
Shaping the Law: Civil Society Influence at International Criminal Courts

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Introduction

The following summarizes an event held by the International Law Programme at Chatham House in association with Doughty Street Chambers on 25 January 2016.¹ The meeting considered the opportunities for civil society actors to participate in the formal processes of international criminal justice at the national and international level.

The meeting was not held under the Chatham House Rule.

Civil society influence at international criminal courts and tribunals

Civil society played a significant role in the establishment of the international criminal justice system. It was the advocacy work of non-governmental organizations (NGOs), among others, that at the Rome Conference in 1998 convinced states of the importance of an International Criminal Court (ICC), which is complementary to national jurisdiction and has the mandate to end impunity for the perpetrators of international crimes. Since this landmark interaction, the role of NGOs in the processes of the ICC has been rather problematic. Introducing an external voice into a criminal trial may impinge upon the fairness of the trial, particularly if the civil society actor is seen to have an interest in the outcome. Nevertheless, the statutes of international criminal courts and tribunals provide explicit avenues for civil society participation.² This section will focus on three such avenues: the *amicus curiae* brief, communications containing information that international crimes may have been committed, and representations in reparations proceedings.

The *amicus curiae* brief

There is little consensus on the precise function of the *amicus curiae* at international criminal courts and tribunals. The translation of the term is ‘friend of the court’, which was originally adopted by the English criminal justice system; although not a party to the case, the *amicus* offers information as a neutral, impartial adviser. By comparison, the American criminal justice system allows for the *amicus* to act as an advocate before the court, whereas other legal systems do not recognize the concept at all, but may allow other avenues for third parties to intervene in proceedings. Where the use of the *amicus curiae* is permitted, it may take the form of a written submission or oral testimony on a legal and/or factual issue before a court.

The *amicus curiae* brief before the ICC

At any stage of proceedings, a chamber of the ICC may invite or permit a civil society organization to submit an observation on any issue that the chamber deems appropriate. Furthermore, the *amici curiae* fall within the scope of the ICC Code of Professional Conduct for Counsel, and the Court will allow such a representation if it considers it desirable for the proper determination of the case.³ Invitations issued by the Court to submit an *amicus curiae* brief have been rare. Therefore, in the majority of cases, civil society organizations have had to apply to the Court to obtain permission to provide *amicus* submissions.

There appears to be mixed practice among chambers regarding their acceptance of an application to submit an *amicus* brief. Some cases have suggested that the brief will only be accepted on the condition that it provides indispensable assistance to the Court. In other cases, a lower threshold seems to have

¹ This summary was prepared by Jack Stewart.

² See, for example, Article 15 and Article 75(3), Rome Statute and Rule 103, ICC Rules of Procedure and Evidence (RPE), Rule 74, ICTY and ICTR RPE.

³ Rule 103, ICC RPE.

been applied. Approximately 30 applications have been made by NGOs to appear as an *amicus* before the Court, of which only one-third were accepted.⁴ The ICC judges have indicated that *amicus* briefs from NGOs were accepted only 'sparsely'.⁵ The Court has generally been reluctant to embrace *amicus* briefs, in an effort to avoid complicating proceedings.⁶

Based on the available case law, a number of necessary preconditions for a successful application were highlighted. Most importantly, the proposed submission ought to be of assistance to the Court. In testing whether a brief will assist, there is first a temporal aspect – that is, the issue of concern must be relevant and it must be a live issue before a particular chamber. Second, the application must be submitted in a timely manner and must not be likely to delay the proceedings substantially. Third, the application must establish that the organization has expertise on the issue of concern and that the expertise would not otherwise be available to the Court. Establishing the necessary expertise has proved difficult for some civil society organizations. An organization may refer to its advocacy experience on an issue to prove expertise, but on at least one occasion this advocacy role has meant that the applicant found it more difficult to establish its capacity to make legal submissions.⁷ Chambers seem willing to distinguish between organizations that have an interest in a particular issue before the Court and organizations that have an interest in the outcome of the case. Finally, the submission that the organization intends to make must not intrude on the Court's inherent functions of applying the law and evaluating evidence.

Chambers appear divided on the question of whether *amicus* briefs should focus merely on legal issues or on factual issues as well. Most successful applications have focused on legal issues. However, it was noted that the submission of factual briefs will be necessary as the Court is likely to be more in need of contextual information than international criminal law assistance.

