THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-02-54-R77.5-A

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

Filed: **26 October 2009**

IN THE CASE OF
Florence HARTMANN

PUBLIC

FLORENCE HARTMANN'S REPLY BRIEF

On behalf of Ms Hartmann

Karim A. A. Khan, Lead Counsel

Guénaël Mettraux, Co-Counsel

***Amicus* Prosecutor**

Bruce MacFarlane, QC

Procedural background, in short

1. The Trial Chamber in the case against Florence Hartman rendered its Judgment on 14 September 2009, finding Ms Hartmann guilty of two counts of contempt of court pursuant to Rule 77(a)(ii) and sentencing her to a fine of 7,000 Euros.[1]

2. The Appellant filed its Notice of Appeal ("Notice") against the Judgment on 24 September 2009.[2]

3. On 2 October, the *amicus* Prosecutor, Mr MacFarlane, filed an "Urgent Prosecutor's Motion for Order Striking Notice of Appeal and Requiring Refiling".[3]

4. On 9 October 2009, the Appellant filed a Motion seeking an extension of the word-limit for its Appeal Brief.[4] On the same day, 9 October, the Appellant filed its Appeal Brief, challenging Trial Chamber's Judgment on 14 grounds.[5]

5. On 13 October, the Appellant filed its Response to the *amicus* Motion to strike.[6]

6. On 13 October, the *amicus* filed an "Urgent Prosecutor's Response to Defence 'Motion Seeking Leave for Extension of World [*sic*] Limit for Appeals Brief".

7. On 14 October, the Appellant filed its "Reply re Motion Seeking Leave for Extension of Word Limit for Appeal Brief." On the same day, the Defence filed an "Amended Reply re Motion Seeking Leave for Extension of Word Limit for Appeal Brief".

8. On 22 October, the *amicus* Prosecutor filed its "Respondent's Brief".

9. The Appellant hereby files its Reply Brief pursuant to par III(7) of Practice Direction IT/155, Rev.3.

Hartmann Reply

10. The Appellant notes that the *amicus* Prosecutor has failed to address the merit and substance of the Appellant's arguments all through its Brief and failed to confront the relevant evidence and precedents which the Appellant has put forward. The

---

1 Judgement on Allegations of Contempt, 14 September 2009 ("Judgment").

2 Notice of Appeal of Florence Hartmann against the Judgment of the Specially Appointed Trial Chamber.

3 Motion, par.25.

4 Motion Seeking Leave for Extension of World [sic] Limit for Appeals Brief.

5 Florence Hartmann's Appellant Brief, 9 October 2009

6 Florence Hartmann's Response to Amicus Motion to Strike Notice of Appeal.

Appellant invites the Appeals Chamber to draw the necessary inferences from this failure.

11. Whilst the Respondent's Brief contains many inaccuracies and insufficiencies, the Appellant will only draw attention to those that warrant a reply.

GROUND II

12. At paragraph 27 of its Brief, the Respondent seeks to draw a distinction of principle between two types of restrictions to freedom of expression. Whilst the Appellant agrees with the Respondent that the permissibility and legality of restrictions of the freedom of expression depends in part from the circumstances peculiar to a case, the Appellant notes that the Respondent has failed to note that there are core principles (as identified in the Appellant Brief[7]) that apply to all such restrictions in particular as regard the conditions and extent of permissible curtailment.

13. The Respondent is plainly wrong also when it suggests (in that same paragraph) that all authorities cited by the Defence pertain to what he calls "publication ban" cases; it is no surprise that he could only point to one such case from the Appellant Brief.[8] The *Dupuis* and *Weber* cases, for instance, which are the precedents most relevant to this case and which, extraordinarily, the *amicus* again fails to address, are there to disprove his submission.

14. At paragraphs 32-34, the *amicus* Prosecutor considers the relevance of the principle of proportionality in relation to the punishment or sanction imposed on a person who has exercised his/her freedom of expression. These submissions are factually incomplete and legally inadequate.[9] In addition, the *amicus* entirely fails to address the relevance and application of that principle, not to sentencing, but to the legality and permissibility of the curtailment of Ms Hartmann's fundamental right through a criminal conviction. The Appellant's submissions in that regard – and the Chamber's errors in that context – remain entirely un-answered. Furthermore, and whilst the *amicus* suggests that the sentence imposed upon Ms Hartmann was

---

[7] In particular, Appeal Brief, pars 47-75.

[8] Respondent's Brief, footnote 43.

[9] The *amicus* fails, for instance, to address any of the facts put forth by the Defence and which the Trial Chamber failed to take into account (see, e.g., Appeal Brief, pars 67-75). The *amicus* also fails to discuss or address any of the precedents/authorities put forth by the Appellant in this matter.

"proportionate", he fails to explain and address the findings of, for instance, the *Weber* Strasbourg Judges who, in similar circumstances, found a much lower sentences – of a criminal conviction and 300 Swiss Francs as a fine, or, approximately 200 Euros– to have been a disproportionate interferences with Mr Weber's freedom of expression. The *amicus* also failed to address each and all of the facts relevant to assessing the proportionality of such a course as put forth by the Appellant/Defence and the fact that the Trial Chamber has failed to take any of those into considerations.

GROUND III

15. At paragraph 39, the *amicus* claims that the lack of appearance of bias that affected the original Trial Chamber only pertained to the post-indictment period.[10] That submission has no merit. Instead, the facts/circumstances put forth by the Defence as a basis for the disqualification of two members of that Chamber,[11] as were taken into account by the special Panel in its Report,[12] pertains to events/facts that occurred both prior to and after the indictment of Ms Hartmann by the impugned Trial Chamber.

