The Management of Third-Party Amicus Participation before International Criminal Tribunals: Juggling Efficiency and Legitimacy

Introduction:

The management of third-party amicus participation before international courts and tribunals is often conceived of as a trade-off between legitimacy and efficiency. A standard narrative is that third-party amici generate administrative burdens, but their participation may enhance the legitimacy of the process in cases that have societal ramifications that extend beyond the narrow concerns of the parties. The more nuanced reality is that, depending on how third-party amicus participation is managed, it has the potential to enhance or undermine both the efficiency and the legitimacy of the proceedings. International Criminal Tribunals (ICTs) provide a rich body of evidence for the analysis of this phenomenon.

Our paper will review the practice of third-party amicus participation before ICTs and consider its impact on the efficiency and legitimacy of the international criminal process. We conceive of 'legitimacy' as a 'sociological' quality, derived from the actual and perceived fairness of the proceedings, rather than from the formal source of an ICT's authority. Our conception of 'efficiency' is based on a more prosaic dictionary definition: 'the ability to do something or produce something without wasting materials, time, or energy'. Against that conceptual backdrop our review will focus on the provenance of third-party interventions, their nature and their impact (if any) on the reasoning of the ICT in a given case.

Our findings suggest that a significant proportion of third-party amicus submissions before ICTs are from western NGOs and individuals. We will consider the implications of this in light of the North/South tensions that exist in the field of international criminal law. Could a lack of diversity among third-party amici encourage criticism that proceedings before ICTs are, or appear to be, unfairly skewed in favour of western interests? If the ICC's caseload is focused on Africa, does legitimacy demand that the third-party amici who give voice to the public interest be drawn – at least to some extent – from sectors of the African public? Can third-party amicus participation be harnessed in such a way as to improve the efficiency of the proceedings (e.g. through the use of solicited expert submissions)?

Our paper is organised as follows:

In Section I we set out our conceptual framework, drawing heavily on the work of other scholars. We concentrate in particular on a concept of 'sociological legitimacy' that serves as a useful lens through which to view the work of international institutions. This leads into a discussion of the way in which international courts and tribunals are required to juggle the twin (and sometimes competing) imperatives of legitimacy and efficiency. We then consider the role that third-party amici play in this context, and the challenge of 'representativeness' that has arisen in certain forums – most notably WTO dispute settlement – where third-party amicus participation has been curtailed due to the perception that amici were pursuing narrow agendas and vested interests.

In Section II we examine the practice of third-party amici before ICTs. We look here at the regulatory frameworks that prevail in the various ICTs; at the quantitative data (number of submissions, from whom, etc); and at various case studies in which ICTs have engaged with third-party amici in interesting ways.

In Section III we discuss the implications of our empirical findings. We conclude that while there appears to be a diversity deficit among third-party amici in ICTs, it is not overwhelming, and the participation of these actors tends to be managed fairly judiciously. The third-party amici who receive most attention in the decisions of ICTs tend to be academic experts intervening to offer their opinions on points of law. The interventions of NGOs are occasionally relied on, but there is little evidence that these interventions are being used as vehicles for the pursuit of narrow agendas and vested interests.

To the extent that the 'representativeness' of third-party amici is a problem in ICTs, there is no obvious procedural panacea. The issue has deep structural roots and the solution may lie in the strengthening of civil society in the Global South. Nevertheless, when it comes to juggling the twin imperatives of efficiency and legitimacy, we observe that some procedural models for managing third-party amici are better than others. In our final comments we evaluate which models are best suited to encouraging amicus submissions that are: (a) helpful to judges for the determination of cases within ICTs; and (b) broadly representative of the public whose interests the submissions sometimes purport to give voice to.

I. 'Legitimacy' and ICTs

A. 'Legitimacy'

Much ink has been spilt over the slippery concept of 'legitimacy' in the context of international institutions.

Fallon provides a useful general starting point. He describes three concepts of legitimacy: legal, sociological and moral.[1] 'Legal' legitimacy, he explains, is judged by what is legal and what is not.[2] The 'sociological' legitimacy of institutions and norms, on the other hand, is defined according to the manner in which a certain, relevant public perceives a norm or an institution, and whether this norm or institution is regarded "as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[3] 'Moral' legitimacy "is a function of moral justifiability or respect-worthiness."[4] Accordingly, a norm or institution may rest on proper legal foundations and enjoy broad public support, but nevertheless be regarded as morally corrupt and thus lacking 'moral' legitimacy.

