UNITED NATIONS

	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-95-14-R77.2-A
		Date:	27 September 2006
		Original:	ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **27 September 2006**

PROSECUTOR

v.

IVICA MARIJA^I]
MARKICA REBI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Peter Kremer

The Government of the Republic of Croatia

per: The Embassy of the Republic of Croatia to the Netherlands, The Hague

Counsel for Ivica Marija~i}:

Mr. Marin Ivanovi}

Counsel for Markica Rebi}:

Mr. Kre{imir Krsnik

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of two appeals[1] by Ivica Marija~i} and Markica Rebi} ("Marijačić" and "Rebi}" or "Appellants", respectively) from the Judgement rendered by Trial Chamber III on 10 March 2006 in the case of *Prosecutor v. Ivica Marija~i} and Markica Rebi}*, Case No. IT-95-14-R77.2 ("Trial Judgement").

2. On 18 November 2004, an article appeared in the Croatian newspaper the *Hrvatski List ("Hrvatski List* Article"), concerning Lieutenant Johannes van Kuijk ("Witness"), who had testified in closed session before the International Tribunal in the *Bla{ki}* trial proceedings, Case No. IT-95-14-T, ("*Bla{ki}* trial case") on 16 December 1997. The article was written by Marija~i}, editor-in-chief of the *Hrvatski List*, and was printed adjacent to an interview with Rebi} who was found to be the source of the material for the article.[2]

3. On 16 January 2006, the Appeals Chamber issued a decision in the *Bla{ki}* review case, Case No. IT-95-14-R ("16 January 2006 Decision"), ordering that all protective measures granted to the Witness at the hearing on 16 December 1997 be lifted, thus permitting the fact that he testified, his statement given to the Prosecution prior to his testimony ("Witness' Statement") and the transcript of his closed session testimony to be referred to in public.[3]

4. The Appellants were found guilty of contempt, punishable under Rule 77(A)(ii)—the disclosure of information in "knowing violation of an order of a Chamber". Marija~i}, as the editor-in-chief of the *Hrvatski List*, was found guilty of having published large portions of the Witness' Statement, and by revealing his identity in the *Hrvatski List* Article in violation of the closed session order in the *Bla{ki}* trial case of 16 December 1997 ("Closed Session Order").[4] Rebi} was found guilty of having disclosed the Witness' identity, the Witness' Statement and his closed session testimony to *Hrvatski List* in violation of the Closed Session Order.[5]

[1] Defendant Ivica Marija~i}'s Notice of Appeal, 20 March 2006 ("Marija~i}'s Notice of Appeal"); Accused Markica Rebi}'s Notice of Appeal, 20 March 2006 ("Rebi}'s Notice of Appeal").
[2] Trial Judgement, para. 42.
[3] *Prosecutor v. Tihomir Bla{ki},* Case No. IT-95-14-R, Decision on Prosecution's Motion for Variance of Protective Measures in the *Prosecutor v. Ivica Marija~i} and Markica Rebi}* case, 16 January 2006.
[4] Trial Judgement, paras 33, 40.
[5] Trial Judgement, para. 45.

5. The Trial Chamber imposed a fine of 15,000 Euros on each of the Appellants, payable within thirty days of the issuance of the Trial Judgement.

6. On 20 March 2006 both Marija~i} and Rebi} filed their notices of appeal. The Appellants appeal "all matters in the Trial Judgement including, but not limited to three issues". In particular:

1. Whether the International Tribunal has personal and subject matter jurisdiction over the Appellants;

2. Whether the Appellants violated the Closed Session Order; and

3. Whether the sentence handed to the Appellants was excessive.[6]

7. On 5 April 2006, Counsel for Rebi} filed the "Motion for Suspension of the Order on Payment of Fines" in which he requested the Appeals Chamber to grant a suspension of Rebi}'s obligation to pay the fine until the Appeals Chamber would have rendered its judgement.[7] The Appeals Chamber decided *proprio motu* that the payment of a fine, if any, shall not be due before the Appeals Chamber has rendered its decision, and ordered that the decision should equally apply to co-Appellant Marija~i}.[8]

8. On 13 April 2006, the Appellant Rebi} filed his appeal brief arguing that the Trial Chamber committed errors both on questions of law invalidating the Judgement and errors of fact resulting in a miscarriage of justice.[9] Rebi} requests the Appeals Chamber to:

