THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-02-54-R77.5-A

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

***Re*-Filed:** **20 November 2009**

IN THE CASE OF

Florence HARTMANN

PUBLIC

FLORENCE HARTMANN'S APPELLANT BRIEF

On behalf of Ms Hartmann
Karim A. A. Khan

Guénaël Mettraux

***Amicus* Prosecutor**
Bruce MacFarlane, QC

Procedural background

1. On 14 September 2009, Florence Hartmann ("FH") was convicted of two counts of contempt of court pursuant to Rule 77(a)(ii) of the Rules of Procedure and Evidence.[1]

2. On 24 September, the Defence filed its Notice of Appeal.

3. On 9 October, the Defence filed its Appellant's Brief.[2] On the same day, the Defence sought leave for a 21,700-word extension.[3]

4. On 6 November, the Defence was ordered to re-file, *inter alia*, its Appellant's Brief.[4] The Defence Motion for an extension of words was denied in full by the Appeals Chamber and the Defence was ordered to re-file its Brief within the 9,000-word limit set in the Practice Direction.[5] The Defence was also ordered to re-file its Notice of Appeal no later than 13 November.

5. On 13 November, the Defence re-filed its Notice of Appeal.[6] The Notice contains **14 principal Grounds of Appeal**. These grounds of appeal are in turn sub-divided into **133 sub-grounds of appeal**. In light of the Appeals Chamber's 6 November order and the number of errors committed by the Trial Chamber, the Defence was being required to argue each of these sub-grounds with an average of **66 words *per* sub-ground**.

6. The word-limit set by the Appeals Chamber in its Decision of 6 November 2009 has proved inadequate to fully flesh out all grounds of appeal as would have been necessary in the circumstances. Being bound, however, to obey the Appeals Chamber's order, the Defence has endeavored to present each ground of appeal as concisely and precisely as possible so as to enable the Appeals Chamber to exercise its reviewing powers whilst at the same time ensuring the *effectiveness* of FH's right to appeal against her conviction and her right to an effective remedy.[7]

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[1] Judgement on Allegations of Contempt,14Sept2009 ("Judgment").
[2] Florence Hartmann's Appellant Brief.
[3] Motion Seeking Leave for Extension of Word Limit,9Oct2009.
[4] Decision on Motions to Strike and Requests to Exceed Word Limit.
[5] Ibid.
[6] Notice of Appeal of Florence Hartmann against the Judgment of the Specially Appointed Trial Chamber.
[7] The Defence has already noted (Notice, par 6) that the re-filing of its appellate filings in compliance with the Chamber's order of 6 November 2009 should not be interpreted as a waiver of Ms Hartmann's right to an "effective" right of appeal (as forms part of her right to a fair trial), her right to an effective remedy (as forms part of customary law) nor her right to a

7. Because of the Appeals Chamber's decision not to grant any extension of words, and with a view to meet the word-limit, the Defence has had to renounce arguing a number of grounds of appeal in its Brief.[8] The Defence notes, however, that this should not be interpreted as a waiver of its right to raise the issues and facts pertaining to these grounds if ever necessary, appropriate or relevant. Nor should it be interpreted as a waiver of Ms Hartmann's fundamental rights. The Defence submits, furthermore, that the Appeals Chamber would have the inherent power, in fairness and with a view to protect the interests of justice, to consider the substance of any of the sub-grounds that could not be fleshed out in the Brief by referring to the detailed notice of these grounds as is contained in the Notice of Appeal. The *amicus* Prosecutor would not suffer any inconvenience or prejudice as he has had full notice of these submissions and of all the authorities that pertain to each of them.

fair trial (which continues to apply to appeals proceedings). See,e.g., Report on the Situation of Human Rights in Panama, OEA/Ser.L/V/II.44, doc. 38, rev. 1, 1978; Case 9850, Annual Report of the Inter-American Commission, 1990 -1991, OEA/ Ser.L/V/II.79, doc. 12, rev.41,1991, at 74 - 76, (Argentina); *Henry v. Jamaica*, (230/1987), 1 November 1991, Report of the HRC, (A/47/40), 1992, par 8.4.

[8] This applies to Grounds XII, XIII and XIV as well as most of Grounds X and XI and parts of others Grounds.

***RE-FILED* "FLORENCE HARTMANN'S APPELLANT BRIEF"**

TABLE OF CONTENTS

I. INADEQUATE PLEADINGS

Errors as to scope of charges

1.**SG(I)(1)**:TC erred in law/fact when suggesting that any fact other than the four facts identified by the Defence had been validly pleaded so that FH could be said to have received detailed/timely notice of those.[9] The background has been laid out in the Notice.[10]

2.**SG(I)(2)**:TC erred in law/fact, and violated FH's fundamental rights, by interpreting broadly the nature/scope of the charges(pars.32-35,Judgment) and when suggesting(par.32) that the Defence's understanding was "unreasonably restrictive".[11]

3.**SG(I)(3)**:TC erred (i)in law when suggesting(par.32) that only "the text of the Indictment" was relevant to determining the scope/nature of the charges and (ii)failing to take into account other relevant indications thereof.[12]

4.**SG(I)(4)**:TC erred in fact when suggesting that the new facts mentioned at pars.33-35 (i)formed part of the charges and/or (ii)that FH received detailed/prompt notice of these despite their absence from the pleadings instruments, the stated position of the Defence and the failure of the *amicus* to give adequate notice of these facts.[13]

5.**SG(I)(5)**:TC erred in law/fact when suggesting that the expression "purported effect" (par.33,Judgment) would provide adequate notice of the charges.**SG(I)(6)**:In the alternative, TC erred in law/fact and abused its discretion when it failed to consider(or rejected) the reasonable possibly that this could be understood by the Defence as it was,i.e., that it referred to the fourth fact identified by the Defence (iv) so that, contrary to the Chamber's assertion (pars.33,73,79), this fact was already in the public domain.

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[9] See,Motion for Reconsideration,9Jan09,pars.80,103;Motion Reconsideration,14Jan09,pars.15-18;PTB,pars.4-6,9;T.52.*et.seq*,124;FTB,par.1.

[10] Notice,pars.4-20.

[11] See,*e.g.*,*Nobilo*AJ,pars.17,55-56;*Kanyabashi*,Decision,10July2001;*Kupreskic*AJ,pars.88.*et.seq*.

[12] Defence Motion,9January2009,pars.75.*et.seq*;Defence Motion for reconsideration,14January2009,pars.14.*et.seq*.;PTB,pars.9.*et.seq*.See,*Krnojelac*AJ,par.138;*Delalic*,Decision,21February1997,par.8;*Krajisnik*,Decision,1August2000,par.13.

[13] PTB,pars.10-22;FTB,pars.8*et seq*.Also Defence Motion,9Jan2009,pars.90-102;Defence Motion for reconsideration,14January2009,pars.15,18.

6.**SG(I)(7)**:TC erred in law/fact and abused its discretion when taking the view that FH received adequate/timely notice of the fact that an allegation going beyond that understanding formed part of the charges.[14]

7.**SG(I)(8)**:TC erred in fact when suggesting that FH had been validly charged with disclosing "the content of closed session transcripts of the Applicant's submissions".[15] FH had no such (adequate/timely) notice.**SG(I)(9)**:TC failed to establish that FH had been aware at the time of publication that

(i) the facts disclosed in her book came from confidential transcripts and, if they were, that they
(ii) were subject to Rule 77(a)(ii) and remained so at the time of publication
(iii) thereby erring in law and fact.

8.**SG(I)(10)**:TC erred in fact when suggesting(par.33) that FH's book contains reference to "confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision", that FH was aware of that fact, that this was established beyond reasonable doubt and that she was charged with disclosing this and had received notice thereof.

9.**SG(I)(11)**:TC erred in fact when suggesting(footnote73) that the Defence "legitimate expectation" had *somehow* been refuted by the Prosecutor's statement in par.6 of its Response *re* Reconsideration:[16] this paragraph is a response to Defence submissions regarding the legal elements of R77(a)(ii). It does <u>not</u> pertain to the scope/nature of the charges. No such rebuttal as might have been relevant to Article 21(4)(a) notice occurred (at a time or in a way relevant to that guarantee). The TC also points(footnote 73) to pars.18,19,21 of *amicus* PTB to suggest that the *amicus* set out clearly "what he believed to be the scope of the Indictment". This was an error insofar as pertained to the requirement of detailed/prompt notice of the charges.Relevantly, none of these paragraphs refer to any of the additional facts uncovered by the TC at par.33.Whilst the TC was correct to note that the *amicus* had later pointed to a "disagreement" between the parties, it failed –and therefore erred– to note that

[14] See,Notice,pars.4-20.
[15] Par.33.
[16] Judgment,par.3.

(i) the *amicus* did not provide any further/adequate notice of what that disagreement related to,

(ii) nor pointed to any of the par.33 facts.

10.**SG(I)(12)**:TC's reliance on 2 February 2009 *amicus* filing is itself a violation of the statutory guarantee of "prompt" notice, which means "as soon as the charge is first made"[17],i.e.,27 August 2008, and thus an additional error of law.