16. The Appellant notes, furthermore, that the Respondent has failed to address all the authorities, the evidence and submissions that pertain to the basis, in law and in fact, that justified the setting aside of the record and which the Trial Chamber erred when disregarding. The Appellant submits that due notice should be taken of that failure and the necessary inferences should be drawn from it.

GROUND V

17. REDACTED.

18. Secondly, to the extent that it would have taken that position, the fact that it behaved differently in a different judicial or public setting would demonstrate either that (i) Serbia-Montenegro sought to mislead the ICTY and/or (ii) that its actions in different setting were different from its submissions before the ICTY. Neither of these

---

[10] Ms Hartmann was indicted on 27 August 2008. The Indictment was amended on 27 October 2008.

[11] Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer in Charge of the Case, 3 February, in particular, pars 30-42.

[12] See Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009, in particular, pars 3-6, 42, 45-47, 52-53.

would negate the fact, established in evidence, that officials of Serbia-Montenegro publically acknowledged the facts in relation to which Ms Hartmann has been charged and convicted.

19. Thirdly, it should be noted that when REDACTED, it did not have before it any of the material that the Defence in *this* case has put forth before the Trial Chamber to establish that Serbia-Montenegro had in fact waived confidentiality over the facts relevant to *this* case.[13]

20. It should be added, finally, that a waiver need not have been made in the course of ICTY proceedings to be valid as a waiver of confidentiality. If, for instance, a protected witness gives a press conference after his testimony, thereby revealing his identity and the fact that he testified as a protected witness, he would thereby have waived any interest that he might have in the continued protection of his identity (and the fact that he testified as a protected witness). The practice of NATO and the OTP to publically disclose the content of sealed indictment after an arrest and before the confidentiality of that indictment has been formally lifted by the Tribunal supports that view.[14]

GROUND XII

21. In his Respondent's Brief, the *amicus* makes submissions as regard the way in which the Trial Chamber allegedly dealt with the "weight" of Mr Joinet's evidence.[15] However, and as is clear from footnote 176 of the Judgment, the Trial Chamber never reached that point. Instead, it excluded at once, and without good reasons, the whole of Mr Joinet's evidence without any consideration of its relevance or weight and thereby committed the errors identified by the Appellant in its Brief. The *amicus* has failed to address the finding of the Trial Chamber and has, instead, made arguments about a finding (as to weight) that the Chamber never made.

---

[13] See, in particular,D10;D5;D9;REDACTED;also,D1;D2;D6;D42 T.276-280,392,398-410;416-417,423-427,429,447-449,466-480,494-497. See,also,FTB,pars.87-96,110-123(referring,*inter alia*,P2.1,1004-2,6/21;P2.1,1003-2,5/13;P1.1 1002-1,3-4/10;P4;T.144-146,311,492-494).

[14] D14;*Dokmanovic* Order 3 April 1996;*Dokmanovic* Order 10 July 1996;*Dokmanovic* Order 3 April 1996; D15;D20;*Milosevic* Decision 24 May 1999; D16;*Obrenovic* Order 9 April 2001;D26,D27,D28; D18;*Limaj* Indictment 27 January 2003; *Limaj* Decision 18 February 2003;*Vasiljevic* Warrant 26 Oct 1998;*Vasiljevic* Decision 31 Oct 2000;D19;*Prlic* Order 2 April 2004; *Prlic* Order 5 April 2004; *Prlic* Order 4 March 2004. See also P2.1,1003-2,5/13.

[15] Respondent's Brief, pars 92-97.

22. The Appellant also wishes to note the entirely inappropriate and baseless "assessment" made by the *amicus* regarding the nature of Mr Joinet's evidence.[16] Furthermore, if that was in fact the position of the *amicus* at trial, he failed to (i) put that part of its case to the witness as he was required to do under Rule 90(H)(ii) and (ii) failed to make these submissions to the Trial Chamber. Instead, at trial, the *amicus* referred to Mr Joinet as a world expert on the issues relevant to these proceedings and a "very eminent witness".[17] The submissions that the *amicus* is now making in his Respondent Brief as regard the evidence of Mr Joinet have been waived, are without merit and are inappropriate.

GROUNDS I, IV, VI, VII, VIII, IX, X, XI, XIII, XIV

23. The Appellant simply wishes to note, in relation to these grounds of appeal, that the Respondent has failed to address all or most of the submissions, evidence and authorities cited by the Appellant in its Brief. The Defence submits that this failure should be taken into account by the Appeals Chamber and inferences be drawn from that fact.

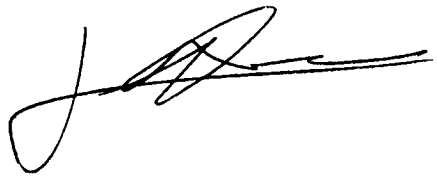
Conclusions and relief sought

24. For the reasons and on the basis put forth by the Appellant in its Appeal Brief and the present filing, the Defence seeks the reversal of the Trial Chamber's finding that Ms Hartmann is guilty of two counts of contempt of court pursuant to Rule 77(a)(ii) and her full and complete acquittal of all charges.

Respectfully submitted,

Karim A. A. Khan, Lead-counsel for Florence Hartmann

[16] Respondent's Brief, pars 94-95.
[17] See, e.g., Transcript, 246, 256.



Guénaël Mettraux, Co-counsel for Florence Hartmann

Word count: 1,500 words. Done the 26th October 2009.