

## Introduction

### *The Overlooked Partnerships*

On June 15, 2015, Sudanese President Omar al-Bashir – who is wanted for genocide and war crimes by the International Criminal Court (ICC) – narrowly eluded arrest upon leaving South Africa after attending an African Union (AU) summit. A high court in Pretoria had issued an interim order preventing Bashir from leaving South Africa until an application for authorities to arrest him was heard; yet, the government ignored the order and gave Bashir clearance to leave. The government not only violated the high court's order but also shirked its international legal obligations to arrest Bashir under the Rome Statute, the treaty underpinning the ICC. Some media analyses faulted South Africa for embracing the anti-ICC, African bias rhetoric and action promulgated by the AU and Kenyan leaders.<sup>1</sup> Others interpreted the event as another blow to the legitimacy and credibility of a beleaguered institution that relies on state cooperation.<sup>2</sup> Both of these narratives tell a story that pits courts against states, of legalism against power politics. In this instance, politics won out. This narrative of courts and legalism versus states and politics plays out in much scholarship on courts, and international courts in particular. States attempt to insert politics into trials and courts through prosecutorial interference, appointing judges

<sup>1</sup> Simon Tisdall, "Omar Al-Bashir Case Suggests South African Foreign Policy Is Going Rogue," *The Guardian*, June 15, 2015, [www.theguardian.com/world/2015/jun/15/omar-al-bashir-south-africa-sudan-international-criminal-court-icc](http://www.theguardian.com/world/2015/jun/15/omar-al-bashir-south-africa-sudan-international-criminal-court-icc); New York Times Editorial Board, "South Africa's Disgraceful Help for President Bashir of Sudan," *The New York Times*, June 15, 2015, [www.nytimes.com/2015/06/16/opinion/south-africa-s-disgraceful-help-for-president-bashir-of-sudan.html](http://www.nytimes.com/2015/06/16/opinion/south-africa-s-disgraceful-help-for-president-bashir-of-sudan.html). Many of the Courts in this volume are referred to by their acronym ("ECtHR" for the European Court of Human Rights, for example), but in some cases I just refer to them as "the Court."

<sup>2</sup> Eugene Kontorovich, "Sudan's Bashir Is the Palestinians' and Pretoria's Favorite Genocidal Tyrant," *The Washington Post*, June 15, 2015, [www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/15/sudans-bashir-is-the-palestinians-and-pretorias-favorite-genocidal-tyrant/](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/15/sudans-bashir-is-the-palestinians-and-pretorias-favorite-genocidal-tyrant/); Somini Sengupta, "Omar Al-Bashir Case Shows International Criminal Court's Limitations," *The New York Times*, June 15, 2015, [www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html](http://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html).

with political ties or biases, pulling out of treaties following contentious judgments or choosing not to enforce those judgments.<sup>3</sup>

What is obscured in this narrative – and in the widely circulated story of Bashir eluding arrest in South Africa – is the catalyst behind the high court's order barring Bashir from leaving that made it a near miss. A local, human rights non-governmental organization (NGO), the South African Litigation Center, filed the urgent application to overturn a government decision to grant immunity to all delegates attending the AU summit with the high court.<sup>4</sup> This was not the first time that NGOs had used such a tactic. In November 2011, the local chapter of the International Commission of Jurists (ICJ) initiated proceedings in the Kenyan court that resulted in an order to the government to arrest Bashir if he should enter the country.<sup>5</sup> Behind these lawsuits is a sophisticated network of local and international human rights NGOs that independently, and in coordination, followed Bashir's travel and engaged in advocacy and litigation tactics to bring about his arrest.<sup>6</sup> NGO involvement with the ICC is not limited to pressuring for Bashir's arrest but NGOs participate at the ICC, and its affiliated bodies, in nearly all areas of the Court – from budget, investigations, ratification of the Rome Statute, to working with victims. NGOs support, monitor, and aid the ICC, and in some roles, are critical to the Court's functionality.

