

IT-02-54-R77.5
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29 JANUARY 2009

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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
Date: 29 January 2009
Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Alphons Orié
Judge Bakone Justice Moloto

Acting Registrar: Mr John Hocking

Decision of: 29 January 2009

IN THE CASE AGAINST
FLORENCE HARTMANN

PUBLIC

DECISION ON URGENT DEFENCE MOTION REQUESTING AN ORDER TO THE
AMICUS CURIAE TO TAKE AND DISCLOSE PROPOSED WITNESS
STATEMENTS

Amicus Curiae Prosecutor

Mr Bruce MacFarlane, QC

Counsel of the Accused

Mr Karim A. A. Khan, Counsel

Mr Guénaél Mettraux, Co-Counsel

1. The Specially Appointed Chamber (“Trial Chamber”) of the International Criminal Tribunal for the former Yugoslavia (“Tribunal”) is seized of the “Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses”, filed publicly on 19 January 2009 (“Defence Motion”), the “Addendum to Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses”, filed publicly on 20 January 2009 (“Addendum”), and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Defence seeks an order from the Trial Chamber to the *Amicus Curiae* Prosecutor (“*Amicus*”) to take statements of all witnesses he intends to call and to disclose them to the Defence without any delay.¹

2. The Defence advances the following arguments in support:

- a) Both Rule 39 (1) and Rule 66(A) (ii) of the Rules of Procedure and Evidence (“Rules”) make it clear that, once the Prosecutor has decided to call a person as a witness at trial, it is required to take a statement of that witness so as to be able to “make it available to the Defence”.²
- b) It has been the “constant and consistent practice of the Office of the Prosecutor (“OTP”)” to make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call at trial”.³
- c) The failure of the *Amicus* to take any statements from his proposed witnesses erodes the fair trial guarantees of Florence Hartmann (“the Accused”) as the Defence is unable to prepare adequately for cross-examination and it is hampered in its ability “to conduct a meaningful, focused or professional investigation”.⁴

¹ Defence Motion, para. 4.

² Defence Motion, paras 6-10, referring also to Article 21 of the Statute.

³ Defence Motion, para. 3 citing also the Appeals Chamber in the *Niyitegeka* case.

⁴ Defence Motion, paras 16-21. The Defence, in particular, contends that it has “no idea what the proposed witnesses will say in evidence” with the corollary that “requests for assistance emanating from the Defence could be denied by the would-be provider on the basis that the Defence has no sufficiently identified the issues in relation to which material/information is being sought.” The Defence claims that this issue has already arisen in relation to one of the proposed witnesses to be called by the *Amicus* and it is likely to arise in relation to at least another one, *ibid.*

3. In the Addendum, the Defence submits that it has received a letter from the *Amicus* in which he indicated that “he will not seek to establish that Ms. Hartmann was dedicated, tenacious and/or loyal to Ms. Del Ponte, through Mr. Ruxton.” In the Defence’s view, this would be in direct contradiction with the 65 *ter* summary filed by the *Amicus* in relation to the expected testimony of Mr. Ruxton. The Defence further argues that it has no adequate notice of the proposed witnesses.⁵

4. On 22 January 2009, the *Amicus* filed publicly its “Prosecution Response to Defence Motion Seeking an Order for the Amicus to Take and to Disclose Witness Statements” (“Prosecution Response”). The *Amicus* opposes the Defence submissions and advances the following arguments:

- a) The *Amicus* does not have to follow “the best practice” adopted by the OTP as his powers are anchored in instructions received from the Chamber and no specific instructions were given in this case in relation to witness statements;⁶
- b) The approach taken by the *Amicus*, though possibly different from the practice of the OTP, is consistent with the Rules which do not require the *Amicus* to provide witness statements, but only witness summaries;⁷
- c) A witness statement does not form an essential element of disclosure providing that the *Amicus* gives a reasonable description of what the witness is expected to say;⁸
- d) Finally, if the Defence feels the need for further clarification in relation to the expected testimony, the *Amicus* makes it clear that there are no objections to the Defence interviewing any of the witnesses.⁹

5. On 26 January 2009, the Defence filed confidentially its “Defence Reply to Prosecution Response to Defence Motion Seeking an Order for the Amicus to Take and to Disclose Witness Statements” (“Defence Reply”)¹⁰ wherein it submits the following arguments:

- a) the *Amicus*, by suggesting that he is not bound by the same duties and obligations as would be binding on the OTP, appears “to grant himself a licence to adopt wholly new

⁵ Addendum, paras 4-5.

