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 Andresia Vaz**
**Judge Theodor Meron**
**Judge Burton Hall**
**Judge Howard Morrison**

**Registrar:** **Mr John Hocking**

**Filed:** **5 November 2009**

**IN THE CASE OF FLORENCE HARTMANN**

**PUBLIC**

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# AMICUS CURIAE BRIEF ON BEHALF OF ARTICLE 19

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# I. INTRODUCTION

1. This Amicus Brief is submitted on behalf of ARTICLE 19: Global Campaign For Free Expression (ARTICLE 19), an independent human rights organization, that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.

2. The Brief follows and should be read in conjunction with the Application for Leave to File an Amicus Brief filed on behalf of ARTICLE 19 on 5 November 2009, which explains the background to this Brief and its purpose.

3. In summary, it is submitted that the judgment of the Trial Chamber in this case departs in significant ways from well-established principles of international human rights law regarding freedom of expression and that the Appellant's convictions for knowingly and wilfully interfering with the Tribunal's administration of justice pursuant to the Statute of the Tribunal and Tribunal Rule 77 are a violation of her right to freedom of expression.

# II. APPLICABLE INTERNATIONAL LAW

4. This brief is based on freedom of expression principles developed in international law. The right to freedom of expression is a fundamental human right guaranteed under the Universal Declaration of Human Rights 1948[1], the European Convention on Human Rights 1950[2], the International Covenant on Civil and Political Rights 1966[3], the American Convention on Human Rights 1969[4] and the African Charter on Human and Peoples' Rights 1981[5].

[1] Article 19
[2] Article 10
[3] Article 19

**The International Covenant on Civil and Political Rights**

5. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

6. The UN Human Rights Committee in its General Comment on Article 19 of the ICCPR made the following observations about restrictions on freedom of expression under paragraph 3:

> Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.[6]

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[4] Article 13
[5] Article 9
[6] Office of the High Commissioner for Human Rights, General Comment No. 10: Freedom of expression (Art. 19) 29/06/83.

**The European Convention of Human Rights**

7. Article 10 of the European Convention provides as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

8. In ***Observer and Guardian v UK*** (1992) 14 EHRR 153, the European Court summarised the key Article 10 principles in terms that have been substantially adopted in the European Court's subsequent judgments concerning Article 10 (para 50):

> a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
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> (b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".
>
> (c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore

> empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).
>
> (d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

9. In summary, freedom of expression is one of the essential foundations of a democratic society, applicable not only to ideas that are well received but also to those that shock or offend the state or any section of the population. It is incumbent on the media to impart information and ideas on matters of public interest and the public has the right to receive such information. Accordingly, restrictions on freedom of expression must be narrowly interpreted and convincingly established on the evidence. To be justified, any restriction must be "necessary in a democratic society" – there must be a "pressing social need" for it and it must be proportionate to the legitimate aim pursued. Furthermore, the reasons advanced by those seeking to justify the restriction must be relevant and sufficient.

10. In considering whether any particular restriction on freedom of expression conforms to Article 10 standards the European Court undertakes a fact-sensitive analysis, applying the principles of necessity and proportionality to the facts of the specific case. In ***Sunday Times v United Kingdom*** (1979) 2 EHRR 245 the Court explained the correct approach (para 65):

> [T]he Court's supervision under Article 10 covers not only the basic legislation but also the decision applying it. It is not sufficient that the interference involved belonged to that class of the exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

**Article 10, contempt of court and confidential information**

11. The only international human rights instrument whose freedom of expression right expressly refers to administration of justice grounds is Article 10(2) of the European Convention of Human Rights (the European Convention), which permits "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.... for maintaining the authority and impartiality of the judiciary."

12. In this context, the European Court of Human Rights (the European Court) has been called upon on a number of occasions to reconcile the Article 10(1) right to freedom of expression with contempt of court provisions in common law jurisdictions and provisions designed to safeguard the confidentiality of legal documents and proceedings in the civil law context. For this reason its case law is particularly relevant to the instant case and forms the principal focus of this amicus brief.

