



**International Criminal Court Bar Association**  
**Association du Barreau près la Cour pénale internationale**

**Amici Curiae Committee annual report 2016-2017**

**I – Introduction:**

The International Criminal Court Bar Association (ICCBA), created on 14 April 2016, held its Inaugural Congress on 30 June 2016 and its first General Assembly on 1<sup>st</sup> July 2016 in The Hague. The chairs of the different ICCBA committees were appointed during summer and effectively took office on September 2016 after the summer break. During the course of its mandate, the Amici Curiae Committee met six times between September 2016 and May 2017. Each time, all its members were involved even though they do not all live in The Hague. The Committee Chair (Philippe Gréciano) lives in the South of France (Grenoble) and one member (Charlène Yangazo Dimba) lives in the Democratic Republic of Congo. The other three members (Karlijn Van der Voort, Anand Ajay Shah and Marion Carrin) live in The Hague. Thanks to new technology (Internet and Skype) it is possible to work remotely even though it is easier for the members living locally to have a direct access to the different services of the International Criminal Court (ICC). During the course of its mandate, the Committee engaged in large consultations (meeting with 15 members of the Court) and looked at several subjects in order to inform in the best way the ICCBA members on how Amici Curiae operate and on the functions of the Amici Curiae Committee.

**II – Work plan:**

At the first meeting held in September, the Amici Curiae Committee developed a work plan for the coming year. This plan was approved by the Executive Council in autumn and has been published on the ICCBA's website. As the internal Committee meetings and consultations within the ICC progressed, it became clear that a prioritisation of the objectives included in the work plan was necessary. The Committee indeed realised the substantial nature of the work involved (in terms of work load and collection of information) in researching and thematically classifying all of the Amici Curiae intervention requests and briefs filed with the ICC, before their analysis and the drawing of conclusions could take place. This analysis focused *not only on the functions and activities of the Amici Curiae*, but also on *the practices of the judges in this area*, which is useful for the members of the ICCBA. The discussions with members of the Court and the debates within

the Committee have also made it possible to go further and to *make propositions to improve the performance of its work*. Finally, meetings with the judges Bruno Cotte and Marc Perrin de Brichambaut were very enlightening: it made it possible to realise the judges' *great interest in favour of the Amici Curiae Committee* but also the existence of a *natural circumspection towards it*, not only because it is a very recent creation, but mainly because of the role it may play in setting out in legal filings the ICCBA's position on particular issues before the Chambers and Presidency of the ICC, and in that way, it crystallises the relationship between judges and lawyers. That is why, during its mandate, the Committee also wanted to investigate *its capacity to assist and advise in relation to Amici Curiae* in order to *reinforce the trust relationship* existing between lawyers and judges.

### **III – Background:**

Before dealing with substantive matters, the Committee gathered and studied the different information available on the Amici Curiae at the ICC.

**Statistics.** In 15 years since the entry into force of the Rome Statute (2002), the ICC has engaged 23 cases. Judges have rendered only 5 verdicts: 4 people were convicted (Thomas Lubanga, Germain Katanga, Bemba Gombo, Al Mahdi) and 1 person was acquitted (Ngudjolo Chui), for all of them at the end of April 2017, our colleagues Anand Shah and Ghislain Mabanga counted, with all due reserves, 102 instances in which Amici Curiae intervened (in cases under Article 5 or Article 70 or at the situation). In 82% of the cases, ie 84 occurrences, Amici Curiae applied for leave to file written pleadings in accordance with Rule 103 or 75 of the Rome Statute, and in 18% of cases Amici Curiae filed 'preliminary Authorisation. In the first case, 31 pleadings were declared admissible, ie 37%; And in the second case, 15 memoranda were accepted out of 18. In total, out of 48 admitted memoranda, the breakdown according to the stage of the procedure is as follows: 2 memoranda, 4% in the situation analysis phase, 10 memoranda of 21% before trial, 6 submissions or 12.5% during the trial, 30 submissions, 62.5% admitted at the reparations stage, and 0 submissions on appeal. Out of these 48 Amici Curiae briefs, the Court retained 4 pleadings, 8% for the defense and 37 briefs, or 77% for the victims; The last 7 memoranda, or 15% relate to other domains. Finally, with regard to the subjects covered, 17 papers by Amici Curiae, ie 35.5% deal with legal questions, 14 papers on social sciences (29%), and 17 papers, 35.5% being more general and integrate analyzes of the two areas mentioned.

