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Who Mobilizes the Court? Migrant Rights Defenders Before the Court of Justice of the EU

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Abstract: Like any other adjudicative body, the Court of Justice of the European Union (CJEU) is an essentially reactive institution: it cannot create disputes on its own motion, but it needs to be 'mobilized'. This simple observation leads us to a question of central importance in the field of courts and social justice: who brings social justice claims before the Court of Justice? This is a particularly salient question if confronted with the Court's restrictive legal standing rules: individuals and collective actors have limited access to the Court and engaging in EU litigation requires the availability of specific resources and allies. This paper relies on an original dataset of 291 rulings of the CJEU in the field of migration, complemented with qualitative empirical research, to unveil and map the actors that defend migrant rights in Luxembourg. The analysis offers an innovative and critical reflection on the accessibility of international courts by disadvantaged groups, showing how some features of the preliminary reference procedure affect the type of actors that engage in EU litigation.

Keywords: international courts, migrant rights, Court of Justice of the European Union, legal mobilization, social justice

1 Introduction

This investigation starts with a simple yet increasingly relevant question: Who brings migrants' justice claims before the Court of Justice of the European Union (CJEU)? The Court is considered "the most effective supranational

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judicial body in the history of the world"[1] and the "hero" of European integration.[2] In the last two decades, along with the expansion of competences conferred on the EU, the Court extended its jurisdiction to cover human rights-sensitive fields such as criminal law and migration.[3] This made the issue of access to the Court of Justice and of legal mobilization more relevant than ever for migrant rights defenders.

The concept of legal mobilization was first coined in US scholarship to describe the use of law or courts to achieve social change. There is no agreed-upon definition of legal mobilization;[4] but, given the aim of this article, here the term will be used in its narrow sense to indicate instances of litigation that are conducted or supported by collective actors, such as nongovernmental organizations (NGOs) and other nonstate groups, and that seek to implement a change in the status quo that transcends the individual interest of the parties. The term legal mobilization is preferred over similar concepts like strategic litigation because of the rich conceptual and analytical framework underlying it.[5] Indeed, legal mobilization scholarship draws upon social movement and socio-legal studies, and it is characterized by its bottom-up approach to the study of courts; these are seen as mainly "reactive institutions" that cannot "acquire cases of their own motion, but only upon the initiative of one of the disputants."[6]

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1 Alec Stone Sweet, *The Judicial Construction of Europe* (New York: Oxford University Press, 2004), p. 1.

2 Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 International Organization, no. 1 (1993), 41.

3 Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 Maastricht Journal of European and Comparative Law, no. 2 (2013), at 421. The Lisbon Treaty transformed the EU Charter of Fundamental Rights into a legally binding instrument and included it among EU primary sources; moreover, the Treaty extended national courts' possibility to refer preliminary reference questions in the Area of Freedom Security and Justice.

4 Lisa Vanhala, "Legal Mobilization," *Oxford Bibliographies Online*, available at <http://www.oxfordbibliographies.com/abstract/document/obo-9780199756223/obo-9780199756223-0031.xml>, accessed January 29, 2019; Emilio Lehoucq and Whitney K. Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 Law & Social Inquiry, no. 1 (2020), 166–93.

5 Scholars are divided also on the definition of strategic litigation, especially on whether the "strategic" element is a core part of it. See for instance Moritz Baumgärtel, *Demanding Rights. Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge: Cambridge University Press, 2019), p. 122; Kris Van der Pas, *Conceptualizing Strategic Litigation,* Oñati Socio-Legal Series [2021].

6 Marc Galanter, "The Radiating Effects of Courts," in Keith O. Boyum and Lynn Mather (eds), *Empirical Theories about Courts* (New York: Longman Inc., 1983), p. 122. Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 The American Political

This viewpoint shift leads to a change in perspective that decentralizes courts and focuses instead on litigants, lawyers, and their social and political context.

Recently, legal mobilization became the object of increasing attention among EU scholars, who started to rethink the Court of Justice as a venue to achieve social change.[7] Some scholars have argued that the use of the preliminary reference mechanism (art. 267 TFEU, the main procedure to reach the Court of Justice) has "shifted the domestic balance of powers" and has created new opportunities for participation.[8] Traditionally, most of the studies focused on EU litigation in the field of gender equality but, recently, new areas of law started to be mobilized before the Court of Justice, attracting new attention;[9] migration is one of these.[10]

Law and courts play a somehow ambiguous role in the migration field. On the one hand, the law is a pervasive tool to control migrants' lives, as it establishes where they can live, whether they can work, when they can reunite with their family, etc.; having limited voting rights and little political leverage, migrants must passively adequate to laws decided by the majority in power. On the other hand, scholarship showed that law and courts could also be tools for migrants' resistance and participation. Courts, in particular, being insulated

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Science Review, no. 3 (1983), 690–703; Michael McCann, "Litigation and Legal Mobilization," in Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds), *The Oxford Handbook of Law and Politics* (New York: Oxford University Press, 2008), p. 523.

7 Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge: Cambridge University Press, 2007); Lisa Conant et al., *Mobilizing European Law*, Journal of European Public Policy [2017], 1–14; Olivier De Schutter, "Group Litigation before the European Court of Justice," in Stijn Smismans (ed.), *Civil Society and Legitimate European Governance* (Cheltenham: Edward Elgar Publishing, 2006), pp. 89–114; Marion Guerrero, "Strategic Litigation in EU Gender Equality Law," European Network of Legal Experts in Gender Equality and Non-Discrimination (Luxembourg: European Commission Directorate-General for Justice and Consumers, 2020), at 93.

8 Karen Alter and Jeannette Vargas, *Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy*, 33 Comparative Political Studies, no. 4 (2000), at 352.

9 Elise Muir et al., *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum*, EUI Working Papers no. 17 (Fiesole: European University Institute) (2017); Jeffrey Miller, *Explaining Paradigm Shifts in Danish Anti-Discrimination Law*, 26 Maastricht Journal of European and Comparative Law, no. 4 (2019), 540–57; Sophie Jacquot and Tommaso Vitale, *Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level*, 21 Journal of European Public Policy, no. 4 (2014), 587–604.