NGO interaction with international courts is not unique to the ICC. Although to a lesser extent, NGOs also participate with varying degrees of influence at other international criminal and human rights courts. In 1980, the newly established Inter-American Court of Human Rights set up an affiliated NGO that circuitously provided funding for necessary special sessions for the Court. Currently, the Washington, DC-based NGO, the Center for Justice and International Law

<sup>3</sup> Alison Danner and Erik Voeten, "Who Is Running the International Criminal Justice System?," in *Who Governs the Globe?*, ed. Deborah Avant, Martha Finnemore, and Susan Sell (Cambridge University Press, 2010): 35–71; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, 1st edition (Oxford and New York, NY: Oxford University Press, 2014); Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization* 61, no. 4 (2007): 669–701; Manfred Elsig and Mark A. Pollack, "Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization," *European Journal of International Relations* 20, no. 2 (2014): 391–415; Jeffrey K. Staton and Alexia Romero, "Clarity and Compliance in the Inter-American Human Rights System," (2011); Frans Viljoen and Lorette Louw, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004," *The American Journal of International Law* 101, no. 1 (2007): 1–34.

<sup>4</sup> Owen Bowcott and Jamie Grierson, "Sudan President Barred from Leaving South Africa," *The Guardian*, June 15, 2015, [www.theguardian.com/world/2015/jun/14/sudan-president-omar-al-bashir-south-africa-icc](http://www.theguardian.com/world/2015/jun/14/sudan-president-omar-al-bashir-south-africa-icc).

<sup>5</sup> "Kenyan Court Issues Arrest Order for Sudan's Bashir," *Reuters*, November 28, 2011, [www.reuters.com/article/2011/11/28/us-kenya-bashir-icc-idUSTRE7ARoYA20111128](http://www.reuters.com/article/2011/11/28/us-kenya-bashir-icc-idUSTRE7ARoYA20111128).

<sup>6</sup> See CICC blog for posts showcasing coordinated civil society action regarding Bashir: <http://us2.campaign-archive2.com/?u=8758bcde31bc78a5c32ceee50&id=2713f7bcf9>.

(CEJIL) is the driving force behind the Court's overturning of the amnesty laws throughout Latin America and litigates over 60 percent of the cases before the Court, including landmark cases on domestic violence and indigenous rights.<sup>7</sup> At the European Court of Human Rights (ECtHR), NGOs represent petitioners, file amicus briefs, and a coalition of NGOs led by Amnesty International submits informal comments on Court reforms. In contrast to the dominant framework that centers on the interplay between states and international courts, NGOs can also be integral actors. NGOs play a multiplicity of roles vis-à-vis international criminal and human rights courts: from the expected roles in litigation, naming and shaming, and sharing information to the more surprising support-based roles of helping with court administration and capacity building. Through these diverse participatory roles, NGOs have the potential to shape court resources, policies, governance, and jurisprudence.

NGO participation across international criminal and human rights courts is not uniform. NGOs take on different combinations of participatory roles at each court with a varying ability to shape the Court and impact its jurisprudence. The identities, goals, and coordinating strategies of the NGOs also diverge across courts. At the ICC, international and domestic human rights NGOs, often coordinated by the Coalition for the International Criminal Court (CICC), support the Court through the widest range of roles. ICC officials, and even member state diplomats, recognize the benefits of NGO participation, and therefore specific NGOs with channels of access have the ability to substantively shape the Court. At the Inter-American Human Rights System (IAS), NGO participation is long-standing and contributed to the revitalization of the Inter-American Commission in the mid 1970s to address the grave abuses occurring in Latin America. Since the 1970s, NGO participation has centered around a few Washington, DC-based NGOs, most notably Americas Watch, which founded CEJIL. These NGOs focus more on information sharing and litigation strategies than the capacity building of NGOs at the ICC. At the ECtHR, major human rights players and boutique litigation NGOs, mostly based in the United Kingdom, seek to influence the Court through litigation, third-party briefs, and advocacy regarding the reform process but have intermittent success and are often viewed as unnecessary or with skepticism among court officials and member state diplomats.