**Commentary.** These statistics show that *the involvement of Amici Curiae has been strongly increasing these past years* and that criticism and lack of interest for this institution, coming from international jurisdictions or their actors, are not valid anymore. The volume of interventions is substantial when it comes to *civil questions* (reparation stage) and discussions with legal counsels for the Chambers (in particular Gilbert Bitti) have made it possible to quickly understand the particular interest for judges to ask and/or accept outside assistance when dealing with *reparation issues* and, to a lesser extent, to define the socio-political context (for instance in the Kenya case) by allowing States to intervene. Indeed, the great proportion of requests for and/or acceptance of amicus curiae briefs in the area of reparation is explained by the fact that: 1) Article 75(3) of the Rome Statute specifically states with respect to issuance of reparations orders that “the Court may

invite and shall take account of” such representations made by third parties regarding reparations; and 2) judges do not wish to be disturbed during the "deliberation stage". It constitutes the "judicial office". If amicus curiae briefs are so plentiful at this stage in particular, it is because outside actors intervene at the moment where judges are done with this "deliberation stage". At this stage of the trial, criminal judges are more open since they are less "burdened". They need help and they even call upon Amici Curiae because they are not necessarily highly specialised in reparation issues (in the Anglo-Saxon system, the question of reparation is never discussed during criminal proceedings). On the contrary, according to judges, *too many interventions from Amici Curiae could compromise their efficiency, especially if they work on the same subjects as ICC-appointed experts*. They must not take the risk to be put in competition or there might be a conflict that could undermine their operational capacity as the experts benefit from a stronger status: they are appointed by judges, draft reports at their request, answer questions asked (adversarial logic) and, accordingly, their motivations are less susceptible to challenge. Finally, if they become witnesses, they swear an oath, which further reinforces the credibility of their intervention. Moreover, nothing prevents an Amicus from participating in a procedure as a witness or from becoming an expert, but this situation rarely occurs.

***An increased interest for the institution.*** At the time when the Rome Statute entered into force, professor Hervé Ascensio from Université Paris 1 Panthéon Sorbonne informed the scientific community of *the too slow and too cautious opening of international jurisdictions to Amici Curiae*<sup>1</sup>. If jurisdictions dealing with inter-state disputes (International Court of Justice – ICJ – WTO Dispute Resolution Body) were completely refractory to this practice, others were more open, in particular jurisdictions dealing with the defence of people's rights and especially international criminal jurisdictions. This observation was interesting and it had to be reminded here because *practice has changed*<sup>2</sup>. Indeed, in the past 15 years, practice before international criminal jurisdictions has strongly evolved, in particular thanks to a pioneering work done by the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These two jurisdictions have been created on the basis of Common law principles, it is the legal system at the origin of the Amici Curiae as this institution does not exist in Romano-Germanic law systems. This is also the case before the ICC, although it is currently in turmoil (several African States want to leave the Rome Statute) and is looking to improve the quality and legitimacy of its jurisdiction<sup>3</sup>, the different chambers of the Court would benefit from resorting more broadly to Amici Curiae, in particular in order to *reinforce the connection with civil society and confront the reality of ground work*. The Amici Curiae Committee supports entirely this vision in accordance with the objectives it has been assigned.

#### **IV – Study of the functions of the Amici Curiae Committee:**

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<sup>1</sup> H. Ascensio, "L'Amicus Curiae devant les juridictions internationales", *Revue générale de droit international public*, 1 October 2001.

<sup>2</sup> Professor Ascensio is also cowriter with professors Alain Pellet and Emmanuel Decaux of the famous reference book: *Droit international pénal* re published in Paris by Pedone in 2012.

<sup>3</sup> M. Nicolas, "La Cour pénale internationale : entre efficacité et légitimité", in: Ph. Gréciano (dir.), *Justice pénale internationale. Les nouveaux enjeux de Nuremberg à La Haye*. Coll. Droit & Science politique. Ed. Mare & Martin, Paris, 2016, p. 75-99

The functions of the Amici Curiae Committee are set out in article 37 of the Constitution of the ICCBA. However, interpretation and application of this article must be made taking into account the internal Directive dated 5 October 2016.

**Commentary of Article 37 of the Constitution of the ICCBA:** The analysis of Article 37 of the Constitution raises two questions: the scope of the *functions of the Amicus Curiae Committee* and its *mode of referral*.

In the Constitution of the ICCBA, Article 37 describes the functions of the Amicus Curiae Committee. As a preliminary point, it must be borne in mind, in light of the terms used in the introductory sentence, that the first subparagraph of that article relates more to the *tasks* of the Committee, that is to say the work which is requested of it, and not to the administrative functions which are necessarily broader and consist mainly in supporting the ICCBA and its members in all areas related to Amicus curiae (see below V.). At the successive meetings, it seemed appropriate to discuss – prior to any external action – *its field of competence* and *its mandate*, which in our view may also *be broader than the tasks listed in Article 37*. If this provision sets out the main tasks assigned to the Committee, it does not provide for an exhaustive list. The Constitution of the ICCBA therefore does not limit its scope of action. Moreover, this provision should be read in conjunction with the preceding Article 36. The latter, in paragraph 2, specifies that the Chair of the Amicus Committee reports only to the Executive Council. Thus, the obligations of the Amicus Curiae Committee apply only to the ICCBA: it does not report to anyone else, in no way to a third party or to an outside institution. In support of this interpretation comes the fact the Amicus Curiae Committee is an organ of ICCBA and not an organ of the Court. It therefore only incurs liability to the ICCBA.

