UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-02-54-R77.5
	Date:	14 September 2009
	Original:	English

IN A SPECIALLY APPOINTED CHAMBER

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

Registrar: **Mr. John Hocking**

Judgement of: **14 September 2009**

IN THE CASE

AGAINST

FLORENCE HARTMANN

PUBLIC

JUDGEMENT ON ALLEGATIONS OF CONTEMPT

***Amicus Curiae* Prosecutor**

Mr. Bruce MacFarlane, QC

Counsel for the Accused

Mr. Karim A. A. Khan, Counsel
Mr. Guénaël Mettraux, Co-Counsel

I. INTRODUCTION **3**

II. PROCEDURAL HISTORY **4**

III. APPLICABLE LAW **6**

IV. EVALUATION OF EVIDENCE **8**

V. PRELIMINARY OBSERVATIONS **8**

VI. DISCLOSURE OF INFORMATION IN VIOLATION OF AN ORDER **10**

A. *ACTUS REUS* 10
1. Scope of the Underlying Charges 10
2. *Actus Contrarius* 13
3. Waiver of Confidentiality of Protective Measures by Applicant 14
4. Conclusion 16
B. *MENS REA* 17
1. Requirement of Specific Intent 18
2. How the Accused Acquired the Confidential Information 19
3. References to the Confidentiality of the Appeals Chamber Decisions and Contextual Information Relevant to *Mens Rea* 20
4. Letter from the Registrar 20
5. Conclusion 21
C. MISTAKE OF FACT AND MISTAKE OF LAW 21
D. FREEDOM OF EXPRESSION 23

VII. SENTENCE **26**

A. SENTENCING LAW AND PURPOSE 26
B. GRAVITY OF THE OFFENCE 26
C. AGGRAVATING AND MITIGATING CIRCUMSTANCES 28
D. PUNISHMENT TO BE IMPOSED 29

VIII. DISPOSITION **30**

IX. ANNEX **32**

1. ICTY 32
2. ICTR 33
3. Special Court for Sierra Leone 33
4. European Court of Human Rights 33
5. International Agreements 33

I. INTRODUCTION

1. Florence Hartmann (the "Accused") was born in 1963 in France. From October 2000 onwards, she served as the spokesperson for the former Prosecutor of the Tribunal,[1] Carla del Ponte, a term that came to an end on 3 April 2006.[2] Her employment with the Tribunal ended in October of 2006.[3] At the time relevant to the Order In Lieu of Indictment, she worked as a journalist, a position which she currently retains.[4]

2. The Order in Lieu of Indictment charges the Accused with two counts of contempt punishable under Rule 77(A)(ii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), for knowingly and wilfully interfering with the administration of justice by disclosing information in knowing violation of two decisions of the Appeals Chamber ordered to be filed confidentially in the case of *Prosecutor v Slobodan Milošević*:

> (a) A decision on the request for review of the Trial Chamber's oral decision of 18 July 2005 (IT-02-54-AR108*bis*.2), filed 20 September 2005; and
>
> (b) A decision on the request for review of the Trial Chamber's decision of 6 December 2005 (IT-02-54-AR108*bis*.3), filed 6 April 2006.

3. Count 1 alleges that on 10 September 2007, a book entitled *Paix et Châtiment* (the "Book"), authored by the Accused, was published by *Flammarion,* a French publishing house.[5] It alleges that pages 120-122 of the Book disclose information related to the two Appeals Chamber decisions referred to above (the "Appeals Chamber Decisions"), including the contents, purported effect, and confidential nature of these decisions.[6]

4. Count 2 alleges that on 21 January 2008, an article authored for publication by the Accused entitled "Vital Genocide Documents Concealed" (the "Article") was published by the *Bosnian Institute.* The Article allegedly discloses information relating to the Appeals Chamber Decisions, including the contents, purported effect, and confidential nature of these decisions.[7]

---

[1] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (the "Tribunal").
[2] Prosecution's Statement of Admission of the Parties and Matters Not in Dispute, 6 February 2009 ("First Set of Agreed Facts"); Defence Motion Pursuant to Rule 65*ter*, 9 February 2009 ("Second Set of Agreed Facts"), Annex, p. 1.
[3] First Set of Agreed Facts.
[4] Second Set of Agreed Facts, Annex, p. 1
[5] The Book was published in the French language.
[6] Order in Lieu of an Indictment on Contempt, 27 August 2008, Annex, para. 2.
[7] Order in Lieu of an Indictment, Annex, para. 3.

5. With respect to knowledge, both counts allege that the Accused knew that (i) the information she published in the Book and Article was confidential at the time the disclosure was made; (ii) the Appeals Chamber Decisions from which the information was drawn were filed confidentially; and (iii) by her disclosure she was revealing confidential information to the public.

II. PROCEDURAL HISTORY

6. On 23 January 2008, the President assigned Judge Carmel Agius (Presiding), Judge Alphons Orie and Judge Christine Van den Wyngaert to the bench in this case.[8] On 1 February 2008, this Specially Appointed Trial Chamber (the "Chamber") ordered the Registrar to appoint an *amicus curiae* investigator to investigate the matter.[9]

7. By a decision of 5 March 2008, the Deputy Registrar assigned Mr. Bruce MacFarlane, QC, as *amicus curiae* investigator in this case.[10] The *amicus curiae* investigator submitted his report to the Chamber on 12 June 2008.

8. On 27 August 2008, the Chamber issued an Order in Lieu of an Indictment against the Accused. An amended Order in Lieu of an Indictment was filed on 27 October 2008, incorporating minor technical changes into the text of the initial order and becoming the operative Order in Lieu of Indictment in this case (the "Indictment").[11]

9. On 1 September 2008, the Deputy Registrar assigned Mr. MacFarlane as *amicus curiae* prosecutor (the "Prosecution") in this case.[12]

10. On 23 September 2008, Mr. William Bourdon was assigned as counsel for the Accused.[13]

11. On 19 December 2008, the Deputy Registrar replaced Mr. Bourdon with Mr. Karim A. A. Khan.[14] On 22 January 2009, Mr. Guénaël Mettraux was assigned as co-counsel for the Accused (collectively, "Defence").[15]

12. On 28 January 2009, the President of the Tribunal issued an order assigning Judge Bakone Justice Moloto to the Chamber in replacement of Judge Van den Wyngaert.[16]

---

[8] Order Assigning Judges to a Contempt Matter, filed on 23 January 2008 (confidential).
[9] Order to the Registrar to Appoint an *Amicus Curiae* to Investigate a Contempt Matter, filed on 1 February 2008 (confidential).
[10] Decision by the Deputy Registrar, 5 March 2008 (confidential).
[11] Amended Order in Lieu of an Indictment on Contempt; *see* Decision on Motion to Amend the Order in Lieu of an Indictment on Contempt, 27 October 2008.
[12] Decision by the Deputy Registrar on Assignment of *Amicus Curiae*, 1 September 2008 (Exhibit P5).
[13] Decision by the Deputy Registrar, 23 September 2008.
[14] Decision by the Deputy Registrar, 19 December 2008.
[15] Decision by the Acting Registrar of 22 January 2009, filed on 23 January 2009.

13. The Accused made her initial appearance before the Chamber on 27 October 2008,[17] at which time she deferred her entry of pleas to a later stage. At the further appearance of the Accused held on 14 November 2008,[18] she again declined to enter a plea. A plea of not guilty to each count in the Indictment was entered on her behalf by the Presiding Judge in accordance with Rule 62(A)(iv) of the Rules.

14. On 8 and 15 January 2009 respectively, the Prosecution and Defence filed their Pre-Trial Briefs.[19] The Trial was scheduled for 5 and 6 February 2009.[20] Throughout the course of January 2009, the Defence filed a series of motions, *inter alia*: challenging the legitimacy of appointment and impartiality of the *amicus curiae* prosecutor;[21] requesting the Chamber to reconsider its decision to initiate contempt proceedings against the Accused;[22] and moving for the disqualification of two Judges of the Chamber—Judge Agius and Judge Orie—as well as the Chamber's Senior Legal Officer.[23] The Chamber ordered the postponement of trial *sine die* until such time as the Motion for Disqualification was disposed of.[24]

15. On 18 February 2009, the President appointed a panel of three Judges pursuant to Rule 15(B)(ii) of the Rules to report to him on the merits of the Motion for Disqualification.[25] The panel consisted of Judge O-Gon Kwon (Presiding), Judge Iain Bonomy and Judge Christoph Flügge. In its report filed on 25 March 2009,[26] the Panel concluded—Judge Bonomy dissenting—that notwithstanding the absence of actual bias, the continued assignment of two Judges involved in the investigative phase of the proceedings created an appearance of bias.[27] The motion with respect to the Senior Legal Officer was denied.[28]

---

[16] Order Replacing a Judge, 28 January 2009.
[17] Initially, the Accused had been summoned to appear for her initial appearance on 15 September 2008. At the request of the Defence, the Chamber postponed the date of her initial appearance first to 13 October 2008, and then to 27 October 2008, *see* Scheduling Order for Initial Appearance, 26 September 2008.
[18] Scheduling Order for Further Appearance of the Accused, 30 October 2008.
[19] Prosecutor's Pre-Trial Brief Pursuant to Rule 65*ter*(E), 8 January 2009 ("Prosecution Pre-Trial Brief"); Pre-Trial Brief of Florence Hartmann, 15 January 2009 ("Defence Pre-Trial Brief").
[20] Scheduling Order for Commencement of Trial, 28 November 2008.
[21] Motion for Voir-Dire Hearing and for Termination of Mandate of the *Amicus* Prosecutor, filed both confidentially and publicly on 9 January 2009 and Motion for Stay of Proceedings for Abuse of Process, filed both confidentially and publicly on 23 January 2009.
[22] Motion for Reconsideration, filed confidentially on 14 January 2009 and publicly on 16 January 2009 ("Motion for Reconsideration").
[23] Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer in Charge of the Case, filed confidentially on 3 February and publicly on 6 February 2009 ("Motion for Disqualification"). The Motion for Disqualification was limited to two Judges on the bench as one of the Judges had been replaced prior to the Motion being filed, *see supra,* para. 12.
[24] Order Postponing Commencement of Trial, 3 February 2009.
[25] Decision on Motion for Disqualification, 18 February 2009, p. 2.
[26] Report of Decision on Defence Motion for Disqualification of two Members of the Trial Chamber and of Senior Legal Officer, filed confidentially on 25 March 2009 and publicly on 27 March 2009 ("Report").
[27] Report, para. 53.
[28] Report, paras 54-55.

