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-95-14-R77.2 Date: 10 March 2006 Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding**
Judge Patrick Robinson
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Judgement of: **10 March 2006**

PROSECUTOR

v.

IVICA MARIJAČIĆ
MARKICA REBIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. David Akerson
Ms. Rebecca Graham
Mr. Salvatore Cannata

Counsel for Ivica Marijačić:

Mr. Marin Ivanović

Counsel for Markica Rebić:

Mr. Krešimir Krsnik

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 18 November 2004, an article appeared in the Croatian newspaper *Hrvatski List*, concerning Lieutenant Johannes van Kuijk ("the Witness") who had testified in closed session before the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal"), in the case *Prosecutor v. Tihomir Blaškić* ("*Blaškić* case"). The article was written by Ivica Marijačić, editor-in-chief of the newspaper, and was printed adjacent to an interview with Markica Rebić, who was said to be the source of the material for the article. This article, and the headlines appearing with it and on the cover of the newspaper, stated that it related to "secret" testimony given by the Witness on 1 and 2 August 1997. These were the dates on which a written statement by the Witness was recorded by the Office of the Prosecutor of the Tribunal ("Prosecution"). He subsequently gave oral evidence in closed session on 16 December 1997.

2. In both his statement and oral testimony, the Witness described events in July 1997, when Miroslav Bralo approached an SFOR camp in Bosnia and Herzegovina where the Witness was stationed, declared his wish to surrender himself, and handed over several documents to the Witness.[1] The newspaper quoted extensively from the statement, but did not reproduce the Witness' oral testimony verbatim. However, in the published interview with Markica Rebić, the *Hrvatski List* interviewer states "Mr. Rebić, you have given our editorial office two documents: one is the ICTY OTP document, the statement given by the witness, and the other is the statement he gave before the ICTY Trial Chamber in the *Blaškić* case." In his article, beside the interview, Ivica Marijačić states that the testimony of the Witness demonstrated that the "Chief Prosecutor" at the Tribunal had made false accusations against Croatia regarding that country's co-operation with the Tribunal. Similarly, in his interview, Markica Rebić is quoted as saying that his motive in publishing the material about the testimony was also to counter "baseless accusations" against Croatia and himself.

3. On 1 December 2004, the Prosecution sought an order, pursuant to Rule 77(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), directing it to investigate a potential matter of contempt involving possible breaches of orders issued by the Trial Chamber hearing the *Blaškić* case.[2] A confidential and *ex parte* decision was then issued on 10 December 2004, by the Duty

[1] The protective measures granted to the Witness were lifted by a decision of the Appeals Chamber on 16 January 2006, permitting the content of his testimony to be made public. *See infra*, para. 10.

[2] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, *Ex Parte* and Confidential Motion for an Order Directing the Prosecutor to Investigate Potential Contempt Concerning Hrvatski List, 1 December 2004.

Judge, directing the Prosecution to investigate the matter with a view to the preparation and submission of an indictment for contempt.[3]

4. An indictment against Ivica Marijačić and Markica Rebić (collectively, "the Accused") was confirmed on 26 April 2005. This indictment charged them with one count of contempt of the Tribunal, punishable under the Tribunal's inherent power and Rule 77(A)(ii) of the Rules.[4] The case against the Accused was assigned to this Trial Chamber on 5 May 2005, and preliminary motions were filed by the Accused challenging the indictment and the jurisdiction of the Trial Chamber.[5] The Prosecution also filed two motions seeking to amend the indictment.[6]

5. The Trial Chamber issued a "Decision on Motions to Dismiss the Indictment and Order on Motions to Amend the Indictment" on 6 September 2005. In that Decision and Order, the Trial Chamber denied those aspects of the motions filed by the Accused that raised a challenge to the jurisdiction of the Tribunal. It further ordered the Prosecution to provide copies of the specific order(s) that the Accused were alleged to have violated in contempt of the Tribunal, along with clarification of which parts of those order(s) the Accused allegedly breached. On 21 September 2005, "Defendant Ivica Marijačić's Response to the Trial Chamber's Order of 6 September 2005 Opposing the Prosecution's Motion to Amend, and Motion Pursuant to Rule 73(A) to Dismiss the Indictment due to Lack of Personal Jurisdiction and Lack of Subject Matter Jurisdiction" was filed. This Response contained a new motion challenging the jurisdiction of the Tribunal. Similarly, on 23 September 2005, a confidential "Response of the Accused Markica Rebić to the Prosecutor's Motions to Amend and Prosecution's Response to the Decision on the Motions to Dismiss the Indictment and Order on Motions to Amend the Indictment and Motion pursuant to Rule 73(A) to Dismiss the Indictment due to Lack of Personal Jurisdiction and Lack of Subject Matter Jurisdiction" was filed.

6. Following the submission of further responses and replies from the parties, the Trial Chamber issued two decisions on 7 October 2005, rejecting the challenges to jurisdiction raised by the Accused on the basis that the arguments made by them did not raise genuine jurisdictional

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[3] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Prosecutor's Motion for an Order Directing the Prosecutor to Investigate Potential Contempt Concerning Hrvatski List, 10 December 2004.

[4] *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Indictment, 10 February 2005.

[5] *Marijačić and Rebić*, Defendant Ivica Marijačić's Motion to Dismiss the Indictment Pursuant to Rule 72 of the Rules of Procedure and Evidence, 14 June 2005; *Marijačić and Rebić*, Preliminary Motion of the Accused Markica Rebić to Dismiss the Indictment, 23 June 2005.

