

# International Law Scholars as *Amici Curiae*: An Emerging Dialogue (of the Deaf)?

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## Abstract

International law scholars frequently seek to participate in international legal proceedings as *amici curiae*. Often they do so by ‘piggy-backing’ onto the submissions of NGOs and other advocacy groups. Occasionally—but increasingly in recent years—they do so in their own names, purporting to offer ‘pure’ academic expertise, and generating certain expectations of scholarly neutrality. This article focuses on the latter trend, which the authors argue has the potential to re-shape the scholar-adjudicator dialogue in interesting ways. Under the traditional approach towards ‘teachings’, the decision of whether, how and with whom to engage is firmly in the hands of the adjudicators. The proliferation of academic amicus briefs threatens to disrupt this arrangement. It also brings certain benefits: the briefs are often more ‘on point’ than doctrinal writings, while openness to unsolicited academic submissions encourages plurality and reduces reliance on reputation as a measure of scholarly quality. Our survey of the emerging practice across various international courts and tribunals indicates that adjudicators tend to be reticent when it comes to the reception of unsolicited academic amicus briefs, however, we identify several instances of productive engagement. This leads us to conclude that it would be unduly gloomy to characterize the emerging practice as a ‘dialogue of the deaf’. A fairer assessment would be that the academic amicus trend is bringing about a modest adjustment in the way that international law scholars and adjudicators engage with each other.

## Keywords

*amicus curiae*; Article 38(1)(d) ICJ Statute; international law scholarship; scholar-adjudicator dialogue; teachings

## I. INTRODUCTION

International law scholars who participate in legal proceedings as *amici curiae* occupy an interesting space at the nexus between the ‘science’ and ‘praxis’ of international law.<sup>1</sup> The scholarship contained in their interventions has been described as a possible manifestation of ‘scholarship of action’, as distinct from more pure forms of

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<sup>1</sup> For a general discussion of the interaction between these two spheres, see M. Lachs, *The Teacher in International Law: Teachings and Teaching* (1987), 228.

researched-based ‘academic scholarship’.<sup>2</sup> This is an especially apt label in the case of scholars who prepare amicus briefs in conjunction with NGOs and other advocacy groups, such as the many law school clinics established at (mainly American) universities. Indeed, the submissions of such actors frequently transgress the realm of scholarship altogether and take the form of outright advocacy.

The scope of this article does not encompass every form of amicus participation in which scholars are involved. Its focus is more narrowly on amicus briefs submitted by academics *qua* academics. By that we mean not only that the briefs are submitted by academics in their own names (rather than in conjunction with NGOs or law clinics) but also that they purport (explicitly or implicitly) to possess special qualities *by virtue of their scholarly provenance*. As Richard Fallon puts it in his discussion of academic amici in the US context, the activity under scrutiny involves:

representing oneself as having a distinctive expertise that depends on notions of integrity that are internal to the scholarly enterprise. Someone claiming scholarly expertise thus sets herself apart from those seeking to participate in a case based on ideological interests. Professors who join scholars’ briefs aim to engender distinctive, role-based expectations concerning the character of their participation.<sup>3</sup>

Such scholars’ briefs, which have become a significant feature of appellate litigation in the US during the latter decades of the twentieth century, are increasingly being submitted before international courts and tribunals. Indeed, our survey of publicly accessible unsolicited academic interventions before international fora shows that about half were filed after 2010.<sup>4</sup> This emerging trend presents interesting challenges and opportunities for the international adjudicative process.

The central concern of this article is to determine whether, and to what extent, a new kind of scholar-adjudicator dialogue is emerging – beyond the constraints of the traditional approach towards doctrine enshrined in Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) – as a result of the submissions of academic amici. While contending that academic amicus participation has the potential to reshape the interaction between the spheres of international law scholarship and international adjudication in meaningful ways, we observe that in practice adjudicators are often reticent when faced with unsolicited scholarly submissions. However, there are some signs of productive engagement – the encounter is not quite the ‘dialogue of the deaf’ that our title provocatively hints at.

Section 2 of the article charts the rise of the academic amicus in the context of the evolution of amicus participation generally. Section 3 identifies the main challenges that academic amicus participation presents to the traditional dynamic between scholarship and international adjudication. Section 4 reviews the practice across

<sup>2</sup> See C. Stahn and E. De Brabandere, ‘The Future of International Legal Scholarship: Some Thoughts on “Practice”, “Growth” and “Dissemination”’, (2014) 27 LJIL 1, especially at 2, where the authors draw on the reflections of A. Oraison.

<sup>3</sup> R. Fallon, ‘Scholars’ briefs and the vocation of law professors’, (2012) 4 *Journal of Legal Analysis* 223, at 237.

<sup>4</sup> We refer to 28 academic amicus briefs in this article. The pre-2010 numbers are skewed by the fact that in the *Blaškić* case (*infra*, note 118) the ICTY accepted nine scholars’ briefs, after issuing an open invitation (but not specific invitations) for scholars to intervene.

a range of international courts and tribunals. Section 5 contains some concluding reflections.

## 2. THE RISE OF THE ACADEMIC AMICUS IN DOMESTIC LITIGATION

A survey of legal dictionaries reveals that the role of amicus is understood to encompass two broad elements. The first is an assumed independence or neutrality; the amicus is defined as a ‘by stander’,<sup>5</sup> ‘stander by’,<sup>6</sup> ‘non-party’,<sup>7</sup> or one ‘without having an interest in the cause’.<sup>8</sup> The second element relates to the amicus’s expertise; the amicus must possess the ability to ‘assist [the court] with research, argument, or submissions’,<sup>9</sup> correct the court ‘when a judge is doubtful or mistaken’,<sup>10</sup> contribute knowledge of facts or laws which the court has ‘overlooked’, or ‘does not at the moment remember’.<sup>11</sup> Scholars tend to pride themselves both on their independence and on their possession of expertise, however, they have had relatively little involvement as amici historically.<sup>12</sup>

Amicus interventions were first documented in fourteenth century England,<sup>13</sup> but they remained infrequent until the nineteenth century, when the function of amicus began to develop in common law jurisdictions as a means of ensuring the representation of third-party rights, which in an adversarial process are often left unprotected.<sup>14</sup> Krislov makes the following observation regarding this development:

While the courts continued to cling to the proposition that the amicus was a detached servant of the court – “he acts for no one, but simply seeks to give information to the court” [*footnote omitted*] – his services no longer precluded commitment to a cause. Indeed, the very notion of his acting for no one was belied by his rising to do just the opposite – in many instances to act directly and officially as counsel for one not formally a party to the case.<sup>15</sup>

The subsequent evolution of the amicus function in legal systems such as the UK, Canada, Australia, New Zealand, South Africa,<sup>16</sup> and France,<sup>17</sup> is well documented.

<sup>5</sup> D. Greenberg (ed.), *Jowitt's Dictionary of English Law* (3<sup>rd</sup> edn., 2010).

<sup>6</sup> J. Bouvier, *A Law Dictionary (Bouvier's Law Dictionary)* (2006, originally 1843), 106.

<sup>7</sup> J. Law (ed.) *Oxford Dictionary of Law* (2015), 35.

<sup>8</sup> *Abbott's Dictionary of Words and Phrases*, as cited in Krislov, *infra* note 12, at 694.

<sup>9</sup> *Oxford Dictionary of Law*, *supra* note 7.

<sup>10</sup> *Bouvier's Law Dictionary*, *supra* note 6.

<sup>11</sup> H.J. Holthouse, *A New Law Dictionary (Holthouse Law Dictionary)* (1850), 19.

<sup>12</sup> For an account of the evolution of the amicus function, see S. Krislov, ‘The amicus curiae brief: From friendship to advocacy’, (1962) 72 *Yale Law Journal* 694.

<sup>13</sup> See review in S. Chandra Mohan, ‘The amicus curiae: Friends no more?’, (2010) *Singapore Journal of Legal Studies* 352, at 356–7. Also E. Angell, ‘The amicus curiae American development of English institutions’, (1967) 16 *International & Comparative Law Quarterly* 1017.