In order to carry out its duties, the Committee may, under Section 5, paragraph 1 of the Internal Directive for the Work of ICCBA Committees, dated 5 October 2016, and *on its own initiative*, contact a member from the Association. Thus, under this provision, and *only if it deems it necessary*, the Committee is authorised to consult individual members in order to carry out effectively the duties defined in Article 37 of the Constitution. Indeed, the Committee may find it useful to consult experts (members) or other Committees of the ICCBA on certain issues related to Amicus Curiae, *before any action is taken* in a case for which its intervention would be expected. On the other hand, neither the Constitution nor the Directive provide for the possibility of referral to the Amicus Curiae Committee directly by a member for a personal mission or in the course of his professional activities before the Court. Thus, in order to function properly, the Amicus Curiae Committee should first be referred to by the Executive Committee, which referral could be requested by a member. This method of prior referral works as a filter to examine the seriousness and the merits of the request. It also makes it possible to prevent any potential conflict of interest with the other Committees of the Association and between the members (representatives of victims and defence counsels) since all the parties will then be able to discuss together the advisability of such request. Finally, the Amicus Curiae Committee is not entitled to file *proprio motu* its observations before the judges. Since the Committee is not a party to the proceedings, it is advisable to act with caution in order to avoid any opposition from Counsels (for the defence and victims) appointed in the case.

On 3 April 2017, in the interest of transparency and good management of its affairs, the Amicus Curiae Committee informed the President of the ICCBA of its analysis, which was welcomed.

Finally, with regard to the other provisions of Article 37 of the Constitution, no requests under subparagraphs (b) and (c) were made during the year 2016-2017. The present Committee therefore proposed that the Executive Council should focus its action on the comments of Amicus Curiae requests made by the ICC since the beginning of the work of the ICCBA (September 2016), in accordance with subparagraph 37(a) of the Constitution Statute. These are the Al Mahdi and Al Bashir cases in which the ICC has requested Amicus Curiae opinions under Rule 103 of the Rules of Procedure and Evidence. These comments make it possible to inform the members of the ICCBA of requests formulated during the mandate of this Committee, by providing some elements for consideration.

***Application example.*** To illustrate these tasks, Amici Curiae Committee members have drafted commentaries on the decisions of the ICC accepting Amicus Curiae submissions.

In the second-half of 2016, Pre-Trial Chamber II in the Al Bashir case (Darfur Situation) and Trial Chamber III in the Bemba case (Central African Republic Situation) issued decisions inviting amicus curiae submissions pursuant to Rule 103 of the ICC Rules of Procedure and Evidence with respect to Article 87(7) proceedings against the Republic of South Africa (Al Bashir) and reparations for victims (Bemba). This note provides an overview of the proceedings in the two cases as relates to these invitations and submitted requests and observations from Amici and prospective Amici, as well as relevant analysis of the Chambers' respective applications of Rule 103 of the Rules.

### **Rule 103 Invitations and Requests in the Prosecutor v Omar Hassan Ahmad Al Bashir**

On 8 December 2016, Pre-Trial Chamber II ("Chamber") issued a decision ("Decision")<sup>4</sup> convening a hearing on 7 April 2017, to receive submissions on fact and law from the ICC Prosecutor, the Republic of South Africa, and the United Nations ("UN") on the following two issues: (i) *whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory [from 13 to 15 June 2015 to attend an African Union summit] despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so, (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted*<sup>5</sup>.

The Chamber noted that these issues are "of general importance" and accordingly "consider[d] it appropriate to permit, under Rule 103 of the Rules of Procedure and Evidence, all interested States

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<sup>4</sup> Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa, ICC-02/05-01/09-274.

<sup>5</sup> *Id.* at para. 15.

Parties" to make written submissions on this matter<sup>6</sup>. The Kingdom of Belgium was the only State Party to accept this invitation<sup>7</sup>. In its observations Belgium noted it might confront the same situation as South Africa given Belgium's hosting of international and regional organizations that regularly hold meetings where invited representatives of States "are protected by international immunity for the benefit of these organizations". Belgium submitted that reliance of a State Party on Article 98(1) of the Statute (cooperation with respect to waiver of immunity and consent to surrender) must "be grounded in a legal provision that already existed when the Statute came into force for the State Party [...] when refusing to comply with a request for arrest and surrender"<sup>8</sup>. Belgium also recalled the Court's jurisprudence holding that the UN Security Council ("UNSC"), in Resolution 1593(2005) referring Sudan to the ICC, implicitly waived on Sudan's behalf the immunities granted to Mr. Al Bashir under international law as a Head of State, and noted that despite this legal finding three State Parties had invoked Sudan's assertion of Mr. Al Bashir's immunity in explaining why these States were impeded from arresting and surrendering Al Bashir to the Court<sup>9</sup>. Belgium lastly opined that Resolution 1593's language "urging" international and regional organizations to cooperate fully with the Court "could be interpreted as a pressing invitation to these organizations to lift the international immunities they would enjoy under international law, if these immunities might hinder compliance with a request by the Court for arrest and surrender"<sup>10</sup>.