1. Revise the Judgement and find the Appellant not guilty of contempt of the International Tribunal;

2. Reverse the Judgement;

3. Reduce the sentence imposed by the Judgement;

4. Grant such other and further relief […] deemed appropriate.[10]

The Prosecution filed its Response Brief on 24 April 2006.[11] Rebi} replied to the Prosecution's Response Brief to Rebić on 28 April 2006.[12]

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[6] Marija~i}'s Notice of Appeal, p. 2; Rebi}'s Notice of Appeal, p. 2.
[7] Motion of the Accused Markica Rebi} for Suspension of the Order on Payment of Fines, 5 April 2006.
[8] Decision on Payment of Fines, 7 April 2006.
[9] Appellant's Brief of the Accused Markica Rebi}, 13 April 2006, ("Rebi}'s Appeal Brief").
[10] Rebi}'s Appeal Brief, para. 49.
[11] Prosecution Brief in Response to Rebi} Appeal, 24 April 2006, ("Prosecution's Response Brief to Rebi}").
[12] Reply of the Accused Markica Rebi} to Prosecution Brief in Response to Rebi} Appeal, 28 April 2006, ("Rebi}'s Reply Brief").

9. On 3 May 2006, the Prosecution filed a notice to the Appeals Chamber that it would not seek an oral hearing in this matter and requested a judgement on the basis of the written briefs in accordance with the expedited appeals procedure set out in Rule 116*bis* of the Rules of Procedure and Evidence ("Rules") for appeals under Rule 77(J) of the Rules.[13] On 15 May 2006, Rebi} opposed the Prosecution's request for a judgement on the basis of written briefs. Rebi} points out that all the matters necessary for a right and valid decision of the case have not been entirely discussed and the complexity of issues requires an oral hearing.[14]

10. The Appeals Chamber hereby grants the Prosecution's request to issue a judgement on the basis of written briefs pursuant to Rule 116*bis*. The Appeals Chamber does not find Rebić's arguments in favour of an oral hearing persuasive, in particular that "the complexity of issues at hand requires an oral hearing".[15]

11. The Appeals Chamber now turns to the Appellant Marija~i}. On 2 June 2006, Marija~i} filed his Appeal Brief requesting that the Appeals Chamber:

> 1. Overturn his conviction imposed by the Trial Chamber;
>
> 2. Enters a Judgement that the International Tribunal lacked personal and matter jurisdiction because the Prosecution failed to establish *prima facie* that Marija~i} violated any order;
>
> 3. Enters a Judgement that Marija~i} did not violate the Closed Session Order; or,
>
> 4. Should the Appeals Chamber uphold Marija~i}'s conviction, order the Trial Chamber to hold an evidentiary hearing and take into consideration Marija~i}'s financial situation for purposes of sentencing.[16]

12. On 8 June 2006, the Prosecution filed the "Urgent Prosecution Motion to Strike Marija~i}'s Appeal Brief" ("Motion to Strike") requesting that the Appeals Chamber strike Marija~i}'s Appeal Brief, as it was filed "manifestly out of time and [without] any good cause for [t]his late filing".[17] In his response, Marija~i} argues that the appropriate briefing schedule for Judgements issued

[13] Prosecution Notice and Request for Judgement on the basis of Written Briefs, 3 May 2006.
[14] The Accused Markica Rebi}'s Request for an Oral Hearing and Response to the Prosecution's Request for a Judgement on the Basis of Written Briefs, 15 May 2006.
[15] *Ibid.*, para. 7.
[16] Appellant Ivica Marija~i}'s Appellant's Brief, 2 June 2006, ("Marija~i}'s Appeal Brief"), p. 27.
[17] *Urgent* Prosecution Motion to Strike Marija~i}'s Appeal Brief, 8 June 2006, ("Prosecution's Motion to Strike") para. 16.

pursuant to Rule 77 is the schedule provided in Rule 111 of the Rules; alternatively, Marija~i} requests the Appeals Chamber to recognize the filing as validly done.[18]

13. The Prosecution filed its Brief in Response to Marija~i}'s Appeal on 12 June 2006.[19] Pending the decision on the Prosecution's Motion to Strike, Marija~i} filed a request for extension of time to file a reply,[20] which was allowed.[21] However, no reply was filed.