<sup>14</sup> M. Lowman, ‘The litigating amicus curiae: When does the party begin after the friends leave?’, (1991) 41 *American University Law Review* 1243, at 1250; also generally J. Koch, ‘Making room: New directions in third party intervention’, (1990) 48 *University of Toronto Faculty of Law Review* 151; P. Collins, *Friends of the Supreme Court: Interest groups and judicial decision making* (2008).

<sup>15</sup> Krislov, *supra* note 12, at 697.

<sup>16</sup> See E. Metcalfe, *To assist the court: Third party interventions in the UK*, (2009), 39.

<sup>17</sup> C. Coslin and D. Lapillonne, ‘France and the concept of *amicus curiae*: what lies ahead?’, *Paris International Litigation Bulletin* No. 4 (Hogan Lovells: 2012), available at [www.hoganlovells.cn/files/Publication/15047541-a7a6-476a-ae82-ffeb97083564/Presentation/PublicationAttachment/e6a90da3-ee0c-49c9-b87c-0ac138f8217e/6%20-%20France%20and%20the%20concept%20of%20amicus%20curiae.pdf](http://www.hoganlovells.cn/files/Publication/15047541-a7a6-476a-ae82-ffeb97083564/Presentation/PublicationAttachment/e6a90da3-ee0c-49c9-b87c-0ac138f8217e/6%20-%20France%20and%20the%20concept%20of%20amicus%20curiae.pdf).

The UK legal system recognizes that amici perform a variety of discrete functions, and that a more nuanced taxonomy is therefore required when regulating these functions as a matter of procedural law. The traditional expert amicus – appointed by the court to provide neutral expertise – is today referred to in the UK as an ‘Advocate to the Court’.<sup>18</sup> The more modern ‘advocate’ amicus – a representative of unrepresented interests, both private and public<sup>19</sup> – is referred to as an ‘intervener’.<sup>20</sup> A third category of amicus is a person appointed by the court on behalf of an unrepresented party (for example, on behalf of a child in family law proceedings).<sup>21</sup> While scholars are arguably best suited to the first of these roles, most amicus interventions in the UK Supreme Court are by interveners.<sup>22</sup> The interveners in those cases are often well-known NGOs like Liberty and Amnesty. Although scholars may be involved in the preparation of these NGO submissions, they tend not to appear as amici in their own name.

All three incarnations of the amicus identified in UK procedural law – expert, advocate, and court-nominated representative of unrepresented parties – find expression on the international plane.<sup>23</sup> However, the practice of academic amici before international courts and tribunals mirrors the practice in the US more than that of any other jurisdiction.

Unlike the UK, no regulatory distinction is made in the US between the ‘expert’ and ‘advocacy’ roles. In practice there is a fair amount of slippage between the two, partly because it is common for academic amici in the US to submit unsolicited briefs whose scope is not constrained by the terms of a court appointment (as the submissions of a British ‘Advocate to the Court’ would be).

In 2013, an average of 14 amicus briefs were submitted to the US Supreme Court per case, most dealing with issues of significant public importance.<sup>24</sup> For example, during the 2012–2013 term, 156 amicus briefs were submitted in same-sex marriage cases, and during the 2011–2012 term, 136 briefs were submitted in health care cases.<sup>25</sup> Like the UK, most of these briefs are filed by civil society organizations. Unlike the UK, academics also frequently submit unsolicited amicus briefs before the US appellate courts. Many of the briefs in question are filed by international law academics. Highly contentious issues, such as the legality of the use of force,<sup>26</sup>

<sup>18</sup> Supreme Court of the United Kingdom, The Supreme Court Rules 2009, No. 1603 (L.17), Rule 35.

<sup>19</sup> *Ibid.*, Rule 26.

<sup>20</sup> *Ibid.*, Rule 20.

<sup>21</sup> Metcalfe, *supra* note 16, at 7–8.

<sup>22</sup> L. Neudorf, ‘Intervention at the UK Supreme Court’, (2013) 2 *Cambridge Journal of International and Comparative Law* 16, at 25, observes that 36.5 per cent of cases in the Supreme Court in 2012 involved third-party interventions.

<sup>23</sup> As to the third category, ‘amici’ are frequently appointed to represent defendants who refuse representation in international criminal proceedings. However, this is not an activity that can be termed ‘scholarly’ in any sense, and it is therefore outside the scope of this article.

<sup>24</sup> A. Franze and R.R. Anderson, ‘The Supreme Court’s reliance on Amicus Curiae in the 2012–13 term’, *The National Law Journal* (18 September 2013), available at [www.arnoldporter.com/resources/documents/NLJ\\_The%20Supreme%20Court's%20Reliance%20on%20Amicus%20Curiae%20in%20the%202012-13%20Term\\_Franze%20and%20Anderson.pdf](http://www.arnoldporter.com/resources/documents/NLJ_The%20Supreme%20Court's%20Reliance%20on%20Amicus%20Curiae%20in%20the%202012-13%20Term_Franze%20and%20Anderson.pdf).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ronald Dellums v. George Bush* (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors, (1991) 27 *Stanford Journal of International Law* 257.

detention without trial,<sup>27</sup> or the enforcement of treaties in the US courts<sup>28</sup> tend to draw high-profile academic amici in droves.

Group submissions are common, and there is an evident concern among amici to present their submissions as ‘pure’ international law scholarship and to distance themselves from moral or political agendas. As with all forms of scholarship, it is important to remain alert to the possible existence of hidden agendas in these submissions. However, the stated scope of the amicus submissions in high-profile cases like *Dellums v. Bush* and *Hamdan v. Rumsfeld* is very much in line with the type of brief one might expect of a court-appointed expert amicus (or an ‘Advocate to the Court’ in the British system). In the first of those cases, the brief was said to be limited solely to ‘matters of constitutional principle, not to the morality or political wisdom of any executed or contemplated governmental action’; in the second, the stated aim of the amici was to provide a ‘historical perspective on the enforcement of treaties in US courts’.<sup>29</sup>

Unsolicited scholars’ briefs such as those referred to above are frequently deemed to meet the Supreme Court’s procedural requirement of ‘bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties’ which ‘may be of considerable help to the Court’.<sup>30</sup>

In a critical review of scholars’ briefs in a US context, Richard Fallon expresses scepticism at the claims of scholarly neutrality that one so often sees in these submissions. He argues that in many cases these briefs are ‘actually not very scholarly’.<sup>31</sup> He attributes the perceived lack of scholarliness to factors such as a tendency to seek the support (and signature) of many scholars, which Fallon claims tends to result in overly generalized briefs.<sup>32</sup> Fallon is also critical of the fact that some scholars sign briefs that are outside their exact field of specialization.<sup>33</sup> His overall assessment is rather grim:

To be blunt, law professors recurrently attempt to leverage their credibility as teachers and scholars to influence non-scholarly audiences, sometimes for personal gain and sometimes without satisfying the standards on which their scholarly reputations depend.<sup>34</sup>

Although the academic amicus is now well established in the US and other domestic jurisdictions, it has only recently emerged as a noteworthy phenomenon in the international arena.<sup>35</sup> The practice before international courts and tribunals is still insufficiently developed to warrant the kind of wide-ranging critique that Fallon has subjected the US practice to. However, given the recent marked increase in academic

<sup>27</sup> *Ibid.*

<sup>28</sup> *Hamdan v. Rumsfeld* 548 US 557, Amicus Brief of Louis Henkin et al.

<sup>29</sup> See *supra* notes 26 and 28.

<sup>30</sup> Rules of the United States Supreme Court, Rule 37.

<sup>31</sup> Fallon, *supra* note 3, at 228.

<sup>32</sup> *Ibid.*, at 233–4.

<sup>33</sup> *Ibid.*, at 234.

<sup>34</sup> *Ibid.*, at 228.

<sup>35</sup> See our review of the practice at [Section 4, \*infra\*](#).

amicus submissions before international fora, it is worth commencing a discussion of this nascent practice and its systemic implications.

