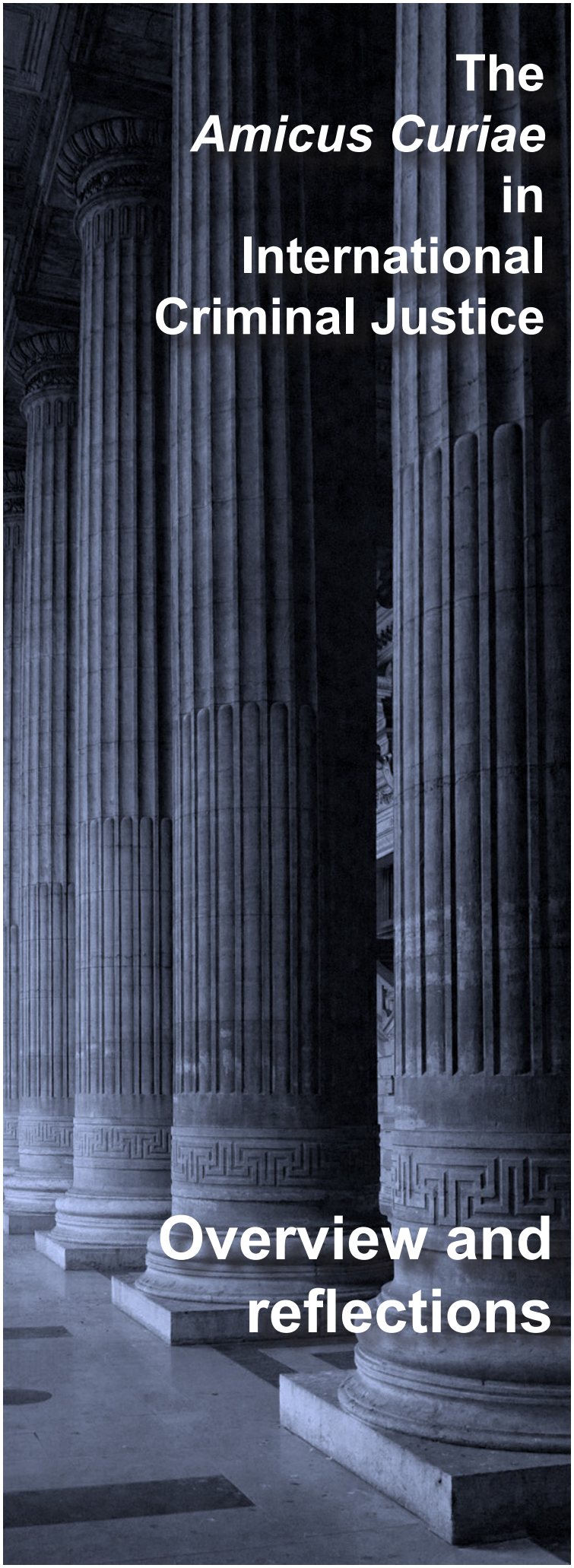

The *Amicus Curiae* in International Criminal Justice

Overview and reflections

Report of the Roundtable held
18 January 2016
Leiden University Campus
The Hague

Australian Human Rights Centre
UNSW Law, UNSW Australia
Faculty of Law, University of Cape Town
Grotius Centre for International Legal Studies

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Glossary of abbreviations

ADC-ICTY	Association of Defence Counsel Practising Before the ICTY
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
IBA	International Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OSJI	Open Society Justice Initiative
PJI	The Peace and Justice Initiative
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon

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Author: Emma Palmer, with Sarah Williams and Hannah Woolaver.

Executive Summary

Recent decades have witnessed an increased role for civil society actors in international law making and the development of international institutions, with the adoption of the Rome Statute of the International Criminal Court (ICC) being an oft-cited example. Yet once international institutions are established, there are few opportunities and mechanisms for civil society actors to participate directly within the formal processes of such institutions. The main way in which civil society can intervene in proceedings before international criminal tribunals is as an *amicus curiae*, or friend of the court. The practice of allowing *amici curiae* to participate in proceedings is included in the rules of procedure and evidence of most international and internationalised criminal tribunals, including the ICC. These rules generally provide chambers with a broad discretion to admit *amicus curiae* briefs where 'desirable for the proper determination' of the case.

However, the use of the *amicus curiae* must be balanced against the already complex nature of the trial process (especially where victims' participation is also available) and the need to ensure that the fair trial rights of the accused are not adversely affected. Further, the strategic considerations, preparation and admission procedures, as well as the possible outcomes and use of the *amicus curiae* brief remain opaque.

These issues were discussed at a roundtable held at Leiden University, The Hague campus, on Monday 18 January 2016. The roundtable aimed to allow judicial officers, legal practitioners, academics and civil society actors to discuss the practice, process, strategy and impact of the *amicus curiae* in international crimes trials. The roundtable arose from a project managed by Dr Sarah Williams and Dr Hannah Woolaver with the assistance of Emma Palmer: *Evaluating Civil society Participation before International Criminal Tribunals: the Amicus Curiae and the Rights of the Defence*. This project considers the use of *amicus curiae* briefs before international criminal tribunals.

The roundtable was divided into four sessions. Professor William Schabas provided a keynote address. Three subsequent panel sessions considered: the strategy and impact of *amicus curiae* briefs before the ICC (Panel 1); the possibility of the *amicus curiae* affecting fair trial rights or being 'co-opted' (Panel 2); and the procedural implications, ethical challenges and potential future directions for managing the *amicus curiae* process (Panel 3).

These discussions suggested that there are a number of issues regarding the use of *amicus curiae* briefs before international criminal tribunals that warrant further attention. These included why and when to apply to provide *amicus curiae* submissions, what topics they might address, the criteria adopted by courts in admitting *amici curiae*, and the relevant ethical considerations involved in acting as *amici curiae*.

Introduction

Recent decades have witnessed an increased role for civil society actors in international law making and the development of international institutions, with the adoption of the Rome Statute of the International Criminal Court (ICC) being an oft-cited example. Yet once international institutions are established, there are few opportunities and mechanisms for civil society actors to participate directly within the formal processes of such institutions.

The main way in which civil society can intervene in proceedings before international criminal tribunals is as an *amicus curiae*, or friend of the court. Historically, the *amicus curiae* acted within the common law as an impartial adviser to the court whose role was simply to inform and not to advocate. This filled a lacuna by permitting the representation of interests beyond those of the primary parties to the case. The practice of allowing *amici curiae* to participate in proceedings is included in the rules of procedure and evidence of most international and internationalised criminal tribunals, including the ICC. These rules generally provide chambers with a broad discretion to admit *amicus curiae* briefs where 'desirable for the proper determination' of the case.[1]

For example, Rule 103 of the Rome Statute states:

Rule 103 - Amicus curiae and other forms of submission

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

[1] For a selection of *amicus curiae* rules, see page 35.

However, the use of the *amicus curiae* must be balanced against the already complex nature of the trial process (especially where victims' participation is also available) and the need to ensure that the fair trial rights of the accused are not adversely affected. Further, for actors considering whether or how to prepare an *amicus curiae* submission, or for judicial officers deciding whether to invite or admit *amicus curiae* submissions, the strategic considerations, preparation and admission procedures, as well as the possible outcomes and use of the *amicus curiae* brief remain opaque.

This report details the proceedings and outcomes of a roundtable event held at Leiden University, The Hague campus, on Monday 18 January 2016. The roundtable arose from a project managed by Dr Sarah Williams and Dr Hannah Woolaver: *Evaluating Civil Society Participation before International Criminal Tribunals: the Amicus Curiae and the Rights of the Defence*. This project considers the use of *amicus curiae* briefs before international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the Special Court for Sierra Leone (SCSL), and the ICC. This research is supported under Australian Research Council's Discovery Projects funding scheme (project number 140101347).

