Civil Society and International Justice: Help or Hindrance?

1. Introduction

Earlier in the institute, participants examined the interrelationship of international judicial bodies and domestic actors as it plays out within institutions of government. In this session, the focus shifted to the particular role of local and international NGOs, as representatives of civil society, in the administration of international justice. The overarching question for this session was what role, if any, NGOs should have in proceedings in international courts and tribunals. This question invited discussion on the forms of interaction that already exist between NGOs and international judicial bodies, as well as the sharing of experiences and thoughts about good practice in this domain.

Participants were invited to consider two academic works that address aspects of the relationship between NGOs and international judicial bodies. First, a piece by Eduardo Szazí advocates for a stronger role for NGOs in international justice and describes forms of interaction between NGOs and international judicial and “quasi-judicial” bodies, including the ICJ, ICTY, ICTR, ICC, CJEU, ECtHR, IACtHR, WTO, and smaller regional bodies. Many of the forms of interaction he identifies, including participation in litigation both as a party and through submission of amicus curiae briefs, were discussed in depth during the session.

Second, an article by Anna Dolidze provides an overview of the developing role of amicus briefs in international proceedings in tribunals, including in criminal courts, human rights courts, the ICJ, the WTO AB, and ITLOS. From her compilation, participants could see a cautious growing use of amicus briefs in cases before international tribunals. Issues raised by Dolidze include whether amicus briefs are a positive development and what limitations should exist on submission and consideration of the briefs. This subject received robust consideration during the session.

In what follows, the different ways in which NGOs interact with international judicial bodies are presented from the perspective of the BIIJ participants. Following some general observations, two forms of interaction are discussed: those that are ancillary to judicial decision-making, and those that seek to influence the process of deciding cases.

2. Different ways in which NGOs interact with international judicial bodies

It was recognized at the outset of the discussion that the benefits and drawbacks of the increased involvement of NGOs in the pursuit of international justice were identifiable along a scale from wholly negative to wholly positive. This distinction was made a number of times in the session through the refrain “there are NGOs and then there are NGOs….” At one end of the spectrum were a relatively small number of very high caliber NGOs that assist the cause of international justice in many ways. At the other end were NGOs that engaged in manifestly one-sided advocacy.

To some extent, the nature of the interaction will depend on the profile of the NGO. Several participants pointed to credibility considerations...
when discussing how their courts and tribunals engaged with different civil society organizations. For example, one participant recounted learning that an NGO had provided misleading information to the court, which made the institution very cautious in the contacts it had with that organization thereafter. The type of NGO involved in international justice, and the ways in which it is involved, also depend on whether the institution is an international criminal, human rights, or inter-state dispute resolution body.

2.1 Activities that are ancillary to judicial decision making

The discussion began with an examination of the following NGO activities that are for the most part ancillary to judicial decision-making: lobbying, provision of technical support, representing the views of stakeholders, and the monitoring of international judicial bodies.

2.1.1 Lobbying

One participant saw the role of NGOs in lobbying for certain conduct by states as being the main contribution that NGOs can make to the cause of international justice. “What should be encouraged is essentially the impact on the behavior of states and their attitudes towards the court.” The ability of NGOs to influence political decision-making through advocacy and lobbying activities was seen as having exceptionally positive impacts in some circumstances.

One participant asserted that there was “no question at all that NGOs over the years have proven themselves to be indispensable to the creation and sustainability of some international criminal institutions.” Another pointed to the substantial contribution of NGOs in the establishment of the ICC as an example of the positive role that such organizations can play in the interests of international justice. Yet another participant recalled the role of the Coalition for the International Criminal Court (CICC), which, at the time of the entry into force of the Rome Statute, consisted of more than 1,000 NGOs. The CICC lobbied intensively in multiple countries to secure the 60 ratifications necessary for the Rome Statute to enter into force. The CICC was also seen as having played an instrumental role in reforming the process of electing judges to the ICC. A participant noted that, prior to establishing an Assembly of States Parties Advisory Committee on Nominations, “There was no vetting of the qualifications of judges who were nominated by countries. Rather unfortunate appointments were made, including judges who qualified under neither List A nor List B, as required in the Rome Statute. The Coalition set up an independent committee of eleven people for the 2011 elections... [and after vetting the candidates] publicly announced that of the fifteen or so nominees at the time, three were not qualified.” None of those three candidates was subsequently elected.