What explains this variation in NGO participatory roles, frequency, and impact across international criminal and human rights courts? Why do NGOs have such tremendous access and potential influence at the ICC yet are not allowed to make

<sup>7</sup> Author interview with a staff member of CEJIL, December 17, 2010. These approximate statistics were confirmed by a personal interview with an official of the Inter-American Commission on Human Rights, December 8, 2010. According to CEJIL's 20 year Activities Report, CEJIL litigated 65 cases at the Court from 1991 to 2001, which comes out to approximately 50% of all of the Court's cases, CEJIL, "CEJIL Activities Report – 20 Years," 2011: 24, <http://cejil.org/en/publicaciones/cejil-activities-report-20-years>.

formal statements at the meetings on Court reform at the ECtHR? Why does the CICC help with the administrative functions of the ICC while CEJIL mostly engages in litigation at the Inter-American Human Rights System? Unfortunately, the current literature in various disciplines and subfields cannot explain NGO participation at international courts.

This book is the first study to map the breadth and influence of NGO engagement with three international criminal and human rights courts. Using largely original data, it documents NGO participatory roles and measures the frequency of NGO interaction and respective impact on court operations, governance, and jurisprudence. The study also develops a new theoretical framework that explains why NGO participatory roles, frequency, and impact vary at the examined courts. I argue that NGO participation is influenced by three factors: (1) court deficiencies of resources and legitimacy, (2) the institutional history of NGO engagement, and (3) NGO motivation and resources. Combinations of these factors shape whether courts and states grant NGOs access for new or expanded participatory *roles*, the *frequency* at which NGOs choose to utilize the channels of access, and whether this participation results in substantive *impact*.

Most participatory *roles* require decision-makers to grant NGOs some level of formal or informal access, such as a rule change or closed-door policy consultation.<sup>8</sup> The decision-makers are typically courts, commissions, or member states. Courts or commissions that are struggling to fulfill their mandates – either through limited funding, state hostility, hamstrung authority, or loss of legitimacy – are more likely to grant allowance to NGOs to provide formal or informal services for aid. Furthermore, judicial institutions and member states with a prior history of NGO engagement are more likely to allow expanded NGO access because NGOs are viewed as suitable partners. The history of engagement might also condition the ways in which courts or states choose to permit NGOs to provide supplemental services – whether through formal rules of access or informal backchannel networks. NGOs may also contribute to new forms of access by pressuring for, and sometimes manufacturing without state or court consent, opportunities for greater participation.

Once participatory access is granted, the decision to utilize the channels of access largely falls with NGOs. NGOs participate with greater *frequency* when they are motivated and have the financial resources to do so. NGO motivation to engage international criminal and human rights is fairly constant and derives from the unique nature of these judicial institutions. As courts of last resort with enforceable decisions, there are no commensurate alternative venues. As such, NGOs seek to utilize these courts to provide redress to victims and to develop new jurisprudence but are also willing to provide services to aid the courts' ability to function.

<sup>8</sup> Some NGO participatory roles require no authorization of access. These typically consist of advocacy roles outside of formal governance institutions or engaging in service provision that would usually be under the purview of the court.

NGO resources to engage with these courts are much more variable. NGO funding streams vary both across judicial institutions and NGOs participating at the same court.

Lastly, the *impact* of NGO participation typically correlates with the reason that courts or member states grant them participatory access. Access granted to mitigate court deficiencies is more likely to result in substantive influence as NGOs are providing much-needed services or information. Conversely, court or member state reticence about NGO participation because of limited historical engagement is more likely to result in shallow or purely symbolic influence. In this situation, the court or states could construct NGO access in a circumscribed way so as to blunt influence or court officials could choose to disregard NGO information or expertise due to negative perceptions of NGOs.