One notable example mentioned was the submission by Lawyers for Justice in Libya and Redress Trust on the situation in Libya.⁸ It was unsurprising for the Court to accept the submission given that the Libya situation was one of the most complicated cases to come before the Court, and the Court did not have the insight and information necessary to determine the issues before it. The acceptance of the *amicus* brief was welcomed as an example of civil society providing the Court with the information necessary to determine the issues before it. The reason given by the Court for granting the submission was that the applicants 'have been following and closely monitoring the institutional developments that have been taking place pursuant to the end of the revolution in Libya'.⁹ Further, the Court noted that the applicants 'do not purport to speak on behalf of specific victims, victim-applicants or potential applicants who seek to participate in proceedings nor to take a position as to the merits of the admissibility challenge'.¹⁰ However, it was mentioned that even if an application to make an *amicus* brief is successful, it remains unclear what impact this brief has on the judgment of the Court, as the ICC does not always make reference to *amicus* submissions in its judgments.

⁴ This information was accurate as of December 2015.

⁵ Discussion at Brandeis University with Court Judges, 2015. Scott, M. and Swigart, L. (2015), *2015 BIJJ International Courts, Local Actors*, Brandeis Institute for International Judges, 4–8 January 2015, <https://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/BIJJ2015.pdf>.

⁶ See Stahn, C. and Williams, S. (2016), speech given at an event entitled 'The Amicus Curiae in International Criminal Justice Program', held on 18 January 2016 at Leiden University, The Hague.

⁷ See, for example, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 16 August 2013. Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence.

⁸ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, 8 June 2012. Observations pursuant to Rule 103 of the Rules of Procedure and Evidence (RPE).

⁹ *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, 18 May 2012. Decision on the "Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", para. 4.

¹⁰ *Ibid.*

The *amicus curiae* brief before other international courts and tribunals

The use of *amicus* briefs by other international courts and tribunals is varied. The Special Court for Sierra Leone (SCSL),¹¹ the Inter-American Court of Human Rights (IACtHR),¹² the European Court of Human Rights (ECtHR)¹³ and the Extraordinary Chambers in the Courts of Cambodia (ECCC)¹⁴ have extensively used the *amicus* brief, not only allowing briefs to be submitted but also using and referencing those briefs in their judgments. By comparison, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) allow the use of the *amicus* brief but often do not refer to the submissions in their judgments.¹⁵ In addition, while the ICC generally publishes *amicus* briefs, the ad hoc tribunals generally do not, thus making it nearly impossible to assess their impact. One particularly active court was the SCSL. In contrast to the ICTY and ICTR, which have not solicited briefs very often, the SCSL has actively sought submissions from academics and NGOs. For example, it sought assistance from outside the SCSL on issues such as the immunity of former Liberian president Charles Taylor, the status of international law on the prohibition of the recruitment of children into the armed forces, the validity of amnesties, and whether human rights reporters have privilege to withhold their sources in the same manner as journalists. Unlike ICTY and ICTR judgments, where references to *amicus* submissions are scarce, the SCSL fully summarizes submissions at the beginning of the judgments together with those of the prosecution and defence. In some judgments, the SCSL explicitly adopted the conclusions made by the *amicus*. Concern was raised as to whether it is appropriate for a court to be engaged in both seeking out *amicus* briefs and, by clarifying what it requires from an *amicus*, shaping the content of those briefs.

The ICTY invited a number of individuals and organizations to appear in several cases, and was fairly proactive in soliciting such briefs. In particular, the *Karadžić* case submissions were sought from a number of different civil society actors.¹⁶ However, the judgments of the ICTY rarely refer to an *amicus* submission, which does not necessarily imply that civil society participation was not appreciated or did not manage to have an impact on the judgments. Instead, and in the absence of explicit referrals to *amicus* briefs, it signals a more indirect inclusion of their work.

By comparison, the ICTR did not actively seek *amicus* submissions, particularly from NGOs. Thus, the influence of *amicus* briefs on the ICTR is limited. However, civil society actors do apply to the Court and their impact can be significant. Most notably, civil society had significant influence in the *Akayesu* case.¹⁷ In this case, almost 30 NGOs filed a joint brief requesting that the Prosecutor amend the indictment to include crimes of sexual violence. Though the Trial Chamber never decided on the admissibility of this brief, the Prosecutor did in fact amend the indictment, suggesting that the *amicus* brief had some influence on that decision.