10 Baumgärtel (2019), *supra* note 5; Virginia Passalacqua, *Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights*, 58 Common Market Law Review, no. 3 (2021).

from democratic pressure and devoted to safeguarding fundamental rights and constitutional guarantees, are often relied upon to question the legitimacy and challenge the enforcement of migration policies.[11] This is also true in the international arena: "Supranational litigation can enable individuals and groups, who are often disadvantaged in their own legal systems, to gain new rights at the national and European level."[12]

When trying to answer the question "who mobilizes the Court of Justice?" there are two challenges that complicate our analysis. The first is access to court: for individuals and groups, it is extremely difficult to bring direct action before the Court of Justice. Indeed, the Court was procedurally designed to receive direct actions by private parties only in very limited circumstances,[13] and because of the form that EU migration legislation usually takes, it is very unlikely for migrant rights defenders to have legal standing (see next session). For this reason, most of the migration cases discussed before the Court of Justice are either initiated by the Commission or the Member States[14] or arrive at the Court via indirect action: the preliminary reference procedure (267 TFEU). This is the main instrument used by migrant rights defenders and constitutes the focus of this article. However, also the preliminary reference procedure presents some challenges in terms of access to court, as its activation depends on national judges.[15] I will tackle more extensively the implications of these procedural obstacles in Section 2.

The second challenge that this investigation faces is more practical. When analyzing the cases of preliminary reference to the Court of Justice, the legal

11 Wayne A. Cornelius, Philip Martin, and James Frank Hollifield (eds.), *Controlling Immigration: A Global Perspective* (Stanford University Press, 1994), pp. 9–10; Christian Joppke and Elia Marzal, *Courts, the New Constitutionalism and Immigrant Rights: The Case of the French Conseil Constitutionnel*, 43 European Journal of Political Research, no. 6 (2004), at 824.

12 Rachel Cichowski, *Mobilisation, Litigation and Democratic Governance*, 49 Representation, no. 3 (2013), at 321.

13 See Art. 263 TFEU; Hjalte Rasmussen, *Why Is Article 173 Interpreted against Private Plaintiffs?*, 5 European Law Review (1980), 112–27.

14 See for instance the annulment action brought by Slovakia and Hungary against the mandatory relocation of asylum seekers in the EU. Court of Justice, Judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*.

15 Art. 267 of the TFEU recites: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court […]".

mobilization promoters are often not evident. Indeed, the text of the judgment provides only limited information: the name (or fictitious initials) of the party and the name of the lawyers. Even when the case is supported by collective actors, their names will rarely appear in the text of the judgment. This is also partially due to the procedural setting of the CJEU, which does not admit amicus curiae or third party interventions, and contributes to giving the general impression that, in comparison to courts where the NGOs' role is prominent, such as the European Court of Human Rights, the CJEU is rather closed to civil society.

These methodological challenges require the adoption of a double empirical strategy to answer this article's initial question. As illustrated in Section 3, I have relied on an original database of 291 preliminary rulings, which constitute all preliminary rulings issued by the Court of Justice in the migration field until December 2020. I have augmented the analysis of this database with qualitative research, which provides useful information on the less visible collective actors participating in the proceedings. These empirical insights reveal important information on the nature and problems affecting legal mobilization before the Court of Justice in the migration field, which will be examined in Sections 4 and 5.

2 Migrant Rights Defenders' (Limited) Access to the CJEU

If traditionally the European integration project was mostly oriented towards creating the internal market, in the last decades, the EU expanded its scope to new human-rights-sensitive fields, such as migration, citizenship, and criminal law. Central to this development were the 1992 Maastricht Treaty, which introduced the concept of EU citizenship, and the 1998 Amsterdam Treaty, creating the area of freedom, security, and justice. The Lisbon Treaty, with the transformation of the European Charter of Fundamental Rights into a legally binding instrument, furthered this process and introduced the Union into the "politics of human rights."[16]

Expectedly, this expansion of the EU's mandate attracted new actors to its orbit. NGOs and civil society organizations, whose activity was previously focused on lobbying and campaigning before national governments, redirected their attention at Brussels as this became the new center of decision-making.[17]

16 Mikael Rask Madsen, "The Power of Legal Knowledge in the Reform of Fundamental Law: The Case of the European Charter of Fundamental Rights," in Bruno De Witte and Antoine Vauchez (eds.), *Lawyering Europe: European Law as a Transnational Social Field* (London: Hart Publishing, 2013), p. 197. Also see Art. 6 of the TEU.

17 Dan Luca, *Mapping the Influencers in EU Policies* (Palgrave Macmillan, 2020), p. 6.

Similarly, legal actors started paying increasing attention to the Court of Justice, realizing that Luxembourg was imposing itself as a new important center of judicial law-making in the human rights field.

2.1 Procedural Obstacles to Reach the Court of Justice

However, contrary to the European Court of Human Rights,[18] the Court of Justice is rather difficult to reach for civil society. Under the EU Treaties, individuals and groups have limited rights to bring direct action before the Court;[19] moreover, these rights have been interpreted restrictively by the Court of Justice, which in its famous *Plaumann* ruling created "a formidable barrier of standing for private parties" [20] and virtually ruled out any possibility for group actions.[21]

The Court of Justice, moreover, does not admit *amicus curiae* briefs and has strict rules for third-party interventions: private parties can intervene only in "contentious proceedings," provided that these are not between the Member States, the Union institutions, and between Member States and Union institutions.[22] If this was not enough, the third-party intervener needs to prove that it

18 Art. 36(2) of the European Convention of Human Rights provides that "any person concerned" can file third-party interventions and take part in the procedure with the President of the Court's consensus. See also Sergio Carrera, Marie de Somer, and Bilyana Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal. Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS, Justice and Home Affairs Liberty and Security in Europe Papers, no. 49 [2012].

19 Private parties cannot bring action against Member States for violation of EU law, only the Commission can (Art. 258 TFEU). Under art. 263 and 265 TFEU, private parties are "unprivileged applicants" in annulment actions and actions for damages against the EU institutions. Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Text and Materials* (3rd ed., Glasgow: Cambridge University Press, 2014), p. 444.

20 See Albertina Albors-Llorens, *Remedies against the EU Institutions after Lisbon: An Era of Opportunity?*, 71 The Cambridge Law Journal, no. 3 (2012), 513.

