

UPDATE

## ICTY: Hartmann case troubling



ARTICLE 19  
10 Oct 2011

**On 19 July 2011, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) upheld the first instance decision of the Trial Chamber in the case of Florence Hartman and ended a long lasting trial in the case. Florence Hartmann – a journalist, NGO activist, and former spokesperson for the International ICTY prosecutor – was convicted by the ICTY and fined €7,000. Ms Hartmann had not been implicated in any crime against humanity in the former Yugoslavia; nor had she violated laws of war or breached the Geneva Convention. Her crime was, rather, to publicly disclose the confidential legal reasoning behind a controversial decision made by the Tribunal. For a body which is meant to be a paradigm of democracy and human rights, the implications of this ruling are deeply troubling: firstly, because the transparency of a judiciary and the accessibility of its jurisprudence are fundamental to that body's democratic value; and secondly, because other than damaging the moral authority of the ICTY there is little to counterweigh the palpable public interest served by Hartmann's report on the controversy. That one of the primary purposes of the ICTY (the pursuit of truth) was compromised in order to pursue another fundamental purpose (bringing Slobodan Milosovic to justice) may be justifiable to some, but its moral value is ambiguous and clearly merits proper investigation and debate. ARTICLE 19, who intervened in the case, finds the ICTY's attempts to suppress its legal reasoning and punish Hartmann for exposing the truth are depressingly inconsonant with the body's stated mission to bring '*transparent international justice*'[\[1\]](#) to the former Yugoslavia.**

The offending words written by Hartmann in her book, *Peace and Punishment* (along with a subsequent magazine article for the Bosnian Institute, entitled "Vital Genocide Documents Concealed") related to the ICTY's decision to provide confidentiality to documents supplied by Serbia. These documents detailed Serbia's role in the Srebrenica massacre - establishing that '*the Serbian State had authority over its accomplices in Bosnia*'[2] - and were given to the Tribunal by the Serbian government on the condition that they be kept secret and used for the sole purpose of Slobodan Milosevic's trial. For this reason, the documents were inaccessible during a separate trial at the International Court of Justice (ICJ) in which Bosnia tried to sue Serbia for genocide[3], a case ultimately frustrated by the complainant's inability to establish a link between Belgrade and the war crimes committed in Bosnia. As such, the tribunal decision ultimately saved Serbia from an obligation to pay millions of dollars in reparations. In Hartmann's words, the information was kept confidential '*for the sole purpose of shielding Serbia from responsibility before another UN court*'[4].

Hartmann claimed that it was a precondition of submitting the evidence for Milosovic's trial that anything that might harm Serbia's "vital national interests" would not be released. This meant that information that might implicate the State in the Srebrenica massacre would not be released. Hartmann was not, however, convicted for disclosing the existence of a deal between the Tribunal and Serbia; this had long since been part of the public record, having been revealed earlier by other international journalists. Rather, Hartmann was convicted for publishing '*confidential reasoning*': in particular, the dates and the conditions under which the deal was struck, including the names of the judges involved.

With no material reason why the disclosure would prejudice the administration of justice - the criminal case to which the decisions pertained had ended with the heart attack of Milosovic and the main substance of the allegations was already in the public domain[5] - the judgement prompts fears that the international judges of the ICTY are using their powers to insulate themselves from criticism[6]. After all, condemnation of the deal between ICTY judges and the Serbian State has been ubiquitous in the international press since spring 2007, with critics arguing that it not only denied public access to the historical

truth contained in Belgrade's war documents but also prevented victims from calling the documents into evidence in order to seek compensation. In the context of such controversy, it is hard to see how the disclosure was not in the public interest.

ARTICLE 19 believes that such an insistence on keeping the logic and effect of the ICPT's jurisprudence secret is profoundly undemocratic and manifestly inappropriate for an international criminal court. The European Court of Human Rights, for example, has repeatedly reaffirmed the public interest involved in reporting judicial proceedings. In *Sunday Times v UK*, for example, the court held that '*there is general recognition of the fact that the courts cannot operate in a vacuum.... It is incumbent [on the media] to impart information and ideas concerning matters that come before the court*'[\[7\]](#). Article 10 of the Convention protects the right to divulge information on matters of public interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information. Likewise, in *Guja v Moldova* it was said that a public interest could be sufficiently strong as to override even a legally imposed duty of confidence[\[8\]](#). As such, it is not enough for a charge of contempt that confidential information is disclosed[\[9\]](#).

