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.

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

Date: 25 August 2009

IN A SPECIALLY APPOINTED CHAMBER

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

Registrar: Mr. John Hocking

IN THE CASE AGAINST

FLORENCE HARTMANN

PUBLIC REDACTED

PROSECUTOR'S FINAL BRIEF

***Amicus Curiae* Prosecutor**

Mr. Bruce A. MacFarlane, Q.C.

Counsel for the Accused

Mr. Karim A. A. Khan

Co-Counsel for the Accused

Mr. Guénaël Mettraux

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I. INTRODUCTION

1. This is a straightforward case. The order in lieu of indictment[1] sets out clearly what the facts in issue are:

> By her acts or omissions **Florence Hartmann** committed:
>
> **Count 1: Contempt of the Tribunal**, punishable under this Tribunal's inherent power and Rule 77(A)(ii) of the Rules, for knowingly and wilfully interfering with the administration of justice by disclosing information in violation of an order of the Appeals Chamber dated 20 September 2005 and an order of the Appeals Chamber dated 6 April 2006 through means of authoring for publication a book entitled *Paix et Châtiment*, published by *Flammarion* on 10 September 2007 ("**Book Count**");
>
> **Count 2: Contempt of the Tribunal**, punishable under this Tribunal's inherent power and Rule 77(A)(ii) of the Rules, for knowingly and wilfully interfering with the administration of justice by disclosing information in violation of an order of the Appeals Chamber dated 20 September 2005 and an order of the Appeals Chamber dated 6 April 2006 through means of authoring for publication an article entitled "Vital Genocide Documents Concealed", published by the *Bosnian Institute* on 21 January 2008 ("**Article Count**").

2. The case is about four key issues. In this brief, they will be referred to as the "four pillars". With respect to the Book Count: whether or not the Accused disclosed confidential information; in other words, the *actus reus* of the offence of contempt of the Tribunal. Secondly, whether or not she, in fact, knew what she was doing, whether it was willful, whether it was knowing: the *mens rea*. The third and fourth points relate to the Article Count and it's essentially the same thing: Was there an improper disclosure of confidential information, the *actus reus*, and was it done knowingly, willfully, the *mens rea* or the fault requirement.

3. The conclusions reached on these four points are dispositive. The evidence demonstrates that the steps taken by the accused, the words that she used and the comments that she made in her publications were not mere inadvertence, they were not an accident; they were deliberate. Her own words, which are at the heart of this case, were a statement of defiance. At the end of the day, this case is all about one of accountability to this International Tribunal.

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[1] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Order in lieu of an indictment on contempt, 27 August 2008, page 3; and In the case against Florence Hartmann, Case IT-02-54-R77.5, Amended order in lieu of an indictment on contempt ("OILOI"), 27 October 2008, page 3.

II. SUMMARY OF THE EVIDENCE

4. The facts in this case are relatively simple. The information disclosed by the Accused is related to two decisions of the Appeals Chamber in the case of *Prosecutor v. Slobodan Milošević*. The decisions contained information that was confidential, including extensive quotes from closed session transcripts,[2] and were ordered to be filed confidentially by the Appeals Chamber. The motions which gave rise to each of the decisions were filed confidentially.[3] REDACTED.[4]

5. The Accused was employed as a Spokesperson for the Office of the Prosecutor ("OTP") of the ICTY from October 2000 until 3 April 2006[5] and left the ICTY in October 2006.[6] As Spokesperson for the Prosecutor, she was responsible for classic media relation duties, monitoring media developments, preparing of speeches.[7] It was an essential part of the spokesperson's job to know what information was confidential or could not be given to the media or the public.[8] The Accused knew of the existence of Rule 77 of the Tribunal's Rules of Procedure and Evidence ("Rules")[9] and was aware that investigations against other journalists for suspected violations of Rule 77.[10]

6. As Spokesperson, the Accused was one of a small number of staff in the "Immediate Office" of the Chief Prosecutor, Ms Carla del Ponte.[11] She was informed of certain matters pertaining to the *Milosevic* trial insofar as they were relevant to her role and function as a spokesperson.

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[2] In particular the 20 September Decision contains extensive quotes from parts of the 18 July 2005 which was held in closed/private session and therefore are also protected by a oral order of the Chamber.
[3] REDACTED
[4] REDACTED
[5] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Joint Admission by the Parties on the Evidence of Mr. Gavin Ruxton, 9 June 2009, p. 4, para. 6 ("Ruxton Submission").
[6] Ruxton Submission, p. 4
[7] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Prosecution's Statement of Admissions of the Parties and Matters Not in Dispute, 6 February 2009, page 1564("Admissions").
[8] Ruxton Submission, p. 4
[9] *Ibid.*
[10] P1.1, 1002-1, 5 of 10, 6 of 10, lines
[11] Ruxton Submission, p. 4

7. On 20 December 2006, the Accused entered into a publishing contract with Flammarion[12], the fifth largest publishing company in France[13]. The agreement called for the writing of a book provisionally entitled "Dans les Coulisses du Tribunal de La Haye"[14]. The book, ultimately entitled "*Paix et Châtiment*" **("the Book"),** was written by the Accused, alone.[15] The Book has since been marketed by Flammarion in France, where they hold exclusive rights to the Book.[16] As of the 8 June 2009, 3799 copies of the Book have been sold[17] which has netted an income of approximately 5000 euro[18]. The Book continues to be sold.[19] On pages 120 through 122 of this book, the Accused makes express reference to the existence of two confidential decisions, their contents, and the purported effect of the confidential decisions.[20] At page 122, the Accused makes express reference to the confidential nature of these decisions.[21] REDACTED[22] Annex A contains a detailed, line-by-line analysis of the disclosures in the Book.

8. The article entitled "Vital Genocide Documents Concealed" ("**the Article**") was written by the Accused, in English, and was published online by the Bosnian Institute on 21 January 2008.[23] The article itself purports to have been authored by the Accused, alone.[24] During the Suspect Interview, the Accused admitted that she had written the article, that it was accurate, and that it was intended to be an English summary of portions of her book.[25] In the article, the Accused discloses the existence, contents of, and purported effect of the two decisions of the Appeals Chamber[26] REDACTED[27]. Annex B contains a detailed, line-by-line analysis of the disclosures in the Article.

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[12] Transcript, p 134; P8.1
[13] *Ibid.*
[14] *Ibid.* p135; P8.1
[15] Admissions, p1564; P9, 1003-2, p1of13, lines 21-25.; Transcript, p135, lines 11-12.
[16] Admissions, page 1564; Transcript, p 136
[17] Transcript, p136; p141
[18] *Ibid.* p142-143.
[19] *Ibid.* p136
[20] P3.1; Decisions of the Appeals Chamber "in late September 2005" and on 6 April 2006. For a line-by-line breakdown of the relevant passages of the book, and the manner in which it breaches these two confidential orders, see Appendix A and B to this submission.
[21] P3.1
[22] REDACTED
[23] Admissions, page 1563.
[24] P4, the first or title page bears the sole name of Florence Hartmann as author.
[25] P9, 1004-2, p. 9-11.
[26] For a line-by-line analysis of the manner in which the article breaches the confidentiality of the two orders in question, see Appendix B to this submission.

9. After publication of the Book, but before publication of the Article, the Registrar wrote a warning letter to the Accused.[28] The letter expressed concern that the book "[made] reference to official tribunal information and documents that were not made public ..." and noted that the "Tribunal reserves the right to take any administrative *or legal measure* deemed necessary to ensure the defence of its interests" (emp. added).[29] The Accused was put on notice that there was a live issue concerning whether in her book she had improperly disclosed confidential information.

III. APPLICABLE LAW & APPLICATION TO THE FACTS

10. The Accused has been charged with two counts of contempt of the Tribunal, punishable under the Tribunal's inherent power and Rule 77(A)(ii) of the Rules.[30] Contempt of the Tribunal, like all crimes, consists of a criminal act and a guilty mind.

