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Résumé de l'article

Le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) a abordé les limites à la liberté d'expression journalistique de façon plus fréquente et détaillée que les autres tribunaux similaires. Dans son *Règlement de procédure et de preuve*, un concept de *common law* d'outrage au tribunal a été adopté. La jurisprudence de TPIY établit qu'une violation d'une ordonnance du tribunal comme telle constitue une entrave à son administration de la justice et qu'il ne revient pas à une partie ou à un tiers de déterminer lorsqu'une ordonnance sert l'administration de la justice du tribunal international. Le Tribunal a également considéré que la divulgation de preuve confidentielle par une tierce partie ne signifie pas que l'information n'est plus protégée ni que l'ordonnance pertinente du tribunal a été *de facto* annulée ou que sa violation n'interférera pas avec l'administration de la justice par le tribunal. En décidant si une restriction au droit d'un journaliste à la liberté d'expression est justifiée, la Chambre d'appel a considéré si elle était prévue par la loi et si elle était proportionnelle et nécessaire à la protection de l'ordre public. La jurisprudence du TPIY dans ce domaine est pertinente pour la pratique d'autres tribunaux pénaux internationaux et internationalisés en raison de la similarité de leurs règles ainsi que des entraves comparables à l'exécution de leurs ordonnances.

JOURNALISTIC FREEDOM OF EXPRESSION AND CONTEMPT PROCEEDINGS AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*John Cubbon**

The International Criminal Tribunal for the former Yugoslavia (ICTY) has addressed the limits to journalistic freedom of expression more frequently and in more detail than other tribunals that resemble it. In its *Rules of Procedure and Evidence* a broadly common law concept of contempt of the Tribunal was adopted. The jurisprudence of the ICTY establishes that a violation of a court order as such constitutes an interference with its administration of justice and that it is not for a party or a third person to determine when an order “is serving the International Tribunal’s administration of justice”. The Tribunal has also held that the disclosure of confidential evidence by another third party does not mean either that this information is no longer protected or that the relevant court order has been *de facto* lifted or that its violation will not interfere with the Tribunal’s administration of justice. In deciding whether a restriction of the right of a journalist to freedom of expression was justified, the Appeals Chamber considered whether it was provided by law and whether it was proportionate and necessary for the protection of public order. The jurisprudence of the ICTY in this area is relevant to the practice of other international and internationalized criminal courts because of the similarity of their rules and the comparable impediments to the enforcement of their orders.

Le Tribunal pénal international pour l’ex-Yugoslavie (TPIY) a abordé les limites à la liberté d’expression journalistique de façon plus fréquente et détaillée que les autres tribunaux similaires. Dans son *Règlement de procédure et de preuve*, un concept de *common law* d’outrage au tribunal a été adopté. La jurisprudence de TPIY établit qu’une violation d’une ordonnance du tribunal comme telle constitue une entrave à son administration de la justice et qu’il ne revient pas à une partie ou à un tiers de déterminer lorsqu’une ordonnance sert l’administration de la justice du tribunal international. Le Tribunal a également considéré que la divulgation de preuve confidentielle par une tierce partie ne signifie pas que l’information n’est plus protégée ni que l’ordonnance pertinente du tribunal a été *de facto* annulée ou que sa violation n’interférera pas avec l’administration de la justice par le tribunal. En décidant si une restriction au droit d’un journaliste à la liberté d’expression est justifiée, la Chambre d’appel a considéré si elle était prévue par la loi et si elle était proportionnelle et nécessaire à la protection de l’ordre public. La jurisprudence du TPIY dans ce domaine est pertinente pour la pratique d’autres tribunaux pénaux internationaux et internationalisés en raison de la similarité de leurs règles ainsi que des entraves comparables à l’exécution de leurs ordonnances.

El Tribunal Penal Internacional para la ex Yugoslavia (TPIY) ha abordado los límites de la libertad de expresión periodística con más frecuencia y con más detalle que otros tribunales similares. Mediante sus *Reglas de Procedimiento y Prueba* se adopta un concepto de *common law* de desacato al tribunal. La jurisprudencia del TPIY establece que la violación de una orden judicial constituye en sí una obstrucción a su administración de justicia, y que no le corresponde a una parte o a una tercera persona determinar cuándo una orden está sirviendo la administración de justicia del tribunal internacional. El Tribunal también sostuvo que la divulgación de pruebas confidenciales por parte de un tercero no significa que esta información ya no esté protegida o que la orden judicial pertinente haya sido revocada o que su violación no interfiera con la administración de justicia del Tribunal. Al decidir si una restricción del derecho de un periodista a la libertad de expresión estaba justificada, la Sala de Apelaciones consideró si dicha restricción estaba prevista en la ley y si era proporcional y necesaria para la protección del orden público. La jurisprudencia del TPIY en esta área es relevante para la práctica de otros tribunales penales internacionales e internacionalizados debido a la similitud de sus reglas y los impedimentos comparables para la ejecución de sus órdenes.

