejection. Rule 103 and Rule 149 of the Rules of Procedure and Evidence of the

71. Convention for the Protection of Human Rights and Fundamental Freedoms art. 36(2), Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR].

72. *Id.* art. 36(3).

73. *See* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 463 (2010); s*ee also* DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 80–81 (1996).

74. Cichowski, *supra* note 3, at 901–02.

75. *Compare* Org. of Am. States [OAS] Rules of Procedure of the Inter-Am. Ct. H.R. (Nov. 2009), http://www.cidh.org/basicos/english/RulesIACourtNov2009.pdf [hereinafter Nov. 2009 RP], *with* Org. of Am. States [OAS] Rules of Procedure of the Inter-Am. Ct. H.R. (Jan. 2009), http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf [hereinafter Jan. 2009 RP].

76. *See* Nov. 2009 RP, *supra* note 75, at arts. 2(3), 44.; Jan. 2009 RP, *supra* note 75, at art. 41.

77. Jan. 2009 RP, *supra* note 75, at art. 41; Nov. 2009 RP, *supra* note 75, at art. 44.

78. *See* Sarah Williams & Hannah Woolaver, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 INT'L CRIM. L. REV. 151, 154 (2006).

79. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Information Concerning the Submission of Amicus Curiae Briefs*, U.N. Doc. IT/122/Rev.1, ¶ 1 (Feb. 16, 2015).

80. International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, r. 74, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

International Criminal Court indicate the power of the Chamber and Appeals Chamber to invite a State, organization, or a person to submit written or oral observations.[81]

Amicus curiae participation procedure has also been endorsed by the WTO dispute resolution body. The Panel has independent authority to receive amicus briefs, under Article 13 of the Dispute Settlement Understanding.[82] The Appellate Body has also accepted amicus briefs. In most cases, however, the panel or appellate body will not consider a brief unless one of the parties endorses it in some fashion, either by attaching it to their submission or by quoting parts of it as relevant in their oral or written submissions.[83] As Leah Butler indicates, sending a brief directly to the WTO and either copying or forwarding it to the parties gives NGOs more autonomy than if they were to work with the parties directly in the first place.[84]

The investment dispute settlement system has also recognized amicus curiae participation,[85] including arbitration under NAFTA Chapter 11 proceedings.[86] The Arctic Sunrise case was a breakthrough for non-state actors in relation to ITLOS, as the Tribunal acknowledged and disseminated the amicus submissions by NGOs for the first time.[87]

Amicus participants differ from each other, comprising NGOs, international organizations, individuals, and states. NGOs themselves differ based on their status as well as their ideological positions; transnational groups, local groups, and unions with opposing positions participate in proceedings and put forward their views.

In this process their opinions diverge from each other, following the first dimension of polyphony.

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81. INTERNATIONAL CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE, rr. 103, 149 (2nd ed., 2013).

82. Understanding on the Rules and Procedures Governing Settlement of Disputes art. 13, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

83. KATI KULOVESI, THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES OF THE ENVIRONMENT, LEGITIMACY AND FRAGMENTATION 210–14 (2011).

84. Leah Butler, Effects and Outcomes of *Amicus Curiae* Briefs at the WTO: An Assessment of NGO Experiences 17 (May 8, 2006) (Senior Thesis, University of California Berkeley), http://nature.berkeley.edu/classes/es196/projects/2006final/butler.pdf.

85. *See generally* Crina Baltag, *The Role of* Amici Curiae *in Light of Recent Developments in Investment Treaty Arbitration: Legitimizing the System?*, 35 ICSID REV. FOREIGN INVEST. L.J. 279 (2020).

86. Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT. L. 200, 212–13 (2011).

87. *See* Dolidze, *supra* note 69.

1. NGOs

NGOs are the most active submitters of amicus briefs and come from a variety of backgrounds, countries, and specializations. They do not represent networks in the sociological sense, as their positions on issues often differ from, or sometimes directly contradict, each other's. In *Lautsi*, for example, the Greek Helsinki Monitor argued that the display of religious symbols in classrooms could be interpreted as support for a particular religion.[88] On the other hand, the *Associazione Nazionale del Libero Pensiero* contended that the display of crucifixes in classrooms was authorized not by law, as required by the Convention, but by domestic regulations, and that a conflict existed between the highest national courts of Italy concerning the applicability of these regulations.[89] The International Commission of Jurists and Human Rights Watch, for their part, emphasized the states' duty of neutrality with regard to religious beliefs as well as the principle of educational pluralism.[90]

Another example is the case of *A, B, and C v. Ireland (2010)*, which centered on the question of the legality of the prohibition of abortion under the European Convention.[91] Amicus submissions in this case represented an amalgamation of submissions by individuals, states, and NGOs. Comments were received from the Lithuanian government, the European Center for Law and Justice, Kathy Sinnott (Member of the European Parliament), the Family Research Council (Washington, DC), the Society for the Protection of Unborn Children (London), the Pro-Life Campaign, joint observations from Doctors for Choice (Ireland) and the British Pregnancy Advisory Service, and the Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme.[92] The submissions were both harmonious and contradictory. The research, arguments, and pleas presented in some of the organizations' briefs could not have been more different. For example, the research and arguments presented by the group of organizations aspiring to protect human life differ diametrically from the pleas made by the Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme.[93]

88. Lautsi v. Italy, App. No. 30814/06, ¶ 50 (Mar. 18, 2011), https://hudoc.echr.coe.int/eng?i=001-104040.

89. *Id.* ¶ 51.

90. *Id.* ¶ 54.

91. *See* A, B, and C v. Ireland, App. No. 25579/05, ¶ 3 (Dec. 16, 2010), https://hudoc.echr.coe.int/fre?i=001-102332.

