

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

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

**BEFORE THE APPEALS CHAMBER**

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

**Registrar: Mr John Hocking**

**Filed: 5 March 2010**

**IN THE CASE OF  
Florence HARTMANN**

***PUBLIC***

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**FLORENCE HARTMANN'S SUBMISSIONS PERTAINING TO  
"ARTICLE 19" *AMICUS* BRIEF**

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**On behalf of Ms Hartmann**

Mr Karim A. A. Khan

Mr Guénaél Mettraux

***Amicus curiae* (on behalf of "Article 19")**

Mr Guy Vassall-Adams

***Amicus Prosecutor***

Mr Bruce MacFarlane, QC

## I. Procedural background

1. By Decision of 5 February 2010, the Appeals Chamber (“AC”) ordered the parties to file their Responses to Article 19’s *Amicus* Brief (“A19 Brief”<sup>1</sup>) no later than 5 March.

## II. Applicable international law

2. “Article 19”, a recognized international authority on the subject of freedom of expression,<sup>2</sup> has correctly outlined the general principles of international law which are relevant to this case. The Appellant adopts and supports the submissions and conclusions set out in A19 Brief.

### *Importance of freedom of expression*

3. The scope of permissible curtailment of a fundamental right depends in part on the importance attributed to that right. The higher the value placed upon it, the narrower permissible restrictions will be and the heavier the burden to justify such restrictions become.

4. Freedom of expression is not an absolute right.<sup>3</sup> As noted by Article 19, it is, however,

“one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfillment”.<sup>4</sup>

The fundamental importance of this right has been duly acknowledged by *this* Tribunal.<sup>5</sup>

5. Therefore, *as a matter of international law*, when dealing with restrictions of that right, a Tribunal-

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<sup>1</sup> Amicus Curiae Brief on Behalf of Article 19, 18 February 2010.

<sup>2</sup> <http://www.article19.org/speaking-out/other-partners>; <http://www.article19.org/speaking-out/viewpoints-from-the-un>; [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=26977&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-473.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=26977&URL_DO=DO_TOPIC&URL_SECTION=-473.html).

<sup>3</sup> *Margetic* TJ, par 81

<sup>4</sup> *Handyside*, par 49; *Lingens*, par 41; *Obershlick*, par 57; *Stankov*, pars 85-90; UNGA Resolution 59(I) (14/12/1946).

<sup>5</sup> *Brdjanin* Decision 11/12/2002; *Karadzic* Decision 12/2/2009; *Jovic* TJ, par 23.

“is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”<sup>6</sup>

This means that “there is a general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial”<sup>7</sup> to which there can only be narrow exceptions, as defined below.

6. The Trial Chamber (“TC”) failed to acknowledge and apply these fundamental *preliminary* legal considerations, thereby violating legally-recognised international standards.

#### *Conditions for restrictions*

7. “Article 19” rightly points out that restrictions on freedom of expression must be narrowly construed, convincingly established, necessary, proportionate and based on reasons that are “relevant and sufficient”.<sup>8</sup>

8. To be permissible, a restriction must be “necess[ary] in a democratic society”,<sup>9</sup> i.e., curtailment “correspond[s] to a ‘pressing social need’”.<sup>10</sup> The adjective “necessary” “is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and that it implies the existence of a ‘pressing social need’”.<sup>11</sup>

9. The “necessity” so defined must be “convincingly established”.<sup>12</sup> The heavy burden to do so is on the party seeking the curtailment.<sup>13</sup> Any interference (if “necessary”) must also be the least invasive/intrusive measure consistent with the legitimate aim pursued.<sup>14</sup> The Appellant concurs with “Article 19” that criminal

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<sup>6</sup> *Sunday Times* 26/4/1979, par 65; HRC GC 10, par 4.65.

<sup>7</sup> *In Re S*, par 15, *per* Lord Steyn.

<sup>8</sup> *Dupuis*, pars 36-38; *Spycatcher1*, par 62; *Handyside*, pars 48-50.

<sup>9</sup> Art 10(2) ECHR.

<sup>10</sup> *Spycatcher1*, par 62; *Handyside*, pars 48-50.

<sup>11</sup> *Spycatcher1*, par 59.

<sup>12</sup> *Dupuis*, par 36.

<sup>13</sup> *Independent Publishing*, *per* Viscount Haldane, 438.