14. The Appeals Chamber dismisses the Prosecution's Motion to Strike, although Marija~i}'s argument that the appropriate briefing schedule for judgements issued pursuant to Rule 77 is the one provided in Rule 111 since he is appealing from a "judgement" rather than a "decision",[22] is a misunderstanding on his part. Marijačić argues that Section III of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal ("Practice Direction")[23] could only apply to interlocutory decisions of Trial Chambers pursuant to Rule 77.[24] He argues that, *e.g.*, the *Milošević* Trial Chamber found witness Kosta Bulatović to be in contempt in the "Decision on Contempt of the Tribunal",[25] and that this decision remained an interlocutory decision of the *Milošević* Trial Chamber to which Section III of the Practice Direction would apply.[26] The Appeals Chamber disagrees. This reading of the Practice Direction would make Section III of the Practice Direction redundant, as Sections II and IV deal with interlocutory appeals as of right and upon certification, respectively.[27] Hence, while Sections II and IV of the Practice Direction apply to all interlocutory proceedings, including those pursuant to Rule 77, Section III applies to final decisions of a Trial Chamber under Rule 77. As a consequence, the time limits set out in Section III of the Practice Direction apply to the present proceedings. However, the Appeals Chamber is mindful of the fact that this appeal is the first one pursuant to Rule 77 since entry into force of the Practice Direction. Thus, the Appeals Chamber considers that Marija~i}'s purported confusion and misunderstanding about the applicable time limits does constitute good cause in this particular instance, and accepts Marijačić's Appeal Brief as validly filed.

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[18] Defendant Ivica Marija~i}'s Response to the Prosecution's Motion to Strike Marija~i}'s Appeal Brief, 13 June 2006, para. 13.
[19] Prosecution Brief in Response to Marija~i} Appeal, 12 June 2006. ("Prosecution's Response to Marija~i}")
[20] Appellant Ivica Marija~i}'s Precautionary Request for Extension of Time, 16 June 2006.
[21] Decision on "Appellant Ivica Marija~i}'s Precautionary Request for Extension of Time", 20 June 2006.
[22] *See* Marija~i}'s Appeal Brief, p. 1, fn 1.
[23] IT/155/Rev. 3, 16 September 2005.
[24] Defendant Ivica Marija~i}'s Response to the Prosecution's Motion to Strike Marija~i}'s Appeal Brief, 13 June 2006, para. 2.
[25] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R77.4, Contempt Proceedings Against Kosta Bulatović – Decision on Contempt of the Tribunal, 13 May 2005 ("*Bulatović* Contempt Decision").

II. STANDARD OF REVIEW

15. Article 25 of the Statute provides for appeals on the ground of an error of law that invalidates the decision or an error of fact that has occasioned a miscarriage of justice. The settled standard of review applicable for appeals against judgements also applies to appeals against convictions for contempt. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error allegedly invalidates the decision.[28]

16. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[29] When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[30] In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[31]

17. The Appeals Chamber recalls that appeal is not a *trial de novo* and a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber. Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[32]

18. If a party makes submissions that are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies, the Appeals Chamber will dismiss the submissions as

[26] Defendant Ivica Marija~i}'s Response to the Prosecution's Motion to Strike Marija~i}'s Appeal Brief, 13 June 2006, paras 3-4.
[27] Prosecution's Motion to Strike, para. 8.
[28] *Prosecutor v. Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 16; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 10.
[29] *Krnojelac* Appeal Judgement, para. 10.
[30] *Kvo~ka* Appeal Judgement, para. 18; *Prosecutor v. Dario Kordi} and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 18.
[31] *Prosecutor v. Anto Furund`ija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 37, referring to *Prosecutor v. Duško Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 64.
[32] *Prosecutor v. Mladen Naletili} and Vinko Martinovi}*, Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement"), para. 13; *Prosecutor v. Tihomir Bla{ki}*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21.

unfounded without providing detailed reasoning.[33] Furthermore, the Appeals Chamber may decline to discuss issues not contained in the notice of appeal even if later raised in the appellant's brief.[34]

[33] *Naletili} and Martinovi}* Appeal Judgement, para. 14; *Bla{ki}* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, paras 22-23.
[34] *See Naletilić and Martinović* Appeal Judgement, para. 17; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, paras 101-103 and 129-130.