### 3. ACADEMIC AMICI IN INTERNATIONAL FORA: EXPANDING THE SCHOLAR-ADJUDICATOR DIALOGUE?

In recent years, a growing emphasis on transparency, legitimacy, and public participation has made it easier for amici (in general) to intervene in international disputes.<sup>36</sup> There also appears to be a growing appreciation of the valuable role that amici can play in gathering additional factual and legal information, especially in complex disputes.<sup>37</sup>

Most fora are open to at least some form of amicus participation. While the ICJ Statute can hardly be described as fertile procedural ground for would-be amici, the ICJ is open in principle to receiving amicus briefs from ‘public international organizations’ in contentious cases (although it does so rarely, and has interpreted the term ‘public international organization’ to the exclusion of NGOs).<sup>38</sup> The ICJ model is predicated on the broader rationale that it is not enough for an amicus to be of assistance; there must also be a ‘public interest’ imperative to warrant participation.<sup>39</sup> In proceedings before the ICJ, the public interest requirement is very tightly construed.<sup>40</sup> Academic amici cannot even get a foot in the door, let alone entertain the prospect that the ICJ might engage with the substance of their submissions.<sup>41</sup>

Other courts and tribunals adopt a more permissive approach. Since the late 1990s in particular, a significant increase in amicus participation can be observed across international judicial and arbitral fora.<sup>42</sup> Academics cannot usually lay claim to represent a public constituency, beyond the limited claim that they are members of the public themselves. However, this has not stopped them from seeking to infiltrate the procedural space that has been opened up by the drive towards greater public

<sup>36</sup> See, for example, E. De Brabandere, ‘Rationale of amicus curiae interventions in international economic and investment disputes’, (2011–2012) 12 *Chicago Journal of International Law* 85; also, L. Bartholomeusz, ‘The amicus curiae before international courts and tribunals’, (2005) 5 *Non-State Actors and International Law* 209, at 283; G. Marceau and M. Hurley, ‘Transparency and Public Participation in the WTO: A report card on WTO transparency mechanisms’, (2012) 4 *Trade, Law and Development* 19.

<sup>37</sup> D. Steger, ‘Amicus curiae: Participant or friend? The WTO and NAFTA experience’, in A. von Bogdandy, P.C. Marvoldis and Y. Mény (eds.), *European integration and international coordination: Studies in honor of Clause-Dieter Ehlermann* (2002) 419, at 421–2; Bartholomeusz, *supra* note 36, at 278.

<sup>38</sup> Art. 34(2) ICJ Statute. Note, however, that memorials by NGOs have occasionally been appended to those of states. For a discussion of the ICJ practice, see De Brabandere, *supra* note 36, at 91–4.

<sup>39</sup> On the public interest rationale, see De Brabandere, *supra* note 36, at 103.

<sup>40</sup> See submission to the ICJ in the *Asylum* case, by the International League for the Rights of Man in 1950. The submission was not accepted as it was determined that the League was not a ‘public international organization’, and thus does not qualify according to the conditions of Art. 34 of the ICJ Statute.

<sup>41</sup> See Letter from Professor W.M. Reisman to the Registrar, 10 September 1970, ICJ Pleadings 1971, Vol. II, 636; Letter from the Registrar to Professor W.M. Reisman, 6 November 1970, ICJ Pleadings 1971, Vol. II, at 638.

<sup>42</sup> See, for example, a factual review of the participation of NGOs as amici before the ECtHR in L. Van den Eynde, ‘An empirical look at the Amicus Curiae practice of human rights NGOs before the European Court of Human Rights’, (2013) 31 *Netherlands Quarterly of Human Rights* 271, at 280. For a review of the cases in which amici attempted to intervene in investment arbitration, see L. Bastin, ‘The Amicus Curiae in investor-state arbitration’, (2012) 1 *Cambridge Journal of International and Comparative Law* 208. For a similar review in a WTO litigation context, see Marceau and Hurley, *supra* note 36.

involvement in international adjudicative processes. Often they seek to do so by ‘piggy-backing’ onto the advocacy-oriented submissions of NGOs and law clinics.<sup>43</sup> Increasingly, however, they seek to intervene *qua* academics. Before examining the practice in the latter area, we will consider some of the implications of this development from a theoretical perspective.

For reasons we explain below, the traditional dynamic between scholarship and the international adjudicative function is very much adjudicator-driven, but it is also premised on the notion that international law scholarship is a judicial resource of considerable value. Our basic contention is that the emergence of the academic amicus on the international plane has the potential to disrupt, but also enrich, this traditional dynamic.

In cases involving international law, the positive law can be relatively thin; judges are frequently required to discern rules from a morass of state practice and *opinio juris*. As a consequence, international law scholarship arguably has a bigger impact on judicial decision-making than scholarship in other fields of law. In the *Paquete Habana* case, the US Supreme Court extolled the usefulness of international law scholarship, lauding:

[T]he works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>44</sup>

Half a century later, the same sentiment would find expression in Article 38(1)(d) of the ICJ Statute, which refers to ‘the teachings of the most highly qualified publicists of the various nations’ as a ‘subsidiary means for the determination of rules of law’. Scholarship is thus conceived in *Paquete Habana* and in the ‘applicable law’ clause of the ICJ not as a source of law, but as a potentially valuable resource when the court is having difficulty deciding what the law is.

Traditionally, it is for a *court* to decide whether, when, and how to engage with teachings (invariably contained in books and articles) in its work. When the need arises (or when it serves the interest of the court) it is also for the court to decide *which* teachings to consider. On this model, any initiation of a scholar-adjudicator dialogue is firmly in the hands of the adjudicator. International adjudicators are often world-renowned experts in international law and may not need to consult academic scholarship with respect to each and every question.<sup>45</sup> The traditional model allows judges to identify those questions on which academic scholarship may be helpful, and avoid a constant time- and resource-consuming dialogue on each and every question.

<sup>43</sup> This practice is particularly widespread in the ECtHR. See generally Van den Eynde, *supra* note 42.

<sup>44</sup> 175 U.S. 677 (1900), 700.

<sup>45</sup> Indeed only in a very small number of cases has the ICJ explicitly relied on academic sources. See M. Peil, ‘Scholarly writings as a source of law: A survey of the use of doctrine by the international court of justice’, (2012) 3 *Cambridge Journal of International and Comparative Law* 136, at 151.

A proliferation of unsolicited academic amicus submissions threatens to disrupt this arrangement. It raises fears of the nightmare scenario envisaged by the ICJ in its correspondence with Professor Michael Reisman concerning his proposed amicus intervention in the *Namibia* case, where the Court stated it wished to guard against the ‘floodgates’ being opened ‘to what might be a vast amount of proffered assistance’.<sup>46</sup> The more scope scholars have to participate as amici, the less adjudicators are able to control the initiation and terms of the dialogue. In the new landscape, scholarship is no longer a static resource for adjudicators to draw upon. Instead, it is being pushed actively onto the judges’ desks. If the upward trend in academic amicus participation continues, it will result in more work for international courts and tribunals, especially those which – unlike the ICJ – actively consider all unsolicited amicus briefs before deciding whether to accept or reject them (like NAFTA tribunals or the ICTY).<sup>47</sup>

The increased prominence of academic amici also raises questions of quality control. The identification of the ‘most highly qualified publicists of the various nations’ involves a degree of subjectivity, but it generally results in the consultation of a confined list of ‘authorities’<sup>48</sup> who are widely considered to be persuasive and authoritative.<sup>49</sup> Many of the ‘teachings’ that are consulted have firmly stood the test of time, as frequent judicial references to the likes of Grotius and Vattel attest. By contrast, the quality of academic amicus submissions is not assured.<sup>50</sup> In the new landscape, adjudicators who are used to engaging at their own initiative with what they consider to be the *crème de la crème* of scholarship, may increasingly find themselves confronted with the writings of any researcher who has enough ambition and an Internet connection.

