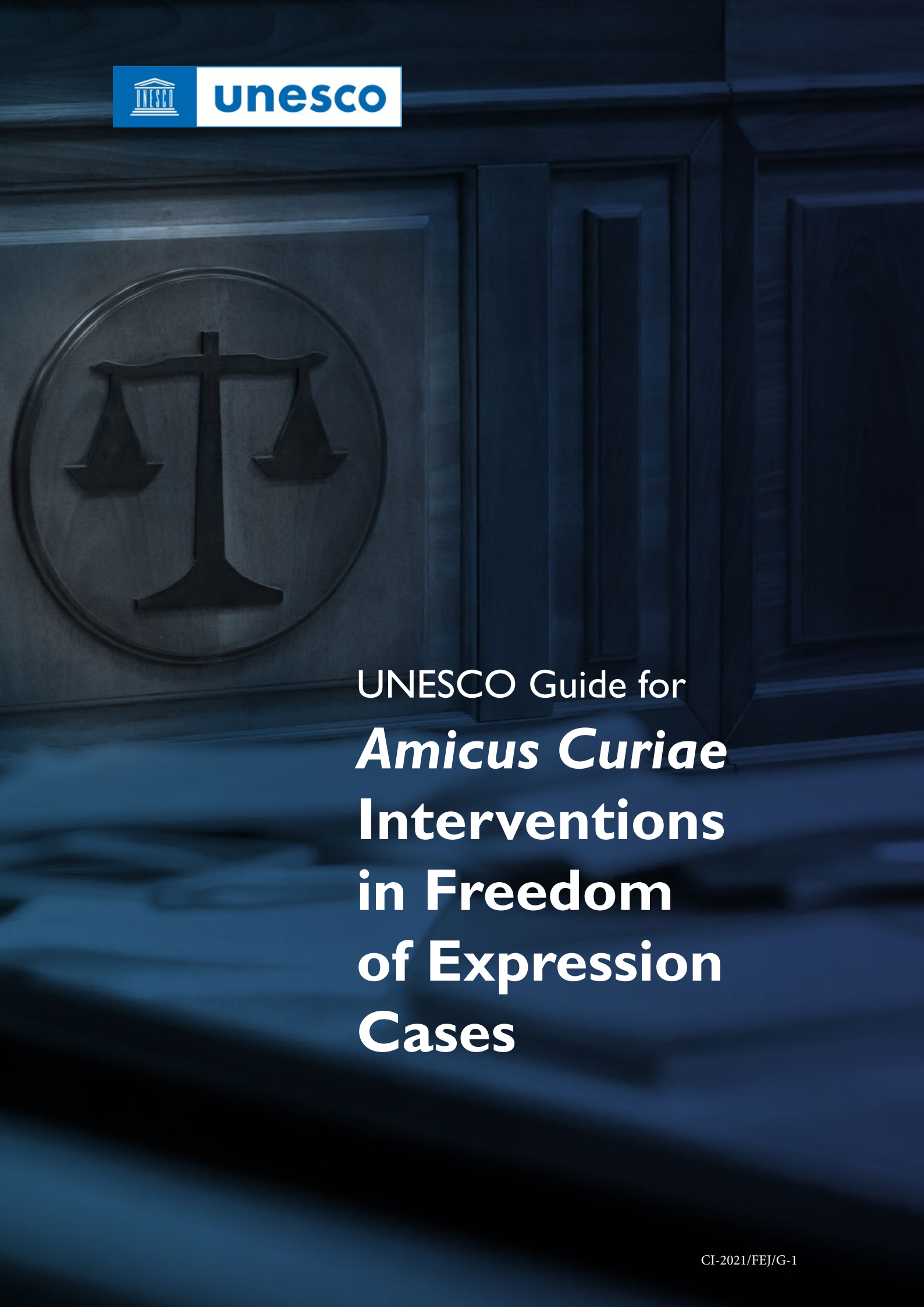

UNESCO Guide for

Amicus Curiae Interventions in Freedom of Expression Cases

CI-2021/FEJ/G-1

Introduction: the purpose of this guide

This guide aims to provide practical information and guidance to civil society organisations who consider intervening in cases before national or international courts as so-called ***'amicus curiae'*** or ***'third party intervener'***. It is focused on interventions in cases concerning freedom of expression and the safety of journalists, but the information it provides is broadly applicable to other human rights cases as well.

The legal term often used for these interventions is ***'amicus curiae intervention'.*** '*Amicus curiae*' is a Latin term that literally means 'friend of the court'. It indicates a person or organisation who participates in the case to provide an external perspective, independent from the parties. There are different interpretations as to what the 'proper' role of an *amicus curiae* is. This guide uses the term to describe a civil society organisation that intervenes in a case which is closely connected with that organisation's mission (for example, a media freedom NGO intervening in the case of a journalist standing trial for defamation) to provide their perspective on the case. In some countries and before some courts, the term 'third party' or 'third party intervener' is preferred. This guide will mainly use the term *amicus curiae*, using the term 'third party' or 'third party intervener' only when referring to a specific court where that is the preferred usage. The plural, used when multiple organisations sign on to an intervention, is '*amici curiae*'.

Amicus curiae interventions can play an important role in proceedings. By bringing specific information or legal trends that have not been highlighted by the parties to the attention of a court, it may be possible to influence the court's reasoning and contribute to a standard-setting judgment. If an individual journalist is on trial, an intervention can be a way of drawing the attention of the court to international standards on freedom of expression whilst also bringing wider attention to the case. A good *amicus curiae* brief can also have an impact as an advocacy and educational tool. For example, by presenting international human rights law standards on a particular issue – say, the imprisonment of journalists for defamation – it can educate judges on aspects of human rights law which they might not otherwise be aware of, and it can serve to educate the lawyers in the case as well. By bringing in voices and opinions from those other than the parties directly involved, the *amicus curiae* process is also a way of ensuring an inclusive legal process, which is of particular importance in cases where the judgments are likely to have broader societal impact. For civil society organisations, participating in a case through an *amicus curiae* can be an effective and low-cost way of engaging in strategic litigation: it allows them to focus on the core issues of the case without the burden of representing a client (something which is beyond the capability of most organisations).

