Spring 2021

Strategic Litigation and the Evolution of Regional Human Rights Norms: Cases from Germany and The Netherlands

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STRATEGIC LITIGATION AND THE EVOLUTION OF REGIONAL HUMAN RIGHTS NORMS: CASES FROM GERMANY AND THE NETHERLANDS

An Undergraduate Thesis
Submitted in Partial Fulfillment of
University Honors Program Requirements
University of Nebraska-Lincoln

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15 March 2021

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Abstract

This study seeks to fill gaps in our understanding of how private actors participate in international human rights politics by examining civil society involvement in European Court of Human Rights (ECtHR) cases against long-standing democracies. Descriptive analysis of an exhaustive data set of instances of civil society organization (CSO) participation in ECtHR cases against Germany and The Netherlands is complemented by a comparative case study analysis of networks of organizations that mobilized around German and Dutch cases concerning Articles 8 (right to privacy) and 10 (freedom of expression). The data suggest that civil society organizations not only appear before the ECtHR for financial or moral redress when rights violations have occurred, but also that some CSOs use strategic litigation to pursue their sector policy preferences when the opportunity for an impactful legal development arises.

Keywords: Human rights; civil society organization; strategic litigation; legal mobilization; judicialization of human rights; European Court of Human Rights; ECtHR.

Introduction

Since the end of World War II, the international community has forged human rights and criminal accountability systems that have since been increasingly legalized and judicialized, gaining furthered recognition and importance as they investigate allegations of abuse, try accused and offer accountability and reparations to victims—functions which domestic institutions oftentimes cannot fulfill. In Europe, post-war commitments to protect democracy, human rights and the rule of law led to the development of the 'European Union' (EU) treaties and the European Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention), both of which have facilitated increasing European integration and constitute important contemporary sources of European law.

The European Court of Human Rights (herein after ECtHR or the Court), the body which oversees the implementation of the Convention, has created an expanding opportunity for rights claims beyond domestic courts within its 47 member states. Having handed down over 15,000 judgments and receiving nearly 50,000 new petitions each year, by most measures, the ECtHR has been very successful (Hillebrecht 2014).

It is important to note that with the advancement of these supranational tribunals, individuals find themselves increasingly governed by "a dense and binding set of international laws and norms—often policies constructed with little or no direct electoral participation by society" (Cichowski 2016). These policy determinations are instead influenced by the individuals, interest groups and companies that access the Court as direct claimants, legal representation or third-party interveners. However, cross-national variation in legal mobilization by these actors has been identified and studied, but the lack of a solid framework to account for these differences constitutes a notable gap in the understanding of the processes that lead to the creation of important

supranational policy (Conant 2016). Moreover, a growing literature about legal mobilization has explored how and why these actors interact with the Court to advance their interests and a number of findings have led scholars to question the degree to which these judicial processes strengthen (Cichowski 2006a) or damage (Dehousse 2000) principles of democratic participation.

Scholars have recognized that a deeper understanding of the causes of variation in legal mobilization across Europe is needed before normative conclusions can be drawn about these trends, but most analyses of civil society participation at the Court are centered around states with the highest violation rates (Conant et al. 2018). Recognizing the need for systematic analysis of legal mobilization patterns, Cichowski and Chrun have compiled a database, The European Court of Human Rights Database (ECHRdb), which enables the examination of judgments and legal mobilization patterns of different actors at the Court, but much of the data has yet to be analyzed (Cichowski and Chrun 2017). Recognizing that the majority of literature exploring participation at the European Court of Human Rights is centered around cases originating in the weaker democratic states that most often appear before the Court, this study instead seeks to contribute to the growing literature on participation in international judicial politics by completing an in-depth analysis of legal mobilization by civil society organizations concerning two long-standing democracies (democratic from 1946 on), Germany and The Netherlands.

The first section of this study offers an overview of the existing literature concerning participation by non-state actors at international tribunals, concluding with the argument that the judicialization of international human rights in the European context provides increased opportunity for civil society actors to pursue regional policy preferences via strategic litigation at the ECtHR. The following section provides a

detailed overview of participation by civil society organizations in ECtHR cases concerning Germany and The Netherlands, employing descriptive analysis of an exhaustive data set of instances of participation by civil society organizations in cases against both countries. The descriptive analysis is followed by a comparative case study of networks of actors involved in ECtHR cases regarding the right to privacy and freedom of speech, which exemplifies the strategic nature that can characterize civil society organization involvement in international human rights litigation. A brief summary of this study's findings and their implications for future research conclude this analysis.

Relevant Literature and Theory

A number of scholars have sought to illustrate how non-state actors use international courts, signaling a shifting balance of power between citizens, governments, and international organizations that has led to transformations in democratic participation in global governance (Cichowski 2006b; Alter 2006). Judgments by international courts have proven to result in far-reaching policy reforms, often against member state preferences (Cichowski 1998), sparking a debate among scholars whether increased power for and access to international courts enhance (Cichowski 2013; 2006a; Alter 2006) or damage (Dehousse 2000; Rubenfeld 2004) principles of democratic participation. Indeed, Alter observes a sharp increase in the number of international courts with a "new-style" design throughout the globe, which have both compulsory jurisdiction (they can compel member states to litigate before them) and private access (non-state actors can participate in decisions), meaning that non-state actors are increasingly gaining access to international lawmaking institutions (Alter 2006). In light of this proliferation of international courts with heightened public

access, it is important to understand the relationship between that heightened access and the fulfillment of democratic principles.

In the context of the European Court of Human Rights, many scholars argue that the body's supranational authority to decide on questions of human rights practices, combined with its "new-style" jurisdiction and access design, increase opportunity for participation in international rights development through law enforcement, rights claiming, and expanded protections (Cichowski 2006a). Alter adopts a neo-functionalist approach to participation at the venue, contending that compulsory jurisdiction and private access are in fact necessary for the fulfillment of rights claiming, constitutional (or conventional) review, and law enforcement roles, all of which the ECtHR seeks to fill (Alter 2006).

Provided the lack of consensus concerning the democratic—or antidemocratic—nature of non-state actor involvement with international politics via supranational tribunals, a number of authors first seek to explain how and why actors participate in international litigation before contributing to the normative debate. Findings by authors working with this topic are many and overlapping. Cichowski identifies three variables expected to cause variation in participation at international courts: the nature and scope of rules and regulations that define what claims actors can make in court; the relative power of nonmajoritarian organizations (like the ECtHR) to review acts of public officials and member state governments; and the degree of access and amount of resources supporting private access to the institution (Cichowski 2006b). In line with Cichowski's third variable, Börzel notably identifies rules of access to international courts and the availability of social, financial, and intellectual resources as important determining factors in an actor's likelihood to mobilize international law, finding that "actors poor of organizational and resources capacities […] stand little chance to benefit

from the increased opportunities for participation through EU law enforcement" (Börzel 2006). In addition to supporting Börzel's findings, Vanhala identifies identity politics and the 'meaning frames,' (i.e., the processes by which organizations arrive at collective action frames) of civil society organizations, as informing non-state actors' decision to use international courts (Vanhala 2009).

