THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

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

BEFORE THE SPECIALLY-ASSIGNED TRIAL CHAMBER

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Mehmet Güney
Judge Liu Daqun

Registrar: **Mr. John Hocking**

Filed: **2 July 2009**

IN THE CASE AGAINST

FLORENCE HARTMANN

PUBLIC REDACTED VERSION

FINAL TRIAL BRIEF OF FLORENCE HARTMANN

***Amicus* Prosecutor**

Bruce MacFarlane, QC

Counsel for Ms Hartmann

Karim A. A. Khan, Lead Counsel

Guénaël Mettraux, Co-Counsel

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1. Nature of the Charges against Ms Hartmann

1.1 Facts allegedly disclosed in breach of confidentiality orders

1. Ms Hartmann is charged with disclosing four facts, which the *amicus* Prosecutor claims were protected by a confidential order of the Appeals Chamber and were treated as confidential by the Tribunal at the time of publication of the impugned publications:[1]

    (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 subject, namely, the fact that protective measures were granted in relation the records/minutes of Serbia-Montenegro's Supreme Defence Council ("SDC").

2. It is not part of the charges that Ms Hartmann had seen or read the impugned decisions prior to publication.[2] Instead, her publications were compiled after she had left the OTP.[3] She had left her position as spokeswoman (and, thus, her position in the immediate Office) *prior to* the second impugned decision

[1] REDACTED pars.80,103;Defence Motion for reconsideration,14 January 2009,pars.15,18; Defence Pre-trial brief,par.9; T.124. Insofar as they pertain to the book written by Ms Hartmann, the charges solely refer to pages 120-122. The indictment does not allege that the book contains any other contemptuous material.

[2] Defence Motion pursuant to Rule 65*ter*,7 February 2009.

[3] P1.1,1002-1,7/10.

having been rendered.[4] The Chamber should resist any attempt by the *amicus* to try to shift his case away from the one that he gave the Defence notice of.

1.2 Facts/information protected by the confidential orders

3. REDACTED [5] [6]

4. It is, therefore, the information in relation to which protective measures have been granted (i.e.,"SDC records") that is confidential for the purpose of Rule 77(a)(ii). This understanding was shared by the Tribunal[7] and Serbia-Montenegro.[8]
5. It is indicative that in all cases of contempt prosecuted under that Rule, the accused was charged with disclosing information in relation to which protective measures had been sought and obtained.[9] There is no precedent in international law (and no valid legal basis) which would authorize a Trial Chamber to punish for contempt the disclosure of any other fact/information.
6. That view was clearly demonstrated by representatives of Serbia-Montenegro who made it clear that what was protected by the impugned decisions was the actual content of the documents for which protective measures had been obtained, not the reasoning or conclusion sustaining these decisions.[10] After discussing in general terms the relevant legal basis for the ICTY to issue such

[4] Defence Motion pursuant to Rule 65*ter*, 7 February 2009;Prosecution Statement of Admissions, 6 February 2009.

[5] REDACTED.

[6] REDACTED.Also *Milosevic* Second Decision 23 September 2004.

[7] E.g.*Milosevic* Second Decision 23 September 2004;T.483-487.

[8] E.g.T.444-446,466-472,479-480;D10.

[9] E.g.Haxhiu;Jovic;Margetic;Marijacic;Nobilo;Šešelj.

[10]D10,pp.27-28,in particular,par.59. Also D9;T.276-280;404;466-472;479-480;483-487.

measures, a representative of Serbia-Montenegro before the ICJ said the following (publically):[11]

> "the representatives of Serbia and Montenegro are not entitled to discuss the contents of the redacted sections of the Supreme Defence Council documents at this moment, for two serious reasons:
>
> […]
>
> (2)At this moment, the redacted sections of the SDC documents are under the protective measures, imposed by the ICTY confidential order, and we are obliged to respect that order. […]"

7. The applicant did not seek protective measures, nor was any granted, in relation to the four facts.[12] This explains or, at the least, is consistent with, the fact that these four facts were widely discussed and publicized already before Ms Hartmann's book/article and that no contempt proceedings was initiated against any of those who publically discussed those facts.[13]

1.3 Reasoning of the Appeals Chamber does not form part of the charges

8. The Order in lieu of indictment does not refer to the reasoning of the Appeals Chamber in reaching its decisions. Nor does the *amicus*' Pre-Trial Brief.[14]

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[11] See D10, pp.27-28,par. 59 (emphasis added). Also T.392,398-403;D9.

[12] See,again,*Milosevic* Second Decision 23 September 2004;T.444-446,466-472,479-480;483-487;D10.

[13] See below.

[14] The fact that the reasoning/conclusion reached by the Appeals Chamber did not form part of the charges was expressly stated by the Defence in its filings: REDACTED; Defence Motion for reconsideration,14 January 2009,pars.15,18 and in its Defence Pre-trial brief,pars.10-22 without any objection being taken by the *amicus* Prosecutor.

Therefore, the discussion of this fact in Ms Hartmann's publication does not form part of the charges. The Appeals Chamber has made it clear that in contempt proceedings, Trial Chambers are strictly bound by the scope and nature of the charges.[15]

9. In any case, the Rules would not provide for a valid legal basis whereby contempt proceedings could be initiated to protect the court's reasoning in reaching a decision.[16] No international precedent would permit the criminalization for contempt of disclosure of the reasoning or conclusions of a Tribunal. Consistent with this approach, the Appeals Chamber has made it clear that contempt proceedings cannot be used to protect the dignity of the judges, nor to punish mere affronts or insults to a court or tribunal.[17] As noted above, the Appeals Chamber has also made it clear that what can validly be the subject of a confidential order (and, therefore, of contempt proceedings if breached) is the confidential information for which protective measures have been ordered under the Rules.[18] Such an interpretation is also consistent with the Tribunal's commitment to transparency,[19] the statutory requirement that proceedings shall be held in public and what one witness called the necessary "contrôle de la légalité" of the Tribunal's proceedings.[20]

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[15] E.g. *Nobilo* Appeals Judgment,par.17.

[16] 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)).

[17] *Vujin* Trial Judgment,pars.12-13 and 16;*Nobilo* Appeals Judgment,par.36;*R v Police Commissioner of the Metropolis*,150,154.

[18]REDACTED

[19] T.263,283-287.

[20] T.271,275.

10. It is also obvious from the repeated public references by representatives of Serbia-Montenegro to the alleged basis and rational for the protective measures (and the purported practical effect of the Appeals Chamber's decisions) that these were not subject to –and were not regarded as or intended to be subject to– any disclosure restrictions.[21] For instance, during a public hearing before the ICJ, the representative of Serbia-Montenegro said the following:[22]

> "The ICTY Trial Chamber (III) recognized the interest of the national security of Serbia and Montenegro with respect to these [Supreme Defence Council] documents and granted certain protective measures."

No contempt proceedings were initiated against Serbia's representative for disclosing these facts. This is because neither of these was – or, at the least, was not understood to be – the subject of any confidential order.

11. The fact that the reasoning of the Chamber and its purported rulings were not subject to the confidential order may also be seen from the fact that it was disclosed publically by the Tribunal itself. In *Milutinovic*, for instance, the Appeals Chamber referred publically to several passages of the legal reasoning from both impugned Decisions.[23]

12. More importantly, several aspects of the Appeals Chamber's reasoning contained in the impugned Decisions were referred in public decisions of Trial Chambers.[24]

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[21] D10,par.58;D9,pp.25,33-34,37-38,41; D5,pp.4-5.

[22] D10,pp.27-28,par.58.

[23] *Milutinovic* Decision 12 May 2006,pars.34-35,footnotes 78 and 79 (and footnotes 7,14,15,16,17,20 and;*Milutinovic* Decision 15 May 2006,footnotes 12 and 42.

[24] *Delic* Decision 23 August 2006,p.4,footnote 10; *Delic* Decision 14 January 2008,p.3,footnote 8; *Perisic*, Order 22 September 2006,p.2,footnote 3; T.181-188.

Trial Chambers have no authority to lift confidential orders of the Appeals Chamber.[25] This can only mean, therefore, that the reasoning of the Appeals Chamber was not confidential in the first place and not treated as such at the relevant time.

13. The correctness of the above-position is further demonstrated by OTP filings in which it relied upon these "confidential" statements/reasonings in public filings.[26]

14. Likewise, others very publically discussed the reasoning and purported effect of the impugned decisions without exposing themselves to contempt proceedings.[27] That a trained and distinguished counsel – Sir Geoffrey Nice – in full awareness of the *Milosevic* confidential filings would feel that he could discuss such matters publically without exposing himself to any contempt proceedings is clear evidence of the fact that the Chamber's reasoning was not covered by the confidentiality order or, if it was, that it was reasonably open to Ms Hartmann (and Geoffrey Nice) to take the view that it was not.[28] Therefore, even if this had formed part of the charges and was regarded as confidential, the Chamber would have to find that it was reasonably open to Ms Hartmann to conclude otherwise, that she might have been mistaken about this fact, but that she did not possess the "knowing and willful" element relevant to the requisite *mens rea*. The evidence of Mr Joinet on that point confirms and supports that conclusion.[29]

[25] E.g.Decision on Urgent Prosecution Motion Seeking Variance, Non-Disclosure Order and Leave to Amend the Rule 65*ter* Exhibit list,30 June 2009,p.4.

[26] *Milutinovic* Prosecution Reply 10 April 2007,par.10 and footnote 9.

[27] D3,D11.

[28] T.272-276,314-315;D11.

[29] T.270-276,312,314-315,342.

15. There are other examples of press articles/reports discussing the purported reasoning/conclusions underlying the impugned decisions.[30] No proceeding for contempt was initiated in these case further reinforcing the reasonable conclusion that these matters/facts are not covered by the confidentiality orders.

16. It is clear from the evidence that Ms Hartmann could reasonably have taken the view (even if shown to have been legally incorrect) that the reasoning/purported effect of the impugned decisions was not treated as confidential at the relevant time.[31] Relevantly, in Ms Hartmann's country of origin, discussion of the reasoning/effect of judicial decisions does not constitute an offence.[32] It was also discussed openly by representative of Serbia.[33]

17. Finally, there is no –accessible/foreseeable- legal basis that would suggest that the disclosure of the decision of Chamber or the reasoning contained therein could warrant a conviction under Rule 77. In that sense, a conviction based on Rule 77 for disclosing the reasoning of a Chamber would constitute a violation of the accused's fundamental right (to freedom of expression and principle of legality).

