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UNITED NATIONS

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	Case No.	IT-02-54-R77.5-A
	Date:	19 July 2011
	Original:	English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

Judgement: **19 July 2011**

IN THE CASE AGAINST FLORENCE HARTMANN

PUBLIC

JUDGEMENT

***Amicus Curiae* Prosecutor**
Mr. Bruce MacFarlane

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1. ICTY 2

1. The Appeals Chamber 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal from the Judgement on Allegations of Contempt rendered by a Specially Appointed Trial Chamber ("Trial Chamber") of 14 September 2009, filed by Florence Hartmann ("Hartmann" or "Appellant") on 15 January 2010.

I. INTRODUCTION

A. Background

2. Hartmann was born in 1963 in France. Beginning in October 2000, she served as the spokesperson for the former Prosecutor of the Tribunal, Carla del Ponte. Hartmann's employment with the Tribunal ended in October 2006.[1]

3. On 14 September 2009, Hartmann was convicted of knowingly and wilfully interfering with the Tribunal's administration of justice by disclosing information in violation of two orders granted by the Appeals Chamber in the case of *Prosecutor v. Slobodan Milošević* ("Appeal Decisions" or, individually, "Decision").[2] The Appeal Decisions' confidentiality was contravened when Hartmann authored a book entitled *Paix et Châtiment* on 10 September 2007 ("Book") and an article entitled "Vital Genocide Documents Concealed" on 21 January 2008 ("Article").[3] At trial, it was held that both the Book and the Article disclosed the confidential nature of the two Appeal Decisions.[4]

4. Hartmann was ordered to pay a fine of €7,000.[5]

B. The Appeal

5. Hartmann filed her Notice of Appeal on 24 September 2009.[6] On 12 October 2009, she filed her Appeal Brief.[7] After two orders to re-file,[8] Hartmann filed her final Appeal Brief on 15 January

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[1] *In the Case Against Florence Hartmann,* Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt ("Trial Judgement"), para. 1.

[2] The two protected decisions from the Appeals Chamber were a decision on the request for review of the Trial Chamber's oral decision of 18 July 2005 (Case No. IT-02-54-AR108*bis*.2), filed on 20 September 2005, and a decision on the request for review of the Trial Chamber's decision of 6 December 2005 (Case No. IT-02-54-AR108*bis*.3), filed on 6 April 2006. The two Appeal Decisions were concerned with requests for protective measures pursuant to Rule 54 *bis* of the Rules of Procedure and Evidence ("Rules").

[3] Trial Judgement, paras 47, 89.

[4] Trial Judgement, para. 89.

[5] Trial Judgement, para. 90. The Appeals Chamber decided that payment of the fine, if any, would not be due before the Appeals Chamber had rendered its decision on appeal. *See* Decision on Motion to Stay Payment of Fine, 9 October 2009, p. 1.

[6] Notice of Appeal of Florence Hartmann Against the Judgement of the Specially Appointed Trial Chamber, 24 September 2009. On 6 November 2009, Hartmann was ordered to re-file her Notice of Appeal no later than 13

2010.[9] The *Amicus* Prosecutor filed his Response on 22 January 2010.[10] Hartmann filed her Reply Brief on 26 January 2010.[11]

6. On 9 November 2009, ARTICLE 19, an international human rights organisation that defends and promotes freedom of expression throughout the world, requested leave to file an *amicus curiae* brief.[12] On 5 February 2010, the Appeals Chamber granted the request in part, and allowed Hartmann and the *Amicus* Prosecutor to respond to the *amicus curiae* brief.[13]

II. STANDARD OF REVIEW ON APPEAL

7. On appeal, the parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute of the Tribunal ("Statute").[14] The settled standard of review for appeals against judgements also applies to appeals against convictions for contempt.[15]

November 2009. *See* Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009 ("Decision on Motions to Strike"), para. 27; *see also* Notice of Appeal of Florence Hartmann Against the Judgement of the Specially Appointed Trial Chamber, 13 November 2009 ("Hartmann Notice of Appeal").

[7] Florence Hartmann's Appellant Brief, 12 October 2009 ("Hartmann Appeal Brief").

[8] Decision on Motions to Strike, para. 27; Decision on Further Motions to Strike, 17 December 2009, para. 16.

[9] Florence Hartmann's Appellant Refiled Brief Against Trial Chamber's "Judgement on Allegations of Contempt", 15 January 2010 ("Hartmann Final Appeal Brief").

[10] Respondent's Brief Refiled Pursuant to 17 December 2009 Order, 22 January 2010 (confidential). The public version of this brief was filed on 2 February 2010, along with a Corrigendum and Book of Authorities. *See* Respondent's Brief Refiled Pursuant to 17 December 2009 Order, 2 February 2010 ("*Amicus* Prosecutor Response Brief"); Corrigendum to Respondent's Brief and Book of Authorities, 2 February 2010 ("*Amicus* Prosecutor's Corrigendum"). The *Amicus* Prosecutor filed two briefs prior to his 22 January 2010 filing, as the Appellant was ordered to re-file her appeal brief on two separate occasions. *See* Respondent's Brief, 21 October 2009 (confidential); Respondent's Brief, 30 November 2009 (confidential).

[11] Florence Hartmann's Reply Brief, 26 January 2010 ("Hartmann Final Reply Brief"). The Appellant argues that the *Amicus* Prosecutor has failed to respond to most of her individualised sub-grounds of appeal and that the Appeals Chamber should regard sub-grounds that are not answered as unopposed. Hartmann Final Reply Brief, paras 2, 15. The Appeals Chamber considers that the Appellant has organised her grounds of appeal in such a way that argumentation pertaining to a single substantive ground is dispersed over several sub-grounds of appeal. However, the Appeals Chamber observes that these sub-grounds are often, properly construed, all parts of a single argument. The *Amicus* Prosecutor has taken a similar approach to the Appellant's brief, which is entirely appropriate in the circumstances. Moreover, many of the Appellant's sub-grounds of appeal contain repetition, purport to draw distinctions that often cannot be discerned, and—taken individually—would constitute undeveloped arguments. The Appeals Chamber has therefore taken the approach of grouping many of the Appellant's sub-grounds of appeal together so as to comprehend them as full arguments.

[12] Application for Permission to File an Amicus Brief on Behalf of Article 19, 9 November 2009. Rule 74 of the Rules allows a Chamber to invite or permit *amicus curiae* briefs from any State, organisation, or person.

[13] Florence Hartmann's Submissions Pertaining to "ARTICLE 19" *Amicus* Brief, 5 March 2010 ("Hartmann Response to *Amicus* Brief"). The *Amicus* Prosecutor's original response exceeded the word limit. Prosecution's Response to ARTICLE 19 *Amicus* Brief, 5 March 2010. Having recognised the error, he unilaterally re-filed his response on 8 March 2010 and requested that the Appeals Chamber, pursuant to Rules 127(A)(ii) and (B) of the Rules, accept the revised filing as the original response or, in the alternative, accept the revised response as a corrected version of the original Response. Motion to Replace Prosecution's Response to Article 19 Amicus Brief with Revised Response, 8 March 2010 ("Motion to Replace with Revised Response"), paras 2-3, 7.

[14] *Mrkšić and Šljivančanin* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para. 11; *Martić* Appeal Judgement, para. 8.

[15] *Šešelj* Contempt Appeal Judgement, para. 9; *Jokić* Contempt Appeal Judgement, para. 11; *Marijačić and Rebić* Contempt Appeal Judgement, para. 15.

8. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[16] A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement.[17] An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.[18] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[19]

9. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[20] In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute the Trial Chamber's finding with its own when no reasonable trier of fact could have reached the original decision.[21] In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[22]

10. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[23] Arguments of a party which do not have the

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[16] *Šešelj* Contempt Appeal Judgement, para. 10; *Jokić* Contempt Appeal Judgement, para. 12; *Jović* Contempt Appeal Judgement, para. 12; *Marijačić and Rebić* Contempt Appeal Judgement, para. 16. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.
[17] *Šešelj* Contempt Appeal Judgement, para. 10; *Jokić* Contempt Appeal Judgement, para. 12; *Jović* Contempt Appeal Judgement, para. 12; *Marijačić and Rebić* Contempt Appeal Judgement, para. 15. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.
[18] *Šešelj* Contempt Appeal Judgement, para. 10; *Jokić* Contempt Appeal Judgement, para. 12; *Jović* Contempt Appeal Judgement, para. 12; *Marijačić and Rebić* Contempt Appeal Judgement, para. 17. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.
[19] *Šešelj* Contempt Appeal Judgement, para. 10; *Jokić* Contempt Appeal Judgement, para. 12. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.
[20] *Šešelj* Contempt Appeal Judgement, para. 11; *Jokić* Contempt Appeal Judgement, para. 13. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[21] *Šešelj* Contempt Appeal Judgement, para. 11; *Jokić* Contempt Appeal Judgement, para. 13; *Jović* Contempt Appeal Judgement, para. 13; *Marijačić and Rebić* Contempt Appeal Judgement, para. 16. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14.
[22] *Šešelj* Contempt Appeal Judgement, para. 11; *Jokić* Contempt Appeal Judgement, para. 13; *Jović* Contempt Appeal Judgement, para. 13; *Marijačić and Rebić* Contempt Appeal Judgement, para. 16. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.
[23] *Šešelj* Contempt Appeal Judgement, para. 12; *Jokić* Contempt Appeal Judgement, para. 14; *Jović* Contempt Appeal Judgement, para. 14; *Marijačić and Rebić* Contempt Appeal Judgement, para. 17. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 24.

potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[24]

11. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[25] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[26]

12. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[27]

III. RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL – GROUND 3

13. The Bench of the Trial Chamber originally assigned to the instant case ("First Chamber") was comprised of Judge Carmel Agius, Judge Alphons Orie, and Judge Christine Van den Wyngaert. On 28 January 2009, the President of the Tribunal assigned Judge Bakone Moloto to replace Judge Van Den Wyngaert, due to her election as a Judge of the International Criminal Court.[28] On 3 February 2009, Hartmann filed a motion before the First Chamber requesting the disqualification of Judge Agius and Judge Orie, and the Senior Legal Officer assigned to the case.[29] The First Chamber issued an order postponing the commencement of trial *sine die* pending resolution of the matter.[30] On 18 February 2009, the President of the Tribunal appointed a Special Panel to consider, *inter alia*, whether the conduct of the First Chamber breached the principle of

[24] *Šešelj* Contempt Appeal Judgement, para. 12; *Jokić* Contempt Appeal Judgement, para. 14; *Jović* Contempt Appeal Judgement, para. 14; *Marijačić and Rebić* Contempt Appeal Judgement, para. 17. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 20; *Martić* Appeal Judgement, para. 17.
[25] *Šešelj* Contempt Appeal Judgement, para. 13; *Jokić* Contempt Appeal Judgement, para. 15; *Jović* Contempt Appeal Judgement, para. 15. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 17; Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, para. 4(b).
[26] *Šešelj* Contempt Appeal Judgement, para. 13; *Jokić* Contempt Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17. *See also Marijačić and Rebić* Contempt Appeal Judgement, para. 18.
[27] *Šešelj* Contempt Appeal Judgement, para. 14; *Jokić* Contempt Appeal Judgement, para. 16; *Jović* Contempt Appeal Judgement, para. 15. *See also Mrkšić and Šljivančanin* Appeal Judgement, para. 18.
[28] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Order Replacing a Judge, 28 January 2009, p. 2.
[29] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer in Charge of the Case, 3 February 2009 (confidential) ("Motion for Disqualification"), para. 82. The public redacted version of the Motion for Disqualification was filed on 6 February 2009.
[30] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Order Postponing Commencement of Trial, 3 February 2009, p. 2.

impartiality required under the Statute and pursuant to recognised standards of fundamental human rights under customary international law.[31]

14. The Special Panel, by majority, determined that the association between the First Chamber and the *Amicus* Prosecutor may have led an objective observer to conclude that the First Chamber had "an interest in the success of the investigation and prosecution of the case against Ms. Hartmann".[32] The Special Panel thus concluded by majority that the aforementioned circumstances warranted the assignment of the case to another Chamber ("Second Chamber") and recommended that the President of the Tribunal assign two Judges to replace Judge Agius and Judge Orie.[33] On 2 April 2009, the President of the Tribunal appointed Judge Mehmet Güney and Judge Liu Daqun to replace them.[34]

15. The Defence subsequently filed a motion before the Second Chamber requesting the nullification of all decisions and orders issued by the First Chamber.[35] On 19 May 2009, the Second Chamber issued a decision denying the Motion for Nullification.[36] In its decision, the Second Chamber considered the nature of the decisions challenged, the stage of the proceedings, "the nature of the bias as established by the Panel, and the extent of any prejudice to the Accused."[37] With regard to orders and decisions "relating to non-substantive matters", the Second Chamber determined that there was no prejudice to Hartmann's right to a fair trial and that consequently it was not in the interests of justice to nullify them.[38]

A. Sub-Grounds 3.1–3.8

1. Submissions

16. Hartmann submits that Rule 15 *bis* of the Rules of Procedure and Evidence ("Rules") prevents a Chamber from validating decisions issued where only one Judge satisfies the basic

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[31] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Decision on Motion for Disqualification, 18 February 2009, p. 2.
[32] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009 ("Report of the Special Panel"), para. 53.
[33] Report of the Special Panel, para. 55.
[34] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Order Replacing Judges in a Case Before a Specially Appointed Chamber, 2 April 2009, p. 2.
[35] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions, 21 April 2009 (confidential) ("Motion for Nullification"). The public version of the Motion for Nullification was filed on 21 April 2009.
[36] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Decision on Defence Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions, 19 May 2009 ("Decision on Motion for Nullification"), para. 13.
[37] Decision on Motion for Nullification, para. 9.
[38] Decision on Motion for Nullification, para. 10.

requirement of impartiality.[39] She further submits that, since the orders and decisions impugned in the Motion for Nullification were issued by a Chamber lacking the appearance of impartiality, they were tainted by the same deficiency.[40]

17. Hartmann states that the factors outlined in the Report of the Special Panel ("Report"), which provided a basis for the disqualification of the two Judges, included incidents that preceded and followed the issuance of the Order in Lieu of an Indictment on Contempt ("Order in Lieu of Indictment") in the case.[41] Hartmann notes that the First Chamber dismissed numerous applications by her challenging the investigation that had been conducted under its authority and that resulted in the issuance of the Order in Lieu of Indictment.[42] Hartmann thus argues that the finding by the Special Panel that the First Chamber lacked the appearance of impartiality should have rendered these orders and decisions suspect of the same inadequacy.[43] It is thus submitted that a reasonable Chamber would have set aside the decisions and orders issued by the First Chamber.[44]

18. The remainder of Hartmann's arguments are predicated on the assumption that the Special Panel found that the First Chamber lacked the appearance of impartiality.[45] As explained in the next section, the Appeals Chamber considers Hartmann's premise to be flawed, thereby rendering moot the subsidiary arguments that flow from the initial proposition.

19. The *Amicus* Prosecutor contends that Hartmann's case was heard by an impartial tribunal and that her arguments are based on a decision from which she failed to seek leave to appeal at trial.[46] He submits that, of the 28 orders and decisions that Hartmann challenged in the Motion for Nullification, the Order in Lieu of Indictment is the only decision that, if successfully impugned, is capable of affecting the Trial Judgement.[47] The *Amicus* Prosecutor states that Hartmann's submissions "fail to meet the standard of review needed to invalidate the decision or establish a miscarriage of justice has occurred".[48]

20. The *Amicus* Prosecutor argues that the Special Panel did not find that Hartmann had been indicted by a Trial Chamber that lacked the appearance of impartiality. Rather, the Special Panel determined that the apprehension of bias resulted from the First Chamber's participation in both the

[39] Hartmann Final Appeal Brief, para. 32.
[40] Hartmann Final Appeal Brief, para. 32.
[41] Hartmann Final Appeal Brief, para. 32, *citing* the Report of the Special Panel, paras 52-53.
[42] Hartmann Final Appeal Brief, para. 32.
[43] Hartmann Final Appeal Brief, para. 32.
[44] Hartmann Final Appeal Brief, para. 32.
[45] Hartmann Final Appeal Brief, paras 33-37.
[46] *Amicus* Prosecutor Response Brief, para. 43.
[47] *Amicus* Prosecutor Response Brief, para. 43.
[48] *Amicus* Prosecutor Response Brief, para. 43.

investigative phase and the trial preparation phase[49] of the proceedings and thus concluded that exceptional circumstances warranted the recusal of the Chamber and the assignment of the case to another Trial Chamber for prosecution.[50] The *Amicus* Prosecutor argues that the conclusion of the Special Panel indicates that any appearance of impartiality and attendant prejudice to Hartmann arose only after the issuance of the Order in Lieu of Indictment by the First Chamber.[51] According to the *Amicus* Prosecutor, the authorities cited by Hartmann fail to address this issue and are factually distinguishable from the instant case.[52] Finally, the *Amicus* Prosecutor argues that Hartmann has failed to demonstrate that materials in support of the Order in Lieu of Indictment did not indicate the existence of a *prima facie* case against Hartmann.[53]

21. Hartmann contends in her Reply that the assignment of the case to the Second Chamber did not extinguish the fact that the orders and decisions issued by the First Chamber were tainted by the finding that the First Chamber lacked the appearance of impartiality.[54] Hartmann also submits that the *Amicus* Prosecutor's assertion that any appearance of bias emerged after the issuing of the Order in Lieu of Indictment conflicts with the record in the case.[55]

2. Discussion

22. The Appeals Chamber notes that the Second Chamber, in the Decision on Motion for Nullification, concluded that the Special Panel found the First Chamber to suffer from implied, though not actual, bias.[56] However, the Appeals Chamber is of the view that the Special Panel, on the contrary, expressed concern regarding the possible emergence of an appearance of bias, should the First Chamber, which had such an active involvement in the investigative and trial preparation phases of the case, have proceeded to preside over the adjudicative phase of the case.

