

## ***Workshop Report***

### ***Legal Mobilization and International Courts: NGO and Lawyer Activism in Regional Human Rights Courts***

May 17, 2017

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#### **1) Introduction**

Regional human rights courts such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR) have had significant influence on state policies. Although regional human rights courts have become popular among victims and activists who seek justice when justice fails at home, we are only beginning to understand who or what shapes the development of their case law – the body of judgments that shapes how judges make their decisions in the future, as well as how applicants and their supporters interpret what is possible to expect from case applications. Legal mobilization, or social actors using law strategically to defend the rights of a group of victims, may involve non-governmental organizations (NGOs), civil society organizations (CSOs), or other public interest advocates, including individual lawyers acting on their own, to promote rights agendas. How and under what conditions do these actors affect the behavior of regional human rights courts? Scholarship on international courts has focused heavily on states or international organizations as dominant actors. Our network of scholars, however, looks beyond states to gain a more comprehensive and nuanced understanding of the roles of other significant actors in regional human rights courts.

In May 2017, the workshop, “Legal Mobilization and International Courts: NGO and Lawyer Activism in Regional Human Rights Courts” brought together a group of leading scholars and specialists from Canada, the United States, Denmark, Germany, and Russia to share and discuss their research on regional human rights courts in comparative perspective and to develop a new international network. Speakers and discussants held expertise in law, sociology, international relations, and political science. During the workshop, the participants analyzed trends and forms of activism by NGOs, CSOs, other public interest advocates and individual lawyers (e.g. as direct petitioners or victims, filing amicus briefs, forwarding cases to human rights tribunals, implementing judgments domestically, monitoring, or shaping citizens’ understandings of their rights); internal and external influences on activists’ efforts (e.g. political opportunity structures, standing rules, expertise, international donor support, or repression); as well as the impact that these actors have had over time within various regional human rights courts.

#### **2) Overview of Workshop Presentations**

##### ***Lawyers Mobilizing for Human Rights: Regional Courts Compared***

**Mikael Rask Madsen, iCourts, University of Copenhagen**

Mikael Rask Madsen presented a comparative analysis of the Caribbean Court of Justice, Central American Court of Justice, and the East African Court of Justice, which are regional economic courts that have nevertheless ventured toward human rights questions. To understand litigation before international courts, Madsen argued that it is important to identify the specific constellation of actors and field that surrounds each international court. What factors contribute to some courts

becoming active interpreters of international law, while others remain legally and effectively sidelined with arguably no authority? Madsen's research identifies processes that transform a formal mandate (*de jure*) into *de facto* authority. Rather than compliance, Madsen emphasizes the concept of authority as capacity to guide action, which can only be assessed in specific constituencies. Studying institutions vis-à-vis constituencies challenges the idea that the authority of international courts is binary, as it may exist in some places and not others. He cautioned that authority and legitimacy should not be conflated. For example, although the Central American Court of Justice was vested with the most powers, it was not the court with the most authority. Madsen concluded with four general findings: 1) The authority and power of international courts is contingent on contextual factors, including the mobilization of lawyers. 2) Mobilization of lawyers for human rights before international courts can expand and retract the authority of international courts. 3) Systematic mobilization is rare, linked to specific organizations, and is very case specific. 4) Alliances with associations or institutional players are crucial, not just with civil society; they also need institutional support, either from strong member states or from institutions within.

***The Hidden Hands of Justice: NGOs and International Human Rights Courts***  
**Heidi Nichols Haddad, Pomona College**

Heidi Nichols Haddad presented two chapters of her forthcoming book manuscript which examines NGO participation in a comparative sense, and explains variation in NGOs' access, roles, frequency of participation, and impact in the European Court of Human Rights and the Inter-American Human Rights System. She found that in the Inter-American system, NGOs have greater information sharing and operational support roles as well as higher impact than in the European system. This is explained by three factors. First, court deficiencies of resources and legitimacy can constitute an opportunity for NGO participation. Second, courts and member states are more likely to grant access to new roles when there are pre-existing relationships in which NGOs are seen as legitimate and helpful actors. Third, the presence of well-resourced and motivated NGOs can lead to more engagement and is a catalyst for pressuring for new roles.