2. Waiver of confidentiality by the Tribunal

18. Even if some or all of the four facts for which Ms Hartmann is being prosecuted had been made confidential by the impugned decisions, their confidentiality had been lifted by the time Ms Hartmann published her book/article.

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[30] E.g.D3,D4. Also D2;T.393-394.

[31] E.g.T.270-276,312 ("the limitations based on confidentiality only concerns the content of the decision, but not the fact that the decision which will decide on the confidentiality is confidential. It cannot be confidential; otherwise, there is no transparency at all in justice.");314-315, 342;D11.

[32] T.312-314,342

[33] E.g. T.406-408;D9;D48

2.1 Actus contrarius and information treated as confidential by the Tribunal

19. The *actus reus* of contempt under Rule 77(A)(ii) is the physical act of disclosure of information relating to proceedings before the Tribunal, when such disclosure would breach an order.[34] There must, therefore, be disclosure of previously confidential information.[35]

20. It is common ground between the parties that the Prosecutor has to establish, not only that the information had been made confidential by an order of the court, but that it was **treated by the Tribunal as confidential** at the time relevant to the charges.[36]

21. From the strict legal point of view, only the Tribunal has the authority to amend or lift the confidentiality of its orders.[37] The Rules do not prescribe for any particular form in which this might be done. The Appeals Chamber has acknowledged that Chambers have the power to lift the confidentiality of decisions, not just by a formal order, but by an "*actus contrarius*".[38]

22. The Tribunal's practice is replete with examples of Chambers lifting the confidential character of decisions/orders –in whole or in part– by disclosing their existence or content in public decisions/orders.[39] For instance, on 19 May 2009, the Trial Chamber rendered a confidential decision. Though that decision, its existence, subject-matter and effect were confidential, during the status conference of 19 May

[34] *Marijacic* Trial Judgment,par.17.

[35] Ibid.

[36]REDACTED

[37] Eg *Marijacic* Appeal Judgment,par.44. See, however, below pars.33-41 the practical and legal effect of public disclosure by the applicant for protective measures.

[38] *Marijacic* Appeal Judgment,par.45.

[39] Ibid.footnote 20,21;also *Milosevic* Order 27 April 2007,par.2; Indictment 27 August 2008,par.1; Decision December 2008,par.1.

Presiding Judge, Judge Moloto, made a reference to the existence (including subject-matter and purported effect) and confidential nature of this decision during a public hearing.[40] The confidentiality as to the existence and status of that decision was lifted by Judge Moloto's statement which effectively acted as a waiver of the confidentiality of the matters mentioned publically.

23. In such circumstances, the material/information publically disclosed by the Chamber is not being "treated as confidential" so that further disclosure thereof could not form the *actus reus* of the crime of contempt. In such a case, the confidentiality that might have attached to these facts/informations disclosed publically has effectively been lifted by an *actus contrarius*.

24. Thus, *and subject to one exception and one qualification discussed below*,[41] whilst the fact that the information has become public by other means may not in all cases be sufficient to make it permissible for a person to communicate it further, the *actus reus* of the crime of contempt would be missing where, as in the present case, the confidentiality of the information said to have been disclosed in violation of a court order had in fact been lifted by an *actus contrarius* of the Tribunal.

2.2 Lifting/waiver of confidentiality by Tribunal

25. 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 Ms Hartmann is being prosecuted–

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

    b. the confidential character of that decision;

40 T.19 May 2009,p.78.

[41] See below "Waiver by the Applicant" and pars.165-171.

c. the identity of the moving party, Serbia-Montenegro.

26. On 12 May 2006, in *Milutinovic*, the Appeals Chamber mentioned the two impugned decisions in paragraphs 6, 33-35 and footnotes 7, 14, 15, 16, 17, 20, 66, 78 and 79, which contain verbatim citations/quotes from these decisions.

27. These references relate to several of the facts relevant to these proceedings, including–

(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) That the impugned decisions relate to the production and protection of the records of the SDC;

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

(vi) The legal meaning/interpretation given by the Appeals Chamber in one of the impugned decisions to the expression "interests";[42]

28. In decisions of 23 September 2004, the *Milosevic* Trial Chamber had made public most of the fact for which Ms Hartmann is being prosecuted.[43] The Chamber also made it clear through that decision that what is being prosecuted in such order is

[42] See par.35 and footnote 78-79.

[43] *Milosevic* Second Decision 23 September 2004;*Milosevic* First Decision 23 September 2004. 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.

not the order itself or effect of the decision, but the material that is the subject of the protective measures.[44]

29. The records of this Tribunal contain many more examples of Chambers having referred publically to these decisions and some or all of the facts that are the subject of these proceedings. Thus, for instance, in the *Delic* case, the Trial Chamber referred to the full title (and confidential nature) of one of the two impugned Decisions.[45] Likewise in *Perisic*.[46]

30. The practical effect of these decisions/orders was to lift the confidential status of the facts which were disclosed publically. In other words, at least from the time of these decisions/orders, the facts in question could not be regarded as having been "treated as confidential" by the Tribunal.

31. The *amicus* investigator/prosecutor had not identified a single one of these decisions/orders.

32. In conclusion, the confidential character of the facts which Ms Hartmann is alleged to have made public in breach of a confidential order had in fact been made public by *actus contrarius* of the Tribunal.

33. The *actus reus* of the crime of contempt under Rule 77(a)(ii) has not therefore been established.

[44] Ibid, in particular page 2.

[45] See *Delic* Decision 23 August 2006;*Delic* Decision 14 January 2008.

[46] *Perisic* Order 22 September 2006.

3. Waiver by Serbia

3.1 Legal considerations

34. The Appeals Chamber made it clear that evidence of statements/comments officially acknowledged by officials whose Government which had sought and obtained protective measures from the Tribunal and which disclose facts/information subject to the protective measures would justify regarding the confidential status of these facts/information as having been lifted.[47]

35. The Appeals Chamber is not thereby suggesting that a party to the proceedings (or a witness) which obtained protective measures in relation to certain facts/information can freely decide if and when to waive the confidentiality of these facts/information. The principle that the Appeals Chamber was outlining is that where a person or Government obtains protective measures based on a claim that it has a valid interest that deserves and requires protection, the public and official disclosure of that fact by the person or Government either demonstrates the fact that this interest was not in fact worthy of protection in the first place or that, due to a change of circumstances (including the fact of disclosure by the applicant), any interest as might have existed up to that point ceases and could not warrant a finding of contempt for any further disclosure of that fact. It is not for the Tribunal to enforce the confidentiality of certain facts which a person or Government which claimed to have an interest in maintaining their confidentiality has effectively publically disclosed.

36. This explains why there is no precedent of a contempt conviction for disclosing facts/information that the applicant had himself/itself made public in the first

[47]REDACTED

place.[48] A conviction for contempt in such a case would not only be without a valid legal basis; it would also be oppressive, unnecessary and inappropriate.[49]

37. There are many examples in the practice of this Tribunal (e.g.Dokmanovic,[50] Milosevic,[51] Obrenovic,[52] Galic,[53] Bala/Musliu,[54] Vasiljevic,[55] Prlic *et al*[56]) (and Taylor[57]) where the party that had sought and obtained a confidentiality order (the Prosecution) disclosed "confidential" information in advance of the order being lifted in relation to the protected information. 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 public.

38. In similar fashion, the Tribunal took no step in the present case to prevent or punish the many repeated and very public acknowledgments of facts for which Ms Hartmann now faces trial. This is a clear indication that, *at least in relation to those facts publically discussed by Serbia*, there was no interest worth protecting as would warrant the initiation of contempt proceedings (either because these facts

[48] E.g. D14,D15,D16,D18,D19;T.194-195;T.157-161.

[49] *DPP v Humphrys*,46.

[50] D14;*Dokmanovic* Order 3 April 1996;*Dokmanovic* Order 10 July 1996;*Dokmanovic* Order 3 April 1996.

[51] D15;D20;*Milosevic* Decision 24 May 1999.

[52] D16;*Obrenovic* Order 9 April 2001.

[53] D26,D27,D28.

[54] D18;*Limaj* Indictment 27 January 2003; *Limaj* Decision 18 February 2003.

[55]*Vasiljevic* Warrant 26 Oct 1998;*Vasiljevic* Decision 31 Oct 2000.

[56] D19;*Prlic* Order 2 April 2004; *Prlic* Order 5 April 2004; *Prlic* Order 4 March 2004.

57 D63,D64,D65.

were not covered by the confidential order in the first place or because confidentiality had been lifted by the applicant's public statements).

3.2 Factual considerations

39. In the present matter, Serbia-Montenegro made public each and all the facts which, the *amicus* suggests, were covered by the impugned decisions and in relation to which Ms Hartmann is now being charged.[58]

40. 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 for which Ms Hartmann now stands accused.[59] This is supported by the record of these proceedings.[60] She also made it clear that the disclosure of the facts discussed by Ms Hartmann in her publications did not cause any prejudice to Serbia(-Montenegro).[61]

41. Ms Hartmann is effectively being prosecuted for disclosing facts that have never been made confidential by a court order or which had ceased to be treated as such at the time of her publications.

42. In those circumstances, the *actus reus* of the alleged offence has not been established.

[58] E.g.D10;D5;D9;D48; T.276-280,392,398-410;423-427,429,466-472,478-480,494-497. This acknowledgements were made by state officials acting in their official capacity:e.g.ibid.Also T.416-417;447-449,472-479.

[59] Ibid and T.400-402.

[60] Ibid;alsoT.423-427,429,466-472,478-480,494-497.

[61] T.389,404.