In this introductory chapter, I give an overview of the existing literature on international courts and NGOs and discuss its shortcomings in explaining the phenomenon of NGO engagement with international criminal and human rights courts. I then further detail my argument and specifically define and conceptualize how court deficiencies, history of NGO engagement, and NGO resources and motivation translate to NGO roles, frequency, and impact. The subsequent section articulates why examining the phenomenon of NGO participation at international judicial mechanisms matters theoretically and empirically, particularly for the conceptualization of international courts and human rights NGOs. The final section outlines the plan of study for the remainder of the book.

#### NGOS AND INTERNATIONAL COURTS: THE OVERLOOKED PARTNERSHIPS

NGOs are increasingly prominent actors in global governance. NGOs contribute to global policy-making at regional and international organizations, institutions, and regimes across a range of issues, from human rights to the environment.<sup>9</sup> A burgeoning literature has begun to explore not only the arenas where NGOs have influence but why the patterns of access and influence across issues and institutions look the way they do.<sup>10</sup> Nevertheless, the relationships and interactions

<sup>9</sup> Thomas George Weiss and Leon Gordenker, eds., *NGOs, the UN, and Global Governance* (Boulder, CO: Lynne Rienner, 1996); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, NY and London: Cornell University Press, 1998); Sanjeev Khagram, James V. Riker, and Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis, MN: University of Minnesota Press, 2002); Kal Raustiala, "States, NGOs, and International Environmental Institutions," *International Studies Quarterly* 41, no. 4 (1997): 719–40; Thomas Risse, "Transnational Actors and World Politics," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (London: Sage Publications, 2002): 255–74.

<sup>10</sup> Raustiala, "States, NGOs, and International Environmental Institutions"; Jonas Tallberg et al., *The Opening Up of International Organizations: Transnational Access in Global Governance*

between NGOs and international courts – a unique type of international organization – are understudied. This is not to say that *no* scholarship explores these relationships but that the existing scholarship only captures a slice of what is occurring: it either looks at one type of participatory role such as filing amicus curiae briefs or at one court, essentially limiting the ability to judge relative influence and participation across courts.<sup>11</sup> This piecemeal approach is not due to lack of scholarly attention to either NGOs or international courts, but from disciplinary and subfield boundaries that cordon off, prioritize, and obscure certain aspects of these participatory relationships at the expense of viewing the phenomenon as a whole. For example, the examination of NGOs within international relations highlights their advocacy roles in establishing new norms or courts, yet typically does not follow-up on whether NGOs have lasting relationships with established courts. Conversely, the cause lawyering scholarship in law only examines formal participation in litigation or trials, and therefore misses any informal relationships or the effects of previous advocacy work on later involvement in litigation. There is a similar story of disciplinary boundaries with regard to the study of international courts. Within international relations, the nature of the delegated or contractual authority to courts by states is the major focus, which can give the impression that states are the only external actors with the ability to grant participatory access to NGOs or to influence the court. Scholarship in comparative constitutional courts and international organizations sees a prominent role for NGOs and civil society in funneling potentially high-impact cases to courts, yet because of the examination of constitutional courts, it cannot envision the range of capacity building roles NGOs play at international courts.

One result of this disciplinary fragmentation is that no existing literature directly addresses why NGO participation varies across international courts. Therefore, by necessity, my argument pulls from and builds upon the many literatures – including global governance, constitutional courts, international organizations, and international law – that speak to possible NGO roles and motivations as well as institutional and organizational dynamics of international courts. In order to see how my argument differs from and builds upon these literatures, it is first necessary

(Cambridge University Press, 2013); Jonas Tallberg et al., “NGO Influence in International Organizations: Information, Access and Exchange,” *British Journal of Political Science*, September 2015: 1–26, <https://doi.org/10.1017/S000712341500037X>.

