



ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE ICTY

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ADC-ICTY EXPRESSES DEEP CONCERN AT PUBLICATION OF EMAIL PURPORTEDLY WRITTEN BY JUDGE FREDERIK HARHOFF

The Association of Defence Counsel Practicing at the ICTY¹ expresses its deep concern at the publication of an email purportedly written by Judge Frederik Harhoff, a sitting *ad litem* judge of the Tribunal. The email disregards the basic principles of judicial conduct, raises questions about the author's impartiality, and undermines years of effort by judges and lawyers alike to create a fair and just institution of international justice.

The email in question, which has now been widely publicized, attacks the correctness of Judgments in which the purported author had no role. This is, in itself, a clear violation of judicial ethics. More seriously, the author's disagreement with the outcome in those cases drives him to make inflammatory insinuations against the presiding judge in two of those cases, asking whether he was pressured by "the military establishments' in certain dominant countries." The insinuations are, of course, unsupported, except perhaps by the author's intention to inflict maximum harm to the reputation of the Judges involved. Maligning the reputation of fellow judges in this manner, apparently with little regard as to whether such views become publicly known, can only be described as a serious departure from universally accepted standards of judicial conduct.

The letter also claims that the presiding judge persuaded other Judges on the same cases to the same point of view, and that he pressured the Judges of a different trial bench to issue a Trial Judgment according to a previously-announced schedule, leaving little time for the dissenting judge to formulate her opinion. Neither of these allegations reflects anything improper or even unusual. What is both unusual and improper, however, is for a judge – especially one who did not participate in those deliberations – to reveal confidential information about the details of deliberations to the public.

¹The Association of Defence Counsel Practicing at the ICTY is the defence counsel organization serving the ICTY pursuant to the its Rules of Procedure and Evidence. In its preamble, the ADC-ICTY Constitution states that it "is a partner, along with the organs of the International Tribunal, in promoting the fairness of the proceedings and the accomplishment of the mission of the ICTY."

While the ADC does not consider it necessary or appropriate to embark on any discussion of the legal issues raised in the email, two contentions expressed therein raise serious questions about the author's legal knowledge and judicial temperament. The email asserts that "'joint criminal enterprise' has now been reduced from contribution to crimes (in some way or another) to demanding a direct intention to commit crime." This is false. Joint criminal enterprise, contrary to what the email states, has always required direct intent for criminal liability, and nothing in the recent decisions says otherwise. The email also claims that guilt should be imposed "unless it can be proven" that the accused did not have the requisite *mens rea*. It is worrying that a judge would so casually disregard the presumption of innocence.

The ADC expresses its profound concern that a sitting Judge of the Tribunal, motivated by a judicial disagreement, would so cavalierly and publicly malign fellow Judges, with no apparent regard for the integrity of the judicial process. In the words of Justice Felix Frankfurter: "Fragile as reason is and limited as law is as the institutionalised medium of reason, that's all we have between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feelings."

The ADC deeply regrets that sensational and irresponsible allegations have been made that threaten to tarnish twenty years of progress towards ever-fairer trials, sometimes conducted under difficult circumstances. Those allegations are an insult to the institution, and to all those who have worked so hard to establish the Tribunal's integrity. The ADC expresses its continued commitment to the Tribunal's mission: the fair and impartial administration of justice.

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Questions and comments relating to this statement can be addressed to the President of the ADC-ICTY, Mr. Novak Lukić: +31 70 512 5418 or email: iduesterhoeft@icty.org