[6] *Marijačić and Rebić*, Motion for Leave to Amend the Indictment, 23 June 2005; *Marijačić and Rebić*, Second Motion for Leave to Amend Indictment, 29 August 2005.

issues, and granting the Prosecution's request to amend the indictment, in part.[7] Upon the order of the Chamber, the Prosecution filed its amended indictment on 14 October 2005, and that became the operational indictment for the trial of the two Accused ("Indictment").

7. The allegations in the Indictment are as follows:

(a) Ivica Marijačić

The Accused Marijačić was a journalist, and editor-in-chief of *Hrvatski List*, a Croatian newspaper. On 18 November 2004, he authored and published an article in the newspaper, which revealed the identity of a protected witness who had testified in the *Blaškić* trial in December 1997. The article also included extracts of a statement that the protected witness had given to the Prosecution prior to his testimony, as well as indicating that he had testified in non-public proceedings before the Tribunal.

(b) Markica Rebić

The Accused Rebić was formerly the head of the Security Information Service (SIS), an intelligence branch of the Croatian government. The article by Marijačić in the 18 November 2004 edition of *Hrvatski List*, was published alongside an interview with Rebić, which revealed that Rebić had provided the name of the protected witness to Marijačić, along with copies of the prior statement that the witness had given to the Prosecution, and the transcript of the testimony that he gave in closed session in the *Blaškić* case. In the published interview, Rebić stated that he was aware that the documents he had provided to Marijačić were protected, and of the possible consequences of making them public.

8. On the basis of these factual allegations, the Indictment states that Marijačić and Rebić knowingly and wilfully interfered with the administration of justice. With regard to the Accused Marijačić, the Indictment alleges that he *published* the identity of the protected witness, along with his statement and the fact that he had testified in non-public proceedings. With regard to the Accused Rebić, the Indictment alleges that he *disclosed* the identity of the protected witness, along with his statement *and transcript* of his testimony, and the fact that he had testified in non-public

[7] *Marijačić and Rebić*, Decision on Motions to Dismiss the Indictment Due to Lack of Jurisdiction and Order Scheduling a Status Conference, 7 October 2005 (the Trial Chamber determined that the arguments raised by the Accused as challenges to jurisdiction were rather matters going to the elements of contempt, more appropriately raised at trial); *Marijačić and Rebić*, Decision on Prosecution's Motion to Amend the Indictment, 7 October 2005. Requests from the parties for certification to appeal these Decisions were subsequently rejected.

proceedings. The Indictment charges that these actions were undertaken in knowing violation of orders of the *Blaškić* Trial Chamber and states that the three applicable court orders were:

(1) A decision dated 6 June 1997, on the protection of witnesses, which ordered, *inter alia*, "the accused, his counsels and their representatives not [to] disclose to the public or to the media the name of the witnesses residing in the territory of the former Yugoslavia," and the Prosecution and the Defence to keep a log of persons receiving copies of witness statements and to instruct those persons not to reproduce them, under pain of sanction for contempt ("6 June 1997 Order");[8]

(2) An oral order, on 16 December 1997, to go into closed session for the hearing of the testimony of the Witness ("closed session Order");

(3) An order dated 1 December 2000, ordering that the publication of statements or testimonies of any protected witness should cease immediately (1 December 2000 Order").[9]

9. On 31 October 2005, the Prosecution filed its pre-trial brief, along with a proposed list of witnesses and exhibits to be brought at trial ("Prosecution Brief").[10] On 28 November 2005, the Accused Rebić filed his pre-trial brief on a confidential basis, and the Accused Marijačić followed suit on 1 December 2005.[11] On 12 December 2005, the Trial Chamber ordered, *inter alia*, both Accused to file their lists of witnesses and exhibits by 9 January 2006, and scheduled a pre-trial conference for 17 January 2006, to be followed immediately by the commencement of trial proceedings.

10. On 16 January, the Appeals Chamber issued a decision in the *Blaškić* case ("16 January 2006 Decision") that is relevant to these proceedings.[12] As the Chamber currently seized of that case, it ruled on a Prosecution motion to vary protective measures granted to the Witness in the course of the *Blaškić* trial. In its decision, the Appeals Chamber found that the Prosecution had not

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[8] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision of Trial Chamber I on the Requests of the Prosecutor of 12 and 14 May 1997 in respect of the Protection of Witnesses, 6 June 1997.

[9] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order for the Immediate Cessation of Violations of Protective Measures for Witnesses, 1 December 2000.

[10] The Prosecution Brief was filed on a confidential basis, and a public version was filed on 2 November 2005. On 9 November 2005, the Prosecution filed confidential Corrigenda to its pre-trial brief, along with a revised version, also filed confidentially.

[11] *Marijačić and Rebić*, The Accused Markica Rebić's Pre-trial Brief Pursuant to Rule 65 *ter* (F), 28 November 2005; *Marijačić and Rebić*, Defendant Ivica Marijačić's Pre-trial Brief Pursuant to Rule 65(F) *ter*, 1 December 2005.