16. By the President's Order of 2 April 2009, Judge Mehmet Güney and Judge Liu Daqun were assigned to the Chamber to replace Judge Agius and Judge Orie.[29] Judge Moloto was subsequently elected by the Chamber to preside at trial.

17. The parties submitted two sets of agreed facts prior to the trial.[30] The trial was held on 15, 16 and 17 June 2009 and concluded on 1 July 2009. The Prosecution and Defence each called two *viva voce* witnesses.[31] A joint submission was made with respect to the statement of a third Prosecution witness.[32] 11 Prosecution exhibits and 67 Defence exhibits were admitted into evidence.[33] The parties submitted their Final Briefs on 2 July 2009.[34] Final arguments were heard on 3 July 2009.[35]

III. APPLICABLE LAW

18. It has been firmly established by jurisprudence that the Tribunal possesses inherent jurisdiction to prosecute the crime of contempt.[36] The crime of contempt punishes conduct which obstructs, prejudices or abuses the administration of justice, in order to ensure that the Tribunal's exercise of jurisdiction over crimes expressly provided for in the Statute of the Tribunal (the "Statute") is not frustrated, and that its basic judicial functions are safeguarded.[37] This power is designed to protect the integrity of the proceedings and to preserve respect for justice.[38] Pursuant to Rule 77 of the Rules, those who knowingly and wilfully interfere with the Tribunal's administration of justice may therefore be held in contempt.[39]

19. Rule 77(A) of the Rules provides a non-exhaustive[40] list of contemptuous acts:

---

[29] Order Replacing Judges in a Case Before a Specially Appointed Chamber, 2 April 2009.
[30] First Set of Agreed Facts; Second Set of Agreed Facts.
[31] Prosecution witnesses: Yorric Kermarrec (T. 132-149) and Robin Vincent (T. 150-200); Defence witnesses: Louis Joinet (T. 236-379) and Nataša Kandić (T. 380-499).
[32] Joint Admission [*sic*] by the Parties on the Evidence of Mr. Gavin Ruxton of 9 June 2009, filed on 10 June 2009 ("Agreed Statement of Gavin Ruxton").
[33] Prosecution Exhibits: P1-P11; Defence Exhibits: D1-D67.
[34] Prosecutor's Final Brief, filed confidentially 2 July 2009 and publicly on 25 August 2009 ("Prosecution Final Brief"); Final Brief of Florence Hartmann, filed both confidentially and publicly on 2 July 2009 ("Defence Final Brief") along with a public Book of Authorities.
[35] Prosecution Closing Arguments, 3 July 2009, T. 515-530; Defence Closing Arguments, 3 July 2009, T. 530-556.
[36] *Vujin* Appeal Judgement, paras 13 and 18; *Nobilo* Appeal Judgement, para. 30; *Marijačić and Rebić* Appeal Judgement, paras 23-24; *Jović* Trial Judgement, para. 11; *Margetić* Trial Judgement, para. 13; *Haxhiu* Trial Judgement, para. 9; *Haraqija and Morina* Trial Judgement,, para. 16; *Jokić* Trial Judgement, para. 9.
[37] *Vujin* Appeal Judgement, paras 13 and 18; *Nobilo* Appeal Judgement, paras 30 and 36; *Beqaj* Trial Judgement, para. 9, *see* also paras 10-13; *Marijačić and Rebić* Trial Judgement, para. 13; *Margetić* Trial Judgement para. 34; *Haxhiu* Trial Judgement, para. 9; *Haraqija and Morina* Trial Judgement, para. 16; *Jokić* Trial Judgement, para. 9.
[38] *Jović* Trial Judgement, fn. 46. *See* also *Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.
[39] *See* Rule 77 of the Rules; *Marijačić and Rebić* Trial Judgement, para. 13.
[40] *Nobilo* Appeal Judgement, para. 39; *Margetić* Trial Judgement, para. 13.

> The 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
>
> (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
>
> (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
>
> (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
>
> (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
>
> (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

20. In the present case, the Accused has been charged with contempt under Rule 77(A)(ii) of the Rules. The *actus reus* of this form of contempt is the physical act of disclosure of information relating to proceedings before the Tribunal, where such disclosure breaches an order of a Chamber.[41] Disclosure is to be understood as the revelation of information that was previously confidential to a third party or to the public.[42] This includes information of which the confidential status has not been lifted.[43]

21. To satisfy the *actus reus* of contempt as articulated in Rule 77(A)(ii) of the Rules, an order by a Trial (or Appeals) Chamber, whether oral or written, must be objectively breached.[44] Where such a breach has occurred, it is not necessary to prove actual interference with the Tribunal's administration of justice.[45] The Appeals Chamber has held that "a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice".[46]

22. The *mens rea* required for this particular form of contempt is the disclosure of particular information in knowing violation of a Chamber's order.[47] Generally, it is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental.[48] This may be inferred from circumstantial evidence.[49] Where it is established that an accused had knowledge of

---

[41] *See* Rule 77 (A)(ii) of the Rules. *See* also *Marijačić and Rebić* Appeal Judgement, para. 24; *Jović* Appeal Judgement, para. 30.
[42] *Marijačić and Rebić* Trial Judgement, para. 17; *Haxhiu* Trial Judgement, para. 10.
[43] *Haxhiu* Trial Judgement, para. 10.
[44] *Marijačić and Rebić* Trial Judgement, para. 17; *Haxhiu* Trial Judgement, para. 10.
[45] *Jović* Appeal Judgement, para. 30; *Marijačić and Rebić* Trial Judgement, para. 19; *Haxhiu* Trial Judgement, para. 10.
[46] *Jović* Appeal Judgement, para. 30 (emphasis in original). *See* also *Marijačić and Rebić* Appeal Judgement, para. 44.
[47] Rule 77 (A)(ii) of the Rules; *Marijačić and Rebić* Trial Judgement, para. 18; *Jović* Trial Judgement, para. 20; *Haxhiu* Trial Judgement, para. 11.
[48] *Nobilo* Appeal Judgement, para. 54; *Prosecutor v. Radoslav Brdanin,* Concerning Allegations Against Milka Maglov – Decision on Motion for Acquittal Pursuant to Rule 98bis, IT-99-36-R77, 19 March 2004 ("*Maglov* Rule 98*bis* Decision"), para. 40.
[49] *Marijačić and Rebić* Trial Judgement, para. 18; *Margetić* Trial Judgement, para. 37.

the existence of a Court order, a finding of intent to violate the order will almost necessarily follow.[50] Wilful blindness to the existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element.[51] Mere negligence in failing to ascertain whether an order had been made is insufficient.[52]

IV. EVALUATION OF EVIDENCE

23. The Chamber notes that the parties have had ample opportunity, both in their Final Briefs and their Closing Arguments, to identify and substantiate the submissions in support of their respective cases. In making its findings, the Chamber has relied upon those arguments by the parties that it considers relevant to the issues which are the subject of the specific charges against the Accused. It has not discussed a number of arguments that it considers to be wholly lacking in merit.[53] It is the discretion of the Trial Chamber as to which legal arguments to address, and, "[w]ith regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record."[54] While not all submissions by the parties are expressly referred to in this Judgement, the Chamber emphasises that it has taken into account the entirety of the evidence adduced at trial and has given due regard to all submissions.

V. PRELIMINARY OBSERVATIONS

24. The Defence submits that the Accused's conduct falls outside the scope of Rule 77 of the Rules and advances three arguments in support of this contention. First, the Defence claims that on the facts, the allegations were not serious enough to support the initiation of criminal proceedings

[50] *Nobilo* Appeal Judgement, para. 54; *Maglov* Rule 98*bis* Decision, para. 40.
[51] *Nobilo* Appeal Judgement, paras 45 and 54. The Chamber notes that the *Nobilo* Appeals Chamber made no finding as to whether reckless indifference to the existence of an order satisfies the *mens rea* for contempt, stating that this question "can be left to the cases in which they arise for determination" (*see* para. 45). The Chamber further notes that the *Nobilo* Appeals Chamber conceded that "[t]here may, however, be cases where [an accused] acted with reckless indifference as to whether his act was in violation of the order. In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order." *See Nobilo* Appeal Judgement para. 54 (internal citations omitted). *See* also *Maglov* Rule 98*bis* Decision, para. 40. *Cf. Haxhiu* Trial Judgement, para. 11.
[52] *Nobilo* Appeal Judgement, para. 45; *Haxhiu* Trial Judgement, para. 11.
[53] The Defence argument of selective prosecution, for example, finds no basis in either fact or law (*see* Defence Pre-Trial Brief, para. 19 and Defence Final Brief, paras 14 and 38). In this respect, the Chamber finds that evidence that other persons may have committed similar acts to those alleged in the Indictment is irrelevant to the case at hand, as it does not prove or disprove any of the charges against the Accused.
[54] *Kvočka et al.* Appeal Judgement, para. 23; *see* also *Čelebići* Appeal Judgement, para. 498; *Brdanin* Appeal Judgement, para. 11; *Beqaj* Trial Judgement, para. 6.

pursuant to Rule 77 of the Rules.[55] It argues, *inter alia,* that the disclosed information does not relate to a witness, that the content of the underlying materials subject to protective measures has not been disclosed, and that the proceedings to which the disclosure pertains have terminated.[56]

25. The Chamber recalls Rule 77 provides that the Tribunal "may hold in contempt those who knowingly and wilfully interfere with the administration of justice". Consequently, any knowing and wilful conduct which interferes with the administration of justice may properly be tried as contempt. The Chamber considers that submissions pertaining to the degree of seriousness are more appropriately considered as mitigating or aggravating factors in the sentencing phase of proceedings.