Haddad described NGO participation at the ECtHR as a story of historical exclusion and diminished necessity. When the Commission and Court were established in the 1950s, there were only a few NGOs which were not granted formal participatory roles. In the 1980s, the court was fairly well run and supported by states, while court and government officials were leery of having non-state actors involved. Some areas in which NGOs have been influential include bringing cases from conflict zones, where the court had difficulty providing investigative work, and amicus briefs providing comparative or specialty law. Haddad described the Inter-American system as a story of early exclusion, but profound necessity for the capacity-building function of NGOs. When established in 1979, motivated and resourced NGOs helped build the court's capacity, shared information, and assisted with logistics and cases. Haddad concluded by noting that NGOs have different avenues to shape courts beyond their formal roles. Representing petitioners and amicus briefs matter, but NGOs also help shape courts by creating legal aid programs. Some NGOs (e.g. CEJIL) are given authority to decide which NGOs gain access to civil society space.

***Legal Mobilization and International Litigation: The Neglected Role of Organizations before International Courts***

**Rachel Cichowski**, University of Washington

Rachel Cichowski presented a paper related to a three-year data collection project that is culminating in a large database as well as a book project. One purpose of the research is to develop a theoretical frame regarding the roles of individual activism, civil society, and organizations in international courts. What are the many ways organizations are participating, how has this changed over time, and what are the effects? How and why does this participation affect governance, protection, and enforcement of human rights? How should we measure change in participation for organizations and activists? Cichowski takes a historical institutionalist, process-based approach and finds that features of international courts such as standing rules and judicial review powers can be instrumental, as are organizational expertise and resources. The litigating environment forms part of the opportunity structure for groups to participate.

Cichowski also showcased her historical, cross-national, and cross-legal domain *European Court of Human Rights Database*, (accessible at <http://depts.washington.edu/echrdb/>), which makes rights and courts understandable in a useable way and can be used in classrooms as well as by scholars. She described coding procedures and features of the database, including information on general judgment characteristics, organization participation (direct applicant, legal representation, amicus curiae), national implementation of judgments, and general measures. For example, the site visualizes which types of organizations are most active and also highlights the level of importance of ECtHR judgments (as coded by the court itself; high importance signifies that legal development is taking place). Does greater participation change the transparency, accountability, accessibility, and legitimacy of international legal processes? This discussion was nested in the larger phenomenon of the diffusion of participation opportunities in international organizations.

***Following the Money or the Violations? The Impact of Donor Funding on NGOs' International Human Rights Litigation***

**Lisa Sundstrom**, University of British Columbia

Lisa Sundstrom presented a paper exploring a new research question, asking about the roles that international funding donors play in shaping the strategic litigation work in which NGOs engage. Interest in this topic was based on an observation during a previous project that Russian women's organizations were not pursuing litigation in domestic courts or the ECtHR, despite their work on gendered human rights violations that were clearly ripe for strategic litigation, while Russian mainstream human rights organizations were active in ECtHR litigation on other kinds of human rights violations. It seemed in that case that human rights NGOs were frequently receiving donor-funded training in how to conduct such litigation, while women's NGOs were not. As an initial approach to this question, Sundstrom's paper focused on the issue area of sex discrimination case applications, examining the work and the funding sources of major Russian human rights and women's rights organizations, as well as tracing the profiles and donor funding of NGOs and lawyers involved in sex discrimination cases from Turkey and Moldova, which are relative "hot spots" for ECtHR rulings on sex-based discrimination. This preliminary analysis found almost no evidence of donors pushing NGOs to engage in litigation in particular areas; in fact, the relationship may be the reverse, with NGOs nudging donors to support litigation activity and concentrations on certain types of human rights violations. The analysis also suggested that donor support may be crucial in complicated areas of human rights claims such as discrimination. The

discussion raised many questions about the methodological challenges of researching the links among NGOs, donors, and successful case litigation at the ECtHR, but also confirmed the importance of continuing to pursue the topic.

