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-R77.6
		Date:	7 February 2007
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: **Mr. Hans Holthuis**

Judgement of: **7 February 2007**

PROSECUTOR

v.

DOMAGOJ MARGETIĆ

JUDGEMENT ON ALLEGATIONS OF CONTEMPT

The Office of the Prosecutor:

Ms. Ann Sutherland
Mr. Salvatore Cannata

Counsel for the Accused:

Mr. Veljko Miljević

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I. INTRODUCTION

1. Domagoj Margetić ("Accused") is charged with contempt of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("Tribunal") pursuant to Rule 77 of the Tribunal's Rules of Procedure and Evidence ("Rules") with respect to conduct in July 2006. The Accused is a free-lance journalist and the former editor-in-chief of *Novo Hrvatsko Slovo* and of the Zagreb-based weekly publication *Hrvatsko Slovo*. The Office of the Prosecutor ("Prosecution") alleges that the Accused published protected witness information from the case *Prosecutor v. Blaškić* (Case No. IT-95-14-T) ("*Blaškić* Case") on his website www.domagojmargetic.com ("Web Site").

2. The Accused was previously an accused in the contempt case *Prosecutor v. Šešelj, Margetić and Križić* (Case No. IT-95-14-R77.5) ("Previous Case"), where he was alleged to have published protected information regarding one particular witness from the *Blaškić* Case in the newspaper *Novo Hrvatsko Slovo*. In that case, the Prosecution withdrew the indictment against the Accused prior to the case being heard.[1] In the instant case, the Accused is charged with making public the complete confidential witness list from the *Blaškić* Case ("Witness List"),[2] which was disclosed to him in the Previous Case pursuant to Rule 65*ter* of the Rules.

II. PROCEDURAL HISTORY AND BACKGROUND

3. An indictment was filed by the Prosecution on 30 August 2006 ("Indictment")[3] and confirmed on 11 September 2006.[4] The Indictment alleges that, on or about 7 July 2006, the Accused published on his Web Site the Witness List as well as an accompanying article authored by him ("First Article").[5] According to the Indictment, on or about 15 July 2006, the First Article was also published on website www.011385.com with a hyperlink to the Witness List on the Accused's Web Site.[6]

[1] *Prosecutor v. Stjepan Šešelj, Domagoj Margetić and Marijan Križić*, Case No. IT-95-14-R77.5, Decision on the Prosecution Motion to Withdraw the Indictment, 20 June 2006, including a Separate Opinion by Judge Bonomy.
[2] The Witness List is comprised of three copies of the complete witness list from the *Blaškić* Case. Two are confidential copies containing full information and one is a public copy with all confidential material redacted. All three copies of the Witness List are in French. The Witness List is Prosecution Exhibit 1 (under seal) in the instant case.
[3] Indictment, 30 August 2006 (confidential). A public version was filed on 11 September 2006.
[4] Decision on Review of the Indictment and Order for Non-Disclosure, 11 September 2006.
[5] Indictment, para. 4.
[6] Indictment, para. 6.

4. The Indictment also alleges that, on or about 15 July 2006, the Accused published two more articles on his Web Site ("Second Article" and "Third Article") which revealed the identity of two of the protected witnesses in the *Blaškić* Case, as well as the date of their testimonies and the fact that they testified in closed session.[7] According to the Indictment, the Second and Third Articles were also published on websites www.lijepanasadomovinahrvatska.com and www.011385.com with hyperlinks to the Accused's Web Site on or about 15 July 2006.[8]

5. On 28 July 2006, the Prosecution filed an *ex parte* and confidential urgent "Motion for an Order for the Immediate Cessation of Violations of Protective Measures". On the same day, a judge of the Tribunal issued an "Order on the Implementation of Protective Measures" ("Cease and Desist Order"),[9] ordering the Accused to immediately cease and abstain from the publication of the identities of protected witnesses and specifically to remove the Witness List from his Web Site. Pursuant to this order, the web host ceased operation of the Web Site on 1 August 2006.

6. The authorities of the Republic of Croatia summoned the Accused to appear at the Zagreb County Court on 4 August 2006 to accept service of the Tribunal's Cease and Desist Order.[10] The Accused stated at the hearing that the disputed material had been removed from the Web Site.[11] However, according to the Prosecution, while the hyperlink to the Witness List had been removed, links to the Second and Third Articles remained accessible.[12]

7. On 4 August 2006, the Accused was provisionally detained by the Croatian authorities[13] at the request of the Tribunal, pursuant to an order for his transfer and provisional detention issued by the Tribunal pursuant to Rule 40 of the Rules.[14] The detention of the Accused was extended by the Zagreb County Court[15] following a Tribunal order for his transfer and provisional detention.[16] On 6 September 2006, the Accused was released from custody pursuant to an order issued by the Zagreb County Court.[17]

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[7] Indictment, para. 5.
[8] Indictment, para. 7.
[9] Order on the Implementation of Protective Measures, 28 July 2006.
[10] Record on the Interrogation of the Accused Compiled in the County Court Zagreb Number XX-KIR-4285/06, 6 August 2006. This document is Prosecution Exhibit 20.
[11] Record on the Interrogation of the Accused Compiled in the County Court Zagreb Number XX-KIR-4285/06, 6 August 2006, p. 4.
[12] Indictment, para. 11.
[13] Record on the Interrogation of the Accused Compiled in the County Court Zagreb Number XX-KIR-4285/06 (Note from County Prosecutor's Office in Zagreb to County Court in Zagreb Duty Investigating Judge), 6 August 2006, p. 5.
[14] *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Request to the Authorities of the Republic of Croatia for the Provisional Arrest of a Suspect Under Rule 40 of the Rules of Procedure and Evidence of the International Tribunal, 3 August 2006.
[15] Record on the Interrogation of the Accused Compiled in the County Court Zagreb Number XX-KIR-4285/06, 6 August 2006 (Decision of County Court in Zagreb), pp. 7-9.
[16] *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Order Authorising the Transfer and Provisional Detention of Domagoj Margetić, 6 August 2006.
[17] Decision by County Court in Zagreb, 6 September 2006.