<sup>14</sup> *Milosevic* Decision 1/11/2004, par 17; *Dupuis*, pars 36-38; *Goodwin*, par 40

sanctions must remain the “last resort” as they are the most intrusive/restrictive of all possible measures.<sup>15</sup>

10. The principles outlined above are not mere ideals which a tribunal should strive for. Rather, they are *minimum guarantees* that must apply in any democratic jurisdiction. The AC has acknowledged that this was the case with the ICTY.<sup>16</sup> Any ICTY-imposed restriction is, therefore, subject to these principles.<sup>17</sup>

11. Judge Kwon has thus noted that restrictions in ICTY-context would not be permissible unless a failure to do so “would compromise [the] achievement of the Tribunal’s mandate”.<sup>18</sup> He also observed that restrictions to this right are all the more inappropriate where, *as in the present case*,<sup>19</sup> there is no evidence to indicate that the defendant “intends to undermine the Tribunal’s mandate”.<sup>20</sup>

12. The TC’s failure to acknowledge and/or apply these *basic* premises renders Ms Hartmann’s conviction unsafe, disproportionate and unnecessary as a matter of international law.

### **III. Special protection of journalists**

13. Article 19” rightly underscores the importance, *as a matter of international law*, to protecting the freedom of expression of journalists and the media. This is especially so when reporting on criminal proceedings.

14. The ECtHR has acknowledged the special role that journalists play “to impart information and ideas on political issues just as on those in other areas of public interest”<sup>21</sup> including in relation to issues of justice and the functioning of the judiciary.<sup>22</sup> Indeed,

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<sup>15</sup> A19 Brief, par 28.

<sup>16</sup> *Milosevic* Decision 1/11/2004, pars 17-18.

<sup>17</sup> *Karadzic* Decision 12/02/2009, in particular, pars 18-19, 21, 23. See T 292-293, 315-319, 349, 360-374.

<sup>18</sup> *Ibid*, par 20.

<sup>19</sup> P1.1, 1002-1, 3-4/10; P2.1,1003-2,2/13; P1.1, 1002-1, 4/10; T.137, 144-146; 384-386, 492-494; *Ruxton Statement*, p 4). *Amicus* conceded this (Defence Motion, 7 February 2009).

<sup>20</sup> *Ibid*, par 22 (emphasised).

<sup>21</sup> *Lingens*, par 41; *Oberschlick*, par 58; *Castells*, par 43; *Thorgeir Thorgeirson*, par 63; *Jersild*, par 31; *Fressoz*, par 45; *Bergens Tidende*, par 18.

<sup>22</sup> *Hrico*, par 40; *Rizos*, par 42.

“the essential function of the press is always taken into account when an assessment is made whether in the given situation a restriction of the freedom of expression is permissible or not”.<sup>23</sup>

“Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’”.<sup>24</sup>

15. As noted above, these principles apply to the exercise of freedom of expression in the context of reporting on court proceedings.<sup>25</sup> They reflect an important legal presumption. Whether labeled as “open justice” in common-law jurisdictions or “*contrôle de la légalité*” in civil-law jurisdictions, the presumption is the same: in favour of the public nature of criminal proceedings. This presumption has various purposes and includes a right of the public to receive information pertaining to the functioning of the legal/judicial system. The presumption also ensures that judicial decisions are not rendered immune oversight or unaccountable.<sup>26</sup>

16. The AC has acknowledged the direct applicability of these principles to the work of this Tribunal.<sup>27</sup> By contrast, the TC (i) made no mention of those, (ii) nor to the fact that *as a matter of international law* journalists (including Ms Hartmann<sup>28</sup>) are entitled to increased protection of their freedom of expression.

#### IV. “Chilling effect”

17. “Article 19” makes reference to the “chilling effect” that punishing journalists can have and how this can operate so as to curtail freedom of expression.<sup>29</sup> This consideration (sometimes referred to as a “doctrine”) is relevant and falls to be considered as a matter of international human rights law.<sup>30</sup>

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<sup>23</sup> Van Dijk, *Theory*, 775; *Prager/Oberschlick*; *Jersild*; *Castells*; *Observer/Guardian* (1992).

<sup>24</sup> *UII v. Austria*, par 37; *Perna*, par 39; *VAK v Lithuania*, par 42.

<sup>25</sup> *Dupuis*, par 42.

<sup>26</sup> T. 271, 275; *Mohamed Judgment*, pars 38-41.

<sup>27</sup> *Brdjanin Decision 11/12/2002*, par 35 (footnotes omitted).

<sup>28</sup> *Judgment*, par 1; *Defence Motion 9 Feb 2009*, Annex, p 1; *FTB*, par 146; T.350-353.

<sup>29</sup> *Rizos*, par 45; *Dupuis*, pars 34-39, 46; *Bergens Tidende*, par 52; *Tromso/Steensaas*.