92. *Id.* ¶ 5.

93. *See id.* ¶¶ 196–11.

Moreover, some of the third parties, for example the European Center for Law and Justice, the Family Research Council, the Society for the Protection of Unborn Children, and the Pro-Life Campaign, shared a common fundamental mission of "defending human life," yet their arguments differed.[94] Doctors' associations intervened to inform the Court of the problems that doctors in Ireland faced due to the lack of clarity on the question of abortion in Irish law.[95]

Civil society organizations have been active in the IACHR as well. Consider, for example, the case of *Marcel Claude Reyes and Others v. Chile* where five civil society organizations submitted a joint amicus brief: Open Society Justice Initiative, Article 19, *Libertad de Informacion Mexico*, *Instituto Presa y Sociedad*, Access Info Europe;[96] *El Centro Mexicano de Derecho Ambiental (CEMDA)* and *La Asociación Interamericana para la Defensa del Ambiente* (AIDA) submitted briefs in the case of *Teodoro Cabrera García y Rodolfo Montiel Flores v. Mexico.* [97]

For instance, various organizations, including transnational and grassroots indigenous groups, have been active in the seminal case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[98] in which the court for the first time recognized the indigenous community's rights to their ancestral land.[99] The submissions were in different languages: The Organization of Indigenous Syndics of the Nicaraguan Caribbean (OSICAN) submitted a brief in Spanish;[100] the Assembly of First Nations (AFN), a Canadian organization, the International Human Rights Law Group,[101] the Hutchins, Soroka & Dionne law firm on behalf of the Mohawk Indigenous Community of Akwesasne, and the National Congress of American Indians (NCAI) submitted briefs in English.[102]

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94. *See id.* ¶¶ 196–05.

95. *Id.* ¶¶ 206–07.

96. *See* Claude Reyes v. Chile, Open Society Justice Initiative, https://www.justiceinitiative.org/litigation/claude-reyes-v-chile.

97. Press Release, La Asociación Interamericana para la Defensa del Ambiente, CEMDA and AIDA present a brief before the Inter-American Court of Human Rights in the case of Teodoro Cabrera García and Rodolfo Montiel Flores against Mexico (Sept. 14, 2010), https://aida-americas.org/es/prensa/cemda-y-aida-presentan-escrito-ante-la-corte-interamericana-de-derechos-humanos-en-el-caso-de.

98. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 12 (Aug. 31, 2001).

99. CATHRINE ZENGERLING, GREENING INTERNATIONAL JURISPRUDENCE: ENVIRONMENTAL NGOS BEFORE INTERNATIONAL COURTS, TRIBUNALS AND COMMITTEES 109 (2013).

100. Mayagna, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 38.

101. *Id.* ¶¶ 41–42.

102. *Id.* ¶¶ 52, 61.

In the case of *Ildephonse Hategekimana*,[103] the Rwanda Tribunal considered the intervention by the Republic of Rwanda and a number of organizations very useful for the case and welcomed their submissions: "[t]he Chamber considers that submissions on the experiences of members of ADAD working in Rwanda, and their interactions with the Rwandan Government, may assist it in determining issues raised by the Referral Request. The Chamber expects that ADAD's submissions in this regard will be filed with supporting documentation."[104]

The ICC routinely accepts submissions from NGOs as amici curiae. For example, on May 12, 2012, the ICC Pre-Trial Chamber I agreed to hear the views of NGOs Justice in Libya and the Redress Trust in the *Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi* case.[105]

Among the last international tribunals that did not allow amici curiae participation by NGOs was the International Tribunal for the Law of the Sea. However, that changed as well in the Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17).[106] In this case, the Court requested a brief by the IUCN and deliberated on the admissibility of two briefs submitted by Greenpeace and the World Wide Fund for Nature.[107]

2. International Organizations

Intervention by international organizations has also been commonplace in various international tribunals. In the case of *Blecic v. Croatia* (2004),[108] the Organization for Security and Cooperation in Europe intervened as a third party to illuminate the Court on the status of "occupancy rights" in Bosnia-Herzegovina.[109] The European Commission

103. Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions (Mar. 20, 2008), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-00-55B/MSC39397R0000556127.PDF.

104. *Id.* ¶ 24.

105. Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11-153, Decision on the "Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", ¶ 3 (May 18, 2012).

106. Anna Dolidze, *Advisory Opinion on Responsibility And Liability For International Seabed Mining (ITLOS Case No. 17) And The Future Of NGO Participation in the International Legal Process*, 19 ILSA J. INT. & COMP. L. 379, 380 (2013).

107. *Id.*

108. Blečić v. Croatia, App. No. 59532/00 (July 29, 2004), https://hudoc.echr.coe.int/eng?i=001-72688.

109. *Id.*

took part in the proceedings by submitting briefs in the case of *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland* (2005).[110]

In *M.S.S. v. Belgium and Greece* (2011),[111] the Council of Europe Commissioner for Human Rights ("the Commissioner") and the Office of the United Nations High Commissioner for Refugees were authorized to submit their views in writing and to take part in the oral proceedings.[112]

For example, in the case *Jean Paul Akayesu*, the ICTR Tribunal considered the U.N. Secretary General's participation to be desirable for determining certain legal issues. The Tribunal noted: "[w]hereas therefore, the Tribunal considers it desirable for the proper determination of the case that a representative of the Secretariat of the Organization of the United Nations appear before the Tribunal for the purposes of making submissions on the scope of lifting the immunity enjoyed by the Major-General Dallaire as Former Commander-in-Chief of UNAMIR."[113]

In Case no. 17, the ITLOS itself requested the amicus curiae brief from the International Union for the Conversation of Nature (IUCN),[114] an intergovernmental organization that includes NGOs and states as its members.[115]

3. Corporations

Corporate entities also use the instrument of amicus curiae participation to take part in proceedings. The case of *Herrera-Ulloa v. Costa Rica*[116] of the IACHR exemplifies corporate participation alongside non-profit organizations in international litigation. In this case, the Court noted submissions from the following organizations: the Committee to Protect Journalists, the Hearst Corporation, the Miami

110. Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, App. No. 45036/98, ¶ 4 (June 30, 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564.

