

**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 Andréia Vaz
Judge Theodor Meron
Judge Burton Hall
Judge Howard Morrison**

Registrar: Mr. John Hocking

Filed: 13 November 2009

IN THE CASE OF

Florence HARTMANN

PUBLIC

**NOTICE OF APPEAL OF FLORENCE HARTMANN
AGAINST THE JUDGMENT OF THE SPECIALLY APPOINTED TRIAL
CHAMBER**

On behalf of Ms Hartmann

Karim A. A. Khan

Guénaél Mettraux

Amicus Prosecutor

Bruce MacFarlane, QC

13 November 2009

Re-Filing of Defence Notice of Appeal

1. On 14 September 2009, Florence Hartmann was convicted of two counts of contempt of court pursuant to Rule 77(a)(ii) of the Rules of Procedure and Evidence.¹
2. On 24 September, the Defence filed its Notice of Appeal.
3. On 6 November, the Defence was ordered to re-file, *inter alia*, its Notice of Appeal.²
4. The Notice of Appeal contains **14 Grounds of Appeal**. These grounds of appeal are in turn sub-divided into **133 sub-grounds of appeal**.
5. In light of the Appeals Chamber's 6 November order and the number of errors committed by the Trial Chamber, the Defence is being required to argue each of these sub-grounds with an average of **66 words per sub-ground**. This is causing great difficulties for the Appellant and has impacted upon the manner in which the Defence was able to present its arguments and has impacted on its ability to substantiate them. Each sub-ground will have to be argued **with less words than this paragraphs contains**.
6. The Defence wishes to record the fact that the re-filing of its appellate filings in compliance with the Chamber's order of 6 November 2009 should **not** be interpreted as a waiver of Ms Hartmann's right to an "effective" right of appeal (as forms part of her right to a fair trial), her right to an effective remedy (as forms part of customary law) nor her right to a fair trial (which continues to apply to appeals proceedings).
7. The Defence hereby re-files its Notice of Appeal against the Judgment in accordance with, *inter alia*, Article 25 of the Statute, Rules 77(J) and 108, the Practice Direction on Formal Requirements for Appeals from Judgment (IT/201) and the Chamber's order of 6 November 2009.
8. The Defence has taken notice of the Appeals Chamber's indication at paragraph 13 of its Decision of 6 November 2009 and has sought to avoid, where appropriate, alternative or cumulative grounds of appeal (as errors of law and/or fact and/or abuse of discretion). It should be noted, however, that the Trial Chamber's extensive legal errors have for the most part influenced and impacted upon its findings of fact and/or the exercise of discretion thereby adding to the original error of law an error of fact and/or an abuse of discretion. The Appellant may not ignore these

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

² Decision on Motions to Strike and Requests to Exceed Word Limit.

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facts and must argue them cumulatively or in the alternative where they have impacted in a prejudicial manner upon the verdict.

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AGAINST THE JUDGMENT OF THE SPECIALLY APPOINTED TRIAL
CHAMBER**

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Grounds of appeal

3. Each sub-ground of appeal has been numbered: **SG** (stands for "Sub-Ground") **X** (Ground to which the sub-ground relates) **1** (number of the sub-ground). Some of the sub-grounds have been further sub-divided where the error may itself be divided as two or more sub-errors.

4. Each of the errors outlined below, individually and/or in combination, meets the relevant standard of review for errors of fact and/or law.³

5. As for the necessary relief, the Defence submits that each and all of these errors are capable of being corrected by the Appeals Chamber as would warrant and justify the Appeals Chamber in overturning the conviction of Ms Hartmann and finding her not guilty.

6. In addition to the (sub-)grounds of appeal outlined below, the Defence submits in general terms that the Judgment suffers from a number of systemic shortcomings, most evident among which is a failure to apply existing, internationally-recognised, standards of international human rights law, in particular as regard the following rights:

- Right to timely and detailed notice of the charges;
- Right to presumption of innocence and principle *in dubio pro reo* as regard the evaluation of the evidence;
- Principle of legality, in particular as regard the requirement of strict and non-expansive interpretation of the definition of a criminal offence;
- Freedom of expression in regard to both Ms Hartmann's freedom of expression and that of the public (in particular victims) to receive that information, in particular as regard the application of the principle of proportionality to any restriction of that right;
- Right to an impartial tribunal, in particular as regard the fact that this trial has proceed on the basis of a record tarnished by the appearance of lack of impartiality of two of the original members of the Trial Chamber; and
- Right to a fair trial, including the right to received a reasoned opinion and the possibility of an *effective* right of appeal as form part of that fundamental guarantee.

³ See, *inter alia*, *Stakic* Appeals Judgment, pars 7-8; *Furundzija* Appeals Judgment, par 37.

7. Whilst the Defence will not submit separate grounds of appeal in relation to each of these fundamental rights, the Defence submits that the systematic failure of the Trial Chamber to apply these rights, or to ensure that they are *effectively* protected, should be considered as a whole. To that effect, the Defence will outline and illustrate in the context of its Appeal Brief several instances where the Chamber failed to guarantee the effective protection or enjoyment of these rights in the context of these proceedings. As a result, it will be submitted that certain assumptions as might otherwise have been in order in this appeal (as, for instance, the assumption that the Trial Chamber has considered all Defence submissions/argument and evidence relevant to the Defence case) should not apply in this case. That is so, the Defence will submit, despite the Chamber's general "disclaimer" at paragraph 23 of the Judgment that it has reviewed all arguments and evidence pertaining to this case. Such a disclaimer cannot make up for the requirement of and right to a reasoned opinion, nor can the Appeals Chamber disregard clear indications that the Trial Chamber has in fact failed to consider many arguments, authorities and evidence that were relevant to this case and favourable to Ms Hartmann.

I. VIOLATION OF FUNDAMENTAL RIGHTS OF MS HARTMANN AND ASSOCIATED ERRORS – INADEQUATE PLEADINGS

Impugned findings

1. At **paragraph 32** of the Judgment, the TC held that –
 - (i) “there is no merit in the interpretation of the Indictment by the Defence that the Accused is only charged with having disclosed Four Facts”
 - (ii) “Nothing in the text of the Indictment gives rise to the unreasonably restrictive interpretation of the charges as advanced by the Defence.”
 - (iii) “The Defence cannot validly claim that its understanding of the Indictment met with no objection by the Prosecution.”
2. At **paragraph 33**, the TC held that it was satisfied that the Accused had “disclosed more information than the Four Facts identified by the Defence” and proceeded to list those.
3. At **paragraphs 34-35**, the TC suggested that the legal reasoning contained in a confidential decision of the Tribunal is subject to confidentiality and to Rule 77(a)(ii) if disclosed.

Procedural background

4. On 9 January 2009, the Defence filed a “Motion for Clarification Pertaining to Confidential Status of Facts Relevant to the *Hartmann* case”. In light of the lack of clarity pertaining to the nature and scope of the charges against Ms Hartmann and because all facts for which she was charged were understood by the Defence to be in the public domain, the Defence thereby sought clarification, from the Chamber as to what facts the Defence was permitted to discuss in its public filings so as to guarantee and protect Ms Hartmann’s right to a public trial.
5. The *amicus* Prosecutor did not respond to the Defence Motion.
6. The Trial Chamber failed to rule upon the Defence application, thereby providing no guidance to the Defence as to what was or had been considered to be subject to a confidential order and what facts were said to remain subject to the confidential orders.
7. On 9 January, the Defence also filed a “Motion for Reconsideration or Stay of Proceedings”. At *pars.73.et.seq*, the Defence pointed to the inadequacies and

uncertainty of the pleadings.⁴ Having reviewed all material relevant to identifying the nature/scope of the charges, the Defence concluded that what Ms Hartmann was alleged to have disclosed to the public in breach of court orders:⁵

- (i) the existence of the two impugned decisions;
- (ii) the confidential character of these decisions;
- (iii) the identity of the moving party/applicant;
- (iv) the subject, namely, the fact that protective measures were granted in relation *the documents*.

8. On 13 January, the Defence was ordered by the Trial Chamber to re-file its Motion within page-limit.⁶

9. On 14 January, the Defence re-filed its “Motion for Reconsideration” and reiterated its understanding that the charges pertained solely to the four facts mentioned above.⁷

10. On 19 January, the *amicus* Prosecutor responded to the Defence Motion for Reconsideration.⁸ In that filing, the *amicus* took no issue with the accuracy of the understanding/rendition of the charges by the Defence.

11. On 15 January, the Defence filed its “Pre-Trial Brief of Florence Hartmann”. After pointing to “factual inaccuracies and other shortcomings” pertaining to the charges, the Defence again outlined the charges against Ms Hartmann as being made solely of the four facts.⁹ It also made clear its understanding that no other facts –in particular, not the “legal reasoning” of the Appeals Chamber– formed part of the charges against Ms Hartmann.¹⁰

12. The *amicus* did not react to these submissions and did not take issue with this rendition/understanding of the charges.

