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:** **15 January 2010**

IN THE CASE OF

Florence HARTMANN

PUBLIC

FLORENCE HARTMANN'S APPELLANT REFILED BRIEF AGAINST TRIAL CHAMBER'S "JUDGEMENT ON ALLEGATIONS OF CONTEMPT"

For Ms Hartmann

Mr. Karim A. A. Khan
Mr. Guénaël Mettraux

***Amicus* Prosecutor**

Mr. Bruce MacFarlane, QC

On 14 September 2009, a Specially-Appointed Trial Chamber ("TC") convicted Ms Hartmann ("FH") for contempt pursuant to Rule 77(a)(ii) ("R77(a)(ii)") ("Judgement on Allegations of Contempt"). A Notice of Appeal was filed on 24 September 2009. The Defence hereby re-files it Appeal Brief as ordered by the Appeals Chamber ("AC") in its 17 December 2009 Decision. Sub-Grounds ("SG") follow those detailed in the Notice of Appeal.

I. INADEQUATE PLEADINGS

Scope of charges

1. **SG(I)(1)**: TC erred in law/fact at paragraphs 30-35 when suggesting that any fact other than the four facts identified by the Defence had been validly pleaded.[1] FH did not receive adequate or timely notice of allegations going beyond these facts.

2. **SG(I)(2)**: TC erred in law/fact by interpreting the scope of the charges in an overly broad manner (paragraphs 32-35) and when holding that the Defence's understanding was "unreasonably restrictive".[2]

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

4. **SG(I)(4)**: TC erred in fact when suggesting that the new facts detailed at paragraphs 33-35 (i) formed part of the charges or (ii) that FH received detailed/prompt notice of the same. The order in lieu of indictment made no mention of them. Neither did the *amicus* give adequate/timely notice of these. Nor was any proper challenge made or answer given before or during trial to the Defence's constant position as to the scope of charges. No reasonable TC properly directing itself could have come to the finding arrived at in these circumstances.[4]

5. **SG(I)(5)**: TC erred in law/fact when suggesting that the expression "purported effect" (paragraph 33) would provide adequate notice. **SG(I)(6)**: In the alternative, TC erred in law/fact and abused its discretion when it failed to consider the reasonable

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[1] Motion Reconsideration, 9 Jan 09, pars 80, 103; Motion Reconsideration, 14 Jan 09, pars 15-18; PTB, pars 4-6,9; T. 52 *et seq*, 124; FTB, par 1.
[2] *Nobilo* AJ, pars 17, 55-56; *Kanyabashi* Decision 10 July 2001; *Kupreskic* AJ, pars 88.
[3] Motion Reconsideration, 9 January 2009, pars 75 *et seq*; Motion Reconsideration, 14 January 2009, pars 14 *et seq*; PTB, pars 9 *et seq*; *Krnojelac* AJ, par 138; *Delalic* Decision 21 February 1997, par 8; *Krajisnik* Decision 1 August 2000, par 13.
[4] PTB, pars 10-22; FTB, pars 8 *et seq*; Motion Reconsideration 9 Jan 2009, pars 90-102; Motion Reconsideration, 14 January 2009, pars 15,18.

possibility that this could be understood as it was, i.e., to fact (iv) identified by the Defence[5] so that, contrary to the Chamber's assertion (paras 33, 73, 79), this fact was already in the public domain.

6. **SG(I)(8)**: TC erred in fact when suggesting that FH was validly charged with disclosing "the content of closed session transcripts of the Applicant's submissions".[6] FH had no such notice. **SG(I)(9)**: TC failed to establish that FH was aware that

(i) the facts disclosed came from confidential transcripts and, if they were,

(ii) were subject to Rule 77(a)(ii) at the time of publication

thereby erring in law and fact.

7. **SG(I)(10)**: TC erred in fact when suggesting (paragraph 33) that FH's book referred to "confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision", that FH was aware of this and that she was charged with disclosing this and had received notice thereof. No such charge was validly brought against her and no evidence was led to support this finding.

8. **SG(I)(11)**: TC erred in fact when holding (FN 73) that the Defence "legitimate expectation" had *somehow* been refuted by the Prosecutor's statement in paragraph 6 of its Response:[7] Paragraph 6 was in response to Defence submissions regarding the legal elements of R77(a)(ii). It did not pertain to the scope/nature of charges and does not meet the guarantees provided for in Article 21(4)(a). At footnote 73, the TC referred to paragraphs 18-19, 21 of *amicus* PTB to suggest that the *amicus* set out clearly "what he believed to be the scope of the Indictment". None of these paragraphs, however, refer to the additional facts identified by the TC at paragraph 33. Whilst the TC was correct to note that the *amicus* later pointed to a "disagreement", it failed to note that

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

(ii) nor pointed to any of paragraph 33 facts.

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[5] References in footnote 1 above.
[6] Par 33.
[7] Judgment, par 3.

This failure constitutes an error of fact and law as meet the relevant standards of review mentioned below.