For all these reasons, UNESCO offers this guide to support interventions where freedom of expression standards can be advanced or where the right to freedom of expression or the safety of journalists is at stake. However, UNESCO also recognises that there are significant hurdles to overcome before an organisation can effectively do so, ranging from a need to navigate opaque legal rules and procedures to questions around how to find lawyers to work with. There are also potential downsides to consider: the final court judgment may not set the standard hoped for or even erode existing international standards; a poorly led intervention can lead to a hostile attitude by the court to the case and to future interventions; or interventions might lead to delay in the litigation.

By providing practical information on how to file *amicus curiae* briefs and setting out strategic considerations and do's and don'ts, this Guide seeks to empower organisations to file *amicus curiae* interventions and helps them write the most impactful brief possible.

This Guide is set out in 6 parts:

- A discussion of the main strategic considerations that organisations who are thinking of intervening in a case should take into account. This includes questions such as how an intervention fits into a broader campaign, the type of cases to intervene in, and whether to intervene alone or as part of a coalition;

- A section providing case studies, each chosen to illustrate interventions before different types of court and in different scenarios;

- A section discussing practicalities, including how to monitor cases, engage lawyers and communicate with parties in the case;

- A section discussing technical legal requirements, before international human rights courts as well as at the national level;

- Some recommended 'do's and don'ts' in writing *amicus curiae* briefs, discussing what tone to strike and how to remain objective yet firmly set out the organisation's perspective.

- How to follow-up on a judgment, including monitoring implementation and engaging in post-judgment advocacy.

1 Observers have argued that more interventions are required to ensure a consistently high level of protection for the right to freedom of expression: Alina Pravdychenko, Vita Volodovska and Richard N. Winfield: Is it time for the media to intervene in Strasbourg? 28 April 2017: https://islp.org/is-it-time-for-the-media-to-intervene-in-strasbourg/

I. Strategic considerations

Any organisation thinking of intervening in a case, or of submitting *amicus curiae* interventions as part of a campaign, should carefully think through its objectives and the various options open to it to achieve them. Considerations include: which case or cases, or types of cases, to intervene in; whether to intervene alone or as part of a coalition; what arguments to bring; and which countries or jurisdictions to intervene in.

Organisations need to be very clear about what they intend to achieve, and whether an intervention is the best way of achieving that aim. Sometimes the scenario is very simple: a journalist or media outlet is being prosecuted, and a journalists' organisation wants to intervene in that case in order to stand in solidarity with the journalist and bolster her or his defence. Even in this simple scenario the journalists' organisation should think about whether to intervene alone or together with other organisations, either submitting one brief or coordinating different interventions, and what arguments to bring. The organisation should also consider whether an *amicus curiae* intervention is the most impactful way of showing solidarity (in some countries, an *amicus curiae* is required to be objective). There may be alternative ways of achieving the same goal, through trial observations, engaging in public hearings organised by a court on a particular issue (a technique used by the Supreme Court of Brazil, for example), through holding 'watching briefs' (a technique used in some common law countries, particularly Malaysia, Kenya and Australia, to allow observers to take part in court proceedings and draw attention to any irregularities), or through a media campaign. A combination of these techniques is also possible, perhaps involving different organisations in each role.

More complex considerations go into *amicus curiae* strategies that seek to achieve a broader aim, such as the decriminalisation of defamation or promoting the right of access to information. In such cases, organisations will need to consider carefully how an *amicus curiae* intervention fits in with their wider campaign, particularly taking into account how long it may take before final judgment is handed down. International organisations should consider which countries to intervene in, and within these countries, before which courts. Various factors should be taken into account: how receptive the courts in a country are to *amicus curiae* interventions, the current state of law in a country, and, for an international strategy, how influential judgments from that country's legal system are internationally. Organisations should also consider whether only to intervene at the highest courts in a country, or also at lower levels (judgments issued by courts of appeal at the level below a country's 'supreme' court may still be very authoritative).

Case selection criteria need to be very carefully construed, and even more carefully applied. Unlike a defence lawyer, who has no choice but to defend a client in need of legal defence, an organisation that pursues a broader goal can pick and choose from among many cases to intervene in, either waiting for the 'right one' to come along, or intervening in a number of cases. Usually, they will want to pick a case that is likely to get a sympathetic hearing before the court, and which is most likely to lead to the outcome they would want to see. In reality, this can be hard. The 'perfect case' rarely comes along; and sometimes organisations are so drawn to an intervention that they misjudge potential downsides. This happened in a 2015 case at the European Court of Human Rights on the liability of news websites for user comments. Keen to set a progressive standard on this issue and encouraged by successes in other recent cases, 35 NGOs intervened, but none anticipated the Court's very negative

instinctive reaction to the anti-Semitic nature of some of the user comments concerned. The judgment did not set the standard that the NGOs had hoped for.[2]

Organisations should also consider the benefit of partnering with others in an intervention or coordinating a series of interventions with others. If a journalists' association intervenes in a case alone –for example, in a case concerning the right of access to information–, a court may be under the impression that the issue concerns only the media. However, if in such a case a journalists' association intervenes together with a human rights organisation, an environmental group, or even an academic research institution or a chamber of commerce, such a coalition of interveners can demonstrate broad concern about the issue of access to information from across society. A broad coalition can intervene jointly, or each organisation can submit their own intervention, highlighting the importance of the issue from their perspective. Organisations could also consider coordinating interventions with one of the Special Rapporteurs on freedom of expression, at the United Nations, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, or the Organisation for Safety and Cooperation in Europe. The UN Special Rapporteur on Freedom of Expression has in recent years frequently intervened in various cases around the world.[3]

Courts particularly welcome input from specialists and subject matter experts and organisations who intervene in a case may consider including such expertise in their interventions. This can take different shapes and forms: experts in comparative law may be able to provide a comparative legal overview of how an issue is addressed (for example, setting out how the right of access to information is implemented in different countries); in situations where a journalist faces multiple cases a psychologist may be able to provide evidence of the psycho-social impact of this; or expert evidence can be included in cases involving complex technical questions. As part of their strategic considerations, organisations should also take into account the potential downsides of an intervention. In some cases, an intervention can lead to significant delay. In a case before the East African Court of Justice challenging criminal defamation laws, the respondent State used the intervention request by *amici curiae* to delay the case by three years.[4] There is also the risk that a judgment may not set the standard hoped for, or even that a judgment erodes developing freedom of expression standards. These risks should be part of the case selection criteria.

