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State Third-Party Interventions before the European Court of Human Rights: The “What” and “How” of Intervening

L'intervention d'États tiers devant la Cour européenne des droits de l'homme : état des lieux (le « quoi ») et modalité (le « comment »)

Lize R. Glas

Abstract

One of the third parties that can intervene before the European Court of Human Rights (Court) are the states parties to the European Convention on Human Rights themselves (ECHR). Although state third-party interventions can be a way for the states to cooperate and to enter into a dialogue with the Court, these interventions have received little attention in the debate about the relationship between the Court and the states of the past years. This article focuses solely on such interventions from two perspectives. It describes first the “what” of intervening, including the categories of cases that attract interventions, the content of the interventions and the Court’s references to the interventions, based on the 59 cases in which states have intervened so far under Article 36(2) ECHR. After that, the article gives reasons why states do (in practice) intervene and why they should intervene (from a normative perspective). Recommendations as to how these interventions can be stimulated are given in the final part of the article.

Résumé

Les États tiers qui peuvent intervenir devant la Cour européenne des droits de l’homme (la Cour) sont les États parties à la Convention européenne des droits de l’homme (CEDH). Bien que l’intervention d’un État tiers puisse être un moyen pour les États de coopérer et de dialoguer avec la Cour, ces interventions n’ont reçu qu’une attention limitée dans le débat concernant les relations entre la Cour et les États ces dernières années. Cet article s’intéresse uniquement à ces interventions, avec deux points de vue. Premièrement, il dresse l’état des lieux des interventions (le « quoi »), et notamment les catégories de cas qui ont suscité une intervention, le contenu des interventions et les références de la Cour auxdites interventions basées sur les 59 cas dans lesquels les États sont intervenus en vertu de l’article 36(2) CEDH. Par la suite, cet article donne les raisons pour lesquelles les États interviennent (en pratique) et pourquoi ils devraient intervenir (d’un point de vue normatif). Des recommandations concernant les modalités d’une éventuelle intervention par les États sont données dans la dernière partie de l’article.

I. Introduction¹

In many legal systems, in addition to the parties to a case, a third party can participate in the proceedings to offer “its special perspectives, arguments, or expertise”.² The idea of interventions by a third party or *amicus curiae* (friend of the court), as they are often called, was developed in the US, then introduced in other states and has also been adopted by various international legal systems.³ The system of human rights protection established by the European Convention on Human Rights (Convention; ECHR) is one such system that creates a possibility for “non-parties” to intervene.⁴

One “non-party” that can intervene before the European Court of Human Rights (Court) are the states parties to the Convention themselves, under Article 36(2) ECHR. In a few pages, they can sketch how the legal issue at the source of a complaint should be resolved or provide the Court with information. The drafters of one of the Convention protocols identified the “need to encourage more frequent interventions by [...] states” as an “issue linked to the functioning of the control system of the Convention”.⁵ The Parliamentary Assembly, the CDDH and the Venice Commission also see such interventions, especially in cases of general importance, as useful additions which states should make more often.⁶

The aforementioned bodies make their comments about state interventions in passing, without analysing how states use interventions or discussing in some depth why more interventions are desirable. Nor have these interventions received much attention in academic writing, while interventions by civil society have been described and analysed in different contributions.⁷ It is also surprising that, although the interventions create a mechanism for direct engagement between the Court and the states, they have hardly been mentioned in the frequent discus-

¹ All cases referred were adopted by the Strasbourg Court. This information is therefore not added to individual references.

² L. BARTHOLOMEUSZ, “The *Amicus Curiae* before International Courts and Tribunals”, *Non-State Actors and International Law*, vol. 5, n° 2, 2005, pp. 209-211.

³ *Ibidem*; L. HENNEBEL, “Le rôle des *amici curiae* devant la Cour européenne des droits de l’homme”, *R.T.D.H.*, vol. 71, 2007, pp. 641-642; J. HARRISON, “Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?”, in P.-M. DUPUY, F. FRANCONI and E.-U. PETERSMANN (eds), *Human Rights in International Investment Law and Arbitration*, Oxford, OUP, 2009, pp. 396-400.

⁴ Article 36 ECHR; Third-party interventions can, for example, also be submitted to the European Committee of Social Rights (Rule 32 of its Rules of Procedure), the Inter-American Court of Human Rights (Article 41 of its Rules of Procedure) and some UN human rights treaty bodies, including the Committee on Economic, Social and Cultural Rights (Article 8 of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights) and the Committee on the Rights of Persons with Disabilities (Rule 72(3) of its Rules of Procedure).

⁵ Explanatory Report to Protocol 14, § 19.

⁶ See note 150.

⁷ L. BURGOGUE-LARSEN, “Les interventions éclairées devant la Cour européenne des droits de l’homme ou le rôle stratégique des *amici curiae*”, in *La conscience des droits – Mélanges en l’honneur de Jean-Paul Costa*, Paris, Dalloz, 2011, p. 67; N. BÜRLI, “*Amicus curiae* as a Means to Reinforce the Legitimacy of the European Court of Human Rights”, in S. FLOGAITIS, T. ZWART and J. FRASER (eds), *Cheltenham, Edward Elgar*, 2013, p. 135; L. VAN DEN EYNDE, “An Empirical Look at the *Amicus Curiae* Practice of Human Rights NGOs before the European Court of Human Rights”, *NQHR*, vol. 31, n° 3, 2013, p. 271.

sions about the relationship between the Court and the states parties of the past few years.⁸

The aim of this article is, first, to describe the “what” of the interventions of interest, which includes quantitative findings, the categories of cases in which states intervene, the content of the interventions and the Court’s references to the interventions. Second, this article digs into the “why” of intervening, providing reasons why states do and should intervene. Therefore, whereas the first part is solely descriptive, the second part knows both descriptive and normative elements. By discussing the foregoing, the following question is answered: how can the practice of state interventions under Article 36(2) ECHR be described and why do and should states intervene?

Before addressing the “why” and “what” of intervening, the article first gives some background information on state third-party interventions in section II. Section III explains the methodology behind the research. The what-question is addressed in sections IV – VII and the why-question in section VIII. Section IX includes some recommendations as to how state interventions can be encouraged in light of the reasons for intervening in section VIII.

II. Article 36(2) ECHR State Third-Party Interventions

The Convention, as it entered into force in 1954, did not provide for the possibility to intervene. In 1982, the Court created this possibility for *inter alia* states that are not a party to the proceedings in Rule 37(2) of Court.⁹ Protocol 11, which entered into force in 1998, amended the Convention to include paragraph 2 of Article 36 ECHR which provides that the “President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments”.¹⁰ Under that paragraph, NGOs can for example also submit interventions. Additionally, states parties one of whose nationals is an applicant and the Council of Europe Commissioner for Human Rights have the right to intervene under the first and third paragraph of Article 36 ECHR respectively.

The current Rules of Court clarify that leave may also be given to a state to submit such comments.¹¹ Third-party interventions are therefore not just possible on invi-

⁸ See for references to such discussions: L. R. GLAS, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System*, Antwerp, Intersentia, 2016, pp. 129-133; See also CDDH, “Guaranteeing the Long-term Effectiveness of the Control System of the European Convention on Human Rights”, 9 April 2003, CDDH(2003)006, Addendum final, pp. 20-29.

⁹ W. A. SCHABAS, *The European Convention on Human Rights: A Commentary*, Oxford, OUP, 2015, p. 2004.

¹⁰ Article 36(2) ECHR.