2.1.2 Provision of technical support

Harking back to the issue of the cost of international justice, touched upon during earlier discussions, one participant provided an example of how NGOs can be instrumental in the operation of international courts and tribunals where parent bodies, such as the United Nations, do not provide sufficient resources. Referring to the role of the International Bar Association (IBA) in the Tadić case, this participant explained: “the IBA was responsible for ensuring that the Tadić trial was a fair trial. The UN said that they would only pay for one lawyer. His lawyer had never observed, let alone conducted, a cross-examination. The IBA employed two British barristers as part of the team and then the UN took over the cost. This was hugely important to ensuring a fair trial.”

Similarly, in the inter-state dispute resolution context, one participant noted that NGO assistance to smaller states with limited resources involved in litigation before the WTO was considered positive. This topic was discussed in detail during BIIJ 2012, in particular the important role played by the Advisory Centre on WTO Law in assisting developing countries to write briefs and develop legal arguments.

2.1.3 Representing the views of stakeholders

It was recognized by participants that the role of NGOs in communicating the views of stakeholders
could have clearly political overtones. For example, some participants considered demonstrations organized by NGOs outside of international criminal courts and tribunals as unhelpful, if not necessarily harmful, to the interests of international justice. Other ways of representing the views of stakeholders were considered more beneficial to the administration of international justice. For example, the role of NGOs as facilitators of communication with different interest groups was seen as potentially very important. Speaking about a regional court, one participant noted that its decisions, which are binding on the member states, have “important cultural, value-laden implications… In those circumstances where the court is making law not just to the parties, but for the community, we listen to all voices interested in being heard on a topic like that.”

In the context of international criminal justice, one participant described the STL practice of inviting a wide spectrum of NGOs based in Beirut to The Hague to exchange views on the Tribunal. It was observed that “[The STL] shares with other international tribunals the problem of distance justice. Less than one fifth of [the] personnel are in Beirut. NGOs are an invaluable means of helping to get over that problem. [The STL] periodically invite[s] all NGOs in Beirut — not just those in favor of the Tribunal — to a meeting, which goes on for several hours… The result is a spectrum of opinion. There are direct criticisms but the opportunity to fire back is precious.”

In regard to the “legacy initiative” of the ICTY, one participant referred to conferences that had taken place in The Hague, Sarajevo, Zagreb and Belgrade, to which numerous NGOs were invited. The participant observed, “These conferences… were well-attended and the discussions were quite hot. Some people made a nuisance of themselves but [the conferences] were a huge success.”

NGOs representing groups of victims in international criminal cases were also seen as providing an important line of communication between courts and victims in some contexts. However, this activity was not entirely unproblematic. Speaking about the wide scope for victim participation in the ICC, one participant noted that NGOs were sometimes responsible for creating expectations that the court may not be able to satisfy.

A representative of a hybrid criminal court described the very cautious approach taken with regard to interactions with NGOs and the particular premium placed on transparency. “Judges do not meet with NGOs individually. We may attend public fora, but only if we are sure that the defense and prosecution are also represented. We are careful about that. We have capacity building through [international organizations] on our terms and ensure that the prosecution and defense are involved. We don’t want any [interaction] with any NGO that is not entirely transparent.”

2.1.4 Monitoring of international judicial bodies
The role of NGOs in monitoring international courts and tribunals, be it their proceedings or other aspects of their operation, was met with a qualified welcome by many participants.