Finally, organisations thinking of intervening should always take into account the 'do no harm' principle. For example, in cases where international organisations consider an intervention in a politically motivated prosecution of activists or journalists, there may be a risk that an intervention politicises the case even further, or an intervention by an international civil society organisation or a CSO from a particular country might be viewed as some sort of 'foreign interference' or evidence that the journalists or activists are 'foreign agents'. In such a scenario the advice of the defendant and her or his lawyers should always be sought, and followed. It is good practice for any organisation considering an *amicus curiae* intervention to carry out a risk assessment which should include an assessment of potential risks to the journalist, activist or media outlet concerned as well as other risks (such as the possibility of setting a negative precedent).

2 *Delfi AS v. Estonia*, 16 June 2015, Application no. 64569/09. The 35 interveners were coordinated in four coalitions.
3 See https://ijclinic.law.uci.edu/2021/02/22/amicus-briefs-expert-testimony/ for a list of interventions up until mid-2020.
4 AG of *Uganda v. Media Legal Defence Initiative*, ARTICLE 19 and 19 others, East African Court of Justice, Appli-cations 4 and 6 of 2018, 28 May 2019.

II. Case studies

Three case studies have been chosen for inclusion in this guide: an intervention before the African Court on Human and Peoples' Rights, an intervention before the European Court of Human Rights, and an intervention before a national court. The case studies were selected not to illustrate a particular situation or country but rather to illustrate different ways in which an intervention can be conducted, and the impact that it can have. The first case study, in the case of *Lohé Issa Konaté v. Burkina Faso* concerned the first defamation case heard by the African Court of Human and Peoples' Rights and attracted a broad coalition of interveners. The second case study, concerning a Palestinian blogger, illustrates the impact that an *amicus curiae* intervention can have on the ability of a lawyer to defend freedom of expression cases. The third case study, concerning the case of *Sanoma v. the Netherlands*, shows the impact of 'solidarity' interventions by journalists' associations.

Criminal defamation at the African Court on Human and Peoples' Rights

The case of *Lohé Issa Konaté v. Burkina Faso* at the African Court on Human and Peoples' Rights concerned a journalist who had been fined and imprisoned for criminal defamation. His was the first defamation case to be heard by the Court and a group of NGOs representing journalists, writers, human rights activists and lawyers applied for permission to intervene.[5] Several of the interveners were already campaigning to decriminalise defamation and insult laws[6] and the case provided the opportunity of a potentially standard-setting judgment on this important issue by the African Court.

Represented by experienced human rights lawyers, Donald Deya and Simon Delaney, the NGOs argued that criminal defamation laws are a remnant of colonialism and incompatible with an independent, democratic Africa, and should be declared incompatible with freedom of expression.

The Court's judgment recites the *amici's* arguments (it may be important to note that one of the *amici's* lawyers, Donald Deya, is the widely respected head of the Pan African Lawyers Union whose reputation was known to the judges) and holds unanimously that the sanction of imprisonment for defamation violates the right to freedom of expression. On the question whether criminal defamation laws as such violate freedom of expression – the argument put forward by the *amici* as well as by Konaté's lawyers – the Court held that criminal defamation laws should be resorted to only in exceptional cases, and emphasized that any sanction imposed must be proportionate. Burkina Faso amended its laws accordingly in December 2015.[7]

5 The Centre for Human Rights; Committee to Protect Journalists; Media Institute of Southern Africa; Pan Africa Human Rights Defenders Network; Pan African Lawyers Union; Pen International And Malawi Pen, Pen Algeria, Pen Nigeria Centre, Pen Sierra Leone, and South Africa Pen Centre; Southern Africa Litigation Centre; and the World Association of Newspapers and News Publishers.

6 The Decriminalisation of Expression Campaign: https://www.doxafrica.org/the-campaign/

7 As reported by RTB Burkina Faso: Délits de presse : le CNT revoit les peines pécuniaires à la baisse, 18 Decem-ber 2015: https://www.rtb.bf/2015/12/18/delits-de-presse-le-cnt-revoit-les-peines-pecuniaires-a-la-baisse/

The strong *amicus curiae* intervention by a coalition of NGOs representing not just media NGOs but also human rights organisations, represented before the Court by a well-respected African human rights lawyer, has important symbolic values. Reflecting on the importance of the decision, the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information in Africa stated: "This is a landmark decision that will … give impetus to the continent-wide campaign to decriminalise defamation [and] pave the way for the decriminalisation of similar laws."[8] The judgment has since been cited by the ECOWAS Court of Justice, the East African court of Justice, the High Court of Kenya, and the Constitutional Court of Lesotho. [9]

Protecting bloggers and activists in Palestine

In 2018, the International Senior Lawyers' Project (ISLP for short) intervened in the case of Palestinian human rights defender Issa Amro, on trial for disturbing public order, hate speech, and insult. He was prosecuted before a military court as well as a magistrate's court in Hebron. ISLP got involved at the request of Amro's Palestinian lawyer and provided a legal brief, translated into Arabic, which provided an overview of comparative law and jurisprudence from the European Court of Human Rights, international human rights and criminal courts, and the United States Supreme Court.

The ISLP intervention came as part of a concerted civil society effort that campaigned for Issa Amro's freedom. Providing in-depth legal arguments drawn from international human rights law, the intervention gave the campaign legitimacy and argued that the proceedings were politically motivated.

Amro faced two trials: one before a civilian court and another before a military court. In the civilian case, the Hebron magistrate's court dropped the charges against Issa Amro in April 2021. Earlier that year, a military court handed down a three-month prison sentence suspended for two years, and a fine of 3,500 NIS (approximately 1,000 USD). Amro faces possible imprisonment if he is found to be participating in peaceful demonstrations during the probation period.