[12] *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Decision on Prosecution's Motion for Variance of Protective Measures in the *Prosecutor v. Marijačić and Rebić* Case, 16 January 2006.

established that the 6 June 1997 Order contained protective measures applicable to the Witness, as he was not residing in the territory of the former Yugoslavia. The Appeals Chamber further noted that on 16 December 1997 the *Blaškić* Trial Chamber had ordered that his testimony be held in closed session, not out of concern for his security, but because he would be "testifying about information that is extremely sensitive" and because questioning of him could intrude upon sensitive operational matters. However, the Appeals Chamber acknowledged that the closed session Order did grant protective measures applicable to the Witness. With respect to the 1 December 2000 Order, the Appeals Chamber did not consider that it contained any additional protective measures that could be varied pursuant to the Prosecution's request. It ordered that all protective measures granted to the Witness at the hearing on 16 December 1997 be lifted, permitting the fact that he testified, his statements to the Prosecution, and the transcript of his testimony, to be referred to publicly.[13]

11. The pre-trial conference duly took place on 17 January 2006, followed immediately by the trial. During these hearings, which lasted until 19 January 2006, the Trial Chamber heard legal arguments from the parties, heard evidence from two Prosecution witnesses, and examined various documents that were introduced. Prior to the pre-trial conference, the Prosecution had sought judicial notice and the admission of certain documents as evidence at trial.[14] In a decision dated 13 January 2006, the Trial Chamber admitted eleven of these documents and rejected the rest, without prejudice.[15] During the trial proceedings, these admitted documents were given exhibit numbers and eleven further documents were admitted as Prosecution exhibits. Two Defence exhibits were also admitted, and two additional documents were admitted as Chamber exhibits. Following the Prosecution's witnesses, the Defence for both Accused made an oral application for a judgement of acquittal, on the basis of Rule 98 *bis* of the Rules. After hearing arguments from the Defence and the Prosecution, the Chamber orally denied this application.[16]

12. Both the Prosecution and the Defence for the two Accused advanced various arguments in the course of their many written submissions prior to trial and their oral submissions at trial. The Chamber has carefully considered all of these submissions in making its findings set out below.

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[13] *Ibid.*, p. 5.

[14] *Marijačić and Rebić*, Prosecution Motion for Judicial Notice and Admission of Evidence, 21 December 2005.

[15] *Marijačić and Rebić*, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence, 13 January 2006.

[16] *Marijačić and Rebić*, Transcript, T. 238 (18 January 2006).

II. DISCUSSION AND FINDINGS

A. The Law on Contempt

13. The Tribunal's jurisdiction in respect of contempt is not expressly articulated in the Statute. However, it is firmly established that the Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded.[17] As an international criminal court, the Tribunal possesses this inherent power to deal with conduct interfering with its administration of justice.[18] Such interference may be by way of conduct which obstructs, prejudices or abuses the Tribunal's administration of justice.[19] Those who knowingly and wilfully interfere with the Tribunal's administration of justice in such a way may, therefore, be held in contempt of this Tribunal.[20]

14. Rule 77(A) of the Rules identifies forms of commission of contempt which fall within the Tribunal's inherent jurisdiction. This provision states that:

> 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
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> (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
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> (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
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> (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
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> (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.

[17] *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Judgement"), para. 13; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Appeals Chamber Judgement"), para. 36. *See also Nuclear Tests Case* (Australia v. France), 1974 ICJ Reports, pp. 259–260, para. 23, *followed by Prosecutor v. Blaškic*, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 25 n. 27.

[18] *Vujin* Judgement, para. 13.

[19] *Ibid.*, para. 18.

[20] *Ibid.*, para. 26(a).

15. The Appeals Chamber has determined that the *content* of the Tribunal's inherent power may be discerned by reference to the usual sources of international law, and not by reference to the wording of Rule 77.[21] However, the Appeals Chamber has also held that each of the forms of commission of contempt, now articulated in Rule 77(A), "falls within—but does not limit—that inherent power, as each clearly amounts to knowing and wilful interference with the Tribunal's administration of justice."[22]

B. Elements of Contempt in this Case

16. In the present case, the Accused are charged with contempt of the Tribunal on the basis of the underlying form of commission contained in Rule 77(A)(ii)—the disclosure of information relating to proceedings before the Tribunal in knowing violation of an order of a Chamber. The Prosecution must therefore prove beyond reasonable doubt that all of the elements of this form of commission of contempt are satisfied before convictions can be entered against either Accused.

17. The *actus reus* of this particular form of commission of contempt is the physical act of disclosure of information relating to proceedings before the Tribunal, when such disclosure would breach an order of a Chamber. The word disclosure is here to be understood in its literal sense, being the revelation of something that was previously confidential. Thus, the passing of confidential information to a third party would amount to disclosure, as would the publication of such information in a newspaper. In addition, the act of disclosing the particular information must objectively breach an order issued by a Trial or Appeals Chamber, whether such order is written or oral, before the *actus reus* of contempt as articulated in Rule 77(A)(ii) is satisfied. It is therefore necessary, in the present case, for the Prosecution to prove that there was an order, or orders, that would be breached by the disclosure of information about the Witness and his testimony, as alleged in the Indictment.

18. The *mens rea* element of contempt, when charged under Rule 77(A)(ii), is the knowledge of the alleged contemnor of the fact that his disclosure of particular information is done in violation of an order of a Chamber. Proof of actual knowledge of an order would clearly suffice to satisfy this element, and actual knowledge may be inferred from a variety of circumstances. In addition, wilful blindness to the existence of an order is sufficient. However, to demonstrate wilful blindness it

[21] *Ibid.*, para. 24.

