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

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

BEFORE THE SPECIALLY-ASSIGNED TRIAL CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Alphons Orie
Judge Christine Van Den Wyngaert

Acting Registrar: **Mr. John Hocking**

Filed: **15 January 2009**

IN THE CASE AGAINST

Florence HARTMANN

PUBLIC

PRE-TRIAL BRIEF OF FLORENCE HARTMANN

***Amicus*:**
Mr. Bruce MacFarlane, QC

On behalf of Ms Hartmann:
Mr. Karim A. A. Khan, Counsel
Mr. Guénaël Mettraux, Legal Consultant

Preliminary remarks

1. On 8 January 2009, the *amicus* filed his Pre-Trial Brief. That document, the Defence submits, is unhelpful and reflects the definicient and wholly inadequate nature of the investigation conducted by Mr MacFarlane.
2. By letters of 12 and 14 January 2009, the Defence asked Mr MacFarlane to provide the statements of the proposed witnesses. The *amicus* said that no such statements exist. He has also refused to provide information pertaining to the chain of custody of several of the Rule 65*ter* documents. The Defence reserves its right regarding these matters.
3. As a result of these serious failures, the Defence is being gravely hindered in its preparation and ability to respond to the "Prosecution case".

Factual inaccuracies and other shortcomings

4. The factual basis said by the *amicus* to be relevant to the charges is incomplete and full of inaccuracies that are the result, the Defence submits, of an incompetent and wholly inadequate investigation.
5. At this point, and in the absence of any statement of proposed *amicus* witnesses, the Defence is not in position to determine on what –factual basis– most of those assertions are based. By letter of 15 January, Mr MacFarlane declined to provide assistance in relation to some of these issues.
6. The Brief also reveals that Mr MacFarlane wishes to establish facts that are irrelevant to the charges. The Defence will deal with those as they arise.

Proceedings against Ms Hartmann an abuse of the process

7. The Defence wishes to note that the submissions made in this Brief are without prejudice to its submission that the decision to indict Ms Hartmann was, in light of the

amicus's failure to bring relevant facts to the attention of the Chamber, unreasonable and disproportionate and that it should be reconsidered.[1]

8. The present submissions are also without prejudice to any application for a stay of proceedings which the Defence might renew after investigation.

Nature of the Charges against Ms Hartmann

9. Ms Hartmann is charged with disclosing the following facts:[2]

(i) the existence (and date) 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*.

10. The Order in lieu of indictment does not refer to the legal reasoning of the Appeals Chamber in the impugned decisions and it is not subject to the charges.

11. In any case, the Rules do not provide for a valid legal basis whereby contempt proceedings could be initiated to protect the court's legal reasoning. Contempt proceedings are not intended to protect the dignity of the judges, nor to punish mere affronts or insults to a court or tribunal.[3]

12. Rule 54*bis* provides for a valid legal basis to order protective measures (such as redaction) in relation to "documents or information" (Rule 54*bis*(F)-(I)).

[1] Motion for Reconsideration,14 January 2009.

[2] Ibid.

[3] *Tadic*, Judgment on Allegations of Contempt, 31 January 2000,pars.12-13 and 16;*Aleksovski*, Judgment on Appeal by Anto Nobilo,30 May 2001,par.36;*R v Police Commissioner of the Metropolis, Ex parte Blackburn* (No 2) (1968) 2 QB 150,154.

13. CONFIDENTIAL.

14. The fact that the legal reasoning of the Chamber in the impugned decisions was not subject to the confidential order may also be seen from the fact that it was disclosed publically by the Tribunal.

15. CONFIDENTIAL.

16. The correctness of the above-position is further demonstrated by public submissions of the Office of the Prosecutor in which it was able to rely upon the confidential statements of the Tribunal in public filings.

17. CONFIDENTIAL.

18. No contempt proceedings were initiated against members of the OTP when this occurred.

19. Likewise, others, such as former OTP Prosecutor, Mr Geoffrey Nice, were able to publically discuss –and criticize– the legal reasoning on which, he says, the Appeals Chamber based its decisions.[4]

20. It is also obvious from the repeated public references by representatives of the Applicant to the alleged legal basis and reasons for the protective measures that this fact was not subject to –and was not intended to be subject to– any disclosure restrictions lest contempt proceedings would have been started against them.[5]

21. There are other examples of press articles/reports disclosing what they believe to be the legal reasoning underlying the impugned decisions.[6]

22. No proceeding for contempt was initiated against any of these persons thereby demonstrating the fact that it was not covered by the confidentiality of the two impugned decisions.