Conant similarly argues that the legal consciousness of societal actors, along with the availability of support structures for individual victims of human rights violations are likely to determine legal mobilization, much like Sundstrom, who finds that specific training on how to use the ECtHR and the particular backgrounds of activists and their organizations influence their likelihood to use the ECtHR as an advocacy strategy (Conant 2016; Sundstrom 2014). At this point, an overview of the literature relevant to the topic of participation by civil society actors in supranational judicial bodies demonstrates that, while there is a general consensus among scholars that the judicialization of international law has resulted in the opening up of a sphere that has traditionally been closed to high-level officials, the questions of what explains variation in public participation in its process and whether that participation leads to positive or negative democratic outcomes remain unanswered.

Departing from the question of what motivates and discourages actors to turn to international litigation, Van den Eynde instead focuses on the growing presence of human rights organizations (HROs), or specialized, non-profit organizations that seek to promote human rights, in judgements before the Court, finding a notable uptick in *amicus curiae* (Latin for 'friend of the court') submissions, not only by HROs, but also by more specialized groups such as professional associations and even conservative groups (Van den Eynde 2013). The practice of accepting *amicus* briefs (sometimes called third party or 'sword-fighting' intervention) allows an actor who is not a direct party to

the case to intervene to provide legal expertise, factual information, or insight into public interests (Bartholomeusz 2005). In the context of the European Court of Human Rights, any group or individual can request permission to intervene on a case to submit an intervention and Cichowski argues that this mode of involvement at the Court provides non-state actors with increased opportunity to play a direct role in the development of international human rights law, finding that a myriad of civil society groups, HROs, and professional associations take advantage of this opportunity to initiate significant supranational policy reforms (Cichowski 2016).

The possibility of achieving an enforceable set of policy goals via international litigation is an important feature of the European Court of Human Rights. Strategic litigation, defined as litigation "that seeks to change the law or how it is applied, in a way that will affect society as a whole", is a well-employed method by human rights practitioners at the ECtHR, who have successfully expanded protections for gross human rights violations in addition to attaining moral and financial redress for victims (Rekosh, Buchko, and Terzieva 2001; Solvang 2008). In fact, in the regional context of Europe, Kelemen argues that the economic liberalization resulting from the Single Market initiative and the fragmentation of power both horizontally and vertically within the region have driven private actors to use international litigation to pursue their policy preferences, resulting in the spread of the 'adversarial legalism' that has notably produced far-reaching policy reforms in the United States (Kelemen 2006).

The arguments presented by Solvang and Kelemen are interesting because they explore the possibility of participation in international law development motivated by a function beyond traditional dispute resolution and provision of redress (Solvang 2008; Kelemen 2006). At the European Court of Human Rights, which is often thought of as a venue of last resort for the most vulnerable residents within its jurisdiction to receive

moral and financial redress for rights violations, judges indeed dispose of the authority to revise laws and practices of member states, at times producing new supranational human rights standards that are enforceable across the region (Solvang 2008).

Within the literature that has been mentioned insofar, most analyses of private actor participation understandably are concentrated around participation in ECtHR cases against the member states with the highest violation rates, notably Russia (Sundstrom 2014); high-profile issue areas, such as torture and gender discrimination (Conant 2016; Vanhala 2009); or a specific mode of participation, such as third party interventions (Cichowski 2016). It is appropriate to point out, however, that an in-depth understanding of how actors mobilize Convention law within member states with fewer violations—often those states in which human rights protections are most entrenched—is lacking.

Conventional wisdom might lead an observer to expect that cross-national differences in the quality and functionality of human rights protections are reflected in the violation rates of each government. In other words, one might expect that actors within states with the best human rights practices are simply motivated less often to petition the ECtHR because fewer human rights violations take place. However, taking into account the documented use of strategic litigation at the Court to achieve supranational human rights policy reform and Kelemen's argument that regional integration can spur policy actors to pursue their interests via litigation (Solvang 2008; Kelemen 2006), it is reasonable to question the logic that a demand for redress—or lack thereof—is what defines civil society involvement in ECtHR cases in states where fewer human rights violations occur.

States with fewer allegations of human rights—today they are typically long-standing democracies in Western Europe given social and political divisions during the

Cold War era—often host the societal actors that are most equipped to mobilize international law, with unequal access to financial and professional resources required to use it (Conant 2016; Börzel 2006). The marked availability of such resources within long-standing democracies in Europe coincides with a longer history of belonging to and operating within regional bodies like the Council of Europe compared to former Soviet states, leading scholars such as Conant to believe that the legal consciousness of individuals and organizations can inform their decisions to mobilize international law (2016). In long-standing European democracies where the legal consciousness of civil society actors is likely to be higher, the enforceability and accessibility of ECtHR judgments, combined with available financial and legal resources could very well attract actors to litigate for reasons beyond the attainment of moral and financial redress.

Here, it is appropriate to clarify that the judgments delivered by the Court by nature deliver a degree of moral or financial redress (when just satisfaction is awarded) where a violation is found. However, the fact that civil society actors can participate in Court proceedings, not only by making a rights claim to hold a responding government accountable, but also by representing a claimant or as a third party intervener, demonstrates the multiplicity of interests that can be represented as judges interpret and apply the Convention. Considering these dynamics, I argue that, as human rights in Europe become increasingly judicialized, there will be increased opportunity for civil society organizations to pursue their policy goals through strategic litigation at the European Court of Human Rights.

The remainder of this study demonstrates strategic litigation at the ECtHR in long-standing democracies by employing a multi-method analytical design. An overview of participation by civil society organizations (CSOs) at the ECtHR concerning

cases originating in Germany and The Netherlands is provided, using descriptive analysis of an exhaustive data set detailing instances of CSO involvement in cases against these states. A comparative case study analysis of civil society mobilization around questions of freedom of speech and privacy in both states follows, providing an example of the dynamics of strategic litigation at the ECtHR and supporting the argument that, in long-standing democracies, participation by civil society organizations in international human rights judicial politics should not only be approached as litigation for redress, but also in some cases as strategic litigation along policy preferences.

