NOTE: This is a very early draft and comments and suggestions are welcome. There is considerable more data than included in this manuscript. The conceptual framework and data collection are the foundations of a larger book project comparing international human rights courts. I look forward to our discussion.

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INTERNATIONAL COURTS AND DEMOCRACY

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INTERNATIONAL COURTS AND DEMOCRACY

In the last fifty years, courts have incrementally transformed international politics. From war crimes to the adjudication of trade disputes, judicial organizations have both empowered and constrained nation-states – the dominant actors in global politics. With the expansion of regional and international legal systems, individuals are now increasingly governed by a dense and binding set of international norms – often policies constructed with little or no direct democratic electoral participation by society. While this reality has led many to criticize international law and organizations as undemocratic (e.g. Dahl 1999; Rubenfeld 2004), recent scholarship sheds light on the possible positive effects of multilateralism and international organization for enhancing the quality of democratic governance (e.g. Cichowski 2006; Keohane, Macedo and Moravcsik 2009; Hawkins 2008). With the growing number and jurisdiction of international courts and tribunals, understanding the effects of these international institutions for democracy has never been more important.

This paper takes the dynamic interaction between law, politics and society as a starting point to think critically about the evolving role of international courts in enhancing domestic democratic governance. Yet given what we know about the growing significance of international courts and other non-majoritarian legal institutions in shaping international politics (Keohane et al., 2000; Alter, 2008; Cichowski, 2007; Helfer 2008; Voeten 2007, 2008) and the potentially powerful effects of courts on political change and individual empowerment in domestic politics (e.g. Shapiro, 1981; McCann, 1994; Stone Sweet 2000; Cichowski & Stone Sweet, 2003; Kelemen 2006), the democratic critiques may be short sighted. These trends create a pressing need to understand how international processes of judicialization and legalization are increasingly shaping democratic governance at the domestic level – linking the national, transnational and international levels (e.g. Russell & O'Brien, eds., 2001; Lutz & Sikkink, 2000; Shapiro & Stone eds., 1994).

In this paper, I examine if, how and why international court enhance democratic practices. Is the proliferation and increasing power of international courts changing the domestic protection of rights? Are international legal processes giving individuals access to participate in important policy reforms? And finally, are international legal institutions providing a forum and venue for greater democratic deliberation? While these questions form the foundation of this analysis, the following highlights two distinct features of the research included in this paper.

First, the analysis in this paper contributes to a growing body of research studying the legalization of world politics generally (e.g. Goldstein et al., 2001; Abbott et al., 2000; Abbott & Snidal, 2000) and the transformative effects of international courts on governance, in particular (e.g. Cichowski, 2007; Alter, 2010; Stone Sweet 2004; Weiler, 1991; Slaughter, 2003; 2004). I study this as a process of institutional change. The analysis is concerned with both the causes and effects of this legalization dynamic. What are the necessary conditions that enable international courts to affect the enforceability and precision of the law? How can we account for such institutional innovation in cases where it is not foreseen nor welcomed by the creators of these legal organizations and institutions? Equally of concern are the subsequent effects. The legalization dynamic is not uni-directional. Instead, as new rules are created, individuals and organizations (from civil society to business groups) take advantage of these new opportunities to pursue their own policy goals. Subsequently, their action can lead to institutional evolution, a feedback effect that can change the balance of power in domestic policy arenas.

Second, a central aim is to examine how the legalization of global politics may be linked to change in democratic governance. The democratic condition of international politics is perhaps one of the most central problems facing comparative and international relations scholars and practitioners today.[1] By focusing on law and courts, I move beyond existing scholarship which privileges executive and parliamentary relations, and instead I place the judicial branch at the center of the analysis. I examine the connections between international courts and democracy by building on a body of comparative research examining new transformations in democratic institutions – reforms that enable greater direct citizen participation through the increased use of referenda, citizen advisory committees and increased access to legal institutions – a shift that resulted from a growing dissatisfaction with the principles and institutions of representative democracy (Elster 1998; Inglehart, 1997; Dalton, et al., 2003).

Further, the research contributes to a body of public law scholarship highlighting when and how courts may provide a more responsive institutional form of democracy than traditional representative institutions (Zemans, 1983; Graber, 1993; Lovell, 2003). Today, democracies throughout the world and some international regimes have witnessed an incremental expansion in judicial authority, an increase in the opportunity for individuals to bring rights claims, and a liberalization of legal standing rules enabling wider citizen and interest group participation in the development, monitoring and enforcement of laws (Cichowski & Stone Sweet, 2003, p. 193). Alongside the potential positive effects of these judicial reforms for democratic participation in law enforcement and rights protection, this *judicialization* of policy-making has not surprisingly deepened long-standing debates over the tenuous relationship between courts (as counter-majoritarian organizations) and representative democracy (e.g. Bickel 1962; Black 1960; Bobbit 1982). These concerns are equally salient in the international context as scholars raise the question whether courts and constitutionalism at the international level may in reality promote or undermine democracy at home and internationally (Rubenfeld, 2004). These are important theoretical and empirical questions, I will respond to these concerns in light of my findings.

The paper is organized as follows. In the first part, I provide a general framework for conceptualizing the connection between international courts and democratic governance. I focus on three characteristics of democracy: rights protection, political participation and collective deliberation and theorize how international legal processes may bring change in these aspects of democratic governance. This provides a set of testable expectations that guide the empirical analyses. What are the necessary conditions that empower international courts to engage in a democracy enhancing processes? Subsequently, how and when do international courts expand rights protection at the domestic level? Do the legal standing rules and accessibility of international legal institutions condition the extent to which citizens and public interest groups use courts to engage in democratic participation? Finally, if, how and why do international legal processes foster or facilitate collective deliberation by connecting national, transnational and international action. In the second part, I turn to a case study of the European Court of Human Rights (ECtHR) to examine these expectations. The analysis utilizes data I collected for a 47 year time period, 1960-2007 to examine the interaction between the ECtHR, states, societal groups and individuals in the adjudication of rights.

[1] There is an extensive literature on the issue of democracy European Union governance (e.g. Weiler, 1999; Scharpf, 1999), and there is a similar debate regarding issues of democracy in general global governance (e.g. Held & Koening-Archibugi, eds., 2004; Moravcsik, 2004; Shapiro & Casiano Hacker-Cordon, eds. 1999).

CONCEPTUALIZING THE EFFECTS OF INTERNATIONAL COURTS ON DEMOCRACY

What factors characterize democratic governance? Democratic theorists highlight (although do not always agree on) a host of factors that are vital features of a healthy democracy – such as individual rights, direct participation, equality, an active and informed citizenry, and the rule of law. Depending on how one conceptualizes democracy, the importance of these factors can vary.[2] In this paper, I focus on a model of democracy emphasizing change and transformation in rights protections, participation and collective deliberation. Democratic theorists have conceptualised a richer "strong" democracy as movement away from the representative model to a model that provides more direct participation (e.g. Barber, 1984; Dahl, 1989). I utilize a key principle that the enhancement of democratic governance is also defined as greater accountability, transparency and participation in political processes. The following discussion develops a framework for understanding how international courts may enhance these aspects of democratic governance.

Necessary Conditions

I begin by elaboration the necessary conditions underlying this dynamic process: a court's review powers, rules/procedures and legal activism. At the core of this process, is a dynamic interaction between mobilization, litigation and governance. In any system of governance, mobilization and litigation can present avenues for institutional change and thus, are particularly fruitful for exposing the many processes through which governance can evolve (Cichowski 2007, Shapiro 1981). I start with the assumption that through litigation, a court's resolution of societal questions or disputes can lead to the clarification, expansion and creation of rules and procedures that are structures of governance (Shapiro 1981: 35-37). Thus, in any system of governance with an independent judiciary possessing judicial review powers, the judicial decision provides a potential avenue for the clarification and expansion of governance. In order to understand this dynamic process of judicial rulemaking, this study adopts an approach that understands the process of rule construction as endogenous to existing governance structures (March and Olsen 1989). That is, a court's rulemaking capacity operates within the institutional framework of an existing body of rules and procedures (e.g., a constitution, legislation or in this case the European Convention), yet a court's jurisprudence can subsequently alter these institutions. This approach is not unfamiliar to scholars of judicial politics (Shapiro 1981, 1988; Stone Sweet 2000; Jackson and Tate, eds. 1992; Ginsburg 2003).