[22] *Ibid.*, para. 26(b). In January 2000, when the *Vujin* Judgement was rendered, the forms of commission of contempt were found in Rule 77(A)–(C), and Rule 77(D) covered incitement and attempts to commit contempt, which is now in Rule 77(B).

must first be shown that the alleged contemnor had a suspicion or realisation of the order's existence.[23]

19. The formulation of Rule 77(A) indicates that knowing and wilful interference with the administration of justice is a consequence of the disclosure of information relating to Tribunal proceedings in knowing violation of an order of a Chamber.[24] There is therefore no additional requirement for the Prosecution to prove that such interference actually occurred. Thus, proof of the *actus reus* and *mens rea* elements of this form of commission of contempt is sufficient to convict an individual of contempt.

20. Having reached these conclusions concerning the elements of contempt, the Trial Chamber addresses the question of whether there were applicable orders that were potentially violated by the Accused, and what information, if any, these orders protected.

C. Applicability of the Orders

1. The 6 June 1997 Order

21. In support of its allegation that the two Accused committed contempt, the Prosecution argued initially that there were three applicable orders, identified above. With regard to the 6 June 1997 Order, the Prosecution made no submissions concerning the Accused Marijačić, but sought to demonstrate that the Accused Rebić was a "representative" of the *Blaškić* defence team, and therefore bound by the terms of that Order. However, in light of the Appeals Chamber's 16 January 2006 Decision, at trial it conceded that the Witness was not residing in the territory of the former Yugoslavia and subsequently dropped its reliance on the 6 June 1997 Order.[25] It concentrated its subsequent arguments on the other two Orders.[26]

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[23] *See Nobilo* Appeals Chamber Judgement, para. 51 ("There can be no wilful blindness to the existence of an order unless there is first of all shown to be a suspicion or realisation that the order exists.").

[24] *See also Prosecutor v. Milošević*, *Contempt Proceedings Against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005, para. 17 (this Trial Chamber holding that "[a]ny defiance of an order of the court interferes with the administration of justice"). In its decision on the appeal of this decision, the Appeals Chamber held that the Trial Chamber had not erred in this particular aspect of its ruling. *Prosecutor v. Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005 ("*Bulatović* Appeals Chamber Decision"), para. 40. *Compare Prosecutor v. Brđanin*, *Concerning Allegations of Contempt against Milka Maglov*, Case No. IT-99-36-R77, Decision on Motion for Acquittal pursuant to Rule 98 *bis*, 19 March 2004, para. 41 (in which that Trial Chamber found that "even though no specific intent to violate an order is required for an accused to be held in contempt, the Prosecution must nevertheless establish that the accused had the specific intent to interfere with the Tribunal's due administration of justice").

[25] *Marijačić and Rebić*, Transcript, T. 273 (19 January 2006).

[26] These Orders were said to stand alone, such that the violation of each of them would constitute contempt of Court. *See Marijačić and Rebić*, Transcript, T. 269 (19 January 2006).

2. The Closed Session Order

22. The Prosecution and the Defence for both Accused differ on the effect of the closed session Order and, in particular, on whether it served to protect the identity of the Witness from being publicly revealed, or rather only prevented public disclosure of the content of his testimony. The Prosecution did not assert that the Witness was granted any other specific protective measures by the *Blaškić* Trial Chamber to ensure that his identity was kept confidential, such as the assignment of a pseudonym, although at trial it produced a witness list from the *Blaškić* trial to indicate that he was assigned the pseudonym EE. It was, however, unable to demonstrate that this pseudonym was ordered by a Chamber rather than applied for internal administrative reasons. The Prosecution argued, nonetheless, that the circumstances in which the closed session was ordered and the fact that the Witness' identity was never publicly revealed indicate that the closed session Order was intended to protect his identity.[27] The Defence, however, argued that the Witness' identity was not covered by the closed session Order, but rather that it was only his oral testimony that was protected, which was not published in *Hrvatski List*.

23. Article 20 of the Tribunal's Statute states the general principle that hearings before the Tribunal shall be public "unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence." Rule 79 of the Rules articulates the reasons which may justify the ordering of a closed session, these being: (i) public order and morality; (ii) safety, security or non-disclosure of the identity of a victim or witness; and (iii) the protection of the interests of justice.

24. The practical effect of a closed session order is that the audio and video broadcast is suspended and blinds are lowered in the courtroom to prevent members of the press and public sitting in the public gallery from seeing or hearing any part of the proceedings. The transcript of a closed session is marked as such, and is not made available to the public in the manner that transcripts of open sessions are distributed. The Tribunal has also developed a practice of using so-called private sessions, which are similar in nature to closed sessions, but which are generally utilised for very short periods during proceedings. When a Chamber orders a private session, the audio and video broadcast is suspended, but the blinds in the courtroom are not lowered and therefore those sitting in the public gallery are able to see the proceedings, without being able to hear them. Those parts of proceedings that are conducted in private session are redacted from the public version of the transcript. The French terminology used to describe a closed session is

[27] *Marijačić and Rebić*, Transcript, T. 256–257 (19 January 2006)

audience à huis clos, and a private session is *audience à huis clos partiel*, indicating that a private session is considered to be a partially closed session. In accordance with the foregoing practice, the difference is that in a private session events and identities can be seen by those sitting in the public gallery.