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[4] Rule65*ter*.8,9,15,29.

[5] Rule65*ter*,par. 58;Rule65*ter* 24, pp.25,33-34,37-38,41.

[6] Rule65*ter*25,4,11,12,13,15,8,9,29.

Waiver of confidentiality

Rescinding of confidentiality by the Tribunal

23. As described in the "Motion for Reconsideration", the Tribunal had made public all of the facts in relation to which Ms Hartmann is being prosecuted.
24. To the extent that it has made public facts which, until that point, are said to have been confidential, the Decisions must be interpreted as rescinding the confidential status of the information which is disclosed publically.
25. In that sense, after these two decisions, the facts in question had become public in the sense of not being subject to a confidentiality order anymore.
26. To that extent, Ms Hartmann could not be said to have committed the *actus reus* of the crime of contempt.

Waiver of confidentiality by the Applicant

27. As noted in the "Motion for Reconsideration", the party which had sought and obtained the protective measures ("the Applicant") had publically disclosed each and all of the facts that are the subject of the charges.
28. In so doing, and in relation *at least* to the facts that were made public, the Applicant could be said to have waived any interest in the continued confidentiality of the measures and to have rendered them moot.
29. The Defence submits, first, that this effectively operated as a waiver of confidentiality matters subject to the impugned decisions.
30. Such a view of the law is supported by the Appeals Chamber.
31. CONFIDENTIAL.
32. Secondly, since the interests that were protected by the measures were those of the Applicant, the disclosure of these facts by the Applicant itself had the effect of displacing any claim that Ms Hartmann's alleged conduct could have had any

prejudicial effect onto these interests or that it could have interfered with the administration of justice, at all or sufficiently to warrant a finding of contempt.[7]

33. The validity of that proposition will be illustrated with examples from the practice of the Tribunal which show beyond any doubt that such conduct is not regarded as criminal by the Tribunal.[8]

Absence of mens rea

Relevant legal standard

34. There is no evidence and the Defence contests that Ms Hartmann possessed the requisite *mens rea*.

35. Criminal contempt requires that the violation of the court's order be committed with knowing and willful intent to interfere with the administration of justice. Thus, the "*mens rea* of contempt is the knowledge and the will to interfere with administration of justice."[9] In other words, to be contemptuous, the conduct must have been "calculated to prejudice the proper trial of a cause".[10]

36. Mere negligence is not criminalized as a form of "contempt".[11]

37. In that sense, the Prosecutor would have to exclude the reasonable possibility that Ms Hartmann could have committed a mistake of law or fact or that she was merely negligent.

[7] See below.

[8] See,below,par.57.

[9] *Margetic*,Judgment on Allegations of Contempt.7 February 2007,pars.30 and 77(emphasis added).

[10] E.g.*Hunt v Clarke* (1889),per Lord Cotton.

[11] *Aleksovski*, Judgment on Appeal by Anto Nobilo against Finding of Contempt,30 May 2001.

Mistake of law and fact

38. In one decision, a Trial Chamber appears to have taken the view that mistake of law was not available in matters of contempt. If that, indeed, was the position of the Trial Chamber –rather than a finding on the facts specific to the case– it would be wrong in law.

39. The defences of mistake of law and fact play a particular important part in the context of international criminal law and procedure because of the many ambiguities and uncertainties that characterize this body of law.

40. A mistake of fact, if it does not result from gross negligence would be a valid defence to the charges.[12] That assessment should be made at the time and in the circumstances relevant to his alleged failure as seen by the defendant.[13]

    And where the evidence allow for an honest error on her part as to the facts relevant to the charges, she is entitled to the benefit thereof by virtue of the presumption of innocence.[14]

41. Under international law, a mistake of law provides a valid excuse when the offender, because of his ignorance of the law, or insufficient understanding thereof, did not possess the required state of mind necessary to support the charges against him.[15]

42. Where the accused believed, in good faith, that she was entitled to act as she did, or believed that her conduct was in conformity with his obligations, she may be said to have been mistaken about the unlawfulness and criminal character of his conduct – if

[12] The mistaken belief must be held in good faith or "honestly" "no matter how unreasonable" (*In re Michael A Schwarz*, US Court Martial, Judgment of 21 June 1970,pp.171-183, Appeal at 862-863).

