

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. John Hocking

Filed: 24 September 2009

IN THE CASE OF

Florence HARTMANN

PUBLIC VERSION

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

On behalf of Ms Hartmann

Mr. Karim A. A. Khan, Lead Counsel

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TABLE OF CONTENTS

Short Procedural background (p 3)

Grounds of appeal (p 3)

- I. Violation of Fundamental Rights of Ms Hartmann and Associated Errors – Inadequate Pleadings (p 5)
- II. Violation of Fundamental Rights of Ms Hartmann and Associated Errors – Freedom of Expression (p 10)
- III. Violation of Fundamental Rights of Ms Hartmann and Associated Errors – Right to an Independent and Impartial Tribunal (p 13)
- IV. Errors of Law/Fact and *Actus Contrarius* (p 15)
- V. Errors of Law/Fact Regarding Waiver by the Applicant (p 16)
- VI. Errors of Law/Fact and Seriousness of the Alleged Conduct (p 18)
- VII. Errors Regarding the Requirement of a “Real Risk” to the Administration of Justice (p 19)
- VIII. Errors Regarding Ms Hartmann’s *Mens Rea* – General Grounds (p 22)
- IX. Errors Regarding Ms Hartmann’s *Mens Rea* – Errors Pertaining to Registry’s Letter (p 25)
- X. Errors Regarding Ms Hartmann’s *Mens Rea* – Mistake of Fact (p 27)
- XI. Errors Regarding Ms Hartmann’s *Mens Rea* – Mistake of Law (p 28)
- XII. Errors Regarding the Evidence of Louis Joinet (p 29)
- XIII. Errors Regarding Sentencing (p 30)
- XIV. Errors Regarding the Allegation of “Selective Prosecution”, Lack of Fairness of Proceedings, Abuse of Process and Related Errors (p 30)
 - 1) Decision on Abuse of Process (p 31)
 - 2) Subpoena Decision (p 35)
 - 3) Overall Effect of the Decisions (p 38)

Conclusions and relief sought (p 38)

Short Procedural background

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. The Defence hereby files its Notice of Appeal against the Judgment in accordance with, *inter alia*, Article 25 of the Statute, Rules 77(J) and 108 and the Practice Direction on Formal Requirements for Appeals from Judgment (IT/201).

Grounds of appeal

3. Each ground of appeal is laid down below. For the purpose of clarity, they have been organized in sub-categories that should assist the Appeals Chamber identify the main areas of concerns that are relevant to this appeal. Several of the grounds of appeal themselves consist of sub-grounds of appeal, which sometimes come in the alternative.
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.²
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;

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

² See, *inter alia*, *Stakic* Appeals Judgment, pars 7-8; *Furundzija* Appeals Judgment, par 37.

- 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.

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

8. The Trial Chamber erred in law and/or fact and abused its discretion when convicting Ms Hartmann in relation to conduct that did not form part of the charges or, if it did, for which Ms Hartmann had not received detailed and timely notice as required under the Statute.³
9. In so doing, the Trial Chamber committed a grave violation of Ms Hartmann's statutory and fundamental right. This resulted in great unfairness, an unfair trial and an unsafe conviction.
10. This general ground of appeal may be sub-divided into a number of errors (of law and/or fact) have been committed by the Chamber in that context.
11. The Trial Chamber erred in law and/or fact when suggesting (*inter alia*, at paragraphs 30-35) that the charges against Ms Hartmann went beyond the four facts identified by the Defence as forming part of the charges.⁴ In particular,
- (i) The Trial Chamber erred in law and/or fact when suggesting that any other facts relevant to the charges had been validly pleaded so that Ms Hartmann had received detailed and timely notice of those;
 - (ii) The Trial Chamber erred in law and/or fact, and violated Ms Hartmann's fundamental rights, by interpreting broadly the nature and scope of the charges.
 - (iii) The Trial Chamber erred in law and/or fact when suggesting, at paragraph 32, that the Defence's understanding was "unreasonably restrictive".
 - (iv) In addition, and in the alternative, this finding constitutes an erroneous shifting onto the Defence of the burden to properly plead charges transforming the clear obligation of the prosecuting authorities into an obligation of the defendant to understand the nature and scope of inadequate or ambiguous pleadings.
 - (v) The Trial Chamber erred in law and/or fact when suggesting that Ms Hartmann had been charged with disclosing anything other than the purported content (as notified and understood by the

³ See Judgment, pars 30-35.

⁴ See, *inter alia*, Final Trial Brief of Florence Hartmann, 2 July 2009, par 1 and references given therein.

Defence)/effect (as notified and understood by the Defence) of two impugned decisions and suggesting (as well as convicting her) in relation to an alleged disclosure of “the content of closed session transcripts of the Applicant’s submissions” in relation to which she had not been charged, had no notice of, did not refer to in her book or, if any part of the book refers to the content of such transcript, in the knowledge that their content was covered by a confidentiality order of the Tribunal.⁵

- (vi) The Trial Chamber erred in law and/or fact when suggesting that the facts mentioned at paragraph 33-35 of the Judgment formed part of the charges against Ms Hartmann and that she had received detailed and timely notice of these.
- (vii) The Trial Chamber erred in law and violated the guarantees of adequate notice and fair trial when failing to properly and legally notify the Defence of its view as to the scope and nature of the charges and basing the conviction of Ms Hartmann on facts in relation to which the Defence had received no proper notice.

12. The Trial Chamber erred in law when suggesting that the facts mentioned in paragraphs 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) The Trial Chamber erred in law, at paragraphs 33-35, 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) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when failing to consider whether or dismissing the possibility that Ms Hartmann could reasonably have taken the

⁵ See Judgment, par 33.

view that the facts for which she was convicted were not covered by Rule 77 and could therefore be discussed publically.⁶

13. The Trial Chamber erred in law and/or fact when concluding that Ms Hartmann had received adequate (i.e. detailed and timely) notice of the additional facts mentioned at paragraph 33 of the Judgment. In particular,

- (i) The Trial Chamber erred in law and/or fact when suggesting that expression such as “purported effect” (as mentioned in paragraph 33 of the Judgment and in the Indictment) would provide adequate notice of the charges as required by Article 21(4)(a) of the Statute.
- (ii) In addition, and in the alternative, to the extent that such expression could be said to provide a sufficient and adequate basis for the purpose of notice, this allegation related to the fourth fact identified by the Defence (iv), which was made public (by the Tribunal and the Applicant, as well as in the media) so that, contrary to the Chamber’s assertion at paragraph 33 (and 73 and 79), this fact was already in the public domain. The Chamber’s conclusion to the contrary is legally and factually in error.
- (iii) In addition, and in the alternative, the Trial Chamber erred in law and/or fact 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.
- (iv) In the alternative, and in addition, the Trial Chamber erred in law and/or fact when dismissing the possibility that Ms Hartmann could reasonably take the view that such reasoning was not covered by Rule 77.⁷

14. The Trial Chamber erred in law and/or fact when concluding that certain information discussed in Ms Hartmann’s book had come and could only have come from the impugned decisions and, if they did, that Ms Hartmann was aware

⁶ See, generally, Judgment, pars 63-67. See also, below, issues pertaining to grounds of appeal re “mistake of fact/law”.