8. The Accused made his initial appearance before the Tribunal on 13 October 2006.[18] The Prosecution and counsel for the Accused ("Defence") submitted pre-trial briefs,[19] and the trial was conducted in two sessions, on 30 November 2006 and 8 December 2006.[20]

9. On the basis of the foregoing, the Prosecution charges the Accused with one count of contempt of the Tribunal pursuant to Rule 77(A), Rule 77(A)(ii) and Rule 77(A)(iv) of the Rules.

10. The Indictment alleges that the Accused committed contempt under Rule 77(A) of the Rules by knowingly and wilfully interfering with the Tribunal's administration of justice when he published, on or about 7 July 2006 until 2 August 2006, the Witness List and related articles on his Web Site.[21]

11. The Indictment alleges that the Accused also committed contempt under Rule 77(A)(ii) of the Rules by publishing the Witness List and the related articles in knowing violation of protective measures orders issued by the *Blaškić* Trial Chamber.[22] The Prosecution alleges that the Accused breached three written protective measures orders and 48 oral protective orders relating to a number of these witnesses when he disclosed the witnesses' identities.[23]

12. The Indictment further alleges that the Accused, by publishing the Witness List and related articles on his Web Site, committed contempt under Rule 77(A)(iv) of the Rules by interfering with witnesses.[24]

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[18] Transcript of Initial Appearance Proceedings ("Initial Appearance"), 13 October 2006, transcript pages (T.) 1-16.
[19] Prosecutor's Pre-trial Brief and Lists of Witnesses and Exhibits Pursuant to Rule 65 *ter* (E), 16 November 2006 (confidential) ("Prosecution's Pre-trial Brief"); Summary of the Defense Pre-trial Brief Submitted in Croatian Language on 24th of November 2006 (confidential), 28 November 2006 ("Defence Pre-trial Brief"). As the original Defence submission filed 24 November 2006 was in Croatian, Trial Chamber I issued a decision ordering the Defence to file a summary of the Pre-trial Brief issues in one of the working languages of the Tribunal. This document is the summary. *See* Decision on Prosecutor's Motion for Order to the Defence to Comply with Trial Chamber's Scheduling Order, 27 November 2006 (confidential).
[20] Trial, 30 November 2006 ("First Trial Session"), T. 17-159 (partly in private session); Trial, 8 December 2006 ("Second Trial Session"), T. 160-202.
[21] Indictment, para. 12.
[22] Indictment, para. 13.
[23] Prosecution Pre-trial Brief, paras 5-6. *See also* Prosecution Exhibit 4 (under seal), a package of written and oral orders that the Prosecution alleges have been breached. The three written protective measures orders are as follows:
(1) Decision of Trial Chamber I on the Requests of the Prosecutor of 12 and 14 May 1997 in respect of the Protection of Witnesses dated 6 June 1997, filed on 10 June 1997 ("First Written Order")
(2) Decision of Trial Chamber I on the Prosecutor's Requests of 5 and 11 July 1997 for Protection of Witnesses dated 10 July 1997, filed on 15 July 1997 ("Second Written Order")
(3) Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures of 11 November 2006 (English translation dated 13 November 1997), filed on 3 December 1997 ("Third Written Order"); *see* Supplemental to Prosecutor's Pre-trial Brief and List of Exhibits and Witnesses, 17 November 2006, Table I (confidential).
The oral protective orders which the Prosecution alleges were breached by the disclosure were issued between 27 August 1997 and 28 July 1998 and are detailed in Prosecution Exhibit 4 (under seal).
[24] Indictment, para. 14.

III. APPLICABLE LAW

13. Contempt of the Tribunal is described in Rule 77(A) of the Rules, which provides:

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

Despite the fact that it is not specifically provided for in the Statute, the Tribunal's inherent power to deal with conduct which interferes with its administration of justice is well-established in the Tribunal's jurisprudence.[25] Although Rule 77 of the Rules enumerates specific acts of contempt, the list it provides is non-exhaustive, as the formulations in Rule 77 of various situations which amount to contempt do not limit the Tribunal's inherent jurisdiction to punish for contempt.[26]

14. The *Jović* Trial Chamber noted that Rule 77(A) of the Rules does not contain any legal or factual elements separate from Rules 77(A)(ii) and 77(A)(iv) of the Rules in that Rule 77(A) contains both the material element and the mental element of the offence of contempt whereas sub-Rules 77(A)(ii) and 77(A)(iv) are non-exhaustive examples of the material elements by which the offence of contempt is constituted.[27] Therefore, if the Prosecution establishes a sufficiently clear factual basis for an accused's liability under Rule 77(A)(ii) or Rule 77(A)(iv) of the Rules, it has automatically established a sufficiently clear basis for an accused's liability under Rule 77(A).[28]

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[25] *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgement 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, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Appeal Judgement"), para. 30; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 21.

[26] *Nobilo* Appeal Judgement, para. 39.

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

[28] *Jović* Preliminary Motion Decision, para. 28.