III. THE APPELLANTS' FIRST GROUND OF APPEAL: PERSONAL AND SUBJECT MATTER JURISDICTION

A. Findings of the Trial Chamber

19. The Trial Chamber held "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."[35] This jurisdiction comprises conduct which obstructs prejudices or abuses the International Tribunal's administration of justice. Those who knowingly and wilfully interfere with the International Tribunal's administration of justice in such a way may, therefore, be held in contempt of this International Tribunal.[36]

B. Submissions of the Parties

20. Marija~i} submits that the Trial Chamber erred in law when rejecting his challenges to personal and subject matter jurisdiction since the Prosecution failed to establish *prima facie* the existence of an order binding upon the Appellant.[37] He also submits that he could not have *prima facie* violated the Closed Session Order as it was not issued to him and did not preclude the publication of the Witness' identity or the Witness statement.[38]

21. Rebi} submits that "there were no grounds for the Tribunal to establish its jurisdiction in the present case, and that there was no appropriate initiative of a competent Chamber for prosecution of contempt in the present case".[39] Rebi} incorporates his previous arguments made in paragraphs 4-19 of the "Preliminary Motion of the Accused Rebi} to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment", as well as paragraphs 6-16 of the "Comment of the Accused Markica Rebi} on the Confidential and *Ex Parte* decision on the Prosecutor's Motion for an Order Directing the Prosecutor to Investigate Potential Contempt

[35] Trial Judgement, para. 13, citing *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Contempt 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* Contempt Judgement"), para. 36. *See also Nuclear Tests Case* (Australia v. France), 1974 ICJ Reports, pp. 259–260, para. 23, *followed by Prosecutor v. Blaškić*, 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 fn. 27.
[36] *Ibid.*
[37] Marija~i}'s Appeal Brief, paras 16, 35, fn 2. Marija~i} relies on *Malone v. Windsor Casino* and *United Electrical, Radio and Machine Workers of America, et. al. v. 163 Pleasant St. Corporation* which held that the failure to establish a material element of the case results in a dismissal for lack of personal jurisdiction.
[38] Marija~i}'s Appeal Brief, paras 36-37.
[39] Rebi}'s Appeal Brief, para. 13.

Concerning Hrvatski List".[40] Rebi} argues that the Trial Chamber erred in law by failing to apply the legal provisions put forward in these filings.[41]

22. The Prosecution responds that it was sufficient in the indictment to name three potentially applicable orders of the court and set out the acts which appeared to breach those orders, and that it presented, *prima facie*, a properly alleged case.[42]

C. Conclusion

23. The Appeals Chamber recalls that, pursuant to Rule 77 and in accordance with its consistent jurisprudence, the International Tribunal possesses an inherent power to deal with conduct interfering with its administration of justice.[43] It has thus been explicitly held that the International Tribunal has both the subject matter and personal jurisdiction to prosecute contempt.[44]

24. Marija~i} was convicted of contempt for the disclosure of information in knowing violation of an order of a Chamber pursuant to Rule 77(A)(ii). The Trial Chamber rightly pointed out that the order in question applies to all persons coming into possession of the protected information, given that Rule 79 is directed at the public in general, including the press, being present in court or not. Also, Rule 77(A)(ii) as such gives jurisdiction to the International Tribunal to hold in contempt any person who discloses information relating to proceedings before the International Tribunal in knowing violation of an order of a Chamber. This is necessary in particular in order to comply with the International Tribunal's obligation pursuant to Article 22 of the Statute to protect witnesses on whose behalf protective measures have been ordered, and it is ultimately necessary for the International Tribunal to fulfil its mandate.[45] Thus, the Trial Chamber did not err in its application of Rule 77(A)(ii) in holding that the International Tribunal had personal and subject matter jurisdiction.

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[40] Preliminary Motion of the Accused Rebi} to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, 23 June 2005; Comment of the Accused Markica Rebi} on the Confidential and *Ex Parte* decision on the Prosecutor's Motion for an Order Directing the Prosecutor to Investigate Potential Contempt Concerning Hrvatski List, 1 September 2005 (Confidential).
[41] Rebi}'s Reply Brief para. 10.
[42] Prosecution's Response to Marija~i}, paras 1.13-1.14.
[43] *See Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 ("*Beqaj* Contempt Judgement"), para. 9; *Nobilo* Contempt Judgement, para. 30; *Vujin* Contempt Judgement, para. 13.
[44] *Beqaj* Contempt Judgement, para. 9.
[45] *See Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, p. 4: "[I] n order to function effectively and fairly, the International Tribunal must have the power to prosecute and punish contempt".

