



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
former Yugoslavia since 1991

Case No. IT-02-54-R77.5  
Date: 27 March 2009  
Original: English

**BEFORE THE PANEL**

**Before:** Judge O-Gon Kwon, Presiding  
Judge Iain Bonomy  
Judge Christoph Flügge

**Acting Registrar:** Mr. John Hocking

**Date:** 27 March 2009

**IN THE CASE AGAINST**

**FLORENCE HARTMANN**

**PUBLIC REDACTED VERSION**

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**REPORT OF DECISION ON DEFENCE MOTION FOR DISQUALIFICATION  
OF TWO MEMBERS OF THE TRIAL CHAMBER  
AND OF SENIOR LEGAL OFFICER**

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**Amicus:**

Mr. Bruce MacFarlane, QC

**Counsel for Ms. Hartmann:**

Mr. Karim A. A. Khan, Lead Counsel  
Mr. Guénaél Mettraux, Co-Counsel

## I. BACKGROUND

1. This is a public redacted version of the Report that was initially filed confidentially on 25 March 2009. This Panel of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the confidential “Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer in Charge of the Case”, filed on 3 February 2009 (“Motion”), and hereby provides its report thereon.

2. The Motion arises from the contempt proceedings against Florence Hartmann, former employee of the Tribunal and spokesperson for the Tribunal’s Prosecutor. [REDACTED] on 10 September 2007, Ms. Hartmann released a book entitled “Paix et Châtiment” (Peace and Punishment) in which she discussed the content of confidential proceedings [REDACTED].<sup>1</sup> [REDACTED] in an interview she gave on 19 September 2007, soon after the publication of her book, Ms. Hartmann referred to a confidential decision [REDACTED].<sup>2</sup> [REDACTED]<sup>3</sup> [REDACTED].<sup>4</sup>

### A. Investigation

3. [REDACTED]. The Specially Appointed Chamber—having reviewed the confidential material in question, [REDACTED], as well as the relevant portions of Ms. Hartmann’s book and the subsequent interview she gave—found that the information provided [REDACTED] gave “reason to believe that Ms. Hartmann may be in contempt of the Tribunal”.<sup>5</sup> The Specially Appointed Chamber also noted, *proprio motu*, that the Prosecutor had a conflict of interest with respect to the matter given that Ms. Hartmann was formerly employed as the Office of the Prosecutor’s spokesperson. Thus, the Specially Appointed Chamber, pursuant to Rule 77(C)(ii) and the Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal (“Practice Direction”),<sup>6</sup> decided to direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to it as to whether there were sufficient grounds for

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<sup>1</sup> [REDACTED]

<sup>2</sup> [REDACTED]

<sup>3</sup> On 28 January 2009, the President issued an order replacing Judge Christine Van Den Wyngaert in this case, on account of her election to the International Criminal Court. Judge Van Den Wyngaert was replaced in the Specially Appointed Chamber by Judge Bakone Justice Moloto. *See* Order Replacing a Judge, 28 January 2009.

<sup>4</sup> [REDACTED]

<sup>5</sup> [REDACTED]

<sup>6</sup> Rule 19(B) states that Practice Directions are issued by the President in consultation with the Bureau, the Registrar and the Prosecutor.

instigating contempt proceedings.<sup>7</sup> The Specially Appointed Chamber further ordered the Registrar to make available to the *amicus curiae* [REDACTED] decisions and the [REDACTED].<sup>8</sup> [REDACTED].<sup>9</sup>

4. [REDACTED] following consultation with the Specially Appointed Chamber, [REDACTED] appointed Mr. Bruce MacFarlane QC as the *amicus curiae* to investigate the alleged contempt.<sup>10</sup> [REDACTED].<sup>11</sup> [REDACTED].<sup>12</sup> [REDACTED].<sup>13</sup>

5. [REDACTED].<sup>14</sup> [REDACTED].<sup>15</sup>

6. [REDACTED].<sup>16</sup> [REDACTED].<sup>17</sup> [REDACTED].<sup>18</sup> [REDACTED].<sup>19</sup> [REDACTED].<sup>20</sup>

### **B. Prosecution**

7. Having completed his investigation, the *amicus curiae* [REDACTED].<sup>21</sup> As a result, on 27 August 2008, the Specially Appointed Chamber publicly issued its “Order in Lieu of an Indictment on Contempt” in which it noted that, on the basis of the factual findings contained in the report prepared by the *amicus curiae*, it had reason to believe that, pursuant to Rule 77(D)(ii), there existed a *prima facie* case of contempt against Ms. Hartmann.<sup>22</sup> The Specially Appointed Chamber accordingly ordered that Ms. Hartmann be prosecuted on two counts of contempt punishable under Rule 77(A)(ii). It also directed the Registrar to appoint an *amicus curiae* prosecutor to prosecute these charges, and on 1 September 2009, the Deputy Registrar appointed Mr. Bruce MacFarlane QC as the *amicus curiae* prosecutor.<sup>23</sup>

8. In preparation for the Trial, which was scheduled to commence on 5 February 2008, the Specially Appointed Chamber conducted an initial appearance of the Accused Ms. Hartmann (on 27 October 2008) and two status conferences (on 14 November 2008 and 30 January 2009).

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<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED]

<sup>9</sup> [REDACTED]

<sup>10</sup> [REDACTED]

<sup>11</sup> [REDACTED]

<sup>12</sup> [REDACTED]

<sup>13</sup> [REDACTED]

<sup>14</sup> [REDACTED]

<sup>15</sup> [REDACTED]

<sup>16</sup> [REDACTED]

<sup>17</sup> [REDACTED]

<sup>18</sup> [REDACTED]

<sup>19</sup> [REDACTED]

<sup>20</sup> [REDACTED]

<sup>21</sup> [REDACTED]

### C. The Motion

9. The current Motion was filed two days before the scheduled start of the Trial. As a result, the Trial was adjourned *sine die* pending the resolution of this matter.<sup>24</sup> On 16 February, the *amicus curiae* filed the “Prosecution Response to Defence Motion for Disqualification” (“Response”).

10. [REDACTED].