Describing the attitude of a hybrid court, one participant stated, “We welcome NGOs monitoring us. However, one major complaint about NGOs in monitoring is that I wish they would be competent. They send people who are not experienced. We get comments that are ill-founded and inappropriate. At any time, we have fifty NGOs looking at us. This is, I think, an industry and it is self-perpetuating. They are good at commenting on the rights of the prosecution and victims and poor at commenting on the rights of the accused.” Thus, for this participant, a more competent and balanced oversight by NGOs was called for.

In relation to the ICC, some participants felt that the monitoring of the Court by NGOs was not entirely positive. One participant observed, “There is this sort of ‘mission complex’ on the part of NGOs. They think they are destined by God to watch the ICC in perpetuity, particularly in this early age where the Court still has to blossom and they will be watching
each and every step... it is there and working, and the more interference, the worse it gets.” Another participant agreed that NGOs might broaden their focus to the anticipated growth in the domestic pursuit of international criminal justice, but did not wish to exclude the role of NGOs in supporting the ICC.

Other participants identified examples where the monitoring of the administration of international justice by NGOs was largely helpful. The role of Human Rights Watch in monitoring ICTR cases that have been referred to Rwanda,9 for example, was seen in a positive light by one participant.

The Coalition for an Effective African Court on Human and Peoples’ Rights,10 an umbrella NGO representing a diverse group of over 300 individuals, academic institutions and other organizations, was identified by one participant as being actively engaged in monitoring the Court, but also in communicating directly with the Court: “Any time [there is] a session, they have a meeting. If [there are] public hearings, they attend. At meetings, judges come and interact and discuss…. They make comments on procedure, what they think is good and not good.”

Such helpful activities notwithstanding, it was observed that sometimes the interest of NGOs in monitoring the work of international judicial bodies can go too far: “[They] wanted to be in attendance in our in camera hearings and wanted to sit in on our deliberations,” said a participant. “That was truly amazing!”

– 2.2 Activities that seek to influence judicial decision-making

Participants expressed the need for greater caution when the discussion turned to the different ways in which NGOs may seek to influence the process of judicial decision-making itself. One participant noted that different considerations arise depending on the nature of the judicial body. As one participant observed: “It is clear that when you have a criminal court, where there is the strict principle of legality, interference has to be discouraged. It can be different in human rights courts where it is the individual against the state. It is a different kind of procedure. The inter-state case may again be different.”

In what follows, observations of participants regarding the role of NGOs in gathering evidence, lobbying, participation in litigation and submitting amicus curiae briefs are presented.

2.2.1 Gathering evidence

NGOs can assist the cause of international justice by contributing to the process of gathering evidence. In some cases, evidence gathered by NGOs has been admitted into evidence for trials at international courts and tribunals. A participant with insight into the ICC considered the work of NGOs such as Human Rights Watch to be important at the investigation stage and noted that the prosecution had based findings on the evidence provided by that NGO. This participant left open the question to what extent such reports could be used as evidence at the pre-trial and trial stages.

Speaking about the experience of the ECtHR, one participant noted that reliance is placed on reports by NGOs such as Human Rights Watch, not least when the Court is asked to issue a Rule 39 injunction prohibiting the expulsion of a person to a country where there is the risk that the person will be exposed to serious human rights violations.

NGOs can also assist by providing training on the conduct of investigations. The intergovernmental facility Justice Rapid Response12 was identified as conducting international criminal investigations as well as providing training. The benefits provided by this kind of organization included that investigations are conducted “in a professional manner so that [material] can be used as evidence” and they “only have the agenda of the body that commissions them.” The participant continued: “This type of NGO might be able to play a significant role in the future… [T]rials concerning mass atrocities always happen years after the events occurred and investigation on the part of the Prosecution in these courts commences very late. It would be more effective if we had some
kind of investigative body in place, maybe while events are taking place.”

Again, the activities of NGOs within the territory where mass atrocities were committed gave rise to the refrain “there are NGOs and then there are NGOs…” One participant with experience in Kosovo recounted how some NGO workers would arrive “with no money and expect funding from UN agencies for food and accommodation.”