***Justice on the Edge: The Shrinking Space for Civil Society and Its Effects on Regional Human Rights Jurisprudence***

**Courtney Hillebrecht**, University of Nebraska at Lincoln

Courtney Hillebrecht presented a new project analyzing the implications of the shrinking space for civil society, making a case, theoretically, that there is a connection between attacks on civil society and organizations' ability to bring petitions to the regional tribunals. She identified three modalities of civil society repression (direct repression and violence, funding restrictions, and organizational and operational barriers) and analyzed how different types of repression can affect patterns of petitioning. The first expectation was that as human rights defenders become increasingly under attack, the number of petitions will initially increase, but as the attacks intensify and the most effective defenders are forcibly removed, the number will decline. Second, as restrictions on funding increases and the available funding for mobilization decreases, the number of petitions should decline. Moreover, the substantive focus of petitions should shift away from the agendas of foreign donors. Third, operational restrictions are likely to slow CSOs' work and lead to fewer cases as well as reduce the quality of the cases. CSOs are critical actors at regional human rights tribunals. Changes in the types and number of cases will change as a function of *how* civil society is being repressed, not just if it is facing restrictions. One objective of this project is to help the tribunals in the European and Inter-American systems and human rights defenders better understand how and why restrictions on civil society affect caseloads at the tribunals and then to help them use that information to fight back.

***From the Grassroots to the Transnational: Kurdish Legal Mobilization before the ECtHR***

**Dilek Kurban**, Hertie School of Governance, Berlin

Dilek Kurban presented her interdisciplinary research on Turkey's engagement with the European Court of Human Rights, with a focus on Kurdish linguistic, cultural and political participation in rights claims between 1987 and 2012. What are the possibilities and limitations for a transnational human rights court in reviewing state violence stemming from an ethno-political conflict in the context of civil war in a non-democratic country? Why and how have Kurdish human rights lawyers litigated before the ECtHR? What is the impact of legal mobilization? What has been the impact of ECtHR rulings? Kurban discussed legal mobilization as a form of political resistance by marginalized groups and the importance of legal opportunity structures. To date, the applicability of legal mobilization theory to authoritarian contexts has not been sufficiently tested. Kurdish legal mobilization has operated in a closed domestic system with a lack of support structure, weak civil society, absence of funding, and a disbursed legal culture. A very experienced grassroots political movement operated inside and outside the system through legal and political tactics. Kurban's presentation also described the history and evolution of Turkey's engagement with the ECtHR and key historical events and turning points in Kurdish legal mobilization (e.g. by Kurdish lawyers at IHD Diyarbakir). Changing contexts such as Council of Europe and EU enlargement led to adaptation by the Turkish government. Overall, Kurban found the legacy of Kurdish legal mobilization to be mixed. On one hand, Kurdish legal mobilization encountered structural barriers, including language, funding, and weaknesses in the legal profession in Turkey. On the other hand, there were positive trends in terms of truth revelation and generating legal mobilization by other

minorities in Turkey, as well as inspiring strategic litigation on state violence in Chechnya and beyond.

***Brokers of Justice: Building an International Litigation Network for Victims of Armed Conflict***  
**Freek van der Vet**, Liu Institute for Global Issues, University of British Columbia

Freek van der Vet presented his multi-sited fieldwork (between 2009 and 2016) in Georgia, Russia, the USA, the UK, on an international network of lawyers that litigate before the European Court of Human Rights on behalf of victims of the armed conflicts in Georgia, Chechnya and Eastern Ukraine. During these conflicts, the civilian population faced forced deportation, torture, and disappearances. In the early 2000s, a group of activists and lawyers established two NGOs—Stichting Russian Justice Initiative (SRJI) and the European Human Rights Advocacy Centre (EHRAC)—that help these victims lodge complaints before the European Court of Human Rights. In his paper, Van der Vet went beyond the external drivers of legal mobilization to examine how NGOs make internal decisions based on their wish to develop their own expertise. Van der Vet asked how these lawyers manage a moral and strategic dilemma with no easy solution: either to keep helping individual conflict victims to find recourse before the ECtHR or seek out new strategic cases that expand the case law of the Court. Van der Vet argued that, in the long run, access to justice closes once the ECtHR case law saturates and the NGOs providing access to the Court move on to cases that can set new precedents and contribute to a “legal legacy”. This urgency to expand the scope of human rights is sometimes at odds with victims’ demands and expectations for justice and truth-seeking.

Providing discussant comments on selected papers were Alison Brysk (University of California, Santa Barbara), Max Cameron (University of British Columbia), Sergei Golubok (LL.M., Partner, Double Bridge Law, Russia), Stephen Hopgood (SOAS, University of London), and Diana Kostina (Russian Justice Initiative).