111. M.S.S. v Belgium and Greece, App. No. 30696/09 (Jan. 21, 2011) https://hudoc.echr.coe.int/eng?i=001-103050.

112. *Id.* ¶ 7.

113. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 20, 2008), ¶ 25 https://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf.

114. Anna Dolidze, *Advisory Opinion on Responsibility And Liability For International Seabed Mining (ITLOS Case No. 17) And The Future Of NGO Participation in The International Legal Process*, 379 ILSA J. INT. & COMP. L. (2013).

115. *See* Brian McGarry & Yusra Suedi, *Judicial Reasoning and Non-State Participation Before Inter-State Courts and Tribunals*, 21 L. & PRAC. INT'L. CT. & TRIBUNALS 123, 145 (2022).

116. *See generally* Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

Herald Publishing Company, *El Nuevo Día*, *La Prensa*, the Reform Group, Reuters Ltd., El Tiempo, the Tribune Company, *Asociación para la Defensa del Periodismo Independiente (PERIODISTAS)*, the Inter-American Press Association, *Colegio de Periodistas de Costa Rica*, Article 19, the Global Campaign for Free Expression, the Center for Justice and International Law (CEJIL), the World Press Freedom Committee, and the Open Society Justice Initiative.[117]

Further, corporations often participate in the capacity of associations. Industry associations are extremely active as amicus participants in proceedings before the WTO. For instance, in *US-Lead and Bismuth II*, the first case before the WTO in which corporate associations intervened, the American Iron and Steel Institute and the Specialty Steel Industry of North America submitted a brief in favor of the applicant (the US).[118]

The EC-Asbestos case stands out for the active participation of industrial associations. The International Council on Metals and the Environment and American Chemistry Council (United States and European Chemical Industry Council (Belgium)) were granted leave to submit their views.[119] The Association of Central American Sugar Industries intervened in the Appellate Body deliberation in the EC-Export Subsidies on Sugar case, although the body decided not to take the brief into account.[120] The Poultry Processors and Poultry Trade in the European Union Countries submitted a brief in the *EC-Customs Classification of Frozen Boneless Chicken Cuts Appellate Body* proceedings.[121]

4. States

States often participate in cases as amici curiae. It is no accident that the first case in which an international tribunal, the ECtHR, allowed the use of the amicus curiae participation procedure raised policy implications beyond the respondent state in question. The first intervention the

117. *Id.* ¶¶ 38–52.

118. Appellate Body Report, *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 36, WTO Doc. WT/DS138/AB/R (adopted May 10, 2000).

119. Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 56 n.32, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

120. Appellate Body Report, *European Communities–Export Subsidies on Sugar*, ¶ 9, WTO Doc. WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted Apr. 28, 2005).

121. Appellate Body Report, *European Communities–Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 12, WTO Doc. WT/DS269/AB/R, WT/DS286/AB/R (adopted Sept. 12, 2005).

Court welcomed was by the U.K. government in *Winterwerp v. the Netherlands* (1979).[122]

Since *Winterwerp*, states have intervened as amici in many international tribunals. In *Scozarri and Giunta v. Italy*, Belgium intervened in support of the application of its nationals.[123] In the case *of A, B, and C v. Ireland,* the Lithuanian government exercised its rights under article 36 (1) and intervened with a submission to support the claims of one of the applicants, a Lithuanian national.[124] In *Slivenko v. Latvia,* former stateless residents of Latvia who later received Russian citizenship brought the applications.[125] Russia again intervened in support of applications in *Sisojeva et al v. Latvia.*[126] In *Xenides-Arestis v. Turkey,* the Government of Cyprus intervened.[127] Cyprus was implicated in the case because the applicant was a Cypriot national living in Nicosia. The applicant owned property in the territory of the so-called Turkish Republic of Northern Cyprus and alleged that she had been forced to leave her native town by Turkish military forces and had since been unable to enjoy her possessions.[128]

In *EC-Sardines*, the WTO Appellate Panel admitted two briefs, one authored by an individual and the other by Morocco.[129] It discussed the right of Morocco to submit such a brief, its content, and its applicability to the dispute at hand. Ultimately, the panel decided that it did not share Morocco's arguments, although it did admit the brief.[130]

The Kingdom of Belgium intervened in the *Semanza* case of the ICTR. The Chamber considered the government's intervention to be valuable in relation to the applicable principles.[131]

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122. *See* Winterwerp v. The Netherlands, App. No. 6301/73, 2 Eur. H.R. Rep. 387, ¶ 7 (1980).

123. Scozarri v. Italy, 2000-VIII Eur. Ct. H.R. 401, ¶ 8.

124. A, B and C v. Ireland, App. No. 25579/05, ¶ 5 (Dec. 16, 2010), https://hudoc.echr.coe.int/fre?i=001-102332.

125. *See* Slivenko v. Latvia, 2003-X Eur. Ct. H.R. 229, ¶¶ 14–48.

126. *See* Sisojeva v. Latvia, 2007-I Eur. Ct. H.R. 127, ¶ 114.

127. Xenides–Arestis v. Turkey, App. No. 46347/99, 52 Eur. H.R. Rep. 490, ¶ 8 (2005).

128. *See id.* ¶¶ 10–11.