15. The *Marijačić* Trial Chamber held that the *actus reus* of interference with the administration of justice pursuant to Rule 77(A) of the Rules includes "[a]ny deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined [. . .]."[29] The *Nobilo* Appeals Chamber ruled that publication of a witness' identity where protective measures have been granted to avoid such disclosure, with knowledge of the existence of those measures and with the intention of frustrating their effect, constitutes interference with the administration of justice.[30]

16. The *Beqaj* Trial Chamber held that with regard to the mental element of Rule 77(A) of the Rules, the Prosecution must establish that an accused wilfully and knowingly interfered with the Tribunal's administration of justice.[31]

IV. SUBMISSIONS AND CENTRAL ISSUES AT TRIAL[32]

17. In the opening statement at trial, counsel for the Prosecution stated that "the magnitude and implications" arising from the conduct of the Accused "distinguishes this case from any other contempt case heard by the Tribunal to date".[33] According to the Prosecution, on or about 7 July 2006, the Accused published on his Web Site "the entire confidential Prosecution witness list from the *Blaškić* case" and "three articles authored by him about protected witnesses contained in the witness list".[34] Counsel for the Prosecution submitted that in doing so the Accused "knowingly and wilfully violated the orders of the Tribunal, interfered with the Tribunal's witnesses and as such [. . .] interfered with the administration of justice and is in contempt of this Tribunal."[35]

18. Before addressing these submissions, the Defence contended that the Tribunal does not have jurisdiction to hear the case. It argued that the jurisdiction of the Tribunal is limited to "severe violations of humanitarian law in the former Yugoslavia".[36]

19. With regard to Rule 77(A)(ii) of the Rules, the Defence did not dispute that the Accused committed the physical act of disclosure,[37] but did argue that such disclosure was not in breach of

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[29] *Prosecutor v. Marijačić and Rebić*, Judgement, 10 March 2006, ("*Marijačić* Trial Judgement"), para. 50.
[30] *Nobilo* Appeal Judgement, para. 40(c).
[31] *Prosecutor v. Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 ("*Beqaj* Trial Judgement), para. 22.
[32] For a better understanding of the central issues at trial, in this chapter the Trial Chamber will not only summarise the submissions of the parties, but also reproduce some evidence the parties have elicited in support of their submissions.
[33] First Trial Session, T. 22.
[34] First Trial Session, T. 22.
[35] First Trial Session, T. 27.
[36] First Trial Session, T. 28.

an order of a Chamber nor was it done in knowing or wilful violation of such an order.[38] The central argument of the Defence is that, from 11 July 2006 to 22 August 2006, the Witness List was in the public domain and therefore not confidential, since the same Witness List had been admitted as an exhibit in the trial of *Josip Jović*[39] and had not been put under seal.[40] Thus, counsel for the Defence argued that "from the 11th of July this year up until the 22nd of August this year, my client performed an allowable action. If that is not so, he was truly in a justified misconception as to the acts of this court."[41] The Defence further submitted that the Accused published the Witness List and related articles on 15 July 2006, rather than on 7 July 2006, as the Prosecution alleged.[42] The Prosecution did not contest the assertion that the Accused had published the Witness List after 11 July 2006 but argued that this issue was not material, since the Witness List was at no time a public document.[43]

20. The Defence sought to support its submission by eliciting evidence from the Accused, who testified that he had believed the Witness List to be a public document:

> [I]n mid-July, I came across a decision published on the internet. It was a decision in the case against my colleague, Mr. Josip Jović, and the gist of it was that this list – that those lists, in fact, in the case against Mr. Jović had been already made public as an exhibit [. . .]. And at the time I thought that this was really a public document [. . .].[44]

21. The Defence also sought evidence from the Accused regarding the reasons he believed the document to be public. The Accused testified that:

> On the 22nd of August, Judge Robinson issued a new decision that – to the effect that those two lists were put under seal, and that was done only on the 22nd of August. And in this decision by Judge Robinson there is a quote where it is said that the Prosecution has not explicitly stated that these documents were confidential and under seal.[45]

22. When asked by counsel for the Defence whether he would have published the Witness List had he not seen this decision of 22 August 2006, the Accused gave evidence that:

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[37] *See* First Trial Session, T. 36-37. Counsel for the Defence stated that "[w]e are not challenging at all that Domagoj Margetić indeed published a list of those witnesses [. . .]", and the publication of the two articles is "not in dispute. Indeed, on the 15th of July two articles were published [. . .]."
[38] First Trial Session, T. 31.
[39] *Prosecutor v. Jović*, Case Nos IT-95-14 & IT-95-14/2-R77 ("*Jović* Case").
[40] First Trial Session, T. 29.
[41] First Trial Session, T. 31.
[42] First Trial Session, T. 36.
[43] *See* First Trial Session, T. 44.
[44] First Trial Session, T. 133.
[45] First Trial Session, T. 134.

> I would like to tell the Chamber for two months I did not publish this list. I had the list in my possession. Had I wanted, had it been my intention to endanger those witnesses in any way, to commit contempt of court, I would have done it in those two months. After this decision on the 11th of July, I believed that the Court had decided that, and this can be seen from the decision of 22nd of August. [. . .] [I] thought really that I was not violating any orders. And it was absolutely not my intention to commit contempt of court in any way.[46]

23. The Accused further gave evidence that, after becoming aware of the 22 August 2006 order:

> I removed the list of protected witnesses from my web site, because at that moment it became clear to me that the decision of the 11th of July, that there was something amiss with it.[47]

24. The Prosecution submitted that the reason the Accused had published the Witness List in July rather than in May was because the indictment against him in the Previous Case had just been dropped and was no longer "hanging over [his] head".[48]

25. The Prosecution further submitted that the Witness List "was confidential, has always been confidential"[49] as it was first filed as a confidential document in the case of *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-14-R77.2 ("*Marijačić and Rebić* Case"), and was never formally categorised as anything other than confidential when admitted into evidence in the *Jović* Case.[50] The Prosecution asserts that the status of the Witness List was never changed by a judicial decision and that the Prosecution cannot, of its own volition, do so.[51]

26. The Prosecution further took issue with the Defence's submission that the Accused did not knowingly violate an order of the Tribunal. On cross-examination, counsel for the Prosecution elicited evidence from the Accused about a letter from the Office of the Prosecutor, dated 6 April 2006, warning that the material being disclosed to him in the Previous Case was subject to oral and written non-disclosure orders.[52] The Accused gave evidence that he had "never received a letter like this".[53] The Prosecution also presented as evidence a consignment report by TNT postal service indicating that the 6 April 2006 letter had been delivered to the Accused's home address.[54]

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[46] First Trial Session, T. 134.
[47] First Trial Session, T. 136.
[48] First Trial Session, T. 150.
[49] First Trial Session, T. 47.
[50] Second Trial Session, T. 171. *See also* Prosecutor's Closing Submissions (confidential), 12 December 2006 ("Prosecutor's Closing Submissions"), para. 7.
[51] Second Trial Session, T. 171.
[52] The 6 April 2006 letter is Prosecution Exhibit 3. *See also* First Trial Session, T. 142; Prosecutor's Closing Submissions, paras 9-12.
[53] First Trial Session, T. 142.
[54] Prosecution Exhibit 2.