4. Public character of the information

43. All four facts in relation to which Ms Hartmann is being prosecuted had been publically discussed in the media prior to the publication of her book/article.[62] Ms Kandic explained:

> "this book by Florence Hartmann appeared in press reports after so many other discussions in the media. We didn't – we couldn't understand what Florence Hartmann was being singled out, because we were discussing openly these things in the press. There was even an expert seminar in our region that was organized after the judgment of the International Court of Justice in June and July 2007. We couldn't understand the standard by which this one person was being singled out, while all of us were being allowed to debate the contents of the said decisions."[63]

44. That also includes the reference to Mladic's file and its purported content which was discussed openly and publically prior to Ms Hartmann's book.[64] It was also openly discussed in public filings of the Tribunal.[65]

45. It is not the Defence case that public disclosure in the media of facts pertaining to the impugned decisions would *per se* and in all cases have displaced the Chamber's confidentiality orders.[66]

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[62] E.g.T.388-399; 423-443,487-492D5;D1;D2;D46;D2;D5;D4;D6; P2.1, 1002-2,6-7/9;D48generally, evidence of Ms Kandic.

[63] T.390.

[64] E.g.P2.1,1003-2,7/13; T.409-413;D42,D5.Discussion of this file/purported content in Ms Hartmann's book does not form part of the charges (see, above, par.1 and references).

[65] E.g.*Milosevic* Decision 12 April 2006,par 14;*Milosevic* Decision 16 June 2005.See also T.409-410.

[66] *Margetic* Trial Judgment.

46. Nor is it the Defence contention, as was advanced in *Jovic* and *Haxhiu*, that the information published was already in the public domain at the time (as a result of public discussion of these fact) and that there could not therefore have been further harm caused to the Tribunal's administration of justice and therefore no possibility of contempt.[67]

47. It is the Defence case that the extensive and very public discussion of these facts is relevant to the following issues:

(i) Reasonable character of Ms Hartmann's conclusion that the information was not regarded as subject to a confidential order anymore

48. In light of the fact that Ms Hartmann knew of the extensive public debate surrounding these facts, she could reasonably have formed the view that the Tribunal did not regard *these facts which she discussed* as being confidential in nature.[68] The evidence of Ms Kandic supports that conclusion.[69]

49. Although that view might have been incorrect, it was not unreasonable in the circumstances considering the fact that respectable media outlets (including the New York Times and IWPR[70]) had discussed those same facts and had not been subject to any criminal prosecution for contempt. The book/article were published, not as an act of defiance, but as a contribution to a vibrant public discussion of the matter.[71]

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[67] E.g.*Haxhiu* Trial Judgment,par.19.

68 P1.1,1002-1, 4-6/10; P2.1,1002-2, 6-7/9; 1003-2,5-6, 8-9/13; 1004-2, 6, 10/21; REDACTED.

[69] T.398-404.

[70] See eg.Rule65ter D1,D2,D3,D4,D5.

[71] P2.1,1004-2,11/21

(ii) Seriousness of the alleged conduct

50. In light of the Tribunal's jurisprudence, the disclosure of facts which are already widely known to the public could not in principle be serious enough to warrant the initiation of criminal proceedings. This is what was made clear in the *Brdjanin* case.[72]

51. Only where, as in the *Jovic* case, there remains an interest worthy of protection *in relation to these facts* could a conviction be warranted under Rule 77(a)(ii) (subject to the principle of proportionality and other requirements outlined below). For instance, if the identity of a protected witness has been publically discussed, the interest that this witness might have in his identity being protected might in some cases remain. In such a case, the beneficiary of the protective measures had not waived his right to protection and there was a continued interest in protecting his identity from further public disclosure.

52. In the present case, Serbia-Montenegro has made it clear that it had no interest in protecting or maintaining the confidentiality of *the facts which Ms Hartmann is said to have disclosed* in her book/article.[73] It might have maintained an interest in keeping other facts/information confidential.

(iii) Proportionality of the restriction made to the accused's freedom of expression

53. In that context, the fact that the information disclosed by the accused in alleged violation of a court order is one of the factors most relevant to assessing the proportionality.[74] Mr Joinet explained that, from a human rights point of view, the

[72] *Maglov* Decision 19 March 2004,pars.9-10.

[73] See above;also T.481-483.

[74] See below pars.135-171.

effect of that publicity was, effectively, to lower the level of confidentiality of the information in question.[75]

(iv) No "real risk" of interference with the administration of justice

54. The extensive publicity that surrounded the facts discussed in Ms Hartmann's publications would be relevant to determine whether, despite such publicity, her publications nevertheless created a real risk of interference with the administration of justice.[76]

5. No "real risk" of interference with the administration of justice

5.1 Jurisdictional considerations

55. The contempt jurisdiction of the Tribunal is not general in nature. It is an enabler of its principal jurisdiction. This explains that the Tribunal's contempt jurisdiction is dependent on proof having been made that the conduct of the accused created a real risk for the administration of justice.[77] Unless such a risk exists, the Tribunal has no jurisdiction under Rule 77.

56. First, it should be noted that there is no evidence whatsoever to suggest that any state has taken the view that Ms Hartmann's conduct was relevant to their cooperation with the Tribunal. The explicit statements of Serbian officials[78] and the evidence of Ms Kandic[79] are clear evidence of the fact that Serbia did not take any issue with the publications of Ms Hartmann. In that sense, the *amicus* case is artificial and without evidential support. It is no more than an unproven

[75] T.281-282,341,372.

[76] See below.

[77] E.g. *Margetic* Trial Judgment,par.15;*Marijacic* Trial Judgment,par.50.

[78] See, above,"Waiver by applicant".

[79] T.389,398-404; 452-460,481-483.

assumption. In fact, the evidence is that Serbia's cooperation has improved since the publication of Ms Hartmann's book/article, not deteriorated.[80]

57. Secondly, cooperation on the part of States is not a matter of discretion, but a statutory duty.[81] In that sense, the *amicus*'s suggestion that alleged disclosure of information could negatively impact on a State's obligations towards the Tribunal is legally unsound. Adopting such a view would also subject state cooperation with the Tribunal to their satisfaction with its enforcement of decisions/orders. Their obligation under Article 29 is unqualified.

58. Thirdly, it is not for the Tribunal to enforce any alleged interference with a State's purported interests/obligations. The contempt jurisdiction of the Tribunal is limited to protecting the Tribunal's own administration *of justice*. It cannot be used to protect any other interest. Had Serbia ever taken the view that Ms Hartmann had interfered with its interests, it could have used mechanisms (e.g. French or Serbian courts) to seek a remedy. In fact, and as explained at trial, there has not been any suggestion on the part of Serbia that Ms Hartmann's publications prejudiced its –or the Tribunal's– interests.[82]

59. Lastly, subject to Article 22 of the Statute, the Tribunal has no jurisdiction to prosecute contempt in relation to conduct that has occurred <u>after</u> the proceedings to which the disclosure relates have ended. An amendment of the Rules would be required to expand the Tribunal's jurisdiction in that respect. This explains that, prior to the indictment of Ms Hartmann, all contempt proceedings had related to disclosure of information that could have interfered with existing and pending (trial or appeal) proceedings. This was not the case here since proceedings in the *Milosevic* case had been terminated.[83] Under international law the curtailment of

[80]T. 452-460,481-483.

[81] Article 29;T.481-482.

[82] T.452-460,481-483.

83 *Milosevic* Order 14 March 2006;T.375-376.

freedom of expression in the context of criminal proceedings knows of only two exceptions: where the fair trial of an accused or his right to be presumed innocent are at stake.[84] This explains that in those jurisdictions that have inspired the law of contempt of this Tribunal, 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".[85] As noted by Mr Joinet, "[w]hen the case is over, there is no problem regarding the administration of justice."[86]

60. Arguably, the Tribunal could have contempt jurisdiction even after the end of proceedings where the protection of victims/witnesses is at stake because the Statute provides for a specific statutory basis (Article 22) for the protection of victims/witnesses. No such basis exists in relation to any other protected interest. The jurisdiction of the relevant states would be competent in such cases.
61. In those circumstances, the exercise of the Tribunal's Rule 77 jurisdiction over the alleged conduct would be *ultra vires* of statutory and international law limitations.

5.2 Legal considerations

62. Under the caselaw of this tribunal, to be criminalized under Rule 77, the conduct in question must create a **real risk for the administration of justice**, not just a theoretical, potential or technical one.[87]
63. This is entirely consistent with the law of common law jurisdictions from which the ICTY contempt descends.[88]

[84] T.346-348;D39.

[85] See Fenwick and Phillipson,p.288.

[86] T.311.

[87] See e.g. *Margetic* Trial Judgment, par 15;*Marijacic* Trial Judgment, par.50. E.g.for a violation by the Registry, REDACTED

64. In practice, this means that the alleged prejudice which this publication is said to have created must be established with sufficient specificity. As noted by Lord Coulsfield, it is

> "difficult to see how it can be suggested that there is such a risk unless the prejudice can be pointed to in some reasonably specific way".[89]

65. This is also because "[t]he administration of justice has to be robust enough to withstand criticism and misunderstanding".[90] In *In re Lonrho plc*, Lord Bridge said (at p 209):

> "**Whether the course of justice in particular proceedings will be impeded or prejudiced by a publication must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court**."

66. In the present case, the disclosure attributed to Ms Hartmann has had no demonstrated effect on the proceedings, nor has it been shown to have created a real or substantial risk to that effect.[91] The *amicus*'s allegation to the contrary stands on nothing but on his own assertion to that effect. It is the unchallenged

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[88] E.g.*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 Director of Public Prosecution (Western cape)*(South Africa).

[89] Ibid.

[90] *Megrahi v Times Newspapers Limited*.

[91] See,to the contrary effect,T.452-460,481-483.

evidence in this case that Serbia never reacted the wide disclosure of these matters, but was only ever interested in protecting the contents of the SDC records:[92]

> "it was common knowledge that these transcripts and records of the Supreme Defence Council exist and certain sections of these transcripts were redacted. It was a constant topic, what these transcripts were about, what was hidden in them, and there was no opposition by the authorities to what we, the human rights organizations, were saying; namely, that those transcripts contained those parts of the debates and deliberations on the Supreme Defence Council that concerned Srebrenica, primarily, and the involvement of the police and army forces of Serbia in those events. I spoke about it openly. Nobody ever said, this is not true, that's not what these redacted parts of the transcripts contain. Nobody ever called into question, back in our country, that the Government of Serbia applied to the Tribunal in the Hague for this decision to protect these redacted parts of the transcript for that reason. What was at issue was the contents of the transcripts."[93]

5.3 Factual considerations

67. Because the confidentiality of the four facts had been waived by the Tribunal, because they had been openly discussed and officially acknowledged by Serbia-Montenegro and been widely publicised, the further discussion of these facts did not and could not reasonably create a real or concrete risk for the administration of justice. If there is a reasonable doubt in that regard, it should benefit Ms Hartmann.
68. In all cases where a conviction has been entered before this Tribunal, including in cases where there had been or might have been public discussions of the facts

[92] See above.