### **3) Some key themes raised in discussion and questions for future research**

#### *Parallel Strategies to Litigation*

One theme of discussion related to the importance of increasing the relevance of international courts for their constituents, the general public, and the middle class. Comments on this topic flowed from the previous day’s workshop at UBC on “Global Rights and Democracy.” Several participants highlighted strategies for scholars and practitioners to increase public interest in the activities of international courts, and to better communicate their effectiveness, for example, through schools, YouTube movies, effectively using space in the blogosphere, and being inventive with socially responsible social media. Another interesting trend is crowdfunding of strategic litigation, an opportunity that is increasing with digital ways of transferring funds. This is legal mobilization of a different type, with another level of legitimacy, and involves constituents (e.g. diaspora communities), reporting about how resources were spent, and communicating to the middle class as investors. Also on the topic of relations with constituents, participants noted that the distant locations of regional human rights courts can disconnect them from affected communities and negatively affect their authority. For example, to address this issue, the Inter-American Commission holds hearings in different countries and the Caribbean Court of Justice is the only court where you can go to court by skype. Increasing innovative opportunities for the participation of affected individuals is a topic for further thought.

### Quality of NGO Participation

A few participants raised normative questions related to NGO participation. Is the quality of cases higher when NGOs are involved? Is more access better? Continuing to problematize this question was viewed as an area for future research. Cross-court comparison of NGO participation might raise a different set of normative assumptions than within the same court across time. For example, if we look at the ECtHR over time, the trends might be positive, but when we compare across courts, we might say there is less NGO access than in the Inter-American system, but is that a good or bad thing for defending human rights through international courts? If NGO participation is lower in part because a court has capacity, this could be positive. More research is needed on the roles of individual lawyers and disaggregating civil society into its different component actors.

### Methodological Questions

Methodological questions related to data availability were also raised. A focus on judgments can be complemented by looking at inadmissibility decisions, strike outs, and important cases that should have resulted in a judgment but were not successful. The delay of many years between submission of case applications and eventual judgments can make it difficult to trace causal relationships between initial violations, legal mobilization, and impacts of judgments. Technicalities within the courts' registries may also affect the data. There is much work to be done to improve the completeness of information available to scholars and lawyers about case applications to the ECtHR.

### External Drivers of Legal Mobilization: Donors and Repression

Another area of discussion addressed relations between donors and NGOs. One participant suggested that there are two types of NGOs, those that convince donors to support the activities they are already doing, and NGOs that are looking for what donors want them to do and then accommodate themselves to satisfy the donors' requirements. Differences between private and public donors may also be significant. Interviews are helpful for distilling the degree to which donors are independent as well as the history of civil society in each country. The level to which repression is taking place or the domestic environment is conducive to NGO participation may also affect donors' strategies.

When faced with repression, the striking resilience and innovative strategies of human rights defenders and civil society organizations were also highlighted by participants. At what point do civil society activists find the court strategy not to be a viable strategy? They may look to alternative venues or strategies but retain their priorities. If there is domestic repression, civil society organizations may put on new hats and come back stronger. A methodological challenge for researchers is to find out where those organizations went. For example, they might work with lawyers in a different country. Participants also discussed the diffusion of legal expertise and the role of lawyers, particularly in the Russian and Turkish cases. How do lawyers diffuse their expertise? What are the personal risks? Why do lawyers move from one issue to another?

### Further Themes

Feedback from practitioners with extensive legal and advocacy experience with the ECtHR highlighted the need for additional research in a few areas. For example, ad hoc solutions such as arbitration were seen as promising for future research because of their flexibility. Additional case studies in the Arctic and other remote areas would also be valuable. They emphasized the utility of dynamic research with regular assessments to show how situations are changing. Qualitative analysis on the content of amicus briefs could also help to effectively highlight NGO influence in regional human rights courts. For example, NGOs may be particularly successful when they include non-legal arguments in their amicus briefs, provide substantive expertise about human rights violations and local contexts, and help to bridge the divide between the development world and the human rights world.

#### **4) Next steps**

To solidify and widen the research network on activism and the European Court of Human Rights, several efforts are currently underway. For example, a special issue proposal will be submitted to a major journal to publish articles written by the participants stemming from the workshop. Network members will also submit a SSHRC Partnership Development Grant application this fall, through which they will propose continued engagement of practicing lawyers and activists, and knowledge mobilization through reporting to the ECtHR/Council of Europe with the project findings. Ideally, the project will culminate in an event to communicate findings in Strasbourg. The organizers have also submitted a joint panel proposal to the International Studies Association Annual Meeting to be held in San Francisco in 2018.