27. On cross-examination, the Prosecution also put to the Accused an electronic version of the 6 April 2006 letter, which had been sent to his personal e-mail address.[55] The Accused denied that he had ever received such an e-mail.[56]

28. On cross-examination, the Accused further denied that he knew of the confidential status of the information he disclosed or that he intended to publish confidential information:

> Q. Mr. Margetić, right up until the 12th of September you were still referring to this as a confidential list, secret list, protected witnesses list. You knew that it was protected. You knew that it was confidential, and you disclosed this document in knowing violation of Tribunal orders.
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> A. That is simply not true. [. . .] When a document is published, that's what journalists do. [. . .] The editors and journalists publish that document which is now in the public domain because the state says so, and then the journalists describe it as a secret FBI document, for example, or a secret document coming from the judiciary and so on and so forth. [. . .][57]
>
> [. . .]
>
> Q. Mr. Margetić, in your official statement, which is Exhibit 25, you state the reason why you published the witness list in part was to reveal to the world that some witnesses were in fact Mujahedin or better known to the world as terrorists. [. . .] You wanted to single those people out, didn't you, for the fact they testified against Blaškić. You didn't care what repercussions became for any of those witnesses, did you?
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> A. This is completely untrue, madam. [. . .][58]
>
> [. . .]
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> Q. In an accompanying article to the witness list, you stated that you would sooner or later publish the confidential document because you had done so before. [. . .] You wanted – you wanted to put this witness list out there because you wanted to single these people out.
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> A. This is simply not true, madam. The reasons why I published this list were presented by me several times here. A journalist has certain responsibility once he or she obtains certain documents [. . .].[59]

29. The Prosecution further submitted that the Accused, in addition to violating an order of the Tribunal, interfered with the Tribunal's witnesses pursuant to Rule 77(A)(iv) of the Rules. The Trial Chamber notes that at trial the Prosecution sought to limit its case to the protected witnesses on the Witness List.[60] The Trial Chamber, while noting that the Prosecution was not fully consistent as to whether it was also alleging interference with potential future witnesses,[61] considers the Prosecution's case regarding interference to be limited to the protected individuals on the Witness List.

30. The Prosecution called Witness Carry Spork, a Prosecution investigator, who testified as to his conversations with three witnesses – MC1, MC2 and MC3 – about their reactions to the

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[55] Prosecution Exhibit 34 (under seal). *See also* First Trial Session, T. 145, where Counsel for the Prosecution stated: "And attached to this e-mail was the letter dated the 6th of April, 2006, which was addressed to counsel for Mr. Jović, counsel for Mr. Križić, counsel for Mr. Šešelj and yourself."
[56] First Trial Session, T. 146.
[57] First Trial Session, T. 148.
[58] First Trial Session, T. 155.
[59] First Trial Session, T. 156.
[60] First Trial Session, T. 33.
[61] *See* First Trial Session, T. 42-43.

disclosure of their identities by the Accused.[62] Witness Carry Spork gave evidence that Witnesses MC1 and MC2 had stated that they would only be willing to testify in future Tribunal proceedings under the strictest of protective measures.[63]

31. The Prosecution also adduced evidence through written statements of two of these three witnesses – MC1 and MC2 – who described the effects on their personal lives of the disclosure of their identities by the Accused.[64] The Prosecution elicited evidence from the third of these witnesses, MC3, who, when asked about the consequences he suffered as a result of his name being disclosed, testified that: "I can tell you first and foremost that I'm no longer secure. Secondly, I have constant pains. I'm on medication at all times."[65]

32. Witness MC3 also gave evidence regarding the effect of this disclosure on his willingness to cooperate with the Tribunal or with national courts.

> Q. Witness, are you willing to cooperate with the ICTY in the future?
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> A. [. . .] [B]efore my case is resolved I am not willing to come because I want what has been inflicted on me to be made good. I want to be paid compensation. [. . .]
>
> Q. Witness, are you willing to cooperate with a national court if you were asked to testify in any cases?
>
> A. I'm not willing, because – because I have been humiliated and then nobody is guaranteeing my security. My security is endangered where I live.[66]

V. DISCUSSION

A. Jurisdiction

33. The Defence argues that the Tribunal does not have jurisdiction to hear this case, contending that the jurisdiction of the Tribunal does not extend beyond serious violations of international humanitarian law in the former Yugoslavia.[67] The Defence also requests that the United Nations Security Council be consulted as an *amicus curiae* for its interpretation of the mandate of the Tribunal and the scope of the Tribunal's powers.[68]

34. The Trial Chamber recalls that the Tribunal possesses the inherent power to prosecute and punish conduct which interferes with its administration of justice.[69] This power ensures that the

[62] Witness Spork, First Trial Session, T. 95-96.
[63] Witness Spork, First Trial Session, T. 96.
[64] Prosecution Exhibits 28-31.
[65] Witness MC3, First Trial Session, T. 112.
[66] Witness MC3, First Trial Session, T. 116.
[67] First Trial Session, T. 28; Closing Submissions by the Defence, 15 December 2006 ("Defence Closing Submissions"), pp. 1-3. *See supra* para. 18.
[68] Defence Pre-trial Brief, p. 3; Defence Closing Submissions, p. 3.
[69] *See supra* para. 13, fn. 25.

exercise of the jurisdiction expressly given to the Tribunal by the Statute is not frustrated and that the Tribunal's basic judicial functions are safeguarded.[70] Rule 77 of the Rules articulates this inherent power, which is well-established in the Tribunal's jurisprudence. The Trial Chamber therefore rejects the Defence's argument that the Tribunal does not have jurisdiction to hear the case.