9. **SG(I)(12)**: TC's reliance on 2 February 2009 *amicus* filing is a violation of the statutory guarantee of "prompt" notice, which means "as soon as the charge is first made"[8] (7 August 2008), and thus an additional error of law.

10. **SG(I)(13)**: TC erred in law/fact when failing to consider that, had the Prosecutor taken issue with the substance of the Defence's understanding of the charges, he was required[9] to address the Defence submissions and state the "correct" position in timely fashion (par 32).[10]

11. **SG(I)(14)**: This is particularly so when the Defence detailed its understanding of the charges on numerous occasions without answer or rebuttal from the *amicus*.[11]

12. **SG(I)(15)**: TC erred in law when it failed to conclude that the *amicus* was precluded from going beyond the scope of the charges repeatedly identified by the Defence in circumstances where the *amicus* had not availed himself of the many opportunities to "correct" or disabuse the Defence of a "faulty" understanding caused by the pleadings.

Errors re R77(a)(ii)

13. **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". It does not provide a legal basis for the protection of the legal reasoning, 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 proceedings) is the confidential information for which protective measures have been ordered under the Rules.[12] In this case, Serbia-Montenegro only sought protective measures in relation to "the

[8] HRC General Comment 13, 8.
[9] IT/227, par 15(ii).
[10] Judgment, footnote 73; *Amicus* Statement 2 Feb 2009, par 5; IT/227, par 15(ii).
[11] See, above, footnote 1.
[12] REDACTED.

contents of the redacted sections of the Supreme Defence Council documents".[13] 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.[14] Nor does international law provide for a general principle that would permit the criminalisation of such disclosure.[15] 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 which none had been ordered.

14. **SG(I)(17)**: TC erred in law when suggesting that facts detailed in paragraphs 33-35 came within the terms of R77(a)(ii) and/or that R77(a)ii) would provide an adequate legal basis to criminalise their disclosure. In particular,

(i) **SG(I)(17.1)**: TC erred in law when suggesting that the disclosure of the "legal reasoning" could be a basis for conviction under Rule 77. No general principle supports such a conclusion.[16] If there was any doubt in the regard, the principle of legality required that the law be interpreted narrowly and 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,[17]

(b) act contrary to its commitment to transparency,

(c) act contrary to its established practice.[18]

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[13] D10, par 59. REDACTED. *Milosevic* Second Decision, 23 September 2004; T. 276-280; 398-404; 444-446, 466-472, 479-487; D9, 33, 37, 40-41, 93.
[14] Judgment, par 35.
[15] T. 270-276, 312-315, 342; D11.
[16] *Nobilo* AJ, pars 17, 30, 36; *Vujin* AJ, pars 12-13, 16, 24. PTB, pars 10-22; FTB, pars.8-17 and references (including *Milutinovic* Decision 12 May 2006, pars 34-35, FN 78-79 (and FN 7, 14-17, 20, 66); *Milutinovic* Decision 15 May 2006, FN 12, 42; *Milutinovic* Prosecution Reply, 10 April 2007, par 10 and FN 9; *Delic* Decision 23 August 2006, FN 10; *Delic* Decision14 January 2008, footnote 8; *Perisic* Order 22 Sept 2006, footnote 3; REDACTED; T. 181-182, 263, 271-276, 283-287, 312-315, 342, 393-394, 406-408; D10, par 58; D9, 25, 33-34, 37-38, 41; D1-D6; D11; D48. Decision on Urgent Prosecution Motion, 30 June 2009, page 4).
[17] T. 263, 271, 275, 283-287.
[18] FN 16, above.

(ii) **SG(I)(17.2)**: TC erred in fact when failing to consider whether FH could reasonably have taken the view that the facts for which she was convicted were not covered by R77.[19]

II. FREEDOM OF EXPRESSION

Errors as to legal standard

15. **SG(II)(1)**: TC erred in law in holding that the standard it applied "is consistent with the jurisprudence of the [ECHR]".[20] At trial, the Defence referred to four critical ECHR cases. 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*;[21]
- *Dupuis v. France*;[22]
- "*Spycatcher*" 1-2;[23]

Many other relevant cases/precedents (cited by the Defence) were ignored.[24] Had these cases been properly considered and principles contained therein applied, no reasonable TC could have concluded that the restriction of FH's freedom of expression through a criminal conviction was permissible.[25]

16. **SG(II)(2)**: TC erred in law by failing to consider that under international law, there is a strong presumption of unrestricted publicity of criminal proceedings.[26] Instead, the TC treated freedom of expression as merely one of a set of equally-important factors.[27]

17. **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

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[19] Judgment, pars 63-67; T. 271, 275, 312-314, 342; 390-391; D1-D2; D5-D6; D36. FTB, pars 16, 110-123.
[20] Judgment, par 70.
[21] Judgment 22 May 1990.
[22] Judgment 7 June 2007.
[23] Judgments 26 November 1991.
[24] FTB, pars 124-154 and references. *Maglov* Decision 19 March 2004, pars 9-10
[25] Ibid.
[26] *In re S (A Child)*, par 15. *Scott v. Scott; AG v. Leveller Magazine Limited*; *Re Trinity Mirror Plc*; *Ekin*, par 56; *Dupuis*, pars 33-35.
[27] Judgment, pars 69 *et seq*.

interests) must be interpreted strictly, applying, instead, an expensive interpretation of its powers under R77(a)(ii).[28]

18. **SG(II)(4)**: TC erred in law/fact when failing to consider the increased protection guaranteed to discussions of issues of public/general interest.[29] The fact that the matters discussed by FH are issues of general/public interest was not in dispute.[30] Only the most pressing social need would warrant restrictions on debate/discussion of such questions.[31] No such grounds existed, none was alleged nor established.