25. When a witness testifies entirely in closed session, and his name is only ever mentioned during that closed session, his name forms part of the closed session transcript, which is a confidential document. There may be circumstances in which the name of a witness who testifies in closed session is revealed by the Chamber—for example, the Chamber could issue a public order granting a request for a named witness to testify in closed session.[28] In such circumstances, it is clear that the identity of the witness is not intended to be kept confidential. However, when the name of a witness can only be found in confidential documents of the Tribunal, such as closed session transcripts, and he appeared in the courtroom only when the blinds were lowered and the audio and video broadcast suspended, it must be concluded that his identity is protected by the closed session order.

26. This latter situation is precisely that of the Witness who is the subject of the present case, who was brought into the courtroom on 16 December 1997 only after a closed session had been ordered, the blinds lowered, and the audio and video transmission of the proceedings suspended. His name was never mentioned in open session, and his entire testimony was given in closed session. The transcript of his evidence on 16 December 1997, which reveals his name, is clearly marked "Closed Session." Therefore, the public revelation of his identity and the content of his testimony would constitute a breach of the closed session Order.

27. In addition, where the content of a written witness statement is largely the same as the content of oral testimony given in closed session, that content must also be considered protected by the terms of the closed session order, or the protection granted would be ineffectual. This conclusion is supported by the Appeals Chamber in its 16 January 2006 Decision. The Appeals Chamber determined that the 1 December 2000 Order did not contain any protective measures additional to those contained in the closed session Order that could be varied as requested by the Prosecution. The Appeals Chamber then ordered that all protective measures with regard to the Witness be lifted such that the fact that he testified, his prior witness statements to the Prosecution, and the transcripts of his closed session testimony could all be referred to publicly. In light of this,

[28] Exhibits D1 and D2 are public decisions issued by Trial Chamber I in the *Blaškić* case, which grant the applications of two witnesses to give testimony in closed session, and name those witnesses as General Philippe Morillon and Mr. Jean-Pierre Thebault.

and the finding that the 6 June 1997 Order was inapplicable to the Witness, it follows that the closed session Order protected not only the identity of the Witness and the content of his testimony, but also that it protected his witness statement.

28. Once the closed session Order was made, these Accused were bound to comply with it. It is impermissible for third parties to act in defiance of an order of a Chamber that is on its face valid.[29] The Accused Marijačić has, however, argued that the Tribunal does not have the power to issue orders that are binding in general upon members of the press and public.[30] The Tribunal is an international judicial institution, established by the Security Council under Chapter VII of the Charter of the United Nations. Its Statute was adopted by the Security Council and Article 20 imposes a duty upon Chambers to ensure that trials at the Tribunal are fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. In fulfilment of this duty, Rule 54 provides that Chambers may issue all necessary orders, Rule 79 permits the exclusion of members of the press and public from proceedings by a Chamber, and no limitation is placed upon those who may be the subject of those orders. Therefore, when a Chamber orders that testimony be given in closed session, rendering everything that transpires confidential, such an order applies to all persons coming into possession of the protected information.

3. The 1 December 2000 Order

29. The third order listed in the Indictment was made on 1 December 2000. Following a narrative of alleged infringements of protective measures granted to another witness by the publication of statements or transcripts of his testimony by the *Slobodna Dalmacija* and *Globus* newspapers, the *Blaškić* Trial Chamber made the following order:

> ORDERS that the publication of statements or testimonies of the witness concerned, and generally, of any protected witness, shall cease immediately and STATES that any publication of these statements or testimonies, shall expose its author(s) and those responsible to be found in contempt of the Tribunal,
>
> REQUESTS the relevant authorities of the Republic of Croatia to take immediately all measures necessary to bring the publication of the Statements to an end and to provide

[29] *See Bulatović* Appeals Chamber Decision, para. 11 ("[t]he Appeals Chamber considers that it is irrelevant to the contempt proceedings against the Appellant whether the Trial Chamber was in error in ordering a continuance of the trial proceedings in the absence of the Accused. As a witness before this Tribunal, the Appellant has an obligation to abide by any orders issued by the Trial Chamber, regardless of his personal view of the legality of those orders.")

[30] The Defence for Marijačić did not make detailed submissions in its pre-trial Brief, or at trial, on this broader point, but raised it repeatedly in its preliminary motions. *See, e.g.*, *Marijačić and Rebić*, Defendant Ivica Marijačić's Response to the Trial Chamber's Order of 6 September 2005 opposing the Prosecution's Motions to Amend, and Motion pursuant to Rule 73(A) to Dismiss the Indictment Due to Lack of Personal Jurisdiction and Lack of Subject Matter Jurisdiction, 21 September 2005, para. 16.

> the Chamber with all and any information regarding the sources or authors of the unauthorised disclosure of the Statements,
>
> REQUESTS the Registrar to send a copy of this decision by telefax to the competent authorities of the Republic of Croatia and to the papers "Globus" and "Slobodna Dalmacija" as soon as practicable,
>
> CALLS UPON the authorities of the Republic of Croatia and upon the Prosecutor to provide the Chamber with any information regarding the identity of those potentially responsible for the illegal disclosure of the Statements and violations of the related orders and decisions of the Chamber regarding the protection of witnesses."

30. This Order contains no additional protective measures for any *Blaškić* witness, but rather serves to re-entrench existing protective measures, by ordering that breaches of those protective measures must cease immediately, and providing a reminder that any future breaches will be sanctioned. *Hrvatski List*, which did not even exist at the time that Order was made, could not be said to fall into the category of those who might already have breached existing protective measures. Even if *Hrvatski List* should act in violation of protective measures orders subsequently, such conduct would amount to a breach of those protective measures rather than of the 1 December 2000 Order. Furthermore, one of the exhibits presented to the Trial Chamber reproduced the notification given by the Registrar to the Republic of Croatia in terms of the 1 December 2000 Order.[31] That notification stated that the Order related to the newspapers *Slobodna Dalmacija* and *Globus*. Against that background it is not possible to say that the Order applied to journals other than the two mentioned.