21 The Court recognized standing to challenge an act of the EU only to natural or legal persons that are singled out as explicit or implicit addressee of an EU act, making virtually impossible for actors representing an affected category to access the CJEU. This situation was slightly improved by the Lisbon Treaty, which abolished the "individual concern" requirement to challenge "regulatory acts," i.e., non-legislative acts. ECJ, *Confédération nationale de producteurs de fruits et de légumes*, Joined cases 16 and 17/62 (14 December 1962); ECJ, *Plaumann v. Commission*, C-25/62 (15 July 1963). De Schutter (2006), see *supra* note 7, p. 13. Sergio Carrera and Bilyana Petkova, "The Potential of Civil Society and Human Rights Organizations through Third-Party Interventions before the European Courts: The EU's Area of Freedom, Security and Justice," in Bruno De Witte, Elise Muir, and Mark Dawson (eds.), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Cheltenham: Edward Elgar Publishing, 2013), p. 233.

22 See Art. 40 of the Statute of the Court of Justice of the EU.

"has a direct and certain interest in the outcome of the proceedings," as a general interest is not enough.[23]

In sum, it is difficult to disagree with scholars that defined the Court as "hostile to collective action."[24] Especially migrant rights defenders seldomly use direct actions to reach the Court of Justice, because of its restrictive rules on legal standing and third-party interventions. As the next subsection will show, this is the reason why migrant rights defenders more often rely on another procedure to reach the Court of Justice: the preliminary reference procedure.

2.2 The Preliminary Reference Procedure as a Tool for the Contestation of National Migration Law

Given the described procedural obstacles to use direct actions and third-party interventions, migrant rights defenders are mainly left with indirect action: the preliminary reference procedure. This is provided by Article 267 Treaty on the Functioning of the European Union (TFEU) and grants domestic courts the possibility, during national proceedings, to stay the case and submit a question of interpretation or validity of EU law to the Court of Justice.

Even if the preliminary reference procedure was originally conceived as an instrument for interpretation, thanks to the judicial doctrines of supremacy and direct effect, it soon started to be used to review the compatibility of national law with EU law.[25] Indeed, instead of referring questions of interpretation, national courts often ask the Court of Justice to review the legitimacy of national law vis à vis EU law standards. This is why scholars have described Article 267 as an instrument for the "decentralized enforcement of EU law,"[26] the "citizens' infringement procedure,"[27] and "a crucial means for contestation" of national

23 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014), p. 832. See Court of First Instance, Order of the President of 7 July 2004, Case T-37/04 R, *The Autonomous Region of the Azores v. Council*, paras. 57–71, where the Court of First Instance dismissed the WWF's request to intervene as its interest was "too wide and general."

24 Carol Harlow and Richard Rawlings, *Pressure Through Law* (Hoboken: Taylor and Francis, 1992), p. 525.

25 Karen Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*, 52 International Organization, no. 1 (1998), 126.

26 Mark A. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003), p. 123.

27 Bruno De Witte, "The Impact of Van Gend En Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions," in Antonio Tizzano and Sacha Prechal (eds.), *50th Anniversary of the Judgment in Van Gend En Loos, 1963–2013* (Luxembourg: Office des Publications de l"Union Européenne, 2013), p. 95.

law.[28] It is precisely in this capacity that the procedure plays the most important role for migrant rights defenders: it allows them to review and contest the legitimacy of restrictive national immigration laws.

But we have to be cautious regarding the potential of the preliminary reference procedure. Despite being used as a tool for supranational judicial review, the procedure has maintained its original structure of tool for judicial cooperation, and this bears three important consequences for legal mobilization. First, the parties to the main proceedings do not have a right to have a preliminary question referred, as the procedure is "based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary."[29] Second, being considered "non contentious," the preliminary reference procedure does not admit third-party interventions by private parties,[30] who can submit an intervention only if they were already a third-party to the main national proceedings; conversely, Member State governments can always submit their written and oral observations on the cases. Finally, individuals and groups to have a question referred to the Court of Justice need to gain access and initiate proceedings before a national court. This means that, in legal mobilization language, the national structure of opportunities heavily determines access to the EU Court.[31]

This overview on the procedural means that collective actors have to reach the Court of Justice leads to mixed results. On the one hand, the preliminary reference procedure shows great potential for collective actors, as it enables them to challenge EU and Member States' acts before the Court of Justice, the judgments of which are binding on the whole Union. On the other hand, the road to the Court of Justice is punctuated by obstacles: collective actors need to gain access to a national court and to convince it to make a reference, which means that national rules on access to court

28 Passalacqua (2021), *supra* note 10, at 252.

29 ECJ, Judgment of 16 December 2008, Case C-210/06, *Cartesio*, at 91.

30 See *supra* section 2.1. Also see ECJ, Order of the Court of 3 June 1964, Case 6/64, *Costa v. Enel*, where the Court refused the intervention of Enel, a private energy company, because the preliminary reference procedure is not a "contentious proceedings."

31 The legal opportunity structure is a concept that legal mobilization scholars borrowed from the social movement literature. There are different definitions in the scholarship but, drawing on Tarrow, I use it to indicate all factors external to collective actors that affect their expectation to conduct legal mobilization successfully. Three factors are commonly understood as part of the legal opportunity structure: the available legal stock, access to courts, and judicial receptivity. Passalacqua (2021), *supra* note 10, at 757; Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (3rd ed., New York: Cambridge University Press, 2011), p. 163; Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 Journal of European Public Policy, no. 2 (2002), 238–55; Gianluca De Fazio, *Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States*, 53 International Journal of Comparative Sociology, no. 1 (2012).

and third-party interventions greatly affect collective actors' ability to reach the Court of Justice. Member State governments, instead, enjoy a status of privileged interveners before the Court, and can always submit their observations on a case. Finally, an EU litigation strategy always bears a certain degree of unpredictability, as ultimately, the decision on whether to refer a question to the Court is taken by the domestic judge. We will see in the next sections that the empirical analysis confirms that these procedural features greatly shape mobilization before the Court of Justice.

3 Mapping the Actors of Legal Mobilization Before the CJEU: A Quantitative and Qualitative Overview

To investigate who mobilizes EU migration law before the Court of Justice, I have relied on two main strategies. The first is a quantitative overview that allowed me to trace and code all the main parties and third parties to the preliminary reference proceedings. The second strategy is a qualitative one: relying on a wide variety of sources such as interviews and reports, I could detect the presence of less visible participants in the procedure, including collective actors.