The traditional approach towards ‘teachings’ also contains a safeguard against the sort of scholarly opportunism identified by Fallon, who is critical of the tendency he observes among law professors to use their academic credentials in order to influence a specific case for personal gains.<sup>51</sup> Unlike academic articles and books, the amicus submissions of scholars are ‘tailored-made’ for specific, not-yet-decided cases. Scholars may be hired by interested parties who seek to confer ‘academic’ credibility on their desired legal outcomes. The same could be said regarding the promotion of political agendas; academics may try to ‘leverage their credibility as teachers and scholars’,<sup>52</sup> offering what is presented as their ‘distinctively scholarly expertise and

<sup>46</sup> ICJ/Reisman correspondence, *supra* note 41, at 638–9.

<sup>47</sup> For commentary on the NAFTA and ICTY practice regarding academic amici, see [Sections 4.2.2 and 4.2.5, \*infra\*](#).

<sup>48</sup> See, for example, the list of the most cited scholars by the ICJ, in Peil, *supra* note 45, at 158–60.

<sup>49</sup> Art. 38 (1)(d) ICJ Statute.

<sup>50</sup> Concerns regarding the scientific quality of amicus briefs were raised in the US, see, for example, M. Rustad and T. Koenig, ‘The supreme court and junk social science: Selective distortion in amicus briefs’, (1993) 72 *North Carolina Law Review* 91. In other studies respondents answered that amicus briefs could be improved through ‘better social science research’: see V. Flango et al., ‘Amicus curiae briefs: The court’s perspective’, (2006) 27 *The Justice System Journal* 180, at 189.

<sup>51</sup> Fallon, *supra* note 3, at 228.

<sup>52</sup> *Ibid.*



perspective'<sup>53</sup> to promote a political goal. One international law academic amicus offers the following reflection:

I have had long suppressed questions about why courts should accept these briefs at all, given that they seem to me – my amicus briefs and everyone else's – just advocacy leveraged by quite specious claims of “neutral” expertise. Meaning by “specious” – the expertise is real, the neutrality is not.<sup>54</sup>

Notwithstanding such concerns, the rise of the academic amicus can also be viewed in a positive light. It has the potential to liberalize and facilitate the scholar-adjudicator dialogue. It generates a greater plurality of voices, undermining the monopoly enjoyed by a small set of highly distinguished scholars, most of whom are of a certain age, gender, and origin.<sup>55</sup> This can in turn result in a more competitive environment with respect to ideas and arguments, one based on persuasiveness and not necessarily on reputation.

Furthermore, the academic amicus trend may also allow for scholarly involvement that is more timely and fact-sensitive. Through amicus submissions, scholars can comment on the specific circumstances of a specific case, and the manner in which the law should be read in this precise context. Scholars' briefs may be more 'on point' than academic literature, especially when courts and tribunals are considering novel issues which the academic literature has not yet addressed.

While the rise of the academic amicus on the international plane therefore has the potential to transform the nature and scope of the scholar-adjudicator dialogue in meaningful ways, it is not clear whether it is currently doing so in practice. As we observe in the following section, international courts and tribunals that are open in principle to amicus submissions by academics are not usually sympathetic towards these submissions, with certain exceptions.

#### 4. A REVIEW OF THE PRACTICE

Any attempt to conduct a comprehensive review of the practice in this area is complicated by the fact that an unknown number of academic submissions are discarded without official acknowledgment, and thus may never see the light of day, unless their authors seek to publish them elsewhere. Furthermore, where a procedural record exists to the effect that a submission has been considered and rejected, it is rare for reasons to be given, let alone detailed reasons. It is nevertheless possible to derive certain insights from the growing body of practice.

While the most interesting developments concern the judicial reception of unsolicited briefs, the most productive form of dialogue between the academic and judicial spheres occurs when expert amici are invited by courts and tribunals to provide scholarly expertise. It is to this aspect of the practice that we turn first.

<sup>53</sup> Ibid.

<sup>54</sup> K. Anderson, 'Richard Fallon on Law Professor Amicus Briefs', *Opinio Juris*, 28 October 2011, available at [opiniojuris.org/2011/10/28/richard-fallon-on-law-professor-amicus-briefs/](http://opiniojuris.org/2011/10/28/richard-fallon-on-law-professor-amicus-briefs/).

<sup>55</sup> See the review of the most cited scholars in the ICJ, Peil, *supra* note 45, at 158–60.

#### 4.1 The invited academic amicus

Given the status accorded to international law scholarship in the judicial decision-making process, it is unsurprising that courts and tribunals have found it valuable on occasion to invite scholars of international law to participate in proceedings as amici.<sup>56</sup> The participation of these scholars is closely aligned with the role of the expert amicus as traditionally conceived – that is to say, as a disinterested friend of the court, providing valuable expertise on what the law is. It can also be viewed as an offshoot of the traditional ‘Article 38’ approach towards the teachings of the most highly qualified publicists.

A classic example of the invited academic amicus in action can be found in the appointment of Professors Philippe Sands and Diane Orentlicher as amici in the *Taylor* case before the Special Court for Sierra Leone in 2004.<sup>57</sup> In their separate briefs, both amici came to the view – as summarized by the Court – that ‘jurisdiction may be exercised over a serving Head of State in respect of international crimes, provided such crimes were to be tried before an international criminal tribunal’.<sup>58</sup> On the question of whether the Special Court for Sierra Leone (SCSL) was such a tribunal, the amici both concluded that it was, and that the court was therefore entitled to exercise jurisdiction over Charles Taylor as an acting Head of State.<sup>59</sup>

The SCSL in the *Taylor* case had exercised its power under Rule 74 of its statute to appoint the two amici, ‘[i]n view of the significance of the international law issues’.<sup>60</sup> It stated that it was ‘grateful for these scholarly submissions’.<sup>61</sup> At paragraphs 17–19 of its judgment, the Court summarized the views expressed by the amici, devoting more space to the scholarly submissions of Sands (23 lines) and Orentlicher (18 lines) than it did to the (unsolicited) submissions of the African Bar Association (5 lines). In articulating its reasoning, the Court referred to the submissions of the amici and those of counsel for the parties in the same breath,<sup>62</sup> and was positively effusive in its endorsement of Professor Sands’ submissions: ‘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*’.<sup>63</sup> Later in the judgment, the court adopted Professor Orentlicher’s conclusions as its own, quoting from her amicus submission verbatim.<sup>64</sup>

The scholar-adjudicator dialogue in this case was clearly productive, however, it did not amount to a major deviation from the standard ‘Article 38’ engagement

<sup>56</sup> See, for instance, the invitation to submit an amicus curiae brief issued by the Extraordinary Chambers in the Courts of Cambodia to Professor A. Cassese, Professor K. Ambos, and McGill, University Centre for Human Rights and Legal Pluralism. See also an invitation to submit an amicus curiae brief issued by the SCSL to Professor D. Orentlicher in *Prosecutor v. Kallon and Kamara*, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), A. Ch., 13 March 2004, at the decision’s preamble. See also the *Taylor* case discussed below, *infra* note 57.

<sup>57</sup> *Prosecutor v. Taylor (Charles Ghankay)*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004.

<sup>58</sup> *Ibid.*, para. 1.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, para. 2.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, para. 34.

<sup>63</sup> *Ibid.*, para. 41.

<sup>64</sup> *Ibid.*, para. 51.

with ‘teachings’. The SCSL was firmly in control of the process, deciding whether to invite scholarly expertise, which scholar(s) to invite, and which issues were to be addressed. Its reliance on scholarship was – in the language of its procedural rules – ‘desirable for the proper determination of the case’.<sup>65</sup>

By definition, the ‘desirability’ criterion is much more difficult to satisfy when an amicus brief is unsolicited. Indeed, the degree of engagement with, and reliance on, the submissions of the amici in the *Taylor* case is only rarely on display when the submissions are unsolicited. As the following section will show, the scholar-adjudicator dialogue has been somewhat less productive in the case of unsolicited academic submissions.

## 4.2 The uninvited academic amicus

For reasons of economy, this overview will not focus in detail on the specific legal issues discussed in the academic submissions under scrutiny. Rather, it will focus on the nature of the interventions and the kind of judicial reception they received.