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I. Right to freedom of expression and its limits in the context of judicial proceedings

Wherever the rule of law is established, there is a clash between the journalistic impulse to inform and the judicial inclination to limit the publicity of sensitive material. This clash has arisen at the ICTY more frequently than in other international and internationalized criminal tribunals.¹ What follows will be an exploration of the limits the ICTY set to journalistic freedom in this context and their implications for international criminal justice.

The right to freedom of expression is one of the cornerstones of the rule of law, but it is not an absolute right in the sense of giving everyone a licence to express themselves in all circumstances in all possible ways. It has limitations and sanctions may be applied when those limitations are breached. Incitement of racial hatred, the dissemination of falsehoods that damage a person's reputation and the disclosure of confidential information by professionals may, therefore, be prohibited. It is public bodies — governments, legislatures, courts and the police — that decide on the limits to freedom of expression and it is public bodies that enforce them. This is where the notorious difficulties arise. Public bodies are made up of people. As we all know, people are fallible. If people, who are fallible, have power, their potential for causing harm is increased. Public bodies may curb the right to freedom of expression excessively and with improper motives. Censorship by a repressive government amounts to a violation of the right. Defiance of laws or orders affecting freedom of expression in a repressive regime may be seen as acceptable, legitimate and admirable.

There are permissible limits to the right to freedom of expression in regard to judicial proceedings. Most obviously, secrecy attaches to deliberations that precede judges' decisions, no matter how detailed and public those decisions may be; and the right to freedom of expression is restricted by this secrecy. Publicity of judicial proceedings, however, is the default position; and the benefits do not need to be outlined; but, again, there are limits. For instance, many domestic jurisdictions prohibit the publication of information about the identity of children who participate in judicial proceedings and victims of sexual violence who give testimony. This benefits not only the individuals concerned by maintaining their privacy, but it also promotes the administration of justice by making it easier for them and people like them to take part.

II. Contempt Proceedings

When a court-ordered restriction on publicity is infringed, courts may impose sanctions of a criminal character. In common law domestic jurisdictions, this occurs in proceedings for contempt of court which can be defined as an act or omission intended

¹ Internationalised criminal tribunals are courts established by domestic authorities and the international community.

to obstruct or interfere with the due administration of justice.² The power to find contempt of court is conceived of as inherent in every court.³ There tends not to be a tight definition of contempt of court;⁴ and the proceedings are summary with the victim court often acting as *iudex in sua causa*.⁵ In civil law systems by contrast, there is no notion of an inherent power;⁶ there is no distinction between the law of contempt and other criminal offences and the normal procedural rules apply.⁷

The UN Security Council established the ICTY on 25 May 1993 pursuant to a resolution issued under Chapter VII of the *Charter of the United Nations*,⁸ by which it may take action “to maintain or restore international peace and security.”⁹ More specifically, it was established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1992.¹⁰ The ICTY was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. Its mandate lasted until 2017.¹¹ Of its 161 indictees, 90 were sentenced; 19 were acquitted; 15 were referred elsewhere; and 37 had their proceedings terminated or their indictments withdrawn.¹² By July 2011, there were no remaining fugitives.¹³ The ICTY processed a relatively large number of cases and, as a result, its jurisprudence has been influential and it has contributed to the establishment of a number of other criminal judicial bodies in the international sphere.

In *Rule 77* of its *Rules of Procedure and Evidence* the ICTY adopted essentially the common law approach of contempt proceedings: it has an “inherent power” to hold in contempt;¹⁴ acts constituting contempt of the Tribunal are defined loosely as knowing and wilful interference with its administration of justice;¹⁵ and the

² Silvia D’Ascoli, “Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties” (2007) 5:3 J Intl C Just 735 at 736.

³ Göran Sluiter, “The ICTY and Offences against the Administration of Justice” (2004) 2:2 J Intl C Just 631 at 632; Michael Bohlander, “International Criminal Tribunals and Their Power to Punish Contempt and False Testimony” (2001) 12:1 Crim LF 91 at 94.

⁴ D’Ascoli, *supra* note 2 at 736; Michael Chesterman, “Contempt: in the Common Law, but not the Civil Law” (1997) 46:3 ICLQ 521 at 523.