[93] T.389.See also Ibid,404;D9.

disclosed in breach of an order, the conduct of the accused could be said to have created a real and concrete risk for the administration of justice. No such risk existed in the present case because –

(i) the relevant *Milosevic* proceedings were terminated so that the accused's right to a fair trial/presumption of innocence could not be prejudiced;

(ii) the protected interests that pertained to these facts either never existed or had been waived by the Tribunal and/or Serbia-Montenegro;

(iii) Ms Hartmann did not disclose any of the information that was subject to the protective measures;

(iv) Serbia-Montenegro did not regard Ms Hartmann's publications as disclosing any fact for which protective measures had been sought;[94]

(v) though not strictly-speaking a requirement, there is no evidence of any actual interference with the administration of justice;

(vi) the *amicus* has not called any evidence to testify to the fact that Serbia-Montenegro had taken the view that its interests had been infringed or that the likelihood of its cooperation had decreased as a result of the publications.

69. In view of the above, and in light of all relevant evidence, it is reasonable to conclude that Ms Hartmann's publications did not represent a real and concrete risk for the administration of justice.

70. For that reason also, the *actus reus* of the offence has not been established.

6. Absence of mens rea

6.1 Absence of culpable state of mind

71. There is no evidence that Ms Hartmann possessed the requisite *mens rea*.

[94] T.389.

72. Ms Hartmann was not privy to the exact content of confidential decisions and had not read those until she was interviewed as a suspect.[95]

73. However, the existence of the two decisions and the fact that they had originally been filed confidentially had been made public by the Tribunal itself and were not treated as confidential at the time of publication of the book/article.[96]

74. It is important to note that

(i) Ms Hartmann left the Immediate Office and ceased to act as spokesperson before the second of the two impugned decisions was rendered;[97]

(ii) Whilst a spokesperson, she was never briefed by members of the Office of the Prosecutor in relation to these two decisions.[98]

(iii) That explains that she never spoke about this matter in her capacity as a spokesperson for the OTP. Because she was never asked by the Chief Prosecutor to state a public position on this matter, there was no need for her to be briefed.[99] OTP statements pertaining to this matter were made after Ms Hartmann had left her position as a spokesperson.[100]

75. Mr MacFarlane's reliance upon the evidence of Mr Ruxton is misplaced. Mr Ruxton does not suggest, and in fact expressly denies, having had any specific information suggesting that Ms Hartmann was ever briefed about these matters as part of her functions.[101] The suggestion that Ms Hartmann would have been

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[95] P2.1, 1002-2,2/9;1002-2,4-5 and 7/9. Defence Motion pursuant to Rule65ter, 7 February 2009,Annex.

[96] See above.

[97] Defence Motion pursuant to Rule65*ter*, 7 February 2009,Annex.

[98] P1.1,1002-1,7/10; P2.1,1002-2,1/9;also *Ruxton* Statement,par.6;D43,D44.

[99] See Prosecution Statement 6 February 2009, no 12; P1.1,1002-1,7/10; P2.1,1002-2,1/9; *Ruxton* Statement,par.6.

[100] P2.1,1004-2,7/21.

[101] *Ruxton* Statement,p.4,pars.5-6.

informed of the detail of the hundreds and maybe thousands of confidential matters pertaining to proceedings that arise each year before the Tribunal is unreasonable. The time of her departure further reinforces the view that she had no dealing with the impugned decisions in her capacity as spokesperson.

76. The *amicus* appears to be saying that, because it was part of her work to know what was confidential and what was not, she must have known that these facts that she discussed were confidential and must have intentionally disregarded a court order when doing so. Not only is this inference not open on the evidence, but it is also not reasonable in the circumstances.

(i) First, as already noted, there is no evidence to suggest that she knew that the facts which she discusses continued to be treated as confidential by the court at the time of the publications.

(ii) Secondly, there is no evidence that she was ever briefed about these decisions or their content as part of her function as spokesperson.[102]

(iii) The lack of reasonableness of that position may also be established otherwise: Mr MacFarlane was fully aware of what was confidential in these proceedings; but he himself knowingly and repeatedly disclosed the content of confidential filings.[103] It would be unreasonable to draw an inference that he intended to interfere with the administration of justice based on the fact that (i) he had a general understanding of what should remain confidential, (ii) that he should be cautious about his actions and (iii) that he repeatedly breached confidential orders.

77. It could not reasonably be concluded that Ms Hartmann possessed the requisite *mens rea* also because -

[102] See above.

[103] REDACTED;Defence Reply 21 January 2009;Prosecution Notice 26 January 2009;Defence Response to Second *Amicus* Submissions,1-2 July 2009.

(i) at the time of publication of the book/article, the existence of these decisions and the fact that they had originally been filed confidentially had been made public by the Tribunal (and by Serbia-Montenegro) and were being treated as such. A culpable *mens rea* could not therefore be formed *in relation to these facts*.

(ii) Ms Hartmann understood or believed that these facts were treated as confidential at the time of publication:

> "I note also that much of the information contained in the pages of my book "Paix et Châtiment" i.e. the documents mentioned in the file communicated to my advisor, Maître Bourdon, up to the start of the interview, had been disclosed, much of this information, thus had been available, some of it for years now, without ever giving rise to reactions by the Tribunal."[104]

At the very least, it would have been reasonable for her to assume that these facts were now public, rather than confidential.[105] In other words, there was no intention on her part to violate a Tribunal order.

(iii) Ms Hartmann did not act with intent to interfere with the administration of justice. Mr Kermarrec made it clear that there was no basis to suggest that a journalist of Ms Hartmann's reputation would have intentionally misled her editor as to the content of her book.[106] An inference to the contrary would have no basis in evidence and would be directly contrary to that undisputed evidence.[107] During her interview upon which the *amicus* is relying unreservedly and which he tendered, Ms Hartmann herself made it clear that she did not possess that intent:

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[104] P1.1,1002-1,4(-5)/10; P2.1,1003-2,8-9/13,1002-2,6-7/9.

[105] See below pars.106-134.

[106] T.144-145.

[107] T.144-146.

> "I am extremely surprised and devastated by these proceedings of the Tribunal. I worked for years, without counting all the other time I invested, to serve the Tribunal, to the detriment of my family and children. And I carried out my work such that no one could ever doubt my commitment, which certainly went beyond that demanded by my employer, i.e. the United Nations, and with intellectual rigour recognized by many observers, and if you need public documents to prove this, I can get them to you."[108]

This evidence has not been rebutted or contradicted.

(iv) Even if culpable, Ms Hartmann's conduct would be no more than negligent so that it would fall outside the realm of criminal liability set out by Rule 77.

6.2 Common ground between the parties

78. It is common grounds between the parties that to succeed in this matter, the Prosecutor would have to establish an intention to violate the order by publishing.[109]

6.3 Intent to interfere with the administration of justice

79. Criminal contempt requires that the violation of the court's order be committed with knowing and willful intent to interfere with the administration of justice. Knowledge or willful blindness as to *the existence* of a confidential order is only a first – and insufficient – element to establish the existence of the requisite *mens rea*.

[108] P1.1,1002-1,3-4/10.Also P2.1,1003-2,2/13.

[109] REDACTED *Nobilo* Appeal Judgment,par 54.

80. In addition, the accused must be shown to have acted "with specific intention of frustrating their effect".[110] The *amicus* appears to have misunderstood the relevance of this element as being limited to the crime's *actus reus*. Instead, it forms part of the crime's *mens rea*.

81. The *Beqaj* Trial Chamber noted that there must be proof of a "specific intent to interfere with the administration of justice".[111] Thus, the "*mens rea* of contempt is the knowledge and the will to interfere with administration of justice."[112] In other words, to be contemptuous under that provision, the conduct must have been "calculated to prejudice the proper trial of a cause".[113] Or, as the ICTR has put it, there must be "an intention to commit the crime of contempt".[114]

82. This element of intent comes *in addition to* the requirement of knowledge –or willful blindness– of the existence of a confidential order:

> "the Prosecution must […] establish that the accused had the specific intent to interfere with the Tribunal's due administration of justice".[115]

83. Therefore, for each form of criminal contempt, the Prosecution would have to establish that the accused acted –

> "with specific intent to interfere with the Tribunal's due administration of justice".[116]

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[110] *Nobilo* Appeal Judgment,par.40(c).

[111] *Beqaj* Trial Judgment,par.22.

[112] *Margetic* Trial Judgment,pars.30 and 77(emphasis added).

[113] E.g.*Hunt v Clarke*,per Lord Cotton.

[114] *Kanyabashi*, Decision 30 November 2001; *Kajelijeli*, Decision 15 November 2002,par 9.

[115]*Maglov* Decision on Acquittal,par.40.Also SCSL-*Brima* Contempt Trial Judgment,par 18-19.

84. Common law jurisdictions, from which the concept of contempt descends,[117] systematically support such a view.[118] In South Africa, the leading case, *State v Van Niekert*, said:

> "[B]efore a conviction [for contempt] can result the act complained of must not only be willful and calculated to bring into contempt but also be made with the intention of bringing the Judges in their judicial capacity into contempt or casting suspicion on the administration of justice."[119]

85. Contrary to the *amicus*' submission,[120] it is not the case that a violation *as such* of a confidential order interferes with the administration of justice and thus constitutes contempt. The many cases of this happening – including by the *amicus* himself[121] – demonstrates that, instead, a supplementary mental element is required. This is why, for instance, the *amicus*'s reckless disclosure of confidential matters in a public filing is not an act of contempt under Rule 77.[122] This is also why, despite finding that the Prosecutor had intentionally violated a witness protection order, the

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[116] *Maglov* Decision on Acquittal,par.16 (and pars 24, 29, and 41); also *Milosevic* Decision 13 May 2005, par 11).

[117] *Vujin* Trial Judgment,par.15.