⁷ See, generally, Judgment, pars 63-67.

of that fact and deliberately disclosed that information with or despite that knowledge. In particular,

- (i) The Trial Chamber erred in law and/or fact when suggesting, at paragraph 33, that the book of Ms Hartmann contains reference to the content of closed session transcripts of the Applicant's submissions, that Ms Hartmann would have been aware of that fact and that this has been established beyond reasonable doubt.
- (ii) The Trial Chamber erred in law and/or fact at paragraph 33 when suggesting that Ms Hartmann's book contains reference to "confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision", that Ms Hartmann would have been aware of that fact and that this has been established beyond reasonable doubt.

15. The Trial Chamber erred in law and/or fact when suggesting that the Prosecutor had given detailed and timely notice to the Defence of any fact other than the four mentioned by the Defence. In particular,

- (i) The Trial Chamber erred in law and/or fact when suggesting that the Prosecutor had objected to the Defence's understanding and/or nature and/or scope of the charges or, if he had, that he had done so in such a way that he had properly corrected the deficiencies of the pleadings in such a way as to provide adequate notice of the charges to the Defence.
- (ii) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when it failed to conclude that the amicus Prosecutor was estopped to go beyond the scope of the charges in relation to which the Defence had received notice.
- (iii) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when it suggested that the Prosecutor's so-called "disagreement" with the Defence understanding of the charges was at all relevant to the necessary requirement of timely and

detailed notice of the charges guaranteed by the Statute.⁸ In addition, and in the alternative, the Trial Chamber erred in law and/or fact when concluding that the “disagreement” of the amicus Prosecutor had provided for an adequate notification of the nature of the charges (as identified by the Trial Chamber in its Judgment, in particular the additional facts outlined in paragraph 33).

- (iv) The Trial Chamber erred in law and/or fact when rejecting the view that the Defence had acted under the legitimate expectation that the trial would proceed on the basis of the charges, as it had understood – and repeatedly stated – them (and despite the absence of any “correction” or further “particulars” being provided by the amicus Prosecutor).⁹
- (v) The Trial Chamber 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 of the nature and scope of the charges, he would have been required, as a minister of justice and as an impartial prosecutor, to clarify this matter. In particular, the Trial Chamber erred in law, at paragraph 32, when interpreting the – scope and/or nature of the – obligations/duties of the *amicus* Prosecutor in that regard.

16. The Trial Chamber violated Ms Hartmann’s right to an independent and impartial tribunal as well as her right to a fair trial. By expanding the charges beyond the case articulated by the *amicus* Prosecutor, the Trial Chamber effectively took over the prosecution of Ms Hartmann and set out the charges against her, creating a factual basis that the *amicus* Prosecutor had never – or not validly – put forth as his own for the purpose of prosecuting the case. In so doing, the Trial Chamber committed an error of law in violation of her right to a fair trial and her right to an independent and impartial tribunal.

⁸ See, e.g., Judgment, par 32.

⁹ See, in particular, Judgment, footnote 73.

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

17. The conviction entered against Ms Hartmann constitutes a grave and impermissible violation of her fundamental right to freedom of expression as recognized under international law. It also constitutes a violation of the right of the public (in particular “victims” as understood under paragraph 7 of Security Council resolution 827) to receiving the information in question.

18. The Trial Chamber erred in law when failing to apply or misapplying international law insofar as was relevant to determining the scope of protection that international law recognizes to freedom of expression.¹⁰ In particular,

- (i) The Trial Chamber 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”.¹¹ As will be demonstrated in the Appeal Brief, the standard applied by the Trial Chamber fell far short of that standard.
- (ii) The Trial Chamber erred in law by failing to account for that fact – and acknowledge – that under the ECHR system and international human rights law generally, there is a strong presumption of unrestricted publicity of any proceedings in a criminal trial.
- (iii) The Trial Chamber 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 Rule 77(a)(ii) and interests which it says are protected by that provision.
- (iv) The Trial Chamber also erred in law and/or fact when it failed to acknowledge and take into consideration, not only Ms Hartmann’s freedom of expression, but the right 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 and erred in failing

¹⁰ Judgment, pars 68-74.

¹¹ Judgment, par 70.

to determine in that context whether its decision was consistent with the Tribunal's mandate.

19. The Trial Chamber erred in law (and/or fact) when it failed to apply the relevant international standards relevant and pertinent to the curtailment/restriction of Ms Hartmann's freedom of expression.¹² In particular,

- (i) The Trial Chamber erred in law by failing to establish and/or seek to establish that the restrictions to Ms Hartmann's freedom of expression (and the right of the public to receive that information) in the form of a criminal conviction was "necessary" in the circumstances in a democratic society (as defined under international law) and constitute the most limited interference available with this right.
- (ii) The Trial Chamber erred in law (and/or fact) – in particular, at paragraph 74, *in fine* – where it failed to apply the test of proportionality to the relevant factors that were relevant to this examination. By applying the test to the question of whether "trial proceedings" were proportionate "to the allegations", the Trial Chamber failed to consider whether this fundamental requirement was met in relation to (i) a criminal conviction of Ms Hartmann and (ii) the sentence which it imposed and thereby misapplied or misinterpreted the relevant legal test.
- (iii) The Trial Chamber erred in law (and/or fact) by merging into one question the two issues that were relevant to testing the permissibility of the restrictions made to Ms Hartmann's – and the public's – freedom of expression, namely, (i) the issue of a legitimate aim and (ii) the issue of the proportionality of the restriction (through a criminal conviction).