[13] *Hostage* case,Vol VIII,p.58.

[14] Ibid.

[15] Cassese,*International Criminal Law*,p.258.

indeed that conduct is shown to have been otherwise criminal – and may not be held criminally liable.[16]

43. Such a defence might be established in relation to each and every element which the prosecution must establish beyond reasonable doubt for the accused to be found guilty of the crimes charges.

44. The burden of proof is upon the prosecution at all times, and it is for the prosecution to exclude the reasonable possibility that the accused might have committed an excusable mistake.[17]

45. The following facts are relevant in this matter and demonstrate that Ms Hartmann could have committed a mistake:

46. The Tribunal was set up pursuant to Security Council Resolution 827. The nature and scope of its jurisdiction is set and limited by the terms of that Resolution and the Statute of the Tribunal which was adopted pursuant to that Resolution. At paragraph 7 of the Resolution 827, the Security Council said the following when creating the ICTY:

> "Decides also that the work of the International Tribunal shall be carried out without prejudice to the rights of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."

47. At page 119-120 her book, Ms Hartmann had made reference to that resolution to explain the need for transparency as regard the disclosure of the impugned documents and suggested that the course taken by the Appeals Chamber in this matter effectively constituted a violation of its mandate as granted by the Security Council under paragraph 7 of Resolution 827.[18]

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[16] *In re B*,The Netherlands,Field Court Martial,Decision 2 Jan 1951,Nederj 1952,no 247,516-525.

[17] *In re Schwarz*,at 862-863.

[18] Rule65*ter*.53(pp.119-120).

48. The Defence does not submit that, and the Chamber need not decide whether, the Appeals Chamber in fact acted in violation of paragraph 7 of Resolution 827 when granting the protective measures.

49. The Defence submits, however, that it would have been reasonable for a person (particularly one not trained in the law) to take the view that the impugned decisions of the Appeals Chamber did in fact violate the terms of the Resolution and was therefore invalid as a result.

50. The Defence does not submit that members of the public or journalists should have a right to determine for themselves what is or should remain confidential.

51. The Defence submits, however, that a reasonable person could take that view –correct or mistaken– and, if he/she did, would have a valid defence to contempt charges in line with the legal principles and precedents outlined above. In such a case, the defendant would lack the requisite *mens rea* for the offence.

52. Punishing a person who might have been no more than negligent or mistaken would serve no valid purposes and would undermine the stigma that should attach to a criminal conviction.

53. Also relevant in that context, and providing further support for this proposition, is the fact that Ms Hartmann could reasonably have believed that, after the Tribunal and the Applicant had made these facts public, the facts discussed in her book were not regarded as confidential anymore.

54. The Defence does not submit that Ms Hartmann would have been correct in drawing that conclusion.

55. However, the Defence submits that it would not be unreasonable, in light of the repeated and extensive public discussion surrounding these facts, that a person who is not legally-trained could have taken that view.[19] Clearly, the fact that many other

[19] See Motion for Reconsideration,in particular Annexes.

persons (including state officials, journalists and members of the public) took that view and were not subject to any form of criminal proceeding suggest that this view was in fact a reasonable one.

56. The mistake is rendered all the more reasonable, in the circumstances, by the following facts:

57. First, as noted above, Ms Hartmann is not a lawyer so that she might have been unaware of the fine points of the law of contempt.