13. Article 10 and contempt have arisen in two main contexts. First, there are cases that concern prior restraint where for example an injunction has been obtained that prevents publication by the media in relation to current or forthcoming court proceedings and where the question is whether the injunction was a necessary and proportionate interference with freedom of expression.[7] Secondly, the European Court has been called upon to consider whether imposing convictions for contempt of court on journalists following disclosures by the media, or disclosures by other persons involved in legal proceedings e.g. lawyers, have been necessary and proportionate restrictions on freedom of expression.[8]

14. A number of themes emerge from the European Court's judgments concerning contempt of court and freedom of expression. First, the Court has repeatedly emphasised that there is a very strong public interest in the reporting by the media of court proceedings and on important legal issues in order to facilitate public understanding and debate about these matters.

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[7] E.g. ***Sunday Times v UK*** (1979) 2 EHRR 245, ***Sunday Times v UK (No 2)*** (1991) 14 EHRR; 229, ***Observer and Guardian v UK*** (1992) 14 EHRR 243.

[8] E.g. ***Weber v Switzerland*** (1990) 12 EHRR 508; ***Fressoz and Roire v France*** (2001) 31 EHRR 2; ***Amihalachioaie v Moldova*** (2005) 40 EHRR 35; ***Dupuis v France*** (2008) 47 EHRR 52.

15. In ***Sunday Times v UK*** (1979) 2 EHRR 245, the European Court referred to the principle that freedom of expression is one of the essential foundations of a democratic society, applicable not only to ideas that are favourably received but also to those that offend, shock or disturb the state or any sector of the population. The European Court observed at para 65 that:

> These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.

16. In ***Dupuis v France*** (2008) 47 EHRR 52, the European Court made similar observations about the importance of reporting criminal proceedings, adopting the Council of Europe's Recommendation Rec (2000) 13 on the provision of information through the media in relation to criminal proceedings (para 42):

> The importance of the media's role in the area of criminal justice is, moreover, very widely recognised. In particular, the Court has previously found that "[p]rovided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public" (*Worm*, cited above, § 50). The Council of Europe's Committee of Ministers, for its part, has adopted Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings. It rightly points out that the media have the right to inform the public in view of the public's right to receive information, and stresses the importance of media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system. In addition, the appendix to that Recommendation states that the public must be able to receive information about the activities of judicial authorities and police services through the media and that journalists must therefore be able to report freely on the functioning of the criminal justice system.

17. Secondly, the Court's approach is to focus on the specific public interest considerations raised by the publication in question, judged in the light of all the relevant factual circumstances. In ***Sunday Times v United Kingdom (No 2)*** (1991) 14 EHRR 229 and ***Observer and Guardian v UK*** (1992) 14 EHRR 153, the Court was concerned with publication of the book *Spycatcher*, which made allegations of misconduct against the British Security Service MI5. The Court held that the UK Government's injunction preventing UK newspapers from reporting extracts of the book *Spycatcher* breached Article 10 as it ceased to be necessary and proportionate following publication of the book in the United States. In these circumstances, the confidentiality of the book's contents had been lost and the restrictions "prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern."[9]

18. Thirdly, the Court has specifically considered cases involving the disclosure of confidential court information that have given rise to convictions for contempt of court or under equivalent civil law provisions that protect confidentiality in legal proceedings. Of particular relevance to the instant case is the decision in ***Dupuis v France*** (2008) 47 EHRR 52. That case concerned the publication of a book which concerned allegations that the Government had ordered the wire tapping of the telephones of a number of lawyers and journalists. Those matters were the subject of an ongoing judicial investigation. The book contained information obtained from a confidential judicial investigation file. Dupuis was convicted of the offence of handling information obtained through a breach of the secrecy of the investigation or through a breach of professional confidence.

19. The European Court accepted that the criminal conviction had a legitimate aim, namely protecting the secrecy of a judicial investigation, but that this did not provide relevant and sufficient justification for the interference in that case. The Court's crucial reasoning is at paras 45-46:

> In this connection it is noteworthy that, while the applicants' conviction for the offence of handling was based on the reproduction and use in their book of documents which had come from the investigation file and which, accordingly, were found to have been communicated in breach of the secrecy of the judicial investigation or in

[9] ***Sunday Times v UK (No 2)*** (1991) 14 EHRR 229, para 55.