Authors focusing specifically on the work of ICTs have also drawn on the concept of 'legitimacy'.[5] Their focus tends to be on what Fallon would call the 'sociological' aspect of legitimacy. According to Luban, for instance, the legitimacy of ICTs is derived "not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments."[6] He claims that ICTs must deliver "champagne-quality due process" in order to be considered as 'legitimate'.[7]

In a similar vein, Murphy stresses the importance of appearance and perception in the context of 'legitimacy':[8]

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[1] Richard Fallon, "Legitimacy and the constitution" (2005) 118(6) Harvard Law Review 1787 [Fallon].
[2] Ibid 1794.
[3] Ibid 1795.
[4] Ibid 1796.
[5] See for example Margaret deGuzman, "Gravity and the Legitimacy of the International Criminal Court" (2008) 32(5) Fordham International Law Journal 1400 [deGuzman]; Marlies Glasius, "Do International Criminal Courts require democratic legitimacy?" (2012) 23(1) The European Journal of Internatioanl Law 43; Hitomi Takemura, "Reconsidering the meaning and actuality of the legitimacy of the International Criminal Court" (2012) 4(2) Amsterdam Law Forum [Takemura]; Luban, *infra* note 6; Murphy, *infra* note 8; Danner, *infra* note 12.
[6] David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law" (2008) Georgetown Public Law Research Paper No 1154117 [Luban] at 14.
[7] Luban, ibid 14-15; See also other authors, like Grier Ulfstein, "International courts and judges: independence, interaction and legitimacy" (2013-2014) New York Journal of International Law and Politics 849 [Ulfstein] at 864-865.
[8] Sean Murphy, "Aggression. Legitimacy and the International Criminal Court" (2010) 20(4) The European Journal of International Law 1147 [Murphy] at 1148.

> "[T]he ICC (and its half-sibling ad hoc international criminal tribunals) depends heavily on the perception of its authority to galvanize the support of states and non-state actors. Without that support, the ability of the ICC to investigate suspects, to take into custody indictees, and to issue authoritative decisions will be severely inhibited, if not crippled."

Drawing on Franck's work on legitimacy in international institutions, Murphy adds that the legitimacy of institutions like ICTs is tightly related to compliance: "Where an international rule or institution lacked legitimacy, its 'compliance pull' would be very weak."[9]

We adopt a similar approach in the present article, drawing on a 'sociological' concept of legitimacy in order to determine the impact that the interventions of third-party amici have on the legitimacy of ICTs. We submit that this requires particular attention to be paid to the impact of amicus interventions on the communities most closely affected by the work of ICTs. In taking this line we are following a fairly well trodden path.

Shany, for example, points to instances where a lack of legitimacy in the eyes of local communities has frustrated the work of ICTs.[10] Hobbs, for his part, connects the sociological legitimacy of ICTs with the procedural principle of 'fair reflection', according to which the composition of ICTs should reflect the societies that are directly affected by these courts.[11]

The ICC in particular tends to be criticised for being 'remote from ... the places where the crimes it adjudicates occur'.[12] Hornsby sums up the ICC's 'image problem' in Africa thus:[13]

> "Perceptions that this important international institution discriminates and disproportionately focuses on Africa, African leaders, and African related human rights abuses exist and need to be addressed."

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[9] Murphy, ibid at 1148.
[10] Yuval Shany, "How can international criminal courts have a greater impact on national criminal proceedings? Lessons from the first two decades of international criminal justice in operation" (2013) 46(3) Israel Law Review 431 [Shany] at 449-450.
[11] Harry Hobbs, "Hybrid Tribunals and the composition of the court: In search of sociological legitimacy" (2016) 16(2) Chicago Journal of International Law 484 [Hobbs] at 487; Samantha Besson, "Legal philosophical issues of international adjudication: Getting over the *amour impossible* between international law and adjudication" in Romano, Alter & Shany, (Eds) *The Oxford Handbook of International Adjudication* (OUP, 2013) at 431-432.
[12] Allison Marston Danner, "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court" (2003) 97 American Journal of International Law 510 [Danner] at 10.
[13] David Hornsby, "The International Criminal Court in Africa: A crisis of legitimacy?" (2015) opencanada.org, available online: https://www.opencanada.org/features/the-international-criminal-court-in-africa-a-crisis-of-legitimacy/

A common theme that emerges from some of these critiques is that the legitimacy of international courts in general (and ICTs in particular) is tied to the quality of procedural justice these institutions mete out, which is in turn linked to some extent to the question of 'representativeness', or the manner in which affected communities are involved in the legal proceedings. [14] Much discussion turns on questions relating to the composition of the judiciary in ICTs,[15] or the geographical location of ICTs. For example, Shany questions the wisdom of the decision not to appoint Rwandan judges to the ICTR, as well as the fact that ICTR and ICTY proceedings were not held in Rwanda or in the affected Balkan states.[16] He concludes as follows:[17]

> "Strengthening the ties between the international criminal courts and local communities could have improved the local degree of acquaintance with the courts and their work, and increase faith in their potential ability to serve the interests of justice. It could have further underscored for judges and other court officials the existence of an important domestic audience for their decisions."

Indeed, formative decisions in the establishment of the ICTR – such as the decision locate the tribunal and incarceration facilities away from Rwanda – contributed towards a perception within Rwanda that the ICTR was remote, and have been cited among the reasons for Rwanda's decision to vote against the Tribunal's establishment.[18] When it comes to the ICTY, the Tribunal's legacy has been undermined, perhaps fatally so, by the absence of 'buy in' among local communities, as vividly illustrated by Milanovic.[19]

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[14] The connection between procedural rules and the legitimacy of international courts was stressed more generally by Armin von Bogdandy and Ingo Venzke: "We understand developments in rules of procedure with regard to more transparency and opportunities of participation as an expression of the changing conception of international decisions and as part of attempts that aim at strengthening the capacity of legitimation that is nested in the judicial process itself." See Armin von Bogdandy & Ingo Venzke "In whose name? An investigation of international courts' public authority and its democratic justification" (2012) 23(1) The European Journal of International Law 7 [von Bogdandy & Venzke] at 25; see also Grossman, *infra* note 24.

