

IN THE APPEALS CHAMBER**Before:**

Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Hans Holthuis

Order of:

9 June 2005

PROSECUTOR

v.

RADOSLAV BRDJANIN

ORDER

The Office of the Prosecutor:

Mr. Mark J. McKeon

Counsel for the Defence:

Mr. John Ackerman

Association of Defence Counsel:

Chrissa Loukas, Acting President

Joeri Maas, Head of Office

INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seised of appeals, filed by both the Prosecution and the Appellant Brdjanin, from the Judgement rendered in this case by Trial Chamber II on 1 September 2004 ("Judgement").

2. Ground I of the Prosecution's Appeal concerned the question whether the membership of a joint criminal enterprise must include the physical perpetrators of the crime. Brdjanin moved to dismiss this ground of appeal on the basis, *inter alia*, that the Prosecution did not seek alteration of the judgement on this ground and that the question therefore would not be subject to genuine adversarial debate. On 5 May 2005, the Appeals Chamber denied Brdjanin's motion, accepting the Prosecution's suggestion that the problem of lack of an adversarial process could be remedied to some extent by inviting an *amicus curiae* brief from the Association of Defence Counsel of the International Tribunal

("Association"). The Appeals Chamber asked the Association to submit such a brief within 30 days, by 4 June 2005.¹

3. On 2 June 2005, the Association moved for an extension of this deadline to 5 July 2005 on the grounds of delay in approval of funding for the brief by the Registry of the International Tribunal and the need to communicate with far-flung members of the Association to ensure that the brief accurately reflected a consensus of their views.² Because the 4 June deadline was imminent, the Pre-Appeal Judge issued a Decision granting the motion on 3 June 2005.³ Later on the same day, the Prosecution timely filed its Response to the Association's motion.⁴

DISCUSSION

4. The Appeals Chamber does not find that the Prosecution's Response provides any reason to alter the Pre-Appeal Judge's Decision granting the Association's motion for an extension—indeed, the Prosecution does not oppose the extension.⁵ However, the Response does raise the valid point that the Prosecution should be permitted to reply to the Association's arguments.⁶ Although ordinarily the place to respond to *amicus curiae* arguments, if a party so chooses, is in the course of the ordinary briefing, here the briefing concerning the Prosecution's appeal is already complete, the Prosecution having filed its Brief in Reply on 25 May 2005. The Appeals Chamber therefore finds that a short supplementary brief is appropriate, noting that such a brief will serve the Appeals Chamber's objective of encouraging a full adversarial process on this important issue.

5. The other contentions in the Prosecution's Response are without merit. First, the Prosecution suggests that the Appeals Chamber reconsider its decision to invite the *amicus* brief in the first place (an invitation that, it bears repeating, was originally suggested by the Prosecution), noting that Brdjanin has chosen, after all, to address Ground I of the Prosecutor's Appeal in his Response Brief.⁷ But the fact that the disinterested defendant chose to include a brief discussion of an issue that he had no incentive to research or argue thoroughly does not obviate the benefits to the Appeals Chamber of having the considered views of the Association on an issue that—as the Prosecution itself strenuously argued—is of great significance to this Tribunal's jurisprudence. Moreover, it would be disrespectful to *amicus curiae*, and the work already invested in its brief, to revoke the Tribunal's invitation at this stage.

6. Second, the Prosecution asserts that it "would appear . . . that the Association of Defence Counsel rather than preparing an *amicus curiae* brief is preparing a brief in response to the Prosecution's Appeal brief."⁸ But the Prosecution provides no support for this assertion, nor is any found in the Association's Motion. The Appeals Chamber was clear in requesting a brief limited to the JCE membership issue, not other issues relevant to the Prosecution's appeal. Provided that the Association's brief is so limited, the Appeals Chamber has no difficulty with the possibility that the brief will reflect the interests of the Association's clients. That, indeed, is the very reason the Prosecution originally suggested that the Appeals Chamber should invite the Association's views: to get the "perspective of the defence."⁹

DISPOSITION

It is hereby **ORDERED** that the Prosecution file its Brief in Reply to the Association's *amicus curiae* brief within 15 days of the filing of that brief. The Brief in Reply is to be no more than ten pages in length.

Done in French and English, the English version being authoritative.

Judge Theodor Meron
Presiding

Dated 9 June 2005
At The Hague
The Netherlands

[Seal of the International Tribunal]

1. *See* Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005 (recounting this procedural history).
2. Association of Defence Counsel's Motion for an Extension of Time, 2 June 2005.
3. Decision on Association of Defence Counsel's Motion for an Extension of Time, 3 June 2005.
4. Response to Association of Defence Counsel's Motion for Extension of Time, 3 June 2005.
5. *Id.* at para. 3.
6. *Id.* at para. 8.
7. *Id.* at para. 6.
8. *Id.* at para. 7.
9. Prosecution Response to Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 4 March 2005, para. 17.