19. **SG(II)(5)**: TC erred in law/fact when it failed to consider the right of the public to receive that information as was required/relevant when assessing the proportionality of the interference.[32]

20. **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 victims as outlined in par.7 of SC-Resolution 827.[33] This error was relevant to determining the right of the public, not only to receive, but to continue to discuss facts contained in FH's publications and thus the scope of permissible curtailment of public debate. By convicting FH, the TC criminalized any public discussion of these facts.

"Necessity" and "proportionality"

21. **SG(II)(7)**: TC erred in law when it failed to apply the internationally-accepted principles identified above to the curtailment/restriction of FH's freedom of expression.[34]

22. **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)[35]

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[28] E.g. *Rizos/Daskas*, par 38; *Spycatcher 1*, par 65; *Spycatcher 2*, par 53. D31, pars 11, 20; D39; T. 244-245, 347; UNGA Resolution 59/1.
[29] References in next footnotes.
[30] T. 137-138, 257-260, 290-297, 389-390; 457-466; D1-D2; D5-D6; D9-D10; D42; D36; D46.
[31] *Orban*, pars 45, 49; *Rizos/Daskas*, pars 42 (38); *Kulis*, par 37; *Sunday Times* No.1, par 62. D31, p 6; T. 252, 284-285.
[32] *Brdjanin* Decision on Interlocutory Appeal 11 Dec 2002, par 37; *Spychatcher 1*, pars 61, 65-66; *Chauvy*, par 67; *Dupuis*, par 41; *Fressoz*, par 51; T. 390-400.
[33] FTB, pars 111-119.
[34] Judgment, pars 68-74.
[35] On "chilling" effect, T. 366-374.

and laid out in Defence FTB, paragraphs 141-159.[36] The TC erred in law and fact when failing to consider those.

23. **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".[37] 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,[38] no *ex post facto* conviction could possibly undo that risk (even if it existed[39]) so as to render it "necessary". 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.[40] The incongruity of a criminal conviction in these circumstances is best illustrated by the four ECHR cases mentioned above where, in similar circumstances, the ECHR concluded that a criminal conviction was disproportionate or un-necessary.[41]

24. **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 sought to balance

(i) "trial proceedings for contempt" against

(ii) "the allegations" raised against FH.

Instead, what had to be evaluated 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 balance the wrong factors led it to disregard each/all factors relevant to the test of proportionality.[42]

25. **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;

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[36] T. 347-353.
[37] *Spycatcher 1*, pars 59, 62; *Handyside*, pars 48-50.
[38] Judgment, par 74.
[39] Below.
[40] Judgment, par 82.
[41] FTB, pars 151-157.
[42] Next sub-section.

(ii) whether its sentence was necessary and proportionate and why it failed to consider/address the Defence's submission that a conditional discharge was sufficient/proportionate.[43]

Permissibility of restrictions

26. **SG(II)(12):** TC erred in law/fact when it failed to consider facts relevant to determining the necessity/proportionality of the restriction of FH's freedom of expression *as were favourable to her.*[44] That these factors were not mentioned excludes any possibility that the TC regarded them as relevant or that any such factors were considered at all. The TC's general disclaimer cannot make up for its failure to provide a reasoned decision in relation to these.

27. **SG(II)(14):** TC erred in law/fact and abused its discretion when taking into account certain facts when assessing the propriety of curtailment of FH's freedom of expression. At par 73, it mentioned that the book is said to contain information that was not in the public domain. The TC considered this to be a "salient" fact for the purpose of weighing competing public interests. In support of its view, the TC cites *Stoll v Switzerland.* This decision supports the exact opposite conclusion. 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.[45] Paragraph 113 of *Stoll* upon which the TC relied states: "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 [...]" In all other ECHR-cases (cited in that paragraph plus *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 be disproportionate/impermissible.

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[43] *Dupuis*, par 47; *Brima* Sentencing Judgment, pars 35-36; FTB, pars 168-171.
[44] FTB, pars 151-159.
[45] Judgment, pars 73, 79.

28. **SG(II)(15)**: TC erred in law (paragraph 74) by merging into one question two issues 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) note that the good administration of justice (namely, the Tribunal's continued ability to prosecute/punish serious violations of IHL) was a legitimate aim for the purpose of curtailing fundamental rights;

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

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

29. **SG(II)(16)**: TC erred in law when it failed to determine whether less intrusive sanctions –in the form of conditional discharge[46]– would have been sufficient and proportionate in the circumstances.