58. Secondly, whether that view might be inaccurate *as a matter of law*, she could have believed it to be correct as a matter of practice. As a result of her function, she would have been aware of many cases where the content of sealed indictments was revealed prior to the confidentiality order being lifted as the reason for the confidentiality had dissipated –thus forming the view that such conduct was accepted as a matter of practice/course:

- Slavko Dokmanović: Arrested on 27 June 1997. The ICTY Indictment and arrest warrant were under seal. Prior to the lifting of the confidentiality on the indictment on 27 June 1997, President Clinton made a statement acknowledging and publicising the fact that Mr Dokmanovic had been indicted by the Tribunal and the fact that he had been arrested.[20]
- Slobodan Milosevic: Indictment issued under a non-disclosure order expiring on 27 May 1999 at 12:00. The existence of a sealed indictment against Slobodan Milosevic was disclosed by Christiane Amanpour on CNN on 26 May 1999 in the early evening. In the following hours, CNN disclosed the content of the sealed indictment in its breaking news.[21] No contempt proceedings were initiated against Ms. Amanpour.

[20] Rule65*ter*.42.

[21] Rule65*ter*.43.

- Momir Nikolic: Arrested on 1 April 2002. Indictment unsealed on 2 April 2002.On 1 April, OTP and NATO made public the existence of a sealed indictment.[22]
- Miroslav Deronjic: Arrested on 7 July 2002. Indictment unsealed on 8 July 2002. Following the arrest, OTP and NATO disclosed, on 7 July 2002, the existence of the sealed indictment. Additionally, NATO Secretary-General disclosed in a statement on 7 July 2002 the content of the sealed indictment and the fact that Mr Deronjic was the subject of such an indictment.[23]
- Radovan Stankovic: Arrested on 9 July 2002. Indictment unsealed on July 10, 2002. Following his arrest, OTP and NATO disclosed the existence of a sealed indictment.Additionally, NATO Secretary General, Lord Robertson, disclosed the fact in a statement on 9 July 2002 the content of the sealed indictment and the fact that he was the subject of a sealed indictment.[24]
- Haradin Bala and Isak Musliu: Arrested on 17 February 2003. Indictment unsealed on 18 February 2003.Following the arrest, the OTP and NATO disclosed the existence of the sealed indictment.[25]
- Fatmir Limaj: Arrested on 18 February 2004. Indictment unsealed on 18 February 2004 afternoon. ICTY Chief Prosecutor disclosed the name of the remaining accused on the sealed indictment in a press statement on 18 February 2004 at 12.00. By then the non-disclosure order was still in place and Fatmir Limaj was not yet arrested nor yet served with the sealed warrant of arrest.[26]
- Jadranko Prlić *et al*.: Voluntarily surrendered to ICTY in The Hague on 5 April 2004. Indictment partially unsealed by Judge Antonetti's Order to lift the seal of confidentiality of 2 April 2004. On 30 and 31 March 2004, several media in

[22] See.e.g.Rule65*ter*.46.

[23] Rule65*ter*.48.

[24] Rule65*ter*.49.

[25] E.g.Rule65*ter*.50.

[26]Rule65*ter*.51.

Croatia and Bosnia-Herzegovina disclosed the existence of a sealed indictment.[27] As a result of these disclosures, Judge Antonetti ordered on 2nd April 2004 to lift the seal of confidentiality. In its decision, he underlined that the fact that "the accused Jadranko Prlic, Bruno Stojic, Slobodan Praljak and Milivoj Petkovic have been served with the warrant of arrest is in the public domain, no valid purpose is served in keeping these documents sealed".

- See also Vasiljevic,[28] Obrenovic[29] and Mrda.[30]

This can genuinely be characterized as an accepted practice insofar as none of these "technical" breaches of confidential court orders were ever sanctioned with criminal-contempt proceedings.

59. Thirdly, the suggestion that Ms Hartmann might have committed a *bona fide* mistake is given further credence by the fact that the initial manuscript of her book did not contain reference to the impugned decisions.[31] Only after the matter was broadly publicized by the ICJ proceedings and in the press was the manuscript amended to include references to the two impugned decisions. This is evidence of the fact that she believed in good faith that these facts were now in the public domain.

60. All of the above point to the necessary conclusion that Ms Hartmann might have committed a mistake of law or fact as regard the continued confidential character of the information which she is said to have revealed or was no more than negligent in that regard.

61. In those circumstances, she should be acquitted of all charges.

[27] Rule65*ter*.52.

[28] Rule65*ter*.44.

[29] Rule65*ter*.45.

[30] Rule65*ter*.47.