Data & Methods

The European Court of Human Rights creates a data rich environment that facilitates the systematic exploration of civil society participation in international judicial politics. The Court is the judicial body of the Council of Europe and is located in Strasbourg, France. Set up in 1959 by the then 13 member states to rule on alleged violations of the European Convention on Human Rights, the Court has since expanded to include a population of 830 million inhabitants in 47 member states, all of which are bound to enforce ECtHR rulings. It is the most active international court in the world, having made more than 18,000 judgements since its establishment and receiving more than 40,000 applications in 2020 alone ("Analysis of Statistics 2020" 2021). The unique accessibility of the ECtHR is one of its defining characteristics; states, individuals, groups of individuals, and organizations residing in any member state can bring claims of Convention violations to the Court. But despite the Court's unprecedented progress in expanding human rights protections across the region, we have yet to understand the

processes by which civil society actors in long-standing democracies participate in the significant political and legal reforms that ECtHR judgements can oftentimes initiate.

This study includes a multi-method research design, employing both qualitative and quantitative analytic methods. A data set detailing CSO participation in ECtHR judgements against Germany and The Netherlands and a comparative case study analysis were used to explore how civil society organizations participate in international judicial politics. Descriptive analysis of the data set was selected as a method in order to gain an aggregate-level understanding of how civil society organizations are active before the Court and the comparative case study analysis enables an in-depth examination of the dynamics of civil society participation. A combination of data from the two sources provides an illustrative picture of CSO participation in ECtHR cases in long-standing democracies. The procedures for each method are described in turn below.

Data Set

In order to first understand how CSOs interact with international judicial politics in long-standing democracies, a data set detailing all instances of CSO participation in cases against Germany and The Netherlands before the ECtHR was constructed. Participation, for the purposes of this data set, was defined to consist of three possible modes: serving as direct claimant, submitting a third-party intervention (*amicus curiae* report), or providing counsel to a direct claimant. Germany and The Netherlands were selected for analysis on the basis of three factors: their long-standing membership in the Council of Europe (from 1952 and 1954, respectively); their status as long-standing democracies, as each country was an original signatory of the Convention (Duranti 2017); and their remarkable compliance with ECtHR judgements.

Data for the data set were drawn from two sources. First, instances of CSO participation in cases against Germany and The Netherlands were isolated from Cichowski and Chrun's European Court of Human Rights Database (ECHRdb), which includes more than 15,000 judgements by the ECtHR from 1960-2014 and identifies interest and advocacy participation in the cases (Cichowski and Chrun 2017). No similar database could be identified. Second, because the ECHRdb includes information through 2014, the Council of Europe's full text online database of judicial decisions, HUDOC [accessible at: https://hudoc.echr.coe.int], was used update the data to include judgements delivered through 2019. Participating actors and their mode of involvement are defined in the procedure section of each case document and were easily identified and recorded. Altogether, the data set includes 123 instances of interest and advocacy group participation in 63 different ECtHR judgements.

Case Study Selection

Following the construction of the data set, descriptive analysis of CSO participation at the ECtHR was used to facilitate case study selection in order to examine the particular dynamics that define how actors are involved with Court rulings. The comparative case study concerning Articles 8 and 10 of the Convention was selected on the basis of two factors. First, mobilization in both Germany and The Netherlands around cases concerning these articles was comparatively high, enabling cross-country comparison. Second, descriptive analysis of the data set indicated that CSOs mobilized to support the German government's position in 12 of the 28 judgments concerning the two articles in which Germany was the responding government. This figure is contrasted by cases in the same issue-areas raised against The Netherlands, where no such instances can be found.

Analysis

Overview of Context of CSO Participation in Long-Standing Democracies

A civil society organization can formally participate in cases at the European Court of Human Rights in one of three ways. First, a CSO may access the Court as a petitioner (also commonly referred to as claimant, litigant, or defendant) by submitting an application to the ECtHR once all domestic legal remedies have been exhausted. The Court examines the merits of applications under the Convention and decides whether the case can be ruled on. If the case is deemed admissible, the respondent government becomes the party held liable for the alleged abuse, regardless of the defendant in the domestic proceedings. Second, CSOs can participate in ECtHR cases by providing legal counsel to petitioners, which is common practice for a number of specialized HROs that house lawyers specifically trained for casework at the ECtHR (Sundstrom 2014). Third, CSOs can be a 'third party' to Court cases as an *amicus curiae* (also commonly referred to as third party intervener). The two modes of participation most relevant to this study are petitioning the Court and submitting a third party intervention. In only two cases before Germany and one case before The Netherlands did a CSO provide counsel for the petitioner, so although this practice was observed, the focus of this analysis lies on the two more salient modes of participation.

Descriptive analysis of data set

Descriptive analysis of the data set indicated that interest groups were involved in 9.09% of total judgments delivered against The Netherlands, compared to 12.64% involvement in judgments against Germany. Comparative figures are shown in Table 1. It is fitting to underline that these figures include interest group involvement in cases that led to judgments and that such involvement could be in support of the state or the petitioner. Differentiation of this pattern of involvement shows that, of the 12.64% of

Table 1. Civil Society Organization Participation in ECtHR Cases against Germany and The Netherlands

	Germany	**% of Judgments**	**The Netherlands**	**% of Judgments**
Total judgments	348	--	165	--
Total participating CSOs	60	--	42	--
Judgments with CSO participation	44	12.64	15	9.09
Judgments where CSO supported litigant	18	5.17	4	2.42
Judgments where CSO supported state	18	5.17	0	0.00
Judgments where CSO was litigant	11	3.16	10	6.06

Source: Data compiled by the author from the ECHRdb (Cichowski and Chrun 2017) and HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

judgments against Germany that included organizational participation, 5.17% of instances were in support of the state, meanwhile there were no such instances in cases against the Netherlands. Discounting such cases from the comparison of legal mobilization of interest groups against each country, it appears that the Dutch cases show greater overall proportional mobilization (with greater instances of interest groups as litigants [6.06%] than as third-party or counsel of petitioner [2.42%]), while the participation of interest groups in German cases seldom is as a petitioner (3.16%) and is more often in support of petitioners (5.17%).

Individual characteristics of the participating interest groups shed light on interesting variations. There were 60 different organizations involved in cases against Germany from 1959-2019 and 42 involved in Dutch cases. Because of the significantly

lower quantity of judgments made against The Netherlands compared to those against Germany, 165 and 348 respectively, there appears to be greater salience of interest group involvement in cases against The Netherlands using the proportion of the total number of organizations involved to the total number of cases against each country in the dataset as a measure.