By way of letter the UN informed the Chamber it would not intervene in the case on this matter<sup>11</sup>.

On 2 February 2017, the Southern Africa Litigation Centre ("SALC") filed a request pursuant to Rule 103 for leave to submit amicus curiae observations ("SALC Request")<sup>12</sup>. SALC described itself as "a non-governmental organisation that promotes human rights and the rule of law in Southern Africa" and submitted that its observations would assist the Chamber in its determination of relevant matters because SALC "is uniquely positioned by the role that it played before the South African courts in attempting to compel the Government of South Africa to arrest President Bashir". More specifically, SALC proposed submitting observations on four issues: (i) South Africa's domestic obligation to arrest and surrender Mr. Bashir to the ICC; (ii) relevant facts regarding Mr. Bashir's presence on and departure from South Africa; (iii) the identification of documents that record what transpired during Mr. Bashir's visit and regarding his departure from South Africa; and (iv) the importance of the issuance of a non-compliance finding against South Africa.

On 27 February, South Africa filed an objection to the SALC Request, submitting that: *"[A]llowing SALC, and for that matter any other organisation, to participate in the proceedings will be unduly burdensome, unhelpful, will add nothing new of substance and would therefore not be in the*

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<sup>6</sup> *Id.* at para. 17.

<sup>7</sup> See ICC-02/05-01/09-277-Anx-tENG, submitted on 20 February 2017.

<sup>8</sup> *Id.* at p. 7.

<sup>9</sup> *Id.* at pp. 7-8 (referring to Djibouti, the Democratic Republic of the Congo, and Uganda).

<sup>10</sup> *Id.* at p. 8.

<sup>11</sup> See ICC-02/05-01/09-282-Anx (letter from the UN Under-Secretary-General for Legal Affairs).

<sup>12</sup> ICC-02/05-01/09-275.

*interests of justice. Furthermore, the real motive for the Request is questioned in light of the lack of impartiality of SALC in this matter*"<sup>13</sup>.

On 28 February 2017, the Chamber granted<sup>14</sup> SALC's request to file submissions on the four issues identified, specifically holding that: (i) "the proposed submissions are desirable, within the meaning of Rule 103 of the Rules of Procedure and Evidence, for the proper determination of the pending matter" because they may assist the Chamber in obtaining pertinent information and resolving relevant questions; (ii) the fact that the Court has previously rejected Rule 103 submissions on grounds that the applicant was not impartial "is not per se a condition of said rule" and furthermore the Chamber did not believe SALC's previous domestic involvement in the matter makes it unsuitable to provide Rule 103 observations; (iii) no prejudice will arise from SALC's observations as "the participants in the proceedings will have the right to respond and because the Chamber will ultimately determine whether to take any submissions into account"; and (iv) South Africa's argument that granting the "request may lead to a multiplicity of submissions from other organisations" is speculative and the Chamber's discretionary powers under Rule 103 "is an entirely adequate tool to address any such situation".

On 1 March 2017, the Helen Suzman Foundation ("HSF"), an NGO with the stated purpose of "promoti[ng] South African democracy and constitutionalism", filed a request to submit legal observations under Rule 103<sup>15</sup> that would argue against the position "that President Al Bashir was immune from arrest and surrender to the ICC and that [South Africa] did not breach its obligations under the Statute by virtue of affording such immunity". HSF further noted it was an *amicus curiae* in the domestic proceedings initiated by SALC. The Chamber rejected HSF's request on 9 March<sup>16</sup>, finding that it "occupies an effectively identical position" as SALC as regards "its knowledge of facts and the position it takes on the matter", limiting any added value of its proposed submissions, which, in any event, are outweighed by the disruption they would cause at this late stage of proceedings.

The Chamber's application of Rule 103 in the context of these Article 87(7) proceedings emphasises the wide discretionary powers of ICC Chambers in granting Rule 103 requests and considering the substance of Rule 103 submissions. It also highlights the utility Rule 103 can hold for Chambers in inviting and receiving observations from knowledgeable third parties on matters of fact and law that may assist the Chamber in reaching a more considered and proper determination on particular issues. Additionally, parties and participants' right of response to substantive submissions under Rule 103 is an important guarantor of the fairness of proceedings when a Chamber permits such interventions.

### **Analysis of Bemba TCIII decision on Amicus Curiae submissions**

Earlier that year, on 21 March, the Chamber had issued its Judgment pursuant to Article 74 of the Rome Statute (RS) and the Decision on Sentence, Article 76 RS. The Chamber then addresses the

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<sup>13</sup> ICC-02/05-01/09-281, para. 20.

<sup>14</sup> ICC-02/05-01/09-283.

<sup>15</sup> ICC-02/05-01/09-285.

<sup>16</sup> ICC-02/05-01/09-287. No responses from the participants were received by the time of the Chamber's decision.

requirements for reparations, that the Appeals Chamber has formulated certain principles that can further be expanded upon and specified.