Yet, courts do not act on their own initiative. Instead, they need to be activated by an individual or group. Mobilization processes involve the strategic action of individuals and groups to promote or resist change in a given policy arena (Tarrow 1998; Marks and McAdam 1996). This study examines civil society legal activism. By movement activism, I mean *sustained challenges, by individuals or groups with common purposes, to alter existing arrangements of power and distribution.* I adopt this general definition to examine the

[2] The libertarian model of democracy (e.g. Locke) emphasizes the importance of individual rights as a protection from the arbitrary power of government. Pluralists (e.g. Dahl, 1989) highlight the significance of direct accountability of government institutions and direct participation by individuals. The social democratic model (e.g. Lindblom, 1977) argues that equality is a critical value to a thriving democracy as it helps balance out the inequalities created by market liberalization. Finally, deliberative democracy privileges the critical role of an active and informed citizenry (e.g. Gutmann & Thompson, 1996).

importance of both individual and group legal activism.[3] The choice to mobilize the law begins as a result of action by individuals (or a group acting on behalf of individuals) that are either disadvantaged or advantaged by an available set of rules. In general, social activists and movements have experienced relative success at utilizing domestic courts as an avenue to pressure for political reform and have done so by utilizing an explicit or implied set of rights (McCann 1994; Olson 1994; Handler 1978; Vose 1959).

In the United States, there is a long tradition of marginalized groups utilizing the courts as an opportunity to challenge existing governance structures and exclusionary policies. Most notable, are the activities of the early civil rights movement on issues such as school segregation (for example, the *Brown v. Board of Education* decision, see Morris 1984) and also a host of other social movements including, the American labor movement (Forbath 1991), the women's movement (Costain 1992; O'Connor 1980), the welfare movement (Piven and Coward 1979), and the animal rights movement (Silverstein 1996). These patterns of legal mobilization are spreading and can be found in domestic legal systems around the globe (Kelemen and Sibbit 2004; Cichowski and Stone Sweet 2003). Interestingly, we also see activists turning to international courts as an outlet for social activism. For example, individual activists and women's rights organizations have successfully utilized the European Court of Justice to push for and attain reforms in employment policies – and often this seemingly individual litigation benefits from organized interests and activists (Craig 1995; Hoskyns 1996; Harlow and Rawlings 1992; Cichowski 2004). Litigation before the ECtHR reveals a similar dynamic with examples covering a host of substantive areas of law from housing rights to racial discrimination (Cichowski 2006).

Stated generally, the democracy enhancing capacity of international courts is critically linked to three necessary conditions: a courts' *review powers*, at least some *necessary rule or procedure*, embodying an explicit or implied right and the *action* on behalf of an individual or public interest to invoke this rule and make a claim before a court. Without these three factors, we might expect this process to fail, or rather that there would be less litigation and in particular less litigation with democracy enhancing results.

Effects of International Courts on Democracy

As we have seen, this mobilization of the law by individuals and civil society can activate and engage courts. We now elaborate how this mobilization – litigation dynamic can shape democratic governance. I focus on the ways in which international courts bring about institutional change and in doing so can enhance democratic governance. In particular, I elaborate how international courts may enhance the protection of rights and participation in and deliberation about law making processes.

Rights Protection

Rules and in particular, individual rights serve as macro structures that encourage and constrain behaviour in any society. They are the cornerstone of democratic governance. In the modern rule of law context, the rights of individuals correspond to duties of governments, even if the duty is only that the government promises itself to respect the rules it creates, and thus

[3] Alongside collective action taken by movement organizations, scholars highlight the importance of activities carried out by individual activists who are often bound together in informal networks, but whose challenging action can be equally as effective as collective action by movement organizations (e.g., Katzenstein 1998).

maintain a "rule of law." Other rules such as public policies can serve as a mechanism to authoritatively allocate values in a society and particular policy designs based on rights protection can both empower and create democratic opportunities for individuals and societal groups *vis a vis* their elected representatives when they are judicially enforceable (Schneider & Ingram, 1997).

Political scientists and legal scholars alike assert that the effective protection of these rights is critically linked to their formality and judicial enforceability (Abbott, et. al., 2000, p. 412; Franck, 1990; Fuller, 1964; Stone Sweet & Sandholtz, 1998, p. 10; Hawkins 2008). Greater precision through formal legal norms provides more certain codes of behaviour that in the presence of independent judicial authority can then be enforced and protected. Constitutional rights alongside courts empowered with constitutional review can serve as a powerful tool for both individuals and courts in litigation initiated policy reform (Epp, 1998; Cichowski 2007). As the formality and enforceability of these rights expand, we might expect this to enhance democratic governance by strengthening the power of the individual *vis a vis* their government in enforcing and protecting rights.

These opportunities are increasing at the international level as we see an expansion in legal rules and organizations. Scholars observe that multilateral institutions are particularly democracy enhancing when they "push in the direction of human rights protection" (Keohane et al, 2009, p. 18). Further, rights to a hearing, transparency and civil society participation are increasingly an integral part of global governance institutions (Bignami, 2005). Much of this is driven by market liberalizing trends, as the distance and distrust grows between regulators and the regulated actors, we might expect more formal and transparent rules. Similarly, the demand for more formal, precise and judicially enforceable rules increases as the geographic distance grows between individual actors – firms, workers, public interest organizations – who now commonly engage in work and life across borders (Stone Sweet, 2004). Scholars also observe that while political fragmentation may lead lawmakers to delegate more power to bureaucracies and courts, it can also lead to more detailed enforceable laws with the hope of limiting bureaucratic discretion and empowering private party enforcement through the courts (e.g. McNollgast, 1999; Kelemen & Sibbitt, 2004; Franchino, 2004). While the changing nature and scope of these rules may play an important step in changes in governance, there are limits.

It remains an important empirical question what challenges surround the adjudication of these rules and regulations and potential rights opportunities, as we know that laws on the books do not *a priori* ensure effective protection. Similarly rights litigation does not necessarily lead to policy reform (e.g. Rosenberg, 1991; Conant, 2002). When we shift to the international level, we face an additional set of challenges. International law places duties on governments rather than enshrining directly enforceable rights on individuals. While some international legal orders and their courts do enable direct individual action (e.g. ECtHR, ECJ, Andean Court of Justice) (see Alter 2006), even within some of these systems the most effective protection of international rights often comes through referral processes originating in the domestic legal system (e.g. Cichowski 2007; Alter and Helfer 2010; Slaughter, Stone Sweet & Welier, eds., 1998; Guiraudon, 2000).

Together this suggests a general relationship between rights, international courts and democratic governance and provides an expectation to further explore the conditions under which this relationship might change. This process highlights the potential importance of judicial rulemaking for holding governments accountable to their society for the practical effects and meaning that is embodied in rights provisions, an effect that can also enhance the

transparency of both the rights, but also the system by which they are protected. This suggests the following expectation:
H1: The extent to which international courts strengthen the precision and enforceability of rights and expand their scope, we would expect an enhancement of democracy.

Participatory Democracy

We now turn to the effects that international courts can have on participatory democracy. International organizations receive the greatest amount of democratic critique on participatory grounds (e.g. Dahl 1999). Yet much of this debate has focused on deficits in the opportunities for direct participation in electoral politics or policy processes. While the participatory value of democracy is clearly attenuated by these deficiencies, international legal institutions, and courts more generally do offer ways of enhancing participatory democracy. I begin with a widely accepted definition of political participation: "an activity that has the intent or effect of influencing government action – either directly by affecting the making or implementation of public policy or indirectly by influencing the selection of people who make those policies" (Verba et al. 1995: 38). We know that democratic participation is enhanced when individuals and societal groups are given direct access to law making processes, providing technical expertise on committees, and speaking at hearings (e.g. Mansbridge 1980; Ober 2005). Further, scholars observe that expanded public access points, as realized through such avenues as referenda, access to information, policy juries, and expanded access to justice, to name just a few, are becoming an increasingly common feature of advanced industrial democracies (e.g. Dalton et al., 2003; Ansell & Gingrich, 2003; Scarrow, 2001; Cichowski & Stone Sweet, 2003). Finally, public interest litigation with the strategic interest in bringing about political and social reform is also an increasingly present form of political participation (e.g. Cichowski 2007).

Thus, when we adopt a more broad definition of participation, we might begin to better identify the democracy enhancing actions of international courts. Similar to the importance of access points in domestic politics, scholars link "permeability" of international organizations to non-state actors with the strengthening of international rules and the subsequent bolstering of domestic democracy (Hawkins 2008). These access points are critical for participatory politics. As non-state party access to international courts is strengthened, we may expect individuals and social groups to have increased opportunities to participate through compliance processes, legal mobilization and rights claiming. This type of strategic litigation is increasingly present in international legal processes (e.g. European Union, Council of Europe).

Increased individual and third party access to international courts may subsequently change both the role of the court as well as civil society in international governance. They are both given a greater role in rights protection. International courts with individual access generally have higher caseloads (Keohane et al., 2000, p. 475). This gives courts a greater opportunity to engage in important political issues through the strategy of incremental development of doctrine (e.g. Helfer & Slaughter, 1997). Further, private parties (both individual activists and non-governmental organizations), rather than states, may be more likely to utilize these courts for strategic policy reform (e.g. Cichowski, 2007; Alter & Vargas, 2000; Harlow & Rawlings, 1992).