⁴ See, in particular, pars. 73, 75.

⁵ Ibid, pars. 80, 103.

⁶ Order to Defence to Resubmit Filing in Accordance with Word Limit.

⁷ See, in particular, pars. 15-18

⁸ Prosecution’s Response to Defence Motion for Reconsideration.

⁹ Pars. 4-6, 9.

¹⁰ Pars. 9-22.

13. On 30 January, a status conference took place during which the Presiding Judge raised issues pertaining to the nature of the case against Ms Hartmann.¹¹ The Defence reiterated its understanding that the charges solely pertained to the four facts and pointed to the fact that the *amicus* had taken no issue with it.¹² At that hearing and being invited to address these issues, the *amicus* Prosecutor did not specifically identify any other fact as forming part of the charges, nor of the case that he intended to lead against Ms Hartmann.¹³ Relevantly, none of the additional facts in relation to which Ms Hartmann was convicted (as appear in par.33 Judgment) were identified by him as relevant to this case. Defence counsel insisted that any departure from the Defence understanding of the charges will amount to

“a shifting of the goalposts and one that we on behalf of Ms Hartmann will take the very strongest exceptions to.”¹⁴

The Defence also highlighted the fact that it was acting in accordance with a “legitimate expectation” that its understanding of the charges was corrected as it had not be rebutted by the *amicus* insofar as it never pointed to any other facts that could have formed the basis of a conviction against Ms Hartmann.¹⁵ The Presiding Judge agreed –or, at least, did not take issue– with the view of Defence counsel that it was not the responsibility of the Chamber to interfere with the parties’ and, in particular, the Prosecutor’s understanding of the charges.¹⁶

14. On 2 February 2009, more than six month after the indictment of Ms Hartmann, spurred as he had been by the Presiding Judge’s comments, the *amicus* filed a “Statement of *Amicus Curiae* Prosecutor Concerning an Issue Raised by the Chamber during 30 January 2009 Status Conference”. In that document, for which no legal basis exists (and none mentioned), the *amicus* referred to paragraphs 10,11,18 and 19 of his Pre-trial Brief and referred to the charges as pertaining to “the existence, contents and purported effect of the two Appeals Chamber decisions [and] to [their] confidential nature” and said that he respected the “different” position of the Defence

¹¹ T.52.*et.seq.*

¹² T.53-55.

¹³ T.56.

¹⁴ T.57.

¹⁵ T.54-55.

¹⁶ T.55-56.

but “disagreed” with it. He also said that his position would be “confirmed” during the opening statement.¹⁷ Again, the *amicus* identified none of the supplementary facts later identified by the Chamber as relevant to Ms Hartmann’s conviction. However, as discussed below, the TC (footnote 74 Judgment) relied on pars.4-5 of that “Statement” to suggest that the Defence had had notice of these facts. The text of the “Statement” makes it clear that this is not the case.

15. On 15 June, the *amicus* gave his opening statement.¹⁸ He mentioned none of the supplementary facts identified by the TC in par.33 Judgment.¹⁹

16. On the same day, the Defence gave its opening, referring explicitly to the four facts as forming the sole basis of the charges (and the basis upon which the Defence was proceeding to trial).²⁰ The *amicus* did not react, nor take issue with the Defence’s understanding/rendition of the scope/nature of the charges.

17. The parties proceeded to trial upon that basis and understanding.

18. On 2 July, the Defence filed its Final Trial Brief. In paragraph 1, it identified the four facts in relation to which Ms Hartmann had been validly charged and in relation to which the trial had proceeded. In footnote 1, the Defence also noted that “The indictment does not allege that the book contains any other contemptuous material.”

19. The *amicus* filed its Final Brief on the same day. He did not take issue with the Defence understanding of these four facts as basis of the charges. Nor did he mention any of the supplementary facts on which the TC relied in par.33.²¹ Nor did he do so in final arguments, which took place 3 July.

20. As a result, the TC has based its conviction on facts that –

- (i) did not (and/or could not) form part of the charges and/or
- (ii) facts that had been inadequately pleaded, so as to violate Ms Hartmann’s fundamental right and create great unfairness.

Notice of the facts on which conviction was entered was neither detailed, nor prompt.

¹⁷ Pars.4-6.

¹⁸ T.118-120.

¹⁹ The Defence does not concede that utterances during opening statement would constitute valid notice for the purpose of Article 21(4)(a).

²⁰ T.124.

²¹ Again, the Defence does not concede that such mention would have been relevant to the requirement of prompt/detailed notice pursuant to Article 21(4)(a).

Errors as to scope of charges

21. **SG(I)(1):**The TC erred in law and/or fact (at pars.32-35) when suggesting that any fact other than the four facts identified by the Defence had been validly pleaded and that Ms Hartmann could be said to have received detailed and timely notice of these additional facts.²²

22. **SG(I)(2):**The TC erred in law and/or fact, and violated Ms Hartmann's fundamental rights, by interpreting broadly the nature and scope of the charges and when suggesting, at par.32, that the Defence's understanding was "unreasonably restrictive".

23. **SG(I)(3):**The TC erred in law when suggesting at par.32 that only "the text of the Indictment" was relevant to determining the scope/nature of the charges and erred in fact when failing to take into account other relevant indications of the nature/scope of the charges as were relevant to the requirement of adequate/prompt notice.

24. **SG(I)(4):**As a result, and in addition, the TC erred in fact when suggesting that the new facts mentioned at pars.33-35 Judgment (i) formed part of the charges against Ms Hartmann and/or (ii) that she had received detailed/prompt notice of these despite their absence from the pleadings instruments, the stated position of the Defence and the failure of the *amicus* to give notice of these facts.²³

25. **SG(I)(5):**The TC erred in law and/or fact when suggesting that expression such as "purported effect" (par.33 Judgment) would provide adequate notice of the charges as required by Article 21(4)(a).

26. **SG(I)(6):**In the alternative, to the extent that such expression could be said to provide a basis for the purpose of notice, the TC erred in law and fact and abused its discretion when it failed to consider (or rejected) the reasonable possibility that this could be understood by the Defence as it was, i.e., that it referred to the fourth fact identified by the Defence (iv) so that, contrary to the Chamber's assertion at par.33 (and pars.73,79), this fact was already in the public domain.

27. **SG(I)(7):**The TC erred in law/fact and abused its discretion when taking the view that the Defence had had adequate and timely notice of the fact that such an allegation formed part of the charges against Ms Hartmann.

²² See, Motion for Reconsideration or Stay of Proceedings, 9 Jan 09, pars. 80, 103; Motion Reconsideration, 14 Jan 09, pars. 15-18; PTB, pars. 4-6, 9; T. 52. *et seq.*, 124; FTB, par. 1.

²³ PTB, pars. 10-22; FTB, pars. 8 *et seq.* Also Defence Motion 9 January 2009, pars. 90-102; Defence Motion for reconsideration, 14 January 2009, pars. 15, 18.

28. **SG(I)(8)**:The TC erred in fact when suggesting that Ms Hartmann had been validly charged with disclosing “the content of closed session transcripts of the Applicant’s submissions”.²⁴

29. **SG(I)(9.1)**:The TC failed to establish that Ms Hartmann had been aware at the time of publication that

- (i) the facts disclosed in her book came from confidential transcripts and, if they were, that they
- (ii) were subject to Rule 77(a)(ii) and remained so at the time of publication
- (iii) thereby erring in law and fact when convicting her in relation to that alleged disclosure.

SG(I)(9.2)In the alternative, the TC failed to consider and/or exclude the reasonable possibility that Ms Hartmann might have been mistaken about that fact and thereby erred in law and fact.²⁵

30. **SG(I)(10)**:The TC erred in fact when suggesting(par,33) that –

- (i) Ms Hartmann’s book contains reference to “confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision”, that
- (ii) Ms Hartmann would have been aware of that fact and that
- (iii) this has been established beyond reasonable doubt.

31. **SG(I)(11)**:The TC erred in fact when suggesting (footnote 73) that the Defence “legitimate expectation” had *somehow* been refuted by the statement of the Prosecutor in par.6 of its Response *re* Reconsideration.²⁶

32. **SG(I)(12)**:The TC’s reliance on that filing of 2 February 2009 (par.32) is itself a violation of the statutory guarantee of “prompt” notice, which means “as soon as the charge is first made”²⁷, i.e., in 27 August 2008, and thus an additional error of law.

33. **SG(I)(13)**:The TC erred in law and/or fact when failing to consider the fact that, had the Prosecutor taken issue with the substance of the Defence’s understanding

²⁴ Par.33.