The Chamber requests the parties and the Registry and the Trust Fund for Victims to submit observations on (a) the application and interpretation of the principles set out by the Appeals Chamber in the *Lubanga* case to the case at hand; (b) the criteria and methodology to be applied in assessing the victims, their harm, and Mr. Bemba's scope of liability; (c) the types and modalities of reparations; (d) whether experts may be appointed to assist in these issues; (e) other issues.

The Chamber then invites organisations to apply for leave to file submissions on the matter of reparations in the *Bemba* case.

On 8 August 2016, the Queen's University of Belfast applied for leave to file submissions, on 10th August, the Redress Trust, on 15 August the United Nations applied. The organizations' main arguments to be admitted to file submissions in this regard is their long experience in this field, as well as prior experience in intervening in national or international proceedings. None of the parties had responded to the applications.

On 26 August, the Chamber issued its decision on requests to make submissions pursuant to article 75(3) of the Statute and Rule 103 of the Rules of Procedure and Evidence', Doc. ICC- ICC-01/05-01/08-3430.

In paragraph 7 of this decision, the Chamber states: "Rule 103 of the Rules provides that "[a]t 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". According to this provision, and in line with the jurisprudence of the AC, the Chamber shall evaluate whether the observations are desirable for the proper determination of the case and whether they relate to any issue that the Chamber deems appropriate".

In assessing the various applications, the Chamber considered the following aspects (see paragraph 8 of the Decision) :

- extensive experience in research
- expert consultations on reparations before judicial and non-judicial bodies
- established record of involvement with international bodies and governments on matters relating to reparations
- specific expertise in reparations approaches and programmes, particularly with regard to victims of sexual crimes
- technical and operational knowledge of the CAR
- three of the four applicants have previously been granted leave to make submissions on reparations issues in the *Katanga* case, which evidences their familiarity with the reparations proceedings.

The Chamber decided to allow all four applicants to file submissions on reparations in the *Bemba* case.



The respective approaches of the Chambers in the Al Bashir and Bemba cases to Rule 103 invitations and requests reveals two broad categories of prospective amicus curiae submissions within the context of ICC proceedings – general Amicus submissions and amicus submissions specifically related to reparations issues. The proceedings in the Al Bashir case fall into the ‘general’ category and only concern Rule 103 of the Rules, which provides the Chamber with full discretion as to whether or not to invite or grant requests to submit amicus curiae submissions on the full array of factual and legal issues that might come before the Court. The proceedings in Bemba, while also reliant on Rule 103, are additionally circumscribed by Article 75(3) of the Rome Statute, which provides that: "Before making an order [...] [for reparations], the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States." The provision in Article 75(3) that a Chamber "may invite and shall take account of representations" submitted to the Court in the context of reparations proceedings would appear to weigh in favor of the Court accepting and considering all amicus curiae observations that meet certain minimum requirements established by the Chamber to best ensure that proposed observations will assist a Chamber in properly determining issues relevant to the awarding of reparations in the particular circumstances of the case.

### **Analysis of UNESCO's observations in the context of forthcoming reparations in the Al Mahdi case**

On September 27, 2016, Trial Chamber VIII ("the Chamber") found Ahmad Al Mahdi guilty of the war crime of attacking protected property under article 8 (2) (e) (iv) of the Rome Statute ("the statute"). On September 29, 2016, the Chamber set a schedule of reparations, notified to the parties and the parties and participants on October 3, 2016. On that occasion, the Chamber decided that any request for general comments on the Pursuant to Rule 103 of the Rules of Procedure and Evidence ("the Rules") was to be filed no later than 21 October 2016. On 21 October 2016, UNESCO requested by email to the Grant him an exceptional period of one additional week in order to submit his request for observations. On the same day, the single judge granted the request, inviting the organization to submit its request for comments by 28 October 2016. On 28 October 2016, UNESCO filed its request to participate in the reparations proceedings As amicus curiae.

By decision of 31 October 2016, the Single Judge accepted the application submitted by UNESCO, considering that it presents the relevant expertise and that its observations will assist the Chamber in determining reparations. Under this decision, UNESCO had until 2 December 2016 to submit a brief not exceeding 50 pages. On 2 December 2016, UNESCO submitted its "observations submitted as amicus curiae under Rule 103 of the Rules of Court") ("the Observations").

UNESCO's request to participate in the amicus curiae reparations proceedings is based on Article 75 (3) of the Statute and Rule 103 of the Rules of Court. The Observations presented by UNESCO are based on three axes: UNESCO's interventions in the protection of the world cultural heritage, and more specifically in times of conflict (i), the analysis of the harm resulting from the alleged acts To Ahmad Al Mahdi (ii), cooperation between UNESCO and the ICC (iii).