> breach of professional confidence, that conviction inevitably concerned the disclosure of information. It is open to question, however, whether there was still any need to prevent disclosure of information that was already, at least partly, available to the public (see *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 23, § 51, and *Vereniging Weekblad* Bluf! *v. the Netherlands*, judgment of 9 February 1995, Series A no. 306-A, p. 15, § 41) and might already have been known to a large number of people (see *Fressoz and Roire*, cited above, § 53) having regard to the media coverage of the case, on account of the facts and of the celebrity of many of the victims of the telephone tapping in question.
>
> The Court further considers that it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as "watchdogs" of democracy. Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see *Goodwin*, cited above, § 39; *Fressoz and Roire*, cited above, § 54; and *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V). In the present case, it transpires from the applicants' undisputed allegations that they acted in accordance with the standards governing their profession as journalists, since the impugned publication was relevant not only to the subject matter but also to the credibility of the information supplied, providing evidence of its accuracy and authenticity (see *Fressoz and Roire*, cited above, § 55).

20. ***Dupuis v France*** is of central importance to the present appeal as it demonstrates that the fact that confidential information has been disclosed is not determinative of whether the disclosing person should be convicted of contempt of court. The trial court is required to go on to consider whether that conviction would be necessary and proportionate, having regard to the strong public interest in the reporting of criminal proceedings, the specific public interest in publication of the matters at issue in the instant case, the extent to which any confidentiality has been lost through other information which is already in the public domain and the "chilling effect" of punishing a journalist for publishing even confidential matters where these contribute to an important public debate.

21. Likewise, in ***Weber v Switzerland*** (1990) 12 EHRR 508, the conviction of a journalist in summary proceedings for having disclosed (in a press conference) the existence of a confidential judicial investigation was held to violate Article 10. In that case, the disclosures were on a matter of genuine public interest and the essence of the information disclosed was already in the public domain. The Government of Switzerland submitted that the issue of whether the information was in the public domain was irrelevant to liability as the relevant provisions merely required disclosure of information about a judicial investigation. The Court dealt with that submission in the following way (paras 50 – 51):

> In the Government's submission this finding was not decisive, because of the formal nature of the confidentiality referred to in Articles 184 and 185 of the Code. According to the relevant Swiss case-law and legal literature, the mere fact of communicating a piece of information in a judicial investigation was sufficient for commission of the offence; whether it was common knowledge beforehand and its importance or degree of confidentiality were relevant only in determining the amount of the fine.
>
> The Court finds this submission unpersuasive. For the purposes of the Convention, the interest in maintaining the confidentiality of the aforementioned facts no longer existed on 2 March 1982. On that date, therefore, the penalty imposed on the applicant no longer appeared necessary in order to achieve the legitimate aim pursued.

22. In ***Weber***, a second important consideration was that the disclosures were not likely to cause prejudice to an ongoing investigation, because at the time that they were made the investigation was almost complete (para 20):

> As to the submission that the impugned statements by Mr Weber on 2 March 1982 could be interpreted as an attempt to bring pressure to bear on the investigating judge and could therefore have been prejudicial to the proper conduct of the investigation, the Court notes that by that time the investigation was practically complete, because on the previous day the judge had committed R.M. for trial (see paragraph 12 above), and that from then on any attempt of that kind would have been belated and thus devoid of effect. Admittedly R.M. appealed against his committal for trial, but even though his appeal meant that the order committing him for trial did not become final, the investigation nonetheless remained suspended (see paragraph 12 above). It was accordingly not necessary to impose a penalty on the applicant from this point of view either."

23. In ***Guja v Moldova***[10], the European Court of Human Rights considered an Article 10 claim by a civil servant who was dismissed from his employment after having disclosed to the media two letters that were sent to Prosecutor General's Office. The Court found a violation of Article 10, holding that civil servants enjoy the right to freedom of expression and that in considering the proportionality of any interference with that right it was essential to take into account the public interest involved in the disclosed information, which could be sufficiently strong as to override their duty of confidence:

> In determining the proportionality of an interference with a civil servant's freedom of expression in such a case the Court must also have regard to a number of other factors. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV). In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence (see *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; and *Radio Twist, A.S. v. Slovakia*, no. 62202/00, ECHR 2006-...).

**The American Convention on Human Rights**

24. Article 13 of the American Convention on Human Rights (American Convention) provides (so far as relevant) that:

> 1.Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2.The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> 1.respect for the rights or reputations of others; or
>
> 2.the protection of national security, public order, or public health or morals.

25. The fundamental principles relating to freedom of expression adopted by the Inter-American Court on Human Rights (Inter-American Court) under Article 13 of

[10] Application no. 14277/04, Judgment of 12 February 2008.