11. On 18 February 2009, the President, noting that the Motion is a direct challenge to the validity of Rule 77 of the Rules and that it alleges the appearance of a lack of impartiality on the part of the Specially Appointed Chamber, appointed the present Panel, pursuant to Rule 15(B)(ii) of the Rules, to decide the merits of the Motion, including in particular: (a) whether the provisions of Rule 77 are in violation of the Tribunal’s Statute and/or generally recognised standards of fundamental human rights under customary international law; and (b) if that is not the case, whether the conduct of the Specially Appointed Chamber breached the principle of impartiality required under the Statute and/or recognised standards of fundamental human rights under customary international law.<sup>25</sup>

## II. ARGUMENTS OF THE PARTIES

### A. The Motion

12. The Defence for Ms. Hartmann (“Defence”) first requests leave to exceed the word limit for the Motion by 8,500 words on the basis that the Motion “effectively contains two separate motions (one pertaining to two judges and another pertaining to the Senior Legal Officer in charge)”, as well as the voluminous nature of the case law and facts in issue.<sup>26</sup>

13. As to the substance of the Motion, the Defence argues that the Specially Appointed Chamber, by virtue of its involvement in the investigation and preparation of the case against Ms. Hartmann, has created “an appearance of a lack of impartiality on the part of the specially-assigned Trial Chamber and an appearance of bias against Ms. Hartmann”.<sup>27</sup> The actions alleged by the Defence in this regard fall into the following two broad categories: (a) consultation to an

<sup>22</sup> This Order was later amended to reflect the accurate case number. See Decision on Motion to Amend the Order in Lieu of Indictment on Contempt, 27 October 2008; Amended Order in Lieu of an Indictment of Contempt, 27 October 2008 (“Order in Lieu of Indictment”).

<sup>23</sup> Decision of the Deputy Registrar, 1 September 2008.

<sup>24</sup> Order Postponing Commencement of Trial, 3 February 2009.

<sup>25</sup> Decision on Motion for Disqualification, 18 February 2009.

<sup>26</sup> Motion, para. 6. Paragraph 5 of the Practice Direction on the Length of Briefs and Motions sets the word limit for motions at 3,000 words.

<sup>27</sup> Motion, para. 5.

inappropriate degree between the *amicus curiae* and the Specially Appointed Chamber during the investigative and prosecutorial phases of the proceedings, including in certain *ex parte*, unrecorded discussions, all of which created an appearance of bias on behalf of the Specially Appointed Chamber;<sup>28</sup> and (b) an allegation of actual bias on the part of the Specially Appointed Chamber evinced by the fact that it refused the Defence request for review of the investigation and sought to influence an amendment of the charges against Ms. Hartmann once they had been issued.<sup>29</sup>

14. The Defence argues that the *amicus curiae* effectively acted as a proxy for the Specially Appointed Chamber during both the investigative and prosecutorial phases of the proceedings to the point where no *cordon sanitaire* existed between the investigative/prosecutorial body on one hand, and the Specially Appointed Chamber on the other.<sup>30</sup> According to the Defence, in allowing this situation, the Specially Appointed Chamber interpreted Rule 77 in such a way as to violate Ms. Hartmann's right to an independent and impartial Tribunal, as guaranteed in the Tribunal's jurisprudence.<sup>31</sup>

15. The Defence acknowledges that under Rule 15(C) of the Rules, a judge who confirms an indictment is not necessarily excluded from sitting as a member of the resultant Trial Chamber. However, the Defence submits that in cases of contempt, such a scenario is only possible in relation to contempt in the face of the court. The Defence cites domestic and European Court of Human Rights jurisprudence in support of the notion that confirmation of an indictment and adjudication of the merits should be heard separately, and argues that this principle should inform this Panel's interpretation of Rule 77 and paragraph 13 of the Practice Direction.<sup>32</sup>

16. As regards the existence of actual bias, the Defence alleges that "[t]here was no apparent effort, nor any evidence of a readiness, on the part of the [Specially Appointed Chamber] to look into the many deficiencies and shortcomings of the *amicus* investigation".<sup>33</sup> According to the Defence, there exists "clear and systematic evidence of improprieties and grave shortcomings" in the manner of the investigation of the case and preparation [REDACTED], and the Specially Appointed Chamber's unwillingness to look into these allegations evinces a lack of impartiality.<sup>34</sup> In addition, the Defence cites a series of defence applications which it considers were met with

<sup>28</sup> Motion, paras. 3, 29–40, 45–47.

<sup>29</sup> Motion, paras. 3, 41–42.

<sup>30</sup> Motion, paras. 32–37.

<sup>31</sup> Motion, paras. 12–14, 19–21. *See* Motion, paras. 15–18, 22–26 for a discussion of domestic and European Court of Human Rights jurisprudence on the right to an impartial bench.

<sup>32</sup> Motion, para. 44.

<sup>33</sup> Motion, para. 41.

<sup>34</sup> Motion, paras. 41–43.

“blanket—and mostly—unreasoned denial” by the Specially Appointed Chamber as further evidence of its partiality.<sup>35</sup>

17. The Defence also criticises the actions of the Specially Appointed Chamber at the Status Conference of 30 January 2009, particularly the Presiding Judge’s question to both parties as to whether they “had considered the reference to the contents of the underlying protected documents to be excluded from what is formulated in the form of a charge and the order in lieu of the indictment”.<sup>36</sup> The Defence views this as an attempt by the Specially Appointed Chamber to amend “by stealth” the charges against Ms. Hartmann to “include an unspecified reference to ‘the content’ of the impugned decisions”.<sup>37</sup> The Defence states in the Motion—as it did during the Status Conference of 30 January—that its understanding of the charges against Ms. Hartmann remains as expressed in its Motion for Reconsideration and Pre-Trial Brief, filed on 14 and 15 January 2009, respectively.<sup>38</sup>

18. In addition to the recusal of two members of the Specially Appointed Chamber, the Defence requests that the senior legal officer working for the Specially Appointed Chamber (“Legal Officer”) be removed from the case.<sup>39</sup> The Defence alleges that the Legal Officer provided “assistance and advice of an unspecified sort” to the *amicus curiae*, which amounted to direct and *ex parte* participation in the investigation and preparation of the case against Ms. Hartmann. As such, the Defence asserts that the Legal Officer’s continued involvement in the case casts an apprehension of bias over the Specially Appointed Chamber.<sup>40</sup> In this regard, the Defence notes that [REDACTED] details assistance from the Legal Officer regarding “process and advisory issues” and provision of “information, documents and general advice or assistance”.<sup>41</sup> Specifically, the Defence notes two unrecorded, *ex parte* communications between the Legal Officer and the *amicus curiae*, during which the Legal Officer authorised the *amicus curiae* to: (a) disclose confidential decisions [REDACTED] to the Defence; and (b) interview Ms. Hartmann’s publisher, [REDACTED].<sup>42</sup> The Defence argues that this communication between the *amicus curiae* and the Legal Officer should have been recorded,<sup>43</sup> and that in any event, neither the Specially Appointed

<sup>35</sup> Motion, paras. 48-49. *See also* Motion, footnote 69.

<sup>36</sup> Motion, para. 51.

<sup>37</sup> Motion, paras. 50-52, 54-62.

<sup>38</sup> Motion, para. 62.

<sup>39</sup> Motion, para. 65.