129. Appellate Body Report, *European Communities –Trade Description of Sardines*, ¶ 153, WTO Doc. WT/DS231/AB/R (adopted Sept. 26, 2002).

130. *Id.* ¶ 170.

131. *See* Prosecutor v. Semanza, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief and on the Defence Application to Strike Out the Observation of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, ¶ 10 (Feb. 9, 2001).

5. Individuals

Individuals also use the opportunity to present their distinct positions before tribunals. Law professors are active in taking part in the proceedings as amici. Individuals are among the most active amici participants in the ECtHRs.[132] In the case of *A, B, and C v. Ireland* (2010), which centered on the question of the legality of the prohibition of abortion under the European Convention, Kathy Sinnott, a Member of the European Parliament, took part as the amici.[133]

Consider, for instance, the *EC-Asbestos* case of the WTO. In this case, Professors Robert Howse, Jan McDonald, and Don Anton submitted briefs.[134] Professor Howse has been particularly active before the WTO dispute resolution body. He took part in both the *EC-Shrimps* and the *EC-Sardines* cases.[135] The panel deliberated on the acceptability of the briefs.[136] Professor Joanna Langille has also submitted a number of briefs in the *EC-Seal Products* at the Panel[137] and the Appeals levels.[138] Professor Katie Sykes also took part as amici on both levels in the *EC-Seal Products* case.[139]

B. *Multiple Voices Shape Each Other Through Dialogue*

The many unique voices in courtrooms constantly interact with the judges. The tribunals' responses to amicus submissions vary. Whereas in many cases the amici's submissions are only summarized, in some cases tribunals enter into a dialogue with the amici, disagreeing or agreeing with their arguments.

In *M.C. v. Bulgaria*, the applicant alleged that two men had raped her when she was fourteen and that Bulgarian law does not accord

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132. *See* Cichowski, *supra* note 3, at 904.

133. A, B, and C v. Ireland, App. No. 25579/05, ¶ 5 (Dec. 19, 2010), https://hudoc.echr.coe.int/fre?i=001-102332.

134. Appellate Body Report, European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 56 n.32, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

135. *See* Robert Howse, *Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENV'T L. 491, 503 (2002); *see also* European Communities–Trade Description of Sardines, ¶ 153, WTO Doc. WT/DS231/AB/R.

136. *See id.* ¶¶ 153, 156.

137. Panel Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 1.18 n.16, WTO Doc. WT/DS400/R, WT/DS401/R (adopted Nov. 25, 2013).

138. Appellate Body Report, European Communities–Measures Prohibiting the Importation and

Marketing of Seal Products, ¶ 1.15 n.32, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted May 22, 2014) [hereinafter EC – Seal Products].

139. *Id.*

sufficient remedy to victims of rape because it requires evidence of their active physical resistance.[140] Interights, a U.K.-based human rights organization, submitted an amicus brief.[141] The Court summarized Interights' submissions in detail, referring to the evidence submitted by the organization and specifically citing the submission with regard to the change in the definition of rape in international law and the prevalent definitions of rape in national legal systems.[142] In its assessment, the Court specifically relied on research findings brought by the organization, noting, "[t]he last decades, however, have seen a clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definitions and narrow interpretations of the law in this area.[143] The Court found violations of Articles 3 and 8 of the Convention.[144]

In *Kovacic and Others v. Slovenia*, the Court cited the submission of the amici but disagreed with it.[145] The Tribunal permitted the intervention by Croatia.[146] Prior to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the applicants, Croatian nationals, had deposited their hard foreign-currency savings in the Zagreb (Croatia) office of a Slovenian bank, Ljubljana Bank.[147] Ljubljana Bank was one of the main banks, with branches in many other Republics in the SFRY.[148] In response to the financial crisis that followed the dissolution of the SFRY, Slovenia adopted banking system reforms in the 1990s.[149] The applicants alleged that the Slovenian government's actions prevented them from withdrawing their savings and thus violated their property rights. [150]The intervening government of Croatia presented an extensive overview of the financial and banking situation in the SFRY and provided its own explication for the legal status of the bank in which the applicants had made their deposits.[151] The Court noted, "[T]he

140. *See* M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. 1, ¶¶ 10–68.

141. *See id.* ¶ 8.

142. *See id.* ¶¶ 129–47.

143. *Id.* ¶¶ 88–108, 126–47, 156.

144. *Id.* at 36, ¶ 1.

145. Kovačić v. Slovenia, App. Nos. 44574/98, 45133/98, and 48316/99, ¶¶ 156, 158, 159, 161 (Oct. 3, 2008), https://hudoc.echr.coe.int/eng?i=001-88702.

146. *Id.* ¶ 9.

147. *Id.* ¶ 174.

148. *Id.* ¶ 21.

149. *Id.* ¶¶ 33–34.

150. *Id.* ¶ 3.

151. *Id.* ¶¶ 204–16.

applicants, the respondent Government and the intervening Government have in effect requested the Court to go into a number of issues pertaining to the circumstances of the break-up of the SFRY, its banking system [. . .]."[152] Nonetheless, the Court decided that these issues were subject to domestic policymakers' decision-making.[153]

In *Bosphorus Airline Company v. Ireland*, the Court expressly shared the opinion of one of the amici. It granted intervention to the Italian and U.K. governments, the European Commission, and the *Institut de formation en droits de l'homme du barreau de Paris.*[154] The applicant, a chartered airline company registered in Turkey, had leased two aircraft from Yugoslav Airlines, the national airline of the former Yugoslavia at the time that the U.N. passed, and the European community implemented sanctions against the Federal Republic of Yugoslavia.[155] On May 17, 1993, one of the aircraft arrived in Dublin for a technical check by an Irish company. Upon completion of the check, the aircraft was not permitted to leave the airport, in accordance with U.N. sanctions.[156] Ireland had a wide margin of discretion in choosing how to implement its U.N. and European community obligations concerning the sanctions.[157] The applicant company submitted that Ireland's impoundment of the aircraft constituted a deprivation of its possessions, as understood under Article 1 of Protocol 1.[158] The case raised the question of the degree of Ireland's responsibility, with the view that Ireland possessed international obligations within other international organizations.