While these findings are significant, there is still an open question regarding what are the consequences of allowing private access and standing for third parties (these often are non-governmental organizations). We know that opening the "floodgates" does not always bring a flood when it comes to access to judicial institutions (Morag-Levine, 2003). Studies reveal that

even when international courts provide the tools private actors can use to influence policy, domestic political institutions (Conant, 2001) and legal support structures (Conant, 2002; Alter & Vargas, 2000) can place limits on this access. There is also much to suggest that opening legal institutions to private actors and societal groups may empower individuals differentially. Scholars observe that litigation strategies are often used most successfully by the "haves," those who may already be more socially, economically or politically privileged (Galanter, 1974). Yet, studies have also illustrated the powerful mobilizing effects of litigation on underrepresented populations even despite loses in court (McCann, 1994). Together, these studies do reveal the democracy enhancing capacity of courts, the extent to which they foster and enable greater political participation either through subsequent policy processes or through litigation.

This suggests a general relationship between international courts and participatory democracy. We might expect:

H2: The extent to which international courts are accessible and open to non-state actors and third parties with the resources to bring claims, we would expect an enhancement of democracy.

Deliberative Democracy

Finally, we explore how international courts may affect deliberative democracy. Public argumentation, deliberation and debate are critical for democratic law making processes (Holmes 1995; Macedo 1990). Interestingly, international organizations and other non-majoritarian institutions are increasingly playing a key role in fostering deliberative democracy. Reliance on legal and technical expertise of non-state actors and consultation of civil society organizations are all hallmarks of international organizations today, including the European Union, the World Trade Organization, the World Bank and the United Nations to name just a few. For example, the European Union's most recent treaty (the Lisbon Treaty, effective December 2009), adopted a new provision (Article 11 TEU) that enshrines this value of deliberation and consultation:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

This broad mandate for EU institutions to engage in dialogue with civil society and foster public exchange of ideas is critically linked to fostering a transparent, coherent and democratic policy process at both the EU and domestic levels.

Thus, the openness of international organizations to deliberation and reliance on communities of experts can have a direct impact on dialogue, deliberation and debate at the domestic level and public consensus on important public policies. Global environmental assessment programs are an example by which groups of scientists are the key actors behind reports that ultimately led to widespread public discussions and consensus regarding salient topics such as climate change (Keohane et al. 2009). Given its broad policy jurisdiction and diversity and number of member state countries, the European Union's institutions, the Commission in particular, have not only fostered deliberation and consultation, but have institutionalized these transnational networks of technical expertise, information exchange, and public education (see Cichowski 2007). One example is the EU Commission's Equality Unit's Network of Legal Experts. With representatives in each of the 27 member states, this group serves to disseminate key innovations in EU discrimination law (e.g. ECJ case law, new EU legislation) to domestic non-governmental organizations and local community institutions.

However, it is also equally important for the exchange of information from the domestic level up, suggesting best practices and ways in which the EU institutions might mandate other member states to follow these practices in the future (Cichowski 2007). International organizations are increasingly the sites for transnational networks involvement in policymaking processes by fostering information exchange and coordination on salient public issues (which are increasingly transnational is scope) (Tarrow 2005).

International courts can serve a similar function as sites for contestation, debate and collective deliberation. The effects are two fold. First, judicial decisions, in particular those involving rights protections, themselves can foster public debate and dialogue over critical public issues. Abortion debates in the United States are clear example. International courts have been equally influential in fostering public debate and deliberation on issues such as rape as a war crime (ICTY), transgender rights (ECtHR) and positive action programs (ECJ). Second, international courts can generate transnational networks and collaboration that foster the exchange of national best practices, legal advice, public education on salient public issues all with the effect of fostering greater public involvement and deliberation.[4] These two factors are critically linked to democratic governance. When international courts are impermeable to this type of public discourse and debate they are weakening democracy by being less transparent and accountable.

Together this suggests a general relationship between international courts and deliberative democracy:

H3: The extent to which international court decisions foster public debate and international courts serve as sites for transnational collaboration and information exchange we would expect an enhancement of democracy.

Data

To test these expectations, I created a series of datasets involving litigation before the European Court of Human Rights from 1960-2007. The Court is a judicial institution for the Council of Europe, is located in Strasbourg, France and was established in 1959 by the then 13 contracting states. Today membership includes 47 states all of which have ratified the Treaties granting the ECtHR jurisdiction. The datasets were compiled from primary documents from the ECtHR including the *Yearbook of the European Convention on Human Rights, the European Commission and European Court of Human Rights, Reports of Judgments and Decisions/European Court of Human Rights,* and the Court's *Annual Survey of Activities* and *General Measures Adopted Report* (H/Exec (2006) 1). The first dataset includes all ECtHR decisions from the first, 1960 through 2005, a total of 6,648 decisions. These are coded by respondent state, decision year, decision outcome, and convention rights invoked. For the period up to 1998, I also include data on NGO third party interventions (amici curiae).

A second dataset includes ECtHR decisions involving the United Kingdom and Turkey in the area of minority rights claims from 1991-2007. This includes cases invoking the following Convention provisions: Articles 3 (torture), 5 (liberty/security), 6 (fair trial), 8 (privacy), 9 (religion), 10 (expression), 11 (association), 14 (discrimination) and Article 1 Protocol 1 (right

[4] For example, there are dense networks of international public interest litigation experts which support conferences to exchange national best practices, public education campaigns, and strategic litigation tactics.

property). This dataset is created using data collected by the *JURISTRAS Project*.[5] The data is coded by respondent state, decision year, Convention rights invoked, and NGO and activist lawyer involvement. I choose to focus on litigation involving Turkey and the United Kingdom as both cases possess active involvement of social activist and NGOs overtime so that we can examine the implications of this participation. Further, the claims brought against these two countries even within the same policy area (minority rights) are quite different and so we are able to study the ways in which the mobilization may or may not vary depending on the legal domain of the claim. This smaller minority rights dataset will be utilized to examine the effects on deliberative democracy.

A third dataset examines national implementation measures. In particular, the data includes all national level general measures taken to implement ECtHR decisions between 1966 and 2006. Rather than focusing on the just satisfaction awards or individual remedies required of some ECtHR decisions which satisfy individual harm done, this dataset focuses on decisions with larger prospective national policy effects. These general measures which aim to prevent further violations in the future, reveal clearly the role of the ECtHR in prospective policymaking and have led to a host of significant national level legislative and judicial reforms.[6] The dataset includes 704 general measures taken which are coded by year, respondent state, type(s) of general measure(s) taken, Convention rights violated, and NGO involvement. Together, these datasets offer the first comprehensive examination of the ECtHR decision's, their national effects and NGO participation in this legal process. Importantly, these data enable us to examine and explain the role of international courts in enhancing rights protection, democratic participation and deliberative democracy.

Historical data illustrate quite clearly that the European Convention and the ECtHR have served as a successful and well utilized opportunity for rights claims above and beyond the domestic legal system. Figure 1 displays the standardized annual number of judgments from six of the oldest and consistently active international courts/dispute bodies: the International Court of Justice (ICJ), the ECtHR, the European Court of Justice (ECJ), GATT/WTO dispute settlement body/appellate panel, Inter-American Court of Human Rights (IACHR) and the Court of Justice of the Andean Community (ACJ). The data are standardized to account for the varying dates of first judgment and include a generally comparative category of judgments: final resolution of a concrete dispute before the court (e.g. does not include advisory opinions etc.). While this is just a snap shot of the work of international courts (See Alter 2006 for a more comprehensive list), this comparison nonetheless illustrates the value of examining this active court. The variation raises many interesting observations: age of the court clearly doesn't determine caseload overtime and equally visible is the powerful effect of private party access (ECJ, ECtHR, ACJ), yet does not explain all variation. And even similar founding institutional

[5] JURISTRAS project funded by the European Commission under the 6th Framework Program (contract no. 028398), 2006-2009. See also Dilek (2010) and Millns et al. (2010) for an elaboration of the data pertaining to the United Kingdom and Turkey.

[6] Article 46 § 1 of the Convention requires states to "undertake to abide by the final judgment of the Court in any case to which they are parties." This requirement to execute judgments places precise obligations on respondent states. Further, the Court elaborated in its Scozzari and Giunta case (2000), reemphasized and elaborated the state's obligation to take both individual measures in order to remedy the effects of the violation and general measures to prevent similar occurrences in the future. For further information on execution of ECtHR decisions process and the national level implementation process were attained from the Council of Europe's Department for the Execution of judgments of the European Court of Human Rights. Their website is:
http://www.coe.int/T/E/Human_rights/execution/

design (ECtHR and IACHR), does not make up for unresponsive states, and less activist courts. As we begin to answer important empirical questions about the international legal process in Europe, this will provide the foundation for comparative analysis in the future.

-------- Figure 1 about here --------

ANALYSIS: THE ECTHR AND DEMOCRATIC GOVERNANCE

We have seen that a set of factors can systematically affect the evolving role of international courts in democracy. In the following analysis, I examine if, how and why the European Court of Human Rights has enhanced rights protection, participatory democracy and deliberative democracy in Europe.