35. The Trial Chamber considers any clarification from the United Nations Security Council regarding this matter to be unwarranted, since the Tribunal, as a judicial body, is tasked with implementing and interpreting all legal provisions relevant to its work, including the United Nations Security Council Resolutions. Further, the Trial Chamber recalls that *amicus curiae* submissions are governed by Rule 74 of the Rules which provides that a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave for an *amicus curiae* submission. The United Nations Security Council has not sought leave to make submissions on the matter. In view of the well-established jurisprudence regarding the Tribunal's jurisdiction to hear contempt cases, the Trial Chamber also finds that such a submission is not desirable and thus rejects the Defence request.

B. Rule 77(A)(ii) – Disclosure of Information in Violation of an Order

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

36. With respect to Rule 77(A)(ii) of the Rules, the *actus reus* 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".[71] The act of disclosing information must objectively breach an order issued by a Trial or Appeals Chamber, whether such order is written or oral.[72] The Trial Chamber considers that, for such an order to be breached, the order must apply to an accused,[73] protect the specific information disclosed by an accused[74] and be in effect at the time of the disclosure of information.

[70] *Vujin* Judgement, para. 13; *Marijačić* Trial Judgement, para. 13; *Nobilo* Appeal Judgement, para. 36.
[71] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Judgement, 30 August 2006 ("*Jović* Trial Judgement"), para. 19; *Marijačić* Trial Judgement, para. 17.
[72] *Marijačić* Trial Judgement, para. 17.
[73] *See Jović* Trial Judgement, para. 10 and *Marijačić* Trial Judgement, para. 28, where the respective Trial Chambers consider whether the orders breached applied to the accused in those cases.
[74] *See Marijačić* Trial Judgement, para. 20, where the Trial Chamber sets forth its obligation to consider what information was protected by the orders.

37. As a general *mens rea* requirement for contempt, the Prosecution must prove that the accused knowingly and wilfully interfered with the administration of justice.[75] Pursuant to Rule 77(A)(ii) of the Rules, it must also prove "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 satisfy this element, and actual knowledge may be inferred from a variety of circumstances."[76] This can be fulfilled by actual knowledge, wilful blindness or reckless indifference.[77]

2. *Actus Reus*

(a) Physical Act of Disclosure

38. The Defence does not dispute that the Accused committed the physical act of disclosure of information relating to proceedings before the Tribunal, that is, that he published the Witness List and related articles on the internet.[78] The Defence submits that the Accused published the Witness List and the related articles on 15 July 2006.[79]

39. The Trial Chamber also notes the evidence submitted at trial demonstrating the publication of this information by the Accused, in particular, the First Article accompanying the Witness List which is entitled "List of secret Hague Witnesses sent to me by Carla Del Ponte, I believe in the calling of the truth, not the truth as a task one is charged with! Exclusive: List of confidential Hague witnesses given to me by Carla Del Ponte's Assistant" in which the Accused states that "[f]or reasons stated above I have decided to publish the list [. . .]".[80] The Trial Chamber also notes the Second and Third Articles published on two web sites in which the Accused identifies witnesses from the Witness List by their real names.[81] It is not in dispute that the Accused authored and published these articles.[82]

40. The Trial Chamber therefore finds that the Accused, by publishing the Witness List and related articles on internet web sites on 15 July 2006, committed the physical act of disclosure of information relating to proceedings before the Tribunal.

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[75] *Jović* Trial Judgement, para. 28.
[76] *Marijačić* Trial Judgement, para. 18. *See also Jović* Trial Judgement, para. 20.
[77] *Nobilo* Appeal Judgement, para. 54.
[78] First Trial Session, T. 36-37. *See supra* para. 19.
[79] First Trial Session, T. 36-37. *See supra* para. 19.
[80] Prosecution Exhibit 6 (under seal).
[81] Prosecution Exhibits 10 (under seal), 11 (under seal).
[82] First Trial Session, T. 36-37. *See supra* para. 19.

(b) Orders Breached by the Disclosure

41. The Trial Chamber now turns to the question of whether this physical act of disclosure breached an order of a Chamber.

42. The Prosecution alleges that the disclosure of information by the Accused violated protective measures orders issued in the *Blaškić* Case. These orders consist of three written protective measures orders, as well as 48 oral orders issued by the *Blaškić* Trial Chamber ordering the use of both pseudonyms and testimony in closed session for 21 witnesses and the use of pseudonyms alone for 27 witnesses.[83]

43. The Defence does not dispute that the witnesses on the Witness List had acquired protected status by virtue of the orders referred to by the Prosecution.[84] The Defence does, however, contend that this protected status was not in force during the period of 11 July 2006 to 22 August 2006. The Defence alleges that the Witness List was filed as a public document in the *Jović* Case and that the protected status of the witnesses had thus been rescinded.[85]

44. The Trial Chamber will now consider whether the protective measures orders issued in the *Blaškić* Case apply to the Accused and protect the information disclosed by him. The Trial Chamber finds that the oral protective orders issued in the *Blaškić* Case, which provide for testimony in closed session and for the use of pseudonyms, do apply to the Accused. As the *Marijačić* Appeals Chamber held, closed session orders apply to all persons coming into possession of the protected information.[86] Closed session orders also render all information within the closed session protected, including the identity of the witness, and thus protect the information disclosed by the Accused.[87] The orders for pseudonyms also have the effect of protecting the identity of the witnesses, as an order for pseudonyms is one of the measures to prevent disclosure to the public of the identity of a victim or a witness as enumerated in Rule 75(B)(i) of the Rules. With respect to the written orders, the Trial Chamber finds that at least one written order - the Third Written Order providing for testimony in closed session[88] - entailed a specific obligation for the Accused and protected the information disclosed by him. Having found that at least one written order and all oral orders apply to the Accused and that these orders covered the protected witness information, the Trial Chamber finds no reason to further consider whether the other two written orders were also

[83] *See supra* para. 11, fn. 23.
[84] First Trial Session, T. 29. Defence stated that "it will not be at all in doubt that all these witnesses have under decisions of previous Trial Chambers in 1997, concretely speaking on the 10th of July and the 10th of November, 1997, acquired protective status. That is indubitable."
[85] First Trial Session, T. 29.
[86] *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić* Appeal Judgement"), para. 24.
[87] *Marijačić* Appeal Judgement para. 42.
[88] Third Written Order, para. 38.

applicable to the Accused. In view of the foregoing, the Trial Chamber concludes that the identities of the witnesses were protected by orders issued by the *Blaškić* Chamber.

