
International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in the
Territory of the Former Yugoslavia since 1991.

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

Date: 8 January 2009

IN A SPECIALLY APPOINTED TRIAL CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Alphons Orié
Judge Christine Van Den Wyngaert

Acting Registrar: Mr. John Hocking

**IN THE CASE AGAINST
FLORENCE HARTMANN**

PUBLIC

PROSECUTOR'S PRE-TRIAL BRIEF
PURSUANT TO RULE 65^{ter}(E)

Amicus Curiae Prosecutor

Mr. Bruce A. MacFarlane, Q.C.

Counsel for the Accused

Karim A. A. Khan, Esq.

TABLE OF CONTENTS

I. Introduction.....	3
II. Disclosures per Rules of Procedure and Evidence Rule 65ter(E)(i) –	4
A. Summary of Evidence.....	4
B. Applicable Law & Application to the Facts.....	6
i. The Elements of Rule 77(A)(ii)	6
ii. <i>Actus Reus</i>	7
a) Physical Act of Disclosure.....	7
b) Orders Breached by Disclosure.....	8
iii. <i>Mens Rea</i>	8
a) Knowledge.....	9
b) Willful Blindness.....	9
C. Admissions by the parties.....	10
D. Statement of Matters Not in Dispute/Contested Matters of Fact and Law.....	10
III. Disclosures per RPE Rule 65ter(E)(ii) – Witness List.....	10
IV. Disclosures per RPE Rule 65ter(E)(iii) – Exhibit List.....	10
Annex A.....	11
Annex B.....	14

I. INTRODUCTION

1. Following investigation, Ms. Florence Hartmann was charged on 27 August 2008 with two counts of contempt of the Tribunal under Rule 77 of the Rules of Procedure and Evidence (“Rules”). The charges, amended by order of the Chamber on 27 October 2008, allege the following:

By her acts or omissions **Florence Hartmann** committed:

Count 1: Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rule 77(A)(ii) of the Rules, for knowingly and wilfully interfering with the administration of justice by disclosing information in violation of an order of the Appeals Chamber dated 20 September 2005 and an order of the Appeals Chamber dated 6 April 2006 through means of authoring for publication a book entitled *Paix et Châtiment*, published by *Flammarion* on 10 September 2007;

Count 2: Contempt of the Tribunal, punishable under this Tribunal’s inherent power and Rule 77(A)(ii) of the Rules, for knowingly and wilfully interfering with the administration of justice by disclosing information in violation of an order of the Appeals Chamber dated 20 September 2005 and an order of the Appeals Chamber dated 6 April 2006 through means of authoring for publication an article entitled “Vital Genocide Documents Concealed”, published by the *Bosnian Institute* on 21 January 2008.

2. Ms. Hartmann was summoned to appear before the Chamber on 15 September 2008. At the request of the accused, the Initial Appearance was deferred until 13 October 2008, and, on direction of the Chamber, it was further deferred until 27 October 2008. At the Initial Appearance, the accused declined to enter a plea, and the matter was adjourned until 14 November 2008. At the Further Appearance, the accused once again declined to enter a plea, and the Honorable Judge C. Agius entered a plea of not guilty on the Accused’s behalf, and instructed the Registrar to set a date for trial in accordance with Rule 62(A) of the Rules.

3. On 28 November 2008, the Chamber issued a Scheduling Order for Commencement of Trial directing that: the *Amicus Curiae* Prosecutor file a pre-trial brief no later than 8

January 2009, the Defence file a pre-trial brief by 15 January 2009; and further directed that the Pre-Trial Conference take place on 5 February 2009, with the trial to proceed immediately afterward on 5-6 February 2009.