Necessary Conditions

Review powers, enabling rules or procedures and social action were all necessary conditions for the democracy enhancing capacity of international courts. We begin by examining the ECtHR's review powers. The Court's main function is to ensure contracting state compliance with and the uniform interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereafter the European Convention). Technically, the Court's jurisdiction involves international – not constitutional – law, such that the ECtHR does not have constitutional review powers. Yet interestingly, while contracting states remain sovereign states in the Council of Europe system, the Convention rights as protected and interpreted by the ECtHR have served as a body of higher order norms and led to considerable constraint on what national legislators can do. As scholars observe, "the Court has rendered enough judgments that have caused enough changes in state practices so that it can be counted to a rather high degree as a constitutional judicial review court in the light of realities as opposed to the technicalities" (Shapiro, 2002, p. 155). Thus, the ECtHR becomes an interesting test of how individual rights adjudication can emerge even without constitutional review and also how the practical effects of administrative review can at times change the democratic nature of governance by rendering new rights.[7]

Given these review powers, we then move to explore the necessary rule or procedure that would enable individuals or groups to invoke the European Convention provisions and bring a claim before the ECtHR. Under the original Convention system, individual petitioners did not have direct access to the Court. Article 25 recognized the right of individuals to file an application, yet it was an optional not compulsory mechanism. However, even when a state accepted Article 25, the European Commission of Human Rights served as the intermediary between the individual and the Court. Prior to 1994, only states and the Commission had standing to bring cases before the Court. In 1994, Protocol 9 was adopted and individual access was reformed improving standing for individuals and groups. The Protocol amended Articles 44 and 48 extending standing to individuals, non-governmental organizations and groups of individuals. Individual access to the ECHR underwent further reform in 1998. Protocol 11, which governed the major reforms to the Convention institutions, also amended Article 25 and made individual access compulsory. Following these reforms, individuals were given both formal and practical access to the Court. These reforms also brought greater accessibility to non-

[7] Similarly Sterett has examined how administrative judicial review has served as quasi-constitutional review in a system with technically no constitutional law – the United Kingdom (Sterett 1997).

governmental organizations. Today, the European Convention clearly provides the necessary rule or procedure for individuals and NGOs to file an application before the Court. Article 34 of the Convention provides:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting parties undertake not to hinder in any way the effective exercise of this right.

Despite only recently gaining full access to this legal process, legal entrepreneurs and activists were a critical motivating force behind the original negotiations and construction of this human rights regime over fifty years ago (Madsen 2007; 2010). Yet as discussed above, ultimately, the original legal structure was crafted to preserve national sovereignty and privilege the role of national governments with no access for NGOs and constrained individual access. Overtime both individual social activists and NGOs have increasingly gained access to the Court, and thus, have expanded the roles they play in ECtHR decision-making. These roles include direct victim (applicant), representing an applicant, intervening as a third party (amicus curiae) and acting as a larger support structure (such as serving as educator to both the public, other groups and lawyers, providing legal information and sponsoring litigation strategy workshops). Thus, we can see that overtime the necessary conditions of review powers, rules governing individual and group access and strategic social action have evolved in a way that presents the possibility of the ECtHR as a democracy enhancing institution. The following sections examine the outcome.

The ECtHR as the Protector of Rights

The Convention system as a whole and the domestic incorporation (or transposition) of Convention rights into domestic law has greatly enhanced the type of rights available to individuals and societal groups and the relative power they may gain in bringing claims against government action and acts. Yet the ECtHR decisions are also another potential source for rights development. Again, scholars have long recognized the power of courts as rule makers, the extent to which their decisions change the precision, scope and meaning of legal norms in the process of dispute resolution (e.g. Shapiro, 1981). In the Convention system, after an application is found admissible, each contracting state is given a chance to respond and resolve the dispute in a "friendly settlement," avoiding a final ECtHR decision. Thus, each of the ECtHR decisions represents a contracting state either indirectly (through in action) or directly defending their national laws (or their interpretation of Convention provisions). Does the Court act to uphold these national practices or domestic interpretations of these rights? Or do we find these rulings leading to the enforcement of Convention rights in a way that expands their precision, enforceability or scope (either through subsequent implementation for a contracting state that is in clear non-compliance or a corrective interpretation of actions falling within the scope of the right)? Again, while the Court can play a democracy enhancing role merely by serving as an inactive watchdog over domestic implementation of Convention rights, we are particularly interested in examining the Court's active role through its judicial decision making.

Table 1 reveals the standardized total number of ECtHR judgments and violation rate (a country's rate of violation rulings as a percentage of all violation rulings) by country between 1960 and 2005. The results are astounding with the vast majority of all cases ending in a violation of the Convention (4962 out of 6648 decisions, or 75%). This quick snap shot reveals a Court that is not hesitant to overturn domestic interpretations of Convention rights and to enforce

non-compliance. Italy, Turkey, Poland and France were clearly the target of many of the claims, with over half (58%) of all ECtHR violation rulings in the 45 year period of this study involving these four legal systems. These judgments lead to both damages and domestic policy reform that over time has expanded who can participate in rights claiming and law enforcement in the future. For example, the *Golder* Case, ECtHR 1975 led to the British Prison Rules of 1964 law to be reformed (Resolution (76) 35 of 22 June 1976); the *Airey* Case, ECtHR 1979 led to the establishment of a program to administer Civil Legal Aid and Advice in Ireland (Resolution DH (81) 8 of 22 May 1980); and the *De Haan* Case, ECtHR 1997 led to a Dutch law reforming the administrative courts procedures of appeal (Resolution DH (98) 9 of 18 February 1998). The Italian cases are largely driven by Article 6 (access to fair trial) violations with Italian legal proceedings falling gravely behind in standards of trial processing times and procedures (Cichowski 2006).

-------- Table 1 about here --------

Table 2 examines the national level general measures adopted to ensure compliance and implementation of ECtHR decisions as reported to the Council of Europe's Committee of Ministers between 1966 and 2006. The data includes information on the total number of each type of general measure taken including: legislation, executive action, changes in jurisprudence, administrative action, publication of judgments with the expectation that national courts will directly apply the decision, practical measures, such as creation of prisons or recruitment of judges or dissemination of the ruling. There were 704 measures adopted in the national legal systems during this time period. Interestingly, almost two-thirds (59%) of these measures involved new domestic legislation or publication of the ruling with the requirement that national courts apply the ECtHR ruling demonstrating the very real domestic policy effects of these international court judgments which changed the rights available in the domestic legal system.

-------- Table 2 about here --------

Elaborating these data, ECHR rulings have led to a host of national policy changes including administrative, legislative, judicial and even constitutional reforms.[8] For example, ECtHR decisions resulted in the expansion of administrative review powers of courts in Sweden (*Pudas & Boden* Case, ECtHR 1987), a new code of criminal procedure in Italy (*F.C.B* Case ECHR 1971), led the Austrian Constitutional Court to reverse its previous interpretations of "civil rights and obligations," (*Ringeisen* Case, ECtHR 1971) and even sensitive domestic issues such as the regulation of property – leading to changes in the administration of property tax codes (*Hentrich* Case, ECtHR 1994) and expanded access to judicial remedies in property disputes (*Holy Monasteries* Case, ECtHR 1994). Further, compared to other international courts, the ECtHR has a remarkable compliance rate ensuring these new rights are realized (Norgaard, 1993; Polakiewicz & Jacob-Foltzer, 1991a; Polakiewicz & Jacob-Foltzer, 1991b; Polakiewicz, 1996).[9] Thus, this supranational legal process increasingly becomes a successful route for

[8] *Effects of Judgments of Cases (1959-1998)* European Court of Human Rights. Downloaded from http://www.ECHR.coe.int/Eng/EDocs/EffectsOfJudgments.html.

[9] The comparatively high compliance rate experienced by the ECtHR is in large part due to a comprehensive and effective monitoring system that oversees the domestic execution of ECtHR decisions. In particular, the Council of Europe's Committee of Ministers (an intergovernmental body) assisted by their Department for the Execution of Judgments work together with respondent states to ensure the effective execution of the ruling, be it paying damages to or implementing individual measures for the injured party, and in some cases also implementing general measures (e.g. domestic legislative or constitutional reform) to prevent violations in the future. By relegating this monitoring responsibility to an intergovernmental body, peer pressure from contracting states, while seldom used, can serve as an effective final insurance method for compliance (Council of Europe, 2005).

individuals to participate in not only individual rights claims but in law enforcement – ensuring greater protection in the domestic legal system in the future.