Neither judgment refers to the amicus curiae intervention, although it is more than possible that combined with the civil society campaign– had an impact. But the lawyer who had reached out to ISLP for assistance indicated that the intervention had been impactful in other ways as well. He described ISLP's intervention as being of "such high quality" that it would help him not just in Amro's case, but also in others.[10] Indeed, a year later, he used the same brief in a case involving bloggers and obtained a full acquittal. The judge in that case cited the brief.[11] The positive impact that the brief had on the lawyer and his ability to defend activists is clearly apparent.

8 PEN International, African Court: Imprisonment for Defamation Violates Freedom of Expression, 5 December 2014
9 *Federation of African Journalists (FAJ) and others v. The Gambia*, 13 February 2018; *Media Council of Tanzania v. Attorney General*, Case no. 2 of 2017; *Okuta v. Attorney General* [2017] eKLR (Petition No. 397 of 2016); *Peta v. Minister of Law*, Constitutional Affairs and Human Rights, Case number CC 11/2016.
10 ISLP: ISLP Defends Facebook Blogger in Palestine, 20 December 2018: https://islp.org/islp-defends-facebook-blogger-in-palestine/

The protection of journalistic materials at the European Court of Human Rights

The case of *Sanoma v. the Netherlands* concerned a publishing company that had been forced to hand over photographs of a street race, under threat of their office being closed and without the formal authorisation of a judge. Unusually, interveners got involved in the case only after the European Court of Human Rights had issued a judgment finding no violation of the right to freedom of expression. Following this adverse judgment by a lower chamber of the Court, the applicant requested a referral to the Court's 'Grand Chamber' – akin to an 'appeal'. The Grand Chamber only accepts a very small number of cases for review each year. Concerned at the impact the judgment might have on the protection of journalistic sources and other materials across Europe, the media freedom NGO Media Defence[12] alerted journalists associations across Europe and encouraged them to write letters to the Court supporting the request for a referral. Several dozen wrote to the Court.

Once the Grand Chamber had accepted the referral (a victory in itself), Media Defence together with other NGOs and the media outlet, *The Guardian*, sought permission to intervene as a 'third party'.[13] They were formally represented by Geoffrey Robertson QC, a well-known lawyer who had argued the very first protection of journalistic sources case at the same court. He argued that journalists should not be required to hand over materials to the police unless there is an overriding justification and the matter has been authorised by an independent judge. The intervention was joined by several dozen media outlets and journalists' associations who had not formally been allowed to intervene but nevertheless wanted to show their support.[14]

The Grand Chamber unanimously overturned the judgment of the lower chamber and held that national law should never allow police to force journalists to hand over materials without prior judicial authorisation. The Court relied on information supplied by the interveners which showed that there was "a tendency in countries in Europe and elsewhere" to provide safeguards against excessive police demands against journalists. It is significant that several dozen journalists' associations from across Europe had written to the Court in support of the referral, and then again in support of the intervention, had been noticed. The Dutch judge issued a concurring opinion to the Grand Chamber judgment acknowledging that the original judgment would have set a very bad standard, particularly in "new democracies" – and many journalists' associations from such "new democracies" had written to the court expressing their concern.[15]

11 ISLP: One *Amicus curiae* Brief, Six Free Speech Acquittals, 25 September 2019: https://islp.org/one-amicus-curiae-brief-six-free-speech-acquittals/

12 Then known as 'Media Legal Defence Initiative': https://www.mediadefence.org/

13 The European Court's preferred term for *amicus curiae*.

14 Associated Press, Bloomberg News, Index on Censorship, The European Newspaper Publishers Association, Condé Nast Publications, Hearst Corporation, The National Geographic Society, The New York Times Company, La Repubblica, Reuters, Time Inc., The Washington Post Company, and the World Association of Newspapers and News Publishers.

15 ECtHR (Grand Chamber), *Sanoma Uitgevers B.V. v. the Netherlands*, Application No. 38224/03 (2010)

III. Practicalities

Several practical considerations need to be taken into account, including setting up a monitoring system for the selection of cases; how to engage lawyers to work with on the brief; and whether and how to communicate with the parties in the case.

Monitoring pending cases

Much of the preparatory work for an *amicus curiae* intervention needs to be done before an intervention is drafted. This is particularly true with regard to the selection of cases: this will require monitoring of ongoing cases, an effort which requires sifting through newly brought cases for weeks and months before the right one is identified. Doing this properly requires resources to be set aside, and is a task that could be shared among a number of like-minded organisations.

The practicalities of monitoring will depend from country to country and from court to court. Some courts list all newly brought cases on their websites; others only list a few; and in some countries no information is available online at all and inquiries need to be made at court houses, or cases are publicised through the media.

Where information is available online, a systematic monitoring system can be devised quite easily. For example, the European Court of Human Rights lists all new cases on its 'HUDOC' system under the tab 'Communicated Cases'. These can be filtered by topic, state and on other criteria, allowing potential interveners to monitor and identify cases for potential interventions.[16] The Inter-American Court of Human Rights similarly lists all pending cases on its website, with details of the procedural stage of each.[17] Websites such as Columbia University's Global Freedom of Expression database also track freedom of expression cases, at the national as well as at the international level.[18] Groups or networks of organisations interested to intervene in cases on a specific topic could take turns to monitor new cases and keep each other updated.

Engaging, and working with, lawyers

An *amicus curiae* intervention is a means of getting involved in legal action. To do this effectively, interveners will need to be able to produce a brief that makes valid legal arguments; that is accepted by the court in the country or region concerned; and that is generally viewed as a valuable contribution and not a waste of the court's and parties' time. All of these are good reasons to engage a lawyer or a law firm, preferably in the country concerned – and if that is not possible, then at least one with affinity or links with the country or the legal system where the case is ongoing, inter-cultural skills, and ideally relevant language skills.

In many countries, national law requires that a brief is submitted by a lawyer qualified in that country. It is not always easy to find a lawyer in-country with the technical legal skills to draft an *amicus curiae* intervention, especially if the intervention is to cover comparative and international law. In that case, an organisation wishing to submit an *amicus curiae* intervention could consider using a lawyer in-country to advise on national law and act

16 See https://hudoc.echr.coe.int
17 See https://www.corteidh.or.cr/casos_en_tramite.cfm
18 See https://globalfreedomofexpression.columbia.edu/

as their agent, while the comparative and international law input in the brief is drafted by specialist freedom of expression lawyers from outside the country.