²⁵ Also,below,pars.174*et seq.*

²⁶ Judgment,par.3.

²⁷ HRC,General Comment 13,par.8.

of the nature and scope of the charges, he would have been required, as a minister of justice and as an impartial prosecutor,²⁸ to clarify this matter.

34. **SG(I)(14)**:The TC erred in law and fact when it failed to take notice of various specific occasions where the Defence outlined its understanding of the charges.²⁹

35. **SG(I)(15)**:The TC erred in law and fact and abused its discretion when it failed to conclude that the *amicus* Prosecutor was estopped/precluded from going beyond the scope of the charges which the Defence had publically and repeatedly identified as relevant to this case and which he failed to correct, if indeed he had taken issue with the nature/scope of those in any way that could have prejudiced the Defence.

Errors as to scope of R77(a)(ii)

36. **SG(I)(16)**:The TC erred in law by expanding the scope of the indictment to facts that are not subject to R77(a)(ii) and/or for which that Rule provides an adequate legal basis.³⁰

37. **SG(I)(17)**:The TC erred in law when suggesting that the facts mentioned in pars.33-35 come within the terms of Rule 77(a)(ii) and/or that this provision would provide an adequate legal basis to criminalise the disclosure of such facts. In particular,

(i) **SG(I)(17.1)**:The TC erred in law when suggesting that the disclosure of the “legal reasoning” of the Appeal Chamber’s decisions could be a basis for conviction under Rule 77.

(ii) **SG(I)(17.2)**:The TC erred in fact when failing to consider whether, or dismissing the possibility, that Ms Hartmann could reasonably have taken the view that the facts for which she was convicted were not covered by Rule 77 and could therefore be discussed publically.³¹

²⁸ See requirement of “impartiality” in IT/227, par.15(ii).

²⁹ Whilst the TC took notice of the Defence position in its PTB, opening statement and FTB, it did not take notice of the fact that this position had been openly laid down (without reaction on the part of the *amicus*) in its motions of 9 January, 14 January and again in its closing speech (see above).

³⁰ Judgment, pars.32-35.

³¹ See, generally, Judgment, pars 63-67; T.271,275,312-314,342;390-391;D1;D2;D5;D6;D36.FTB, par.16,110-123. See also, below, “mistake of fact/law”.

Right to independent/impartial Tribunal

38. **SG(I)(18)**:By expanding the charges beyond the case articulated by the *amicus*, the TC effectively took over the prosecution of Ms Hartmann and set out the charges against her, creating a factual basis that the *amicus* had not –or not validly– put forth as his own for the purpose of prosecuting the case.³² In so doing, the Trial Chamber committed an error of law in violation of Ms Hartmann’s right to an independent/impartial tribunal as well as her right to a fair trial.

II. VIOLATION OF FUNDAMENTAL RIGHTS OF MS HARTMANN AND ASSOCIATED ERRORS – FREEDOM OF EXPRESSION

Impugned findings

39. The impugned findings relevant to this Ground of appeal are contained in paragraphs 70-74 of the Judgment.

40. These paragraphs contain findings which constitute grave errors of law and/or fact all of which pertain to the fundamental right of Ms Hartmann (and that of the public) to the respect and protection of freedom of expression. The standard applied by the TC falls short of relevant international standards, which has resulted in impermissible/illegal curtailment of this fundamental right. The TC also erred in fact in its consideration and assessment of the evidence/facts relevant to the curtailment of this right.

Errors as to the relevant legal standard

41. The TC erred in law when failing to apply or misapplying international law to determine the scope of protection guaranteed by international law to freedom of expression.³³ In particular,

42. **SG(II)(1)**:The TC erred in law when suggesting that the standard that it applied to this matter “is consistent with the jurisprudence of the European Court of Human Rights”.³⁴

43. **SG(II)(2)**:The TC erred in law by failing to account for that fact -and failing to acknowledge– that under international human rights law generally, there is a strong presumption of unrestricted publicity of any proceedings in a criminal trial.³⁵

³² Judgment, pars.32-35.

³³ Judgment, pars.68-74.

³⁴ Judgment, par.70.

44. **SG(II)(3):**The TC erred in law by failing to apply the principle recognized under international law that restrictions to freedom of expression (in particular, as regard journalists and issues of public interests) must be interpreted strictly, applying, instead, an expansive interpretation of its powers under R77(a)(ii) and interests which it says are protected by that provision.

45. **SG(II)(4):**The TC erred in law and fact when failing to consider the special/increased protection guaranteed to the discussion of issues of public or general interest by international law in the context of the exercise of freedom of expression.

46. **SG(II)(5):**The TC also erred in law and fact when it failed to acknowledge and take into consideration, not only Ms Hartmann's freedom of expression, but the right/interest of the public (in particular, the right of victims as members of the public) to receiving the information that was the subject of the charge as was relevant and necessary under international law.

47. **SG(II)(6):**The TC erred in law/fact when failing to determine whether its decision was consistent with the Tribunal's commitment to transparency and responsibility towards the victims –as members of the public– as outlined in par.7 of SC resolution 827.

Errors as regard “necessity” and “proportionality” of restriction

48. **SG(II)(7):**The TC erred in law when it failed to apply the requirements of “necessity” and “proportionality” to the curtailment/restriction of Ms Hartmann's freedom of expression.³⁶

49. **SG(II)(8):**The ECHR has identified a range of considerations relevant to assessing that matter which were identified by Mr Joinet in his evidence (but ignored by the TC–footnote 176) and laid out by the Defence in its FTB,pars.141-159. The TC erred in law (as they were legally relevant) and fact when failing to consider those.

50. **SG(II)(9):**The TC erred in fact when it failed to establish and/or to seek to establish that the restrictions to Ms Hartmann's (and the public's) freedom of expression in the form of a criminal conviction was “necessary” (as defined above) in the circumstances. Had it done so, the TC could not reasonably have concluded that

³⁵ See e.g. x *In re S (A Child)*,par.15.Also *Scott v Scott*; *AG v Levens Magazine Limited*; and *Re Trinity Mirror Plc*.Also,*Ekin*,par.56;*Dupuis*,pars.33-35.

³⁶ See, in particular,Judgment,pars.68-74.

such curtailment (through criminal conviction, i.e., the most intrusive of all restrictions) was “necessary”.

51. **SG(II)(10)**:The TC erred in law and fact when it failed to apply or misapplied the requirement of “proportionality” (par.74).

52. **SG(II)(11)**:The TC erred in law and fact when it failed to apply the requirements of proportionality and necessity to deciding-

- (i) whether a criminal conviction was appropriate in the circumstances and
- (ii) whether the sentence which it imposed was itself necessary and proportionate and why it failed to even consider or address the Defence’s submission that a conditional discharge would have been sufficient.

Errors re evaluation of permissibility of restrictions to freedom of expression

53. **SG(II)(12)**:The TC erred in law and/or fact and abused its discretion when it failed to take into account any of the facts relevant to determining the necessity/proportionality of a curtailment/restriction of Ms Hartmann’s freedom of expression *as were favourable to Ms Hartmann*.³⁷

54. **SG(II)(13)**:The TC’s failure to account for (i) the right of the public to receive that information, (ii) the fact that the exercise of freedom of expression in relation to issues of public/general interest may only be exceptionally curtailed, that (iii) there is a strong presumption of full enjoyment of that right, that (iv) any restriction must be interpreted strictly, that (v) the TC failed to apply or misapplied the principle of proportionality, (vi) failed to establish the “necessity” of Ms Hartmann’s right through criminal conviction, all constitutes discrete/separate errors of law and/or fact and also provide evidence of the TC’s errors in deciding on the permissibility, legality and propriety of the curtailment of Ms Hartmann’s fundamental right.

55. **SG(II)(14)**:The TC erred in law/fact and abused its discretion when taking into consideration and/or giving undue weight to certain factual considerations when assessing the proportionality/permissibility of curtailment of Ms Hartmann’s freedom of expression.³⁸

56. **SG(II)(15)**:The TC erred in law by merging into one question the two issues that were relevant to testing the permissibility of any restrictions to Ms Hartmann’s – and the public’s– freedom of expression, namely,

³⁷ See FTB, pars.151-159 and references therein.

³⁸ Judgment, par.73.

- (i) the issue of a legitimate aim pursued by the measure and
- (ii) the issue of the proportionality/necessity of the restriction that results from it (in this case, through a criminal conviction).³⁹

57. **SG(II)(16)**:The TC erred in law when it failed to determine whether less intrusive sanctions –in the form of a conditional discharge, for instance⁴⁰ – would have been sufficient and proportionate in the circumstances or, if it considered it, erred in fact and abused its discretion when rejecting it as unreasonable/disproportionate.