#### **(i) Interventions in the protection of the world's cultural heritage**

This part of the Observations is devoted to a more general presentation of the role played by UNESCO in the protection of the world cultural heritage. In particular, it is recalled that "the intentional directing of attacks against the cultural heritage and the right to wrongfully appropriate this heritage in armed conflicts may constitute war crimes". An overview of the legal instruments

on which UNESCO supports its intervention is also presented. In this first part of the Observations, UNESCO recalls both its mission and its major achievements in the protection of cultural heritage. UNESCO then focuses more specifically on the status of the city of Timbuktu and the holy places on the territory of the city, as well as on the religious and social significance of these monuments on local communities.

(ii) Injury

The Observations contain a descriptive part of the social and moral consequences of fear and despair that the populations of Timbuktu had to suffer as a result of the destruction of the mausoleums. UNESCO also recommends guidelines on the form of future compensation and the role it could play in this context as an organization committed to the protection of the world's cultural heritage.

(iii) Cooperation with the ICC

UNESCO recalls that its cooperation with the ICC dates back to the year 2013 and has been particularly nourished since then, in particular in determining the charges against Ahmad Al Mahdi. In this regard, it considers that its experience can be used by the ICC in the implementation of reparations.

In conclusion, the relevance of the Observations is both general and cross-cutting, insofar as UNESCO's contribution is not limited to addressing the particular issue of injury determination and modalities of reparation. To include in a more comprehensive analysis to place the occurrence of harm in the legal context of protection of the city of Timbuktu and in the cooperation between UNESCO, the ICC and the other components of the United Nations. UNESCO's contribution is therefore to enable the Chamber to assess both the extent of the harm suffered by the local communities that are the main victims and the measures that must be implemented to ensure the effectiveness of the remedies which may be imposed. However, the briefness of the Observations may be regretted when the Chamber had left open the possibility of a further contribution. It is also regrettable that UNESCO's actions to preserve cultural heritage are not sufficiently illustrated. Finally, it is regrettable that the notion of "cultural cleansing" mentioned at an early stage in the Observations is not further developed. It remains, however, certain that UNESCO, in choosing to take as its center of gravity of its intervention, the prejudice suffered by the local communities of Timbuktu, places the harm resulting from a cultural crime in the context of its main victims. UNESCO has also devoted much of its Observations to the practical implementation of reparations, a problem that is sometimes less evident in other amicus curiae observations.

## **V – Widening of the Amici Curiae's scope of action:**

Following discussions with different members of the Court, the Amici Curiae Committee wished to clarify its role within the ICCBA and to propose a widening of its scope of action in order to better defend the rights of Amici Curiae who are ICCBA members.

***Preliminary observations.*** During the consultations with the Principal Counsels of the Office of Public Counsel for the Defence (Xavier-Jean Keïta) and the Office of the Public Counsel for Victims (Paulina Massidda), it appeared essential to reflect on the complementary actions that the Amici Curiae Committee should have to undertake beyond the duties set by Article 37 of the Constitution, in particular to reinforce its position within the ICCBA and to serve its members in the best way. These interviews have also made it possible to recall that the Amici Curiae

Committee is neither an expert nor a consultative organ that could act as a substitute for the other Committees (Legal Advisory, for Defence or for Victims). Neither is it a disciplinary Council, which would have to intervene in private disputes between Counsels, nor an arbitrator which would have to resolve an internal dispute (dispute relating to the choice or assistance of a defendant or a victim before the ICC and/or with one of the Offices of Public Counsels at the ICC). Finally, the discussions moved towards the possibility to reinforce the relationship between the different ICCBA Committees to avoid any conflict of interest or misunderstanding when they carry out their duties. It is suggested that before any outside intervention, the Amici Curiae Committee *should first consult the other Committees involved* in accordance with Section 3 point 1 of the Internal Directive. This precaution could be a point for reflection to avoid the different ICCBA organs being at odds when carrying out their duties. Indeed, *in order to preserve its independence and integrity*, the Amici Curiae Committee must act as a facilitator, assistance and support organ whenever a question concerning Amicus Curiae is raised. This is especially so when the Amicus is an ICCBA member, because the Committee must be able to protect its rights and to serve, whenever possible, as a quality control centre.

