



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

Case No. IT-02-54-R77.5-A
Date: 17 December 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Andréia Vaz
Judge Theodor Meron
Judge Burton Hall
Judge Howard Morrison

Registrar: Mr. John Hocking

Decision: 17 December 2009

IN THE CASE AGAINST FLORENCE HARTMANN

PUBLIC

DECISION ON FURTHER MOTIONS TO STRIKE

Amicus Curiae Prosecutor

Mr. Bruce MacFarlane

Counsel for Appellant

Mr. Karim A. A. Kahn, Lead Counsel

Mr. Guénaél Mettraux, Co-Counsel

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 (“Appeals Chamber” and “Tribunal,” respectively) is seised of the “Prosecutor’s Motion for Order Striking Elements of Re-filed Notice of Appeal and Re-filed Appellant’s Brief”, filed by the *Amicus Curiae* Prosecutor (“*Amicus* Prosecutor”) on 4 December 2009 (“Motion”).

I. Background

1. On 14 September 2009, a Specially Appointed Chamber issued the “Judgement on Allegations of Contempt” in the present case, convicting the Appellant of two counts of contempt of the Tribunal and sentencing her to pay a fine of 7,000 euros.¹
2. On 24 September 2009, the Appellant filed her notice of appeal.² On 9 October 2009, the Appellant filed her appeal brief,³ along with a motion for an extension of the word limit.⁴ On 6 November 2009, the Appeals Chamber, by majority, denied the Appellant’s motion for an extension of the word limit for her appeal brief and ordered the re-filing of the notice of appeal and appeal brief, the latter not to exceed 9,000 words.⁵

II. Submissions

3. In the Motion, the *Amicus* Prosecutor requests that the Appeals Chamber strike elements of the Appellant’s notice of appeal and appeal brief.⁶ The *Amicus* Prosecutor argues that the notice and the brief do not comply with the 6 November Decision of the Appeals Chamber, do not conform to the requirements set out in the Rules of Procedure and Evidence of the Tribunal (“Rules”) and relevant Practice Directions, and would cause prejudice to the *Amicus* Prosecutor if they were allowed to “stand unchanged”.⁷ The *Amicus* Prosecutor argues first that the Appellant has circumvented the word limit for the appeal brief by removing the spaces between words and characters.⁸ The *Amicus* Prosecutor also argues that the Appellant has referred in her appeal brief to the notice of appeal, the final trial brief, the pre-trial brief, and other filings—rather than including

¹ *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009.

² Notice of Appeal of Florence Hartmann Against the Judgment of the Specially Appointed Trial Chamber, 24 September 2009 (confidential). A public version was filed the same day.

³ Florence Hartmann’s Appellant Brief, 9 October 2009 (confidential). A public version was filed on 12 October 2009.

⁴ Motion Seeking Leave for Extension of World [*sic*] Limit for Appeals Brief, 9 October 2009.

⁵ Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009 (“6 November Decision”), para. 27.

⁶ Motion, para. 1.

⁷ Motion, para. 1; *see also* paras 14, 16–20.

⁸ Motion, paras 2–6, 15.

her arguments in the appeal brief—and has therefore impermissibly shifted arguments so as to circumvent the word limitation.⁹ It is therefore requested that the Appeals Chamber (a) strike from the notice of appeal all references not in the appeal brief and order that the notice be re-filed without new grounds of appeal; (b) strike from the appeal brief all references adopting arguments from other filings; (c) strike from the appeal brief all words in excess of 9,000; (d) order that the appeal brief be re-filed without new arguments (along with a tracked-changes version); and (e) order that the *Amicus* Prosecutor’s brief be re-filed to address any remaining arguments in the re-filed appeal brief.¹⁰

4. The Appellant responds by arguing that the *Amicus* Prosecutor is (a) prolonging the proceedings, (b) making them unduly adversarial, (c) greatly increasing the costs of the appeal, and (d) “robbing [the Appellant] of the participation of a neutral party to which she was entitled under the legal order relevant to his type of proceedings [sic]”.¹¹ In paragraph 7 of the Response, the Appellants lists at length purported examples of the *Amicus* Prosecutor’s “gamesmanship” throughout the proceedings. The Appellant then formulates a theory that the *Amicus* Prosecutor timed his motion to strike the Appellant’s notice of appeal and brief in order to “see the Appellant’s cards” and to have more time to prepare his response.¹² As to the *Amicus* Prosecutor’s point that the footnotes have been formatted without spaces between words and characters in order to circumvent the word limit, the Appellant counters that the references are clear enough to identify the authorities and documents cited therein.¹³ The Appellant admits that she has had to “renounce ... several grounds of appeal because of the word limitation”.¹⁴ The Appellant requests that the Motion be denied and that all purportedly new arguments that were not in the original respondent’s brief be disregarded.¹⁵

5. The *Amicus* Prosecutor replies, first, that the Appellant’s allegations that he has timed the Motion in order to gain an unfair tactical advantage are unsubstantiated and that the Motion was filed within a reasonable time after the re-filed notice and brief.¹⁶ Second, the *Amicus* Prosecutor points out that the Appellant has not argued that her re-filed brief meets the requirements of the Appeals Chamber in its 6 November Decision.¹⁷ Third, the *Amicus* Prosecutor observes that

⁹ Motion, paras 7–11, 15.