45. The Trial Chamber will now examine whether these orders were in effect at the time of the disclosure of information by the Accused.

46. The Trial Chamber gives consideration to the Defence argument that, when the Witness List was admitted into evidence in the *Jović* Case, it was not under seal. The Trial Chamber notes that on 26 June 2006, the Prosecution filed a motion in the *Jović* Case for the admission of evidence pursuant to Rule 89(C) of the Rules.[89] Annexed to this motion was a list of proposed exhibits, which included the Witness List, but the list of proposed exhibits contained no column or other marking indicating the public or confidential status of the Witness List or any of the other exhibits.[90] On 3 July 2006, the *Jović* Trial Chamber granted this motion, admitting the Witness List into evidence as Exhibit 18, without making reference to its public or confidential status ("3 July Decision").[91] On 11 July 2006, the *Jović* trial took place, but the Witness List was not used during the proceedings.[92] On 21 August 2006, the Prosecution filed a motion acknowledging that, in its motion of 26 June 2006, the Prosecution "did not expressly state that part of Exhibit 18 was confidential" and recognising that "the current court records do not mention the confidential status of Exhibit 18."[93] On 22 August 2006, the *Jović* Trial Chamber decided this motion, ordering Registry to remove Exhibit 18 from the trial record and rename it as confidential Exhibit 19 in the *Jović* Case ("22 August Decision").[94]

47. The Trial Chamber rejects the Defence argument that, when the Witness List was admitted into evidence on 3 July 2006 in the *Jović* Case, it became a public document. The Trial Chamber considers that the Witness List was from the outset a protected document and that when it was first admitted into evidence, in the *Marijačić and Rebić* Case, it was labelled as confidential.[95] Although the circumstances which brought the confidential status of the Witness List into question are unfortunate, the Trial Chamber does not consider the admission of the Witness List in the *Jović* Case without an explicit reference to its status, be it public or confidential, to have had the effect of formally rendering the Witness List a public document.

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[89] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Prosecution Motion for Admission of Evidence Pursuant to Rule 89(C), 26 June 2006.
[90] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Annex I to the Prosecution Motion for Admission of Evidence Pursuant to Rule 89(C), 26 June 2006.
[91] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 89(C), 3 July 2006, which was admitted in this case as Defence Exhibit 1 (under seal).
[92] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Trial, 11 July 2006, T. 31-150 ("*Jović* Trial Proceedings").
[93] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Motion Seeking an Order with Respect to Exhibit 18, 21 August 2006, admitted as Defence Exhibit 2 (under seal).
[94] *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Decision Granting Prosecution Confidential Motion with Respect to Exhibit 18, 22 August 2006. This Decision was admitted in this case as Defence Exhibit 3 (under seal).
[95] *See supra* para. 25.

48. The Trial Chamber finds that the 3 July Decision of the *Jović* Trial Chamber did not, and could not have had, the effect of rescinding all protective measures ordered in past proceedings and applicable to the witnesses on this list. The Trial Chamber recalls that Rule 75(F)(i) of the Rules provides that, once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, these protective measures continue to apply *mutatis mutandis* unless and until they are "rescinded, varied or augmented in accordance with the procedure set out in this rule". Rule 75(G) of the Rules specifies that a party to the second proceedings must so apply for such rescission, variation or augmentation to any Chamber, however constituted, remaining seised of the first proceedings. The *Blaškić* review proceedings before the Appeals Chamber were only concluded on 23 November 2006[96] and thus, on the date when the Accused published the Witness List, only the Appeals Chamber rather than the *Jović* Trial Chamber had the authority to rescind the applicable protective measures orders.

49. Further, it appears that any rescission of protective measures would require an explicit act, rather than a failure to specifically categorise a document as confidential when admitting it into evidence. As the *Marijačić* Appeals Chamber held, protected information must remain protected "until confidentiality is lifted" because otherwise all protective measures imposed by a Chamber could be undermined "without an explicit *actus contrarius*".[97] The Trial Chamber finds that the 3 July Decision does not qualify as an explicit *actus contrarius* in this sense.

50. The Trial Chamber therefore finds that the disclosure of information by the Accused breached the protective measures orders issued by the *Blaškić* Trial Chamber, as these orders were never rescinded by the *Jović* Trial Chamber or by any other Chamber. Having satisfied itself above that the Accused committed the physical act of disclosure of information, the Trial Chamber therefore finds that the *actus reus* element of contempt with respect to Rule 77(A)(ii) has been proven.

3. *Mens Rea*

51. The Trial Chamber now turns to the *mens rea* element of contempt under Rule 77(A)(ii) of the Rules, that is, whether the Accused knew that his disclosure of information was done in violation of an order of a Chamber. The Trial Chamber also considers the mental element of contempt under Rule 77(A) of the Rules, that is, whether the Accused knowingly and wilfully interfered with the administration of justice.

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[96] *Prosecutor v. Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006.
[97] *Marijačić* Appeal Judgement, para. 45.