23. The Appeals Chamber notes that the Report defines the investigative phase of the proceedings as having commenced with the appointment of an *amicus curiae* to investigate the allegations of contempt against Hartmann and ended with the *amicus curiae* investigator's submission of his investigative report recommending that contempt proceedings against Hartmann

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[49] The Report of the Special Panel refers to this stage as the "prosecution phase." Report of the Special Panel, para. 29. In order to distinguish this phase from the Prosecution's presentation of evidence at the trial itself, the Appeals Chamber has employed the term "trial preparation phase."
[50] *Amicus* Prosecutor Response Brief, para. 44 and notes 90-91, *citing* the Report of the Special Panel, paras 47-53, and the Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal, IT/227, 6 May 2004 ("Practice Direction on Contempt"), para. 13.
[51] *Amicus* Prosecutor Response Brief, para. 44.
[52] *Amicus* Prosecutor Response Brief, para. 44.
[53] *Amicus* Prosecutor Response Brief, para. 45.
[54] Hartmann Final Reply Brief, para. 13.
[55] Hartmann Final Reply Brief, para. 14, *citing* the Report of the Special Panel, paras 52-53, and the Motion for Disqualification, paras 30-42.
[56] Decision on Motion for Nullification, para. 11.

be initiated.[57] The trial preparation phase is defined as having commenced with the issuance of the Order in Lieu of Indictment, which *inter alia* directed the Registrar to appoint an *amicus curiae* to prosecute the charges contained therein.[58] The adjudicative phase of the proceedings therefore had not yet commenced at the time the Report was issued.

24. In evaluating whether the First Chamber was tainted by an appearance of bias, the Special Panel drew a clear distinction between the investigative phase and the adjudicative phase of the proceedings. The Special Panel expressly stated that "[i]t is a well-established law that a Trial Chamber cannot act as both investigator/prosecutor and adjudicator", noting that "[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."[59] The Special Panel determined that there was no impropriety in the First Chamber's involvement with the *Amicus* Prosecutor in the investigative and trial preparation phases of the case.[60]

25. The Special Panel proceeded to consider whether the involvement of the First Chamber in the investigative and trial preparation phases would have caused an appearance of bias with regard to the adjudicative phase of the proceedings.[61] Referring to the Practice Direction on Contempt ("Practice Direction"), it found that the investigation and adjudication of a contempt case are to be conducted in the same Chamber in cases where contempt occurred inside the courtroom and thus before the Chamber in question, except in "exceptional circumstances".[62] The Special Panel considered that it was reasonable to apply the same rule in cases where the alleged contempt occurred outside of the courtroom, but that "exceptional circumstances" should be viewed broadly.[63] The Special Panel concluded that, in this instance, the degree of the First Chamber's involvement in the investigative and trial preparation phases, which "went beyond the extent of giving general, generic or purely administrative instructions", constituted an "exceptional circumstance".[64] The Special Panel therefore recommended the transfer of the case to a new Chamber, citing the Practice Direction on Contempt:

[57] Report of the Special Panel, paras 3-7.
[58] Report of the Special Panel, para. 7.
[59] Report of the Special Panel, para. 46.
[60] The Special Panel concluded that, given the unique nature of contempt proceedings, "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 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." Report of the Special Panel, para. 46.
[61] Report of the Special Panel, paras 47-53.
[62] Report of the Special Panel, para. 48. *See also* Practice Direction on Contempt, paras 5, 13.
[63] Report of the Special Panel, paras 48-50.
[64] Report of the Special Panel, para. 53.

> [...] 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.[65]

26. The Appeals Chamber therefore considers that the Special Panel did not conclude that there was an appearance of bias on the part of the First Chamber with regard to its involvement in the investigative and trial preparation phases of the case. The Special Panel was instead concerned with the eventual manifestation of *apparent bias* should the Chamber involved in the investigative and trial preparation phases of the case have proceeded to adjudicate the matter. The assignment of the case to the Second Chamber thus constituted a preventative measure designed to forestall the appearance of partiality in the adjudicative phase of the case, which had not commenced at the time of the issuance of the Report. Accordingly, because the Special Panel did not in fact find that the First Chamber lacked the appearance of impartiality, the decisions and orders issued by the First Chamber were free of any taint of apparent bias and thus valid.

27. In addition, the Appeals Chamber notes that the Second Chamber reviewed the materials in support of the Order in Lieu of Indictment and confirmed that "there were—and are—sufficient grounds to proceed against the Accused for contempt."[66] The Second Chamber thus adopted the Order in Lieu of Indictment issued by the First Chamber. As there was no finding of actual or apparent bias by the Special Panel with regard to the First Chamber's involvement in the investigative phase of the case, it follows that the supporting materials assembled during this phase, and subsequently reviewed by the Second Chamber, were untainted by any bias, actual or apparent. The Appeals Chamber therefore finds that, also in light of the fact that the Second Chamber reviewed the evidence in support of the Order in Lieu of Indictment and satisfied itself that there was a *prima facie* case against Hartmann for contempt, it was unnecessary for the Second Chamber to set aside the original Order in Lieu of Indictment and re-issue a fresh order in lieu of indictment in the circumstances.

28. As sub-grounds 3.1 through 3.8 are based on the erroneous premise that the Special Panel found the First Chamber to have lacked the appearance of impartiality, they are, in view of the Appeals Chamber's above-stated findings, moot. Sub-grounds 3.1 through 3.8 are therefore dismissed.

B. Conclusion

29. The Appeals Chamber therefore dismisses ground of appeal 3 in its entirety.

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[65] Practice Direction on Contempt, para. 13.
[66] Decision on Nullification Motion, para. 11.

IV. NOTICE TO HARTMANN – GROUND 1

30. On 14 January 2009, the Defence filed a motion requesting that the Trial Chamber reconsider the Order in Lieu of Indictment charging Hartmann with contempt, stay the proceedings, and dismiss the charges against her.[67] In setting out the background to its arguments, the Defence, *inter alia*, considered that the charges against Hartmann related to her public disclosure of four specific facts ("Four Facts").[68] On 19 January 2009, the *Amicus* Prosecutor filed a response to the Motion for Reconsideration in which he stated, *inter alia*, that the Defence submissions were "in essence an attempt to refute the Prosecution's showing that the Accused committed the *actus reus*, and possessed the *mens rea* of Contempt [sic] of the Tribunal as described in Rule 77(A)(ii)" of the Rules, and that these were "issues best left for trial."[69] On 29 January 2009, the Trial Chamber issued a decision denying the Motion for Reconsideration.[70]

31. During a status conference held on 30 January 2009, the Defence stated that the *Amicus* Prosecutor failed to express any objections to the Defence's assertion in the Motion for Reconsideration that the charges in the Order in Lieu of Indictment were limited to the disclosure of the Four Facts. The Defence argued that it therefore had a legitimate expectation that its understanding concerning the scope of the charges was correct.[71] On 2 February 2009, the *Amicus* Prosecutor filed a statement indicating that his position on the nature and substance of the charges was set out in his Pre-Trial Brief and that it "has been, and continues to be, clear: the impugned disclosures are unlawful because they outline and describe the existence, contents and purported effect of the two Appeal Decisions".[72]

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[67] *In the Case Against Florence Hartmann,* Case No. IT-02-54-R77.5, Motion for Reconsideration, 14 January 2009 (confidential) ("Motion for Reconsideration"), para. 53. The public version of the Motion for Reconsideration was filed on 16 January 2009. The Defence previously filed *In the Case Against Florence Hartmann,* Case No. IT-02-54-R77.5, Motion for Reconsideration or Stay of Proceedings, 9 January 2009 (confidential) ("Motion for Reconsideration of 9 January 2009"). On 13 January 2009, the Trial Chamber ordered the Defence to resubmit the Motion for Reconsideration of 9 January 2009 "in a form not exceeding 3000 words" in compliance with the Practice Direction on the Length of Briefs and Motions, IT/184-Rev.2, 16 September 2005, sections 5 and 7. *See In the Case Against Florence Hartmann,* Case No. IT-02-54-R77.5, Order to Defence to Resubmit Filing in Accordance with Word Limit, 13 January 2009, pp. 2-3. The Defence subsequently filed the Motion for Reconsideration.

[68] Motion for Reconsideration, para. 18. The Four Facts, listed at paragraph 18 of the Motion for Reconsideration, are as follows: (a) the existence and dates of the Appeal Decisions; (b) the confidential character of both decisions; (c) the identity of the applicant for protective measures ("Applicant"); and, (d) the fact that the protective measures were granted in relation to specific documents.

[69] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Prosecution's Response to Defence Motion for Reconsideration, 19 January 2009 ("Response to the Motion for Reconsideration"), para. 6.

[70] *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor, 29 January 2009, para. 25.

[71] T. 55.

[72] *In the Case Against Florence Hartmann,* Case No. IT-02-54-R77.5, Statement of *Amicus Curiae* Prosecutor Concerning an Issue Raised by the Chamber During 30 January 2009 Status Conference, 2 February 2009 ("Statement of 2 February 2009"), paras 3-4 and 6. The *Amicus* Prosecutor also acknowledged the Defence's disagreement with his position on the charges, stating that points of disagreement between parties in adversarial proceedings are part of the nature of the adversarial process. *See* Statement of 2 February 2009, para. 5.

32. In the Trial Judgement, the Trial Chamber determined that the Defence's interpretation of the charges in the Order in Lieu of Indictment was "unreasonably restrictive" and that it could not validly claim that its understanding of the charges was uncontested by the *Amicus* Prosecutor, in view of the Statement of 2 February 2009, the Response to the Motion for Reconsideration, and the *Amicus* Prosecutor's Pre-Trial Brief.[73] The Trial Chamber found that the *Amicus* Prosecutor's Statement of 2 February 2009 and his Pre-Trial Brief clearly conveyed his understanding of the scope of the Order in Lieu of Indictment.[74] Furthermore, the Trial Chamber determined that, having reviewed the Book and Article, it was "satisfied that the Accused disclosed more information than the Four Facts identified by the Defence" ("Additional Facts").[75]

A. Sub-Grounds 1.1–1.6, 1.8, and 1.11–1.15

1. Submissions

33. Hartmann contends that the charges were restricted to the disclosure of the Four Facts and that the Trial Chamber erred by convicting her for the disclosure of the Additional Facts. She asserts that the Additional Facts did not form part of the charges in the Order in Lieu of Indictment and that consequently she was not adequately notified of them.[76]

34. Hartmann submits under **sub-ground 1.1** that the Trial Chamber erred when it suggested that any fact other than the Four Facts identified by the Defence had been properly pleaded.[77] In **sub-ground 1.2**, Hartmann argues that the Trial Chamber erred in law and/or fact by broadly interpreting the nature and scope of the charges against her and by suggesting that her understanding of the charges in the case was unreasonably restrictive.[78] She asserts under **sub-**

[73] Trial Judgement, para. 32 and notes 73-74. The Trial Chamber specifically cited paragraph 6 of the Response to the Motion for Reconsideration. *See* Trial Judgement, note 73. *See also* Response to the Motion for Reconsideration, para. 6.
[74] Trial Judgement, para, 32 and note 73.
[75] Trial Judgement, para. 33. With regard to both Appeal Decisions, the Trial Chamber concluded that the Appellant's Book and Article disclosed the following Additional Facts: (a) the legal reasoning applied by the Appeals Chamber in arriving at its disposition in each of the Appeal Decisions, and (b) the purported effect of both Decisions. With specific regard to the first of the two Appeal Decisions, issued on 20 September 2005, the Trial Chamber found that the Appellant's Book additionally disclosed the content of closed session transcripts of the Applicant's submissions in that case. With respect to the second of the two Appeal Decisions, issued on 6 April 2006, the Trial Chamber found that the Appellant's Book additionally disclosed confidential Prosecution submissions contained in the second Decision's text. *See* Trial Judgement, para. 33.
[76] Hartmann Final Appeal Brief, para. 1. The Appeals Chamber notes that the Appellant listed a **sub-ground 1.7** in her Notice of Appeal (Hartmann Notice of Appeal, para. 27); however, she failed to include this sub-ground in her appeal brief. The Appeals Chamber finds that **sub-grounds 1.5 and 1.6** (Hartmann Final Appeal Brief, para. 5) are obscure, vague, and without any supporting explanatory arguments and therefore summarily dismisses them. *See Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17.
[77] Hartmann Final Appeal Brief, para. 1.
[78] Hartmann Final Appeal Brief, para. 2.

ground 1.3 that the Trial Chamber erred in law by: (a) suggesting that only the text of the Order in Lieu of Indictment was relevant to determining the nature and scope of the charges and (b) failing to consider other relevant indicators of the nature and scope of the charges in the case.[79] She claims under **sub-ground 1.4** that the Trial Chamber erred in fact by suggesting that the Additional Facts formed part of the charges against her and that she received adequate notice of them.[80] Hartmann states that no reasonable Trial Chamber properly directing itself could have arrived at such a finding.[81] She further submits that the *Amicus* Prosecutor failed to challenge her repeated statements throughout the proceedings concerning her understanding of the charges in the case.[82]

35. Hartmann argues under **sub-ground 1.8** that the Trial Chamber erred in fact by suggesting that she was validly charged with disclosing the content of closed session transcripts of the submissions of the applicant for protective measures ("Applicant").[83] Hartmann contends that she was not notified in this regard.[84]

36. Under **sub-ground 1.11**, Hartmann submits that the Trial Chamber erred in fact by finding that the Defence's submission—that it had a legitimate expectation that the scope of the Order in Lieu of Indictment would be limited to the Four Facts enumerated in its Reconsideration Motion—was refuted by paragraph 6 of the *Amicus* Prosecutor's Response to the Motion for Reconsideration.[85] Hartmann contends that paragraph 6 of the Response to the Motion for Reconsideration was limited to the legal elements of Rule 77(A)(ii) of the Rules, did not pertain to the nature and scope of the charges, and failed to meet the guarantees provided for in Article 21(4)(a) of the Statute.[86] Hartmann further submits that the Trial Chamber erred by finding that paragraphs 18, 19, and 21 of the *Amicus* Prosecutor's Pre-Trial Brief clearly defined the scope of the Order in Lieu of Indictment, as the *Amicus* Prosecutor did not refer to the Additional Facts. Hartmann states that, while the Trial Chamber noted the *Amicus* Prosecutor's acknowledgement of a disagreement between the parties, it omitted to consider the *Amicus* Prosecutor's failure to specify the nature of the disagreement or to mention any of the Additional Facts.[87]

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[79] Hartmann Final Appeal Brief, para. 3.
[80] Hartmann Final Appeal Brief, para. 4.
[81] Hartmann Final Appeal Brief, para. 4.
[82] Hartmann Final Appeal Brief, para. 4.
[83] Hartmann Final Appeal Brief, para. 6.
[84] Hartmann Final Appeal Brief, para. 6.
[85] Hartmann Final Appeal Brief, para. 8.
[86] Hartmann Final Appeal Brief, para. 8.
[87] Hartmann Final Appeal Brief, para. 8.