11. Rule 77(A) preserves the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice. Rule 77(A)(ii) specifically provides any person who "discloses information relating to... proceedings in knowing violation of an order of a Chamber" may be held in contempt. The language of Rule 77 demonstrates that a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice.[31] This is further reinforced by the jurisprudence of the International Tribunal which has established that any defiance of an order of a Chamber interferes with the administration of justice for the purposes of a conviction for contempt.[32] Consequently, to convict an individual of contempt, it is sufficient to prove the relevant *actus reus* and *mens rea* elements.[33]

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[27] REDACTED
[28] P10. The letter is dated 19 October 2007, approximately one month after publication of the book and three months prior to publication of the article.
[29] *Ibid.*
[30] OILOI, p3.
[31] *Prosecutor v. Jović,* Case IT-95-14 & 14/2-R77-A, Appeals Chamber Judgement, 15 March 2007, para. 30, ("*Jović* Appeal Judgement"); *Prosecutor v. Marijačić & Rebić*, Case IT-95-14-R77.2-A, Appeals Chamber Judgement, 27 September 2006, para. 44. ("*Marijačić & Rebić* Appeal Judgement").
[32] *Jović* Appeal Judgement, para. 30; *Marijačić & Rebić* Appeal Judgement, para. 17, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R77.4, Contempt Proceedings Against Kosta Bulatovic: Decision on Contempt of the Tribunal, 13 May 2005 ("Bulatovic Trial Decision"), para. 17.
[33] *Prosecutor v. Jović,* Case IT-95-14 & 14/2-R77, Trial Chamber Judgement, 30 August 2006, para. 11, ("*Jović* Trial Judgement"); *Prosecutor v. Marijačić & Rebić*, Case IT-95-14-R77.2, Trial Chamber Judgement, 10 March 2006, para. 19. ("*Marijačić & Rebić* Trial Judgement")

A. The Elements of Rule 77(A)(ii)

12. The Appeals Chamber has held that the *actus reus* of contempt charged under Rule 77 (A)(ii) is the physical act of disclosure of information relating to proceedings before the International Tribunal where such disclosure would be in violation of an order of a Chamber.[34] Disclosure, as understood in its literal sense, is the revelation of information that was previously confidential to a third party or to the public.[35] As held by the Trial Chamber in *Haxhui*, this includes information the confidential status of which has not been lifted.[36] Further, the disclosure must objectively breach either a written or an oral order issued by a Chamber.[37] As will be shown below, that is demonstrably clear on the facts in this case.

13. The fault requirement or *mens rea* needed to support a charge of this form of contempt is whether the Accused had knowledge that the disclosure was in violation of an order of the Chamber.[38] Rule 77(A) requires a demonstration that the Accused "knowingly and wilfully interfered" with the Tribunal's administration of justice. Rule 77(A)(ii) puts a finer point on the issue, requiring "disclosure (of) information…in **knowing violation** of an order of a Chamber" (emp. added). Clearly, *actual knowledge* that the confidential terms of an order are being breached will suffice. However, the "knowing violation" requirement in the Rule is not confined to actual knowledge: willful blindness to the existence of the order (in the sense of deliberate ignorance, or refraining from finding out whether the order existed because she wanted to be able to deny knowledge of it) or being recklessly indifferent on the issue, is sufficiently culpable conduct to satisfy the requirements for contempt.[39] Finally, there is no requirement to prove a willful intention to disobey the order. It is sufficient to prove that the act that breached the order was deliberate and not accidental.[40]

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[34] *Jović* Appeal Judgement at 30; *Marijačić & Rebić* Appeal Judgement, para. 24; see also *Prosecutor v. Haxhiu*, Case IT-04-84-R77.5, Trial Chamber Judgement, 24 July 2008, para. 10, ("*Haxhiu* Trial Judgement").
[35] *Haxhiu* Trial Judgement, para. 10; *Marijačić & Rebić* Trial Judgement, para. 17.
[36] *Ibid.*
[37] *Ibid.*; *Marijačić & Rebić* Trial Judgement, para. 17.
[38] *Jović* Appeal Judgement at 27.
[39] *Prosecutor v. Aleksovski*, Case IT-95-14/I-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, paras. 42-45 ("*Nobilo* Appeal Judgement"); *Haxhiu* Trial Judgement, para. 11.
[40] *Nobilo* Appeal Judgement, para. 54.

B. *Actus Reus*

14. In the present case, to establish the *actus reus*, it must be shown that there was an order or orders in effect at the time of the disclosure information that were breached by the disclosure in question.

a) Orders Breached by Disclosure

15. Having clearly identified dates, parties, and names of judges along side the contents and purported effect of the decisions, there is no mistaking which decisions the Accused was referring to. The information disclosed by the Accused is related to two decisions of the Appeals Chamber in the case of *Prosecutor v. Slobodan Milošević*, which were issued and filed confidentially:

i) A decision on the request for review of the Trial Chamber's oral decision of 18 July 2005, on 20 September 2005 ("20 September 2005 Decision"); and

ii) A decision on the request for review of the Trial Chamber's decision of 6 December 2005, on 6 April 2006 ("6 April 2006 Decision").

16. The decisions contained information that was confidential, including extensive quotes from closed session transcripts,[41] and were ordered to be filed confidentially by the Appeals Chamber. The motions which gave rise to each of the decisions were filed confidentially.[42] REDACTED[43]

17. REDACTED[44] Information that may have been discussed publicly by

[41] In particular the 20 September decision contains extensive quotes from parts of the 18 July 2005 which was held in closed/private session and therefore are also protected by a oral order of the Chamber.
[42] REDACTED
[43] REDACTED
[44] REDACTED

others in different fora does not lift confidentiality.[45] The confidential status guaranteed by these orders can only be lifted by a Chamber;[46] no Chamber has lifted confidentiality of either order. Therefore, the information disclosed by the Accused was subject to an order or orders by a Chamber which were in effect at the time the information was disclosed.

18. It is important not to confuse the orders which granted confidential status to the two Appeals Chambers decisions in question and other orders which stem from the procedural history, however, it is helpful to consider the latter for context. The 'prodigious' procedural history[47] which preceded the Appeals Chambers decisions in question consisted of numerous filings and decisions on a variety of issues related to the production of evidence on one hand and the confidentiality which will attach on the other. Some documents were confidential; others were public. From exhibits put forward by the Defence, and sources relied on by the Accused in the preparation of the Book and the Article,[48] it can be inferred that the media, academia and rights activists were aware that in discussing the area generally, one must be alive to the existence of the orders of the Tribunal which render certain information confidential. In March 2007, an IWPR reported "...Belgrade is likely to want to keep the documents confidential, and the wider public is likely to be denied the unexpurgated version for a very long time, if not for ever."[49] It can be inferred that an order keeping the documents confidential was still in place. In November 2007, two months after the publication of the Book, "[a] group of international scholars, legal experts, and rights activists have signed an open letter demanding that the minutes from wartime meetings of Serbia's Supreme Defence Council, SDC, be made public."[50] It can be inferred that if such a request was being made, this large and diverse group knew than an order was still in place. In May 2008, IWPR again reported that "...an invitation to the tribunal president, registrar and prosecutor [to discuss the SDC minutes] was declined on the grounds that the panel would be discussing information that had been classified as confidential by the court."[51] At various points before

[45] *Jović* Appeal Judgement at 30.
[46] *Marijačić & Rebić* Appeal Judgement, para. 45. The disclosure of the name of the decisions by Chambers of the International Tribunal, is not an explicit *actus contrarius*.
[47] As described by Judge May in *Prosecutor v. Slobodan Milošević,* Case IT-02-54-T, Thirteenth Decision on Applications Pursuant to Rule 54bis of Prosecution and Serbia and Montenegro, 17 December 2003.
[48] P1.1, 1002-1, 4-5 of 10; P9, 1002-2, 7 of 9, lines 10-18.;
[49] D1
[50] D4
[51] D3

and after the publication of the Book and the Article, the media, academia and rights activists were aware of the existence orders of Chambers. A more detailed discussion of issues concerning the Defence's theory of waiver by Serbia and Montenegro and of the existence of information in the "public domain" can be found below in Section V.