### 4.2.1 WTO tribunals

Several scholars have attempted to submit amicus briefs to WTO tribunals. While under WTO law the legal status of amicus submissions was originally unclear, the WTO’s Appellate Body based its authority to accept unsolicited amicus briefs on the wide language of Article 13.2 of the WTO’s Dispute Settlement Understanding, according to which panels have the right ‘to seek information’ from ‘any individual body’ or from ‘any relevant source’.<sup>66</sup>

It seems therefore that WTO tribunals are open, at least in principle, to the submissions of academic amici, which are clearly capable of qualifying as a ‘relevant source’ of information. In practice, however, WTO tribunals have been reluctant to consider such submissions.

We examined three amicus briefs, submitted by academics *qua* academics to WTO tribunals: a brief submitted by Luca Rubini (2013) in the *Canada FIT* case,<sup>67</sup> a brief submitted by Robert Howse (2012) in the *US Tuna Dolphin* case,<sup>68</sup> and a brief submitted by Robert Howse, Joanna Langille, and Katie Sykes (2013) in the *EC-Seals*

<sup>65</sup> SCSL Rules of Court, Rule 74. Like other international criminal tribunals (e.g., Lebanon, Cambodia), the SCSL takes the wording of its amicus provision from the ICTY.

<sup>66</sup> See *United States – Import prohibition of certain shrimp and shrimp products*, Report of the Appellate Body, WT/DS58/AB/R (1998), para. 104–10. This decision was later reaffirmed in several other cases, see, for example, *United States – Imposition of countervailing duties on certain hot-rolled lead and Bismuth carbon steel products originating in the United Kingdom*, Report of the Panel, WT/DS138/R (1999), para. 6.8. The Panel in this case rejected the amicus submission as it was submitted too late; *United States – Imposition of countervailing duties on certain hot-rolled lead and Bismuth carbon steel products originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (2000), para. 39; *Australia – Measures affecting importation of salmon – recourse to Article 21.5 by Canada*, Report of the Panel WT/DS18/RW (2000), paras. 7.8–7.9; *European Communities – Trade Description of Sardines*, Report of the Appellate Body, WTO Doc. WT/DS231/AB/R (2002), para. 157.

<sup>67</sup> L. Rubini, ‘Written submission of non-party amicus curiae’, submitted in *Canada – Certain measures affecting the renewable energy generation sector*, WT/DS412, WT/DS426 (2013) [*Canada FIT*].

<sup>68</sup> R. Howse, ‘Amicus Submission’, submitted in *United States-Measures concerning the importation, marketing and sale of tuna and tuna products*, WT/DS381 (2012) [*US Tuna*].

case.<sup>69</sup> The briefs were largely ignored by the WTO tribunals. No reasons were given to explain the tribunals' treatment of the amicus submissions. With respect to the briefs submitted by Rubini and Howse, the Appellate Body allowed the participants to express their views on these, but 'did not find it necessary to rely on [them]'.<sup>70</sup> The third brief, submitted by Howse et al., was deemed inadmissible on technical grounds.<sup>71</sup>

One possible explanation for this frosty judicial reception can be found in the objection of several WTO member states to the involvement of amici (generally) in proceedings held by the Appellate Body. The objection is that, as appeals before the Appellate Body are only permitted on questions of law, and as the members of the Appellate Body are legal experts, the acceptance of amicus briefs seems redundant.<sup>72</sup> This concern appears present in the minds of the adjudicators in one of the rare instances in which a WTO tribunal actually referred to an amicus brief, which had been submitted jointly by a legal clinic and an advocacy group.<sup>73</sup> The Tribunal cited only parts of the brief in which non-WTO law issues were reviewed.<sup>74</sup>

#### 4.2.2 *Investment tribunals*

The role of the amicus in investment arbitration was traditionally conceived of as similar to that of a third-party 'intervener' in the British system, assisting the court while simultaneously giving voice to a public interest.<sup>75</sup> The importance of the public interest being served in the context of amicus participation is emphasized both in the decisions of investment tribunals<sup>76</sup> and in procedural regulations.<sup>77</sup>

<sup>69</sup> R. Howse, J. Langille, and K. Sykes, 'Written submission of non-party amici curiae', submitted in *European Communities – Measures prohibiting the importation and marketing of seal products*, WT/DS400 (2013).

<sup>70</sup> *Canada FIT*, Appellate Body Report, *supra* note 67, para. 1.30; *US Tuna*, Appellate Body Report, *supra* note 68, para. 8.

<sup>71</sup> *European Communities – Measures prohibiting the importation and marketing of seal products*, WT/DS40/AB/R (2014), para. 1.15.

<sup>72</sup> See review of the objections to amicus submissions in C.L. Lim, 'The amicus brief at the WTO', (2005) 4 *Chinese Journal of International Law* 85, at 106.

<sup>73</sup> Humane Society International and American College of Law, 'Written submission of non-party amici curiae', submitted in *US Tuna*, *supra* note 68.

<sup>74</sup> *USTuna*, Report of the Panel, WT/DS381/R (2011), paras. 7.182, 7.288, 7.363, 7.368. In an earlier case, unsolicited amicus briefs were accepted, and even added to the case records, but never openly debated. See *Australia – measures affecting importation of salmon – recourse to Article 21.5 by Canada*, Report of the Panel, WT/DS18/RW (2000), *supra* note 66, paras. 7.8–7.9.

<sup>75</sup> On the 'public interest' rationale, see De Brabandere, *supra* note 36, at 103.

<sup>76</sup> Before the entering into force of the 2006 ICSID Arbitration Rules, the *Suez* Tribunal mentioned the public nature of the dispute (i.e., where cases are more than 'simply a contract dispute') as a relevant condition, see *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ICSID Case No. ARB/03/19 (2005), para. 20; *Methanex Corporation v. The United States of America*, NAFTA Chapter 11, Decision of the tribunal on petitions from third persons to intervene as 'Amici Curiae', para. 49; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Procedural Order No. 5 on amicus curiae, ICSID Case No. ARB/05/22 (2007), para. 51; *Apotex Holdings Inc and Apotex Inc v. The United States of America*, Appleton intervention, ICSID Case No. ARB(AF)/12/1 (2013) [*Apotex v. USA*], para. 43.

<sup>77</sup> See, for example, NAFTA Free Trade Commission, Art. 6(d), *Statement of the Free Trade Commission on non-disputing party participation* (2003), available at [www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf) [FTC Statement]; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art. 1(4)(a) (effective date: April 2014), which instructs a tribunal to consider the 'public interest' when exercising discretion (as in the case of decisions on amici participation).

Unsurprisingly, therefore, the majority of amicus interventions in investor-state proceedings are filed by civil society organizations.<sup>78</sup>

As far as the present authors are aware, there are no examples of amicus briefs submitted by academics *qua* academics in investment disputes. However, the approach of the Tribunal in the *Apotex v. US* dispute (2013) regarding an amicus brief submitted by Barry Appleton is highly instructive for present purposes.

Mr. Appleton is a prominent investment lawyer, not a university academic, but he is – and holds himself out to be in his submission – a renowned expert in the field who has published widely in investment law generally and on NAFTA issues in particular.<sup>79</sup> The carefully reasoned procedural Order of the Tribunal rejecting his application is an unusually comprehensive judicial statement concerning the participation of individual legal experts as amici in investor-state proceedings, and it therefore seems apt to consider the decision in the context of the present study.