III. VIOLATION OF FUNDAMENTAL RIGHTS OF MS HARTMANN AND ASSOCIATED ERRORS – RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Procedural background

58. Based on the conclusion of a special panel that two of the Judges of the original Trial Chamber lacked the appearance of impartiality,⁴¹ the President of the Tribunal ordered the replacement of these two Judges.⁴²

59. Based on the conclusions of the special panel and the order of the President, on 21 April 2009, the Defence filed an application pursuant to which the Defence asked that the record of all decisions/orders rendered by the impugned Trial Chamber be set aside.⁴³

60. By decision of 19 May 2009, the Trial Chamber rejected the Defence Motion in its entirety and proceeded with the impugned record.⁴⁴

Errors

61. **SG(III)(1.1)**:The TC erred in law when applying an incorrect legal standard (at par.8) to resolve the Defence application for the setting aside of the impugned (pre-)trial record of decisions/orders. **SG(III)(1.2)**:In the alternative, and to the extent that a general principle of law was necessary to decide the matter, the ruling of the Trial Chamber fails to demonstrate that the basis which it adopted to dismiss the Defence Motion represents a general principle of law.

³⁹ See, in particular, Judgment, par 74.

⁴⁰ FTB, pars. 168-171.

⁴¹ Report of Decision on Defence Motion for Disqualification of 27 March 2009.

⁴² Order Replacing Judges of 2 April 2009.

⁴³ Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions ("Motion").

⁴⁴ Decision on Defence Motion Pertaining to the Nullification of the Trial Chamber's Orders and Decisions (thereafter, "Impugned Decision").

62. **SG(III)(2)**:The TC also erred in law when suggesting that the Rules did not provide guidance in this matter.⁴⁵

63. **SG(III)(3)**:The TC erred in law and/or fact in par.10 when suggesting that Ms Hartmann's right to a fair trial had not been prejudiced. **SG(III)(3.1)**:First, the TC erred in law by requiring the Defence to establish a "prejudice" as resulting from the violation of Ms Hartmann's fundamental right by the TC. **SG(III)(3.2)**:The TC erred in fact when misinterpreting/misunderstanding the nature of the prejudice caused to Ms Hartmann and erred when concluding that no such prejudice had been established.

64. **SG(III)(4.1)**:The TC erred in law when suggesting that proof that it was "in the interests of justice" to set the record aside was a supplementary requirement to be met in these circumstances.⁴⁶ **SG(III)(4.2)**:The TC erred in law when suggesting that the "interests of justice" was a factor to be weighed against the rights of the accused to a fair trial.⁴⁷ **SG(III)(4.3)**:Even if the TC's position had been correct in law, it is telling that whereas the TC pitted the rights of the accused against what it saw as "the interests of justice" in relation to "decisions and orders relating to non-substantive matters" (par.10), it failed to do so in relation to the order in lieu of indictment (par.11). This means that the TC did not even consider the fact that Ms Hartmann has been indicted by a TC that has been found to lack the basic, necessary, minimum requirement of appearance of impartiality and thereby erred in law and fact.

65. **SG(III)(5)**:The TC erred in law/fact and abused its discretion by undertaking what it said was a review of the supporting material and found that such material was sufficient to proceed against Ms Hartmann.⁴⁸ The TC had no authority and no valid legal basis to do so. Furthermore, it erred further as it

- (i) **SG(III)(6)**:failed to give a reasoned opinion on that critical point so that its adequacy/legality cannot be adequately ascertained,
- (ii) **SG(III)(7)**:had no way to exclude the reasonable possibility that the apparent bias of the impugned Chamber might have played a part in the way in which the original TC had conducted the investigation, shaped that investigation (through its instructions to the *amicus* investigator) or when confirming the charges.

⁴⁵ Judgment, par. 8.

⁴⁶ Impugned Decision, pars. 9-10.

⁴⁷ Par. 9.

⁴⁸ Impugned Decision, par. 11.

66. **SG(III)(8):**In the alternative, the TC's finding as to the alleged sufficiency of the supporting material to ground contempt proceedings would create an appearance of lack of impartiality on its part that would justify the disqualification of the Chamber and the annulment/setting aside of their subsequent decisions and Judgment.

IV. ERRORS OF LAW/FACT AND *ACTUS CONTRARIUS*

Impugned findings

67. The TC's impugned findings on that point are to be found in paragraphs 36-40, 47 of the Judgment.

Errors

68. By convicting Ms Hartmann for discussing facts that the Tribunal itself had made public, the Trial Chamber has committed a legal and factual error and caused a great unfairness to Ms Hartmann in violation of her fundamental rights.

69. **SG(IV)(1):**The TC erred in law and/or fact when it failed to ascertain and/or to acknowledge that each and all facts in relation to which Ms Hartmann had been validly charged had been made public by the Tribunal itself through *actus contrarius*.⁴⁹

70. **SG(IV)(2):**The TC erred in law and/or fact and abused its discretion by convicting Ms Hartmann despite that fact or, if it considered it, for rejecting the reasonable possibility that each and all of these facts had been the subject of an *actus contrarius*.

71. **SG(IV)(3):** The TC erred in fact (at par.40) when suggesting that the Tribunal's public references were limited to "the existence of the Appeals Chamber Decisions" and that "its references to the law contained in the Appeals Chamber Decisions [did not] amount to an *actus contrarius* by the Tribunal".⁵⁰

72. **SG(IV)(4):**Each and all of the four facts for which Ms Hartmann had been validly charged had been made the subject/object of an *actus contrarius* on the part of the Tribunal.⁵¹ The TC erred in fact and abused its discretion when it failed to

⁴⁹ Judgment, pars.36-40,47; see, FTB, pars.18-33.

⁵⁰ Par.40.

⁵¹ FTB, pars.25-33.

acknowledge and take account of that fact and convicted Ms Hartmann despite the absence of *actus reus*.

73. **SG(IV)(5)**: To the extent that there was any doubt about what had been rendered public, the TC was required to interpret that doubt in favour of Ms Hartmann and erred in law and fact when it failed to do so and failed to consider the reasonable possibility that Ms Hartmann might have been mistaken about that fact so as to prevent the formation of a culpable *mens rea*.⁵²

74. **SG(IV)(6)**: The TC erred in law when it failed to require the *amicus* to establish that the facts pleaded in the indictment as relevant to the charges had not been made public through *actus contrarius* of the Tribunal and, instead, put the onus on the Defence to establish the fact that facts in relation to which Ms Hartmann had been charged had been made public, instead of requiring the *amicus* Prosecutor to prove its contrary.⁵³

75. **SG(IV)(7)**: The TC erred in law, at paragraph 39, when drawing a distinction between “legal reasoning” and “applicable law” that (i) has no support in law, (ii) is contrary to the practice of this Tribunal, (iii) for which neither R77(a)(ii), nor international law provides a valid basis.⁵⁴

76. **SG(IV)(8)**: The TC erred in law and fact, in footnote 85, when suggesting that D24 and D62 could not constitute evidence of *actus contrarius*.

77. **SG(IV)(9)**: The TC erred in law and fact when it failed to consider whether Ms Hartmann could reasonably have taken the view that, as a result of the Tribunal’s public decisions, the facts that she discussed were not treated as confidential by the Tribunal anymore.⁵⁵

⁵² In particular, Judgment, par. 47. See, also, below.

⁵³ See, in particular, Judgment, par 38 (and pars 40 and 47).

⁵⁴ See, in relation to the legal basis/reasoning pertaining to this case, FTB, pars. 11-14, 26-29, and references therein (*Milutinovic* Decision 12 May 2006, pars. 34-35, footnotes 7, 14, 15, 16, 17, 20, 78, 79; *Milutinovic* Decision 15 May 2006, footnotes 12 and 42; *Delic* Decision 23 August 2006, p. 4, footnote 10; *Delic* Decision 14 January 2008, p. 3, footnote 8; *Perisic*, Order 22 September 2006, p. 2, footnote 3; T. 181-188; *Milutinovic* Prosecution Reply 10 April 2007, par. 10 and footnote 9. See also D3, D11 (FTB, par. 14).

⁵⁵ FTB, pars. 110-123; FTB, pars. 13-14; *Milutinovic* Prosecution Reply 10 April 2007, par. 10 and footnote 9; D3, D11; D3, D4. Also D2; T. 393-394.

78. **SG(IV)(10):**In the alternative, and to the extent that it considered this issue, the TC erred in law/fact and abused its discretion when concluding that such a conclusion was unreasonable in the circumstances.⁵⁶

V. ERRORS OF LAW/FACT REGARDING WAIVER BY THE APPLICANT

79. At par.46, whilst acknowledging the possibility, in law, of a waiver of confidentiality by the applicant, the TC suggested that, under the law of this Tribunal, a waiver by the party who applied for protective could only operate for the purpose of R77 where there has been a formal request to that effect by the applicant to the Tribunal and an “explicit” order of the Chamber in response lifting the confidentiality.⁵⁷ **SG(V)(1):**The TC’s position has no support in law, is contradicted by the Tribunal’s practice and constitutes an error of law. It has resulted in a wrongful conviction of Ms Hartmann.