4. Throughout most of the proceedings, the Accused was represented by Mr. William Bourdon, Attorney-at-law from France. On 8 December 2008 the Accused wrote to the Registry indicating that she was seeking the withdrawal of her counsel. On 19 December 2008 the Deputy Registrar withdrew the assignment of Mr. Bourdon, and assigned Mr. Karim A. A. Khan as replacement counsel to the Accused. Mr. Bourdon was directed to hand over to Mr. Khan any case-related materials he had received during his assignment as counsel.

II. DISCLOSURES PER RULE 65TER(E)(i) – SUMMARY OF EVIDENCE

A. SUMMARY OF THE EVIDENCE

5. The facts in this case are relatively straightforward. The Accused, Ms. Florence Hartmann, was born in France in 1963. She graduated with a Master's degree in Literature and Foreign Civilizations at the University of Paris in 1985. The following year, 1986, she married an Engineer from the former Yugoslavia in Belgrade. From 1986 until 1990 she worked as a free lance journalist, on occasion working for *Le Monde*. Throughout this period she lived in Belgrade. In 1998, she became a member of the Association of Professional Translators for Serbo-Croatian, French and Spanish. In 1990, Ms. Hartmann became a permanent employee of *Le Monde*. She left Belgrade and moved to Paris in 1994, but continued to work for *Le Monde*. Her first book, *Milosevic: La diagonale du fou*, was published in 1999.

6. Ms. Hartmann carries a French passport, and speaks Bosnian, Croatian, Serbian, Italian, Spanish, English as well as her native French.

7. In October 2000 she became the Spokesperson for Carla Del Ponte, Prosecutor for the International Criminal Tribunal for the former Yugoslavia. Her term as Spokesperson came to an end in October 2006, when she left employment with the United Nations.

8. As Spokesperson for the Prosecutor, she was responsible for classic media relations

duties, monitoring media developments, preparation of speeches and general public relations tasks. That included ensuring that the views of the Prosecutor and the Office of the Prosecutor were effectively conveyed to the public.

9. The Accused had a close working relationship with the former Prosecutor. Their offices were in close proximity, and they enjoyed a reciprocal “open door policy”. They traveled extensively together, and worked on most significant issues together. This allowed the Accused to have access to a broad range of confidential materials and information. Within the Office of the Prosecutor, the Accused was, in essence, the “Chief of Staff”; “Chef de Cabinet”; and “Principal Policy Advisor to the Prosecutor”, especially in terms of issues arising in the Balkans. She was part of the “Immediate Office” of the Prosecutor.

10. On 20 December 2006, Ms. Hartmann entered into a publishing contract with Flammarion, the fifth largest publishing company in France. The agreement called for the writing of a book provisionally entitled “Dans les Couloirs du Tribunal de La Haye”. Flammarion accepted the publishing proposal by Ms. Hartmann on the basis that the book would consist of her own views and opinions, as distinct from an investigative work. The book, ultimately entitled “*Paix et Châtiment*”, was written by the Accused, alone. All editorial and typographical changes to the original manuscript were approved by Ms. Hartmann prior to publication, in French, on 10 September 2007. The book has since been marketed by Flammarion in France, where they hold exclusive rights to the book. Since publication, the Flammarion edition has sold approximately 3,600 copies. (Final figure to be confirmed just before trial). Pages 120-122 of this book in particular disclose information related to the decisions of the Appeals Chamber dated 20 September 2005 and 6 April 2006, including the contents and purported effect of these decisions, as well as specific reference to the confidential nature of these decisions.

11. The article entitled “Vital Genocide Documents Concealed” was written by the Accused, alone, in English, and was published online by the Bosnian Institute on 21 January 2008. It has been available freely on the Internet since then. This article discloses information relating to the two confidential decisions of the Appeals Chamber dated 20 September 2005 and 6 April 2006, including the contents and purported effect of these decisions.

B. APPLICABLE LAW & APPLICATION TO THE FACTS

12. The accused has been charged with two counts of contempt of the Tribunal, punishable under the Tribunal's inherent power and Rule 77(A)(ii) of the Rules.¹ Contempt of the Tribunal, like all crimes, consists of a criminal act and a guilty mind.