11.**SG(I)(13)**:TC erred in law/fact when failing to consider the fact that, had the Prosecutor taken issue with the substance of the Defence's understanding of the charges, he was required, as minister of justice and impartial prosecutor,[18] to clarify/specify/articulate this.In particular, the TC erred in law(par.32,including,footnote73) when interpreting too narrowly the –scope and/or nature of the– obligations/duties of the *amicus* Prosecutor in that respect.[19]

12.**SG(I)(14)**:TC erred in fact when it failed to take notice of various specific occasions/filings where the Defence outlined its understanding of the charges.[20]

13.**SG(I)(15)**:TC erred in law/fact and abused its discretion when it failed to conclude that the *amicus* was estopped/precluded from going beyond the scope of the charges which the Defence had publically/repeatedly identified as relevant to this case and which he failed to correct.

Errors as to scope of R77(a)(ii)

14.**SG(I)(16)**:TC erred in law by expanding the scope of the indictment to facts for which R77(a)(ii) provides no adequate legal basis.Rule 54*bis* provides that protective measures may be ordered in relation to "documents or information" (Rule 54*bis*(F)-(I)). It does not provide a legal basis for the protection of the legal reasoning of a Chamber, nor for any of the four facts and/or supplementary facts *unless the disclosure of such facts would result in the disclosure of the actual contents of the "documents or information" covered by protective measures*. The AC made it clear that what can validly be the subject of a confidential order (and,therefore, of contempt

[17] HRC,General Comment 13,par.8.
[18] IT/227,par.15(ii).
[19] See,Judgment,footnote.73 in light of *Amicus* Statement,2Feb2009,par.5;IT/227,par.15(ii).
[20] Whilst the TC took notice of the Defence position in its PTB,opening statement and FTB,it did not take notice of the fact that this position had been openly laid down(without reaction on the part of the *amicus*) in its motions of 9 January,14 January and again in its closing speech(see above).

proceedings,if breached) is the confidential information for which protective measures have been ordered under the Rules.[21] In this case, Serbia-Montenegro only sought protective measures (under Rule 54*bis*) in relation to "the contents of the redacted sections of the Supreme Defence Council documents".[22] No protective measures was sought or granted in relation to any of the facts that form the basis of the conviction.The legal reasoning or other such facts could only arguably be subject to R77(a)(ii) if/where its disclosure had the effect of disclosing the actual content of the "documents or information" for which measures were granted.That was not part of the allegations, nor has it been established in this case.[23] Nor does international law provide for a general principle that would permit the criminalisation of such disclosure.[24] The TC erred by relying upon R77(a)(ii) to sanction the disclosure of facts for which there was no legal basis and in relation to none had been ordered.

15.In the alternative, if one accepts, *as the TC put it*, that what was being protected in this case were the interests "of a sovereign state", in view of the fact that (i)Serbia-Montenegro identified those interests to be the continued protection of the "**the contents** of the redacted sections of the Supreme Defence Council documents" and that (ii)as noted in par.35 Judgment, FH was not charged for disclosing the content of these documents, there could not have been a violation of a protected interest for the purpose of Rules 54*bis*/77(a)(ii).

16.**SG(I)(17)**:TC erred in law when suggesting that the facts mentioned in pars.33-35 come within the terms of Rule 77(a)(ii) and/or that this provision would provide an adequate legal basis to criminalise the disclosure of such facts. In particular,

(i) **SG(I)(17.1)**:TC erred in law when suggesting that the disclosure of the "legal reasoning" of the decisions could be a basis for conviction under Rule 77.There is no general principle nor custom supporting such a conclusion.[25]If there was any doubt in the regard, the principle of legality

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[21]REDACTED.

[22] D10,par.59.Also, REDACTED.*Milosevic*,Second Decision,23September2004.T.483-487,444-446,466-472,479-480;D9,pp.33,37,40-41,93;T.276-280;404;466-472;479-480;483-487;392,398-403.

[23] Judgment,par.35.

[24] See,e.g.T.270-276,312-315, 342;D11.

[25] *Nobilo*AJ,par.30;*Vujin*AJ,pars.13,24.See,PTB,pars.10-22 and references;FTB,pars.8-17 and references (incl.*Milutinovic* Decision,12May2006,pars.34-35,footnotes 78 and 79(and footnotes 7,14,15,16,17,20 and 66);*Milutinovic*,Decision,15May2006,footnotes 12 and 42;*Milutinovic*,Prosecution Reply,10April2007,par.10 and footnote 9;*Nobilo*AJ,pars.17,36; *Vujin*AJ,pars.12-13 and 16;*Delic*,Decision,23August2006,p.4,footnote10;*Delic*,Decision,14

required that the law be interpreted narrowly and any doubt resolved in favour of FH. If legal reasoning of decisions was subject to R77(a)(ii), the Tribunal would

(a) become un-accountable for its actions,

(b) act contrary to its commitment to transparency,

(c) act contrary to its established practice[26] and

(d) render a "contrôle de la legalité" of its action, as forms part of human rights law, impossible/illusory.[27]

(ii) **SG(I)(17.2)**:TC erred in fact when failing to consider whether, or dismissing the possibility, that FH could reasonably have taken the view that the facts for which she was convicted were not covered by Rule 77.[28]

Conclusions

17.Each and all of these errors, individually or in combination, meet the requisite standard of review[29] and warrant the overturning of the conviction.[30]

18.At par.79, the TC acknowledged that all four facts had been in the public domain prior to the publication of the impugned book/article. The TC did not make clear whether FH was being convicted in relation to the new facts only (as identified in par.33) or in relation to those *and* the four facts.

19.If FH was convicted solely in relation to the new facts, a finding that the TC impermissibly extended the scope of the charges would necessarily lead to the conclusion that she should be acquitted.

January2008,p.3,footnote 8;*Perisic*,Order,22Sept2006,p.2,footnote 3;T.181-188; *Milutinovic*,Prosecution Reply,10April2007,par.10 and footnote 9; REDACTED;Rule 54*bis* provides for a valid legal basis to order protective measures (such as redaction) in relation to "documents or information"(Rule 54*bis*(F)-(I)).See also T.263,271-276,283-287;312-315;342;393-394;406-408;D10,par.58;D9,pp.25,33-34,37-38,41;D1;D2;D5,pp.4-5;D3;D4;D6;D11;D48.Decision on Urgent Prosecution Motion,30June2009,p.4).

[26] FTB,pars.11-13,referring to *Milutinovic*,Decision,12May2006,pars.34-35,footnotes 78-79 (and footnotes 7,14,15,16,17,20 and;*Milutinovic* Decision,15May2006,footnotes 12 and 42;*Delic*,Decision,23August2006,p.4,footnote 10;*Delic*,Decision,14January2008,p.3,footnote 8;*Perisic*,Order,22September2006,p.2,footnote 3; T.181-188;Decision on Urgent Prosecution Motion,30June2009,p.4;*Milutinovic*,Prosecution Reply,10April2007,par.10 and footnote 9.

[27] T.263,271,275,283-287.

[28] See,generally,Judgment, pars 63-67;T.271,275,312-314,342;390-391;D1;D2;D5;D6;D36.FTB,par.16,110-123.See also, below,"mistake of fact/law".

[29] See,e.g.,*Stakic*AJ,pars.7-13;*Furundzija*AJ,pars.34.*et.seq*.

[30] *Nobilo*AJ,par.17;*Kupreskic*AJ,pars.88.*et.seq*

20.If, however, FH was convicted in relation to both the four facts and the new facts, the AC would be required to quash the conviction insofar as pertains to the new facts and turn to the next grounds of appeal insofar as pertains to the four facts.

II. FREEDOM OF EXPRESSION

Errors as to legal standard

21.**SG(II)(1)**:TC erred in law when suggesting that the standard applied to this matter "is consistent with the jurisprudence of the [ECHR]".[31] At trial, the Defence referred to four(4) ECHR cases that are on point and the most relevant precedents to this case. The TC did not consider(apart from an irrelevant reference,FN.165) and did not apply any of the four cases nor the principles they contain:

- *Weber v.Switzerland*;[32]
- *Dupuis v.France*;[33]
- "*Spycatcher*" 1-2;[34]

Many other relevant cases/precedents (cited by the Defence) were ignored.[35] Had theses and the principles they contain been applied, TC could only have concluded that the restriction of FH's freedom of expression through a criminal conviction was impermissible under international law.[36]

22.**SG(II)(2)**:TC erred in law by failing to account for that fact -and failing to acknowledge– that under international law, there is a strong presumption of unrestricted publicity of any criminal proceedings.[37] Instead, the TC treated freedom of expression as merely one of a set of equally-important factors.[38]

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[31] Judgment,par.70.
[32] Judgment,22May1990(Application no.11034/84).
[33] Judgment,7June2007(final12Nov2007,Application no.1914/02).
[34] Judgment,26November1991,Series.A,No216;(1992),14 EHHR 153;Judgment,26November1991,Series.A,No217;(1992),14 EHHR,229.
[35] FTB,pars.124.*et.seq* (e.g.ECHR-*Fressoz;Rizos and Daskas;Hrico; Orban;Chauvy;Kulis;Guja;Bergens Tidende*).Also,*Maglov* Decision,19March2004,pars.9-10
[36] See,FTB,pars.124-157.
[37] See,e.g.*In re S (A Child)*,par.15.Also *Scott v.Scott;AG v.Leveller Magazine Limited;Re Trinity Mirror Plc*.Also,*Ekin*,par.56;*Dupuis*,pars.33-35.
[38] See,in particular,Judgment,pars.69.*et.seq*.