¹⁰ Motion, para. 21.

¹¹ Response to *Amicus* Third Motion to Strike and Hartmann Motion to Strike Parts of *Amicus* Respondent Brief, 11 December 2009 (“Response”), para. 2.

¹² Response, paras 4–6, 8–13, 15–16.

¹³ Response, para. 14.

¹⁴ Response, para. 5.

¹⁵ Response, para. 17.

¹⁶ Prosecutor’s Reply to Response to Motion for Order Striking Elements of Re-filed Notice of Appeal and Re-filed Appellant’s Brief, 15 December 2009 (“Reply”), para. 3.

¹⁷ Reply, para. 4.

paragraph 7 of the Response goes into matters that are either irrelevant or only relate to the merits of this appeal, rather than to the *Amicus* Prosecutor's Motion.¹⁸ Fourth, issue is taken with the Appellant's averment that the *Amicus* Prosecutor has raised new arguments in his respondent's brief: the *Amicus* Prosecutor argues that it is an appellant, and not a respondent, who frames the issues on appeal and that the *Amicus* Prosecutor is simply responding to the significantly re-worked arguments of the Appellant in her re-filed and scaled-down appeal brief.¹⁹

III. Applicable law

6. Paragraph 8 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev.3, dated 16 September 2005 ("Practice Direction on Written Appeal Proceedings"), provides that, in appeals from decisions of a Trial Chamber pursuant to Rule 77 of the Rules, the applicable word limit is prescribed under paragraph (C)(2) of the Practice Direction on the Length of Briefs and Motions, IT/184/Rev.2, dated 16 September 2005 ("Practice Direction on the Length of Briefs and Motions").

7. Paragraph (C)(2) of the Practice Direction on the Length of Briefs and Motions provides that a brief shall not exceed 9,000 words.

8. Paragraph (C)(7) of the Practice Direction on the Length of Briefs and Motions provides:

A party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing. Upon filing by a party of a motion for an extension of time or word limit, the pre-appeal Judge may dispose of the motion without hearing the other party, unless he/she considers that there is a risk that the other party may be prejudiced.

Paragraph (C)(8) of the same Practice Direction provides:

Parties shall conduct a word count of any document they file which is subject to the length limitations set forth in this Practice Direction and shall include this information in the form "Word count: ___" at the end of the document, before the signature line.

9. Paragraph 20 of the Practice Direction on Written Appeal Proceedings provides as follows:

Where a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein.

Paragraph 17 of the Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, dated 7 March 2002 ("Practice Direction on Formal Requirements"), is substantially the same as the above.

¹⁸ Reply, para. 5.

IV. Discussion

10. As acknowledged by both the Appellant and the *Amicus* Prosecutor, the Appellant was ordered to re-file her appeal brief with no more than 9,000 words. In the beginning of its re-filed brief, the Appellant informs the Appeals Chamber as follows:

The word-limit set by the Appeals Chamber in its Decision of 6 November 2009 has proved inadequate to fully flesh out all grounds of appeal as would have been necessary in the circumstances. ... Because of the Appeals Chamber's decision not to grant any extension of words, and with a view to meet the word limit, the Defence has had to renounce arguing a number of grounds of appeal in its Brief. The Defence notes, however, that this should not be interpreted as a waiver of its right to raise the issues and facts pertaining to these grounds if ever necessary, appropriate or relevant. Nor should it be interpreted as a waiver of Ms Hartmann's fundamental rights. The Defence submits, furthermore, that the Appeals Chamber would have the inherent power, in fairness and with a view to protect the interests of justice, to consider the substance of any of the sub-grounds that could not be fleshed out in the Brief by referring to the detailed notice of these grounds as is contained in the Notice of Appeal.²⁰

11. From an examination of the appeal brief, which bears a word count of 8,998 words, it is clear that the Appellant was able to come within the 9,000 word limit by removing spaces between words and characters throughout the footnotes. Footnotes, of course, count toward the overall word limit, pursuant to paragraph 6 of the Practice Direction on the Length of Briefs and Motions. The Appellant therefore seems to have "tricked" Microsoft Word's automatic word-count function into counting a footnote consisting of several words as a single word. Such an approach is contrary to both the spirit and letter of the relevant Practice Directions. Under the present circumstances, the Appeals Chamber considers that the appropriate remedy is to order the Appellant to re-file her appeal brief in conformity with the relevant Rules and Practice Directions, as well as the 6 November Decision. The *Amicus* Prosecutor shall have the opportunity to re-file his response, and the Appellant her reply, if any. The Appeals Chamber emphasises that this is not an opportunity for the parties to add fresh arguments to these filings.²¹

12. The Appeals Chamber now turns to the *Amicus* Prosecutor's request to strike from the appeal brief all references adopting arguments from other filings. The Appeals Chamber has previously held that, pursuant to Rule 111 of the Rules, the proper place for pleading arguments in support of a particular ground of appeal, as well as any supporting authority, is the appeal brief and not the notice of appeal.²² Moreover, "allowing the appellant to submit arguments in a notice of appeal which are not repeated in the appeal brief would put the respondent in a disadvantageous

¹⁹ Reply, para. 6.

