

## BULLET POINTS FOR AMICUS CURIAE ROUND TABLE

### *The Amicus Curiae in International Criminal Justice*

#### **Admissibility and qualification requirements:**

- The issue addressed in the Amicus Brief must be a *legal issue*.<sup>1</sup> Amicus cannot comment on factual issues and evidence.
- It must be a *relevant* legal issue.<sup>2</sup> It may be an unclear, novel issue. Amicus Briefs are not required if the issue is fully addressed.<sup>3</sup>
- The Amicus Brief must focus on a specific issue and *cannot go beyond the scope* of this issue in the case at hand.<sup>4</sup>
- The Amicus Brief must *assist the court in the proper determination of the case*.
  1. It is left to the *Court's discretion* to determine whether it will assist.<sup>5</sup>
    - a. The Court may consider whether:
      - i. granting the application is desirable and appropriate;
      - ii. the issues may have bearing on determination;

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<sup>1</sup> ICTY Practice Directive, IT/122m, *Information Concerning the Submission of Amicus Curiae Briefs*, para. 5 (b): "...shall be limited to questions of law, and in any event may not include factual evidence relating to the elements of a crime charged."

<sup>2</sup> *Prosecutor v. Musema*, ICTR-96-13, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae, 17 March 1999, para. 13. The Trial Chamber rejected the application on the basis that the question of restitution was not relevant since no charges about unlawful taking of property were in the indictment.

<sup>3</sup> *Prosecutor v. Hadzihasanović*, IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 8. The Appeals Chamber declined the application of Mr. Ilias Bantekas (University of Westminster) on the issue of the application of Article 7(3) of the Statute (command responsibility) to internal armed conflicts in the view of extensive submissions made by the parties on the issue.

<sup>4</sup> *Prosecutor v. Ojdanić*, IT-05-87, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003. The Appeals Chamber declined the application because the submissions offered concerned the whole legal aid scheme and not the specific application of the legal aid to the case at hand.

<sup>4</sup> *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on "motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103, 22 April 2008, para. 8. The AC held that it is at the discretion of Appeals Chamber to grant leave to any state, organization or person to submit *amicus curiae* observations.

<sup>5</sup> *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on Application for leave to submit observations under Rule 103, 5 November 2008, paras. 9-14. In granting the application, the Trial Chamber considered whether the issues may have bearing on determination of the Chamber and that granting application is desirable and appropriate. The Trial Chamber assessed desirability and appropriateness against the duty to ensure expeditious trial.

iii. it may delay the expeditiousness of the proceedings.<sup>6</sup>

- Amicus Curiae applicants must be generally, *independent, impartial*, and have *no affiliations* with any parties or participants in the case.<sup>7</sup>
- The Court may grant leave to Amicus Curiae who has *interest in the outcome* and wants to be heard on the issue.<sup>8</sup>
- Amicus Curiae applicants may also have *interest in the legal issue* in the case, regardless of whether they are concerned with the outcome.

2. Risk of setting a “bad precedent” that might negatively impact a subsequent case.

### **Ethical considerations:**

- Amicus Curiae applicants must be scrupulous in following the practice directions and guidelines for qualification and admissibility.
- If the guidelines provide that the actual *amicus brief* cannot be submitted as an annex to the application for leave, Counsel must follow that rule.
- Counsel may consider to “frontload” substantive arguments in the application to ensure that they are read.

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<sup>6</sup> *Prosecutor v. Kony et al.*, ICC-02/04-01/05, Decision on Application for leave to submit observations under Rule 103, 5 November 2008, paras. 9-14. In granting the application, the Trial Chamber considered whether the issues may have bearing on determination of the Chamber and that granting application is desirable and appropriate. The Trial Chamber assessed desirability and appropriateness against the duty to ensure expeditious trial.

<sup>7</sup> *Prosecutor v. Milosević*, IT-02-54, Decision concerning an Amicus Brief, 10 October 2002. The Trial Chamber discontinued Mr. Wladimiroff as *amicus* due to the comments he made regarding the accused’s guilt, and with respect to some evidence, raising questions about his impartiality. *See also Prosecutor v. Prlić*, Decision on Request by the Government of the Republic of Croatia for Leave to Appear as Amicus Curiae, 11 October 2006. In this case, the Trial Chamber declined the application holding, *inter alia*, that it would not be in the interests of justice to authorize a state, whose former political and military leaders are mentioned in the indictment as participants of JCE.

<sup>8</sup> *Prosecutor v. Bagosora*, ICTR-096-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998. The Trial Chamber noted that the general definition of *amicus curiae* does not call for impartiality on the part of the filing party, and such briefs are filed by a party, not a part of the action, but one with strong interests in or views on the subject matter before the court. *See also Prosecutor v. Kallon*, SCSL-2003-07, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for leave to File Amicus Curiae Briefs and to Present Oral Submissions, 1 November 2003. The Appeals Chamber in granting the application, noted that the highest courts in the UK and Australia have been willing to grant leave to interested parties, when they may be likely affected by the decision or precedent in future, or when they wish to have the law clarified or developed in a particular way.

- Amicus Curiae applicants *must consider the relevant codes of conduct.*
- **ICC Code of Conduct applies to *Amicus Curiae***<sup>9</sup>
  1. Art. 5: (oath): “perform my duties and exercise my mission ... with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously....”
  2. Art. 6: Independence
    - a. Do not compromise independence, integrity or freedom by external pressure; or
    - b. Do anything which may lead to any reasonable inference that the independence has been compromised.
  3. Art. 8: Respect for professional secrecy and confidentiality
  4. Art. 24: Duties towards the Court:
    - a. Ensure that actions are not prejudicial to the proceedings and do not bring the Court into disrepute
    - b. Not deceive or knowingly mislead the Court
    - c. Not submit any request or document with the sole aim of harming the participants
    - d. Avoid unnecessary expense or delay in the proceedings
- **National codes of conduct**
  1. **Honesty and Diligence**
  2. *E. g.*, under American Bar Association Model Rule 3.3(a)(2), the lawyer may be sanctioned for ethical violation when “fail[s] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

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<sup>9</sup> International Criminal Court (‘ICC’) Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted 2 December 2005, Art. 1.