⁵ Sluiter, *supra* note 3 at 632; Chesterman, *supra* note 4 at 524-25.

⁶ D’Ascoli, *supra* note 2 at 736; Bohlander, *supra* note 3 at 94-5.

⁷ Sluiter, *supra* note 3 at 632.

⁸ *UN Security Council*, SC Res 827, UNSC, 3217th meeting, UN Doc S/RES/827 (1993).

⁹ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (entered into force: 24 October 1945) at art 39.

¹⁰ *UN Security Council*, *supra* note 8 at para 2.

¹¹ United Nations International Residual Mechanism for Criminal Tribunals, *International Criminal Tribunal for the former Yugoslavia* 1993-2017, 31 December 2017, online: ICTY <www.icty.org>.

¹² United Nations International Criminal Tribunal for the former Yugoslavia, *Infographic: ICTY Facts and Figures*, July 2011, online: ICTY <www.icty.org/node/9590>.

¹³ *Ibid.*

¹⁴ International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, 8 July 2015, at rule 77(A), online: ICTY <http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf>.

¹⁵ *Ibid.*

procedure does permit a chamber to be *iudex in sua causa*.¹⁶ Rule 77 contains provisions that are broadly similar to those applied in the International Criminal Tribunal for Rwanda (ICTR), the Residual Special Court for Sierra Leone (RSCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) and the International Residual Mechanism for Criminal Tribunals (IRMCT).¹⁷ The International Criminal Court (ICC) did not follow the ICTY in this regard. Its *Statute* contains articles that define offences against the Administration of Justice and Misconduct before the Court¹⁸ and there is no mention in the *Statute* or the *Rules of Procedure and Evidence* of an inherent power to find in contempt. The Specialist Chambers within the Kosovo justice system (Kosovo Specialist Chambers), which consist of international judges,¹⁹ also adopt a basically civil law approach in that they do not have a separate procedure for contempt of court²⁰ but they have jurisdiction over various offences in the Chapter of the *Kosovo Criminal Code on Criminal Offences Against the Administration of Justice and Public Administration*.²¹

III. Power to restrict publicity of proceedings

The ICTY *Statute* does not explicitly provide that the right to freedom of expression shall be observed, but the Tribunal has always operated within the framework of international standards of human rights. Almost all the contempt cases involving journalists at the ICTY concern violations of orders restricting the publicity of court proceedings.

¹⁶ *Ibid* at rules 77(C)(iii), 77(D)(ii).

¹⁷ International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, 13 May 2015, at rule 77, online: ICTR <<http://unictr.irmct.org/en/documents/rules-procedure-and-evidence>>; Residual Special Court for Sierra Leone, *Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone*, 30 November 2018, at rule 77, online: RSCSL <<http://www.rscsl.org/Documents/RSCSL-Rules.pdf>>; Extraordinary Chambers in the Courts of Cambodia, *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia*, 16 January 2015, at rule 35, online: ECCC <<https://www.eccc.gov.kh/en/document/legal/internal-rules-rev9>>; Special Tribunal for Lebanon, *Rules of Procedure and Evidence of the Special Tribunal for Lebanon*, 3 April 2017, at rule 60 bis, online: STL <<https://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence>>; International Residual Mechanism for Criminal Tribunals, *Rules of Procedure and Evidence of the International Mechanism for Criminal Tribunals*, 4 March 2019, at rule 90, online: IRMCT <<http://www.irmct.org/en/basic-documents/rules-procedure-and-evidence>>; Rule 77 of the RPE ICTY is also broadly similar to Rule 77 of the *Rules of Procedure and Evidence* of the Special Court for Sierra Leone, which preceded the RSCSL; See also, Special Court for Sierra Leone, *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, 31 May 2012, online: RSCSL <<http://www.rscsl.org/Documents/RPE.pdf>>.

¹⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544, arts 70-71 (entered into force: 1 July 2002).

¹⁹ Republic of Kosovo Assembly, *Law on Specialist Chambers and Specialist Prosecutor's Office 05/L-053*, 3 August 2015, arts 1(2), 24, 25, 26, 33, online: SCPKS <<https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office>>.

²⁰ Kosovo Specialist Chambers & Specialist Prosecutor's Office, *Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court*, 25 August 2017, online: SCPKS <<https://www.scp-ks.org/en/documents/rules-procedure-and-evidence-kosovo-specialist-chambers-including-rules-procedure>>.

²¹ *Law on Specialist Chambers and Specialist Prosecutor's Office*, *supra* note 19 at art 6(2).