13. Rule 77(A) preserves the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice. Rule 77(A)(ii) specifically provides any person who "discloses information relating to... proceedings in knowing violation of an order of a Chamber" may be held in contempt. The language of Rule 77 demonstrates that a violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice.² This is further reinforced by the jurisprudence of the International Tribunal which has established that any defiance of an order of a Chamber interferes with the administration of justice for the purposes of a conviction for contempt.³ Consequently, to convict an individual of contempt, it is sufficient to prove the relevant *actus reus* and *mens rea* elements.⁴

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

14. The Appeals Chamber has held that the *actus reus* of contempt charged under Rule 77 (A)(ii) is the physical act of disclosure of information relating to proceedings before the International Tribunal where such disclosure would be in violation of an order of a Chamber.⁵ Disclosure, as understood in its literal sense, is the revelation of information that was previously confidential to a third party or to the public.⁶ As held by the Trial Chamber in

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

² *Prosecutor v. Jović*, Case IT-95-14 & 14/2-R77-A, Appeals Chamber Judgement, 15 March 2007, para. 30, ("Jović Appeal Judgement"); *Prosecutor v. Marijačić & Rebić*, Case IT-95-14-R77.2-A, Appeals Chamber Judgement, 27 September 2006, para. 44. ("Marijačić & Rebić Appeal Judgement").

³ *Jović Appeal Judgement*, para. 30; *Marijačić & Rebić Appeal Judgement*, para. 17, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R77.4, Contempt Proceedings Against Kosta Bulatovic: Decision on Contempt of the Tribunal, 13 May 2005 ("Bulatovic Trial Decision"), para. 17.

⁴ *Prosecutor v. Jović*, Case IT-95-14 & 14/2-R77, Trial Chamber Judgement, 30 August 2006, para. 11, ("Jović Trial Judgement"); *Prosecutor v. Marijačić & Rebić*, Case IT-95-14-R77.2, Trial Chamber Judgement, 10 March 2006, para. 19. ("Marijačić & Rebić Trial Judgement")

⁵ *Jović Appeal Judgement* at 30; *Marijačić & Rebić Appeal Judgement*, para. 24; see also *Prosecutor v. Haxhiu*, Case IT-04-84-R77.5, Trial Chamber Judgement, 24 July 2008, para. 10, ("Haxhiu Trial Judgement").

⁶ *Haxhiu Trial Judgement*, para. 10; *Marijačić & Rebić Trial Judgement*, para. 17.

Haxhiu, this includes information the confidential status of which has not been lifted.⁷

Further, the disclosure must objectively breach either a written or an oral order issued by a Chamber.⁸ As will be shown below, that is demonstrably clear on the facts in this case.

15. The fault requirement or *mens rea* needed to support a charge of this form of contempt is whether the Accused had knowledge that the disclosure was in violation of an order of the Chamber.⁹ Rule 77(A) requires a demonstration that the Accused “knowingly and wilfully interfered” with the Tribunal’s administration of justice. Rule 77(A)(ii) puts a finer point on the issue, requiring “disclosure (of) information...in **knowing violation** of an order of a Chamber” (emp. added). Clearly, *actual knowledge* that the confidential terms of an order are being breached will suffice. However, the “knowing violation” requirement in the Rule is not confined to actual knowledge: willful blindness to the existence of the order (in the sense of deliberate ignorance, or refraining from finding out whether the order existed because she wanted to be able to deny knowledge of it) or being recklessly indifferent on the issue, is sufficiently culpable conduct to satisfy the requirements for contempt.¹⁰ Finally, there is no requirement to prove a willful intention to disobey the order. It is sufficient to prove that the act that breached the order was deliberate and not accidental.¹¹

ii. *Actus Reus*

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

a) Physical act of Disclosure

17. The Accused disclosed information relating to proceedings before the International Tribunal on two occasions. First, in her book, *Paix et Châtiment*; next in an article published online entitled “Vital Genocide Documents Concealed”.