Irrespective of the merits of the ICTY's deal with Serbia, the people of the former Yugoslavia had a right to know why conclusive evidence of Serbian involvement in Srebrenica was precluded from consideration by the ICJ. Arguably, the citizens of the world – whose taxes fund the ICJ – have a right to know why a tribunal whose stated mission is to expose the truth of what happened in Yugoslavia and to punish the perpetrators of genocide ended up doing the opposite; *suppressing* the truth and *shielding* the perpetrators from justice.

Indeed, ARTICLE 19 believes that the right to know whether a State was involved in the commission of a crime is a paradigmatic example of the widely-recognised right to truth[\[10\]](#), as acknowledged by a plurality of international human rights instruments. The resolution of both the UN Human Rights Council[\[11\]](#) and the General Assembly of the Organisation of American States (OAS) on the right to truth[\[12\]](#), have held that the right includes '*the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred*'.

It is hard therefore to conceive of how the benefits of a deal with Serbia could outweigh the importance of exposing the truth of Srebrenica and other war crimes. Trials before ad-hoc international criminal tribunals serve an important truth-telling function and the creation of an historical record is widely considered to be a primary purpose of the tribunal. In *Prosecutor v. Dražen Erdemović* the sentencing judgement even went as far to say that '*establishing the truth behind the evils perpetrated in the former Yugoslavia*' was the ICTY's '*duty*'. The court went on to say that truth itself was a '*prerequisite for peace*' [13].

While the right to truth can conflict with other fundamental values, the importance of the right is especially pronounced where the focus is on state guilt; here, for example, the confidential information was said by Hartmann to '*directly [implicate] the Serbian state in the war in Bosnia and in the massacres in Srebrenica*' [14]. As Lorna McGregor has argued: '*[p]robably one of the worst aspects of [many] crimes under international law is that the State – the very body that is designed to protect the rights of individuals – has abused its position of power and itself been responsible for the perpetration of serious crimes*' [15]. While the right to truth is rarely absolute, it is arguably underogable in respect of information establishing the involvement of a state in the commission of the crime. At the very least, it should be an extremely rare occurrence for conflicting values to outweigh the right to truth in this context. This rule is amplified where the information in question conclusively establishes the innocence or guilt of parties on trial. As argued in *Prosecutor v Radoslav Brdanin and Momir Talic* the weighing of a fair trial with other public interests, generally legitimised in human rights law, is excluded where a piece of evidence gives the accused "*the opportunity to establish his or her innocence*" [16]. As a consequence, "*the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.*" [17].

The argument given by the ICTY in support of the sentence was a simple one of deterrence. If confidentiality rulings are not respected, the Court held, the administration of justice at the ICTY will be undermined. In respect of Hartmann's disclosure, '*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*[18]. In this way, paradoxically, the right to truth was said to provide arguments *in favour* of prosecution. If Hartmann's disclosure were to go unpunished, state governments would be hesitant to disclose information lest they end up getting punished by extraneous courts or tribunals.

ARTICLE 19 is convinced that the problem with this argument is that it assumes the very thing that has proved so contentious; that confidentiality agreements can permissibly be entered into in order to secure inculpatory information. The above arguments on the right to truth are directed toward this very assumption. Even those pragmatists who are sympathetic to the notion of a deal have expressed scepticism about this particular decision: the tribunal prosecutor sent Belgrade a broadly-worded letter promising "support in general terms" before the former had even seen the documents in question, for example, and it is unclear whether the Tribunal even had the power to make the particular agreement it made (under the published rules of the war crimes tribunal omissions from documents can only be requested where a "national security interest" is at stake). By punishing Florence Hartmann the ICTY has essentially ignored the virulent and very real criticism that its decision prompted, and consequently has undermined its own authority and moral credibility.