American Convention are very similar to those adopted by the European Court under Article 10 of the European Convention.[11] In summary, the Inter-American Court has held that as freedom of expression is essential to the functioning of a truly democratic system, any imposition of liability by the state in respect of freedom of expression should be expressly, previously and strictly limited by law, should be necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals" and should be proportionate, interfering as little as possible with the effective exercise of the right.[12] As with the European Court of Human Rights, a crucial factor for the Inter-American Court is the contribution that the expression in question makes to a debate of public interest.

26. The Inter-American Court has been called upon to consider the relationship between convictions for contempt of court and freedom of expression in the leading case of ***Palamana-Iribarne v Chile***[13]. The case concerned a former Naval officer who published a book entitled "Etica y Servicios de Inteligencia" ("Ethics and Intelligence Services") about the need for intelligence personnel to adhere to ethical standards of conduct in order to prevent human rights abuses. The book was banned, copies were seized and the applicant was convicted by a naval court martial of offences of disobedience and breach of military duties for having published confidential information without prior written consent. The applicant then gave a press conference at which he spoke out against his treatment, following which he was convicted by a naval court martial of contempt of court.

27. The Inter-American Court held that Chile had violated Article 13 of the American Convention in convicting the applicant of contempt of court (para 88):

> The Court considers that in the instant case, by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation of Mr. Palamara-Iribarne's right to freedom of thought and expression with regard to the negative opinion he

[11] See generally Eduardo Andres Bertoni, "The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards", European Human Rights Law Review, Sweet and Maxwell, 2009.
[12] ***Palamana-Iribarne v Chile,*** Inter-American Court of Human Rights, Judgment of November 22, 2005, paragraphs 79-85.
[13] See above reference.

> had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him. The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression.

28. Consistently with the approach adopted by the European Court, the Inter-American Court has made it clear that courts must take the greatest care before imposing criminal liability on persons who have spoken out on matters of public interest. In a recent judgment in a criminal defamation case where the Court found a violation of Article 13, the President made the following observations in his concurring opinion[14]:

> At this point in the analysis, it is worth recalling that as a rule, save for some digressions into authoritarianism -all too many and unfortunately not yet on the decline, the current thinking favors the so-called minimalist approach to criminal law. In other words, moderate, restricted, marginal use of the criminal-law apparatus, reserving it instead for only those cases when less extreme solutions are either out of the question or frankly inadequate. The power to punish is the most awesome weapon that the State – and society, for that matter- has in its arsenal, deploying its monopoly over the use of force to thwart behaviors that seriously –very seriously threaten the life of the community and the fundamental rights of its members.
>
> In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to "govern with the penal code in the hand," a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society's legitimate demand for security. The opposite happens in a "democratic environment": criminalization of behaviors and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then, and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable.

[14] Concurring Opinion of Judge Sergio Garcia Ramirez in the judgement of the Inter-American Court of Human Rights in the case of ***Hererera Ulloa vs. Costarica,*** of 2 July 2004.

## III. NATIONAL LEGAL STANDARDS

29. While it would not be appropriate or helpful to undertake a detailed comparative analysis of jurisprudence from national jurisdictions, it is important to note that national legal systems have developed a variety of ways of protecting freedom of expression on matters of public interest in the context of contempt of court.

30. In the United States, the US Supreme Court has sought to reconcile the need to protect the administration of justice in pending cases and the First Amendment to the Constitution by holding that a publication cannot be punished for contempt unless it creates a "clear and present danger" to the administration of justice. The test requires that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished".[15]

31. In the United Kingdom, as a result of the European Court of Human Rights' adverse judgment in the first ***Sunday Times*** case[16], the law on contempt of court relating to publications which may prejudice active legal proceedings was reformed through the Contempt of Court Act 1981. The aim of the Act was expressly 'to effect a permanent shift in the balance of public interest away from the administration of justice and in favour of freedom of speech.'[17] One of the main reforms of the Act was the introduction of a public interest defence which protects publications which are part of a discussion in good faith of public affairs or on other matters of public interest.[18] The s.5 defence is now subject to Article 10 ECHR tests of necessity and proportionality because the courts are required to read and give effect to domestic legislation in a way which is consistent with ECHR rights.[19]

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[15] ***Bridges v California***, 314 US 252 (1941).
[16] ***Sunday Times v UK*** (1979) 2 EHRR 245
[17] Per Lloyd LJ, ***A-G v Guardian Newspapers publishing plc*** [1988] Ch 333, 382.
[18] Section 5 of the CCA 1981 provides that: "A publication made as or as part of a discussion in good faith of public affairs, or other matters of general public interest is not to be treated as contempt of court under the strict liability rule if the risk of impediment to justice or prejudice to particular legal proceedings is merely incidental to the discussion."
[19] Human Rights Act 1998, s.3.