Table 2. Civil Society Organizations Participating in ECtHR Cases against Germany and The Netherlands by Type

	Germany	**% of CSOs**	**The Netherlands**	**% of CSOs**
Domestic organizations	40	66.67	21	50.00
Companies	14	35.00	22	52.38
Rights organizations	7	11.67	15	35.71
Professional associations	4	6.67	2	4.67
Religious organizations	19	31.67	0	0.00

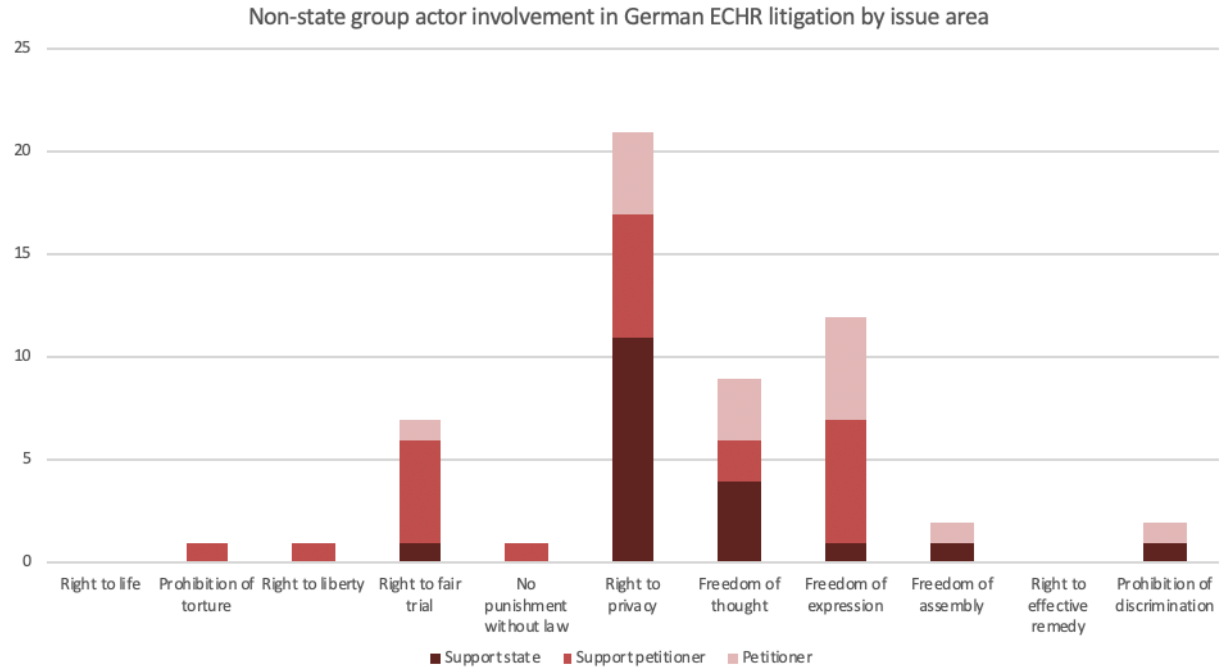
Source: Data compiled by the author from the ECHRdb (Cichowski and Chrun 2017) and HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

This analysis demonstrates that 66% of the organizational participants in German cases were domestic groups, while only 50% of participants in Dutch cases originated in The Netherlands. It could be interesting to further decompose this data to reveal possible variations in the party that was supported by these groups. It may be that domestic are more likely to support the state, not the petitioner, which could lead to important conclusions.

Further breaking down this data to reveal the different types of groups that mobilized around the cases (see Table 2) reveals that companies are more likely to be

involved in cases against The Netherlands, followed by rights organizations, while the involvement in German cases demonstrates strong mobilization from both private companies and from religious organizations. The characteristics of these groups could lead to interesting conclusions, especially regarding the nature of religious organizations in Germany and their relation to the state. Perhaps a framework of systems under neo-corporatist governance could be useful as a conceptual point of departure to explain these variations (Vanhala 2016).

Table 3. Non-state Group Actor Involvement in German ECtHR Litigation by Article

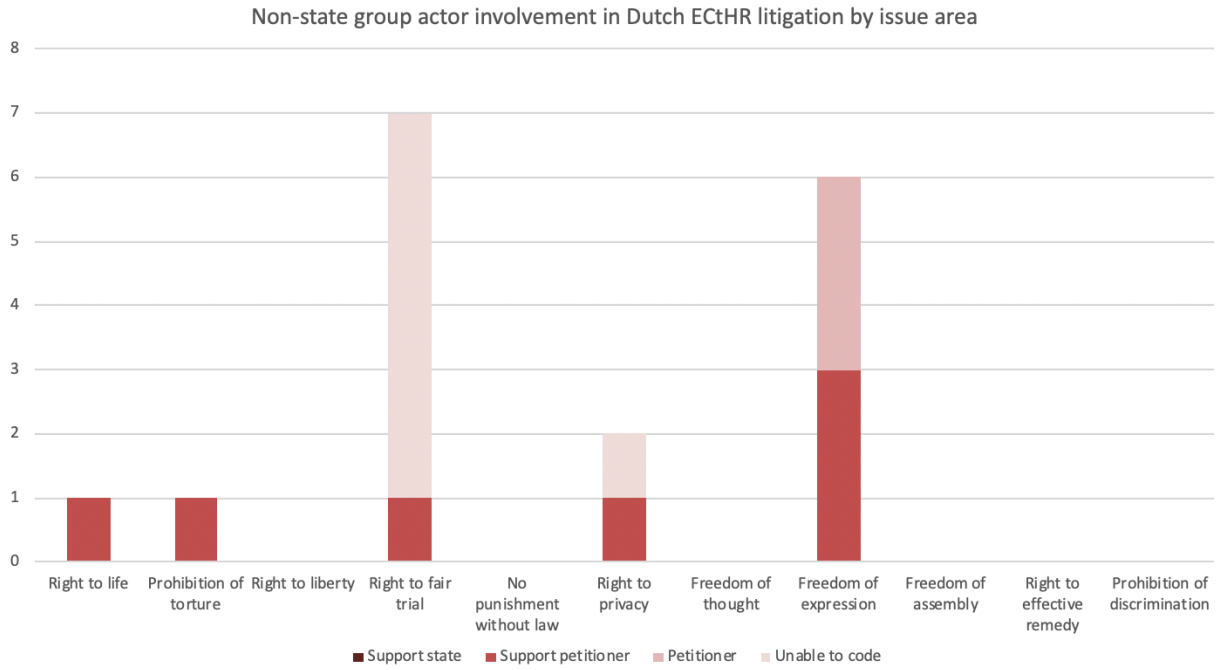


Source: Data compiled by the author from the ECHRdb (Cichowski and Chrun 2017) and HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

Tables 3 and 4 compare legal mobilization by CSOs in each state broken down by issue area and the party supported. CSO participation in ECtHR cases against Germany (Table 4) is highest concerning Articles 8 (right to privacy), 9 (freedom of thought, religion), and 10 (freedom of expression) of the Convention and it is appropriate to call attention to the frequency in which participating CSOs support the German

government in these cases. More than half of CSO participation in Article 8 judgments was in support of the state and in several cases concerning Articles 6 (right to a fair trial) 9, 10, 11 (freedom of assembly), and 14 (prohibition of discrimination) of the Convention similar support for the state is observed. The submission of *amicus* briefs in support of the respondent state is perhaps one of the most interesting findings of this descriptive analysis, as a number of scholars have called attention to how the practice is widely used to support human rights victims (Bartholomeusz 2005; Cichowski 2016; Van den Eynde 2013).