The roundtable allowed judicial officers, legal practitioners, academics and civil society actors to discuss the practice, process, strategy and impact of the *amicus curiae* in international crimes trials. The report summarises the proceedings for the benefit of the roundtable participants.

The roundtable was divided into four sessions, each of which is addressed in this report. Professor William Schabas provided a keynote addressing the history of the *amicus curiae* before various international legal mechanisms, including international criminal tribunals, and raised many of the issues debated throughout the day. Three subsequent panel sessions considered: the strategy and impact of *amicus curiae* briefs before the ICC (Panel 1); the possibility of the *amicus curiae* affecting fair trial rights or being 'co-opted' (Panel 2); and the procedural implications, ethical challenges and potential future directions for managing the *amicus curiae* process (Panel 3).

The discussions suggested that the use of *amicus curiae* briefs before international criminal tribunals raises several issues that warrant further attention. These included why and when to apply to provide *amicus curiae* submissions, what topics they might address, the criteria adopted by courts in admitting *amici curiae*, and the relevant ethical considerations involved in acting as an *amicus curiae*. These matters are addressed in the conclusions of this report.

Context

Background

The *Amicus Curiae* in International Criminal Justice event was organised with the support of the Grotius Centre for International Legal Studies at the University of Leiden; Faculty of Law and Australian Human Rights Centre, UNSW Australia; and the Faculty of Law, University of Cape Town. It was funded under the Australian Research Council Discovery Projects Funding Scheme (DP140101347). It was the first roundtable organised with this theme at the Grotius Centre.

The event was designed to allow judges, legal practitioners and civil society representatives to present their research and experiences regarding the use of *amicus curiae* briefs in international criminal justice. It aimed to create a collaborative forum for debating and investigating the role, strategy, impact and future directions for the use of *amicus curiae* briefs before international criminal tribunals and particularly the ICC.

Agenda

The roundtable was held on Monday 18 January 2016. The program is annexed on page 36.

Participants

Participants included judges of the ICC and STL, legal practitioners, NGO actors, academics and representatives of embassies in The Hague. A list of participants is provided on page 38.

Roundtable Review

Welcome

Professor Carsten Stahn, Grotius Centre of International Legal Studies and Dr Sarah Williams, UNSW Law Australia welcomed the participants to the roundtable.

Professor Stahn observed that the role of the *amicus curiae* is under-studied, particularly in relation to international criminal justice. He offered several possible reasons why the ICC has been relatively reluctant to engage with *amicus curiae* briefs. First, ICC procedures are already complex and involve a large number of filings, so there may be a fear of *amici curiae* prolonging proceedings. It could also be that the ICC's legal framework contained in the Rome Statute, its Elements of Crimes and its Rules of Procedure and Evidence provide additional guidance as to the applicable law compared to other international criminal tribunals. Finally, the ICC may have more relatively more resources and therefore have less need to seek or accept additional assistance.

In Professor Stahn's view, there have also been instances where the use of *amicus curiae* briefs raised issues of institutional politics and cautioned against international criminal courts using the *amicus curiae* to 'fish for their friends'. However, he proposed the field of international human rights law as one area that could continue to attract *amicus curiae* submissions, while the *amicus curiae* might also contribute to debates concerning questions of immunity and statehood. Nevertheless, Professor Stahn suggested that there are advantages to international criminal tribunals exercising a degree of restraint toward admitting *amicus curiae* briefs.

Dr Sarah Williams thanked the participants for their attendance. She introduced the Australian Research Council Discovery Project, which was stimulated by an earlier scoping article authored by Dr Williams and Dr Hannah Woolaver, "The Role of the *Amicus curiae* before International Criminal Tribunals".[2] The project evaluates the use of *amicus curiae* briefs before international criminal tribunals. To date, this has involved collating and categorising *amicus curiae* applications and

[2] *International Criminal Law Review* (2006) 6: 151-189.

submissions from a range of international criminal tribunals. The next stage of the project will further analyse the impact of *amicus curiae* briefs on proceedings.

Keynote Address – Professor William Schabas

Introduction

- Professor William Schabas provided a keynote address that highlighted many of the questions and themes discussed throughout the day.
- Chair: Sarah Williams.

Keynote Address Summary

Professor William Schabas began with an anecdote from the CBS television show "Perry Mason", which included episodes featuring the role of the *amicus curiae* in US courts. In his experience when practising law in Canada in the 1980s and 1990s, *amici curiae* were unusual. There were no *amici curiae* at the Nuremberg International Military Tribunal or the Tokyo International Military Tribunal for the Far East and there have been very few attempts to participate as *amici curiae* at the International Court of Justice. The European Court of Human Rights (ECHR) and the earlier European Commission had mechanisms to allow parties to intervene in proceedings, including the right for states to intervene when a matter considered one of its nationals. However, states now rarely seek to intervene in such cases. One recent exception is the *Perinçek v Switzerland* case decided 15 October 2015, in which both Turkey and Armenia participated as third parties.

Professor Schabas then reflected on his own experience of acting as an *amicus* before the ECHR. He did not find the process for admitting his submissions difficult and considered it to be a successful way to allow one's views to be publicly and seriously considered by the court. Only once has he applied to act as an *amicus curiae* before international criminal tribunals: when he was invited by the SCSL to provide a submission on the topic of privilege and communication with detainees. Professor Schabas recalled undertaking a significant amount of legal research to prepare his *amicus curiae* submissions, without payment, and with hindsight is unsure whether the topic really warranted inviting *amici curiae*, as it may equally have been managed by Chambers. On another occasion he was asked to prepare an expert opinion on a

question of law and was unsurprised to find that the Chambers rejected the application on the basis that they did not require legal opinions. Yet he believes the Chambers nevertheless took his arguments into account in their reasoning. That case had included an "*amicus curiae* prosecutor", which Professor Schabas does not consider to be an accurate label. He suggested that "ad hoc prosecutor" might be a more appropriate.

In a different context, Professor Schabas observed the common practice, particularly in US courts, of large groups of academics and other actors signing onto joint *amicus curiae* briefs. Professor Schabas is hesitant to join such initiatives and wonders how all the signatories can reach agreement on the text of such a submission. In his view, as an academic it will usually be more appropriate to prepare a journal article or other written material to disseminate one's views.

Turning to international criminal tribunals, Professor Schabas recalled that *amici curiae* have been employed since the first motion in the first case heard before the ICTY - the *Tadic* case – when Professor Chinkin and a group of feminist lawyers in New York including Rhonda Copeland applied to intervene as *amici curiae* regarding the use of anonymised witnesses.

While Rule 103 of the ICC Rules of Procedure and Evidence allows *amicus curiae* briefs to be accepted by the Court, the practice of ICC Chambers in accepting and rejecting submissions is unclear. He has identified decisions that indicate ICC Chambers will refuse *amicus curiae* applications that consider factual matters, whereas others suggest that briefs should not purely address questions of law. This compares to the ICTR, for example, where Chambers referred to factual information provided by *amici curiae* regarding the proposed transfer of defendants to Rwanda for domestic proceedings. He referred to an ICC Appeals Chamber decision allowing Darryl Robinson, Margaret deGuzman, Charles Jalloh and Robert Cryer to provide an *amicus curiae* brief on the elements of crimes against humanity.[3] Here was a situation where the usual roles were flipped: rather than academics writing about judicial decisions, here they were writing for the use of Chambers. Reflecting generally upon academic *amici curiae*, Professor Schabas wondered

[3] *Prosecutor v. Laurent Koudou Gbagbo*, ICC-01/11-01/11, Decision on the "Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", Appeals Chamber, 1 October 2013.

whether the time and effort spent preparing (and agreeing upon) submissions might often be better spent drafting a peer reviewed journal article.