¹¹ Rule 44(3)(a) of Court.

tation. A request for leave to intervene must be “duly reasoned and submitted in writing in one of the official languages [...] no later than twelve weeks” after the application has been communicated to the respondent state.¹² In practice, it is highly unlikely that states are refused leave;¹³ they seem to have a *de facto* right to intervene. The granting of leave is subject to “any conditions, including time-limits” set by the Court.¹⁴ Since the intervener is not a party to the case,¹⁵ the Court usually requests it to not directly address the facts, admissibility or merits of a case.¹⁶ In other words, the intervention should be “detached from the case”.¹⁷ Further, the Court normally sets a maximum number of fifteen pages.¹⁸ Where the conditions are not complied with, the President “may decide to not include the comments in the case file”.¹⁹ When states do not fully comply, the President can ask them to redo their job, something that virtually never happens.²⁰ The interventions are forwarded to the parties, who are entitled to file written observations in reply.²¹

III. Methodology

The interventions relied upon in this article were found through HUDOC with eight search terms, all entered on 15 June 2016.²² In spite of the different search terms used, it cannot be excluded that an intervention was missed; at least for interventions by human rights NGOs it is known “that the Court has occasionally ‘forgotten’” to mention one.²³ However, it may be the case that, when a state intervenes, the Court forgets to mention it less easily and that, therefore, the list of interventions composed for the purposes of this research is practically complete.

The descriptions of the content of the interventions in section VI are derived from the summaries of the interventions as presented by the Court in its rulings. The author depended therefore completely on the Court’s summaries.²⁴ This means that the content of some interventions has remained unknown, as the Court did not present a summary of the interventions in eight (inadmissibility/strike out) decisions.²⁵

¹² Rule 44(3)(b) of Court.

¹³ L. HENNEBEL, *op. cit.*, note 3, p. 650; D. J. HARRIS *et al.*, *Law of the European Convention on Human Rights*, Oxford, OUP, 2014, p. 153.

¹⁴ Rule 44(5) of Court.

¹⁵ See also Explanatory Report to Protocol 11, § 91.

¹⁶ D. J. HARRIS, *op. cit.*, note 13, p. 154; P. HARVEY, “Third Party Interventions before the ECtHR: A Rough Guide”, 24 February 2015, blog post on *Strasbourg Observers*.

¹⁷ L. R. GLAS, *op. cit.*, note 8, p. 314.

¹⁸ P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, OUP, 2011, p. 49.

¹⁹ Rule 44(5) of Court.

²⁰ L. R. GLAS, *op. cit.*, note 8, p. 315.

²¹ Rule 44(6) of Court.

²² “37 § 2”, “61 § 3”, “Rule 44 § 2”, “Article 44 § 2”, “Article 36 § 2”, “amicus”, “third-party intervention”, “*tiers intervenant*”. Terms based on relevant (former) Convention articles and Rules of Court and inspired by L. VAN DEN EYNDE, *op. cit.*, note 7, p. 278.

²³ *Ibidem*, p. 279.

²⁴ See for an exception where the Court copy-pasted the text of the intervention in its judgment (GC), *Jaloud v. the Netherlands*, 20 November 2014 (Appl. No. 47708/08), § 121.

²⁵ (2nd sect.), judgm. (struck out), *Danell and Others v. Sweden*, 17 January 2006 (Appl. No. 54695/00); (4th sect.), dec. (struck out), *Bednarek v. Poland*, 30 September 2008 (Appl. No. 32023/02); (4th sect.), dec. (struck out), *Buczanski*

IV. Quantitative Findings

The searches on HUDOC yielded 59 cases with one or more interventions. To come to this number, nine comparable Italian cases on the length of civil proceedings, with nine identical interventions by Poland, the Czech Republic and Slovakia, have been counted as one case.²⁶ The cases found are mostly decided by judgment and exceptionally by (inadmissibility or strike-out) decision. Compared to the number of interventions by human rights NGOs, this number is low; they intervened in 237 cases until 2013.²⁷ The number is also low compared to the number of decisions and judgments rendered by the Court in one year. To illustrate, in 2015 alone, the Court delivered 823 judgments and the Chambers and Committees declared approximately 6,800 cases inadmissible or struck them out. Further, the Grand Chamber delivered 22 judgments in that year, which attracted only 4 relevant interventions.²⁸

Table 1 shows the number of interventions per state. The UK is by far the most frequent intervener, whereas about two-thirds of the interveners only intervened in 1 to 3 cases. In total, 32 states intervened. 15 have therefore never intervened, most of which are either relatively new member states or very small states; Spain and Switzerland are the odd ones out in this category.

Table 1: Interventions per intervening state

Intervening state	Interventions
UK	23
Italy	8
France	7
Czech Republic; Finland; Germany; Ireland; the Netherlands	6
Greece; Slovakia	5
Belgium; Cyprus; Norway; Portugal	3
Armenia; Estonia; Lithuania; Malta; Monaco; Poland; Russia; Sweden	2
Austria; Azerbaijan; Bulgaria; Denmark; Georgia; Latvia, Moldova; Romania; San Marino; Turkey	1
Albania; Andorra; Bosnia and Herzegovina; Croatia; Hungary; Iceland; Lichtenstein; Luxembourg; Montenegro; Serbia; Slovenia; Spain; Switzerland; the FYRM; Ukraine	0

v. *Poland*, 30 September 2008 (Appl. No. 1836/03); (1st sect.), dec. (struck out), *Sofi v. Cyprus*, 14 January 2010 (Appl. No. 18163/04); (3rd sect.), dec. (struck out), *Djelani Sufi, Hassan Guduud and Others v. the Netherlands and Greece*, 20 September 2011 (Appl. No. 28631/09); (1st sect.), dec. (struck out), *Barakzai, Habibi and Ali Zadeh v. the Netherlands and Greece*, 13 December 2011 (Appl. No. 30457/09); (3rd sect.), dec. (inadm.), *Ahmed Ali v. the Netherlands and Greece*, 24 January 2012 (Appl. No. 26494/09); (3rd sect.), dec. (struck out), *Micheal v. the Netherlands*, 11 March 2014 (Appl. No. 33229/12).

²⁶ These have also been counted as one intervention (per state) for the numbers presented in Tables 1 and 2 and Graph 1. Reference will only be made to this case (GC), *Cocchiarella v. Italy*, 29 March 2006 (Appl. No. 64886/01); An intervention in the *Winterwerp* case of 1979 was not taken into consideration because it was made before the procedure was added to the Rules of Court.

²⁷ L. VAN DEN EYNDE, *op. cit.*, note 7, p. 280.

²⁸ Court, *Annual Report 2015*, p. 65.

Table 2 gives insight into which states see how many interventions of other states as respondent state. The Netherlands has seen most interventions. 24 respondent states have seen one intervention or more, three-fourths of which in only 1 to 3 cases. The remaining 23 states have never been a party to a case in which another state intervened. Again, these states are often either relatively new member states or small states.

Table 2: Interventions per respondent state

Respondent state	Interventions
The Netherlands	10
Italy	7
France; Switzerland	6
Greece; UK	4
Belgium; Sweden	3
Austria; Cyprus; Germany; Latvia; Norway; Poland	2
Bosnia and Herzegovina; Finland; Hungary; Lithuania; Malta; Ireland; Portugal; Romania; Spain; Turkey	1
<i>Albania; Andorra; Armenia; Azerbaijan; Bulgaria; Croatia; Czech Republic; Denmark; Estonia; Georgia; Iceland; Liechtenstein; Luxembourg; Monaco; Montenegro; Moldova; Russia; San Marino; Serbia; Slovakia; Slovenia; FYRM; Ukraine</i>	0

When combining the information in Tables 1 and 2, it becomes apparent that 10 of the 47 states parties (indicated in italics in Table 2) have neither intervened nor ever seen an intervention as a party. The interventions have therefore not yet been relevant to about 20 percent of all states. Moreover, those who do use or see the phenomenon, only encounter it in few cases.