3.1 The Visible Actors: Main parties, Governments, and Third-Party Interveners

The first strategy consisted of the creation of an original database containing all the preliminary rulings issued by the Court of Justice in the field of EU migration law until December 2020, amounting to a total of 291 preliminary rulings (the first ruling dates back to 1982).[32] The database was compiled using the official Court of

32 EU migration law is understood here as comprising all the norms that regulate the legal status of third-country nationals (TCN): entry and residence conditions, family reunification rights, asylum and reception conditions etc. It is a vast group of norms, some of them now repealed, the main of which are: Association Agreements regulating the status of Turkish, Moroccan, Algerian, and Tunisian nationals (signed in 1963 with Turkey and in 1976 with Maghreb countries); norms regulating the status of TCN who are family members of Union citizens (Directive 2004/38, art. 20 and 21 TFEU); norms regulating borders and expulsion (Return Directive 2008/115, Borders Code Regulation 2016/399); norms regulating asylum and refugee status (Qualification Directive 2011/95, Asylum Procedures Directive 2013/32, Reception Conditions Directive 2013/33, Dublin Regulation 604/2013); norms on regular migration (Family Reunification Directive 2003/86, Long Term Resident Directive 2003/109, Single Permit Directive 2011/98).

Justice's online search tool, double-checked with the quarterly newsletter of the Nijmegen Centre for Migration Law.[33] Thanks to this database, I could obtain a quantitative overview of migration litigation before the CJEU: I have coded the main parties to the preliminary reference procedure (whether individuals or collective actors), the presence of third-party interventions (including by Member States governments, which can submit observations to the Court), the issues raised, the country of reference, and whether the migrant participated in the proceedings by filing an oral or a written intervention.

This quantitative overview offers many interesting insights on the actors in the proceedings, which you can see summarized in Table 1. First, the role of collective actors in the litigation before the Court of Justice seems scant. Only four preliminary rulings out of 291 originated from proceedings initiated by collective actors.[34] These appear more often as third parties to the national proceedings: in 14 cases, the preliminary reference originated from national proceedings where collective actors had filed a third-party intervention. Still, 14 is a low number if compared to the total number of rulings (4.8%). To give a benchmark, according to the Equality Law in Europe Database, collective actors were among the parties (as main parties or third-party interveners) in 11.3% of preliminary references in the antidiscrimination field.[35] The rate of collective actors' presence becomes higher before the European Court of Human Rights, where collective actors are present in 21% of cases.[36]

Table 1: Main parties to the preliminary ruling proceedings.

	Total	Percentage
Number of cases where the Member State of reference made an observation	289	99.3%
Number of cases where at least another Member State made an observation	247	84.8%
Number of cases where the migrant made an oral or written submission	245	84.2%
Number of cases where a collective actor was among the main parties	4	1.3%
Number of cases where a collective actor intervened as third-party	14	4.8%

33 Info curia case law, available at: <<u>http://curia.europa.eu/juris/recherche.jsf?language=en>,</u> accessed February 11, 2020; CJEU overview, available at: <https://www.ru.nl/law/cmr/documentation/cmr-newsletters/>, accessed February 11, 2020.

34 These are: ECJ, Judgment of 25 July 2002, C-459/99 *MRAX*; ECJ, Judgment of 14 June 2012, C-606/10 *ANAFE*; ECJ, Judgment of 27 September 2012, C-179/11 *CIMADE and GISTI*; ECJ, Judgment of 2 September 2015, C-309/14 *CGIL-INCA*.

35 Equality Law in Europe: A New Generation, *Database of CJEU discrimination cases from 1970–2018* (EUI, Fiesole, 2018), available at: <https://equalitylaw.eui.eu/database/>, accessed June 21, 2021.

36 Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 Netherlands Quarterly of Human Rights, no. 3 (2013), at 280.

On the contrary, governments are very active in the migration domain. In 84.8% of cases, at least two Member States filed observations (the Member State of reference virtually always submits observations), and this figure is substantially higher than the average for all policy domains, which is 71%.[37] The governments' attention for migration cases was also reported in qualitative studies that show that government agents use and coordinate their observations to influence the Court rulings.[38] This confirms that migration is a salient policy field and that Member States perceive litigation before the Court of Justice as an important arena to define EU legislation and defend their policy preferences.

A third interesting finding, which often goes unnoticed, is what I call the "missing participants":[39] in a non negligible number of cases (46, 15.8%) the migrant and his/her lawyer did not file any written or oral intervention in the proceedings before the Court of Justice. This raises critical questions on legal representation and participation that I will tackle in Section 4.

3.2 The Invisible Participants: Informal Amici Curiae and Litigation Supporters

The quantitative overview has the advantage of enabling researchers to analyze a large number of cases in a relatively short time. But what if collective actors contribute to a case without their name appearing on the text of the judgment? For instance, in a recent case involving a clash between animal rights and religious freedom, a coalition of animal rights NGOs, the Eurogroup for Animals, published online a document addressing the Court of Justice that started in the following way:

> We take the liberty to submit this Amicus Curiae brief to your attention in a spirit of constructive collaboration. While we are well aware that – under the current Court's Statute and Rules of Procedure – this brief won't formally be admissible to the proceedings, we hope that it could inform your deliberation, given the nature erga omnes of your forthcoming preliminary judgment in such an important, consequential case.[40]

37 Julian Dederke and Daniel Naurin, *Friends of the Court? Why EU Governments File Observations before the Court of Justice*, 57 European Journal of Political Research, no. 4 (2018), 870.

38 Moritz Baumgärtel, "Part of the Game," in T. Aalberts and T. Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge: Cambridge University Press, 2018), p. 119.

39 This expression was inspired by Gill et al.'s work on absence in legal proceedings, in particular on "absent appellants" in asylum proceedings cases. Nick Gill et al., *What's Missing from Legal Geography and Materialist Studies of Law? Absence and the Assembling of Asylum Appeal Hearings in Europe*, 45 Transactions of the Institute of British Geographers, no. 4 (2020), 937–51.

