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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: 3 February 2009
Original: English

IN A SPECIALLY APPOINTED CHAMBER

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

Acting Registrar: Mr John Hocking

Decision of: 3 February 2009

IN THE CASE AGAINST
FLORENCE HARTMANN

PUBLIC

REASONS FOR DECISION ON THE DEFENCE MOTION FOR STAY OF
PROCEEDINGS FOR ABUSE OF PROCESS

Amicus Curiae Prosecutor

Mr Bruce MacFarlane, QC

Counsel of the Accused

Mr Karim A. A. Khan
Mr Guénaél Mettraux

Procedural history and submissions of the parties

1. On 23 January 2009, the Defence filed its motion for stay of proceedings for abuse of process.¹ The Defence argued that a number of “serious violations” occurred in the course of the investigation of the present case, that they are attributable to the *Amicus Curiae* Investigator, and that they individually or cumulatively amount to an abuse of the process.² The Defence organized the alleged “violations” in the following categories; 1) Complete failure to investigate *à décharge*; 2) Violations of United Nations immunities and Tribunal Statute; 3) Violation of Court orders; 4) Failure to abide by basic standards of investigative diligence in the process of collecting evidence; 5) Failure to provide the specifically-assigned Chamber with a reliable factual foundation on which to decide to initiate contempt proceedings; and 6) Refusal to answer legitimate queries by the Defence.³ Through this, the Defence argued, the fundamental rights of the Accused were violated, including the right to remain silent, the right to equality of arms and adequate time and resources to prepare, the right to independent and impartial proceedings, and the right to a fair trial.⁴ The Defence concluded that the investigation by the *Amicus Curiae* Investigator “was negligent, incomplete and thoroughly flawed” which resulted in vitiating the decision by the Chamber to initiate contempt proceedings against the Accused.⁵
2. On 29 January 2009, the *Amicus Curiae* Prosecutor filed his response to the Motion.⁶ He argued that the Defence through the Motion sought to re-define the nature of the proceedings, and re-focus the case away from the charges and on to the work of the opposing counsel.⁷ The *Amicus Curiae* Prosecutor identified a number of legal and factual errors in the Motion and also set out the role of the *Amicus Curiae* Investigator in this case.⁸
3. On 30 January 2009, the Chamber denied the Motion, with reasons to follow.⁹ The Chamber’s reasons are set out below.

¹ Motion for Stay of Proceedings for Abuse of Process with Confidential Annexes, 23 January 2009 (“Motion”).

² *Ibid.*, paras 9-10.

³ *Ibid.*, para. 9.

⁴ *Ibid.*, para. 11.

⁵ *Ibid.*, para. 10.

⁶ Prosecution Response to Defence Motion for Stay of Proceedings, 29 January 2009 (“Response”).

⁷ Response, para. 1.

⁸ *Ibid.*, paras 5-20.

⁹ T. 45-46.

Reasons

4. According to the Appeals Chamber, the abuse of process doctrine may be relied on “where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice, due to pre-trial impropriety or misconduct”.¹⁰ This Chamber shares the view of the Trial Chamber in the *Dragan Nikolić* case that in order to use this doctrine “it needs to be clear that the rights of the Accused have been egregiously violated”.¹¹

5. A number of matters raised in the Motion have been argued by the Defence in earlier motions and have thereafter been considered and decided upon by the Chamber. The decisions in question are the Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor of 29 January 2009¹² and the Decision on Urgent Defence Motion Requesting an Order to the *Amicus Curiae* to Take and Disclose Proposed Witness Statements of 29 January 2009¹³. In particular, in the first decision, the Chamber found that there were no circumstances (including alleged flaws in the investigation and the *Amicus Curiae* report) that justified reconsideration of the Chamber’s Order in Lieu of Indictment or the termination of the *Amicus Curiae*’s mandate as prosecutor.¹⁴ In the current decision, the Chamber will only deal with such matters that have not already been considered and decided upon.