There have also been instances where parties with a direct interest in the outcome of proceedings have attempted to provide *amicus curiae* briefs, including during preliminary examinations as with William Ruto in the Kenya situation,[4] and Saif Al-Islam Gaddafi's friends and relatives.[5] States have also intervened to participate in ICC proceedings, as have NGOs. In other situations, as Professor Stahn discussed, judges may consider inviting specific opinions in the form of *amicus curiae* briefs. A different but analogous situation has arisen where the ICC has invited states to appear in proceedings, but not as an *amicus curiae*, for example in the *Bemba* case.[6] All of these applicants are not direct parties to the ICC cases, but some are less partial than others. In sum, ICC practice concerning the *amicus curiae* presents somewhat of an incoherent picture, though it indicates that, in general, *amici curiae* submissions will be exceptional. This, Professor Schabas suggested, is probably as it should be.

Questions and Discussion

Professor Schabas' keynote provoked a discussion about the appropriate scope for admitting *amici curiae*. Judge Raul Pangalangan opined that *amici curiae* might normally be limited to questions of law, since in light of court procedures whereby facts are pleaded and proved by the parties, it would be unusual for *amicus curiae* counsel to contribute to determining questions of fact. On the other hand, Judge Pangalangan had personally experienced a judge deciding that the court

[4] Situation in the Republic of Kenya, ICC-01/09, Application for Leave to Submit Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 22 December 2010.

[5] E.g., *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Application on behalf of Aisha Gaddafi for leave to submit amicus curiae observations concerning her brother - Saif al-Islam Gaddafi, 31 January 2012; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on the Application on behalf of Mishana Hosseinioun for Leave to Submit Observations to the Appeals Chamber pursuant to Rule 103, Appeals Chamber, 15 August 2013.

[6] See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Pre-Trial Chamber II, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, 14 August 2009.

should determine questions of law and so there was no need for an *amicus curiae* considering legal matters. This raises a quandary: if *amici curiae* are no help for questions of fact and no help for questions of law, then how would they be accepted at all? Further, NGOs may provide *amicus curiae* briefs but will generally be advocates for particular causes. In some cases, they are friends with the court, but they are better friends with some parties. Still, Judge Pangalangan remained open to the provision of *amicus curiae* briefs and thought they might be particularly useful at the pre-trial and appellate stages.

Professor Schabas offered that while he also recognises the same potential for a "dead end" between questions of fact and law, *amici curiae* might also help fill gaps in the record where judges feel they need additional factual information. Further, as an academic providing *amicus curiae* briefs, he felt judges had been seeking a balanced and independent opinion on a legal question. As an example, he recalled Professor Stahn's suggestion that ICC Chambers' may benefit from expertise regarding international human rights law. Colleen Rohan pointed out that the Association of Defence Counsel Practising before the ICTY (ADC-ICTY) had been refused permission to provide factual information regarding the defence's inability to conduct investigations in Sudan.[7]

Dr Woolaver raised the issue of *amici curiae* acting where they may have a conflict of interest in the proceedings. Professor Schabas then reflected upon whether *amici* should be list counsel. Dr Williams observed that the ICC Code of Conduct technically includes *amici curiae* within the definition of 'counsel'. Manuel Ventura and Michael G Karnavas reflected on an experience at the ECCC in which Antonio Cassese and Kai Ambos were invited to provide *amicus curiae* briefs as to the status of joint criminal enterprise in customary international law, despite their well-known published views on the matter.[8]

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[7] *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09, Trial Chamber IV, Order on the request to file an amicus curiae brief on the defence request for a temporary stay of proceedings and the prosecution's related request, 23 February 2012.

[8] See *Prosecutor v. Kaing Guek Eav*, alias Duch, Case 001, Pre-Trial Chamber II, Invitation to Amicus Curiae, 25 September 2007.

Panel 1 – Strategy and Impact of *Amicus Curiae* Brief

Introduction

- Following morning tea, Judge David Re of the STL; Göran Sluiter, a legal practitioner and Professor at Universiteit van Amsterdam; and Rupert Skilbeck, the litigation director of Open Society Justice Initiative reflected on their respective experiences of the strategy and impact of submitting *amicus curiae* briefs.
- Chair: Hannah Woolaver.

Judge David Re, STL

Judge David Re drew an analogy between the role of *amici curiae* in international criminal law proceedings and that of domestic public interest litigation and interveners, concluding that it is an international form of public interest litigation. These include the natural extremes of such intervention - on the one hand, at its 'purest' level, *amici curiae* may serve some of the goals of public interest litigation of acting in the 'public interest' or defending some value of 'public interest'. At the other extreme, however, *amicus curiae* submissions might be used to 'push a particular barrow', including to attack the very existence of a court or tribunal or to promote a particular view that may not serve the broader aims of international criminal justice. All *amici curiae* have an agenda, stated or unstated, but some agendas are helpful and in the 'public interest' (however defined) while some are destructive.

Putting the *amicus curiae* prosecutor aside – since this role is really that of an independent prosecutor who is a party to proceedings, a role fundamentally differing from that of *amici curiae* – Judge Re considers that the experience of the last 21 years shows that the result of bringing *amici curiae* arguments to the international criminal courts and tribunals is mixed. While *amici curiae* need to be aware of the danger that judges from civil law backgrounds, in particular, are acutely aware of the principle of *lura novit curia*, (the court knows the law), experience shows that, whatever judges think of their own abilities and knowledge and what they think they know, not all courts will necessarily have all the requisite expertise in a given matter. Some genuinely need 'outside' assistance (i.e. from outside the parties), while for others it can be an unhelpful work-creating distraction.

At the STL there were two issues where one may have expected some interest in filing *amicus curiae* briefs: namely, decisions on the novel (modern) international criminal law issue of trials *in absentia*, and on the legality of the Tribunal. However, none were submitted on those matters. Five parties, however, (the Prosecution and counsel for four accused) filed their own submissions in both matters. Other matters, at the trial level, that could have but did not attract *amici curiae* filings at the STL, included the use of documents obtained from Wikileaks, and compelling journalists to testify. In contempt trials, *amici curiae* have filed briefs on the issue of whether the STL could prosecute media organisations in circumstances where this is not prescribed in the STL's Statute or its Rules of Procedure and Evidence. The Appeals Chamber also sought *amicus curiae* briefs in relation to its pre-indictment opinion on joint criminal enterprise and whether terrorism was defined in customary international law. However, it then declined to allow a short extension of time to allow Professor Ben Saul, a world academic expert on terrorism, to file his brief on the latter topic.

Judge Re provided some advice for potential *amicus curiae* applicants. First, it is important to know your audience (i.e. your bench) and its expertise and make-up and to pitch it to that specific audience – even if you consider that your broader audience lies elsewhere. Second, you must therefore frame your application to make it clear to the court why it needs the *amicus curiae* brief. Third, *amici curiae* should honestly consider why they wish to provide a brief – what are their motivations and how can they provide useful submissions – and they must be candid and upfront in the brief about why they are filing it. Fourth, he advised applicants to consider the Practice Direction on *Amicus Curiae* Submissions for the Special Tribunal for Lebanon.[9] In particular, the requirements in Article 3 regarding setting out the applicant's qualifications, how the brief will aid in the determination of the issue, and identifying any relationship the applicant has with any of the parties. To save time and unnecessary filings, *amici curiae* may file their *amicus* brief with their application. Further, this practice direction specifies that unless 'otherwise ordered by the Judge or Chamber, an *amicus curiae* submission shall be limited to questions of law, and may not include factual evidence relating to elements of a crime charged' (Article 4). In Judge Re's view, *amici curiae* should be permitted to make submissions on facts in exceptional circumstances only.