37. Hartmann submits under **sub-ground 1.12** that the Trial Chamber's reliance on the *Amicus* Prosecutor's Statement of 2 February 2009 violated the guarantee under the Statute of prompt notice of the charges.[88]

38. Hartmann states under **sub-ground 1.13** that the Trial Chamber erred in law and/or fact by failing to determine that, had the *Amicus* Prosecutor disputed her understanding of the nature and scope of the charges, he would have been obliged to clarify the matter in a timely manner in compliance with paragraph 15(ii) of the Practice Direction on Contempt.[89] She further submits under **sub-ground 1.14** that the Trial Chamber erred in law and fact by failing to consider the various occasions on which she stated her understanding of the charges without any rebuttal from the *Amicus* Prosecutor.[90] Hartmann thereby argues under **sub-ground 1.15** that the Trial Chamber erred in law by failing to find that the *Amicus* Prosecutor was precluded from exceeding the scope of the charges identified by Hartmann, due to his failure to correct her repeated statements concerning her understanding of the charges.[91]

39. The *Amicus* Prosecutor responds that Hartmann had a clear understanding of the Prosecution's position on the charges months before the trial.[92] He submits that the charges were clearly articulated in the Order in Lieu of Indictment and that any misunderstanding on the part of Hartmann should have been dispelled by the Statement of 2 February 2009, which acknowledged the disagreement between the parties on the issue and clearly stated the *Amicus* Prosecutor's position concerning the nature and scope of the charges.[93]

40. The *Amicus* Prosecutor further submits that Hartmann's argument is erroneously premised on a theory of constructive concessions, which posits that the *Amicus* Prosecutor is to be regarded as having conceded to any points advanced by Hartmann, in the absence of any specific counter-arguments thereto by him.[94] The *Amicus* Prosecutor argues that the theory has no legal basis and ignores the practical restraints posed by word limits and deadlines for filings in trial and appellate proceedings. The *Amicus* Prosecutor submits that, in order to comply with word limits and deadlines for filings, he selectively responded to the most salient issues raised by Hartmann in her

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[88] Hartmann Final Appeal Brief, para. 9.
[89] Hartmann Final Appeal Brief, para. 10, note 9.
[90] Hartmann Final Appeal Brief, para. 11. In this regard, the Appellant cites (a) the Motion for Reconsideration of 9 January 2009, paras 80, 103; (b) the Motion for Reconsideration, paras 15-18; (c) *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Pre-Trial Brief of Florence Hartmann, 15 January 2009 (confidential) ("Hartmann Pre-Trial Brief"), paras 4-6, 9; (d) T. 52; and, (e) *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Final Trial Brief of Florence Hartmann, 2 July 2009 (confidential) ("Hartmann Final Trial Brief"), para. 1. *See* Hartmann Final Appeal Brief, note 11, *citing* Hartmann Final Appeal Brief, note 1.
[91] Hartmann Final Appeal Brief, para. 12.
[92] *Amicus* Prosecutor Response Brief, paras 21, 23, note 45.
[93] *Amicus* Prosecutor Response Brief, paras 21, 23.
[94] *Amicus* Prosecutor Response Brief, paras 12, 17.

pleadings.[95] The *Amicus* Prosecutor further submits that, unless he expressly agrees to a submission made by Hartmann, his agreement should not be implied.[96]

41. The *Amicus* Prosecutor also contends that the information to which Hartmann refers as new information was reflected in her Book and falls within the scope of the terms "contents" and "purported effect" employed in the Order in Lieu of Indictment.[97]

42. Hartmann reiterates in reply that the *Amicus* Prosecutor failed to correct her repeated statements concerning the scope of the charges in the case and thus failed to provide adequate notice of the charges against her. She contends that the *Amicus* Prosecutor's failure in this regard warrants the overturning of her conviction and precludes him from arguing a different case on appeal.[98] Hartmann further states that the *Amicus* Prosecutor suggests that she should have guessed the scope of the charges in the case from the contents of her Book and Article[99] and submits that this comprises a new argument by the *Amicus* Prosecutor, which he is precluded from raising on appeal.[100] It is further submitted that this argument lacks merit, as the obligation to provide notification of the charges in a case resides with the prosecutor.[101]

2. Discussion

43. The Appeals Chamber considers that Hartmann's submissions are erroneously premised on the presumption that the *Amicus* Prosecutor was responsible for defining the charges in the case. Rule 77(D)(ii) of the Rules provides that, where a Chamber considers that sufficient grounds exist to proceed against a person for contempt, the Chamber may "issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself." The Order in Lieu of Indictment in the instant case was issued by the Trial Chamber pursuant to Rule 77(D)(ii) of the Rules and, as a court order, its contents, including the statement of the charges therein, were ultimately determined by the Trial Chamber. Accordingly, Hartmann's assertion that the duty to define the charges in the case resided with the *Amicus* Prosecutor is without merit. The issue for consideration therefore is whether the Order in Lieu of Indictment, as issued by the Trial Chamber, adequately defined the scope of the charges against Hartmann.

44. The Appeals Chamber recalls that the Additional Facts that the Trial Chamber found Hartmann to have disclosed are as follows: (a) the legal reasoning applied by the Appeals Chamber

[95] *Amicus* Prosecutor Response Brief, para. 19.
[96] *Amicus* Prosecutor Response Brief, para. 20.
[97] *Amicus* Prosecutor Response Brief, para. 25.
[98] Hartmann Final Reply Brief, para. 3.
[99] Hartmann Final Reply Brief, para. 5.
[100] Hartmann Final Reply Brief, para. 5.
[101] Hartmann Final Reply Brief, para. 5.

in the two Appeal Decisions; (b) the purported effect of the two Appeal Decisions; (c) the content of closed session transcripts of the Applicant's submissions, which was included in the text of the first of the two Appeal Decisions; and, (d) confidential submissions made by the Prosecution, which were cited in the text of the second of the two Appeal Decisions.[102]

45. The Appeals Chamber notes that the Order in Lieu of Indictment expressly referred to the confidential status of the two Appeal Decisions.[103] It alleged that, in her Book and Article, Hartmann disclosed "information relating to the two confidential decisions [...] including the contents and purported effect" thereof, knowing that such information was confidential at the time of disclosure, and that her disclosure revealed confidential information to the public.[104] The Appeals Chamber thus considers that the language in the Order in Lieu of Indictment expressly notified Hartmann that the charges in the case related to her disclosure of information concerning the "purported effect of these decisions".[105] Furthermore, the Appeals Chamber notes that the text of the two Appeal Decisions was clearly the original source of the legal reasoning explaining how the Appeals Chamber arrived at its disposition in each Decision. The legal reasoning of the two Appeal Decisions thus clearly comprised part of "the contents [...] of these decisions" for the purpose of the Order in Lieu of Indictment.[106] The Appeals Chamber further notes that the aforementioned submissions of the Applicant and the Prosecution pertained to the respective requests for protective measures with which the two Appeal Decisions were concerned and therefore constituted "information related to the decisions of the Appeals Chamber."[107] Moreover, the submissions of the Applicant and the Prosecution were respectively reflected in the text of the first and second Appeal Decisions and therefore formed part of the "contents [...] of these decisions" for the purposes of the Order in Lieu of Indictment.[108]

46. In view of the foregoing, the Appeals Chamber considers that the Trial Chamber correctly decided that the legal reasoning applied in the two Appeal Decisions, the purported effect of both Decisions, and the content of the submissions of the Applicant and the Prosecution that were cited in the two Appeal Decisions, respectively, fell within the scope of the Order in Lieu of Indictment. The Appeals Chamber therefore finds that the Order in Lieu of Indictment notified Hartmann of the scope of the charges against her. The Appeals Chamber further finds that the Trial Chamber correctly decided that Hartmann's restriction of the scope of the charges to the Four Facts amounted

[102] Trial Judgement, para. 33.
[103] Annex to *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Order in Lieu of an Indictment on Contempt, 27 August 2008 ("Order in Lieu of Indictment"), paras 1, 4.
[104] Annex to Order in Lieu of Indictment, paras 2-4.
[105] *See* Annex to Order in Lieu of Indictment, paras 2-3.
[106] *See* Annex to Order in Lieu of Indictment, paras 2-3.
[107] *See* Annex to Order in Lieu of Indictment, para. 2.

to an excessively narrow interpretation of the charges, which was unsupported by the language in the Order in Lieu of Indictment.[109]

47. Sub-grounds 1.1 through 1.6, 1.8, and 1.11 through 1.15 are therefore dismissed.

B. Sub-Grounds 1.16 and 1.17

1. Submissions

48. Hartmann submits under **sub-ground 1.16** that the Trial Chamber erred in law by expanding the scope of the Order in Lieu of Indictment to include facts for which Rule 77(A)(ii) of the Rules provides no legal basis.[110] She argues that Rule 54 *bis* of the Rules is limited to providing protective measures to documents or information and does not encompass legal reasoning or any of the Four Facts or Additional Facts, unless their disclosure results in the disclosure of the actual contents of the documents or information subject to protective measures.[111] She submits that the Applicant applied for protective measures only in respect of the contents of certain specific documents, and that no protective measures were sought or granted regarding any of the facts in respect of which Hartmann was convicted.[112]

49. **Sub-ground 1.17** states that the Trial Chamber erred in law by determining that the Additional Facts fell within the scope of Rule 77(A)(ii) of the Rules. Hartmann submits under the first limb of sub-ground 1.17 that the Trial Chamber erred in law by finding that the disclosure of legal reasoning could constitute grounds for a conviction under Rule 77(A)(ii) of the Rules. She contends that there is no general principle in support of the Trial Chamber's conclusion[113] and that the principle of legality requires that the law be construed narrowly and in her favour.[114] Hartmann further argues that subjecting the legal reasoning of the Tribunal's decisions to Rule 77(A)(ii) of the Rules is contrary to the established practice of the Tribunal and would result in a lack of transparency and accountability.[115] Under the second limb of sub-ground 1.17, Hartmann states that the Trial Chamber erred in fact by failing to consider the possibility that she reasonably believed that the facts which she was convicted of disclosing did not fall within the scope of Rule 77(A)(ii) of the Rules and could therefore be disclosed.[116]

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[108] *See* Annex to Order in Lieu of Indictment, para. 2.
[109] *See* Trial Judgement, para. 32.
[110] Hartmann Final Appeal Brief, para. 13.
[111] Hartmann Final Appeal Brief, para. 13.
[112] Hartmann Final Appeal Brief, para. 13.
[113] Hartmann Final Appeal Brief, para. 14.
[114] Hartmann Final Appeal Brief, para. 14.
[115] Hartmann Final Appeal Brief, para. 14.
[116] Hartmann Final Appeal Brief, para. 14.

50. The *Amicus* Prosecutor responds by arguing that the Trial Chamber correctly determined that Rule 77 of the Rules "does not distinguish between categories of information the disclosure of which may amount to a contempt".[117]

2. Discussion

51. The legal reasoning in a confidential decision on protective measures characteristically contains references to the information or documents directly subject to an order of protective measures under the Rules, as well as references to related information or surrounding circumstances that tend to identify the documents or information directly subject to protective measures. The legal reasoning integrates such references, together with the law relevant to the determination of the issues, and the analysis of both by the Chamber in question. It therefore follows that the legal reasoning of a decision on protective measures necessarily falls within the ambit of the confidential status ordered in respect of such a decision. Similarly, the confidential submissions of parties concerning an application for protective measures and information regarding the purported effect of a decision on protective measures typically contain information tending to identify the documents or information subject to the protective measures ordered in the relevant decision. Thus, the confidentiality order respecting such a decision necessarily encompasses information concerning the purported effect of that decision and the confidential submissions of the parties regarding the application for protective measures.

52. The confidential issuance of a decision by a Chamber constitutes an order for the non-disclosure of the information contained therein, and it is not for a party to decide which aspects of a confidential decision may be disclosed.[118] This principle equally applies to third parties. The discretion as to whether the confidential status of a decision may be lifted in whole or in part belongs exclusively to a competent Chamber of the Tribunal with its intimate knowledge of all the facts, information, and circumstances surrounding the relevant case. Furthermore, "[a] court order remains in force until a Chamber decides otherwise."[119] Accordingly, in the instant case, in the absence of an order of a competent Chamber varying or lifting the confidential status of the two Appeal Decisions, the content of both Decisions remained subject to an order of non-disclosure.

53. Regarding Hartmann's submission that Rule 77(A)(ii) of the Rules does not encompass the particular information that Hartmann was found to have disclosed, the Appeals Chamber notes that Rule 77(A)(ii) of the Rules does not purport to restrict liability in terms of any specific kind of

[117] *Amicus* Prosecutor Response Brief, para. 25.
[118] *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Prosecution's Motion to Seal Defence Appeal Brief, 10 May 2007 (confidential), p. 3.
[119] *Marijačić and Rebić* Contempt Appeal Judgement, para. 45.

information that might be disclosed. Rather, the focus of Rule 77(A)(ii) of the Rules is the fact of deliberate disclosure in knowing violation of an order prohibiting disclosure. It is therefore established in the jurisprudence of the Tribunal that:

> [...] the *actus reus* of contempt under Rule 77(A)(ii) is the disclosure of information relating to proceedings before the International Tribunal where such disclosure would be in violation of an order of a Chamber. In such a case, "[t]he language of Rule 77 shows that a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice. Any defiance of an order of a Chamber *per se* interferes with the administration of justice for the purposes of a conviction for contempt. No additional proof of harm to the International Tribunal's administration of justice is required."[120]

54. Sub-grounds 1.16 and 1.17 are therefore dismissed.

C. Conclusion

55. The Appeals Chamber therefore dismisses sub-grounds of appeal 1.1 through 1.8 and 1.11 through 1.17.

V. *ACTUS CONTRARIUS* – GROUND 4

56. At trial, the Defence submitted that the Tribunal itself had made the Four Facts public and that the Tribunal's jurisprudence is replete with examples of public references to confidential decisions revealing the existence, title, and legal reasoning of the decision. The Defence therefore argued during the trial that the Tribunal may decide to lift the confidential status of a decision in whole or in part not only by means of a formal order, but also by an *actus contrarius* and that this is precisely what occurred in the present case. The Defence was therefore of the view that the facts which she was charged with revealing in her Book and Article could no longer have been considered confidential at the time she published them.[121]

57. In the Trial Judgement, the Chamber stated that it had reviewed the alleged acts of *actus contrarius* raised by the Defence. The Trial Chamber considered that decisions containing mere references to confidential decisions are not required to be filed confidentially and that the citation of applicable law contained in the Appeals Chambers Decisions had to be distinguished from the reference to the legal reasoning contained therein: references to applicable law do not divulge confidential information, and the citation of the law of another Chamber contributes to the uniformity of the application and development of the Tribunal's jurisprudence.[122] The Trial Chamber accordingly held that neither the Tribunal's public references to the existence of the

[120] *Jović* Contempt Appeal Judgement, para. 30 (internal citations omitted); *see also Marijačić and Rebić* Contempt Appeal Judgement, para. 44.
[121] Trial Judgement, para. 36.
[122] Trial Judgement, paras 38-39.

Appeal Decisions nor its references to the law contained therein amounted to an *actus contrarius* by the Tribunal.[123]

58. Under ground 4 of her Appeal, Hartmann advances ten sub-grounds of appeal. Introducing these sub-grounds, Hartmann avers that Rule 77(A)(ii)'s *actus reus* is the physical act of disclosure of information when such disclosure breaches an order. Hartmann also states that it was "common ground" that the Prosecution had to establish that the information was treated as confidential at the time of the relevant charges.[124] Hartmann submits that the Appeals Chamber has acknowledged that Chambers can lift the confidentiality of decisions not just by formal order, but also by "*actus contrarius*"; that no particular form of this lifting is required; and that the Tribunal's practice is replete with examples of lifting of the confidential character of decisions, in whole or in part, by disclosing their existence or content in public decisions. Hartmann argues that the information which she publicly disclosed was not being treated as confidential at the time of her disclosure and therefore that the *actus reus* of the offence was not satisfied.[125] Hartmann therefore argues that the Trial Chamber erred in fact or in law.

59. The *Amicus* Prosecutor responds to ground of appeal 4, and its ten sub-grounds, by arguing that the Appeals Chamber in *Marijačić and Rebić* held that protective measures imposed by a Chamber would be undermined without an explicit *actus contrarius* and that no explicit *actus contrarius* had disclosed the breadth of information made public by Hartmann's publications. As argued by the *Amicus* Prosecutor, a compilation of the information in the decisions cited by Hartmann would not enable someone to reconstruct the information disclosed by her, as set out in the Order in Lieu of Indictment.[126] The *Amicus* Prosecutor also contends that a further consideration applies to this ground of appeal, as well as to ground of appeal 5 (pertaining to alleged waiver), namely that anyone can easily determine contumacious acts prospectively. According to the *Amicus* Prosecutor, "[i]n a matter of a few keystrokes on the Tribunal's website members of the public can readily ascertain what information is available to them. There is a single, accurate repository of information. Should [Hartmann's] position succeed it would render such a task very difficult. Those seeking to comply will need to consult a multitude of sources around the world to establish the confidential status of various materials."[127] The *Amicus* Prosecutor therefore submits that Hartmann's position is untenable and that this ground of appeal, and all its sub-grounds, should be dismissed.[128]

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[123] Trial Judgement, para. 40.
[124] Hartmann Final Appeal Brief, para. 38.
[125] Hartmann Final Appeal Brief, paras 38, 62.
[126] *Amicus* Prosecutor Response Brief, para. 47; *see also Amicus* Prosecutor's Corrigendum.
[127] *Amicus* Prosecutor Response Brief, para. 48.
[128] *Amicus* Prosecutor Response Brief, paras 46, 48-49.

60. Hartmann replies that the *Amicus* Prosecutor's submission that there is a single, accurate repository of information for the Tribunal's records has no basis in law and is contradicted by the practice of the Tribunal.[129]

A. Sub-grounds 4.1–4.5

1. Submissions

61. Hartmann argues in **sub-ground 4.1** that the Trial Chamber erred in law or fact when it failed to (a) ascertain and/or (b) require that the *Amicus* Prosecutor exclude the reasonable possibility that all facts in relation to which she had been validly charged had been made public by *actus contrarius*.[130] According to Hartmann's arguments in **sub-ground 4.2**, the Trial Chamber erred in fact or law by convicting her, despite the fact that all relevant facts had been the subject of an *actus contrarius* and/or for rejecting the reasonable possibility that this might be the case.[131] Hartmann further submits in **sub-ground 4.3** that the Trial Chamber erred in fact when suggesting that the Tribunal's public references were limited to "the existence of the Appeals Chamber Decisions" and that "references to the law contained in the Appeals Chamber Decisions [did not] amount to an *actus contrarius* by the Tribunal".[132] Hartmann states in **sub-ground 4.4** that, on 27 April 2007, the Tribunal's President issued a public order in which he referred publicly to the existence of the first Appeal Decision by its full title and that this made public several of the facts for which she was prosecuted: (a) the existence and date of one of the Appeal Decisions; (b) the confidential character of that Decision; and, (c) the identity of the Applicant.[133] Hartmann submits additionally that, on 12 May 2006, the Appeals Chamber publicly mentioned the two Appeal Decisions, including *verbatim* quotations from them and including several facts relevant to this Appeal: (a) the existence and date of the Appeal Decisions; (b) the confidential character of the Decisions; (c) the identity of the Applicant; (d) the fact that the Decisions related to the production or protection of the Supreme Defence Council ("SDC") records; (e) the fact that national interests were a legal basis for the applications that led to the Decisions; and, (f) part of the Appeals Chamber's legal reasoning.[134] Hartmann further argues that the *Milošević* Trial Chamber made public facts for which she was convicted and made clear that what was being protected in its orders was not the orders themselves, but the material subject to the protective measures.[135] According to

[129] This argument in reply seems to be mistakenly located under ground of appeal 5. Hartmann Final Reply Brief, para. 16.
[130] Hartmann Final Appeal Brief, para. 50.
[131] Hartmann Final Appeal Brief, para. 51.
[132] Hartmann Final Appeal Brief, para. 52, *citing* Trial Judgement, para. 40.
[133] Hartmann Final Appeal Brief, para. 53.
[134] Hartmann Final Appeal Brief, para. 55. There is no **sub-ground 4.5.**
[135] Hartmann Final Appeal Brief, para. 55.

