AMICUS CURIAE BRIEFS OF HUMAN RIGHTS NGOs BEFORE
THE EUROPEAN COURT OF HUMAN RIGHTS

A THESIS SUBMITTED TO THE STANFORD PROGRAM IN
INTERNATIONAL LEGAL STUDIES AT THE STANFORD LAW
SCHOOL, STANFORD UNIVERSITY IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF THE SCIENCE OF THE LAW

BY

LAURA VAN DEN EYNDE

ADvised under the faculty supervision of

PROFESSOR DEBORAH R. HENSLER

MAY 2011
ABSTRACT

This thesis explores the practice of third intervention by human rights NGOs before the European Court of Human Rights. Although allowed since over two decades, the practice has not been comprehensively and empirically explored so far. Most likely because the primary data is not readily available, the majority of existing studies rely almost solely on the judgments to discuss the amicus curiae device.

The approach adopted here has been to collect and review the amicus curiae briefs themselves (from 1986 to 2011), allowing for this activity before the Court to be accurately pictured. First, this research confirms the increase in terms of numbers of amicus participation. In addition to UK-based charities and large transnational human rights organizations, the Court witnesses more and more the presence of smaller and more specialized groups, as well as, recently, a few conservative groups. The briefs cover almost all issues under scrutiny of the Court, although cases involving the prohibition of torture and inhuman or degrading treatment, the right to family and private life, the right to free expression and the prohibition of discrimination attract a higher concentration of briefs. Finally, the most recent numbers expose that the findings of a violation by the Court in cases involving third parties is not higher than for the general docket, on the contrary.

The content analysis of 200 briefs submitted to the Court has revealed that they largely adopt the language of the Court and the concepts it has developed over time (such as the ‘consensus’ element). Most of the arguments they contain resort from the legal field and the briefs provide the Court with many comparative elements (as well from member States as from other democratic States). The analysis further suggests that they provide other types of information (such as factual information, policy considerations and potential consequences) to a lesser degree than could be inferred from the existing literature.
TABLE OF CONTENTS

ABSTRACT ........................................................................................................................................... i

ACKNOWLEDGMENTS .......................................................................................................................... ii

TABLE OF CONTENTS .......................................................................................................................... iii

ABBREVIATIONS ................................................................................................................................... v

LIST OF FIGURES ................................................................................................................................. vi

LIST OF TABLES ..................................................................................................................................... vi

CHAPTER 1: INTRODUCTION .................................................................................................................. 1

CHAPTER 2: THE AMICUS CURIAE: ORIGIN, TRANSFORMATION AND ROLES ................................. 4

I. The Amicus Curiae: definition and evolution ............................................................................. 5
   A. Roles traditionally assigned to amicus .................................................................................... 6
   B. Initial attitude of the ECtHR towards NGOs' participation in the proceedings .................. 11
   C. Third party intervention procedure before the European Court of Human Rights .......... 12

CHAPTER 3: METHODOLOGY ............................................................................................................... 14

I. Establishing the research population ......................................................................................... 14

II. Practical Data Collection ........................................................................................................... 16

III. Analysis of the briefs .................................................................................................................. 16

CHAPTER 4: PRACTICE OF THE AMICUS CURIAE BEFORE THE EUROPEAN
       COURT OF HUMAN RIGHTS: FACTS AND FIGURES .............................................................. 17

I. Figures of third party interventions before the European Court of Human Rights .................. 17

II. Who are the third interveners? Meeting the actors ............................................................... 20
   A. The geographical origin ...................................................................................................... 21
   B. The substantive area(s) of concern in the human rights field ......................................... 21
   C. Three observations: ........................................................................................................... 22
      i. Presence of repeat players .............................................................................................. 22
      ii. The rise of non British-based NGOs ........................................................................... 23
      iii. The appearance of conservative groups ................................................................. 24
   D. Joint interventions ............................................................................................................ 25

III. The cases in which third interventions are observed ............................................................. 26
   A. The defendant States ....................................................................................................... 27
   B. The issues at stake ........................................................................................................... 29
   C. Figures of admissibility and violations ........................................................................... 32
   D. Conclusion ....................................................................................................................... 35
CHAPTER 5: THE BRIEFS’ CONTENT: THEIR MAIN FOCUS AND THE SOURCES THEY CITE .................................................................................................................. 36

I. Introduction.................................................................................................................. 36

II. Focus of the briefs ....................................................................................................... 36

A. Legal issue: the interpretation of the Convention .................................................. 37

   i.  Teleological approach ......................................................................................... 38

   ii.  Evolutive interpretation .................................................................................... 38

   iii.  Sources for interpretation .............................................................................. 39

B. Facts .......................................................................................................................... 39

C. Comparative analysis .............................................................................................. 40

D. Domestic law or practice ......................................................................................... 41

E. Others ....................................................................................................................... 43

F. Preliminary conclusion ........................................................................................... 43

III. Arguments ............................................................................................................... 44

A. Precedents ................................................................................................................. 45

B. International Standards ............................................................................................. 47

C. Regional standards .................................................................................................... 50

   i.  The European Union ......................................................................................... 50

   ii.  The Council of Europe .................................................................................... 51

D. Comparative law ........................................................................................................ 52

   i.  Introduction and purposes of comparative law ................................................. 52

   ii.  Conventions and cases from other Regions .................................................... 55

   iii. Legislation and Cases from Member States ..................................................... 56

   iv.  Legislation and Cases from Non-Member States ............................................. 58

   v.  Criticism and solutions: stating the goals and methods ..................................... 61

E. The “consensus” argument ....................................................................................... 63

   i.  Definition and Justification ............................................................................. 64

   ii.  Criticisms ......................................................................................................... 65

   iii. The “consensus” argument in the amicus curiae briefs ..................................... 67

F. Experts arguments / Alternative authorities .......................................................... 70

G. Policy (or externality) arguments ............................................................................. 71

H. The “disadvantaged group” argument ................................................................... 73

I. Suggestion of solutions ............................................................................................ 75

J. Conclusion ................................................................................................................. 76

CONCLUSION .............................................................................................................. 78

BIBLIOGRAPHY ............................................................................................................. 82

I. Books .......................................................................................................................... 82

II. Articles ....................................................................................................................... 83

III. Online Documents ................................................................................................... 88

IV. List of Cited Cases .................................................................................................. 89

APPENDIX: CODING SCHEME ................................................................................. 93