**Propositions.** Following these discussions, the Amici Curiae Committee proposes to broaden its scope of action by:

- a) *Providing assistance to ICCBA members when they select and choose an Amicus Curiae.*  
To this end, the Amici Curiae Committee shall endeavour to progressively constitute a list of persons or organisations that could be recommended and solicited to intervene as Amicus Curiae for a counsel having a case before the ICC. This will centralise the area of expertise in which they intervene and all relevant documentation necessary to learn from the experience of the different teams involved. Working together with the Office of Public Counsel for the Defence (OPCD) and the Office of Public Counsel for Victims (OPCV), the Committee might provide documents, studies and opinions and make sure that counsel are able to exercise their mission in the best way with the assistance of an independent Amicus Curiae. This proposal was supported by the ICC Presidency during an interview (Hirab Abtahi).
- b) *Representing and protecting the rights of the Amici Curiae members of the ICCBA*, of whom it is the advocate. The Amici Curiae Committee raises awareness on the role of Amici Curiae and on the importance of their intervention before the ICC and outside of this court through cooperation with similar Association structures (for instance the Association of Defence Counsel practicing before the International Criminal Tribunal for the former Yugoslavia, ADC-ICTY).
- c) *Serving as quality control centre, ready to carry out certain duties before the ICC.* To make sure that the judicial activities of the Court do not prejudice future defendants or victims at the Situation stage, the Committee shall represent and protect the rights of the ICCBA's Amici Curiae from the beginning of the case. It shall also intervene together with the Office of Public Counsel for the Defence (OPCD) and the Office of Public Counsel for Victims (OPCV) before a Chamber on matters relating to history, sociology or specific rights. It shall furthermore remain at the disposal of the ICCBA to facilitate the intervention of an Amicus chosen in a procedure or to serve as a coordinator between lawyers and the ICC in the case where a question is raised in relation to the Amicus Curiae.

## **VI – Improvement of the Amici Curiae Committee's work:**

In the course of the past year, the Amici Curiae Committee reflected upon the ways it could improve the efficiency of its work. To this end, the Committee undertook a broad campaign aiming at identifying the Amici Curiae's interlocutors at the ICC, and reviewing the brief filing procedure in order to suggest improvements.

***Interlocutors identification.*** To improve the efficiency of the Amici Curiae Committee's work, a number of consultations have first made it possible to target the persons interested in the demand and filing procedure of Amici Curiae's briefs. During a meeting with the Chief of the Registry Legal Office (Thomas Henquet), the emphasis was put on the improvement of research capacity necessary to select and locate more quickly ICC internal information on Amici Curiae. Even though there is no highly functional data base, the ICC website allows, through a key-word or sequences of text search, to find information on the modalities of intervention of Amici Curiae before the ICC. The verification of information obtained is eased thanks to a contact with the Court Management Service which is under the authority of the Court Registry, in particular under the responsibility of Charlotte Dahuron. At the occasion of three meetings with this service, the Committee could familiarize itself with the Registry's working practices which can bring useful information on how material filed with the ICC is processed in cases involving Amici Curiae. Thanks to an efficient IT team including Court Record Assistants (led by Stéphane Leho), the questions relating to Amici Curiae are filed and all documents addressed through email are centralised and classified in the archive with the help of the Registry *judoc* email address which receives all demands and all briefs.

***Procedure monitoring.*** After this, the Committee reflected on the authorisation procedure and the Amici Curiae's briefs admissibility by the ICC. Even though Rule 103 of the Rules of Procedure and Evidence specifies the modalities of Amici's intervention, which can happen at every stage of the procedure and in a free manner (oral or written), it does not bring any precision on the different steps that must be followed by Amici to file their observations. In practice, the Registry receives brief filling requests and distributes information between the Prosecution, offices of public counsel, Defence teams, Victims teams and Judges. There is the question of whom has the benefit of a mandate to act as Amicus before the Court. Even though Rule 103 states that: "...any Chamber of the Court can invite or authorise any State, organization or person...", there must be a precise interest (an intervention on "an appropriate question") and a legitimacy to act as Amicus Curiae.

***The interest to involve the ICCBA.*** In the ICC procedure, nothing prevents an Amicus assisted by a lawyer to intervene in the case. Consultations with the Registry Legal Office (Thomas Henquet) and judicial coordination by the Counsel Support Section (Pieter Vanaverbeke) have shown that it would be possible to involve the ICCBA which *would then check the competence of the proposed Amici* and could *reinforce the efficiency of the interventions admissibility procedure* before the Registry. Substantially, this intervention could, among other things, assist with *the clarification of legal, technical or scientific questions asked*. Indeed, the application as Amicus could be opened to areas other than law: for example to political history, international relations or to sociology (study of populations), because these areas are often encountered during trials for genocide, war crimes

and crimes against humanity and are unfortunately not subject to any coordination or *a priori* verification concerning the professional skills of the persons or organisations intervening on these matters. It must also be noted that there is no particular prerequisite to become an Amicus in contrast to what is requested from applicant lawyers to be included on the ICC List of Counsel, or if someone wishes to become an Expert at the Court. An interview with the services in charge of experts at the ICC brought the attention on the necessity to set prerequisites allowing the Court to recruit and update every year its list of experts and to publish calls for applications in specific areas (in particular concerning the compensation question)<sup>17</sup>. One of the advantages of this process is not only to *verify the skills and quality of their interventions but also to harmonise the presentation of experience on the forms used to this end*. This will enable to centralise information and to submit an application form to the Court in a didactic and relevant way.