18. The Accused was the sole author of *Paix et Châtiment*, published by Flammarion on

⁷ *Haxhiu* Trial Judgement, para. 10.

⁸ *Haxhiu* Trial Judgement, para. 10; *Marijačić & Rebić* Trial Judgement, para. 17.

⁹ *Jović* Appeal Judgement at 27.

¹⁰ *Prosecutor v. Aleksovski*, Case IT-95-14/I-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, paras. 42-45 (“*Nobile* Appeal Judgement”); *Haxhiu* Trial Judgement, para. 11.

¹¹ *Nobile* Appeal Judgement, para. 54.

10 September 2007. In *Paix et Châtiment*, the Accused makes express references to the existence, contents and purported effect of the two Appeals Chamber's Confidential Decisions on Review. Of particular note are pages 120 through 122. The Accused makes express reference to the confidential nature of these decisions.

19. On 21 January 2008, the Accused authored an article entitled, “Vital Genocide Documents Concealed”, which was published online by the Bosnian Institute. In the article, the Accused discloses the existence, date and purported effect of the 20th September 2005 and 6 April 2006 decisions of the Appeals Chamber.

b) Orders Breached by Disclosure

20. The information disclosed by the Accused is related to two decisions of the Appeals Chamber in the case of *Prosecutor v. Slobodan Milošević* (IT-02-54-AR108bis.2 and .3), which were issued and filed confidentially:

- i) A decision on the request for review of the Trial Chamber's oral decision of 18 July 2005, on 20 September 2005 [Case No: IT-02-54-AR108bis.2]; and
- ii) A decision on the request for review of the Trial Chamber's decision of 6 December 2005, on 6 April 2006 [Case No.: IT-02-54-AR108bis.3]

21. The caption page of each decision indicated its status as confidential. The motions which gave rise to each of the decisions were filed confidentially. Therefore, the information disclosed by the Accused was subject to an order or orders by a Chamber which were in effect at the time the information was disclosed. Information that may have been discussed publicly by others in different fora does not lift confidentiality.¹² The confidential status guaranteed by these orders can only be lifted by a Chamber;¹³ no Chamber has lifted confidentiality of either order.

iii. Mens Rea

22. In the present case, to establish the *mens rea*, it must be shown that the Accused had

¹² *Jović* Appeal Judgement at 30.

¹³ *Marijačić & Rebić* Appeal Judgement, para. 45.

knowledge that the disclosure was in violation of an order of the Chamber.¹⁴ It is sufficient to establish that the act which constitutes the violation (here, publication) was deliberate and not an accident. Once it has been established that the Suspect had knowledge of the existence of the order (either actual knowledge or willful blindness/reckless indifference), a finding that she *intended* to violate the order by publishing will almost necessarily follow. It is not necessary to show that the Suspect contemnor knew that the order violated was directly binding on her.¹⁵

a) Knowledge

23. The evidence in this case supports a finding of *actual* knowledge. The Accused knew that the information was confidential at the time disclosure was made, that the decisions from which the information was drawn were ordered to be filed confidentially, and that she was revealing confidential information to the public. Her comments at p. 120-122 in *Paix et Châtiment*, which are in the nature of admissions, are clear in this respect. Those admissions are relevant to, admissible and probative of the issue in respect of count two as well as count one.

b) Willful Blindness

24. The Appeals Chamber has held that although mere *negligence* in failing to ascertain whether an order has made could never amount to contempt, it has also held that either willful blindness or reckless indifference to the existence of an order is sufficiently culpable conduct to be dealt with as contempt.¹⁶ A finding of willful blindness, however, first requires a suspicion or realization on the part of the Accused that an order may exist. The Accused has worked for over twenty years as a journalist, a profession where verifying one's sources is essential to ensure quality work and to maintain one's reputation and credibility. Further, the Accused worked for six years as the Spokesperson for the Prosecutor, where, on a daily basis, she worked within the Tribunal's confidentiality framework. When this evidence is considered together, an inference that the Accused had a suspicion that an order may exist is irresistible.