[9] Available at https://www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/practice-directions/1402-practice-direction-on-amicus-curiae-submissions-before-the-special-tribunal-for-lebanon (accessed 20 January 2015).

Judge Re recommended this practice direction as a model for filing *amici curiae* briefs in international criminal proceedings.

Rupert Skilbeck, Open Society Justice Initiative

Rupert Skilbeck began by noting that the new Executive Director of the NAACP Legal Defense Fund had recently questioned whether the organisation should provide *amicus curiae* briefs or instead focus on pursuing their own litigation. He proposed that this could relate to the escalating use of *amicus curiae* submissions before US courts, where more than a hundred applications were filed in a recent case on same-sex marriage.[10] In contrast, the UK Supreme Court takes a restrictive approach to accepting *amicus curiae* briefs and applicants may even be at risk of costs if their submissions are not useful.

There is a distinction between the *amicus curiae*, traditionally the independent academic expert invited to provide technical assistance on a specific matter, and a third party intervener, who is usually intervening on behalf or in support of one of the parties and is clearly not neutral. All human rights courts accept interventions in one form or another and UN treaty bodies have recently started to accept submissions from NGOs. There are similar rights to participate in proceedings in many other national systems, though the role may have a different name, such as 'bystander' in Germany.

Open Society Justice Initiative (OSJI) has intervened in national proceedings including in Haiti in relation to the prosecution of Duvalier, while other organisations such as the International Federation of Human Rights (FIDH) and TRIAL have also demonstrated that it is possible to intervene in domestic international crimes proceedings.

Based on these experiences, Mr Skilbeck proposed several issues for any NGO deciding whether to act as an *amicus curiae* to consider. First, national NGOs can help provide an understanding of national law in international criminal proceedings, while multi-national NGOs can provide global experience and awareness of international court procedures. Often a national NGO has partnered with an international

[10] Obergefell v. Hodges, No. 14-556, 26 June 2015, see http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/ (accessed 20 January 2016).

NGO in public interest litigation and *amicus curiae* activities. Second, litigation and *amici curiae* are not the only tools available to NGOs. Advocacy can take many forms and publicising court proceedings and decisions can often have a broad impact. NGOs could also advise parties to a case behind the scenes, or encourage other actors to provide *amicus curiae* submissions. It may be rare for the arguments of NGO *amici curiae* to be adopted in judicial decisions, but they could have a broader influence or briefs may provide judges with arguments that help them persuade their colleagues during judicial deliberations. Finally, *amicus curia*e briefs might have indirect benefits for NGOs by boosting their public profiles or demonstrating their expertise in a particular area. Thus in considering the impact of *amicus curiae* briefs it is important to also consider how NGOs used their other capabilities to support their submission.

Mr Skilbeck suggested that matters of comparative law, including: human rights and international humanitarian and criminal law, as well as information about national laws; analysis of particular factual situations, which can be most usefully provided by UN Special Rapporteurs; and sociological research, particularly in relation to cultural issues or experiences foreign to the presiding judges, all represented potentially fruitful areas for *amicus curiae* briefs, especially within national court systems. On the other hand, there may be less need for briefs as international criminal law matures. However, Mr Skilbeck proposed that acting as *amici curiae* would benefit NGOs where they can demonstrate that it not only assists the court process, but also serves their own strategic priorities.

Göran Sluiter, Universiteit van Amsterdam

Professor Göran Sluiter first observed that while there is no avenue for *amici curiae* before Dutch courts, he recalled an occasion when the prosecutor submitted a report by Antonio Cassese dealing with genocide in Rwanda, though the Court did not provide it much attention.

He then drew on his own experience of filing *amicus curiae* applications before the ICC in relation to the asylum applications of four witnesses from the Democratic Republic of the Congo (DRC). In this matter, both the *Katanga* and *Lubanga* Chambers agreed that the witnesses should be able to apply for asylum without being sent back to the DRC. However, the Dutch case proceeded very slowly and Professor Sluiter became aware that the ICC Registrar was providing information to the Dutch courts that he viewed as inaccurate.

In this situation, he and his colleagues thought that the ICC Chambers should be updated regarding the domestic proceedings and the Registrar's activities and applied to act as *amici curiae*. Since they were acting in the interests of their clients, they were not confident that the Court would accept the application. They therefore targeted the *Lubanga* Chamber since it was presided by Judge Fulford, who came from a common law background. To their surprise, they were granted permission.[11]

With hindsight, Professor Sluiter is not sure whether the brief directly assisted his clients' position in the matter, but they were not worse off. Indirectly, they improved their clients' standing in the Dutch proceedings, since they were able to refer to their *amicus curiae* brief whenever the Dutch Government sought to rely upon information provided by the Registrar, while the Registrar also appeared to become more cautious in its contact with the government. Still, the brief did take a considerable amount of (unpaid) work. This was a unique situation, but does suggest that there may be scope for providing *amicus curiae* submissions regarding national proceedings.

Questions and Discussion

The discussion following this panel took several directions. First, participants debated the issue of conflicts of interest. Matthew Cannock of Amnesty International asked whether NGOs engaged in trial monitoring should not act as *amici curiae* and Mr Skilbeck suggested that this might be inappropriate since it is arguably necessary to maintain neutrality to effectively perform court outreach.

Second, Dr Woolaver raised the issue of unaccepted briefs and whether submitting *amicus curiae* briefs could have indirect benefits, such as by publicly stating an NGO's position on an issue or boosting their public reputation. It is also possible that rejected submissions are still read by judges or their clerks. It was pointed out that some tribunals require *amicus curiae* briefs to be annexed to applications, whereas at international criminal tribunals this practice has been frowned upon.

[11] See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Order authorising the submission of observations, 15 November 2011.

Third, Colleen Rohan and others debated whether most novel international criminal legal issues had or had not been resolved and/or whether there would be less need for *amici curiae* in the future.

Fourth, Mr Karnavas argued that issues of transparency and fair trial rights arise if judges contact experts to provide off-record advice on particular matters. Judge Re, in answer to a question from Mr Karnavas, said that actively soliciting *amicus curiae* briefs or seeking advice from potential *amicus curiae* behind closed doors should be discouraged. Professor Schabas recalled that courts had, in fact, invited *amicus curiae* briefs in the past and there should be a place to continue this practice.

Fifth, additional matters to consider when preparing or considering *amicus curiae* briefs were suggested, including timing the brief so as to be relevant and, equally, enforcing time limits, and ensuring that applications are provided in a professional style that suggests independence rather than taking an advocacy position. Judge Re stressed that from the judicial perspective, there is an absolute need for caution in dealing with *amicus curiae* submissions. A court has to be aware that *amicus* briefs are sometimes filed as a 'public shaming function' in an attempt to influence a judicial decision.

Panel 2 - Co-opting the *Amicus Curiae*? The *amicus curiae* as defence, the *amicus curiae* prosecutor and victims or states as *amici curiae*

Introduction

- After lunch, the second panel comprising: Gaëlle Carayon, Redress; Steven Powles, Doughty Street Chambers; Colleen Rohan, ADC-ICTY; and Manuel Ventura, The Peace and Justice Initiative (PJI), discussed the tension between whether *amici curiae* might represent a particular objective or cause, or should be impartial and independent assistants to the court.
- Chair: Emma Palmer.