26. Second, the Defence submits that unless the conduct of the Accused created a "real risk" for the administration of justice, the Tribunal has no jurisdiction to proceed under Rule 77.[57] In support, the Defence relies on the *Marijačić and Rebić* and the *Margetić* Trial Judgements which provide "[a]ny deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice."[58]

27. The Chamber considers that the authorities relied upon by the Defence refer to the elements of contempt rather than the preliminary legal question of jurisdiction. The risk posed to the administration of justice in this particular case is considered in both Sections VI.D. and VII.B. below, in the discussion relating to the freedom of expression as well as the gravity of the offence.

28. Third, the Defence claims that the criminalisation of the Accused's conduct would violate her fundamental human rights, and thus be *ultra vires* the statutory powers and jurisdiction of the Tribunal.[59] The Chamber will discuss this Defence submission in greater detail in VI.D. of this Judgement.

[55] Defence Pre-Trial Brief, para. 71; Defence Final Brief, paras 50-52, 160-166.
[56] Defence Pre-Trial Brief, para. 71; Defence Final Brief, paras 51 and 166 (referring to submissions made in para. 157 pertaining to the test of "proportionality" in the context of the freedom of expression).
[57] Defence Final Brief, paras 55, 59 and 62-65; Defence Closing Arguments, 3 July 2009, T. 551-553. The Chamber notes that this argument is also framed as one relating to the lack of *actus reus* in this case (*see* paras 67-70 of Defence Final Brief). The Chamber considers the argument more properly disposed of as one of jurisdiction, and therefore considers it unnecessary to further address it in the Section of this Judgement relating to *actus reus.*
[58] Defence Final Brief, para. 55, fn. 77 referring to the *Marijačić and Rebić* Trial Judgement, para. 50 and the *Margetić* Trial Judgement, para. 15. The Chamber notes that while the Trial Chamber in *Marijačić and Rebić* used the word "serious" to describe the interference with the administration of justice, the Trial Chamber in *Margetić* did not.
[59] Defence Final Brief, para. 124. *See* also paras 125-128 and 144-146.

VI. DISCLOSURE OF INFORMATION IN VIOLATION OF AN ORDER

A. *Actus Reus*

29. The Prosecution submits that it is clear from the evidence that the Accused is the sole author of both the Book and the Article, the latter—according to her own statement—being an English summary of relevant parts of her Book.[60] The Prosecution submits that in her Book, the Accused makes express reference to the existence of the confidential Appeals Chamber Decisions, their contents and their purported effect.[61] Four months later, it submits, the Accused authored the Article in which she again discussed the contents and purported effect of these same Decisions, however this time no mention was made of the fact that they were confidential.[62] The Prosecution contends that the Appeals Chamber Decisions were ordered by the Appeals Chamber to be filed confidentially and contained information that was confidential, notably extensive quotes from closed session transcripts.[63] Further, the Prosecution submits, the motions which gave rise to each of the two Appeals Chamber Decisions were filed confidentially.[64] The Prosecution asserts that the confidential status of the Appeals Chamber Decisions could only be lifted by a Chamber. Since no Chamber has to date lifted the confidentiality, the Prosecution submits that the information disclosed by the Accused at the time of the publication of the Book and Article was protected by confidentiality.[65] On this basis, the Prosecution submits that the *actus reus* of contempt of each count (the Book and the Article) has been established.

1. Scope of the Underlying Charges

30. The Defence submits that the Indictment charges the Accused with the disclosure of only four facts, namely (i) the existence and date of the Appeals Chamber Decisions; (ii) the confidential character of the Appeals Chamber Decisions; (iii) the identity of the applicant for protective measures (the "Applicant"); and (iv) the fact that the protective measures requested by the Applicant were granted in relation to specific underlying documents (collectively, the "Four Facts").[66] It also asserts that the Indictment does not charge the Accused with the disclosure of the

[60] Prosecution Final Brief, paras 19, 21; Prosecution Closing Arguments, 3 July 2009, T 518-519.
[61] Prosecution Final Brief, para. 20; Prosecution Closing Arguments, 3 July 2009, T. 518.
[62] Prosecution Final Brief, paras 21-22; Prosecution Closing Arguments, T. 520, 523.
[63] Prosecution Final Brief, para. 16.
[64] Prosecution Pre-Trial Brief, para. 21; Prosecution Final Brief, para. 16.
[65] Prosecution Pre-Trial Brief, para. 21; Prosecution Final Brief, para. 17.
[66] Defence Pre-Trial Brief, para. 9; Defence Opening Statement, 15 June 2009, T. 124; Defence Final Brief, para. 1.

legal reasoning contained in the Appeals Chamber Decisions.[67] It contends that the Defence understanding in this respect did not meet with any objection by the Prosecution.[68]

31. The Defence further submits that the Appeals Chamber Decisions only protect the underlying documents for which the Applicant sought protection, and not the Four Facts or the legal reasoning of the Appeals Chamber.[69] It argues that in all other contempt cases before the Tribunal, the accused were charged with disclosing information for which protected measures had been sought and ordered. It avers that there is no precedent in international law and no valid legal basis in the Rules that authorises a Trial Chamber to punish as contempt the disclosure of any extraneous information, such as in this case, the legal reasoning of the Appeals Chamber in reaching its decisions.[70] In this regard, the Defence relies on Rule 54*bis* of the Rules which it claims provides a legal basis to order protective measures only to "documents or information".[71]

32. The Chamber is of the view that the wording of the Indictment is clear and unequivocal: the Accused is charged with disclosing information related to the Appeals Chamber Decisions "including the content and purported effect of these decisions, as well as specific reference to the confidential nature of these decisions".[72] The Chamber finds that there is no merit in the interpretation of the Indictment by the Defence that the Accused is only charged with having disclosed Four Facts. Nothing in the text of the Indictment gives rise to the unreasonably restrictive interpretation of the charges as advanced by the Defence. The Defence cannot validly claim that its understanding of the Indictment met with no objection by the Prosecution.[73] While the Prosecution has no duty to state whether it agrees with the Defence's interpretation of the indictment, the Chamber recalls, notably, that on 2 February 2009, the Prosecution submitted a statement clearly

[67] Defence Pre-Trial Brief, para. 10; Defence Final Brief, paras 8, 9, fn. 16.
[68] Defence Final Brief, paras 8, fn. 14. *See* also Defence Closing Arguments, 3 July 2009, T. 534.
[69] Defence Final Brief, paras 3-4, 6. *See* also Defence Closing Arguments, T. 535-536.
[70] Defence Final Brief, para. 5.
[71] Defence Final Brief, para. 9, fn. 16.
[72] Indictment, Annex, para. 2.
[73] The Chamber notes in this regard the Defence submission during the Status Conference held on 30 January 2009, that as a result of its understanding of the Indictment being limited to the Four Facts as defined in its Motion for Consideration filed on 14 January 2009, it had a "legitimate expectation" that its understanding of the Indictment was correct, because the Prosecution in its Response to the Motion for Consideration did not take issue with this understanding (Status Conference, 30 January 2009, T. 54-55). However, the "Prosecution's Response to Defence Motion for Reconsideration", filed 19 January 2009, submits generally that the arguments set out in the Motion for Reconsideration are "an attempt to refute the Prosecution's showing that the Accused committed the *actus reus,* and possessed the *mens rea*" for contempt (para. 6). Further, the Prosecution's Pre-Trial Brief, and therefore the understanding by the Prosecution of the Indictment, was filed a week before the Defence Motion for Reconsideration and its own Pre-Trial Brief, setting out clearly what it believed to be the scope of the Indictment (*see* paras 18, 19 and 21 specifically).

setting out its understanding of the Indictment. It recognised therein that the scope of the charges contained in the Indictment was a point of disagreement between the parties.[74]

33. Moreover, having reviewed the Book and the Article in detail, the Chamber is satisfied that the Accused disclosed more information than the Four Facts identified by the Defence. With respect to the first of the Appeals Chamber Decisions (of 20 September 2005), it is clear from a careful reading of the relevant passages in the Book that the information contained therein relates both to the content of closed session transcripts of the Applicant's submissions in that case, as well as references to the legal reasoning applied by the Appeals Chamber in the determination of its disposition.[75] With respect to the second of the Appeals Chamber Decisions (of 6 April 2006), the Accused refers in her Book to confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision as well as to its purported effect.[76] The Article likewise contains references to the contents, *i.e.* the legal reasoning applied by the Appeals Chamber in reaching its disposition, as well as the purported effect of both Appeals Chamber Decisions.[77]

34. With respect to the Defence submission that there is no valid basis authorising the Chamber to punish the disclosure of the legal reasoning of the Appeals Chamber, the Chamber further notes that Rule 77 of the Rules does not distinguish between categories of information the disclosure of which may constitute the *actus reus* of contempt. It considers the Defence reliance on Rule 54*bis* of the Rules to be unfounded. Rule 54*bis* provides the legal basis for a Chamber to adopt protective measures not only *strictu sensu* in relation to documents or information provided by a state but also to the proceedings where such documents and information are discussed or analysed.[78]

35. Furthermore, legal reasoning by its very nature requires the application of the law to the facts, and therefore requires the whole reasoning to be protected. The law is public while the facts often are not. The application of the law to the facts is confidential by virtue of the mix of the two. Exclusion of legal reasoning from the realm of protection by confidentiality would compromise confidential party submissions fundamental to the Chamber's legal reasoning. In this particular

[74] Statement of *Amicus Curiae* Prosecutor Concerning an Issue Raised by the Chamber During 30 January 2009 Status Conference, 2 February 2009, paras 4-5.
[75] Exhibit P3.1, p. 2056, first paragraph includes the content of parties' submissions made in closed session as cited in the text of the 5 September 2005 Appeals Chamber Decision (Exhibit P6) at para. 4; pp. 2055 and 2056 include on several occasions the content of the legal reasoning of the Appeals Chamber Decision of 5 September 2005 (Exhibit P6).
[76] Exhibit P3.1, p. 2055, second paragraph includes reference to confidential Prosecution submissions as set out in para. 7 of Appeals Chamber Decision of 6 April 2006 (Exhibit P7).
[77] Exhibit P4, *see* specifically, p. 1 second to last paragraph, as well as p. 2, paras 5, 6 and 9, revealing contents and purported effect of the Appeals Chamber Decisions (Exhibits P6 and P7).

case, the Chamber recalls that submissions discussed in the Appeals Chamber Decisions were filed confidentially by the parties. In addition, the Appeals Chamber Decisions also contain quotes from closed session proceedings. While the Accused is not charged with the disclosure of the contents of the confidential documents underlying the Appeals Chamber Decisions, this does not negate the *actus reus* of contempt for disclosing other confidential information contained in the text of the Appeals Chamber Decisions themselves.