Hartmann, the practical effect of these decisions and orders was to lift the confidential status of the facts subsequently disclosed publicly by the Tribunal. Rule 77(A)(ii)'s *actus reus* could therefore not have been established in relation to these facts, and the Trial Chamber erred when it found otherwise.[136]

2. Discussion

62. The Appeals Chamber will consider each order and decision referenced by Hartmann.

63. The Appeals Chamber takes note of the public order of the President, issued on 27 April 2007, in which he assigned Judges to an interlocutory appeal in the *Milošević* case.[137] In this order, the President references the "Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005" and that this decision was issued confidentially by the Appeals Chamber on 6 April 2006. According to Hartmann, therefore, the President had already made public the information which she was convicted for revealing to the public. However, the Appeals Chamber observes that the Trial Chamber in the present case made it clear that it did not accept Hartmann's interpretation of the Order in Lieu of Indictment that she was prosecuted for revealing this information.[138] Rather, the Trial Chamber held as follows:

> With respect to the second of the Appeals Chambers Decisions (of 6 April 2006), the Accused refers in her Book to confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision as well as to its purported effect. The Article likewise contains references to the contents, *i.e.* the legal reasoning applied by the Appeals Chamber in reaching its disposition, as well as the purported effect of both Appeals Chamber Decisions.[139]

The Appeals Chamber considers that the President's order did not reveal the information for which Hartmann was prosecuted. Hartmann has therefore failed to demonstrate that the Trial Chamber erred.

64. The Appeals Chamber notes next the "Decision on Request of the United States of America for Review", which was issued publicly on 12 May 2006.[140] The first paragraph which Hartmann references is from the "standard of review" section of this decision, wherein the Decision of 6 April 2006 is cited:[141]

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[136] Hartmann Final Appeal Brief, para. 55.
[137] Exhibit D21 (*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.3, Order Assigning Judges to a Case Before the Appeals Chamber, 27 April 2007).
[138] Trial Judgement, para. 32.
[139] Trial Judgement, para. 33 (internal citations omitted).
[140] Exhibit D23 (*Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006).
[141] Hartmann Final Appeal Brief, note 65; Exhibit D23, para. 6, notes 14-17. The Appeals Chamber notes that the Appellant's references to *paragraphs* 14-17, 20, 66, and 78-79 are in fact references to *notes*.

> Therefore, the Appeals Chamber will not conduct a *de novo* review of a Rule 54*bis* decision and the question before it is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision." [Note: *Milošević* Decision of 6 April 2006, para. 16 (internal citations omitted).] It must be demonstrated that the Trial Chamber has committed a "discernible error" [Note: *Ibid.*] resulting in prejudice to a party. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion only where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion." [Note: *Ibid.*] The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations [...]" in reaching its discretionary decision. [Note: *Ibid.*]

Footnote 20 of this decision, referenced by Hartmann, simply cites as follows: "*Cf. Milošević* Decision of 6 April 2006, para. 19."

The next part of the 12 May Decision referenced by Hartmann is as follows:[142]

> The Appeals Chamber notes that "[i]t is clear that the Tribunal's Rules have been intentionally drafted to incorporate safeguards for the protection of certain State interests in order to encourage States in their fulfilment of their cooperation obligations under the Tribunal's Statute and Rules." [Note: *Prosecutor v. Milošević*, Case No. IT-02-54AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 ("*Milošević* Decision of 20 September 2005"), para. 11.]

The next part of the 12 May Decision referenced by Hartmann is as follows:[143]

> [...] the use of the term "interest" in sub-paragraph (I) has been interpreted by the Appeals Chamber to refer to "national security interests" only, in light of the reference therein to other subparagraphs of Rule 54*bis*, which specifically refer to a State's national security interests. [Note: *Milošević* Decision of 20 September 2005, para. 19.]

The next part of the 12 May Decision referenced by Hartmann is a footnote and is as follows:[144]

> *Id.*, para. 14 (holding that "it is generally for the State to present its argument to the Chamber than [sic] an interest is a national security interest that warrants a Chamber ordering non-disclosure of the material sought. It is then for the Chamber to consider whether that claim is justified and warrants an order of protective measures. It is not the case [...] that a Chamber must accept the qualification presented by a State.").

Hartmann also references another footnote of the 12 May Decision:[145]

> *Prosecutor v. Milošević*, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006 ("Milošević Decision of 6 April 2006"), para. 15; *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Rule 70 Decision"), para. 4.

65. Hartmann then addresses the *Milošević* Trial Chamber's "Second Decision on Admissibility of Supreme Defence Council Materials", issued 23 September 2004, and the public version of the

[142] Hartmann Final Appeal Brief, note 65; Exhibit D23, para. 33, note 66.
[143] Hartmann Final Appeal Brief, note 65; Exhibit D23, para. 34, note 78.
[144] Hartmann Final Appeal Brief, note 65; Exhibit D23, note 79.
[145] Hartmann Final Appeal Brief, note 65; Exhibit D23, note 7.

"First Decision on Admissibility of Supreme Defence Council Materials", issued 23 September 2004.[146] The Appeals Chamber takes note of the fact that these decisions revealed the fact that protective measures had been granted in relation to the SDC minutes and stenographic notes.

66. Hartmann also relies upon two decisions and an order that merely cite the *Milošević* Decision of 6 April 2006 for its legal standard regarding a motion for reconsideration.[147]

67. What can be discerned from all of the above orders and decisions is that, while the President and the Appeals Chamber relied upon the Decision of 20 September 2005 for the general legal authority that it had established, they never disclosed the confidential legal reasoning of those decisions, the reasoning by which the law was applied to the facts. This was recognised by the Trial Chamber in the present case when it held that:

> [l]egal reasoning by its very nature requires the application of the law to the facts, and therefore requires the whole reasoning to be protected. The law is public while the facts often are not. The application of the law to the facts is confidential by virtue of the mix of the two. Exclusion of legal reasoning from the realm of protection by confidentiality would compromise confidential party submissions fundamental to the Chamber's legal reasoning. In this particular case, the Chamber recalls that submissions discussed in the Appeal Chamber Decisions were filed confidentially by the parties. In addition, the Appeals Chamber Decisions also contain quotes [sic] from closed session proceedings. While the Accused is not charged with disclosure of the contents of the confidential documents underlying the Appeals Chamber Decisions, this does not negate the *actus reus* of contempt for disclosing other confidential information contained in the text of the Appeals Chamber Decisions themselves.[148]

68. The Appeals Chamber considers that the order of the President and the decisions of the *Milošević* Trial Chamber and the Appeals Chamber were careful and meticulous in not revealing the legal reasoning of the Appeal Decisions or other confidential information pertaining to the SDC materials. The fact that the *Milošević* Trial Chamber had granted protective measures to the SDC materials was a matter of public record as early as 23 September 2004; however, Hartmann was not convicted for revealing this fact, the existence of the Appeal Decisions, or the law contained within them (which had been revealed by the President and the Appeals Chamber), but rather for revealing the confidential legal reasoning contained within those decisions. It can also be seen that a member of the public would not have been privy to the information that Hartmann disclosed, even having read all of these passages from the orders and decisions relied upon by her. Hartmann's argument that she was convicted for revealing information that had already been revealed by the Tribunal

[146] Exhibit D24 (*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Second Decision on Admissibility of Supreme Defence Council Materials, 23 September 2004); *see also Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, First Decision on Admissibility of Supreme Defence Council Materials, 23 September 2004.

[147] Hartmann Final Appeal Brief, note 68; Exhibit D58 (*Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006), Exhibit D59 (*Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on the Motion to Vary "Decision on Sixth Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*", 14 January 2008), and Exhibit D60 (*Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Order on Applicant's Renewed Motion Seeking Access to Confidential Material in the *Milošević* Case with Annex A, 22 September 2006).

therefore does not stand up to close scrutiny. Hartmann has therefore failed to demonstrate that the Trial Chamber erred.

69. These sub-grounds of appeal are therefore dismissed.

B. Sub-ground 4.6

70. Hartmann argues that the Trial Chamber erred in law when it failed to require the *Amicus* Prosecutor to establish that the underlying facts had not been made public through *actus contrarius* and instead put the onus on Hartmann.[149]

71. The Appeals Chamber observes that the Trial Chamber reviewed the defence of *actus contrarius* raised by Hartmann and the evidence admitted in support of that defence. The Trial Chamber then considered the evidence of Robin Vincent, a witness who had been called by the *Amicus* Prosecutor and who testified about the practice of referring to the existence of a confidential decision, but not to its contents.[150] The Appeals Chamber also observes that the Trial Chamber made the following findings regarding Hartmann's *actus contrarius* defence:

> The Chamber accordingly finds that neither the Tribunal's public references to the existence of the Appeals Chamber Decisions, nor its references to the law contained in the Appeals Chamber Decisions amounted to an *actus contrarius* by the Tribunal lifting the confidentiality of the said Decisions in the absence of an order.[151]

72. Finally, the Appeals Chamber take note of the fact that the Trial Chamber, in making its ultimate findings upon the *actus reus* of the offence, held that Hartmann was the sole author of both the Book and the Article and that the confidentiality of the Appeal Decisions was in effect at the time of their publication.[152] The Trial Chamber therefore held beyond reasonable doubt that Hartmann has disclosed confidential information, namely the contents and purported effect of the Appeal Decisions in breach of orders by the Appeals Chambers.

73. Based upon a review of the foregoing finding of the Trial Chamber, the Appeals Chamber cannot accept Hartmann's contention that the Trial Chamber failed to require the *Amicus* Prosecutor to establish that the underlying facts had not been made public through *actus contrarius*, thereby placing the onus on her. The Trial Chamber analysed the evidence adduced at trial, considered the defence advanced by Hartmann, and then made its findings accordingly. Hartmann has therefore failed to demonstrate that the Trial Chamber erred.

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[148] Trial Judgement, para. 35.
[149] Hartmann Final Appeal Brief, para. 59.
[150] Trial Judgement, para. 38.
[151] Trial Judgement, para. 40.
[152] Trial Judgement, para. 47.

74. This sub-ground of appeal is therefore dismissed.

C. Sub-ground 4.7

75. Hartmann argues that the Trial Chamber erred in law when it drew a distinction between "legal reasoning" and "applicable law", a distinction that, according to Hartmann, has no support in Rule 77 of the Rules or international law and that is contrary to Tribunal practice.[153]

76. The Appeals Chamber considers that the Trial Chamber set forth its explanation for the difference between a general legal principle, which should always be available to the public (*i.e.*, "applicable law"), and "legal reasoning", which is the result of a Chamber applying that "applicable law" to the facts before it and which can sometimes be withheld from the public.[154] The Appeals Chamber finds no error in the distinction drawn by the Trial Chamber between "applicable law" and "legal reasoning", a distinction that is a regular feature of decisions issued by Chambers of the Tribunal. The Appeals Chamber also rejects Hartmann's contention that the distinction between "applicable law" and "legal reasoning" must be provided for in Rule 77 of the Rules or international law in order for it to be employed at the Tribunal. Hartmann has therefore failed to demonstrate that the Trial Chamber erred.

77. This sub-ground of appeal is therefore dismissed.

D. Sub-ground 4.8

78. Hartmann argues that the Trial Chamber erred in law or fact when it suggested that exhibits D24 and D62 could not constitute evidence of *actus contrarius* because they were *posterior*[155] to the Appeal Decisions and erred further when disregarding their content.[156]

79. In the Trial Judgement, the Trial Chamber observed as follows:

> The Chamber notes that Exhibits D24 and D62, referred to by the Defence in support of a waiver of confidentiality of the Tribunal, pre-date the Appeals Chamber Decisions and therefore cannot logically qualify as *acti contrarii* lifting the confidentiality of these Decisions.[157]

Exhibit D24 is *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Second Decision on Admissibility of Supreme Defence Council Materials, 23 September 2004, which revealed to the public the fact that the *Milošević* Trial Chamber had granted protective measures to the SDC materials. Exhibit D62 is *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Prosecution

[153] Hartmann Final Appeal Brief, para. 60.
[154] Trial Judgement, para. 39.
[155] The Appeals Chamber considers that the Appellant must have intended to write "*anterior*".
[156] Hartmann Final Appeal Brief, para. 61.
[157] Trial Judgement, note 85.

Response to the 6 May 2003 Submission by Serbia and Montenegro Regarding Outstanding Requests for Assistance, 20 May 2003, which detailed the Prosecution's efforts to obtain the SDC materials.

80. The Appeals Chamber considers that Hartmann was not convicted for revealing to the public that the *Milošević* Trial Chamber had granted protective measures to the SDC materials, but rather for disclosing confidential information in the Appeal Decisions. Because the Appeal Decisions were indeed issued *after* the two *Milošević* decisions cited by Hartmann, the Trial Chamber was correct in deciding that it was impossible for the *Milošević* decisions to have lifted the confidentiality of the Appeal Decisions because the latter did not even exist when the former were issued. Moreover, the Appeals Chamber considers that the fact that the Trial Chamber made reference to the temporal relationship between exhibits D24 and D62 and the Appeal Decisions does not indicate that the Trial Chamber disregarded their contents. In any case, the contents of exhibits D24 and D62 do not support Hartmann's arguments, as discussed below.

81. Hartmann states that exhibits D24 and D62 are relevant because they provide corroboration and support for her submissions that the facts contained therein had been made public by the Tribunal and were regarded all through that time as non-confidential.[158] The Appeals Chamber considers that exhibits D24 and D62 do not provide support for the proposition that the information that Hartmann disclosed was not confidential or was treated as public by the Tribunal. Exhibit D24 revealed to the public that the *Milošević* Trial Chamber had granted protective measures to the SDC materials,[159] but Hartmann was not convicted for revealing this information. Exhibit D62 detailed the Prosecution's efforts to obtain the SDC materials,[160] which is also not information that Hartmann was convicted for revealing.

82. Hartmann also states that exhibits D24 and D62 counter the Trial Chamber's finding that only a formal decision lifting confidentiality following an application to that effect can legally be regarded as waiver by the Applicant.[161] The Appeals Chamber notes that this argument is subsumed in ground of appeal 5, which will be examined below.

83. For the foregoing reasons, this sub-ground of appeal is dismissed.

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[158] Hartmann Final Appeal Brief, para. 61.
[159] Exhibit D24 (*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Second Decision on Admissibility of Supreme Defence Council Materials, 23 September 2004, p. 2).
[160] Exhibit D62 (*Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Prosecution Response to the 6 May 2003 Submission by Serbia and Montenegro Regarding Outstanding Requests for Assistance, 20 May 2003, paras 10-13).
[161] Hartmann Final Appeal Brief, para. 61.