<sup>40</sup> Motion, paras. 65-78. *See* Motion, paras. 69-73 for a discussion of domestic jurisprudence supporting the notion that challenges can be made to the impartiality of court officials.

<sup>41</sup> Motion, para. 37, citing *Amicus Report*, para. 7.

<sup>42</sup> Motion, para. 74.

<sup>43</sup> The Defence alleges additional *ex parte* unrecorded correspondence between the *Amicus Curiae* and the Legal Officer—including correspondence after the Order in Lieu of an Indictment had been issued—of which the Specially Appointed Panel “failed to disclose the existence nature and scope of”. Motion, paras. 46-47.

Chamber nor the Legal Officer has the power to waive the confidentiality of [REDACTED] decisions.<sup>44</sup>

19. The Defence cites a wide range of jurisprudence to support its contention that the impartiality of a judge may be prejudiced by his or her association with judicial staff<sup>45</sup> and submits that chambers staff at the Tribunal fall within the ambit of Rule 15(A), which states that a Judge should be disqualified if he or she has “*any association which might affect his or her impartiality*” (emphasis added).<sup>46</sup> The Defence argues that in this case, the Legal Officer has taken a “very personal, direct and *ex parte* part in the investigation and preparation of this case”, and as a result, any association the Legal Officer may have with a judge on this case would compromise that Judge’s impartiality.<sup>47</sup>

## **B. Response**

20. The *amicus curiae* responded to the Motion within the 3,000 word limit imposed in the Practice Direction on the Length of Briefs and Motions, choosing not to address every point raised by the Defence, but rather to focus on the issues relevant to disqualification.<sup>48</sup> In the Response, the *amicus* emphasises that the threshold for rebutting the presumption of impartiality is high.<sup>49</sup> He argues that the Specially Appointed Chamber has assessed the evidence concerning Ms. Hartmann in a similar way that a Judge called upon to confirm an indictment might. According to the *amicus curiae*, a Chamber is capable of applying a different standard of review to the evidence at different stages of the trial, and simply because the Specially Appointed Chamber has assessed the evidence according to a certain standard does not create an apprehension of bias when that Chamber comes to finally determine the case according to a different standard.<sup>50</sup>

21. The *amicus curiae* argues that the Specially Appointed Chamber’s compliance with the Practice Direction does not make it akin to a party in the proceedings. According to the *amicus curiae*, the Specially Appointed Chamber’s power to issue investigative instructions does not render the *amicus curiae* an “investigative proxy” for the Chamber because it is within the normal discharge of a Chamber’s responsibility to establish rules and guidelines which ensure that the interests of justice are upheld.<sup>51</sup> Further, the *amicus curiae* argues that compliance with the Practice Direction does not lead to a contravention of Article 6 of the European Convention on Human

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<sup>44</sup> Motion, para. 38–40.

<sup>45</sup> Motion, paras. 69–71.

<sup>46</sup> Motion, para. 66.

<sup>47</sup> Motion, paras. 67–68, 74–77.

<sup>48</sup> Response, para. 1.

<sup>49</sup> Response, paras. 2–7.

<sup>50</sup> Response, para. 6.

Rights, and distinguishes a number of cases relied upon by the Defence, primarily on the basis that the framework established by Rule 77 and the Practice Direction is substantially different from those cited.<sup>52</sup>

22. Responding to the allegation that the charges against Ms. Hartmann were modified by stealth, the *amicus curiae* emphasises that the charges against Ms. Hartmann have not changed as a result of the Status Conference of 30 January 2009. They were first set out in the Order in Lieu of an Indictment, and the prosecution case was set out in its Pre-Trial Brief, in terms “not only consistent with the Order in Lieu of an [I]ndictment, [but] virtually verbatim”.<sup>53</sup> The *amicus curiae* states that these charges were re-confirmed “to avoid any misapprehension by the Defence” in a statement filed by the *amicus curiae* on 2 February 2009.<sup>54</sup> The *amicus curiae* further opines that the Defence’s allegation that the Specially Appointed Chamber proceeded by stealth, or *mala fides*, crosses the line of propriety and compromises the obligation of counsel appearing before the Tribunal to demonstrate respect and courtesy to the Chamber.<sup>55</sup>

### III. APPLICABLE LAW

23. Rules 15(A) and 15(B) of the Rules allow any party to apply to the President of the Tribunal for removal of a Judge if the Judge in question “has or has had any association which might affect his or her impartiality”.<sup>56</sup> The President may, as he did in this case, appoint a panel of three judges to decide and report to him on the merits of the application.<sup>57</sup>

24. The Appeals Chamber has held that “a Judge is not impartial if it is shown that actual bias exists”. An unacceptable appearance of bias exists if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>58</sup>

<sup>51</sup> Response, paras. 8–10.

<sup>52</sup> Response, paras. 12–14.

<sup>53</sup> Response, paras. 15–17.

<sup>54</sup> Response, paras. 15–17.

<sup>55</sup> Response, paras. 18–19. Specifically, the *Amicus Curiae* Prosecutor cites Article 27 of the Code of Professional Conduct for Counsel Appearing Before the Tribunal.

<sup>56</sup> Rule 15(A).

<sup>57</sup> Rule 15(B)(ii).

<sup>58</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009 (“*Lukić* Decision”), para. 2. See also *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 (“*Blagojević* Decision”), para. 2; *Prosecutor v. Vojislav Šešelj*, Decision on

With respect to the reasonable observer prong of this test, the Appeals Chamber has held that the “reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of judicial integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold”.<sup>59</sup>

25. The Appeals Chamber has also emphasised that there is an assumption of impartiality that attaches to a Judge.<sup>60</sup> Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial, and there is a high threshold to rebut the presumption of impartiality.<sup>61</sup> The party must demonstrate “a reasonable apprehension of bias by reason of prejudgement” which is “firmly established”.<sup>62</sup> The Appeals Chamber has explained that this high threshold is required because “it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as is the real appearance of bias itself”.<sup>63</sup>

26 As indicated above, Rule 77 of the Rules is concerned with contempt proceedings at the Tribunal and provides in relevant part as follows:

- (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
  - [...]
  - (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
  - [...]
- (C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
  - (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
  - (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
  - (iii) initiate proceedings itself.

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Motion for Disqualification, 16 February 2007 (“Šešelj Decision”), para. 4; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeals Judgement”), para. 189.

<sup>59</sup> *Lukić* Decision, para. 2; *Blagojević* Decision, para. 2; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 190.

<sup>60</sup> *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 196.

<sup>61</sup> *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 197.

<sup>62</sup> *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Furundžija* Appeals Judgement, para. 197; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeals Judgement”), para. 707.

<sup>63</sup> *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Čelebići* Appeals Judgement, para. 707.