2. *Actus Contrarius*

36. The Defence submits that the Tribunal itself made the Four Facts public.[79] It submits that Tribunal jurisprudence is replete with examples of public references to confidential decisions, revealing the existence, title and the "jurisprudence" of a decision.[80] The Defence claims that the Tribunal may decide to lift the confidential status of decisions in whole or in part not only by formal order but also by an *actus contrarius,* submitting that this has occurred with respect to the Appeals Chamber Decisions.[81] As a result, the Defence submits, "the facts in question"[82] could no longer have been considered confidential at the time the Accused published the Book and the Article.[83]

37. In response, the Prosecution submits that the disclosure of the title of decisions by a Chamber does not qualify as an explicit *actus contrarius.*[84]

38. The Chamber has reviewed the alleged acts of *actus contrarius* raised by the Defence.[85] The Chamber considers that decisions containing mere references to confidential decisions are not required to be filed confidentially.[86] According to Prosecution witness Robin Vincent, then Registrar of the Special Tribunal for Lebanon, the confidentiality of a judicial decision does not

[78] *See* for instance Rule 54*bis* (F)(ii) of the Rules, which provides that a state may request a Judge or Trial Chamber to direct appropriate protective measures be made for hearing its objection pursuant to Rule 54*bis* (D), by, *inter alia,* hearing the objections of a state in camera and *ex parte* or order that no transcripts be made of the Rule 54*bis* hearing.
[79] Defence Pre-Trial Brief, paras 14-16, 23-25; Defence Final Brief, paras 18-32.
[80] Defence Closing Arguments, 3 July 2009, T. 542. *See* also Defence Opening Statements, 15 June 2009, T. 125. The Chamber notes that it is the position of the Defence that "[t]he existence of cases are [*sic*] part of the jurisprudence of the Court" *see* Defence Opening Statements, 15 June 2009, T. 169.
[81] Defence Opening Statements, 15 June 2009, T. 125-126; Defence Final Brief, para. 21; Defence Closing Arguments, 3 July 2009, T. 536.
[82] Defence Pre-Trial Brief, para. 25.
[83] Defence Pre-Trial Brief, paras 24, 25; Defence Final Brief, para. 30.
[84] Prosecution Final Brief, para. 17, fn. 46.
[85] *See* Exhibits D21, D23, D58, D59, D60 and testimony of Robin Vincent, 15 June 2009, T. 165-179, 182-189. The Chamber notes that Exhibits D24 and D62, referred to by the Defence in support of a waiver of confidentiality of the Tribunal, pre-date the Appeals Chamber Decisions and therefore cannot logically qualify as *acti contrarii* lifting the confidentiality of these Decisions.
[86] Second Decision on Redaction of Prosecution Exhibit and Related Defence Requests, 3 July 2009 (confidential), p. 3. The Chamber accepts that there are specific examples where it is not preferable, however, to provide the full or exact title of a specific decision, if by doing so sensitive information may be released to the public.

protect against disclosure of the existence of that decision but rather its contents.[87] Mr. Vincent also testified that there is nothing unusual about the practice of courts referring to the existence of confidential decisions in their public filings, explaining that such reference in public filings is a matter of judicial discretion.[88]

39. The Chamber considers that the citation of applicable law contained in the Appeals Chamber Decisions must be distinguished from the reference to the legal reasoning contained in those decisions. Reference to applicable law does not divulge confidential information, and citing the law of another Chamber contributes to the uniformity of the application and the development of Tribunal jurisprudence.

40. The Chamber accordingly finds that neither the Tribunal's public references to the existence of the Appeals Chamber Decisions, nor its references to the law contained in the Appeals Chamber Decisions amounted to an *actus contrarius* by the Tribunal lifting the confidentiality of the said Decisions in the absence of an order.

3. Waiver of Confidentiality of Protective Measures by Applicant

41. The Defence further submits that the Applicant publicly disclosed the Four Facts and in doing so, waived any interest in the continued confidentiality of matters subject to the Appeals Chamber Decisions.[89] The Defence argues that this disclosure occurred through state officials associated with the Applicant acting in their official capacity.[90] Further, the Defence claims that there is no evidence that the Applicant viewed the Book or the Article as undermining the confidentiality of the Appeals Chamber Decisions.[91] It submits that "[i]t is not for the Tribunal to enforce confidentiality of certain facts" which were "effectively publically [*sic*] disclosed" by a person or Government that sought the confidentiality in the first place.[92] In support, the Defence draws a comparison to cases in which the prosecution had requested and was granted protective measures by a Chamber for an indictment, but then publicly disclosed it prior to the Chamber lifting its order of confidentiality.[93]

42. According to the Prosecution, irrespective of public commentary by persons associated with the Applicant or public discussion and media-speculation concerning the existence and the effect of

[87] Robin Vincent, 15 June 2009, T. 199-200.
[88] Robin Vincent, 15 June 2009, T. 166-167. The witness explained that he has come across situations where a Chamber made reference to a confidential decision in a public filing, but that he is also aware of a Chamber having avoided such a reference, "for some particular reason".
[89] Defence Pre-Trial Brief, paras 27-29; Defence Final Brief, para. 39.
[90] Defence Final Brief, para. 39, fn. 58.
[91] Defence Closing Arguments, 3 July 2009, T. 533.
[92] Defence Final Brief, para. 35.

the Appeals Chamber Decisions, the confidentiality of those decisions remains effective unless and until set aside or varied by the Chamber.[94] Citing the Appeals Chamber in *Marijačić and Rebić* and *Jović*, it submits that the case law of the Tribunal supports this position.[95] The Prosecution argues that an applicant for protective measures cannot, as a matter of law, unilaterally rescind a decision of the Chamber ordering such measures, and asserts that this argument must fail in any event because the evidence in this case does not demonstrate the existence of a waiver of confidentiality by the Applicant.[96]

43. The Chamber recalls the *Marijačić and Rebić* Appeals Chamber finding that "[a] court order remains in force until a Chamber decides otherwise".[97] In that case the Appeals Chamber determined that although the reason for the Closed Session Order subject to the charges in that case no longer existed, the legal rationale that the protected information should remain protected until confidentiality is lifted was still applicable.[98] It added that "[t]o 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 functions and mandate".[99] The Chamber also recalls in this context the Appeals Chamber's finding in *Jović* that "[t]he fact that some portions of [the protected information] 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."[100]

44. With respect to the publication of an indictment by prosecutors before the formal lifting of its confidentiality by a Chamber, this may readily be distinguished from the current case, since in such cases, it is the applicant for protective measures who, as an officer of the court, issues the indictment.[101] An indictment, by its very nature, cannot remain permanently confidential. The purpose of the confidentiality of indictments is limited in time until their issue and service on the suspect. The current case concerns the publication of confidential information from Decisions issued by the Chamber and not by the applicant for the protective measures.

---

[93] Defence Final Brief, para. 37.
[94] Prosecution Final Brief, paras 17, 70-75; Prosecution Closing Arguments, 3 July 2009, T. 526-527.
[95] Prosecution Final Brief, paras 71-75, citing para. 45 of the *Marijačić and Rebić* Appeal Judgement and para. 30 of the *Jović* Appeal Judgement.
[96] Prosecution Final Brief, paras 46(iv), 76. *See* also paras 60-68; Prosecution Closing Arguments, 3 July 2009, T. 524.
[97] *Marijačić and Rebić* Appeal Judgement, para. 45. *See* also *Jović* Appeal Judgment, para. 30.
[98] *Marijačić and Rebić* Appeal Judgement, para. 45.
[99] *Marijačić and Rebić* Appeal Judgement, para. 45.
[100] *Jović* Appeal Judgment, para. 30.
[101] *See* Robin Vincent, 15 June 2009, T. 159-161. The Chamber notes that in his testimony Robin Vincent cites one such example of which he had specific knowledge, and explained that the Prosecution, in that case, had informed the Trial Chamber of its intention to lift the confidentiality of the Indictment prior to doing so. *See* also T. 157-162 and 196-198.

45. The Chamber has carefully considered the evidence adduced by the Defence in support of the submission of alleged waiver by the Applicant. It has paid particular attention to the transcripts of public hearings before the International Court of Justice, the conference organised by the Humanitarian Law Centre held on 29 June 2007 in Belgrade, and the evidence of Defence witness Nataša Kandić.[102] The Chamber notes this body of evidence is demonstrative of the opinion of a number of officials associated with the Applicant. The Chamber is not persuaded that these opinions may be properly understood to reflect the Applicant's official position before this Tribunal vis-à-vis the issue of confidentiality, nor that the information disclosed by these associated officials is the same information that the Accused is charged with disclosing.[103]

46. In any event, and as this Chamber has emphasised earlier in this Judgement, the jurisprudence of this Tribunal clearly provides that a decision remains confidential until a Chamber explicitly decides otherwise.[104] The Applicant has not made a request to the Tribunal with a view to rescind the confidentiality of the Appeals Chamber Decisions. On the contrary, the record indicates that the Applicant has in fact pursued the opposite approach.[105]

4. Conclusion

47. It is an uncontested fact that the Accused is the sole author of both the Book and the Article.[106] The Chamber further does not consider it to be a matter of any uncertainty that at the time of the publication of the Book and Article, the confidentiality of the Appeals Chamber Decisions was in effect. On the basis of the above discussion, the Chamber is satisfied beyond reasonable doubt that the Accused has disclosed confidential information, namely the contents and purported effect of the Appeals Chamber Decisions, in breach of orders by the Appeals Chamber. The *actus reus* with respect to Count 1 and Count 2 of the Indictment has therefore been met.