20. The Trial Chamber erred in fact (and/or law) when it misinterpreted the significance, importance or weight of considerations relevant to the curtailment

¹² See, in particular, Judgment, pars 68-74.

of that fundamental right or failed to consider or give weight to those factors. In particular,

- (i) The Trial Chamber erred in law and/or fact when failing to consider fact/matters relevant to the curtailment of freedom of expression in the context of deciding on the proportionality of the curtailment of Ms Hartman's freedom of expression as had been put forth by the Defence.
- (ii) Whilst noting, at paragraph 71, that journalists might be sanctioned for conduct related to their exercise of freedom of expression, the Trial Chamber erred in law and/or fact when it failed to acknowledge and to consider the special and increased protection guaranteed by international law to journalists in the exercise of their freedom of expression.
- (iii) The Trial Chamber erred in law and/or fact when failing to consider the special or increase 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. In addition, and in the alternative, the Trial Chamber erred in law when misinterpreting, misunderstanding or failing to account for the fact that the issues discussed in Ms Hartmann's publications are issues of public or general interest and that such issues are subject to increased protection from curtailment and interference.
- (iv) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when taking into account facts that are not relevant to the principle of proportionality.
- (v) In the alternative, the Trial Chamber erred in law and/or fact abused its discretion and erred in law and/or fact when giving undue weight to certain factual considerations (as in paragraph 73) and failing to give due weight to relevant factors when deciding upon the permissibility – under international law – of Ms Hartmann's freedom of expression.
- (vi) The Trial Chamber erred in law and/or fact and/or abused its discretion by giving undue and disproportionate weight to the

interests of states at the expense of the fundamental rights of Ms Hartmann.¹³

- (vii) The Trial Chamber erred in law and/or fact and abused its discretion when reaching the view – if indeed it decided this matter – that a conviction of Ms Hartmann could constitute a “proportionate” curtailment of her right to freedom of expression in the circumstances relevant to this case.¹⁴

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

21. Based on the conclusion of a special panel that two of the Judges of the original Trial Chamber lacked the appearance of impartiality,¹⁵ the President of the Tribunal ordered the replacement of these two Judges.¹⁶ 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.¹⁷ The Trial Chamber rejected the Defence Motion in its entirety and proceeded on the impugned record.¹⁸ As a result, Ms Hartmann’s fundamental rights, in particular her right to a fair trial and her right to an independent/impartial tribunal was seriously violated. The error committed by the Chamber may be sub-divided into a number of separate errors (of law and/or fact) which, individually or in combination, meet the relevant standard(s) of review.

22. The Trial Chamber erred in law when applying an incorrect legal standard to the issue raised by the Defence. In particular,

¹³ See in particular Judgment, pars 72-74, 80-81.

¹⁴ Judgment, par 74 in particular.

¹⁵ Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Sertior Legal Officer, filed confidentially on 25 March 2009 and publicly on 27 March 2009.

¹⁶ Order Replacing Judges in a case before a Specially Appointed Chamber, 2 April 2009.

¹⁷ Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions.

¹⁸ Decision on Defence Motion Pertaining to the Nullification of the Trial Chamber’s Orders and Decisions, 19 May 2009 (thereafter, “impugned decision”).

- (i) The Trial Chamber erred in law, at paragraph 8 of the Impugned Decision when suggesting that the principle identified by the Defence did not constitute a general principle of law.
- (ii) In addition, and 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 application represent a general principle of law.
- (iii) The Trial Chamber erred in law when suggesting that the concept of “interest of justice” is a supplementary requirement or a basis for a discretionary power on the part of the Chamber.¹⁹ Instead, in this context it is a “jurisdictional” hook that allows a chamber to nullify the record where a finding of lack of impartiality has been made.²⁰

23. The Trial Chamber erred in law and/or fact, at paragraph 10 of the Impugned decision,

- (i) when equating the issue of “prejudice” to that of “interest of justice”.
- (ii) when effectively reversing the onus to protect/guarantee Ms Hartmann’s fundamental right by requiring the Defence to demonstrate prejudice.
- (iii) when concluding that no such prejudice existed.

24. Even if the matter had been a discretionary one, the Trial Chamber would have erred in law and/or fact by failing to take into account or give adequate weight to factors relevant to decision to adopt the impugned record of a disqualified Chamber and abused its discretion when deciding to proceed on that record. In particular,

- (i) The Trial Chamber erred in law and/or fact when it failed to consider and guarantee the fundamental right of Ms Hartmann by

¹⁹ See Impugned Decision, pars 8-9, in particular.

²⁰ Ibid.

proceeding on a record that was impugned by the disqualification of two judges.²¹

- (ii) In the alternative, and to the extent that the Trial Chamber were to be said to have considered those, it erred in law and/or fact when failing to give them adequate weight/consideration.
- (iii) The Trial Chamber erred in law when treating the annulling/nullifying effect as a matter of judicial discretion.
- (iv) The Trial Chamber's decision to proceed with the impugned record constitutes an abuse of the process as would warrant the nullification of all Trial Chamber decisions rendered thereafter.

25. The Trial Chamber had no authority to review the charges and the sufficiency of the supporting material and erred in law and/or fact when it did so and took the view that such material was sufficient.

26. In addition, and in the alternative, this finding (at paragraph 11 of the impugned Decision) created a further appearance of lack of impartiality that would justify the disqualification of the Chamber and/or the annulment of their decision on that point.

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

27. 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.

28. The Trial Chamber 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*.

29. The Trial Chamber further erred in law and/or fact and abused its discretion by convicting Ms Hartmann despite that fact.

30. The Trial Chamber erred in law and/or fact when suggesting, at paragraph 40, that the scope of the Tribunal's *actus contrarius* was limited to a reference to the applicable law and/or existence of the impugned decisions.

²¹ See, in particular, par 8.

31. The Trial Chamber erred in law, at paragraph 39, when drawing a distinction between “legal reasoning” and “applicable law”.
32. The Trial Chamber erred in law and/or fact, in footnote 85, when suggesting that D24 and D62 could not constitute *actus contrarius* because they are posterior to the impugned decisions.
33. The Trial Chamber erred in law (and/or fact) when it 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.²²
34. The Trial Chamber erred in law and/or fact when taking the view that the confidentiality of the Appeals Chamber’s Decision remained in effect in relation to the facts which Ms Hartmann was alleged to have disclosed in violation of these decisions (despite the Tribunal’s *actus contrarius*).²³
35. The Trial Chamber erred in law and/or 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.
36. In the alternative, and to the extent that it considered this issue, the Trial Chamber erred in law and/or fact when concluding that such a conclusion was unreasonable in the circumstances.