b) Physical Acts of Disclosure

i) Pillar Number One: *Actus reus* concerning the Book Count

19. The Accused first disclosed information relating to proceedings before the International Tribunal in her book, *Paix et Châtiment*. She was the sole author of the Book published by Flammarion on 10 September 2007. The Defence has formally admitted that the book was written by the Accused.[52] In the Suspect interview, she conceded that she wrote the book, alone.[53] In fact, the evidence is clear that she wrote the book under contract with Flammarion, alone.[54] And the book itself purports to have been authored by her, alone.[55]

20. In the Book, in particular at pages 120 through 122, the Accused makes express reference to the existence of two confidential decisions, their contents, and the purported effect of the confidential decisions.[56] When viewed in concert, there can be no doubt about which decisions the Accused has disclosed. In addition, at page 122, the Accused makes express reference to the confidential nature of these decisions.[57]

ii) Pillar Number Two: *Actus Reus* concerning the Article Count

21. Four months later, the Accused disclosed information relating to proceedings before the International Tribunal a second time in an article published online entitled "Vital Genocide Documents Concealed". There has been a formal admission by the Defence that the Article was written in English by the Accused, and was published online by the Bosnian Institute on 21 January 2008.[58] The Article itself purports to have been authored by the

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[52] Admissions, p. 1564.
[53] P9, Recording 1003-2, p. 1, l. 5-26.
[54] *Ibid.*, p. 1-3; P8; Transcript, p135, lines 11-12.
[55] P3, p1. The title page bears the name of Florence Hartmann as sole author.
[56] P3.1, decisions of the Appeals Chamber "in late September 2005" and on 6 April 2006. For a line-by-line breakdown of the relevant passages of the book, and the manner in which it breaches these two confidential orders, see Appendix A and B to this submission.
[57] *Ibid.*
[58] Admissions, p1563

Accused, alone.[59] During the Suspect Interview, she admitted that she had written the article, that it was accurate, and that it was intended to be an English summary of portions of her book.[60]

22. In the Article, the Accused discloses the existence, contents of, and purported effect of the two decisions of the Appeals Chamber[61] REDACTED [62].

C. *Mens Rea*

23. In the present case, to establish the *mens rea,* it must be shown that the Accused had knowledge that the disclosure was in violation of an order of the Chamber.[63] It is sufficient to establish that the act which constitutes the violation (here, publication) was deliberate and not an accident. Once it has been established that the Accused had knowledge of the existence of the order (either actual knowledge or willful blindness/reckless indifference), a finding that she *intended* to violate the order by publishing will almost necessarily follow. It is not necessary to show that the Accused knew that the order violated was directly binding on her.[64] Further, "actual knowledge of an order may be inferred from a variety of circumstances, such as… markings on the information indicating its 'confidentiality' or statements by an accused describing the information as confidential."[65]

24. The Appeals Chamber has held that although mere *negligence* in failing to ascertain whether an order had been made could never amount to contempt, it has also held that either willful blindness or reckless indifference to the existence of an order is sufficiently culpable conduct to be dealt with as contempt.[66] A finding of willful blindness, however, first requires a suspicion or realization on the part of the Accused that an order may exist.

a) Pillar Number Three: *Mens rea* concerning the Book Count

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[59] P4, the first or title page bears the sole name of Florence Hartmann as author.
[60] P9, Recording 1004-2, p. 9-11.
[61] P3.1. For a line-by-line analysis of the manner in which the article breaches the confidentiality of the two orders in question, see Appendix B to this submission.
[62] *Ibid.*, and see REDACTED.
[63] Rule 77(A)(ii) of the Rules; *Marijačić & Rebić* Trial Judgement, para. 18; *Jović* Trial Judgement, para. 20; *Haxhiu* Trial Judgement, para. 11.
[64] *Jović* Appeal Judgement, para. 30.
[65] [65] *Prosecutor v. Margetić,* Case IT-95-14 R77-6, Judgement, 7 February 2007, para 102 ("*Margetić* Trial Judgement")
[66] *Nobilo* Appeal Judgement, paras. 45 and 54; *Haxhiu* Trial Judgement, para. 11.

25. The evidence supports a finding of *actual* knowledge on the Book Count. On page 122 of the Book, the Accused writes "the judges had rendered each of their decisions marked 'confidential'."[67] REDACTED[68] Two points can be inferred from these statements. First, the disclosure was deliberate and not an accident. Second, the Accused had knowledge of the existence of an order which rendered the decisions confidential.

26. The Accused has worked for over twenty years as a journalist, a profession where verifying one's sources is essential to ensure quality work and to maintain one's reputation and credibility.[69] The Accused's journalistic sources assisted her in piecing the story together; they were good, and accurate, and correctly confirmed that the decisions in question had been issued confidentially.[70] As discussed earlier, the media sources reviewed by the Accused in the preparation of the Book[71] would have alerted her to the fact that in discussing the topic generally, one must be alive to the existence of the orders of the Tribunal which render certain information confidential. In fact the need for caution due to orders of Chambers was well known in the media and civil society. Further, the Accused worked for six years as the Spokesperson for the Prosecutor, where, on a daily basis, she worked within the Tribunal's confidentiality framework. In her role as Spokesperson, the Accused was careful in terms of what she could talk about publicly, and what she could not discuss because it had been ordered confidential by the Chamber.[72] The Accused was not only aware of the existence of Rule 77[73], she was aware of investigations against other journalists for suspected violations of it.[74] When this evidence is considered together, only a willfully blind or recklessly indifferent individual would not have a suspicion or realization that an order may exist. In fact, her sources told her that they did exist.

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[67] P3.1.
[68] REDACTED.
[69] Mr. Joinet notes: "And Ms. Hartmann, who was also a journalist who was famous for having good knowledge of the situation in the area..." Transcript, p 261. He also notes "...she had the necessary professional skills and competences." Transcript, p 262.
[70] P9, 1002-2, p. 6; 1003-2, p. 7-11; REDACTED; 1004-2, p. 6.
[71] P9, 1002-2, 7 of 9, lines 10-18.
[72] P9, Recording 1001-2, p. 10; 1002-2, pp. 1-2; Ruxton Submission, p. 4
[73] Ruxton Submission, p. 4
[74] P1.1, 1002-1, p5-6

b) Pillar number Four: *Mens rea* concerning the Article Count

27. The evidence also supports a finding of *actual* knowledge on the Article Count. In the Book, the Accused conceded she knew that the decisions were issued confidentially[75]. This public admission was made before the Article was published, and is therefore relevant and probative on both counts.[76] The Accused's intimate knowledge of the Tribunal's confidentiality framework, the existence and application of Rule 77 and her diligence as a journalist which contribute to the *mens rea* relevant to the Book Count, and discussed above, apply equally to the *mens rea* of the Article Count.

28. One additional fact is significant: after publication of the Book, but before publication of the Article, the Registrar wrote a warning letter to the Accused.[77] The letter expressed concern that the book and an unrelated article "[made] reference to official tribunal information and documents that were not made public…". The Registrar also added that "…the Tribunal reserves the right to take any administrative *or legal measure* deemed necessary to ensure the defence of its interests". (emp. added)[78] The Accused was therefore put on notice that there was a live issue concerning whether she had improperly disclosed confidential information. No evidence adduced at Trial supports a finding that, in the three months between the receipt of the letter and the publication of the Article, the Accused sought and received assurances that all of the information contained in the book was public. As will be discussed in more detail below, the Accused was fixed with knowledge *but elected to go ahead* with the Article nonetheless.

V. Probative Value of Key Prosecution Exhibits

A. The Suspect Interview

29. *Mens rea* is a central issue in this case. Evidence as to the intention of an accused person at the time of the commission of an offence is often very difficult to assess, and usually is a matter of inference from proven facts. A pre-indictment interview of a suspect often sheds direct light on that issue. This case is no exception. Much can be learned by

[75] REDACTED.
[76] Ms. Hartmann indicated that the book had been published on 10 September 2007, P9, Recording 1003-2, p. 1, l. 19; Admissions, page 1563. The book admissions on this point therefore precede publication of the article by 4 months.
[77] P10. The letter is dated 19 October 2007, approximately one month after publication of the book and three months prior to publication of the article.

examining what the Accused said during the interview – and, correspondingly, what she did not say when outlining her recollection of events.