23.**SG(II)(3)**:TC erred in law by failing to apply the principle that restrictions to freedom of expression (in particular, as regard journalists and issues of public interests) must be interpreted strictly, applying, instead, an expensive interpretation of its powers under R77(a)(ii).[39]

24.**SG(II)(4)**:TC erred in law/fact when failing to consider the special/increased protection guaranteed to the discussion of issues of public/general.[40] The fact that the matters discussed by FH are issues of general/public interest was not in dispute.[41]As noted by the ECHR, there is little scope in international law for restrictions on debate/discussion of such questions.[42]Only the most pressing social need would so warrant.[43] No such grounds existed, none was alleged and none has been established.

25.**SG(II)(5)**:TC erred in law/fact when it failed to acknowledge/consider the right/interest of the public (in particular, victims) to receive the information that was the subject of the charges.[44]

26.**SG(II)(6)**:TC erred in law/fact when failing to determine whether its decision was consistent with the Tribunal's commitment to transparency and responsibility towards the victims –as members of the public– as outlined in par.7 of SC-Resolution 827.[45] This failure/error was relevant to determining the permissible right/interest of the public, in particular victims, not only to receive but to continue to discuss facts discussed in FH's publications and thus the scope of permissible curtailment of free/public discussion of these facts.By convicting FH, the TC effectively criminalized any further discussion of these facts in the public and by victims.

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[39] E.g.*Rizos/Daskas*,par.38;*Spycatchr1*,par.65;*Spycatcher2*,par.53.D31,par.20;D39;T.244-245,347;D31,par.11;UNGA Resolution59/1,14Dec1946;T.244.

[40] See,references in next footnotes.

[41] FTB,par.129;T.137-138,257-260,290-297,389-390et seq;457-460,464-466;D1;D2;D5;D6;D10;D42; D36;D46;D9.

[42] *Orban*, pars.45,49;*Rizos/Daskas*,par.42 (and 38); *Kulis*,par.37.Also D31,page 6; T.252,284-285.

[43] *Sunday Times v. The United Kingdom*,Application no.6538/74,par.62;also *Guja;De Haes and Gijsels*.

[44] E.g *Brdjanin*,Decsion on Interlocutory Appeal,11Dec2002,par.37;*Spychatcher1*,par.61,65-66;*Chauvy*, par 67;*Dupuis*,par.41;*Fressoz*,par.51;See also *Brdjanin*,Decision,11Dec2002,par.37;T.390-400

[45] FTB,pars.111-119.

"Necessity" and "proportionality" of restrictions

27.**SG(II)(7)**:TC erred in law when it failed to apply international law/standards/principles identified above to the curtailment/restriction of FH's freedom of expression.[46]

28.**SG(II)(8)**:International law provides for a range of factual considerations relevant to this matter (identified by Mr Joinet,but ignored by the TC–footnote 176)[47] and laid out in Defence FTB,pars.141-159.[48] The TC erred in law and fact when failing to consider those.

29.**SG(II)(9)**:TC erred in fact/law when it failed to establish and/or seek to establish that the restrictions to FH's(and the public's) freedom of expression in the form of a criminal conviction was "necessary".[49] Had it done so, the TC could not reasonably have concluded that such curtailment (through criminal conviction) was "necessary". Having found that her publications had created a real risk that states "*may*" be deterred to cooperate,[50] no *ex post facto* conviction of FH could possibly undo that risk (even if it existed[51]) so as to render it "necessary" in the circumstances.That conclusion is all the more evident as the TC did not seek to prohibit the sale/distribution of the impugned publications which remain freely available.[52]The incongruity of a criminal conviction in these circumstances is best illustrated by reference to the four ECHR cases mentioned above where, in similar circumstances, the ECHR concluded that a criminal conviction could not be regarded as necessary under international law.[53]

30.**SG(II)(10)**:TC erred in law/fact when it failed to apply or misapplied the requirement of "proportionality".At par.74, *in fine*, where the TC appears to be discussing the issue of proportionality, it measured, on the one hand,

(i) "trial proceedings for contempt" against

(ii) "the allegations" raised against FH.

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[46] See,in particular,Judgment,pars.68-74.
[47] On"chilling"effect,see,T.366-374.
[48] E.g.T.347-353.
[49] E.g.*Spycatcher1*,par.59,62;*Handyside*,pars.48-50.
[50] Judgment,par.74.
[51] See,below.
[52] Judgment,par.82.
[53] See,cases above;also,FTB,pars.151-157.

These, however, were not the factors relevant to the principle of proportionality.What had to be measured/compared were

(i) the interference/restriction to the right in question (which in this case came in the form, not of "proceedings", but of a criminal conviction);and

(ii) the legitimate aim being pursued (in this case, the good administration of justice).

The fact that the TC sought to measure the wrong factors led it to disregard each/all factors relevant to the test of proportionality (i)as relevant to international law and (ii)as appeared on the record.[54]

31.**SG(II)(11)**:TC erred in law/fact when it failed to apply that test(of proportionality) to deciding-

(i) whether a criminal conviction was appropriate in the circumstances;and

(ii) whether the sentence which it imposed was necessary and proportionate and why it failed to even consider/address the Defence's submission that a conditional discharge would have been sufficient/proportionate.[55]

Permissibility of restrictions

32.**SG(II)(12)**:TC erred in law/fact and abused its discretion when it failed to take into account facts relevant to determining the necessity/proportionality of a curtailment/restriction of FH's freedom of expression *as were favourable to her.*[56] The fact that these factors are not mentioned/weighed/considered excludes any fiction/assumption that the TC regarded them as relevant and/or considered any of them in coming to its decision.The TC's general disclaimer cannot make up for its failure to provide a reasoned decision in relation to these.

33.**SG(II)(13)**:TC's failure to account for (i)the right of the public to receive that information,[57] (ii)the fact that the exercise of freedom of expression in relation to issues of public/general interest may only be exceptionally curtailed,[58] that (iii)there is a strong presumption of full enjoyment of that right,[59] that (iv)any restriction must be

[54] See,next sub-section.
[55] See*Dupuis*,par.47;*Brima* Sentencing Judgment,pars.35-36;FTB,pars.168-171.
[56] See,FTB,pars.151-159,and references therein.
[57] See,above.
[58] See,above.
[59] See,above.

interpreted strictly,[60] that (v)the TC failed to apply or misapplied the principle of proportionality,[61] (vi)failed to establish the "necessity" of FH's right through criminal conviction,[62] all constitutes discrete/separate errors of law/fact and also provide evidence of the TC's errors in deciding on the permissibility, legality and propriety of the curtailment of FH's fundamental right.

34.**SG(II)(14):**TC erred in law/fact and abused its discretion when taking into consideration and/or giving undue weight to certain factual considerations when assessing the propriety of curtailment of FH's freedom of expression.At par.73, it mentioned the fact that the book is said to contain information that was not in the public domain which the TC considered to be a "salient" fact for the purpose of weighing competing public interests. In support of its view, the TC cites *Stoll v Switzerland*(pars,113,115).This ECHR decision supports the exact opposite of what the TC sought to have it say.By the TC's own reckoning, the publications of FH contain material that was in part already in the public domain and some which, *it says*, was not.[63] Par.113 of *Stoll* upon which the TC relied says this(emphasis added): "The present case differs from other similar cases in particular by virtue of the fact that the content of the paper in question had been completely unknown to the public (see,in particular,*Fressoz and Roire*, cited above,§53;*Observer and Guardian*,cited above,p. 34,§69;*Weber*,cited above,pp.22et seq.,§49;*Vereniging Weekblad Bluf!*,cited above, pp.15 et seq.,§§43 et seq.;*Open Door and Dublin Well Woman*,cited above,p.31,§76; and *Editions Plon*,cited above, §53)." In all other ECHR-cases (which also included *Dupuis*,par.45;*Weber*,par.51), the ECHR found that some information –though not all– which had been disclosed in breach of a court order was already in the public domain so that a restriction/interference with freedom of expression through a criminal conviction for disclosing more information constitutes a disproportionate/impermissible restriction.The application of that jurisprudence to the present case would mean that even if some of the information disclosed by FH was not already in the public domain, a curtailment of her right through a criminal conviction would constitute a disproportionate/impermissible curtailment.

[60] See,above.
[61] See,above.
[62] See,above.
[63] Judgment,pars.73,79.

35.**SG(II)(15)**:TC erred in law (par.74)by merging into one question two issues that were relevant to testing the permissibility of any restrictions to FH's –and the public's– freedom of expression, namely,

(i) the issue of a legitimate aim pursued by the measure;and

(ii) the issue of the proportionality/necessity of the restriction that results from it (in this case, through a criminal conviction).