[15] Hobbs, *supra* note 11 at 487.

[16] Shany, *supra* note 10 at 450.

[17] Shany, *supra* note 10 at 450.

[18] Catherine Cisse, "The end of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda" (1998) 1(1) Yearbook of International Humanitarian Law 161, at 163-164.

[19] Marko Milanovic, "The Impact of the ICTY on the Former Yugloslavia: An Anticipatory Post-Mortem' AJIL (forthcoming): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755505; and, of particular relevance to the present discussion: "Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences" Georgetown Journal of International Law (forthcoming): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757151.

The problem is arguably inherent in any attempt to dispense transitional justice. The diverse array of stakeholders includes – in addition to the types of parties that participate in normal criminal proceedings – the communities that have been torn apart by the acts that ICTs have been set up to deal with, and the international actors whose efforts (and money) have gone into establishing the process. Local concerns and sensibilities have arguably not always be given the attention they deserve, and some commentators have been critical of the way they have been overlooked. Refik Hodzic is particularly scathing:

> The ICTY has never truly made a commitment to the people of the former Yugoslavia … because, simply, it has never seen them as its primary constituency. Instead, to the vast majority of judges and lawyers who shaped its development and jurisprudence, they remained merely the objects of Tribunal's cases, while the only people they saw themselves accountable to were the policymakers in New York, Washington, Berlin and other key capitals ...[20]

Others, like Haslam, have argued that in order to 'operate in a meaningful way' the ICTR needed to be 'responsive to civil society claims'.[21]

Against a backdrop of local hostility (at worst) or indifference and misunderstanding (at best) concerning the activities of ICTs, third-party amici may have a valuable role to play in proceedings, in the sense that they are potentially in a position to give voice to the interests of constituencies who are affected by the work of an ICT but are not directly participating in proceedings. With this in mind, we wish to suggest in this article that it is worth considering the 'representativeness' of third-party amici, especially those who purport to give voice to the public interest, as this can impact on the overall perception of the legitimacy of the procedural justice meted out by ICTs.

B. Legitimacy, efficiency and amicus participation

Third-party amicus participation is becoming increasingly popular in domestic[22] and international[23] litigation. This trend is reflected in the practice of ICTs.[24] The question of how

[20] Cited (with approval) by Milanovic in the GJIL paper, ibid at 46.
[21] Emily Haslam, "Law, Civil Society and Contested Justice" in M-E Dembour and T Kelly (eds) *Paths to International Justice: Social and Legal Perspectives* (CUP 2007) 58-9. She argues (at 61-62) that amici can play an important role in bringing a 'broader range of voices' before the court.
[22] See a description of these phenomena, including data, in Avidan Kent & Jamie Trinidad, "International law scholars as amici curiae: An emerging dialogue (of the deaf)?", 29:4 Leiden Journal of International Law (forthcoming, 2016), [Kent & Trinidad] 23.
[23] See ibid for a more detailed review of the term 'amicus', as well as the increase in amicus participation in domestic and international litigation.
[24] The rules and approaches of international courts range between the rather limited model of the ICJ, to the ultra-permissive approach of the IACtHR. For a complete review see Bartholomeusz, *infra* note 35.

amicus submissions are impacting on the work of ICTs is therefore a matter of increasing importance.

It is often argued that amicus participation promotes values like openness, transparency and inclusiveness, and therefore *a priori* enhances the legitimacy of international courts and tribunals.[25] On such a view, the main barriers to amicus participation are the time and cost of processing third-party submissions, which place burdens on court registries, judges and parties.

The weight attached to such 'efficiency' concerns can be significant. Indeed, in the case of contentious proceedings in the ICJ, efficiency concerns are determinative. The World Court's refusal to accept such submissions derives from its desire to avoid having to deal with a 'vast amount of unwanted proffered assistance'.[26] Even in advisory cases the Court is reticent, and it is easy to understand why. In the advisory proceedings on the *Legality of Nuclear Weapons* for example, the ICJ received 'thousands of letters' from third parties "appealing both to the Members' conscience and to the public conscience".[27] A more liberal approach towards the acceptance of amicus briefs may well have resulted in that case in the submission of thousands of amicus briefs, and a major – debilitating – administrative headache.

Nevertheless, when it comes to forums that are more open towards amicus participation, the view is often expressed that as long as the 'efficiency' burdens are properly managed, the net contribution of third-party amici is to enhance the legitimacy of proceedings. Distinguished authors have taken this line in relation to, inter alia, the WTO dispute resolution system[28] and the Investor-State Dispute Settlement Process (ISDS):[29] According to the ICSID *Suez* Tribunal:[30]

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[25] See for example Nienke Grossman, "The Normative legitimacy of international courts" (2013) 86 Temple Law Review 61 [Grossman].

[26] See the relevant correspondence; Letter from Professor WM Reisman to the Registrar, 10 September 1970, ICJ Pleadings 1971, Vol. II, 636; Letter from the Registrar to Professor Reisman, 6 November 1970, ICJ Pleadings 1971, Vol. II, at 638, at 638-639.