30. The Accused said that she worked within the "Immediate Office" of the Prosecutor, and enjoyed a close working relationship with Ms. Del Ponte.[79] One of her basic roles was to ensure that the public understood an issue from the perspective of the OTP.[80]

31. The Accused was alive to the sensitivity of confidential information when employed as the Spokesperson. She was often not privy to the contents of confidential decisions, but when an issue arose that may be confidential, care was taken to stress that fact or note that the matter was not in the public domain.[81] Careful preparation in advance avoided compromising the confidentiality of decisions:[82]

> My replies were given in consultation with the Office of the Prosecutor, so in general, we knew what questions were coming at us, and prepared for them. *I knew exactly what the framework of my replies would be without taking the risk of infringing on any decisions, and you can see for yourself that such problems never arose during my period in office....* (emp. added)

32. From the evidence, it is apparent that: the Accused in her former role was very much alive to the need to protect confidential information; took steps to do that; and was proud that in the six years she worked in the job no problems of that nature arose. This was confirmed by the evidence of Mr. Ruxton who noted that: "It was an essential part of the Spokesperson's job to know what information was confidential or could not be given to the media or the public".[83] The Accused was also aware of Rule 77[84] and that journalists who breached confidential orders were not immune.[85]

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[78] *Ibid.*
[79] P9, Recording 1001-2, p.8 l. 30-35.
[80] *Ibid.*, l. 2-8
[81] *Ibid.*, recording 1002-2, p. 2, l. 3-20.
[82] *Ibid.*, p. 1, l. 11-21. And see *Ibid.*, Recording 1001-2, p. 10, l. 15-16.
[83] Ruxton Submission, p. 4
[84] *Ibid.*
[85] P1.1, 1002-1, p5-6

33. The Accused also discussed the writing of the Book. It was started in January 2007, after leaving the Tribunal, and was published in September 2007.[86] She said she wrote it alone.[87] Essentially, it was a reconstruction of events based on her own experiences at the Tribunal, together with information provided to her by a number of unnamed sources.[88] As she put it, "It is information…a compilation of different sources that may perhaps refer to this decision, I don't know. The sources are the ones that helped reconstruct that chain of events."[89]

34. The Accused noted that having good sources of information, and verifying your sources, was important to a journalist, as your reputation and integrity depended on it.[90] Against that backdrop, the following exchange provides important information on her state of mind when she wrote the book, and, in particular when she observed at p. 122 that the decisions had been marked confidential by the Chamber:[91]

> Q: REDACTED. *That's the information you received*?
>
> A: *It would appear that I had good sources*, as I have noted since reading the documents that you… that you sent to Maitre Bourdon. (emp. added)

35. REDACTED.[92]

36. The evidence establishes that she treasured her reputation, and relied on sources in whom she had confidence when preparing her book. She believed them when they told her, and when she recounted, that the decisions were confidential. And, as it turns out, her confidence was well placed: they were confidential. Given the care with which she treated

[86] P9, 1003-2, p. 1, l. 11-13.
[87] *Ibid.*, l. 25
[88] *Ibid.*, pp. 3-11, especially l. 24-27 at p. 8 and l. 31-33 at p. 11.
[89] *Ibid.*, p. 11, l. 31-33
[90] P9, Recording 1001-2, p. 8, l. 13-14., Recording 1001-2, p. 5, l. 11-27
[91] *Ibid.*, 1003-2, p. 12, l. 1-10
[92] REDACTED.

the issue of confidentiality in her former role, her published statements are not just willful; they are ones of public defiance.

37. Although the Accused recognized the importance of fact verification,[93] she did not confer with the Registrar, Carla Del Ponte or anyone else at the tribunal or otherwise, except her editor at Flammarion.[94] In fact, the record is completely devoid of any evidence of due diligence steps that were taken to determine whether confidentiality of the two decisions had been lifted, or was still in place. It is also devoid of any suggestion that she believed that confidentiality had been lifted either by the Chamber, a so-called waiver by Serbia or other means. As discussed in Section III, the fault requirement – *mens rea* – required by Rule 77 is satisfied either on the basis of actual knowledge that the decisions were confidential, or willful blindness to the issue. The evidence here meets either standard.

38. The Accused also described the background to the Article.[95] She said that after the release of her book, she was asked to publish the "essence" of it in English.[96] She put it quite simply: "It's an English version of passages in the book. It's nothing new".[97] She added: "And there was interest in having the article in English because the subject had been debated publicly by various sources".[98] It is significant to note that this article was published *after* she had been warned by the Registrar that the book disclosed confidential information, and that she may face legal consequences as a result.[99]

39. Throughout the interview, the Accused stressed several things: she had never seen either of the Appeals Chamber decisions prior to their being provided to her counsel as part of the pre-interview disclosure process;[100] she questioned whether she was required to erase from her brain all of her experiences that she had while employed at the ICTY;[101] and what she wrote about had been the subject of discussion and writing for some time.

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[93] P9, Recording 1001-2, p. 5, l. 11-27, esp. l. 27
[94] *Ibid.*, Recording 1003-2, p. 1-2, esp. p. 2, l. 33-34; 1004-2, p. 3, l. 33-34; and 1004-2, p. 18, l. 1-6.
[95] Which is the subject of the second count on the Order in Lieu of Indictment.
[96] P9, recording 1004-2, p. 10, l. 6-14.
[97] *Ibid.*, p. 9, l. 35
[98] *Ibid.*, p. 11, l. 13-14.
[99] This issue is dealt with in detail in the next section of this submission.
[100] P9, Recording 1002-2, p. 5, l. 23-30; and generally pp. 7-9;
[101] *Ibid.*, Recording 1004-2, pp. 15-16

40. The Prosecutor does not take issue with these broad propositions. But they beg this question: did the accused knowingly publish information concerning confidential decisions of the Appeals Chamber, and make it available to the world? The interview alone establishes that she did.

B. Registrar's Warning Letter to Ms. Hartmann

41. The letter sent from the Registrar to the Accused on 19 October 2007 has considerable probative value, particularly with respect to the *mens rea* necessary to establish the Article count. First, "sandwiched" between these two publications, the Accused was put on notice that there was a live issue concerning whether in her book she had improperly disclosed confidential information. There can be no doubt, therefore, that she was fixed with knowledge of that issue on or about 19 October 2007. Yet she chose to go ahead with the article, which in the Suspect Interview she conceded was "an English version of passages in the book".[102] The Accused explained that she had been asked to compile the essence of her book in English, so she took passages from the book, and on her own published them in English.[103] "Its nothing new", she advised.[104]

42. REDACTED[105] . A reasonable inference can be drawn from the facts established in evidence that after publishing a book in which she disclosed confidential information, she was warned *but consciously elected to go ahead* with a further publication which in material respects replicates the contemptuous material from her publication four months earlier.

43. Over objection from the Defence, this letter was received as evidence and marked as an exhibit.[106] The Defence was not taken by surprise, and cannot be prejudiced: the Accused was the recipient of the letter in October 2007; it formed part of the disclosure package provided to the Defence in November 2008; it was included in the original 65*ter* exhibit list

[102] P9, generally at pp.1004-2, pp. 9-11, and specifically at p. 1004-2, p. 9, l. 35.
[103] *Ibid.*,, esp. at p. 10, l. 31-32.
[104] *Ibid.*,, at p. 9, l. 35.
[105] REDACTED
[106] P10

found in Annex A to the Prosecutor's Pre-trial brief filed on 8 January 2009[107] and remained in all subsequent amended versions[108]. Correspondence between counsel later confirmed that the Prosecutor intended to rely upon it in evidence, although until the Accused formally elected not to testify on 15 June 2009, it was believed that it would be relied upon and tendered during cross-examination of Defence witnesses[109]. The point is this: the Accused has known about the document for 20 months, and the Prosecutor's clear and stated intention to rely upon it for evidentiary purposes has been unflagging for at least 8 months prior to trial.