- (D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
- (i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or
  - (ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.
- (E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

27. The procedure for the investigation and prosecution of contempt before the Tribunal is further regulated by the Practice Direction. In the Investigation section, the Practice Direction provides, in paragraphs 4 and 5 respectively, that a request to a Chamber to investigate an allegation of contempt must be made prior to the commencement of the investigation and that it is to be made *ex parte* and confidentially “before the Chamber in which the contempt allegedly occurred”. According to paragraph 7 of the Practice Direction, upon a Chamber having considered the application for investigation and having found reason to believe that a person (other than the Prosecutor) may be in contempt of the Tribunal, the Chamber will in the first instance direct the Prosecutor to investigate the contempt allegation unless the Prosecutor makes a showing of a conflict of interest with respect to the relevant conduct of the alleged contempt. Paragraph 8 then provides that, if the Chamber is of the view, *proprio motu* or upon showing by the Prosecutor, that the Prosecutor has a conflict of interest, it may issue a confidential and *ex parte* order directing the Registrar to appoint an *amicus curiae* to investigate the matter and report back and make recommendations to the Chamber. This order must set out the following:

- (i) the incident to be investigated;
- (ii) the documents and filings, including confidential material which the Registry of the International Tribunal and/or the Prosecutor shall make available to the Amicus Curiae Investigator for the purposes of the investigation;
- (iii) investigative instructions (if any) including instructions concerning the summoning and questioning of witnesses, recording their statements and collecting evidence and such other matters as may be necessary for the conduct and completion of the investigation;
- (iv) the due date for the Amicus Curiae Investigator to report back to the Chamber.

28. Before appointing the *amicus curiae* investigator, the Registrar must first consult the Chamber as to the suitability of the candidate.<sup>64</sup> Once appointed, the *amicus curiae* may petition the Chamber to seek clarification and/or further instructions. However, this petition is restricted to

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<sup>64</sup> Practice Direction, paragraph 9.

seeking clarification and/or further instructions concerning only the matters contained in paragraph 8(i)–(iv), outlined above.<sup>65</sup>

29. As for the prosecution phase of the proceedings, paragraph 13 of the Practice Direction states that, upon completion of the investigation of an alleged contempt, and where sufficient grounds have been determined by a Chamber in order to proceed against a person for contempt, “the Chamber in which the contempt allegedly occurred shall adjudicate the matter unless there are exceptional circumstances such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber.”<sup>66</sup>

30. Where an *amicus curiae* investigator was appointed to investigate the allegation, the adjudicating Chamber may direct the *amicus curiae* to prosecute the matter.<sup>67</sup> Furthermore, paragraph 15 of the Practice Direction addresses situations in which the Chamber decides to issue an order in lieu of the indictment to be served on the person accused of contempt.

## IV. DISCUSSION

### A. President’s First Question

31. As recalled above, in appointing this Panel to report to him on the merits of the Motion, the President directed the Panel to consider: “(a) whether the provisions of Rule 77 of the Rules are in violation of the Statute and/or generally recognised standards of fundamental human rights under customary international law”. The Panel interprets the President’s instruction as requiring consideration of whether the provisions of Rule 77 as applied in the contempt proceedings against Ms. Hartmann are in violation of the Statute or such generally recognised standards. In addressing this question, the Panel will take into account the terms of the Practice Direction.

32. Rule 77 expresses the “inherent power” of the Tribunal to “hold in contempt those who knowingly and wilfully interfere with its administration of justice” and lists specific forms of contempt, including disclosure of “information relating to those proceedings in knowing violation of an order of a Chamber”. The Appeals Chamber has confirmed the existence of this inherent power which has been applied by Chambers of the Tribunal on a number of occasions.<sup>68</sup>

<sup>65</sup> Practice Direction, paragraph 10.

<sup>66</sup> Practice Direction, paragraph 13.

<sup>67</sup> Practice Direction, paragraph 14.

<sup>68</sup> See e.g. *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, 17 December 2008, para. 16; *Prosecutor v. Haxhiu*, Case No. IT-04-84-R77.5, 24 July 2008, para. 9.

33. The procedure followed in contempt cases has been that set out in Rule 77 and the Practice Direction, tailored to meet the requirements of the particular case. Contempt can arise in a wide variety of circumstances and must be addressed appropriately whenever it arises. The wilful breaching of an order of the court in the course of proceedings before that court is different from, and may be *very* different from the breach of an order such as is alleged in this case. This point was touched upon in Judge Bonomy's Separate Opinion in the Decision on Contempt of the Tribunal in proceedings against one of the witnesses in the *Milošević* trial:

Contempt may take many forms. Indeed the offence encompasses a wide variety of conduct, some of which is otherwise clearly criminal and some of which is not criminal. It comprises conduct which affects the administration of the court or is otherwise disciplinary in character, and conduct which goes to the root of the issues being litigated before the court. It includes conduct which must be dealt with immediately if it is to be dealt with effectively, and it includes conduct that may appropriately be dealt with by ordinary criminal procedures within their proper time limits. It may comprise conduct in the face of the court and conduct occurring at a location far removed from the court, such as communications with witnesses or the publication of inappropriate reports in newspapers. It may involve the behaviour of persons on the public benches, counsel, a witness or the accused himself.<sup>69</sup>

34. Where contempt must be addressed, Rule 77 envisages a trial on an indictment brought by the Prosecutor or on an order issued by a Chamber in lieu of an indictment. Rule 77(E) provides for the application to contempt proceedings of the sections of the Rules which regulate trial and appellate proceedings. In recognition of the *sui generis* nature of contempt proceedings, those sections of the Rules are stated to apply "*mutatis mutandis*". The power to make these Rules is contained in Article 15 of the Statute of the Tribunal.

35. In addition, pursuant to paragraph 13 of the Practice Direction, the Chamber before which the contempt allegedly occurred will ordinarily adjudicate the matter. The same paragraph also recognises that there are circumstances where the case should be assigned to another Chamber. As Judge Bonomy noted:

[T]he Practice Direction also recognises that there are circumstances where the case should be assigned to another Chamber. While these are described as 'exceptional', the example given of the impartiality of a Chamber possibly being called into question suggests that this course may be appropriate in more than 'exceptional' circumstances. A court must always act impartially. ... However, it may be difficult to demonstrate objective impartiality where the court appears to have already made decisions on matters of fact which are challenged in the contempt proceedings. It is not uncommon for issues of contempt to involve factual disputes. Indeed, the same may also be said in relation to matters of law which are controversial. ... The Chamber can find its determination of the proper approach to the particular circumstances of this case. The variety of circumstances in which contempt may be committed inevitably rules out 'one size fits all' approach to handling such allegations.<sup>70</sup>

<sup>69</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R.77.4, 13 May 2005, Separate Opinion of Judge Bonomy on Contempt of the Tribunal, para. 6.