40 Alberto Alemanno and Nicolas Michel de Sadeleer, "Humanising Animal Slaughter Need Not Infringe Religious Freedom (Amicus Curiae Brief in C-336/19 Centraal Israëlitisch Consistorie Van

This animal rights NGO has used an online blog as a platform to reach the judges of the Court of Justice and to circumvent the inadmissibility of amicus curiae briefs. And informal amici curiae have also been submitted in the migration field; for instance, when the case of *Elgafaji*, the very first important case regarding the interpretation of the 1951 Refugee Convention, was referred to the Court of Justice, the United Nations High Commissioner for Refugees (UNHCR) published a brief on its website advocating for a certain interpretation of the Convention.[41] The case of *Elgafaji* was not initiated as a test case, but we cannot rule out that the UNHCR opinion had an impact on the Advocate General and the Court's interpretation. Since then, the UNHCR issued informal amici curiae also in other cases, and in at least one instance Advocate General Sharpstone explicitly acknowledged it:

> The UNHCR occasionally makes statements which have persuasive, but not binding, force. His Office has published various statements which relate to the interpretation of Article 1D of the 1951 Convention: a commentary in its Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol, a note published in 2002 (and revised in 2009) and a 2009 statement (also subsequently revised) which relates expressly to Ms Bolbol's case. I intend to treat this last as an unofficial amicus curiae brief.[42]

Publishing online informal amici curiae is just one of the techniques that collective actors use to participate informally in preliminary ruling proceedings. Another common strategy that migrant rights defenders use is that of sponsoring and supporting litigation brought in the name of individual migrants. In these cases, the name of the collective actors does not feature on the official document of the case, and the only way to trace their presence is through qualitative analysis.

In a larger study, I have investigated legal mobilization in three different EU Member States, Italy, the Netherlands, and the UK, by interviewing the actors involved in selected proceedings and gathering information on their socio-political context.[43] By interviewing the lawyers representing the migrants in the

België and Others)," SSRN Scholarly Paper, October 21, 2020, available at: <https://www.eurogroupforanimals.org/news/amicus-curiae-cjeu-case>, accessed June 21, 2021.

41 UN High Commissioner for Refugees, "UNHCR Public Statement in Relation to Elgafaji v. Staatssecretaris van Justitie before the Court of Justice of the European Union," *Refworld* (blog), January 2008, available at: <https://www.refworld.org/docid/479df7472.html>, accessed June 21, 2021.

42 AG Sharpstone, Opinion of 4 March 2010, case C-31/09, *Bolbol*, at 16.

43 The research focused on the most-referred migration issue in the three countries: in Italy it was the return of undocumented migrants, in the UK the status of TCN family members of Union citizens, and in the Netherlands the right to family reunification. See Virginia Passalacqua, *Legal Mobilization and the Judicial Construction of EU Migration Law* (Florence, European University Institute, 2020), available at: <https://cadmus.eui.eu/handle/1814/66270>.

proceedings before the Court of Justice, I could understand whether the case was supported by collective actors or not. This qualitative investigation allowed me to unveil the presence of nongovernmental actors in several EU migration cases. Given the limited geographical and material scope of my qualitative research, this provides only a glimpse of the role that collective actors play in EU litigation, and we need more qualitative research to have a better picture of the phenomenon. Still, the findings of this qualitative investigation give an idea about the type of actors and techniques they use to mobilize the Court of Justice; I will present them in the following subsection.

3.3 Result: Collective Actors Taking Part in the Preliminary Reference Procedure

By combining the quantitative and qualitative strategies outlined before, I compiled two tables listing all the collective actors that I could trace the presence of in the 267 procedure. Table 2 lists the collective actors that formally appeared as a party to the proceedings by bringing a case or filing an intervention before a national court. Table 3 lists the organizations detected through qualitative research, which supported the cases without their names appearing in the judgments. Where the collective actors participated together in a case, I grouped them on the same line; for instance, the AIRE Centre filed interventions alone in seven cases, and with other organizations in two cases that I indicated in two separate lines.

These empirical insights show that collective actors' degree of involvement in the preliminary reference procedure varies greatly. First of all, it varies numerically, as we can see that some groups participate more often than others: for instance, the AIRE Centre stands out for having filed interventions in nine preliminary reference procedures, and this was already a recurrent intervener before the European Court of Human Rights, which earned it the title of "repeat player";[44] in light of this overview, we can say that it confirms itself as a repeat player also in EU litigation. Along with the AIRE Centre, other recurrent interveners are the international organization UNHCR, the Italian lawyer association ASGI (*Associazione per gli Studi Giuridici sull'Immigrazione*), and the Dutch VU (Vrij University) Migration Law Clinic. Conversely, most of the other collective actors listed in

44 Van den Eynde (2013), *supra* note 36, at 285; Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Review, no. 1 (1974), 95–160.

Table 2: Collective actors that formally took part in the proceedings.

	Cases brought in their name	Third-party interventions	Country of reference
MRAX	1	0	BE
ANAFE	1	0	FR
La CIMADE and GISTI	1	0	FR
CGIL-INCA	1	0	IT
Associazione Porte Aperte/Offene Türen, Human Rights International, Associazione Volontarius, Fondazione Alexander Langer	0	1	IT
The AIRE Centre	0	7	UK
Amnesty International, the AIRE Centre, UNHCR, Equality and Human Rights Commission	0	1	UK and IE
UNHCR	0	3	HU (1) NL (2)
Immigrant Council of Ireland	0	1	IE
FEDASIL	0	1	BE
The AIRE Centre + CCLC	0	1	UK

Table 3: Collective actors identified thanks to qualitative research in Italy, the UK, and the Netherlands.

	Supported cases	Informal amicus curiae	Country of reference
ASGI and Magistratura democratica	2	0	IT
The Dutch Refugee Council	2	0	NL
CISL	1	0	IT
ASGI	3	0	IT
JCWI	1	0	UK
Shelter legal service	1	0	UK
UK Immigration Advice Service	1	0	UK
Public law project	1	0	UK
VU Migration Law Clinic	0	6	NL
IOT (Turkish minority organization in the Netherlands)	2	0	NL DE
UNHCR	0	1	NL

Tables 2 and 3 have participated only in one case, and they can therefore be considered as "one-shotters."[45]

But collective actors' degree of involvement also varies in intensity. For instance, the VU Migration Law Clinic informally participated in six cases, which is a high number, but its role consisted mainly in providing expert's opinions by attaching a document to the party's written observations, hoping that the EU judges would consider it (this strategy is again used to overcome the inadmissibility of amici curiae);[46] the VU legal clinic plays no role in the initiation of the proceedings at the national level, and probably neither in the emergence of the preliminary reference questions. A diametrically different case is that of *N.S.*,[47] where collective actors played an important role throughout the proceedings: they ideated an EU law strategy, they supported the initiation of the case at the national level, filed third-party interventions, and convinced the national judge to refer.[48] It is not by chance that this is probably the most famous strategic litigation case in the EU migration field.