The power to impose these restrictions is set forth in Article 20(4) of the *Statute*, which provides: “The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.”²²

Article 21(2) in conjunction with Article 22 grants the accused the right to a fair and public hearing subject to measures of protection for victims and witnesses. Such measures include assignment of a pseudonym, deletion of names and identifying information from public records, giving testimony through image- or voice-altering devices or closed-circuit television.²³ A judge or chamber may order these measures “for the privacy and protection of witnesses, provided that they are consistent with the rights of the accused.”²⁴

Large numbers of witnesses testifying at the ICTY have done so subject to protective measures. The reasons have included the high profile of the criminal proceedings; the strength of feeling about the alleged crimes that have been the subject of their testimony; and uncertainty about the ability and even on occasion the willingness of the domestic authorities to prevent intimidation of witnesses or reprisals against them.

Information about protected witnesses is hidden from the public in order to protect the witnesses concerned. At the same time, the full basis for a decision to make certain information confidential will often not be revealed to the public, in which case it is only the parties that are in a proper position to challenge the decision to make the information confidential and the media will be in the same position as the public and will not be privy to the full facts on which the court has made its decision and so they are not in a suitable position to pass judgment on the decision of the court.

IV. Contempt of the tribunal committed by journalists

Ivica Marijačić, Markica Rebić, Josip Jović, Domagoj Margetić, Baton Haxhiu and Florence Hartmann are journalists who were found guilty of disclosing information in relation to proceedings in knowing violation of an order of a Chamber under *Rule 77(A)(ii)* of the *Rules of Procedure and Evidence* of the ICTY, which provides that

[t]he Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who [...] discloses information relating to those proceedings in knowing violation of an order of a Chamber.²⁵

The case of *Marijačić and Rebić* concerns an article written by Ivica Marijačić

²² UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia (as amended)*, 25 May 1993, at art 20(4), online: ICTY <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

²³ *Rules of procedure and evidence ICTY*, *supra* note 14 at rule 75(B).

²⁴ *Ibid* at rule 75(A).

²⁵ *Ibid* at rule 77(A)(ii).

which was printed adjacent to an interview with Markica Rebić, who was said to be the source of the material for the article. The article, and the headlines appearing with it and on the cover of the newspaper, stated that it related to “secret” testimony.²⁶ The Trial Chamber found both accused guilty of contempt of the Tribunal under *Rule 77(A)(ii)*, that is disclosing information in relation to proceedings in knowing violation of an order of the Chamber and imposed fines on them.²⁷ The Appeals Chamber dismissed all grounds of appeal that they raised.²⁸

Josip Jović, the editor-in-chief of a Croatian daily newspaper, was charged with having published information and material in his newspaper concerning a protected witness and having refused to comply with an order to cease such publication.²⁹ The Trial Chamber found him guilty of disclosing information in relation to proceedings in knowing violation of an order of the Chamber under *Rule 77(A)(ii)* and fined him.³⁰ The Appeals Chamber dismissed Jović’s grounds of appeal.³¹

Margetić was a free-lance journalist and former editor-in-chief.³² The Indictment alleged that he published the entire confidential witness list from a case.³³ The Trial Chamber found that as well as committing contempt pursuant to *Rule 77(a)(ii)* he also did so pursuant to *Rule 77(A)(iv)* by interfering with witnesses in proceedings before a Chamber.³⁴ It pointed out that the witness list that Margetić published on his website contained the names of 102 witnesses, many of whom were subject to protective measures put in place by the Trial Chamber in order to ensure their security and to prevent the disclosure of their identities to the public or the media.³⁵ It held that by publishing the witness list he had reversed the effect of the protective measures “thus undermining the confidence of the witnesses in the Tribunal’s ability to protect them.”³⁶ It found that his conduct was “likely to dissuade these protected witnesses from testifying in the future before the Tribunal, and that if they do, their

²⁶ *Prosecutor v Marijačić and Rebić*, IT-95-14-R77.2, Trial Judgement (10 March 2006) at para 1 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_marijacic_rebic/tjug/en/reb-tcj060310e.pdf>.

²⁷ *Ibid* at para 53.

²⁸ *Prosecutor v Marijačić and Rebić*, IT-95-14-R77.2-A, Appeals Chamber Judgement (27 September 2006) at Disposition (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_marijacic_rebic/tjug/en/reb-tcj060310e.pdf>.

²⁹ *Prosecutor v Jović*, IT-94-14 & IT-95-14/2-R77, Trial Chamber Judgement (30 August 2006) at para 1 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_jovic/tjug/en/jov-jud060830e.pdf>.

³⁰ *Ibid* at para 27.

³¹ *Prosecutor v Jović*, IT-95-14 & IT-95-14/2-R77-A, Appeals Chamber Judgement (15 March 2007) at para 45 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_jovic/acjug/en/jovic-ajudg070315e.pdf>.