52. In this context, the Trial Chamber takes note of several statements by the Accused indicating his intent to interfere with the administration of justice. In an interview with *Večernji List*, the Accused demonstrated his disregard for the authority of the Tribunal, stating that "I am a journalist and it is not my job to guard the secrecy of the documents. [. . .] Even if I am to end up in prison, that fact won't change anything. Of course that [*sic*] I am not going to change my opinion and my actions, that material will again see the light of the day on the Internet."[98] The Accused also insisted that "I am not bound by any obligation to protect a secret, anyone's and on anything. I am not a secret agent and my duty is not to hide confidential information."[99]

53. In considering the specific requirements of contempt under Rule 77(A)(ii) of the Rules, that is, whether the Accused knew that his disclosure of information was done in violation of an order of a Chamber, the Trial Chamber recalls that proof of actual knowledge of an order may be inferred from a variety of circumstances,[100] such as the receipt of orders regarding the confidentiality of information, markings on the information indicating its confidentiality[101] or statements by an accused describing the information as confidential.[102]

54. The Trial Chamber is satisfied beyond reasonable doubt that the Prosecution sent notification of confidentiality to the Accused both through the post and electronically. In a letter sent to the Accused by David Akerson, attorney for the Prosecution, dated 6 April 2006, the Accused was warned that the material being disclosed to him was subject to oral and written non-disclosure orders.[103] An electronic version of the letter was sent to the Accused's personal e-mail address on 3 April 2006.[104]

55. The Trial Chamber does not accept the Accused's argument that he received neither the letter nor the e-mail, especially in light of the consignment report by TNT postal service indicating delivery of the letter[105] and the evidence adduced by the Prosecution confirming that the e-mail was sent to the Accused's personal e-mail address.[106] The Trial Chamber likewise does not accept the argument that the information disclosed arrived in the post unaccompanied by the letter from the Office of the Prosecution, as the Accused claimed.[107] Further, the Trial Chamber notes that the

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[98] Prosecution Exhibit 18.
[99] Prosecution Exhibit 6 (under seal). *See also* Prosecutor's Closing Submissions, para. 14.
[100] *See supra* para. 37, fn. 76.
[101] *See Marijačić* Trial Judgement, para. 37. When considering the *mens rea* of the accused, the *Marijačić* Trial Chamber considered the fact that the transcript of witness statements was clearly marked as in closed session.
[102] *See Jović* Trial Judgement, fn. 81. The *Jović* Trial Chamber inferred the knowledge of the Accused from, among other factors, the fact that he acknowledged receiving the 1 December 2000 cease and desist order by fax and from his description, in newspaper articles, of the material in question as "secret."
[103] Prosecution Exhibit 3. *See also* Prosecutor's Closing Submissions, para. 9.
[104] Prosecution Exhibit 34 (under seal). *See also* Prosecutor's Closing Submissions, para. 10.
[105] Prosecution Exhibit 2.
[106] Prosecution Exhibits 32 (under seal), 33 (under seal), demonstrating the Accused's personal use of this email address.
[107] Second Trial Session, T. 196. *See also* Prosecutor's Closing Submissions, para. 11.

Accused stated in newspaper articles that the information had been disclosed to him by David Akerson,[108] a fact which the Accused is unlikely to have known without the accompanying letter.

56. The Trial Chamber also infers the knowledge of the Accused from the fact that the Witness List was clearly marked as confidential and not for distribution. One copy of the Witness List carries a handwritten annotation in English on the first page "C,* Confidential" and the other copy a handwritten annotation in English on the first page "Confidential. Do not Distribute."[109] The Accused was therefore clearly put on notice that this information was confidential.

57. The Trial Chamber also notes that the Accused made several statements describing the information in question as "confidential". For example, the First Article is entitled "Exclusive: List of Confidential Hague Witnesses [. . .]" and, within the article, the Accused refers to the confidential status of the Witness List. Nowhere in the articles published by the Accused does he describe the Witness List as a public document.[110] The Trial Chamber does not find the Accused's argument to be credible that he referred to this information as confidential only as part of a journalistic *modus operandi*.[111] The Trial Chamber also notes that, on 20 August 2006, the Accused stated in a handwritten note to the Zagreb County Court that "I give you my word and promise that I will never again disclose or in any way use confidential ICTY information", further indicating his knowledge of the confidential status of the information he disclosed.[112]

58. The Trial Chamber takes consideration of the Defence's argument that the Accused believed that the orders protecting the information he disclosed had been rescinded and that, even if the Accused was incorrect about this fact, he had been labouring under a "justified misconception" that this was the case.[113] The Trial Chamber notes that the decision of 11 July which the Accused claimed to have read online, allegedly prompting him to believe that the information had been made public,[114] was never produced by the Defence at trial or described in greater detail. There is no evidence that such a written decision exists. Neither was an oral decision rendered during the *Jović* trial proceedings.[115] The only relevant decision was the 3 July Decision issued by the *Jović* Trial Chamber.

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[108] Prosecution Exhibit 11 (under seal). *See also* Second Trial Session, T. 194 and Prosecutor's Closing Submissions, para. 11.
[109] Prosecution Exhibit 1 (under seal).
[110] Prosecution Exhibits 6 (under seal), 10 (under seal), 11 (under seal). *See also* Prosecutor's Closing Submissions, para. 21.
[111] First Trial Session, T. 147-148.
[112] Prosecution Exhibit 23.
[113] First Trial Session, T. 31; Defence Closing Submissions, pp. 4-5. *See supra* para. 19.
[114] First Trial Session, T. 133. *See also supra* para. 20. The Accused states that "in mid-July, I came across a decision published on the internet. It was a decision published in mid-July in the case against my colleague, Mr. Josip Jović, and the gist of it was that this list – that those lists, in fact, in the case against Mr. Jović had been already made public as an exhibit [. . . .] And at the time I thought that this was really a public document [. . . .]"
[115] *Jović* Trial Proceedings, T. 31-151.