---

[102] Exhibits D9, D10, D42, D45. *See* also Exhibit D5 (the Chamber notes that this exhibit pre-dates the Appeals Chamber Decisions) as well as Exhibit D48 (under seal). *See* also testimony Nataša Kandić, 17 June 2009, T. 413-417, 1 July 2009, T. 443-450, 466-481 with respect to Exhibit D9; T. 396-402 with respect to Exhibit D5; T. 403-404 with respect to Exhibit D10; T. 405-409 (private session) with respect to Exhibit D48 (under seal); T. 409-410 with respect to Exhibit D42.

[103] *See supra,* para. 33.

[104] *Marijačić and Rebić* Appeal Judgement, para. 45; *Jović* Appeal Judgement, para. 30; *Margetić* Trial Judgement, para. 49.

[105] Nataša Kandić, 1 July 2009, T. 495-496 (private session). *See* also Prosecution Final Brief (confidential), paras 46(v), 47-58, 59(i), 76.

[106] First Set of Agreed Facts, pp. 1 and 2 of attached letter; Yorric Kermarrec, 15 June 2009, T.135; Exhibit P4; Exhibit P8.1; Exhibit P9, Recording 1003-2, pp. 1-2 and Recording 1004-2, pp. 10-11.

B. ***Mens Rea***

48. The Prosecution submits that *mens rea* is a central issue in this case.[107] In its view, the evidence supports a finding of the Accused having actual knowledge that her disclosure was in violation of an order of the Tribunal both with respect to the publication of the Book and the Article.[108] The Prosecution points to the explicit reference made by the Accused in her Book to the fact that the Appeals Chamber Decisions had been marked confidential.[109] Moreover, the Prosecution asserts that in her suspect interview, the Accused referred specifically to the confidential nature of one of the Appeals Chamber Decisions.[110] The Prosecution relies on the words of the Accused that the Article, published four months after the Book, was intended to be an "English version of passages in the book. It's nothing new".[111] According to the Prosecution, the Accused's concession in her Book concerning the confidential nature of the Appeals Chamber Decisions is also relevant to the *mens rea* in respect of the Article.[112] It is the Prosecution's position that the disclosure by the Accused on both occasions was deliberate and not accidental.[113]

49. Further, the Prosecution is of the view that there is contextual information relevant to the *mens rea* of the Accused.[114] It submits that the Accused has been a journalist for more than 20 years, a profession in which verifying sources is essential to ensure the quality of work and maintain one's reputation and credibility.[115] It is also the position of the Prosecution that in her role as spokesperson for the Tribunal for a period of six years, the Accused worked in an environment of confidentiality and was alive to the sensitivity of confidential information.[116] It avers she was aware not only of the existence of Rule 77 of the Rules, but also of the fact that other journalists were subject to proceedings before the Tribunal for having disclosed confidential information.[117] On the basis of the Accused's own words in her suspect interview, the Prosecution argues, the information in her Book is essentially a "reconstruction of events" based on her own experience and information provided to her by a number of unnamed sources.[118] Despite having been informed by her sources that the Appeals Chamber Decisions were confidential, the Prosecution contends, the Accused

[107] Prosecution Final Brief, para. 29.
[108] Prosecution Pre-Trial Brief, para. 23; Prosecution Final Brief, paras 25 and 27; Prosecution Closing Arguments, 3 July 2009, T. 519-521.
[109] Prosecution Final Brief, para. 25.
[110] Prosecution Final Brief, para. 25; Prosecution Closing Arguments, 3 July 2009, T. 519.
[111] Prosecution Final Brief, para. 38.
[112] Prosecution Final Brief, para. 27.
[113] Prosecution Final Brief, para. 25; Prosecution Closing Arguments, 3 July 2009, T. 519.
[114] Prosecution Closing Arguments, 3 July 2009, T. 519.
[115] Prosecution Pre-Trial Brief, para. 24; Prosecution Final Brief, para. 26; Prosecution Closing Arguments, 3 July 2009, T. 519.
[116] Prosecution Pre-Trial Brief, para. 24; Prosecution Final Brief, paras 26, 31, 32; Prosecution Closing Arguments, 3 July 2009, T. 519-520.
[117] Prosecution Final Brief, paras 26, 32; Prosecution Closing Arguments, 3 July 2009, T. 520.
[118] Prosecution Closing Arguments, 3 July 2009, T. 522-523.

decided to publish this information in her Book.[119] Taken together, all of this evidence leads the Prosecution to conclude that only a wilfully blind or recklessly indifferent individual would not suspect or realise that an order of confidentiality may exist.[120]

50. Finally, and specifically in relation to the *mens rea* pertaining to the publication of the Article, the Prosecution avers that on 19 October 2007, after the publication of her Book but before the publication of her Article, the Accused received a letter from the Registrar of the Tribunal.[121] It contends that by this letter, the Accused was "fixed with knowledge" that there was a live issue concerning the improper disclosure of confidential information, but despite this, she chose to publish the Article.[122] The Prosecution notes that the Article, unlike the relevant pages of the Book, does not refer to the Appeals Chamber Decisions as being confidential, and suggests that the Accused might have omitted this information as a result of the warning letter in her belief that this was sufficient.[123]

51. The Defence submits that the *mens rea* of the Accused has not been established. In support, it has provided the Chamber with numerous and lengthy submissions in this regard.[124] The Chamber will limit its discussion in this section of the Judgement to the submissions it considers relevant to the legal and factual issues of this particular case.[125]

1. Requirement of Specific Intent

52. The Defence submits that in addition to the element of knowledge or wilful blindness as part of the *mens rea,* the Prosecution must prove that the Accused acted with specific intent to interfere with the administration of justice.[126] It contends that the Accused lacked such intent and that, therefore, the *mens rea* is not satisfied.[127]

53. The Chamber notes the Defence relies on the holdings of the *Beqaj* and the *Maglov* Trial Chambers that for each form of criminal contempt listed in Rule 77(A), the Prosecution must establish that the Accused acted with the specific intent to interfere with the Tribunal's administration of justice.[128] The *Beqaj* Trial Chamber added that "[s]uch intent may be separately

[119] Prosecution Final Brief, paras 33-36; Prosecution Closing Arguments, 3 July 2009, T. 522-523.
[120] Prosecution Final Brief, para. 26; Prosecution Closing Arguments, 3 July 2009, T. 520.
[121] Prosecution Final Brief, para. 28; Prosecution Closing Arguments, 3 July 2009, T. 520-521.
[122] Prosecution Final Brief, paras 28, 38; Prosecution Closing Arguments, 3 July 2009, T. 520-521, 523.
[123] Prosecution Closing Arguments, 3 July 2009, T. 520-521, 523.
[124] Defence Pre-Trial Brief, paras 34-61; Defence Final Brief, paras 71-77, 79-123.
[125] *See supra,* Section IV.
[126] Defence Pre-Trial Brief, para. 35; Defence Final Brief, paras 77 (iii), 78-87, 90-94; Defence Closing Arguments, 3 July 2009, T. 540-541.
[127] Defence Final Brief, paras 77(iii), 121(iv).
[128] *Beqaj* Trial Judgement, para. 22; *Maglov* Rule 98*bis* Decision, paras 15, 40. *See* also *Prosecutor v. Juvénal Kajelijeli*, International Criminal Tribunal for Rwanda ("ICTR"), Case No. ICTR-98-44A-T, Decision on Kajelijeli's

proved or inferred from the facts of each case."[129] The Chamber, however, considers this jurisprudence to have been developed by the more recent Appeals Chamber rulings that a violation of a Chamber's order *as such* interferes with the Tribunal's administration of justice.[130] This Chamber considers that any knowing and wilful conduct in violation of a Chamber's order meets the requisite *mens rea* for contempt and is committed with the requisite intent to interfere with the administration of justice. As held by the Trial Chamber in the *Bulatović* Contempt Decision, "[i]t is an obvious consequence of refusing to comply with an order of the Chamber that the administration of justice is interfered with."[131] Having established either actual knowledge or wilful blindness to the existence of an order, or reckless indifference to the consequences of the act by which the order is violated, the intent to interfere with the administration of justice is also established.

54. Further, this Chamber agrees with the *Margetić* Trial Judgement that Rule 77(A) of the Rules, which dictates that the Tribunal may hold in contempt those "who wilfully and knowingly interfere with the administration of justice", does not contain any legal or factual elements separate from those set out in Rule 77(A)(ii).[132] Therefore, if the Prosecution establishes a sufficiently clear factual basis for an accused's liability under Rule 77(A)(ii), "it has automatically established a sufficiently clear basis for an accused's liability under Rule 77(A)".[133]

55. In light of the foregoing, the Chamber considers the Defence understanding of the definition of *mens rea* for conduct under Rule 77(A)(ii) as including an additional element, *i.e.* the "specific intent to interfere with the administration of justice", to be an erroneous characterisation of the law.

2. How the Accused Acquired the Confidential Information

56. In her suspect interviews in May and June of 2008, the Accused repeatedly stated that while she had heard of the subject matter of the Appeals Chamber Decisions during her tenure at the Tribunal, she never saw them prior to having been shown these Decisions during the suspect

---

Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C) ("*Kajelijeli* Decision"), 15 November 2002; *Independent Counsel Against Brima* Samura, Special Court for Sierra Leone (SCSL), Case No. SCSL-2005-01, Judgment in Contempt Proceedings ("*Brima* Contempt Judgement"), 26 October 2005. Although the Defence relies on the *Kajelijeli* Decision and the *Brima* Contempt Judgement the Chamber notes that the *Kajelijeli* Decision makes no mention of an alleged additional element of proof of *mens rea* requiring a showing of a specific intent to interfere with the administration of justice. Furthermore, the Chamber is of the view that the *Brima* Contempt Judgement refers to "specific intent" in the context of differentiating between the various mental states required for each form of contempt pursuant to Rule 77 (*see Brima* Contempt Judgement, paras 18, 19, 27).

[129] *Beqaj* Trial Judgement, para. 22.

[130] *See supra,* para. 21. *See Jović* Appeal Judgement, para. 30; *Marijačić and Rebić* Appeal Judgement, para. 44.

[131] *Bulatović* Contempt Decision, para. 17.