III. RIGHT TO IMPARTIAL TRIBUNAL

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

31. **SG(III)(1.1)**: TC erred in law (paragraph 8) when suggesting that the principle identified by the Defence (Motion, paragraphs 11-18) did not constitute a general principle. **SG(III)(1.2)**: If a general principle was necessary to decide the matter, the ruling fails to demonstrate that the standard which was adopted represents one or has any basis in international law.[47]

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[46] FTB, pars 168-171.

[47] Motion, pars 11 *et seq.* *Karemera* Decision 7 Dec 2004, pars 14, 20-23; *Pinochet* Judgment 125-146; *Dimes v. Proporietors of Grand Junction Canal*, 3 HL Case 759 (793-794); *Sellar v. Highland Railway Co.*, 1919 SC (HL), 19; *Bradford v. McLeod*, 1986 SLT 244; *Reg v*

32. **SG(III)(2)**: TC erred in law when suggesting that the Rules did not provide guidance.[48] Rule 15*bis* prevented the TC to validate decisions rendered with only one judge meeting the basic requirement of impartiality.[49] The defendant is entitled under the Statute to a trial not subject to any suspicion of lack of impartiality. Because all orders had been rendered by a TC lacking the appearance of impartiality, they are suspect of the same shortcoming. The factors detailed as a basis for disqualification, included incidents that occurred both ***before*** and ***after*** the indictment of FH.[50] In other words, FH was indicted by a TC that lacked the appearance of impartiality. That same Chamber dismissed many Defence applications challenging the investigation that led to that indictment and which had been conducted under its authority.[51] The finding that two Judges lacked an appearance of impartiality rendered these decisions suspect of the same deficiency. Any reasonable TC would have vacated these decisions/orders.

33. **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". This has no basis in international law. A violation of a fundamental right *per se* calls for a remedy. **SG(III)(3.2)**: TC erred in fact in misconceiving the nature of the prejudice caused to FH and erred when concluding that no such prejudice was established. The prejudice was that FH was investigated, indicted and, for a time, subject to decisions pertaining to her rights by a Chamber lacking the basic requirement of apparent impartiality.

34. **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.[52] 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 to a fair trial.[53] Instead of being a counter-weight to this right, the "interests of

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Altrincham Justices, ex parte N Pennington [1975] QB 549, 552; *Antoun v. R* [2006] HCA 2; *Gassy v The Queen* [2008] HCA 18; *S v. Dube* (523/07) [2009] ZASCA 28, pars 18-21.

[48] Decision, par 8.

[49] Decision, par 16; Motion, par 16.

[50] Report Special-Panel 27 March 2009, pars REDACTED.

[51] Defence Motion Disqualification, 3 Feb 2009.

[52] Decision, pars 9-10.

[53] Par 9.

justice" to which *Karemera* refers was an additional 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.

35. Even if the requirement of "interests of justice" had applied, it was clearly in the interests of justice to set aside these decisions/orders. All pertained to important issues going to the legitimacy/legality of the investigation and conduct of proceedings. The case was still at pre-trial. In *Karemera*, the record was set aside although trial had already started. Contrary to the TC's suggestion (pars. 9, 11), the fact that the bias was *apparent* rather than *actual* bias did not justify departure from existing precedents. *Karemera* (and other precedents above) was/were about *apparent* bias; they have similar effects in law.[54] 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).

36. **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.[55] The TC had no authority to do so. Furthermore, it erred 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 TC 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.

37. **SG(III)(8):** In the alternative, the TC's finding as to the alleged sufficiency of the supporting material would create an appearance of lack of impartiality on its part that

[54] Trechsel, *Human Rights in Criminal Proceedings*, p.63.
[55] Decision, par 11.

would justify the disqualification of *that* Chamber and the annulment/setting aside of its subsequent decisions and Judgment.[56]

IV. *ACTUS CONTRARIUS*

38. R77(a)(ii)'s *actus reus* is the physical act of disclosure of information when such disclosure breaches an order.[57] It was common ground that the Prosecutor has to establish that the information continued to be treated as confidential at the time relevant to charges.[58] The AC acknowledged that Chambers can lift the confidentiality of decisions, not just by a formal order, but by "*actus contrarius*".[59] 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.[60] 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).[61]

Errors

50. **SG(IV)(1)**: TC erred in law/fact when it failed to (i) 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*.[62]

51. **SG(IV)(2)**: TC erred in law/fact by convicting FH despite the fact that all relevant facts had been subject of an *actus contrarius* and/or for rejecting the reasonable possibility that this might be the case.[63]

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

> "the existence of the Appeals Chamber Decisions"