Table 4. Non-state Group Actor Involvement in Dutch ECtHR Litigation by Article



Source: Data compiled by the author from the ECHRdb (Cichowski and Chrun 2017) and HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

CSO participation in ECtHR cases against The Netherlands (Table 4) demonstrates less variation. In no cases did CSOs support the Dutch government and participation is concentrated around Articles 6, 8, and 10. In these cases, CSOs supported the petitioner in *amicus curiae* briefs or appeared in the case as the petitioner.

This is perhaps the sort of pattern one might expect to observe in CSO participation in cases concerning long-standing democracies at the ECtHR; the few instances where CSOs did participate, they petitioned the Court to hold the Dutch government accountable for rights abuses or supported the petitioner in their cause.

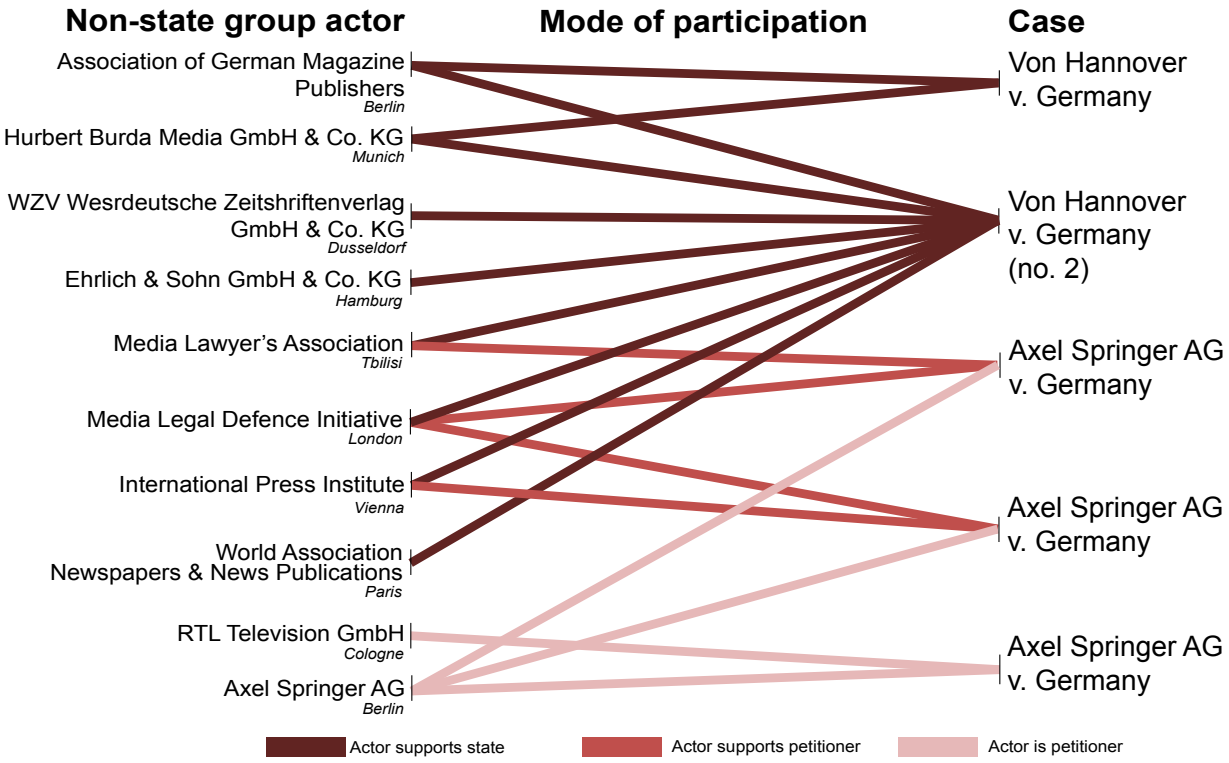
Given that in cases against both Germany and The Netherlands participation was high concerning Articles 8 and 10 of the Convention, these two issue-areas were selected for further analysis to understand why in some cases CSOs mobilized in support Germany, while in The Netherlands such type of participation was not present. The following section explores this variation in depth.

Strategic Litigation at the ECtHR

The German Case

The loose network of actors mobilizing around cases against Germany concerning Articles 8 and 10 of the Convention is concentrated around five distinct cases, which can be grouped by litigant. Table 5 illustrates the cases under study, the actors involved, and their mode of involvement. Caroline von Hannover, the Princess of Monaco, was the litigant in the first two cases (*Von Hannover v. Germany* and *Von Hannover v. Germany [No. 2]*); Axel Springer AG, a large German publishing company, was the litigant of the following two cases (*Axel Springer AG v. Germany* and *Axel Springer AG v. Germany [No. 2]*) and the final case, along with another German media company, RTL Television GmbH (*Axel Springer SE and RTL Television GmbH v. Germany*).

Table 5. CSO Participation in Article 8 and 10 Cases against Germany



Source: Data compiled by the author from full-text case documents available on HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

The first two cases under analysis were taken up under Article 8 of the Convention, the right to respect for private and family life, by Princess of Monaco Caroline von Hannover. Von Hannover had been seeking injunctions against the publication of photos taken of her in her private life, eating at restaurants, at the beach with her children or completing other normal activities for some time before petitioning the ECtHR. In *Von Hannover v. Germany*, the applicant complained that constant harassment by the press resulted in a violation of her right to respect for private and family life and argued that the German courts' decision that, as a public figure, she was not entitled to privacy outside of a 'secluded place' was insufficient to guarantee her

Article 8 protections because of a narrowly defined legal concept of the term 'secluded place'.

The Association of German Magazine Publishers submitted a third party intervention in support of the German government, referencing a resolution by the Parliamentary Assembly of the Council of Europe which highlighted the important role of the press in democratic society. The organization argued that the "watchdog" role of the press could not be narrowly interpreted and that the State should have a wide margin of appreciation in the area. Hubert Burda Media (a German publishing company) also supported the German government and stated that pubic figures of contemporary society enjoyed sufficient protections under German law and that the German courts frequently reinforced that protection. The Court held, however, that there was a violation of Article 8, stating that domestic German courts had not sufficiently protected the applicant's right to private and family life.