[31] See above.

'Prescribed by law'

62. The above submissions are related, but not identical, to another matter of relevance. Under Article 10(2) ECHR, only restrictions that are "prescribed by law":

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[32]

63. As discussed above, there is at the least ambiguity in the law as to whether a person could commit contempt after the party that sought the protective measures has effectively waived them. Rule 77 says nothing about it. There is no clear jurisprudential body that would appear to criminalize such conduct. In none of the cases in which contempt was pronounced had the protected information been made public by the party that had sought the protective measures (as was the case in this instance). And the holding of the Appeals Chamber in its Decision of CONFIDENTIAL and a large body of practice[33] support the view that such conduct is <u>not</u> criminal.
64. In that sense, and *in relation to that narrow aspect of the law*, the law of contempt of Tribunal could not be said to meet the relevant ECHR standard of "foreseeability and

[32] *Sunday Times v UK*,Judgment,26April 1979,par.49.

[33] See above,par.57.

accessibility" so that it could not validly warrant a restriction of Ms Hartmann's fundamental rights (nor, therefore, a criminal conviction).[34]

65. In those circumstances, punishing Ms Hartmann's alleged improper disclosure would amount to a violation of her fundamental rights and to a violation of the ECHR.

Seriousness of the alleged violation

Legal considerations

66. The Tribunal has not criminalized all forms of disclosure of confidential information, however minor the breach would be. First, it does not criminalise conducts that are merely negligent.[35]

67. In fact, and thus far, the Tribunal have only criminalized serious interferences with the administration of justice. In *Ntakirutimana*, for instance, the ICTR found that the disclosure in violation of the witness protection order was not sufficiently serious to be tantamount to contempt.[36]

68. In *Furudnzija*, the Tribunal likewise took the view that the pattern of violations of court's order by the Prosecution was not sufficiently serious to amount to a crime of contempt since only the most serious interferences with the administration of justice were intended to be prosecuted under that heading.[37]

69. Revealingly for the present matter, in the *Brdjanin* case, the Trial Chamber found that one of the counts of contempt raised against Ms Maglov did not meet that threshold as

[34] See *Hadzihasanovic* Decision 16 July 2003, par.34.

[35] *Aleksovski*, Judgment on Appeal by Anto Nobilo,30 May 2001.

[36] *Ntakirutimana*, Decision on Prosecution Motion for Contempt of Court and on two Defence Motions for Disclosure, 16 July 2001, pars 10-12.

[37] *Furundzija*,The Trial Chamber's Formal Complaint to the Prosecutor concerning the conduct of the Prosecution, 5 June 1998,par.11.

the information which she was said to have disclosed in violation of a court order related to disclosure of a fact that was already publically known.[38]

70. As noted above, the same is true in the present case.

Facts are not so serious as to justify contempt proceedings

71. The facts of this case are not so serious that they could be criminalized under Rule 77. The following factors are relevant in that context:

(i) No prejudice has been demonstrated to the Applicant.

(ii) No *actual* interference with the course/administration of justice has been established. Notably, the *Milosevic* proceedings are closed.

(iii) There has been no disclosure/revelation of the content of the material/documents that were the subject of the protective measure.

(iv) Facts which are said to have been disclosed were already in the public domain.

(v) There is no evidence of an intention on the part of Ms Hartmann to damage the reputation of the Tribunal.

(vi) No witness was endangered as a result of the conduct of Ms Hartmann.[39]

(vii) The facts have been extensively discussed in the media and in the public generally.

(viii) It is not in the public interest, and in fact, against it, to convict Ms Hartmann for discussing facts that are clearly in the interest of the public.[40]

[38] *Brdjanin* (Maglov), Decision on Motion for Acquittal pursuant to Rule 98*bis*, 19 March 2004, pars 9-10 (in relation to count 3).

[39] Rule65*ter*.35-38.

Fundamental human rights of Ms Hartmann and the principle of proportionality

72. By responding to the perceived violation of a court order with criminal proceedings, and in light of the abuses outlined above, such proceedings could not be regarding as being consistent with that fundamental principle as recognized by the European Court of Human Rights.
73. The prosecution of journalists for allegedly disclosing facts of public interest is likely to undermine the freedom of the press, hinder public discussion of important matters and is unlikely to contribute to a frank and open discussion about those events which interest the Tribunal and the public at large.[41]
74. Furthermore, a conviction in this matter would constitute a violation of the fundamental rights of Ms Hartmann under Article 10 ECHR.