After this overview of collective actors' presence and role, I will dedicate the next two sections to discuss two issues that emerged from this analysis: the problem of missing participants and the national character of the litigation before the Court of Justice.

4 Migrants as Missing Participants

As said in Section 2, the preliminary reference procedure was not conceived as a judicial remedy but as an instrument for judicial cooperation, the activation of which depends on national courts that enjoy wide discretion in deciding whether a preliminary ruling is relevant and necessary to decide a dispute. Indeed, even when both parties agree on the existence of a question of interpretation that does not fall in situations of *acte clair* or *acte éclairé*,[49] the national court remains free not to refer if it deems that the question is irrelevant or unnecessary to solve the dispute. This is stated clearly in the Court of Justice's Recommendation to national judges: "Whether or not the parties to the main proceedings have expressed the

45 But we shall not forget that these data are partial and would need to be integrated with further qualitative analysis. For instance, some of my interviewees reported that the IOT, the Turkish minority organization in the Netherlands, participated in several national and EU cases.

46 See the official website for a list of all the opinions filed: <https://migrationlawclinic.org/category/expert-opinions/>.

47 ECJ, Judgment of the Court (Grand Chamber) of 21 December 2011, C-411/10 and 493/10, *N.S.*

48 Interview with one of the lawyers in the case, Simon Cox, London, 18 November 2016.

49 ECJ, Judgment of 6 October 1982, in case C-283/81, *CILFIT*.

wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling."[50]

Commentators highlighted how national courts' refusal to refer might be problematic from a fair trial point of view.[51] Indeed, a certain EU law interpretation might change the course of a dispute and denying a reference can lead not only to misinterpret EU law but also to injustice. Moreover, national courts are not compelled to motivate their decision not to refer, which raises the problem of arbitrary refusals. This second issue was particularly persuasive for the European Court of Human Rights, which in several cases recognized that national courts must state their reasons for not referring;[52] in 2014, in *Dhahbi v. Italy*, the Strasburg Court for the first time condemned a state for violating the applicant's right to a fair trial (Art. 6 ECHR) because the last instance judge did not motivate its decision not to refer although the applicant formally asked it to do so.[53] In conclusion, national courts remain free to deny a reference, but if one of the parties had formally required it, they have at least to motivate their denial.

Less explored in the scholarship is the case of national courts making unsolicited references, i.e., without the parties requiring them to do so. Under EU law, it is perfectly legitimate for a national court to ignore the parties' will when making a reference; however, some of these references might lead to the problematic situation of having missing participants before the Court of Justice. Typically, we will have a missing participant when one of the parties does not submit any written or oral observation before the Court of Justice, either because it does not have the resources or the intention to take part in the procedure. Remarkably, the preliminary reference procedure can progress independently from parties' impulse, as it does not only start but also continues regardless of their presence.

The issue of missing participants assumes particular significance in the migration field. As the quantitative analysis shows, in 15.8% of cases migrants did not file any written or oral observations (see Table 1). Migrants' absence from the preliminary reference procedure risks having two negative effects. First, the Court relies to a great extent on parties' observations to gather information on national law and the factual background of the case; absent one of the parties, the Court risks having partial or one-sided information. Second, migrants' non-participation

50 CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, 2012/C 338/01 at 10.

51 Morten Broberg and Niels Fenger, *Preliminary References to the Court of Justice of the EU and the Right to a Fair Trial under Article 6 ECHR*, 41 European Law Review, no. 4 (2016): 599–607; Jasper Krommendijk, *"Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason Their Refusals to Refer*, 42 European Law Review, no. 1 (2017), 46–62.

52 For an overview of the ECtHR case law see Broberg and Fenger (2016), *supra* note 51, at 601.

53 ECtHR, Judgment of 8 April 2014, Case of *Dhahbi v. Italy*, Application no. 17120/09.

negatively impacts the balance between the parties in the case, as one party (the state) will present its observation and the other will not.

A case that well exemplifies this problem is that of *Celaj*.[54] This case started in Italy and regarded an undocumented migrant that violated an entry ban and risked being condemned to spend up to four years in jail.[55] The national judge decided to refer the case to the Court of Justice *ex officio*, independently from the parties, because in light of previous case law, he deemed that sanctioning migrants to long criminal detention could be incompatible with the EU Return Directive, which requires speedy administrative removals.[56] However, in Luxembourg, things did not go as the referring judge expected. Mr. Celaj and his lawyer did not participate in the preliminary reference procedure, and five Member States intervened in support of the Italian criminal provision, along with the Commission.[57] Eventually, nobody defended the thesis of the incompatibility between Italian law and EU law, and the Court of Justice upheld the view of the Commission and the Member States, stating that the Return Directive does not preclude national laws imposing long prison sentences against irregular migrants in breach of an entry ban.[58] Although it is impossible to know what the Court would have decided had Mr. Celaj been present, it is legitimate to think that his absence represented a missed opportunity to present arguments in favor of the incompatibility of the Italian law.

Unfortunately, we don't know the reason why Mr. Celaj's lawyer decided not to file any written or oral submission, as she never replied to my emails; neither the referring judge, that I interviewed, knew why she did not intervene. What we do know, however, is that the case of *Celaj* is not isolated, as many are the instances where one voiceless migrant faced several intervening Member States

54 ECJ, Judgment of 1 October 2015, C-290/14 *Skerdjan Celaj*.

55 Art. 13(13) of the Italian *Testo Unico Immigrazione*, Legislative Decree 286/1998.

56 Interview with the referring judge in the case of *Celaj*, 26 March 2016, Florence. In previous case law, the Court of Justice found measures criminalizing irregular migrants as incompatible with the Return Directive: see ECJ, Judgment of 28 April 2011, C-61/11 PPU, *El Dridi*; ECJ, Judgment of 6 December 2011, C-329/11, *Achughbabian*; ECJ, Judgment of 6 December 2012, C-430/11 *Sagor*.