25. The Appeals Chamber notes that Rebi} solely refers to arguments made at trial.[46] The Appeals Chamber recalls that a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber.[47] The Appeals Chamber finds with respect to his first ground of appeal that Rebić has failed to do so.

26. For the foregoing reasons, Marija~i}'s and Rebi}'s first grounds of appeal are dismissed.

IV. THE APPELLANTS' SECOND GROUND OF APPEAL: THE ALLEGED ACT OF CONTEMPT

A. Findings of the Trial Chamber

27. The Trial Chamber held that when the name of the Witness can only be found in confidential documents and the Witness appeared in the courtroom only when the blinds were lowered and the audio and video broadcast suspended, it must be concluded that the Witness' identity is protected by the Closed Session Order.[48] The Trial Chamber also held that 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.[49]

28. The Trial Chamber determined that when a Chamber orders that testimony is to be given in closed session, it renders everything that transpires confidential, and such an order applies to all persons coming into possession of the protected information. Thus, once the Closed Session Order was made, the Appellants were bound to comply with it.[50]

29. The Trial Chamber found that Marija~i} was put on clear notice that the material from Rebi} was subject to an order preventing disclosure. The transcript of the Witness' closed session testimony that Marijačić received from Rebi} was clearly marked as such. In the 5 May 2005

[46] Rebić's Appeal Brief, paras 13-14.
[47] *Naletilić and Martinović* Appeal Judgement, para. 13; *Blaškić* Appeal Judgement, para. 13; *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, paras 35-36.
[48] Trial Judgement, paras 25-26.
[49] Trial Judgement, para. 27.
[50] Trial Judgement, para. 28.

edition of *Hrvatski List* Marija~i} wrote an open letter in which he stated that Rebi} had told him that the Witness and the testimony were protected.[51]

30. The Trial Chamber was left with no doubt that Rebi} had disclosed the Witness' Statement and the closed session transcript, thereby revealing his identity. Rebi} was cited in the article of 18 November 2004 as having said to the newspaper that he knew that the documents were protected. Further, in a HINA news agency report of 27 April 2005, Rebi} was reported as saying that during the publication of the 18 November 2004 article he was "aware of what he was doing".[52] The Trial Chamber held this as a clear statement that he deliberately violated the Closed Session Order.[53]

B. Protection of the Witness' Identity and his Statement

31. Marija~i} asserts that the Trial Chamber erred in failing both to look at the transcript of 16 December 1997 to determine the *Bla{ki}* Trial Chamber's intent in moving into closed session, and also in relying on the 16 January 2006 Decision for its conclusion that the Witness' Statement was protected by the Closed Session Order.[54]

32. According to Marija~i}, it is clear from the transcripts that the intent of the *Bla{ki}* Trial Chamber was to protect the public order in the Netherlands under Rule 79(A)(i) of the Rules, and that the Witness' identity and his statement were not protected.[55]

33. Rebi} argues that there is no argument to support the thesis that the parties abstained from naming the Witness in order to comply with any legal obligation.[56] He also claims that the Trial Chamber erroneously held that the Witness' Statement had the same value as the transcript of the Witness' testimony given in closed session, and was thus being protected by the Closed Session Order.[57] He argues that it would be against the principles of criminal law if the Witness' Statement, which was in the beginning not particularly protected as such, later was encompassed by the Closed Session Order which in no way explicitly addressed the statement.[58]

34. The Prosecution responds that Marija~i} "misinterpreted" the intention of the Trial Chamber when going into closed session. The Prosecution submits that it is not for him to second

[51] Trial Judgement, paras 36-38.
[52] Trial Judgement, para. 41.
[53] Trial Judgement, para. 45.
[54] Marija~i}'s Appeal Brief, para. 18.
[55] Marija~i}'s Appeal Brief, paras 20-22, 26.
[56] Rebi}'s Appeal Brief, para. 24.
[57] Rebi}'s Appeal Brief, para. 27.

guess the intention of the Trial Chamber in determining the extent of a closed session order. In the view of the Prosecution it was reasonable for the Trial Chamber to conclude that the Closed Session Order would be "ineffectual" if it did not also apply to the Witness' Statement.[59]