Instead, the TC was required to

(i) take notice of the fact that the good administration of justice by the Tribunal (namely, the Tribunal continued ability to prosecute/punish serious violations of IHL) was a legitimate aim for the purpose of curtailing the exercise of fundamental rights;and

(ii) take into consideration all relevant facts relevant to the test of proportionality/necessity;and

(iii) determine whether, in light of those factors and considering the legitimate aim being pursued, the restriction/interference of her right through a criminal conviction was "necessary", "proportionate" and reasons adduced to justify are "relevant and sufficient".

36.**SG(II)(16)**:TC erred in law when it failed to determine whether less intrusive sanctions –in the form of a conditional discharge[64]– would have been sufficient and proportionate in the circumstances or, if it considered it, erred in fact and abused its discretion when rejecting it as unreasonable.

Conclusions

37.See, below,par.106.

III.RIGHT TO IMPARTIAL TRIBUNAL

38.These (sub-)grounds pertain to 19 May 2009 Decision on Defence Motion Pertaining to the Nullification of the Trial Chamber's Orders and Decisions.[65]

39.**SG(III)(1.1)**:TC erred in law(par.8)when suggesting that the principle identified by the Defence(in pars.11-18 of its Motion) did <u>not</u> constitute a general principle of

[64] FTB,pars.168-171.
[65] Notice,pars.58-60.

law.**SG(III)(1.2)**:In the alternative, if a general principle was necessary to decide the matter, the ruling of the TC fails to demonstrate that the standard which it adopted represents a general principle or has any basis in international law.There was ample support for the Defence position;none for the TC's.[66]

40.**SG(III)(2)**:TC erred in law when suggesting that the Rules did not provide guidance.[67] Rule 15*bis* prevented the TC to validate decisions that had been rendered by only one judge who met the basic requirement of impartiality.[68] The Statute (art.12(1) and art.21) provided all the necessary guidance:a defendant is entitled to a trial that is not subject to any suspicion of lack of impartiality. Because all the orders (including the order in lieu of indictment) challenged by the Defence had been rendered by a TC said to lack appearance of impartiality, they are suspect of the same shortcoming. The facts/factors put forth by the Defence as a basis for the disqualification of two judges and taken into consideration to disqualify them, included incidents that occurred both ***before*** and ***after*** the indictment of FH.In other words, FH was indicted by a TC that lacked the appearance of impartiality. That same Chamber dismissed many Defence applications challenging the legality and integrity of an investigation that led up to that indictment, and which had been carried out under its authority and pursuant to its instructions.[69] The finding that two of the Judges of the TC lacked an appearance of impartiality rendered these decisions suspect of the same deficiency.

41.**SG(III)(3)**:TC erred in law/fact(par.10) when suggesting that FH's right to a fair trial had not been prejudiced.**SG(III)(3.1)**:TC erred in law by requiring the Defence to establish a "prejudice". Such a requirement has no basis in international law (a violation of a fundamental right *per se* calls for a remedy) and erroneously reverses the onus of establishing the need for a remedy.**SG(III)(3.2)**:TC erred in fact when misinterpreting/misunderstanding the nature of the prejudice caused to FH and erred when concluding that no such prejudice had been established. The prejudice made to

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[66] Motion,pars.11.*et.seq*.See,e.g.,*Karemera*,Decision,7Dec2004,pars.14,20-23;Pinochet Judgment at 125,137,139,143,146;*Dimes v.Proporietors of Grand Junction Canal*,3 HL Case.759(in particular,*per*Lord Campbell,at 793-794);*Sellar v.Highland Railway Co*.,1919 SC(HL),19;*Bradford v.McLeod*,1986 SLT 244;*Reg v Altrincham Justices,ex parte N Pennington* [1975] QB 549,at.552(*per*Lord Widgery);*Antoun v.R* [2006]HCA 2;*Gassy v The Queen* [2008]HCA 18;*S v.Dube and Others* (523/07) [2009] ZASCA 28(30 March 2009),in particular,pars.18-21;*Pinochet* Judgment,at139,*per*Lord Nolan

[67] ImpugnedDecision,par.8.

[68] ImpugnedDecision,par.16;Motion,par.16.

[69] Defence Motion for Disqualification,3Feb2009.

FH's fundamental rights was that she has been investigated, indicted and, for a time, subject to decisions pertaining to her rights (procedural or otherwise) by a Chamber that lacked the basic requirement of impartiality.

42.**SG(III)(4)**:TC erred in law when suggesting that proof that it was "in the interests of justice" to set the record aside was a supplementary requirement to be met.[70] After the special bench and the President had found that the original bench lacked the appearance of impartiality, the setting aside of the record came, as the *Karemera* Chamber noted, "as a consequence of" such decision. The TC erred further (in law) when suggesting that the "interests of justice" was a factor to be weighed against the right of the accused to a fair trial.[71] Instead, it forms part of what would constitute the interests of justice. Instead of being a counter-weight to this right, the "interests of justice" to which the *Karemera* Chamber referred is an additional basis/reason to set aside the record, not a reason to decline to do so.As is clear from par.10, the TC equated the absence of "prejudice" to the accused's right to a fair trial to that of "interests of justice".That was wrong in law.

43.Even if the requirement of "interests of justice" had applied, it was clearly in the interests of justice to set aside these decisions and orders.All decisions pertained to important decisions going to the legitimacy/legality of the investigation and conduct of these proceedings.The case was still at pre-trial so that practical consequences would have been limited. In the *Karemera*, the record was set aside despite the fact that the trial had already started and witnesses been heard. Contrary to the TC's suggestion (pars.9,11), the fact that the bias was one of *appearance* rather than *actual* bias did not justify departure from existing precedents.*Karemera* (as well as other precedents listed above) was(were) about *apparent*, rather than actual, bias;they have similar effects in law.[72]

44.Even if the TC's position was correct in law, it is telling that whereas the TC pitted the rights of the accused against what it saw as "the interests of justice" in relation to "decisions and orders relating to non-substantive matters"(par.10), it failed to do so in relation to the order in lieu of indictment(par.11). In those circumstances, the TC's decision to proceed with the impugned record constitutes an error of law and fact and

[70] ImpugnedDecision,pars.9-10.
[71] Par.9.
[72] Trechsel,*Human Rights in Criminal Proceedings*,p.63.

an abuse of the process as would warrant the nullification of all Trial Chamber decisions rendered thereafter, including the Judgment.

45.**SG(III)(5)**:When considering the effect of the original TC's lack of impartiality in relation to the order in lieu of indictment, the TC erred in law/fact and abused its discretion by undertaking what it said was a review of supporting material and found that such material was sufficient to proceed against FH.[73] The TC had no authority and no valid legal basis to do so.Furthermore, it erred further as it

(i) **SG(III)(6)**:failed to give a reasoned opinion on that critical point so that its adequacy/legality cannot be adequately ascertained,

(ii) **SG(III)(7)**:had no way to exclude the reasonable possibility that the apparent bias of the impugned Chamber might have played a part in the way in which it had conducted the investigation, shaped it (through its instructions to the *amicus* investigator) or when confirming the charges.

46.**SG(III)(8)**:In the alternative, the TC's finding as to the alleged sufficiency of the supporting material to ground contempt proceedings would create an appearance of lack of impartiality on its part that would justify the disqualification of the Chamber and the annulment/setting aside of their subsequent decisions and Judgment.[74]

Conclusions

47.See, below,par.106.

IV. *ACTUS CONTRARIUS*

Legal considerations

48. R77(a)(ii)'s *actus reus* is the physical act of disclosure of information when such disclosure breaches an order.[75]It was common ground between the parties that the Prosecutor has to establish that the information continued to be treated as confidential at the time relevant to charges.[76]

[73] ImpugnedDecision,par.11.
[74] See,generally,*Kyprianou*(ECHR);Motion on Disqualification,pars.15.*et.seq*.
[75] *Marijacic* TJ,par.17.
[76]REDACTED.FTB,par.20.

49.The AC has acknowledged that Chambers have the power to lift the confidentiality of decisions, not just by a formal order, but by "*actus contrarius*".[77] No particular form is required and Tribunal's practice is replete with examples of lifting of confidential character of decisions/orders –in whole or part– by disclosing their existence or content in public decisions/orders.[78] In such circumstances, the material/information publically disclosed is not being "treated as confidential" thereafter so that further disclosure could not form the *actus reus* of R77(A)(ii).[79]

Errors

50.**SG(IV)(1)**:TC erred in law/fact when it failed (i)to ascertain and/or (ii)require the Prosecutor to exclude the reasonable possibility that all facts in relation to which FH had been validly charged had been made public by *actus contrarius*.[80]

51.**SG(IV)(2)**:TC erred in law/fact by convicting FH despite that fact that all of these facts had been the subject of an *actus contrarius* and/or for rejecting the reasonable possibility that this might be the case.[81]

52.**SG(IV)(3)**:TC erred in fact(par.40) when suggesting that the Tribunal's public references were limited to

> "the existence of the Appeals Chamber Decisions"

and that

> "its references to the law contained in the Appeals Chamber Decisions [did not] amount to an *actus contrarius* by the Tribunal".[82]

The Tribunal made public much more than the "existence" of these decisions, and its *actus contrarius* was in no way limited to "references to the law" contained in these decisions.[83]

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[77] *Marijacic*AJ,par.45.
[78] Ibid.footnote 20,21;also*Milosevic*,Order,27April2007,par.2;*Hartmann* Indictment par.1;*Delic*,Decision,23August2006;*Delic*,Decision,14Jan2008;*Perisic*,Order,22Sept2006 (in relation to the same impugned decisions).See,also,T.19 May 2009,p.78.
[79] See,again,e.g.,*Marijacic* TJ,par.17
[80] Judgment,pars.36-40,47;see,FTB,pars.18-33.
[81] See,below.See,also,FTB,pars.19-33;
[82] Par.40.