Gaëlle Carayon, Redress

Gaëlle Carayon addressed three situations where NGOs like Redress might consider intervening in ICC proceedings. First, when judges call for submissions such as in reparations proceedings. Second, to provide legal analysis or comparative legal information to the ICC. Third, in admissibility proceedings, for local groups to inform chambers how national legal proceedings operate in practice. In each of these cases, she believes that NGOs should be careful to provide neutral submissions.

Another potential area for intervention is the provision of briefs by victims' groups. In that situation, the audience will not just be the three judges on the Bench, but the ICC more broadly and the potential to influence policy decisions.

However, such participation by victims as *amici curiae* can involve risks. It may delay proceedings and often the timing to provide a brief is very short. This is a particular issue when the ICC only invites submissions in English, for example in the reparations cases regarding the DRC. It may also raise conflicts of interest, including between *amici curiae* and victims' legal representatives participating in ICC proceedings.

There is no practice direction concerning how *amici curiae* should act, or clear jurisprudence as to who will be provided with leave to submit a brief, which increases the complexity involved in applying to act as an *amicus curiae*.

Steven Powles, Doughty Street Chambers

Steven Powles believes that *amici curiae* can assist the defence through providing impartiality, expertise, and resources. He recalled that civil society actors played a crucial role during the Rome Statute negotiations and development of the Elements of Crimes and Rules of Procedure and Evidence. Yet the vast majority of the NGOs involved in this process were victim, rather than defence, focused, apart from some bar and international criminal defence associations. There is therefore scope for *amicus curiae* interventions that support defence rights issues at the ICC.

First, *amici curiae* can assist the defence by contributing impartiality, that is, by providing independent arguments that could appear as motivated by self-interest if the defence presented them. Second, defence advocates can benefit from the expertise brought by *amicus curiae* submissions, which may supplement their arguments. Third, the defence

usually has very limited resources and if complicated issues arise, it can be very difficult to find staff to carry out the necessary extra legal research. *Amicus curiae* briefs could provide one way to help fill this resources gap.

Mr Powles then provided examples of where *amicus curiae* have been helpful to the defence, both in domestic and international criminal proceedings, including by providing human rights arguments, such as in the *Florence Hartmann* case at the ICTY, in contrast to the invitation of *amici curiae* that left the defence outnumbered in the *Kallon* case at the SCSL. While the SCSL and ICTY allow for *amici curiae* prosecutors in contempt/false testimony cases, a similar role for an independent prosecutor should be provided for at the ICC. Mr Powles argued that *amici curiae* could provide arguments that support the prosecution or victims, but it is also important to consider the equality of arms to ensure that jurisprudence reflects equally weighted arguments.

Colleen Rohan, ADC-ICTY

Colleen Rohan offered the definition of an *amicus curiae* as being a person or a group who is not a party to a case but has a strong interest in the matter and seeks to intervene to influence the decision. She pointed out that in reality, all *amici curiae* seek to present a particular point of view – thus she disagrees with the concept of 'co-opting the *amicus curiae'*. In the US, for example, *amici curiae* must reveal any contact they have had with the parties and declare any payment they have received, but are understood as being in court to advocate a particular position.

ADC-ICTY has filed a large number of *amicus curiae* briefs in a range of proceedings and in some circumstances has been invited by the court to provide submissions. Ms Rohan provided several examples where ADC-ICTY had applied to act as *amicus curiae*, including in the *Bemba* case at the ICC and *Perlic* and *Brjadnin* cases at the ICTY, as well as in domestic proceedings in Bosnia-Herzegovina. Sometimes the courts provide very short deadlines and the appropriate practice for filing briefs as an annex to the application is unclear, but it could be helpful to maintain deadlines to prevent time delays.

In the mixed and relatively new system of international criminal law in which the ICC proceedings are selective and political, judges will rarely

be aware of all of the relevant information. In this context, *amicus curiae* participation that supports all sides - including defence and civil society – is necessary to educate the ICC and to legitimise its verdicts. Thus, defence are not co-opting the *amicus curiae*, but the *amicus curiae* submission is a tool for advocacy that should be used every time it is appropriate.

Manuel Ventura, The Peace and Justice Initiative

Manuel Ventura focused on PJI's experience in providing *amicus curiae* briefs. PJI acted as *amicus curiae* in the 'Zimbabwe Torture Docket' case in South Africa.[12] They found the role of local lawyers familiar with the South African legal system to be of crucial assistance and felt that their arguments were reflected in the judgment. PJI is also acting as *amicus curiae* in the case concerning the failure to arrest President Bashir when he visited South Africa in 2015. They are partnering with a South African organisation and expect doing so to be strategic in light of the political sensitivities surrounding the case.

Finally, PJI also sought to act as *amicus curiae* in the Supreme Court of Uganda decision regarding Thomas Kwyelo.[13] This was complicated by a lack of clarity surrounding the procedures for applying to act as *amici curiae,* since this is not an avenue provided for in Ugandan law. As a result, they searched for other avenues for providing the submission, but found that this involved difficult ethical decisions.

Mr Ventura added that from his personal experience as a law clerk at the South African Constitutional Court, the many *amicus curiae* briefs that were received, often regarding socioeconomic rights, were read and summarised by clerks and in some cases were very influential.

Questions and Discussion

The subsequent discussion considered whether there should be any concern about using *amici curiae* to present information that would affect the outcome of a criminal trial. Mr Powles and Ms Rohan agreed that while it is beyond the purview of the *amicus curiae* role to argue for guilt or innocence, the resource constraints that face defence teams mean

[12] *National Commissioner of the South African Police Service v. Southern Africa Litigation Centre & Another* [2014] ZACC 30.

[13] *Uganda v. Thomas Kwoyelo*, Constitutional Appeal No. 01 of 2012.

that *amicus curiae* briefs can be very valuable. Helen Brady and Mr Karnavas offered their concerns with information such as a proposed *amicus curiae* brief being provided directly to law clerks without going through the public *amicus curiae* application procedures.

From the other perspective, Mr Powles and Ms Rohan argued that it would not necessarily be inappropriate for parties to contact specific individuals to advise them of an opportunity to provide *amicus curiae* briefs that would support your position. However, they cautioned that you must not seek to influence the content of anyone's *amicus curiae* brief. *Amici curiae* must act independently in order to have their submissions considered and, if admitted, may not always present the perspective you were hoping for. Ms Carayon suggested that NGOs can play an important role in publicising calls for *amicus curiae* submissions and keeping other organisations updated regarding international criminal proceedings so they are aware of issues that might prompt them to act as an *amicus curiae*.

Ms Carayon said that in her view, the ICC did not necessarily adopt different standards to the applications of smaller local or national NGOs as compared to larger, multinational NGOs. However, it may be that local NGOs have less familiarity with ICC proceedings. She and Mr Ventura agreed that this is one reason for NGOs to submit *amicus curiae* briefs in partnership. It is also important to have the input of groups who have knowledge of local context. Many local groups have indicated that they feel that the voices of victims' groups and domestic actors are not adequately heard in ICC proceedings and the *amicus curiae* could provide an avenue for addressing this representation gap.