[132] *Margetić* Trial Judgement, para. 14.

[133] *Margetić* Trial Judgement, para. 14, referring to *Prosecutor v. Josip Jović,* Case No. IT-95-14 & 14/2-R77, Decision to Deny the Accused Josip Jović's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, 21 December 2005, para. 28.

interviews.[134] The Defence attaches significance to this fact as affecting the *mens rea* of the Accused.[135]

57. The Chamber notes that the parties have agreed that it is not part of the Prosecution's case that the Accused saw or read the Appeals Chamber Decisions prior to her suspect interview.[136] It considers, however, that the manner in which the Accused came into possession of the protected information that she published in her Book and later in the Article, and therefore the fact that she did not physically set eyes on the Appeals Chamber Decisions prior to her suspect interview, is of no consequence to this case. What is of consequence is that she became aware of the confidential information, and of the fact of its confidentiality, and disclosed the information nonetheless.

3. References to the Confidentiality of the Appeals Chamber Decisions and Contextual Information Relevant to *Mens Rea*

58. In her Book, the Accused makes express reference to the fact that the two Appeals Chamber Decisions are confidential.[137] Her knowledge of the confidentiality of the Appeals Chamber Decisions is likewise relevant to her state of mind with respect to the Article published four months later; the Article, in her own words, was an English version of the passages of the Book.[138] The Chamber considers the Accused's admissions concerning the confidentiality of the Appeals Chamber Decisions in her own publications to be the strongest evidence of her *mens rea.* The contextual information which the Prosecution submits is relevant to the Accused's state of mind both with respect to the Book as well as the Article will be discussed below in Section VI.C. concerning the mistake of fact and mistake of law raised by the Defence.

4. Letter from the Registrar

59. The relevant portions of the letter sent to the Accused by the Registrar on 17 October 2008 read as follows:

> After review, it appears that your book and the articles, should they prove to have been published, make reference to official Tribunal information and documents that were not made public and of which you had knowledge in the context of your official duties as an employee of the Tribunal from 13 October 2000 to 12 October 2006.
>
> […]

[134] Exhibit P9, Recording 1002-2, pp. 4-8, Recording 1004-2, p. 6.
[135] Defence Opening Statements, 15 June 2009, T. 122-123; Defence Final Brief, para. 72.
[136] Second Set of Agreed Facts, Annex, p. 1.
[137] Exhibit P3.1.
[138] Exhibit P9, Recording 1004-2, p. 9.

> Furthermore, the Tribunal reserves the right to take any administrative or legal measure deemed necessary to ensure the defence of its interests.[139]

60. The Defence submits that nothing in this letter suggested that the Accused had violated the confidentiality of a court order in her Book, and that it contained no reference to Rule 77 of the Rules or to the Appeals Chamber Decisions.[140]

61. The Chamber considers that even without explicit references to the Appeals Chamber Decisions and to Rule 77 of the Rules, the Accused, by this letter, was formally put on notice that the Registry was concerned about the disclosure of confidential information and that it contemplated taking "administrative or legal measures" against her as a result. The fact that the Accused published essentially the same information in her Article after having received the Registrar's letter is strongly suggestive of her state of mind.

5. Conclusion

62. In light of the above, the Chamber is satisfied beyond reasonable doubt that the Accused had knowledge at the time of the publication of her Book and the Article that her disclosure was in violation of an order of the Tribunal. It considers, therefore, that the *mens rea* for both Count 1 (the Book) and Count 2 (the Article) of the Indictment has been met.

C. Mistake of Fact and Mistake of Law

63. The Defence raises mistake of fact and mistake of law as defences to the alleged acts of contempt in this case.[141] It argues that disclosure by the Tribunal and Applicant, as well as public discussion in the media prior to publication of her Book and Article, of the information she is charged with disclosing, could have led her reasonably to believe that the information was no longer treated as confidential.[142] The Defence asserts that this position would not have been unreasonable for a "non-lawyer" in view of others who purportedly discussed the information

---

[139] Exhibit P10.
[140] Defence Final Brief, para. 120; Defence Closing Arguments, 3 July 2009, T. 556.
[141] Defence Final Brief, para. 97. *See* also paras 14, 16, 48-49, 97-104, 106-119, 121, 122 and Defence Pre-Trial Brief, paras 37-61.
[142] Defence Pre-Trial Brief, para. 53; Defence Final Brief, paras 48-49, 77(i), 103, 117, 121(ii) and (iii). Defence Closing Arguments, 3 July 2009, T. 538. The Chamber notes that it is submitted in the Defence Pre-Trial Brief that the original manuscript of the Book did not include references to the Appeals Chamber Decisions, and that "[o]nly after the matter was broadly publicized by the ICJ proceedings and in the press was the manuscript amended to include references" to the Appeals Chamber Decisions (Defence Pre-Trial Brief, para. 59). The Chamber notes that the Defence did not present evidence of this at trial and has made no reference to this matter in its Final Brief. Further, the Chamber notes it is not the Defence case that public disclosure in the media of facts pertaining to the Appeals Chamber Decisions would *per se* and in all cases have displaced the Chamber's confidentiality orders. It is noted the Defence submits that the extensive and public discussion of "these facts" are relevant to, *inter alia,* a reasonable mistake on behalf of the Accused as to the confidentiality of these facts (*see* Defence Final Brief, paras 45, 48-49).

publicly.[143] Hence, the Defence argues, there was no awareness on the Accused's part of the illegality of her conduct.[144] The Defence contends that while the Accused's view may have been inaccurate as a matter of law, she could have reasonably believed it to be correct as a matter of practice. It is argued that the Accused, as a result of her experience in the Office of the Prosecutor, would have been aware of instances where the content of a sealed indictment was revealed prior to the confidentiality order having been lifted because the need for confidentiality no longer existed.[145] The Defence argues that the Accused's view was not that she could "over-rule or prefer" her opinion to that of the Tribunal, and that as a result, this case may be distinguished from a situation where an accused believed his legal position to be preferable to that of the Tribunal.[146] The Defence argues, finally, that it would have been reasonable for the Accused to believe that her publications were consistent with the mandate of the Tribunal regarding the need for transparency, and therefore legal.[147]

64. With respect to the alleged mistake of fact—that the Accused acted under a reasonable belief that the information she is charged with disclosing was public—the Chamber recalls that in her Book, the Accused explicitly stated that both of the Appeals Chamber Decisions were confidential.[148] When asked about her knowledge of this during the suspect interview, she replied "[i]t would appear that I have had good sources".[149] Despite claiming to know from her "sources" that the Appeals Chamber Decisions were confidential, she nonetheless did not "regard any check as necessary" with the United Nations or the Tribunal prior to the publication of her Book to inquire as to potential problems with disclosure.[150] Further, the Chamber notes the absence in her Book and Article of any reference to public sources from which, as the Defence claims, facts related to the Appeals Chamber Decisions were revealed. The Chamber does not accept, therefore, that the Accused could have reasonably been mistaken in fact with respect to the confidential status of the Appeals Chamber Decisions. The Chamber finds that the Accused did not labour under a mistake of fact.

65. With regard to the alleged mistake of law, the Chamber recalls that a person's misunderstanding of the law does not, in itself, excuse a violation of it.[151] In the words of the *Jović* Trial Chamber, "if mistake of law were a valid defence […], orders would become suggestions and

[143] Defence Pre-Trial Brief, paras 55-57; Defence Final Brief, paras 119, 121(i); Defence Closing Arguments, 3 July 2009, T. 538-540.
[144] Defence Final Brief, para. 108.
[145] Defence Pre-Trial Brief, para. 58; Defence Final Brief, para. 121(v).
[146] Defence Final Brief, para. 105.
[147] Defence Pre-Trial Brief, paras 46-51; Defence Final Brief, paras 111-116.
[148] *See supra,* para. 58.
[149] Exhibit P2.1, Recording 1003-2, pp. 11-12 (under seal); Exhibit P9, Recording 1003-2, pp 11-12 (public).
[150] Exhibit P9, Recording 1003-2, p. 2.
[151] *Jović* Appeal Judgement, para. 27; *Jović* Trial Judgement, para. 21; *Haxhiu* Trial Judgement, para. 29.

a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled".[152]

66. In the present case, the Chamber further observes that the Accused is a former senior employee of the Tribunal. In her capacity as spokesperson for the former Prosecutor, Carla del Ponte, one of her tasks was to ensure that the position of the Prosecutor was accurately conveyed to the public.[153] In her suspect interview, she was confronted with the importance of knowing, in her position, whether she could answer certain questions posed by the media in light of the fact that certain information may have arisen from a confidential decision of one of the Chambers.[154] She answered that, in consultation with the Office of the Prosecutor, she "knew exactly what the framework of [her] replies would be without taking the risk of infringing on any decisions".[155] The witness Gavin Ruxton gave evidence in this regard, stating 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 to the public.[156] According to Mr. Ruxton, the Accused had knowledge of the existence of the Rule governing the crime of contempt, Rule 77.[157] In her suspect interviews, the Accused refers to contempt proceedings against Croatian journalists before the Tribunal.[158] All of these factors demonstrate knowledge, rather than ignorance, of the law.

67. For the foregoing reasons, the Chamber rejects the defences of mistake of fact and mistake of law with respect to the knowledge and intent of the Accused in publishing confidential information from the Appeals Chamber Decisions in violation of an order.