<sup>30</sup> Van Dijk, *Theory*, 342 (footnote omitted); *Castells*, par 46; *Goodwin*, par 39; *Selisto*, par 53; *Rizos*, par 42; *Brdjanin Decision 7/6/2002*, par 30; T 252; *FTB*, par 153.

“Applied under Article 10 [ECHR], this doctrine means that journalists, press or the public in general should not be discouraged from criticizing public authorities by the threat of criminal or civil proceedings for defamation. In view of the ‘dominant position’ that it occupies, a Government must display restraint in sanctions against freedom of expression and show prudence in choosing the measure of a less restrictive kind.”

18. This doctrine is recognized, not just by international tribunals, but also by domestic jurisdictions, which have underlined the prejudicial effect that the restriction of a person’s freedom of expression could have on the exercise of that right by others:<sup>31</sup>

“These freedoms are delicate and vulnerable, as well as supremely precious in our society.”

“The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions .... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

19. The TC disregarded this doctrine and its relevance to the charges. This was so despite the fact that the potential “chilling effect” of a conviction was established in evidence and at any point challenged by the *amicus* Prosecutor.<sup>32</sup>

## **V. Public interest**

### *General*

20. “Article 19” correctly noted that it is incumbent on the media to impart information and ideas on matters of public interest and that the discussion of such issues is protected with particular vigor under international law.<sup>33</sup> The ECtHR held

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<sup>31</sup> *NAACP v. Button*, per Brennan J, 432-433.

<sup>32</sup> T. 252, 366-374; FTB, par 153. This was not challenged/contested by the Prosecutor.

<sup>33</sup> *Orban*, pars 45, 49; *Rizos/Daskas*, pars 42, 38; *Chauvy*, par 68; *Hrico*, par 40(g); *Surek*, par 61; *Dupuis*, par 40; *Kulis*, par 37; Also D31, page 6; T.252, 284-285.

that the permissibility of restricting journalists from discussing issues of public interest was very narrowly circumscribed.<sup>34</sup>

21. There was no dispute at trial that the facts discussed in Ms Hartmann's book/article are matters of public interest.<sup>35</sup> The TC took no notice of this uncontested fact or the legal consequences arising from this.

22. There are other compelling and legally-relevant factors re-enforcing the public interest(s) involved in the issues under discussion. These are addressed below:

*(a) Rights and interests of victims*

23. In paragraph 7 of resolution 827, the Security Council decided:

“the work of the International Tribunal shall be carried out without prejudice to the rights of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.”

24. Under the UN system, victims enjoy a right to reparation and a right to truth. This is particularly so with regard the responsibility of States or individuals involved in criminal conduct.<sup>36</sup> The corollary of this is the public's right to receive the reasons on which judicial decisions are based.<sup>37</sup> This is critical where, as in the present case, the interests of victims militate in favour of their receiving that information.<sup>38</sup>

25. By convicting the Appellant for her writings, victims are effectively prevented from seeking/discussing/obtaining information which, as a matter of law, the Tribunal was required to let them have and discuss. Such criminalisation, if permitted to stand, would constitute a violation of their rights and interests (as well as Ms Hartmann's right to impart such information). It is submitted such criminalization constitutes a

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<sup>34</sup> *Ibid.*

<sup>35</sup> T.137-138, 389-390 *et seq*; D46; D9.

<sup>36</sup> D36; D31; D5; P3, P3.1, D47; T. 271, 390-391.

<sup>37</sup> *Mohamed* Judgment, pars 34, 56, 176, 285; *Sunday Times*, par 65; *Dupuis*, par 42.

<sup>38</sup> T. 254-260, 290-296, 331-335, 429, 460, 489.

violation of the Tribunal's binding mandate towards the victims of serious violations of international humanitarian law in the Former Yugoslavia.

*(b) Truth-seeking*

26. Restrictions to free expression are not permitted where they would impede justice “to look for truth, which is its final objective” or eviscerate that that right of its content or purpose.<sup>39</sup> It is an essential function of this Tribunal to contribute to peace and reconciliation in the Former Yugoslavia and to help that process by establishing as complete and accurate a record of the events that marked the break-up of the country so as to prevent historical revisionism and to prevent the reoccurrence of such tragedies<sup>40</sup>

27. Genuine reconciliation without truth is unrealistic.<sup>41</sup> In an article cited with approval by the AC,<sup>42</sup> Judge Weeramantry correctly noted that–

“Distorted or incomplete information results in distorted or unbalanced attitudes and from these result tensions which disturb international harmony and may eventually lead to breaches of international peace. In many cases of international tension, inadequate or distorted information is often demonstrably the cause. At this level, if peace is a human right, it can be argued that the necessary information, on which peace itself depends, is also a human right. The right to peace is incomplete without it.”<sup>43</sup>

28. This view is consistent with that of the UN.<sup>44</sup> The ECHR has likewise noted–

“it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which

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<sup>39</sup> T. 285, 316-317; 390-391; 454-460, 464-466; D36, par 17.