32. In Canada, the leading case is ***Dagenais v Canadian Broadcasting Corporation*** (1995) 120 DLR ($4^{th}$) 12, where a provincial court had issued a publication ban on a fictional television programme dealing with sexual and physical abuse of children in a Catholic orphanage. The injunction was in order to prevent an anticipated common law contempt of court because at the same time there were active criminal proceedings against four members of a Catholic order charged with similar crimes. The Court over-turned the ban, holding that the common law test which emphasised the right to a fair trial over freedom of expression with inconsistent with the freedom of expression guarantee in s.2(b) of the Canadian Charter of Rights and Freedoms. The Court held that such a ban was only justified where it was necessary in order to prevent a real and substantial risk to the fairness of the trial and where the salutary effects of the ban outweigh the deleterious effects to freedom of expression of those affected by the ban.

## IV. THE TRIAL CHAMBERS' JUDGMENT

33. At paragraph 69 of its judgment the Trial Chamber states as follows:

> The need to balance the protection of confidential information in court proceedings and the right to freedom of expression under various regional and international instruments such as the ECHR, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights, have been considered by the Tribunal. Significantly, these instruments contain qualifications on freedom of expression in relation to court proceedings. As a result, an accused, having chosen to ignore valid orders, cannot thereafter invoke the freedom of expression to excuse his or her conduct."

34. This analysis of the approach to restrictions on freedom of expression in international human rights law is incorrect. As the Article 10 ECHR case law demonstrates, it is not enough simply to show that a ground of restriction such as conviction for contempt of court has the legitimate aim of "maintaining the authority and impartiality of the judiciary"; it must be demonstrated that the conviction is necessary in a democratic society and proportionate on the facts of the particular case.[20] The same is true under Article 13 ACHR, where any restriction

[20] See in particular paragraph 10 above where the European Court spells out its approach in terms.

on free speech including a conviction for contempt of court must be justified on grounds of necessity and proportionality. Accordingly, freedom of expression *can* be invoked to excuse an accused person's conduct even if valid orders have been breached. If it were otherwise, the breach of any court order would *ipso facto* result in criminal liability for contempt no matter how remote the risk of any interference with the administration of justice or how overwhelming the public interest in disclosure.

35. Significantly, the Trial Chamber makes 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. There is a passing reference at paragraph 73 to the "public interest in receiving the information" but no acknowledgement or analysis at all as to what specific public interest may have been served by publication of the book and the article. The principle of proportionality achieves its only reference at the time the Trial Chamber concludes that "trial proceedings for contempt are proportionate", but there is no application of the proportionality test to the actual facts of the case. Furthermore, there is no acknowledgement at all of the potential chilling effect on freedom of expression of imposing criminal liability on journalists which deters other journalists from reporting on matters of public interest. Surprisingly, the Trial Chamber makes no reference at all to either the ***Dupois*** or the ***Weber*** cases although they are by far the most relevant of the Article 10 cases as they actually concern the disclosure of confidential information resulting in convictions for contempt.

36. As to information in the public domain, the Trial Chamber simply notes 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" (para 73). Had this not been the case, none of the appellant's disclosures could have been described as confidential, but the real question (unaddressed by the Trial Chamber) is whether it was necessary and proportionate to take the draconian step of imposing criminal liability notwithstanding that much of the information was already in the public domain. Again, the Trial Chamber has wholly failed to apply the tests required under international human rights law.

## V. SUBMISSIONS

37. The book extract and article which formed the subject matter of the instant convictions both concerned allegations that the Appeals Chambers had made decisions to withhold documents which, if they had been disclosed, might provide evidence that Serbia was in control of the soldiers and paramilitaries who committed genocide at Srebrenica. The result of this decision not to allow this information to be disclosed, the appellant argues, was to deprive the International Court of Justice of important evidence which could have led to a different finding in the genocide case brought by Bosnia against Serbia.