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

37. The Trial Chamber erred in law (at paragraph 46) when making it a condition of a valid waiver that there be an “explicit” order to that effect in the sense of a formal request by the Applicant and a formal decision granting that request.
38. In addition, and in the alternative, the Trial Chamber erred in law when suggesting that the Appeals Chamber’s jurisprudence supports such a requirement for the purpose of a waiver of confidentiality.
39. The Trial Chamber erred in fact and/or law when suggesting, at paragraph 45, that the evidence did not demonstrate that the statements that are

²² See, in particular, Judgment, par 38 (and pars 40 and 47).

²³ Judgment, par 47.

on the record were acknowledged by officials of the Applicant (as relevant for the purpose of waiver). In so doing, and in addition and in the alternative, the Trial Chamber violated the principle *in dubio pro reo*. In the alternative, the legal test relied upon by the Trial Chamber for that purpose (at paragraphs 44-46) was incorrect and constitutes an error of law.

40. The Trial Chamber also erred in fact and/or law when taking the view, at paragraph 45, that the information which had been disclosed by the Applicant was not the same information that Ms Hartmann had been validly charged with disclosing.

41. The Trial Chamber erred in law and/or fact when failing to determine/ascertain whether the facts for which Ms Hartmann had been validly charged had been the subject of a waiver by the Applicant or, in the alternative, to require the *amicus* Prosecutor to establish that this was not the case.

42. The Trial Chamber erred in law and/or fact (at paragraph 46) when suggesting/concluding that the record suggested that the Applicant had pursued “the opposite approach” in relation to the facts relevant to this case and relying upon the evidence cited in footnote 105 for that purpose.

43. The Trial Chamber erred in law and/or fact when taking the view that the confidentiality of the Appeals Chamber’s Decision was in effect in relation to the fact which Ms Hartmann was alleged to have disclosed in violation of these decisions despite the waiver of the applicant.²⁴

44. The Trial Chamber erred in law and/or 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.

45. In the alternative, and to the extent that it considered this issue, the Trial Chamber erred in law and/or fact when concluding that such a conclusion was unreasonable in the circumstances.

²⁴ Judgment, par 47.

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

46. The Trial Chamber erred in law when treating the issue of seriousness or gravity of the conduct as an issue relevant only to (i) the question of sufficient gravity to support “the initiation of criminal proceedings” and/or (ii) sentencing.²⁵ In particular,

- i. The Trial Chamber erred in law when taking the view (at paragraph 25) that issues pertaining to the seriousness of the conduct “are more appropriately considered as mitigating or aggravating factors” and failed to consider its relevance to the issue of culpability.
- ii. The Trial Chamber erred in law when failing to ascertain whether the conduct was serious enough to constitute an offence pursuant to Rule 77(a)(ii) and erred (in law and/or fact) by assuming that this was necessarily the case and/or when considering that this was the case.
- iii. The Trial Chamber erred in law and/or fact by failing to require the *amicus* Prosecutor to prove that fact beyond reasonable doubt.

47. The Trial Chamber erred in law when suggesting (at paragraphs 24-25) that, once proceedings had been initiated, the violation of a confidential order would per se be sufficient to constitute the *actus reus* of a crime of contempt pursuant to Rule 77(a)(ii).

48. In addition and in the alternative, the Trial Chamber erred in law and/or fact when failing to consider each and all of the factors (including relevant precedents) and evidence pertaining to the seriousness of the conduct as had been put forth by the Defence when deciding whether the conduct was sufficiently serious to qualify as a crime under Rule 77(a)(ii).

49. The Trial Chamber erred in law when it failed to consider whether Ms Hartmann’s conduct had been more than negligent and erred in law and/or fact

²⁵ Judgment, pars 24 and 25.

if it made that finding to the detriment of Ms Hartmann and considered the opposite conclusion to be unreasonable.

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

50. The Trial Chamber erred in law, went beyond the Tribunal’s contempt jurisdiction and made new international law (a violation of the principle of legality) when deciding that the Tribunal’s Rule 77(a)(ii) jurisdiction did not require proof of the fact that the conduct of the accused created a real risk for the administration of justice.²⁶ In particular,

- i. The Trial Chamber erred in law (and/or fact) when taking the view that the issue of the creation of a real risk for the administration of justice was not a jurisdictional one, thereby failing to ascertain its own jurisdiction over the alleged conduct.²⁷
- ii. The Trial Chamber erred in law (and/or fact) when it stated, in footnote 57, that though the Defence had referred to the matter of the requirement of a “real risk” in the context of both the Tribunal’s jurisdiction and the *actus reus* element of the offence, “the argument [is] more properly disposed of as one of jurisdiction, and therefore considers it unnecessary to further address it in the Section of this Judgment relating to *actus reus*”.
- iii. In addition, and in the alternative, the Trial Chamber erred as it in fact failed to address this matter as a jurisdictional one.
- iv. It erred in law further when failing to deal with this matter in relation to the offence’s *actus reus*.
- v. It erred in law further when it failed to acknowledge that this requirement forms part of the *actus reus* of that offence and/or to apply the principle of legality to that issue (in

²⁶ See, in particular, Judgment, pars 26-27.

²⁷ Judgment, par 27.

particular as regard the interpretation of Rule 77(a)(ii) on that point).

51. The Trial Chamber erred in law and/or fact and went beyond its own jurisdiction insofar as it determined that it could convict Ms Hartmann pursuant to Rule 77(a)(ii) in relation to conduct that has occurred after the proceedings to which the disclosure relates have ended. In particular,

- (i) The Trial Chamber erred in law by failing to ascertain its own jurisdiction in such cases and disregarding or failing to address the Defence's arguments (and the evidence) on that point.
- (ii) The Trial Chamber erred in law and/or fact when it failed to determine whether there was any support in law for the conclusion that such a risk could occur where the proceedings to which disclosure is related had been terminated.
- (iii) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when it failed to take this fact into account when assessing whether Ms Hartmann's conduct had created a real risk of interference with the administration of justice.