¹⁴ Rule 77(A)(ii) of the Rules; *Marijačić & Rebić* Trial Judgement, para. 18; *Jović* Trial Judgement, para. 20; *Haxhiu* Trial Judgement, para. 11.

¹⁵ *Jović* Appeal Judgement, para. 30.

¹⁶ *Nobilo* Appeal Judgement, paras. 45 and 54; *Haxhiu* Trial Judgement, para. 11.

C. ADMISSIONS BY THE PARTIES

25. On 5 January 2009 the *Amicus Curiae* Prosecutor sent a proposal to replacement counsel Mr. Khan respecting areas of the evidence that may potentially be undisputed and the subject of agreement between the parties. We await a response in this respect.

D. STATEMENT OF MATTERS NOT IN DISPUTE/ CONTESTED MATTERS OF FACT AND LAW

26. Absent admissions, all adjudicative facts and issues of law are in issue.

III. DISCLOSURES PER RPE RULE 65^{ter}(E)(ii) – Witness List

28. See Annex A to this Brief.

IV. DISCLOSURES PER RPE RULE 65^{ter}(E)(iii) – Exhibit List

29. See Annex B to the Brief.

Word Count: 2934

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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

Dated this eighth day of January 2009
in The Hague,
Netherlands

ANNEX A
to
PROSECUTOR'S PRE-TRIAL BRIEF
PURSUANT TO RULE 65*ter*(E)

DISCLOSURES PER RPE RULE 65ter(E)(ii) – Witness List

Witness	Summary of Testimony	Counts and Paragraphs in Annex to Order in Lieu of an Indictment	Viva Voce/ 92bis/ 92ter/ 92quater	Estimated Time
1. Robin VINCENT	VINCENT is the Registrar for the Special Tribunal for Lebanon. He has also served as a temporary Deputy Registrar at the ICTY, and Registrar for the Special Court for Sierra Leone. As an expert in the field of international tribunals, he will testify on the necessity of confidential orders of the Chamber, particularly during the investigative stage of a proceeding. He will provide the “big picture” concerning the work of international criminal tribunals, and the adverse consequences of deliberate breaches of confidentiality orders. He will underscore the importance of the rule of law in an international context.	Count 1 and Count 2 Para. 1	Viva Voce	2 hours
2. Evelyn ANOYA	ANOYA is the Legal Coordinator in the Office of the Registry of the ICTY. She will identify the two Appeals Chamber Orders in issue, confirm that they were filed confidentially, and will further confirm that they have remained confidential continuously to the date of the trial. She will also outline the general rationale underlying the issuance of confidential orders. Ms. Anoya will also testify that the article in the Bosnian Institute, is and has been on the Internet and for that reason has been available to the public around the world for some time.	Count 1 and Count 2 Paras. 1 and 3	Viva Voce	1 hour
3. Yorric KERMARREC	KERMARREC is the Secrétaire General of Flammarion Groupe., the French publisher of the Accused’s book <i>Paix et Châtiment</i> . He will testify to matters relating to the contract between Flammarion and the Accused and the subsequent publication and distribution of <i>Paix et Châtiment</i> . He will tender the contract.	Count 1 Para. 2	Viva Voce	1 hour

DISCLOSURES PER RPE RULE 65ter(E)(ii) – Witness List (con’t)