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[56] *Kyprianou* (ECHR); Motion on Disqualification, pars 15 *et seq.*
[57] *Marijacic* TJ, par 17.
[58] REDACTED. FTB, par 20.
[59] *Marijacic* AJ, par 45.
[60] Ibid. footnotes 20, 21; *Milosevic* Order 27 April 2007, par 2; *Hartmann* Indictment par 1; *Delic* Decision 23 August 2006; *Delic* Decision 14 Jan 2008; *Perisic* Order 22 Sept 2006 (in relation to the same impugned decisions). T. 78 (19 May 2009).
[61] *Marijacic* TJ, par 17
[62] Judgment, pars 36-40, 47.
[63] Below.

and that

> "references to the law contained in the Appeals Chamber Decisions [did not] amount to an *actus contrarius* by the Tribunal".[64]

53. **SG(IV)(4)**: All facts for which FH had been charged had been made the subject/object of an *actus contrarius*. The TC erred in fact and abused its discretion when it failed to acknowledge this and and in convicting FH despite this. 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, he 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 impugned decision;

b. the confidential character of that decision;

c. the identity of the applicant.

55.On 12 May 2006,[65] the AC publically mentioned the two impugned decisions, verbatim citations/quotes from these, including several facts relevant to these proceedings–

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

(ii) the confidential character of these decisions;

(iii) the identity of the applicant;

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

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

(vi) Part of the AC's legal reasoning;[66]

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[64] Par 40.
[65] *Milutinovic* Decision 12 May 2006, pars 6, 33-35, 14-17, 20, 66, 78-79, footnote 7.
[66] Par 35 and FN 78-79.

The *Milosevic* TC also made public facts for which FH was convicted.[67] It also made clear that what is being protected in protective-measures orders is not the order itself, but the material subject to protective measures.[68] 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 otherwise.

59. **SG(IV)(6)**: TC erred in law when it failed to require the *amicus* to establish that the underlying facts had not been made public through *actus contrarius* and, instead, put the onus on the Defence.[69]

60. **SG(IV)(7)**: TC erred in law (paragraph 39) when drawing a distinction between "legal reasoning" and "applicable law" that has no support in law (R77 or international law) and is contrary to Tribunal practice.[70]

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 regarded all through that time as not being "treated as confidential". They also counter the TC's finding that only a formal decision lifting confidentiality following an application to that effect could legally be regarded as *waiver by the applicant.*[71]

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 no longer treated as confidential by the Tribunal.[72]

SG(IV)(10): TC erred in law/fact and abused its discretion when concluding that such a conclusion was unreasonable in the circumstances.[73]

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[67] *Milosevic* Second Decision 23 Sept 2004; *Milosevic* First Decision 23 September 2004. These decisions make public: (i) identity of applicant; (ii) existence of confidential orders pertaining to the SDC records; (iii) legal basis relied upon.
[68] Ibid. *Delic* Decisions of 23 Aug 2006 and 14 Jan 2008; *Perisic* Order 22 Sept 2006.
[69] Judgment, pars 38, 40, 47.
[70] FTB, pars 11-14, 26-29 and references cited above.
[71] Below.
[72] *Milutinovic* Prosecution Reply 10 April 2007, par 10 and footnote 9; D2-D4; D11; T. 393-394.

V. WAIVER

63. At paragraph 46, the TC suggested that a waiver could only operate where there is a formal request by the applicant and an "explicit" order formally/explicitly lifting the confidentiality.[74] **SG(V)(1)**: TC's position has no basis in law, is contradicted by Tribunal practice and constitutes an error of law.[75] Tribunal practice makes it clear that no formal/explicit order is required to lift confidentiality of a particular fact.[76] This explains why there is no precedent of a contempt conviction for disclosing facts/information that an applicant had himself/itself made public.[77] There are many examples of disclosure by a party of "confidential" information (in relation to which it had sought confidentiality) in advance of the order being lifted in relation to the protected information.[78] In none of these cases did the Tribunal initiate contempt proceedings. Instead, the information in question was treated as public as soon as the applicant had made it so. Practice from other international tribunals supports that view.[79]

64. **SG(V)(2)**: TC erred in fact (par 45) when finding that information disclosed by representatives of Serbia-Montenegro was not the same information which FH was charged with disclosing. No reasonable Chamber could so conclude on the evidence.[80] 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).[81]

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[73] T. 270-276, 312-315, 342; D11; P1.1, 1002-1, 4(-5)/10; P2.1, 1003-2,8-9/13, 1002-2, 6-7/9.
[74] T. 561.
[75] E.g. REDACTED. 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, (iii) does not suggest that "explicit" can/should be interpreted (as the TC did) as a formal order granting a formal application for waiver of confidentiality.
[76] See above.
[77] D14-D19; T. 194-195, 157-161.
[78] D14; *Dokmanovic* Orders 3 April 1996, 10 July 1996; D15; D20; *Milosevic* Decision 24 May 1999; D16; *Obrenovic* Order 9 April 2001; D26-D28; D18; *Limaj* Indictment 27 January 2003; *Limaj* Decision 18 February 2003; *Vasiljevic* Warrant 26 Oct 1998; *Vasiljevic* Decision 31 Oct 2000; D19; *Prlic* Orders of 2 April 2004, 5 April 2004, 4 March 2004; D63-D65.
[79] *Bemba* Decision on Interim Release 14 Aug 2009, par 65.
[80] D10; D5; D9; REDACTED; T. 276-280, 392-410; 423-429, 466-480, 494-497. These acknowledgements were made by state officials acting in their official capacity: T. 416-417, 447-449, 472-479.
[81] D10, par 58; D9, 25, 33-34, 37-38, 41; D5, 4-5.