Panel 3 - Managing the *Amicus Curiae* Process: Procedural implications, ethical challenges and future directions

Introduction

- In the final panel of the day, Judge Howard Morrison of the ICC, legal practitioner Michael G Karnavas, Senior Appeals Counsel for the ICC Helen Brady, and Aurélie Roche-Mair of the International Bar Association reflected on many of the issues raised throughout the day and suggested possible implications for the role of the *amicus curiae*.
- Chair: Carsten Stahn.

Helen Brady, ICC Office of the Prosecutor

Helen Brady and Jimena Viveros Alvarez, an OTP intern, had collated 63 *amicus curiae* applications made under Rule 103 at the ICC. Of these, approximately a third had been granted over the last 10 years, which is a relatively low rate. Only a third of the applications sought to provide submissions on purely legal issues, but legal applications were more likely to be admitted.

In terms of the criteria that ICC Chambers adopted when reviewing *amicus curiae* applications, Ms Brady observed that while many ICC decisions on the question of admissibility are cursory, there are some key trends and the decisions are not arbitrary. Chambers have said that the key question is whether they will be *assisted* and it is desirable to accept the *amici curiae*, which provides significant discretion. Decisions have stressed that submissions must refer to live issues, be relevant, and relate to issues that the Chamber is competent to deal with. Overall the cases suggest that Chambers are looking to see whether they will be assisted by an independent and impartial individual with expertise that they cannot otherwise get on their own or via the participants' interventions.

The topics that have been accepted on legal issues include elements of certain crimes - especially novel crimes- modes of liability, cumulative charging, standards of proof, defence rights, procedural issues, and legal obligations of states under the Statute. Factual submissions have related to victims' access to justice in a country, the state of a country's judicial system, how best to implement victims' representation, and state cooperation.

Her review of practice revealed several key reasons why *amicus curiae* applications were rejected at the ICC, including:

- Procedural reasons, including not seeking leave to intervene.
- Timing issues or because the Chamber was no longer competent to hear the matter.
- The applicant did not have the appropriate expertise.
- The proposed information was not relevant or not currently a disputed issue before the Court.
- The submissions would intrude on the function of the Chambers (by putting forward arguments relating to the guilt of the accused) or the function of the prosecutor.
- They would duplicate the submissions of the parties.
- Sometimes there was a more opaque indication that the Court simply would not be assisted by the submissions.

In her view, the ICC's restrictive approach to *amicus curiae* briefs could partly be explained by its more comprehensive statutory framework and greater access to jurisprudence and resources than other tribunals - it is now operating with the benefit of being able to consider more than 20 years of precedents from the modern international criminal courts and tribunals. Further, the Rome Statute provides for a wider array of avenues for actors to participate in proceedings, including for states and for reparations and victims' participation. Ms Brady concluded that the ICC has favoured a traditional understanding of *amicus curiae* participation as involving interventions of impartial legal expertise. However, as additional situations are opened, it may be useful for Chambers to invite submissions or provide general calls for *amici curiae* in specific areas that would assist the Court. Finally, she agreed that the ICC Code of Conduct covers *amicus curiae* submissions, though she suspects it was drafted with *amicus curiae* prosecutors or defence counsel in mind.

Michael G Karnavas, ECCC

Michael G Karnavas has applied to act as *amicus curiae* before the ECCC and ICC. In doing so, he first asks himself "Do I have something to say?" and second "Why would anyone want to hear what I have to say?" This might involve situations where he believes there is a risk of a court setting 'bad precedent', including where the law decided in a case would impact on a subsequent case in which he is acting as counsel. In such a situation, he could informally contact defence counsel in the earlier case to offer his advice, but they may not be willing to hear from him. Alternatively, he would ask to intervene with leave or as *amicus curiae*.

Mr Karnavas argues that *amicus curiae* applicants must be scrupulous in following pertinent rules or practice directions. If the guidelines are unclear, as at the ECCC, he has attempted to annex his submissions to his application, though the Court would not place them on file. However, he would always consider how to 'front load' substantive arguments into an *amicus curiae* application to ensure that they are read. It is also important to frame your arguments to make it clear what assistance you will bring.

Mr Karnavas then provided some examples from experience. He applied to intervene in proceedings in Case 001 at the ECCC, when he was counsel for an accused in Case 002, in relation to joint criminal enterprise. More recently, he attempted to intervene or to act as *amicus curiae* in Case 002 on the issue of torture-tainted evidence, now that he is counsel for an accused in Case 003. He has also applied to act as *amicus curiae* at the ICC. In all cases, he has been rejected, but it is important to keep attempting to make any crucial arguments and to develop a reputation for submitting quality work.

Mr Karnavas explained that ethical and fair trial issues could arise. For example, a party to the proceedings might ask someone to write an *amicus curiae* brief and even offer to draft its contents. Further, no *amicus curiae* can be completely objective, so it is important to be upfront about your particular position. Finally, applicants should consider the relevant Code of Conduct, which in his view requires *amici curiae* to research and disclose all relevant aspects of the law. He referred to Article 5 of the ICC Code of Conduct, which includes an oath to act with 'integrity and diligence, honourably, freely, independently, expeditiously and conscientiously…' All of these aspects are important for *amici curiae* to consider.

Judge Howard Morrison, ICC

When considering whether to apply to act as *amicus curiae*, Judge Howard Morrison advised first asking, 'Do you really need to?' Second, the best person possible must write the *amicus curiae* brief, so one must work hard to secure the most respected expert. In his view, it is quality rather than quantity that matters, because judges are looking to be assisted. Third, you must know what the *amicus curiae* submission is being used for. The more focused and narrow the issue addressed by the *amicus curiae*, the more useful it is likely to be for Chambers. Fourth, craft your application carefully. Do not necessarily annex your submissions, but there is nothing wrong with a very complete application that contains the essence of the intended arguments. Fifth, advise the parties, particularly the defendant, what you are presenting, as all parties should know the case they need to meet.

A brief may help one party more than another, as long as it is genuinely assisting the Court to come to a fair decision. Thus, *amicus curiae* briefs may be helpful when defendants are self-representing. However, while international criminal courts necessarily deal with political issues, they are not political forums. Submissions must only assist with the proper determination of the case.

In Judge Morrison's view, the ICC may benefit from *amici curiae* more than the ad hoc tribunals because it is dealing with diverse situations that will be unfamiliar to many in the courtroom. Thus it is more likely that the ICC will need specialist assistance, particularly on cultural, sociological and linguistic issues. Further, international criminal law is dynamic as it responds to social context and recognises different forms of harm. Thus, *amici curiae* may remain a helpful option for the ICC.

Aurélie Roche-Mair, International Bar Association

Aurélie Roche-Mair explained that International Bar Association (IBA) has provided *amicus curiae* briefs in various national and international mechanisms, but has mainly partnered with other organisations. One of the reasons why IBA has not submitted an *amicus curiae* application before international criminal tribunals is because IBA is involved with monitoring Court proceedings, although they may reconsider this position in future.

Amici curiae will always have some kind of an interest in the outcome of proceedings. However, courts should be open to enriching the record of their cases. Thus, while Courts should not be naïve about the motivations of civil society applicants, there should be a transparent framework as to what expertise is useful. This would help to encourage a more consistent practice regarding *amici curiae*. For instance, the ICC has no practice directions in relation to submitting *amicus curiae* applications. This means that while jurisprudence indicates some trends as to what Chambers are taking into consideration, to discern these criteria may require analysis that is difficult for NGOs to undertake. As it is, the situation is opaque from a civil society perspective. Further, if two-thirds of applications are rejected, that is an enormous waste of resources. Therefore, more detailed guidelines would be helpful for civil society organisations seeking to act as *amici curiae* before the ICC.