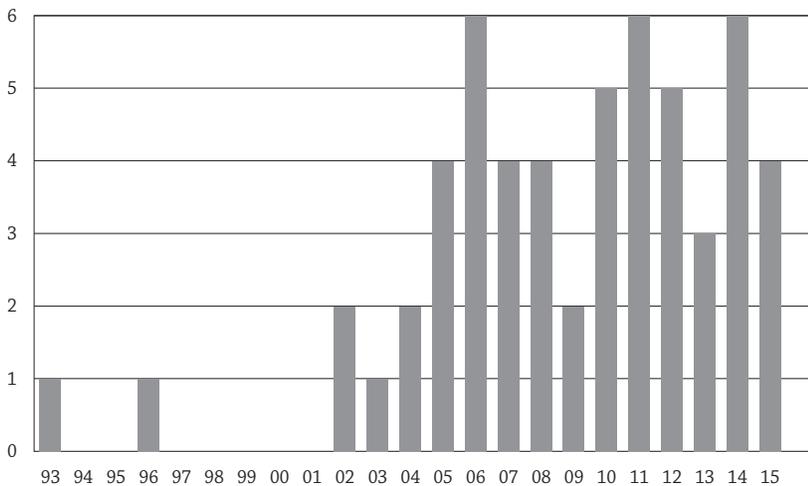
Graph 1 presents the number of cases in which states intervened per year and shows that states started to intervene regularly from 2002 onwards and that the number of interventions per year has never been more than six. The numbers do not seem to be clearly de- or increasing over the years. In comparison to (human rights) NGOs, the states started to intervene relatively “late”, since NGOs already started to intervene in the 1980s and already did so more frequently in the 1990s.²⁹

The Grand Chamber is the Court’s formation that decided the majority (34) of the 59 cases.³⁰ States therefore intervene relatively often in Grand Chamber cases, especially considering that that formation only delivers few rulings. This means that states intervene relatively often in important cases which *inter alia* raise a serious question affecting the interpretation or application of the Convention or

²⁹ L. VAN DEN EYNDE, *op. cit.*, note 7, p. 280.

³⁰ The Italian length of proceedings cases counted as one because all GC cases.

Graph 1: Number of cases in which states intervene per year (1993-2015)



a serious issue of general importance.³¹ This finding is supported by the finding that they intervene the most in cases which the Court considers to be of the highest level of importance (Case Reports): 33 times.³² About sixty percent of the Grand Chamber cases found are referred cases.³³ States therefore tend to intervene more in referred than in relinquished cases,³⁴ as the number of referred and relinquished cases is roughly equal.³⁵

In conclusion, this section has demonstrated that interventions are rare and even a phenomenon that a certain proportion of the states has never encountered. If the states intervene, they intervene most often in the most important cases, especially cases that have been referred to the Grand Chamber. Further, state third-party interventions are mostly something of the past fourteen years.

Some tentative reasons are given for the low number of interventions as this will facilitate making recommendations in section IX. One reason may be that interventions simply cost time: one needs to check HUDOC for relevant communicated cases and write the intervention. Although this is less time-consuming than defending oneself before the Court,³⁶ states may want to prioritise the former nevertheless because of what is at stake and because of the (high) number of cases brought against them. Also, states may doubt whether intervening is worth-

³¹ Articles 30, 43(2) ECHR.

³² See HUDOC for a description of the levels; The Italian length of proceedings cases not counted because three of level Case Reports and six of importance level 1.

³³ The Italian length of proceedings cases counted as one because all referred.

³⁴ A Chamber can relinquish jurisdiction before it decides the case (Article 30 ECHR); the parties can request referral upon a Chamber judgment (Article 43 ECHR).

³⁵ Court, "The General Practice Followed by the Panel of the Grand Chamber when Deciding on Requests for Referral [...]", October 2011, p. 4.

³⁶ L. HENNEBEL, *op. cit.*, note 3, p. 641.

while, considering that the Court hardly refers to the interventions,³⁷ making it unclear whether they are of any relevance.³⁸ States may also doubt this because an intervention may be in vain when a case is struck out or declared inadmissible³⁹ or because the Court can simply ignore the intervener's points.⁴⁰

V. Categories Of Cases

From discussing numbers, we now move to the subject matter of cases in which states intervene. The author has chosen to discuss the content of the cases based on different categories rather than based on the Convention article at stake, because an article says little about the actual content of a case; the categories chosen are more informative. It must be noted that it is not possible to categorise all the 56 cases neatly into categories. Nevertheless, the below categories encompass the great majority of cases and some cases even fall into more than one category.

A. INTERNATIONAL OR EU LAW

As has also been observed by others, states intervene frequently in cases “where a point of general public international law is being considered”.⁴¹ Such cases relate often to the question whether an alleged violation falls within the jurisdiction of the respondent state, as is required by Article 1 ECHR. A state may dispute this, for example, because it was implementing a Security Council resolution,⁴² or because it took part in a peace-keeping mission under the UN's authority.⁴³ States also intervened in a case on the immunity from jurisdiction of foreign heads of state in office⁴⁴ and on the Hague Abduction Convention.⁴⁵

Cases in which EU law plays an important role are mostly cases about the return of asylum seekers from one EU member state to another under the Dublin Regulation. Seven such cases were found.⁴⁶ A good example in this context is the *Bosphorus* case, in which the Court formulated the presumption that an EU

³⁷ See section VII.

³⁸ Cf. J. D. KEARNEY and T. W. MERRILL, “The Influence of *Amicus Curiae* Briefs on the Supreme Court”, *UPLR*, Vol. 148, 2000, pp. 743, 767.

³⁹ See section VI.

⁴⁰ See also L. HODSON, *NGOs and the Struggle for Human Rights in Europe*, Oxford, Hart Publishing, 2011, p. 54.

⁴¹ D. J. HARRIS, *op. cit.*, note 13, p. 153.

⁴² (GC), *Nada v. Switzerland*, 12 September 2012, (Appl. No. 10593/08); *Al-Dulimi and Montana Management Inc. v. Switzerland*, 26 October 2013 (Appl. No. 5809/08) (referred to the GC).

⁴³ (GC), dec. (inadm.), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007 (Appl. No. 71412/01), § 71; See also (GC), *Markovic and Others v. Italy*, 14 December 2006 (Appl. No. 1398/03); (4th sect.), dec. (inadm.), *Berčić and Others v. Bosnia and Herzegovina*, 16 October 2007 (Appl. No. 36357/04); *Jaloud*, *op. cit.*, note 24.

⁴⁴ (GC), dec. (struck out), *Association SOS Attentats and de Boery (SOS) v. France*, 4 October 2006 (Appl. No. 76642/01).

⁴⁵ (GC), *X. v. Latvia*, 26 November 2013 (Appl. No. 27853/09); See also (GC), *Stoll v. Switzerland*, 10 December 2007 (Appl. No. 69698/01).

⁴⁶ (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Appl. No. 30696/09); *Sufi and Guduud*, *op. cit.*, note 25; *Barakzai, Habibi and Ali Zadeh*, *op. cit.*, note 25; *Ahmed Ali*, *op. cit.*, note 25; *Michael*, *op. cit.*, note 25; (3rd sect.), dec. (struck out), *Abdullahi Ali v. the Netherlands*, 27 May 2014 (Appl. No. 63931/12); (GC), *Tarakhel v. Switzerland*, 4 November 2014 (Appl. No. 29217/12).

member state does not depart from the requirements of the Convention when it implements, without having discretion, legal obligations flowing from its EU membership.⁴⁷ In this case, Italy and the UK intervened.

B. SHARED DOMESTIC LEGAL CONCEPTS

Another category of cases is those that touches upon a legal concept that is known in both the respondent and the intervening state. The states, for example, have in common that they know absolute parliamentary immunity,⁴⁸ a system of debt repayment⁴⁹ or a law on adverse possessions.⁵⁰ Different cases falling into this category concern criminal procedure.⁵¹

C. SENSITIVE MATTERS

Other cases that seem to attract interventions concern a sensitive matter for the intervening state, the respondent state and probably other states too. A case in point is the *Lautsi* case about the question whether the presence of crucifixes in Italian state-school classrooms was compatible with the Convention requirements.⁵² The referred Chamber case attracted ten interventions, the highest number in a single case. Other sensitive matters include prohibiting denying the Armenian genocide,⁵³ *in vitro* fertilisation,⁵⁴ and same-sex marriage.⁵⁵

D. DEPORTATION

Yet another category that can be distinguished, are deportation-related cases.⁵⁶ These cases can concern, for example, the question how the rights protected in Article 3 (and 6) ECHR should be applied,⁵⁷ or whether the exclusion of the appli-

⁴⁷ (GC), *Bosphorus v. Ireland*, 30 June 2005 (Appl. No. 45036/98); See also (GC), *Avotiņš v. Latvia*, 23 May 2016 (Appl. No. 17502/07).