52. The Trial Chamber erred in law when dealing with the issue of a "real risk to the administration of justice" in the context of its consideration of the relevance of Ms Hartmann's freedom of expression. In particular,

- (i) The Trial Chamber erred in law and/or fact when it took the view that the supposed "risk" was such as to warrant and permit the curtailment of Ms Hartmann's freedom of expression through a criminal conviction.²⁸
- (ii) The Trial Chamber also erred in law and/or fact when finding that such an abstract risk would be sufficient to justify a restriction/curtailment of Ms Hartmann's freedom of expression.²⁹
- (iii) The Trial Chamber erred in law and/or fact when its finding as regard the risk of a supposed potential interference with the

²⁸ 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.

²⁹ See also above.

administration of justice could in any case be a sufficient basis to curtail the freedom of speech of Ms Hartmann as guaranteed by international law. In addition, and in the alternative, the Trial Chamber abused its discretion when making that finding.

53. The Trial Chamber erred in law and/or fact when it concluded, without evidential support for it (or insufficient/inadequate evidential support), that the conduct of Ms Hartmann had created a real risk for the administration of justice and that it had been proved beyond reasonable doubt.³⁰ In particular, the Trial Chamber erred in law and/or fact when –

- (i) Making an erroneous determination as to what would constitute such a risk,
- (ii) When determining what legal standard was applicable to establishing that fact, and/or
- (iii) Misapplying that test and/or in abusing its discretion in that regard.
- (iv) Finding that such a risk had been established beyond reasonable doubt.

54. The Trial Chamber erred in law and/or fact, in particular, when suggesting – at paragraph 80 – that an alleged risk that states may not be as forthcoming in their cooperation with the Tribunal “necessarily impacts upon the Tribunal’s ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law”.

55. The Trial Chamber erred in law and/or fact when finding that an abstract risk of reduced cooperation would be sufficient for the conduct to be criminalized under Rule 77(a)(ii).

56. The Trial Chamber erred in law when finding that Rule 77(a)(ii) provided an adequate legal basis for such a finding.

57. The Trial Chamber also erred in law and/or in fact by “double-counting” the alleged “real risk”.³¹

³⁰ See in particular Judgment, pars 74 and 80.

³¹ See in particular Judgment, par 80.

58. The Trial Chamber erred in law and/or fact where it concluded, based on the finding that Ms Hartmann’s conduct had created a real risk that states “may” not be as forthcoming in their cooperation with the Tribunal, that this, in turn, “necessarily” impacts upon the Tribunal’s ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law.³²

59. The Trial Chamber erred in law in its interpretation of States’ obligation to cooperate as laid down in Article 19 of the Statute insofar as was relevant to its reasoning as pertain to the issue of an alleged “real risk” to state cooperation that Ms Hartmann’s conduct is said to have generated.³³

60. The Trial Chamber erred in law and/or fact when taking the view that the conduct of Ms Hartmann had negatively impacted upon public confidence vis-à-vis the Tribunal and regarding that fact as aggravating.³⁴

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

61. The Trial Chamber erred in law and/or fact as regard its reliance upon Ms Hartmann’s acknowledgment that she knew that the two impugned decisions had been filed confidentially for the purpose of establishing her *mens rea* at the time relevant to the charges (i.e., the time of publication of Ms Hartmann’s book and article) and in relation to the facts relevant to the charges.³⁵ In particular, and in addition,

- i. In the alternative, the Trial Chamber placed disproportionate weight upon that acknowledgment and abused its discretion and/or committed an error of law/fact when so doing.³⁶
- ii. To the extent that the Trial Chamber suggests (at paragraph 58) that Ms Hartmann stated in her book that she knew that the information that she discussed in her book was confidential *at the time of its publication*, i.e. the time

³² Ibid.

³³ See, in particular, Judgment, pars 74, 80-81.

³⁴ Judgment, par 80.

³⁵ Judgment, par 58.

³⁶ Ibid.

relevant to the charges, the Trial Chamber erred in law and/or fact.

- iii. The Trial Chamber also erred in law and/or fact and/or abused its discretion when relying upon that statement as evidence of Ms Hartmann's alleged awareness of the fact that the information contained in her publications was still treated as confidential by the tribunal.
- iv. The Trial Chamber erred in law and/or fact by equating Ms Hartmann's knowledge that the impugned Decisions had been filed confidentially (and her concession to that effect) with an alleged – and un-demonstrated – knowledge of the fact that the facts that she discusses in her publications formed part of the impugned decisions and were still treated as confidential by the tribunal at the time of publication.

62. The Trial Chamber committed several errors of law and/or fact as regard the requirement that proof should be made under Rule 77(a)(ii) that, at the time relevant to the charges, the accused had intended to interfere with the administration of justice. In particular,

- (i) The Trial Chamber erred in law and/or fact when it failed to establish (and failed to require the Prosecutor to establish) an intention to violate the order by publishing on the part of Ms Hartmann.
- (ii) In addition and in the alternative, the Trial Chamber violated the Defence "legitimate expectation" that the Prosecutor was required to establish that fact in the present case (or had conceded to the fact that he was not seeking to do so) and thereby committed an error of law and/or fact.
- (iii) The Trial Chamber erred in law when taking the view that an intent to interfere with the administration of justice did not form part of the requisite *mens rea* pursuant to Rule 77(a)(ii).³⁷

³⁷ See, in particular, Judgment, par 55.

- (iv) The Trial Chamber erred in law and/or fact when relying upon the *Margetic* Trial Chamber Judgment in support of a proposition that the law relevant to Rule 77(a)(ii) did not contain a requirement of proof of an intent to interfere with the administration of justice.³⁸
- (v) The Trial Chamber erred in law by relying upon the *Bulatovic* Decision (par 17) to support its view that no intent to interfere with the administration of justice was required under Rule 77(a)(ii).³⁹
- (vi) The Trial Chamber erred in law and/or fact when entering a conviction pursuant to Rule 77(a)(ii) without evidence of an intent to interfere with the administration of justice – and explicit evidence to the contrary.
- (vii) The Trial Chamber erred in law when it misconstrued existing caselaw pertaining to the offence’s *actus reus* and applying it to the offence’s *mens rea* and vice-versa.⁴⁰
- (viii) The Trial Chamber erred in law when suggesting that the finding of the Appeals Chamber in *Jovic* Appeal (par 30) and *Marijacic/Rebic* (par 44) had displaced the *Beqaj* and *Maglov* precedents as bad law or, as the Trial Chamber put it (at paragraph 53), that this body of law had been “developed” by the Appeals Chamber’s caselaw. Furthermore, even if correct, that position would constitute a violation of the principle of legality.
- (ix) The Trial Chamber was also in legal – and factual – error at paragraph 53 where it suggested that “any knowing and willful conduct in violation of a Chamber’s order meets the requisite *mens rea* for contempt and is committed with the requisite intent to interfere with the administration of justice”.
- (x) The Trial Chamber erred in law and violated the principle of legality and created a new criminal offence or expanding it beyond the scope of existing law. To the extent that a doubt existed as

³⁸ Judgment, pars 54-55.