D. Responsibility of the Accused

31. Having determined that the closed session Order protected the identity of the Witness, the content of his testimony, and his prior witness statement, insofar as it contained the same information as his closed session testimony, the Trial Chamber must examine whether either of the two Accused can be held criminally responsible for knowingly violating this Order. To convict the Accused of contempt, punishable under Rule 77(A)(ii) of the Rules, the Prosecution must prove beyond a reasonable doubt that the *actus reus* and the *mens rea* elements of contempt, as outlined in sub-section B above, are satisfied.

1. The Accused Marijačić

32. Prior to trial, Marijačić filed his list of witnesses and exhibits, as ordered by the Trial Chamber, and stated that he agreed with the assertion made by the Prosecution that he authored an

article appearing in *Hrvatski List* on 18 November 2004, with the headline "World Exclusive – The First to Publish the Secret Document Which Shows Carla del Ponte's Plot Against Croatia," and that printed with the article was the statement of the Witness.

33. The Chamber notes that the 18 November 2004 edition of *Hrvatski List*[32] states that the Accused Marijačić was at that time the editor-in-chief of the newspaper. The article by Marijačić on page 6 of the newspaper repeatedly names the Witness and states that he testified "secretly" before the Tribunal. On the cover and on pages 6 and 7 of the newspaper, extracts from the witness statement given by the Witness to the Prosecution are also published. They reveal his name. Comparison of these extracts with the statement given by the Witness to the Prosecution during interviews held on 1 and 2 August 1997 demonstrates that a significant proportion of the statement is reproduced in the 18 November 2004 edition of *Hrvatski List*.

34. Furthermore, a comparison of the terms of the portions of the statement that appeared in *Hrvatski List* with the transcript of the Witness' closed session testimony on 16 December 1997, demonstrates that much of the substance of the statement was repeated in the testimony. The following are simply three significant examples of the relationship between the two:

The closed session testimony:

> About 12:30 after midnight, a man came up to me. This man introduced himself as being Miroslav Bralo. We woke up the interpreter, who arrived five minutes later to this guard post. She had a conversation, during which Mr. Bralo explained that he knew that he was not on the list of names, the list used by the International Criminal Tribunal, of indicted war criminals. Still, he wished to surrender, he wished to give himself in, because he could no longer live with his conscience because he had committed crimes during the war.

The witness statement, as printed in *Hrvatski List*:

> At about 0300 hours Miroslav Bralo arrived at the gate of PO1. Although he knew that he was not on the list of persons indicted for war crimes he wanted to surrender, because during the war in 1992 he had killed many Muslims…

The closed session testimony:

> He also declared that in order to ensure his own security, he had fifteen of his men under arms, close to the guard post, hidden behind a building, next to the guard post. He said that the next day in the morning, we could go and look for him in his apartment, and that he would of his own go with the people who came to pick him up…. He said to me that this arrest had to be done in such a way that he would not feel threatened, because if he would feel threatened in his house, he had enough arms and termination [*sic*] to take a few guys down with him.

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[31] Exhibit OTP12, tab 5.

[32] Exhibit OTP1, admitted by written decision of 13 January 2006.

The witness statement, as printed in *Hrvatski List*:

> Bralo was carrying a pistol and said that there were 15 armed men behind [illegible] swimming pool, near PO1. He gave his address and said that SFOR could come for him in the morning (on Tuesday 22 July). This should take place peacefully and silently, and in that case he would surrender.

The closed session testimony:

> (Answering a question concerning the number of documents given to him by Bralo) He gave me nine documents.

The witness statement, as printed in *Hrvatski List*:

> On the night of 22 July 1997 Miroslav Bralo handed over nine original documents to me.

35. Therefore, by publishing large portions of the Witness' statement, the Accused Marijačić, as editor-in-chief of *Hrvatski List*, was in effect publishing the information that was contained in his closed session testimony before the Tribunal. As discussed above, in the view of this Trial Chamber, and the Appeals Chamber, the content of the Witness statement is therefore protected by the closed session Order.[33]

36. Evidence of Marijačić's knowledge that he was publishing protected information is contained in the 18 November edition of *Hrvatski List* itself. An interview with the Accused Rebić, which appears in *Hrvatski List* alongside the article authored by the Accused Marijačić and the extracts of the witness statement, reveals that *Hrvatski List*, and therefore Marijačić as its editor-in-chief, was aware that publication of this information would be in contravention of orders of the Tribunal. The question posed by the *Hrvatski List* interviewer, and the response to that question by Rebić, published in the newspaper, are as follows:

> Mr. Rebić, you have given two documents to our editors: one from the ICTY OTP, namely a witness statement by Johannes van Kuijk, and the other a record of the testimony of the same person given before the ICTY Trial Chamber in Blaškić case. Are these protected documents, and what do they represent?
>
> […]
>
> They are protected documents and I am aware of the possible consequences of them being revealed to the public.
>
> […]
>
> If the OTP wishes to initiate proceedings against me, I am at their disposal, even at the cost of being punished…

[33] The Prosecution has not made the argument that witness statements disclosed to the defence prior to or during trial are inherently confidential, although in many national jurisdictions it is an offence to make public the content of such witness statements, unless and until that content is revealed in open court.