57 See AG Szpunar, Opinion of 28 April 2015, Case C-290/14 *Celaj*, at 46.

58 The case of *Celaj* generated opposite reactions, with some commentator criticizing and other praising it: Anna Magdalena Kosińska, *The Problem of Criminalisation of the Illegal Entry of a Third-Country National in the Case of Breaching an Entry Ban. Commentary on the Judgment of the Court of Justice of 1 October 2015 in Case C 290/14, Skerdjan Celaj*, 18 European Journal of Migration and Law, no. 2 (2016), 243–57; Andrea Romano, *"Circumstances…Are Clearly Distinct": La Detenzione Dello Straniero per Il Delitto Di Illecito Reingresso Nella Sentenza Celaj Della Corte Di Giustizia*, Diritto, Immigrazione e Cittadinanza, no. 2 [2015], 109–24; Mario Savino, *Irregular Migration at the Crossroads, between Administrative Removal and Criminal Deterrence: The Celaj Case*, 53 Common Market Law Review, no. 5 (2016): 1419–39.

in Luxembourg.[59] Not all these cases concluded with the Court upholding the view of the governments; however, the fact remains that we must ask ourselves whether migrants' right to participate in the preliminary ruling proceedings is adequately safeguarded.

The reasons for migrants' absence are complex to identify. As reported by an ethnographic cross-country study that investigated "absence" in asylum seekers proceedings:

> We saw many unrepresented appellants, for example, partly owing to "legal deserts" outside the largest urban centres, meaning a lack of qualified legal representatives in a particular area (Burridge & Gill, 2017). In Augsburg, Bavaria, for example, under 40% of appellants had a representative, compared to over 90% in Berlin and Paris. Being unrepresented usually reduces the chances of success in asylum proceedings (Schoenholtz & Jacobs, 2002) but particular challenges face those who were previously represented and whose representatives have abandoned their case. Sometimes this is due to a lack of funds to pay for legal representation. We heard of one Austrian case in which a lawyer rose from his seat next to the appellant exactly two hours into the hearing, announcing he had not been paid for any more work, and left the appellant to fight the rest of his case alone.

Especially in cases concerning marginalized and "have-nots" parties,[60] litigation costs can play a decisive role in determining the lawyer's availability to participate in the proceedings. This is even more crucial in the particular setting of the preliminary reference proceedings: this requires additional material resources, such as the money to cover travel expenses to Luxembourg and the extralegal work for the written submissions, which are often not covered by legal aid.[61] This casts dark clouds on the intrinsic fairness of the preliminary reference procedure and the balance between parties.

Migration litigation is already characterized by a structural disparity among parties, as in most cases, an individual migrant has to confront better equipped and represented state authorities. This is implicitly confirmed by the fact that state authorities always make written and oral observations in the preliminary reference procedure, often with the support of other intervening governments, while migrants do not (Table 1). If migration proceedings usually take place on an uneven playing field, the procedure before the Court of Justice risks exacerbating such disparity.

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59 See for instance: ECJ, Judgment of 21 April 2016, C-558/14 *Mimoun Khachab*; ECJ, Judgment of 29 January 2009, C-19/08 *Petrosian*.

60 Galanter (1974), *supra* note 44.

61 See the case of the Netherlands: Jos Hoevenaars, *Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References*, 5 European Papers, no. 2 (2020), 788.

5 National Mobilization in an International Setting

A common assumption when studying transnational litigation is that this is a field dominated by transnational actors. But this is probably due to a bias towards high-profile cases: it is true that cases like *N.S.* before the Court of Justice, or *MSS v. Switzerland* before the European Court of Human Rights, featured prominent international organizations, like Amnesty International and the UNHCR.[62] However, if we look at Tables 2 and 3, we will realize that the majority of the collective actors participating in proceedings before the Court of Justice have a national focus, meaning that they are local NGOs that litigate in their country of origin and are predominantly concerned with migrant right violations at the national level.

The national focus of these organizations resonates with the fact that the preliminary reference mechanism is fundamentally embedded in the national legal framework for two main reasons. First, because any preliminary reference presupposes the initiation of national proceedings, the rules and the language of which are determined by national law. This renders it more difficult for international actors, unfamiliar with national procedural law, to file an action or intervene as third parties. Indeed, even if international organizations are admitted as third-party before the national court, they should normally submit their written and oral observations in the language of the referring State.[63] This differs from the European Court of Human Rights, where submissions can be either in English or French.[64] Second, as mentioned in Section 2, the preliminary reference procedure is often used to challenge the legitimacy of national law vis à vis EU law standards; indeed, the questions of interpretation often imply questions regarding the compatibility of national law. In the migration field, collective actors often use the preliminary reference procedure to contest the legitimacy of new restrictive migration regulations adopted at the national level; having as a target a national provision, also litigation often assumes a marked national character.

The national embeddedness of the preliminary reference procedure has another important consequence: national rules, by determining who can bring an action at the national level, indirectly also shape access to the Court of Justice. Indeed, most of the time, the EU leaves to national procedural autonomy the setting up of rules and

62 ECJ, Judgment of the Court (Grand Chamber) of 21 December 2011, C-411/10 and 493/10, *N.S.*; ECtHR, Judgment of 21 January 2011, Application No. 30696/09, *M.S.S. v Belgium and Greece*.

63 See art. 37(3) of the Rules of Procedure of the Court of Justice: "In preliminary ruling proceedings, the language of the case shall be the language of the referring court or tribunal."

64 French and English are the official languages of the European Court of Human Rights.

procedures for EU law enforcement, provided that these guarantee the effective and equivalent protection of EU rights.[65] This means that the Member States enjoy great discretion in determining the rules for collective actors' participation in migration proceedings, along with rules on legal standing and legal aid. As a consequence, the openness or closeness of each national judicial system towards collective actors will inevitably condition their access to the Court of Justice, creating a certain disparity of access across the different Member States.

