

AFFECTED INDIVIDUALS IN PROCEEDINGS BEFORE  
THE ICJ, THE ITLOS AND THE ECHR

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A. INTRODUCTION

International law generally applies to legal relations and disputes among states. In many cases, however, international disputes actually arise out of litigation in domestic courts between private parties. In some of these cases, especially in the context of diplomatic protection, one or both parties to the national proceedings may not be represented at the international level but nevertheless may be affected by the decision of the international court. This is especially the case if the international judgment obliges the state to implement its decision in a manner which will either modify the ongoing domestic proceedings or affect the enforceability of the judgment issued.<sup>1</sup>

Representation and standing of individuals before international courts is not a new issue.<sup>2</sup> However, recent developments in international law with regard to the position of individuals, especially in the context of human rights and investment protection, lead to the question whether the position of affected individuals should be strengthened at the international level, in that these individuals should be given the opportunity to present their views and arguments directly to the international court concerned with their case. Although it is still valid to assume that states generally defend and represent the interests of their nationals satisfactorily in international disputes, it is argued that the individual affected by the outcome of the case should have his/her own say in the proceedings. At least from the perspective of private international law, the quasi-total shielding of the individual from disputes before inter-state courts does not correspond to the increased importance of procedural human rights like access to justice and fair

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<sup>1</sup> It is in this regard only that the term “affected individual” is used.

<sup>2</sup> I. Brownlie, *The Individual before Tribunals Exercising International Jurisdiction*, 11 *The International and Comparative Law Quarterly* 701 (1962); G. Dahm/J. Delbrück/R. Wolfrum (eds.), *Völkerrecht*, Vol. I/2 (2nd ed. 2002), at 260.

trial which has largely evolved since the second half of the 20th century.<sup>3</sup>

This article addresses the issue concerning disputes arising out of domestic civil actions with regard to three international bodies: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and the European Court of Human Rights (ECHR). It discusses recent cases and explores procedural mechanisms and the courts' investigative powers which may be used to permit the affected individual to present his/her own views on the case to the tribunal. The contribution is dedicated to *Rüdiger Wolfrum* who is familiar with the cross-fertilization of public and private international law with regard to dispute resolution. Thanks to *Rüdiger's* promotion and inspiration, the International Max Planck Research School on Successful Dispute Resolution explores the interfaces between dispute settlements in both areas. *Astrid Wiik* who assisted me in preparing this article is a doctoral student of the school and currently working on her thesis on the *amicus curiae* before international courts and tribunals.

Before addressing the legal position of individuals in the different international courts and tribunals, it seems appropriate to address one fundamental issue. One might argue that the separation of international and municipal law does not require any participation of the individual in international proceedings. This argument may be reinforced by the fact that decisions of international courts and tribunals do not bind the individual, but only the States Parties to the respective case. Yet this assumption seems to be too formalistic. The most prominent example is the European Court of Human Rights. According to Article 46 ECHR, the judgments of the Court bind only the contracting parties. The Committee of Ministers of the Council of Europe has the task of supervising the implementation of the judgments. However, many member states have adopted provisions in their domestic systems which provide for direct effect: if the ECHR holds that the Convention has been infringed by German civil courts, the affected party may ask that the civil judgment is set aside—even if it has become *res judicata* (Section 580 no. 8 Code of Civil Procedure). The legal situation is identical in criminal matters (Section 359 no. 6 Code of

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<sup>3</sup> A. del Vecchio, *International Courts and Tribunals, Standing*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press (2008), online edition <http://www.mpepil.com>.