**Reform proposals.** In order to reinforce the efficiency of the procedure, the Amici Curiae Committee can offer its support in relation to the follow-up of internal procedures before the Court thanks to two actions:

- (1) *by acting as an interface with the Registry Service.* By consolidating the trust established with the Registry Services, the Committee can play a coordination and follow-up role for Amici Curiae in order to rationalise and reinforce their intervention;
- (2) *by proposing to the Court Services the creation of a legal counsel position (P3 or P4) dedicated to the Amici Curiae.* Such a position does not currently exist and the Director of the Division of Judicial Services (Marc Dubuisson) welcomed very favourably the idea when suggested by the Committee President. This new administrative agent to be recruited could work on the creation of a data base relating to the Amici Curiae, check the good transmission of briefs, put in place a regular information channel with the ICCBA in order to be informed of any request for Amici Curiae made by the ICC, check the status and good standing of Amici Curiae (*vetting*) in accordance with a procedure to be determined, enter in contact with States involved in cases and with the United Nations, as need be. This new position will have the advantage of lessening the burden on the Court Management Service as regards amici filings and will also enable the Amici Curiae Committee to have a specialised point of contact within the ICC for these questions. This new position will considerably reinforce its reactivity and efficiency.

## **V – Other activities:**

During the course of the past year, the Amici Curiae Committee members also had other activities, it represented the institution during professional training, maintained special relations with other organisations and developed several high level scientific activities.

**Participation in professional training.** Members of the Amici Curiae Committee have been invited to participate in different professional activities. Thus, they had the chance to attend two conferences in The Hague, on 9 and 11 November 2016, on the *Construction of XXII century international criminal justice* (at the Peace Palace), and on *the 15 years of activity of the ICC* (at the

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<sup>17</sup> See for example on the ICC website, the call for applications for experts on the area of reparation for victims concerning the Bemba case (dated 2 November 2016) and Al Mahdi (dated 20 October 2016).

ICC seat). In the same spirit, another invitation was launched on 16 November 2016 by the Embassy of Great-Britain to attend a conference by Richard Goldstone, former Chief Prosecutor of the ICTY and ICTR, named "The ICC: Current Challenges". Finally, the president of the Committee was invited to the University of Vienna to conduct a seminar on human Rights and international Justice from 11 to 18 November 2016 including a presentation on the ICCBA.

***Relations with other institutions.*** With the aim of maintaining professional relations with other national bar associations and to ensure a better awareness of the ICCBA's work, the Amici Curiae Committee members have joined national delegations visiting the ICC and participated in discussion regarding international criminal justice; for instance at the occasion of a visit from the Val de Marne bar association at The Hague on 10 November 2016, in the presence of the President of the Bordeaux Bar Association. The Committee has also worked on the rapprochement of the ICCBA with the Siracusa International institute for criminal justice and human rights (SII) presided by Jean-François Thony. These contacts have made it possible to establish a cooperation in the area of professional training and to reinforce the link between magistrates and lawyers specialising in international criminal law. The ICCBA president, David Hooper, was invited to participate in pedagogical activities which took place in May/June 2017 (conference, practitioners training). In the same spirit, the Amici Curiae Committee informed the President of the Dijon and Grenoble Bar Associations of the meeting organised on 29 March 2017 by the ICCBA on the reinforcement of inter-professional cooperation with national bar associations.

***Scientific and academic contributions.*** To contribute to the extension of the ICCBA's influence within the academic world, the Amici Curiae Committee participates in several scientific activities. At the occasion of the 30<sup>th</sup> anniversary of Klaus Barbie' trial, the president of the Committee organises an international conference entitled "Judging crimes against humanity: history's lessons" which will take place on 23 and 24 November 2017 at the Grenoble University (France) and under the ICCBA's auspices. The program is already available on the ICCBA's website. All members are warmly invited to this symposium which will take place in a friendly setting at the heart of the Alps at the time of the opening of the Christmas market! Concerning the other research activities, the president of the Committee was also appointed rapporteur in the jury for the thesis presented by our colleague Ghislain Mabanga on "Le témoin assisté devant la Cour pénale internationale" and brilliantly defended on 9 December 2016 at the University Paris Ouest Nanterre before a panel of renowned academics. Finally, as an associate member of the Centre de recherche sur les Droits Fondamentaux in Nanterre, he supervised the publication of two scientific articles on the Al Mahdi trial written by Marie Nicolas, doctor in law<sup>18</sup> and teaching at the University Grenoble Alpes, respectively entitled: "Le procès de Tombouctou: un tournant historique ?" (June 2016) and "Le verdict de Tombouctou: le prix des remords" (November 2016), published in the *Revue des droits de l'Homme* and available online (<http://revdh.revues.org>).

All these activities made it possible to increase awareness of the ICCBA and to ensure its promotion.

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<sup>18</sup> Marie Nicolas wrote a very interesting thesis on : "L'égalité des armes devant les juridictions pénales internationales" which was published by the editions of the Institut Universitaire Varenne, 2016, p. 624

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Before concluding this report, we want to thank all the people who accepted to participate in this very stimulating and enriching study. The first Amici Curiae Committee has now completed its mandate. The Committee hopes that its pioneering work continues and that the membership of the next Committee will also enjoy working on this subject which remains insufficiently explored.

Philippe Gréciano

*President of the Amici Curiae Committee (ICCBA)*