<sup>70</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R.77.4, 13 May 2005, Separate Opinion of Judge Bonomy on Contempt of the Tribunal, para. 7.

36. In giving effect to the Rules and Practice Direction governing contempt proceedings, Trial Chambers must accord full respect for the right of the accused to a fair trial, which presupposes the right of the accused to be tried before an independent and impartial tribunal. These rights are enshrined in Articles 13, 20, and 21 of the Statute. Specifically, Article 20 of the Statute requires Trial Chambers to ensure that: (a) a trial is fair and expeditious; (b) proceedings are conducted in accordance with the Rules; (c) proceedings are conducted with full respect for the rights of the accused; and (d) proceedings are conducted with due regard for the protection of victims and witnesses. Article 21(2) further requires that “[i]n the determination of the charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute”. Additionally, Article 13(1) of the Statute provides that the Judges of the Tribunal “shall be persons of high moral character, impartiality and integrity”.

37. The Panel considers that, if Rule 77 and the Practice Direction can be so interpreted as to be applied consistently with these rights, then these provisions cannot be deemed *ultra vires* of the Statute. That does not mean that these provisions are necessarily so well-worded as to avoid controversy. If the language is inelegant or ambiguous, then that may be a reason for these provisions to be revised but not a reason for finding them *ultra vires* since the interpretation that accords full respect to the rights of the accused in accordance with the Statute should apply.

38. The Panel recognises that there are situations in which the involvement of a Trial Chamber in both directing the investigation and prosecution of a complaint of contempt as well as adjudicating the contempt case could affect the impartiality of the Chamber or create an appearance of bias on the part of the Chamber in violation of Rule 15 of the Rules as well as the fundamental fair trial rights of an accused, as guaranteed by the Statute. The Panel considers, however, Judge Flügge dissenting, that, taken together, Rule 77 and the Practice Direction contain safeguards to ensure the impartiality of the Chamber adjudicating the substantive issues of the contempt case. In this regard, the Panel recalls that pursuant to paragraph 13 of the Practice Direction, a Trial Chamber initiating contempt proceedings in terms of Rule 77(C) or (D) is authorised to decide that “exceptional circumstances” exist “such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber”. The Panel considers that given the distinct nature of each contempt case, when such exceptional circumstances exist must be determined on a case-by-case basis.

39. In light of the foregoing, the Panel, Judge Flügge dissenting, holds the view that Rule 77 of the Rules does not violate the Statute or generally recognised standards of fundamental human rights. Accordingly, the Panel will proceed to determine whether exceptional circumstances existed in the instant case, which called into question the impartiality of the Specially Appointed Trial

Chamber and thus warranted the assignment of the case to another Chamber.

### **B. President's Second Question**

40. The Panel, therefore, turns to consider the President's second question, namely: whether the conduct of the Specially Appointed Chamber breached the principle of impartiality required under the Statute and/or generally recognised standards of fundamental human rights under customary international law.

41. This question requires the Panel to determine whether Ms. Hartmann's right to be tried by an impartial Tribunal has been breached, either because the Specially Appointed Chamber has been shown to be subjectively partial or because it has acted in a way that creates an appearance of partiality. The Appeals Chamber has stressed the importance of judicial impartiality before.<sup>71</sup> As noted above, the Practice Direction in paragraph 13 specifically recognises the application of this principle to contempt of court.

42. The Panel will address evidence which, in the submission of the Defence, indicates that the Specially Appointed Chamber is not impartial, or at least has created the impression of a lack of impartiality, which renders it inappropriate for that Chamber to hear the case. From the outline of the Defence arguments above, it can be seen that they fall broadly into two categories, namely: (i) the extent of the involvement of the Specially Appointed Chamber in the investigation and the prosecution phases of this case, including having informal, unrecorded communications with the *amicus curiae*, all of which create an appearance of bias on behalf of the Specially Appointed Chamber, and (ii) an allegation of an actual bias on the part of the Specially Appointed Chamber as shown by its allegedly unreasoned dismissals of the attempts by the Defence to have the conduct of the investigation reviewed and evaluated, and by the Specially Appointed Chamber's alleged attempts to modify the charges against Ms. Hartmann "by stealth".

43. Addressing the allegations of subjective bias first, the Panel has reviewed the Specially Appointed Chamber's decisions relating to Defence motions for reconsideration and stay of proceedings, as well as the events surrounding the alleged attempt at modifying the charges against Ms. Hartmann. Having done so, it is of the view that the decisions in question were sufficiently reasoned and gave ample explanation for dismissing the motions. As for the alleged attempts at modifying the charges, the Panel considers that the relevant discussion during the status conference was nothing more than an attempt by the Specially Appointed Chamber to clarify the charges and avoid confusion during trial. The suggestion that the Specially Appointed Chamber was attempting

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<sup>71</sup> *Furundžija* Appeals Judgement, paras. 189, 196–198.

“to modify the charges against Ms. Hartmann ‘by stealth’” is groundless. Accordingly, the Panel is unanimous in its view that none of these actions on behalf of the Specially Appointed Chamber indicate that it was biased in fact.

44. The Defence also submits that, by finding on two occasions that there was a *prima facie* case of contempt against Ms. Hartmann, the Specially Appointed Chamber acted in a way that would cause a reasonable observer to apprehend bias. The Panel, Judge Flügge dissenting, considers that this submission is unfounded for two reasons. First, it is well established within the jurisprudence of the Tribunal that a judge who confirms an indictment after having reviewed the supporting material and determined that there is a *prima facie* case against the Accused may nevertheless be a member of the Trial Chamber presiding over the trial. Secondly, and more importantly, such a finding is an essential and inherent part of contempt proceedings. The practice set out in Rule 77 involves the formulation by a Chamber of the view that there may have been conduct which satisfies that test. The findings that a *prima facie* case existed were no more than an initial determination that there was an issue of contempt requiring investigation and secondly an issue of contempt requiring adjudication. The Panel, Judge Flügge dissenting, considers that a reasonable observer with a full understanding of the circumstances of this case and the concept of contempt could not conceivably view these preliminary determinations by the Specially Appointed Chamber as indicative of bias.

45. Now the Panel turns to the issue of the alleged inappropriate involvement of the Specially Appointed Chamber with the *amicus curiae* in the investigation and prosecution phases. The Panel notes that this involvement consisted of [REDACTED] and, later, [REDACTED] made after he had been appointed Prosecutor.