35. The Prosecution asserts that the effect of using a closed session is that all information adduced in it is protected unless otherwise adduced elsewhere in open session.[60] The Prosecution argues that Marija~i}'s argument that it would be unworkable to find out if a Witness' identity is protected is unfounded since it is clear that he knew that the Witness was protected.[61]

C. Vagueness and Extent of the Closed Session Order

36. Marija~i} claims that the Closed Session Order was too vague and imprecise as a matter of law, and the conviction of Marija~i} for contempt on that basis was erroneous.[62] He also claims that the Trial Chamber erred when it looked at external evidence to determine the scope of the Closed Session Order, and that the Closed Session Order is not binding upon him because it was not directed towards him.[63]

37. Rebi} argues, *inter alia*, that the Closed Session Order was only binding for the parties in the *Bla{ki}* trial case.[64] He submits that the protective measures only existed in form and were not serving the International Tribunal's administration of justice; thus, the breach could not have represented an interference with justice pursuant to Rule 77 (A) of the Rules.[65]

38. The Prosecution responds that Rebi} was aware of the protected nature of the information by the fact that the transcript was marked "closed session" and it was in this protected document that the Witness' identity was revealed. It is further clear from the article in the *Hrvastki List* of 18 November 2004, the HINA agency report of 27 April 2005 and the open letter by Marija~i} that

[58] Rebi}'s Appeal Brief, para. 28.
[59] Prosecution's Response to Marija~i}, paras 1.7, 1.19, 1.24-1.25; Prosecution's Response Brief to Rebić, paras 16, 19.
[60] Prosecution's Response to Marija~i}, para. 1.21; Prosecution's Response Brief to Rebić, paras 16-17.
[61] Prosecution's Response to Marija~i}, para. 1.22.
[62] Marija~i}'s Appeal Brief, paras 41, 43-44, 46, 48-49, 51, citing *International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n; Armstrong v. Executive Office of the President; Drywall Tapers and Painters of Greater NY Local 1974 v. Local 530 of Operative Plasterers and Cement Masons Int'l Ass'n.* according to which an order must be clear and unambiguous, and the party must be able to tell from the order precisely what acts are forbidden; Marija~i} also draws the attention to the case *Attorney General v. Leveller Magazine and Others* where the House of Lords acquitted three journalists from charges of contempt because the court's order granting confidentiality to the witness was too vague and not obvious enough to speak for itself.
[63] Marija~i}'s Appeal Brief, paras 36, 45, 50-51 citing *Alemite Mfg. Corporation v. Staff* where the Court held that the District court had no authority to punish the defendant for contempt since he was not mentioned nor legally identified with someone in the writ.
[64] Rebi}'s Appeal Brief, paras 32-33, 36-37.
[65] Rebi}'s Appeal Brief, para. 43.

Rebi} knew that the information was protected.[66] The Prosecution further points out that in the article published by Marija~i}, he referred to the Witness' Statement as a "secret document" and that he was told by Rebi} that the documents were "protected" and that in his open letter he acknowledged these facts.[67]

39. The Prosecution submits that there is no need to prove that actual interference beyond defiance of the Closed Session Order occurred. It cannot be for third parties to determine whether there is good reason for continuing protective measures in relation to a witness.[68]

D. The Probative Value of the Newspaper Articles

40. Rebi} is challenging the Trial Chamber's factual finding that he disclosed the protected information to Marija~i}. Rebi} argues that the Trial Chamber erred when it based its determination on the disclosure of information by the Appellant on the newspaper articles in the *Hrvatski List* of 18 November 2004 and the HINA agency report of 27 April 2005; According to Rebić, newspaper articles are to be given probative value with much caution.[69] Rebi} argues that the Trial Chamber's evaluation of the articles is wholly erroneous.[70]

41. The Prosecution responds that the Trial Chamber also based its findings on the content of the open letter written by Marija~i} on 5 May 2005, which repeated that Rebi} had knowingly disclosed information concerning a protected witness and testimony. Further, the Trial Chamber was entitled to rely on Rebi}'s position on the editorial board of the newspaper and his failure to disavow the comments in the letter as evidence that he had in fact disclosed the information.[71]

E. Conclusion

42. Rule 79 of the Rules lists three reasons for holding closed sessions, one of which is the safety, security or non-disclosure of the identity of a witness as provided in Rule 75 of the Rules. The consequence of a closed session is that *all* information mentioned therein including the identity of the witness who testifies is protected from the public. It is not for third parties to determine which part of a closed session is protected. Since the identity of the Witness was not revealed elsewhere, it follows that the Closed Session Order protected the Witness' identity. The Appeals Chamber holds that the finding of the Trial Chamber was reasonable.