In relation to evidence-gathering itself, participants from several international criminal tribunals identified the inappropriate handling of evidence as being a significant issue. One judge commented, “What [the prosecution] have told me is that [the NGOs] contaminate the evidence so the prosecution can’t use it.” Another participant noted that some NGOs have impacted upon cases by seeking to influence witnesses.

2.2.2 Lobbying

Although, as noted earlier, lobbying is predominantly an activity that is ancillary to judicial decision-making, at times NGOs can lobby with the aim of influencing the outcome of specific proceedings. A participant brought up the Brđanin trial, in which the ICTY Prosecutor sought to subpoena Washington Post war correspondent Jonathan Randal, who refused to testify, citing a qualified journalistic privilege not to give evidence. It was noted that substantial lobbying efforts took place around the question, which ultimately became a sort of “trial within a trial.” The original decision of the Trial Chamber to subpoena Mr. Randal was ultimately overturned by the Appeals Chamber, which considered an amicus brief submitted by 34 press companies and associations of journalists.

Interestingly, one participant, referring to the Arctic Sunrise case at ITLOS, expressed the view that the Russian Federation may have felt that it would be hard to receive an impartial judgment from the Tribunal following the intensity of both political and civil society pressure brought to bear in the case.

2.2.3 Participating in litigation

A less common way in which NGOs interact with international courts and tribunals – and which may be unique to human rights cases – is through direct involvement in litigation as an interested party or by providing legal advice and assistance to an interested party. Describing the rules in force at the ACtHPR, one participant explained that NGOs only have access to the court if they have observer status with the Commission and the state party has made the declaration allowing them access. This participant noted that NGOs had been directly involved in three cases before the Court, in which they had filed as applicants, with an affected individual identified as a second applicant.

NGOs are also entitled to seek an advisory opinion from the African Court, but here the NGO must be recognized by the African Union, not the Commission. An example of NGOs making use of this entitlement can be found in the request made by the Pan African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC), which requested an advisory opinion on the legality of the suspension of the SADC Tribunal (referred to earlier in the report). In a different kind of NGO/Court interaction, the ACtHPR also has a practice of referring applicants to the Pan African Lawyers Union when they are in need of legal assistance.

According to one participant with knowledge of the ECtHR, the European Convention on Human Rights protects not only individuals but also legal persons, thus enabling NGOs to bring claims as victims of human rights violations, which might involve, for example, issues relating to freedom of expression or the right to privacy. NGOs are also involved in litigation brought by individuals, and can assist in preparations for the proceedings, although they cannot (generally) bring a case on behalf of a particular individual.

But the general exclusion of NGOs from having standing in individual claims at the European Court appears to allow for an exception in certain cases. Recalling the Grand Chamber case of Centre for
Legal Resources on Behalf of Valentin Câmpeanu,\(^{22}\) which concerned the death in an institution of a person with mental and physical health challenges, one participant noted that the Court had ruled in that case that the NGO was able to lodge the claim themselves on behalf of the deceased “applicant,” given the exceptional nature of the case. Notably, several other NGOs also intervened with amicus briefs in this case,\(^{23}\) including Human Rights Watch, the Euroregional Center for Public Initiatives, the Bulgarian Helsinki Committee and the Mental Disability Advocacy Center, particularly with reference to the question of the standing of the Centre for Legal Resources. This participant considered the case to offer a greater opportunity for NGOs to participate directly in litigation before the ECtHR, and found it surprising that it had not received more attention.

### 2.2.4 Amicus curiae briefs

The issue regarding the role of amicus curiae briefs in the pursuit of international justice received robust consideration during the session, with a range of different practices and perspectives brought to the discussion. Although amicus briefs are submitted by states, academics, and various entities, NGOs in particular often seek to file them.

In relation to the role of amicus briefs in the international criminal context, one participant pointed to the intervention in the ICTY *Furundžija* case\(^{24}\) by the Coalition for Women’s Human Rights in Conflict Situations as an example of a helpful contribution. The brief concerned the re-opening of proceedings, calling for full disclosure of medical and psychological records, and allowing cross-examination of a witness in relation to those records.\(^{25}\) The participant considered the submissions to be “very important for the purpose of the case.”