V. Discussion regarding Arguments advanced by the Defence

A. Issues concerning waiver and "public domain"

44. The Defence argues that Serbia and Montenegro, as the party who had sought protective measures, had the authority to waive the confidentiality granted by an order of the Chamber, and consequently the *actus reus* for the offence of contempt could not exist. The argument raises a series of fundamental and interrelated questions: in respect of what information is the waiver said to have been given? Was the waiver, if it existed, express or implied? Can an implied waiver of this nature exist as a matter of law? If express, who provided it? And did that person have a clear mandate to do so? Or are we talking about an *implied mandate*, resulting in an *implied waiver*? What is the best evidence of the position taken on this issue by Serbia and Montenegro? And was it conveyed to the International Tribunal? More fundamentally, as a matter of law, can an applicant unilaterally "waive" protection, or does an order remain in place until the Chamber decides otherwise?

45. In support for the theory that a waiver existed, the Defence tendered evidence concerning the conduct and words of persons who were then, or had been, agents of the government of Serbia and Montenegro, principally Professor Radoslav Stojanović. The Defence also tendered evidence from other, unrelated cases in support for the proposition that, post-decision, an applicant is entitled as a matter of law to waive protection without further involvement of the Chamber. Finally, reliance was placed, principally through Nataša Kandić, on what was described as a general understanding within the media, human rights

[107] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Prosecutor's Pre-Trial Brief Pursuant to Rule 65*ter*(E), 8 January 2009.
[108] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Submission Pursuant to Oral Decision on Prosecution Motion to Amend Rule 65ter Witness & Exhibit lists, 4 February 2009.
[109] See the email chain of correspondence filed by the defense: D49-D57; D66-D67.

organizations and the public that documents existed, and that they had been the subject of an order of this International Tribunal. Ms. Kandić's testimony will be the subject of critical analysis later on in this submission.

46. In brief, the Prosecutor submits that:

i. it is important first to understand what the effect of the 2005 and 2006 decisions of the Appeals Chamber was;

ii. the contours of a order of the Chamber may be influenced by the submissions of the parties but are ultimately determined by the Chamber;

iii. a decision of a Chamber, including any order concerning confidentiality, remains in place and effective unless and until it is set aside or varied by the Chamber, irrespective of the subsequent conduct of the applicant;

iv. in any event, the evidence in this case fails to demonstrate that the conduct and statements said to amount to a waiver were done by persons with a clear mandate to provide such a waiver (even if that can be done at law); and

v. in any event, irrespective of the statements attributed to certain individuals associated with the government of Serbia and Montenegro, the best evidence of the position of that government, *as an organization and a state*, REDACTED[110] which clearly outline the official position of that government.

a) What do the REDACTED Decisions say:

47. REDACTED[111]. REDACTED.[112] REDACTED.

[110] REDACTED
[111] REDACTED
[112] REDACTED

48. REDACTED[113], REDACTED.[114] REDACTED.[115]

49. REDACTED.

50. REDACTED[116]; REDACTED[117];

[113] REDACTED
[114] REDACTED
[115] REDACTED
[116] REDACTED
[117] REDACTED

REDACTED [118].

51. REDACTED [119]. REDACTED.[120]

52. REDACTED.

53. REDACTED.[121] REDACTED [122], REDACTED.[123]

54. REDACTED [124]; REDACTED.

55. REDACTED [125].

[118] REDACTED
[119] REDACTED
[120] REDACTED
[121] REDACTED
[122] REDACTED
[123] REDACTED
[124] REDACTED
[125] REDACTED

REDACTED.[126]

56. REDACTED.[127]

57. REDACTED:[128]

REDACTED

58. REDACTED:[129]

REDACTED

59. REDACTED:

i. REDACTED

[126] REDACTED
[127] REDACTED
[128] REDACTED
[129] REDACTED

REDACTED;[130]

ii. REDACTED;

iii. REDACTED;[131]

iv. REDACTED;[132]

v. REDACTED.[133]

b) *Viva voce* evidence led in support of the theory of waiver

60. The theory of waiver arises principally, though not exclusively, from the evidence of Nataša Kandić. Ms. Kandić, a human rights activist who founded and is the director of the Humanitarian Law Centre, has known the Accused since the early 1990's, and in 2008 invited her to be on the Center's Management Board.[134] They visited frequently, and when the Accused was charged with contempt Ms. Kandić assisted in the preparation of a press release that questioned "why Ms. Hartmann has been singled out by The Hague Judges."[135] There is, therefore, a closeness between Ms. Kandić and the Accused that the Chamber will need to take into account when assessing the weight of her evidence.

61. Ms. Kandić testified that it had been common knowledge that "transcripts and records of the Supreme Defence Council exist and certain sections of these transcripts were redacted".[136] "It was a constant topic", she added.[137] She herself had spoken about it openly,

[130] REDACTED
[131] REDACTED
[132] REDACTED.
[133] REDACTED
[134] Transcript, p. 381, 384 and 386.
[135] *Ibid.*, p. 389, l. 2-3.
[136] *Ibid.*, , p. 389, l. 7-13.
[137] *Ibid.*, , p. 389, l. 13.

and no one ever denied the truth of what was being discussed.[138] She and other human rights activists "had been aware of that information long before the [B]ook was published. It was a topic in the media, and it was discussed in public".[139]

62. It is less clear, however, what "information" was being discussed: was it the existence of confidential protective measures, the ICTY decisions or the underlying documents such as the SDC minutes? And when? Early in her testimony in chief, she said that she and other human rights activists had been astonished by the indictment in this case "because we discussed the contents of these controversial decisions for years before that, especially intensively during the establishment of the International Court of Justice, because it was common knowledge that these transcripts and records of the Supreme Defence Council exist and certain sections of these transcripts were redacted".[140] Throughout much of her testimony, however, she said that the public discussion was really about the underlying documents.[141] Until a conference that she helped organize in June 2007, ".... the main issue was never that the court rulings were confidential, but the discussions always centered on the contents"[142]. By "contents", she meant "the facts that everyone knew related to the facts and evidence on the involvement of the police and Army of the Republic of Serbia in the perpetration of the genocide in Srebrenica".[143]

63. Ms. Kandić testified that the situation changed at the conference she organized in June, 2007. Representatives of the Serbian team mentioned during a panel discussion that there were decisions, and that they were confidential.[144]

64. At the same time, however, Serbian representatives were signally the need for caution in discussing these matters, because they were the subject of a confidential order from the Chamber. On 8 May 2006 before the ICJ, Serbia noted its inability to discuss the contents of the SDC documents.[145] During the panel discussion at the conference, Saša Obradović, a lawyer at the Serbian Embassy in the Netherlands, advised caution during the discussions as reference to confidential documents amounts to "an offence of disrespecting the Tribunal",

[138] *Ibid.*, , p. 389, l. 19-20
[139] *Ibid.*, , p. 392, l. 11-14.
[140] *Ibid.*, , p. 389, l. 7-13
[141] See: *Ibid.*, , pp. 393, l. 10-15; 394-5; 395-6; 396, l. 15-16;
[142] *Ibid.*, , p. 401, l. 7-8.
[143] *Ibid.*, , p. 401, l. 10-13.
[144] *Ibid.*, , p. 400, l.23 to p. 401, l. 20.

for which some journalists in Croatia had previously had to answer.[146] Unconvincingly, Ms. Kandić was dismissive of this comment because it was a minor comment coming from a civil servant.[147]

65. Mr. Robin Vincent was also cross-examined with a view to showing that Applicants for protective measures sometimes speak publicly about the information under seal before the Chamber authorizes release of the information. A case in the Special Court for Sierra Leone, and prosecutor David Crane, was suggested to be just such an example. Mr. Vincent noted, however, that "there were extreme circumstances which persuaded the Prosecution, indeed the Court, to act as it did", and that prior to the action in question there had been contact with the Trial Chamber.[148]

c) REDACTED

66. REDACTED

67. REDACTED [149]

[145] *Ibid.*, , p. 404, l. 7-10.
[146] D9, p. 41.
[147] Transcript, p. 446-450.
[148] *Ibid.*, , p. 197-8.
[149] REDACTED

REDACTED.[150] REDACTED[151] REDACTED [152]

68. REDACTED.

d) When is an order imposing protective measures varied or rescinded?