80. **SG(V)(2):**The TC erred in fact when finding, at par.45, that the information disclosed by representatives of Serbia-Montenegro was not the same information as the accused was charged with disclosing.

81. **SG(V)(3):**The TC erred in law/fact (and violated Ms Hartmann’s presumption of innocence) when failing to require the *amicus* Prosecutor to prove that this was not the case and requiring, instead, the Defence to establish that it was.

82. **SG(V)(4.1):**The finding, at par.45, that the statements placed on the record do not “reflect the Applicant’s official position before this Tribunal vis-à-vis the issue of confidentiality” is both an error of law and fact.

83. **SG(V)(4.2):**The TC erred in fact because the record indicates beyond any doubt that the persons making these statements were acting/disclosing/acknowledging the relevant facts in their official capacity.

84. **SG(V)(5):**The TC erred in fact when it failed to consider whether Ms Hartmann could reasonably have taken the view that, as a result of the Applicant’s public statements, the confidentiality of facts that she discussed had been waived.⁵⁸

85. **SG(V)(6):**To the extent that it considered this issue, the Trial Chamber erred

⁵⁶ See, also, T.270-276,312,314-315,342;D11;P1.1,1002-1,4(-5)/10;P2.1,1003-2,8-9/13,1002-2,6-7/9.

⁵⁷ Also, T.561.

⁵⁸ See, below; 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).

in fact when concluding that such a conclusion was unreasonable in the circumstances.

VI. ERRORS OF LAW/FACT AND SERIOUSNESS OF THE ALLEGED CONDUCT

86. **SG(VI)(1):**The TC erred in law when it found, at par.25, that “any” knowing and willful violation of an order which interferes with the administration of justice, regardless of the seriousness of that interference, would necessarily amount to a criminal offence for the purpose of R77(a)(ii) and that issues of seriousness are to be addressed in the context of sentencing only.

87. **SG(VI)(2):** The TC erred in law when it failed to determine if/whether the conduct of Ms Hartmann had been more than negligent. **SG(VI)(3):**And if it did (without mentioning it), it would have erred in fact and abused its discretion in excluding it as a reasonable possibility.⁵⁹

88. **SG(VI)(4):**The TC erred in law/fact when failing to satisfy itself that that conduct was such (in terms of gravity) as to meet the relevant standard and failing to consider relevant caselaw and assuming instead that any violation was sufficiently serious per se.

89. **SG(VI)(5):**The TC erred in law/fact by failing to require the *amicus* to prove that fact and, having failed to do so, failed to draw the necessary conclusion from the *amicus*'s failure to prove that fact.

90. **SG(VI)(6):**The TC erred in fact as it failed to consider each and all of the factors on the record pertaining to this issue.⁶⁰

VII. ERRORS REGARDING THE REQUIREMENT OF A “REAL RISK” TO THE ADMINISTRATION OF JUSTICE

Background

91. It was the position of the *amicus* all through these proceedings that he was not required to establish, as part of the *actus reus*, that the conduct created a “real risk” to the administration of justice. It was his constant position that a knowing violation of a

⁵⁹ See, in particular, FTB, pars. 77, 87, 97.

⁶⁰ See, in particular, FTB, pars. 151-166.

court order was *per se*, and necessarily, be sufficient to meet the standard of R77(a)(ii).⁶¹ The TC took a similar position. In doing so, it erred.

Impugned findings

92. In par.27, the TC indicates that the requirement of a “real risk” is dealt with in Sections VI.D (Freedom of expression) and VII.B (Gravity of the offence).

93. In footnote 57, the TC says that arguments pertaining to this requirement are more properly disposed as one of jurisdiction and that it is therefore unnecessary to deal with them as an issue pertaining to *actus reus*.

94. At par.74, the TC held that Ms Hartmann had created a real risk of interference with the Tribunal’s ability to exercise its jurisdiction to prosecute and punish serious violations of IHL. It then identifies the “real risk” in the following terms (emphasis added):

“The disclosure of protected information in direct contravention of a judicial order serves to undermine international confidence in the Tribunal’s ability to guarantee the confidentiality of certain information and may deter the level of cooperation that is vital to the administration of international criminal justice.”

95. At par.80, the TC declared that Ms Hartmann’s conduct had –

“created a real risk that states may not be as forthcoming in their cooperation with the Tribunal”

and added that–

“This in turn necessarily impacts upon the Tribunal’s ability to exercise jurisdiction to prosecute and punish violations of [IHL]”
(emphasis added)

⁶¹ *Amicus*PTB,pars.13.et.seq;*Amicus*FTB,pars.11-13.

96. The TC's reasoning regarding this requirement is filled with errors. It has no basis in international law, is contrary to the law of the AC and has resulted in the impermissible curtailment of several fundamental rights in violation of the Statute/international law.

TC's failure to address the issue as part of the actus reus and incorrect legal test adopted to assess existence of a "real risk" to the administration of justice

97. **SG(VII)(1):**The TC erred in law and/or fact when (i) suggesting that the matter was not jurisdictional (as an element of the offence, it was), (ii) failing to address that requirement as such, (iii) failing to acknowledge that it forms part of the offence's *actus reus* and dealing with it as such and (iv) failing to take notice of the fact that the *amicus* had failed to prove (and seek to prove) that this was a requirement to be proved at trial.⁶²

98. **SG(VII)(2):**The TC erred in law by diluting the requirements of this offence below the standard that was recognized under international and/or in violation of the principle of legality by resolving a doubt in Ms Hartmann's disfavour.

99. **SG(VII)(2.1):** The TC's failure to acknowledge that this requirement formed part of R77(a)(ii)'s *actus reus* was an error of law.⁶³

100. **SG(VII)(2.2):**The TC erred in law when suggesting that conduct that "may" render state cooperation less forthcoming "necessarily" interferes with the administration of justice and thus was sufficient to meet the requirements of international law and R77(a)(ii).⁶⁴

101. **SG(VII)(2.3):**The TC erred in law and violated international law when suggesting that the mere possibility of a risk of interference with the administration of justice would suffice to criminalise conduct under Rule 77(a)(ii) and international law.

No jurisdiction after the end of proceedings

102. **SG(VII)(3):**The exercise of the Tribunal's Rule 77 jurisdiction by the TC over the conduct of Ms Hartmann was *ultra vires* of statutory and international law

⁶² Judgment, par.27 and footnote 57.

⁶³ See, above.

⁶⁴ Pars.74,80.

limitations and an error of law as it had no jurisdiction to prosecute acts pertaining to a procedure that had come to an end at the time of publication.

TC's erroneous finding that a "real risk" to the administration of justice existed

103. **SG(VII)(4)**:The TC erred in fact (and law) (pars.74+80) when finding that the conduct of Ms Hartmann had created a "real risk" that states would lessen their cooperation which in turn "necessarily" impacts upon the Tribunal's ability to exercise its primary jurisdiction.

104. **SG(VII)(5)**:The TC considered none of the many indications contradicting its findings or abused its discretion when disregarding them and, therefore, erred in fact.⁶⁵ **SG(VII)(6)**:It erred in fact and abused its discretion when finding that such a risk existed despite the absence of evidence to support such findings, and despite clear evidence to the contrary.

105. **SG(VII)(7)**:The supplementary finding that the alleged risk that states may decrease cooperation "necessarily" means that the administration of justice will be interfered with is equally flawed and an error of fact and law.

Alleged "real risk" and freedom of expression

106. **SG(VII)(8)**:The TC erred in law when it took the view that, as a matter of international law, a mere potential "risk" to the administration of justice would be such as to warrant/permit the curtailment of Ms Hartmann's freedom of expression through a criminal conviction.⁶⁶

Double-counting

107. **SG(VII)(9)**:The Trial Chamber also erred in law and/or in fact by "double-counting" the alleged "real risk"

- (i) as a basis for curtailment of Ms Hartmann's freedom of expression and
- (ii) as an aggravating factor.⁶⁷

⁶⁵ FTB, pars. 67-70.

⁶⁶ The matter is also the subject of an appeal in the context of the Trial Chamber's erroneous interpretation of the nature and scope of Ms Hartmann's freedom of expression and its relevance to the present matter.

⁶⁷ Judgment, pars. 74, 80.