The ECCC demonstrates extensive use of *amicus* submissions to fuel discussions around fundamental legal questions. The most important issue on which it requested an *amicus* brief was that of Joint Criminal Enterprise (JCE). The Court undertook a more comprehensive review of this issue than any other international court. It was therefore necessary for the Court to seek out expert advice on this complex legal issue. Contrary to the practice of ‘The Hague-based tribunals’, on one occasion the Court copied an entire *amicus* brief verbatim. Yet, the Court failed to acknowledge the source of that brief, which in turned raised concerns of transparency with respect to its functioning.

¹¹ Rule 74, SCSL RPE.

¹² Article 44, IACtHR RPE.

¹³ Article 36, ECHR.

¹⁴ Rule 33, ECCC Internal Rules.

¹⁵ Rule 74, ICTY and ICTR RPE.

¹⁶ *The Prosecutor v Karadžić*, IT-95-5/18.

¹⁷ *The Prosecutor v Akayesu*, ICTR-96-4-T.

The ECtHR has been very receptive to *amicus* briefs. Indeed, the practice is reflected in Article 36 of the European Convention on Human Rights (ECHR) and allows the President of the Court, in the interest of the proper administration of justice, to invite any person who is not the applicant to submit written comments or take part in hearings.¹⁸ It has been suggested that those entitled to intervene may be entities, groups or individuals with relevant specialist legal expertise or factual knowledge, and that the participation of public interest groups has positively contributed to the Court's judgments on important issues.¹⁹

The example of the Iraqi High Tribunal, a body established under Iraqi national law to try Iraqis accused of international crimes, demonstrates the necessity of outside assistance to courts concerned with international crimes. When the Tribunal was established, the International Bar Association (IBA) was asked to provide assistance in the form of a small committee of experts. The judges of the Tribunal filed eight requests to the committee to provide its expert opinion to the Tribunal on a number of issues, including the principal sources of international standards of judicial independence, the practice and decisions of international courts in respect of multiple convictions and multiple sentences, the application of JCE in cases of genocide, and the relevance of head of state immunity. This practice was evaluated to be successful because the committee was providing expert briefs on the international legal standards on the issues of concern, thus providing additional expertise to the Tribunal that it otherwise would not have had.

The IACtHR has a long history of accepting *amicus* briefs and clearly values their use. In *Kimel v Argentina* the Court was of the opinion that '*amici curiae* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court'.²⁰ In this context, it was remarked that the democratic, pluralistic and participatory character of a state can be reflected within a process of intervention by way of *amicus* briefs.

Communications to international criminal courts

Article 15 of the Rome Statute allows the ICC Prosecutor to receive information in relation to the commission of international crimes from intergovernmental organizations (IGOs) or NGOs, or 'other reliable sources that he or she deems appropriate'.²¹ This information is designed to assist in the Prosecutor's decision whether or not to proceed with a preliminary investigation into the alleged crimes and provides a crucial set of facts that may form the very scope of a case as a whole. This provision extends a potentially significant opportunity for civil society to directly influence the cases that may be brought before the ICC. The most recent statistics available show that by the end of October 2015, the Prosecutor had received 11,568 Article 15 communications since the ICC began functioning in July 2002.²² However, these statistics do not illustrate how many of these came from civil society actors. It is therefore difficult to assess which communications are prioritized.

The range of responses from the Prosecutor's office has been broad: from no response at all, to a letter acknowledging the application, to the issuing of a statement confirming that the office is keeping a particular situation under review, and to the commencement of a preliminary examination. An example of

¹⁸ Article 36(2), ECHR.

¹⁹ Bartholomeusz, L. (2005), 'The Amicus Curiae before International Courts and Tribunals', *Non-State Actors and International Law*, 5: 209–286, pp. 237 and 241.

²⁰ IACtHR, *Kimel v Argentina* (Merits, Reparations and Costs), 2 May 2008, para. 16.

²¹ Article 15(2), Rome Statute.