The ECtHR and Participatory Democracy

We now turn to examine the extent to which the ECtHR enhances democracy by being accessible to non-state actors and third parties. As we discussed above, while the Convention today clearly provides the basis for non-state actors to bring individual complaints, the access for NGOs is more limited. The NGO must prove that the organization has itself directly experienced a violation of Convention rights. This is laid out in the ECtHR's case law.[10] Nonetheless, the Court's jurisprudence also reveals the diversity of organizations and entities that have successfully brought claims, including church associations,[11] media groups,[12] trade unions,[13] human rights groups[14], and many companies.[15] Interestingly, the Court has also incrementally developed an "indirect victim" approach that enables persons to bring a claim who were not directly affected, but who are close relatives and have a valid personal interest in having the violation confirmed.[16] This type of indirect representation is differentiated from a third party representing a direct victim or the continuation of proceedings by a relative, yet there have been notable exceptions. One example, is *Karner v. Austria*, the claimant's legal representative (non-relative) was allowed to continue the proceedings after the applicant's death.[17] While this evolving case law on "indirect victims" has not previously provided a clear standing for NGOs as an applicant representing a victim, one ECtHR judge suggests it may be an "indication of a possible evolution of the ECtHR's practice with regard to the role of representatives before the ECtHR" (Vajic 2005, p. 95). Thus, in the future, there may be an expanded opening for greater NGO participation in filing an application, beyond its role as a direct victim.

NGOs have also come to play an important role through third party interventions. Again, if we look over time, the ECtHR itself has largely been responsible for this expansion in access. The original Convention made no mention of third party intervention, but instead it has evolved over time by way of the Court's case law and today is codified in the Convention. Yet, the story

[10]For example, see *Éskomoravsk v. Czech Republic*, no. 33091/96, ECtHR 1999; *ARSEC and Others v. Spain*, no. 42916/98, ECtHR 1999; *Association of Polish Teachers v. Poland*, no. 42049/98, ECtHR 1998; *VgT v. Switzerland*, no. 24699/94, ECtHR 2000; and in two other cases the ECtHR dismissed the claims of the NGO in the case on grounds of not being able to claim direct harm, *Éonka v. Belgium*, no. 51564/99 ECtHR 2001 and *Asselbourg and Others*, no. 29121/95 ECtHR 1999.

[11] For example, *Johannische Kirche and Peters v. Germany*, no. 41754/98, ECtHR 2001; *Christian Federation of Jehovah's Witness v. France*, no. 53430/99 ECtHR 2001.

[12] For example, *Verdens Gang and Aase v. Norway*, no. 45710/99 ECtHR 2001; *Pasalaris and Foundation de Presse v. Greece*, no. 60916/00 ECtHR 2002; *Independent News and Media plc v. Ireland*, no. 55120/00 ECtHR 2003.

[13] For example, *Unison v. UK*, no. 53574/99, ECtHR 2002; *Federation of Offshore Workers' Trade Unions v. Norway*, no. 38190/97 ECtHR 2002.

[14] A recent decision is one example, *Women on Waves & Others v. Portugal* (no. 31276/05 ECtHR 2009) involved three NGOs, one Dutch and two Portuguese, successfully won their claim that the Portuguese government had violated their Art 10 (freedom of expression) rights when it prevented the organizations from disseminating information about reproductive rights and abortion. See country case studies below for further examples.

[15] For example, *Comingersoll v. Portugal*, no. 35382/97, ECtHR 2000; *Eielectric Srl v. Italy*, no. 36811/97, ECtHR 2000.

[16] For example, the *Aksoy v. Turkey* case was brought by the victim's father along with assistance by a Kurdish human rights group, the KHRP. This case is discussed in more detail in country case study below.

[17] *Karner v. Austria*, no. 40016/98 ECtHR 2000.

is not only one of top down reform; instead it has evolved over time as a result of the interaction between social activists and the ECtHR.

The first request by a third party came in 1978 when the National Council for Civil Liberties requested to submit a brief in a pending case for an individual they had represented earlier in the legal process.[18] The Court denied the request. The following year, the UK Government asked to intervene in the *Winterwerp* case against the Netherlands on the grounds it had a series of similar pending cases.[19] The UK Government admitted it had no right to submit a brief but inquired whether Rule 38(1) of the Rules of the Court might provide the basis: *"the Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear….in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task."* The Chamber granted the UK leave to submit the brief but required that the information would be submitted to the Court by delegates of the Commission rather than directly by the UK Government. NGOs took notice and quickly followed suit with new requests. In 1981, the Court allowed the same indirect third party participation via the Commission, but this time to a trade union, the Trades Union Congress (TUC).[20] Interestingly, the Court further expanded participation by granting a TUC representative leave to also participate in oral proceedings alongside the written documents submitted by the Commission on behalf of TUC. What is the effect of this NGO participation? These TUC documents would later be cited directly in the Court's final decision finding a violation of Article 11.[21]

Following this trend developed in the case law, the ECtHR subsequently amended the meaning in Article 37(2) of the Rules of the Court in 1983 to specifically allow third party participation both by states or any other person. Between 1984 and 1998 the Court has authorized 41 requests for third party intervention (it refused 20).[22] Figure 2 includes all the third party intervention requests during this time period. From the mid-1990s NGOs increasingly utilized this new access point to participate in the Court's law making processes. Today, following the adoption of Protocol 11 in 1998, we see third party access and participation clearly specified in the Convention and the Rules of the Court. Article 36§2 of the Convention provides the President of the Court the discretionary power to allow third party intervention: *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 or take part in hearings.*
Likewise, Rule 44§2 from the Rules of the Court govern similar provisions on third party participation.

----- Figure 2 about here -----

Together, these provisions and actions by the Court have led to greater participation by social activists and NGOs in ECtHR litigation. Clearly, these provisions do not create an open flood gate for NGO participation, but instead illustrate the persistence of NGOs to challenge constraints on the accessibility of the Court and the power of the Court to allow increased participation over time – a decision that often takes place long before states clarified criteria for participation. In sum, while public interest organizations are rarely a litigant before the ECtHR given the constraints by the Art 34 requirement of claiming to be a direct victim of an alleged

[18] *Tyrer v. UK*, no. 5856/72 ECtHR 1978.
[19] *Winterwerp v. Netherlands*, no. 6301/73 ECtHR1979.
[20] *Young, James & Webster v. UK*, no. 7601/76, no. 7806/77 ECtHR 1981.
[21] Paragraphs 31,64.
[22] See European Court of Human Rights. *Survey: Forty Years of Activity*. 1998, p. 134-137.

violation of the Convention, they are able to participate and their involvement has directly impacted the development, reform and implementation of Convention rights in domestic legal systems. It is through this transnational participation that they are able to enhance the quality of democracy at home. We can see this most clearly when we look at the ways in which public interest organizations have at times shaped the decisions made by the ECtHR and even the policy positions held by national governments. The following are examples.

In the *Soering* case[23] concerning the United Kingdom's involvement in extraditing an individual accused of a capital offence to the United States, Amnesty International was granted leave to submit an amicus brief which ultimately was quoted by the Court in its judgement.[24] The group Article 19 (which focuses on the defence of freedom of expression rights) filed amicus briefs in two cases[25] and played a key role in the Court's decision and dissenting opinions, and was ultimately used to support the Court's finding of a violation.[26] The *Nachova*[27] decision was also particularly important not only for expanding Convention rights to find that Art 14 (prohibition of discrimination) also has a procedural element (obligation of the authorities to investigate possible racist motives), but also that the amicus briefs of three NGOs played prominently in the judgement. The three NGOS, the European Roma Rights Centre (ERRC), INTERIGHTS and the Justice Initiative were all granted leave by the Court to file briefs. By 2005, these groups were directly involved (either as third party intervention or directly representing a claimant) in over 80 cases before the ECtHR . In sum, the number of cases involving NGOs is admittedly a small number compared to the total number of ECtHR cases. But the quality of the case is high, meaning most of these groups are very strategic about choosing to participate in cases which they believe will lead to significant changes in European law and bring maximum reforms to domestic legal systems. They see it as an opportunity to participate in the development of international human rights law, which subsequently has a direct impact not only at the international level, but at the way democratic rights are upheld by judges and public officials at the domestic level.

The ECtHR and Deliberative Democracy

Finally, we turn to the interaction between international courts and deliberative democracy. I examine the extent to which the ECtHR's decisions foster public debate and serve as sites for transnational collaboration and information exchange and the effects of this on domestic democracy. In order to provide an in depth examination of this dynamic process, I will focus on a subset of the larger decision database. In particular, I provide an in depth case study of minority rights claims brought between 1991-2007 involving two countries, Turkey and the United Kingdom. I will examine each country in turn.

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[23] *Soering v. UK*, no. 14038/88 ECtHR 1989.

[24] The ECtHR stated in para. 102: "This 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice', to use the words of Amnesty International, is reflected in Protocol No 6 to the Convention, which provides for the abolition of the death penalty in time of peace."

[25] *Observer & Guardian v. UK*, no. 13585/88 ECtHR 1991; *Sunday Times v. UK*, no. 13166/87 ECtHR 1991.

[26] The Court stated in para. 60: "For the avoidance of doubt, and having in mind the written comments that were submitted in this case by 'Article 19'…. the Court would only add to the foregoing that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such."

