



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: 5 February 2010
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: 5 February 2010

IN THE CASE AGAINST FLORENCE HARTMANN

PUBLIC

**DECISION ON APPLICATION FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF**

Applicant
ARTICLE 19

Amicus Curiae Prosecutor
Mr. Bruce MacFarlane

Counsel for the 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 an “Application for Permission to File an Amicus Brief on Behalf of ARTICLE 19”, filed by ARTICLE 19 on 9 November 2009 (“Application”), requesting leave to appear as an *amicus curiae* in the present case.

1. ARTICLE 19 seeks leave from the Appeals Chamber to file an *amicus* brief in the present proceedings.¹ ARTICLE 19 states, in its application, that it is an international human rights organisation that defends and promotes freedom of expression and information throughout the world, including by acting as *amicus curiae* in numerous cases before national and international courts.² As stated by ARTICLE 19 in the Application, the *amicus* brief “addresses the relevant international human rights jurisprudence, focussing on freedom of expression cases in the context of contempt of court and the disclosure of confidential legal information” and then “considers whether the Judgement of the Trial Chamber reflects those principles and makes Submissions on the application of those principles to the facts of the Hartmann case”.³ ARTICLE 19 is of the view that the Judgement in the present case “departs in a number of significant ways from well-established international jurisprudence on freedom of expression and sets a precedent that, if it is upheld, is likely seriously to impair freedom of expression in the field of international criminal justice”.⁴

2. On 23 November 2009, the *Amicus* Prosecutor filed a response to the Application, not objecting to leave being granted to ARTICLE 19 to file an *amicus* brief and setting forth his views as to the terms and conditions pursuant to which that brief should be filed, namely the following: (a) a limit of less than 9,000 words should be imposed; (b) an expeditious deadline should be set for the brief; (c) ARTICLE 19 should be limited to submitting a brief on the following issue of law: “the scope of freedom of expression in the context of international criminal law”; (d) ARTICLE 19’s submissions should be in writing only; and (e) the parties should be directed to respond directly to the *amicus* brief and not use the response as an opportunity to “fill in perceived holes” in their briefs.⁵ Finally, the *Amicus* Prosecutor surmises that, due to the fact that the Appellant solicited ARTICLE 19 to file an *amicus* brief in her case, it is reasonably expected that the *amicus* brief will not be adverse to the Appellant’s case. Therefore, it is submitted that it would be

¹ Application, para. 1.

² Application, para. 1 (the second paragraph 1).

³ Application, para. 5.

⁴ Application, para. 3.

⁵ Response to Application by ARTICLE 19 to File an *Amicus Curiae* Brief, 23 November 2009 (“*Amicus* Prosecutor Response”), paras 6–7.

appropriate for the Appeals Chamber to set the schedule for the parties' responses to the *amicus* brief so that the Appellant responds first and the *Amicus* Prosecutor then responds second.⁶

3. The Appellant submits that ARTICLE 19 is a well-known and respected human rights organisation that has acted as *amicus curiae* before many jurisdictions, making contributions to some of the most important international cases pertaining to the law of freedom of expression.⁷ She also states that ARTICLE 19's brief discusses important legal issues and precedents, as well as adding much substance and many references to the submissions of the parties, the hearing of which would be useful for the proper administration of justice.⁸

4. Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides as follows: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber".⁹ A decision on an application to appear as *amicus curiae* is within the Chamber's discretion, and the primary criterion for the Appeals Chamber in determining whether to grant leave to an *amicus curiae* to submit a brief or to offer oral argument is whether such submissions would assist the Appeals Chamber in its consideration of the questions at issue on appeal.¹⁰

5. The Information Concerning the Submission of *Amicus Curiae* Briefs ("*Amicus* Information") provides: "In general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged".¹¹ Moreover, Chambers have generally allowed *amicus* submissions in relation to questions of law.¹²

⁶ *Amicus* Prosecutor Response, para. 7.

⁷ Florence Hartmann's Submissions Pertaining to "ARTICLE 19" *Amicus* Brief, 23 November 2009 ("Appellant Response"), para. 10.

⁸ Appellant Response, para. 11.

⁹ This rule is applicable to appeal proceedings via Rule 107.

¹⁰ See *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on Request from the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief, 18 July 2008, p. 3; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on Its Request to Be Heard at the Appeals Hearing, 12 January 2007, p. 3; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005, p. 3.

¹¹ IT/122, 27 March 1997, para. 5(b).