⁶ Prosecution Response, para. 3.

⁷ Prosecution Response, paras 4-10.

⁸ Prosecution Response, paras 11-18.

⁹ Prosecution Response, para. 18.

¹⁰ The same day a public redacted version of the Defence Reply was also filed.

procedures and practices under the skeletal provisions of the [Tribunal] Statute and [Rules]";¹¹

- b) The *Amicus*' position would raise serious issues as to the fairness of the process as the Accused would be denied certain rights simply because her case is being prosecuted by an *Amicus* rather than the OTP;¹²
- c) There is no basis in law that would support the *Amicus* on his arguments, as both the Practice Direction and the Rules make it clear that he is subject to the same set of rules and principles as would be applicable to a prosecution by the OTP;¹³

II. DISCUSSION

6. The Rules do not enshrine an obligation on the part of the *Amicus* to take statements of witnesses whom he intends to call at trial. Rule 39 of the Rules which states, in its relevant part, that the "Prosecution *may* summon and question suspects, victims and witnesses and record their statements." The Rule should not be construed as requiring an obligation on the part of the Prosecution to take witness statements. Similarly, the Trial Chamber is of the view that Rule 66 (A) of the Rules imposes a duty to disclose, *inter alia*, copies of the statements of all proposed witnesses only insofar as these statements have been taken by the *Amicus* pursuant to Rule 39 of the Rules. In the present case, the *Amicus* justified his decision not to take any statements by the consideration that, in his view, the "facts in issue are relatively straightforward".¹⁴

7. The Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal ("Practice Direction") empowers the Trial Chamber to "set out *inter alia* investigative instructions (if any) including instructions concerning the [...] recording [of witness] statements".¹⁵ In the present case, however, the Chamber did not provide any administrative instructions to the *Amicus* with respect to the taking of witness statements. It follows therefore that the *Amicus* did not have a duty to record witness statements. Nor had he any obligation to follow the "constant and consistent practice" of the OTP as the Defence appears to suggest.

¹¹ Defence Reply, para. 4.

¹² Defence Reply, para. 6.

¹³ Defence Reply, paras 7-8 referring to Articles 1 and 2 of the Practices Direction and Rule 77. The Defence makes also reference to correspondence received by the *Amicus* in which the latter acknowledged that the Rules were binding on him and relevant to his duties, *see* Defence Reply, paras 11-12.

8. The Trial Chamber also dismisses the Defence argument that the failure of the *Amicus* to take any statements of his proposed witnesses erodes its fair trial guarantees and hampers his right to cross-examination. Considering the limited scope of the case and the limited number of proposed witnesses, these guarantees are protected by the *Amicus*' obligation to provide an adequate summary of the facts under Rule 65 *ter*(E). Rule 65 *ter*(E) serves the purpose of putting the Defence on notice of the main facts upon which a witness is expected to testify with a view to allowing the Defence to prepare for its cross-examination. In his 65 *ter* summaries, the *Amicus* clearly indicates the key facts expected to be adduced from the witnesses at trial. Furthermore, the Defence may interview the witnesses proposed by the *Amicus* for investigative purpose.

9. Finally, on 20 January 2009, the *Amicus* filed "the Prosecution Motion to Amend Rule 65ter Witness & Exhibits Lists" wherein the *Amicus* clarified that he intends to reduce the scope of the expected testimony of Mr. Ruxton. The Trial Chamber is satisfied that the clarification made by the *Amicus* in his Motion meets the concerns of the Defence as raised in its Addendum and adequately puts the Defence on notice of Mr. Ruxton's expected testimony.

III. DISPOSITION

10. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54, 65 *ter*, 77, 126 *bis* of the Rules and the Practice Direction on Contempt, the Trial Chamber **GRANTS** leave to the Defence to file its Reply and **DENIES** the Defence Motion.

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



Judge Carmel Agius
Presiding Judge

Dated this twenty-ninth day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁴ See Prosecution Response, para. 18.

¹⁵ Practice Direction, para. 8 (iii).