[118] E.g., *ex parte Bread Manufacturers ltd, Re Truth & Sportman Ltd*;*Hinch v Attorney-General*(Australia); *A-G v Times Newspapers*(UK).

[119] *State v Van Niekert.*

[120] *Amicus* Pre-Trial Brief,par.13.

[121] Defence Reply 21 January 2009;Prosecution Notice 26 January 2009;T.228;Response to *Amicus* Second Submission,2 July.

[122] Ibid.

ICTR did not find counsel guilty of contempt, but excluded the evidence obtained in violation of that order.[123]

86. Thus, whilst there is no need for the Prosecutor to establish *actual* interference with the administration of justice, the law of the Tribunal requires that it be established that the accused intended by her actions to interfere with the administration of justice, i.e., a conscious and deliberate attempt to do so.

6.4 Factual/evidential considerations

87. There is no evidence that Ms Hartmann –

(i) possessed the requisite *mens rea*; nor that she

(ii) knew or believed that the facts discussed in her book/article were or remained confidential at the time of publication; nor that she

(iii) intended to violate an order of the Tribunal. In her interview, which the *amicus* acknowledges to be reliable, Ms Hartmann said this:

> "I formally reject having ever knowingly violated any regulations and affirm that I never knowingly or willingly endeavored to hamper the course of justice, in any way."[124]

(iv) nor that she intended to interfere with the administration of justice;[125] nor that

(v) her conduct would have been more than negligent.

88. The *amicus* has solely focused on the question of whether Ms Hartmann knew of *the existence* of the two impugned decisions and the fact that they had originally

[123] *Kajelijeli* Decision 15 Nov 2002,pars.14-15.

[124] P1.1,1002-1,4/10

[125] See above and also T.492-494

been filed "confidentially".[126] Anyone with an internet connection and the will to review public decisions of the ICTY would have been aware of that fact. This, and the discussion of such public information, does not constitute contempt.

89. What Ms Hartmann knew (or believed) based on the various public decisions issued by the Tribunal, the statements made by Serbian representatives and through the media was that the confidentiality of these decisions did not extend to the facts that she discussed in her book/article.

90. Whilst the burden to prove these facts is squarely on the Prosecutor, it is noticeable that the evidence is that Ms Hartmann was known to be a professional and committed employee and a person committed to the ideal of international justice and to the success of the work of this Tribunal.[127] There is no reasonable basis to conclude that such a person would wish or would even consider interfering with the good administration of justice.[128]

91. Ms Hartmann's publisher has made it clear that he had no reason to believe that the book contained material protected by a confidential order.[129] He described Ms Hartmann as trustworthy and reliable.[130] He also testified to the effect that he had no reason and no basis to believe that Ms Hartmann would have thought or considered misleading him about the content of the book and any contemptuous material that the book might have included.[131] Mr Kermarrec was not challenged in relation to any of these assertions.

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[126] *Amicus* PTB,pars.22-24.

[127] *Ruxton Statement*,p.4; T.137;145;384-386;492-494.

[128] P1.1,1002-1,3-4/10. Also P2.1,1003-2,2/13;T.492-494.

[129] T.145.

[130] T.144-145.

[131] T.145-146.

92. Ms Kandic has testified to the same effect, presenting Ms Hartmann as an honest, reliable and committed person.[132] Asked whether she knew of any situation where Ms Hartmann acted contrary to her professional and deontological duties, Ms Kandic said that she knew of none.[133]
93. Finally, the *amicus* has agreed with the proposition that Ms Hartmann had not acted with reprehensible motives.[134] In the absence of such motives, it is hard to imagine how she could have intended to interfere with the administration of justice.
94. In these circumstances, the conclusion that Ms Hartmann could have intended to interfere with the administration of justice is simply unreasonable. So is the suggestion that she intended to violate a Tribunal order.
95. Nor is there any evidence that her conduct would have been more than negligent. Mr MacFarlane, whose very responsibility it was to prosecute her and fully aware of the importance of maintaining the confidentiality of confidential filings, made repeated public disclosure of confidential facts in violation of a court order.[135] Considering that he is a trained lawyer of great experience (who was assigned specifically to try cases of alleged contempt) and that his conduct could not be said to have been more than negligent, the same conclusion must be reached as regard a person with no legal training and no claim to any expertise in matters of contempt.
96. Finally, as will be discussed next, the Prosecutor has failed to exclude the reasonable possibility that, should the impugned facts be regarded as having been confidential at the time of publication, Ms Hartmann would have committed a good faith mistake about the confidential nature of these facts. This would have made it impossible for her to form the requisite culpable *mens rea*.[136]

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[132] T.384-386.

[133] T.386-387.

[134] Defence Motion pursuant to Rule65*ter*, 7 February 2009,Annex.

[135] Ibid.footnote 112;T.178.T.228;Defence Response to Second *Amicus* Submission,2 July 2009.

[136] See next.

7. Mistake of law and fact

97. Even if the facts relevant to this case had been treated as "confidential" at the time of her publications, Ms Hartmann could not have formed the requisite *mens rea* as a result of a mistake as regard the status of these facts. Her mistake (if indeed her view that the facts that she discussed were not covered by any confidentiality was in error) may be regarded, in the alternative, as a mistake of law and/or fact.

98. It is clear from the jurisprudence of the Tribunal that the accused must have been "put on clear notice that the material [in question] was subject to an order preventing disclosure" at the time of the impugned disclosure.[137]

7.1 Legal considerations

99. Because proof of *mens rea* is required, an honest mistake would be a defence to an allegation of contempt.[138]

100. In at least one decision, a Trial Chamber appears to have taken the view that mistake of law was not available in matters of contempt. If that, indeed, was the position of the Chamber –rather than a finding on the facts specific to the case– it would be wrong in law. The Defence submits, however, that this finding is a more limited one. It suggests that a defendant cannot question the legality of a Tribunal's decision by preferring his interpretation of the law to that of the Tribunal. However, where an accused is genuinely mistaken about the state of the law, this doctrine would provide him with a valid defence to the charges if that prevented him from forming the requisite *mens rea*.[139]

[137] See *Marijacic* Appeals Judgment,par 29 citing *Marijacic* Trial Judgment.

[138] E.g.*Dobson v Hastings*.

[139] E.g.Cassese,*International Criminal Law*,p.258.

101. Where the accused believed, in good faith, that she was entitled to act as she did, or believed that her conduct was in conformity with his obligations, she may be said to have been mistaken about the unlawfulness and criminal character of his conduct – if indeed that conduct is shown to have been otherwise criminal – and may not be held criminally liable.[140] This is the case, the Appeals Chamber has made clear, also in relation to the crime of contempt so that to entail criminal liability –

> "it must be possible for the individual to determine ex ante, based on the facts available to him, that the act is criminal".[141]

102. Such a defence might be established in relation to each and every element which the prosecution must establish beyond reasonable doubt for the accused to be found guilty of the crimes charges. The burden of proof is upon the prosecution at all times, and it is for the prosecution to exclude the reasonable possibility that the accused might have committed an excusable mistake.[142]

103. In this particular case, the Trial Chamber should fully consider the fact that there is, at the very least a great deal of ambiguity and uncertainty as to the scope and effect of the waiver of confidentiality that results from the Tribunal's public references to the impugned information and from the public acknowledgements of these allegedly "confidential" facts by Serbia-Montenegro.[143]

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[140] *In re B*,The Netherlands,Field Court Martial,Decision 2 Jan 1951,No.247,516-525.

[141] *Marijacic* Appeals Judgment,par.43.

[142] *In re Schwarz*,at 862-863.

[143] See e.g. REDACTED and a large body of practice support the view that such conduct is <u>not</u> criminal. See also T.281-282;340-341;372-374.

104. Looking at this matter through the lens of the principle of legality, the law of contempt of Tribunal on that point could not be said to meet the necessary requirement of "foreseeability and accessibility" to warrant a criminal conviction.[144]

7.2 Further considerations

105. The present situation is unlike the *Jovic*-type situation where an accused thought that his legal position was preferable to that of the Tribunal and that he could therefore disregard the view of the Chamber. Ms Hartmann's view was never that she could over-rule or prefer her opinion to that of the Tribunal. Nor is it the position of the Defence.

106. In the present case, Ms Hartmann's understanding was that her position was legally consonant and in accordance with that of the Tribunal based on the fact that she knew or believed that the facts that she discussed in her book/article had been made public by the Tribunal and by the applicant so that *these facts* were not treated as confidential by the Tribunal.

107. At no point did Ms Hartmann pretended or wished to arrogate for herself the right to decide for the Tribunal what should or can remain confidential.[145] It was her understanding, and a reasonable one in the circumstances, that this determination had been made by the Tribunal itself. In that sense, and in the words of the Appeals Chamber, there was no awareness on her part of the illegality of her conduct.[146]

108. In any case, and in the alternative, Ms Hartmann's mistake (if indeed her view is considered to be mistaken) could be regarded as a mistake of fact. The Tribunal has

[144] See *Hadzihasanovic* Decision 16 July 2003, par.34.Also *Sunday Times v United Kingdom*,Judgment,par.49.

[145] E.g.P1.1,1002-1,4-5/10;P2.1,1002-2,6-7/9,1003-2,5-6,8-9/13;1004-2,10/21.

[146] *Jovic* Appeal Judgment,par.27.

recognized that such matter, if proved, would provide a valid defence to the charges.[147] The Appeals Chamber has recognized that contempt requires proof of the accused's knowledge that his conduct was "illegal" in the sense that new knew that disclose was in violation of an order of the Chamber.[148]

109. A mistake of fact could also be a valid defence to the charges.[149] That assessment should be made at the time and in the circumstances relevant to his alleged failure as seen by the defendant.[150] And where the evidence allow for an honest error on her part as to the facts relevant to the charges, the accused is entitled to the benefit thereof by virtue of the presumption of innocence.[151]

7.3 Factual considerations

110. The following facts are relevant in this matter and demonstrate that Ms Hartmann could have committed a mistake:

111. The Tribunal's jurisdiction (including pursuant to Rule 77) is limited by SC Resolution 827, in particular paragraph 7.[152] At page 119-120 her book, Ms Hartmann had made reference to that resolution to explain the need for transparency as regard the disclosure of the impugned documents and suggested

[147] E.g.*Margetic* Trial Judgment, pars 58 *et seq* where the Trial Chamber considered the Defence argument on that point but was not satisfied that the error under which he said he had laboured had been *proved* in this instance.