Mr. Appleton claimed that, based on his extensive experience and expert knowledge, he could be of service to the Tribunal.<sup>80</sup> More specifically, he claimed that he could provide clarification regarding the meaning of certain investment treaty obligations.<sup>81</sup> He claimed moreover that there was a ‘public interest’ in permitting his intervention, in the sense that the public has an interest ‘in the proper interpretation of the Treaty and in ensuring that the NAFTA Chapter 11 process benefits from the perception of being more open and transparent’.<sup>82</sup>

The Tribunal had ‘no doubt’ that Mr. Appleton’s expertise and experience were extensive, and it accepted that his proposed intervention fell within the scope of the dispute.<sup>83</sup> However, the Tribunal held that Mr. Appleton’s extensive legal expertise did not of themselves justify his amicus participation according to the criteria in the rules.<sup>84</sup> The question, according to the Tribunal, was whether a non-party could provide:

a different perspective and a particular insight on the issues in dispute, on the basis of either substantive knowledge or relevant expertise or experience that go beyond, or differ in some respect from, that of the disputing parties themselves.<sup>85</sup>

The Tribunal held that counsel for the parties were sufficiently knowledgeable and experienced to provide the Tribunal with the necessary legal insights and perspectives.<sup>86</sup> It thus concluded that Mr. Appleton was very unlikely to provide

<sup>78</sup> See generally N. Bernasconi-Osterwalder, ‘Transparency and Amicus Curiae in ICSID Arbitrations’, in M.C. Cordonier Segger et al. (eds.), *Sustainable Development in World Investment Law* (2010), 191.

<sup>79</sup> See B. Appleton, ‘Petition for leave to submit non-disputing party (*amicus curiae*) submission of Barry Appleton’, submitted in *Apotex v. USA*, *supra* note 76.

<sup>80</sup> Mr. Appleton’s experience, according to his petition, includes serving as an advisor to sub-national governments during the negotiations of the NAFTA, extensive practice as a litigant in investment disputes, and authoring two books on the NAFTA.

<sup>81</sup> *Apotex v. USA*, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party, paras. 11, 30, and 34.

<sup>82</sup> *Ibid.*, para. 14, citing para. 18 of Mr. Appleton’s submission.

<sup>83</sup> *Apotex v. USA*, *supra* note 81, paras. 32 and 36.

<sup>84</sup> The specific rule in question being section B(6)(a) of the NAFTA FTC Statement.

<sup>85</sup> *Apotex v. USA*, *supra* note 81, para. 31.

<sup>86</sup> *Ibid.*, para. 32.

the tribunal with ‘any particular perspective or insight different from the Disputing Parties’.<sup>87</sup>

Up to this point, it seems clear that the same obstacles would be faced by any individual expert, whether a university academic, a practising lawyer, or an individual with one foot in practice and one in academia. However, it is important to note that Mr. Appleton’s professional connections as a practising lawyer militated in important respects against the acceptance of his application. The Tribunal held that: ‘It seems that the Applicant’s “significant interest” in this arbitration lies only in having this Tribunal adopt legal interpretations of NAFTA that he favours that could be advantageous to his clients in his pending and possible future NAFTA cases.’<sup>88</sup> In a related finding on the question of ‘public interest’, the Tribunal held that ‘what lies behind Mr. Appleton’s asserted public interest is a particular and professional interest and not a “public interest” affecting him personally’.<sup>89</sup>

The approach of the Tribunal in *Apotex* suggests that the door is not closed to scholars who wish to intervene in investor-state proceedings as amici. It can be inferred from the decision that professional detachment from the world of investment law practice may be conducive to success as an amicus. In this respect, full time academics, untainted by involvement with clients, may be looked upon more favourably than investment law practitioners. Furthermore, persons capable of providing a ‘different perspective’ from the parties or ‘a particular insight’, are likely to find investment tribunals more prepared to accept and engage with their submissions. Those who can demonstrate expertise in areas of law other than investment law may also be favoured by tribunals, given the requirement that the amicus should provide a distinctive perspective or insight, which counsel for the parties cannot be relied upon to provide.

Several examples exist of cases in which non-investment law expertise was required, and accepted, by investment tribunals. Most notably, since 2010 the European Commission has been invited to intervene,<sup>90</sup> and has intervened of its own initiative,<sup>91</sup> in several cases in order to provide expert knowledge of EU law. For example, in *Electrabel S.A. v. The Republic of Hungary* (2012),<sup>92</sup> the Tribunal accepted an amicus brief submitted by the European Commission. The Tribunal specifically emphasized the European Commission’s ability to contribute expert knowledge in fields such as the relations between EU law and the Energy Charter, and with respect to EU law on state aid.<sup>93</sup> The Tribunal described the European Commission’s submission as ‘a

<sup>87</sup> Ibid., para. 33.

<sup>88</sup> Ibid., para. 40.

<sup>89</sup> Ibid., para. 43.

<sup>90</sup> *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (2010), para. 154.

<sup>91</sup> *Ioan Micula, Viorel Micula and others v. Romania*, Award, ICSID Case No. ARB/05/20 (2013) [*Micula*]; *Electrabel S.A. v. The Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19 (2012).

<sup>92</sup> *Electrabel*, *supra* note 91.

<sup>93</sup> Ibid., para. 4.89.

lengthy, *scholarly* and important document for these arbitration proceedings' and made several references to it.<sup>94</sup>

While the role of the European Commission in these cases cannot be considered as that of a classic independent expert amicus (as stated by the *Elecrabel* Tribunal, the European Commission had 'much more than "a significant interest" in these arbitration proceedings'<sup>95</sup>), it is clear that in complex fields of law, investment tribunals will sometimes embrace 'scholarly' expertise offered by external actors. Theoretical space appears to exist for amicus participation by scholars who possess the right type of expertise, but it remains to be seen whether this space will be exploited.

#### 4.2.3 *The European Court of Human Rights*

The European Court of Human Rights (ECtHR) has been accepting amicus briefs since 1981. As with other fora, NGOs are by far the most prolific amici before the ECtHR. Certain NGOs, like Interights and the International Commission of Jurists, have a particularly strong track record in this regard.<sup>96</sup>

From an extensive review of amicus submissions before the ECtHR, it would seem for the most part that in cases involving academics, the individuals in question either represented or collaborated with NGOs,<sup>97</sup> or acted as leaders of advocacy-oriented law clinics.<sup>98</sup>

A rare example of the ECtHR engaging with an amicus brief submitted by academics *qua* academics, can be found in *Hassan v. United Kingdom* (2014), where the ECtHR granted permission to Professors Françoise Hampson and Noam Lubell to submit an amicus brief.<sup>99</sup> The Court summarized the amicus submission – which dealt with the relationship between international humanitarian law and human rights law – in considerable detail, and while it did not refer to the brief in the operational part of its judgment, the reasoning in the majority's decision echoes the arguments made by Professors Hampson and Lubell to some extent.<sup>100</sup>

While it would be unwise to draw conclusions from a single case, it is possible that the ECtHR's approach in *Hassan* signals an opening up by the Court to academic amici. Even if it does not, it is possible that in light of *Hassan* more academics will be encouraged to submit amicus briefs to the ECtHR *qua* academics, rather than riding on the coat-tails of NGOs and law clinics.

<sup>94</sup> *Ibid.*, para. 4.91 (emphasis supplied).

<sup>95</sup> *Ibid.*, para. 4.92.

<sup>96</sup> Van den Eynde, *supra* note 42, at 285.

<sup>97</sup> See among other examples, an amicus brief submitted by M. Hamilton in collaboration with the International Commission of Jurists and ILGA Europe, in *Milica Dordevic and others v. Serbia*, 5591/10 (2014).

<sup>98</sup> These include such organizations as the University of Toronto's Centre for Reproductive Rights, International Reproductive and Sexual Health Law Programme, the Yale Law School National Litigation Project, Columbia Law School Human Rights Clinic, and many others, all of which mention 'advocacy' as their declared objectives.

<sup>99</sup> 'Amicus curiae brief submitted by Professor Françoise Hampson and Professor Noam Lubell of the Human Rights Centre, University of Essex', submitted in *Hassan v. United Kingdom*, App. No. 297950/09 (2014).

<sup>100</sup> *Hassan v. United Kingdom*, *supra* note 99. The summary of the amicus submissions is at paras. 91–5. The Court seems to draw on the amici's assessment of the ICJ's approach towards the co-existence of international humanitarian law and human rights law in situations of armed conflict (cf. paras. 93 and 104).