75. In two parallel cases pertaining to the publication of *Spycatcher*, British newspapers complained of a violation of Article 10 of the ECHR caused by the actions of the Attorney-General who sought to restrain the publication of extracts of that book.[42] The Court of Appeal had issued injunctions against *The Observer* and *The Guardian* which also bound all media within the jurisdiction of English courts and held that any publication or broadcast of the *Spycatcher* material would constitute a criminal contempt of court.[43] Copies of the books were imported from outside the UK. However, the court order remained in force until October 1998. The European Court of Human Rights distinguished between two time-periods: for the first period (July 1986-July 1987), the Court held by a narrow majority that the risk of material prejudice to the national security existed justifying the imposition of the above-mentioned injunction. Concerning the later period, by contrast, and unanimously, the

[40] Rule65*ter*.35-38.

[41] D.Feldman,*Civil Liberties and Human Rights in England and Wales* (OUP,1993),in particular, 547-552.

[42] Judgment,26 November 1991,Series.A,No216;(1992) 14 EHHR 153; Judgment of 26 November 1991,Series.A,No217;(1992) 14 EHHR,229.

[43] Ibid.

Court held that Article 10 of the ECHR had been violated. The basis of its reasoning on that point was that the material could no longer be regarded as likely to prejudice the national security of the country since the book had become freely available in the United States.

76. The same reasoning, if applied to the present circumstances, would lead to the necessary conclusion that the enforcement of the confidential orders contained in the impugned decision –and to do so through the criminal prosecution of a journalist– would constitute a violation of the rights guaranteed in the ECHR and the Statute.

77. The same conclusion would be reached by considering the principle of "proportionality" which applies to any curtailment of fundamental human rights. In particular, the criminal conviction of Ms Hartmann could not be said to have been based on "sufficient reasons" that made it "necessary in a democratic society".[44] To meet that standard, the restriction would have to-

> "correspond[d] to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10 (2)'"[45]

Any restriction to fundamental rights must be interpreted narrowly.[46]

78. In this case, the criminal conviction of a journalist who acted in the exercise of her fundamental rights and, the Defence says, in the interest of the public to know, would constitute a disproportionate curtailment and infringement of Ms Hartmann's fundamental right to freedom of expression. The interest of the public to the facts allegedly revealed in violation of a court order is directly relevant to that issue.

[44] Art.10(2)ECHR.

[45] *Sunday Times v UK*, Judgment 26 April 1979,par.62;also *Handyside v UK*, Judgment of 7 December 1976,Series A, NO 24; (1979-1980) 1 EHHR 737,pars.48-50.

[46] *Klass et.al* Judgment 6 September 1978,Series A no. 28,par.42

79. In the *Sunday Times* case, for instance, the European Commission for Human Rights took the view that a court-ordered ban on an article pertaining to facts of public interests could not validly be imposed and constituted a violation of Article 10 of the Convention on the basis of the fact that the impartiality of the court might be affected if revealed since the impugned article contained only information with which the court had already become familiar from another source and because the disclosure of the information had no proven consequences on the relevant proceedings.[47] In the same case, the Commission had underlined that "the very important function, in a democratic society, of the press in general and to the duties and responsibilities of individual journalists" and that "the examination of public responsibility" as regard issues of public concerns is "certainly a legitimate function of the press".[48] The Commission added the following:

> "the public interest to clarify matters of great importance cannot be satisfied by any kind of official investigation, it must, in a democratic society, at least be allowed to find its expression in another way . Only the most pressing grounds can be sufficient to justify that the authorities stop information on matters the clarification of which would seem to lie in the public interest, and this on the application of the persons concerned and for the reason that its publication would seriously disturb civil litigation in which these persons are engaged."[49]

80. The Court took a similar view of the matter.[50]

81. A similar conclusion would be warranted in this instance: the interference with Ms Hartmann's fundamental rights which would result from a criminal conviction would not correspond to a social need sufficiently pressing to outweigh the public

[47] Report of 18 May 1977,pars.231-248.