[27] *Nachova & Others v. Bulgaria*, no. 43577/98, no. 43579/98 ECtHR 2005.

The great majority of minority rights cases brought against Turkey involved Art 3 (torture), Art 5 (liberty/security) and Art 8 (privacy). Interestingly, these are also the cases in which we see the greatest involvement of activists, including organized Kurdish lawyers, British human rights lawyers, and also the NGO Kurdish Human Rights Project (KHRP). The KHRP was clearly a key actor in this litigation. This non-governmental organization was founded in 1992 and is based in London. It has a global mission in that they are not tied to a single country but instead are "committed to the promotion and protection of the human rights of all persons living within Kurdish regions" with the aims to "to promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and elsewhere, to bring an end to the violation of the Kurds in these countries, and to promote the protection of human rights of Kurdish people everywhere" (KHRP 2008, p. 1). The group utilizes international human rights mechanisms as a key instrument to protect Kurdish rights and the European Convention system has been its most successful avenue. Between 1992 and 2007 they represented over 500 applicants, and recognize the importance of this individual procedure in attaining "collective justice" (KHRP 2008, p. 25). The ECtHR provided the site for the KHRP's transnational collaboration and campaign. As seen from its mission statement, this transnational legal activism clearly has the goal of bringing greater public awareness and debate to the issue of human rights protection of Kurdish populations. If we turn to the case law we can examine these effects.

The KHRP's collaboration with activist lawyers in both the United Kingdom and Turkey has led to a successful campaign to bring greater awareness to the public and international bodies, as well as greater accountability of public officials on the treatment of the Kurdish population in Southern Turkey. This litigation has led to both an expansion in domestic protection and also reform in European Convention procedures. The following are examples.

The *Aydin vs. Turkey* decision[28] was integral to expanding the scope and meaning of Art 3 and its prohibition of torture. In particular, this KHRP assisted case, led to the ground breaking decision that established rape as a form of torture. Prior to this ruling, rape was often categorized by many legal systems as a criminal act, under appreciating its potential systematic use by authorities in times of war. The KHRP's legal team provides the basis for the ECtHR to expand this definition of torture. This ECtHR decision not only expanded Convention rights, but it also contributed to larger discussions in the international human rights community on how rape would be prosecuted under international law, in particular in the international criminal tribunals for Rwanda and the Former Yugoslavia (see Eaton 2004). Another important Art 3 decision which had KHRP involvement was the *Aksoy v. Turkey* case.[29] The case involved Zeki Aksoy who was shot on 1994 after receiving death threats for filing a complaint with the European Commission regarding mistreatment and torture he suffered while detained by the Turkish security forces. The case was brought by his father with the assistance of KHRP. The ECtHR's decision was important by publicizing the Turkish government's use of torture, bringing greater public debate to this issue and also making clear that the Convention system took seriously such claims brought by individuals against their governments. Groups such as the KHRP understand the importance of utilizing the Convention system as a way of enhancing the accountability of domestic governments.

It is important to note that social activists may bring this litigation, sometimes formally through their work with NGOs like the KHRP, but also working outside of these organizations. In the case of Turkey, there are two legal activists that are particularly noteworthy for their

[28] *Aydin vs. Turkey*, no. 23178/94 ECtHR 1997.
[29] *Aksoy v. Turkey*, no. 21897/93 ECtHR 1996.

transnational collaboration in bringing claims before the ECtHR. Kevin Boyle and Francoise Hampson are professors of law and fellows in the Human Rights Centre at Essex University in the United Kingdom. Both have a distinguished career of involvement in human rights litigation, in particular before the ECtHR. Boyle spent over a decade working specifically on bringing claims involving human rights violations in South East Turkey.[30] An examination of the case law from Turkey further details this involvement with their participation as legal representative to the applicant in 15 cases. The pair of lawyers has an excellent track record, with the ECtHR in almost all cases finding a violation of Convention rights, most involving Art 3 (torture) and Art 8 (privacy). For example, in the *Elci and Others v. Turkey* case,[31] Hampson and Boyle assisted 16 Turkish nationals in bringing two complaints (that were later combined into one application) under Art 3, Art 5 (liberty/security), Art 8, Art 1 Protocol 1 and Art 25. This case involved a group of lawyers who were detained under the pretext that they were involved in criminal activities but in reality it was for their work representing individuals before the State Security Court and their wider human rights work. The ECtHR held that there was a violation of Art 3, Art 5 and Art 8. The effect of this decision not only held the Turkish Government accountable in these sixteen cases, but also was publicized widely by networks of activists to send a clear message to the public that the ECtHR will confront governments that limit access to legal institutions. Again, this decision and the subsequent dissemination of information expands protection and access for those bringing rights complaints against their governments in the future.

We now turn to look closer at NGO and social activist involvement in the minority rights cases in the United Kingdom. The most notable variation from the Turkish cases is the number and diversity of NGOs involved in these cases. Drawing from the larger data set, we find that the United Kingdom is home to the largest number of NGOs that are systematically involved with applications before the ECtHR. Further, many of the key litigators and justice advocates before the ECtHR over the last thirty years are from the UK. Professors Boyle and Hampson are examples as mentioned above, and Lord Lester of Herne Hill QC would be another.[32] As we saw from the Turkish case, these British social activists (KHRP for example) are not only involved in cases in their home country but are a part of an increasingly important network of transnational public interest lawyers. The Convention system provides the site for this exchange of information, collaboration and deliberation of important human right issues. The NGOs assisting in these cases included AIRE Centre, Justice, Children's Legal Centre, National Council of Civil Liberties, Stonewall, National Romani Rights Association, and Liberty. Due to space limitation, I will highlight a few of these NGOs and elaborate the effects of the ECtHR on their activities.

The AIRE Centre is based in the United Kingdom and was set up in 1993 to assist individuals in obtaining rights provided through international agreements. Between 1993 and 2003 they were involved in more than 77 cases. The vast majority of their participation came in

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[30] Their personal profiles can be found at the following URLs:
Kevin Boyle http://www.essex.ac.uk/law/people/academic/boyle.shtm
Francoise Hampson http://www.essex.ac.uk/law/people/academic/hampson.shtm

[31] *Elci and Others v. Turkey*, no. 23145/93, 25091/94 ECtHR 2003.

[32] Lord Lester has a distinguished career as a human rights advocate and lawyer both before British courts but importantly before the ECtHR. One recent example, he represented the applicants in *D.H. & Others v. Czech Republic*, (no. 57325/00 ECtHR 2007) which was a landmark decision on the meaning and effect of racial discrimination as protected under the Convention. His 40 years of work as a lawyer exemplifies the social justice activist who has utilized the courts to bring real legislative and legal reform.

the form of directly assisting claimants with legal information (37 cases) or serving as a claimant's primary legal representative (37 cases) and a handful in which they were granted third party intervention (3 cases).[33] Further, the group is called upon by the Council of Europe and other international organizations to provide training on litigating Convention rights (Harby 2005). This is an interesting example of how an international organization reaches out to NGOs and facilitates this collaboration and exchange of information with the purpose of bringing greater public awareness and utilization of these rights. Subsequent litigation involving AIRE Centre has resulted in decisions finding violations in a host of legal domains, from failure in police protection (under Art 6) to family law (under Arts 6, 8, 13). Nuala Mole from the AIRE Centre served on the legal team for the applicant in *D v. UK* [34]a case involving the deportation of an immigrant with AIDS to his home country which is a remote island (St Kitts). The ECtHR found the UK in violation of Art 3 as deportation of the man in this condition to place where he would have neither medical or family support constituted "inhumane and degrading treatment." The ruling expanded the protection offered to non-nationals living in the UK especially those suffering from terminal illness.

Stonewall is also involved with equality and justice advocacy for the lesbian, gay and bisexual communities. This is a professional lobbying organization that was set up in the United Kingdom in 1989 in opposition to anti-gay legislation.[35] Today the group has offices throughout the UK and has successfully mainstreamed their equality claims by garnering support by all main political parties. While research, community and educational outreach and lobbying Parliament are their main activities, representatives from Stonewall have also lodged cases with the ECtHR to bolster these public awareness campaigns at home. In the *Sutherland v. UK* case[36] case, the applicant was represented by Stephen Grosz and also Angela Mason from Stonewall who lodged the complaint with the European Commission on Human Rights in 1994. The applicant in the case was questioning the lawfulness of a UK law which fixed the age of consent for lawful homosexual activities between men at 18 rather than that set for women at 16. He claimed that the statute was a violation of his right to privacy under Art 8 and was discriminatory and thus a breach of Art 14. This case is notable in that it complemented the public campaign in the UK that subsequently led to direct legislative amendments by the British government which lowered the age of consent to 16, despite repeated opposition from some parliamentarians. The government was held accountable to remove discriminatory practices, and the litigation in effect helped foster public debate that enabled laws to be reformed to meet current societal pressures. Stonewall is also a classic example of an NGO utilizing a wide array of venues to bring policy and social reform – through the courts (both domestic and supranational levels), legislature and larger public education campaigns (Cichowski 2007). While ECtHR litigation is but one avenue for this NGO, it clearly helps support the groups work in improving deliberative democracy.