When engaging lawyers, it is important to make sure that they understand the case, the reason why an intervention is being considered, and how that intervention fits in with a wider campaign. An organisation looking for a lawyer should, whenever possible, engage with various stakeholders and speak with a few different lawyers before settling on one whom they believe is the best 'fit' for them, the case and the campaign. There is a good possibility that lawyers may be willing to draft an *amicus curiae* intervention without charge – to work 'pro bono', as lawyers put it. In some countries, professional lawyers' associations require or recommend that lawyers do a certain number of hours per month pro bono. In other countries this is not a requirement but lawyers enjoy it: it is a break from other legal work which can be quite monotonous; the issue is usually of some interest to lawyers; and they might even get a certain amount of recognition out of working on an intervention, at least in legal circles. In any case, lawyers should treat a 'pro bono' case the same level of professionalism as a case with a paying client.

There are a number of pro bono 'clearing houses' that can help an organisation find the right lawyer. These include (in alphabetical order):

- **International Senior Lawyers Project**, which has a focus area on media law and freedom of expression: http://islp.org/
- **i-Probono:** https://www.i-probono.com/about-us
- **PILnet, the Global Network for Public Interest Law**, which runs a global pro bono lawyers clearinghouse: https://www.pilnet.org/access-legal-help/
- **TrustLaw,** a global pro bono law program run by the Thomson Reuters Foundation that, like ISLP, has a media freedom focus area: https://www.trust.org/media-freedom/

Another way of finding a lawyer may be to approach a large international law firm. These often have sizeable pro bono practices and they may be keen to work on an *amicus curiae* brief.

When a law firm agrees to work pro bono, it is likely that a lot of the drafting is done by junior lawyers, usually supervised by more senior lawyers. This may come as a shock but is not necessarily a bad thing: a more junior lawyer may well be keen to prove their worth, and the supervision of a senior lawyer should ensure quality. Nevertheless, to ensure that there are no surprises, this should be talked through before settling on a lawyer or law firm.

If a lawyer is needed in a specific country where pro bono clearing houses do not have any members, it is probably best to ask the lawyer of the journalist or media outlet in whose case the intervention is envisaged for advice. It is also prudent (and more ethical) for the lawyer acting for the *amicus curiae* to be different from the one representing the journalist or media outlet, as having a single lawyer acting for both would constitute a conflict of interest.

Specialist organisations such as Media Defence, which works with lawyers around the world, the Digital Freedom Fund, which works with lawyers across Europe in internet and technology-related cases, and the International Bar Association, which houses the secretariat of the High Level Panel of Legal Experts on Media Freedom, may also be able to recommend lawyers in various countries.[19] Funding for *amicus curiae* interventions can be provided through UNESCO's Global Media Defence Fund, which issues calls for partnerships on an annual basis.[20]

19 See https://www.mediadefence.org/, https://digitalfreedomfund.org/, and https://www.ibanet.org/IBAHRIsecretariat for contact details.
20 See https://en.unesco.org/global-media-defence-fund for the 2021 call for applications, now closed.

Communicating with the parties

In some countries, getting the permission of the parties is a requirement; in other countries this is not necessary. Regardless of the formal requirements, it is advisable to at least alert the parties to the fact that an intervention is being considered. It is a matter of respect and the parties will usually welcome a potential intervener getting in touch beforehand. If the intervention is in a country where *amicus curiae* interventions are a rarely used legal tool, a prospective intervener may have to explain what this means, what the intervention seeks to achieve, and provide an overview of the kind of points likely to be made in the intervention. Interveners should ask their lawyer to help with these communications, or even handle these communications on their behalf. If the intervention is in a criminal prosecution or in a case where a journalist or activist is being sued by a powerful politician or business person, then the intervener will usually primarily be in touch with the journalist or activist and will prioritise their concerns. If a journalist or media outlet objects to an intervention in the case, that should be taken very seriously and generally respected.

In a number of countries, courts require that an *amicus curiae* intervention is strictly independent from the parties. When a media freedom NGO intervenes in a case that involves a journalist, there will be a natural tendency for the NGO to be sympathetic to the journalist's case. This in itself should not normally be objectionable, so long as the *amicus curiae* puts forward its own, independently reasoned legal arguments, and is not (perceived to be) directed by lawyers acting for the journalist.

As set out above, there are potential downsides to interventions. One downside that the parties are likely to be concerned about is potential delay. If one of the parties has strong concerns about the danger of delay –and particularly if that party is the victim of a human rights violation and seeks a speedy resolution– then that concern should be taken very seriously. The interests of an NGO wishing to intervene should never be put before the interests of the victim of a human rights violation.

IV. Technical requirements

The technical requirements for submitting *amicus curiae* interventions vary enormously from country to country. In some countries and before some courts, there are very detailed rules and regulations that cover everything from deadlines to the type of font to be used; in other countries there is very little or even no regulation at all and *amicus curiae* briefs are admitted entirely at the discretion of courts.

Before international human rights courts

There is a well-developed practice of *amicus curiae* interventions at the European Court of Human Rights and at the Inter-American Court of Human Rights. The African Court on Human and Peoples' Rights has an emerging practice. Interventions are possible at other international courts and tribunals as well; for reasons of space, this section focuses only on the three main regional human rights courts.[21]

21 For *amicus curiae* interventions at the ECOWAS Court of Justice, see Article 89 of the Court's Rules of Proce-dure: http://www.courte-cowas.org/wp-content/uploads/2018/11/Rules_of_Procedure_2002_ENG.pdf; for the East African Court of Justice, see Rule 36 of that Court's Rules of Procedure: https://www.eacj.org/?page_id=5722.

- African Court on Human and Peoples' Rights

Rules 42-47 of the Practice Directions of the African Court on Human and Peoples' Rights lay down specific procedures for a prospective *amicus curiae*.[22] In summary, organisations need to write to the Court and specify the contribution they intend to make. The Court may grant the request at its discretion. If a request is granted the Court will invite the *amicus curiae* to make their submissions, together with any annexes, at any point during the proceedings. The *amicus curiae* will be provided with the parties' pleadings, and their brief will be shared with the parties. In addition to providing written submissions, an *amicus curiae* may also be invited to make oral submissions at the hearing of the matter.