6. The Defence alleged violations of United Nations immunities and the Tribunal’s Statute.¹⁵ Article 30(3) of the Statute sets out that “[t]he staff [...] of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the [Convention on the Privileges and Immunities of the United Nations of 13 February 1946]” (hereinafter “Convention”). Section 18 of article V of the Convention reads, in relevant part, “[o]fficials of the United Nations shall [...] be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity”. Further, section 20 of article V reads, in relevant part:

¹⁰ *Prosecutor v. Barayagwiza*, Decision, 3 November 1999, para. 77.

¹¹ *Prosecutor v. Dragan Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, para. 111.

¹² Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor, 29 January 2009 (“Reconsideration decision”).

¹³ Decision on Urgent Defence Motion Requesting an Order to the *Amicus Curiae* to Take and Disclose Proposed Witness Statements, 29 January 2009 (“Witness statement decision”).

¹⁴ Reconsideration decision, paras 17-19, 24.

¹⁵ Motion, para. 9(ii) and (v), second and third items.

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

7. As part of the preliminary investigation, the *Amicus Curiae* conducted interviews with a number of ICTY staff members, either for obtaining background information or for the purpose of factual discovery. The interviews were conducted before the Order in Lieu of Indictment was issued and therefore before the staff members potentially could be characterized as prospective witnesses for trial. The Chamber considered that the concept of “legal process” in the Convention does not include such interviews. Therefore, the *Amicus Curiae* was under no obligation to request any waiver of immunity from the UN Secretary-General in order to conduct interviews with the ICTY staff members. Even if waivers of immunity had been necessary for these staff members, the failure to obtain them in advance should in no way inure to the benefit of the Accused. More importantly, as for the Accused, the immunity set out in the Convention covers only “words spoken or written and all acts performed by [UN officials] in their official capacity”. The investigation, as well as the Order in Lieu of Indictment, does not cover words written and acts performed by the Accused in her official capacity as they relate to a book and an article the Accused wrote and published after the termination of her contract with the ICTY. The *Amicus Curiae* was therefore under no obligation to request a waiver of immunity from the UN Secretary-General with respect to the Accused.

8. The Defence made allegations about the *Amicus Curiae* violating various court orders.¹⁶ As for providing the Accused with copies of the confidential Appeals Chamber decisions during the interview and interviewing the publisher of the Accused, the *Amicus Curiae* correctly pointed out that this occurred not in violation of court orders but after consultation with, and authorization by, the Chamber.¹⁷ This was done fully in accordance with the Chamber’s role under the Contempt Directive, according to which the Chamber may provide instructions as necessary to the *Amicus Curiae* Investigator in the course of the investigation.¹⁸ As for the other two violations,¹⁹ which allegedly had been committed by the

¹⁶ Ibid., para. 9(iii).

¹⁷ Ibid., para. 9(iii), first and second item; Response, paras 16-17.

¹⁸ Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, 6 May 2004, paras 8, 10.

Amicus Curiae Prosecutor, the Defence did not explain how they would affect the *Amicus Curiae*'s investigation which was completed months earlier. The Chamber did therefore not further consider them.

9. In its Witness statement decision, the Chamber set out that “[t]he Rules do not enshrine an obligation on the part of the *Amicus* to take statements of witnesses whom he intends to call at trial”.²⁰ This disposed of the Defence argument in the first item of para. 9(iv) of the Motion related to the alleged failure on the part of the *Amicus Curiae* to abide by basic standards of investigative diligence in the process of collecting evidence. However, in the Motion the Defence also argued that the *Amicus Curiae*, according to Appeals Chamber case law, should have kept a list of questions asked during the interviews with potential witnesses.²¹ In this respect, the *Niyitegeka* Appeal Judgement clarifies that “[r]ecords of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 66(A)(ii) of the Rules” and that the questions are to be distinguished from “internal documents prepared by a party” pursuant to Rule 70(A) of the Rules.²² The Appeals Chamber adds, however, that

a witness statement which does not correspond to the standard set out above does not necessarily render the proceedings unfair. The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to impossibility).²³

Therefore, the Chamber considered that the *Amicus Curiae* was under no obligation to keep a list of questions asked during the interviews he conducted as part of his investigation.