<sup>11</sup> Loveday Hodson, *NGOs and the Struggle for Human Rights in Europe* (Hart Publishing, 2011); Rachel A. Cichowski, “Civil Society and the European Court of Human Rights,” in *The European Court of Human Rights between Law and Politics*, ed. Jonas Christoffersen and Mikael Rask Madsen (Oxford University Press, 2011): 77–97; Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York, NY: Palgrave Macmillan, 2008); Dinah Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings,” *The American Journal of International Law* 88, no. 4 (1994): 611–42, <https://doi.org/10.2307/2204133>; Laura Van den Eynde, “Amicus Curiae Briefs of Human Rights NGOs at the European Court of Human Rights” (Stanford University Law School, 2011).

TABLE 1.1 *Alternative Theories of NGO Participation*

| Type of Theory   | Theory                             | Related Scholarship   | How Theory Accounts for NGO Participation   | Observable Implications of Theory   |
|------------------|------------------------------------|---|---|---|
| NGO Mobilization | NGO Capacity                       | TANs, Organizational theory                                   | NGO capacity/incentive to participate   | NGOs promoting new courts; driven by funding  |
|                  | NGO Strategy                       | Cause lawyering, Legal opportunity structure                  | NGO strategy optimizes reaching normative goals   | NGO participation at the most functional courts   |
| Court-Centric    | State-driven                       | International organizations; Rational choice institutionalism | States grant NGO participation and/or push courts to allow NGO participation to advance state interests | NGO participatory access is state-driven; limited unilateral allowance of NGO participation by courts |
|                  | Resources (expertise, cases, etc.) | Comparative courts  | Courts allow NGO participation to provide resources   | NGO participation follows resource needs; resources limited to monitoring and litigation              |

to articulate what each literature elucidates and obscures with regard to NGO interaction with international courts as well as extrapolate what observable expectations would be predicted from the theory. In this way, I develop plausible alternative explanations in the absence of any established competing explanations. Below, I present four principle bodies of scholarship relating to either NGOs and courts – transnational advocacy networks, cause lawyering and social movements, courts as international organizations, and comparative constitutional courts – and the empirical expectations of NGO participation each body of scholarship would predict (see Table 1.1).

*An NGO Divided*

To engage with international judicial mechanisms, NGOs must be motivated to do so and have the requisite resources. Therefore, a potential explanation for variation in NGO participation across courts is discrepancies in NGO organizational capacity: financial, expert-based, or network resources. Such a capacity-based argument can be derived from both the scholarship on Transnational Advocacy Networks (TANs) and emergent work on NGOs as organizations in global governance.



TANs are networks of principled actors who coordinate efforts and share information in horizontal relationships.<sup>12</sup> The result of this coordination and information sharing is to place new issues on the agenda and pressure for their adoption, which could result in norm change and even “norm cascades.”<sup>13</sup> TANs as “norm entrepreneurs” are studied in this way across many issue arenas in international affairs including human rights, the environment, and global regulation.<sup>14</sup> According to this literature, the influence of TANs expanded in the 1980s and 1990s as the number of NGOs grew exponentially and technological advancements allowed for a new range of coordination and tactics.<sup>15</sup> From this insight, it is possible to extrapolate that the supply, or number of NGOs, relates to NGO participation at international courts. This idea merits consideration as greater numbers of more networked NGOs may share or coordinate tactics and approaches. Nevertheless, the TANs literature does not illuminate much more about NGO participation across courts. The scholarship looks at NGOs in a global sense, not at the specific networks that emerge, or do not emerge, around specific courts. The literature also typically envisions NGOs acting as “norm entrepreneurs,” pressuring for the establishment of a new court, such as the ICC.<sup>16</sup> This focus overlooks hybridized NGOs that may perform advocacy functions as well as service provision on related issues, such as the recent movement towards NGOs engaging in both human rights advocacy and development service provision.<sup>17</sup>

A more recent vein of global governance research departs from the emphasis on mechanisms and outcomes of governance to consider the types of authority of governors and the relationships between governors.<sup>18</sup> By allowing for governors to have multiple sources of authority and switching the focus from governance

<sup>12</sup> Keck and Sikkink, *Activists Beyond Borders*.