³² *Prosecutor v Margetić*, IT-95-14-R77.6, Trial Chamber Judgement (7 February 2007) at para 1 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_margetic/tjug/en/margetic_judgement.pdf>.

³³ *Ibid* at paras 2-3.

³⁴ *Ibid* at para 83.

³⁵ *Ibid* at para 69.

³⁶ *Ibid*.

evidence may be affected and given in fear.”³⁷ It considered the contempt he committed particularly egregious.³⁸ Margetić was given a sentence of three months’ imprisonment as well as a fine.³⁹

The Indictment of Baton Haxhiu alleged that he wrote and published an article which revealed the identity of a protected witness who had appeared before the Tribunal in *Prosecutor v Haradinaj et al.* and that he thereby knowingly and wilfully interfered with the administration of justice in knowing violation of orders by a Trial Chamber of the Tribunal.⁴⁰ Haxhiu was found guilty of contempt of the Tribunal and fined.⁴¹

Florence Hartmann served from October 2000 until 3 April 2006 as the spokesperson for the former Prosecutor of the Tribunal, Carla del Ponte.⁴² On account of publications after her employment by the ICTY she was charged on two counts of contempt punishable under *Rule 77(A)(ii)* of the *Rules of Procedure and Evidence* for knowingly and wilfully interfering with the administration of justice by disclosing information in knowing violation of two decisions of the Appeals Chamber in the case of *Prosecutor v Slobodan Milošević*.⁴³ She was found guilty on both counts⁴⁴ and fined.⁴⁵ The Appeals Chamber dismissed all her grounds of appeal.⁴⁶ Hartmann’s case was unlike the others in that the confidential material that she disclosed had been made confidential not for the sake of protecting the identity of a witness but the interest of a sovereign state.⁴⁷

The various contempt cases brought against Vojislav Šešelj who is a political figure rather than a journalist should also be mentioned. He was twice found guilty of disclosing confidential information about protected witnesses when he published a book.⁴⁸ On 31 March 2016, the Trial Chamber of the ICTY found him not guilty of

³⁷ *Ibid.*

³⁸ *Ibid* at para 86.

³⁹ *Ibid* at para 94.

⁴⁰ *Prosecutor v Haxhiu*, IT-04-84-R77.5, Trial Chamber Judgement (24 July 2008) at para 3 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_haxhiu/tjug/en/080724.pdf>.

⁴¹ *Ibid* at para 40.

⁴² *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Final Judgement (14 September 2009) at para 1 (International Criminal Tribunal for the former Yugoslavia, Specially Appointed Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_hartmann/tjug/en/090914judgement.pdf>.

⁴³ *Ibid* at paras 2-4.

⁴⁴ *Ibid* at para 89.

⁴⁵ *Ibid* at para 90.

⁴⁶ *In the Case Against Florence Hartmann*, IT-02-54-R77.5-A, Appeals Chamber judgment (19 July 2011) at para 172 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_hartmann/acjug/en/110719_judgement_hartmann.pdf>.

⁴⁷ ICTY, *supra* note 42 at para 72.

⁴⁸ *Prosecutor v Šešelj*, IT-03-67-R77.2, Trial Chamber Judgement (24 July 2009) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_seselj/tjug/en/090724.pdf>; *In the Case Against Vojislav Šešelj*, IT-03-67-R77.2-A, Appeals Chamber Judgement (19 May 2010) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/contempt_seselj/acjug/en/100519_ajug.pdf>; *Prosecutor v Šešelj*, IT-03-67-R77.3, Contempt Judgement (31 October 2011) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY

various crimes against humanity and violations of the laws or customs of war.⁴⁹ On 11 April 2018, the Appeals Chamber of the IRMCT reversed his acquittal, in part, entering convictions under counts of crimes against humanity and sentenced him to a term of ten years of imprisonment.⁵⁰

V. The vulnerability of the authority of the ICTY

The enforceability of the orders of the ICTY is subject to potentially serious impediments. There has been hostility to it among certain influential groups in former Yugoslavia. Its relatively recent establishment allows for a genuine or feigned uncertainty about the scope of its authority. These factors are reflected in the actions and submissions of some of those who have been found to be in contempt.