[27] Emphasis supplied, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Separate Opinion of Judge Guillaume* [1996] at 287.

[28] Marceau and Hurley.

[29] Emphasis supplied. Eric De Brabandere "NGOs and the "public interest": The legality and rationale of amicus curiae interventions in international economic and investment disputes" (2011) 12(1) Chicago Journal of International Law 85 [De Brabandere]; One of the present authors has also made a connection between the ISDS' legitimacy and amicus participation, see Avidan Kent, "The principle of public participation in NAFTA Chapter 11 Disputes" in Hoi Kong & Kinvin Wroth, *NAFTA and sustainable development: History, experience and prospects for reform* (CUP, 2015) [Kent]; Avidan Kent, "Renewable energy disputes before international economic tribunals: A case for institutional 'greening'?" (2015) 12(3) Transnational Dispute Management.

[30] Emphasis is not in the origin. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19 (Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005), at para 22.

> "The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function."

The ICC's first prosecutor, Luis Moreno-Ocampo, while not referring explicitly to amici, has argued in relation to third-party involvement with the work of the Court that:[31]

> "transparency and consistency in our work will ensure our legitimacy, and help to increase other actors' commitment to, and cooperation with, the Court and the OTP."

In our submission, such views tend to gloss over the problem of 'representativeness' that we identified earlier. Amici before ICTs (especially NGO amici) may claim to be voice-pieces for affected communities but, like judges in ICTs, they are not always the products of those communities. Claims by amici that they are giving voice to the interests of affected communities should not be accepted at face value. The experience of the WTO dispute resolution regime suggests that ICTs should at least be alert to the possibility that the interventions of third-party amici may be helping to fuel a 'representativeness deficit'.

Despite lofty proclamations that 'open[ing] the door to public observation and participation' was necessary to 'maintain legitimacy', the WTO today adopts a highly restrictive approach towards the participation of amici curiae in the resolution of disputes.[32] This approach stems in large part from the perception among developing states that in practice, the amici with the financial means to intervene in proceedings tend to represent the interests of western civil society, to the detriment of developing states.[33] There is also widespread suspicion within the WTO regime that western amici often serve as vehicles for the promotion of narrow vested commercial interests.[34]

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[31] Emphasis supplied. Luis Moreno-Ocampo, "The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the law" Speech, London School of Economics, available online: http://www.lse.ac.uk/assets/richmedia/channels/publicLecturesAndEvents/transcripts/20081007_LuisMorenoOcampo_tr.pdf .

[32] Emphasis supplied. Gabrielle Marceau & Mikella Hurley, "Transparency and Public Participation in the WTO: A report card on WTO transparency mechanisms" (2012) 4(1) Trade Law & Development 19 [Marceau & Hurley] at 36.

[33] WTO, "Minutes of meeting held in the Centre William Rappard on 23 October 2002" WTO Doc. WT/DSB/M/134 [WTO minutes 2002] at para 63.

[34] Reported comments of Brazil, WTO minutes 2002, *supra* note **Error! Bookmark not defined.** at para 71.

Such concerns go beyond straightforward conflicts of interest of the type that international courts and tribunals are required to deal with from time to time (the *Gotovina & Markac* case in the ICTY provides an obvious example of a straightforward conflict of interest, where a request to intervene was refused due to the fact, inter alia, that one of the would-be amici had a previous association with the defence team and that the ICTY therefore had "concerns about the objectivity of the Proposed Amicus Curiae").[35] 'Representativeness', as a component of legitimacy, turns on a broader perception of things, across a number of different constituencies. The identities of third-party amici, and the type of arguments they make when purporting to give voice to the public interest, are therefore of some relevance.

Following an extensive review of the practice of amicus participation before a variety of international courts and tribunals, Bartholomeusz concludes cautiously that "[i]t may be that wider participation in international jurisdictions' proceedings promotes their legitimacy, at least among those seeking to participate."[36] In so concluding, he offers the important insight that the same action could enhance the sociological legitimacy of an institution in the eyes of some groups (e.g. civil society organizations), and reduce it in the eyes of others (e.g. governments).[37] This, we submit, is crucial.

In the following section we review the practice of amicus participation in ICTs in light of the conceptual framework we have outlined in this section. This is impossible to do comprehensively without adopting a rather 'broad brush' approach. Our intention, after setting out the procedural rules governing amicus participation before ICTs, is to identify the provenance of the interventions and discuss their impact.

II. THIRD-PARTY AMICI IN ICTs

A. The procedural rules

The procedural rules concerning amicus participation in proceedings before ICTs are short and open-ended, especially when compared with those of other international tribunals. The

[35] *Prosecutor v. Ante Gotovina and Mladen Markac*, (Decision on the application and proposed amicus curiae brief) (2012) Case No. IT-06-90-A at para 12.
[36] Emphasis supplied. Lance Bartholomeusz, "The Amicus Curiae before international courts and tribunals" (2005) 5 Non-State Actors and International Law 209 [Bartholomeusz] at 283
[37] Former President Gilbert Guillaume commented that states should be protected against 'powerful pressure groups which besiege them today with the support of the mass media'. For that reason, he argued, that the ICJ should better ward off unwanted amicus curiae submissions.1

'pioneer' provision is Rule 74 of the ICTY Rules, reproduced identically in Rule 74 of the ICTR Rules.[38] It states that:

> "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."