²⁰ Florence Hartmann's Appellant Brief, 20 November 2009, paras 6–7 (footnotes omitted).

²¹ See *Prosecutor v. Halilović*, Case No. IT-01-48-A, Decision on Prosecution's Motion to Strike Annexes to the Respondent's Brief, 6 September 2006, para. 12.

²² *Prosecutor v. Orić*, Case No. IT-03-68-A, Decision on Prosecution's Motion for an Order Striking Defence Notice of Appeal and Requiring Refiling, 3 October 2006 ("*Orić* Decision of 3 October"), p. 4 & n. 16; cf. *Prosecutor v. Orić*,

situation as the respondent responds to the appeal brief and not to the notice of appeal”.²³ The Appellant therefore cannot simply refer in her appeal brief to other documents, most notably the notice of appeal, and expect those grounds of appeal to be preserved. The Appeals Chamber therefore, under the present circumstances, intends to consider as abandoned any grounds of appeal not argued in the re-filed appeal brief.²⁴ In this regard, the Appeals Chamber has already stated that “[t]he quality and effectiveness of an appellant’s brief are not contingent on the length of the submissions, but on the cogency and clarity of the arguments presented.”²⁵

13. The Appeals Chamber finds no merit in the Appellant’s argument that the *Amicus* Prosecutor has conducted this matter so as to “see her cards”. The *Amicus* Prosecutor, within a reasonable amount of time, made a motion to strike the initial notice of appeal and brief because it did not conform to the relevant requirements, *and that motion succeeded on its merits*. The present Motion has also succeeded in substantial part. No gamesmanship on the part of the *Amicus* Prosecutor has been demonstrated by the Appellant. Moreover, the Appellant cannot complain about differences in argumentation in the *Amicus* Prosecutor’s re-filed respondent’s brief. The Appellant’s arguments, pursuant to the order of the Appeals Chamber, have been re-worked and refined, and it is reasonable that the *Amicus* Prosecutor’s brief must now meet the present state of the Appellant’s arguments, not the previous ones, which no longer control this appeal.

14. In light of the fact that the Appeals Chamber will order the Appellant to re-file her appeal brief and does not intend, at this stage of the proceedings, to consider any grounds of appeal raised in the notice of appeal that are not argued in the appeal brief, it is not necessary to order a re-filing of the notice of appeal. It is also not necessary to order a tracked-changes version of the appeal brief, as requested by the *Amicus* Prosecutor. However, should the Appellant, in re-filing her appeal brief, wish to reorganise her grounds of appeal in order to meet the word limit, then she must also correspondingly reorganise her notice of appeal and then re-file both.

15. The Appeals Chamber is concerned at the progress of this appeal and the manner in which the Appellant and her counsel are approaching it. Faced with a clear order from the Appeals Chamber to file an appeal brief that conformed to the relevant Rules and Practice Directions, counsel have not done so and continue to engage in a manner of litigation that has necessitated a third filing of the appeal brief. This is unfortunate, and the Appeals Chamber urges the Appellant to ensure that she complies fully with the order of the Appeals Chamber.

Case No. IT-03-68-A, Decision on the Motion to Strike Defence Reply Brief and Annexes A–D, 7 June 2007, paras 8–12 (striking annexes to reply brief because they contained argumentation).

²³ *Orić* Decision of 3 October, p. 4; *see also* n. 16.

²⁴ *See Prosecutor v. Strugar*, Case No. IT-01-41-A, Judgement, 17 July 2008, para. 265 & n. 659.

²⁵ 6 November Decision, para. 24.

V. Disposition

16. For the foregoing reasons and pursuant to Rule 111 of the Rules and paragraphs 8 and 20 of the Practice Direction on Written Appeal Proceedings, paragraphs (C)(2) and (6)–(8) of the Practice Direction on the Length of Briefs and Motions, and paragraph 17 of the Practice Direction on Formal Requirements, the Appeals Chamber hereby:

- (a) GRANTS the Motion, in part;
- (b) ORDERS as follows:
 - a. The Appellant shall re-file her appeal brief, which shall not exceed 9,000 words, and her notice of appeal (only if necessary in accordance with the terms of this decision), by no later than 15 January 2010;
 - b. The *Amicus* Prosecutor shall re-file his response, which shall not exceed 9,000 words, by no later than 22 January 2010;
 - c. The Appellant shall re-file her reply, if any, which shall not exceed 3,000 words, by no later than 26 January 2010;
- (c) DENIES the Appellant's request for purportedly new arguments not in the original *Amicus* Prosecutor's brief to be disregarded; and
- (d) DISMISSES the Motion in all other respects.

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



Judge Patrick Robinson
Presiding

Dated this seventeenth day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]