⁴⁸ (2nd sect.), *A. v. UK*, 17 December 2002 (Appl. No. 35373/97) (final since 17 March 2003).

⁴⁹ (4th sect.), *Bäck v. Finland*, 20 July 2004 (Appl. No. 37598/97) (final since 20 October 2004).

⁵⁰ (GC), *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. UK*, 30 August 2007 (Appl. No. 44302/02); See also (GC), *Kleyn and Others v. the Netherlands*, 6 May 2003 (Appl. No. 39343/98); (1st sect.), *TV Vest As and Rogaland Pensjonistparti (TV Vest As) v. Norway*, 11 December 2008 (Appl. No. 21132/05) (final since 11 March 2009); (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, 30 June 2009 (Appl. No. 32772/02); (GC), *Sindicatul "Păstorul cel Bun" (Sindicatul) v. Romania*, 9 July 2013 (Appl. No. 2330/09).

⁵¹ See also P. HARVEY, *op. cit.*, note 16; See e.g. (GC), *Kyprianou v. Cyprus*, 15 December 2005 (Appl. No. 73797/01); (GC), *Taxquet v. Belgium*, 16 November 2010 (Appl. No. 926/05); (GC) *Schatschaschwili v. Germany*, 15 December 2015 (Appl. No. 9154/10).

⁵² (GC), *Lautsi and Others v. Italy*, 18 March 2011 (Appl. No. 30814/06).

⁵³ (GC), *Perinçek v. Switzerland*, 15 October 2015 (Appl. No. 27510/08).

⁵⁴ (GC), *S.H. and Others v. Austria*, 3 November 2011 (Appl. No. 57813/00).

⁵⁵ (1st sect.), *Schalk and Kopf v. Austria*, 24 June 2010 (Appl. No. 30141/04) (final since 22 November 2010); See also (GC), *Hirst and Others v. UK (No. 2)*, 6 October 2005 (Appl. No. 74025/01); (GC), *Scoppola v. Italy (No. 3)*, 22 May 2012 (Appl. No. 126/05); (GC), *S.A.S. v. France*, 2 July 2014 (Appl. No. 43835/11); (GC), *Couderc and Hachette Filipacchi Associés v. France (Couderc)*, 10 November 2015 (Appl. No. 40454/07).

⁵⁶ (5th sect.), *Ahorugeze v. Sweden*, 27 October 2011 (Appl. No. 37075/09) (final since 4 June 2012).

⁵⁷ (GC), *Saadi v. Italy*, 28 February 2008 (Appl. No. 37201/06); (3rd sect.), *A. v. the Netherlands*, 20 July 2010 (Appl. No. 4900/06) (final since 20 October 2010); (3rd sect.), dec. (inadm.), *Joesebov v. the Netherlands*, 2 November 2010 (Appl. No. 44719/06).

cant from the territory of one state for ten years is compatible with the rights protected by Article 8 ECHR.⁵⁸ The Dublin cases also fall into this category.

E. OTHER

The intervener can also have a connection to the case, other than through one of the above categories. Germany for example intervened in two Polish cases on the possibility to appeal a decision of the Polish-German Reconciliation Foundation – a body established by a treaty between Poland and Germany – to not give them compensation for the forced labour they had carried out on territory occupied by Germany during World War II.⁵⁹ Further, Cyprus intervened in *Adalı v. Turkey*. In this case, the applicant complained that her husband, a Turkish Cypriot, had been killed by the Turkish authorities and/or the authorities of the Turkish Republic of Northern Cyprus and that no adequate investigation into his death had been carried out.⁶⁰

VI. Content of Interventions

The categories discussed in section V show that the states intervene because they have some sort of a connection to the subject matter of the case. From these categories, we move on to the content of the interventions. As was noted in the methodology section, the content of eight decisions has remained unknown, because the Court did not summarise them. An observation that applies to all interventions is that the interveners side with the respondent state, in the sense that both their submissions mean that the Court should not find a violation. Cyprus' intervention in *Adalı* is the exception to this rule, as the intervener clearly opposed Turkey.⁶¹ Additionally, the interveners do not address the applicant's arguments directly. In that light, the UK's remark that it contested the applicants' argument drawn from a previous judgment is exceptional.⁶²

A. TOUCHING ON THE FACTS, ADMISSIBILITY OR MERITS

As explained in section II, the Court usually requests the intervener to not address the facts, admissibility or merits of a case. Nevertheless, examples of interventions can be found where interveners do exactly that.

Sometimes, factual information is provided on the Court's invitation: Italy intervened in three cases about Dublin returns to Italy, providing information about

⁵⁸ (GC), *Üner v. the Netherlands*, 18 October 2006 (Appl. No. 46410/99).

⁵⁹ *Bednarek*, *op. cit.*, note 25; *Buczanski*, *op. cit.*, note 25.

⁶⁰ (1st sect.), *Adalı v. Turkey*, 31 March 2005 (Appl. No. 38187/97) (final since 12 October 2005); See also *Danell*, *op. cit.*, note 25; *Sofi*, *op. cit.*, note 25; (GC), *Vasiliasukas v. Lithuania*, 20 October 2015 (Appl. No. 35343/05).

⁶¹ *Adalı*, *op. cit.*, note 60, §§ 185, 208.

⁶² *Schalk and Kopf*, *op. cit.*, note 55, § 82; See also Armenia's intervention in *Perinçek*, *op. cit.*, note 53.

the applicants' situation.⁶³ Further, the Court invited Cyprus to submit "explanations and observations on Cypriot law as relevant to the case".⁶⁴ Azerbaijan too gave comments "mainly of a factual nature", which helped clarify that the applicant was not a citizen of Azerbaijan, as he had claimed.⁶⁵

In other cases, the intervener seemed to have ignored the Court's request to not comment on admissibility matters or the merits.⁶⁶ To illustrate, France directly addressed the admissibility of the *Nada* case, on the implementation by Switzerland of United Nations counterterrorism resolutions, by proposing that the applicant's complaints should be declared inadmissible *ratione personae*.⁶⁷ In *Adalı*, Cyprus addressed the merits rather extensively. It *inter alia* argued that the investigations of the authorities into the death of the applicant's husband had been inadequate.⁶⁸ Armenia even commented on the character of the applicant himself in the *Perinçek* case, in which the Court decided that subjecting him to a criminal penalty for denying the Armenian genocide violated Article 10 ECHR (right to freedom of expression). Armenia called the applicant an "incorrigible genocide denier".⁶⁹ Moreover, the intervener qualified his statements as "no more than a racially motivated insult to Armenians and an invitation to Turks to believe them to be liars".⁷⁰

B. GIVING INFORMATION

One thing about which the states give information is domestic legal concepts that are of relevance to the case.⁷¹ The interveners, for example, explain the rationale behind parliamentary sovereignty,⁷² how debt repayment works⁷³ or which safeguards apply to trial by jury.⁷⁴ They can also shed light on a relevant domestic judgment⁷⁵ or even submit a copy thereof.⁷⁶

Additionally, the interveners offer explanations as to how they think international law should be interpreted.⁷⁷ To illustrate, the UK once explained that the

⁶³ *Abdullahi Ali*, *op. cit.*, note 46, § 5; *Tarakhel*, *op. cit.*, note 46 (the Court did not make explicit that it asked Italy to intervene); *Micheal*, *op. cit.*, note 25, § 5.

⁶⁴ *Avotiņš*, *op. cit.*, note 47, § 10.

⁶⁵ *Joesobov*, *op. cit.*, note 57, §§ 41, 56.

⁶⁶ See also P. HARVEY, *op. cit.*, note 16.

⁶⁷ *Nada*, *op. cit.*, note 42, § 109.

⁶⁸ *Adalı*, *op. cit.*, note 60, § 210.

⁶⁹ *Perinçek*, *op. cit.*, note 53, § 177.

⁷⁰ *Ibidem*; See also *Stoll*, *op. cit.*, note 45, § 98; *Vasiliasukas*, *op. cit.*, note 60, §§ 151, 163-2015; *Couderc*, *op. cit.*, note 55, § 74.

⁷¹ See also section V, B.

