



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-05-87-A
Date: 7 September 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 7 September 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON DAVID J. SCHEFFER'S APPLICATION TO
FILE AN *AMICUS CURIAE* BRIEF**

Applicant

Mr. David J. Scheffer

Office of the Prosecutor:

Mr. Peter Kremer, QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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);

BEING SEISED OF the “Application for Permission to File an Amicus Brief on Behalf of David J. Scheffer, Director of the Center for International Human Rights, Northwestern University School of Law” filed by David J. Scheffer (“Applicant”) on 5 August 2010 (“Application”), wherein the Applicant requests, pursuant to Rule 74 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), leave to file an *amicus curiae* brief and attaches the proposed brief to the Application;¹

NOTING “General Ojdanic’s [*sic*] Response to Scheffer Amicus Curiae Application” filed by Counsel for Dragoljub Ojdanić (“Ojdanić”) on 16 August 2010 (“Response”), whereby Ojdanić informs the Appeals Chamber that he does not oppose the Application and further requests leave to file a response brief should the Application be granted;²

NOTING that neither the Office of the Prosecutor (“Prosecution”) nor the other appellants in this case filed their responses to the Application;

NOTING that the Applicant seeks leave to file his *Amicus Curiae* Brief in relation to the question of the *mens rea* requirement of aiding and abetting as established by customary international law, and in particular on the “narrow issue of what Articles 25(3)(c) and 30(2)(b) of the Rome Statute of the International Criminal Court [(“Rome Statute”)] mean with respect to the necessary men [*sic*] *rea* for aiding and abetting the commission of atrocity crimes (genocide, crimes against humanity, war crimes and aggression)”;³

NOTING the Applicant’s submission that Article 25(3)(c) of the Rome Statute does not reflect a rule of customary international law and that the proposed *Amicus Curiae* Brief provides information on the negotiation process of the said provision and an analysis of its interpretation;⁴

NOTING the Trial Chamber’s holding that the *mens rea* element of aiding and abetting requires that “the accused intentionally performed an act with the knowledge that such act would lend

¹ Application, para. 1; see also “Amicus Brief on Behalf of David J. Scheffer, Director of the Center for International Human Rights, Northwestern University School of Law” attached to the Application (“*Amicus Curiae* Brief”).

² Response, paras 1-2.

³ Application, para. 4 ; see also *ibid.* para. 3.

⁴ *Ibid.*, para. 8; *Amicus Curiae* Brief, paras 1-38.

practical assistance, encouragement, or moral support to the commission of a crime or underlying offence”;⁵

NOTING that in his appeal brief, Ojdanić argues that under customary international law, the *mens rea* element of aiding and abetting requires proof that the purpose of the aider and abettor was to assist the commission of the crime by the principal perpetrator;⁶ and that in support of his submission, Ojdanić relies upon, *inter alia*, Article 25(3)(c) of the Rome Statute arguing that the said provision is declaratory of a rule of customary international law;⁷

NOTING that Rule 74 of the Rules provides that “[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”;

RECALLING that granting leave to make submissions pursuant to Rule 74 of the Rules falls within the discretion of the Appeals Chamber;⁸

RECALLING FURTHER that the primary criterion for the Appeals Chamber in determining whether to grant leave to an *amicus curiae* to submit a brief is whether such submission would assist the Appeals Chamber in its consideration of the questions at issue on appeal;⁹

NOTING that according to the Information Concerning the Submission of *Amicus Curiae* Briefs “[i]n 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”;¹⁰

CONSIDERING that the proposed *Amicus Curiae* Brief provides an interpretation of Article 25(3)(c) of the Rome Statute, offering an insight into the circumstances leading to the adoption of the said provision and, in so doing, it relies upon a variety of sources, including the Applicant’s personal knowledge in his capacity as Head of the Delegation of the United States of America to the Rome Conference;¹¹

⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 1, para. 93.

⁶ General Ojdanić’s Amended Appeal Brief, 11 December 2009 (filed as Annex B to General Ojdanić’s [*sic*] Motion Submitting Amended Appeal Brief, 11 December 2009) (public with confidential annex) (“Ojdanić’s Appeal Brief”), para. 280(dd).

⁷ *Ibid.*, paras 280(gg) – 280(oo).

⁸ *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010, para. 4, and the references cited therein.

⁹ *Ibid.*

¹⁰ Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, 27 March 1997, Article 5(b).

¹¹ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, Official Records, Volume II, U.N.Doc. A/CONF.183/13 (Vol. II), p. 38. The Appeals Chamber notes that pursuant to the Vienna Convention on the Law of Treaties, in the interpretation of a treaty

CONSIDERING, without expressing any views on the merits of the appeals against the Trial Judgement, that the question of whether the *mens rea* standard of aiding and abetting identified in the Rome Statute represents a rule of customary international law and the interpretation thereof, may be relevant to the matters raised on appeal in the present case;¹²

CONSIDERING that in this respect the *Amicus Curiae* Brief provides details that may assist the Appeals Chamber in the determination of the appeal;

FINDING, therefore, that the *Amicus Curiae* Brief is admissible under Rule 74 of the Rules;

FOR THE FOREGOING REASONS,

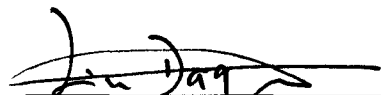
GRANTS the Application and **ACCEPTS** the *Amicus Curiae* Brief as validly filed;

ORDERS Ojdanić and the Prosecution, should they wish to do so, to file their submissions in response to the *Amicus Curiae* Brief of no more than 4500 words each within 20 days of the present Decision;

ORDERS that such submissions directly address the legal issue discussed in the *Amicus Curiae* Brief and not raise any new arguments on appeal.

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

Dated this seventh day of September 2010,
At The Hague, The Netherlands.


Judge Liu Daqun, Presiding

[Seal of the Tribunal]

recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion as supplementary means of interpretation (Vienna Convention on the Law of Treaties, 23 May 1969, U.N.T.S., vol. 1155, p. 331, Article 32).

¹² See Ojdanić's Appeal Brief, paras 280(dd)-(oo); Prosecution Response to General Ojdanić's Amended Appeal Brief, 15 January 2010 (confidential; public redacted version re-filed on 1 September 2010), paras 278-284; General Ojdanić's Reply Brief, 15 February 2010, paras 152-153.