Marijačić argued that the Tribunal did not have the power to issue orders that were binding in general upon members of the press and public.⁵¹ He implied that closed session and other protective measures orders could not in general prohibit journalists from publishing information about Tribunal proceedings or more narrowly that in the case of the witness who was the focus of the case the orders that were issued could not have this effect.⁵² The Trial Chamber dismissed this submission stating that individuals cannot decide to publish information in defiance of such orders on the basis of their own assessment of the public interest in that information.⁵³

Two days after the ICTY ordered Jović's newspaper to cease publication of confidential information, the newspaper printed the order and described it as "arrogant", an "interference in Croatian sovereignty" and "[a]ggression on a legal state".⁵⁴ The next day, the newspaper's front page stated, "Josip Jović, Editor-in-Chief: I Don't Have any Moral Obligations towards The Hague".⁵⁵ During the proceedings Jović stated that he "[q]uite obviously" violated the Chamber's order but "was by no means clear whether ICTY had the power to issue to [him] such an order".⁵⁶ In rejecting the position taken by Jović here, the Trial Chamber referred to the well-established principle that a person's misunderstanding of the law does not excuse a violation of it and pointed out that the Appeals Chamber had stated that where a person is subject to

<http://www.icty.org/x/cases/contempt_seselj2/tjug/en/111031.pdf>; *Prosecutor v Šešelj*, IT-03-67-R77.3-A, Appeals Chamber Judgement (28 November 2012) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY

<http://www.icty.org/x/cases/contempt_seselj2/acjug/en/121128_judgement.pdf>.

⁴⁹ *Prosecutor v Šešelj*, IT-03-67-T, Trial Chamber Judgement (31 March 2016) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY

<<http://www.icty.org/x/cases/seselj/tdec/fr/160331.pdf>>.

⁵⁰ *Prosecutor v Šešelj*, MICT-16-99-A, Appeals Chamber Judgement (11 April 2018) at para 181 (Mechanism for International Criminal Tribunals, Appeals Chamber), online: IRMCT <<http://cld.irmct.org/assets/filings/Apeal-Judgement-11.04.2018.PDF>>.

⁵¹ *Prosecutor v Marijačić and Rebić*, *supra* note 26 at para 28.

⁵² *Ibid* at para 39.

⁵³ *Ibid*.

⁵⁴ *Prosecutor v Jović*, *supra* note 29 at paras 4-5.

⁵⁵ *Ibid* at para 5.

⁵⁶ *Ibid* at para 21.

the Tribunal's authority, the person must abide by its orders "regardless of his personal view of the legality of those orders."⁵⁷ The Appeals Chamber supported the position of the Trial Chamber on this point.⁵⁸

The Tribunal was therefore able to dismiss without difficulty the apparent doubts about the scope of its authority; but that these doubts were raised is significant.

VI. ICTY jurisprudence

The ICTY Appeals Chamber has established principles in its Judgments in *Marijačić and Rebić*, *Jović and Hartmann* which have a bearing on the scope of contempt proceedings in regard to journalistic activity.⁵⁹ Such proceedings have mostly concerned alleged disclosure of information in knowing violation of an order of a Chamber falling under *Rule 77(A)(ii)*. In *Marijačić and Rebić* the Appeals Chamber determined that the jurisdiction of the ICTY pursuant to this *Rule* was "necessary in particular in order to comply with the International Tribunal's obligation pursuant to Article 22 of the *Statute* to protect witnesses on whose behalf protective measures have been ordered, and it is ultimately necessary for the International Tribunal to fulfil its mandate."⁶⁰

In the same case the Appeals Chamber held that the language of *Rule 77* showed that a violation of a court order as such constituted an interference with the International Tribunal's administration of justice and that it was not for a party or a third person to determine when an order "is serving the International Tribunal's administration of justice."⁶¹ It went on to hold that a court order remained in force until a chamber decided otherwise and it noted *proprio motu* that the fact that the information concerned was no longer confidential did not present an obstacle to a conviction for having published the information at a time when it was still under protection.⁶² The Appeals Chamber found that although the reason for the order imposing confidentiality no longer existed, the legal rationale, namely that protected information has to remain so until confidentiality is lifted, was still applicable and that to hold otherwise would mean to undermine all protective measures imposed by a chamber without an explicit *actus contrarius*, thus endangering the fulfilment of the International Tribunal's

⁵⁷ *Prosecutor v Milošević*, IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings (29 August 2005) at para 11 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/050829.htm>.

⁵⁸ *Prosecutor v Jović*, *supra* note 31 at para 27.

⁵⁹ The ICTY Appeals Chamber has held that a proper construction of the *ICTY Statute* requires that the *ratio decidendi* of its decisions is binding on Trial Chambers and that the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice; *Prosecutor v Aleksovski*, IT-95-14-1-A, Appeals Chamber judgement (24 March 2000) at paras 107, 113 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/x/cases/aleksovski/acjug/fr/ale-asj000324f.pdf>>.