⁷² *A. v. UK*, *op. cit.*, note 48, §§ 37-42, 44-45, 47-48, 50-51, 55, 57-58; See also (2nd sect.), *dec. (adm.)*, *A. v. UK*, 5 March 2002 (Appl. No. 35373/97).

⁷³ *Bäck*, *op. cit.*, note 49, §§ 25-36.

⁷⁴ *Taxquet*, *op. cit.*, note 51, §§ 74-75, 77, 80; See also *Kleyn*, *op. cit.*, note 50, §§ 185-189; (4th sect.), *AB Kurt Kellermann v. Sweden*, 26 October 2004 (Appl. No. 41579/98) (final since 26 January 2005), §§ 57-59; (GC), *Karácsony and Others v. Hungary*, 17 May 2016 (Appl. No. 42461/13), §§ 110-113, 115, 171.

⁷⁵ *S.A.S.*, *op. cit.*, note 55, § 87.

⁷⁶ *TV Vest AS*, *op. cit.*, note 51, § 57.

⁷⁷ *Behrami and Saramati*, *op. cit.*, note 43, §§ 97, 100, 102, 104-107, 109, 113-119; *Berić*, *op. cit.*, note 43; *Al-Dulimi*, *op. cit.*, note 42, §§ 82, 85; *Avotiņš*, *op. cit.*, note 47, § 86.

“correct interpretation” of the international law on the immunity from jurisdiction of foreign heads of state was “that they should also enjoy a general immunity from the civil jurisdiction of other States”.⁷⁸

The information can also relate to matters other than domestic or international law. States, for example, point out that no consensus existed,⁷⁹ that a case should be distinguished from another *Strasbourg* case,⁸⁰ or what their understanding of Article 6 ECHR had been when ratifying the Convention.⁸¹ They also commented on religious precepts (“the wearing of the full-face veil was not required by the Koran”)⁸² and historical events (“the Soviet authorities [did not intend] [...] to destroy any of the constituent parts of Lithuanian society”).⁸³ As noted above, the interveners sometimes also submit information of a factual nature.⁸⁴

C. EXPRESSING DIFFICULTIES...

The intervening states also use the interventions regularly to express difficulties. Some comments are backward looking because they give insight into the difficulties which the intervener has experienced with a previous judgment; others are forward looking because they inform the Court of the difficulties a stay may face, should the Court find a violation or should the Grand Chamber confirm the Chamber’s vision upon referral.

1. *With a Previous Judgment*

In *A v. the Netherlands*, four states, amongst which the UK, pointed to difficulties the *Chahal* judgment had created, for they could no longer weigh the risk of treatment contrary to Article 3 ECHR against the reasons for expelling someone.⁸⁵ They therefore asked the Court to alter its case-law so that *inter alia* the threat to national security posed by a deportee could be a factor “in relation to the possibility and the nature of the potential ill-treatment”.⁸⁶ In each other case falling into this category, the UK was also the intervener.⁸⁷ In none of the cases, however, the Court indeed changed its case-law.

⁷⁸ *SOS*, *op. cit.*, note 44, § 26; See also *Nada*, *op. cit.*, note 42, § 110; *X*, *op. cit.*, note 45, § 83; *Vasiliauskas*, *op. cit.*, note 60, § 150.

⁷⁹ *Schalk and Kopf*, *op. cit.*, note 55, § 46; *Lautsi*, *op. cit.*, note 52, § 49; *S.H.*, *op. cit.*, note 54, § 73; *Sindicatul*, *op. cit.*, note 50, §§ 118-119.

⁸⁰ *Jaloud*, *op. cit.*, note 24, § 125.

⁸¹ (Plenary) *Ruiz Mateos v. Spain*, 23 June 1993 (Appl. No. 12952/87), § 56.

⁸² *S.A.S.*, *op. cit.*, note 55, § 86.

⁸³ *Vasiliauskas*, *op. cit.*, note 60, § 148.

⁸⁴ See also *Ahorugeze*, *op. cit.*, note 56, §§ 83, 110-112.

⁸⁵ *A v. the Netherlands*, *op. cit.*, note 57, § 125.

⁸⁶ *Ibidem*, § 130.

⁸⁷ *SOS*, *op. cit.*, note 44, § 27; *Saadi*, *op. cit.*, note 57, §§ 117-122; *TV Vest AS*, *op. cit.*, note 50, § 55; *Scoppola*, *op. cit.*, note 55, §§ 75-77.

2. *With a Chamber Judgment in the Same Case*

More frequently than asking the Court to change previous case-law, states ask the Grand Chamber to overturn the Chamber judgment in the case in which they intervene.⁸⁸ Although they do not always ask this expressly, they at least explain why they disagree with the Chamber. Ireland for example responded to the Chamber's finding that the applicant had not had a fair hearing in proceeding before a Belgian assize court, because the jury convicting him had not reasoned its decision. The intervener contended that the Chamber "had not sufficiently taken into account the assize court procedure as a whole and the safeguards existing in Belgium and other States".⁸⁹ Moreover, "[t]o require juries to give reasons for their decisions would alter the nature and the very essence of the system of jury trial as operated in Ireland".⁹⁰ The Grand Chamber explicitly mentioned in nine referred cases that the intervener disagreed with the Chamber (which had found a violation). Of these cases, the Grand Chamber did not find a violation in three cases, thus overruling the Chamber.⁹¹

3. *If the Court Were to Find a Violation*

In other cases, states want to prevent the Court from finding a violation in the pending case. For example, both interveners in the *M.S.S.* case sketched the consequences of holding to account under Article 3 ECHR the state responsible for the asylum application prior to a transfer under the Dublin Regulation. According to the UK, this "was bound to slow down the whole process no end".⁹² The Netherlands added that, to no longer assume that the receiving state would honour its international obligations "would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based".⁹³

D. REMINDING THE COURT OF...

The interventions also serve as reminders to the Court. The interveners emphasise other important matters than the protection of human rights, remind the Court of how it is supposed to function and of how the Convention should be interpreted.

⁸⁸ See also section IV.

⁸⁹ *Taxquet*, *op. cit.*, note 51, § 78.

⁹⁰ *Ibidem*, § 79; See also *Couderc*, *op. cit.*, note 55, § 75; *Lautsi*, *op. cit.*, note 52, §§ 47, 49; *Perinçek*, *op. cit.*, note 53, § 177; *Sindicatul*, *op. cit.*, note 50, §§ 113, 115; *X.*, *op. cit.*, note 45, §§ 84-86, 88-89; *Kyprianou*, *op. cit.*, note 51, §§ 105-108, 109-116; *Stoll*, *op. cit.*, note 45, § 90.

⁹¹ The Grand Chamber did not find a violation in *Stoll*, *op. cit.*, note 45; *Lautsi*, *op. cit.*, note 52; *Sindicatul*, *op. cit.*, note 50; It found a violation in *Kyprianou*, *op. cit.*, note 51; *Hirst*, *op. cit.*, note 55; *Taxquet*, *op. cit.*, note 51; *X.*, *op. cit.*, note 45; *Perinçek*, *op. cit.*, note 53; *Couderc*, *op. cit.*, note 55.

⁹² *M.S.S.*, *op. cit.*, note 46, § 331.

⁹³ *Ibidem*, § 330; See also *Ab Kurt Kellermann*, *op. cit.*, note 74, § 59; *Taxquet*, *op. cit.*, note 51, § 82; *Nada*, *op. cit.*, note 42, § 111; *Jaloud*, *op. cit.*, note 24, § 126.