Rule 103 of the ICC is a slightly modified, more elaborate version of the same rule:

> "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."

The rules of 'hybrid' criminal tribunals are also broadly similar. The Special Court for Sierra Leone (SCSL) for example, uses almost the same language as Rule 74 ICTY/ICTY described above.[39] A very similar approach can be found in Rule 33 of ECCC's Internal Rules and Rule 131 of the Special Tribunal For Lebanon (STFL), the latter introducing an extra procedural layer in the form of an obligation to 'hear the parties' before approving a submission.

The formal regulatory framework governing amicus participation in ICTs is therefore permissive – more so than, say, the NAFTA or UNCITRAL rules.[40] Moreover, apparent restrictions in ICT rules tend not to be interpreted particularly strictly in practice. For instance, the ICTR/ICTY rule that amicus briefs may be submitted only "on any issue *specified by the Chamber*" would seem to imply on its face that the Chamber will only accept amicus submissions on issues it has previously specified. In practice however, it is clear that with rare

[38] Also other tribunals like the Special Court for Sierra Leone adopted an almost identical provision.
[39] With one difference – the right to appear before the SCLS is omitted from Art 74 of the SCSL Rules.
[40] The rules concerning NAFTA Chapter 11 disputes (the NAFTA's Statement of the Free Trade Commission on Non-Disputing Party Participation), as well as the recent (2014) UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration, include more specific restrictions on amici submissions, while the ICTs rules reviewed in this section includes almost no formal restrictions. See discussion below.

exceptions (see for example the *Blaskic* case discussed below) amici do not wait for the court to 'specify' issues but rather attempt to intervene on whatever issue they see fit. It is perhaps due to this practice that the later ICC Rules do not include the same limitation, and in fact 'reverse' the order of things – the Court will decide whether the topic is appropriate only after reviewing the submission, rather than specifying in advance which topics merit submissions.

While the rules of other courts and tribunals demand that amici demonstrate a "significant interest in the proceeding",[41] an "insight that is different from that of the disputing parties", and on some occasions set limits concerning the length of these submissions;[42] no such requirements can be found in the rules presented above.

In 1997 the ICTY sought to flesh out the procedural requirements in a note innocuously entitled 'information concerning the submission of *amicus curiae* briefs',[43] which in fact contains some strong regulatory prescriptions. It provides for instance that amici should state their contact with any party to the case in order to prevent conflicts of interest,[44] Furthermore, amici are also expressly limited to intervening on questions of law,[45] a prescription that has served to 'cull' the number of potential amici.[46] The Tribunal also reserves a right to set a page limit in order to prevent voluminous submissions.

The way the amicus rules have been framed in ICTs suggests the framers shared a few basic presumptions. First, third-party amicus participation was to be treated as, basically, a good thing. Second, it is worth paying an 'efficiency' price in order to encourage amicus participation. Third, the rules should be flexible enough to allow ICTs a broad discretion, thus enabling them to manage these 'efficiency' concerns.

This liberal approach arguably reflects the mood of the 1990s, when the international community was enthralled by the rise of the so-called 'global civil society'.[47] The sympathetic

[41] See for example Rule 37(2) ICSID Rules.
[42] See for example Article 3(b) of the NAFTA's Statement of the Free Trade Commission on non-disputing party participation.
[43] ICTY, "Information concerning the submission of *amicus curiae* briefs" (1997) IT/122, available online: http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it122_amicuscuriae_briefs_en.pdf [ICTY Information note]
[44] Ibid Art 3(f).
[45] Ibid Art 3(b).
[46] See for example in *Prosecutor vs Karadzic & Mladic,* where the ICTY rejected a brief presented by a psychiatrist concerning "the relationship between ethnic cleansing and psychiatric science", as such did not comment on issues that are related to law.
[47] See for example the attention given to non-governmental organization in Agenda 21, adopted in the 1992 Rio Earth Summit; a simple document search reveals that the term 'non-governmental organizations' is mentioned no less than 183 times in this document.

environment provided a fertile breeding ground for the self-appointed representatives of 'global civil society', whose funding increased and whose numbers proliferated.[48] A received wisdom was established during this period which deemed public participation essential for closing a "democratic gap" in international law and politics, thus enhancing the legitimacy of international institutions.[49] Against this backdrop, the eagerness of third-party amici to intervene before ICTs was perceived as basically a benevolent phenomenon, and the question of their 'representativeness' received scant attention. Having said that, the rules give ICTs the scope to reflect evolving concerns in their approach towards the management of amici. In the sections that follow we assess whether they do so in practice.