37. Marijačić was therefore put on clear notice that this was material which was the subject of orders preventing disclosure. In addition, the transcript of the Witness' testimony in closed session that he received from Rebić was clearly marked as such. He published extracts of the witness statement, describing this material as "secret," regardless. He thus published deliberately in defiance of an order that was brought to his attention.

38. On 27 April 2005, following the issuance of the original indictment against him, Marijačić was reported by HINA, a Croatian news agency, as stating that in the next issue of the *Hrvatski List* newspaper he would publish an apology for breaking the Tribunal regulations.[34] However, in the 5 May 2005 edition of *Hrvatski List*, no apology was published. Rather, Marijačić wrote an open letter to readers headed "Reaction against ICTY Indictment of two Croatian Journalists for Contempt of Court."[35] In the course of the letter he wrote this:

> As you will know, the Hague Tribunal has accused me, as editor-in-chief, and our journalist, Markica REBIĆ, a member of the editorial board, of contempt of court for publishing the secret testimony of a Dutch officer through which we showed that the chief prosecutor at The Hague, Carla del Ponte, has no grounds to single out Croatia for the non-surrender of a Croat from Bosnia, Miroslav BRALO aka Čičko.
>
> […]
>
> When handing us the document to read at *Hrvatski List* in November last year, Mr. Rebić said that he knew it concerned a protected witness and testimony, but we did not know then, nor do we now, whether the provisions regarding the obligations of secrecy applied only to the parties to the proceedings, that is, the indictees, the prosecutors, witnesses, lawyers, judges and others, or whether it extended to the whole world. Having pondered at length the pros and cons of publishing it, we opted for the latter[.]

This statement is again a clear indication of a deliberate premeditated act in defiance of an order of the Tribunal known to exist. While he did not publish extracts from the transcript of the Witness' testimony that he was given by the Accused Rebić, it would have been readily apparent to him that the content of the witness statement, which he did publish, was essentially the same as the content of the closed session testimony.

39. The Defence for Marijačić has also placed emphasis on the right of the public to access to information concerning proceedings before the Tribunal, drawing from this the argument that journalists such as Marijačić have certain rights to report on Tribunal proceedings and related issues. Implicit in this argument is an assertion that closed session and other protective measures orders cannot in general prohibit journalists from publishing information about Tribunal

[34] Exhibit OTP16, admitted 18 January 2006. *See also* Exhibit OTP17, a letter from the Assistant General Manager of HINA, admitted 18 January 2006.

[35] Exhibit OTP2, admitted by decision of 13 January 2006.

proceedings, or more narrowly that, in the case of this Witness, the orders that were issued could not have this effect. Once again, the Trial Chamber simply notes that Chambers have the power under the Statute to exclude the press and public from Tribunal proceedings, should it be considered appropriate to do so, and to prohibit the press from publishing protected material. Individuals, including journalists, cannot then decide to publish information in defiance of such an order, on the basis of their own assessment of the public interest in that information.

40. The Trial Chamber is therefore convinced that Marijačić published information about proceedings in the *Blaškić* case, and that he did so deliberately, in the knowledge that that information was the subject of protection orders issued by the Tribunal.

2. The Accused Rebić

41. The HINA news agency report of 27 April 2005 is of particular significance in relation to the Accused Rebić. He was there reported as saying that, during the publication of the 18 November 2004 article in *Hrvatski List*, he wrote that he was "aware of what he was doing, but certain that he was doing a service to both Croatia and himself, because he was showing that it was not true that the State of Croatia and him were involved in harbouring Bralo." That is a statement attributed to Rebić, which his counsel stated was a "free journalistic interpretation" of what was said by him to the author of the article.[36] It is a clear statement that he deliberately violated the closed session testimony Order. It is a statement which also matches the terms of the interview published by Marijačić in the 18 November 2004 edition, where Rebić is reported as saying:

> "These are protected documents and I am aware of the possible consequences of making them public. … By publicising these documents I want to help myself to remove misconceptions of the OTP that I took part in hiding Cicko Bralo, and to the Republic of Croatia for being accused and held accountable without any grounds in 'Bralo' case".

Thereafter Rebić became a member of the Editorial Board of *Hrvatski List* and held that position when the open letter of 5 May 2005 was published. Rebić does not disavow the comments quoted above which were made when he was a member of the Editorial Board of the newspaper.

42. On the basis of this evidence, the Trial Chamber is left in no doubt that Rebić did indeed disclose a copy of the witness statement and closed session testimony to the *Hrvatski List* newspaper, and thus also revealed the identity of the Witness. The remaining question is whether he did so with the requisite knowledge that his actions were in violation of an order or orders of a Chamber.

[36] *Marijačić and Rebić*, Transcript, T. 158 (18 January 2006).