53.**SG(IV)(4)**:All facts for which FH had been charged had been made the subject/object of an *actus contrarius*.[84] The TC erred in fact and abused its discretion when it failed to acknowledge and take account of that fact and convicted FH despite this.[85]

54.On 27 April 2007, then ICTY President, Judge Pocar, issued a public "Order Assigning Judges to a Case before the Appeals Chamber".At page 2,Judge Pocar referred publically to the existence of the first impugned Decision by its full title, making public several of the facts for which FH was prosecuted–

a. the existence(and date) of one of the impugned decisions;

b. the confidential character of that decision;

c. the identity of the applicant:Serbia-Montenegro.

55.On 12 May 2006,[86] the AC publically mentioned the two impugned decisions,verbatim citations/quotes from these, including references to several facts relevant to these proceedings–

(i) the existence(and date) of the two impugned decisions;

(ii) the confidential character of these decisions;

(iii) the identity of the moving party/applicant;

(iv) the impugned decisions relate to the production/protection of records of the SDC;

(v) That national interest as legal basis/argument sustaining the application;

(vi) Part of the AC's legal reasoning legal;[87]

56.The *Milosevic* TC also made public facts for which FH was convicted.[88] It also made clear that what is being protected in protective-measures orders is not the order itself or its effect, but the material subject to protective measures.[89]

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[83] See,below.
[84] FTB,pars.25-33;see,below,pars.54-57.
[85] See,next.
[86] *Milutinovic*,Decision,12May2006,pars.6,33-35,footnotes7,14,15,16,17, 20,66,78,79
[87] See,par.35 and footnotes78-79.

57.The practical effect of these decisions/orders was to lift the confidential status of the facts subsequently disclosed publically by the Tribunal. R77(a)(ii)'s *actus reus* could not therefore be established *in relation to these facts*.The TC erred when it found to the contrary.

58.**SG(IV)(5)**:If there was any doubt about what had been rendered public, the TC was required to interpret that doubt in favor of FH and erred when it failed to do so and failed to consider the reasonable possibility that FH might have been mistaken about that fact so as to prevent the formation of a culpable *mens rea*.[90]

59.**SG(IV)(6)**:TC erred in law when it failed to require the *amicus* to establish that the facts pleaded in the indictment had not been made public through *actus contrarius* and, instead, put the onus on the Defence to establish that facts in relation to which FH had been charged had been made public.[91]

60.**SG(IV)(7)**:TC erred in law(par.39) when drawing a distinction between "legal reasoning" and "applicable law" that (i)has no support in law, (ii)is contrary to the Tribunal practice, (iii)for which neither R77(a)(ii), nor international law provides a valid basis.[92]

61.**SG(IV)(8)**:TC erred in law/fact, footnote 85, when suggesting that D24 and D62 could not constitute evidence of *actus contrarius* because they are posterior to the impugned decisions and erred further when disregarding their content. They are relevant because they provide corroboration and support for the Defence's submission that the facts contained therein had been made public by the Tribunal and were

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[88] *Milosevic*,Second Decision,23Sept2004;*Milosevic*,First Decision,23September2004.These decisions make the following facts public:(i)the identity of the applicant;(ii)the existence of confidential orders pertaining to the SDC records;(iii)legal basis relied upon to order those measures.

[89] Ibid,in particular,p.2.See,also,*Delic*,Decision,23Aug2006;*Delic*,Decision,14Jan2008;*Perisic*,Order 22Sept2006

[90] Inparticular,Judgment,par.47.See,also,below.

[91] See,in particular, Judgment, par.38(and,pars.40,47).

[92] See,in relation to the legal basis/reasoning pertaining to this case,FTB,pars.11-14,26-29,and references therein(*Milutinovic*,Decision,12May2006,pars.34-35,footnotes 7,14,15,16,17,20,78, 79;*Milutinovic*,Decision,15May2006,footnotes 12 and 42;*Delic*,Decision,23August2006,p.4,footnote 10;*Delic*,Decision,14January2008,p.3,footnote 8; *Perisic*,Order,22Sept2006,p.2,footnote 3; T.181-188;*Milutinovic*,Prosecution Reply, 10April2007,par.10 and footnote 9.AlsoD3,D11(FTB,par.14).

regarded all through that time as not being "treated as confidential". They also provide support to impugn the TC's suggestion that only a formal decision lifting confidentiality following an application to that effect could legally be regarded as *waiver by the applicant.*[93]

62.**SG(IV)(9)**:TC erred in law/fact when it failed to consider whether FH could reasonably have taken the view that, as a result of the Tribunal's public decisions,the facts that she discussed were not treated as confidential by the Tribunal anymore.[94] **SG(IV)(10)**:In the alternative, the TC erred in law/fact and abused its discretion when concluding that such a conclusion was unreasonable in the circumstances.[95]

Conclusions

63.See,below,par.106.

V. WAIVER BY APPLICANT

64.At par.46, whilst acknowledging the possibility of a waiver of confidentiality by the applicant, the TC suggested that it could only operate where there has been a formal request by the applicant and an "explicit" order of the Chamber formally/explicitly lifting the confidentiality.[96]**SG(V)(1)**:The TC's position has no basis in law, is contradicted by Tribunal practice and constitutes an error of law.[97] Tribunal practice makes it clear that no formal/explicit order is required to lift confidentiality of a particular fact/information.[98] This explains why there is no precedent of a contempt conviction for disclosing facts/information that an applicant had himself/itself made public.[99] A conviction for contempt in such a case would be without a valid legal basis;it would also be oppressive, unnecessary and

[93] See,below.
[94] FTB,pars.110-123;FTB,pars.13-14;*Milutinovic,*Prosecution Reply,10April2007,par.10 and footnote 9;D3,D11; D3,D4;D2;T.393-394.
[95] See,also,T.270-276,312,314-315,342;D11;P1.1,1002-1,4(-5)/10;P2.1,1003-2,8-9/13,1002-2,6-7/9.
[96] Also,T.561.
[97] E.g. REDACTED.Also,FTB,pars.34-36.The *Margetic*TJ,par.49,to the extent that it refers to an "explicit" order (i) is obiter, (ii) cites no support/authority for its finding, (iii) does not suggest that "explicit" can or should be interpreted (as the TC did in the present case) as a formal order that grants a formal application for waiver of confidentiality.
[98] See,e.g.,FN.99.*et.seq*,below,FN.78,88,92,above.
[99] E.g.D14,D15,D16,D18,D19;T.194-195;T.157-161.

inappropriate.[100] There are many examples a party which had sought/obtained a confidentiality order disclosed "confidential" information in advance of the order being lifted in relation to the protected information.[101] In none of these cases did the Tribunal initiate contempt proceedings against the relevant Prosecution officials. Instead, the information in question was treated as public as soon as the applicant had made it so.Practice from other international tribunals supports the view that no formal/explicit application and order is necessary to waive/lift such confidentiality.[102]

65.**SG(V)(2)**:TC erred in fact when finding(par.45) that information disclosed by representatives of Serbia-Montenegro was not the same information which FH was charged with disclosing.All facts with which she was charged were made public by representatives of Serbia-Montenegro.[103]Ms Kandic gave evidence that, at the latest from June 2007, Serbia-Montenegro had ceased to seek to protect the confidentiality of any of these facts.[104] This is supported by the record of these proceedings.[105] Representatives of Serbia-Montenegro also made repeated public references to, for instance, the alleged basis and rational for the protective measures (the "purported effect" of AC's decisions).[106]

66.**SG(V)(3)**:TC erred in law/fact and violated the burden of proof when failing to require the *amicus* to prove that this was not the case. As a result, it has not been established by the *amicus* that the new facts had not, in fact, been made public by the Applicant, Serbia-Montenegro, and there is positive evidence that this is the case;e.g.:

- Whilst the Defence is unable to ascertain with any certainty what the TC's reference to "the content of closed session transcripts of the Applicant's submissions" and "confidential submissions"(par.33) relate to, there are clear