E. Conclusion

84. The Appeals Chamber therefore dismisses sub-grounds 4.1–4.8.

VI. WAIVER – GROUND 5

85. At trial, the Defence argued that the Applicant publicly disclosed the Four Facts and in doing so waived any interest in the continued confidentiality of matters subject to the Appeal Decisions.[162]

86. The Trial Chamber rejected this contention and held that a decision made by a Chamber of this Tribunal remains confidential until a Chamber explicitly decides otherwise.[163] Moreover, the Trial Chamber was not persuaded that the information disclosed by the associated officials was the same information that Hartmann was charged with disclosing.[164]

A. Sub-grounds 4.9–4.10 and 5.1–5.6

1. Submissions

87. In **sub-ground 5.1**, Hartmann argues that the Trial Chamber suggested that a waiver can only operate where there is a formal request by an applicant and an explicit order formally or explicitly lifting the materials' confidentiality.[165] She also contends that the Trial Chamber's holding has no basis in law, is contradicted by Tribunal practice, and constitutes an error of law. According to Hartmann, the practice of the Tribunal makes it clear that no formal or explicit waiver order is required to lift confidentiality of a particular fact. Hartmann states that the practice of other international tribunals supports her view.[166] Hartmann argues in **sub-ground 5.2** that the Trial Chamber erred in fact when it found that the information disclosed by officials associated with the Applicant was not the same information that Hartmann was charged with disclosing. She argues that all of the facts were made public by these associated officials, who also made repeated public references to the alleged basis for the protective measures.[167] Hartmann further submits in **sub-ground 5.3** that the Trial Chamber erred in law or fact and violated the burden of proof when it failed to require the *Amicus* Prosecutor to prove that the information she was prosecuted for revealing had not been made public by the Applicant. Moreover, she contends that there was

[162] Trial Judgement, para. 41.
[163] Trial Judgement, para. 46.
[164] Trial Judgement, para. 45.
[165] Hartmann Final Appeal Brief, para. 63, *citing* Trial Judgement, para. 46.
[166] Hartmann Final Appeal Brief, para. 63.
[167] Hartmann Final Appeal Brief, para. 64.

positive evidence that the Applicant had in fact made this information public.[168] Hartmann argues in **sub-ground 5.4.1** that the Trial Chamber made an error of law when it held that statements of the Applicant did not reflect its official position before the Tribunal *vis-à-vis* the issue of confidentiality. Hartmann claims that the Appeals Chamber has held that information publicly disclosed only needs to be acknowledged by officials whose government had sought or obtained protective measures from the Tribunal. According to Hartmann, the Trial Chamber adopted an incorrect legal test because the Appeals Chamber has not required that a statement must reflect an applicant's official position before the Tribunal in order to constitute a waiver.[169] Hartmann contends in **sub-ground 5.5** that the Trial Chamber erred in fact when it failed to consider whether she could reasonably have taken the view that, as a result of the Applicant's public statements, the confidentiality of the facts that she disclosed had been waived.[170]

88. The *Amicus* Prosecutor argues that the parties who, according to Hartmann, disclosed the confidential information did not represent the Applicant's official position and that, even if a purported waiver were convincingly established, it would not invalidate the Trial Judgement. According to the *Amicus* Prosecutor, the outcome of the proceedings would remain unaffected because: (a) parties cannot unilaterally withdraw confidentiality; (b) disclosure of confidential information by a third-party does not lift confidentiality; and, (c) disclosures by Hartmann exceeded the scope of information discussed by certain individuals associated with the Applicant.[171] The *Amicus* Prosecutor argues that the Appeals Chamber in the *Martinović* case held that "an appellant may not unilaterally withdraw the confidential status of a filing that has been ordered by the Appeals Chamber".[172] The *Jović* case clearly holds, according to the *Amicus* Prosecutor, that information disclosed by a third-party nevertheless remains confidential.[173] Instead, a Chamber must instruct the Registry to lift the confidential status of the document in question.[174] The *Amicus* Prosecutor argues that the particular factual circumstances of this case cast serious doubt on Hartmann's assertion that the parties allegedly disclosed information and did so in the Applicant's

[168] Hartmann Final Appeal Brief, para. 65.
[169] Hartmann Final Appeal Brief, para. 66. Hartmann also argues in **sub-ground 5.4.2** (Hartmann Final Appeal Brief, para. 66) that the Trial Chamber made an error of fact when it held that that statements of the Applicant did not reflect its official position before the Tribunal *vis-à-vis* the issue of confidentiality. According to Hartmann, the record indicates that the persons making the statements in question disclosed the relevant facts in their official capacity.
[170] Hartmann Final Appeal Brief, para. 67. In the alternative, Hartmann contends in **sub-ground 5.6** (Hartmann Final Appeal Brief, para. 67) that the Trial Chamber erred in fact when it concluded that she could not reasonably have taken such a view in the circumstances.
[171] *Amicus* Prosecutor Response Brief, para. 50 (first paragraph 50).
[172] *Amicus* Prosecutor Response Brief, para. 50 (second paragraph 50), *citing Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.
[173] *Amicus* Prosecutor Response Brief, para. 52.
[174] *Amicus* Prosecutor Response Brief, para. 50 (second paragraph 50).

name.[175] Finally, the *Amicus* Prosecutor avers that the information discussed in the public domain does not cover the breadth of Hartmann's disclosures.[176]

89. Hartmann replies that a party who obtained protective measures cannot freely decide to waive those measures; however, where a party obtains protective measures based on a claim that it has a valid interest that deserves protection, but then publicly discloses the protected information, the party either demonstrates that this interest was not in fact worthy of protection in the first place or that, due to a change of circumstances, any interest in the protection of that information has ceased. In either case, according to Hartmann, any public disclosure of such information could not warrant a finding of contempt.[177] According to Hartmann, this is the reason why there is no precedent for a contempt conviction for disclosing information that an applicant itself made public: this would be without a valid legal basis, unnecessary, and disproportionate.[178]

2. Discussion

90. The Trial Chamber held that:

> [T]he jurisprudence of this Tribunal clearly provides that a decision remains confidential until a Chamber explicitly decides otherwise. The Applicant has not made a request to the Tribunal with a view to rescind the confidentiality of the Appeals Chamber Decisions. On the contrary, the record indicates that the Applicant has in fact pursued the opposite approach.[179]

The Trial Chamber relied upon the *Marijačić and Rebić* Appeal Judgement, the *Jović* Appeal Judgement, the *Margetić* Trial Judgement, and the evidence adduced during the trial.

91. The Appeals Chamber rejects this ground of appeal based on the existence of a waiver of confidentiality by the Applicant, because only a Chamber of the Tribunal can remove an order of confidentiality, not a party. In the context of Rule 77(A)(ii) of the Rules in the *Marijačić and Rebić* case, the Appeals Chamber held that:

> A court order remains in force until a Chamber decides otherwise. The Appeals Chamber *proprio motu* notes that the fact that the aforementioned information today is no longer confidential does not present an obstacle to a conviction for having published the information at a time when it was still under protection. [...] To hold otherwise would mean to undermine all protective measures imposed by a Chamber without an explicit *actus contrarius*, thus endangering the fulfilment of the International Tribunal's functions and mandate.[180]

[175] *Amicus* Prosecutor Response Brief, para. 51.
[176] *Amicus* Prosecutor Response Brief, para. 53.
[177] Hartmann Final Reply Brief, para. 17.
[178] Hartmann Final Reply Brief, para. 17.
[179] Trial Judgement, para. 46 (internal citations omitted).
[180] *Marijačić and Rebić* Contempt Appeal Judgement, para. 45 (internal citations omitted).

Moreover, the Appeals Chamber stated in the *Jović* case that "The fact that some portions of the Witness's written statement or closed session testimony may have been disclosed by another third party does not mean that this information was no longer protected, that the court order had been *de facto* lifted or that its violation would not interfere with the Tribunal's administration of justice."[181]

92. In the present case, the filings by the Applicant and the Appeal Decisions that resulted therefrom were confidential; therefore, the content of this material was confidential until a competent Chamber of the Tribunal decided otherwise, and it was not within the authority of a party or a third party to reveal any of the confidential information. The Appeals Chamber is of the clear view that no actions on the part of associated officials or representatives of the Applicant—or any other third-parties (whether acting as agents of the Applicant or not)—could have unilaterally lifted the confidentiality of the information contained within the Appeal Decisions that Hartmann was convicted for revealing to the public. The Appeals Chamber therefore finds that the Trial Chamber did not err when it held that a decision remains confidential until a Chamber explicitly decides otherwise, and rejects sub-grounds 5.1 and 5.2.[182] In regard to sub-grounds 5.4.1 and 5.4.2, whether or not the opinions expressed by certain "associated officials" reflected the Applicant's "official position" before this Tribunal or were acting in their official capacity, these associated officials were not able to "waive" confidentiality on behalf of the Applicant and thus change the status of information that had been kept confidential by the Appeals Chamber.

93. Regarding sub-ground 5.3, the Appeals Chamber notes that the Trial Chamber, after summarising the defence evidence that was adduced on this point, stated that it was "not persuaded [...] that the information disclosed by these associated officials [of the Applicant] is the same information that the Accused is charged with disclosing".[183] The Appeals Chamber has reviewed the documents disclosed by parties associated with the Applicant and found that they did not contain the same information which Hartmann was charged with disclosing. Hartmann's argument that she adduced positive evidence that the Applicant had made public the information which she was convicted of disclosing is therefore without merit.

94. Finally, the Appeals Chamber rejects sub-grounds 5.5 and 5.6. The Appeals Chamber recalls that, in coming to its conclusions regarding Hartmann's state of mind, the Trial Chamber focused its analysis upon two items of evidence: first, Hartmann made express reference in her Book to the fact that the two Appeal Decisions were confidential, and she acknowledged that the Article was an

[181] *Jović* Contempt Appeal Judgement, para. 30.
[182] Trial Judgement, para. 46.
[183] Trial Judgement, para. 45.

English version of certain passages of the Book.[184] Second, following the Registrar's 19 October letter ("Registrar's Letter") formally putting her on notice that he was concerned about the disclosure of confidential information and that "administrative or legal measures" were being contemplated, Hartmann published essentially the same information in her Article.[185] Based upon this evidence, the Trial Chamber was satisfied beyond reasonable doubt that Hartmann had knowledge at the time of the publication of her Book and the Article that her disclosure was in violation of an order of the Tribunal.[186] These findings, which the Appeals Chamber has found to be reasonable in ground 8 below, indicate that the Trial Chamber implicitly considered—and rejected—the possibility that Hartmann regarded the information that she disclosed as no longer being confidential as a result of public statements by the Applicant.[187]

B. Conclusion

95. The Appeals Chamber therefore dismisses ground of appeal 5 in its entirety, as well as sub-grounds 4.9 and 4.10.

VII. SERIOUSNESS OF THE CONDUCT – GROUND 6

96. The Trial Chamber held that, under Rule 77 of the Rules, "any knowing and wilful conduct which interferes with the administration of justice may properly be tried as contempt," and that consideration of the degree of seriousness of such interference would constitute a mitigating or aggravating factor at the sentencing phase, not an element of the contempt itself.[188] The Trial Chamber also held that Hartmann, in disclosing the confidential information, created a real risk to the Tribunal's ability to administer justice.[189] The Trial Chamber found that the information disclosed by the Accused in her Book and Article contained protected information not previously disclosed and that, as a result of her conduct, Hartmann had created a real risk that states might not be as forthcoming in their cooperation with the Tribunal where the provision of evidentiary material is concerned.[190]

[184] Trial Judgement, para. 58.
[185] Exhibit P10.
[186] Trial Judgement, para. 62.
[187] For the same reasons, the Appeals Chamber dismisses **sub-grounds 4.9 and 4.10**.
[188] Trial Judgement, para. 25.
[189] Trial Judgement, para. 80.
[190] Trial Judgement, para. 80.

A. Sub-ground 6.1, 6.2, and 6.4–6.6

97. In **sub-ground 6.2**, Hartmann asserts that the Trial Chamber erred in law when it failed to determine whether her actions were more than negligent.[191]

98. The Appeals Chamber considers that, in order to convict Hartmann, the Trial Chamber had to conclude that publishing the confidential information in the Book and Article in violation of a court order was done "knowingly and wilfully".[192] The Trial Chamber convicted Hartmann in part based upon its finding that "the Chamber is satisfied beyond reasonable doubt that the Accused had knowledge at the time of publication of her Book and the Article that her disclosure was in violation of an order of the Tribunal".[193] The Appeals Chamber is of the view the Trial Chamber, having made this finding, was under no obligation to also make a finding on whether Hartmann's actions were "more than negligent". In the present case, the only criterion that the Trial Chamber had to explicitly consider to establish contempt under Rule 77 of the Rules was whether Hartmann knowingly and wilfully interfered with the Tribunal's administration of justice.

99. This sub-ground is therefore dismissed.

B. Conclusion

100. The Appeals Chamber therefore dismisses sub-grounds 6.1, 6.2, and 6.4 through 6.6.

VIII. REAL RISK TO THE ADMINISTRATION OF JUSTICE – GROUND 7

101. The Trial Chamber held that Hartmann, in publishing confidential information, created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and

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[191] Hartmann Final Appeal Brief, para. 69. The Appeals Chamber considers that that the Appellant's contentions under **sub-grounds 6.1, 6.4, and 6.5** are merely repetitions of unsuccessful arguments raised at trial with no identification of how the Trial Chamber erred. Hartmann Final Appeal Brief, paras 68, 70-71; *see also Amicus* Prosecutor Response Brief, paras 55-56 and notes 104, 106, *citing* Motion for Reconsideration, paras 9, 19, 39, 45; Hartmann Final Trial Brief, paras 50-52, 160-166; Hartmann Final Reply Brief, para. 21. The Appeals Chamber therefore summarily dismisses them. The Appeals Chamber also summarily dismisses **sub-ground 6.6** (Hartmann Final Appeal Brief, para. 72) because it is merely a vague assertion that the Trial Chamber failed to consider evidence, without an attempt to show how no reasonable trier of fact, based on the totality of the evidence, could have reached the same conclusion as the Trial Chamber.

[192] *See* Rule 77(A) of the Rules. *See also Nshogoza* Appeal Judgement, paras 56-57 ("No additional proof of harm to the Tribunal's administration of justice is required. The Appeals Chamber is not convinced that the *defiance* of a Chamber's order conveys any different connotation than a knowing and wilful *violation* of one. Considerations of the gravity of an accused's conduct or his underlying motivations are rather to be assessed in connection with the decision to initiate proceedings or in sentencing. Bearing this in mind, the Appeals Chamber considers that the various statements by Trial Chambers, cited by Nshogoza, which take into account the minimal gravity surrounding a violation of a Chamber's order should be understood, not as a finding that the conduct was not contempt, but as an exercise of the discretion of the Chamber not to initiate proceedings in such circumstances. The fact that other persons might also have engaged in similar conduct is not a defence.") (internal citations omitted).

[193] Trial Judgement, para. 62.

punish serious violations of humanitarian law.[194] In this regard, the Trial Chamber observed that the disclosure of protected information in breach of a judicial order undermines confidence in the Tribunal's ability to guarantee the confidentiality of certain information and may deter the level of cooperation that is vital to the administration of international criminal justice.[195]

A. Sub-grounds 7.1, 7.2, and 7.4–7.9

1. Submissions

102. In **sub-ground 7.1**, Hartmann argues that the Trial Chamber, in holding that her arguments regarding the risk that her actions posed to the administration of justice went to the elements of contempt rather than to the preliminary question of jurisdiction,[196] erred in law and fact.[197] The *Amicus* Prosecutor responds that the legal conclusions reached by the Trial Chamber were consistent with the precedent of the Appeals Chamber and with general principles of law.[198]

103. In **sub-ground 7.2**, Hartmann argues that the Trial Chamber erred in law by setting a standard that has no support in international law.[199] She submits that the requirement of a "real risk" forms part of the *actus reus* of Rule 77(A)(ii) of the Rules and that the Trial Chamber's failure to acknowledge this constituted an error of law.[200] She also submits that the Trial Chamber's finding that conduct that may render state cooperation less forthcoming necessarily interferes with the administration of justice has no support in international law.[201] She further argues that, in the *Nobilo* case, the Appeals Chamber stated that only conduct "which tends to" obstruct, prejudice, or abuse the administration of justice would meet the requisite standard. Thus, it is only an actual and substantial risk, not a potential one, that would be sufficient to support a conviction for contempt, and the Trial Chamber erred by not taking the *Nobilo* precedent into account.[202] The *Amicus* Prosecutor responds that the findings of the Trial Chamber accord with decisions of the Appeals Chamber.[203]

104. With regard to **sub-ground 7.4**, the Trial Chamber found that Hartmann created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law because the disclosure of protected information undermined

[194] Trial Judgement, para. 74.
[195] Trial Judgement, para. 80.
[196] Trial Judgement, para. 27.
[197] Hartmann Final Appeal Brief, para. 74.
[198] *Amicus* Prosecutor Response Brief, para. 62.
[199] Hartmann Final Appeal Brief, para. 75.
[200] Hartmann Final Appeal Brief, para. 75.
[201] Hartmann Final Appeal Brief, para. 75.
[202] Hartmann Final Appeal Brief, para. 75.
[203] *Amicus* Prosecutor Response Brief, para. 64.

international confidence in the Tribunal and might deter state cooperation.[204] Hartmann contends that the Trial Chamber erred because there is no evidence of any such deterrence.[205] Instead, she argues that the record shows that no such risk existed and that, rather than decreasing, state cooperation with the Tribunal increased by the Applicant after her publication.[206] Similarly, under **sub-ground 7.7**, Hartmann asserts that the Trial Chamber's finding that the alleged risk of states decreasing their cooperation with the Tribunal would necessarily mean that the administration of justice would be interfered with constitutes an error of fact and law.[207] She states that there is no evidence to sustain such a finding and that there is clear, undisputed evidence to the contrary.[208]

105. The *Amicus* Prosecutor responds that the Trial Chamber's finding in this instance was based on *viva voce* and documentary evidence before it that was unchallenged and uncontradicted.[209] The *Amicus* Prosecutor argues that defiance of an order of a Chamber *per se* interferes with the administration of justice and that no additional proof of harm or risk is required. In support, the *Amicus* Prosecutor cites the *Jović* Appeal Judgement, which it states is fully dispositive of this ground of appeal.[210] The *Amicus* Prosecutor submits that deviations from the presumption of openness occur because a Chamber has decided that such a departure is necessary in the interests of the due administration of justice and that anyone who reveals such information frustrates the result that such a ruling is designed to achieve and can be found in contempt.[211]

106. In reply, Hartmann argues that the *Jović* case is not dispositive, that the Appeals Chamber's finding in that case was limited to answering Jović's argument that proof of actual harm was required, and that the *Jović* case did not suggest that any sort of interference, however minor, would suffice under Rule 77(A)(ii) of the Rules.[212] Furthermore, she seeks to distinguish the *Jović* case on the basis that it pertained to the disclosure of material related to ongoing proceedings and to the protection of witnesses' identities, two factors that greatly increased the risk.[213] Instead, she cites the *Nobilo* and *Vujin* cases, in which she argues that the Appeals Chamber stated that only conduct which tends to obstruct, prejudice, or abuse its administration of justice would meet the requisite standard.[214]

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[204] Trial Judgement, paras 74, 80.
[205] Hartmann Final Appeal Brief, para. 77.
[206] Hartmann Final Appeal Brief, para. 77.
[207] Hartmann Final Appeal Brief, para. 80.
[208] Hartmann Final Appeal Brief, para. 80.
[209] *Amicus* Prosecutor Response Brief, para. 63. *See also Amicus* Prosecutor Response Brief, para. 67.
[210] *Amicus* Prosecutor Response Brief, para. 64.
[211] *Amicus* Prosecutor Response Brief, para. 65.
[212] Hartmann Final Reply Brief, para. 22.
[213] Hartmann Final Reply Brief, para. 22.
[214] Hartmann Final Reply Brief, para. 22.