**VIII. ERRORS REGARDING MS HARTMANN'S *MENS REA* –
GENERAL GROUNDS**

TC's errors regarding "intent to interfere with the administration of justice"

108. **SG(VIII)(1):**The TC erred in law when taking the view that a crime under R77(a)(ii) and international law did not require proof of an intent to interfere with the administration of justice and suggesting that "any" knowing and willful violation of an order meets the requisite *mens rea* requirement.⁶⁸

109. **SG(VIII)(2):**The TC erred in law/fact when it failed to require the Prosecutor who bore the burden of proof, to prove that element and erred in law/fact when it failed to come to the reasonable conclusion that no such intent existed.⁶⁹

110. **SG(VIII)(3):**To the extent that the TC considered, at par.53, that there were doubts as regard the state of the law, it erred by failing to apply the principle *in dubio pro reo* and to interpret the law in favour of the accused, thereby violating the principle of legality.

111. **SG(VIII)(4):**The TC erred in law and/or fact when convicting Ms Hartmann despite the Prosecutor's failure to establish such an intent and despite the evidence that she did not intend to interfere with the administration of justice.

112. **SG(VIII)(5):**The *obiter*⁷⁰ suggestion of the TC, at par.53, that proof of actual knowledge or willful blindness of the existence of an order, or reckless indifference to the consequences of the act by which the order is violated automatically means that an intent to interfere with the administration has been established has (i) no support in international law and (ii) no basis in the evidence. As such it is an error of law and fact.

TC's errors regarding alleged knowledge of confidentiality of facts disclosed

113. **SG(VIII)(6):**The TC erred in fact and/or abused its discretion when making findings (at pars.58-59) suggesting that the "strongest evidence" of Ms Hartmann's *mens rea* was Ms Hartmann's knowledge of the confidentiality of the two impugned AC decisions and taking the view that the fact that she had not seen the impugned decisions was "of no consequence to this case".

⁶⁸ Judgment, pars.53(54-55,62).

⁶⁹ Ibid.

⁷⁰ Judgment, par.55.

114. **SG(VIII)(7):**The TC erred in fact when failing to identify any evidence that Ms Hartmann had “willfully” disclosed evidence that she knew to be treated as confidential.

115. **SG(VIII)(8):**In the alternative, the Trial Chamber placed disproportionate weight upon her knowledge that the impugned decisions had originally been filed confidentially and failed to consider all of the evidence contrary to a finding of knowing/willful disclosure of confidential facts⁷¹ and abused its discretion and/or committed an error of law/fact when so doing.

General failure to apply in dubio pro reo and relevant evidential standard

116. **SG(VIII)(9):**The TC erred in law/fact and/or abused its discretion when it failed to apply the principle *in dubio pro reo* to the evidence, failed to exclude other reasonable inferences compatible with Ms Hartmann’s lack/absence of culpable *mens rea* and/or unreasonably excluded those.⁷²

117. **SG(VIII)(10):**In particular, the TC erred in law/fact and/or abused its discretion when it failed to consider the possibility and/or excluded as unreasonable the conclusion that Ms Hartmann’s conduct had been no more than negligent and, therefore, did not come within the terms of R77(a)(ii).⁷³

IX. ERRORS REGARDING MS HARTMANN’S MENS REA – ERRORS PERTAINING TO REGISTRY’S LETTER

Impugned findings

118. At pars.59-61, the TC relies upon a letter from the Registrar to Ms Hartmann dated 17 October 2008 which it says is “strongly suggestive of her state of mind”. By relying upon this letter, the TC committed a grave error of law/fact and/or abused its discretion and caused great unfairness/injustice to Ms Hartmann.

⁷¹ See, above, and FTB, pars.87-96,110-123.

⁷² FTB, pars.87-96. See. e.g. T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404; 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1, 1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13; P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6, 9-11/21;P2.1,1004-2,7,11/21;Ruxton Statement,pars5-6.

⁷³ Ibid.

Errors

119. **SG(IX)(1):**By allowing the *amicus* to use and tender the Registrar's letter (P10) and, subsequently, by relying upon it, the TC committed a serious violation of Ms Hartmann's fundamental rights, breached international law and the Rules and therefore erred in law and, as a result, in fact.⁷⁴

120. **SG(IX)(2):**The TC erred in fact when suggesting that this document could be read as suggesting an awareness on the part of Ms Hartmann that she knew that any of the facts contained in the relevant pages of her publications were still treated as confidential by the Tribunal.

X. ERRORS REGARDING MS HARTMANN'S *MENS REA* – MISTAKE OF FACT

121. **SG(X)(1):**The TC erred in fact and abused its discretion by failing to take into consideration any of the many factors present on the record that supported the reasonable conclusion that Ms Hartmann could reasonably have committed a mistake of fact on that point or, if it did, by failing to give them any weight.

122. **SG(X)(2):**The TC erred in fact when excluding/disregarding the reasonable possibility that Ms Hartmann was not aware of the illegal/criminal nature of her conduct (if it is regarded as such).

123. **SG(X)(3):**Having failed to consider all of the relevant evidence, the TC erred in law and/or fact and abused its discretion when it failed to consider or rejected the reasonable conclusion that Ms Hartmann was mistaken in fact in relation to the question of whether the facts that she discusses in her publications continued to be treated as confidential by the tribunal at the time relevant to the charges (Judgment,pars.64,67).

124. **SG(X)(4):**That error was compounded, is further established and is coupled with the TC's failure to acknowledge the requirement that an accused may only be convicted if he/she was able to determine *ex ante* the criminal character of his/her conduct.

125. **SG(X)(5):**The TC erred in law and/or fact (at par.64, as it had at par.58) when suggesting that Ms Hartmann's "acknowledgment" (as regard the fact that the decisions had been rendered confidentially) (P2.1,1003-2,pp.11-12) went to

⁷⁴ P10;Judgment,pars.59-61.

demonstrate her knowledge of the confidential character of the facts discussed in her publications and thus went to establish her culpable *mens rea* and excluding the reasonable possibility that she might have committed a mistake of fact in this matter.

126. **SG(X)(6)**:The TC erred further in fact when suggesting that this “acknowledgment” provided evidence relevant to excluding the possibility that Ms Hartmann had committed a mistake of fact as regard the public/confidential character of these facts.⁷⁵

127. **SG(X)(7)**:The TC erred in law and/or in fact (at par.64) by taking into account the absence from Ms Hartmann’s book of any reference to “public sources” as a factor relevant to concluding that she must have obtained that information from a confidential source or a source she knew to be confidential.

128. **SG(X)(8)**:The TC erred in law and/or fact in footnote 142 of the Judgment where it drew inferences from the fact that the Defence had not produced evidence of the fact that, as mentioned in the PTB,par.53, Ms Hartmann’s original manuscript did not contain any reference to the impugned Appeals Chamber’s decisions.

129. **SG(X)(9)**:At paragraph 64, the TC erred in law and/or fact as to the matter in relation to which Ms Hartmann was said to have been mistaken, i.e., according to the Trial Chamber “with respect to the confidential status of the Appeals Chamber Decisions”.

XI.ERRORS AS REGARD MS HARTMANN’S *MENS REA* – MISTAKE OF LAW

130. **SG(XI)(1)**:The TC erred in law and/or fact when rejecting (or failing to consider) the evidence and submissions that Ms Hartmann laboured under a mistake of law, failing to consider the relevant matters to which it pertained and/or abusing its discretion when doing so.⁷⁶

131. **SG(XI)(2)**:The TC erred in law and/or fact, by considering whether Ms Hartmann was mistaken as regard whether she knew that the impugned decisions had originally been rendered confidentially.⁷⁷

132. **SG(XI)(3)**:The TC erred in law when suggesting that a person’s misunderstanding of the law could never excuse a violation of the law.⁷⁸

⁷⁵ Judgment,par.64.

⁷⁶ Judgment,pars.65-67.

⁷⁷ Ibid.

133. **SG(XI)(4)**:The Trial Chamber erred in law by equating ignorance of the law with mistake of law when focusing on Ms Hartmann's general awareness of a body of rules criminalizing contempt law before the Tribunal.⁷⁹

134. **SG(XI)(5)**: The TC erred in law/fact when it failed to determine whether Ms Hartmann had been put on clear notice that the material in question was subject to an order preventing disclosure and failed to subject the evidence to it with a view to ascertain whether such mistake prevented her from forming the culpable *mens rea*.

135. **SG(XI)(6)**:Even if the TC were said to have identified and applied the correct legal test/standard, it erred in fact and abused its discretion by failing to take into consideration the many factors advanced on the record that supported the reasonable conclusion that Ms Hartmann could reasonably have committed a mistake as regard the criminal character of her conduct or when unreasonably disregarding them all or failing to give them their due weight.

XII. ERRORS REGARDING THE EVIDENCE OF LOUIS JOINET

Impugned Findings

136. At footnote 176 of the Judgement, the TC held that the testimony of Louis Joinet "largely consisted of policy considerations and legal opinions. Consequently, the Chamber considers his evidence did not advance the Defence case." By disregarding the testimony of Mr. Joinet, the TC erred in law/fact and abused its discretion.