1. *Other Important Matters*

The intervening states do not shy from reminding the Court of the importance of various matters; in addition to the rights invoked by the applicant, there are rights of others and other concepts deserving respect, they emphasise. Additionally, the interveners usually explain the rationale behind these other important matters, which include peace-keeping missions,⁹⁴ the proper functioning of international organisations,⁹⁵ and criminally prosecuting denialism.⁹⁶

2. *Its Task*

The states also remind the Court of its task under the Convention. This often comes down to noting that the Courts “exercises only “limited control””, because a wide margin of appreciation should be available to the states⁹⁷ or because domestic authorities are “in principle better placed than an international court to evaluate local needs and conditions”.⁹⁸ The states also remind the Court of its task by contrasting it with that of domestic courts. To illustrate, Poland explained that it was “debatable to what extent a supranational body could intervene” in assessing the facts of the case with a view to determining whether the reasonable time had been exceeded and that “regard should be had [...] to the discretion available to the domestic courts in assessing the facts and the evidence”.⁹⁹

3. *How to Interpret the Convention*

Comparably, the states can point out to the Court how it should interpret the Convention. The UK, when inviting the Court to change its case-law, emphasized “the principle that the Convention fell to be interpreted and applied in accordance with international law as a whole”.¹⁰⁰ In another case, the same state stressed that the margin of appreciation was wide due to the “importance of the public interest at stake”.¹⁰¹ As a last example, the Czech Republic explained to the Court how it should interpret certain admissibility requirements.¹⁰²

⁹⁴ *Behrami and Saramati*, *op. cit.*, note 43, §§ 101, 108, 111, 115.

⁹⁵ *Ibidem*, § 108; *Bosphorus*, *op. cit.*, note 47, § 129; See also *Markovic*, *op. cit.*, note 43, § 90; *Pye*, *op. cit.*, note 50, § 50.

⁹⁶ *Perinçek*, *op. cit.*, note 53, § 179; See also (GC), *Lobo Machado v. Portugal*, 20 February 1996 (Appl. No. 15764/89), § 27; *Couderc*, *op. cit.*, note 55, § 74.

⁹⁷ *Cocchiarella*, *op. cit.*, note 27, § 59; See also *Hirst*, *op. cit.*, note 56, § 55; *Kyprianou*, *op. cit.*, note 52, § 105; *Pye*, *op. cit.*, note 51, § 51; *Karácsony*, *op. cit.*, note 75, §§ 114, 116.

⁹⁸ *A. v. UK*, *op. cit.*, note 49, § 53; See also *VgT*, *op. cit.*, note 51, §§ 56, 76; *Taxquet*, *op. cit.*, note 52, § 82; *M.S.S.*, *op. cit.*, note 47, § 330; *Lautsi*, *op. cit.*, note 53, § 47; (2nd sect.), *El Haski v. Belgium*, 25 September 2012 (Appl. No. 649/08) (final since 18 March 2013), § 75; *Sindicatul*, *op. cit.*, note 51, § 122.

⁹⁹ *Cocchiarella*, *op. cit.*, note 26, § 61; See also *Markovic*, *op. cit.*, note 43, § 63.

¹⁰⁰ *SOS*, *op. cit.*, note 44, § 27.

¹⁰¹ *Bosphorus*, *op. cit.*, note 47, § 132.

¹⁰² (GC), *Micallef v. Malta*, 15 October 2009 (Appl. No. 17056/06), §§ 43, 70; See also *Üner*, *op. cit.*, note 58, § 53; *Markovic*, *op. cit.*, note 43, § 88; *TV Vest AS*, *op. cit.*, note 50, § 53; *Jaloud*, *op. cit.*, note 24, § 121.

E. ASKING THE COURT...

In addition to reminding the Court of different matters, the interveners also ask it more or less directly for something. They can ask the Court to confirm a rule or they can ask it for guidance.

1. *To Confirm Certain Matters*

The UK invited the Court in an Article 3 ECHR case to confirm the existence of “of an ‘exclusionary rule’ on statements that had been obtained directly by torture, with the result that a violation of this Article should be found where the rule applied, irrespective of the overall fairness of the proceedings”.¹⁰³ It also asked the Court to confirm *inter alia* “that the alleged torture had to be established ‘beyond reasonable doubt’”.¹⁰⁴ The UK’s strategy was therefore to formulate a rule itself and to subsequently ask the Court to confirm that rule. Comparably, France argued that the *Nada* case “provided the Court with an opportunity to transpose onto the member States’ actual territory the principles established in *Behrami and Saramati*, taking into account the hierarchy of international law norms and the various legal spheres arising therefrom”.¹⁰⁵

2. *For Guidance*

One request for guidance came from the Czech Republic, which wanted to set up a compensatory remedy for length of civil proceedings cases. It asked the Court “to provide as many guidelines as possible” and demanded more information about *inter alia* the applicable criteria.¹⁰⁶ In the same case, Poland found the Court “should indicate what just satisfaction consisted of” so that domestic courts could rely on and act in accordance with its case-law.¹⁰⁷ The Court’s response to these requests is outlined in section VII.

F. CONCLUSIONS

Certain interventions are in vain in the sense that the Court declares a case inadmissible or strikes it out, even before it reaches the part of the case to which an intervention is of relevance. Clearly therefore, it is not always possible to predict beforehand in which case it is worth the intervener’s while to intervene.

Even though the Court requests interveners to not directly address the admissibility or merits of a case,¹⁰⁸ this does happen occasionally. The Court is therefore

¹⁰³ *El Haski*, *op. cit.*, note 98, § 74.

¹⁰⁴ *Ibidem*.

¹⁰⁵ *Nada*, *op. cit.*, note 42, § 109; See also *SOS*, *op. cit.*, note 44, § 27.

¹⁰⁶ *Cocchiarella*, *op. cit.*, note 26, §§ 60, 135.

¹⁰⁷ *Ibidem*, § 136; See also *Schatschaschwili*, *op. cit.*, note 51, §§ 96, 99.

¹⁰⁸ See section II.

not too strict on this point. It is furthermore logical that the Court sometimes permits an intervener to comment on the facts of a case, because it asked for that information itself and because the intervener may be the only one able to provide that information.

From the content of the interventions, it becomes apparent that the states frequently react to a Chamber judgment. This can also be derived from section IV, where it was described that the majority of the 59 cases are Grand Chamber cases, of which about two-thirds are referred cases. Many interventions can therefore be characterised as reactive to a Chamber judgment. The states therefore seem to be comparably less inclined to intervene when the Court has not yet dealt with a certain issue or when it dealt with it in a different case.

The above descriptions show why the Convention aptly uses the term “third-party intervener” rather than “*amicus curiae*”. Except for the odd intervention in which the intervener provides information, the states are not really the Court’s friends, for they are often rather critical of the Court and may squarely disagree with its previous findings. Friends can of course be critical, but if the interveners must be qualified as friends, they are more adequately described as friends of the respondent state, with whom they share a mission: preventing that the Court finds a violation or tempting the Court to overturn a (Chamber) judgment.

Indeed and quite logically, the motive seeming to underpin most interventions is to prevent the Court from establishing that a violation has been committed. More than for their friend (i.e. the respondent state) however, the states probably intervene for themselves, because when the Court finds a violation, the intervener may be found in violation of the Convention in a future case for comparable reasons.¹⁰⁹ Explaining why (no) consensus exist, reminding the Court of its task or asking it to confirm certain matters, may eventually all be interpreted as means to prevent that the Court finds a violation.

When expressing disagreement with a previous judgment, the states have never been successful in the sense that the Court explicitly changed its case-law upon the intervener’s request. The Court has overturned Chamber judgments with which interveners disagreed. However, whether this was (in part) a consequence of the criticism aired by the interveners cannot be established. After all, it happens regularly that the Grand Chamber overrules a Chamber.¹¹⁰

¹⁰⁹ See section VIII, B, 1.

¹¹⁰ L. R. GLAS, *op. cit.*, note 8, p. 351.

VII. The Court's References to the Interventions

The Court does normally not refer to the arguments of the intervener in its reasoning. It only did so in 9 of the 59 judgments and decisions.¹¹¹ Sometimes, this is not possible because the Court declares inadmissible or strikes a case out even before it can address the merits. In other cases, the Court may react to the interventions implicitly because it normally reacts to the arguments of the respondent state, which are often to some extent comparable to those of the intervener.