As well as these important points of principle there are certain jurisdictional questions prompted by the case as to whether the Tribunal has the authority to issue such a finding of contempt. Certainly, this was vehemently disputed by Hartmann's attorney, Guenael Mettraux, who argued that *'the goal and purpose of the tribunal is to prosecute individuals charged with committing serious violations of humanitarian law'* and that the court's contempt jurisdiction *'only applies to those who, through their actions, have interfered with the tribunal's ability to perform that mandate'*[19]. Indeed, nothing in the ICTY Statute explicitly empowers the judges to deal with criminal offences that are not serious violations of humanitarian law. The power is instead described as "inherent"[20] and derived from Article 15, which empowers judges to create *"rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate*

*matters*"[21]. Yet the very notion of an "inherent" judicial power is alien to the legal philosophies of many civil law systems, including France, Spain and Germany, where any sanction must be authorised by a special law. In this context there is little justification for any presumed contempt jurisdiction to be anything other than extremely limited.

There is therefore little justification in either principle or practice for the conviction of Florence Hartmann by the ICTY. The decision of the ICTY to concede the full truth over Srebrenica in order to expedite the trial of Milosovic is morally ambiguous at best, and it was clearly therefore in the public interest for the legal reasoning of the Tribunal to be exposed by Hartmann. To impose such a penalty on a journalist for bringing transparency and accountability to the ICTY raises troubling questions about the Tribunal's democratic legitimacy. At a time when the ICTY faces criticism for its conduct of the Ratko Mladic case –with the former Bosnian Serb General on trial only for crimes committed in Bosnia, and not for those in Croatia - the ICTY must restore its moral authority by focussing its energies on its true antagonists: not internal critics and investigative journalists, but the war criminals and perpetrators of genocide the Tribunal was set up to pursue in the first place.

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[1] See "About the ICTY" on the Tribunal's [website](#)

[2] Florence Hartmann, *Peace and Punishment: the Secret Wars of Politics and International Justice*, page 120, Flammarion (2007)

[3] The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), case 91, International Court of Justice (ICJ) Judgement returned on 26 February 2007

[4] Florence Hartmann, 'Vital Genocide Documents Concealed', *Bosnian Institute*, Monday 21 January 2008

[5] See for example the ECtHR case *Weber v Switzerland*, where a conviction for disclosure of confidential information was said to violate Article 10, as the- disclosures were on a matter of genuine public interest and the essence of the information disclosed was already in public domain. In such a context, the court held that the interest in maintaining confidentiality no longer existed.

[6] A statement issued after the appeal decision by a group of organisations and individuals who supported Hartmann, for example, said that the Tribunal had '*imposed a form of censorship aimed to protect the international judges from any form of criticism*'.

[7] *The Sunday Times v. United Kingdom*, para. 64. See also Section 7.6.1 i&a.

[8] *Guja v. Moldova*, ECtHR (Global Chamber) Application no. 14277/04 of 12 February 2008

[9] *Dupuis v France*

[10] See, for example, UN Secretary General Kofi Annan's Bulletin, ST/SGB/1999/13, 6 August 1999, "[t]he United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives."

[11] Human Rights Council Resolution 9/11 on the Right to the Truth

[12] General Assembly of OAS Resolution 2595 (XL-O/10) on the Right to the Truth

[13] *Prosecutor v. Drazen Erdemovic, (Sentencing Judgement)*, IT-96-22-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 November 1996

[14] Florence Hartmann, *Peace and Punishment*, page 122, Flammarion (2007)

[15] Lorna McGregor, "*Immunity v. accountability: considering the relationship between state immunity and accountability for torture and other serious international crimes*", the Redress Trust, 2005, p. 4

[16] Case No. IT-99-36/1, Trial Chamber II

[17] *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

[18] In the Case Against Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, (Sept. 14, 2009), paragraph 80

[19] As reported by Edward Cody, 'UN Yugoslav Tribunal's Prosecution of Ex-Spokeswoman Draws Criticism', *Washington Post*, June 21 2009

[20] See the contempt judgement against Milan Vujin, where the court said '*There is no mention in the Tribunal's Statute of its power to deal with contempt. The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguard*

[21] Article 15, 'Rules of Procedure and Evidence', of Annex I ('Provisions on Witness Protection and Related Issues') of the ICTY Statute

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