In its judgment, the Court spelled out in detail the arguments of each of the interveners, emphasizing their differences of opinion, and summarized the arguments of the Italian and British governments, the European Commission, and the *Institut.* Moreover, the Court expressly shared arguments presented by one of the interveners, the European Commission:

> The Court finds persuasive the European Commission's submission that the State's duty of loyal cooperation . . . required it to appeal the High Court judgment of June 1994 to the

152. *Id.* ¶ 235.

153. *Id.*

154. Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H. R. 107, ¶ 9.

155. *Id.* ¶¶ 11–14.

156. *See id.* ¶¶ 19–24.

157. *See id.* ¶¶ 115–16.

158. *See id.* ¶ 120.

> Supreme Court in order to clarify the interpretation of Regulation [. . .].[159]

The Court also openly agreed with another argument presented by both the intervener and the government of Ireland: "[t]he Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ . . ."[160]

In *S.A.S. v. France*, the Grand Chamber of the Court again engaged in dialogue with amicus curiae interveners. The case concerned the French law that banned the wearing of the full veil in public places. The applicant alleged that the ban contravened articles 3, 8, 9, 10, and 11 of the Convention, taken separately and together with Article 14.[161] In its judgment, the Grand Chamber first summarized the position of amicus interveners: Amnesty International, Liberty, the Open Society Justice Initiative, and ARTICLE 19, together with the Human Rights Centre of Ghent University and the Belgian Government.[162] In substantive terms, the Court sometimes agreed and other times disagreed with the position of the amici. The Court disagreed with the presumption put forth by the applicant and some of the interveners, stating:

> The Court would first emphasize that the argument put forward by the applicant and some of the third-party interveners, to the effect that the ban introduced by sections 1 to 3 of the Law of 11 October 2010 was based on the erroneous supposition that the women concerned wore the full-face veil under duress, is not pertinent. It can be seen clearly from the explanatory memorandum accompanying the Bill . . . that it was not the principal aim of the ban to protect women against a practice, which was imposed on them or would be detrimental to them.[163]

At the same time, the Court agreed with the proposition of the amici regarding a blanket ban: "[i]t should furthermore be observed that a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be

159. *Id.* ¶ 146.
160. *Id.* ¶ 147.
161. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, ¶ 3.
162. *Id.* ¶ 8.
163. *Id.* ¶ 137.

disproportionate. This is the case, for example, of . . . the non-governmental organizations such as the third-party interveners."[164] Further, the Court followed up on evidence presented by some of the amici in relation to Islamophobic remarks made during the drafting of the French ban.[165] Yet, it disagreed with the submission of the Open Society Justice Initiative about the existence of a wider European consensus against a ban on religious clothing.[166]

In most cases, the IACHR has simply noted the amici briefs and their authors. In certain instances, however, the Tribunal has mentioned the submissions and specifically acknowledged those made by the amici. In *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Court noted the long list of organizations that submitted amicus briefs.[167] Similarly, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court noted a series of amicus briefs provided by individuals and organizations. In *Allan Randolph Brewer Carías v. Venezuela*, the Court noted the extensive list of amici and specifically recognized the types of evidence the amicus briefs put forth.[168] The Court indicated, "All these amici curiae indicate various violations of Convention rights of Mr. Brewer Carias."[169] In *Bámaca-Velásquez v. Guatemala*, the Court noted the International Commission of Jurists' amicus curiae presentation on the right to truth for families of victims of forced disappearances.[170] Further, in *Yatama v. Nicaragua*,[171] the Court did both. On one hand, it acknowledged submissions by several NGOs: the Wisconsin Coordinating Council on Nicaragua,[172] the United Nations University for Peace,[173] the University of Arizona's Indigenous People Law and Policy Program,[174] and the Office of the Ombudsman of Nicaragua.[175] On the other hand, it

164. *Id.* ¶ 147.

165. *See id.* ¶ 149.

166. *See id.* ¶ 156.

167. The Court received eight amicus briefs from 34 organizations and individuals. *See* Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 8 (Nov. 24, 2010).

168. *See* Brewer Carías v. Venezuela, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 278, ¶ 9 (May 26, 2014).

169. *Id.* ¶ 3.

170. Bámaca–Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 64 (Nov. 25, 2000).

171. Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

172. *Id.* ¶ 17.

173. *Id.* ¶ 34.

174. *Id.* ¶ 38.