2. Discussion

107. Hartmann is incorrect in her argument that "[w]hilst the Prosecutor need not prove an *actual* interference with the administration of justice, proof must be made that the impugned conduct created a real risk for the administration of justice".[215] When a court order has been violated, the Trial Chamber does not need to assess whether any actual interference took place or whether a real risk to the administration of justice has taken place because such a violation *per se* interferes with the administration of justice. The Appeals Chamber in the *Jović* case held that "[t]he language of Rule 77 shows that a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice."[216] Thus, "[n]o additional proof of harm to the International Tribunal's administration of justice is required".[217]

108. It also follows from the above that the issue of whether there was a real risk to the administration of justice was not a jurisdictional matter. The Appeals Chamber is therefore of the view that the Trial Chamber did not err by refusing to treat this issue as such during the trial.

109. Thus, for these reasons, sub-grounds 7.1, 7.2, 7.4, and 7.7 are dismissed.[218]

B. Sub-ground 7.3

110. In **sub-ground 7.3**, Hartmann asserts that there is no general principle permitting the Tribunal to prosecute a person for disclosing facts pertaining to judicial proceedings *after* the proceedings have closed or ended, subject arguably to the protection of victims or witnesses under Article 22 of the Statute.[219] As proceedings in the *Milošević* case had ended on 14 March 2006, prior to the publication of the Book and Article in question, Hartmann contends that the exercise of the Tribunal's Rule 77 jurisdiction over her conduct was *ultra vires* and an error of law.[220]

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[215] Hartmann Final Appeal Brief, para. 73.
[216] *Jović* Contempt Appeal Judgement, para. 30, *quoting Marijačić and Rebić* Contempt Appeal Judgement, para. 44.
[217] *Jović* Contempt Appeal Judgement, para. 30; *see also Nshogoza* Appeal Judgement, para. 56; *Šešelj* Contempt Appeal Judgement, para. 20.
[218] There is no **sub-ground 7.5** in the Appellant's brief. The Appeals Chamber summarily dismisses **sub-ground 7.6** because it is duplicative of sub-grounds 7.4 and 7.7, which are without merit. Hartmann Final Appeal Brief, para. 79. **Sub-ground 7.8** relates to the Appellant's contention that her freedom of expression was illegally curtailed. Hartmann Final Appeal Brief, para. 81. The Appellant's arguments in this regard are therefore resolved in ground of appeal 2. In **sub-ground 7.9**, the Appellant argues that the Trial Chamber erred by "double counting" the alleged "real risk" as an aggravating factor. Hartmann Final Appeal Brief, para. 82. This sub-ground constitutes an undeveloped argument and therefore is summarily dismissed.
[219] Hartmann Final Appeal Brief, para. 76. Article 22 of the Statute of the International Criminal Tribunal for the former Yugoslavia states: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."
[220] Hartmann Final Appeal Brief, para. 76.

111. The *Amicus* Prosecutor states that, contrary to Hartmann's assertions, prosecutions for contempt do occur after proceedings are completed.[221] The *Amicus* Prosecutor argues that, when the rationale for the restriction survives the proceedings, so too does the risk of a person's prosecution for contempt.[222]

112. In reply, Hartmann states that the *Amicus* Prosecutor and the Trial Chamber neither provided a legal basis that would permit a prosecution for contempt once proceedings are complete nor established a general principle to that effect.[223]

113. The Appeals Chamber considers that it is a regular feature of protective measure orders that they remain in effect even after a proceeding has come to a close. Hartmann acknowledges as much in her final Appeal Brief, albeit only in relation to the protection of "victims/witnesses under Article 22 [of the] Statute".[224] It is for a competent Chamber to decide that protective measures are not in place any longer, not Hartmann. The Appeals Chamber has previously held that "an order remains in force until a Chamber decides otherwise".[225]

114. Accordingly, sub-ground 7.3 is dismissed.

C. Conclusion

115. The Appeals Chamber therefore dismisses ground of appeal 7 in its entirety.

IX. *MENS REA* – GROUND 8

116. At trial, the Defence submitted that, in addition to the element of knowledge or wilful blindness as part of the *mens rea*, the *Amicus* Prosecutor had to prove that Hartmann acted with specific intent to interfere with the administration of justice. Because she lacked such intent, it was argued by the Defence that the requisite *mens rea* was not proved.[226] In relation to this point, the Trial Chamber considered that the Defence's understanding that the definition of *mens rea* for conduct under Rule 77(A)(ii) of the Rules included an additional element of "specific intent to interfere with the administration of justice" was an erroneous characterisation of the law.[227]

117. In addition, the Trial Chamber held that it was satisfied beyond reasonable doubt that Hartmann had knowledge at the time of the publication of her Book and the Article that her

[221] *Amicus* Prosecutor Response Brief, para. 66.
[222] *Amicus* Prosecutor Response Brief, para. 66.
[223] Hartmann Final Reply Brief, para. 23.
[224] Hartmann Final Appeal Brief, para. 76.
[225] *Jović* Contempt Appeal Judgement, para. 30; *Marijačić and Rebić* Contempt Appeal Judgement, para. 45.
[226] Trial Judgement, para. 52.

disclosure was in violation of an order of the Tribunal. It therefore considered that the *mens rea* for both counts of the Order in Lieu of Indictment had been proved by the *Amicus* Prosecutor.[228]

A. Sub-ground 8.1–8.5

1. Submissions

118. Hartmann argues that the Trial Chamber erred when it held that Rule 77(A)(ii) of the Rules and international law did not require proof of an intent to interfere with the administration of justice and when it "suggest[ed]" that any knowing or wilful violation of an order satisfies the *mens rea* requirement.[229] Hartmann contends that under Rule 77(A)(ii) of the Rules there must be proof of a specific intent to interfere with the administration of justice.[230]

119. Hartmann argues that the Trial Chamber referred to the *Beqaj* and *Maglov* cases, but then incorrectly dismissed them.[231] Hartmann observes that in the *Jović* and *Marijačić and Rebić* cases, which were cited by the Trial Chamber, no issues were raised as to the need for an intent to interfere with the administration of justice. Rather, the findings pertained to a suggestion that, as part of the *actus reus*, harm or actual prejudice to the administration of justice had to be proved.[232]

120. Hartmann submits that the Trial Chamber failed to take notice of the *Nobilo* case[233] and instead erred in law or fact by relying upon the *Bulatović* case, which pertained not to Rule 77(A)(ii) of the Rules, but rather to Rule 77(A)(i) of the Rules. Hartmann also contends that the Trial Chamber assumed, without verifying and establishing, that the same *mens rea* is applicable to these different kinds of contempt. Hartmann notes that the *Bulatović* case related to a contempt in the face of the court, unlike the present case, and that it is common to most common law jurisdictions to have different *mens rea* requirements for "out-of-court" contempt and contempt "in the face of the court".[234] Hartmann argues that, in the *Nobilo* case, the Appeals Chamber held that an accused could only be convicted under Rule 77 of the Rules for an out-of-court contempt where he or she has been shown to have acted "with specific intention of frustrating [the] effect [of confidential orders]". Hartmann claims, however, that the Trial Chamber in the present case failed to take notice of this binding precedent, which reflects a general principle of international law.

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[227] Trial Judgement, para. 55.
[228] Trial Judgement, para. 62.
[229] Hartmann Final Appeal Brief, para. 83.
[230] Hartmann Final Appeal Brief, para. 83.
[231] *See Beqaj* Trial Judgement; *Prosecutor v. Radoslav Brđanin Concerning Allegations Against Milka Maglov*, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004.
[232] Hartmann Final Appeal Brief, para. 83.
[233] Hartmann Final Appeal Brief, para. 84.
[234] Hartmann Final Appeal Brief, para. 83. *See also Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, paras 4-6.

Hartmann states that in the *Maglov* case the Trial Chamber cited many authorities supporting this requirement and that many other authorities exist.[235]

121. In conclusion, Hartmann asserts that a general principle criminalising conduct, despite the absence of a specific intent to interfere with the administration of justice, could simply not be established as a matter of international law.[236]

122. The *Amicus* Prosecutor responds that the Trial Chamber's factual findings on this issue are dispositive and that Hartmann's argument is really a discussion of what, in her view, the law ought to be, rather than what the law in fact is. According to the *Amicus* Prosecutor, the Trial Chamber's legal conclusions were correct and fully consistent with the jurisprudence of the Appeals Chamber, which is supported by national jurisprudence.[237] The *Amicus* Prosecutor specifically avers that the Appeals Chamber's holding in the *Jović* case is fully dispositive of this ground of appeal.[238]

123. The *Amicus* Prosecutor argues that the Appeals Chamber authoritatively resolved the issue of whether it is necessary to prove specific intent, including in the *Marijačić and Rebić* case.[239] The *Amicus* Prosecutor then takes issue with Hartmann's interpretation of the *Nobilo* case, arguing that the Appeals Chamber in that case noted that the offence of contempt is a protean one concerned with many widely diverse types of conduct and states of mind. The *Amicus* Prosecutor also avers that, in the passage from the *Nobilo* case relied upon by Hartmann, the Appeals Chamber was only setting forth examples of contemptuous conduct. The *Amicus* Prosecutor also argues that this passage from the *Nobilo* case, which examined specific intent, pertained to the publication of a witness's identity and therefore is inapplicable to the present Appeal.[240]

124. In conclusion, the *Amicus* Prosecutor avers that Hartmann has failed to show how this ground of appeal meets the standard of review and therefore submits that it, and all its sub-grounds, should be dismissed.[241]

125. In her Reply Brief, Hartmann takes issue with the *Amicus* Prosecutor's interpretation of the *Nobilo* case and argues that that case "plainly/explicitly supports" Hartmann's position that it is

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[235] Hartmann Final Appeal Brief, para. 84.
[236] Hartmann Final Appeal Brief, para. 84.
[237] *Amicus* Prosecutor Response Brief, para. 69.
[238] *Amicus* Prosecutor Response Brief, para. 77.
[239] *Amicus* Prosecutor Response Brief, para. 74.
[240] *Amicus* Prosecutor Response Brief, para. 75. The *Amicus* Prosecutor also relies upon a case from Australia. *Amicus* Prosecutor Response Brief, para. 76. In her Final Reply Brief, the Appellant disputes the *Amicus* Prosecutor's interpretation of this case and seeks to counter with "English law" and cases from other domestic jurisdictions. Hartmann Final Reply Brief, para. 25. The Appeals Chamber does not consider that an analysis of these non-binding authorities is necessary for its disposition of this matter.
[241] *Amicus* Prosecutor Response Brief, para. 78.

necessary to prove specific intent.[242] Hartmann notes that the *Nobilo* case was later cited as authority for this specific intent requirement by other Chambers in relation to Rule 77(A)(ii) of the Rules.[243] Hartmann also argues that neither the *Amicus* Prosecutor nor the Trial Chamber established a general principle that conduct could be criminalised under Rule 77(A)(ii) of the Rules without proof of specific intent and that, without a general principle, a conviction would constitute a violation of the principle of legality.[244]

2. Discussion

126. As a preliminary matter, the Appeals Chamber notes that Hartmann, in her Reply Brief, accuses the *Amicus* Prosecutor of impermissibly adding an argument in his re-filed Response Brief.[245] The Appeals Chamber recalls that Hartmann's first two briefs were struck because they failed to comply with the relevant requirements.[246] In striking the second brief, the Appeals Chamber observed that "the Appellant cannot complain about differences in argumentation in the *Amicus* Prosecutor's re-filed respondent's brief" because "the *Amicus* Prosecutor's brief must now meet the present state of the Appellant's arguments, not the previous ones, which no longer control this appeal."[247] Hartmann's complaint has thus already been rejected.[248]

127. The Appeals Chamber recalls that it is settled jurisprudence that "the requisite *mens rea* for a violation of Rule 77(A)(ii) of the Rules is knowledge that the disclosure in question is in violation of an order of a Chamber. Such knowledge may be proven by evidence other than the accused's statement expressing a particular intent".[249] Insofar as Hartmann contends that the *Nobilo* Appeal Judgement set out a different standard,[250] she is mistaken; any ambiguity in its analysis of the *mens rea* required to enter a conviction for contempt has been definitively addressed by later Appeals Chamber judgements.[251]

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[242] Hartmann Final Reply Brief, para. 24.
[243] Hartmann Final Reply Brief, para. 24.
[244] Hartmann Final Reply Brief, para. 25.
[245] Hartmann Final Reply Brief, para. 24.
[246] Decision on Further Motions to Strike, para. 16; Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009, para. 27.
[247] Decision on Further Motions to Strike, para. 13.
[248] Decision on Further Motions to Strike, para. 15 ("The Appeals Chamber is concerned at the progress of this appeal and the manner in which the Appellant and her counsel are approaching it. Faced with a clear order from the Appeals Chamber to file an appeal brief that conformed to the relevant Rules and Practice Directions, counsel have not done so and continue to engage in a manner of litigation that has necessitated a third filing of the appeal brief. This is unfortunate, and the Appeals Chamber urges the Appellant to ensure that she complies fully with the order of the Appeals Chamber.").
[249] *Šešelj* Contempt Appeal Judgement, para. 26 (internal citations omitted). *See also Jović* Contempt Appeal Judgement, para. 27.
[250] *See* Hartmann Final Appeal Brief, para. 84. *See also Nobilo* Appeal Judgement, paras 40-41.
[251] *See, e.g., Šešelj* Contempt Appeal Judgement, para. 26; *Jović* Contempt Appeal Judgement, para. 27. *See also Nobilo* Appeal Judgement, paras 40, 41, 53, and 54.

128. The Trial Chamber set out the *mens rea* required to enter a conviction for contempt under Rule 77(A)(ii) of the Rules as follows:

> The *mens rea* required [....] is the disclosure of particular information in knowing violation of a Chamber's order. Generally, it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental. This may be inferred from circumstantial evidence. Where it is established that an accused had knowledge of the existence of a Court order, a finding of intent to violate the order will almost necessarily follow. Wilful blindness to the existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element. Mere negligence in failing to ascertain whether an order had been made is insufficient.[252]

The Appeals Chamber considers that the Trial Chamber's analysis of the *mens rea* required to enter a conviction for contempt was consistent with Appeals Chamber precedent. It correctly found that this precedent does not require the Prosecution to prove specific intent to interfere with the administration of justice in order to secure a conviction under Rule 77(A)(ii) of the Rules.

3. Conclusion

129. These sub-grounds of appeal are therefore dismissed.[253]

B. Sub-grounds 1.9–1.10, 6.3, and 8.6–8.8

1. Submissions

130. Hartmann observes that the Trial Chamber suggested that the strongest evidence of her *mens rea* was her knowledge of the confidentiality of the two Appeal Decisions. According to Hartmann, as set forth in **sub-ground 8.6**, the Trial Chamber erred in law or in fact and/or abused its discretion when making these findings. She states that she knew of the existence of the Appeal Decisions and knew that they had originally been filed confidentially because these facts had been made public by the Tribunal and the Applicant and in the media. It is therefore argued that the Trial Chamber equated knowledge of that fact with knowledge that the facts disclosed in the Book or Article continued to be treated as confidential at the time of publication.[254] Further, in **sub-ground 8.7**, it is argued that the Trial Chamber erred in fact when failing to identify any evidence that she had wilfully disclosed information that she knew was to be treated as confidential and despite evidence

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[252] Trial Judgement, para. 22 (internal citations omitted).

[253] The Appellant argues in **sub-grounds 8.2**, **8.4**, and **8.5** that the Trial Chamber erred in law by not requiring the *Amicus* Prosecutor to prove the correct *mens rea* element. Hartmann Final Appeal Brief, paras 85-87; *see also Amicus* Prosecutor Response Brief, paras 70-73. The Appeals Chamber notes that there is no **sub-ground 8.3**. The Appeals Chamber recalls its holding in relation to sub-ground 8.1 that the Trial Chamber correctly identified the *mens rea* of the offence. Because the Appellant's arguments in these sub-grounds of appeal are premised upon the contention that the Trial Chamber applied the incorrect *mens rea* element, it is unnecessary for the Appeals Chamber to examine these arguments any further.

