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Changing role of friends of the court in the International Courts and Tribunals

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Abstract. The paper examines the practice and procedures of a range of international courts and tribunals with regard to the submission of *amicus curiae* briefs by non-governmental actors. The focus is on the recent practice in the ICJ, WTO dispute settlement system and in the regional human rights bodies, as well as in international criminal tribunals, with a view to identifying whether any common rules or approaches exist. The study sets out the current rules regarding the receipt of *amicus curiae* briefs and considers the procedural rules apply to the submission of such briefs. The paper focuses on the ways are international court and tribunal able to use the information and arguments submitted by *amicus curiae* briefs.

1. Introduction

This paper deals with the potential role of the *amicus curiae* briefs in dispute settlement proceedings before international courts and tribunals.[1] In particular, the focus is on the opportunities for NGOs and other non-governmental actors to make factual and legal arguments available to international courts and tribunals in the form of *amicus curiae* briefs, i.e., as a friend of the court. The human rights tribunals and the criminal tribunals have already adopted 'rules of procedure' allowing this possibility. This paper explores the implications of applying these rights in relation to other international courts and tribunals which deal with matters of public interest such as the International Court of Justice (ICJ), World Trade Organisation (WTO), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY).

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2. Role of *amicus curiae*

The amicus appears to have been originally a bystander who, without any direct interest in the litigation, intervened in his own initiative to make a suggestion to the court on matters of fact and law within his knowledge.[2] An amicus brief should generally contain materials submitted to the court and are additional to that submitted by any other parties. It may support the argument of one party or indeed support the argument of one party in part and another party in part.

The *amicus curiae* (hereafter, AC) can contribute to the work on international courts and tribunals in a number of ways. For example, an amicus can bring to the attention of the tribunal, factual and legal information, which, for whatever reason, have not been adduced by the parties to a dispute. This function is of particular significance in novel and complex areas. The amicus can also serve to alert a tribunal to relevant sources of additional information and expertise which tribunal might usefully draw upon in order to fulfil its functions. An amicus can submit information as to the broader implications of decisions beyond the immediate interests of the parties to a dispute, particularly where a decision may have a significant impact on matters of public interest, thus serving to enhance public participation in international decision making.[3] The advantages[4] of having AC is that it is less costly and time consuming than a full case, and they can share litigation burden with other parties. They are generally not bound by the decision and can raise issues omitted by states for any number of reasons. They can raise any issues the court could raise on its own motion and is not limited by questions presented to them or to matters pleaded by the parties. The AC can participate on the basis of a general interest, which could be their desire to prevent a collusive suit, to protect unrepresented persons or the public interest, or to point out the error of the court. The AC, such as the non-governmental organisations (hereafter, NGOs) can represent global interests

[2] E. Angell, "The Amicus Curiae Brief: American Development of English Institution", *ICLQ* 16 (1967), 1017. Generally: S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy", *Yale Law Journal* 72 (1963), 694–721. The difference between AC and third party submission is that the former, known as the 'friend of the court' submits arguments independently of the parties to the dispute. The third party needs to establish a legal interest in the outcome of the case. The right of access is not dependent upon the consent of the parties. The third party will need to prove, *prima facie*, that their right or protected interest will be affected by the outcome of the case. This is not necessary with an amicus brief.

[3] Supplementary AC brief on the *Shrimp-Turtle Dispute*, submitted to the Appellate Body of the WTO by WWF International, July 1998.

[4] See generally: Dinah Shelton, "The Participation of Non-governmental Organisations in International Judicial Proceedings", *AJIL* 88 (1994), 611 at 611–612.

because they do not have allegiances to certain mandates.[5] AC brief gives a chance to maintain the consistency and uniformity of case law.[6] It can provide comparative law analysis and practical information that the parties may be unable to marshal and the court would otherwise be unable to acquire. Where there is no clear precedent and where the court is clearly divided, the amicus brief can assist the court in new areas of law where the impact is particularly broad. Moreover, AC is nobody's 'opponent' or 'ally', he works neutrally and objectively[7] and can raise new grounds.[8]

However, the AC cannot control the direction or management of the proceedings. They are not served with papers or other relevant documents, cannot examine or cross-examine witnesses and cannot be heard without special leave of the court. They are not entitled to any cost or compensation. It is often argued that submission of AC briefs may cause difficulties such as an additional burden upon the parties, who will be obliged to address additional sets of arguments, as well as on the tribunal, whose scare time will be further pressed. There is also an added question based on floodgate argument.[9] In addition, arguments could be made as to the undesirability of providing strong

[5] For general discussion on the definition of NGO: Martin A. Olz, 'Non-Governmental Organisations in Regional Human Rights Systems', *Columbia Human Rights Law Review* (1997), 308–372; Daniel C. Esty, "Why the World Trade organisation needs Environmental NGOs" (published by ICTSD).