<sup>40</sup> UNGA (A/52/PV.44), p 2; UNGA (A/53/219-S/1998/737); UNSC (S/PV.3217).

<sup>41</sup> E.g. *Duch* Transcript E1/75.1, 69-70.

<sup>42</sup> *Brdjanin* Decision 11/12/2002, footnote 33.

<sup>43</sup> Weeramantry *Access*, 101.

<sup>44</sup> D39; D31; D36. T. 253 *et seq.*

are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.”<sup>45</sup>

29. The TC took no notice of these critical factors,<sup>46</sup> nor of the Tribunal’s responsibilities in that regard.<sup>47</sup> There was no dispute at trial that the facts discussed in Ms Hartmann’s publications were true. Nor was there any dispute about the historical importance of these facts to victims and others.<sup>48</sup>

*(c) Precedential consequences*

30. As a UN tribunal, the ICTY enjoys great respect and authority around the world. It has been and is a pioneering international legal institution. Any decision or judgment it renders is of import and has important precedential potential.

31. A judgment of this Tribunal that would interpret freedom of expression narrowly in breach of existing international standards could (i) trigger a slippery slope of oppressive rulings in other jurisdictions or (ii) come to be regarded as irrelevant to those jurisdictions which apply internationally-recognised standards as identified above.<sup>49</sup>

**VI. Legitimate aim**

32. “Article 19” rightly notes that there is a very strong public interest in the media reporting court proceedings and important legal issues, in order to facilitate public discussion. The mere existence of a “legitimate aim” for restricting that freedom is not sufficient, in and of itself, so as to render any such restriction permissible under international law.

33. The Appellant in this case has never disputed that the protection of the good administration of justice could be a legitimate aim capable, *all other conditions being*

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<sup>45</sup> *Chauvy*, par 68.

<sup>46</sup> *Nationwide News*; *Phillmore Report*, par 166; *Irwin Toy v Quebec*, 976, *per Dickson*.

<sup>47</sup> *Rizos*, par 42.

<sup>48</sup> E.g. T.137-138, 389-390 *et seq*; D46; D9

<sup>49</sup> T. 366-374.

*met*, of justifying the curtailment of that freedom. However, this does not mean that any sort of risk to the administration of justice will be sufficient.<sup>50</sup> This is because-

“[t]he administration of justice has to be robust enough to withstand criticism and misunderstanding”.<sup>51</sup>

In *In re Lonrho plc*, Lord Bridge said (at 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.”

34. This explains that the ECtHR has regarded as disproportionate and unnecessary curtailments imposed where the exercise of this right had had no proven effect on on-going proceedings.<sup>52</sup> In the present case, it was undisputed that Ms Hartmann’s publications had had no alleged, let alone established, effect on the *Milosevic* proceedings.<sup>53</sup>

35. Before curtailment is legally permissible, the alleged risk which a publication is said to have created must be “convincingly established”.<sup>54</sup> 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”.<sup>55</sup>

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<sup>50</sup> Appeal Brief, pars 73-82.

<sup>51</sup> *Megrahi*.

<sup>52</sup> *Campos*, pars 11, 36; *Weber*, par 20.

<sup>53</sup> FTB, pars 66, 158.

<sup>54</sup> *Dupuis*, par 36.

<sup>55</sup> *Duffy*.

36. The US Supreme Court has held that:

“the likelihood, however great that a substantive evil will result [to the administration of justice] cannot alone justify a restriction up on freedom of speech or the press. The evil itself must be ‘substantial.’”<sup>56</sup>

“[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”<sup>57</sup>

The US Court also explained that the risk to the administration of justice-

“must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.”<sup>58</sup>

37. The TC has not pointed to a general principle of international law which would allow for the curtailment of freedom of expression below that standard. None exists. Under existing general principles of international law, the curtailment of 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.<sup>59</sup> This explains that in those jurisdictions which inspired the Tribunal’s law of contempt, the test of a “real risk of prejudice to the administration of justice” has since the ECHR-era “always been used in relation to [particular proceedings], not in relation to the administration of justice generally”.<sup>60</sup> As noted by Mr Joinet, an international authority on the subject,<sup>61</sup> as a matter of international practice,

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<sup>56</sup> *Bridges v California*, 262.

<sup>57</sup> *Id.* 263.

<sup>58</sup> *Craig v Harney*, 376.

<sup>59</sup> T 346-348; D39; *Campos*, pars 34-37.