²² See ICC website, 'Preliminary Examinations', https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx.

the potential of Article 15 communications is the announcement of Prosecutor Fatou Bensouda that in June 2014 her office was reopening its investigations into the situation in Iraq on the basis of Article 15 communications received from two NGOs alleging the responsibility of UK military officials for war crimes between 2003 and 2008.²³ However, given the large number of Article 15 communications received by the Prosecutor, the relatively few cases under investigation attest to the reality that these communications are not guaranteed to have any impact on the activities of the ICC. It was concluded that these communications may have a broader, political role to play, but that they have not proved to be an opportunity for civil society to genuinely influence the Court in the manner that was initially hoped for when Article 15 was included in the Rome Statute.

Representations in reparations proceedings

Article 75 of the Rome Statute allows the ICC to invite representations from or on behalf of the convicted person, victims, other interested persons or interested states.²⁴ Civil society actors may therefore submit representations to the Court to express their views in reparations proceedings. If the Court does in fact invite such representations, it is, contrary to the *amicus* brief, under an obligation to take them into account.²⁵

Article 75 representations have been a successful avenue for civil society actors to make submissions to the ICC. In the *Lubanga* reparations hearing, five civil society organizations were allowed to submit written representations.²⁶ In the *Katanga* hearing, several NGOs were given permission to make submissions.²⁷ It was observed that the readiness to accept Article 75 representations could be linked to the fact that by the time the reparations hearing commences, a criminal conviction of the accused has already been obtained. Therefore, the fair-trial concerns that may arise when third parties intervene in a criminal trial lose some of their weight.

Civil society influence at domestic courts

The South African experience

South Africa has a progressive legal framework, which allows for the prosecution for international crimes in the domestic courts and, most relevant for the topic at hand, for civil society actors to participate in those proceedings. More specifically, avenues created by domestic law enable civil society actors to actively contribute to the investigation and prosecution of individuals responsible for the commission of international crimes. At the same time, it has been remarked that the effective functioning of this legal framework is impaired by a clear lack of political will on the part of South African authorities.

The legal framework

South Africa became a party to the ICC in 2002 and subsequently adopted domestic legislation implementing the Rome Statute in the form of the International Criminal Court Act 2002 (ICC Act). The ICC Act is significant for three reasons. First, it establishes the core crimes of the ICC (genocide, crimes

²³ See ICC website, communication submitted by the European Centre for Constitutional and Human Rights and Public Interest Lawyers, https://www.icc-cpi.int/EN_Menu/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/pages/iraq.aspx.

²⁴ Article 75(3), Rome Statute.

²⁵ *Ibid.*

²⁶ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, 3 March 2015.

²⁷ See, for example, Redress Trust observations pursuant to Article 75 of the Rome Statute, *Prosecutor v Germain Katanga*, ICC-01/04-01/07.

against humanity and war crimes) as crimes under domestic law. Second, it asserts universal jurisdiction over the crimes under the condition that the accused is present in the territory of South Africa after the alleged commission of the crime,²⁸ while the location of the alleged commission of the crime is irrelevant. Third, the core crimes are designated as priority crimes, meaning that responsibility for their investigation and prosecution is assigned to an elite law enforcement agency, the Directorate for Priority Crime Investigation (DPCI).

Civil society interventions

Civil society actors in South Africa have intervened in matters of international criminal justice and have thereby helped to shape the legal landscape regarding international crimes in three ways. First, they have experienced considerable success in their campaign for the domestication of international treaties, such as the Rome Statute. Second, they have been active through research, advocacy and evidence gathering to initiating judicial proceedings. And third, they have acted as *amici curiae* in judicial proceedings.

The ICC Act, in particular the establishment of universal jurisdiction over international crimes, has been used by civil society organizations in South Africa to push for the initiation of domestic investigations into international crimes committed outside the territory of South Africa. Despite the DPCI's responsibility to investigate and prosecute international crimes, it has failed to initiate investigations on its own initiative. In response to this inaction, civil society actors have collected evidence themselves on the commission of international crimes outside South Africa. Civil society actors have then presented this evidence to the authorities requesting that an official investigation be commenced. Nevertheless, the authorities have remained unwilling to act voluntarily in response to such evidence. Therefore the next step for civil society organizations has been to obtain binding court orders requiring the South African authorities to open official investigations – including, most notably, into acts of torture amounting to a crime against humanity allegedly committed by Zimbabwean officials in the run-up to the 2008 presidential elections; and into crimes against humanity allegedly committed by the president of Madagascar. In both instances civil society actors were successful in obtaining court orders which led to the initiation of universal jurisdiction-based investigations.