#### 4.2.4 *The Inter-American Court of Human Rights*

Since 1982 the Inter-American Court of Human Rights (IACtHR) has received more than 500 amicus briefs, mostly from NGOs, individuals, and law school clinics.<sup>101</sup> The IACtHR is arguably the international forum that is most receptive to unsolicited amicus briefs. Its Rules of Procedure are among the most permissive of any international court or tribunal; they stipulate that anyone who wishes to act as amicus may submit a brief at any stage in the proceedings (although within 15 days of a public hearing).<sup>102</sup> Amicus briefs can relate to ‘the facts contained in the application or legal considerations over the subject-matter of the proceeding’.<sup>103</sup>

The format of amicus briefs in the IACtHR tends to mirror the US practice closely, as does the propensity for submitting briefs on behalf of a large number of signatories.<sup>104</sup> These briefs include ‘group’ submissions by academic authors, often in conjunction with NGOs and law school clinics.<sup>105</sup>

Despite a long tradition of interventions by academic amici, interventions by academics *qua* academics are relatively rare. The first scholar’s brief ever to be accepted by the IACtHR was submitted by Professor Raúl Emilio Vinuesa in 1986. The case was an Advisory Opinion concerning the legal interpretation of the word ‘laws’ in Article 30 of the American Convention on Human Rights. While recognizing the submission made by Professor Vinuesa, the IACtHR did not refer to or rely on it directly in its decision.<sup>106</sup> In written comments, the IACtHR’s First Secretary described the submission, by a law professor ‘who did not claim any affiliation with an NGO’, as a ‘positive development’.<sup>107</sup>

Other examples of scholars’ briefs submitted to the IACtHR include submissions by notable scholars such as James Crawford (2004), Vaughan Lowe and Guy Goodwin-Gill (2002), Antônio Augusto Cançado Trindade (1994),<sup>108</sup> and others (2012),<sup>109</sup> as

<sup>101</sup> J. Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights* (2<sup>nd</sup> edn., 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)’, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2488073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488073).

<sup>102</sup> Rules of Court, Art 41 (2009). Added by the Court during its LXXXII Ordinary Period of Sessions, in the session held on 29 January 2009.

<sup>103</sup> Rules of Court, Art 2.3, (2009).

<sup>104</sup> See, for example, an amicus brief submitted by 56 amici, including 24 legal scholars, NGOs, Legal clinics, and practitioners: Amnesty et al., ‘Amici Curiae brief in support of petitioners’, submitted in *Campo Algodonero et al. v. Mexico*, Case Nos. 12.496, 12.497, 12.498, available at [www.law.georgetown.edu/rossrights/documents/2009-07-07AmicusBriefCampoAlgodonero.pdf](http://www.law.georgetown.edu/rossrights/documents/2009-07-07AmicusBriefCampoAlgodonero.pdf).

<sup>105</sup> See, for example, *ibid.*; see also Amicus brief submitted by Labor, Civil Rights and Immigrants’ Rights Organizations in the United States, in the matter of request for Advisory Opinion submitted by the Government of the United Mexican States, OC-18, February 2003, at 4, [www.nelp.org/content/uploads/2015/03/Brief-to-interamerican-court.pdf](http://www.nelp.org/content/uploads/2015/03/Brief-to-interamerican-court.pdf). While the latter submission was presented in the name of 50 ‘Labor, Civil Rights and Immigrants’ Rights Organizations in the United States’, four of the seven listed authors are university academics.

<sup>106</sup> Advisory Opinion OC-6/86, 9 May 1986.

<sup>107</sup> C. Moyer, ‘The Role of Amicus Curiae in the Inter-American Court of Human Rights’, in *La Corte Interamericana de Derechos Humanos, Estudios y documentos*, (1986), 103, 106.

<sup>108</sup> See list of amici compiled by Juaristi, *supra* note 101.

<sup>109</sup> See four scholars’ briefs submitted by E. Haba; H. Gullco et al.; A. Huerta Zepeda et al.; and R. Nieto Navia et al., in *Case of Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, Judgment of 28 November 2012 [*Murillo*].



well as several ‘group’ submissions by academics with no NGO involvement (e.g., Romano et al. (2012)<sup>110</sup> and Romano et al. (2012)).<sup>111</sup>

The IACtHR tends to summarize amicus submissions in its decisions, but not engage with them directly in its reasoning. The extent to which the thinking of individual judges is informed by academic amicus submissions is difficult to fathom. The present authors have attempted to reach out to judges and officials at the IACtHR and other fora on this point via e-mail, to no avail.<sup>112</sup>

#### 4.2.5 *The International Criminal Tribunal for the former Yugoslavia*

The International Criminal Tribunal for the former Yugoslavia (ICTY) has considered, and accepted, numerous amicus briefs. A few of those briefs were submitted by international law academics *qua* academics. Notably, in 1995 a brief was submitted by Professor Christine Chinkin, whose stated aim was to ‘present legal and policy arguments for supporting claims of non-disclosure to the public and of anonymity from the accused’.<sup>113</sup> The ICTY acknowledged Professor Chinkin’s brief in its decision,<sup>114</sup> cited it, and relied on it with respect to several issues.<sup>115</sup>

In 1997, the ICTY permitted the submission of 13 amicus briefs in the *Blaškić* case, nine of which were submitted by academics without the involvement of any advocacy group.<sup>116</sup> The amici commented on purely legal issues concerning the ICTY’s power to issue a *subpoena duce tecum* to a sovereign state or to governmental officials, and the appropriate remedies in the case of non-compliance with such an order.<sup>117</sup> The ICTY relied on,<sup>118</sup> and engaged with,<sup>119</sup> the amicus submissions to a significant extent in its decision.

The ICTY stated that its decision to reach out to the academic community was motivated by ‘the importance of the issues’ in the *Blaškić* case.<sup>120</sup> The briefs that the ICTY eventually received were from renowned scholars and they proved to be a useful resource. As with invited amici, and the traditional approach towards engagement with doctrine, the ICTY initiated the dialogue and dictated its parameters (albeit with less predictability concerning the provenance, quantity, and quality of the submissions). If an open call for academic amicus submissions were repeated today, one wonders whether the Court registry would be deluged with submissions of indifferent quality.

<sup>110</sup> Amicus brief submitted by Romano et al. in *Murillo*, *supra* note 109.

<sup>111</sup> Amicus brief submitted by Romano et al. in *Nadege Dorzema v. Dominican Republic*, Judgment of 24 October 2012.

<sup>112</sup> It is tempting to draw conclusions regarding the state of the scholar-adjudicator dialogue from the wall of silence that met our e-mails, but our experience is merely anecdotal.

<sup>113</sup> C. Chinkin, ‘Amicus curiae brief on protective measures for victims and witnesses’, submitted in *Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, 14 June 1995.

<sup>114</sup> *Prosecutor v. Duško Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-I-T, T. Ch., para. 10.

<sup>115</sup> *Ibid.*, paras. 39, 46, 47, 56.

<sup>116</sup> *Prosecutor v. Tihomir Blaškić*, Judgment on the request of the Republic of Croatia for review of the decision of trial chamber II of 18 July 1997, Case No. IT-95-14, A. Ch., 29 October 1997, para. 10.

<sup>117</sup> *Ibid.*

<sup>118</sup> The ICTY cited the amici 11 times in its decision: *ibid.*, footnotes 20–22, 38, 49, 61, 64, 71, 74, 75, 79, 101.

<sup>119</sup> *Ibid.*, paras. 21, 29, 30, 43, 57.

<sup>120</sup> *Ibid.*, para. 8.

In other cases where the ICTY has not actively called for academic assistance, it has been reluctant to engage with academic amici. In the *Gotovina & Markač* case (2012), a group of legal experts comprised mostly of law professors, some with extensive practical experience, submitted an amicus brief to the ICTY.<sup>121</sup> The brief was submitted purportedly ‘for the sole purpose’ of offering expertise in international humanitarian law.<sup>122</sup>

The ICTY rejected this submission for several reasons. First, the ICTY stated that the submission ‘repeats the task undertaken by the Trial Chamber and by the appeal briefs of Gotovina and the Prosecution’.<sup>123</sup> The Tribunal also observed that one of the amici neglected to disclose prior involvement in the case (as expert witness for the defence), and therefore did not comply with the ICTY guidelines on amicus submissions. This omission, the Tribunal stated, raised concerns about the amici’s objectivity.<sup>124</sup>

The *Gotovina* Tribunal’s decision by no means closes the door to academic amici. As with the *Apotex* case discussed above, it is implicit in the Tribunal’s decision that future submissions which have the quality (and appearance) of neutrality, and which contribute valuable expert knowledge that goes beyond the parties’ submissions, may be accepted by the ICTY, even if they are totally unsolicited.