Errors

137. **SGXII(1)**:The TC erred in fact when suggesting that the majority/essence of Mr.Joinet's evidence consisted of policy considerations and legal opinions and rejecting it on that basis.⁸⁰

138. **SGXII(2)**:The TC erred in law and fact and abused its discretion when rejecting and failing to consider his testimony because it was said to consist of policy considerations (it did not, or not wholly) and legal opinions that did not "advance the case" (it did and was no sufficient to reject it all).

⁷⁸ Judgment, par 65. See FTB,pars.99-109.

⁷⁹Judgment,pars.65-66.

⁸⁰ Judgment,FN.176.

139. **SGXII(3)**:The TC erred in law, in fact and abused its discretion by failing to apply a consistent standard to assess/evaluate/admit Defence and *amicus* evidence and violated the principle of equality of treatment when giving weight to *amicus* witness Vincent and rejecting the evidence of Mr. Joinet.⁸¹

XIII. ERRORS REGARDING SENTENCING

Impugned Findings

140. The TC erred in law/fact and abused its discretion when sentencing Ms Hartmann to a 7,000 Euros fine.

Errors

141. **SGXIII(1)**:The TC failed to subject its decision to convict and the sentence it imposed to the principle of proportionality and “necessity”, an error of law.⁸² As such, the sentence is arbitrary.

142. **SGXIII(2)**:The TC erred in fact and/or abused its discretion when failing to consider any of the facts relevant to assessing (i) the necessity/propriety of a criminal conviction and/or (ii) of the sentence imposed as were advanced in FTB(in particular, par.158).

143. **SGXIII(3)**:The TC also erred in law/fact and abused its discretion by giving undue weight to erroneous and irrelevant factors,⁸³ namely that the gravity of this offence is aggravated by the “real risk” that Ms Hartmann has said to have created “upon the Tribunal’s ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law”.⁸⁴

144. **SGXIII(4)**:The TC erred in law/fact and abused its discretion when failing to consider and/or unreasonably rejecting the Defence’s suggestion that a conditional discharge would have been proportionate and appropriate/sufficient.⁸⁵

⁸¹ Compare, Judgment, FN.176, and, FN.31, 85, 87, 88, 101, 171, 182, 187 (and, Judgment, pars.38, 44, 72, 74).

⁸² *Orban*, pars.53-54.

⁸³ These factors are addressed in detail above, in particular, under Ground VI and VIII.

⁸⁴ Par. 80 Judgment.

⁸⁵ The Judgment does not even discuss that possibility as a reasonable one. FTB, pars.167-17; *Brima* Sentencing Judgment, pars.53-54. See also *Heaney v Ireland. R Shayler*, (at 281, per Kelly J); *Mahon v Post Publications*, par.62.

145. **SGXIII(5)**:The TC also erred in law and fact and abused its discretion when acting contrary to established jurisprudence, and erred in law by failing to pay sufficient regard to Ms Hartmann's personal situation.

XIV. ERRORS REGARDING THE ALLEGATION OF 'SELECTIVE PROSECUTION', LACK OF FAIRNESS OF THE PROCEEDINGS, ABUSE OF THE PROCESS AND RELATED ERRORS

General remarks

146. There has been a comprehensive failure on the part of the TC to consider and assess the consequences and effect of irregularities as occurred in the course of the investigation and/or prosecution of this case resulting in grave errors and the violation of Ms Hartmann's right to a fair trial. Because of the nature/scope of facts and issues relevant to this ground, the Defence refers to and adopt the extensive submissions and references given in the relevant filings mentioned below. Limitations of space do not permit the Appellant to review and point to each and all of the facts that pointed to the existence and nature of these irregularities.⁸⁶

147. In short, all through the proceedings, the Defence was denied access to information and to the procedural mechanisms necessary to obtain information that would have allowed the Defence to establish the basis and circumstances under which Ms Hartmann was selected and identified for the purpose of investigation (then prosecution) and determine whether, in that context, any improper considerations or interferences had played a part and whether the irregularities/shortcomings of the *amicus* investigation/prosecution had rendered the case against her unfair.

148. All of the Defence's efforts were denied or rejected by the TC. As a result, the Defence's contention that the proceedings against Ms Hartmann –in particular as regard the process of investigation and indictment– constitute an abuse of the process has not been considered on its merit and the Defence applications that this matter be elucidated were erroneously rejected.

149. On 13 January 2009, the specially assigned Trial Chamber ordered the Defence to re-file its 9 January "Motion or Reconsideration and Stay of Proceedings".

150. On 23 January, the Defence filed its "Motion for Stay of Proceedings for Abuse of Process with Confidential Annexes" ("Motion") in which it sought an order

⁸⁶ Those have been extensively laid down in the Defence's Motions of 9, 14 and 19 January as are referred below.

from the specially assigned Trial Chamber to stay the proceedings for abuse of the process based on many procedural and substantive violations committed by the *amicus* Prosecutor/investigator as part of his investigation and preparation of the case against Ms Hartmann.

151. On 29 January, the *amicus* Prosecutor responded to the Defence Motion.⁸⁷

152. During the 30 January Status conference, the Trial Chamber issued an oral ruling denying the Defence Motion in full, with written reasons to follow.⁸⁸ Written reasons were filed on 3 February 2009.⁸⁹

153. The Defence's contention that the proceedings against Ms Hartmann – in particular as regard the process of investigation and indictment – constitute an abuse of the process has not and never been considered on its merit and the Defence applications that this matter be elucidated were erroneously rejected. All of these decisions contain errors that pertain to a pattern of procedural avoidance whereby allegations of improprieties or inadequacies on the part of the *amicus* (investigator and then Prosecutor) or other procedural irregularities have been, for the most part, ignored or disregarded and the merit of these complaints remain un-answered. The Defence complaints as regard the selection, investigation and indictment of Ms Hartmann did not pertain to the guilt or otherwise of Ms Hartmann, but to the investigative and prosecutorial course followed to bring her to trial. These complaints have never been dealt with on their merit within the bounds of what made them legally relevant.

Decision on abuse of process

Procedural background

154. On 13 January 2009, the specially assigned Trial Chamber ordered the Defence to re-file its 9 January “Motion or Reconsideration and Stay of Proceedings”.

155. On 23 January, the Defence filed its “Motion for Stay of Proceedings for Abuse of Process with Confidential Annexes” in which it sought an order from the specially assigned Trial Chamber to stay the proceedings for abuse of the process based on many procedural and substantive violations committed by the *amicus*

⁸⁷ Prosecution Response to Defence Motion for Stay of Proceedings for Abuse of Process.

⁸⁸ T.45-46.

⁸⁹ Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009.

Prosecutor/investigator as part of his investigation and preparation of the case against Ms Hartmann.

156. On 29 January, the *amicus* Prosecutor responded to the Defence Motion.⁹⁰

157. During the 30 January Status conference, the Trial Chamber issued an oral ruling denying the Defence Motion in full, with written reasons to follow.⁹¹ Written reasons were filed on 3 February 2009.⁹²

158. The following grounds of appeal pertain to the Chamber's Decision of 30 January 2009 with reasons of 3 February 2009.⁹³

Errors

159. **SG(XIV)(1):**The TC erred in law when it held that its jurisdiction to stay proceedings for abuse of process required clear proof of the fact "that the rights of the Accused have been egregiously violated" and **SG(XIV)(2)** erred in fact when finding that this had not been the case in the present instance.⁹⁴

160. **SG(XIV)(3):**The TC erred in law and/or fact and abused its discretion when it declined or failed to deal with a number of issues raised by the Defence because, it said (erroneously), they had already been resolved in the context of separate applications.⁹⁵

161. **SG(XIV)(4.1):**The TC erred in law when suggesting that UN immunities did not apply to interviews carried out as part of the *amicus* investigation (in particular the interview of Ms Hartmann, which included questions pertaining to her employment at the ICTY) and erred in law when suggesting that this investigation did not form part of a "legal process" for the purpose of the Convention on Privileges and Immunities of the United Nations.⁹⁶ **SG(XIV)(4.2)**The Trial Chamber erred in law and/or fact and abused its discretion when suggesting that the failure of the *amicus* investigator to seek and obtain UN waiver of immunities did not inure to the benefit

⁹⁰ Prosecution Response to Defence Motion for Stay of Proceedings for Abuse of Process.

⁹¹ T. 45-46.

⁹² Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009.

⁹³ Leave to appeal was filed on 9 February 2009 and rejected on 13 May 2009.

⁹⁴ Decision, par 4.

⁹⁵ Decision, par 5.