<sup>60</sup> Fenwick/Phillipson, *Media Freedom*, 288. See, e.g., *Campos*, par 36.

<sup>61</sup> The *amicus* conceded that Mr Joinet is such an authority: T. 246, 256.

“[w]hen the case is over, there is no problem regarding the administration of justice.”<sup>62</sup>

This explains why, before the prosecution of Ms Hartmann, (i) all previous ICTY contempt proceedings pertained to disclosure of information that could have interfered with existing or pending (trial or appeal) proceedings and why (ii) neither the TC nor the Prosecutor could refer to a single precedent, let alone establish a general principle (as was required<sup>63</sup>), that would support a contempt conviction in other circumstances.

38. Any interference with the right of a person to freedom of expression – including through contempt proceedings<sup>64</sup> – would only be permissible where, all other conditions being met, the exercise of that right has created a genuine, concrete and substantive risk of interference with the Tribunal’s exercise of its principal jurisdiction to prosecute and punish serious violations of humanitarian law.<sup>65</sup> With the possible exception of conduct endangering victims/witnesses,<sup>66</sup> restrictions imposed on that basis would only have a legal basis in international law where the impugned conduct pertains to on-going (trial or appeals) proceedings. The proceedings to which this matter related had been terminated at the time of the impugned publications.<sup>67</sup>

39. This legally significant fact was overlooked by the TC.

## **VII. Strict interpretation of exceptions**

40. “Article 19” has noted that freedom of expression sets a general principle from which only narrow- and strictly-defined exceptions may legally be carved. This position is fully supported by international law.<sup>68</sup>

41. The TC failed to acknowledge and apply this fundamental legal principle.

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<sup>62</sup> T. 311.

<sup>63</sup> *Nobilo* AJ, par 30; *Vujin* AJ, pars 13,24.

<sup>64</sup> D31, par 25; T 250

<sup>65</sup> *Karadzic* Decision 12/2/2009, par 20.

<sup>66</sup> FTB, par 59.

<sup>67</sup> *Milosevic* Order 14/3/2006; T. 375-376.

<sup>68</sup> *Rizos*, par 38; *Chauvy*, par 63; *Sunday Times*, par 65. D31, par 20; D39; T. 244-245, 347.

### VIII. Right of public *re* freedom of expression

42. “Article 19” rightly notes that freedom of expression guarantees that the public has a right to receive information imparted by others.<sup>69</sup> The public’s right to know “is a very important feature” of this guarantee.<sup>70</sup> The AC has duly acknowledged the legal significance of that consideration.<sup>71</sup>

43. By contrast, the TC has taken no apparent notice of this consideration.

### IX. “Necessity” and “proportionality”

#### *Two requirements*

44. “Article 19” correctly explains that freedom of expression *can* be invoked to excuse an person’s conduct even if valid court orders have been breached in the exercise of that right. That is entirely consistent with international precedents.<sup>72</sup> Any restriction (even if pursued for a “legitimate aim”) must, therefore, be subject to the tests of “necessity” and “proportionality”.<sup>73</sup>

45. The TC failed to subject its findings to these standards, making no reference at all to the “necessary in a democratic society” test or the requirement for a “pressing social need” to justify interferences with freedom of expression” and mixing into one the two distinct questions of (i) legitimate aim pursued and (ii) the necessity *and* proportionality of the restriction.

#### *Public character of facts disclosed*

46. *As a matter of law* an issue critical to determining whether a criminal conviction for contempt could be regarded as proportionate/necessary is whether the information disclosed was, in whole, in part or in essence,<sup>74</sup> already in the public domain.<sup>75</sup>

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<sup>69</sup> *Guja; De Haes; Brdjanin* Decision 11/12/2002, par 37; T. 390-400. PACE Resolution 428 (1970); OHCHR GC 10, par 2; ECOSOC(E/3373), Article 1; Art 10 ICCPR/Universal Declaration; Weeramantry, *Access* 103.

<sup>70</sup> *Mohamed* Judgment, par 180.

<sup>71</sup> *Brdjanin* Decision 11/12/2002, pars 36-37.

<sup>72</sup> *Chauvy*, par 67; *Dupuis*, par 41; *Fressoz*, par 51; *Sunday Times*, pars 65-66.

<sup>73</sup> *Brdjanin* Decision 11/12/2002, pars 41-42; *Hrico*, par 40; *Orban*, par 44.

<sup>74</sup> *Dupuis*, par 45.

<sup>75</sup> *Weber*, par 47; *Dupuis*, pars 44-49; *Fressoz*, par 53.