65. **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 been made public by the Applicant and there is positive evidence that this is the case:

- Whilst the Defence is unable to ascertain with 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 indications that Serbia made public what would appear to have been submissions before ICTY;[82]
- Whilst the Defence is unable to ascertain with certainty what the TC's reference to "legal reasoning" as opposed to "applicable law/legal basis" is intended to mean, there are clear indications of Serbia having made public matters relevant to that issue;[83]
- As regard the "purported effect" (paragraph 33) of the Decisions as understood by the Defence, there were again clear indications that Serbia made this fact public.[84]

66. The finding (paragraph 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 held that the information publically disclosed only needed to be acknowledged by officials whose Government had sought/obtained protective measures from the Tribunal.[85] 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.[86] What Serbia-Montenegro sought to keep confidential is the actual contents of the SDC

[82] D5; D1-D2; D10; D9, p 33, 37, 93.
[83] D10, par 58; D9, p 25, 33-34, 37-38, 41; D5, 4-5; D1-D2; D6.
[84] D9-D10; D5-D6; D1-D2; T. 389-390, 404.
[85] E.g. REDACTED.
[86] D10; D42; REDACTED; D9, p 16, 33, 39, 84, 93, 94, 102; T. 416-417; 447-449, 472-479

minutes.[87] FH was not charged with disclosing this.[88] There is no support for the finding 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.

67. **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.[89] **SG(V)(6):** In the alternative, the TC erred in fact when concluding that such a conclusion was unreasonable in the circumstances.

VI. SERIOUSNESS OF ALLEGED CONDUCT

68. **SG(VI)(1)**: TC erred in law when it found (paragraph 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 Tribunal practice is full of 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.[90]

69. **SG(VI)(2)**: TC erred in law when it failed to determine if/whether FH's conduct was more than negligent.[91] **SG(VI)(3)**: If it did, in light of clear evidence supporting such a conclusion, it erred and abused its discretion in excluding it as a reasonable possibility.[92]

70. **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.[93] In *Brdjanin*, in line with ECHR, the Tribunal found that one count of contempt raised against Maglov did not

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[87] D10, pars 55-59; D9, p 33, 36-37, 41, 92-93; D5.
[88] Judgment, par 35.
[89] See,below; FTB, pars 87-96,110-123 (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).
[90] REDACTED. Defence Reply 21 January 2009; Prosecution Notice 26 Jan 2009; Response to *Amicus* Second Submission, 2 July 2009; T. 178, 228.
[91] *Nobilo* AC.
[92] FTB, pars 77, 87, 97.
[93] *Ntakirutimana* Decision 16 July 2001, pars 10-12; *Furundzija* TC's Complaint 5 June 1998, par 11; *Kajelijeli* Decision 15 Nov 2002, pars 14-15

meet that threshold as the disclosed information in knowing/willful violation of an order related to a fact that was already publically known.[94]

71. **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.

72. **SG(VI)(6)**: TC erred in fact as it failed to consider the factors on the record pertaining to this issue.[95]

VII. "REAL RISK" TO ADMINISTRATION OF JUSTICE

TC's failure to address the issue

73. Whilst the Prosecutor need not prove an *actual* interference with the administration of justice, proof must be made that the impugned conduct created a real risk for the administration of justice.[96] This conforms to relevant domestic practice.[97]

74. **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 (iv) failing to take notice of the fact that the *amicus* had failed to (seek to) prove it.[98]

75. **SG(VII)(2):** TC erred in law by setting a standard that has no support under international law.[99] **SG(VII)(2.1):** Such a requirement forms part of R77(a)(ii)'s *actus reus*.[100] The TC's failure to acknowledge this was an error of law. **SG(VII)(2.2):** TC 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).[101] There is no

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[94] *Maglov* Decision on Acquittal, pars 9-10.
[95] FTB pars 151-166.
[96] *Vujin* AJ, par 18; *Nobilo* AJ, par 36; *Margetic* TJ, par 15; *Marijacic* TJ, par 50
[97] *Duffy, ex p Nash*, p.896 (UK); *Glennon*, at 605 (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).
[98] Judgment, par 27 and footnote 57.
[99] *Nobilo* AJ, par 30; *Vujin* AJ, pars 13, 24.
[100] *Margetic* TJ, par 15; *Marijacic* TJ, par 50; *Vujin* AJ, par 18; *Nobilo* AJ, par 36.
[101] Pars 74, 80.

support for such a position under international law.[102] **SG(VII)(2.3):** In *Nobilo* and *Vujin*, the AC stated that only conduct "**which tends to**" obstruct, prejudice or abuse its administration of justice would meet the requisite standard.[103] The TC took no apparent notice of that binding precedent. 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 the administration of justice.[104]

No jurisdiction after end of proceedings

76. There is no general principle permitting the tribunal to prosecute a person for disclosing facts pertaining to judicial proceedings *after* these proceedings have closed/ended[105] s*ubject arguably to the protection of victims/witnesses under Article 22 Statute*. This explains why, in those jurisdictions that inspired 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".[106] Here, proceedings in *Milosevic* had ended on 14 March 2006. **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.