[254] Hartmann Final Appeal Brief, para. 88.

to the contrary. Hartmann states that she believed and understood that all the facts that she discussed were in the public domain and could therefore be disclosed.[255] In the alternative, Hartmann submits in **sub-ground 8.8** that the Trial Chamber placed disproportionate weight upon her knowledge that the Appeal Decisions had originally been filed confidentially and failed to consider all of the evidence contrary to a finding of knowing or wilful disclosure of confidential facts. The Trial Chamber therefore, according to Hartmann, abused its discretion and/or committed an error of fact.[256]

2. Discussion

131. The Appeals Chamber considers that, in arriving at its findings in relation to Hartmann's state of mind, the Trial Chamber considered evidence that she revealed information in her Book that she clearly stated, in the Book, was contained within the confidential Appeal Decisions.[257] The Trial Chamber also considered evidence that Hartmann published her Article containing the confidential information *after* the Registrar's Letter informing her that he was concerned about the disclosure of confidential information and that "administrative or legal measure[s]" were being contemplated.[258] The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude from this evidence that Hartmann possessed knowledge at the time of the publication of her Book and Article that her disclosure was in violation of an order of a Chamber.[259]

132. Regarding Hartmann's argument that there was evidence contrary to a finding of knowing or wilful disclosure of confidential facts, Hartmann cites portions of her suspect interview of 9 June 2008, wherein she stated that the existence of the two Appeal Decisions was public knowledge, but their contents were not,[260] and that her intention in including in her Book the information from the Decisions was "to complete information already in the public domain".[261] The Appeals Chamber has reviewed this evidence and does not find that it is contrary to the findings of the Trial Chamber. Nor does it show that Hartmann was under the belief that the information in the two Appeal Decisions had been rendered public either by the Tribunal or the Applicant.

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[255] Hartmann Final Appeal Brief, para. 89.
[256] Hartmann Final Appeal Brief, para. 90.
[257] Trial Judgement, para. 58.
[258] Trial Judgement, paras 59-61.
[259] Trial Judgement, para. 62.
[260] Exhibit P2.1, 1004-2, p. 6 (cited in note 135 of the Hartmann Final Appeal Brief). *See also* Exhibit P1.1, 1002-1, p. 4 (wherein the Appellant states that "much of" the information she disclosed was in the public domain for years without it giving rise to reactions from the Tribunal) (cited in note 135 of the Hartmann Final Appeal Brief). The Appellant also cites, in note 135 of her Final Appeal Brief, the evidence of witnesses Yorric Kermarrec, Louis Joinet, and Nataša Kandić, but the Appeals Chamber is of the view that their evidence does not undermine the reasonableness of the Trial Chamber's findings.
[261] Exhibit P2.1, 1003-2, p. 5 (cited in note 135 of the Hartmann Final Appeal Brief). *See also* Exhibit P2.1, 1002-2, p. 6, 1003-2, pp. 3-4, 8-11 (cited in note 136 of the Hartmann Final Appeal Brief).

133. These sub-grounds of appeal are therefore dismissed.[262]

C. Conclusion

134. The Appeals Chamber therefore dismisses ground of appeal 8 in its entirety, as well as sub-grounds 1.9, 1.10, and 6.3.

X. THE REGISTRAR'S LETTER – GROUND 9

135. In determining Hartmann's *mens rea*, the Trial Chamber relied upon the Registrar's Letter, sent 19 October 2008, which stated that her Book appeared to make reference to official Tribunal information and documents that were not public and of which she had knowledge in the context of her official duties as an employee of the Tribunal from 13 October 2000 to 12 October 2006. At trial, the Defence submitted that nothing in the Registrar's Letter suggested that she had violated the confidentiality of a court order in her Book and that the Letter contained no reference to Rule 77 of the Rules or to the Appeal Decisions.

136. The Trial Chamber considered that, even without explicit references to the Appeal Decisions or Rule 77 of the Rules, Hartmann was formally put on notice by the Registrar's Letter that the Registry was concerned about the disclosure of confidential information. The Trial Chamber also found that the fact that Hartmann published essentially the same information in her Article after having received the Registrar's Letter was strongly suggestive of her state of mind.

137. Hartmann states under **sub-ground 9.1** that the Trial Chamber, by permitting the *Amicus* Prosecutor to tender the Registrar's Letter into evidence and subsequently rely on it, violated her fundamental rights, international law, and Rules 89(D) and 95 of the Rules.[263] The *Amicus* Prosecutor contends that Hartmann: (a) received a copy of the Registrar's Letter on or about 19 October 2007; (b) consequently had notice of its contents 20 months prior to trial; and, (c) was notified of the *Amicus* Prosecutor's intention to rely upon the Letter as evidence during the

[262] In **sub-ground 6.3**, the Appellant argues that, if the Trial Chamber found that the Appellant was acting in more than a negligent manner, it erred and abused its discretion. Hartmann Final Appeal Brief, para. 69. For the reasons given in this section, the Appeals Chamber dismisses this sub-ground of appeal. **Sub-ground 1.9** (Hartmann Final Appeal Brief, para. 6) is duplicative of the arguments set forth in this section and therefore is dismissed. In **sub-ground 1.10**, (Hartmann Final Appeal Brief, para. 7) Hartmann argues that she was not validly charged in respect of the *mens rea* requirement with respect to her awareness that her Book contained confidential information. Based upon paragraph 4 of the Annex to the Order in Lieu of Indictment, which alleges that she "knew that the information was confidential at the time disclosure was made, that the decisions from which the information was drawn were ordered to be filed confidentially, and that by her disclosure she was revealing confidential information to the public", the Appeals Chamber is of the view that Hartmann was on adequate notice that she was charged with revealing confidential information. Annex to Order in Lieu of Indictment, para. 4. Sub-grounds 1.9 and 1.10 are therefore dismissed.

[263] Hartmann Final Appeal Brief, para. 91.

proceedings at least eight months in advance of the trial date.[264] In reply, Hartmann contests the Respondent's assertion that she was aware of the *Amicus* Prosecutor's intention to rely on the Registrar's Letter as evidence in the trial proceedings and reiterates that she was prejudiced.[265]

138. Hartmann submits under **sub-ground 9.2** that the Trial Chamber erred in fact by suggesting that the Registrar's Letter reflected Hartmann's awareness of the fact that the information relevant to the charges eventually filed against her was still considered confidential.[266] The *Amicus* Prosecutor responds that the Registrar's Letter is of "considerable probative value" concerning Hartmann's *mens rea*.[267]

139. The Appeals Chamber recalls that, on appeal, the parties must limit their arguments to legal errors that invalidate the Judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute.[268] An allegation of an error of law that has no chance of changing the outcome of a Judgement may be rejected on that ground.[269] Only an error of fact that has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[270]

140. The Appeals Chamber observes that the Trial Chamber found Hartmann's admissions concerning the confidentiality of the Appeal Decisions in her own publications to be the strongest evidence of her *mens rea*.[271] The Appeals Chamber therefore considers that any possible error in relation to the Registrar's Letter would not have changed the outcome of the Judgement or occasioned a miscarriage of justice.

141. The Appeals Chamber therefore dismisses ground of appeal 9 is in its entirety.

XI. MISTAKE OF FACT AND LAW – GROUND 10

142. At trial, Hartmann raised mistake of fact and mistake of law as defences to the alleged acts of contempt. She argued that disclosure by the Tribunal and the Applicant, as well as public discussion in the media prior to the publication of her Book and Article, of the information she was charged with disclosing could have led her to reasonably believe that the information was no longer treated as confidential.[272] The Trial Chamber held that Hartmann could not have been reasonably

[264] *Amicus* Prosecutor Response Brief, paras 79-81.
[265] Hartmann Final Reply Brief, para. 26.
[266] Hartmann Final Appeal Brief, para. 92.
[267] *Amicus* Prosecutor Response Brief, paras 82-83.
[268] *Šešelj* Contempt Appeal Judgement, para. 9; *Jokić* Contempt Appeal Judgement, para. 11.
[269] *Šešelj* Contempt Appeal Judgement, para. 10; *Jokić* Contempt Appeal Judgement, para. 12.
[270] *Šešelj* Contempt Appeal Judgement, para. 11; *Jokić* Contempt Appeal Judgement, para. 13.
[271] Trial Judgement, paras 58, 62.
[272] Trial Judgement, para. 63.

mistaken in fact with respect to the confidential status of the Appeal Decisions.[273] In relation to the mistake of law, the Trial Chamber found that a person's misunderstanding of the law does not, in itself, excuse a violation of it.[274]

143. Hartmann argues that the Trial Chamber erred in fact and law when it excluded or disregarded the reasonable possibility that: (a) she was unaware of the criminal nature of her conduct (if regarded as such) and (b) as a result of an error of fact or law, she believed or understood that the facts in question were no longer treated as confidential at the time of publication.[275]

144. The *Amicus* Prosecutor responds that this ground of appeal should fail for two reasons. First, the *Amicus* Prosecutor submits that Hartmann is inviting the Appeals Chamber to reach a conclusion on the basis of speculation and without supporting evidence. Second, the speculative conclusions sought to be drawn by Hartmann are contrary to the Trial Chamber's express findings based on the evidence that Hartmann did not labour under a mistake of fact and that, in relation to the law, the evidence demonstrated knowledge, rather than ignorance, of the law.[276]

145. Hartmann replies that the *Amicus* Prosecutor's "suggestion" that there was no evidence to support the conclusion that Hartmann might have laboured under a mistaken belief is contradicted by the record.[277]

146. In respect of the mistake of fact defence, the Appeals Chamber observes that the Trial Chamber, in reaching its conclusion on this issue, recalled: (a) that, in her Book, Hartmann explicitly stated that the Appeal Decisions were confidential; (b) that, when asked about her knowledge of this during the suspect interview, she replied, "[i]t would appear that I had good sources"; (c) that, despite claiming to know from her "sources" that the Appeal Decisions were confidential, she nonetheless did not "regard any check as necessary" with the United Nations or the Tribunal prior to the publication of her Book in order to inquire about potential problems with disclosure; and, (d) that there was an absence in Hartmann's Book and Article of any reference to public sources in which she claimed the facts related to the Appeal Decisions were revealed. Based upon the foregoing, the Appeals Chamber considers that the Trial Judgement analysed the evidence

[273] Trial Judgement, para. 64.
[274] Trial Judgement, para. 65.
[275] Hartmann Final Appeal Brief, para. 93.
[276] *Amicus* Prosecutor Response Brief, para. 85.
[277] Hartmann Final Reply Brief, para. 27. The Appellant argues in her reply that this ground of appeal is not opposed by the *Amicus* Prosecutor. Hartmann Final Reply Brief, para. 27. The Appeal Chamber considers that the *Amicus* Prosecutor has indeed responded to this ground of appeal, contrary to the contention of the Appellant.

in relation to the mistake of fact defence raised by Hartmann and acted reasonably when it rejected this defence.

147. In respect of the mistake of law defence, the Appeals Chamber recalls its holding in the *Jović* case that:

> [K]nowledge of the legality of the Trial Chamber's order is not an element of the *mens rea* of contempt; to hold otherwise would mean that an accused could defeat a prosecution for contempt by raising the defence of a mistake of law. [...] It is not a valid defence that one did not know that disclosure of the protected information in violation of an order of a Chamber was unlawful.[278]

The Trial Chamber accurately identified this principle, citing the *Jović* Contempt Trial Judgement, and applied it to the present case.[279] Moreover, the Trial Chamber went even further and identified evidence adduced at trial that clearly demonstrated that Hartmann was not ignorant of the relevant law.[280]

148. The Appeals Chamber therefore dismisses ground of appeal 10 in its entirety.

XII. RIGHT TO FREEDOM OF EXPRESSION – GROUND 2[281]

149. The Trial Chamber considered the arguments raised by the Defence at trial regarding the alleged infringement of Hartmann's right to freedom of expression as a journalist, principally under Article 10 of the European Convention on Human Rights ("ECHR").[282] The Trial Chamber acknowledged Hartmann's right to freedom of expression, but noted a qualification to that right in relation to court proceedings.[283] The Trial Chamber held that Hartmann, in openly publishing confidential information, created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law.[284]

A. Submissions

150. Under **sub-ground 2.1**, Hartmann argues that the Trial Chamber erred in law in holding that the standard applied in assessing the contempt conviction against her was consistent with jurisprudence from the European Court of Human Rights ("ECtHR").[285] Under **sub-ground 2.2,**

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[278] *Jović* Contempt Appeal Judgement, para. 27.
[279] Trial Judgement, para. 65.
[280] Trial Judgement, para. 66.
[281] The Appeals Chamber notes as a preliminary issue that, although the Appellant's appeal brief indicates that ground of appeal 2 contains 16 sub-grounds of appeal, the Appellant has omitted to present **sub-ground 2.13** in her appeal brief.
[282] Trial Judgement, paras 68-74; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1 November 1998, ETS 155 ("ECHR").
[283] Trial Judgement, para. 70.
[284] Trial Judgement, para. 74.
[285] Hartmann Final Appeal Brief, para. 15.

Hartmann submits that the Trial Chamber erred in law by failing to consider the strong presumption under international law of unrestricted publicity in criminal proceedings and by instead treating this presumption as one of many "equally important" factors.[286] Under **sub-ground 2.4**, Hartmann asserts that the Trial Chamber erred in law or fact by failing to consider the increased protection guaranteed to free expression regarding issues of public or general interest.[287] In **sub-ground 2.5**, Hartmann contends that the Trial Chamber erred in law or fact by failing to consider the right of the public to receive information disclosed by her in assessing the proportionality of the interference with her right to free expression.[288]

151. In **sub-ground 2.9**, Hartmann contends that the Trial Chamber erred in law or fact when it failed to establish, or even failed to seek to establish, that the restrictions on her—and the public's—freedom of expression in the form of a criminal conviction were "necessary".[289] Under **sub-ground 2.10**, she argues that the Trial Chamber erred in law or fact by misapplying the requirement of proportionality when it balanced various irrelevant factors in the Trial Judgement.[290] In **sub-ground 2.11**, Hartmann alleges that the Trial Chamber erred in law or fact when it failed to apply the proportionality test in deciding whether a criminal conviction was appropriate in the circumstances.[291]

152. In **sub-ground 2.12**, Hartmann contends that the Trial Chamber erred in law or fact when it failed to consider facts relevant to determining the necessity or proportionality of the restriction on her freedom of expression "as were favourable to her".[292] Finally, in **sub-ground 2.15**, she argues that the Trial Chamber erred in law by merging two issues relevant to testing the permissibility of restrictions on her freedom of expression. In her view, the Trial Chamber was required to note the aim of the good administration of justice, take into account all facts relevant to the proportionality/necessity test, and determine whether the restriction on her free speech through a criminal conviction was necessary and proportionate.[293]

153. In response, the *Amicus* Prosecutor argues that the Trial Chamber applied the correct legal standard in assessing the restriction on Hartmann's freedom of expression. He submits that Hartmann fails to acknowledge valid restrictions on what the *Amicus* Prosecutor terms the "open

[286] Hartmann Final Appeal Brief, para. 16. The Appellant relies upon jurisprudence from the United Kingdom and the European Court of Human Rights ("ECtHR") to support her position. Hartmann Final Appeal Brief, notes 21-23, 26.
[287] Hartmann Final Appeal Brief, para. 18.
[288] Hartmann Final Appeal Brief, para. 19.
[289] Hartmann Final Appeal Brief, para. 23.
[290] Hartmann Final Appeal Brief, para. 24.
[291] Hartmann Final Appeal Brief, para. 25.
[292] Hartmann Final Appeal Brief, para. 26.
[293] Hartmann Final Appeal Brief, para. 28.

court principle".[294] The *Amicus* Prosecutor also states that the decision to displace the presumption of openness is consistent with international law.[295] The *Amicus* Prosecutor contends that Hartmann selectively applies ECtHR jurisprudence and that, even if the ECtHR jurisprudence did apply, the cases relied upon by Hartmann can be distinguished from the case at hand.[296]

154. In reply, Hartmann contends that the *Amicus* Prosecutor is wrong in his enunciation of the appropriate legal standard in relation to legitimate curtailments on freedom of expression.[297] She contends that the standard of what is "necessary in a democratic society" is not whether the restriction on freedom of expression pursues a legitimate aim, but rather whether the restriction is imposed on a fundamental right.[298] Hartmann notes that she "never contested that the protection of the administration of justice could be a legitimate aim for the purpose of ordering confidentiality, including in relation to information received from a state".[299] Instead, she contended that the errors "pertain [...] to the additional requirements of (i) 'necessity', (ii) 'proportionality' and (iii) sufficiency of reasons adduced and whether, in the circumstances, [her] criminal conviction [...] for allegedly discussing confidential matters satisfied these requirements".[300] According to Hartmann, the *Amicus* Prosecutor mistakenly argues that she objected to whether protective measures could be ordered at all, when this was never her position.[301]

155. The *amicus curiae* brief submitted by ARTICLE 19 addresses freedom of expression principles as developed in international law.[302] ARTICLE 19 notes that the right to freedom of expression is a fundamental human right guaranteed under, *inter alia*, the Universal Declaration of Human Rights[303] and the International Covenant on Civil and Political Rights ("ICCPR").[304] Reference is made also to additional jurisprudence, both international and national.[305]

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[294] *Amicus* Prosecutor Response Brief, paras 27-31.
[295] *Amicus* Prosecutor Response Brief, para. 29.
[296] *Amicus* Prosecutor Response Brief, para. 27.
[297] Hartmann Final Reply Brief, para. 6.
[298] Hartmann Final Reply Brief, para. 6.
[299] Hartmann Final Reply Brief, para. 6.
[300] Hartmann Final Reply Brief, para. 6.
[301] Hartmann Final Reply Brief, para. 6.
[302] *Amicus Curiae* Brief on Behalf of ARTICLE 19, 19 February 2010 ("ARTICLE 19 *Amicus* Brief"), para. 3.
[303] U.N. General Assembly, Universal Declaration of Human Rights ("UDHR"), 10 December 1948, G.A. Res. 217 (III)A, Article 19.
[304] U.N. General Assembly, International Covenant on Civil and Political Rights ("ICCPR"), 16 December 1966, United Nations Treaty Series, vol. 999, p. 171, Article 19. *See also* ECHR, Article 10; American Convention on Human Rights, *published* 22 November 1969, *entered into force* 18 July 1978, OAS Treaty Series No. 36; 9 I.L.M. 99 (1969), Article 13; African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, *entered into force* 21October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 9.
[305] ARTICLE 19 *Amicus* Brief, paras 6-32.