³⁹ Judgment, par 53.

⁴⁰ See, in particular, Judgment, pars 53-54.

regard the state of the law on that point, the Trial Chamber erred by not interpreting that doubt in favour of the accused and instead making new international law that has no (or little) support in any known source of international law.

63. The Trial Chamber erred in law and/or fact at paragraph 53 where it concluded that “Having established either actual knowledge or willful blindness to the existence of an order, or reckless indifference to the consequences of the act by which the order is violated, the intent to interfere with the administration of justice is also established”.
64. The Trial Chamber erred in law and/or fact by failing to take into account (or give due weight to) all the evidence that demonstrated that Ms Hartmann did not have the intent to interfere with the administration of justice and erred when not taking account of the fact that this requirement did not even form part of the Prosecution’s case.
65. In addition, the Trial Chamber erred in law and/or fact when concluding (as it might have done at paragraph 53, *in fine*) that such an intent existed in the circumstances and had been established beyond reasonable doubt and failing to exclude reasonable conclusions that she did not possess such intent.
66. The Trial Chamber erred in fact and/or in law at paragraph 57 when concluding that the manner in which Ms Hartmann obtained information “is of no consequence to this case”.
67. The Trial Chamber erred in law and/or fact 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.

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

68. The Trial Chamber erred in law and/or fact when admitting the Registry’s letter mentioned at paragraphs 59-61 of the Judgment. In allowing the *amicus* Prosecutor to use the Registry’s letter and in admitting that letter, the Trial Chamber violated Ms Hartmann’s fundamental rights, including (i) her right to

timely and detailed notice of the charges, (ii) her right to adequate time/resources to prepare, (iii) her right to an adversarial proceedings and (iv) her right to a fair trial.

69. The Trial Chamber erred in law and/or fact when
- (i) failing to require the *amicus* to provide detailed information about the origin of this document and/or complete chain of customary,
 - (ii) by admitting this document in violation of the UN Convention on Privileges and Immunities and of Article 30 of the Statute and/or by failing to verify whether the document had been obtained in accordance with these instruments
 - (iii) by failing to otherwise establish that this document had been obtained legally and could validly be used in these proceedings.
 - (iv) The Trial Chamber erred in law and violated Rule 89(D) when admitting the Registry's letter.
70. The Trial Chamber erred in law and/or fact at paragraphs 59-61 when relying upon the Registry's letter in support of its finding that Ms Hartmann possessed the requisite *mens rea* or by giving it undue weight. In particular,
- (i) In drawing the conclusions made at paragraph 61, the Trial Chamber erred in law and in fact and violated the principle of *in dubio pro reo* when concluding that this letter was relevant to establishing a culpable – contemptuous – *mens rea* in relation to any of the facts that form the basis of the charges.
 - (ii) The Trial Chamber erred in law and or fact by relying upon this letter to establish Ms Hartmann's alleged *mens rea* at the time of the publication of her book, insofar as the book was published prior to the Registry's letter.⁴¹
71. The Trial Chamber erred in law and/or fact when it failed to consider and failed to exclude the reasonable possibility that Ms Hartmann did not regard the letter as referring in any way to the facts disclosed in the impugned pages of her publications.

⁴¹ See Judgment, pars 59-62.

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

72. As already noted, the Trial Chamber erred in law and/or fact (at paragraph 64, as it had at paragraph 58) when suggesting that Ms Hartmann's acknowledgment (as regard the fact that the decisions had been rendered confidentially) went to demonstrate her knowledge of the confidential character of the facts discussed in her publications. In this context, the Trial Chamber erred further – in law and/or 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.

73. The Trial Chamber erred in law and/or in fact in misquoting (or misunderstanding) a part of the interview of Ms Hartmann to suggest that her answer as to her "good sources" pertained to her knowledge of the confidential character of the facts relevant to the charges and conviction.

74. The Trial Chamber erred in law and/or in fact (at paragraph 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.

75. The Trial Chamber erred in law and/or fact by failing to take into consideration any of the many factors present on the record that support 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.

76. The Trial Chamber 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 Ms Hartmann's original manuscript did not contain any reference to the impugned Appeals Chamber's decisions. In so doing, it reversed the burden of proof and failed to take notice of a fact that was not being challenged by the amicus Prosecutor (although he had declined to formally agree to it).

77. At paragraph 64, the Trial Chamber 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”.

78. The Trial Chamber erred in law and/or fact 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 were treated as confidential by the tribunal at the time relevant to the charges.⁴²

79. The Trial Chamber erred in law and/or fact when it failed to consider whether, despite the evidence that she might have been mistaken on that point, Ms Hartmann had been able to determine, *ex ante*, that her actions were criminal and/or when rejecting the reasonable possibility that she had not possessed that state of mind at the relevant time.

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

80. The Trial Chamber erred in law and/or fact when rejecting (or failing to consider) the evidence and submission 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.⁴³

81. The Trial Chamber erred in law and/or fact, as it did in relation to the issue of mistake of fact, by considering whether Ms Hartmann was mistaken as regard whether she knew that the impugned decisions had been rendered confidentially. The issue relevant to the charges was, instead, whether she could reasonably have taken the view that, in law, the facts discussed in her publications were not treated as confidential (for the reasons outlined in the Defence Final Brief) at the time relevant to the charges and that her conduct was, therefore, not criminal in character.

83. The Trial Chamber erred in law, misrepresented the authorities cited in support of its finding and failed to take into account those that contradicted it, to suggest that a person’s misunderstanding of the law could never excuse a violation of the law.⁴⁴

⁴² Judgment, pars 64 and 67.

⁴³ Judgment, pars 65-67.

⁴⁴ Judgment, par 65.

84. The Trial Chamber erred in law by equating ignorance of the law with mistake of law.

85. The Trial Chamber erred in law and/or fact by failing to take into consideration any of the many factors advanced on the record that support the reasonable conclusion that Ms Hartmann could reasonably have committed a mistake of fact as regard the criminal character of her conduct or when unreasonably disregarding them all or failing to give them their due weight.