69. The Defence has endeavored to argue that the 2005 and 2006 orders of the Appeals Chamber were in some manner varied, rescinded or waived as a result of the public discussion concerning them, media speculation concerning their existence and effect, or the public (or not-so-public) commentaries of persons associated with the Applicant, the Government of Serbia and Montenegro.

70. The Prosecutor's position is that an order, and its terms and conditions, including an order authorizing protective measures, remains in force until a Chamber decides otherwise. Two decisions of the Appeals Chamber clearly support this proposition.

[150] REDACTED
[151] REDACTED

71. In *Marijačić & Rebić* it was alleged that the accused had published an article in a newspaper that outlined the testimony of a witness who had testified in closed session. Significantly, the protective measures granted to the witness were lifted *after* he testified, but before charges were laid. Both accused were found guilty at trial. Affirming conviction, the Appeals Chamber held as follows: [153]

> A court order remains in force until a Chamber decides otherwise. The Appeals Chamber *proprio motu* notes that the fact that the aforementioned information today is no longer confidential does not present an obstacle to a conviction for having published the information at a time when it was still under protection.

72. One year later, the Appeals Chamber re-affirmed this proposition in a decision that the Prosecutor submits is virtually dispositive of the principal issues raised in this case.

73. *Jović,* again, involved alleged publication contempt. It was said that the editor-in-chief of a newspaper had published information concerning confidential testimony, including excerpts from the witness's written statement to the OTP. After publication, but before prosecution, the Appeals Chamber issued a decision, ordering that the protective measures granted to the witness be lifted.[154] The Accused was tried, and found guilty of contempt.

74. Amongst other things, the Defence argued that the information he had published had already been in the public domain, and for that reason his publication had not interfered with this Tribunal's administration of justice. The following statement of the Appeals Chamber is virtually dispositive of the main issues raise in the present case:[155]

> As the Trial Chamber correctly recognized, the *actus reus* of contempt under Rule 77 (A)(ii) is the disclosure of information relating to proceedings before the International Tribunal where such disclosure would be in violation of an order of a Chamber. In such a case, "[t]he language of Rule 77 shows that a violation of a court order as such constitutes an interference with the International Tribunal's administration of justice. Any defiance of an order of a Chamber *per se* interferes with the administration of justice for the purposes of a conviction for contempt. No additional proof of harm to the International Tribunal's administration of justice is required. *Moreover, an order remains in force until a Chamber decides otherwise. The fact that some portions of the 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*

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[152] REDACTED
[153] *Marijačić & Rebić* Appeal Judgement, para. 45
[154] *Jović* Appeal Judgement, para. 7.
[155] *Ibid.*, para. 30

with the Tribunal's administration of justice. [emp. added; footnotes in original omitted].

e) Summary and Conclusions on the issues of waiver and "public domain"

75. Based on the analysis outlined above, and as discussed in Section III, it is submitted that the confidential decisions issued by the Appeals Chamber in 2005 and 2006 are in force, and will remain fully in force unless and until a Chamber decides otherwise. The terms and conditions of these decisions, including their confidential nature, also remain in place and are unaffected by public discussion about them, or media speculation concerning their existence and purported effect. Put simply, as the Appeals Chamber observed in *Jović*, the fact that confidential information may have been disclosed to a third party does not mean that the information is no longer protected, that the court order has been *de facto* lifted or that its violation will not interfere with the Tribunal's administration of justice.

76. An applicant, including a State, cannot, as a matter of law, rescind a decision of the Chamber respecting protective measures; and, in any event, there is no evidence in the present case establishing that a mandated agent of the Government of Serbia and Montenegro attempted to do so. Indeed, the record here demonstrates quite the contrary: REDACTED.

B. Weight to be accorded to evidence of Ms. Kandić

77. The Chamber will need to give close attention to the weight to be attached to the evidence of Nataša Kandić. As her evidence progressed on 1 July 2009, it became more and more apparent that this witness was more interested in giving speeches than answering questions.[156] Her answers were lengthy, rambling, evasive, and she appeared to be more interested in advancing a political agenda than assisting the fact-finding process in this trial. She also has a close connection to the accused, suggesting a personal bias in favor of Ms.

[156] Largely non-responsive answers that were more in the nature of speeches can be found in the following passages: 430; 432-3; 433-4; 437; 439-440; 442; 449-450; 456-7; 460; 463; 464; 465.

Hartmann. Irrespective of the question posed, she invariably came back to the same point in her answers: "the secret documents must be released". In retrospect, the Accused's characterization of her as a "high-profile militant for human rights"[157] may be quite correct. Her answer to the penultimate question posed to her in cross-examination, which she may have sensed was the last point at which she could advance her agenda, is classic[158]:

> Q: My final question is this. I take it, from what you've said, that you would not want to see the accused convicted.
> A: Well, again I have to correct that impression of yours. You say that I would not want to see her convicted. I profoundly believe that there is not a single real reason – I'm referring to the realm of truth and justice – for her to be convicted. In my view, this trial should serve to reconsider – re-examine the decision – the adoption of a decision for those transcripts to be at long last disclosed so that we might eliminate all these doubts, dispel all these suspicions, in terms of the evidence about the crimes in Srebrenica and all the other things which happened in 1992 and 1993. For us, the citizens of the states formed in the territory of the former Yugoslavia, it is very important to actually be confronted with that past. Now, the fact that we do not have the best of authorities, the democratic authorities that we need to have, that is why, inter alia, this issue is so important..... I avail myself of every opportunity to say that we should not have secrets, that we should exert pressure on the authorities for them to renounce that tool of theirs, that of manipulating and of hiding. We need guarantees that there will be no more crimes, and one of such guarantees is that what has been declared a secret should be disclosed.[159]

C. Freedom of Expression

78. The tension between the need to protect confidential information from being published by journalists and the right to freedom of expression as set out in the *Convention for the Protection of Human Rights and Fundamental Freedoms* ("ECHR")[160], the *International Covenant on Civil and Political Rights*[161], and the *Universal Declaration of Human Rights*[162]has been considered by this Tribunal in *Margetić* and again in *Jović*. The Trial Chamber in *Jović* reminds us that while "it is undeniable that legal instruments relevant to the work of this Tribunal protect freedom of expression...all the instruments...on freedom

[157] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Pre-Trial Brief of Florence Hartmann, 15 January 2009, Annex A, para. 1.
[158] For context, the full questions and answers to the last two questions posed in cross-examination are reproduced in Annex C.
[159] Transcript p 465, lines 4-8
[160] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950. ETS 5, art. 10(1) ("*ECHR*").
[161] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966. United Nations, Treaty Series, vol. 999, p. 171, art. 19(2) ("*ICCPR*").
[162] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, art 19 ("*UDHR*").

of the press have qualifications in relation to court proceedings."[163] The Tribunal has further noted that having chosen to ignore valid orders, an Accused cannot invoke the principle of freedom of expression to excuse his or her conduct.[164]

79. These positions are consistent with the jurisprudence of the European Court of Human Rights which has held that "[w]hile recognizing the vital role played by the press in a democratic society, the Court emphasises that journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of Article 10 defines the boundaries of the exercise of freedom of expression."[165] In particular, 10§2 of the ECHR states that the exercise of the freedom of expression "carries with it duties and responsibilities, [which] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,...for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

80. For the interference to be prescribed by law, in conformity with the ECHR, one must consider if the law was "adequately accessible"[166] and if it was "formulated with sufficient precision to enable the citizen to regulate his conduct."[167] The Accused was able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of her book and article might fall afoul of the rules. Consequently it can be said that the interference was prescribed by law.

81. The interference in the Accused's right to freedom of expression has legitimate aims. First, the law of contempt has the general aim of securing the fair administration of justice. It thereby seeks to achieve purposes similar to those envisioned in Article 10§2 where is speaks of maintaining the authority and impartiality of the judiciary.[168] Secondly, in this particular case of publication contempt it also has the twin aim of preventing the disclosure of information received in confidence which is also envisioned in Article 10§2.