175. *Id.* ¶ 42.

refuted the government of Nicaragua's objections to the amicus briefs and specifically noted the useful value of the amicus submissions: despite Nicaragua's denial of any legal value of the amicus curiae briefs, the Court notes that the submitted briefs offer useful information.[176]

Similarly, in *Almonacid-Arellano et al v. Chile*, the Court accepted submissions by the American Association of Legal Scholars of Valparaíso/Aconcagua and noted that it accepted the briefs because "they contain information which is useful and relevant to the instant case."[177]

The ICSID investment arbitral tribunal's judgment in the *Pac Rim* case illustrates polyphony in investment arbitration.[178] Eight member organizations of *La Mesa Frente a la Minería Metálica de El Salvador* (the El Salvador National Roundtable on Mining) submitted a brief dated May 20, 2011, under the umbrella of the Center for International Environmental Law (CIEL).[179] Pursuant to Central American Free Trade Agreement Article 10.20, the amici were given permission to submit their briefs.[180] The Tribunal issued the procedural order regularizing the submissions by the amici curiae.[181] It then summarized these submissions,[182] particularly in relation to the issue of abuse of process.[183] It accepted the task of responding to the issues raised by the amici in addition to the claims put forth by the parties: "the Tribunal will limit itself here to the Amicus' arguments relating to the Abuse of Process issue."[184] It responded directly to the amici submission and rejected their contentions in relation to the issue, noting that the applicant's change of nationality did not amount to abuse of process. Further, it noted, "[t]he Tribunal does not accept the arguments made to the contrary in the Amicus Curiae Submission."[185]

The WTO's dispute resolution panels have recognized and directly engaged with amicus submissions from various organizations. Even the very first case in which the panel was confronted with amicus petitions

176. *Id.* ¶ 120.

177. Almonacid-Arellano et al v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 80 (Sept. 26, 2006).

178. *See generally* Pac Rim Cayman L.L.C. v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (June 1, 2012).

179. *Id.* ¶ 1.33.

180. *Id.* Annex to Part 1, ¶ 1.10

181. *Id.* ¶ 1.35.

182. *Id.* ¶ 1.36.

183. *Id.* ¶¶ 2.36–40.

184. *Id.* ¶ 2.39.

185. S*ee id.* ¶ 2.43.

by NGOs shows its dialogue with the amicus petitioners.[186] The panel rejected briefs by the World Wildlife Fund for Nature and the CIEL, albeit with an extensive explanation addressed to the petitioners and to the wider audience, highlighting the reasons for the rejection.[187] The panel specifically informed the petitioners about the possibility of attaching the briefs to the parties' submissions.[188]

WTO panels have engaged in dialogue with amicus petitioners in other cases as well. For instance, the organization Concerned Fisherman and Processors in South Australia wrote a letter to the panel in the *Salmon* case between Australia and Canada.[189] The panel accepted the letter, making it part of the case file. In addition, explaining the decision, the panel noted that the material had "a direct bearing" on Canada's claim.[190]

In the *EC-Sardines* case, the WTO Appellate Panel admitted two briefs, one authored by an individual and the other by Morocco. The panel deliberated on their acceptability and analyzed the brief by Morocco in detail.[191] It discussed the right of Morocco to submit such a brief, its contents, and its applicability to the dispute at hand. Ultimately, the panel decided that although it would admit the brief and make it part of the case, the brief was not useful.[192]

Moreover, dialogue occurs not only between participants and judges. The WTO dispute resolution gives participants an opportunity to enter into dialogue with each other. For instance, in the *Asbestos* case, the panel gave Canada the opportunity to respond in writing as well as orally to two amicus curiae submissions by Collegium Ramazzini and the American Federation of Labor and Congress of Industrial Organizations.[193] The opportunity was taken up by Canada.[194]

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186. For a detailed discussion of the dialogue, see Geert Zonnenkeyn, The *Appellate Body's Communication on Amicus Curiae Briefs in the* Asbestos *Case-an Echternach Procession?* (Institute for International Law, Working Paper No. 10, 2001), https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP10e.pdf.

187. *See* Panel Report, United States–Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 7.8, WTO Doc. WT/DS58/R (adopted May 15, 1998).

188. *Id.*

189. Panel Report, Australia–Measures Affecting Importation of Salmon-Recourse to Article 21.5 by Canada, ¶ 7.8, WTO Doc. WT/DS18/RW (adopted Feb. 18, 2000).

190. *Id.* ¶ 7.9.

191. *See* Appellate Body Report, European Communities–Trade Description of Sardines, ¶¶ 153–70, WTO Doc. WT/DS231/AB/R (adopted Sept. 26, 2002).

192. *Id.* ¶ 170.

193. Panel Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 6.1, 8.12, WTO Doc. WT/DS135/R (adopted Sept. 18, 2000).

194. *See id.* ¶ 6.2.

The initial justification for allowing amicus curiae briefs is notably similar in a different international dispute resolution body, the NAFTA Investment Tribunal. *Methanex* was the first case to recognize the "privilege" of third parties to participate as amicus curiae in investment arbitration proceedings.[195] The case concerned a dispute under NAFTA and was adjudicated under the U.N. Commission on International Trade Law (UNCITRAL) Rules. The dispute centered on the right of the government of California to ban substances produced by a Canadian investor, on the basis of potential health risks to local populations. Several NGOs, including the International Institute for Sustainable Development, petitioned the arbitral tribunal to submit an amicus brief.[196] The tribunal held that it had authority to permit or prohibit amicus access, and it emphasized that the case concerned a matter of great public interest and that rejecting an amicus brief in these circumstances could have been harmful:

> There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. [. . .] The public interest in this arbitration arises from its subject matter. [. . .] In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general, and this arbitration in particular, whereas a blanket refusal could do positive harm.[197]

ICTY engaged in a conversation with the authors of the amicus curiae submission in the *Furundžija* "Lašva Valley" case. The Court accepted the amicus curiae brief by eleven applicants who are scholars of the international human rights of women or representatives of NGOs.[198] In the trial judgment, the Court noted the submission, underlining the usefulness of such briefs: "[t]he Trial Chamber granted the applications seeking leave to file two *amicus curiae* briefs. Timely assistance in

195. Patrick Dumberry, *The Admissibility of Amicus Curiae Briefs by NGOs in Investors-State Arbitration: The Precedent Set by the Methanex Case in the Context of NAFTA Chapter 11 Proceedings*, 1 NON-STATE ACTORS AND INT'L L. 201, 201 (2001).