[148] *Jovic* Appeal Judgment, par 27.

[149] E.g. *Margetic* Trial Judgment, pars 58 *et seq*. The mistaken belief must be held in good faith or "honestly" "no matter how unreasonable" (*In re Michael A Schwarz*,pp.171-183, Appeal at 862-863).

[150] *Hostage* case,p.58.

[151] Ibid.

[152] Also D36;D29;D38.

that the course taken by the Appeals Chamber in this matter effectively constituted a violation of its mandate as granted by the Security Council under paragraph 7 of Resolution 827.[153] She also did in her impugned article thereby demonstrating a belief (even if incorrect) that her position was consistent with the Tribunal's jurisdiction. In that sense, the statement of the *Tadic* Appeals Chamber must be recalled:

> "That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community."[154]

112. The evidence of Mr Joinet makes it clear that, from the point of view of human rights law, the view taken by Ms Hartmann was entirely consistent with the standards relevant to this internationally- and United Nations- sanctioned body of rules.[155]

113. The Defence does not submit that, and the Chamber need not decide whether, the Appeals Chamber in fact acted in violation of paragraph 7 of Resolution 827 when granting the protective measures. The Defence does not challenge the legality of the impugned decisions.

114. The Defence submits, however, that it would have been reasonable for a person (particularly one not trained in the law[156]) to take the view that her publications were consistent with the overall mandate of the Tribunal and therefore legal. The

[153] P3,P3.1,D47.

[154] *Vujin* Trial Judgment,par.18.

[155] E.g.T.271,390-391;D5;D36.

[156] Defence Motion pursuant to Rule 65*ter*,7 February 2009,Annex.

evidence of Ms Kandic and Mr Joinet makes it entirely clear that Ms Hartmann's actions can reasonably be regarded as consistent with the mandate of the Tribunal as described above.[157] The unchallenged evidence of Mr Kermarrec that there was no reason to believe that Ms Hartmann would intentionally mislead her publisher as regard the content of her book further supports that conclusion.[158]

115. The Defence does not submit that members of the public or journalists should have a right to determine for themselves what is or should remain confidential.

116. The Defence submits, however, that a reasonable person could take that view – correct or mistaken– and, if he/she did, would have a valid defence to contempt charges in line with the legal principles and precedents outlined above. In such a case, the defendant would lack the requisite *mens rea* for the offence. The extent of information publically discussed by Mr Geoffrey Nice supports that conclusion as being reasonable.[159]

117. Also relevant in that context, and providing further support for this proposition, is the fact that Ms Hartmann could reasonably have believed that, after the Tribunal and Serbia-Montenegro had made these facts public, the facts discussed in her book were not treated as confidential anymore.[160]

118. The Trial Chamber need not decide whether Ms Hartmann was correct in drawing that conclusion.

119. However, the Defence submits that it would not be unreasonable, in light of the repeated and extensive public discussion surrounding these facts, for a non-lawyer

[157] E.g.T.271,390-391.Also D36.

[158] T.144-146.

[159] T.272-276,314-315;D3.

[160] E.g.P1.1,1002-1,4/10, 1002-1,4(-5)/10;P2.1,1003-2,8-9/13.

to have taken that view.[161] Clearly, the fact that many other persons (including state officials, journalists and members of the public) took that view and publically discussed these facts for many months and were not subject to any form of criminal proceeding suggest that this view was in fact a reasonable one.

120. REDACTED.[162] REDACTED.[163] This is also the way the letter had been understood by Ms Hartmann.[164]

121. The possibility of a mistake (if indeed the facts discussed are said to have been confidential at the time of publication) is rendered all the more reasonable, in the circumstances, by the following facts:

(i) First, as noted above, **Ms Hartmann is not a lawyer** so that she might have been unaware of the fine points of the law of contempt.

(ii) Secondly, as already noted, **the facts in relation to which she wrote had been made public** by the Tribunal and by the Applicant and had been widely discussed in the media.[165] No suggestion of a breach of court order had been made up to her interview/indictment.[166] In fact, journalists and ICTY officials had freely participated in this public debate.[167]

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[161] See REDACTED/14 January 2009,in particular Annexes.

[162] The Defence has recorded its view that the document should not have been admitted and reserves its rights in that regard (D49,D50,D51,D52,D53,D54,D55,D56,D57,D66,D67).

[163] T.302-303; Defence Motion pursuant to Rule 65*ter*,7 February 2009 (point 8).

[164] P2.1,1004-2,9/21.

[165] E.g.P1.1,1002-1,4/10, 1002-1,4(-5)/10;P2.1,1003-2,8-9/13;D5.

[166] P2.1,1003-2,10/13.

[167] P2.1,1004-2,10-11/21.

(iii) Thirdly, **during her interview with the *amicus* Prosecutor, Ms Hartmann made it clear that it was her understanding that the facts which she discussed were not treated as confidential anymore** as it had been the subject of many reports in the press and public filings that all she discussed was in the public domain.[168] She knew, for instance, that the issue of the protection of the SDC minutes had been discussed publically during the *Milosevic* proceedings.[169]

(iv) Fourthly, there is **no evidence that would allow for a reasonable inference that she would have deliberately sought to interfere with the course of justice**. Instead, there is ample evidence, including from her own words, that she was in fact at all times committed to ensure that the tribunal was capable of fulfilling its mission in accordance with its mandate.[170]

(v) Fifthly, whether that view might be inaccurate *as a matter of law*, Ms Hartmann could reasonably have believed it to be **correct as a matter of practice**. As a result of her function, she would have been aware of many cases where the content of confidential filings (in particular, sealed indictments) was revealed prior to the confidentiality order having been lifted because the reason to seek the confidential measures in the first place had disappeared. In those circumstances, it would have been reasonable for her to form the view that such conduct was accepted as a matter of practice/course before the Tribunal.[171]

122. All of the above point to the reasonable conclusion that, should the information discussed in Ms Hartmann's book/article be regarded as having been confidential at

[168] See above. REDACTED.

[169] P2.1,1004-2,6/21.E.g. *Milosevic* Second Decision 23 September 2004; *Milosevic* First Decision 23 September 2004;*Milosevic* Prosecution Response 20 May 2003; *Milosevic* Prosecution's Application for an Order 12 July 2002.

[170] E.g. P4;P2.1,1003-2,5/13;P1.1 1002-1,3-4/10;T.311;492-494.

[171] P2.1,1003-2,5/13.

the time of publication, Ms Hartmann could have committed a good faith and reasonable mistake of law and/or fact as regard the status of that information.

123. In those circumstances, Ms Hartmann could not have formed the requisite *mens rea* for the crime of contempt under Rule 77(A)(ii). She should be acquitted for that reason also.

8. The law of contempt and the relevance of human rights standards

8.1 General considerations

124. There is another reason why this Chamber should regard the conduct of Ms Hartmann as falling beyond the scope of Rule 77: that is because the criminalisation of her conduct would, in the circumstances, constitute a violation of her fundamental rights and, thus, be *ultra vires* of the statutory powers and jurisdiction of the Tribunal.

125. The Tribunal has recognised as "undeniable" that "legal instruments relevant to the work of this Tribunal protect freedom of expression".[172] This does not mean that such freedom is absolute; nor that restrictions cannot be imposed by the Tribunal on the exercise of that freedom.[173] It does mean, however, that there are internationally-recognised limitations, which are binding on the Tribunal and which set the limits of the restrictions that can validly be imposed onto the fundamental rights of an accused including through contempt proceedings.[174]

[172] E.g. *Jovic* Trial Judgment,par.23.

[173] See *Margetic* Trial Judgment,par.81 and references.

[174] See next.

126. First, international law demands that any restriction on fundamental rights be interpreted strictly.[175] Freedom is the principle and curtailments exceptions that must be interpreted strictly.[176] This freedom is

> "the touchstone of all freedoms to which the United Nations is consecrated."[177]

Restrictions are not permitted where they would impede justice "to look for truth, which is its final objective" or empty that right of its content or object and purpose.[178]

127. Insofar as the Tribunal is concerned, this means that any interference with the right of a person to freedom of expression –including through contempt proceedings[179]- would only be permissible where, all other conditions being met, the exercise of that right is effectively capable and creates a risk of interference with the Tribunal's exercise of its principal jurisdiction to prosecute and punish serious violations of humanitarian law.[180] In his Decision of 12 February 2009, Judge Kwon made it clear that any restriction of an accused's freedom of speech should be subject to the principle of proportionality.[181] The Vice-President also made it clear that such restrictions would not be in order unless a failure to do so "would compromise [the]

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[175] E.g.*Rizos and Daskas v Greece*,par.38.

[176] *The Sunday Times v United Kingdom*,par.65. D31,par.20;D39;T.244-245,347

[177] D31, par11;UN GA resolution 59/1 of 14 December 1946; T.244.

[178] T.285,316-317;390-391;454-460,464-466D36,par.17.

[179] E.g.D31,par25; T.250

[180] E.g. *Karadzic* Decision 12 February 2009,par.20.

[181] *Karadzic* Decision 12 February 2009, in particular pars.18, 19, 21 and 23. See T.292-293,315-319,349,360-374.

achievement of the Tribunal's mandate".[182] As noted by the Vice-President, restrictions of this right are all the more inappropriate where, as in the present case, there is no evidence to indicate that the defendant "intends to undermine the Tribunal's mandate".[183]

128. Secondly, the permissibility of any restrictions upon the exercise of that right depends in part on whether the exercise of that right in the circumstances could be said to partake in a matter of public interest. As noted by the ECHR, there is little scope under the Convention for restrictions on debate of questions of public interest.[184] The Court has recently acknowledged, for instance, that the freedom of journalists to write work/book about issues of general interest could hardly be curtailed.[185]

129. There is no dispute that the facts discussed in Ms Hartmann's book/article are matters of general or public interest.[186]

130. Nor is there any dispute that the public is entitled to receive that information unless there are overwhelming reasons to the contrary.[187] *Guja v Moldova* is a good example of application of the principle of proportionality in the context of

[182] Ibid,par.20.