Liberty is another UK based NGO that has played a critical role in the ECtHR's minority rights case law. It was established in 1934 under the name the National Council for Civil Liberties. Their organizational goals are to "promote the values of individual human dignity, equal treatment and fairness as the foundations of a democratic society" and they do so "through a combination of public campaigning, test case litigation, parliamentary lobbying, policy analysis

[33] The Aire Centre. 2003. *Ten Year Review.* Report can be downloaded at http://www.airecentre.org/fileman/tenyearreview.pdf

[34] *D. v. UK* no. 30240/96 ECtHR 1997.

[35] For more information on Stonewall go to: http://www.stonewall.org.uk/

[36] *Sutherland v. UK*, no. 25186/94 ECtHR 2001.

and the provision of free advice and information."[37] Liberty has utilized the ECtHR as a venue for its test case litigation in the area of minority rights. Again, similar to Stonewall this group utilized the ECtHR as a platform in its work to foster public deliberation and debate on human rights issues. The *Grant v UK* test case[38] is an example. The applicant in this case was a male to female transsexual and Liberty brought into question the fact the applicant was disallowed a pension at the age of 60 despite the fact she had a Gender Recognition Certificate as established through legislation adopted in 2004 following the ECtHR's *Goodwin* decision[39] which raised similar issues pertaining to new gender recognition for transsexuals. The ECtHR granted the applicant a pecuniary award finding a violation under Art 8. Along with the *Goodwin* case, the *Grant* case helped foster a growing transgender rights movement in the UK, gave the public space for their claims and debate which subsequently has led to significant legislative changes, despite the Government's initial slow implementation pace (Besson 2008). In the last 10 years, Liberty has been directly involved in at least 26 cases before the ECtHR serving mainly in the role as primary legal representation (13), amicus briefs (12) and 1 as actual claimant. Liberty's strategic litigation has led to not only an expansion in rights protections for minorities living in the UK but has fostered public debate on issues as diverse as transgender rights to governmental oversight.[40]

CONCLUSIONS

Some might think international courts possess the double evil. On the one hand they are criticized as anti-democratic by their counter-majoritarian nature as courts, and on the other, they are international organizations that critics argue are rife with democratic deficiencies. Yet the findings of this analysis also suggest that accepting this double jeopardy for international courts, and the European Court of Human Rights, in particular, would be short sighted. In this paper I have argued how international courts, like other multilateral organizations, can enhance democracy – through their protection of rights and by fostering participatory and deliberative democracy. The findings reveal this dynamic.

Today the ECtHR's fifty year history is characterized by landmark human rights innovations, extensive participation with NGOs and the promotion of public dialogue – all which have touched the lives of individuals across Europe. The findings revealed that this dynamic process was linked to a set of necessary conditions: the ECtHR's review powers, rules and procedures granting individual and group access, and then strategic social action by individuals and NGOs. Remarkably, had the Court not changed these original conditions granted to the Convention system by states in the last 1950s, the Court's historical legacy of enhancing democracy might not exist. Overtime, the Court developed its own "constitutional review"

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[37] Liberty (2009) 'About', at http://www.liberty-human-rights.org.uk/about/index.shtml accessed on 11/15/09.
[38] *Grant v. UK*, no. 32570/03 ECtHR 2006.
[39] *Goodwin v. UK*, no. 28957/95 ECtHR 2002.
[40] *Liberty & Others v. UK* (no. 58243/00 ECtHR 2008) is an example of a case where Liberty is the applicant and the resulting decision pushed for greater government oversight. Liberty along with 2 civil liberties NGOs from Ireland brought a case before the ECtHR against the United Kingdom under Art 8 alleging wrongful interception of telecommunications traffic by the UK Ministry of Defense during which time the claimants were in regular phone contact with each other and also clients in order to discuss confidential legal matters. The Court's finding of a violation laid out clearly that while interception of telecommunications for national security purposes is lawful, the UK policy governing such action was "not adequately accessible and formulated with sufficient precision as to be foreseeable."

powers and expanded the accessibility of Convention institutions – innovations that developed hand in hand with a growing body of transnational legal activists and groups.

How did these necessary conditions then shape the ECtHR's role in enhancing democracy? The findings highlight the extent to which this dynamic interaction between mobilization and litigation led to the strengthening of the precision and enforceability of Convention rights and expanded their scope. The data illustrate that three quarters of the cases in this 45 year time period led to the finding of a violation, states were then asked to upgrade their domestic rights protections to include these new more precise definitions. These cases ranged from a majority of cases arguing for greater access to justice to those cases widening the scope of discrimination to fit society. Further, the implementation of the ECtHR rulings led to institutional change such as legislative and constitutional reforms, all with the effect of creating a more enforceable and precise set of rights in the domestic legal system.

This case law also had significant effects on participatory democracy. If we look at participation by NGOs, today, both the Convention and the Rules of the Court explicitly grant access to NGOs either as a direct victim or in the form of third party intervention. Yet looking back over the last fifty years, we see that these rules evolved not at the initiation of states, but instead through the Court's jurisprudence and the strategic action of NGOs. Second, while these rules facilitated formal access for NGOs, the historical analysis also reveals NGOs playing myriad roles in the litigation process. Beyond, their role as applicant or third party, social activists were crucial in the role of representing applicants, and providing a general support structure to the Convention system. This participation had a direct impact on the work of the Court. The analysis revealed that overtime the ECtHR has systematically utilized third party interventions (amici curiae) to support its findings of a violation. These amicus briefs are often directly quoted by the Court in the final decision shaping the new definition of rights.

Finally, the analysis highlighted the ways in which the ECtHR decisions fostered public debate and the ECtHR served as a site for transnational collaboration and information exchange. Dense networks of transnational public interest lawyers have developed over the last fifty years to utilize the Convention legal system. Most of these networks are grounded in the work of domestic NGOs, like Liberty and the KHRP in the United Kingdom, in which they serve as a conduit between domestic public discourse and debates and the Convention rights system. The ECtHR has fostered this transnational collaboration by seeking out NGOs such as the AIRE Centre to host workshops to encourage and educate individuals and groups on bringing rights claims. Further, these groups utilize ECtHR case law to add greater strength to domestic debate and deliberation with the goal of bringing policy reform (Stonewall's work on transgender rights is an example).

Alongside these findings, the analysis also raises a host of unanswered questions that serve as avenues for research in the future. First, do these findings travel across time, region or area of law? The European Court of Human Rights is exceptional in many ways given its vibrant legacy, large case law, historical network of legal advocacy support and general compliance amongst member states. Yet it is also currently facing a massive crisis. Thousands of claims are turned away each year on "admissibility" grounds with critics pointing to the inability of the institution to handle the real number of violations that exist. And proposed reforms remain in a dead lock given the power of states to block a system that would ensure greater constraints on national sovereignty. [41] Clearly, the legitimacy of this dynamic process

[41] The current debate around reforms to the European Convention system and in particular Russian opposition highlights that for the ECtHR an expanding case law protecting rights may enhance its legitimacy in the eyes of

remains a fine balance between societal inclusion and domestic government support. Thus, it remains an important question how the ECtHR's democracy enhancing capabilities might evolve in the future to balance the support of states and citizens.

What can the data tell us about variation across region and legal domain? The analysis suggests a set of generalizable expectations that enable us to understand the democracy enhancing capabilities of international courts – connecting the work of these multilateral institutions to change in rights protections, participation and deliberative democracy. The analysis also provides a set of necessary conditions that initiate this process. This general framework provides the foundations to explore international courts around the globe. However, it also leaves room for greater specification of the intervening variables and conditions that might shape these general relationships. It is worth testing varying external factors such as domestic rule of law institutions and regional democracy norms, to see whether this might explain variation across regional human rights legal institutions (e.g. Europe, Americas and Africa). Although, comparative scholarship illustrates greater significance is placed on international court characteristics when explaining democracy enhancing outcomes than these mitigating domestic factors (Hawkins 2008). Further, we might expect variation in outcomes between courts with different jurisdiction (e.g. the ECJ – economic disputes versus the ECtHR – human rights). These remain important empirical questions.

