ASIL The American Society of International Law

ASIL Insight

October 9, 2009
Volume 13, Issue 17
PDF Print Version

# ICTY Special Chamber Decision *In the Case Against Florence Hartmann*

By Benjamin E. Brockman-Hawe

## Introduction

On September 14, 2009, a Specially Appointed Trial Chamber of the International Criminal Tribunal for the former Yugoslavia[1] (ICTY) convicted French journalist and former ICTY official Florence Hartmann of contempt of court for disclosing confidential information in violation of two orders of the Appeals Chamber.[2] Hartmann is not the first journalist to be indicted by the tribunal for contempt, but she is the first journalist found guilty of the offense for revealing portions of confidential judgments rather than the identity of witnesses or content of witness statements. She is also the first former employee of the ICTY to face allegations of contempt. In convicting Hartmann, the Special Chamber developed the law on the relationship between the right to freedom of expression and the need to maintain the confidentiality of court proceedings.

## Background

Between October 2000 and April 2006, Florence Hartmann served as Spokesperson for the Office of the Prosecutor at the ICTY. In 2007 Hartmann released a book, *Paix et Chatiment: Les Guerres Secretes de la Politiqueet de la Justice Internationales (Peace and Punishment: the Secret Wars of Politics and International Justice)*, and in 2008 posted an online article, "Vital Genocide Documents Concealed," on the Bosnian Institute website,[3] alleging that in two separate confidential decisions the Appeals Chamber declined to release transcripts of meetings of Serbia's Supreme Defense Council (SDC) submitted by Serbia to the ICTY during the *Milošević* trial.[4] According to Hartmann, the submissions contained evidence of Serbia's involvement in the massacre of Bosnian Muslims in Srebrenica, established "that the Serbian State had authority over its accomplices in Bosnia,"[5] and were kept confidential by ICTY judges "for the sole purpose of shielding Serbia from responsibility before another UN court."[6]

An Order in Lieu of an Indictment of Contempt was issued by the Trial



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Chamber in August 2008,[7] and the subsequently filed Prosecutors' final brief alleged that the disclosure of "dates, parties and names of judges along side the contents and purported effects of the [confidentially filed and issued] decisions" violated the Orders of the Appeals Chamber.[8]

**The Decision of the Trial Chamber**

The Special Chamber carefully followed the precedent established in *Tadić* by asserting its inherent power to deal with allegations of contempt.[9] Hartmann was charged with violation of Rule 77(A)(ii) of the Rules of Procedure and Evidence (RPE), which permits the Tribunal to hold in contempt any individual who knowingly and willfully interferes with the administration of justice by disclosing information "relating to. . .proceedings in knowing violation of an order of the Chamber."[10]

As a preliminary matter, the Chamber dismissed the arguments of the Defense that it considered "wholly lacking in merit."[11] This included the Defense's selective prosecution claim that Hartmann was targeted despite the fact that "others very publically discussed the reasoning and purported effect of the impugned decisions without exposing themselves to contempt proceedings."[12]

i. Elements of Contempt

Much of the Chamber's opinion considered whether the Prosecution had established the *actus reus* and *mens rea* of contempt.

With respect to the *actus reus*, Hartmann's attorneys argued that the Appeals Chamber decisions granting confidential status to documents handed over by Serbia only protected the documents themselves, not the legal reasoning of the Appeals Chamber decisions.[13] The Chamber declined to endorse this view, and held that "[t]he 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." The Chamber was similarly unpersuaded by Hartmann's arguments that the Tribunal, by citing to the confidential decisions in its jurisprudence, had itself engaged in an *actus contrarius* with the effect of nullifying the protective orders,[14] or that Serbia waived the Court-imposed protective measures by publicly disclosing the facts protected under their aegis.[15] The Chamber concluded its discussion of *actus reus* holding that citation to the title of confidential Appeals Chamber decisions by the Court was not an *actus contrarius* and that "a decision remains confidential until a Chamber explicitly decides otherwise."[16]

Hartmann's attorneys also requested that the Special Chamber find, consistent with the opinion of the *Beqaj* and *Maglov* Trial Chamber decisions, that Hartmann did not act with the specific intent to interfere with the administration of justice, and thus did not fulfill the *mens rea* requirements of Rule 77.[17] The Special Chamber rejected this argument, holding that *Beqaj* and *Maglov* had been "developed by the more recent Appeals Chamber rulings that a violation of a Chamber's order as such interferes with the Tribunal's administration of justice."[18] The Court found that Hartmann acted