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[163] *Jović* Trial Judgement, para.23 and Fn94; *Margetić* Trial Judgement, para. 81 and Fn144. See also *ECHR*, art. 10(2), *ICCPR*, art. 19(3) and *UDHR* art. 29(2).
[164] *Jović* Trial Judgement, para.23; *Margetić* Trial Judgement, para. 82.
[165] *Case of Dupuis and Others v. France*, ECtHR, (Application no. 1914/02), 12/11/2007, para 43.
[166] *Sunday Times v UK*, ECtHR, (Application no. 6538/74), 26 April 1979, Para 49.
[167] *Ibid.*
[168] *Ibid.*, Para 54.

82. Finally, the interference in the freedom of expression must be shown to be necessary in a democratic society. To do so, one may examine, among other things, the nature of the interests at stake and the conduct of the applicant.[169]

83. In examining the nature of the interests, the first point to note about the present case is one which distinguishes it from some ECHR cases. Contrary to the assertions of the Defence, the relevant pages of the book and article contained information which was not known to the public at the time that the book was published.[170]

84. Further, in the present case there is a need to balance the public interest of the right to know against another public interest – the access to confidential information to enable the prosecution of war criminals.[171] Where a state may be willing to cooperate in the prosecution of individual war criminals by providing confidential information, it may decide not to cooperate if the information provided became public at the detriment of the state as a whole. As was noted by Robin Vincent in his testimony, "tribunals in the international scene…face[…] a significant challenge in terms of the level of cooperation that [they]…can get from states in a number of regards. …I would say…that it's, I think, fairly obvious that if there is any lack of confidence in the tribunal, so far as the state is concerned that's in a position to provide evidence which is crucial to that particular tribunal, once its recognized that there has been or may well be dangers of breaches, then it's unlikely that the cooperation that tribunal seeks will actually be forthcoming."[172] This evidence was unchallenged and uncontradicted. To facilitate cooperation by states, in limited circumstances, the Tribunal imposes confidentiality. Where confidentiality is imposed, it is incumbent on the Tribunal to ensure that the confidential status accorded to the documents or information is protected. In according confidential status, a Chamber must balance the public interest of the right to know, with the public interest in securing convictions of war criminals.[173]

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[169] *Stoll v. Switzerland*, ECtHR (Application no. 69698/01) , 10 December 2007, para. 112 ("*Stoll*").
[170] *Ibid.* para 113 where the court notes that the fact that the content of the paper in question had been completely unknown to the public was a distinguishing factor.
[171] *Ibid.* para. 115 where they note that need to balance competing public interests.
[172] Transcript, p153, lines 2-11.
[173] See *Stoll* para 115-116 where the Grand Chamber distinguishes cases where the competing interests at stake are both in the public interest as opposed to the public interest competing against the interest of an individual.

85. A further interest that must be balanced is the right to a fair trial. Key evidence is often obtained from various parties provided that it remains confidential. If the power of the Tribunal to enforce orders of confidentiality is eroded, confidence in the Tribunal's ability to guarantee confidentiality may result in the loss of this valuable source of information. This would have a negative impact on the ability of an Accused to defend oneself. REDACTED.

86. The conduct of the individual whose freedom of expression has been interfered with must also be considered. In *Guja v. Moldova* the ECtHR noted that "an act motivated by ...the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection."[174] In the circumstance of the Accused, publication of the book would lead to pecuniary gain. The motivation of the Accused is illustrated by the following quote from the suspect interview, where she indicates that rather than respond to a letter by Geoffrey Nice in the New York Times, she chose not to reply because "[she] wanted to keep the "goods" for [her] book."[175]

VI. Sentencing Considerations

87. The Accused's motives were not reprehensible when she wrote the two publications in issue. That noted, her words are ones of public defiance.

88. The two decisions in issue were issued and marked "Confidential" by the Appeals Chamber. Her sources told her that. She believed them, and, despite that, she made a conscious decision to publicly expose them to the world. Brazenly, she even proclaimed in her book that both had actually been issued confidentially by the Chamber.

89. The interests sought to be protected by these two decisions were those of a sovereign state. Mr. Robin Vincent, well experienced in the work of international criminal tribunals, outlined the dangers and potential consequences of this type of activity. He testified that International Tribunals face significant challenges in obtaining co-operation from states to begin with, and if there is a lack of confidence in the tribunal through breaches of protective

[174] See *Guja v. Moldova*, ECtHR Application no. 14277/04), 12 February 2008, para 77 and Haseldine,
[175] Suspect Interview, 22 June 2008, Recording 1004-2, p 12 of 21, lines 21-22.

measures orders "then it's unlikely that the co-operation that tribunal seeks will actually be forthcoming".[176]It is significant to note that his testimony on this point was unchallenged and uncontradicted.

90. When assessing the appropriate penalty for a publication contempt, or any offence, the Statute is clear that the gravity of the offence and the individual circumstances of the convicted person ought to be taken into account.[177] Rule 77(G) provides for a maximum penalty of seven years imprisonment, or a fine not exceeding 100,000 Euros, or both.[178] The Prosecutor immediately concedes, and submits, that anything near the maximum penalty would, on the facts of this case, be manifestly inappropriate. Indeed, for the reasons outlined below, the prosecution takes the position that a term of imprisonment is unjustifiable.

91. Rule 101 describes in a non-exhaustive way some of the factors that shall be taken into account by the Trial Chamber in the event of a finding of guilt. They include any aggravating circumstances, as well as any mitigating circumstances, including substantial co-operation with the Prosecutor. Without in any way being exhaustive, the prosecutor submits that the Chamber can properly take into account the following matters when assessing sentence in the present case:

i. aggravating circumstances:

- there were two separate and distinct contempts, separated by four months;
- the second followed a warning from the Registrar;
- the first, a book, involved a commercial venture in which a financial gain was negotiated and expected by the Accused;
- the Accused had formerly been a senior employee of the Tribunal who knew of Rule 77 of the Tribunal's Rules of Procedure and Evidence;[179]
- scope of the publications was significant: the first was marketed by one of France's largest general publishers;[180] the second was placed on the Internet for the world to see.

[176] Transcript, p. 153, l. 1-11.
[177] Statute of the Tribunal, Article 24(2).
[178] Rules of Procedure and Evidence, Rule 77(G).
[179] Ruxton Submission, p. 4

ii. *Mitigating circumstances*:

- the Accused co-operated during the course of the investigation, and twice made herself available for an interview by the Prosecutor at her then-counsel's office;
- her book was not a success; the initial advance from the publisher outstripped royalties otherwise payable to her (so far);[181]
- her motives were not reprehensible;[182]
- the Accused is the mother of two children, aged 20 and 19; she supports her two children financially; she is not a lawyer, and has no formal legal training;[183]
- While not in evidence, and not the subject of admissions, the prosecutor wishes to say that to the best of his knowledge, the accused has never been charged or convicted of any offence before;
- The Prosecutor also wishes to concede that some of the issues raised as defences to the charges may properly be seen as mitigating circumstances (particularly, though not exclusively, that the procedural history related to the production of evidence and the confidentiality of said evidence that ultimately led to the two Appeals Chambers had been a subject of public discussion before publication of the Accused's book – providing, of course, that the Chamber accepts that evidence, and gives it weight).

92. Factors for consideration during a sentencing process are often in conflict, and this case is no exception. In the circumstances of this case, the prosecutor submits that a monetary sanction would be appropriate, and is justified. The main issue is quantum, and it is to that issue I will now turn.

93. As the Appeals Chamber has noted, the offence of contempt is a protean one. It is concerned with a wide variety of conduct and a correspondingly wide variety of states of mind.[184] In the past decade or so, charges have been laid in connection with: the refusal to appear as a witness; contacting a protected witness; refusal to answer questions; refusal to testify; publishing the identity of a protected witness; harassment and bribery of a witness;

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[180] Transcript, p. 124, l. 10-11.
[181] *Ibid.*,, p. 141-4.
[182] *In the case against Florence Hartmann*, Case IT-02-54-R77.5, Defence Motion Pursuant to Rule 65*ter*, 9 February 2009. p 1571 ("Additional Admissions").
[183] Additional Admissions
[184] *Nobilo* Appeal Judgement, para. 40.

and intimidation of a witness (amongst others). The following submission on quantum will therefore be confined to cases of publication contempt.