#### 4.2.6 *The International Criminal Court*

The International Criminal Court receives amicus briefs on a regular basis, mostly from civil society organizations and individuals. In at least two instances, scholars have attempted to intervene *qua* scholars. In 2010, two US professors requested to submit their ‘observations on some issues related to the Prosecutor’s Request’ for authorization to investigate the Situation in Kenya.<sup>125</sup> The Pre-Trial Chamber rejected this application. The Chamber’s cursory decision states that ‘the proposed submission of observations would not assist in reaching a proper determination on the Prosecutor’s Request’.<sup>126</sup>

In a later ICC decision in the *Laurent Gbagbo* case (2013), a group of academics asked permission to submit an amicus brief.<sup>127</sup> The amici asked to intervene as legal experts ‘on the law of crime against humanity’, and offered to provide their observations with respect to two legal issues.<sup>128</sup> Despite the defendant’s objections to the request, the amicus submission was accepted by the ICC. The Court explained

<sup>121</sup> L. Blanc et al., ‘Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm’, submitted in *Prosecutor v. Ante Gotovina & Mladen Markač*, Case No. IT-06-90-A, 13 January 2012.

<sup>122</sup> *Ibid.*, para. 1.

<sup>123</sup> *Prosecutor v. Ante Gotovina & Mladen Markač*, Decision on the application and proposed amicus curiae brief, Case No. IT-06-90-A, A. Ch., 14 February 2012, para. 11.

<sup>124</sup> *Ibid.*, para. 12.

<sup>125</sup> *Situation in the Republic of Kenya*, Decision on Application to Appear as *Amicus Curiae* and Related Requests, ICC-01-09-14, PTC II, 3 February 2010, para. 2.

<sup>126</sup> *Ibid.*, para. 8.

<sup>127</sup> *Prosecutor v. Laurent Koudou Gbagbo*, Decision on the ‘Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules of Procedure and Evidence’, ICC-02/11-01/11-516, A. Ch., 1 October 2013.

<sup>128</sup> *Ibid.*, para. 4.

that the observations of the amici ‘appear to be of relevance’ to the matter at hand and ‘may be desirable for the proper determination of the appeal’.<sup>129</sup> The amici’s observations were eventually not considered by the ICC’s Appeal Chamber,<sup>130</sup> as it was decided that the issue dealt with by the amici could not be discussed in the appeal process.<sup>131</sup>

## 5. REFLECTIONS ON AN EMERGING TREND

The body of practice examined above is not particularly extensive, and a significant proportion of academic amicus interventions are very recent. However, there are enough examples across various international courts and tribunals to justify our description of the academic amicus phenomenon as an emerging trend. Certain patterns are visible, and tentative predictions may be made as to the likely development of this phenomenon.

The growing number of academic submissions is only part of the story. Prior to 2010, the interventions of academic amici tended to focus on the more ‘amicus-friendly’ fora like the IACtHR and ICTY. In the past five years, scholars have started to intervene not only in greater numbers but also before more fora (including notoriously ‘amicus-unfriendly’ fora like WTO tribunals).

When an academic amicus is directly appointed (as in the *Taylor* case)<sup>132</sup> or when there has been an open call for academic submissions (as in the *Blaškić* case),<sup>133</sup> the resulting scholar-adjudicator dialogue tends to be productive, as one would expect. It could be viewed as an iteration of the traditional approach towards engaging with the ‘teachings of the most highly qualified publicists’ (albeit a more fluid and context-sensitive form of engagement than the more usual recourse to written doctrine).

International adjudicators are understandably more reluctant to engage with unsolicited submissions from academics. There are, however, some chinks of light. The recent cases of *Hassan* (2014) in the ECtHR<sup>134</sup> and *Gbagbo* (2012) in the ICC<sup>135</sup> are relatively rare examples of judicial willingness to engage with academic amici. For an earlier example of constructive engagement, one might consider the ICTY’s reliance on Professor Chinkin’s submissions in the *Tadić* case (1996).<sup>136</sup> The IACtHR in particular shows a general willingness to admit academic amicus briefs (in line with its sympathetic approach to amici in general). The extent to which the reasoning of IACtHR judges is actually informed by the academic submissions whose existence

<sup>129</sup> *Ibid.*, para. 10.

<sup>130</sup> *Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’, ICC-02/11-01/11-572, A. Ch., 16 December 2013.

<sup>131</sup> *Ibid.*, para. 54.

<sup>132</sup> *Supra* note 57.

<sup>133</sup> *Supra* note 116.

<sup>134</sup> *Supra* note 100.

<sup>135</sup> *Supra* note 130.

<sup>136</sup> *Supra* note 114.

is acknowledged in the judgments remains an open question, deserving of further study.

In certain cases, reasoned judicial rejections of academic amicus briefs provide useful instruction regarding the elements that are conducive to the success of such briefs. In *Gotovina* (2012)<sup>137</sup> and *Apotex* (2011),<sup>138</sup> the ICTY and NAFTA Tribunals, respectively, both emphasized: (a) the requirement that the interventions of academic amici should be untainted by potential conflicts of interest or the appearance thereof; and (b) the importance of bringing distinctive expertise to the table that the parties to a dispute cannot be expected to provide.

The *Blaškić* example is perhaps the most resounding academic amicus success story. A key feature of that example was the Tribunal's open call for academic amicus participation. This approach arguably represents a useful compromise between the rigidity of the 'invited expert' model and the chaos that might result from a general open-door policy for academic amici. If academics are aware that a certain court or tribunal is well disposed to receiving academic 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.

If academic amicus interventions continue to increase as they have done in recent years, the *Blaškić* approach may become more popular among international courts and tribunals, eager to guard against the kind of deluge of unwanted 'proffered assistance' feared by the ICJ.<sup>139</sup> Another ICTY practice that may gain broader popularity is the employment of amicus officers in the registries of courts and tribunals, with a view to managing the reception of amicus briefs more effectively.<sup>140</sup>

While unsolicited academic amicus briefs have enjoyed limited success, the foregoing analysis shows that there are some signs that international adjudicators are prepared to listen. Adjudicators remain understandably keen to control the terms of the conversation and understandably sceptical of claims to scholarly neutrality, but it would be unduly gloomy to characterize the current state of affairs as a 'dialogue of the deaf'. Equally, it is unlikely that the emerging trend we have identified will grow into something that radically transforms the scholar-adjudicator dialogue as traditionally conceived. It seems more likely that there will be a gradual recalibration of the traditional approach towards 'teachings', as international adjudicators come to appreciate that academic amicus briefs – both solicited and unsolicited – provide a valuable opportunity to engage in real time with scholarship that is sensitive to the specific context of a given case.

The 'invited expert' approach may have the advantage of efficiency, but 'the most highly qualified publicists of the various nations' are scattered around the various nations, and their identity may not always be obvious to an adjudicator embedded

<sup>137</sup> *Supra* note 123.

<sup>138</sup> *Supra* note 81.

<sup>139</sup> ICJ/Reisman correspondence, *supra* note 41, at 638–9.

<sup>140</sup> The ICTY's amicus officer does not extend to making decisions on the merits of amicus submissions. Applications are sent to the Trial Chamber for a decision on whether they should be admitted. See ICTY Publication (IT/122), 'Information Concerning the Submission of Amicus Curiae Briefs', (27 March 1997), para. 4.

in a particular tradition. A preparedness to engage with unsolicited academic briefs would promote plurality and reduce excessive reliance on reputation as a measure of scholarly quality. In a dynamic and complex international environment, in which novel legal questions frequently arise, unsolicited academic amicus submissions may come to be seen as a valuable judicial resource to supplement – but by no means replace – judicial engagement with written doctrine and invited expert amici.