Finally, the analysis also raises a larger question about how we conceptualize international courts. Agent, trustee, principal? All of the above? Scholars have utilized principal agent models for understanding the behaviour and effects of international organizations, in particular international courts (see Alter 2008 for a review). This leads to an overemphasis on state behaviour and compliance, which remains only a part of the international legal process and only one of the roles by which international courts operate. Delegation models help us understanding founding moments (e.g. Moravcsik 2000), but they do little to help us understand change overtime, which was critical to understanding the democracy enhancing effects of the ECtHR. This analysis highlighted that the original negotiators of the Convention set up a system with significant constraints on individual and group access and the Court's review powers. It subsequently was the Court, not states, which changed this system so it would be more democracy enhancing. Overtime, the Court expanded their own power, Convention rights and access points, which enhanced accountability, transparency and accessibility to the public. This institutional evolution places the Court in the role of serving the public and enabling a check on domestic government accountability. While compliance with ECtHR rulings is of critical importance to this system, equally important is the radiating effects of the decisions that strengthened the precision and enforceability of rights, and fostered participatory and deliberative democracy throughout Europe. It is this process of mobilization and litigation that has not only characterized the protection of human rights in Europe over the last fifty years, but has become the hallmark of good governance around the globe.

So perhaps rather than the demons of democracy, we could look to international courts as the drivers of democracy.

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citizens, but at the same time cause a legitimacy crisis in the eyes of national executives. For further discussion of reforms see Mowbray (2009); Caflisch (2006); Greer (2006).

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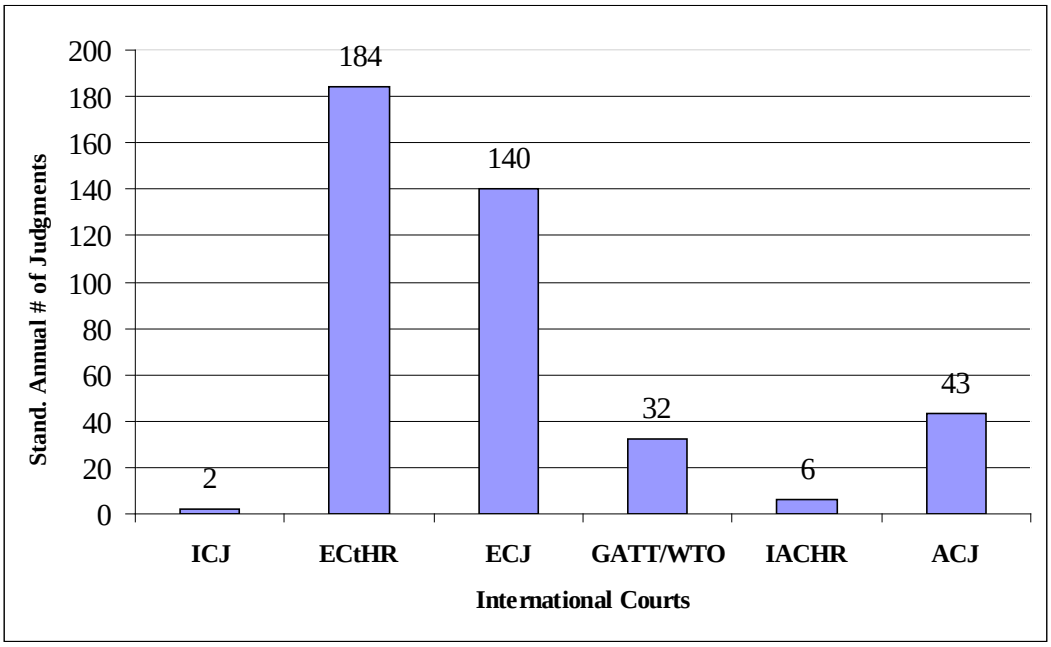
Figure 1 *COMPARISON OF STANDARDIZED ANNUAL # OF JUDGMENTS TAKEN BY INTERNATIONAL COURTS, 1949-2007*



Note: The data includes six of the oldest and consistently active international courts/dispute bodies: the International Court of Justice (ICJ), the ECtHR, the European Court of Justice (ECJ), GATT/WTO dispute settlement body/appellate panel, Inter-American Court of Human Rights (IACHR) and the Court of Justice of the Andean Community (ACJ). The data are standardized to account for the varying dates of first judgment and include a generally comparative category of judgments: final resolution of a concrete dispute before the court (e.g. does not include advisory opinions etc.).
Source: Data compiled by the author from the websites of each of the courts, 2008.

TABLE 1 ***EUROPEAN COURT OF HUMAN RIGHTS DECISIONS AND VIOLATION RATE BY COUNTRY, 1960-2005***

Country	Standardized Total # of ECHR Judgments	Violation Rate %
Italy	38	26%
Turkey	24	18%
Poland	21	5%
France	19	9%
Ukraine	18	3%
Greece	12	7%
Russia	12	2%
United Kingdom	10	6%
Romania	10	2%
Croatia	9	1%
Slovakia	7	1%
Bulgaria	6	1%
Czech Republic	6	1%
Moldova	6	1%
Austria	5	3%
Portugal	5	2%
Hungary	4	1%
Slovenia	4	0.2%
Belgium	3	2%
Finland	3	0.8%
Germany	2	1%
Netherlands	2	1%
Switzerland	2	0.8%
Spain	2	0.8%
Lithuania	2	0.4%
Sweden	1	0.7%
Estonia	1	0.2%
Latvia	1	0.1%
Macedonia	1	0.1%
Georgia	1	0.1%
Denmark	0.6	0.1%
Cyprus	0.6	0.4%
San Marino	0.6	0.2%
Ireland	0.5	0.3%
Norway	0.3	0.2%
Luxembourg	0.2	0.2%
Malta	0.2	0.1%
Albania	0.2	0.02%
Andorra	0.2	0.02%
Iceland	0.1	0.1%
Liechtenstein	0.1	0.1%

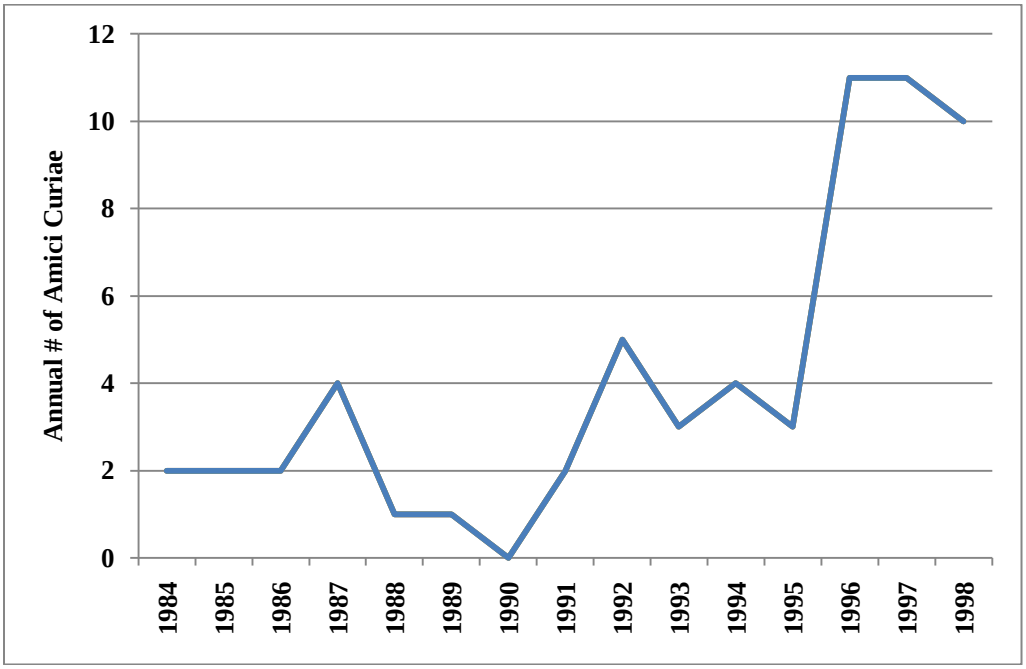
Total # of Judgments = 6648, total # of violation rulings = 4962
Notes: 'Standardized total' is standardized by years since ratification of the Convention. Violation rate is calculated as a country's violation judgments as a percentage of all violation judgments between 1960-2005.
Source: Data compiled by the author from ***Reports of Judgments and Decisions/European Court of Human Rights,*** **(various years)**.

TABLE 2 ***GENERAL MEASURES TAKEN BY THE DOMESTIC LEGAL SYSTEM TO ENSURE COMPLIANCE WITH ECTHR JUDGMENTS AND PREVENTION OF FUTURE VIOLATIONS, 1966-2006***

General Measure Type Taken in the Domestic Legal System	Total # of Measures Taken	Measure Type Taken as a % of Total
Parliamentary Legislation	263	37%
Executive Action	102	14%
Change in National Jurisprudence	56	8%
Administrative Measures	46	7%
Publication of Judgment requiring Nat'l judges to apply ECHR jurisprudence	156	22%
Practical Reform (e.g. recruit judges, build prisons)	21	3%
Dissemination	60	9%
Total	704	100%

Source: Data compiled by the author from Council of Europe (2006).

Figure 2 *ANNUAL # OF AMICI CURIAE SUBMITTED TO THE ECTHR, 1984-1998*



Notes: The Court began accepting Amici Curiae in 1984 under Rule 37 2 Rules of the Court.
N = 61
Source: The author compiled the data from Council of Europe (1999).