⁶⁰ *Prosecutor v Marijačić and Rebić*, *supra* note 28 at para 24.

⁶¹ *Ibid* at para 44; *Prosecutor v Marijačić and Rebić*, *supra* note 26 at para 39.

⁶² *Prosecutor v Marijačić and Rebić*, *supra* note 28 at para 45.

functions and mandate.⁶³

Journalists have defended their disclosure of information declared confidential by the Tribunal on the grounds that it is already widely known. In the case of *Baton Haxhiu* the defence submitted that once information that should have remained confidential had become a “public secret” known to many people, no violation of *Rule 77* of the *Rules* was possible.⁶⁴ The Appeals Chamber addressed this issue in the appeal in *Jović*. In his appeal, *Jović* submitted that the information he published was “already in the public domain at the time of publishing.”⁶⁵ The Appeals Chamber took a firm stance. After referring to its findings in *Marijačić and Rebić*⁶⁶, it stated that any defiance of an order of a Chamber *per se* interferes with the administration of justice for the purposes of a conviction for contempt and that no additional proof of harm to the Tribunal’s administration of justice was required.⁶⁷ It then held that the fact that some portions of a witness’s written statement or closed session testimony may have been disclosed by another third party does not mean that this information was no longer protected, that the court order had been *de facto* lifted or that its violation would not interfere with the Tribunal’s administration of justice.⁶⁸ In *Hartmann*, the Appeals Chamber held that when a court order has been violated, the Trial Chamber does not need to assess whether any actual interference has taken place or whether there is a real risk to the administration of justice because such a violation *per se* interferes with the administration of justice.⁶⁹

In the *Hartmann* case the relationship between contempt proceedings and the right to freedom of expression was directly addressed. At the relevant time, Florence Hartmann worked as a journalist.⁷⁰ She was charged with knowingly and wilfully interfering with the administration of justice by disclosing information in a book and an article in knowing violation of two confidential decisions of the Tribunal.⁷¹

On appeal, Hartmann alleged that her right to freedom of expression as a journalist was being infringed. In its consideration of this submission, the Appeals Chamber looked to Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*⁷² for guidance.⁷³ Article 19 provides that the exercise of everyone’s

⁶³ *Ibid*; This was applied in the *Margetić* Trial Judgement and the *Hartmann* Appeal Judgement, *Prosecutor v Margetić*, *supra* note 32 at para 49; *In the Case Against Florence Hartmann*, *supra* note 46 at para 91; see also *In the Case Against Vojislav Šešelj*, IT-03-67-R77.2-A, Appeals Chamber Judgement (19 May 2010) at para 29 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/fr/case/seselj/4>>.

⁶⁴ *Prosecutor v Haxhiu*, *supra* note 40 at para 15.

⁶⁵ *Prosecutor v Jović*, *supra* note 31 at para 29.

⁶⁶ *Prosecutor v Marijačić and Rebić*, *supra* note 28 at paras 44-5.

⁶⁷ *Ibid* at para 30.

⁶⁸ *Prosecutor v Jović*, *supra* note 31 at para 30; *Prosecutor v Haxhiu*, *supra* note 40 at paras 12-21; *In the Case Against Florence Hartmann*, *supra* note 46 at para 91.

⁶⁹ *Ibid*, *In the Case Against Florence Hartmann* at para 107.

⁷⁰ *In the Case Against Florence Hartmann*, Final Judgement, *supra* note 42 at para 1.

⁷¹ *Ibid* at para 2.

⁷² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force: 23 March 1976) [ICCPR].

⁷³ *In the Case Against Florence Hartmann*, *supra* note 46 at para 160.

right to freedom of expression “carries with it special duties and responsibilities” and “may therefore be subject to certain restrictions, but these shall 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.”⁷⁴

The Appeals Chamber found that the restrictions imposed on Hartmann’s freedom of expression were “provided by law” because the decisions which she violated were filed confidentially under protective measures granted pursuant to the *Rules of Procedure and Evidence* of the Tribunal. As to whether the restrictions were “necessary” within the terms of Article 19, the reasoning of the Appeals Chamber is lengthier. It observed that the *travaux préparatoires* of the ICCPR indicated that the “protection of [...] public order” in Article 19 was intended to include the prohibition of the procurement and dissemination of confidential information and that in respect of whether the restriction to an individual’s freedom of expression was “necessary” to achieve its aim, the Human Rights Committee had considered whether the action taken was proportionate to the sought-after aim.⁷⁵ It concluded that restricting Florence Hartmann’s freedom of expression was both proportionate and necessary because it protected the “public order” by guarding against the dissemination of confidential information.⁷⁶ In drawing this conclusion, it noted that the Trial Chamber found that the effect of Hartmann’s disclosure of confidential information decreased the likelihood that states would cooperate with the Tribunal in the future, thereby undermining its ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law and that prosecuting an individual for contempt under these circumstances was proportionate to the effect her actions had on the Tribunal’s ability to administer international criminal justice.⁷⁷

The jurisprudence of the ICTY on contempt proceedings against journalists for the publication of material in violation of judicial orders has been⁷⁸ and will be

⁷⁴ ICCPR, *supra* note 72.