- European Court of Human Rights

Rule 44 of the Rules of Court of the European Court of Human Rights sets out the procedure for 'third party' interventions, the term that the Court prefers to *amicus curiae*.[23] Within twelve weeks of a case being 'communicated' to the defending State (this is the point at which a brief summary of the case is published on the Court's website, under the tab 'Communicated Cases'[24]) or referred to the Grand Chamber, an organisation may request permission to intervene. Requests should be short – no more than two or three pages – and set out a brief introduction to the third party, its interest in the case and the points it wishes to address, and why it would be "in the interest of the proper administration of justice"[25] for it to intervene. If an organisation has intervened previously, it would be good to mention this. If permission is granted, a deadline is set (usually three weeks) and a maximum number of pages specified (usually ten pages). *Amici curiae* are only very rarely allowed to participate in hearings, but it is always worth asking for permission.

- Inter-American Court of Human Rights

Articles 2.3 and 44 of the Rules of Procedure of the Inter-American Court of Human Rights lay down the procedure for *amicus curiae* interventions.[26] They provide that any person or institution who is unrelated to the case and to the proceedings may submit a brief to the Court as *amicus curiae*, in the working language of the case, to offer "reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceedings."[27] A brief may be submitted up until fifteen days following a public hearing in the case, or if no public hearing has taken place, fifteen days following the publication of an Order setting deadlines for final arguments (a procedural document that lawyers will be familiar with). The brief must be signed; if it is submitted via email and it is not signed, then the original brief together with supporting documentation should reach the Court within seven days of the emailed submission. Following consultation with the President, the *amicus curiae* brief and its annexes are transmitted to the parties for their information.

22 See https://www.african-court.org/wpafc/guides-to-litigants/
23 At https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
24 At https://hudoc.echr.coe.int/
25 The technical rationale stated in Article 36(2) of the Convention for admitting a third party.
26 Rules of Procedure of the Inter-American Court Of Human Rights, last amended November 2009, at https://www.corteidh.or.cr/reglamento.cfm
27 Ibid. Article 2(3).

Before national courts

Amicus curiae interventions can be very powerful before national courts, including lower courts. The rules for interventions vary from country to country, and in some countries there are no rules at all. A lack of rules does not mean that *amicus curiae* are not accepted: it simply means there are no rules and courts may decide to admit an intervention at their discretion. In practice, civil society organisations regularly intervene in cases even in countries where there are no rules.

An example of a court with detailed rules is the **United States** Supreme Court. Rule 37 of its Rules of Court provides that "[an] *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court", and goes on to stipulate detailed requirements.[28] The Court has issued a six-page Guide specifically for prospective *amici curiae*, laying down detailed procedural as well as technical requirements, including on such practical matters as the number of copies needed to be filed (forty).[29]

Similarly detailed rules are found in other countries as well. For example, Argentina's Supreme Court Regulation on the participation of *amici curiae*[30] provides that individuals or legal organisations with an interest in the case or issue may be allowed to intervene in the case. The Court can issue a call inviting *amici curiae*, or in the absence of such a call, an *amicus curiae* can intervene by establishing that the case concerns an issue of public importance. The Supreme Court regulation requires an *amicus curiae* to state which party they support and whether they stand to gain from the case financially or economically. *Amicus curiae* interventions should "enrich the deliberation on institutionally relevant issues, with well-founded arguments of a legal, technical or scientific nature".[31] The intervention cannot introduce unrelated or new facts, and interventions must not be more than twenty pages in length. *Amici curiae* must be represented by a lawyer.

In **Kenya**, the role of *amici curiae* is envisaged in the 2010 Constitution: Article 22 provides that "an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court". The Supreme Court Rules elaborate that, in determining whether to grant leave, the court must take into account the expertise of the *amicus curiae*, their independence and impartiality, and the public interest in deciding the intervention.[32] Sometimes, requests have been denied for lack of impartiality: for example, the Katiba Institute, which defends the rule of law, was denied permission to appear as *amicus curiae* in a case because it was deemed to have "strong views regarding the issues raised in this petition, which views support some of the parties".[33]

South Africa's Supreme Court of Appeal and Constitutional Court have similarly established rules for interveners. Constitutional Court Rule 10 and Supreme Court Rule 16 provide that *amicus curiae* interventions may proceed with the permission of the Chief Justice.

28 See https://www.supremecourt.gov/filingandrules/rules_guidance.aspx

29 See https://www.supremecourt.gov/casehand/AmicusGuide2019.pdf. It should be noted that these rules concern only the Supreme Court: other courts in the United States have their own rules.

30 The regulation uses the Spanish term, "Amigos del Tribunal": Corte Suprema de Justicia de la Nacion, Acorda-da 7/2013, Régimen que regula la participación de los Amigos del Tribunal. Modificaciones, Expediente Nº 2439/04

31 Ibid. Article 40.

32 Supreme Court Rules 2020, Article 19.

33 As quoted in A guide to Public Interest Litigation in Kenya, Kenyans for Peace with Truth and Justice, Africa Centre for Open Governance, Katiba Institute, March 2017: http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf

Requests should set out the submissions to be made, their relevance, and why the submissions would be useful to the Court and different from those of the other parties. A request should also include a summary of the written submissions, in order to allow the Chief Justice to make a ruling on whether or not to admit the intervention.[34]

Courts in many other countries have less detailed rules, sometimes developed through case law, while in a number of countries there are no rules at all. The latter does not mean that interventions are not allowed, but rather that the issue is at the discretion of the courts.