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[100] *DPP v.Humphrys*,46.
[101] D14;*Dokmanovic*,Order,3April1996;*Dokmanovic* Order,10July1996;*Dokmanovic*,Order, 3April1996//D15;D20;*Milosevic* Decision 24May1999//D16;*Obrenovic*,Order,9April 2001//D26,D27,D28//D18;*Limaj*,Indictment,27January2003;*Limaj*,Decision,18February2003/ /*Vasiljevic*Warrant,26Oct1998;*Vasiljevic*Decision 31Oct2000//D19;*Prlic*,Order,2April2004;*Prlic*,Order,5April2004;*Prlic*,Order,4March2004//A lso,D63,D64,D65.
[102] Also,*Bemba*,Decision on the Interim Release(ICC-01/05-01/08-475),14Aug2009,par.65.
[103] D10;D5;D9; REDACTED;T.276-280,392,398-410;423-427,429,466-472,478-480,494-497.These acknowledgements were made by state officials acting in their official capacity:e.g.ibid.Also T.416-417;447-449,472-479.
[104] Ibid,and,T.400-402.
[105] Ibid;alsoT.423-427,429,466-472,478-480,494-497.
[106] E.g.D10,par.58;D9,pp.25,33-34,37-38,41; D5,pp.4-5.

indications that Serbia made public what would appear to have been submissions before ICTY;[107]

- Whilst the Defence is unable to ascertain with any certainty what the TC's reference to the "legal reasoning" as opposed to "applicable law/legal basis" is intended to refer to, there are clear indications of Serbia having made public matters relevant to that issue;[108]
- As regard the "purported effect"(par.33) of the Decisions as understood by the Defence[109], there were again clear indications that Serbia made this fact public;[110]

67.The finding, at par.45, that the statements placed on the record do not "reflect the Applicant's official position before this Tribunal vis-à-vis the issue of confidentiality" is an error of law and fact.**SG(V)(4.1):**An error of law because the TC adopted an incorrect legal test/standard.The AC has not required that, to amount to a waiver, the statement had to "reflect the Applicant's official position before this Tribunal vis-à-vis the issue of confidentiality". Instead, the AC took the view that the information publically disclosed only needed to be acknowledged by officials whose Government had sought and obtained protective measures from the Tribunal.[111] There is no requirement, in international law, that this position needs to relate specifically to the Applicant's "position before this Tribunal".**SG(V)(4.2):**TC erred in fact because the record indicates clearly that the persons making these statements were acting/disclosing/acknowledging the relevant facts in their official capacity.[112]

68.None of the references given by the TC supports the view that Serbia-Montenegro sought to maintain the confidential nature of <u>any</u> of the facts that formed the basis of the charges.Nor do any of them suggest that Serbian officials had a different position than the one identified by the Defence *in relation to any of <u>these</u> facts*. What Serbia-Montenegro sought to keep confidential is the actual <u>contents</u> of the SDC minutes.[113] FH was not charged with disclosing this.[114]There is simply no support for the finding

[107] See,e.g.D5;D1;D2;D10;D9,pp.33,37,93.
[108] E.g.D10,par.58;D9,pp.25,33-34,37-38,41;D5,pp.4-5;D1;D2;D6.
[109] See,above.
[110] E.g.D9;D10;D5;D1;D2;D6;T.389-390;404.
[111]E.g. REDACTED.
[112] See,D10;D42; REDACTED;D.9,pp.16,33,39,84,93,94,102;T.416-417;447-449,472-479
[113]D10,pars.55-59;D9,pp.33,36-37,41,92-93;D5.
[114] Judgment,par.35.

that Serbian officials "pursued the opposite approach" in relation to any of the facts that form the basis of FH's conviction. For all these reasons, the TC erred in law/fact.

69.**SG(V)(5):**TC erred in fact when it failed to consider whether FH could reasonably have taken the view that, as a result of the Applicant's public statements, the confidentiality of facts that she discussed had been waived.[115]**SG(V)(6):**In the alternative, the TC erred in fact when concluding that such a conclusion was unreasonable in the circumstances.

Conclusions

70.See,below,par.106.

VI. SERIOUSNESS OF ALLEGED CONDUCT

71.**SG(VI)(1):**TC erred in law when it found(par.25) that "any" knowing/willful violation of an order which risks interfering with the administration of justice, regardless of the seriousness of that risk, would necessarily amount to a criminal offence under R77(a)(ii).The practice of this Tribunal is littered with examples of counsel and others knowingly and, arguably willfully, disclosing information in breach of court orders who are not being charged with contempt, because their conduct does not rise to the level of seriousness that would justify criminal proceedings.[116]

72.**SG(VI)(2):**TC erred in law when it failed to determine if/whether FH's conduct was more than negligent.[117]**SG(VI)(3):**If it did, it erred and abused its discretion in excluding it as a reasonable possibility.[118]

73.**SG(VI)(4):**TC erred in law/fact when failing to satisfy itself that that conduct was sufficiently serious to meet the relevant legal standard.[119] In *Brdjanin*, the Tribunal found that one count of contempt raised against Maglov did not meet that threshold as

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[115] See,below;FTB,pars.87-96,110-123(referring,*inter alia*,P2.1,1004-2,6/21;P2.1,1003-2,5/13;P1.1 1002-1,3-4/10;P4;T.144-146,311,492-494).

[116]E.g. REDACTED.See *amicus* disclosure,in,Defence Reply,21January2009;Prosecution Notice,26Jan2009;Response to *Amicus* Second Submission,2July2009;T.178,T.228.Also,below,par.72.

[117] *Nobilo*AC.

[118] See,in particular,FTB,pars.77,87,97.

[119] E.g.*Ntakirutimana*,Decision,16July2001,pars.10-12;*Furundzija* TC's Complaint,5June1998,par.11;*Kajelijeli*,Decision,15Nov2002,pars.14-15

the disclosed information in knowing/willful violation of an order related to a fact that was already publically known.[120]

74.**SG(VI)(5)**:TC erred in law/fact by failing to require the *amicus* to prove that fact and, having failed to do so, failed to draw the necessary conclusion form his failure.

75.**SG(VI)(6)**:TC erred in fact as it failed to consider the factors on the record pertaining to this issue.[121]

Conclusion

76.See,below,par.106.

VII. "REAL RISK" TO ADMINISTRATION OF JUSTICE

TC's failure to address the issue

77.Whilst the Prosecutor need not prove an *actual* interference with the administration of justice, proof must be made, as part of the *actus reus*, that the impugned conduct created a real risk for the administration of justice.[122]This conforms to relevant domestic practice.[123]

78.**SG(VII)(1)**:TC erred in law/fact when (i)suggesting that the matter was not jurisdictional(as an element of the offence, it was), (ii)failing to address that requirement as such, (iii)failing to acknowledge that it forms part of the offence's *actus reus* and dealing with it as such and (iv)failing to take notice of the fact that the *amicus* had failed to (seek to) prove this element.[124]

79.**SG(VII)(2):**The TC erred in law by setting a standard that has no support under international law.[125]**SG(VII)(2.1):**Such a requirement forms part of R77(a)(ii)'s *actus reus*.[126] The TC's failure to acknowledge this was an error of law.[127]**SG(VII)(2.2):**TC

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[120] *Maglov*Decision on Acquittal,pars.9-10 (*re* count 3).
[121] See,inparticular,FTB.pars.151-166.
[122] See*Vujin*AJ,par.18;*Nobilo*AJ,par.36;*Margetic*TJ,par.15;*Marijacic*TJ,par.50
[123] E.g.*Duffy, ex p Nash*,p.896(UK);*Glennon*,at605(Australia);*Birdges v.California*,at 263(USA);*Dagenais v.CBC*(Canada);*Mahon v.Post Publications*,par.92(Ireland); *Midi Television (Pty) Ltd v.DPP(Western cape)*(South Africa).
[124] Judgment,par.27 and footnote 57.
[125] *Nobilo*AJ,par.30;*Vujin*AJ,pars.13,24.
[126] E.g.*Margetic*TJ,par.15;*Marijacic*TJ,par.50.See also,below,*Vujin*AJ,par.18;*Nobilo* AJ,par.36.
[127] See,above.

erred in law when suggesting that conduct that "may" render state cooperation less forthcoming "necessarily" interferes with the administration of justice and was sufficient to meet the requirements of international law and R77(a)(ii).[128] There is no support for such a position under international law.[129]**SG(VII)(2.3):**In *Nobilo* and *Vujin*, the AC stated that, as a matter of international law and for this Tribunal, only conduct "**which tends to**" obstruct, prejudice or abuse its administration of justice would meet the requisite standard.[130] The TC took no apparent notice of that binding caselaw. What the AC stressed is that only an *actual and substantial*, not a *potential*, risk would be sufficient and only if it was serious enough as to "tend to" obstruct/prejudice/abuse the administration of justice.Thus interpreted, AC standard is consistent with relevant domestic practice.[131]

No jurisdiction after end of proceedings

80.There is no general principle as would permit a tribunal to prosecute for contempt a person for disclosing facts pertaining to judicial proceedings *after* these proceedings have closed/ended so that ICTY has no jurisdiction in such a case[132] *subject arguably to the protection of victims/witnesses under Article 22 Statute.*This explains that in those jurisdictions that have inspired the ICTY-law of contempt, the test of a "real risk of prejudice to the administration of justice" has since the ECHR-era "always been used in relation to [particular proceedings], not in relation to the administration of justice generally".[133] Here, proceedings in the *Milosevic* case had been terminated on 14 March 2006.[134]

81.**SG(VII)(3)**:In those circumstances, the exercise of the Tribunal's R77 jurisdiction over the conduct of FH was *ultra vires* and an error of law.