⁷⁵ *In the Case Against Florence Hartmann*, *supra* note 46 at paras 160-61.

⁷⁶ *Ibid* at para 161.

⁷⁷ *Ibid* at para 162.

⁷⁸ *Prosecutor v Nshogoza*, ICTR-2007-91-A, Appeals Chamber Judgement (15 March 2010) at paras 56-7 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.worldcourts.com/icttr/eng/decisions/2010.03.15_Nshogoza_v_Prosecutor.pdf>; *Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, STL-11-01/PT/CJ/R60bis.1, Decision on Allegations on Contempt (29 April 2013) at para 20 (Special Tribunal for Lebanon, Contempt Judge), online: STL <http://www.worldcourts.com/stl/eng/decisions/2013.05.28_Prosecutor_v_Ayyash_1.pdf>; *In the case Against Akhbar Beirut S.A.L., Ibrahim Mohamed Al Amin*, STL-14-06/ICJ, Decision in Proceedings for Contempt with Orders in Lieu of an Indictment (31 January 2014) at para 34 (Special Tribunal for Lebanon, Contempt Judge), online: STL <<https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14->

influential in other international and internationalized criminal courts. There are a number of reasons for this.

The ICTY has decided on more of such cases than any other international or internationalized tribunal and generated a coherent set of principles in its case law that will be applicable elsewhere. This applicability is enhanced by the similarity of the relevant provisions in the legislative instruments of other currently existing tribunals. The IRMCT, the RSCSL, the STL and the ECCC all have procedural provisions that are essentially the same as *Rule 77(A)(ii)* of the *ICTY Rules of Procedure and Evidence*.⁷⁹ The ICC and the Kosovo Specialist Tribunals are unlike the others in that their procedural rules do not contain provisions sanctioning interference with the administration of justice. However, the Kosovo Specialist Chambers have the power to apply an Article of the Kosovo *Criminal Code* defining an offence of Violating Secrecy of Proceedings, which corresponds to *Rule 77(A)(ii)*.⁸⁰ It is only the ICC that lacks any provision that effectively criminalises disclosure of information in violation of a judicial decision; however, Article 70(1) of the *Rome Statute* gives the ICC jurisdiction over various offences against the administration of justice.

There is a further factor. It relates to the vulnerability of the authority of international and internationalized criminal tribunals and their dependence on both the willingness of witnesses to testify sometimes at personal risk and the support of governments which may not always be forthcoming. As a consequence, a significant quantity of the procedure and evidence before them is confidential. There may be widespread questioning of the scope of their jurisdiction and even of their legitimacy, thereby undermining respect for their orders. In these circumstances special efforts need to be made to protect confidentiality so as not to discourage witnesses and governments from cooperating in the future.

In short, in balancing journalistic freedom with the integrity of the administration of justice through contempt proceedings, the ICTY has been a pioneer and the positions that it has taken will be the starting point for future developments in international criminal justice because of the shared context and legislative framework.

06/filings-stl-14-06/orders-and-decisions-stl-14-06/3091-f0001-1406>; *In the case Against Akhbar Beirut S.A.L., Ibrahim Mohamed Ali Al Amin*, STL-14-06/T/CJ, Public Redacted Version of the Judgment (15 July 2016) at paras 40, 143 (Special Tribunal for Lebanon, Contempt Judge), online: STL <<https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/judgments-stl-14-06/5092-f0262prv>>.

⁷⁹ RPE IRMCT, *supra* note 17 at rule 90(A)(ii); RPE RSCSL, *supra* note 17 at rule 77(A)(ii); RPE STL, *supra* note 17 at rule 60 bis (A)(iii); *Internal Rules ECCC*, *supra* note 17 at rule 35(1)(a).

⁸⁰ *Criminal Code of the Republic of Kosovo*, 2011/04-L/082 2012 s 400, which provides, inter alia: "1. Whoever, without authorisation, reveals information disclosed in any official proceedings which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished by a fine or by imprisonment of up to one (1) year. 2. Whoever, without authorisation, reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years."