46. It is a well-established law that a Trial Chamber cannot act as both investigator/prosecutor and adjudicator. A fundamental tenet of an accused’s right to a fair trial is that the trial be heard by an impartial adjudicator, absent any appearance of bias. However, as noted above,<sup>72</sup> contempt is a unique crime in that it usually takes place before a court or pertains to orders by a court, and in these situations, the court in question retains an inherent power to prosecute such instances of contempt. In such situations, a Trial Chamber is inevitably involved in the case from the outset, given that the Trial Chamber has some association with the circumstances in which the allegation is made. Indeed, under the Rules and the Practice Direction, a Trial Chamber may involve itself in the

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<sup>72</sup> See paras. 32-33.

investigative and prosecutorial phases of proceedings to a much greater extent than it may in the case of other crimes under the Tribunal's Statute. In this case, [REDACTED].<sup>73</sup>

47. In the instant case, this Panel is called upon to consider such composite roles of a Trial Chamber dealing with an allegation of contempt, and in particular, the extent to which a Trial Chamber may involve itself in the investigation and prosecution phases of the contempt case before it becomes inappropriate for the Chamber to adjudicate the case due to an apprehension of bias.

48. Rule 77 provides little guidance regarding these issues. For guidance on these matters, one must look to paragraph 13 of the Practice Direction, which states that "the Chamber in which the contempt allegedly occurred shall adjudicate the matter unless there are exceptional circumstances such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber". However, the Practice Direction does not appear to contemplate contempt which occurs outside of the courtroom, given that paragraphs 5 and 13 require "the Chamber in which the contempt allegedly occurred" to oversee investigation of the allegation and adjudicate the case. It is reasonable to assume that paragraphs 5 and 13 would apply *mutatis mutandis* to contempt which does not occur within a specific Chamber, so that in situations such as the one currently before the Panel, the case shall remain with the originally assigned Trial Chamber (in this case, the Specially Appointed Chamber) throughout all phases of the proceedings, unless exceptional circumstances warrant assignment of the case to another Chamber.

49. Relevant for our purposes is the example of what may constitute exceptional circumstances provided in paragraph 13 of the Practice Direction, namely: "where the impartiality of a Chamber may be called into question". The Practice Direction gives no further guidance on what renders circumstances so exceptional as to warrant referral to another Chamber. As indicated above, such a determination will necessarily be made on a case by case basis. It may be so—particularly in cases where contempt has not occurred within the confines of a specific Trial Chamber—that assignment is warranted in more than just exceptional cases, owing to the wide and unique power of the Trial Chamber to direct the investigative and prosecutorial phases of the case.

50. Rule 77 and the Practice Direction must therefore be interpreted in light of an accused's right to a fair trial enshrined in Articles 20 and 21 of the Statute of which trial by an independent and impartial bench is an inalienable component. Whenever a Trial Chamber finds itself in a situation whereby to proceed with a case could potentially compromise the rights of an accused, that Trial Chamber must recuse itself from the case and refer the matter to another Chamber. Given the unique nature of contempt cases and the wide ranging, overlapping powers of the Chamber to

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<sup>73</sup> [REDACTED]

affect the investigation and prosecution of the case even where that case did not originate in that Chamber, it is fair to assume that the category of cases where recusal is warranted may be more common than a characterisation as “exceptional” may suggest. Therefore, in light of the accused’s right to an independent and impartial bench, the “exceptional circumstances” standard under paragraph 13 of the Practice Direction should be given a wide interpretation.

51. With these principles in mind, the Panel will now consider whether the conduct of the Specially Appointed Chamber places it in the category of cases under paragraph 13 in which referral to an alternate Chamber was warranted.

52. [REDACTED].<sup>74</sup> [REDACTED]<sup>75</sup> [REDACTED].<sup>76</sup> In light of these instructions, on several occasions, the *amicus curiae* placed himself in the hands of the Specially Appointed Chamber, leaving the direction of the investigation open to accommodate the intention of the Specially Appointed Chamber.<sup>77</sup> [REDACTED].<sup>78</sup> [REDACTED].<sup>79</sup>

53. The issue in this case is neither whether the Specially Appointed Chamber is subjectively impartial in issuing such instructions nor whether the actual content of [REDACTED] instructions is such that would threaten the impartiality of the Specially Appointed Chamber. As stated above, this Panel does not consider that the Defence has provided evidence demonstrating the subjective partiality of the members of the Specially Appointed Chamber and considers that the content of specific the instructions given by the Specially Appointed Chamber to the *amicus curiae* is not such that would result in any bias on the part of the Chamber. However, the real issue in this case is whether such association between the *amicus curiae* and the Specially Appointed Chamber may lead an objective observer to conclude that the Specially Appointed Chamber has an interest in the success of the investigation and prosecution of the case against Ms. Hartmann. This Panel finds by majority, Judge Bonomy dissenting, that in the circumstances of this case, where the alleged contempt occurred outside the courtroom and the members of the Specially Appointed Chamber had no prior experience of the facts in issue, such active involvement on the part of the Specially Appointed Chamber in directing the course and parameters of the investigation against Ms. Hartmann beyond the extent of giving general, generic or purely administrative instructions renders this circumstance “exceptional” pursuant to paragraph 13 of the Practice Direction. Accordingly the Panel, by majority, Judge Bonomy dissenting, considers that assignment of the case to another Chamber was warranted.

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<sup>74</sup> [REDACTED]

<sup>75</sup> [REDACTED]

<sup>76</sup> [REDACTED]

<sup>77</sup> [REDACTED]

54. As regards the allegations in the Motion pertaining to the Senior Legal Officer in this case, the Panel notes that Rule 15 is very clear in its application solely to judges of the Tribunal. It does not contemplate disqualification of chambers staff, nor is this contemplated in the Tribunal's jurisprudence on this issue. Furthermore, this Panel does not consider the conduct of a staff member to be relevant to a Judge's impartiality. The Defence's request for recusal of the Senior Legal Officer from the instant case is therefore dismissed.

## V. REPORT TO THE PRESIDENT

55. For these reasons, pursuant to Rule 15 of the Rules, the Panel is of the view that it should be decided as follows:

- a. The Motion is **GRANTED** in part as follows:
  - i. The Defence is granted leave to exceed the page limit for the Motion; and
  - ii. By majority, Judge Bonomy dissenting, the Motion with respect to recusal of two members of the Specially Appointed Chamber is granted, and the President is invited to assign two new Judges to the Specially Appointed Chamber, to replace Judge Agius and Judge Orie.
- b. The Motion is **DENIED** in all other respects.