Witness	Summary of Testimony	Counts and Paragraphs in Annex to Order in Lieu of an Indictment	Viva Voce/ <i>92bis/92ter/92quater</i>	Estimated Time
4. Gavin RUXTON	<p>RUXTON is the Chief of the Trials Division within the Office of The Prosecution (“OTP”), of the ICTY. He will testify with respect to the role and responsibility of the Accused within the OTP. More specifically he will say that as Spokesperson for the former Prosecutor, the Accused was responsible for classic media relation duties. In the discharge of that responsibility, she was often asked to confirm or deny the truth of certain facts or events. The Accused understood the importance of being careful about what she said, and took care to ensure that she did not disclose confidential information. Mr. Ruxton will also testify with respect to the Accused’s working relationship with the former prosecutor, noting that it was extremely close and went well beyond the normal role of a Spokesperson, including roles akin to “chief of staff”, “chef de cabinet”, “special advisor to the prosecutor”, and “principal policy advisor to the prosecutor”, especially in terms of issues arising in the Balkans. Mr. Ruxton is expected to say that the accused was a “close confidante” of the Prosecutor— someone who was part of the “immediate office”, and was dedicated, tenacious, and extremely loyal to Ms. del Ponte.</p>	<p>Count 1 and Count 2</p> <p>Para. 4</p>	<p>Viva Voce</p>	<p>2 hours</p>
Total Number of Witnesses to be called by the Prosecution= 4		Total Trial Time for Prosecution’s Case		6 hours

ANNEX B
to
PROSECUTOR'S PRE-TRIAL BRIEF
PURSUANT TO RULE 65^{ter}(E)

DISCLOSURES PER RPE RULE 65ter(E)(iii) – Exhibit List

Rule 65ter Exhibit No.	Date	Original Language	Description
1.	16 October 2000	English	UN Declaration of Loyalty signed by Ms. Hartmann
2.	25 June 2003	English	ICTY Internal Memorandum regarding Outside Activities
3.	20 September 2005	English	Cover Sheet for Appeals Chamber Decision on the request for review of the Trial Chamber's oral decision of 18 July 2005 [Case No: IT-02-54-AR108bis.2];
4.	20 September 2005	English	Appeals Chamber Decision on the request for review of the Trial Chamber's oral decision of 18 July 2005 [Case No: IT-02-54-AR108bis.2];
5.	6 April 2006	English	Cover Sheet for Appeals Chamber Decision on the request for review of the Trial Chamber's decision of 6 December 2005 [Case No.: IT-02-54-AR108bis.3]
6.	6 April 2006	English	Appeals Chamber Decision on the request for review of the Trial Chamber's decision of 6 December 2005 [Case No.: IT-02-54-AR108bis.3]
7.	2006	French with English subtitles	DVD - La Liste de Carla produced by Marcel Schüpbach
8.	20 December 2006	French	Publishing Contract between Flammarion and Ms. Hartmann
9.	10 September 2007	French	Book - <i>Paix et Châtiment</i> published by Flammarion
10.	undated	English	Paix et Châtiment - translation excerpt
11.	26 September 2007	French	First Letter from Registrar to Ms. Hartmann
12.	19 October 2007	French	Second Letter from Registrar to Ms. Hartmann
13.	21 January 2008	English	"Vital Genocide Documents Concealed", published by the Bosnian Institute
14.	1 February 2008	English	Order to the Registrar to appoint an <i>Amicus Curiae</i> to investigate a contempt matter
15.	22 May 2008	English & French	Sealed CD of First Suspect Interview
16.	22 May 2008	English	Translated transcript of First Suspect Interview
17.	9 June 2008	English & French	Sealed CD of Second Suspect Interview
18.	9 June 2008	English	Translated transcript of Second Suspect Interview
19.	1 September 2008	English	Order from Deputy Registrar Appointing Bruce MacFarlane as <i>Amicus Curiae</i> Prosecutor
20.	30 December 2008	English	Immunity waiver letter re: E. Anoya
21.	TBA	TBA	Immunity waiver letter re: G. Ruxton
22.	TBA	TBA	Immunity waiver letter re: R. Vincent
23.	undated	English	Biography of Robin Vincent