196. Methanex Corporation v. United States, Decision of the Tribunal on the Petition from Third Persons to Intervene as "Amici Curiae", ¶ 1 (Jan. 15, 2001).

197. *Id.* ¶ 49.

198. Prosecutor v. Anton Furundžija, Case No. IT-95-17/1-T, Order Granting Leave to File *Amicus Curiae* Brief (Int'l Crim. Trib. for the Former Yugoslavia Nov. 10, 1998), http://www.icty.org/x/cases/furundzija/tord/en/81110AA24608.htm.

this manner is generally appreciated."[199] At the same time, the Tribunal responded to the claims in the brief, elaborating on its own position: "[u]nfortunately, both the briefs dealt at great length with issues pertaining to the re-opening of the instant proceedings. By the time the two briefs were received, the re-opening of the proceedings had already been decided[. . .]."[200] In this way, the Tribunal elaborated on the reasons for reopening the proceedings.[201]

Similarly, in the case of *Laurent Semanza,* the *ICTR* Chamber regarded the submission by the Belgian government as useful and indicated that "it may be useful to gather additional legal views on the scope of the applicability of Article 3 common of the four Geneva Conventions, and Additional Protocol II."[202] The Chamber determined that the Belgian Government's submission is maintainable with respect to the legal principles involved, and not with respect to the particular circumstances of this or any other case.[203]

The ICC discussed the usefulness of amicus submissions made by the Women's Initiative for Gender Justice. For instance, in *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Court remarked, "[h]aving considered the Request submitted by the Women's Initiatives for Gender Justice, the Single Judge is of the view that the proposed amicus curiae brief tends to provide legal information that the Chamber may find useful in the context of the present case. The Single Judge considers, therefore, that granting the Request is both desirable and appropriate for the proper determination of the case."[204]

The ICC engaged with the amicus curiae even in cases in which participation was refused. In *The Prosecutor v. Mathieu Ngudjolo Chui*,[205] the Court rejected a brief by the Queen's University Belfast Human Rights Centre, noting:

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199. Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 107 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

200. *Id.*

201. *Id.*

202. Prosecutor v. Semanza, Case No. No. ICTR- 97-20-T, Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, ¶ 10 (Feb. 9, 2001).

203. *Id.*

204. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶ 12 (July 17, 2009).

205. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the motion filed by the Queen's University Belfast Human Rights Centre for leave to submit an amicus curiae brief on the definition of crimes of sexual slavery (Apr. 7, 2011).

> However, at the current stage of the proceedings, the Chamber does not consider that the QUB Human Rights Centre's submission would be an indispensable aid to the Chamber, or that it would provide information that otherwise would not be available to the Chamber. Accordingly, the Chamber is not required, for the proper determination of the case, to grant the motion submitted by this academic institution.[206]

V. The Future of Polyphony In International Lawmaking

Most scholars of international tribunals imply that international dispute resolution takes a form of a triadic dialogue. However, the international courtrooms are no longer solely triadic. As judges and multiple diverse litigant and non-litigant parties engage in dialogue with one another, the trials become avenues for this interplay. Polyphony is one way to conceptualize the international dispute resolution formed through bringing together various actors' harmonious and disharmonious voices acting in the capacity of amicus curiae. A polyphonic tribunal reflects a conversation among the many and diverse entities present.

Theorizing international dispute resolution as polyphony has multiple implications. First, this is the very first attempt to provide for an overarching theory of amicus curiae participation in international law. Existing studies engage in the analyses of the amicus curiae submissions and their impact before various tribunals and fall short of offering a theory of the relationship between amicus curiae participants and the international tribunals.

The previous theoretical accounts of international dispute resolution did not do justice to all the actors that shape the process. Certain processes, such as the contribution of amicus curiae participants and judges' dialogue with them, have been overlooked. How amici's ideas and voices flow into the dispute resolution fora and shape the processes within the courtroom needs to be accounted for. If multiple and divergent voices shape international courtrooms' character and influence how international law is made in international tribunals, then theoretical accounts that do not reflect this influence remain inaccurate. For instance, the authoritative narrative theory, the dominant theory explaining the authority of international tribunals, needs to be reconsidered. Traditionally, based on the adversarial nature of proceedings,

206. *Id.* ¶ 6.

the theory tasks judges with creating a narrative that draws on the positions of two parties. However, as we see, in most international tribunals judges have a different and perhaps a more difficult task: to recognize, to enter into dialogue with, and to establish a narrative based on a dialogue between many participants who are diverse both in form and in their positions. The authoritative narrative theory has to account for this change.

Polyphony sheds a different light on the theoretical accounts of international dispute resolution, and in particular on international tribunals' engagement with amicus curiae. Although international tribunals are well studied, most work focuses on individual tribunals or on tribunals of a similar nature (e.g., international criminal tribunals); studies that theorize on the phenomena across tribunals are the exception. This Article enriches the scholarship in this particular aspect as well.

Finally, this Article contributes to interdisciplinary work in law and literary studies. It is the first instance of applying Mikhail Bakhtin's notion of polyphony to international law. By bringing Bakhtin's work to shed light on legal phenomena, it strengthens the connection and the exchange between these two fields.