Ms Roche-Mair then argued that not providing clear legal reasoning as to what is 'desirable' when rejecting *amicus curiae* applications is detrimental to the process. She suggested that, in comparison to the ICC, the ICTY and SCSL jurisprudence is a richer source for criteria as to when *amici curiae* might be desirable. As examples, she referred to the *Prlić* case at the ICTY and *Sesay* case at the SCSL, which set out

criteria for admitting *amici curiae*. Transparency and guidelines around publishing *amicus curiae* briefs would also be helpful.

The lack of a clear framework or guidelines also creates ethical challenges. IBA was involved in drafting the ICC Code of Conduct in 2002. Ms Roche-Mair has discovered that IBA recommended that due consideration be given to including 'other counsel' within the Code, but had noted that issues affecting *amici curiae*, victims' representatives and others had not been considered in preparing the draft, though they should be considered in future. Thus, the Code was not intended to cover *amici curiae* in the traditional sense and its adoption in 2005 was a missed opportunity to consider this issue. Moreover, the application of the Code is further complicated for state *amici curiae* or bodies such as the African Union.

Questions and Discussion

The final discussion addressed the ethical challenges involved where an actor is asked by a party or the Bench to provide an *amicus curiae* brief. It was then suggested that there might be more *amicus curiae* applications during the admissibility and pre-trial phase, along with the interventions on reparations issues, though *amici curiae* might be more likely to be accepted during the trial if their main role is to provide legal assistance.

In response to a question asking if a state's *amici curiae* briefs might indicate *opinio juris* in some circumstances, Ms Brady said she thought they possibly could. In response to a question as to whether it would theoretically be possible for an organ of one international criminal tribunal to appear as *amicus curiae* before another (since Rule 103 encompasses international organisations), she said it could be theoretically possible, but it was hard to imagine how this could work and there did not seem to be any examples that this had ever happened. When asked how changes to the *amicus* process could best be achieved, she suggested that this would most appropriately take place and be easier to achieve through an amendment to the ICC Regulations, rather than the Rules of Procedure and Evidence.

Finally, participants discussed the importance of *amici curiae* following Court instructions, including those set out in any practice direction. It was suggested that the ICC consider preparing its own 'Practice Direction on *Amicus Curiae* Briefs'. Further, it would be worth considering providing guidelines for NGOs as to the internal procedures

they ought to consider undertaking before applying to act as an *amicus curiae*, as well as advice as to increasing the chances of submissions being admitted.

Closing

Dr Woolaver thanked the organisers and particularly Ioana Moraru for her administrative support. She expressed her gratitude on behalf of the whole project team for the participants in providing such a rich and fascinating discussion of what might, on its surface, appear to be a relatively technical issue and expressed the hope that this conversation continue.

Conclusions

The panel presentations, keynote address and discussions throughout the day highlighted several important areas surrounding the *amicus curiae* that deserve ongoing research and attention. These include the considerations for potential *amici curiae* when preparing to submit a brief, the criteria adopted to admit briefs, and the impact of *amicus curiae* briefs on international criminal proceedings. The following section distils some of the key discussion points raised during the roundtable.

Preparation

1. *Why apply*. Potential applicants should consider the reasons for acting as an *amicus curiae*, including:
    a. Strategy: How does the proposed topic relate to their core individual or organisational strategic priorities? How will it conflict or supplement other activities, including trial monitoring?
    b. Expertise: Is the proposed topic within the applicant's expertise? Is the applicant the best actor to provide advice on the proposed topic?
    c. Benefits: What benefit might the *amicus curiae* brief bring to the trial process, as well as to the applicant? (This might include legal, broader policy, or reputational outcomes).
    d. Costs: What resources/tools/avenues might be needed to support the *amicus curiae* process?
    e. Alternatives: What other tools/avenues might bring similar benefits or outcomes? (Peer reviewed articles, NGO reports, other forms of advocacy). Which options appear transparent and ethical? Are there

other actors such as local organisations who could instead be encouraged or assisted to apply?

f. Planning for collaboration: Who should draft the *amicus curiae* application and submission? Is legal advice required? Is there a benefit to partnering with another actor, such as a local or international NGO or academic?
g. Internal Controls and Ethics: What internal review and risk or control procedures might be relevant or appropriate? Are there any conflicts of interest, reputational risks, or ethical complexities? Has the applicant been in contact or have a relationship with any of the parties?

2. *Preparation.* There are many factors to consider in preparing to act as *amicus curiae*, including:

   a. Collaboration: Which other actors including local and/or multi-national NGOs, academics, state representatives or other experts could or should assist or partner to ensure a high quality *amicus curiae* application and submissions?
   b. Timing: When will the relevant Chamber hear the topic of the submissions? At what stage of proceedings will the proposed submissions most aid in the determination of the case?
   c. Forum: Which court, case or proceedings are most appropriate for the proposed submissions? What is the background and expertise of the Bench? Are they from a common law or civil law background? How would the submissions assist the individuals who make up the Bench to reach their decision? How have other similar applications been treated in the past?
   d. Audience and stakeholders: What other actors or groups comprise the intended audience for the brief? Who will the applicant 'speak for' in its submissions? What political sensitivities should be taken into account?
   e. Rules: What practice directions, rules and codes of conduct apply to submitting *amicus curiae* briefs? What criteria or additional rules has the Court adopted in the past toward *amici curiae*?
   f. Refine the topic: Define the parameters of the proposed submissions. Include focused arguments that directly relate to the applicant's expertise and the contested issue before the Chambers.

Applications

3. *Topics*: Participants suggested that while the ICC's relatively comprehensive legal framework and resources might appear to limit the need for *amicus curiae* briefs, there are several areas where such submissions could assist:
   a. Areas of novel or unsettled law or procedure, including issues of state cooperation, complementarity, immunity and statehood.

b. Unfamiliar national laws and legal practices, including how national legal proceedings operate in practice.
c. Comparative legal analysis, including international human rights and international humanitarian law, as well as information about different national laws or procedures.
d. Analysis of particular factual situations in some circumstances. (Where the information would otherwise unavailable to the Court, including potentially in admissibility proceedings).
e. Sociological, cultural, or linguistic research, especially in country situations or regarding topics that are less familiar to the Court.
f. In response to any call or standing invitation for submissions or interventions on a matter, such as in relation to reparations.

4. *Applications* to appear as an *amicus curiae* might address:
   a. The Rules: *Amicus curiae* applications should follow any practice directions, rules or practices that specify what applications should include. In the absence of clear rules, the Practice Direction on Amicus Curiae Submissions before the Special Tribunal for Lebanon may provide a useful guide.[14]
   b. Adequate information: the addressee Judge or Chamber, contact information, references to any documents the application responds to.
   c. The applicant's identity, qualifications, contact details and the reason for their interest in the case.
   d. The issues to be addressed by the brief and the nature of the proposed analysis. Subject to each tribunal's practice, avoid annexing the entire submission unless this is accepted practice.
   e. How and why the submissions will aid in the determination of the issue. (This is crucial.)
   f. Any conflicts of interest, including any contact or relationships the applicant may have with the parties, as well as – if appropriate – the source of any request, payment or donor funding that supports the work for the *amicus curiae* brief.
   g. Style: Maintain a professional style, but adjust for the intended audience(s). Unnecessarily emotive or advocacy-style language may reduce the likelihood of being accepted.
5. *Providing oral or written* amicus curiae *submissions*. The above considerations relating to applications remain relevant for preparing submissions, as well as:
   a. Abiding by any rules, page limits, or time deadlines.
   b. Considering whether or how to react to any submissions that the parties make in response to the application or submissions.
   c. Planning any complementary advocacy activities or publicity.