Finding of a "real risk"

77. **SG(VII)(4)**: TC erred in fact (and law) (pars 74+80) when finding that FH's conduct had created a "real risk" that states would lessen their cooperation which in turn "necessarily" impacts upon the Tribunal's ability to exercise its jurisdiction. There is no evidence of that fact. Instead, the record shows that

(i) no such risk existed,[107]

(ii) rather than decrease, Serbia's cooperation with the Tribunal increased/improved after FH's publication.[108]

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[102] *Nobilo* AJ, par 30; *Vujin* AJ, pars 13, 24.
[103] *Vujin*AJ, par 18; *Nobilo* AJ, par 36.
[104] Also *Megrahi v Times Newspapers Limited; In re Lonrho plc, per* Lord Bridge (209); *Bridges v State of Cal* (262-263); *Craig v Harney*, 331 U.S. 367, 376.
[105] *Nobilo* AJ, par 30; *Vujin* AJ, pars 13, 24.
[106] Fenwick/Phillipson, *Media Freedom under the Human Rights Act*, 288. T. 311.
[107] T. 389, 398-404; 452-460, 481-483.
[108] T. 452-460, 481-483.

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

(i) Disclosure attributed to FH had no demonstrated effect on the proceedings/administration of justice;

(ii) Evidence was recorded that no real or substantial risk had been created by **her** conduct;[109]

(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.[110]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**;[111]

(v) *Milosevic* proceedings had ended;

(vi) These issues were already in the public domain and were widely discussed;[112]

(vii) FH disclosed none of the documents' contents that were subject to protective measures.[113]

(viii) FH acted in good faith and based on an accurate factual basis.[114]

80. **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 unqualified obligation to cooperate leaving no room for a choice/discretion to do so. It is flawed as a matter of fact since there is (i) no evidence to sustain that finding (let alone beyond reasonable doubt) and (ii) clear, un-disputed, evidence to the contrary, namely, that in fact, Serbia's cooperation with the Tribunal improved

[109] Ibid.
[110] T. 389, 404; D9.
[111] T. 452-460, 481-483.
[112] FTB, pars 43-52.
[113] Judgment, par 35.
[114] T. 145, 270, 384-387. *Rizos*, par 45; *Dupuis*, par 46; *Fressoz*, pars 54-55. Defence R65*ter* Motion, 7 February 2009, Annex.

after publication.[115]

Alleged "real risk"

81. **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.[116] 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.[117]

Double-counting

82. **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.[118]

VIII. *MENS REA*–GENERAL GROUNDS

"Intent to interfere"

83. **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*.[119] Under R77(a)(ii), there must be proof of a "specific intent to interfere with the administration of justice".[120] TC referred to *Beqaj* and *Maglov* holdings and dismissed them as *passé*. Not so. In *Jovic* and *Marijacic*, the authorities

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[115] T. 452-460; 481-483.
[116] T. 346-348; D39.
[117] Fenwick/Phillipson, 288.
[118] Judgment, pars 74, 80.
[119] Judgment, pars 53-55, 62.
[120] *Beqaj* TJ, par 22. *Margetic* TJ, pars 30, 77; *Hunt v. Clarke, per* Lord Cotton. *Kanyabashi* Decision 30 November 2001; *Kajelijeli* Decision 15 Nov 2002, par 9; *Maglov* Decision on Acquittal, pars 15/40 (14, 23); SCSL-*Brima* Contempt Trial Judgment, pars 18-19; *Milosevic* Decision 13 May 2005, par 11.

cited by the TC, 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.[121] The TC also erred in law/fact by relying (paragraph 53) upon *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 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.[122] Therefore, whilst the *Bulatovic* TC was right not to rely on the *Aleksovski* precedent,[123] the TC was wrong to rely on *Bulatovic*.[124] The assumption that the same *mens rea* would apply to different forms of contemptuous 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 grounded in a general principle.