156. ARTICLE 19 concludes its *amicus* brief by inviting the Appeals Chamber to consider various principles regarding freedom of expression in deciding the Appeal.[306] This includes the principle that any interference with freedom of expression must serve a legitimate aim and be necessary and proportionate to the aim pursued, with any exceptions being narrowly interpreted and convincingly established.[307] ARTICLE 19 suggests that media reporting of criminal proceedings must be protected to make sure that the public receives information on matters of public interest. It also notes that media reporting enables public scrutiny of the functioning of the criminal justice system.[308]

157. The Appeals Chamber permitted Hartmann and the *Amicus* Prosecutor to respond to ARTICLE 19's *amicus* brief.[309] Hartmann responds by adopting and supporting the submissions and conclusions of ARTICLE 19.[310] The *Amicus* Prosecutor responds that the general principles in the Trial Judgement are consistent with the jurisprudence cited by ARTICLE 19.[311] The *Amicus* Prosecutor notes that ARTICLE 19 fails to cite cases in support of the principles that prohibiting publication of confidential information violates freedom of expression, criminal contempt of court violates freedom of expression, or the exercise of the criminal contempt power to prosecute and convict parties who have violated a court order violates the freedom of expression.[312]

B. Discussion

158. The Appeals Chamber considers that Hartmann appears to submit that, had the Trial Chamber enforced a "strong" presumption in favour of unrestricted publicity, it would have ruled in her favour and permitted her to disclose confidential information pursuant to her freedom of expression rights. The Appeals Chamber considers that there is no merit in Hartmann's submission. There is no strong presumption of unrestricted publicity for matters a Chamber has ruled are not to be disclosed to the public. This was made clear in the *Jović* case, in which it was held that:

> The effect of a closed session order is to exclude the public, including members of the press, from the proceedings and to prevent them from coming into possession of the protected information being discussed therein. In such cases, the presumption of public proceedings under Article 20(4) of the Statute does not apply.[313]

159. At the heart of Hartmann's submission is the alleged inconsistency of the Trial Judgement with freedom of expression principles recognised by the ECHR. The Appeals Chamber is not bound

[306] ARTICLE 19 *Amicus* Brief, para. 34.
[307] ARTICLE 19 *Amicus* Brief, para. 33.
[308] ARTICLE 19 *Amicus* Brief, para. 33.
[309] Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010, para. 10(b).
[310] Hartmann Response to *Amicus* Brief, paras 2, 62.
[311] Annex to Motion to Replace with Revised Response, para. 4.
[312] Annex to Motion to Replace with Revised Response, para. 4.
[313] *Jović* Contempt Appeal Judgement, para. 21.

by the findings of regional or international courts and as such is not bound by ECtHR jurisprudence.[314]

160. The Appeals Chamber notes that Article 21 of the Statute of the Tribunal mirrors the provisions of Article 14 of the ICCPR.[315] The ICCPR and its commentaries are thus among the most persuasive sources in delineating the applicable protections for freedom of expression in the context of the Tribunal's proceedings.[316] The Human Rights Committee of the United Nations ("Human Rights Committee") has interpreted Article 14(1) of the ICCPR to require that courts' judgements be made public, with "certain strictly defined exceptions."[317] The Appeals Chamber notes that, although Article 19(2) of the ICCPR states that "[e]veryone shall have the right to freedom of expression," Article 19(3) recognises that

> The exercise of the right provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[318]

The *travaux préparatoires* of the ICCPR indicate that the "protection of [...] public order" in Article 19(3) was intended to include the prohibition of the procurement and dissemination of

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[314] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 51. In the *Delalić et al.* Appeal Judgement, the Appeals Chamber stated that, "[a]lthough the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion". *Delalić et al.* Appeal Judgement, para. 24.

[315] *See* U.N. Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 106. This Report was issued pursuant to U.N. Security Council Resolution 808, which requested the Secretary-General "to submit for consideration by the [Security] Council [...] a report" on the establishment of the Tribunal. *See* U.N. Security Council Resolution 808, U.N. Doc, S/RES/808 (1993), p. 2.

[316] The ICCPR has 167 state parties and, as such, is considered to be closer to universal application than the European Convention, which is a regional human rights instrument. *See* United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>, accessed 11 July 2011. The Appeals Chamber in the *Barayagwiza* Decision stated that the ICCPR "is part of general international law and is applied on that basis." In contrast, the Appeals Chamber indicated that, "[r]egional human rights treaties, such as the [ECHR] and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom." *Jean-Bosco Barayagwiza v. The Prosecutor*, Case. No. ICTR-97-19-AR72, Decision, 3 November 1999, para. 40.

[317] CCPR General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, para. 6.

[318] ICCPR, Article 19(3). Article 14(1) of the ICCPR also restricts a journalist's right to report on court proceedings. It states, *inter alia*, that "the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". This provision was cited in the *Blaškić* and *Jović* cases. *See Jović* Contempt Trial Judgement, para. 23, note 95; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, 18 July 1997, note 248.

confidential information.[319] In respect of whether the restriction to an individual's freedom of expression is "necessary" to achieve its aim, the Human Rights Committee has considered whether the action taken was proportionate to the sought-after aim.[320]

161. Based upon the foregoing, therefore, in order to legitimately restrict Hartmann's freedom of expression under Article 19 of the ICCPR, the restriction must have been provided by law and proportionately necessary to protect against the dissemination of confidential information.[321] The two Appeal Decisions in the case of *Prosecutor v. Slobodan Milošević* contained restrictions on the freedom of expression that were "provided by law" because they were filed confidentially under protective measures granted pursuant to Rule 54 *bis* of the Rules. Furthermore, restricting Hartmann's freedom of expression in this manner was both proportionate and necessary because it protected the "public order" by guarding against the dissemination of confidential information. These restrictions were therefore within the ambit of Article 19(3) of the ICCPR.

162. In this regard, the Appeals Chamber observes that the Trial Chamber found that the effect of Hartmann's disclosure of confidential information decreased the likelihood that states would cooperate with the Tribunal in the future, thereby undermining its ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law.[322] The Trial Chamber further found that prosecuting an individual for contempt under these circumstances was proportionate to the effect her actions had on the Tribunal's ability to administer international criminal justice.[323] The Appeals Chamber is therefore of the view that the Trial Chamber was correct to conclude that Rule 54 *bis* of the Rules permits the Tribunal to impose confidentiality in an effort to secure the cooperation of sovereign states.[324] In light of the foregoing, the Appeals Chamber is satisfied that the Trial Chamber adequately took into account all relevant considerations to ensure that its Judgement was rendered in conformity with international law.[325]

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[319] *See* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 2nd Revised Edition N.P. Engel, 2005, pp. 464-65 (stating that the term "public order" "covers the grounds for restriction set out in Art. 10(2) of the [ECHR] and repeatedly proposed during the drafting of Art. 19 of the [ICCPR], namely, the procurement and dissemination of *confidential* information and endangering the *impartiality of the judiciary*").

[320] *Jong-Choel v. The Republic of Korea* (CCPR Communication No. 968/2001), U.N. Doc. A/60/40 vol. II (27 July 2005), p. 60, para. 8.3; *see also Marques v. Angola* (CCPR Communication No. 1128/2002), U.N. Doc. A/60/40 vol. II (29 March 2005) p. 181, para. 6.8 ("The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.").

[321] *See* CCPR General Comment No. 10: Freedom of Expression (Art. 19), 29 June 1983, para. 4; *see also Kim Jong-Cheol v. Republic of Korea*, para. 8.3; *Marques v. Angola*, para. 6.8.

[322] Trial Judgement, para. 74.

[323] Trial Judgement, para. 74.

[324] Trial Judgement, para. 72. The Trial Chamber relied upon testimony by Robin Vincent, who testified that the confidentiality breaches would lead to less cooperation by sovereign states regarding the disclosure of information, thereby affecting the Tribunal's ability to administer international criminal justice. The Trial Chamber also noted that "the testimony was not challenged by the Accused". *See* Trial Judgement, para. 72, note 171.

[325] ARTICLE 19's brief discusses other human rights instruments that guarantee freedom of expression. *See* ARTICLE 19 *Amicus* Brief, para. 3. While the Appeals Chamber acknowledges that these instruments contain freedom of

163. Hartmann also relies on an Appeals Chamber decision in *Brđanin* to support her argument that the Trial Chamber erred by failing to consider the public's right to receive information disclosed by Hartmann in evaluating the proportionality of the interference with her freedom of expression.[326] In the instant case, however, the Appeals Chamber considers that the Trial Chamber did explicitly consider the public's right to receive information. In evaluating the proportionality of the interference with Hartmann's freedom of expression, it considered certain factors that were:

> salient in weighing the public interests involved: namely, the public interest in receiving the information and the protection of confidential information to facilitate the administration of international criminal justice, which is also in the public interest, indeed, on an international scale.[327]

164. Finally, the Appeals Chamber considers ARTICLE 19's discussion of national legal standards regarding freedom of expression.[328] While ARTICLE 19 sets out different ways in which domestic jurisdictions address freedom of expression in the context of contempt of court, it cites no jurisprudence to support the position that contempt proceedings for disclosing confidential information in violation of a court order impermissibly restrict an individual's freedom of expression.

C. Conclusion

165. The Appeals Chamber therefore dismisses ground of appeal 2 in its entirety.[329]

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expression guarantees, they follow a similar approach to restrictions on freedom of expression as the European Convention and the ICCPR. The UDHR states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." UDHR, Article 29(2). The African Charter on Human Rights and Peoples states: "Every individual shall have the right to express and disseminate his opinions within the law". African Charter on Human and Peoples' Rights, Article 9(2). The American Convention on Human Rights similarly notes: "Everyone has the right to freedom of thought and expression". American Convention on Human Rights, Article 13(1). In Article 13(2), it restricts that right by noting, "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals." American Convention on Human Rights, Article 13(2).

[326] Hartmann Final Appeal Brief, para. 19.

[327] Trial Judgement, para. 73 (internal citations omitted).

[328] *See* ARTICLE 19 *Amicus* Brief, paras 30-32.

[329] For the reasons given in this section, **sub-ground 7.8** is dismissed. In **sub-ground 2.3**, Hartmann contends that the Trial Chamber erred in law by failing to apply the principle that restrictions to freedom of expression must be interpreted strictly and instead interpreted such restrictions to be "expensive". The Appeals Chamber assumes that this was meant to read "expansive". Hartmann Final Appeal Brief, para. 17. The Appeals Chamber considers that this amounts to a vague, obscure, and undeveloped submission and therefore summarily dismisses it. In **sub-ground 2.6**, Hartmann, referencing her final trial brief, argues that the Trial Chamber's findings are inconsistent with the Tribunal's commitment to transparency and its responsibility to victims and criminalised any public discussion of the facts contained in her publications. Hartmann Final Appeal Brief, para. 20. The Appeals Chamber considers that Hartmann has not demonstrated a legal error that invalidates the Judgement of the Trial Chamber or that would result in a miscarriage of justice within the scope of Article 25 of the Statute. In **sub-ground 2.7**, Hartmann contends that the Trial Chamber erred in law when it failed to apply internationally accepted principles regarding freedom of expression, referencing an entire section of the Trial Judgement. Hartmann Final Appeal Brief, para. 21, note 34. The Appeals Chamber considers that it is insufficient to assert that an entire section of a Judgement is an error of law or fact, without identifying further the purported error, and therefore summarily dismisses this sub-ground. Hartmann argues in **sub-**

XIII. SENTENCE – SUB-GROUNDS 2.11 (IN PART) AND 2.16

166. In **sub-ground 2.11**, Hartmann argues that the Trial Chamber erred in law or fact when it failed to apply a proportionality test to her sentence.[330] In **sub-ground 2.16**, Hartmann argues that the Trial Chamber erred in law when it failed to determine whether less intrusive sanctions, such as conditional discharge, would have been sufficient and proportionate in the circumstances.[331]

167. The Appeals Chamber recalls that Trial Chambers are vested with broad discretion in determining an appropriate sentence. In general, the Appeals Chamber will not revise a sentence unless the appellant demonstrates that a Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.[332]

168. In this case, the Trial Chamber fined Hartmann €7,000.[333] It reached this determination after assessing the gravity of the offence and considering whether any aggravating or mitigating factors existed. Regarding the gravity of the offence, the Trial Chamber noted that, by virtue of Hartmann's actions, there existed a real risk that states may not be as forthcoming in their cooperation with the Tribunal where provision of evidentiary material was concerned.[334] Consequently, this negatively impacted the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate.[335] Additionally, the Trial Chamber found that the Book that gave rise to the criminal proceedings against Hartmann was still available for sale and that evidence suggested that it had been translated into Bosnian for wider distribution.[336]

169. The Trial Chamber did not find any aggravating factors. In assessing mitigating factors in the case, the Trial Chamber considered *inter alia* Hartmann's character as a respected professional and her indigence.[337] Finally, it noted that, in determining the appropriate penalty, it took into account the need to deter future wrongful disclosure of confidential information.[338]

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ground 2.8 that the Trial Chamber erred in law and fact by failing to take into account certain factual considerations relevant to the case, principally those identified in the testimony of Mr. Joinet, a witness of fact for Hartmann. Hartmann Final Appeal Brief, para. 22. The Trial Chamber stated in note 176 of its Judgement that it had considered the evidence of Louis Joinet, but that his testimony largely consisted of policy considerations and legal opinions and thus did not advance the Defence case. Trial Judgement, note 176. The Appeals Chamber is satisfied that the Trial Chamber did not ignore his testimony and therefore dismisses this sub-ground. **Sub-ground 2.14** is duplicative of sub-grounds 5.1-5.3 and is therefore dismissed.

[330] Hartmann Final Appeal Brief, para. 25.
[331] Hartmann Final Appeal Brief, para. 29.
[332] *Šešelj* Contempt Appeal Judgement, para. 37.
[333] Trial Judgement, para. 90.
[334] Trial Judgement, para. 80.
[335] Trial Judgement, para. 80.
[336] Trial Judgement, para. 82.
[337] Trial Judgement, para. 85.
[338] Trial Judgement, para. 88.

170. Hartmann has identified no error with the reasoning of the Trial Chamber. She simply asserts that the Trial Chamber erred in issuing a disproportionate sentence and that it erred in not finding that a conditional discharge was a more appropriate sentence. Therefore, she has not demonstrated that the Trial Chamber gave weight to extraneous considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or issued a decision so unreasonable or unjust that the Appeals Chamber could infer that the Trial Chamber must have failed to exercise its discretion properly.[339]

171. The Appeals Chamber therefore dismisses sub-grounds of appeal 2.11 (in part) and 2.16.

XIV. DISPOSITION

172. For the foregoing reasons, the Appeals Chamber,

PURSUANT to Article 25 of the Statute and Rules 77, 77 *bis*, 117, and 118 of the Rules;

NOTING the respective submissions of the Parties;

DISMISSES all the grounds of appeal advanced by the Appellant, Ms. Florence Hartmann;

AFFIRMS the imposition of a fine of €7,000, payable to the Registrar of the Tribunal in two instalments of €3,500 on 18 August 2011 and 19 September 2011; and

[339] *See Brdanin* Appeal Judgement, para. 500.

INSTRUCTS the Registrar of the Tribunal to take the necessary measures to enforce the Judgement.

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

Judge Patrick Robinson, Presiding

Judge Andrésia Vaz

Judge Theodor Meron

Judge Burton Hall

Judge Howard Morrison

Dated this nineteenth day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

XV. ANNEX – GLOSSARY

A. Appeals Chamber Judgements

1. ICTY

Prosecutor Zlatko Aleksovski, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Appeal Judgement")

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement")

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement")

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement")

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement")

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement")

Contempt Proceedings Against Dragan Jokić, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 ("*Jokić* Contempt Appeal Judgement")

Prosecutor v. Josip Jović, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 ("*Jović* Contempt Appeal Judgement")

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement")

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A,. Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement")

Prosecutor v. Ivica Marijačić and Markica Rebić, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić and Rebić* Contempt Appeal Judgement")

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement")

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement")

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement")

In the Case Against Vojislav Šešelj, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010 ("*Šešelj* Contempt Appeal Judgement")

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement")

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement")

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

Léonidas Nshogoza v. The Prosecutor, Case No. ICTR-2007-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement")

B. Trial Chamber Judgements

1. ICTY

Prosecutor v. Beqa Beqaj, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 ("Beqaj Trial Judgement")

Prosecutor v. Josip Jović, Case No. IT-95-14 & IT-95-14/2-R77, Judgement, 30 August 2006 ("*Jović* Contempt Trial Judgement")

C. Appeals Chamber Decisions

1. ICTY

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Decision on Prosecution's Motion to Seal Defence Appeal Brief, 10 May 2007 (confidential)

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007

2. ICTR

Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision, 3 November 1999

D. Trial Chamber Decisions

1. ICTY

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, 18 July 1997

Prosecutor v. Radoslav Brđanin Concerning Allegations Against Milka Maglov, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 bis, 19 March 2004