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



\_\_\_\_\_  
Judge O-Gon Kwon  
Presiding

Dated this twenty seventh day of March 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>78</sup> [REDACTED]

<sup>79</sup> [REDACTED]

## SEPARATE OPINION OF JUDGE FLÜGGE CONCURRING IN RESULT

1. While I am in agreement with the opinion of the Presiding Judge concerning the disqualification of Judge Agius and Judge Orié in the case against Florence Hartmann, I wish to provide additional, and in my view more prevailing reasons for this decision. They are independent of the facts of the case in question and relate to the President's first question, namely whether the provisions of Rule 77 of the Rules are in violation of the Statute and/or generally recognised standards of fundamental human rights under customary international law.

2. It is my position that Rule 77 is in violation of the principles of fair trial and, thus, of generally recognised standards of fundamental human rights. This is insofar as it authorises a particular Chamber, consisting of a number of Judges, to initiate contempt proceedings (Rule 77(C)(iii)); to issue an order in lieu of an indictment and prosecute the contempt matter itself (Rule 77(D)(ii)); and to proceed with the contempt case, under Rule 77(E), in accordance with Part Four ("Investigations and Rights of Suspects"), Part Five ("Pre-Trial Proceedings") and Part Six ("Proceedings before Trial Chambers") of the Rules. In other words, the Rule allows for the situation where the same Judges can be involved in the entire process against the person suspected and accused of contempt, starting with the ascertainment of suspicion, continuing with the initiation of, and involvement with, the criminal investigation against that person, then proceeding to filing and reviewing of an indictment, and ending with a judgement, that might include imposition of criminal punishment on the accused.

3. Such a concentration of investigative activities and judicial responsibility is, in my view, a violation of the principles of a fair trial. A Chamber that initiates and leads criminal investigation against a person up to the stage of finalising an indictment is essentially fulfilling activities and obligations of a Prosecutor, and cannot then be authorised to lead the criminal proceedings against that person. After distributing the indictment, an independent court must have the sole authorisation to adjudicate the case and to judge an accused. This principle finds its roots in corresponding rules of procedure in many national judicial systems, in which a judge is excluded from participation in trial proceedings by law, if he or she was involved in the investigation of the case prior to the trial stage as a prosecutor, an investigative judge or in a similar position. For instance, in the Criminal Procedure Codes of Albania (Art. 15), Austria (Para. 68(2)), Belgium (Art. 292), Bosnia and Herzegovina (Art. 39(c)), Bulgaria (Art. 29(2)), Estonia (Para. 49(1)) Former Yugoslav Republic of Macedonia (Art. 36), Germany (Para. 22(4)), Italy (Art. 43(3)), Moldova (Art. 33(2) and (4)), Montenegro (Art. 38(4)), Russian Federation (Art. 61(1) and (2)), Serbia (Art. 39(5)), and Uzbekistan (Art. 76). This principle is also acknowledged in Switzerland, which has no

national Criminal Procedure Code (Hauser and Schweri, Schweizer Strafprozessrecht p. 105 ff.).

4. The Rome Statute for the International Criminal Court has a similar provision and reads in the relevant part as follows:

A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

5. I note that both Judge Kwon and Judge Bonomy disagree with me on this point and argue that the Rules and the Practice Direction, taken together, can be interpreted in such a way as to make them *intra vires vis-à-vis* the Statute.<sup>80</sup> In my view, the Practice Direction does the exact opposite and exacerbates the flaws of Rule 77 even further. For example, paragraph 8 (iii) of the Practice Direction instructs the Chamber in charge of the contempt to provide the *amicus curiae* with “investigative instructions (if any), including instructions concerning the summoning and questioning of witnesses, recording their statements and collecting evidence and such other matters as may be necessary for the conduct and completion of the investigation.” By directing the *amicus* investigator on such matters as how evidence should be collected, which witnesses should be summoned, and how those witnesses should be questioned, the Trial Chamber retains power—if it so chooses—to direct the course of the investigation. Paragraph 13 of the Practice Direction provides that this same Chamber is then to adjudicate the matter unless there are “exceptional circumstances such as cases in which the impartiality of a Chamber may be called into question, warranting the assignment of the case to another Chamber.” What the Practice Direction overlooks is that, in light of the extensive involvement that the Chamber will have in the investigation phase of the case, its impartiality will necessarily come into question, especially in cases such as this one where the contempt did not involve contempt in face of court. Accordingly, I cannot agree with my learned colleagues that the Rule and the Practice Direction can be interpreted in such a way as to make them *intra vires* with respect to the Statute.

6. My opinion is further strengthened by the fact that the Practice Direction is fundamentally confusing. For example, it seems to imply, by using the expression “before the Chamber in which the contempt allegedly occurred” in paragraphs 5 and 13, that it is only concerned with contempt in the face of the court. If that were the case, however, it is unclear why a Chamber in which the contempt allegedly occurred would need to appoint an *amicus* investigator. The only possible explanation is that the Practice Direction is meant to also apply to contemptuous acts or omissions

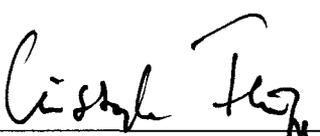
<sup>80</sup> See paras. 31–39 of the decision of the majority.

that take place outside of the courtroom. However, the circumstances of such cases cannot be ascertained from the Practice Direction, although they, presumably, cover all the cases referred to in Rule 77(A). Since the Practice Direction does not clarify whether and how procedure should differ with respect to different types of contempt, I am of the view that the Practice Direction only provides more scope for confusion and mistakes, which in turn may result in appearance of bias of a particular group of Judges.

7. Accordingly, it is my view that, in order to avoid the appearance of partiality of a Judge or a group of Judges in future contempt cases before the Tribunal, Rule 77 and the Practice Direction should be amended in such a way as to avoid the involvement of the same Judge or group of Judges in both the investigation *and* the adjudication of those contempt cases. In particular need of amendment are Rules 77(C)(iii) and 77(D)(ii). In addition, the Practice Direction should be modified substantially in order to achieve the same effect, and to clarify if there should be a distinction between contempt in the face of the court and other types of contempt.

8. It is for that reason, and also because I am largely in agreement<sup>81</sup> with the Presiding Judge's response to the President's second question elaborated in the decision of the majority above, that I concur in the decision to disqualify Judge Agius and Judge Orié from the contempt case against Florence Hartmann.

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

  
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Judge Christoph Flügge

Dated this twenty seventh day of March 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>81</sup> With the exception of my dissent in relation to the Specially Appointed Chamber's preliminary findings regarding the existence of the *prima facie* case against Florence Hartmann. *Compare* para. 3 of this separate opinion to para. 44 of the decision of the majority.