84. By contrast, in *Nobilo*, a binding AC precedent pertaining to "out of court" contempt, which the TC failed to take notice of, 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]".[125]

This requirement reflects general principles of international law.[126] In *Maglov*, the TC cited many authorities/cases supporting that requirement.[127] Many others exist.[128] A

[121] *Jovic* AJ, par 30, referring to *Marijacic* AC, par 44. FTB par 86.
[122] Miller, *Contempt of Court*, (3rd ed), pars 4.1 *et seq*.
[123] *Bulatovic* TJ, par 17.
[124] Judgment, par 53.
[125] *Nobilo* AJ, par 40(c).
[126] *Nobilo* AJ, par 30; *Vujin* AJ, pars 13, 24.
[127] *Maglov* Decision on Acquittal, footnotes 22, 27, 40.
[128] *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; *AG v News Group Newspapers PLC*, [1989] QB 110, 126; *Connoly v Dale* [1996] QB 120, 125-126 and 229 (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; *American Airlines, Inc. v. Allied Pilots Ass'n*, 968 F.2d 523, 532 (USA).

general principle criminalising conduct despite the absence of such an intent could simply not be established *as a matter of international law.*

85. **SG(VIII)(2)**: TC erred in law by not requiring the Prosecutor to prove that element and erred in fact when it failed to come to the reasonable conclusion that no such intent existed on the evidence.[129] The *amicus* did not make it a part of his case to prove such an intent.[130]

86. **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.[131] No reasonable TC taking that evidence into account could have reached that conclusion.

87. **SG(VIII)(5)**: TC's *obiter*[132] suggestion (paragraph 53) that proof of actual knowledge or willful blindness of the existence of an order, or reckless indifference to the 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 evidence.

Alleged knowledge of confidentiality

88. At paragraph 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[133]) 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.[134] 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.

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[129] Next paragraph.
[130] *Amicus* PTB, pars 22-24
[131] FTB, pars 87-96. *Ruxton Statement*, 4; T. 137; 144-146; 271-282, 311-315, 340-341, 372, 384-404, 423-443, 487, 492-494; P1.1, 1002-1, 3-7/10; P2.1, 1003-2, 2, 5-11/13; P.1.1, 1004-2,16/21; D1-D6; D9; D36; D47; P2.1, 1002-2, 1-2, 4-7/9; 1004-2, 6, 7-11/21.
[132] Judgment, par 55.
[133] Judgment, pars 53, 62.
[134] 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.

89. **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.[135] FH believed and understood that all the facts that she discussed were in the public domain and could therefore be disclosed.[136]

90. **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[137] and abused its discretion and/or committed an error of fact when so doing.

IX. REGISTRY'S LETTER

91. **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 and an error of law.[138] The *amicus* had given Defence counsel a formal undertaking **not** to use that document. The Defence, therefore, dropped its investigation concerning its origin/provenance/legality. The *amicus* later breached that undertaking despite the Defence objection.[139] The TC took no account of the unfairness/prejudice caused. Nor did it require the *amicus* to produce a chain of custody despite indications that it was obtained illegally/impermissibly and in violation of UN immunities/privileges,[140] 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/detailed notice of the charges,
(ii) to adequate time/resources to prepare,
(iii) to an adversarial proceedings,
(iv) to a fair trial.

92. **SG(IX)(2)**: TC erred in fact when suggesting that this document suggests that FH knew that the facts relevant to the charges were still treated as confidential. Nowhere

[135] 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.
[136] 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.
[137] Below and FTB, pars 87-96, 110-123.
[138] P10; Judgment, pars 59-61.
[139] D49-D54, REDACTED, D56-D57 D66-D67; T. 204-214.
[140] Art. 30.

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).[141] 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.[142] Therefore, the letter simply could not reasonably be read as suggesting a reference to the impugned decisions.[143] Revealingly, the letter only refers to UN regulations (that were attached), not 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 former UN employee.[144] As noted by the TC,[145] the impugned article is a mere reproduction (in English) of passages of the book.[146] 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 error of law and/or fact when it failed to exclude the reasonable possibility that FH did not regard the letter as referring in any way to the facts disclosed in the impugned pages of her publications.[147]

X. MISTAKE OF FACT AND LAW

93. TC erred in fact/law (paragraphs 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.[148]

Conclusions and relief

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[141] T. 302-303; Defence Motion 7 Feb 2009 (point 8).
[142] Ibid.
[143] FH quit as spokesperson prior to the second impugned decision (Defence Motion 7 Feb 2009; Prosecution Statement 6 Feb 2009).
[144] P2.1, 1004-2,8 -9/21.
[145] Judgment, par 58.
[146] P2.1,1004-2, 10-11/21.
[147] Above, footnotes 136-138, 146.
[148] *Marijacic* AJ, pars 29, 43; *Jovic* AJ, par 27. Clayton/Tomlinson, *The Law of Human Rights* (2nd ed), 15.95; *Dobson v. Hastings*; Cassese, *International Criminal Law*, 258. And references in footnotes 133, 136-138 above.

94. Each of these errors, individually or in combination, 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 that they meet the relevant standard of review;

(iii) Apply the correct legal standard;

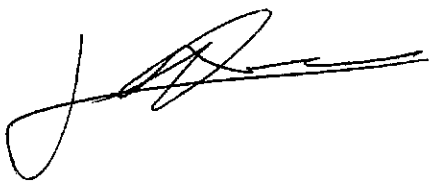
(iv) Take relevant facts into account;

(v) Overturn the conviction;

(vi) Enter a not guilty verdict.

Respectfully submitted,

Karim A. A. Khan



Guénaël Mettraux

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