In this case, the *amicus* briefs by the Association of German Magazine Publishers and Hubert Burda Media are interesting in that they represent the obvious interest of the media in the potentially broad political ramifications of the case. In fact, as a result of the Court's ruling in *Von Hannover v. Germany*, the freedoms of the press to report on public figures were significantly diminished so that public figures could generally rely on privacy unless acting in an official function, which "had grave effects on the media that heavily relies on the images of celebrities, including members of the royalty and the aristocracy" (Westkamp 2012).

The second and related case, *Von Hannover v. Germany (No. 2)*, resulted from the applicant's allegation that the Court's prior ruling had not been enforced and that she and her family continued to suffer harassment and lack of privacy on behalf of the German media. The German government argued that decisions by domestic courts had

taken up the previous judgment of the Court (concerning the case of *Von Hannover v. Germany [No. 1]*). It also argued that the state should enjoy a wide margin of appreciation in such cases, needing only to show that it had considered a balance of competing interests of the private person, public figures and the press. The Association of German Magazine Editors likewise submitted that the German courts had factored the Court's previous ruling into their decisions and that the press enjoyed much less freedom as a result. The German media company Ehrlich & Sohn GmbH highlighted the important role the press plays in successful democracy and reiterated the applicant's status as a public figure. It also underlined the severe curtailment of the freedom of information and of the press since the Court's prior judgment. The Media Lawyers Association based in Tbilisi argued that states must enjoy a wide margin of appreciate when balancing competing interests of individual privacy and public debate and that the Court should only intervene where courts failed to balance those interests.

The Media Legal Defence Initiative, International Press Institute and the World Association of Newspapers and News Publishers, based in London, Vienna, and Paris, respectively, submitted jointly that Contracting States should enjoy a wide margin of appreciation when balancing competing interests, referencing several earlier Court decisions. The parties argued that the Court would risk becoming a court of appeals for future similar cases. The Court held that there was no violation of Article 8 and observed that the German courts had undertaken considerable analysis of the Court's case-law following the initial Von Hannover ruling. The Court found that the German government had in fact sufficiently complied with its prior ruling and that there was no violation in the second case. The case of *Von Hannover v. Germany (No. 2)* attracted mobilization in support of the German government's position by German media companies and freedom of speech nonprofits alike, who recognized the further

diminished press freedoms that could result should the Court rule in Von Hannover's favor.

The final three cases are different in that they dealt with Article 10 (the right to freedom of expression) and they were brought forth by media companies. In *Axel Springer AG v. Germany*, the applicant company complained of an injunction on the publication of an article detailing the drug-related arrest and prosecution of a well-known German actor. The German government argued that it had considered the Court's judgment in the *Von Hannover v. Germany* case, which required domestic courts to balance the competing rights and interests of the individual, the press and the public and reiterated that it should enjoy a wide margin of appreciation in determining proportionality of such cases.

The applicant company argued that the actor was very well-known and that a criminal offense was never a truly private matter. It stated that all of the information published in the article in question had also been made publicly available in a press release by the prosecutor's office. The company argued that the press must be allowed to report on prominent persons that seek to establish or maintain a public image of themselves and to correct that image when necessary. The Media Lawyers Association supported the applicant company and submitted that the right to reputation was not protected under the Convention, that the press was obligated to report on all matters of public interest, including judicial proceedings of persons of interest, where identifiable information is crucial to the task of informing the public. The association also cited a United Kingdom Supreme Court ruling that determined that the exclusion of names from reports on criminal proceedings stripped them of any public utility. The association concluded that, outside of situations where defendant or witness anonymity had to be protected, there should be no restriction on the reporting of court

proceedings. The Media Legal Defence Initiative, International Press Institute and World Association of Newspaper and News Publishers submitted a joint statement highlighting a broad trend among Contracting States to consider the Court's standards regarding the balancing of Article 8 and Article 10 rights. The associations invited the Court to grant a wide margin of appreciation to the Contracting States on the issue, ensuring only that states had a domestic mechanism in place to consider a balance of Article 8 and 10 rights in similar cases. The Court concluded that there had been a violation of Article 10 of the Convention and awarded the applicant company just over 50,000 euros in respect of pecuniary damages and costs and expenses. In this case, the Media Lawyers Association, Media Legal Defence Initiative, International Press Institute, and World Association of Newspaper and News Publishers were critical of the prior rulings by the German courts and pushed against the restrictions on press freedoms that they imposed, which were ultimately reversed with the Court's decision.

In the case of *Axel Springer AG v. Germany (No. 2)*, The applicant company complained of the prevention of the publication of two sentences in the mass-circulation daily newspaper *Bild* that questioned the motives of former Federal Chancellor Gerhard Schröder for calling for early elections. The domestic courts found that the applicant company had not fulfilled its journalistic duties in the elaboration of the article, particularly for failing to include counter statements from Mr. Schröder. The applicant company submitted that it had reached out to Mr. Schröder's office three times before finally receiving a response indicating that Mr. Schröder had no comments to add. The German government submitted that the applicant company did not fairly represent the information surrounding the circumstance, pointing out that serious allegations must be accompanied by a rigorous factual basis. The Media Legal Defence Initiative submitted that media outlets could not be responsible for carrying out investigations to