86. The Trial Chamber erred in law and/or fact and abused its discretion when it failed to exclude the reasonable possibility that Ms Hartmann might have laboured under a mistake of law as regard the criminal character of her conduct and concluded that she could not reasonably have been mistaken as regard that fact.⁴⁵

XII. ERRORS REGARDING THE EVIDENCE OF LOUIS JOINET

87. The Trial Chamber erred in law and/or fact and abused its discretion, in footnote 176, when disregarding the entirety of Mr Joinet's evidence.

88. In addition, and in the alternative, the Trial Chamber erred in law and/or fact when failing to consider the factors identified as relevant by Mr Joinet to any permissible restriction of the freedom of expression.⁴⁶

89. In addition, and in the alternative, even if the Trial Chamber had been correct as a matter of law to reject Mr Joinet's evidence on the basis advanced in footnote 176, it failed to apply its own standard consistently, fairly and equally as it failed to apply it to the evidence that it considered to support the case of the Prosecutor.

90. The Trial Chamber erred in law and/or fact when it failed to ascertain whether its decision was consistent with the law and practice of the United Nations as regard the curtailment of freedom of expression as is binding upon the Tribunal.

⁴⁵ See Judgment, par 66.

⁴⁶ See also above.

XIII. ERRORS REGARDING SENTENCING

91. The Trial Chamber erred in law and/or fact when failing to consider as a factor relevant to sentencing the ability of Ms Hartmann to pay her fine. In addition, the Trial Chamber erred in law when failing to consider the fact that Ms Hartmann had been declared to be indigent.

92. The Trial Chamber erred in law when it failed to apply the principle of proportionality to the issue of sentencing. In particular,

(i) The Trial Chamber erred in law and/or fact when failing to adopt a proportionate sentence that was the least restrictive of Ms Hartmann's fundamental rights.

(ii) The Trial Chamber erred in law and/or fact when it failed to impose a conditional discharge and/or to establish that such sanction would have been disproportionate in the circumstances.

93. As already noted, the Trial Chamber erred in law and/or fact, in particular, when suggesting – at paragraph 80 – that the “real risk” which Ms Hartmann was said to have created “necessarily impacts upon the Tribunal's ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law”.

94. The Trial Chamber erred in law and/or fact when taking into consideration as factors relevant to establishing the gravity of the offence, not facts established beyond reasonable doubt, but consequences that “may” occur or effects that might impact on the work of the tribunal for which there is no evidence and which have not been established to the relevant evidential standard.

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

95. The Trial Chamber said, in footnote 53 of the Judgment, that the Defence suggestion of a “selective prosecution” against Ms Hartmann had no basis in law or in fact. That finding is contradicted by a large amount of factual indications to the contrary that the Trial Chamber has failed to consider and/or has failed to address.

96. In addition, the Trial Chamber has failed to address the core concern of the Defence in the context of its application for reconsideration and stay of proceedings, namely, that Ms Hartmann was being treated unfairly. The misunderstanding on the part of the Trial Chamber as to what was legally relevant to that concern is most clearly highlighted by its formulation of what would constitute a “selective prosecution”. In footnote 53, the Trial Chamber erred in law when suggesting that the Defence’s complaint were to be rejected as they did not go to “prove or disprove any of the charges”. 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.

97. All through the proceedings, the Defence was denied access to information and to the procedural mechanism that were necessary to obtain information that might 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. All of the Defence’s efforts were denied or rejected as baseless, meritless or unsubstantiated.

98. Without access to the relevant records – and thus to the procedural mechanisms (including subpoenas and binding orders) that it had sought – the Defence cannot prove its case. The finding of the Chamber on that point, however, is no more than the acknowledgment of the fact that, having been denied the means to prove its case, the Defence in fact failed to prove it.

99. 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.

Decision on abuse of process

100. 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”.

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

102. On 29 January, the *amicus* Prosecutor responded to the Defence Motion.⁴⁷

103. During the 30 January Status conference, the Trial Chamber issued an oral ruling denying the Defence Motion in full, with written reasons to follow.⁴⁸

Written reasons were filed on 3 February 2009.⁴⁹

104. The following grounds of appeal pertain to the Chamber’s Decision of 30 January 2009 with reasons of 3 February 2009.⁵⁰

105. The Trial Chamber erred in law and/or fact 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 erred in law and/or fact when finding that this had not been the case in the present instance.⁵¹

106. The Trial Chamber 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.⁵²

107. The Trial Chamber erred in law and/or fact and abused its discretion when it effectively refused, failed or declined to critically and effectively review the manner in which the investigation had been conducted and failed to address

⁴⁷ Prosecution Response to Defence Motion for Stay of Proceedings for Abuse of Process.

⁴⁸ T. 45-46.

⁴⁹ Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009.

⁵⁰ Leave to appeal was filed on 9 February 2009 and rejected on 13 May 2009.

⁵¹ Decision, par 4.

⁵² Decision, par 5.

any of the many violations committed in the context of that process. In so doing, the Trial Chamber violated, *inter alia*, the right of Ms Hartmann to a fair trial.

108. The Trial Chamber erred in law when suggesting that UN immunities did not apply to interviews carried out as part of the *amicus* investigation 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.⁵³

109. 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 of the accused and erred in law and/or fact when failing to address the consequence of such failure.⁵⁴

110. The Trial Chamber 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 and 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.⁵⁵

111. The Trial Chamber erred in law and abused its discretion when authorizing the *amicus* to conduct its investigation in a manner that was consistent with an existing order and without any record of this that was accessible and available to the Defence.

112. The Trial Chamber 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.⁵⁶

113. The Trial Chamber 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).⁵⁷

114. The Trial Chamber also erred in law and fact and abused its discretion when (a) suggesting that the Defence was required to establish how the

⁵³ Decision, pars 6-7.

⁵⁴ Decision, par 7.

⁵⁵ Decision, pars 6-7.

⁵⁶ Decision, par 8.