Colombia is an example of the first category: *amicus curiae* interventions are envisaged through a simple provision in the Constitutional Court's Regulations, and criteria have been elaborated through subsequent case law.[35] The Constitutional Court has held that *amicus curiae* interventions assist in the aim of democratic participation provided for by the Colombian Constitution and clarified that interventions may be admitted when (a) the purpose of a brief is to provide evidence, information or opinion in cases of general public interest; (b) the aim of the brief is to illustrate and not to define or decide matters before the Court or to influence its final decision; and (c) the intervention is designed to be impartial.[36]

In **Malaysia** there is no legislation but courts have developed the following criteria to determine when an *amicus curiae* intervention may be allowed: (a) the public interest in the case; (b) whether an *amicus curiae* would be of significant assistance to the Court in arriving at a just decision; (c) the parties to the case are unable or unwilling to provide the assistance proposed by the *amicus curiae*; and (d) the presence of an *amicus curiae* would not be prejudicial to the parties, including financially: any resultant costs should not outweigh the anticipated assistance.[37]

In **Indonesia**, there are no formal rules and courts are not bound to accept or even consider an *amicus curiae* intervention; the matter is entirely at their discretion. This lack of rules notwithstanding, there has been a number of *amici curiae* interventions, including in media freedom cases.[38] The legal justification cited by *amici curiae* is Article 5(1) of the Law on Judicial Power, which requires judges to "explore, follow, and understand the legal values and sense of justice that live in society."[39] Instead of submitting an *amicus curiae* brief, organisations can also choose to present their intervention as an expert witness. If this path is followed, they need to liaise with the lawyers concerned who will then present the intervention as evidence for one of the parties.[40]

Given this strong divergence in national rules, an organisation wishing to intervene in a case before a national court should seek advice from a lawyer who knows the legal system in that country (see section 4.b above on finding lawyers).

34 As summarised in Constitutional Law of South Africa, 2018, at https://constitutionallawofsouthafrica.co.za/.
35 Article 13, Decree No. 2067 of 4 September 1991
36 Constitutional Court Judgment C-513/92, 10 September 1992.
37 See Jerry WA Dusing @ Jerry W Patel & Anor v MAIWP & Ors [2017] 1 MLJ 216 (Court of Appeal), Nadarajan s/o Verayan v Hong Tuan Teck (Part 2) [2007] 7 MLJ 640 (High Court), Selvamary v Rethinasamy [1991] 1 MLJ 156 (Supreme Court),
38 For example, in the case of *Erwin Arnada v. Negara Republik* Indonesia, 2011 (downloadable, in Bahasa Indo-nesia, at http://referensi.elsam.or.id/wp-content/uploads/2014/09/Delik-Kesusilaan-dan-Kemerdekaan-Pers-dalam-Perkara-Majalah-Playboy-di-Indonesia.pdf).
39 Constitutional Court Regulation 06/PMK/2005 mentions the possibility of hearing "related parties … not di-rectly affected but for whom the subject matter is of high concern". This embodies the spirit of *amicus curiae* briefs, but it has been commented that this regulation was not intended as such. C.A. Soares, I.M.A.M. Iswara, *Amicus curiae* In The Criminal Evidence System In Indonesia, Sociological Jurisprudence Journal Vol. 2 Issue 1, pages 67-72.
40 See, for example, ARTICLE 19's April 2020 intervention in a prosecution in the Banda Aceh district court: https://www.article19.org/wp-content/uploads/2020/04/Indonesia-amicus-curiae-Mahdi-April-2020-Final-Signed1.pdf

V. How to write it? An effective amicus curiae brief

An effective *amicus curiae* brief should be clear, realistic in its objectives, be succinct and to the point, and be mindful of the legal culture in the court and country where the case is pending. This section provides a few "do's and don'ts" in the writing of *amicus curiae* briefs.

- **Understand the court and what arguments it finds receptive**

A good understanding of the court where the case is pending is very important. Organisations should research previous judgments made by that court and ascertain whether there are particular lines of argument that the court finds persuasive, or whether there are indications in previous judgments that it could be willing to consider certain issues. If a court is made up of multiple judges, it can be useful to research the judges and any opinions they have written in previous cases, as this can provide an indication of their receptiveness to certain arguments. At a court that is divided into sections, such as the European Court of Human Rights, it is worth considering intervening in cases pending before sections with judges known to be sympathetic to certain arguments. It is also good to listen to court 'insiders'. Former judges or senior lawyers at courts sometimes write blog posts or academic articles on their experience with *amicus curiae* interventions. It is useful to track these down, read them and follow the advice they give.[41]

- **Be culturally and politically sensitive**

Arguments made by international and foreign organisations are sometimes dismissed on the grounds that these organisations 'do not understand' the culture or context in the case in which they are intervening. There are steps that organisations can take to mitigate this: they can demonstrate their understanding of the case in how they write their intervention; they can submit a brief in equal partnership with a local or regional organisation against whom arguments of cultural or political ignorance cannot be made; or they can be represented by a local lawyer. The same goes for the question what arguments to make in an intervention. There may be specific arguments that can be drawn from comparative law, or specific jurisprudence to cite from other countries and courts. But this should be done with sensitivity. For example, in freedom of expression cases, it will frequently be tempting to cite United States Supreme Court arguments – the US First Amendment sets a very high standard for the protection of speech. But in doing so, it is important to understand the legal culture of the court and country concerned, and write the brief accordingly. This does not mean that US Supreme Court jurisprudence should not be cited, but rather that if it is cited, there should be an explanation as to why it is relevant in the case and why the court should follow it. If no such explanation is provided, a court may simply dismiss the argument, reasoning that the US has a very different legal and political context from the country concerned. Even when there is no rule stating this specifically, an *amicus curiae* brief should always be submitted in one of the main working languages of the court.

41 See, for example, P. Harvey, Third Party Interventions before the ECtHR: A Rough Guide, 24 February 2015: https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/ (ad-vice from a former lawyer at the Court registry); K J. Lynch, Best Friends?: Supreme Court Law Clerks on Effec-tive *Amicus curiae* Briefs, 20 J. L. & Politics 33: https://www.ndrn.org/wp-content/uploads/2019/02/Clerks.pdf (advice from United States Supreme Court law clerks).