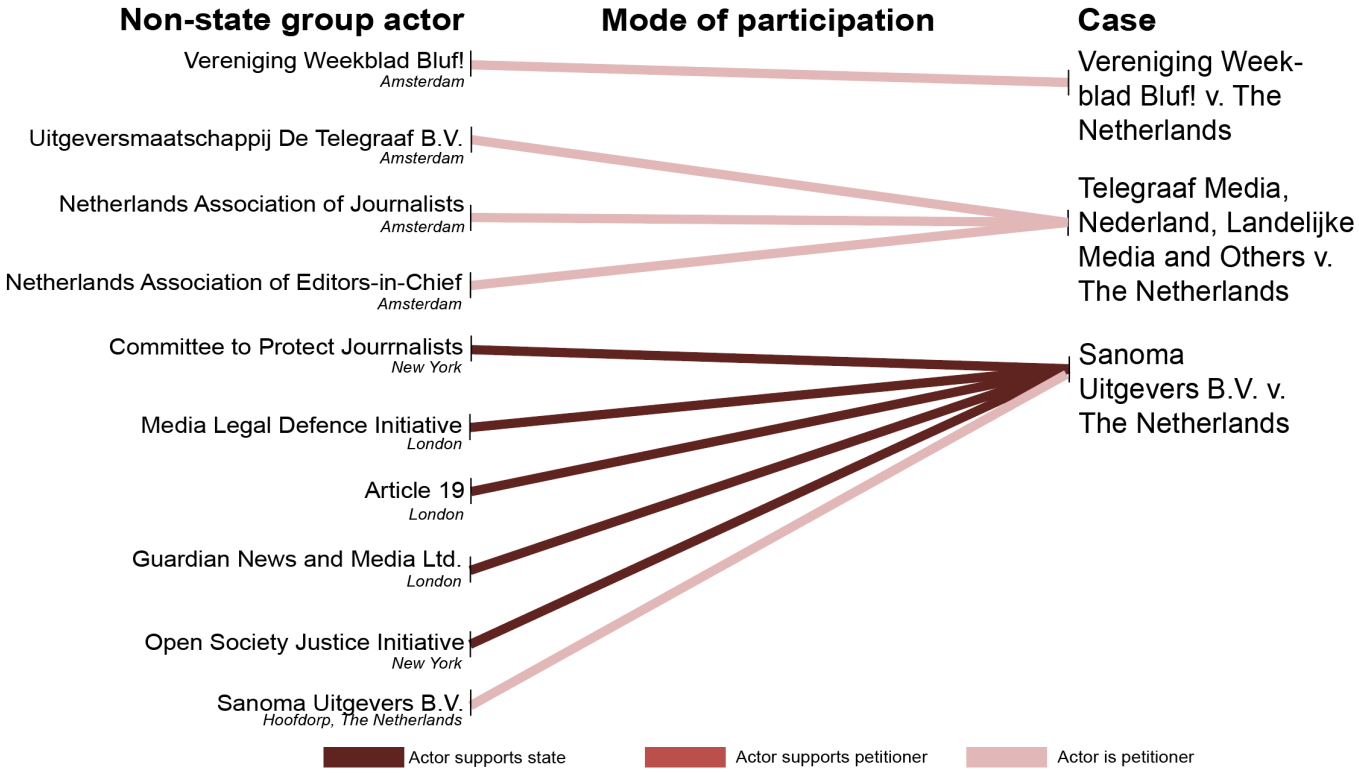
back every quote by third parties—especially a prominent politician. The organization also underlined the risks associated with reaching out to parties referred to in a report, especially if they had interest in stifling its publication or preventing public debate concerning them. Moreover, the organization pointed out that questions in early reports are often answered in later reports. The Court found that there was not sufficient need to protect former Chancellor Schröder's reputation above the applicant company's freedom of expression and that a violation of Article 10 had occurred. The applicant company was awarded 36,000 euros for legal costs.

In the case of *Axel Springer SE and RTL Television GmbH v. Germany*, the applicant companies complained that a judicial order that banned the publication of photos or videos that identified a defendant with schizoid personality disorder who killed his parents resulted in a violation of Article 10. The German government submitted that the order preventing the publication of identifiable photos and videos was necessary to protect the privacy rights of the defendant, who merited heightened protection considering he suffered from a psychiatric disorder. The government argued that the dissemination of images of the defendant in association with the crime violated principles of "presumption of innocence". The applicant companies argued that there was no legal basis for the judicial ban and, considering that the defendant had confessed to the crime both at the initial crime scene and during the first day of legal proceedings—which were not closed to the public—, the ban had gone too far. The Court concluded that no violation of Article 10 had taken place, noting that the judicial ban was proportionate to the protection of the defendant and "necessary in a democratic society".

The Dutch Case

The network of actors mobilizing around cases against The Netherlands concerning Articles 8 and 10 of the Convention is concentrated around three distinct cases. Table 6 illustrates the cases under study, the actors involved, and their mode of involvement. Unlike the network of actors involved in cases against Germany, there are no repeat players in the Dutch cases.

Table 6. CSO Participation in Article 8 and 10 Cases against The Netherlands



Source: Data compiled by the author from full-text case documents available on HUDOC (accessible at: https://hudoc.echr.coe.int/eng).

The first case under analysis, *Vereniging Weekblad Bluf! V. The Netherlands*, is a rather standard case before the Court, involving routine application of Convention law. The applicant company complained that a search and seizure and subsequent withdrawal of publications prepared for distribution on the grounds of national security interests resulted in a violation of their right to freedom of expression under

Article 10 of the Convention. The government argued that the materials published, although already distributed to an extent, were still subject to secrecy as the details in the report resulted in a breach of national security interests. The Court held that there had been a violation of Article 10 and awarded 60,000 Netherlands guilders to the applicant company. This case involved a rather specific interpretation of Convention law and its ruling did not lead to any important policy development.

The second case under analysis, however, *Sanoma Uitgevers B.V. v. The Netherlands*, involved a question of the confidentiality of journalistic sources, which significantly effects the work of the media. The applicant company complained that the Dutch government had violated their Article 10 rights by compelling the provision of information that would allow the identification of journalistic sources.

Journalists from the applicant company had attended an illegal street race and, after coming to an agreement with the attendees and ensuring complete anonymity, took photos and videos to later de-identify and use for publication. The police and prosecuting authorities later suspected that one of the cars that appeared in the street race had previously been involved as the getaway car for a crime compelled the applicant company to release the photo and video evidence against his will. The government disputed that an agreement of anonymity had ever occurred, citing the public nature of the illegal street race and the large number of attendees and argued that the applicant company could not possibly be under any duty of confidentiality. Additionally, the government submitted that the seized evidence was never intended to be used in connection to the illegal street race, but rather for a crime previously committed which was not protected by any anonymity agreement. The applicant company submitted that verbal agreement of anonymity had taken place, and that they could not realistically be expected to have produced a written agreement. Three

freedom of speech organizations (The London-based Media Legal Defence Initiative and Article 19 and New York-based Committee to Protect Journalists) one human rights organization (New York-based Open Society Justice Initiative) and one British media company (Guardian News and Media Ltd.) supported the petitioner and submitted comparative law information, arguing that only courts can make decisions compelling the handing over of confidential journalistic sources. The Court held that a violation of Article 10 had taken place and directed the Dutch government to pay 35,000 euros to the applicant company.

In this case, the Court's ruling that there had been a violation of Article 10 was crucial for the media to maintain its ability to ensure source anonymity. Without strong guarantees for journalistic sources to remain anonymous, it would be difficult-to-impossible for the press to gather and share important information. The freedom of speech organizations, rights organization, and media company that submitted third party interventions in support of the petitioner made this explicit in their remarks.

The final case against Netherlands under analysis, *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, again focuses around a similar question as the case of *Vereniging Weekblad Bluf! V. The Netherlands.* The applicants, who had acquired through a leak a confidential Dutch secret service report, complained that its seizure and their subsequent surveillance violated their rights as protected by Articles 8 and 10 of the Convention. The government argued that the measures were necessary to protect national security interests, considering that a leak of confidential state information had occurred. The applicants argued that they were not directly related to the leak, thus they could not legally be subject to the special powers of the secret service that violated their rights. The Court determined that there had been a

violation of Articles 8 and 10 of the Convention and ordered the government to pay the applicants EUR 60,000 for costs and expenses.