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Statute of the International Criminal Tribunal for the former Yugoslavia

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

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with knowledge that her disclosure was in violation of an Appeals Chamber order when she published her book and article.[19]

ii. Defenses

In the *Jović*[20] and *Margetić*[21] cases, two Trial Chambers of the ICTY confronted the need to weigh the right to freedom of expression and freedom of the press against the equally critical need to protect confidential information related to court proceedings.[22] Indeed, the Special Chamber relied on *Jović* and *Margetić* when it dismissed Hartmann's claims that "criminalisation of her conduct would, in the circumstances, constitute a violation of her fundamental rights and, thus, be *ultra vires* of the statutory powers and jurisdiction of the Tribunal."[23]

However, the *Hartmann* decision is noteworthy for its discussion of European Court of Human Rights (ECtHR) case law. The Chamber noted:

> [The ECtHR,] while recognising the vital role played by the press in a democratic society, has nonetheless emphasised that 'journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection', and indeed, Article 10(2) of the ECHR [European Convention on Human Rights] 'defines the boundaries of the exercise of freedom of expression.' Pursuant to Article 10(2) of the ECHR, the exercise of freedom of expression may be subject to such 'formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.' These interferences with the freedom of expression are applicable 'even with respect to press coverage of matters of serious public concern.' Notably, the ECHR recognises that freedom of expression may not only be lawfully subject to restrictions, but also subject to penalties.[24]

During the trial, Hartmann's counsel emphasized that the information revealed in her book and article had already been in the public domain.[25] While the Chamber was persuaded that "some of the information . . .had indeed been in the public domain prior to the publication . . .,"[26] after balancing the public interest of receiving the information with the public interest of facilitating the administration of justice by leaving the information concealed,[27] the Chamber noted that the confidentiality orders on the Appeals Chambers judgments had not been lifted[28] and that as a result Hartmann was liable for contempt.

iii. Sentencing

Consistent with precedent, the Special Chamber considered Hartmann's sentence in light of the gravity of the conduct and the need to deter its repetition, balanced against various mitigating and aggravating factors.[29] With respect to the former, the Chamber found that "the Accused's conduct has created a real risk that states may not be as forthcoming in their cooperation with the Tribunal where provision of evidentiary material is concerned."[30] With respect to the latter, the Court took into account, *inter*

**Berkeley School of Law; Amelia Porges, Sidley Austin LLP; and David Kaye, UCLA School of Law. Djurdja Lazic serves as the managing editor.**

*alia*, the indigency of Hartmann, her reputation as a reliable and trustworthy journalist, and her debt to the publisher of her book.[31] She was fined 7,000 Euros.

**The Significance of the Decision**

One of the most interesting features of the *Hartmann* decision is the Chamber's approach to the freedom of expression defense. Since neither the *Jović* nor *Margetić* Trial Chambers examined contemporary ECtHR case law on this issue, the Court's newfound interest in balancing competing public interests can be attributed to its more thorough consideration of the ECtHR precedent, where a balancing test has been employed for many years.[32] This is a step forward for the Court, and the decision to balance interests is in conformity with human rights law and ICTY precedent.[33]

The Chamber's approach to sentencing is an additional interesting feature of this case. Rule 77(G) of the RPE authorizes the Tribunal to impose in contempt cases a fine up 100,000 Euros and/or a term of imprisonment not to exceed seven years. It is surprising that Hartmann's punishment was not more severe in light of the potentially "real" risk that states may limit future cooperation with the ICTY. Although historically the Court has distributed punishments well below the maximum threshold established in the Rules, it has demonstrated a willingness to punish journalists with prison time when an accused disclosed the identity of multiple protected witnesses,[34] and fines not below 15,000 Euros when the content of witness testimony was revealed.[35]

It is not immediately clear why the Chamber would impose a lenient punishment Hartmann. One possible explanation is that the Chamber was prompted by ECtHR case law to take the unprecedented step of mitigating Hartmann's sentence in light of her reputation in the professional community as a "trustworthy and reliable author" and an "objective and reliable journalist."[36] Alternatively, Hartmann's sentence may be the result of a perception that states are better situated than individuals to protect themselves against threats to their security resulting from unapproved disclosure, and it is therefore unnecessary to sentence with the same vehemence demonstrated by the Court in the witness-information cases.[37]