- **If objectivity is required, take this seriously**

For many journalists' associations and media freedom NGOs, it is against their natural instincts to remain objective in an *amicus curiae* intervention. Yet, if a court requires an *amicus curiae* to provide objective arguments, then that requirement should be followed. If not, then the intervention is likely to be ignored and future *amicus curiae* interventions from the same organisation may not be looked on favourably. There are two elements to objectivity: (1) objectivity in language; and (2) objectivity in the technical and substantive arguments that are made. As regards the first, an objective *amicus curiae* should not use campaigning language and direct the court on what they believe the outcome of the case should be. Phrases such as "the Court should find the defendant innocent" should be avoided. As regards the second element, an *amicus curiae* should provide information objectively. This can still be de facto supportive of one of the parties – but care needs to be taken in how the information is presented. For example, an organisation might intervene in the case of a journalist who has been imprisoned for defamation. It would be objective for an *amicus curiae* to intervene in such a case and point out that international standards on freedom of expression hold that no journalist should be imprisoned for defamation: this is, objectively speaking, what the international standard provides. An *amicus curiae* who submits a brief that summarises this, written in objective language, will have satisfied the requirement of objectivity whilst still de facto supporting the journalist. In practice this can be a fine balance.

- **Don't repeat arguments that are already before the court**

Even when an *amicus curiae* intervention is not required to be objective, care should be taken to present arguments other than those that have already been made by the parties. Courts generally do not need to hear the same argument repeated from different parties; there is no 'strength in numbers'. If an *amicus curiae* makes identical arguments to those made by one of the parties, the court will just be annoyed and see the intervention as a waste of its time. The unique value that an *amicus curiae* brings is providing a perspective on a case that is other than that of the parties. This could be by pointing out the broader implications of a case in terms of precedent that might be set; by drawing attention to relevant international human rights law standards or comparative law; or providing additional factual or even scientific information (although care should be taken in presenting new facts in a case, this is not allowed in all countries). In an area of law that is relatively new and still under development, *amicus curiae* might provide information on how the issue has been approached in other countries, or refer to academic studies that show the implications of different types of regulation. In some countries and before some courts the law provides that *amici curiae* are provided with the pleadings in the case, so that they can avoid repetition. Even when there is no legal obligation, parties to the case – or at least, the lawyers representing a journalist or media outlet – may be happy to share their pleadings, or even their draft pleadings, with lawyers acting for the *amicus curiae*.

- **Include an executive summary and ensure easy readability**

Judges may not read every intervention from beginning to end and instead rely on summaries provided by a court clerk. In anticipation of this, an *amicus curiae* is well-advised to provide an executive summary of their own, ensuring that it reflects exactly the concerns and arguments that they wish to highlight. Interventions should always be succinct and to the point. Some courts enforce this by setting page limits, but even when no maximum number of pages is set an intervener should write crisply and avoid repetition. Interveners should re-

alise that they are, in a sense, a 'guest' in the proceedings, and if they outstay their welcome through writing at unnecessary length, courts may not be receptive to the arguments they make, or allow them to intervene in future cases. In terms of presentation, the *amicus curiae* brief should be formatted in such a way as to make it easy to read. Longer briefs should have a table of contents, sections should have clear headers, and conclusions should be clearly indicated as such. The writer of the brief should have in mind that their target audience is a court clerk who is overworked and who has little time: the clerk's job of reading the brief and summarising it (if, despite the advice above, no executive summary is included) should be made as easy as possible. Finally: proofread the intervention. An *amicus curiae* brief with typos will not be well-regarded.

VI. Follow-up!

The work of an *amicus curiae* does not end with the submission of the *amicus curiae* brief, or even when judgment is handed down. The intervention may have contributed to a standard-setting judgment – in which case, congratulations! – but the work continues: for real change to happen on the ground, the judgment needs to be implemented. This may involve public advocacy, monitoring of legislative developments, and potentially even going back to court.

For an organisation whose mandate is to advocate for freedom of expression, such lobbying work may be easily incorporated in its ongoing work. It is nevertheless still important that it is planned in advance. Work on the implementation of judgments requires resources to be set aside; if a case was important enough to spend resources on and intervene in, then the implementation of the judgment should be at least as important. This is particularly the case for judgments that set a new standard: there usually needs to be monitoring to ensure that this new standard is implemented and adhered to. *Amici curiae* in a case should not just assume that this will somehow happen. If the parties to the case were individual journalists or media outlets, their concern is probably limited to the direct implications of judgment for them (for example, payment of damages). An *amicus curiae* whose intervention was premised on the broader policy implications of a case will often be the best placed party to monitor implementation of the broader aspects of a judgment.

At some courts, there are specific mechanisms to follow-up on the implementation of judgments. For example, within the Council of Europe the Committee of Ministers formally supervises the execution of judgments of the European Court of Human Rights. NGOs (including those who have not intervened in cases) can take part in this process by writing to the Committee with any concerns or relevant information they may have.[42] The Inter-American Court of Human Rights also allows for *amicus curiae* participation in the monitoring compliance stage of the procedure.[43] At the national level, there are usually various mechanisms to ensure compliance with a judgment, although the role for *amici curiae* in those processes may be limited – unless there are renewed court proceedings.

42 See https://www.coe.int/en/web/cm/execution-judgments. See also the European Implementation Network, which works with members and partners - lawyers, civil society organisations and communities - from across the Council of Europe region to advocate for the full and timely implementation of judgments of the European Court of Human Rights: https://www.einnetwork.org/

43 See article 44.4 of the Court's Rules of Procedure and, inter alia, Case of Gelmán v Uruguay, Order of Moni-toring Compliance, 19 November 2020, available at: https://www.corteidh.or.cr/docs/supervisiones/gelman_19_11_20.pdf, and Cases of Barrios Altos and La Cantuta v Peru, Order of Monitoring Compliance, 30 May 2018, available at: https://www.corteidh.or.cr/docs/supervisiones/barriosaltos_lacantuta_30_05_18.pdf.

With the support of the
UNESCO Multi-Donor Programme on Freedom of
Expression and Safety of Journalists (MDP)

The publication of this guide was made with the support of Media Defence.

Media Defence is an international human rights organisation which provides legal help to journalists, citizen journalists and independent media across the world who are under threat for their reporting.

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Published in 2021 by the United Nations Educational, Scientific and Cultural Organization, 7, place de Fontenoy, 75352 Paris 07 SP, France