Another participant with experience in the ICTY said that the Tribunal had not received many applications for filing of amicus briefs. However, Rule 74 of the ICTY Rules of Procedure specifies, “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.”\(^{26}\)

Participants with experience in the ICTR noted the contribution of amicus briefs, particularly in relation to cases referred to the Rwandan courts. The ICTR has faced challenges in some of these cases owing to complicating “equality of arms” factors, including situations where the prosecution requests a referral, the Rwandan government is invited to make submissions, the accused is a fugitive, or there is a lack of experienced duty legal counsel in any proximity to the court. For this participant, amicus briefs offering insight into the Rwandan legal system “provided the balance we needed.”

As for other criminal institutions, the ICC has, according to one participant, accepted amicus briefs from NGOs, but only “sparingly.” The ECCC can invite or grant leave for an amicus brief from either an organization or person. However, “[the ECCC] does not want someone pushing a particular agenda, and [it is] careful about that,” said one participant with insight into that institution. The STL has also invited amicus briefs in several cases. One participant recalled the valuable contribution of the numerous briefs submitted in relation to the question of whether non-natural persons may be prosecuted for contempt of court, following the publication by a Lebanese media outlet of the names of purported confidential witnesses before the Tribunal. In that case,\(^{27}\) an open invitation to “any interested party, such as media organizations, non-governmental organizations, or academic institution” was issued by the Contempt Judge. Twenty briefs were submitted, for example from the President of the Beirut Bar Association, the Order of Lebanese Press Editors, a former Lebanese Prime Minister, and the legal representatives of victims in a related case.

The role of amicus briefs appeared to be significant for human rights courts. The AChPR appeared very welcoming of amicus briefs, with one participant noting: “[NGOs] must apply to the Court, stating the reasons why they want to submit an amicus brief and...
[the Court] then makes a judicial ruling on whether the NGO should be allowed to file the brief or not. ...the briefs are quite good and well researched, so it reduces [the judges’] research work. [The Court] almost always allows them to come.” The ECtHR also makes provision for the admission of amicus briefs according to an admissibility procedure under Rule 44 of the Rules of Court. Here, as with other international courts and tribunals, the focus is on whether the submission is “in the interests of the proper administration of justice,” which is doubtful where the intervention appears, as one participant noted, “too biased or general.” There are substantial examples of amicus interventions in ECtHR jurisprudence, including in many Grand Chamber cases.

In relation to inter-state dispute resolution mechanisms, the ICJ appeared to have a somewhat unique approach to the submission of statements or documents by international NGOs in advisory opinion cases. In accordance with Practice Direction XII, such documents are not to be considered as part of the case file, but will be treated as publications readily available and may be referred to by states and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain. ITLOS followed a similar procedure with amicus briefs in a recent case in which the briefs were not part of an official case file, but were nonetheless treated favorably in that the submissions were posted on an accessible website. In general, though, ITLOS rules do allow for the possibility of amicus submissions by intergovernmental organizations.

Somewhat in contrast to the restrictive approach taken by the ICJ, the ATJ invites extensive involvement by NGOs in many aspects of the Tribunal’s work, including in relation to proceedings. According to one participant, “the position the Tribunal has now is to try to get into the proceedings as much of civil society as possible, as this kind of work reflects directly on our society. The more they provide their views and participate, the better the integration process.” Regarding the question of procedure, the participant observed, “there is no explicit rule against it. So if [there is no rule against it, the Tribunal] can admit it.” This position echoes that adopted by the IACtHR, as noted in the Szazi article. Addressing the possibility that such an open approach to participation in proceedings before the ATJ could become overwhelming, this participant expressed the view that the technical nature of many cases made it unlikely that the Tribunal would receive substantial applications to intervene.