38. It is difficult to think of a more important topic for debate in the context of international criminal law than whether evidence relevant to the crime of genocide may have been withheld without proper justification. The appellant's focus in her book and article was to criticise the reasoning of the Appeal Chamber in the Milosevic case as having given too much emphasis to Serbia's legitimate expectations as against the legitimate interests of the victims and the transparency of the trial process. The book and article were serious contributions to that debate and fell within the general principle that there is a strong public interest in reporting criminal proceedings and in informed debate about criminal justice, recognised by the European Court of Human Rights. Furthermore, the book and article also served a specific public interest in highlighting crucial decisions about disclosure in the Milosevic case that may have altered the course of legal history in a leading case concerned with the gravest of international crimes.

39. As the former spokesperson for the Prosecutor to the Tribunal, the appellant was particularly well-placed to make an informed and intelligent contribution to this very important debate. The book and article were written after the appellant had returned to her former profession as a journalist and in disclosing these facts and debating these matters the appellant was discharging a classic "public watchdog" function of the media, opening up important topics to public scrutiny. The European Court has recognised that this is the "essential task" or duty of the media and that the general public has the right to receive information and ideas on matters

of public interest even if the publications may shock or offend those who are subjected to criticism.

40. In having regard to whether it was necessary and proportionate to convict the appellant of these offences the fact that much of this material was already in the public domain is a highly relevant consideration. In all of the Article 10 cases on contempt of court of the European Court, but most notably in the ***Dupois*** and ***Weber*** cases, this is regarded as being a critical factor. In both of those cases, the applicants *had* disclosed some confidential information that was not already in the public domain, but the European Court had regard to the fact that there was already a substantial amount of information in the public domain about the relevant topics in deciding that the convictions were disproportionate.

41. Another relevant factor on proportionality is the fact that the appellant did not actually disclose any of the confidential documents in question, but sought to stimulate a debate about whether they should have been disclosed on the basis of the evidence those documents *might* contain.

42. Furthermore, the proceedings were over at the time the appellant published her book and article and no actual prejudice was caused to the administration of justice in the proceedings. This was not a case where the disclosures actually prejudiced the administration of justice in the proceedings e.g. by disclosing information that would have prejudiced an accused person's right to a fair trial. The European Court has emphasised e.g. in ***Weber*** that whether actual prejudice has been caused to the instant proceedings is an important factor when it comes to the proportionality of imposing criminal liability on the person who made the disclosures (see para 19 above).

43. A critical factor for the European Court, which the Trial Chamber completely overlooks, is the "chilling effect" arising from convicting journalists for making public interest disclosures of confidential information (see para 16 above). The reason why the European Court of Human Rights has held courts should take "the greatest care" when assessing the need to punish journalists for disclosing confidential information that contributes to a debate of public interest is because

such convictions have a much broader impact on freedom of expression than the particular case – they inhibit other journalists from discharging their function of acting as a public watchdog.

44. The chilling effect is the main reason why the European Court takes the view even modest fines may be a disproportionate interference with freedom of expression, because the very fact of conviction serves to deter other journalists from investigating and reporting on matters of public interest (see ***Dupuis*** at para 48).

45. In summary, it is submitted that the appellant's convictions were not "necessary in a democratic society" and were a disproportionate interference with her right to freedom of expression for the following reasons:

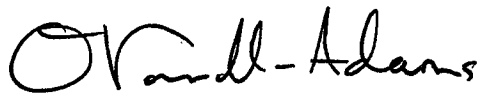
(1) The disclosures were a serious and well-informed contribution to the debate about international criminal justice, an important matter of legitimate public interest. The media is under a duty to inform the public about information and ideas on matters of public interest and the public has a right to receive such information;

(2) Most of the information contained in the book extract and the article was already in the public domain;

(3) The appellant's disclosures were of a limited nature and did not involve the disclosure of the confidential documents themselves;

(4) The disclosures were made long after the Milosevic trial had ended and there was no actual prejudice to the administration of justice in those proceedings;

(5) Imposing criminal liability on journalists who disclose confidential information on matters of public interest has a chilling effect that goes far beyond the instant case and undermines freedom of expression generally by deterring journalists from reporting on matters of public interest.



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