47. The TC appears to have misunderstood the legal and factual relevance of that fact. The TC suggested that “the relevant pages of the book and the article contain certain information that was not in the public domain at the time of publication”.<sup>76</sup> Had this not been the case, none of the appellant’s disclosures could have been described as confidential. The real legal issue (unaddressed by the TC) was therefore whether it was necessary and proportionate to impose criminal liability notwithstanding that all or much of the information was already in the public domain.

48. In Haxhiu, Nobile, Jovic, Margetic, Marijacic, it was held that the confidentiality of the information and the good administration of justice demanded a criminal response despite some information having become public before the impugned conduct. The circumstances of the present case were, *as a matter of law*, significantly different from these cases. In all relevant (legal) respects, it was similar to the *Weber/Dupuis/Campos* precedents:

- (i) In the present case, the information had been in the public domain (in whole or in essence) for many months without any step having been taken by the Tribunal, the Prosecution or the applicant to stop the spread of such information. In contrast, in the five ICTY cases cited above, the Tribunal reacted immediately to the disclosure by the accused and initiated proceedings to prevent any further disclosure of protected information.
- (ii) In the five cited 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 basis/responsibility to protect victims/witnesses.<sup>77</sup> In the present 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 Serbia-Montenegro was disclosed by Ms Hartmann.<sup>78</sup>
- (iii) In the five cited cases, the need and interest to protect the identity of protected witnesses had not ceased after the wrongful disclosure of their identity so that disclosure by the accused in those cases had created a real risk of interference

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<sup>76</sup> Judgment, par 73 (emphasized).

<sup>77</sup> Statute, Article 22.

<sup>78</sup> FTB, pars 6, 10, 34-42.

with the administration of justice (as defined above). Their conduct had in fact the effect of increasing the risk to their well-being so that criminal proceedings were appropriate.

(iv) In all these cases, disclosure of the information 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.<sup>79</sup> 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.<sup>80</sup> 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.

(v) Ms Hartmann acted in good faith and based on an accurate factual basis.<sup>81</sup>

(vi) Her actions were consistent with standards governing her profession.<sup>82</sup>

49. All these factors set the present case *legally apart* from those mentioned above. It was, in all relevant respects (see below) comparable to relevant ECtHR cases which the TC erroneously disregarded or ignored.

#### *Relevant legal standards*

50. The TC took no notice of cases (and standards contained therein) which the Appellant and “Article 19” identified as directly relevant to this case.<sup>83</sup>

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<sup>79</sup> *Milosevic* Order 14/3/2006. Also, T 374-377, 250, 355-356; D31, par 25.

<sup>80</sup> T. 347-348; D39.

<sup>81</sup> T.145, 270, 384-387; Defence Motion 7/2/2009, Annex; *Rizos*, par 45; *Dupuis*, par 46; *Fressoz*, pars 54-55.

<sup>82</sup> T. 350-353 (un-challenged); *Dupuis*, par 46.

<sup>83</sup> Appeal Brief, pars 21 *et seq.*

51. In *Spycatcher*, British newspapers complained of a violation of Article 10 ECHR caused by the actions of the Attorney-General who sought to restrain the publication of extracts of that book.<sup>84</sup> The Court of Appeal had issued injunctions against *The Observer* and *The Guardian* and held that any publication of the *Spycatcher* material would constitute criminal contempt.<sup>85</sup> Copies of the books were imported from outside the UK. However, the court order remained in force until October 1998. The ECtHR distinguished between two time-periods: for 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 had been violated. The basis of its conclusion 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.

52. The same principle could be drawn from a more recent decision of the Court of Appeal of England and Wales: in that case, Lord Neuberger found that the effect of the disclosure (in a public US judgment) of the essence of the confidential information which the UK Government sought to keep confidential had the effect of putting that information in the public domain so that it could not in any way be said to constitute confidential information.<sup>86</sup> A submission (by the UK Government) that disclosure of that information risked reducing the sharing of privileged information was held to be “unsustainable” when –as in that case and the present one– the essence of the sensitive/confidential information had otherwise become public.<sup>87</sup> The very opposite logic was adopted by the TC, namely, that unless it criminalized the conduct of Ms Hartmann despite the fact that the information (or the essence thereof) was already public, States *might* cease to cooperate with the Tribunal.<sup>88</sup> The TC’s position had no basis in law (and no support in evidence).<sup>89</sup>

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<sup>84</sup> *Spycatcher 1/Spycatcher 2*.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Mohamed* Judgment, in particular pars 137-138.

<sup>87</sup> *Ibid.*, pars 282-292.

<sup>88</sup> Judgment, pars 72-74.

<sup>89</sup> FTB, pars 55-58.