The quantitative and qualitative overview presented in Section 3 reflects the national asymmetry in the access to the Court of Justice. For instance, if we look at third-party interventions, we can see that most of them comes from the UK; this is explained by the country's liberal attitude towards third-party interventions at the national level, which can be submitted by any natural or legal person that has an interest in the outcome of the case.[66] Moreover, because of the high litigation cost in the UK, collective actors often prefer participating as third parties, whereby they can intervene in the case without bearing the cost of the procedure. Conversely, we see that in the other Member States, such as France or Belgium, collective actors do bring actions in their own name to challenge a national law; these types of actions gave rise to the cases of *MRAX*, *La Cimade and Gisti*, *ANAFE*, and *CGIL-INCA*.[67]

Such asymmetrical access to national courts, and therefore to the Court of Justice, is rather unsatisfactory, and it would be preferable to have a minimum European standard that grants collective actors' access to migration litigation. Something along these lines has been introduced in the antidiscrimination field: here the EU law-maker enacted a "proceduralization", meaning that it did not only imposed the protection of certain rights but also required the Member States to introduce procedural guarantees that facilitate their enforcement and the involvement of collective actors in support of discrimination victims.[68] In particular, Directive 2000/44, on race and ethnic discriminations, provides that Member

65 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th ed., New York: Oxford University Press, 2015), p. 226.

66 More specifically, to obtain permission to intervene, third parties need to convince the court that their intervention will make a relevant contribution to the case, will not negatively affect the parties, and will be non-partisan. See The Public Law Project, *Third-Party Intervention – A Practical Guide*, PLP Guides for Practitioners (2008), available at: <https://publiclawproject.org.uk/content/uploads/data/resources/120/PLP_2008_Guide_3rd_Party_Interventions.pdf>, accessed June 21, 2021, p. 7.

67 ECJ, Judgment of 25 July 2002, C-459/99 *MRAX*; ECJ, Judgment of 14 June 2012, C-606/10 *ANAFE*; ECJ, Judgment of 27 September 2012, C-179/11 *CIMADE and GISTI*; ECJ, Judgment of 2 September 2015, C-309/14 *CGIL-INCA*.

68 Elise Muir, *Procedural Rules in the Service of the "Transformative Function" of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along*, 8 Review of European Administrative Law, no. 1 (2015), at 8.

States must enable collective actors to bring actions in the name or on behalf of discrimination victims.[69] These procedural safeguards had an important transformative effect, as they empowered equality actors and secured the enforcement of EU rights. Moreover, a recent study showed that these procedural rules, by increasing collective actors' opportunities for right claims, also impacted on the chances of having legal mobilization via preliminary reference; indeed, equality actors used these new procedural opportunities to bring actions at the national level and to request the national judge to make a reference to the Court of Justice.[70]

Procedural rules like those adopted in the EU antidiscrimination field can have a transformative impact also in the migration field. As mentioned above, migration litigation is characterized by a relevant disparity between parties, and in this respect, collective actors can play an important role: they can "support, represent or replace action" by individuals who lack the necessary resources to take action.[71] Increasing possibilities for collective actors' participation in migration proceedings would help rebalance the structural asymmetry of the proceedings, as migrant rights defenders can provide for material resources, technical knowledge, and creative litigation strategies to otherwise less resourceful migrants.

Admittedly, increasing collective actors' participation in migration proceedings also entails some risks. Compared to antidiscrimination litigation, migration is a more politicized and polarized field, which might expose migrant rights defenders to attacks and backlash in case of legal victories.[72] Migrant rights defenders should be (and probably already are) very aware of these risks and they should take politicization and instrumentalization into account when deciding whether to mount a litigation strategy. However, in my view, instances of backlash against collective actors are present in a very small number of cases compared to the total of migration litigation, and especially in high-profile litigation. Therefore, it would still be worth to have increase support for migrants in "everyday cases," as after all these receive very little attention from the public and bear potential both for the single migrant and for shaping the meaning of migration legislation in general, especially if they end up before the Court of Justice.

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69 Article 7(2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180.

70 Muir et al. (2017), *supra* note 9.

71 Mark Dawson, Elise Muir, and Monica Claes, "A Tool-Box for Legal and Political Mobilisation in European Equality Law," in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*, Oñati International Series in Law and Society (Portland Oregon: Hart Publishing, 2014), p. 120.

72 There are overlaps between anti-discrimination and migration litigation, but under EU law they are regulated as separate fields.

6 Conclusion

The Court of Justice in recent years has seen a surge in litigation concerning fundamental rights, environmental protection, antidiscrimination, and migration. Together with these new issues, new actors arrived in Luxembourg, advocating for an interpretation of EU law that is more sensitive towards the public interest. Migrant rights defenders are among them: they understood the potential of the preliminary reference procedure as a tool to challenge restrictive national laws and to foster a human-right oriented approach to migration.

This article addresses the question of who mobilizes the Court of Justice in the migration field. First, it drew an overview of the judicial actions available to reach the Court of Justice, showing that collective actors have little chances to reach the Court via direct actions, while the preliminary reference procedure, despite its many limitations, offers a good potential as a mechanism for enacting judicial review of national legislation vis à vis EU law. Then Section 3 provided a quantitative overview of the actors that participate in the preliminary reference procedure. In particular, it showed that the official documents of the cases and the Court's database provide only limited information on the collective actors involved, and to understand the extent of their presence and role we need to rely on qualitative research. Indeed, a previous qualitative study was undertaken in Italy, the Netherlands, and the UK revealed that collective actors rely on informal strategies to participate in EU litigation, such as by filing unofficial amicus curiae briefs or conducting litigation in the name of individual migrants.

The quantitative and qualitative overview of litigation before the Court of Justice raised some criticisms on the preliminary reference procedure as a mechanism to protect the public interest and minority rights. First, because of its origin as a judicial cooperation procedure, it does not provide guarantees to satisfactory ensure the party's participation in the proceedings before the Court of Justice; indeed, the procedure goes on regardless of the party's possibility or intention to participate in it. However, this bears the risk of leaving one party – the one lacking resources and means: the migrant – unrepresented and giving to the counterpart – the government – a huge advantage at the EU level. Finally, since the preliminary reference procedure starts within national proceedings, collective actors' chances to arrive before the Court of Justice are shaped by national rules on legal standing and legal aid; this creates a situation of structural asymmetry, where some Member States' judicial systems are more open than others. Drawing from the example of proceduralization in the EU antidiscrimination field, this paper has proposed to introduce similar procedural

mechanisms to facilitate collective actors' access to court and increase the support to migrants during litigation.

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