When the Court does refer to an intervention, it for example mentions the information or arguments provided by the intervener.¹¹² It can also refute an admissibility argument made by an intervener, explaining why the case at hand should be distinguished from a case on which the intervener relied.¹¹³ The Court reacted very clearly to the UK's proposition that the Court's findings in *Hirst (No. 2)* should be revisited, in which the Court found a violation of Article 3 of Protocol 1 ECHR (right to free elections) on account of the blanket ban on prisoner voting.¹¹⁴ It held that "[i]t does not appear [...] that anything has occurred or changed at the European and Convention levels since the *Hirst (No. 2)* judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined".¹¹⁵ The Court also noted the Czech Republic and Poland's request for guidance, but did not give it.¹¹⁶

In one case, the Court relied on information about Cypriot law provided by Cyprus to not find a violation in proceedings in Latvia about the enforcement of a Cypriot judgment. Based thereon, it concluded that, even though this was possibly not the case in theory, the applicant had enjoyed "equivalent protection" in the EU legal system in practice. Therefore, the *Bosphorus*-doctrine applied and no violation took place in Latvia.¹¹⁷ Two concurring judges found this type of reasoning "remarkable",¹¹⁸ also because the majority interpreted a provision of domestic law (of a third state), something that is in principle not the Court's task, and because the interpretation did "not seem to have been the subject of adversarial debate before the domestic courts of the respondent State".¹¹⁹

¹¹¹ The nine interventions in the Italian length of proceedings cases were counted once.

¹¹² *Ruiz Mateos*, *op. cit.*, note 81, § 35; *Hirst*, *op. cit.*, note 55, § 77; *Ahorugeze*, *op. cit.*, note 56, § 92; *Tarakhel*, *op. cit.*, note 46, §§ 109, 110, 116, 121; *Avotiņš*, *op. cit.*, note 47, § 98.

¹¹³ *Al-Dulimi*, *op. cit.*, note 42, § 90; See also *ibidem*, §§ 93, 113.

¹¹⁴ *Scoppola*, *op. cit.*, note 55, § 78.

¹¹⁵ *Ibidem*, § 95.

¹¹⁶ See section VI, C, 2; *Cocchiarella*, *op. cit.*, note 26, § 138; See also *Stoll*, *op. cit.*, note 45, §§ 114, 126; *Saadi*, *op. cit.*, note 57, §§ 138-141; *M.S.S.*, *op. cit.*, note 46, §§ 338, 355; *Nada*, *op. cit.*, note 42, § 120; *El Haski*, *op. cit.*, note 98, § 86; *Al-Dulimi*, *op. cit.*, note 42, § 90.

¹¹⁷ *Avotiņš*, *op. cit.*, note 47, § 122.

¹¹⁸ *Ibidem*, Joint Concurring Opinion of Judges Lemmens and Briede, § 5.

¹¹⁹ *Ibidem*.

The examples just discussed do not make it possible to draw any conclusions as to how influential the interventions are.¹²⁰ The mere fact that the Court refers to them, does not mean that they have any influence. Furthermore, the Court only refers to the interventions in less than fifteen percent of all cases, something which may lead the states to conclude that they are of little relevance to the Court. An exception to the foregoing may be factually orientated interventions, as the example of the Cypriot intervention demonstrates, for the information provided can have clear consequences for the Court's findings.¹²¹

VIII. Reasons to Intervene

This section gives two types of reasons for states to intervene under Article 36(2) ECHR: reasons why states *do* intervene and reasons why states *should* intervene. These types of reasons can be distinguished from each other in the sense that the former are descriptive, giving actual reasons to intervene, based on the previous sections and other sources. The latter type of reasons are normative because they explain why it is desirable to intervene. The normative reasons are derived from inherent features of the Convention system. In spite of the distinction made, it is possible that normative reasons play a role in a decision for a state to intervene, making it a descriptive reason as well.

A. WHY DO STATES INTERVENE

As was noted in section VI, F, states mostly seem to intervene to prevent the Court from finding a violation, as that may mean that it will find a violation in a future case against the intervener too,¹²² for example because the respondent state and the intervener both know a certain domestic legal concept or are subject to the same piece of EU legislation. Less often, they apparently intervene to demand that the Court overrules a judgment with which they disagree. Also, a state may want to ask the Court to confirm something or to ask for guidance.

A rather practical reason why Germany intervened in a certain case was that the case was originally brought against itself (and two other states). When the case against Germany was struck out, its submissions were accepted as third-party observations.¹²³ Comparably, when it turned out that an applicant was not an Azerbaijani national, Azerbaijan's submissions under Article 36(1) ECHR were interpreted as a request for leave to intervene under the second limb of that Article and leave was granted.¹²⁴

¹²⁰ See also H. ASCENSIO, "L'amicus curiae devant les juridictions internationales", *Rev. gén. dr. intern. publ.*, vol. 105, n° 4, 2001, pp. 897, 922, 925.

¹²¹ See also *ibidem*, p. 922.

¹²² L. R. GLAS, *op. cit.*, note 8, p. 318.

¹²³ *Behrami and Saramati, op. cit.*, note 43, § 65.

¹²⁴ *Joesebov, op. cit.*, note 58, § 40.

The fact that a state is asked to intervene may also play a role. States ask each other, something which is facilitated by a list of the e-mail addresses of all government agents.¹²⁵ Further, the Court asked states to intervene to provide specific factual information three times.¹²⁶ Additionally, it invited Malta to intervene in a Cypriot case about contempt of court, in response to which Malta provided information on relevant Maltese laws.¹²⁷ This invitation is unique, as the information was not directly relevant to the merits of the individual case, whereas this was the case for the other interventions. It is not unique in the sense that the Court probably only asked for factual information; it seems to only ask for this information when inviting a state to intervene.

B. WHY SHOULD STATES INTERVENE

1. *The Res Interpretata Effect of Judgments*

Although Strasbourg judgments are formally only binding upon the respondent state,¹²⁸ it has been proposed that judgments establishing “a new legal principle or standard should have a persuasive authority for all states”;¹²⁹ they have *res interpretata* effect. The Court has not referred to this term, but it has underscored the precedential value of its judgments¹³⁰ and the states seemed to have accepted this effect as well.¹³¹ Exactly because some judgments are potentially of relevance to states other than the respondent state, it is appropriate that they intervene. Intervening gives them the opportunity to give input into a judgment to which they may have to abide (partially).¹³² It also creates the possibility to make the Court aware of the potential consequences of a judgment for them, something which they can do best because they know their own domestic legal systems best and because the Court “cannot know all of the laws or other materials that may have a bearing on the outcome of a case”.¹³³ Further, by intervening, the judgment may be “easier to apply” for the states,¹³⁴ not only because the Court is better informed, but also because the interveners know of relevant pending cases.¹³⁵

¹²⁵ L. R. GLAS, *op. cit.*, note 8, p. 318.

¹²⁶ See section VI, A.

¹²⁷ *Kyprianou*, *op. cit.*, note 51, § 117.

¹²⁸ Article 46(2) ECHR.

¹²⁹ A. BODNAR, “*Res Interpretata*: Legal Effect of the European Court of Human Rights’ Judgments for other States Than Those Which Were Party to the Proceedings”, in Y. HAECK and E. BREMS (eds), *Human Rights and Civil Liberties in the 21st Century*, Dordrecht, Springer, 2014, pp. 223, 224.

¹³⁰ *Ibidem*, p. 227; (1st sect.), *Rantsev v. Cyprus and Russia*, 7 January 2010 (Appl. No. 25965/04) (final since 7 January 2010), § 197.

¹³¹ Interlaken Declaration (2010), Action Plan, § 4(c); Brussels Declaration (2015), Action Plan, § B(1)(d).

¹³² See also A. LESTER, “Third-Party Interventions Before the European Court of Human Rights”, in F. MATSCHER and H. PETZOLD (eds), *Protecting Human Rights: The European Dimension*, Cologne, Carl Heymanns, 1988, pp. 341-342; L. HENNEBEL, *op. cit.*, note 3, p. 650.

¹³³ (GC), *Hatton and Others v. UK*, 8 July 2003 (Appl. No. 36022/97), § 97; N. BRATZA, “The Relationship between the UK Courts and Strasbourg”, *EHRLR*, n° 5, 2011, pp. 505, 510-511; P. HARVEY, *op. cit.*, note 17.

¹³⁴ CDDH, *op. cit.*, note 8, p. 27.

¹³⁵ *Ibidem*.