Discussion

Analysis of the cases summarized above leads to interesting findings regarding the role of civil society organizations in cases against long-standing democracies at the ECtHR. Mobilization around the two *Von Hannover* cases against Germany in support of the state demonstrate that civil society organizations in the media sector from London to Vienna to Tbilisi are conscious of the possible implications of Court judgments on their sector. Likewise, the freedom of speech organizations that mobilized to support the petitioner in the two *Axel Springer AG v. Germany* cases acted to promote the interests of the media where Convention law had the opportunity for development. Perhaps an interesting finding of the study of these German cases is that there was no additional organizational mobilization in the case of *Axel Springer SE and RTL Television GmbH v. Germany*, possibly because the judicial ban by the German courts that was at the heart of the case was discrete in that it had no further policy implications beyond the case in question.

The pattern of participation by media organizations in this set of cases is consistent with a strategic litigation approach. Organizations are observed to mobilize in a mode that is consistent with their policy preferences when opportunities for policy development arise. In the *Von Hannover* cases, as the petitioner's claim constituted a threat to the freedom of the media to use images of public figures, media organizations strategically submitted *amicus curiae* reports in support of the state. The *Axel Springer* cases, in contrast, presented instances where the state had taken measures imposing upon the freedom of the media to report on public figures and, recognizing the imposition upon that freedom, media organizations submitted *amicus* reports

supporting the position of the petitioner. When little opportunity for legal development is present, as with *Axel Springer SE and RTL Television GmbH v. Germany*, it is of little strategic value to mobilize and no additional actors are involved.

The same seems to be true for the first case in the Dutch set. In *Vereniging Weekblad Bluf! V. The Netherlands,* the core question of the case is whether the seizure of publications with confidential information that had already been widely circulated was a violation of Convention law. The specific nature of the case (pertaining to the specific confidential information in question) did not entail significant development of the application of Article 10 and no organizations mobilized as third parties. However, in the case of *Sanoma Uitgevers B.V. v. The Netherlands,* the Court's decision had the potential to establish precedent regarding the extent to which anonymity could be provided to journalistic sources, which would result in considerable legal impacts for media actors throughout the Court's jurisdiction. This case accordingly attracts strong mobilization by five organizations who were critical of the Dutch government's position. The case of *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, again involves a similar question as the first case, a rather routine application of Convention law, and demonstrates no third party organizational mobilization.

In considering the German set of cases and the Dutch set of cases in tandem, a common phenomenon is that the cases with the greatest opportunity for policy development are those which demonstrate highest salience of participation by civil society organizations. Concerning Articles 8 and 10 of the Convention, relating to questions of privacy and freedom of speech, it is not surprising that mobilizing organizations are largely freedom of speech organizations, media companies, and professional journalistic associations. In these cases, particularly those in which CSOs

support the position of the respondent government, moral and financial redress does not seem to define organizational participation. Rather, these organizations are strategic in their litigation at the European Court of Human Rights, adapting their mode of participation according to their policy preferences.

Conclusion

While the possibility of obtaining moral and financial redress for human rights violations is certainly a defining characteristic of litigation at the European Court of Human Rights, this analysis demonstrates that civil society organizations also employ strategic litigation to participate in cases according to their policy preferences. The network of freedom of speech and media organizations that mobilized in support of the German government in *Von Hannover v. Germany* and *Von Hannover v. Germany (No. 2)* acted to preserve loose privacy protections for persons of public interest and similar mobilization in support of the petitioner in the *Axel Springer v. Germany* cases served to counter efforts by the state to regulate information reported by the media. Notably, the case of *Sanoma Uitgevers v. The Netherlands* presented an opportunity for the Court to clarify the extent to which anonymity can be provided to journalistic sources—a potentially impactful legal development for journalistic organizations throughout the COE member states—and a number of media organizations mobilized to prevent a restrictive legal development regulating that practice. The cases that presented little opportunity for impactful interpretations of Convention law (*Axel Spring SE and RTL Television GmbH v. Germany; Vereniging Weekblad Bluf! V. The Netherland;* and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*) were also those that did not attract participation by third party organizations. Media companies, freedom of speech organizations, and even broader rights organizations are likely cognizant of the

important policy developments that can follow ECtHR rulings and employ strategic litigation to pursue their policy interests at the venue when opportunity for development arises.

The finding that the European Court of Human Rights serves as a venue of last resort not only for victims of human rights violations to receive financial and moral redress, but also for civil society actors to pursue their policy interests in relation to the interpretation of Convention law is an important addition to our understanding of participation in international judicial politics. The question that remains unanswered, however, is what factors make an actor's use of strategic litigation at the European Court of Human Rights more likely. The cases included in this analysis suggest that civil society organizations may be more likely to use strategic litigation at the ECtHR when a pending case presents the opportunity for a significant legal development within their relevant issue-area, but why do cases in some issue-areas attract more attention by civil society actors than others (e.g., Articles 8 and 10 in cases against Germany and The Netherlands)? Another pressing question in light of the findings of the current study is how to determine if an actor's participation at the ECtHR is motivated by a desire for redress, a larger political strategy, or a combination of both.

Elite, semi-structured interviews conducted by the author of this study between October and December, 2020 with seven human rights practitioners—NGO professionals and lawyers—will be analyzed and used in an attempt to answer the questions above in a forthcoming paper. Preliminary analysis of interview data suggests that transnational dynamics such as the export of human rights advocacy and informal NGO networks can influence instances of strategic litigation at the ECtHR, as well as the availability—or lack thereof—of alternative forums to promote policy preferences. Additionally, many interview respondents commented on how the post-Soviet export

of human rights advocacy from Western European countries to countries in Eastern Europe may have resulted in astonishing differences in how civil society actors in distinct geographic and cultural settings participate in international judicial politics.

Nonetheless, in light of the finding of strategic litigation at the ECtHR, it is also fitting to consider its implications for the fulfillment of democratic principles in the creation of supranational human rights policy. Similar to the findings laid out in several previous works, the findings of this study suggest that the judicialization of international human rights in Europe has resulted in enhanced opportunity for participation in international policymaking (Cichowski 2006a; Alter 2006; Börzel 2006). Civil society organizations can and do access the ECtHR to make their policy preferences and the possible wider implications of Court decisions known. However, marked geographic and thematic variation in participation in cases at the ECtHR difficult the drawing of normative conclusions. A larger-scale study of strategic litigation, including both weaker democratic states committing more human rights violations and long-standing democracies that are less active before the Court, could reveal additional effects of such an approach and its use beyond long-standing democracies. The highly judicialized nature of human rights in Europe certainly serves as a promising model for the involvement of private actors in supranational policy development. Given the stark geographical and thematic differences in the nature of that involvement, however, the question of who it benefits remains unanswered.

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