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[66] Prosecution's Response Brief to Rebi}, para. 22.
[67] Prosecution's Response to Marija~i}, para. 1.27.
[68] Prosecution's Response Brief to Rebić, para. 23.
[69] Rebi}'s Appeal Brief, para. 18.
[70] Rebi}'s Appeal Brief, paras 19-21.
[71] Prosecution's Response Brief to Rebi}, para. 13.

43. The Appeals Chamber finds that Marija~i}'s argument that it would be "unworkable" to find out if the Witness' identity was protected as well as Rebi}'s submission that it would require "high technical legal knowledge" to avoid violating the Closed Session Order is manifestly ill-founded, to say the least, since both Appellants knew that the Witness had testified in closed session and that his testimony was marked as such.[72] For the same reasons, the Appeals Chamber finds the Appellant's submissions concerning the vagueness of the Closed Session Order to be unfounded. Also, whether or not the *Bla{ki}* Trial Chamber had clearly set out the motive for the Closed Session Order pursuant to Rule 79(B) is irrelevant. Furthermore, not only is the document itself protected, more importantly, so is the information given by the witness with protective measures in place. The Appeals Chamber recalls that for conduct to entail criminal liability it must be possible for the individual to determine *ex ante*, based on the facts available to him, that the act is criminal. Both Appellants knew that the information was given by a witness with protective measures in place. Thus, the Trial Chamber correctly held that the Appellants had the necessary *mens rea*.

44. The language of Rule 77 shows that a violation of a court order as such constitutes an interference with the International Tribunal's administration of justice. It is not for a party or a third person to determine when an order "is serving the International Tribunal's administration of justice". It has already been established in the jurisprudence that any defiance of an order of the court interferes with the administration of justice.[73]

45. A court order remains in force until a Chamber decides otherwise. The Appeals Chamber *proprio motu* notes that the fact that the aforementioned information today is no longer confidential does not present an obstacle to a conviction for having published the information at a time when it was still under protection.[74] Although the reason for the Closed Session Order (to protect the status of the information provided by the Witness) no longer exists, the legal rationale (protected information has to remain so until confidentiality is lifted) is still applicable. To hold otherwise would mean to undermine all protective measures imposed by a Chamber without an explicit *actus contrarius*, thus endangering the fulfilment of the International Tribunal's functions and mandate.

46. With respect to Rebić's second ground of appeal, the publishing of the newspaper article in the *Hrvatski List* of 18 November 2004 is the basis of this contempt case and can reasonably be given probative value. Rebi} has not shown how the Trial Chamber has been unreasonable in its evaluation of the articles.

[72] *See Naletilić and Martinović* Appeal Judgement, para. 114.
[73] *Bulatovi}* Contempt Decision, para. 17.

47. Consequently, both Marija~i}'s and Rebi}'s second grounds of appeal are dismissed.

V. THE APPELLANTS' GROUNDS OF APPEAL CONCERNING THE SENTENCE

A. Findings of the Trial Chamber

48. The Trial Chamber found that the violation of the Closed Session Order created a real risk that the confidence in the Tribunal's ability to grant effective protective measures would be undermined and thus amounts to a serious interference with the administration of justice. Also, the Trial Chamber recognised the need to discourage this type of behaviour. The Trial Chamber held that the fines of 15,000 Euros correspond to the gravity of the breach and the need for deterrence. [75]

B. Submissions of the Parties

49. Marija~i} submits that Trial Chamber erred when it imposed the fine of 15,000 Euros without considering his financial situation.[76] In particular, he argues that the Trial Chamber violated Article 24(2) of the Statute, Rule 101 of the Rules and his right to a fair trial by failing to invite evidence concerning his means to pay a fine for the purpose of sentencing.[77] For the foregoing reasons, he requests that the Appeals Chamber order the Trial Chamber to hold an evidentiary hearing for purposes of sentencing.[78]

50. Rebi} submits that the penalty is excessive. He argues that the Prosecution offered no evidence in support of its arguments concerning damages and that the breach did not result in any threat or harm to the Witness, nor any reaction in Croatia.[79]