The proceedings brought by civil society organizations concerning the Zimbabwean officials also provided an opportunity for South Africa's constitutional court to authoritatively interpret key provisions of the ICC Act. Crucially, the Court found that investigations based on universal jurisdiction could be opened even without the presence of the accused in South Africa. Further, the Court held that the South African authorities were under an obligation to open such investigations. These interventions therefore not only had a significant impact in relation to the initiation of investigations into a particular case, but also provided the opportunity for the Constitutional Court to shape the wider legal framework concerning the investigation and prosecution of international crimes in South Africa.

Proceedings have also been initiated by civil society actors to obtain arrest warrants for individuals suspected of having committed international crimes, both in relation to those sought to be prosecuted domestically and also to enforce ICC arrest warrants. The most significant example was in relation to Sudanese President Omar al-Bashir, who has been the subject of two ICC arrest warrants since 2009.²⁹ Bashir visited South Africa as the representative of Sudan to the African Union summit in June 2015.

²⁸ Section 4(3)(c), ICC Act 2002.

²⁹ On 4 March 2009, the Pre-Trial Chamber I issued a warrant of arrest for President Bashir for crimes against humanity. See Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009. On 12 July 2010, the ICC issued a second warrant of arrest for genocide; see Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010.

South Africa failed to arrest him despite its obligation to do so under the Rome Statute.³⁰ This failure occurred despite concerted efforts by civil society organizations, which brought urgent applications to the High Court to obtain a judicial order to enforce the ICC arrest warrant domestically.³¹ Such an order was in fact granted, yet the government failed to comply with it, resulting in a constitutional crisis in South Africa. Though civil society action was not able to compel the South African government to comply with its international obligations, the action none the less yielded noteworthy results. The binding High Court order affirmed the domestic enforceability of an ICC arrest warrant and rejected the government's flawed interpretation of Article 98 of the Rome Statute, which it claimed protected Bashir from arrest. Moreover, it seems that there has also been a clear impact in the political arena, as South Africa reversed a decision to re-invite Bashir in 2016.

It was emphasized that the above actions were only possible as a result of the rules that have been developed by the South African judiciary in relation to the ICC Act. Under these rules, any party acting in the public interest has standing to initiate proceedings under the ICC Act. Civil society groups are therefore able to bring proceedings either on behalf of victims or on grounds of public interest.

Civil society organizations in South Africa have also played a significant role by way of the *amicus curiae* brief. Any person interested in any matter before a court is able to apply to act as an *amicus*. The Constitutional Court has held that in so far as *amici curiae* introduce additional, new and relevant perspectives leading to more nuanced judicial decisions, their participation in the court process is to be welcomed. Most prominently, several individuals and organizations submitted briefs in the case against Zimbabwean officials accused of crimes against humanity in the form of acts of state-sanctioned torture mentioned above.³² Whereas the briefs were not cited in the judgment of the Court, it was argued that on a closer reading it becomes apparent that the briefs did in fact have an impact on the decision, evidencing that the *amicus* process constitutes an effective avenue by which civil society can influence domestic judicial decisions on issues of international criminal justice in South Africa.

Civil society influence in the wider international criminal justice arena

It was concluded that many of the problems associated with civil society participation at international criminal courts and tribunals, in particular the ICC, are of a political rather than legal character. For this reason, it appears that many civil society actors are turning away from participating within the formal processes of international criminal courts. Instead, they may focus on long-term, political strategies as an alternative means of participating in the international criminal justice system. However, this turn to a political strategy should be undertaken with caution since attempting to work on both sides of politics and law might negatively affect NGOs' credibility. In other words, it follows that if NGOs express themselves politically, the likelihood of their being able to participate before an international criminal court or tribunal is drastically reduced.

³⁰ Articles 86 and 87, Rome Statute.

³¹ *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015), High Court of South Africa, Gauteng Division, Pretoria, 24 June 2015.

³² The Southern Africa Litigation Centre (SALC) and the Zimbabwean Exiles Forum (ZEF) have launched a landmark case in the North Gauteng High Court to compel South Africa to abide by its legal obligations to investigate and prosecute high-level Zimbabwean officials accused of crimes against humanity.