Finally, the Chamber's dismissal of Hartmann's selective prosecution arguments is noteworthy for its explanation that the defense has "no basis in either fact or law . . . ."[38] This determination is difficult to justify in light of the Appeals Chamber's decision in *Delalić*, which confirmed that an accused who can show "evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with [the principle of equality before the law]"[39] was entitled to satisfaction. These decisions can only be reconciled if one adopts the disputatious view that either former employees of the Tribunal or persons brought before a chamber on contempt charges are not entitled to the same fair trial rights extended to defendants accused of 'core crimes'.[40]

**Conclusion**

There is substantial tension between the principles of freedom of expression and the fair administration of justice. As international law crystallizes with

respect to these issues, the *Hartmann* judgment is a milestone in the development of an international standard in this area.

Viewed against this backdrop, it is unfortunate that the opinion of the Chamber does little to address the lingering perception in the international law community that issues of cost, objectivity and legality make the Trial Chambers of the ICTY a poor venue for handling contempt proceedings, particularly in cases where the Court is one of the injured parties.[41] The conviction of Hartmann, herself a former Court employee, brings to the foreground the question of whether there ought to be an "outer limit" on the power of international courts to hear contempt cases.

**About the Author**

Benjamin E. Brockman-Hawe, an ASIL member, is an International Law Fellow at the American Society of International Law.

**Endnotes**

[1] Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29 (1993).

[2] In the Case Against Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, ¶ 89 (Sept. 14, 2009), *available at* http://www.icty.org/x/cases/contempt_hartmann/tjug/en/090914judgement.pdf (last visited Sept. 20, 2009) [hereinafter Judgment].

[3] In the Case Against Hartmann, Case No. IT-02-54-R77.5, Prosecution Final Trial Brief, ¶ 7-8 (Aug. 25, 2009), *available at* http://www.icty.org/x/cases/contempt_hartmann/custom5/en/090825.pdf (last visited Sept. 20, 2009).

[4] *Id.* ¶ 15.

[5] FLORENCE HARTMANN, PAIX ET CHATIMENT: LES GUERRES SECRETES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES 120, 122 (2007) (English translation *available at* http://docs.google.com/gview?a=vq=cache:D98GX7eEW0IJ:www.preserverla justiceinternationale.org/docs/PeaceAndPunishment_EN.pdf+hartmann+peace+and+punishmenthl=engl=us) (last visited Sept. 20, 2009).

[6] Florence Hartmann, *Vital Genocide Documents Concealed* (Jan. 2008), *available at* http://www.bosnia.org.uk/news/news_body.cfm?newsid=2341 (last visited Sept. 20, 2009). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), I.C.J. ¶¶ 297, 438 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf (last visited Sept. 20, 2009). Hartmann believed that the confidentiality orders issued by the ICTY determined the outcome of the ICJ proceedings, asserting that "[i]f the ICJ had possessed evidence that Serbia was 'in control' of the Republika Srpska authorities or of the Bosnia Serbian Army, the Court would have not cleared Serbia of genocide at Srebrenica." Hartman, *Vital Genocide Documents Concealed*.

[7] In the Case Against Hartmann, Case No. IT-02-54-R77.5, Order in Lieu of Indictment on Contempt (Aug. 27, 2008), *available at* http://www.icty.org/x/cases/contempt_hartmann/ind/en/080827.pdf (last visited Sept. 20, 2009).

[8] Prosecution Final Brief, *supra* note 3, ¶ 15.

[9] Prosecutor v. Tadić, Case No. IT-94-1, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶18 (Jan. 31, 2000), *available at* http://www.icty.org/x/cases/tadic/acjug/en/vuj-aj000131e.pdf (last visited Sept. 20, 2009).

[10] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev. 43 (July 24, 2009), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf (last visited Sept. 20, 2009).

[11] Judgment, *supra* note 2, ¶ 23.

[12] In the Case Against Hartmann, Case No. IT-02-54-R77.5, Defense Final Trial Brief, ¶ 14 (July 2, 2009), *available at* http://www.icty.org/x/cases/contempt_hartmann/custom5/en/090702.pdf (last visited Sept. 20, 2009).

[13] *Id.* ¶ 6.

[14] Judgment, *supra* note 2, ¶ 40.

[15] *Id.* ¶ 41.

[16] *Id.* ¶ 46.