51. The Prosecution submits that Marija~i}'s argument that his right to a fair trial was violated goes beyond his ground of appeal and therefore ought to be dismissed. In the alternative, the Prosecution argues that Marija~i} should have addressed the matters of sentencing in his closing arguments pursuant to Rule 86(C), but failed to do so despite the fact that Judge Kwon specifically drew attention to the rule and then invited for comments. The Prosecution further submits that

[74] The same rationale applies that forms the basis of the principle of *temporary law*/*regime*, thus constituting, *mutatis mutandis*, an exception to the general principle of *lex mitior*.
[75] Trial Judgement, paras 48, 50, 52.
[76] Marija~i}'s Appeal Brief, paras 53-54.
[77] Marija~i}'s Appeal Brief, paras 55-57, citing *Fry v. Basset* (1986) 44 SASR 90 (Australia) in which the court held that a fine must be related to the means of a person and that subjective considerations should be given to what level of fine will act as sufficient level of punishment in the particular circumstances.
[78] Marija~i}'s Appeal Brief, para. 57.
[79] Rebi}'s Appeal Brief, paras 44-48; Rebi}'s Reply Brief, para. 25.

Marija~i} failed to set out any information upon which the Appeals Chamber could determine that the sentence constitutes a discernible error of the Trial Chamber.[80]

52. According to the Prosecution the Trial Chamber weighed all the factors set out by Rebi} and he has not demonstrated any discernible error by the Trial Chamber.[81]

C. Conclusion

53. Trial Chambers are vested with broad discretion in determining an appropriate sentence.[82] In general, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[83] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[84]

54. Rule 86(C) of the Rules requires the parties to address matters of sentencing in their closing arguments. As the Prosecution rightly points out, both Appellants failed to demonstrate that the Trial Chamber committed any discernible errors in regard to their sentences. In view of the foregoing, Marija~i}'s and Rebi}'s grounds of appeal concerning the sentence are dismissed.

55. However, the Appeals Chamber considers *proprio motu* that it is in the interests of justice in the particular case to allow payment by instalments, since the Appellants shall not be disadvantaged by any inadvertence of their Counsel, who failed to make sufficient submissions at trial on the financial situation of the Appellants, despite the clear wording of Rule 86(C), and a specific invitation to do so by the Trial Chamber.[85]

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[80] Prosecution's Response to Marija~i}, paras 1.30-133.
[81] Prosecution's Response Brief to Rebi}, paras 27-30.
[82] *Prosecutor v. Žejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 717.
[83] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement in Sentencing Appeals, 26 January 2000, para. 22; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 187; *Furund`ija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Prosecutor v. Zoran Kupreški} et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 408; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 99; *Prosecutor v. Radislav Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 242; *Blaškić* Appeal Judgement, para. 680.
[84] *Prosecutor v. Momir Nikoli}*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para. 8; *Čelebići* Appeal Judgement, para. 725.
[85] T. 19 January 2006, p. 306, Judge Kwon: "Rule 86 […] (C) says: 'The parties shall also address matters of sentencing in closing arguments.' So you have nothing further in relation to sentencing issue?" After this, neither Counsel for Rebić nor Counsel for Marijačić added further submissions on sentencing.

VI. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**, unanimously,

PURSUANT to Article 25 of the Statute and Rules 77, 77*bis*, 79, 116*bis*, 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties;

DISMISSES all the grounds of appeal filed by the Appellants Marijačić and Rebić;

AFFIRMS the imposition of a fine of fifteen thousand Euros on each of the Appellants, payable to the Registrar of the International Tribunal within thirty days of this Judgement; however

ALLOWS, *proprio motu*, that the Appellants may, if they so wish, pay the fines by equal instalments of 5,000 Euros by 16 October 2006, 15 January 2007, and 16 April 2007;

INSTRUCTS the Registrar of the International Tribunal to take the necessary measures to enforce the sentences, and, if need may be;

ORDERS the competent authorities of the Republic of Croatia to co-operate with and assist the Registrar pursuant to Article 29 of the Statute in the enforcement of the sentences.

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

Dated this twenty-seventh day of September 2006, At The Hague, The Netherlands

Judge Fausto Pocar Presiding	Judge Mehmet Güney	Judge Andrésia Vaz
Judge Theodor Meron		Judge Wolfgang Schomburg

[Seal of the International Tribunal]