⁵⁷ See Decision, par 8.

violations outlined in that paragraph of its Motion had impacted on the *amicus* investigation and when (b) suggesting that the Defence had failed to do so.⁵⁸

115. The Trial Chamber erred in law and abused its discretion when suggesting that the *amicus* was not required to take and disclose statements of proposed witnesses⁵⁹ and erred in law and/or 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, and, in turn, on the exercise of its discretionary power to initiate proceedings against Ms Hartmann.⁶⁰

116. The Trial Chamber erred in law and/or fact and abused its discretion when (a) mischaracterizing the Defence submissions as regard the failure of the *amicus* to provide and disclose information requested by the Defence, (b) when suggesting that only the rules pertaining to disclosure were relevant in this matter, and (c) when taking the view that the *amicus* was not required to provide information sought by the Defence.⁶¹

117. The Trial Chamber 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 and (b) failed to ascertain the effect of such failures on the exercise of its discretionary power to initiate contempt proceedings, including the following:

- (a) The *amicus* had failed to ascertain and to bring to the Chamber's attention the fact that the facts for which Ms Hartmann was being investigated had been made public by the Tribunal, the Applicant and in the media.

⁵⁸ Decision, par 8.

⁵⁹ The Trial Chamber erred in law and/or fact when suggesting, in its Decision of 29 January, that the *amicus* Prosecutor was not required to provide the Defence with statements of would-be witnesses, thereby further undermining the Defence ability to prepare and to identify the exact scope of the charges against Ms Hartmann. See Decision on Urgent Defence Motion requesting an Order to the Amicus Curiae to Take and Disclose Proposed Witness Statements, 29 January 2009. See also Decision on Defence Motion for Leave to Appeal Trial Chamber's Decision regarding Prosecution Witness Statements, 19 May 2009. This general error is subsumed into a number of sub-errors that are identified in Defence Motion for Leave to Appeal Trial Chamber's Decision Regarding Prosecution Witness Statements", filed publicly on 9 February 2009.

⁶⁰ Decision, par 9.

⁶¹ Decision, pars 11-12.

- (b) The *amicus* failed to pursue any line of investigation as might have been favourable to Ms Hartmann despite the fact that he was required to act as an impartial investigator.
- (c) The *amicus* failed to verify the reliability/credibility of information provided to him by interviewing before reporting it to the Trial Chamber.
- (d) The *amicus* obtained and used documents from Ms Hartmann's ICTY personnel file without authorization to do so and without waiver of UN immunities.
- (e) During the interview of Ms Hartmann, the *amicus* pursued no line of inquiry that might have been favourable to Ms Hartmann and failed to give her an opportunity to comment upon or respond to some of the baseless allegations made by other interviewees only later to rely upon those allegations in his Report to the Chamber recommending the initiation of contempt proceedings, effectively denying her the right to be heard and basic procedural fairness.
- (f) He failed to act with the requisite impartiality in the execution of his mandate as *amicus* investigator and Prosecutor.
- (g) He relied, for the purpose of his recommendation, upon the evidence of persons whose credibility/reliability he failed to verify.
- (h) He relied upon documents/information that were obtained in violation of the UN Convention on Privileges and Immunities and of Article 30 of the Statute.⁶²

118. The Trial Chamber erred in law and/or 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

119. 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

⁶² See above.

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 65*ter* witnesses.⁶³ On 29 January, the specially-assigned Trial Chamber rendered its Decision in this matter, denying the Defence Motion in full.⁶⁴ Its reasons were given in a written decision of 3 February.⁶⁵

120. 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.⁶⁶ Its Motion for leave to appeal the Trial Chamber’s decision was later denied.⁶⁷

121. The Trial Chamber’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.

122. At paragraph 5 of the impugned Decision, the Trial Chamber erred in law and/or 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.”

123. The Trial Chamber also erred in law when misinterpreting or misapplying the Appeals Chamber’s jurisprudence as regard conditions of the issuance of subpoena.⁶⁸

⁶³ The *amicus* Prosecutor responded on 22 January 2009.

⁶⁴ 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”).

⁶⁵ Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to *Amicus Curiae* Prosecutor, 3 February 2009.

⁶⁶ Order Varying Time Limits for Filing of Applications for Certification.

⁶⁷ 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.

⁶⁸ In particular, Impugned Decision, pars 5-6. See e.g. *Prosecutor v Krstic*, IT-98-33-A, Decision on Application for subpoenas, 1 July 2003, par 8. See again Defence Motion Seeking Certification of Trial Chamber’s ‘Reasons for Decision on Urgent Defence Motion

124. The Trial Chamber erred in law and/or fact and abused its discretion when it failed to detail why the Defence had not demonstrated that there was a “chance” that the investigating officer would be able to give information that would assist the Defence case and/or abusing its discretion when reaching that view.

125. The Trial Chamber erred in law and/or fact when taking the view that the matter raised issues of testimonial privileges.

126. 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.

127. The Trial Chamber erred in law and/or fact when holding that the Defence made no submissions as to the balancing exercise, or necessity of compelling the *amicus* Prosecutor to submit to questioning (in his erstwhile capacity as *amicus* investigator.)

128. The Trial Chamber erred in law and/or fact 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.⁶⁹

129. The Trial Chamber additionally erred in failing to give any, or sufficient, regard to the Defence inability to obtain the required information through any other witness.

130. The Trial Chamber erred in law and/or fact when suggesting that it would only be required to issue the subpoena in “the most extraordinary circumstances”.⁷⁰

131. 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.

for the Issuance of Subpoena to Amicus Curiae Prosecutor’ Dated 3 February 2009, 9 February 2009, in particular par 6.

⁶⁹ Impugned decision, par 13.

⁷⁰ Impugned decision, par 14.

132. The Trial Chamber 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.⁷¹

133. The Trial Chamber erred in law and/or fact by conditioning or subjecting the right of a party to a subpoena to alternative mechanisms and/or abused its discretion when suggesting that such alternative measures were capable of guaranteeing Ms Hartmann's right to a fair trial.⁷²

134. By denying the Defence Motion for a subpoena, the Trial Chamber erred in law and/or fact by violating the right of Ms Hartmann to equality of arms, to an adversarial hearing and to a fair trial.

Overall effect of the decisions

135. Compounded by the complete failure of the amicus to investigate a discharge, the refusal of the Trial Chamber to allow the Defence to access relevant records⁷³ 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,⁷⁴ 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.

Conclusions and relief sought

136. 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).

⁷¹ See e.g. Impugned Decision, pars 14-15, 17 and 22.

⁷² See, generally, paragraph 8 of the Defence Motion for Leave to Appeal.

⁷³ REDACTED.

⁷⁴ 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.

137. 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.

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

Respectfully submitted,



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Done the 24th September 2009