43. As noted above, the closed session transcript was clearly marked as such, and its content was substantially similar to the content of the witness statement given by the Witness in August 1997. In his interview with *Hrvatski List*, published in the 18 November 2004 edition, Rebić describes these two documents as "protected" and indicates his awareness that he may face "consequences" by revealing them. His subsequent comments to HINA, published on 27 April 2005, again demonstrate that he acted deliberately in the knowledge that he was revealing information that was protected in some way when he handed over the statement and transcript to *Hrvatski List*. He therefore must be considered to have been put on notice that a protective measures order existed.[37]

44. The Defence for Rebić made the additional argument that the protection granted to the Witness, an officer in the Dutch army, could not be the same as that granted to a vulnerable victim, and that the Witness came to no harm as a consequence of the revelation of his identity and testimony. However, the Trial Chamber is not convinced by this argument. Once protective measures are granted to any witness their effect cannot depend upon the assessment by third parties of the degree of vulnerability of a particular witness. Similarly, whether or not a witness came to harm after confidential information about his identity and testimony was revealed is not relevant to the question of whether the party revealing that information should be found responsible for contempt, although it may have some relevance to the matter of penalty.

45. The Chamber therefore concludes that Rebić disclosed the identity, statement and closed session testimony of the Witness to *Hrvatski List*, and that he did so in the knowledge that such disclosure was prohibited.

[37] The Prosecution sought to prove that Rebić had knowledge of the effect of an order for closed session in general, by producing documents concerning the testimony of two other protected witnesses who testified during the *Blaškić* trial. The Prosecution argued that as these documents emanated from Rebić's office, it is evident that he was aware of the type of protective measures granted to witnesses by the Tribunal and that such protective measures included protection of a witness' identity and the content of his testimony. *See Marijačić and Rebić*, Transcript, T. 200-201 (18 January 2006). However, there was no evidence presented to this Trial Chamber to indicate the circumstances in which closed session orders were made with regard to these particular witnesses, who are not the subject of the present case. It is therefore difficult to see how these documents have any bearing on the knowledge or intention of Rebić in his actions in relation to the Witness who is the subject of this trial. The Prosecution also led evidence of a discussion in 1997 in the Office of the President of the Republic of Croatia in which Rebić discussed the publication of the evidence of one of these other protected witnesses. It is sufficient to note that these discussions related to matters so divorced in time, content, and significance from the evidence of the Witness as to have no bearing whatsoever upon the issues that must be determined in this trial in relation to Rebić.

III. PENALTY

46. Rule 77(G) of the Rules provides that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both. The most important factors to be taken account of in determining the appropriate penalty in this case are the gravity of the contempt and the need to deter repetition and similar conduct by others.

47. On the question of gravity it is submitted by the Accused that there was no actual interference with the administration of justice since, by the date of publication in November 2004, no reason remained for protecting the evidence or the Witness. When counsel for the Prosecution was asked in the course of the trial whether there was at that date any purpose being served by the continuing protective measures, he could not specifically identify such a purpose.[38]

48. In the opinion of the Trial Chamber, it is plainly a knowing and wilful interference with the administration of justice in the *Blaškić* trial to breach an order of the *Blaškić* Trial Chamber in the defiant way in which the closed session Order was breached by Marijačić and Rebić. It appears from the terms of the two editions of *Hrvatski List* and a HINA news agency report discussed above that the motivation for the actions of the Accused may well have been to set straight what they perceived to be a misrepresentation by the Chief Prosecutor of the Tribunal of the failure of Croatia to co-operate with the Tribunal. While the Chamber is prepared to proceed on that basis for present purposes, the deliberate and calculated way in which the Order was defied by both Accused is a serious matter which tends to diminish the authority of the Trial Chamber in the *Blaškić* trial.

49. In addition the Prosecution points to the damage that is likely to be done to the efforts of the Office of the Prosecutor to persuade witnesses from Croatia, who are willing to give evidence but wish to do so under the added security of protective measures, to come to The Hague and give their evidence. The Prosecution also submits that there is a significant risk that witnesses, who have already co-operated in relation to cases from Croatia which are about to be heard and who anticipate that protective measures will apply to them, may now refuse to come. It is the Prosecution's submission that in both instances witnesses will lose confidence in the ability of the Tribunal to guarantee that protective measures will be effective.

[38] *Marijačić and Rebić*, Transcript, T. 247–249 (19 January 2006).

50. Any 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. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal. The Trial Chamber accepts that, in the particular circumstances of this case, the flouting of the closed session Order created such a risk.

51. Furthermore, it is also necessary to recognise the need to discourage this type of behaviour. The work of the Tribunal has a long way to go. It is a matter of great public interest in the former Yugoslavia. It remains vital that its work should not be interfered with by irresponsible conduct on the part of journalists. It is plain from what has been recounted from the *Blaškić* trial that it was bedevilled by reporting in breach of its orders. It is incumbent upon this Trial Chamber to take such steps as it can to try to ensure that there is no repetition of such conduct on the part of either of these Accused or any other person.

52. The Trial Chamber, therefore, impose a penalty which recognises the gravity of the breach and the need for deterrence. Each of the Accused will be fined 15,000 Euros, to be paid to the Registrar of the Tribunal within one month of this Judgement.

IV. DISPOSITION

53. For the foregoing reasons, the Trial Chamber,

PURSUANT TO the Statute and the Rules,

Finds the Accused Ivica Marijačić and the Accused Markica Rebić **GUILTY** of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules;

IMPOSES a fine of fifteen thousand Euros on the Accused Ivica Marijačić, and a fine of fifteen thousand Euros on the Accused Markica Rebić;

ORDERS both Accused to pay the full amount of the fine to the Registrar of the Tribunal within thirty days of this Judgement.

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

O-Gon Kwon, Presiding

Patrick Robinson

Iain Bonomy

Dated this tenth day of March 2006
At The Hague
The Netherlands

[Seal of the Tribunal]