Moreover, the polyphonic view of the courtroom changes our perception of the judicial role. We might be witnessing a new emerging role of an international judge as facilitator. Triadic accounts of dispute resolution emphasize a specific role of a judge. Judges dominate and control proceedings through a well-regulated, structured engagement with two sides, litigant parties. In polyphony, however, the role of the bench is reshaped. To handle the influx of multiple and diverse actors, and their divergent positions, judges must assume the role of facilitator. They recognize and engage tens of participants, adopt and respond to their contradictory and divergent arguments, and devote to these steps trial resources, including time and resources that are inevitably limited. This could be occurring for pragmatic considerations. It is noteworthy that this new role of judge is neither adversarial nor inquisitorial in the traditional sense. The duty and the ability to recognize, to engage, and to draw upon many, different, and often conflicting voices is new and very different from how the role of the judge has been understood in either of these two traditional systems.

Moreover, in polyphony amici's interventions often supplant the questions/arguments that would have to be raised by judges themselves. Judges are prompting parties to engage in a conversation with points put forward by the amici. In this different, facilitator role, judges step back from dominating the courtroom conversation toward steering dialogue between participants. This Article does not aspire to

answer all these questions; it instead offers preliminary insights into new potential research avenues opened by the theory of polyphony.

The implications of the polyphonic view for the practice of international dispute resolution also have to be accounted for.

Polyphony has an emancipating potential for non-state actors. Being recognized as taking part in international lawmaking presents an opportunity for non-state actors to raise their profile, to raise the visibility of their campaign, and to increase the exposure of their issues and agenda. Polyphony gives voice to those actors that could not obtain such recognition previously. In a polyphonic courtroom, non-state actors do not have to go through states or parties with legal standing as gatekeepers to express their positions.[207] Moreover, numerous advocacy groups are active in advocacy related to international litigation. They mainly rely on "information politics."[208] Polyphony gives these groups an opportunity to participate in international dispute resolution, to be recognized for their opinions, and to influence how international law is made.

The polyphonic perception of the international courtroom is not just an academic exercise. It raises important practical implications for tribunals as well as for non-state actors themselves. Admittedly, polyphony highlights questions in relation to the fairness of trials and the equal treatment of all actors. The dialogue between the bench and participants is inevitably sporadic. Judges have neither the time nor the space needed to devote equal attention to all actors willing to intervene in the proceedings. Thus, they must and do choose which actors to engage with. They must enter into dialogue with actors while overlooking the voices of others without substantiating their decision and explaining their approach. Sooner or later, this approach will raise issues of fairness and equal treatment. Actors that do not receive judicial attention and mention will question the fairness of the treatment. Proceedings that lack fairness and where unequal treatment is suspected will be questioned about the rule of law and will lose legitimacy in public.

There might be a temptation, in order to remedy this charge of unfairness and the unequal treatment of all entities that request participation, to call for international courts to fully embrace requests for

207. On gatekeepers, *see* SIDNEY TARROW, THE NEW TRANSNATIONAL ACTIVISM 145 (2006); Sidney Tarrow, O*utsiders Inside and Insiders Outside: Linking Transnational and Domestic Action for Human Rights*, 11 HUM. RTS. REV. 171, 180 (2010).

208. For the use of the concept, *see, e.g.*, MARGARET E. KECK AND KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 13 (1998).

participation of all actors and to urge judges to engage with all their positions. For instance, Robert Rubinson has argued in relation to domestic courts that a judicial opinion should "embrace dialogue and complexity, and recognize the independent validity of multiple perspectives."[209] Nevertheless, this is not a real possibility: the bench will have neither the time nor the space to recognize and to enter into dialogue with all actors willing to take part in proceedings given that international litigation often raises issues of such importance that they might draw numerous actors.

One policy suggestion is for international tribunals to move forward in giving structure to polyphony. Courts could adopt a set of rules that will normalize expectations and provide equal opportunities for all those aspiring to participate. Having been confronted with amicus requests, some international tribunals have already taken the initial step of legalizing basic participation procedures.[210] However, in most cases a bigger step is necessary: amending tribunals' rules of procedure to set fair terms for participation as amici curiae and for the court's engagement with participants. Such a change would eliminate arbitrariness in courts' engagement with parties and give polyphony a necessary and predictable structure. Polyphony, after all, does not presume chaotic and arbitrary engagement; it instead presumes a rigid structure that nevertheless guarantees space for the recognition of individuality.[211]

VI. Conclusion

The fact that amicus curia participate in international lawmaking is widely recognized in scholarship. However, the theoretical approaches to this phenomenon have so far missed an important pattern. Most scholars have focused on examining the political or advocacy strategies employed by amici curiae to advance their aims, and have studied the degree of influence that they have on international lawmaking by ICTs. Further, legal scholarship has paid much more attention to the conceptualization of international dispute resolution from the perspective of tribunals, overlooking the need to closely study the activity of amici curiae, although the procedure is accepted and practiced across international courts and tribunals. Moreover, all schools of thought rely on

209. Robert Rubinson, The *Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 Dick. L. Rev. 3, 5 (1996).

210. *See* Anna Dolidze, *Bridging Comparative and International Law:* Amicus Curiae *Participation as a Vertical Legal Transplant*, 26 Eur. J. Int. L. 851, 851 (2016).

211. *See, e.g.*, Peter Phillips, *Singing Polyphony*, 155 Musical Times 7, 18 (2014).

or presume the triadic structure of international dispute resolution: that is, the bench engages with and draws upon the position of two opposing sides.

This Article suggests that we rethink the nature of international dispute resolution. Using a case study of amicus curiae participation across international tribunals, I show that the nature of international dispute resolution has changed. Multiple and diverse participants from different positions exist in courtrooms, they present their views in relation to the issue at hand, and the tribunals recognize and engage with them in unsystematic dialogue.

Polyphony in international dispute resolution has significant normative, theoretical, and practical consequences for international law scholarship as well as for international tribunals and non-state actors. As a new and distinct conceptual lens, polyphony in international dispute resolution sets ground for future thinking on the changing nature of international law and the role of non-state actors in relation to it.