TC's erroneous finding that a "real risk" existed

82.**SG(VII)(4)**:TC erred in fact(and law) (pars.74+80) when finding that the conduct of FH had created a "real risk" that states would lessen their cooperation which in turn

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[128] Pars.74,80.
[129] *Nobilo*AJ,par.30;*Vujin*AJ,pars.13,24.
[130] *Vujin*AJ,par.18;*Nobilo*AJ,par.36.
[131] See,above,FN.123;*Megrahi v Times Newspapers Limited;In re Lonrho plc*,per Lord Bridge(at.209);*Bridges v.State of Cal.*at262-263;*Craig v.Harney*,331U.S.367,376(1947)
[132] *Nobilo*AJ,par.30;*Vujin*AJ,pars.13,24.
[133] See,Fenwick/Phillipson,*Media Freedom under theHumanRightsAct*,p.288.See,also,T.311.
134 *Milosevic*,Order,14March2006;T.375-376.

"necessarily" impacts upon the Tribunal's ability to exercise its primary jurisdiction. There is no evidence of that fact.Instead, the record is replete with indications that-

(i) no such risk existed,[135] that,

(ii) rather than decrease, Serbia's cooperation with the Tribunal increased/improved after FH's publication.[136]

83.**SG(VII)(5)**:TC considered none of the indications contradicting its findings or abused its discretion when disregarding them and, therefore, erred in fact.[137]

84.**SG(VII)(6)**:It erred in fact and abused its discretion when finding that such a risk existed despite the absence of evidence to support such findings, and despite clear evidence to the contrary:

(i) The disclosure attributed to FH has had no demonstrated effect on the proceedings or administration of justice;

(ii) Evidence was recorded that no real or substantial risk had been created by **her** conduct;[138]

(iii) Serbia-Montenegro never suggested that its interests had been interfered with as a result of FH's publications or that it would cease/lessen its cooperation with the Tribunal as a result.[139]No evidence was called to establish this.

(iv) The evidence is that, after the publication of FH's book, Serbia's cooperation with the Tribunal **improved**;[140]

(v) *Milosevic* proceedings had been terminated;[141]

(vi) These issues were already in the public domain and were widely discussed;[142]

(vii) FH disclosed none of the contents of the documents that were subject to protective measures.[143]

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[135] E.g.T.389,398-404;452-460,481-483.
[136] T.452-460,481-483.
[137] FTB,pars.67-70.
[138] T.452-460,481-483.
[139] T.389;404;D9.
[140] T.452-460;481-483.
[141] See,above.
[142] FTB,pars.43-52.
[143] Also,Judgment,par.35.

(viii) FH acted in good faith and based on an accurate factual basis.[144]

85.**SG(VII)(7)**:The supplementary finding that the alleged risk that states may decrease cooperation "necessarily" means that the administration of justice will be interfered is an error of fact and law.It is flawed as a matter of law since Article 29 sets an absolute/unqualified duty/obligation to cooperate that leaves no room for a choice/discretion to do so. It is flawed as a matter of evidence since there is (i)no evidence to sustain that finding (let alone beyond reasonable doubt) and (ii)clear, undisputed, evidence to the contrary, namely, that in fact, Serbia's cooperation with the Tribunal improved after publication.[145]

Alleged "real risk"

86.**SG(VII)(8)**:TC erred in law when it took the view that a mere potential "risk" would be such as to warrant/permit the curtailment of FH's freedom of expression through a criminal conviction. Where the safety of victims/witnesses is not at stake, freedom of expression may only be curtailed in the context of criminal proceedings where (i)the fair trial of an accused or (ii)his right to be presumed innocent are at stake.[146] There is no support in international law as would allow a general/abstract risk to the administration of justice generally to curtail freedom of expression.This explains that in ECHR-countries such a risk can only be said to exist in relation to particular/on-going proceedings.[147]

Double-counting

87.**SG(VII)(9)**:TC erred in law and/or in fact by "double-counting" the alleged "real risk"

(i) as a basis for curtailment of FH's freedom of expression and

(ii) as an aggravating factor.[148]

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[144] T.145.See,*Rizos*,par.45;*Dupuis*,par 46;*Fressoz*, pars.54-55.T.145,270,384-387;Defence Motion pursuant to Rule65*ter*,7February2009,Annex.

[145] T.452-460;481-483.

[146] T.346-348;D39.

[147] Again,e.g.,Fenwick/Phillipson,p.288.

[148] Judgment,pars.74,80.

Conclusions

88.See,below,par.106.

VIII. *MENS REA*–GENERAL GROUNDS

"Intent to interfere"

89.**SG(VIII)(1)**:TC erred in law when taking the view that R77(a)(ii) and international law did not require proof of an intent to interfere with the administration of justice and suggesting that "any" knowing/willful violation of an order meets the requisite *mens rea*.[149] Under R77(a)ii),there must be proof of a "specific intent to interfere with the administration of justice".[150]

90.TC referred to *Beqaj* and *Maglov* holdings and dismissed them as *passé*, as having been "developed" by subsequent AC rulings. Not so. No cited AC judgment suggests this. In *Jovic* and *Marijacic*, the authorities cited by the TC for this alleged jurisprudential "development", no issues were raised as to the need or otherwise of an intent to interfere with the administration of justice. Instead, findings pertained to a suggestion that as part of the *actus reus*, proof had to be made of "harm"/actual prejudice to the administration of justice, a submission not advanced here.[151] The TC also erred in law/fact by relying(par.53) upon the *Bulatovic* TC Decision, which pertained, not to R77(a)(ii), but to R77(a)(i), and assuming (without verifying and establishing) that the same *mens rea* would apply to different sorts of contempt. Furthermore, and contrary to the present case and the precedents cited by Defence, the *Bulatovic* contempt was committed "in the face of the court". It is common to most common law jurisdictions to have different *mens rea* between "out of court" and "in the face of the court" contempt-types.[152] Thus, whilst the *Bulatovic* TC was right not to rely on the *Aleksovski* precedent,[153] the TC was wrong to rely on *Bulatovic*.[154] The assumption that the same *mens rea* would apply to different forms of contemptuous

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[149] Judgment,pars.53(54-55,62).
[150] *Beqaj*TJ,par.22.*Also,Margetic*TJ,pars.30 and 77;*Hunt v.Clarke*,per Lord Cotton.Also,*Kanyabashi*,Decision,30November2001; *Kajelijeli*,Decision,15Nov2002,par9;*Maglov*Decision on Acquittal,pars.15/40(and14,23);SCSL-*Brima* Contempt Trial Judgment,pars.18-19;*Milosevic*Decision,13May2005, par.11.
[151] See,*Jovic*AJ,par.30,referring to *Marijacic*AC,par.44.See FTB,par.86.
[152] E.g.C.J.Miller,*Contempt of Court*,(3rd.ed),in particular,pars.4.1*et.seq*.
[153] *Bulatovic*TJ,par.17.
[154] Judgment,par.53.

crimes and that the *mens rea* would be identical in the case of "in the face of the court" and "out of court" contempt is not one that is grounded in general principles.

91.By contrast, in *Nobilo*, a binding AC precedent pertaining to "out of court" contempt, which the TC failed to notice, the AC said that an accused could only be convicted under R77 where he has been shown to have acted

> "with specific intention of frustrating [the] effect [of confidential orders]".[155]

92.This requirement reflects general principles of international law.[156]In *Maglov*, the TC cited many authorities/cases from domestic practice/jurisdictions supporting that requirement of intent.[157]Many others exist.[158] A general principle that would criminalise conduct regardless of or despite the absence of such an intent could simply not be established *as a matter of international law*.