94. Omitting one case where a term of imprisonment was imposed in 2006,[185] fines in cases of publication contempt have generally ranged from a low of 7000 Euros to a high of 20,000 Euros:

i. Baton Haxhiu, convicted of publishing the identity of a protected witness (7000 Euros);[186]
ii. Ivica Marijačić, convicted of publishing an article which revealed the identity of a a protected witness and the witness' statement (15,000 Euros);[187]
iii. Markica Rebić, co-accused in case "b", convicted the same day for disclosing the identity of a protected witness and the witness' statement (15,000 Euros);[188]
iv. Josip Jović, convicted of publishing an article revealing confidential testimony and a witness' statement (20,000 Euros).[189]

95. All of these cases involved revealing the identity of protected witnesses or associated information. That conduct could leave the witness in danger. The present case does not involve that. The risk is of a different nature. For the reasons outlined by Robin Vincent in his testimony, the publication of protected State information could lead to the withdrawal of co-operation of the State involved, and potentially other States.[190] His evidence on this point was unchallenged and uncontradicted. This type of conduct could affect the very functioning of the Tribunal, *and future Tribunals*, including the arrest of fugitives, obtaining documents and the interviewing of witnesses.

96. The Prosecutor submits that it is difficult to place these two basic scenarios into some sort of hierarchical structure. Both strike at the very heart of a Tribunal to administer justice.

97. The Prosecutor accepts the testimony of defence witness Louis Joinet when he said that the sentencing process involves at least two separate objectives: punishment and

[185] *Margetić* Trial Judgement.
[186] *Haxhiu* Trial Judgement.
[187] *Marijačić & Rebić* Appeal Judgement.
[188] *Ibid.*
[189] *Jović* Appeal Judgement
[190] Transcript, pp. 152-3.

prevention.[191] The latter consideration (prevention) involves a signal to the offender and other journalists (and aspiring authors) that if you deliberately publish material that breaches a confidence of the Chamber, don't count on profiting from your illegal act[192].

98. Given all of these factors, remembering the principle of proportionality, and taking into account both the mitigating and aggravating factors outlined earlier, the prosecutor submits that a fine in the range of 7000 to 15,000 Euros is appropriate in the circumstances, and is proportionate to the nature of the offence.

VII Conclusions

99. Florence Hartmann, a journalist by profession, on two separate occasions published information in violation of confidential Appeals Chamber decisions delivered in 2005 and 2006. On the first occasion, she conceded in the publication that the decisions were confidential. The second was preceded by a warning from the Tribunal, but she went ahead anyway.

100. Ms. Hartmann had for 6 years been employed in a senior position at the Tribunal. One of her primary tasks in that position had been to look out for and protect confidential information. Given that reality, her conscious decision to publish in knowing violation of judicial orders amounts to a public statement of defiance.

101. During an ensuing investigation, Ms. Hartmann was interviewed and given the opportunity to explain what she had done. She admitted writing both publications, alone, and conceded that she did so with knowledge from her confidential sources that the information was confidential. She contended that the information, or some of it, had already been made public by other journalists who had written on the subject. She admitted, however, that she had not consulted with anyone on her proposed publications, including the Prosecutor and the Registrar.

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[191] *Ibid.*,, pp. 357-360

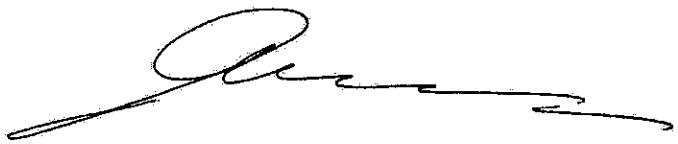
[192] The prosecutor notes the deep-rooted public policy encapsulated in the Latin maxim "*ex turpi causa non oritur actio*" (courts shall not assist an offender in reaping benefits from his or her own wrongdoing). Usually applied in civil contexts, for example to disallow an insurance benefit where the applicant was involved in the death of the diseased, it recently has found application in criminal contexts to disallow an accused from regaining the financial proceeds of his/her own crime: for instance, see: *R v. Mac*, 1995 CanLii 2071; (1995), 97 CCC (3d) 115 (Ont. CA).

102. At trial, Ms. Hartmann raised a series of arguments in her defence – principally, her right to freedom of expression; the information in question was already public; and the applicant for confidentiality in the first place – Serbia – had subsequently waived confidentiality. The evidence does not support any of these contentions. This Tribunal has already ruled that those who choose to ignore valid orders of the Chamber cannot invoke the principle of freedom of expression to excuse their conduct. Second, the fact that some portions of confidential information or testimony may have been disclosed by a third party does not mean that it is no longer protected, that the order of confidentiality has been lifted, or that the breach of confidence will not interfere with the Tribunal's administration of justice. Finally, there is no evidence that an agent of Serbia with a mandate to do so "waived" confidentiality – expressly, or by implication. Indeed, the evidence is quite to the contrary.

103. The evidence overwhelmingly demonstrates that the Accused committed the offences with which she is charged. The prosecutor submits that she should be held accountable for her conduct.

Word Count: 14,463

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Bruce A. MacFarlane, Q.C.
Amicus Curiae Prosecutor

Dated this twenty fifth day of August 2009
in The Hague,
Netherlands

Appendix "A"

REDACTED

REDACTED

REDACTED

Appendix "B"

REDACTED

REDACTED

Appendix "C"

Q. My final question is this: I take it, from what you've said, that you would not want to see the accused convicted.

A. Well, I again have to correct that expression of yours. You say that I would not want to see her convicted. I profoundly believe that there is not a single real reason - I'm referring to the realm of truth and justice - for her to be convicted. In my view, this trial should serve to reconsider -- re-examine the decision -- the adoption of a decision for those transcripts to be at long last disclosed so that we might eliminate all these doubts, dispel all these suspicions, in terms of the evidence about the crimes in Srebrenica and all the other things which happened in 1992 and 1993. For us, the citizens of the countries of the states formed in the territory of the former Yugoslavia, it is very important to actually be confronted with that past. Now, the fact that we do not have the best of authorities, the democratic authorities that we need to have, that is why, inter alia, this issue is so important. We need to stop supporting something which still belongs to the old authorities, which is the ownership of Milosevic's regime. I believe it is very important for us not to have any secret in respect of that state, in respect of Milosevic, that we stop creating myths and compel today's authorities to act in accordance with facts, no matter how embarrassing, how difficult, those facts might be. But what Milosevic's state did is something that we need to know the truth about.

Q. Ms. Kandic, based on what you've said, I suggest that you perceive these proceedings as a vehicle to achieve your agenda and your objective, and that is the disclosure of the documents. Is that accurate?

A. I avail myself of every opportunity to say that we should not have secrets, that we should exert pressure on the authorities for them to renounce that tool of theirs, that of manipulating and of hiding. We need guarantees that there will be no more crimes, and one of such guarantees is that what has been declared a secret should be disclosed. Now, the fact that you are interpreting this in this way, namely, you keep accusing me that I'm some sort of an orator, a politician, that I'm using this for promoting my personal objectives, I have no personal objectives. All my objectives are based on what I have learned since the beginning of this war, which is that the truth and facts are the most important of all. Please, I have no private objectives. I have no power. I am just a mere human rights activist who has learned, after all these years -- who has come to understand the facts. The disclosure of facts can be of the greatest assistance to us. I live there. You don't live there. I want our future to be brighter. I want us to force these authorities to make available to us all facts concerning the past. I want them to tell us the facts, to tell us where the graves are, mass graves are, to show us the transcripts of this army. The army is not innocent at all. The generals are at large, and thousands of people have been killed. I want us to actually lift the veil of mystery from the police and from the army and to give priority to what is professional, and nothing is professional if documents are hidden behind it.