53. In *Sunday Times*, the EComHR held 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 that the impartiality of the court might be compromised 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.<sup>90</sup> 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”.<sup>91</sup> It 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 persons concerned and for the reason that its publication would seriously disturb civil litigation in which these persons are engaged.”<sup>92</sup>

The Court took a similar view.<sup>93</sup>

54. The cases of *Weber*, *Dupuis* and *Campos Damaso* constitute other inescapable precedents directly relevant to this case which demonstrate that the conviction of Ms Hartmann was contrary to the standards established by international human rights bodies and otherwise inconsistent with international law.<sup>94</sup> It is possible to identify from relevant caselaw a number of facts which are legally relevant to deciding the legality of the curtailment of this fundamental right.<sup>95</sup>

55. In *Dupuis*, 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

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<sup>90</sup> *Sunday Times* Report, pars 231-248.

<sup>91</sup> *Ibid*, pars 243-244.

<sup>92</sup> *Ibid*, par 247 (emphasised).

<sup>93</sup> *Sunday Times*, pars 42-68.

<sup>94</sup> T 362-370.

<sup>95</sup> *Dupuis*, pars 33-49; *Weber*, pars 47-52; *Campos*, pars 29-40; T 366-374.

speech and was therefore impermissible. The Court took into account many factors to come to its conclusion of undue interference; each and all of these are relevant as a matter of international law to decide upon the necessity/proportionality of a restriction. Each and all were met and identical in the present case so that, if the relevant international standards had been applied, an acquittal *had* to follow:<sup>96</sup>

- (i) All or much of the information was already in the public domain;
- (ii) journalists contribute to an important public debate and that such penalty risked having a chilling effect on their work;
- (iii) matters of public interest were involved;
- (iv) international law leaves little scope for restrictions on freedom of expression;
- (v) the right of the public to receive information;
- (vi) the media/journalist's role in reporting criminal proceedings is significant;
- (vii) journalists have duties/responsibilities in the exercise of their profession;
- (viii) "watchdog" function of journalists;
- (ix) the accused acted in good faith and on an accurate factual basis;
- (x) (criminal) nature and seriousness of sanction imposed.

In all relevant factual and legal respects, this case was identical in nature to *Dupuis*. At no point did the TC suggest otherwise.

56. Another precedent avoided/ignored by the TC is *Weber*. Weber, a Swiss citizen/journalist, had been charged (and convicted) for disclosing information pertaining to confidential judicial proceedings. Weber argued that his public disclosure of confidential facts pertaining to judicial proceedings could not be

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<sup>96</sup> *Dupuis*, pars 39-49; T 366-374.

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 was relevant only in determining the amount of the fine.<sup>97</sup>

57. The Court rejected the argument of the Swiss government. It held that, at the time relevant to the charges (a press conference given by 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.<sup>98</sup> The penalty imposed on Weber therefore no longer appeared necessary in order to achieve the legitimate aim pursued.<sup>99</sup> The Court concluded that a criminal conviction for discussing these facts publically in breach of a court order constituted an undue interference with the exercise of his freedom of expression, because such interference was not “necessary in a democratic society” for achieving the legitimate aim pursued. The same principles could be drawn from *Campos* to which “Article 19” drew attention.

58. In all relevant legal and factual respects, the present case was therefore identical to these precedents. By contrast, the TC failed to put forth even a single precedent where a journalist was convicted in circumstances even remotely similar to those relevant to the present case. This, the Appellant submits, is a strong indication of the legal impossibility to secure a conviction of Ms Hartmann if generally-recognised principles of international law are applied to the facts of this case.

*Fact-sensitive analysis*

59. “Article 19” rightly points out that the principles of necessity and proportionality must be assessed in light of the facts of the case insofar as these are legally-relevant to that assessment. The TC entirely failed to do,<sup>100</sup> therefore failing to account for many or all facts which are regarded (*inter alia* by the ECtHR) as legally-

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<sup>97</sup> Ibid, par 50.

<sup>98</sup> Ibid, par 51. CMCE CM(94) 204 Resolution 2, in particular Principle 4.

<sup>99</sup> Ibid.