D. Freedom of Expression

68. The Defence asserts that the prosecution of the charges in this case violates the Accused's fundamental rights as a journalist under Article 10 of the European Convention of Human Rights ("ECHR")[159] and is *ultra vires* the statutory powers and jurisdiction of the Tribunal.[160]

---

[152] *Jović* Trial Judgement, para. 21.
[153] First Set of Agreed Facts.
[154] Exhibit P9, Recording 1001-2, p. 10.
[155] Exhibit P9, Recording 1002-2, p. 1.
[156] Agreed Statement of Gavin Ruxton, para. 6.
[157] Agreed Statement of Gavin Ruxton, para. 9.
[158] Exhibit P1.1, Recording 1002-1, pp. 5-6
[159] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 1 November 1998 (ETS 155). Article 10, concerning the freedom of expression provides:
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

69. The need to balance the protection of confidential information in court proceedings and the right to freedom of expression under various regional and international instruments such as the ECHR, the International Covenant on Civil and Political Rights,[161] and the Universal Declaration of Human Rights,[162] has been considered by the Tribunal.[163] Significantly, these instruments contain qualifications on freedom of expression in relation to court proceedings. As a result, an accused, having chosen to ignore valid orders, cannot thereafter invoke the freedom of expression to excuse his or her conduct.[164]

70. This position is consistent with the jurisprudence of the European Court of Human Rights ("ECtHR") which, while recognising the vital role played by the press in a democratic society, has nonetheless emphasised 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", and indeed, Article 10(2) of the ECHR "defines the boundaries of the exercise of freedom of expression."[165] Pursuant to Article 10(2) of the ECHR, the exercise of freedom of expression 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 maintaining the authority and impartiality of the judiciary." These interferences with the freedom of expression are applicable "even with respect to press coverage of matters of serious public concern."[166] Notably, the ECHR recognises that freedom of expression may not only be lawfully subject to restrictions, but also subject to penalties.

71. Article 20(4) of the Statute clearly authorises a Trial Chamber to close hearings to the public in accordance with the Rules and to order that certain evidence be protected as confidential.[167] Trial Chambers have accordingly exercised their authority "to prohibit the press from publishing

---

[160] Defence Pre-Trial Brief, paras 72- 74; Defence Final Brief, para. 124.
[161] UN General Assembly, International Covenant on Civil and Political Rights ("ICCPR"), 16 December 1966, United Nations Treaty Series, vol. 999, p. 171, Article 19(2).
[162] UN General Assembly, Universal Declaration of Human Rights ("UNDR"), 10 December 1948, G.A. Res. 217A(III), Article 19.
[163] *See Jović* Trial Judgement, para. 23; *Margetić* Trial Judgement, para. 81.
[164] *Jović* Trial Judgement, para. 23.
[165] *Dupuis and Others v. France*,, ECtHR, (Application No. 1914/02), 12 November 2007, para. 43.
[166] *Stoll v. Switzerland*, ECtHR. (Application No. 69698/01), 10 December 2007, para. 102. *See* also *Bladet Tromsø and Stensaas v. Norway,* ECtHR (Application No. 21980/93), 20 May 1999, para. 65; *Monnat v. Switzerland*, ECtHR (Application No. 73604/01), 21 December 2006, para. 66.
[167] *See Jović* Trial Judgement, para. 23; *Margetić* Trial Judgement, para. 81. The criminal sanction of contempt constitutes a legitimate interference with an individual's freedom of expression where proceedings are proportionate to the legitimate aim pursued. *See Handyside v. UK*, ECtHR, (Application No. 5493/72), 7 December 1976, paras 48-50; *Sunday Times v. UK*, ECtHR, (Application No. 6538/74), 26 April 1979, para. 62: In this respect, the general aim of contempt proceedings is to secure the fair administration of justice and to achieve purposes similar to those envisaged under Article 10(2) of the ECHR of maintaining the authority and impartiality of the judiciary and preventing the disclosure of information received in confidence. *See Sunday Times v. UK*, para. 54.

protected material" by way of issuing protective orders.[168] Individuals, including journalists, may not – with impunity – publish information in defiance of such orders on the basis of their own assessment of the public interest in accessing that information.[169]

72. In certain cases, the Tribunal imposes confidentiality to secure the cooperation of sovereign states.[170] In the present case, the interests sought to be protected by the two confidential decisions were those of a sovereign state. The witness Robin Vincent unequivocally confirmed the significant challenges faced by international tribunals in securing the vital cooperation of sovereign states, observing that "once it's recognised that there has been or may well be dangers of breaches [of confidentiality], then it's unlikely that the cooperation that tribunal seeks will actually be forthcoming."[171]

73. Contrary to the assertions by the Accused, the relevant pages of the Book and Article contain certain information that was not in the public domain at the time of publication.[172] The Chamber considers this factor salient in weighing the public interests involved:[173] namely, the public interest in receiving the information and the protection of confidential information to facilitate the administration of international criminal justice, which is also in the public interest, indeed, on an international scale.[174]

74. In publishing confidential information, the Chamber considers the Accused created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law.[175] The disclosure of protected information in direct contravention of a judicial order serves to undermine international confidence in the Tribunal's ability to guarantee the confidentiality of certain information and may deter the level of cooperation that is vital to the administration of international criminal justice. In these circumstances, the Chamber is satisfied that trial proceedings for contempt are proportionate to the allegations and do not contravene the letter or spirit of Article 10(2) of the ECHR.[176]

---

[168] *Marijačić and Rebić* Trial Judgement, para. 39. *See* also *Jović* Trial Judgement, para. 23.
[169] *Ibid.*
[170] *See* Rules 54*bis* and 70 of the Rules.
[171] Robin Vincent, 15 June 2009, T. 153. The Chamber notes that this testimony was not challenged by the Accused.
[172] *See supra,* para. 33.
[173] *See Stoll v. Switzerland*, para. 113.
[174] *See Stoll v. Switzerland*, para. 115.
[175] The Chamber notes that this is contrary to Defence submissions. *See* Defence Final Brief, para. 127.
[176] The Chamber has considered the evidence of Louis Joinet (T.237-379), Exhibit D3. The Chamber notes that Louis Joinet was called as a witness of fact rather than as an expert witness. His testimony nevertheless largely consisted of policy considerations and legal opinions. Consequently, the Chamber considers his evidence did not advance the Defence case. The scope and application of the law are matters for the Chamber to determine.

VII. SENTENCE

A. Sentencing Law and Purpose

75. In its determination of sentence, the Trial Chamber takes into account such factors as the gravity of the offence and the individual circumstances of the accused in accordance with Article 24 of the Statute, as well as, *inter alia,* any aggravating and/or mitigating circumstances pursuant to Rule 101 of the Rules. It is well established in the jurisprudence of the Tribunal that the two most important factors to be taken into account in determining the appropriate penalty in contempt cases are the gravity of the conduct and the need to deter repetition and similar conduct by others.[177]

B. Gravity of the Offence

76. As outlined in Section V., the Defence contends that no real risk of an interference with the administration of justice exists in this case. It submits that no prejudice to the Applicant has been demonstrated, no witness has been endangered as a result of the Accused's conduct, that there has been no disclosure of the content of the documents that were the actual subject of the protective measures, and that the facts which are said to have been disclosed were already in the public domain.[178] Further, it submits that there is no evidence of an intention on the part of the Accused to damage the reputation of the Tribunal and that no actual interference – although it concedes that this is not a requirement of the crime of contempt– with the administration of justice has been established.[179]

77. The Prosecution argues that the specific risk in the present case is that the publication of protected state information could lead to the withdrawal of cooperation of states involved, and potentially other states.[180] This type of conduct, it submits, "could affect the very functioning of the Tribunal, *and future Tribunals*, including the arrest of fugitives, obtaining documents and the interviewing of witnesses".[181] Prosecution witness Robin Vincent emphasised that protective

[177] *Jović* Trial Judgement, para. 26; *Marijačić* and *Rebić* Trial Judgement, para. 46; *Margetić* Trial Judgement, para. 84; *Haraqija and Morina* Trial Judgement, para. 103.
[178] Defence Final Brief, para. 158; Defence Closing Arguments, 3 July 2009, T 538. *See* also Defence Final Brief, para. 56, 57, 67, 77, 157(v) and Defence Closing Arguments, 3 July 2009, T. 536 and 540.
[179] Defence Final Brief, para. 158. The Chamber notes that all of these factors were listed by the Defence in support of the argument that a criminal conviction would constitute a disproportionate and impermissible interference with the Accused's fundamental rights. In its Pre-Trial Brief, the Defence lists these factors in support of the argument that the facts of this case are not so serious as to justify contempt proceedings (Defence Pre-Trial Brief, para. 71). The Chamber deems it appropriate to consider these factors in relation to the gravity of the offence.
[180] Prosecution Final Brief, para. 95; Prosecution Closing Arguments, 3 July 2009, T. 528.
[181] Prosecution Final Brief, para. 95 (Emphasis in original.)

measures are required not only for the provision of evidence by witnesses, but also when information is provided by organisations or states.[182]

78. The Prosecution further argues that the scope of the Accused's publications was significant in that her Book was marketed by one of France's largest publishers, and the Article was placed on the Internet "for the world to see".[183] Finally, the Prosecution concedes the "procedural history related to the production of evidence and the confidentiality of said evidence that ultimately led to the two Appeals Chambers [Decisions] had been a subject of public discussion before publication of the Accused's book" to be a factor the Chamber may take into account in its determination of the sentence.[184]

79. The Chamber has considered the above submissions in weighing the gravity of the Accused's conduct. It notes that the Indictment charges the Accused with having knowingly and wilfully disclosed information in violation of a court order: that the Accused did not interfere with an ongoing investigation, nor did she disclose the names of protected witnesses. The Chamber further notes from a review of Defence exhibits in this case, that some of the information, notably the Four Facts referred to by the Defence, had indeed been in the public domain prior to the publication of the Accused's Book and Article.[185] However, it also considers the fact that information disclosed by the Accused in her Book and Article contains protected information not previously disclosed.