Still other institutions, such as the CCJ, were considering amending their Rules of Procedure to allow for the submission of amicus curiae briefs. The CCJ has decided to engage with NGOs and formalize the process of their participation. Under the proposed new rules, amici can submit written briefs and can even make oral submissions at the Court’s discretion. Some national governments have questioned these steps on the ground that these developments threaten to slow the judicial process and increase costs. Additionally, NGOs are not legal individuals, further complicating their relationship with the Court. The CCJ is exploring whether cost orders could be made and be imposed against NGOs. However, there is no question that wider participation will be accorded to the participation of civil society.

From the discussion it was clear that most international courts and tribunals have come to accept amicus curiae briefs, albeit following differing criteria. Some courts accept applications to submit briefs whereas others adopt a practice of inviting submissions on questions when the court or tribunal requires expert insight. Several participants felt that what mattered most was not the method chosen for dealing with amicus briefs, but that there was some form of admissibility procedure.

On a final note, in addition to the issue of admissibility, the issue of procedural fairness was also raised in relation to the submission of amicus briefs that support one side in an adversarial procedure. Here, views seemed to emphasize the need for a contextual approach to the question, with one participant noting, “There is really a situation in which the court would have to take into account
that, if it admits a brief on the law that goes in a certain direction, [someone] should submit a brief in the other direction… But it really depends on the situation, in particular the situation in favor of the accused. It is not necessary to adopt a protective approach for the prosecution.”

3. Conclusion

By the end of the session it was clear that NGOs have come to play a significant and often positive role in the administration of international justice. Activities that seek to directly support international courts and tribunals were naturally very well regarded by participants, although plainly unhelpful activities, such as disseminating inaccurate information about judgments and the workings of international judicial bodies, were criticized. Between these extremes, however, there lay considerable variation in practice and perspective, based in part on the nature of the judicial body (criminal, human rights or inter-state) and in part on the particular activity being considered. Where NGO activities sought to influence the decision-making process, for example through the submission of amicus curiae briefs, some judges adopted a very cautious approach whereas others invited a wide range of submissions. Where activities sought to bring the perspectives of stakeholders to the attention of the court or tribunal, many participants were welcoming although others saw the need to exercise considerable caution in this connection as well.

As one element of the dynamic relationship between international judicial bodies and local actors, the answer as to whether NGOs are a help or hindrance to the cause of international justice depends, as with many issues discussed during the Institute, on who is asked.
Notes


5 Article 36 of the Rome Statute of the International Criminal Court sets out that two lists shall be prepared regarding candidates for judicial office in accordance with their professional experience, either in the practice of law (for example as a judge, prosecutor and so forth) or as a person with established competence in an area of relevance, such as human rights or humanitarian law. Rome Statute of the International Criminal Court, U.N. Doc A/Conf. 183/9 (1998), Art. 36.

6 Prosecutor v Tadić, Case No. IT-94-1-T, Judgment (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997).


13 Since BIJ 2015 took place, the International Bar Association has launched the “eyeWitness to Atrocities” app, which will allow those filming or photographing abuses on their smartphones to document the exact time and place of the events and save them to a secure archive, so that the images can be used later as evidence in court proceedings. See http://eyewitnessproject.org/.


17 The “Arctic Sunrise” case (Neth. v. Russ.), Case No. 22, Order of Oct. 25, 2013, [International Tribunal for the Law of the Sea (ITLOS)].


19 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, available at http://www.achpr.org/instruments/court-establishment/. Art. 5(3) provides for the institution of cases by NGOs and individuals provided the relevant state has accepted the jurisdiction of the court to hear such cases under Article 34(6) of the Protocol.


23 Briefs were submitted with the permission of the President under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of the European Court of Human Rights.


27 In the Case against NEW TV S.A.L. & Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ. (Special Tribunal for Lebanon, 2015).

29 See Laura Van den Eynde, An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights, 31 Netherlands Quarterly of Human Rights 271, 282 (2013), who identifies the involvement of over 140 NGOs in the case law of the ECtHR. Interestingly, she finds that the intervention of amici does not increase the likelihood that the Court will find a violation.


31 See supra note 1.