<sup>100</sup> *Sunday Times*; Colvin/Cooper, *Human Rights*, par 12.19.

relevant to determining the legality (necessity/proportionality) of the curtailment of this right:<sup>101</sup>

- (i) Issues discussed in her publication were issues of public interest;<sup>102</sup>
- (ii) She was discharging her function as “public watchdog”;<sup>103</sup>
- (iii) The public was entitled to receive that information;<sup>104</sup>
- (iv) Much –and possibly all– of the material disclosed was already in the public domain. It pertained to legal matters and could have been gleaned from available open material and was in any event already largely in the public domain.<sup>105</sup>
- (v) She did not disclose any confidential documents covered by the protective measures;<sup>106</sup>
- (vi) The *Milosevic* proceedings were over;<sup>107</sup>
- (vii) There was no demonstrated effect on proceedings;<sup>108</sup>
- (viii) The potential “chilling effect” of her conviction;<sup>109</sup>
- (ix) The necessary minimalist approach that must prevail in using criminal law to interfere with free expression;<sup>110</sup>
- (x) No prejudice was demonstrated to the applicant;<sup>111</sup>
- (xi) No *actual* interference with the course/administration of justice was established;<sup>112</sup>

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<sup>101</sup> See footnote 95 above. Reply Brief, par 8.

<sup>102</sup> T.137-138, 389-390 *et seq*; D46; D9.

<sup>103</sup> T 350-353.

<sup>104</sup> T.257-260, 290-297, 390-392, 457-460, 464-466; D5; D36.

<sup>105</sup> FTB, pars 18 *et seq*.

<sup>106</sup> FTB, par 158 (unchallenged).

<sup>107</sup> *Milosevic* Order 14/3/2006; T.375-376.

<sup>108</sup> T. 347-348; D39.

<sup>109</sup> T. 366-374.

<sup>110</sup> A19 Brief, par 28.

<sup>111</sup> FTB, par 158 (unchallenged).

<sup>112</sup> *Campos*, pars 11, 36; *Weber*, par 20.

- (xii) There was no evidence of an intention on her part to damage the reputation of the Tribunal;<sup>113</sup>
- (xiii) No witness was endangered as a result of her conduct;<sup>114</sup>
- (xiv) There is no evidence, and it was not part of the Prosecution case, that she acted with reprehensible motives.<sup>115</sup>
- (xv) Ms Hartmann is indigent and is the mother of two children, which she still supports financially. Any conviction would have dramatic personal and professional consequences.<sup>116</sup>
- (xvi) The stigma attaching to a criminal conviction is very serious and should be limited to those cases genuinely warranting it. In the present case, 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 is served by a conviction.
- (xvii) A criminal conviction could set a dangerous precedent for journalists in other jurisdictions.

60. As noted by “Article 19”, the tests of proportionality/necessity applies, not just to the decision to curtail, but to the nature (criminal or otherwise) and seriousness of the sentence/punishment involved. As noted above, the “criminal” character of the punishment is directly relevant and militates against the use of a penal remedy to curtail free expression. Even minor fines have been found to breach these standards.<sup>117</sup> The TC erroneously failed to subject (i) its decision to convict and (ii) its sentence to the principles of “proportionality” and “necessity”.<sup>118</sup> As such, its

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<sup>113</sup> FTB, par 158 (unchallenged).

<sup>114</sup> Ibid.

<sup>115</sup> Defence Motion 7/2/2009.

<sup>116</sup> Hartmann Decision regarding indigence.

<sup>117</sup> *Weber* (approximately 200 euro); *Campos* (1,750 euro and “frais de justice”); *Dupuis* (762.25 euro each + joint-fine of 7,622.50 euro).

<sup>118</sup> *Orban*, pars 53-54.

decisions to convict and the sentence are arbitrary and constitute grave errors of law.<sup>119</sup>

#### **X. Concluding remarks**

61. When confronted with existing standards of international law on that point, as identified by Article 19 and as discussed above, the Trial Judgment is demonstrably deficient. As such, it is incapable of setting a precedent or a relevant benchmark in any those jurisdictions which endeavors to abide by those standards.

62. Applying the principles of international law identified by “Article 19” to the present case, a conviction would be rendered factually unreasonable and legally unnecessary and disproportionate and therefore impermissible. The Appellant prays the AC to apply these principles, grant the appeal and reverse Ms Hartmann’s conviction.

Respectfully submitted,



Karim A. A. Khan



Guénaël Mettraux

Word count: 5,979 words.

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<sup>119</sup> *R. v. NACT*, 350-351; *R. v. BMBC*, 1057-1058; *Bowe & Anor*; *Spence & Hughes*, per Saunders JA (A-G), par 216

# **ANNEX**

## BOOK OF AUTHORITIES

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<b>INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)</b>	
<b>JUDGMENTS</b>	
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<i>Vujin</i> AJ	<i>The Prosecutor v. Milan Vujin (IT-94-1-a-r77)</i> – Appeal Judgment – 27 Feb 2001
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<i>Brdjanin</i> Decision 7/6/ 2002	<i>The Prosecutor v. Radoslav Brdjanin (IT-99-36)</i> - Decision on motion to set aside a confidential subpoena to give evidence - 7 June 2002
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