¹² See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on *Amicus Curiae* Request, 7 July 2009, p. 2; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Requests of Republic of Croatia to Appear as *Amicus Curiae*, 18 October 2006, p. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, 17 October 2006, p. 4; *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision on Submission of an *Amicus Curiae* Brief Pursuant to Rule 74 of the Rules, 7 February 2005, p. 1; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, 9 February 2001, paras 1, 10, 13, 14(b); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Orders

6. The *Amicus* Information also provides that “[t]he Chamber shall determine the timing of *amicus* submissions, and may set page limits on the length of such submissions” and that “[t]he parties will be given an opportunity to comment on such *amicus* briefs as have been accepted”.¹³

7. The Appeals Chamber observes that the proposed *amicus* brief surveys relevant international and national law on the principles of freedom of expression¹⁴ and then, applying this law to the facts of the present case, concludes that the Trial Chamber erred when it convicted the Appellant for contempt of the Tribunal.¹⁵ The Appeals Chamber considers that ARTICLE 19’s exposition of the law, similar to that set forth in portions of its brief, would be desirable for the proper determination of the case; however, ARTICLE 19’s contentious application of this law to the facts of the case and its conclusions that the Trial Chamber erred in a number of areas is not helpful to the Appeals Chamber. Moreover, the Appeals Chamber considers that the appellate process at the Tribunal is largely party-driven and that the Appeals Chamber will be assisted by submissions on issues of fact from the parties. The Appeals Chamber therefore accepts the suggestion of the *Amicus* Prosecutor and will only accept an *amicus* brief from ARTICLE 19 relating to discussion of the law that, in its view, is applicable to the appeal. Limiting the *amicus* brief in such a manner also has the virtue of ameliorating any potential lack of objectivity on the part of ARTICLE 19 on account of its prior contact with the Appellant in relation to the possibility of filing an *amicus* brief in the proceedings.

8. As to the issue of the timing and sequence of the parties’ responses, the Appeals Chamber notes the *Amicus* Prosecutor’s submission that the brief will most likely not be adverse to the Appellant and that he should therefore be allowed to respond to it after having seen the Appellant’s response. However, having limited ARTICLE 19 to submissions on the applicable law, the Appeals Chamber considers that it would be appropriate for the Appellant and the *Amicus* Prosecutor to file their responses, if any, on the same day. This has also been the general practice.¹⁶

Granting Leave to Appear as *Amicus Curiae*, 14 April 1997; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Order of Leave to Appear as *Amicus Curiae*, 22 August 1995, p. 2.

¹³ IT/122, 27 March 1997, para. 5(d)–(e).

¹⁴ *Amicus Curiae* Brief on Behalf of ARTICLE 19, attached to Application, paras 4–32.

¹⁵ *Amicus Curiae* Brief on Behalf of ARTICLE 19, attached to Application, paras 33–45.

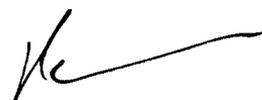
¹⁶ See, e.g., *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on Request from the Republic of Rwanda for Permission to File an *Amicus Curiae* Brief, 18 July 2008, p. 4; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2001-61-11bis, Decision on *Amicus Curiae* Requests (IBUKA, AVEGA and ICDA), Rule 74 of the Rules of Procedure and Evidence, 30 June 2008, para. 7; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-1997-36-I, Decision on the Application by the International Criminal Defence Attorney’s Association (ICDAA) for Leave to File a Brief as *Amicus Curiae*, Rules 11 bis and 74 of the Rules of Procedure and Evidence, 6 December 2007, para. 14; *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the “Open Society Justice Initiative” and on Its Request to Be Heard at the Appeals Hearing, 12 January 2007, p. 4; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR73.9, Decision on the Request for Extension of Time Limit and Authorising Appearance as *Amici Curiae*, 5 August 2002, p. 4.

9. Finally, the Appeals Chamber agrees with the *Amicus* Prosecutor that the parties' responses should not be abused as a forum for advancing new grounds of appeal and new arguments not related to the legal issues set forth by ARTICLE 19 in its *amicus* brief. The parties should therefore use their responses, if any, to *directly* address the legal issues contained within the *amicus* brief.

10. For the foregoing reasons and pursuant to Rule 74 of the Rules, the Appeals Chamber hereby GRANTS the Application, in part, and ORDERS as follows:

- (a) ARTICLE 19 shall, no later than 19 February 2010, file an *amicus* brief, which is not to exceed 6,000 words, solely addressing the relevant domestic and international law and jurisprudence that it believes is applicable to the present case, especially the right to freedom of expression in the context of contempt of court and the disclosure of confidential information.
- (b) The Appellant and the *Amicus* Prosecutor shall, no later than 5 March 2010, file any responses. Any such responses, which are not to exceed 6,000 words each, shall directly address the legal issues contained within the *amicus* brief, and should not raise new grounds of appeal or new arguments unrelated to the issues therein.

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



Judge Patrick Robinson
Presiding

Dated this fifth day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]