## PARTIALLY DISSENTING OPINION OF JUDGE BONOMO

1. While I agree with a number of aspects of the decision of the majority in regard to the President's second question, I disagree on others, including the outcome of that decision. The issue focussed in the President's second question is whether Ms. Hartmann's right to be tried by an impartial Tribunal has been breached, either because the Specially Appointed Chamber has been shown to be subjectively partial or because it has acted in a way that creates an impression of partiality. In my opinion it was not. I therefore am in agreement with the majority's finding that none of the actions of the Specially Assigned Chamber indicate that it was biased in fact. I also agree with the Presiding Judge that the Special Chamber's findings that a *prima facie* case against Florence Hartmann existed were no more than an initial determination that there was an issue of contempt requiring investigation and, secondly, an issue of contempt requiring adjudication.

2. With respect to the issue of inappropriate involvement of the Chamber with the *amicus curiae*, I note that this involvement consisted of [REDACTED] and, later, [REDACTED], made after he had been appointed as prosecutor. With regard to the former, [REDACTED].<sup>82</sup> [REDACTED].<sup>83</sup> [REDACTED].<sup>84</sup> [REDACTED].<sup>85</sup> [REDACTED].<sup>86</sup>

3. I consider that the prior involvement of the Chamber that will hear and determine the case in giving directions in connection with the investigation and prosecution is the matter of most significance to the question whether there is an appearance of bias. These matters, when viewed in the light of a proper understanding of the nature of contempt proceedings by an independent observer, who has a full understanding of all the circumstances, would not cause that observer to apprehend bias. Contempt proceedings are the means available to Chambers of the Tribunal to maintain their authority over the conduct of proceedings and to secure the proper administration of justice. While the initiating source of a complaint of contempt may be the Prosecutor, Registrar or some other person, even an accused, it is for the court to determine whether an issue of contempt arises for consideration in the first place. That is the nature of the beast widely recognised in common law jurisdictions and long-established at this Tribunal as an integral part of its adversarial system.

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<sup>81</sup> With the exception of my dissent in relation to the Specially Appointed Chamber's preliminary findings regarding the existence of the *prima facie* case against Florence Hartmann. Compare para. 3 of this separate opinion to para. 44 of the decision of the majority.

<sup>82</sup> [REDACTED]

<sup>83</sup> [REDACTED]

<sup>84</sup> [REDACTED]

<sup>85</sup> [REDACTED]

<sup>86</sup> [REDACTED]

4. In recognition of the wide range of circumstances in which it will not be appropriate for the Prosecutor of the Tribunal to be involved in contempt proceedings as a party, Rule 77(C)(ii) provides for the appointment of an *amicus curiae* investigator. Paragraph 8 of the Practice Direction sets out the matters to be included in any order for the appointment of an *amicus curiae* investigator. Such an investigator is plainly someone independent of the organs of the Tribunal and one to whom it is appropriate to give outline directions in relation to the investigation. The directions given by the Specially Appointed Chamber fell squarely within the terms of paragraph 8. Of course that is not the complete answer, since the directions given could be such as to indicate closer involvement in the investigation than would be appropriate for the Chamber that is ultimately to hear the case. In this instance these directions identified the scope of the investigation as confined to [REDACTED] and otherwise were of a purely administrative nature concerning the timing of witness interviews designed to ensure that the investigation remained confidential. An informed observer could not consider that to be an interference with investigation indicative of potential bias such as might be created by an instruction as to who the witnesses should be or how they should be examined.

5. As for [REDACTED].<sup>87</sup> [REDACTED]. It should be noted that these had been disclosed months earlier during the interview process with Ms. Hartmann, and that the purpose of this filing was to ensure formal disclosure under Rule 66(C) following the initial appearance of the Accused. [REDACTED] The purpose of these [REDACTED] was plainly to secure full disclosure to the Accused. It is not conceivable that the procedure followed could give rise to an apprehension of bias.

6. Closely related to this issue of inappropriate involvement of the Chamber with the *amicus* is the allegation that the two had unrecorded and informal communications throughout the preparation of this case. [REDACTED] the *amicus* [REDACTED] [REDACTED] acknowledged that he was assisted “on process and advisory issues” by, among others, the Chamber’s Senior Legal Officer.<sup>88</sup> The *amicus*, in his letter to the Defence, explained that there had been two such contacts between the Senior Legal Officer and him. The first took place during the investigative stage of the case when, on 14 May 2008 the Senior Legal Officer, with the approval of the Chamber, authorised the *amicus* to disclose [REDACTED] decisions to the Defence. The second took place during the *amicus*’s preparations for the trial when he left a voicemail for the Senior Legal Officer seeking instructions on whether approval was necessary before he could interview the book publisher. The *amicus* was then contacted by a person from OLAD and told that no approval was necessary at this

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<sup>87</sup> See [REDACTED].

<sup>88</sup> [REDACTED]

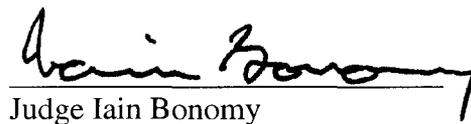
stage of the proceedings and that he could conduct an interview if he thought this was necessary.<sup>89</sup> The communications between the Senior Legal Officer and the *amicus* were firstly to ensure the disclosure to the Accused of [REDACTED] decisions referred to above and secondly to confirm that the decision on interviewing the book publisher was for the *amicus* to make. Again, it is inconceivable that such common sense communications, which are an essential part of ensuring proper disclosure and proper conduct of an independent investigation and prosecution, could give rise to a perception of bias.

7. [REDACTED].<sup>90</sup> [REDACTED].

8. I wish to add that, in reaching my determination, I have considered the various authorities referred to by the parties. As the parties will recognise, none can be said to be a precedent having a direct bearing on the circumstances of this case. In addition none raises comparable circumstances of bias. They are all clearly distinguishable on their facts from the present case. I have found within these authorities helpful guidance on matters of principle. It is necessary to mention only one specifically. The case of *Kyprianou v. Cyprus*, when determined at first instance, appeared to provide general guidance on the conduct of contempt proceedings. However, the Grand Chamber, in turn, gave little general guidance, in circumstances which are far removed from the present, where the contempt was directed at the Judges personally, and in which some might think that the actual bias and perception of bias were obvious.<sup>91</sup>

9. Accordingly, I am satisfied that the Specially Appointed Chamber complied with the Statute of the Tribunal, the relevant Rules, and with the Practice Direction in a way which does not breach the principle of impartiality required under the Tribunal's Statute and generally recognised standards of fundamental human rights under customary international law. As a result, I need not address the arguments relating to the removal of the Senior Legal Officer of that Chamber.

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

  
Judge Iain Bony

Dated this twenty seventh day of March 2009  
At The Hague  
The Netherland

[Seal of the Tribunal]

<sup>89</sup> Motion, [REDACTED].

<sup>90</sup> See para. 52 of the decision of the majority.

<sup>91</sup> *Kyprianou v. Cyprus*, Appl No. 73797/01, ECHR 2005-XIII, 14 December 2005.