<sup>13</sup> Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (1998): 887–917.

<sup>14</sup> Ann Florini, *Third Force: The Rise of Transnational Civil Society* (Washington, DC: Carnegie Endowment, 2000); Keck and Sikkink, *Activists Beyond Borders*; Khagram, Riker, and Sikkink, *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*; Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society,” *International Organization* 44, no. 4 (1990): 479–526; Jacqui True and Michael Mintrom, “Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming,” *International Studies Quarterly* 45, no. 1 (2001): 27–57.

<sup>15</sup> Keck and Sikkink, *Activists Beyond Borders*; Steve Charnovitz, “Two Centuries of Participation: NGOs and International Governance,” *Michigan Journal of International Law* 18 (1996–1997): 183–286.

<sup>16</sup> Steve Charnovitz, “Nongovernmental Organizations and International Law,” *The American Journal of International Law* 100, no. 2 (2006): 348–72; Marlies Glasius, *The International Criminal Court* (London: Routledge, 2006); Struett, *The Politics of Constructing the International Criminal Court*.

<sup>17</sup> Paul J. Nelson and Ellen Dorsey, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (Washington, DC: Georgetown University Press, 2008).

<sup>18</sup> Deborah D. Avant, Martha Finnemore, and Susan K. Sell, eds., *Who Governs the Globe?* (Cambridge University Press, 2010).



outcomes to governance relationships, this new approach informs research that interrogates the core assumption of NGOs as principled actors working horizontally and cooperatively for universal and cosmopolitan goals. Research in this vein explores why certain issues are picked up by transnational advocacy campaigns and others not, and how the network relationships among NGOs are structured.<sup>19</sup> This literature also looks at networks of non-state actors with principled, but illiberal, goals, such as the National Rifle Association (NRA) promoting the trade in global small arms.<sup>20</sup> Lastly, another body of literature questions the notion that NGOs only act according to their core normative principles with the result of outcomes that further their normative aims. According to this research, NGOs can act both from material and normative interests, the normative goals of NGOs can lead to suboptimal outcomes, and normative goals can become politicized and alter with changing environmental contexts.<sup>21</sup> If one assumes that material interests are a core interest of NGOs, then financial incentive would drive NGO engagement with international judicial mechanisms. In other words, NGO participation would follow donor money.

Focusing on donor money does help explain some of the variation in NGO participation across international courts, as the young ICC was for some time a grant priority for philanthropic foundations and Western European governments. Yet, donor money does not shed light on the initial motivation of NGOs to seek to

<sup>19</sup> Clifford Bob, *The Marketing of Rebellion: Insurgents, Media, and International Activism* (Cambridge University Press, 2005); R. Charli Carpenter, “Women, Children and Other Vulnerable Groups’: Gender, Strategic Frames and the Protection of Civilians as a Transnational Issue,” *International Studies Quarterly* 49, no. 2 (2005): 295–334; R. Charli Carpenter, “Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks,” *International Studies Quarterly* 51, no. 1 (2007): 99–120; R. Charli Carpenter, “Vetting the Advocacy Agenda: Network Centrality and the Paradox of Weapons Norms,” *International Organization* 65, no. 1 (2011): 69–102; David A. Lake and Wendy Wong, “The Politics of Networks: Interests, Power, and Human Rights Norms,” in *Networked Politics: Agency, Power, and Governance* (Ithaca, NY: Cornell University Press, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1004199](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004199); Wendy Wong, *Internal Affairs: How the Structure of NGOs Transforms Human Rights* (Ithaca, NY: Cornell University Press, 2012).