80. The heart of the matter is the issue of real risk caused by the Accused by her disclosure. As already discussed to some extent in Section VI.D. of this Judgement, the Chamber considers that the Accused's conduct has created a real risk that states may not be as forthcoming in their cooperation with the Tribunal where provision of evidentiary material is concerned. This in turn necessarily impacts upon the Tribunal's ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate. Public confidence in the

[182] Robin Vincent, 15 June 2009, T. 152-154.
[183] Prosecution Final Brief, para. 91(i); Prosecution Closing Arguments, 3 July 2009, T. 529. The Chamber notes that the Prosecution makes these particular submissions with respect to aggravating factors (Prosecution Final Brief, para. 91(i); Prosecution Closing Arguments, 3 July 2009, T. 529). The Chamber considers this to be a factor going to the gravity of the offence rather than being an aggravating factor, and has therefore dealt with it in this particular section of the Judgement.
[184] Prosecution Final Brief, para. 91(ii). The Chamber notes that the Prosecution concedes that some of the issues raised by the Defence may be regarded as mitigating circumstances, listing the public discussion of the procedural history leading up to the Appeals Chamber Decisions. The Chamber considers this to be more appropriately dealt with as a factor pertaining to the gravity of the offence.
[185] Exhibits D1, D2, D4, D6, D7. *See* also Exhibit D9, excerpts from the transcripts of the Humanitarian Law Centre conference in Belgrade on 29 June 2007, "Regional Debate on the Judgment of the International Court of Justice on Genocide". *See* also D10, Verbatim record of public sitting before the International Court of Justice on 8 May 2006. The Chamber notes that Exhibit D5, which is dated 17 May 2005, pre-dates the issuance of the Appeals Chamber Decisions. The Chamber also notes that some of the articles in the public domain post-date the Accused's publications, *see* Exhibits D3 and D8.

effectiveness of protective measures, orders and decisions is absolutely vital to the success of the work of the Tribunal.[186] This was succinctly described by Prosecution witness Robin Vincent, "[…] if there is a situation where, for instance, a tribunal was seen from the outside world as consistently or at any stage being perhaps prone to breaches of confidentiality, I think it does have a serious impact upon that organisation."[187] The Chamber endorses this view.

81. The Chamber rejects the Defence submission in its Pre-Trial Brief that it would be against the public interest to convict the Accused for discussing facts which the Defence considers to be clearly in the interest of the public.[188] The Appeals Chamber has held, that "[i]t is not for a party or a third person to determine when an order 'is serving the International Tribunal's administration of justice'".[189] By disclosing confidential portions of the Appeals Chamber Decisions which she knew to be confidential at the time of her publications, the Accused did just that.

82. An additional and minor factor which the Chamber takes into account is that while the Book sold merely 3,799 copies as of 8 June 2009, it remains available for sale[190] and evidence suggests it has been translated into Bosnian for wider distribution.[191] Moreover, the publication of the Article on the internet has infinitely expanded the dissemination of the information which is the subject of the Indictment.

C. Aggravating and Mitigating Circumstances

83. As aggravating circumstances, the Prosecution submits that there were two distinct offences of contempt, and that the second was preceded by a letter of warning from the Registrar. It submits that the Book involved a "commercial venture" in which financial gain was negotiated and expected by the Accused. Further, through her former employment in a senior position at the Tribunal, she was aware of the law of contempt pursuant to Rule 77 of the Rules.[192] As mitigating circumstances, the Prosecution submits that (i) the Accused cooperated during the course of the investigation; (ii) her Book was not a success; (iii) although her words were ones of public defiance her motives were not reprehensible; (iv) she does not (to the knowledge of the Prosecution) have a previous criminal record; and (v) she is the mother of two children aged 19 and 20 who she supports financially.[193]

[186] *Marijačić and Rebić* Trial Judgement, para. 50.
[187] Robin Vincent, 15 June 2009, T. 154.
[188] Defence Pre-Trial Brief, para. 71(viii).
[189] *Marijačić and Rebić* Appeal Judgement, para. 44 (internal quotation omitted).
[190] Yorric Kermarrec, 15 June 2009, T. 136.
[191] Exhibit P4, endnote on p. 3.
[192] Prosecution Final Brief, para. 91(i); Final Prosecution Arguments, 3 July 2009, T. 529.
[193] Prosecution Final Brief, para. 91(ii); *see* also Prosecution Closing Arguments, 3 July 2009, T. 529.

84. Beyond the mitigating circumstances already submitted to the Chamber by the Prosecution,[194] the Defence submits that the Accused is committed to the ideal of international justice and to the success of the work of the Tribunal.[195]

85. The Chamber has given due weight to all of the parties' submissions. The Chamber notes that there is evidence to support that the Accused is a well-respected professional. Prosecution witness Yorric Kermarrec who dealt with legal issues at the French publishing company *Flammarion* confirmed that in view of her resumé, *Flammarion* regarded the Accused as a trustworthy and reliable author.[196] Defence witness Nataša Kandić considered the Accused an objective and reliable journalist.[197] The Chamber also takes into account the evidence of Prosecution witness Yorric Kermarrec that the Accused owes *Flammarion* approximately 10,000 Euro,[198] and the fact that the Registry has determined the Accused to be indigent.[199]

D. Punishment to be Imposed

86. According to Rule 77 (G) of the Rules, the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment of seven years, a fine of 100,000 Euros, or both. The Rule gives discretion to the Trial Chamber to choose between a term of imprisonment, a fine, or a combination of the two.

87. The Defence submits that should the Accused be convicted, she could be ordered to "keep the peace and be of good behaviour", and not "publicly discuss the Appeals Chamber Decisions or their content".[200] The Prosecution submits that a term of imprisonment would not be justified in the circumstances of this case, and recommends that the Chamber impose a fine of 7,000-15,000 Euros.[201]

88. The Chamber has taken due account of the gravity of the offence and the aggravating and mitigating circumstances set out above. Further, in the determination of the appropriate penalty, the Chamber has also considered the need to deter future wrongful disclosure of confidential information by the Accused or any other person.

---

[194] Defence Final Brief, paras 93, 158(vii) and (viii), and 171. The Chamber notes that this argument is made by the Defence with respect to its position that a criminal conviction would constitute a disproportionate and impermissible interference with the Accused's fundamental rights. The Chamber, however, considers it to be more properly discussed as a mitigating factor.
[195] Defence Final Brief, para. 90; Defence Closing Arguments, 3 July 2009, T. 539.
[196] Yorric Kermarrec, 15 June 2009, T. 144.
[197] Nataša Kandić, 17 June 2009, T. 386-387.
[198] Yorric Kermarrec, 15 June 2009, T. 142-143.
[199] Registrar's Decision, 13 November 2008.
[200] Defence Final Brief, para. 170.
[201] Prosecution Final Brief, para. 98; Prosecution Closing Arguments, 3 July 2009, T. 530.

VIII. DISPOSITION

89. For the foregoing reasons, having considered all of the evidence and the arguments of the parties, the Chamber, pursuant to the Statute of the Tribunal and Rules 77 and 77 *bis* of the Rules, finds the Accused guilty of

1) Count 1, knowingly and wilfully interfering with the Tribunal's 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 by means of authoring for publication a book entitled "*Paix et Châtiment*" published by *Flammarion* on 10 September 2007; and

2) Count 2, knowingly and wilfully interfering with the Tribunal's 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 by means of authoring for publication an article entitled "Vital Genocide Documents Concealed", published by the *Bosnian Institute* on 21 January 2008.

90. The Accused is hereby sentenced to pay a fine of 7000 Euros, to be paid by two instalments of 3500 Euros each, the first to be paid by 14 October 2009 and the second to be paid by 14 November 2009.

Done in English and French, the English version being authoritative.

_____

Judge Bakone Justice Moloto, Presiding

_____ _____

Judge Mehmet Güney Judge Liu Daqun

Dated this fourteenth day of September 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]

IX. ANNEX

Table of authorities

1. ICTY

Beqaj Trial Judgement	*Prosecutor v. Beqa Beqaj,* Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005
Bulatović Contempt Decision	*Prosecutor v. Slobodan Milošević,* Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005
Brđanin Appeals Judgement	*Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-A, Judgement, 3 April 2007
Čelebići Appeal Judgement	*Prosecutor v. Delalić et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001
Haraqija and Morina Trial Judgement	*Prosecutor v. Astrit Haraqija and Bajrush Morina,* Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008
Haxhiu Trial Judgement	*Prosecutor v. Baton Haxhiu,* Case No. IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008
Jokić Trial Judgement	*Prosecutor v. Dragan Jokić,* Case No. IT-05-88-R77.1, Judgement on Allegations of Contempt, public redacted version, 27 March 2009
Jović Trial Judgement	*Prosecutor v. Josip Jović*, Case No. IT-95-14&14/2-R77, Judgement, 30 August 2006
Jović Appeal Judgement	*Prosecutor v. Josip Jović*, Judgement, Case No. IT-95-14&14/2-R7-A, 15 March 2007
Jović Contempt Decision	*Prosecutor v. Josip Jović,* Case No. IT-95-14 & 14/2-R77, Decision to Deny the Accused Josip Jović's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, 21 December 2005
Kvočka et al. Appeal Judgement	*Prosecutor v. Kvočka et al*. Case No. IT-98-30/1-A, Judgement, 28 February 2005
Maglov Rule 98*bis* Decision	*Prosecutor v. Radoslav Brđanin,* Case No. IT-99-46-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis,* 19 March 2004
Margetić Trial Judgement	*Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007
Marijačić and Rebić Trial Judgement	*Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006
Marijačić and Rebić Appeal Judgement	*Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006
Nobilo Appeal Judgement	*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001

Vujin Appeal Judgement	*Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000

2. ICTR

Kajelijeli Decision	*Prosecutor v. Juvénal* Kajelijeli, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)

3. Special Court for Sierra Leone

Brima Contempt Judgement	*Independent Counsel Against Brima* Samura, Special Court for Sierra Leone, Case No. SCSL-05-01, Judgement in Contempt Proceedings, 26 October 2005

4. European Court of Human Rights

Bladet Tromsø and Stensaas v. Norway	*Bladet Tromsø and Stensaas v. Norway*, (Application No. 21980/93), 20 May 1999
Dupuis v. France	*Dupuis and Others v. France*, (Application No. 1914/02), 12 November 2007
Handyside v. UK	*Handyside v. UK*, (Application No. 5493/72), 7 December 1976
Monnat v. Switzerland	*Monnat v. Switzerland*, (Application No. 73604/01), 21 December 2006
Stoll v. Switzerland	*Stoll v. Switzerland*, (Application No. 69698/01), 10 December 2007
Sunday Times v. UK	*Sunday Times v. UK*, (Application No. 6538/74), 26 April 1979

5. International Agreements

European Convention on Human Rights ("ECHR")	Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No.11, 1 November 1998, ETS 155
International Covenant on Civil and Political Rights ("ICCPR")	UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p.171
Universal Declaration of Human Rights ("UNDR")	UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, G.A. Res.217A(III)