⁹⁶ Decision, pars 6-7. See Motion, par.9(ii).

of the accused and erred in law and/or fact when failing to address the consequence of such failure.⁹⁷

162. **SG(XIV)(5)**The TC erred in law and/or fact and abused its discretion when suggesting that the interview of Ms Hartmann (which related *inter alia* to her role/activities as ICTY-OTP spokesperson) did not require nor demand that her UN immunities be lifted and erred in law and/or fact and abused its discretion when failing to address the consequence of such failure.⁹⁸

163. **SG(XIV)(6)**:The TC erred in law and abused its discretion when authorizing the *amicus* to conduct its investigation in a manner that was inconsistent with an existing order and without any record of this that was accessible and available to the Defence.⁹⁹

164. **SG(XIV)(7)**:The TC erred in law and abused its discretion when suggesting that a Trial Chamber has the authority and power to waive the confidential character of an order of the Appeals Chamber.¹⁰⁰

165. **SG(XIV)(8)**:The TC erred in law and/or fact and abused its discretion when failing to address and give reasons in relation to the Defence submissions at paragraph 9(iii) of its Motion (items 3 and 4) and its unreasonable rejection thereof.¹⁰¹

166. The TC erred in law and fact and abused its discretion when

(a) **SG(XIV)(9.11)** suggesting that the Defence was required to establish how the violations outlined in that paragraph of its Motion had impacted on the *amicus* investigation. No such requirement exists as a matter of law.¹⁰² And when

(b) **SG(XIV)(9.2)** suggesting that the Defence had failed to do so.¹⁰³

167. **SG(XIV)(10)**The TC erred in law and abused its discretion when suggesting that the *amicus* was not required to take and disclose statements of proposed witnesses and erred in law/fact and abused its discretion when it failed to consider what impact this had on the reliability of the report that was made to the Chamber,

⁹⁷ Decision, par 7.

⁹⁸ Decision, pars.6-7.

⁹⁹ See, Motion, par.9(iii).

¹⁰⁰ Decision, par 8.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

and, in turn, on the exercise of its discretionary power to initiate proceedings against Ms Hartmann.¹⁰⁴

168. The Trial Chamber erred further in that regard (at pars.10-11) and abused its discretion when:

- (a) **SG(XIV)(11.1)** suggesting that only the rules pertaining to disclosure were relevant in this matter, and
- (b) **SG(XIV)(11.2)** taking the view that the *amicus* was not required to provide information sought by the Defence.¹⁰⁵

169. **SG(XIV)(12)** The TC erred in law and/or fact and abused its discretion when it

- (a) failed to address and provide reasons in relation to several of the submissions or facts advanced by the Defence as a basis for a finding that an abuse of the process had occurred;¹⁰⁶ and
- (b) failed to ascertain the effect of such failures on the exercise of its discretionary power to initiate contempt proceedings.

170. **SG(XIV)(13)** The TC erred in law/fact and abused its discretion when it failed to consider the effect that many failures outlined in the Defence Motion had on the fundamental rights of Ms Hartmann and erred in law and abused its discretion by failing to address and remedy the prejudicial consequences of these failures.

Subpoena Decision

Procedural background

171. On 19 January 2009, the Defence filed an “Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses” in which it sought to obtain from the Chamber an order to the *amicus* Prosecutor to take and disclose statements of his proposed Rule 65ter witnesses.¹⁰⁷ On 29 January, the specially-appointed Trial

¹⁰⁴ Decision, par 9.

¹⁰⁵ Decision, pars 11-12.

¹⁰⁶ See Motion, par.9 and let(b) below.

¹⁰⁷ The *amicus* Prosecutor responded on 22 January 2009.

Chamber rendered its Decision in this matter, denying the Defence Motion in full.¹⁰⁸ Its reasons were given in a written decision of 3 February.¹⁰⁹

172. On 2 February, the Defence filed an “Urgent Defence Motion to Stay Time Limits for Filing and Rule 73 Applications for Certification” in which the Defence prayed the Chamber to stay the time limits to file any motion for leave to appeal. In an order of 4 February, the Trial Chamber rejected the Defence Motion of 2 February and ordered the Defence to file any Motion for leave to appeal within seven (7) days of this Order.¹¹⁰ Its Motion for leave to appeal the Trial Chamber’s decision was later denied.¹¹¹

173. The TC’s decision denying the Defence Motion for *subpoena* contains several errors of law and/or fact. The failure of the Trial Chamber to grant the subpoena – compounded by the fact that it failed and refused to ask any questions pertaining to the investigation to the *amicus* Prosecutor – resulted in grave unfairness to Ms Hartmann, unfair proceedings and a potential miscarriage of justice.

Errors

174. **SG(XIV)(14):**At paragraph 5 of the impugned Decision, the TC erred in law/fact and abused its discretion when it stated that it “will not interpret the current request for a subpoena to summon Mr MacFarlane for an interview as a request for issuance of a subpoena to appear as a witness at trial.” This was the case and should have been dealt with as such.

175. **SG(XIV)(15):**The TC also erred in law (in particular, at pars.14-15 of the Impugned decision) when misinterpreting or misapplying the Appeals Chamber’s jurisprudence as regard conditions of the issuance of subpoena.

176. **SG(XIV)(16):**The TC erred in law/fact and abused its discretion when it failed to detail and provide a reasoned decision as to why the Defence could be said to have failed to demonstrate that there was a “chance” that the investigating officer would be

¹⁰⁸ Decision on Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses (“Impugned Decision”).

¹⁰⁹ Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curia Prosecutor, 3 February 2009.

¹¹⁰ Order Varying Time Limits for Filing of Applications for Certification.

¹¹¹ Decision on Defence Motion for Certification to appeal Trial Chamber’s Decision Regarding the Issuance of a Subpoena to the Amicus Curiae Prosecutor, 19 May 2009.

able to give information that would assist the Defence case and/or abusing its discretion when reaching that view.

177. **SG(XIV)(17):**The TC erred in law/fact when taking the view that the matter raised issues of testimonial privileges. In addition and in the alternative, even if such privileges had existed, the Trial Chamber would have erred in law and/or fact by giving precedence to those over the right of the accused to a fair trial.

178. **SG(XIV)(18):**The TC erred in law/fact and/or abused its discretion (at par.13 Impugned Decision) when dismissing the Defence submission that the *amicus* investigator was “in an identical position to an investigating officer in a criminal case” and taking into account irrelevant or insufficient factor to dismiss the Defence’s application, including:

- That he had professional and prosecutorial experience;
- That he had been assigned/appointed for that reason.
- That he had prosecutorial experience/expertise (contrary to an investigative officer).¹¹²

179. **SG(XIV)(19):**The TC erred in law/fact when failing to give any, or sufficient, regard to the Defence inability to obtain the required information through any other witness. This resulted in the Defence inability to obtain evidence of the scope and nature of investigative/prosecutorial irregularities for which *prima facie* evidence existed.

180. **SG(XIV)(20):**The TC erred in law and/or fact when suggesting that it would only be required to issue the subpoena in “the most extraordinary circumstances”.¹¹³ In addition and in the alternative, and even if such a test had existed in law, the Trial Chamber could be said to have erred in law and/or fact when concluding that the circumstances of the case were not such as to warrant the issuance of the subpoena sought.

¹¹² Ibid.

¹¹³ Impugned decision, par 14.

181. **SG(XIV)(21)**:The TC erred in law and/or fact when taking into account considerations that were irrelevant to its considerations and failing to consider factors relevant to the Defence request.¹¹⁴

Overall effect of the decisions

182. Compounded by the complete failure of the *amicus* to investigate *à décharge*, the refusal of the Trial Chamber to allow the Defence to access relevant records¹¹⁵ and the Chamber's refusal to look at the way and manner in which the investigation was conducted and by its refusal to allow the Defence to raise these issues with the Appeals Chamber prior to trial,¹¹⁶ resulted in a complete failure to look into the merit of the Defence's complaints and into the fairness or otherwise of the process that had led up to the indictment of Ms Hartmann.

¹¹⁴ See, e.g. Impugned Decision, pars 14-15, 17.

¹¹⁵ See REDACTED.

¹¹⁶ See, e.g., Decision on Defence Motion for Certification to appeal Trial Chamber's Decision Regarding the Issuance of a Subpoena to the Amicus Curiae Prosecutor, 19 May 2009; Decision on Motion for Certification to Appeal Trial Chamber's Decision re Stay of Proceedings for Abuse of Process, 13 May 2009; Decision on Motion for Certification to Appeal Trial Chamber's Decision on Defence Motion for Reconsideration, 13 May 2009.

Conclusions and relief sought

183. Each and all of the above errors, whether individually or in combination, resulted in a miscarriage of justice (errors of fact) or invalidated the judgment (errors of law).

184. As for relief, 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.

185. An appeal brief will be filed in due course in relation to the above grounds of appeal.

Respectfully submitted,



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