2. *The Relevance of Diversity*

Irrespective of the *res interpretata* effect of a judgment, knowledge of different domestic legal systems, and the societal attitudes within them, can be of relevance to deciding a case. The Court has namely formulated the rule that, in principle, a lack of consensus, implies a comparably wide margin of appreciation,¹³⁶ which gives the states relatively much discretion to decide how they protect a Convention right. Interventions can help the Court to establish whether consensus indeed exists,¹³⁷ since the states know their systems best as was noted above.

3. *The Importance of Cooperation*

Cooperation between the Court and the states is key to the Convention system's effective functioning, because the system is characterised by the lack of final power of the former over the latter and by the sharing of responsibilities between them. The Court has no final power over the states because it cannot force them to execute its judgments if they refuse to do so. Consequently, it cannot rely on coercion, but must instead rely on cooperation.¹³⁸ The sharing of responsibilities is characteristic of the system essentially because the states are primarily responsible for the implementation the Convention and the Court has secondary responsibility for ensuring that the states observe that responsibility.¹³⁹ The protection of the Convention rights therefore "requires a collective effort".¹⁴⁰ When responsibilities are shared, it is only logical that cooperation is important too. For the states, interventions are a way to cooperate with the Court, by providing it useful information (which the Court may not have the resources for to collect) as was also outlined above. Further, interventions, when they help inform the Court of domestic laws and attitudes and of the consequences of its judgments for the states, may contribute to the quality and persuasiveness of its judgments,¹⁴¹ something which may in turn add to the likelihood that states will cooperate.

4. *The Rise of Dialogue*

The concept of dialogue has become a central theme in speeches and writings on the relationship between the Court and the states parties.¹⁴² Dialogue between them is, for example, seen as a way to carry out the shared responsibility between the Court and the states,¹⁴³ to achieve better implementation of the Conven-

¹³⁶ *S.H.*, *op. cit.*, note 54, § 94; Consensus is not the only factor determining the margin of appreciation.

¹³⁷ L. VAN DEN EYNDE, *op. cit.*, note 7, p. 274.

¹³⁸ *Ibidem*.

¹³⁹ See also Interlaken Declaration (2010), Declaration, § 3; Brighton Declaration (2012), § 3.

¹⁴⁰ N. BRATZA, "Solemn Hearing (Speech at the Opening of the Judicial Year in Strasbourg)", 27 January 2012, p. 2.

¹⁴¹ See also L. HENNEBEL, *op. cit.*, note 3, p. 643; L. HODSON, *op. cit.*, note 40, p. 51; N. BÜRLI, *op. cit.*, note 7, pp. 136-137.

¹⁴² See generally L. R. GLAS, "Dialogue in the European Convention on Human Rights System: inspiration, added-value and means", *EJHR*, n° 3, 2015, p. 247.

¹⁴³ Brighton Declaration (2012), § 12(c).

tion,¹⁴⁴ and to prevent or resolve conflicts.¹⁴⁵ The states have limited means to formally engage with the Court when they are not a respondent state. Interventions are such a means, which makes it possible to directly write to the Court within the context of a specific case in a rather easy manner.¹⁴⁶

IX. Recommendations

The previous two sections gave various cogent reasons why states do and should intervene. Intervening gives them the opportunity to explain to the Court why, for diverse reasons, finding a violation would not be a good idea in their opinion or to give relevant factual information. States should use this opportunity because the Court's judgments have *res interpretata* effect and because a diversity of domestic practice can be of relevance to the outcome of a case. Intervening moreover permits them to cooperate and to enter into a dialogue with the Court, actions which potentially greatly advance the Convention system's functioning. Yet, interventions remain rare and even are a phenomenon that some states never encounter. The states are therefore recommended to intervene more often.¹⁴⁷

Considering the *res interpretata* effect of the Court's judgments, the states are encouraged to continue to focus on cases that will probably lead to judgments of general importance. They can inform the Court of the consequences which a certain ruling may have for its own domestic legal system. Also, they could provide relevant information of a factual nature, including relevant domestic judgments,¹⁴⁸ since asking for such information is a reason for the Court to ask states to intervene and because it is a way to cooperate with the Court. According to a Registry lawyer, "the most effective [interventions] are those which respect the Court's request to not comment on the merits of a case, those which do not seek to advance their own interest and, above all, those which, in good faith, seek to provide real assistance to the Court in its adjudicative task".¹⁴⁹ Considering that the states do not always respect this request and often seem to advance their own interest, they could change the content of their interventions accordingly when they really want to cooperate with the Court. Further, because the interven-

¹⁴⁴ Committee of Ministers, *Annual Report 2011*, p. 10.

¹⁴⁵ N. BRATZA (2011), *op. cit.*, note 133, p. 510; See also J. H. GERARDS, "The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'", in J. H. GERARDS and J. W. A. FLEUREN (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law. A Comparative Analysis*, Antwerp, Intersentia, 2014, pp. 13, 33-34.

¹⁴⁶ See also L. R. GLAS, *op. cit.*, note 8, p. 358; Also, upon its entry into force, Protocol 16 makes it possible for the highest domestic courts – in the states that have ratified the Protocol – to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention rights (Article 1(1)). This possibility will, according to the preamble of the Protocol, increase the interaction between the Court and the national authorities.

¹⁴⁷ See also Parliamentary Assembly, "Recommendation on Execution of Judgments of the [ECtHR]", 1477(2000), 28 September 2000, § 3; Venice Commission, "Opinion 209/2002 on the Implementation of Judgments of the [ECtHR]", CDL-AD(2002)34, 18 December 2002, §§ 86-88; Explanatory Report to Protocol 14, § 19; CDDH, "Report on Measures Taken by the Member States to Implement relevant Parts of the Interlaken and Izmir Declarations", CM(2012)167, 17 December 2012, §§ 81, 94.

¹⁴⁸ P. HARVEY, *op. cit.*, note 16; See also H. ASCENSIO, *op. cit.*, note 120, p. 921.

¹⁴⁹ *Ibidem*.

tions seem to be mostly reactive to referred Chamber judgments, the states are encouraged to be more proactive and to also intervene when the Court has not yet decided on a certain issue.

The states can also take measures to stimulate interventions. In light of the finding that they have a *de facto* right to intervene under Article 36(2) ECHR, but must formally request leave to intervene, they could amend the Convention. The Convention could be amended to turn the *de facto* right into a *de jure* right to intervene in any (Grand) Chamber case, regardless of whether a state's national is the applicant and as long as its intervention is detached from the case. Thus, a procedural barrier would be dismantled, something which possibly stimulates interventions. This amendment is also advocated because, considering the *res interpretata* effect, the states have a legitimate interest in the outcome of principled judgments.¹⁵⁰ More practically, respondent states can ask other states to intervene more often and discuss how they can share information about communicated cases that are suitable for interventions "at the earliest possible stage", for example by means of an online discussion forum.¹⁵¹

In addition to the states, the Court can stimulate interventions. It could invite states to intervene more often and, once, they intervene, make the most of their dialogue by asking questions to the intervener as it does to the parties.¹⁵² The Court could further refer to interventions more in its judgments, to demonstrate that they are indeed of relevance and to make the intervention process more of a dialogue. Additionally, the Court could bring all the cases that are referred to the Grand Chamber to the states' attention with an invitation to intervene and use press releases to identify pending cases which may result in principled judgments.¹⁵³ To make the interventions probably more useful to itself, the Court could be stricter in upholding the requirement that the intervener cannot comment on the admissibility and merits of the applicant's case.

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¹⁵⁰ P. MAHONEY, "Commentaire", in H. RUIZ-FABRI and J.-M. SOREL (eds), *Le tiers à l'instance devant les juridictions internationales*, Paris, Pedone, 2005, pp. 150, 158.

¹⁵¹ *Ibidem*.

¹⁵² CDDH, "Guaranteeing the Long-term Effectiveness of the Control System of the European Convention on Human Rights", 9 April 2003, CDDH(2003)006, Addendum final, p. 27; L. R. GLAS, *op. cit.*, note 8, pp. 564-565.

¹⁵³ Venice Commission, *op. cit.*, note 147, § 88; CDDH (2003), *op. cit.*, note 152, p. 27.