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[14] Available at https://www.stl-tsl.org/en/documents/stl-documents/code-of-conduct-and-practice-directions/practice-directions/1402-practice-direction-on-amicus-curiae-submissions-before-the-special-tribunal-for-lebanon (accessed 20 January 2015).

d. Deciding whether and how to fairly advise the parties of the intended submissions.
e. *Ethical and fair trial issues*:
    i. Referring to the ICC Code of Conduct, which applies to *amici curiae* applicants before the ICC.
    ii. Considering how to ensure the applicant acts with 'integrity and diligence, honourably, freely, independently, expeditiously and conscientiously…'
    iii. Deciding whether to request, accept or make payment for any services related to preparing the *amicus curiae* submissions and how to disclose such decisions.

Responding to Applications and Briefs

6. *Criteria*: Common reasons why *amicus curiae* applications are refused include:
    a. Not following the correct procedures.
    b. The application being provided at the wrong time, when the Chamber is not competent to hear the matter, or where the matter is no longer relevant.
    c. The application might unduly delay proceedings.
    d. The applicant lacked appropriate expertise.
    e. The proposed information was not relevant or necessary to help aid in determining the case.
    f. The submissions would intrude upon the judicial functions of the court or the role of any of the parties, or would duplicate the submissions of the parties.
7. *Judicial practice*: Other matters that might be considered in judicial processes include:
    a. Indicating through open calls or invitations the topics or areas where it might be useful to receive *amicus curiae* briefs.
    b. Providing clear reasoning in admissibility decisions. That is, providing transparent guidance that could prevent future rejections, including by explaining why the proposed submissions would or would not be desirable or of assistance in the given case.
    c. Considering comparative practice at other international legal mechanisms.
    d. Since all *amici curiae* will have some 'interest' in the proceedings, considering how to provide greater transparency as to the nature or scope of permissible interests.
    e. Imposing and enforcing reasonable and feasible page limits and deadlines to reduce the risk of delaying proceedings, but still allowing adequate time for submissions to be prepared.
    f. Cite/reference *amici curiae* submissions that have been taken into account during judicial deliberations in decisions and judgments.
    g. Act in a transparent manner regarding advice received or solicited regarding a matter before the court.

h. Consider whether practice directions or regulations relating to the practice of *amicus curiae* briefs ought to be drafted.

8. *Evaluation*. *Amici curiae* might consider reviewing each experience of applying to act as an *amicus curiae* to:
   a. Compare the judicial, policy and reputational impact against initial expectations.
   b. Review internal procedures for deciding whether to act as *amicus curiae*.
   c. Document and apply any lessons learned regarding the application or submissions-drafting procedures.
   d. Publicise and leverage any positive impact through other forms of advocacy.
   e. Identify any opportunities for undertaking or providing training or experience-sharing with other actors.

Selected *Amicus Curiae* Rules

ICC: Rule 103 Amicus curiae and other forms of submission

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

ICTY and ICTR: Rule 74. Amicus Curiae

A Chamber may, if it considers it desirable for the proper determination of the

case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

ECCC: Rule 33. *Amicus curiae* Briefs

1. At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.

2. Briefs under this Rule shall be filed with the Greffier of the Co-Investigating Judges or Chamber concerned, who shall provide copies to the Co-Prosecutors and the lawyers for the other parties, who shall be afforded the opportunity to respond.

SCSL: Rule 74: *Amicus Curiae (amended 7 March 2003)*

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to make submissions on any issue specified by the Chamber.

STL: Rule 131: Third Parties and *Amicus Curiae*

(A) The Trial Chamber may decide, after hearing the Parties, that it would assist the proper determination of the case to invite or grant leave to a State, organisation or person to make written submissions on any issue, or to allow a State, organisation or person to appear before it as *amicus curiae*.

(B) The Parties shall have the opportunity to respond to any submissions made by *amicus curiae* or third parties under paragraph (A).

Program

The *Amicus Curiae* in International Criminal Justice

Venue: Leiden University - Campus The Hague
Schouwburgstraat 2
2511 VA The Hague

Date: Monday 18 January 2016
Time: 9:30 am – 6:00 pm

Program

9:30-9:45	Welcome Carsten Stahn, Grotius Centre Sarah Williams, Australian Human Rights Centre
9:45-10:30	Keynote *What is the Role of the Amicus Curiae?* William Schabas, Middlesex University
10:30-11:00	Morning Tea
11:00-12:30	Panel 1 *Strategy and Impact of Amicus Curiae Brief* Judge David Re, STL Göran Sluiter, Universiteit van Amsterdam Rupert Skilbeck, OSJI
12:30-1:30	Lunch
1:30-3:00	Panel 2 *Co-opting the amicus? The amicus as defence, the amicus prosecutor and victims or states as amicus* Gaëlle Carayon, Redress Steven Powles, Doughty Street Chambers Colleen Rohan, ADC-ICTY Manuel Ventura, STL

3:00-3:30	Afternoon Tea	
3:30-5:00	Panel 3	
	Managing the Amicus Process: Procedural implications, ethical challenges and future directions	
		Judge Howard Morrison, ICC
		Michael G Karnavas, ECCC, ICC
		Helen Brady, OTP, ICC
		Aurélie Roche-Mair, IBA
5:00-5:15	Closing	
		Hannah Woolaver, UCT
5:15-6:00	Drinks	

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Participant List

The Role of *Amicus Curiae* in International Criminal Justice

List of attendees

Ms. Tanja Erika Andersen Czelusniak, Royal Norwegian Embassy
Ms. Helen Brady, International Criminal Court
Mr. Matthew Cannock, Amnesty International
Ms. Gaëlle Carayon, Redress
Mr. Shehzad Charania, British Embassy
Ms. Carrie Comer, International Federation for Human Rights
Mr. Mikel Delagrange, Victims Participation and Reparations Section
Mr. Daniel Eck, International Bar Association
Ms. Lindsay Freeman, International Bar Association
Mr. Miguel Angel Gonzalez Ocampo, Embassy of Colombia
Ms. Catherine van Hoogstraten, The Hague University of Applied Sciences
Mr. Michael G Karnavas, ECCC
Ms. Katharina Kofler, Austrian Embassy
Ambassador H E Brett Mason, Embassy of Australia
Prof. Guénaël Mettraux, University of Amsterdam/Doughty Street Chambers
Judge Howard Morrison, International Criminal Court
Ms. Meital Nir-tal, Embassy of Israel
Ms. Emma Palmer, UNSW Australia
Judge Raul Pangalangan, International Criminal Court
Mr. Steven Powels, Doughty Street Chambers
Ms. Lucia Prados, Mexican Embassy to The Netherlands
Judge David Re, Special Tribunal for Lebanon
Ms. Aurélie Roche-Mair, International Bar Association
Ms. Colleen Rohan, ADC-ICTY
Prof. William Schabas, Middlesex University/Leiden University
Ms. Neelu Shanker, Embassy of Canada
Mr. Rupert Skilbeck, Open Society Justice Initiative
Prof. Göran Sluiter, University of Amsterdam
Ms. Simran Sohi, Amnesty International
Prof. Carsten Stahn, Grotius Centre for International Legal Studies
Ms. Anastasiia Tatarenko, ADC-ICTY
Mr. Manuel Ventura, Special Tribunal for Lebanon
Ms. Jimena Viveros, Alvarez International Criminal Court
Ms. Alix Vuillemin, Grendel Coalition for the International Criminal Court
Dr. Sarah Williams, UNSW Australia
Dr. Hannah Woolaver, University of Cape Town