B. The Practice

As noted above, third-party amicus participation is on the increase in domestic[50] and international[51] litigation, a trend that is reflected in the practice of ICTs.[52] NGOs, law schools' clinics and academics are increasingly viewing amicus participation as a vehicle for promoting their agendas. In the UK and US courts the trend has been dramatic.[53]At the international level participation varies from forum to forum with some court, like the IACtHR and the ECtHR, receiving a disproportionate number of amicus briefs (the IACtHR for example, has received more than 500 amicus briefs since its establishment, mostly from NGOs, individuals, and law school clinics).[54]

In seeking to identify trends in amicus practice before ICTs we have employed a rather crude methodology. We have relied on the search engines on the websites of ICTs and searched manually for as many examples of third-party amicus participation as we could find. It should be stressed that we are concerned exclusively with *third-party* amici – ostensibly independent,

[48] See in Felix Dodds, Michael Strauss & Maurice Strong, *The Only Earth: The long road via Rio to sustainable development* (Routledge, 2012) at 230.
[49] See discussion in Karin Bäckstrand (2013) "Civil Society Participation in Sustainable Development Diplomacy. Toward Stakeholder Democracy", Paper presented at the 8th pan-European Conference on International Relations, 18-22 September, 2013, Warsaw, Poland http://www.eisa-net.org/be-bruga/eisa/files/events/warsaw2013/B%C3%A4ckstrandStakeholderDemocracyWarsaw2013.pdf
[50] See a description of these phenomena, including data, in Kent & Trinidad, *supra* note 22.
[51] ibid.
[52] The rules and approaches of international courts range between the rather limited model of the ICJ, to the ultra-permissive approach of the IACtHR. For a complete review see Bartholomeusz, *infra* note 35.
[53] See a description of these phenomena, including data, in Kent & Trinidad, *supra* note 22.
[54] J Pasqualucci, The practice and procedure of the Inter-American Court of Human Rights, (2nd ed. Cambridge University Press,2013) 72. For a list of amici appearing before the IACtHR, see F. Rivera Juaristi, 'The Amicus Curiae in the Inter-American Court of Human Rights (1982-2013)', SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488073 .

unattached interveners – not, for example, with court-appointed representatives of otherwise unrepresented defendants, to whom the 'amicus' label is also attached.[55] We have tried to be as comprehensive as possible in our review of third-party amicus practice, but some instances of amicus participation may have slipped through the cracks. It is worth bearing in mind in this respect that attempts to intervene will not always be documented publicly. While we cannot therefore claim to have conducted an exhaustive survey of the practice, the data presented here is helpful when it comes to identifying broad patterns of participation.

(i) The Numbers

We identified 46 amici submissions before the ICC, with amici attempting to intervene in 15 out of 21 cases. 21 of the 46 amici came from the states in which the facts of the adjudicated dispute took place (i.e. 'local' amici), while 25 amici submissions were submitted by amici that were based in foreign states (i.e. 'foreign' amici). One case (*Lubanga*) attracted ten submissions – a disproportionately high number.

In ICTR proceedings, there were 23 submissions from 'local' amici (ten of these coming from either the government of Rwanda or the Kigali Bar Association) and 20 submissions by foreign amici.

In ICTY proceedings, 38 briefs were submitted by foreign amici and nine by local amici. The foreign/local gap is largely attributable to one case (*Blaskic*) in which 20 amicus submissions were made, 19 of which were by 'foreign' actors.

The numbers therefore reveal that a significant (though not overwhelming) proportion of third-party amicus interventions are by foreign actors. In and of itself, this does not tell us very much. It is certainly not sufficient to disclose the existence of a representativeness deficit. Field research would be required in order to gain a meaningful understanding of how these interventions are perceived among local communities, and that would take us beyond the confines of the present study. Nevertheless, a closer look at some instances of third-party amicus participation before ICTs yields some useful qualitative insights. Specifically, it is helpful to consider whether, and to what extent, third-party amicus submissions influence judicial decisions in ICTs.

[55] See the detailed review of the term 'amicus curiae' in Kent & Trinidad, *supra* note 22.

(ii) The influence of third-party amici before ICTs

Identifying 'influence' is a methodological minefield. It should be acknowledged from the outset that third party entities like governments and civil society organizations are able to influence the operation of ICTs in a variety of *informal* ways, and amicus submissions are only one strategy that they may adopt.[56] Haslam describes for example one amicus (the Coalition for Woman's Human Rights in Conflict Situation) that, despite being ignored by the *Akayesu* Tribunal, managed to influence the case through informal interactions with the ICTR prosecutor, which led eventually to the indictment being amended.[57]

It should also be noted that the effect of an amicus intervention on a judge's thinking may sometimes be subtle or not openly acknowledged, thus making it difficult to discern 'influence' from judgments and other court records (even when one reads between the lines).[58] Judges are understandably reticent when it comes to discussing such matters, even off the record.

Notwithstanding the above, there is some value in looking at what is actually said in decisions of ICTs. After all, the concept of sociological legitimacy that we articulated in Section I relates to the way things *appear* to be, not necessarily to the way things *are*. Two cases in particular stand out when it comes to visible influence: the *Blaskic* case[59] (ICTY) and the *Taylor* case[60] (SCSL).