[183] Ibid,par.22 (emphasis added).

[184] E.g.*Hrico v Slovakia*,par 40(g);*Dupuis and others v France*, par 40;*Rizos and Daskas v Greece*, par 38;*Orban v France*,par.45;*Chauvy v France*,par.68.

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

[186] E.g.T.137-138, 389-390et seq; D46;D9.

[187] *Brdjanin* Decision 11 December 2002,par.37;T.390-400.

disclosure of information pertaining to criminal investigations highlighting the importance of the issue of public interest in the matter.[188]

131. In the present case, witnesses have made it clear that they regarded as being in the interest of the public and victims to have the information relevant to the charges communicated to them.[189] While their views on the matter might not be conclusive, they certainly are a weighty factor when considering denying them that information by restricting it, particularly when, as in the present case, those who wish to receive that information are "victims", i.e., those for whom the Tribunal was set up in the first place.[190]

132. Under international law, the concept of "national security" only gives a narrow and "exceptional" margin for the curtailment of freedom of expression, namely, in case where the disclosure of information would endanger a return to the rule of law.[191] This is not to say that the Appeals Chamber could not rely upon that basis to order protective measures. As indicated above, the Defence does not challenge the legality of the impugned decisions. The question here is whether and to what extent could this serve as a basis to curtail the freedom of expression of Ms Hartmann, the victims and the public at large as would necessarily result from a criminal conviction for contempt of Ms Hartmann.

133. In the present case, there was never any suggestion that the discussion of the facts mentioned in Ms Hartmann's book/article could endanger the re-establishment of the rule of law in Serbia. In fact, it was made clear by a victims' representative, that

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[188] *Guja v Moldova*.Also *De Haes and Gijsels v Belgium*.

[189] E.g. T.257-260,290-297,390-392;457-460,464-466;Security Council Resol.827,par.7;D5;D36.

[190] *Sunday Times v United Kingdom*,par.61.

[191] T.298-300;D36, Principle 15.

reliance and enforcement of that principle to curtail free discussion would go against the rights and interests of victims.[192]

134. Thirdly, any restriction (even if they pursue a "legitimate aim" such as the protection of the administration of justice) must be subject to the test of "proportionality".[193] Under the ECHR system, "there is a general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial…".[194] Any restriction of Ms Hartmann's fundamental right would, therefore, have to be necessary in the circumstances and the measure adopted to curtail that right would have to be necessary to a democratic society and constitute the most limited interference available with her rights.

135. Considering that criminal sanctions are the most intrusive and most serious types of interference with an individual's fundamental rights, such sanctions could only be justified in the most serious and grave of cases.

136. This is not to suggest that individuals, including journalists, can decide when to publish information in defiance of court orders on the basis of their own assessment of what the public interest might demand.[195]

137. But it does mean that the Chamber itself is empowered – and is in fact required – to determine whether the facts allegedly disclosed in violation of a court order were of public/general interest and, if so, whether the criminalisation of the conduct in question would constitute a disproportionate curtailment of the fundamental right of

[192] E.g.T.299-300.

[193] For an illustration, see *Brdjanin* Decision 11 December 2002,pars 41-42.*Hrico v Slovakia*,par.40;Or*ban v France*,par.44.

[194] *In re S (A Child)*,par.15.Also *Scott v Scott; AG v Leveller Magazine Limited*; and *Re Trinity Mirror Plc.*

[195] E.g. *Marijacic* Trial Judgment,par.39.

the accused *in the circumstances of the case* to communicate that information and for members of the public (including victims) to receive it.[196]

138. As a preliminary matter, it should be noted that the prosecution of journalists for allegedly disclosing facts of public interest is likely to undermine the freedom of the press, hinder public discussion of important matters and is unlikely to contribute to a frank and open discussion about those events which interest the Tribunal and the public at large.[197]

139. Secondly, should the Trial Chamber regard the conduct of Ms Hartmann as "criminal" in nature, such a decision would set a dangerous precedent, the negative effect of which could be felt by investigative journalists everywhere and for a long time.[198] It would also deny victims and the public at large the ability and right ot discuss these facts publically without facing criminal charges. The legacy of the Tribunal should consist of decisions that uphold high standards of respect and regard for human rights rather than leave for future generations what would constitute a misguided example of judicial censorship.

140. As will be discussed further below, a criminal conviction of Ms Hartmann would fall beyond the scope of what existing international human rights law would regard as permissible. In that sense, it would fall beyond the Tribunal's jurisdiction.

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[196] See e.g.*Chauvy v France*, par 67;*Dupuis and others v France*,par.41;*Fressoz v France*,par.51;*Sunday Times v United Kingdom* pars.65-66.

[197] E.g.*Rizos and Daskas v Greece*,par.45;*Dupuis and others v France*,pars.34-39 & 46;*Bergens Tidende v Norway*,par.52.

[198] See *Brdjanin* Decision 7 June 2002, par.30;T 252.

8.2 Relevant human rights standards and permissible restrictions of freedom of expression

141. The *amicus* has completely omitted to subject the theory of his case to the human rights standards that set out the limits of what can permissibly be punished under Rule 77.[199] In particular, there is not a trace of any discussion of the principle of proportionality that must be complied with in all cases of interference with the exercise of a fundamental right, in this case freedom of expression. The theory of his case assumes that, regardless of the circumstances, any violation of a confidential order of the Court would constitute a contempt over which the Tribunal has jurisdiction pursuant to Rule 77.

142. In fact, the Tribunal's contempt jurisdiction is subject to the limits set out under international law for any curtailment of freedom of expression, in particular that of journalists reporting on matters of public interest as in the present case.[200]

143. In two parallel cases pertaining to the publication of *Spycatcher*, British newspapers complained of a violation of Article 10 of the ECHR caused by the actions of the Attorney-General who sought to restrain the publication of extracts of that book.[201] The Court of Appeal had issued injunctions against *The Observer* and *The Guardian* which also bound all media within the jurisdiction of English courts and held that any publication or broadcast of the *Spycatcher* material would constitute a criminal contempt of court.[202] Copies of the books were imported from outside the UK. However, the court order remained in force until October 1998. The European Court of Human Rights distinguished between two time-periods: for

[199] See *Amicus* Report 12 June 2008 and PTB.

[200] See above.

[201] Spycatcher 1/Spycatcher 2.

[202] Ibid.

the first period (July 1986-July 1987), the Court held by a narrow majority that the risk of material prejudice to the national security existed justifying the imposition of the above-mentioned injunction. Concerning the later period, by contrast, and unanimously, the Court held that Article 10 of the ECHR had been violated. The basis of its reasoning on that point was that the material could no longer be regarded as likely to prejudice the national security of the country since the book had become freely available in the United States.

144. The same reasoning, if applied to the present circumstances, would lead to the necessary conclusion that the enforcement of the confidential orders contained in the impugned decision –and to do so through the criminal prosecution of a journalist– would constitute a violation of the rights guaranteed in the ECHR and the Statute.

145. The same conclusion would be reached by considering the principle of "proportionality" which applies to any curtailment of fundamental human rights. In particular, the criminal conviction of Ms Hartmann could not be said to have been based on "sufficient reasons" that made it "necessary in a democratic society".[203] To meet that standard, the restriction would have to-

> "correspond[d] to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10 (2)'"[204]

The adjective "necessary", within the meaning of Article 10(2) ECHR, "is not synonymous with 'indispensable', neither has it the flexibility of such expressions as

[203] Art.10(2)ECHR.

[204] *Sunday Times v United Kingdom*,par.62;also *Handyside v United Kingdom*,pars.48-50.

'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need'.[205]

146. In this case, the criminal conviction of a journalist who acted in the exercise of her fundamental rights and in the interest of the public to know, would constitute a disproportionate curtailment and infringement of Ms Hartmann's freedom of expression. The interest of the public/society (in particular, victims) to the facts allegedly revealed in violation of a court order and their right to receive that information is directly relevant to that issue.[206]

147. In the *Sunday Times* case, the European Commission for Human Rights took the view that a court-ordered ban on an article pertaining to facts of public interests could not validly be imposed and constituted a violation of Article 10 on the basis of the fact that the impartiality of the court might be affected if revealed since the impugned article contained only information with which the court had already become familiar from another source and because the disclosure of the information had no proven consequences on the relevant proceedings.[207] In the same case, the Commission underlined that "the very important function, in a democratic society, of the press in general and to the duties and responsibilities of individual journalists" and that "the examination of public responsibility" as regard issues of public concerns is "certainly a legitimate function of the press".[208] The Commission added that –

> "Only the most pressing grounds can be sufficient to justify that the authorities stop information on matters the clarification of which would seem to lie in the public interest, and this on the application of the

[205] *Sunday Times v United Kingdom*,par.59.

[206] E.g. T.267,390-392;Security Council Resol.827,par.7.

[207] *Sunday Times* Report,pars.231-248.

[208] Ibid,pars.243-244.

> persons concerned and for the reason that its publication would seriously disturb civil litigation in which these persons are engaged."[209]

The Court took a similar view.[210]

148. The cases of *Weber v Switzerland* and *Dupuis and others v France* constitute two other inescapable precedents that are directly relevant to the present case and demonstrate beyond any doubt that a conviction of Ms Hartmann could not be consistent with the requirements of the ECHR.[211]

149. If the facts relevant to the present case are placed within the relevant ECHR-matrix, the following conclusion would be inescapable: the interference with Ms Hartmann's fundamental rights which would result from a criminal conviction would not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of internationally-recognised human rights standards. In other words, a conviction would not be proportionate to the legitimate aim pursued and it is not necessary in a democratic society for maintaining the authority of the judiciary.

150. Because the Trial Chamber must uphold Ms Hartmann's fundamental rights, it would have to acquit her for that reason also.

[209] Ibid,par.247(emphasis added).

[210] Judgment 26 April 1979,pars.42-68.

[211] *Weber v Switzerland*;*Dupuis and others v France*; T 362-370.