10. The Defence also argued the *Amicus Curiae* “relied upon – prejudicial – information of individuals which he has now disregarded as witnesses”.²⁴ The Defence appears not to indicate any shortcoming with the investigation or the *Amicus Curiae* report but rather to indicate that one of the persons who had been relied upon in the report was not included in the

¹⁹ Motion, para. 9(iii), third and fourth item (“whilst seeking to prosecute Ms Hartmann for disclosing, *inter alia*, the date of the two impugned decisions, he himself disclosed that fact at paragraph 20 of his Brief. If, as alleged, ms Hartmann committed a contemptuous act in relation to that matter, so would the *amicus*” and “in his public Response of 19 January 2009, the *amicus* has committed what, by his own standard and understanding of the law of contempt, would amount to a contempt by knowingly and willfully revealing in more than half a dozen places the ‘contents and purported effect’ of a document which he knew to be confidential”).

²⁰ Witness statement decision, para. 6.

²¹ Motion, para. 9(iv), second item.

²² *Niyitegeka* Appeal Judgement, paras 33-34.

²³ *Ibid.*, para. 35.

²⁴ Motion, para. 9(v), fourth item.

witness list. It is for the *Amicus Curiae* Prosecutor to decide who to call as witnesses in support of his case. Whether the evidence to be presented is sufficient to prove the charges in the Order in Lieu of Indictment is obviously a matter to be dealt with during trial. The Chamber considered that the Defence had not shown any “failure” on behalf of the *Amicus Curiae* Investigator in this respect.

11. Finally, the Defence argued that the *Amicus Curiae* had refused “to answer Defence legitimate queries” with regard to certain matters.²⁵ The Defence appears in this respect to refer to the *Amicus Curiae*, both in his capacity as investigator and as prosecutor. Either way, the procedural mechanism for providing information between the parties at this stage of the proceedings is disclosure and the Rule 65ter filings. The Defence is not arguing that the *Amicus Curiae* has failed to meet his disclosure obligations under the Rules. The Chamber considered that it does not fall within the disclosure obligations of the *Amicus Curiae* to “provide information about those persons who assisted him in identifying potential witnesses”, “to explain the nature of its case as regard certain aspects of its Brief” or to agree to be interviewed by the Defence. As for “information pertaining to the chain of custody of some of [the] proposed exhibits”, this is also not part of the disclosure obligation. The Defence may of course at trial challenge the authenticity of any document tendered into evidence by the *Amicus Curiae* Prosecutor. If the Defence has objections as to the authenticity of specific documents, the Chamber urges it to inform the *Amicus Curiae* Prosecutor about this so that it can be dealt with at trial.²⁶

12. The Defence also argued that the *Amicus Curiae* refused to provide his requests to the UN and the Office of the Prosecutor for a waiver or lifting of immunities of would-be witnesses and that this had resulted in a denial to the Defence of information about the nature and scope of the evidence of the proposed witnesses and the nature and scope of the waiver granted in relation to them.²⁷ The *Amicus Curiae* indeed has an obligation, pursuant to Rule 65ter (E), to notify the Defence about what the Prosecution witnesses are going to testify about. Having reviewed the *Amicus Curiae*'s Rule 65ter filing, the Chamber considered that he had met this obligation.²⁸

²⁵ Ibid., para. 9(iii).


²⁶ Rule 65ter (E)(iii) sets out that the Prosecutor shall file the list of exhibits he intends to offer and in this list indicate, where possible, whether the defence has any objection as to authenticity.

²⁷ Motion, para. 9(vi).

²⁸ See Witness statement decision.

13. In conclusion, the Chamber found that the arguments by the Defence, to the extent they are factually correct and valid, individually or cumulatively do not amount to abuse of process. For this reason, pursuant to Rules 54 and 77 of the Rules, the Chamber denied the Motion.

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



Judge Carmel Agius
Presiding Judge

Dated this 3rd day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]