<sup>20</sup> Kenneth Anderson and David Rieff, “Global Civil Society’: A Skeptical View,” in *Global Civil Society 2004/5*, ed. Helmut K. Anheier, Marlies Glasius, and Mary Kaldor (Sage Publications, 2004): 26–39; Clifford Bob, “Clashing Interests in Global Arenas: The International Battle over Small Arms Control” (Annual Meeting of the International Studies Association, San Francisco, 2008).

<sup>21</sup> Alexander Cooley and James Ron, “The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action,” *International Security* 27, no. 1 (2002): 5–39; S. K. Sell and A. Prakash, “Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights,” *International Studies Quarterly* 48, no. 1 (2004): 143–75; Aseem Prakash and Mary Kay Gugerty, *Advocacy Organizations and Collective Action* (Cambridge University Press, 2010); Deborah Avant, “Conserving Nature in the State of Nature: The Politics of INGO Policy Implementation,” *Review of International Studies* 30, no. 3 (2004): 361–82; Michael Barnett, “Evolution Without Progress? Humanitarianism in a World of Hurt,” *International Organization* 63, no. 4 (2009): 621–63.

participate at international judicial institutions when little to no money was available or NGO insistence on continuing to monitor and aid the ICC when donor money is scarcer.

### *The Myopia of Legalism*

The cause lawyering literature in domestic and international law offers another potential explanation that attributes variation in NGO participation to NGOs, not courts. Instead of capacity or funding driving NGO participation, differences in NGO participation across courts is caused by the various strategic motivations of NGOs. Two main questions animate much of this scholarship, which in many ways mirrors the legal opportunity structure in social movement literature.<sup>22</sup> First, why and when do NGOs or social movements utilize international courts as petitioners representing clients or filing amicus briefs? Second, what is the impact of such formal participation on judicial outcomes?<sup>23</sup> This literature views engagement with international courts as one strategic option among many others, including utilizing domestic courts, quasi-judicial institutions, political advocacy, lobbying, or possibly elections.<sup>24</sup> NGO behavior, or the decision to engage with international courts, is based upon a cost-benefit analysis of what would best optimize the desired normative goals of the organization.

<sup>22</sup> Ellen Ann Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor: University of Michigan Press, 2009); Chris Hilson, “New Social Movements: The Role of Legal Opportunity,” *Journal of European Public Policy* 9, no. 2 (2002): 238–55, <https://doi.org/10.1080/13501760110120246>; Bruce M. Wilson and Juan Carlos Rodríguez Cordero, “Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics,” *Comparative Political Studies* 39, no. 3 (2006): 325–51, <https://doi.org/10.1177/0010414005281934>.

<sup>23</sup> The results of this research are mixed and significant methodological problems hamper the teasing out of influence on judicial decision-making. See: M. L. Busch and K. J. Pelc, “The Politics of Judicial Economy at the World Trade Organization,” *International Organization* 64, no. 2 (2010): 257–79; Laurence Boisson de Chazourmes and Makane Moïse Mbengue, “The Amici Curiae and the WTO Dispute Settlement System: The Doors Are Open,” *Law and Practice of International Courts and Tribunals* 2 (2003): 205–48; Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press, 2007); Laura Van den Eynde, “Amicus Curiae Briefs of Human Rights NGOs before the European Court of Human Rights” (Stanford University Law School, 2011); Petros C. Mavroidis, “Amicus Curiae Briefs before the WTO: Much Ado about Nothing,” 2001; Abdelsalam A. Mohamed, “Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples’ Rights: Lessons from the European and Inter-American Courts of Human Rights,” *Journal of African Law* 43 (1999): 201–13; Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings.”

<sup>24</sup> Austin Sarat and Stuart A. Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford and New York, NY: Oxford University Press, 1998); Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Cambridge University Press, 2011).