8.3 Public nature of the facts and test of "proportionality"

151. A factor most relevant to the issue of whether a criminal conviction for contempt could be regarded as proportionate in the circumstances is the fact that the information that was disclosed was already in the public domain.[212]

152. In that respect, it should be noted that the Appeals Chamber has never suggested that the fact that information was in the public domain was irrelevant to considering the criminal character of the underlying conduct. Instead, it has at least implicitly acknowledged that, in some cases, this might preclude a finding that contempt had occurred. In *Marijacic*, for instance, that Appeals Chamber noted that the identity of the protected witness had not been "revealed elsewhere", thereby entertaining the possibility that, should this have been the case, a different conclusion might have been reached.[213] As will be discussed below, such position is entirely consistent with the law of the European Court of Human Rights.

153. Most relevant to the application of the principle of proportionality is *Dupuis v France* where the Court found that a fine imposed on a journalist for disclosing confidential documents from a judicial investigation was a violation of his freedom of speech and was therefore impermissible.[214] The Court took into account many factors directly relevant to the present case including (i) the fact that much of the information was already in the public domain and (ii) that journalists are contributing to an important public debate and that such penalty risked having a chilling effect on their work.[215]

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[212] E.g.*Weber v Switzerland*,par.47;*Dupuis and others v France*,pars.44-49;*Fressoz v France*,par.53.

[213] See *Marijacic* Appeals Judgment,par.42.

[214] *Dupuis and others v France.*

[215] T.366-374.

154. The present case may also be compared with the *Weber v Switzerland* case before the ECHR. In that case, Mr Weber, a Swiss citizen/journalist, had been charged (and convicted) for disclosing information pertaining to confidential judicial proceedings.[216] It was the argument of Mr Weber that his public disclosure of confidential facts pertaining to judicial proceedings could not be criminalized after these facts had become "public knowledge". The Swiss Government responded that under Swiss law, the mere communicating of a piece of information in a judicial investigation was sufficient for the commission of the offence and that whether or not it was common knowledge beforehand and that its importance or degree of confidentiality were relevant only in determining the amount of the fine.[217]

155. The Court rejected the argument of the Swiss government. It held that, at the time relevant to the charges (a press conference given by Mr Weber where he publically discussed facts/matters that were the subject of confidentiality orders), the information had already been in the public domain and the interest to maintain the confidentiality of that information therefore no longer existed.[218] The penalty imposed on Mr Weber therefore no longer appeared necessary in order to achieve the legitimate aim pursued.[219] This ruling is, therefore, consistent with the *Spycather* jurisprudence cited above.

156. The Court concluded that the criminal conviction of Mr Weber for discussing these facts publically in breach of a court order constituted an undue interference with the exercise of his right to freedom of expression, because such interference was not "necessary in a democratic society" for achieving the legitimate aim pursued.

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[216] *Weber v Switzerland*.

[217] Ibid,par.50.

[218] Ibid,par.51. See also, 4th European Ministerial Conference on Mass Media Policy, 7-8 December 1994, Resolution no 2: Journalistic Freedoms and Human Rights, in particular Principle 4.

[219] Ibid.

157. Whilst the view was taken in the factually peculiar cases of Haxhiu, Nobilo, Jovic, Margetic, Marijacic that the confidentiality of the information in question and the good administration of justice demanded a criminal response despite some information having become public before the impugned conduct of the accused, the facts of the present case are very different from these cases and similar in nature to the *Weber/Dupuis* factual matrix:

(i) In the present case, the information had been in the public domain for many months without any step having been taken by the Tribunal, the Prosecution or the applicant to stop the spread of such information. Instead, in the cases mentioned above, the Tribunal immediately reacted immediately to the disclosure by the accused persons and initiated proceedings to prevent any further disclosure of protected information.

(ii) In all of these cases, the protected information pertained to a protected witness so that the risk involved in the disclosure of information was indeed very serious and the Tribunal has a statutory responsibility to protect victims/witnesses.[220] In this case, the information does not pertain to a witness and it has been made clear that none of the matters sought to be protected by the applicant has been disclosed to the public.

(iii) Furthermore, in the above cases, the need and interest to protect the identity of the protected witnesses had not ceased after the wrongful disclosure of their identity so that disclosure by the accused created a real risk of interference with the administration of justice. In those cases, such disclosure had in fact the effect of increasing the risk to their well-being so that criminal proceedings were appropriate in such a case. The witnesses had not renounced their protection.

[220] Article 22.

(iv) Ms Hartmann acted in good faith and based on an accurate factual basis;[221]

(v) In all of the above cases, disclosure took place at a time when the trial/appeal proceedings to which the confidential information related was still ongoing, i.e. the matter was *sub judice*. The disclosure of such information was therefore capable of creating a real risk of interference with the administration of justice. This was not the case in the present matter as the *Milosevic* proceedings had been terminated.[222] There was therefore no risk to the fair trial of the defendant or to his presumption of innocence, the only two permissible grounds for restrictions of reporting on criminal proceedings.[223] Nor has it otherwise been demonstrated that a criminal conviction would be "necessary" to further any of the legitimate aims that can motivate a restriction to the freedom of expression.

(vi) Her actions were said to have been a reasonable/responsible journalistic action.[224]

8.4 Other facts relevant to the issue of proportionality

158. There are many other facts supporting the view that a criminal conviction would constitute a disproportionate and thus impermissible interference with Ms Hartmann's fundamental rights, including:

(i) No prejudice has been demonstrated to the applicant.

(ii) No *actual* interference with the course/administration of justice has been established.

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[221] T.145. See *Rizos and Daskas v Greece*,par.45;*Dupuis v France*, par 46;*Fressoz v France*, pars.54-55. T 145, 270, 384-387;Defence Motion pursuant to Rule65*ter*,7 February 2009,Annex.

[222] *Milosevic* Order 14 March 2006. See also T.374-377;250,355-356;D31, par.25.

[223] E.g.T.347-348; D39.

[224] T.350-353.

(iii) There has been no disclosure/revelation of the content of the material/documents that were the subject of the protective measures.

(iv) Facts which are said to have been disclosed were already in the public domain.

(v) There is no evidence of an intention on the part of Ms Hartmann to damage the reputation of the Tribunal.

(vi) No witness was endangered as a result of the conduct of Ms Hartmann.

(vii) There is no evidence, and it is not part of the Prosecution case, that Ms Hartmann acted with reprehensible motives.[225]

(viii) Ms Hartmann is indigent and is the mother of two children, which she still supports financially. Any conviction would have dramatic consequences on her family.[226]

159. The stigma that attaches to a criminal conviction is a very serious one and it should be limited to those cases that warrant it. In the case of Ms Hartmann, a criminal conviction could have very prejudicial consequences on her ability to find employment and to travel for her work as a journalist. No valid purpose would be served by a conviction in this case.

9. Insufficient seriousness of the alleged violation to warrant criminal conviction

9.1 Legal and jurisdictional considerations

160. The Tribunal has not criminalized all forms of disclosure of confidential information, however minor the breach would be. Instead, as a minimum, the

[225] Defence Motion pursuant to Rule 65*ter*,7 February 2009.

[226] Hartmann Decision regarding indigence.

Tribunal has said that it would not criminalise conduct that is merely negligent in nature.[227]

161. It is clear from the practice of the Tribunal, that only a most serious substrate of interferences with the administration of justice is criminalized pursuant to Rule 77.

162. In *Ntakirutimana*, for instance, the ICTR found that the disclosure in violation of the witness protection order was not sufficiently serious to be tantamount to contempt.[228]

163. In *Furundzija*, the Tribunal likewise took the view that the pattern of violations of court's order by the Prosecution was not sufficiently serious to amount to a crime of contempt since only the most serious interferences with the administration of justice were intended to be prosecuted under that heading.[229]

164. Revealingly for the present matter, in the *Brdjanin* case, the Trial Chamber found that one of the counts of contempt raised against Ms Maglov did not meet that threshold as the information which she was said to have disclosed in violation of a court order related to disclosure of a fact that was already publically known.[230]

165. Furthermore, as noted above, a whole range of "technical", "formal" or "negligent" violations of court orders have been left out of the scope of Rule 77.[231]

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[227] *Nobilo* Appeals Judgment.

[228] *Ntakirutimana* Decision 16 July 2001,pars.10-12.

[229] *Furundzija* TC's Complaint 5 June 1998,par.11.

[230] *Maglov* Decision on Acquittal,pars.9-10 (in relation to count 3).

[231] E.g. for a violation by the Registry, REDACTED. See also, for legal authority, *AG v Newspaper Publishing plc and Others.*

9.2 Facts are not so serious as to justify contempt proceedings

166. The facts of this case –as outlined above, in particular at par 156 above- are not so serious that they could be criminalized under Rule 77. In light of the above, and the other circumstances relevant to this case, the conduct of Ms Hartmann could not be said to be sufficiently serious to come within the realm of conducts that are criminalized by the Tribunal under Rule 77.

10. Personal considerations

167. For the reasons given, Ms Hartmann must be acquitted of the charges.

168. Should the Chamber decide otherwise, however, and take the view that a sanction should be imposed in this matter, the Defence submits that the principle of proportionality and the facts of this case would require the court to order the least constraining punishment as is consistent with the gravity of Ms Hartmann's alleged conduct.[232]

169. International tribunals have made it clear that it is within their inherent authority to impose a **conditional discharge** (in place of a criminal conviction) whereby the contemonor will be required to fully respect all conditions set out by the Tribunal for her probation during the relevant timeframe.[233]

170. In the present case, Ms Hartmann could be order, and would undertake –

(i) To keep the peace and be of good behaviour;

(ii) Not to publically discuss the impugned decisions or their content;

[232] E.g.*Orban v France*,pars.53-54.

[233] *Brima Contempt* Sentencing Judgment, pars 35-36. The Chamber's discretion in that regard includes an inherent power to impose a sentence other than a fine or imprisonment.

171. Such a measure would be consistent with the ECHR requirement that any measure restrictive of rights should be no broader than is strictly necessary.[234] It would be all the more appropriate that, as an indigent person, Ms Hartmann does not have financial resources as would have allowed her to pay a fine of any significant amount.[235]

11. Conclusions and relief sought

172. In light of the above, the Defence prays the Trial Chamber to acquit Ms Hartmann.

Respectfully submitted,

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Karim A. A. Khan

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Guénaël Mettraux

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[234] E.g.*Heaney v Ireland. R Shayler*, (at 281, per Kelly J);*Mahon v Post Publications*,par.62.

[235] T.143.