[48] Ibid,pars.243-244.

[49] Ibid,par.247(emphasis added).

[50] See Judgment 26 April 1979,pars.42-68.

interest in freedom of expression within the meaning of the European Convention. And there has been no demonstrated effect on any proceedings. A conviction would not be proportionate to the legitimate aim pursued and it is not necessary in a democratic society for maintaining the authority of the judiciary.

Outstanding requests for assistance and production of documents

82. It should be noted that, at this stage, the list of proposed exhibits and, possibly, the list of proposed witnesses for the Defence is unlikely to be final. The Defence notes, in that regard, that a number of requests for assistance (and for translation) are pending.

Conclusions and relief sought

83. Whatever its decision in this matter, the Tribunal will set a new precedent.
84. That precedent can be one that gives its due place to the fundamental rights of journalists to discuss matters of public interest so that the Tribunal continues to serve its role as a recorder of history. Or, for the first time in the history of international criminal justice, it can punish a journalist for discussing facts of public interest that had lost any valid claim to confidentiality and which have had no demonstrated prejudicial effect on the administration of justice. The Defence trusts that it will be the former, not the latter, and that Ms Hartmann will be acquitted.

Respectfully submitted,

Karim A. A. Khan

Word count: 4,909 words.
Done the 15th of January 2009

ANNEX A – LIST OF PROPOSED WITNESSES

1. **Natasha KANDIC**

Ms Kandic is a high-profile militant for human rights with extensive knowledge and expertise in the former Yugoslavia. Ms Kandic is expected to be able to give evidence about the importance of international justice to victims generally, and to the issue of the right to know, in particular. She is expected to discuss issues pertaining to the function of the Tribunal as a record of history. She is also expected to testify about statements made by, *inter alia*, representatives of the Applicant concerning the facts and issues that form the underlying basis of the charges. She is also expected to testify about the waiver of protective measures by the Applicant. She is also expected to testify about the personality and character of Ms Hartmann.

Live, 3 hours.

2. **Louis JOINET**

Mr Joinet has extensive knowledge and expertise regarding the conflict in the former Yugoslavia as well as relevant issues pertaining to judicial transparency. He has been a member of the UN Sub-Commission on Human Rights. In 1992, he was the President of a UN commission regarding certain events of the former Yugoslavia. Mr Joinet is expected to testify about the mission and mandate of the ICTY in the context of the events of the former Yugoslavia. He is also expected to testify about the importance of transparency in the context of war crimes proceedings, in particular those taking place the ICTY. Mr Joinet is also expected to testify about the importance of transparency and truth to the victims of the conflict in the former Yugoslavia.

Live, 2 hours.

3. **Nura ALISPAHIC**

Ms Alispahic is expected to testify about the importance of the Tribunal as a record of history and the importance for victims, such as herself, to know the truth of what happened to them or their relatives during the conflict in the former Yugoslavia (including as regard the involvement of the Applicant) in that context. Ms Alispahic lost her son in Srebrenica. She is expected to testify about the public interest that attach to the

discussion of the facts that underlie the charges against Ms Hartmann. She is also expected to testify about the work of the Tribunal and the consequence of the alleged breaches of confidentiality order in relation to the underlying issues pertaining to the charges against Ms Hartmann. She is also expected to testify about the public discussion surrounding the redaction of the impugned information. She is also expected to testify about these issues in the context of the support expressed by the *Mothers of Srebrenica* for Ms Hartmann.

Live, 2 hours.

4. **Bruce MacFarlane**

Mr MacFarlane acted as *amicus* investigator in this case. The Defence reserves its right to call him as a witness after it has been able to interview him. If called, Mr MacFarlane would be expected to testify about the process of investigation and preparation of the case against Ms Hartmann.

Live, 3 hours.

5. **Florence Hartmann**

The Defence reserves its right to call Ms Hartmann as a witness.

Live, 3 hours.

Total time for witnesses: 13 hrs.

The Defence reserves its right to seek an extension of the time allocated for the presention of the Defence case.

ANNEX B – LIST OF PROPOSED EXHIBITS

1 Blank

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