[6] *Lobo Machado* v. *Portugal* (1996 ECHR): The Court stated: 'The member of the Attorney-General's department in its capacity as an institution of the judicial system had no other duty than to assist the court by giving a completely independent, objective and impartial written opinion super partes on the legal issues raised. In this way he contributed to ensuring good administration of justice. The objective function of *amicus curiae* discharged by the Deputy Attorney-General as a guarantor of the consistency of the Supreme Court's case-law and protector of the public interest in employment cases was known to the public and especially to lawyers.'

[7] *Vermulen* v. *Belgium* (1996 ECHR): In Court's view, the procureur général acts, in civil proceedings, as an adversary of either of the parties is to misunderstand the nature of the institution, since his role – of what one might call an *amicus curiae* – is solely that of a neutral and objective guardian of the lawfulness of the proceedings and of the uniformity and consistency of the case-law. To that extent, his participation in the hearing and – in an advisory capacity – in the deliberations in no way offends against the principle of equality of arms as he is placed above the parties.

[8] *Akayesu* case (1998 ICTR): The AC brief provided evidence and testimony to the court in order to add rape and sexual violence with the charges brought against Akayesu. In contrast, in *Vermulen* v. *Belgium* (1996 ECHR) the Court stated that the argument should be strictly confined to the grounds raised by the appellant and the procureur général's department could not of its own motion raise any others, even ones based on public policy. The latter's role was therefore even more distinct from that of the only true adversaries, the parties to the case.

[9] In the Namibia proceedings, the register refused the application stating that the court would be 'unwilling to open the floodgates to what might be a vast amount of proffered assistance' [1972 ICJ Pleadings (2 Legal Consequences) at 639].

lobbies with the possibility of influencing the outcome of international justice through the presentation of AC briefs, while the same possibilities are not available to less affluent groups. The paper considers these arguments in the context of discussions as to the proper role of the AC in the international dispute settlement.

3. Status of AC briefs in the International Court of Justice

There is scope for the NGOs to submit AC briefs under advisory jurisdiction. The Court may, at any time, entrust any individual, body, bureau, commission, or other organisation that it may select, with the task of carrying out an enquiry or giving an expert opinion.[10] A change of the Rules would be necessary to admit NGOs in the contentious proceedings. The court can allow NGO to submit expert opinion in contentious proceedings. The NGOs wishing to make their views known could ask one of the parties to submit information as annex without necessarily agreeing to it.[11] From 1946 till 1996, there are 75 contentious cases and 22 advisory cases. Among the 61 judgements made, 39 were on merits and 23 offered advisory opinions. Each year, a vast number of applications submitted from private persons and rejected thereafter.[12]

Article 96 of the Charter of the United Nations provides that the General Assembly or the Security Council may request ICJ to give an advisory opinion on any question. Under certain conditions, other organs and specialised agencies of the UN can request such opinions. It does not give the Member States of the UN standing to seek advisory opinions.[13] In relation to advisory proceedings, the court's Statute provides for the participation of international organisations considered likely to be able to furnish information on the question at hand.[14] The expressions 'international organisation' in Article 66(2)[15] and 'organisations' in Article 66(4)[16] may be contrasted

[10] Article 50 of the ICJ Statute. See Appendix I

[11] For example, see: WTO DSU *Shrimp Turtle case.*

[12] In 1994–1995, there were 1,200 applications and in 1995–1996, there were 1,200 applications. They were rejected as Article 34 allows application from member states, not from individuals.

[13] Article 65(1). See Appendix I.

[14] ICJ Statute, Art. 66(2), see Appendix I.

[15] When a request for the advisory opinion under Art. 96 is received, all states are entitled to appear, and any 'international organisation' considered likely to be able to furnish information on the question, shall be notified by the Registrar 'that the court will be prepared to receive ... written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.'

[16] It allows organisations that have presented written or oral submissions to comment on the statements made by states or other organisations, as the court decides in particular case.