In *Blaskic*, following an open solicitation of amicus briefs by the ICTY, no less than 20 amici attempted to intervene.[61] Their submissions touched almost exclusively on matters of law, notably on the ICTY's power to issue a *subpoena duces tecum* to a sovereign state or to governmental officials, and the appropriate remedies in the case of non-compliance with such an order.[62] These attempts were undoubtedly influential. The ICTY relied on,[63] and engaged

[56] Emily Haslam, "Law, civil society and contested justice at the International Criminal Tribunal for Rwanda" In Marie-Bénédicte Dembour & Tobias Kelly (eds.) *Paths to International Justice* (Cambridge University Press, 2007) [Haslam].
[57] Haslam, ibid 61-62.
[58] Haslam, ibid 56 at 61.
[59] *Prosecutor v. Tihomir Blaskic* (Judgement on the request of the Republic of Croatia for review of the decision of trial chamber II of 18 July 1997) (1997) Case No. IT-95-1 [*Blaskic*].
[60] Prosecutor v. Taylor (Charles Ghankay), Decision on Immunity from Jurisdiction, Case No SCSL2003-01-I, SCSL-03-01-I-059, ICL 25 (SCSL 2004), 31st May 2004, Appeals Chamber (SCSL) [*Taylor*].
[61] *Blaskic*, *supra* note 59 para 10.
[62] *Blaskic*, *supra* note 59.
[63] The ICTY cited the amici 11 times in its decision, *Blaskic*, *supra* note 59, in footnotes 20-22, 38, 49, 61, 64, 71, 74, 75, 79, 101.

with[64] the amicus submissions in its decision to a considerable extent. Indeed the Tribunal's decision is peppered with phrases such as "as suggested by the amicus…",[65] and, "as demonstrated in the valuable survey submitted by amicus curiae…"[66], all of which indicate that the Tribunal not only relied heavily on these submissions but was also keen to acknowledge openly that it had done so.[67]

In *Taylor*[68], the SCSL reviewed the submissions of three amici in detail. The submissions of two of the amici (Professors Sands and Orentlicher) had been solicited directly by the SCSL, so it is hardly surprising that the Court relied on these submissions explicitly. Indeed, it went so far as to adopt the conclusions of these two amici as its own,[69]and was quite open about this being reflected in the record:

> "For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assisted the court as *amicus curiae*."[70]

Other examples exist of visible reliance on amicus submissions. In the *Tadic* case (ICTY) for example, the contribution of one amicus (Professor Christine Chinkin[71]) was acknowledged,[72] cited, and relied on by the Tribunal with respect to several issues.[73]

In the *Kayishema* case,[74] the ICTR chose openly to rely on and accept the arguments of several amici (including Human Rights Watch) concerning the safety of witnesses and their treatment in Rwanda. The Tribunal gave much shorter shrift to the arguments of the Rwandan government, which also submitted an amicus brief in this case. The Tribunal reviewed the

[64] Ibid paras 21, 29, 30, 43, 57.
[65] Ibid para 21.
[66] Ibid para 57.
[67] Ibid paras 21, 29, 30, 43, 57.
[68] *Prosecutor v Taylor* (Charles Ghankay), Decision on Immunity from Jurisdiction, Case No SCSL-2003-01-I, SCSL-03-01-I-059, ICL 25 (SCSL 2004), 31st May 2004, Appeals Chamber (SCSL) [*Taylor*].

[69] *Taylor*, ibid paras 51 and 41.
[70] Para 41.
[71] Christine Chinkin, 'Amicus curiae brief on protective measures for victims and witnesses' submitted in *Prosecutor* v. *Dusko Tadic* (1996) Case No. IT-94-1-T.
[72] *Prosecutor* v. *Dusko Tadic* (1996) Case No. IT-94-1-T at para 10.
[73] Ibid, at paras 39, 46, 47, 56.
[74] *Prosecutor v. Fulgence Kayishema* (Decision on the prosecutor's request for referral of case to the republic of Rwanda, 16 December 2008) [*Kayishema*].

amicus submissions it had received in great detail,[75] and relied heavily on them (the footnotes in the 'discussion' part are dominated by references to the various amicus submissions).[76]

In the *Laurent Gbagbo case*,[77] despite the defendant's objections, the ICC decided to accept a request to intervene from a group of third-party amici. The Tribunal explained that the observations of the amici "appear to be of relevance", and "may be desirable for the proper determination of the appeal."[78] The submissions of the amici were eventually not considered by the ICC's Appeal Chamber,[79] on the basis that the subject matter of the submissions was not up for discussion in the appeal process.[80] Despite the decision of the Appeal Chamber, the decision of the Court to admit the amicus submissions shows openness in principle to this form of participation.

Other examples exist of judicially-acknowledged amicus briefs, although in some cases only oblique reference is made to them in official documents.[81] Our anecdotal, non-exhaustive review of the case law nevertheless suggests that third-party amici can have – and can be seen to have – real influence over the decision-making process in ICTs.