93.**SG(VIII)(2)**:TC erred in law when it failed to require the Prosecutor to prove that element and erred in fact when it failed to come to the reasonable conclusion that no such intent existed.[159]The *amicus* did not make it a part of his case to prove such an intent.[160]

94.**SG(VIII)(4)**:TC erred in law/fact when convicting FH despite clear evidence that she did not intend to interfere with the administration of justice.[161]

95.**SG(VIII)(5)**:TC's *obiter*[162] suggestion(par.53) that proof of actual knowledge or willful blindness of the existence of an order, or reckless indifference to the

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[155] *Nobilo*AJ,par.40(c).
[156] *Nobilo*AJ,par.30;*Vujin*AJ,pars.13,24.
[157] See*Maglov* Decision on Acquittal,FN.22,27,40.
[158] E.g.,*ex parte Bread Manufacturers ltd,Re Truth & Sportman Ltd;Hinch v Attorney-General*(Australia);*A-G v Times Newspapers; AG v.Newspaper Publishing PLC*,[1988]Ch.333,374-375,381-383,387,perSir John Donaldson,Lloyd LJ and Balcombe LJ;*AG v News Group Newspapers PLC*,[1989]QB 110,126(Watkins LJ);*Connoly v Dale* [1996]QB 120,125-126 and 229(Balcombe LJ) (UK);*State v.Van Niekert*(South Africa);*US v.Ortlieb*,274 F.3d 871,874;*US v.United Mine Workers of America*,330 U.S. 258,303;*AmericanAirlines,Inc.v.Allied Pilots Ass'n*,968 F.2d 523,532(USA).
[159] See,next paragraph.
[160] E.g.*Amicus*PTB,pars.22-24
[161]FTB,pars.87-96.See,e.g.*Ruxton Statement*,p.4;T.137;144-146;271-276,281-282,311,314-315,340-341,372,384-404,423-443,487,492-494;P1.1,1002-1,3-4/10;P2.1,1003-2,2/13;P.1.1,1004-2,16/21;FTB,par.16.FTB,pars.79-96;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1,1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13;P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6,9-11/21;P2.1,1004-2,7,11/21;*Ruxton* Statement).

consequences of the act by which the order is violated automatically means that an intent to interfere with the administration has been established has (i)no support in international law and (ii)no basis in the evidence.

Alleged knowledge of confidentiality of facts

96.At par.58, TC suggested that the "strongest evidence" of FH's *mens rea* (which the TC took to mean knowing/willful violation of a court order[163]) was FH's knowledge of the confidentiality of the two impugned AC decisions.**SG(VIII)(6)**:TC erred in law/fact and/or abused its discretion when making these findings.FH knew of the existence of two decisions and knew that they had originally been filed confidentially because these facts had been made public by the Tribunal, the Applicant and in the public/media.[164] The TC erroneously equated

(i) knowledge of that fact with

(ii) knowledge that the facts disclosed in the book/article continued to be treated as confidential at the time of publication.

97.**SG(VIII)(7)**:TC erred in fact when failing to identify any evidence that FH had "willfully" disclosed evidence that she knew to be treated as confidential and despite evidence to the contrary.[165]FH believed and understood that all the facts that she discussed were in the public domain, came from public sources and could therefore be disclosed.[166]

98.**SG(VIII)(8)**:In the alternative, the TC placed disproportionate weight upon FH's knowledge that the impugned decisions had originally been filed confidentially and failed to consider all of the evidence contrary to a finding of knowing/willful disclosure of confidential facts[167] and abused its discretion and/or committed an error of fact when so doing.

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[162] Judgment,par.55.
[163] Judgment,pars.53,62.
[164] E.g.P1.1,1002-1,4(-5)/10;P2.1,1003-2,8-9/13,1002-2,2,4-5,6-7/9;P.3.1(p.122).FTB,pars.71-73,88.
[165] E.g.P2.1,1004-2,6/21;P2.1,1003-2,5/13;P1.1,1002-1,3-4/10;T.144-146,311,492-494;P4.
[166]P1.1,1002-1,4/1;P.2.1,1004-2,6/21;1002-2,6/9;1003-2,3-4/13;P.2.1,1003-2,8-11/13.
[167] See,FN.166,and,FTB,pars.87-96,110-123.

Conclusions

99.See,below,par.106.

IX. *MENS REA* –REGISTRY'S LETTER

1009.**SG(IX)(1)**:By allowing the *amicus* to use/tender P.10 and, subsequently, relying upon it, the TC committed a serious violation of FH's fundamental rights and Rules 89(D)/95.[168] The *amicus* had undertaken **not** use that document at trial. The Defence, therefore, dropped its investigation *re* the origin/provenance/legality of this document. The *amicus* later breached that undertaking and tendered the document in evidence despite the Defence objections.[169] The TC took no account of the unfairness/prejudice caused. Nor did it require the *amicus* to produce a chain of custody despite indications of the fact that it was obtained illegally/impermissibly and in violation of UN immunities/privileges,[170] without the necessary authorization from UN headquarters, without requiring the party tendering it to establish the legality of its reception and in violation of R89(D)/95.This resulted in the violation of FH's rights

(i) to timely and detailed notice of the charges,

(ii) to adequate time/resources to prepare,

(iii) to an adversarial proceedings and

(iv) to a fair trial.

101.**SG(IX)(2)**:TC erred in fact when suggesting that this document could be read as suggesting that FH knew that the facts relevant to the charges were still treated as confidential.Nowhere is it suggested in P.10 that the Registrar had taken the view or suspected that FH had violated a confidential court order (let alone the impugned decisions).[171] It was beyond dispute –and agreed between parties– that FH had not obtained the impugned information (for which she was charged) in the course of her occupation at the Tribunal.[172]Therefore, the letter simply could not and could not

[168] P10;Judgment,pars.59-61.
[169] D49,D50,D51,D52,D53,D54, REDACTED,D56,D57,D66,D67;T.204-214.
[170] In particular,art.30.
[171] T.302-303;Defence Motion pursuant to Rule 65*ter*,7Feb2009 (point 8).
[172] Ibid.

reasonably be read as suggesting a reference to the impugned decisions.[173] Revealingly, the letter only refers to UN regulations (that were attached) and not to Rule 77.Significantly, the TC failed to account for the fact that FH explained during her interview that she had regarded the Registrar's letter as pertaining, not to information contained in confidential decisions, but to her "duty of discretion" as a former UN employee.[174] Also,as noted by the TC,[175] the impugned article is a mere reproduction (in English) of passages of the book.[176] The book was written before the Registrar's letter was sent to FH so that it could not be indicative –retroactively– of her alleged culpable state of mind.The TC committed a further erred of law and/or fact when it failed to exclude the reasonable possibility that FH did/could not regard the letter as referring in any way to the facts disclosed in the impugned pages of her publications.[177]

Conclusions

102.See,below, par.106.

X. AND XI. *MENS REA*–MISTAKE OF FACT AND LAW

103.TC erred in fact/law(Judgment,pars.64-67) when excluding/disregarding the reasonable possibility that FH was unaware of the criminal nature of her conduct (if regarded as such) as a result of an error of fact or law as she believed/understood that the facts in question were not anymore treated as confidential at the time of publication.[178]

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[173] Furthermore,FH had left her position as spokesperson prior to the second impugned decision (Defence Motion,7Feb2009;Prosecution Statement,6Feb2009;FTB,par.2).
[174] P2.1,1004-2,8-9/21.
[175] Judgment,par.58.
[176] P2.1,1004-2,10-11/21.
[177] FTB,pars.87-96.See.e.g.T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404; 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1, 1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13;P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6, 9-11/21;P2.1,1004-2,7,11/21;*Ruxton*Statement,pars5-6; REDACTED.
[178] *Marijacic*AJ,par 29,43;*JovicAJ*,par.27.R.Clayton/H.Tomlinson,*The Law of Human Rights* (2nded,Vol.1),par.15.95;*Dobson v.Hastings*; art.20(2)Regulation No.2000/15 on establishment of Panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15);Art.32 ICC Statute;Cassese,*International Criminal Law*,p.258.See,generally,FTB,pars.79-96,16,111-114;*Ruxton Statement*,p.4;P1.1,1002-1,3-4/10;P2.1,1003-2,2/13;P.1.1,1004-2,16/21;T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404, 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1,1002-

Conclusions

104.See,below,par.106.

XI. EVIDENCE OF LOUIS JOINET

105.[179]

XII. SENTENCING

106.[180]

XIII. 'SELECTIVE PROSECUTION', LACK OF FAIRNESS OF THE PROCEEDINGS, ABUSE OF THE PROCESS AND RELATED ERRORS

107.[181]

2,1-2,4-7/9;P2.1,1003-2,2,7/13;P1.1,1002-1, 3-7/10;P2.1,1002-2,1,6-7/9;1003-2,2,5-10/13;1004-2, 6,9-11/21;P2.1,1004-2,7,11/21.Also,P3,P3.1;D47;Defence Motion,7Feb2009,AnneX;D36;D29;D38.For detail of sub-errors,see,Notice,pars.121-135.

[179] Notice,pars.136-139.

[180] Notice,pars.140-145.

[181] Notice,pars.146-182.

Conclusions and relief sought

108.Each of the above errors, whether individually or in combination, have resulted in a miscarriage of justice (errors of fact) or invalidated the judgment (errors of law).

The AC should, therefore,

(i) Acknowledge the errors;

(ii) Take note of the fact that they meet the relevant standard of review/appeal;

(iii) Apply the correct legal standard;

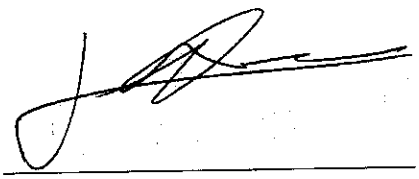
(iv) Take all relevant facts into account; and, on that basis,

(v) Overturn the conviction of Ms Hartmann;

(vi) Enter a not guilty verdict.

Respectfully submitted,

Karim A. A. Khan,Lead-counsel



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Word count: 8,986
Re-filed on 20th November 2009