[17] Defense Final Brief, *supra* note 12, ¶¶ 77(iii), 78-87, 90-94.

[18] Judgment, *supra* note 2, ¶ 53.

[19] *Id.* ¶ 62.

[20] Prosecutor v. Jović, Case No. IT-95-14 and 14/2-R77, Judgment (Aug. 30, 2006), *available at* http://www.icty.org/x/cases/contempt_jovic/tjug/en/jov-jud060830e.pdf (last visited Sept. 20, 2009).

[21] Prosecutor v. Margetić, Case No. IT 95-14-R77.6, Judgment on Allegations of Contempt (Feb. 7, 2007), *available at* http://www.icty.org/x/cases/contempt_margetic/tjug/en/margetic_judgement.pdf (last visited Sept. 20, 2009).

[22] Jović, *supra* note 20, ¶ 23.

[23] Defense Final Brief, *supra* note 12, ¶ 124.

[24] Judgment, *supra* note 2, ¶ 70. It is not entirely clear why the Special Chamber wished to call attention to the provisions of the ECHR that provide for penalties. Perhaps the Chamber was seeking to address the suggestions that, in the process of punishing those found guilty of contempt of court, it may be violating the principle of *nulla poena sine lege*. For more on this

issue, *see, e.g.* Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice*, 53 J. INT'L CRIM. J. 735 (2007).

[25] Defense Final Brief, *supra* note 12, ¶ 35.

[26] Judgment, *supra* note 2, ¶ 79.

[27] *Id.* ¶ 73.

[28] *Id.* ¶ 46.

[29] *Id.* ¶ 75.

[30] *Id.* ¶ 80.

[31] *Id.* ¶ 85.

[32] *See, e.g.*, Stoll v. Switzerland, App. No. 69698/01, Eur. Ct. H.R. 141 (2007) (quoted by the Special Chamber) *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=htmldocumentId=826926portal=hbkmsource=externalbydocnumbertable=F69A27FD8FB86142BF01C1166DEA398649 (last visited Sept. 20, 2009).

[33] *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-I, Decision on Radovan Karadžić's Request for Reversal of Denial of Contact with Journalist, ¶ 23 (Feb. 12, 2009), *available at* http://www.icty.org/x/cases/karadzic/presdec/en/090212.pdf (last visited Sept. 20, 2009); *Prosecutor v. Brdjanin & Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, ¶ 45-55 (Dec. 11, 2002), *available at* http://www.icty.org/x/cases/brdanin/acdec/en/randall021211.htm (last visited Sept. 20, 2009).

[34] Margetić, *supra* note 21, ¶ 94.

[35] *See, e.g.*, Prosecutor v. Marijačić & Rebić, Case No. IT-95-14-R77.2, Judgment, ¶ 54 (Mar. 10, 2006), *available at* http://www.icty.org/x/cases/contempt_marijacic_rebic/tjug/en/reb-tcj060310e.pdf (last visited Sept. 20, 2009); Jović, *supra* note 20, ¶ 27.

[36] Judgment, *supra* note 2, ¶ 85. The regular approach of the ECtHR is to only limit journalists' freedom of expression in cases were principles of journalistic integrity have been violated. Douglas Voorhoof, Seminar on the European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends, Comments (Oct. 10, 2008), *available at* http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Voorhoof_Final_conclusions.pdf (last visited Sept. 20, 2009). *See also* Stoll, *supra* note 32, ¶ 104.

[37] Margetić, *supra* note 21, ¶ 70.

[38] Judgment, *supra* note 2, ¶ 23, n53.

[39] Prosecutor v. Delalić et al., Case No. IT-96-21, Appeals Chamber Judgment, ¶ 611 (Feb. 20, 2001), *available at* http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/eea9364f4188dc

c0c12571b500379d39/ae9f71c76da782d5c12571fe004be295?OpenDocument (last visited Sept. 20, 2009).

[40] Gorian Sluiter, *The ICTY and Offenses Against the Administration of Justice*, 2(2) J. INT'L CRIM. JUST. 631, 635 (2004) (noting that "the jurisprudence and the Rules offer a confusing picture" with respect to the question of whether a person accused of contempt is entitled to the same degree of protection as a person accused of one or more of the "core crimes").

[41] *Id. See also* Nhu B. Vu, *The Necessity of Maintaining Protective Measures in Balancing the Rights of Victims and the Accused*, 4 EYES ON THE ICC 23, 31 (2007).