III. DISCUSSION

In a recent paper, Alter, Gathii and Hefler discuss the "backlash against international courts" in Africa, referring *inter alia* to the activities of foreign NGOs and their 'western' appearance as some of the reasons for certain African states' attempts to curtail the operation of international courts:[82]

> "While these NGOs hire skilled human rights lawyers, they make easy targets for political leaders like Mugabe, who discredit them as thinly veiled fronts for Western

[75] *Kayishema*, ibid paras 34-37.
[76] *Kayishema*, ibid paras 41-43.
[77] *Prosecutor v. Laurent Koudou Gbagbo* (Decision on the "request to submit amicus curiae observations") (2013) Case No. ICC-02/11-01/11 [Gbagbo amicus decision]
[78] *Gbagbo amicus decision*, ibid para 10.
[79] *Prosecutor v. Laurent Koudou Gbagbo* (Judgement on the appeal of the prosecutor) (2013) Case No. ICC-02/11-01/11[*Gbagbo, Judgment on the appeal*]
[80] *Gbagbo, Judgment on the appeal*, ibid para 54.
[81] Other more subtle references to amicus briefs can be found, for example, in *Prosecutor v Bemba Gombo* (decision from 15 June 2009) at FN 559.
[82] Karen Alter, James Gathii & Laurence Hefler, "Backlash against international courts in west, east and southern Africa: Causes and consequences" (2016) 27(2) The European Journal of International Law [Alter et al.] at 324.

> nations seeking to interfere with the internal politics of African nations. The location of these foreign-funded NGOs in the more constitutionally progressive South Africa adds to this perception."

Could the preponderance of 'foreign' amici before ICTs be contributing to the type of backlash that Alter et al are concerned with? Further research would be required in order to give a meaningful answer to that question.[83] There are plenty of other factors, far more central to the work of ICTs (e.g. decisions relating to indictments and sentencing) that are more likely – individually and cumulatively – to produce such a backlash. We nevertheless submit that it is important for ICTs to be mindful of the issue of representativeness when it comes to managing amicus participation, especially given the increase in amicus submissions in recent years and the fact that the sociological legitimacy of ICTs is so often called into question at a general level.

The evidence suggests that ICTs, perhaps aware of their 'image problems', do tend to tread carefully in their management of third-party amici. Harnessing this valuable resource to improve the decision-making process, while ensuring that the process is open to a broad range of third-party actors, requires a delicate balancing of interests. In our final remarks we discuss some of the techniques that ICTs have employed for achieving this balance, and offer some suggestions for improvement.

One of the most striking aspects of the practice examined in the preceding section is that most instances of ICTs engaging in detail with the submissions of third-party amici involve submissions by academic experts. Soliciting such submissions through direct invitation (as in *Taylor*) or indirectly (as in *Blaskic*) seems a valuable way of enhancing the efficiency of proceedings when complex points of law are at issue.

The *Blaskic* approach arguably represents a useful middle ground between the rigidity of the 'invited expert' model and the efficiency losses that might result from a general open-door policy for third-party amici. Moreover, if amici are aware that a certain court or tribunal is well disposed to receiving expert assistance in a certain case, but not in another case, they may be able to target their interventions more efficiently, for the benefit of all concerned.

[83] Following the publication of the above-cited article, Karen Alter has said she plans to focus future work in this area on the ICC (see interview with Joseph Weiler, EJIL Live, August 2016: http://ejil.org/episode.php?episode=24).

Having said that, the academic experts who intervene as third-party amici by ICTs are overwhelmingly drawn from the Global North. To some extent this may reflect the geographical distribution of leading universities, but the 'most highly qualified publicists of the various nations' are scattered around the various nations, and more could arguably be done by ICTs to reach out to a broader, more representative, pool of talent.

NGOs seek to intervene as third-party amici with greater frequency than academic experts, but their submissions are not openly relied upon by ICTs to the same extent. This does not necessarily mean that the NGO submissions do not influence the minds of the judges. However, the fact that the submissions of NGO amici are – as a matter of record – less 'visible' than those of academic experts, is surely deliberate. It may be relevant in this regard that a disproportionate number of NGO amici are both foreign (vis-à-vis the communities most directly affected by the work of a given ICT) *and* from the Global North (although without interviewing judges on this issue it is difficult to say whether they are conscious of not wanting to fuel a representativeness deficit by relying openly on submissions by the likes of Redress or Human Rights Watch, even if such submissions have actually proved helpful in the determination of the case).

International NGOs are themselves taking steps to address the representativeness deficit. Organizations such as Oxfam and Amnesty International are relocating to the Global South, partly with a view to enhancing their perceived legitimacy. Salil Shetty, Secretary General of Amnesty International, made the following statement concerning the organisation's decision to establish headquarter in Nairobi:

> "This legitimacy, and an authority, that comes from voices within the countries concerned packs a … powerful punch for Amnesty … It's easy for governments to dismiss human rights and say this is a western concept: but everything is totally different when you are there with people from the region – it really weakens the counter-argument."

NGOs looking to 'be there with the people' might consider involving local civil society more intensely when they intervene as amici before ICTs, perhaps through co-submissions with local organisations.

From the perspective of ICTs, more could arguably be done to facilitate amicus participation by local civil society organisations. Indeed, such organisations could serve as vital bridges

between ICTs and the communities most directly affected by their work. ICTs have the resources and know-how to reach out actively to local constituencies, to keep them informed of developments and where necessary to provide administrative support and advice to persons and organisations from those communities who wish to participate in proceedings as amici. A dedicated Amicus Officer, a role that for a time existed within the ICTY registry, could be tasked with performing this function.

A spike in local amicus participation would no doubt generate extra administrative burdens. It would however help to level the playing field between local and foreign entities that wish to intervene as third-party amici, and in doing so it would enhance the legitimacy of ICTs.