59. The Accused failed to provide specific information about the web site from which he allegedly learned about the public character of the Witness List. When asked to provide further details, the Accused remained vague. The Accused claimed that the Defence Pre-Trial brief specified the exact link to such a web site, but this brief, in fact, fails to do so.[116] Furthermore, in its request for an order to disclose exculpatory material, the Defence did not in any way rely on this alleged information from the internet.[117] The Defence relied exclusively on the 22 August Decision and a related press release dated 23 August 2006. It merely inferred from these two documents that there must have been a decision dated 11 July 2006 or earlier which had made the Witness List a public document.[118] The Defence was unable to identify the decision or its content in any further detail at trial and sought the court's assistance.[119] The Trial Chamber assisted in the identification of the 3 July Decision and ordered the Prosecution to disclose this decision to the Defence pursuant to Rule 68 of the Rules.[120] The Defence was offered time to review this decision at trial. The Accused, however, never even claimed to have read the 3 July Decision, nor could he correctly identify this decision as the relevant one. Further, even if the Accused had read the 3 July Decision, it nowhere mentions either Exhibit 18 or the Witness List and certainly does not explicitly state that these were public documents.[121] The only documents which the Accused referenced as having caused him to believe that the information he disclosed was public were the 22 August Decision formally making the Witness List confidential and a press release of 23 August 2006 referring to this decision.[122] These documents were both issued *after* the Accused published the witness information, which both parties concede occurred in mid-July.[123]

60. In addition, the Accused did not refer to the purported decision of 11 July any earlier than 12 September 2006. Instead, as outlined above, as late as 20 August 2006 in a handwritten note, the Accused referred to the information he disclosed as confidential.[124] Indeed, the Accused, as set out above, expressed himself on all occasions in a way that showed a complete lack of awareness of any decision which could potentially have rendered public the information he disclosed.[125]

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[116] First Trial Session, T. 140-141. The Defence Pre-Trial Brief merely includes the following: "it was from the 11 July to 22 August and by decision of Court council III, in the case of Jović, list of protected witnesses a public document [*sic*], as it was announced in the public documents of ICTY." Defence Pre-Trial Brief, p. 4.
[117] Motion by the Defence of the Accused Domagoj Margetić that the Court Council Order the Prosecutor's Office to Deliver the Releasing Evidence and Based on that Evidence Immediately Cease Further Court Persecution and Dismiss the Prosecution's Charges, 7 December 2006 ("Defence Motion for Disclosure"). pp. 2-3
[118] Defence Motion for Disclosure, p. 3.
[119] First Trial Session, T. 124-125.
[120] Second Trial Session, T. 162-165.
[121] Defence Exhibit 1 (under seal). *See also* Prosecutor's Closing Submissions, para. 20.
[122] Second Trial Session, T. 175. The document to which the Accused refers is Defence Exhibit 3 (under seal).
[123] First Trial Session, T. 36, 44.
[124] Prosecution Exhibit 23.
[125] Prosecution Exhibit 25.

61. The Trial Chamber therefore does not accept the Accused's contention that he made an error as to the public status of the Witness List as credible and finds that the Accused did not know about the *Jović* confidentiality issue until after he had already disclosed the information. The Trial Chamber is satisfied beyond reasonable doubt that the Accused knew at the time he published the information that he was both publishing confidential information in violation of orders of a Chamber and interfering with the administration of justice.

62. The Trial Chamber thus finds that the *mens rea* with respect to Rule 77(A)(ii) of the Rules has been proven.

4. Conclusion

63. In sum, the Trial Chamber is satisfied beyond reasonable doubt that the Accused committed the *actus reus* and possessed the *mens rea* of contempt of the Tribunal as described in Rule 77(A)(ii) of the Rules.

C. Rule 77(A)(iv) – Interference With Witnesses

1. Elements of Rule 77(A)(iv) – Otherwise Interfering with a Witness

64. Rule 77(A)(iv) of the Rules gives a non-exhaustive sub-list of possible forms of *actus reus* of the offence of contempt of the Tribunal, including "threat, intimidation, causing of injury, offering of a bribe and otherwise interfering with a witness or a potential witness".[126] The phrase "otherwise interfering with a witness or potential witness" adds to these specifically provided acts any conduct that is likely to dissuade a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence.[127] The Trial Chamber considers that any conduct which is likely to expose witnesses to threats, intimidation or injury by a third party also constitutes "otherwise interfering with a witness" as provided by Rule 77(A)(iv). Proof is not required that this conduct *actually* produced such a result.[128]

65. The Trial Chamber considers that such conduct can be fulfilled through personal or direct contact, as well as through intermediaries or through the media by way of publications.

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[126] *Beqaj* Trial Judgement, para. 21.
[127] *See also Prosecutor v. Brđanin (Milka Maglov)*, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 19 March 2004 ("*Brđanin* Decision"), para. 27.
[128] *Beqaj* Trial Judgement, para. 21.

66. As a general *mens rea* requirement for contempt, the Prosecution must prove that the Accused acted knowingly and wilfully.[129] Rule 77(A)(iv) of the Rules also requires that the conduct was carried out with an intent to interfere with witnesses.[130]

67. The Trial Chamber has already found that the publication of the Witness List constitutes contempt of the Tribunal as "disclosure of information in violation of an order" pursuant to Rule 77(A)(ii) of the Rules. It finds that this does not preclude that the publication also constituted an interference with witnesses pursuant to Rule 77(A)(iv) of the Rules. The Trial Chamber considers that Rule 77(A)(ii) and Rule 77(A)(iv) of the Rules differ with respect to the interests they seek to protect. Rule 77(A)(ii) focuses on the disrespect of judicial orders, not necessarily with respect to witnesses, whereas Rule 77(A)(iv) focuses on witnesses, not necessarily protected by any judicial orders.

2. *Actus Reus*

68. The Trial Chamber first turns to the question of whether the conduct of the Accused – the disclosure of the identities of protected witnesses by publication on the internet – was likely to dissuade a witness or a potential witness from giving evidence, to influence the nature of a witness' or potential witness' evidence, or to expose a witness or potential witness to threats, intimidation or injury by a third party.

69. The Witness List contained the names of 102 individuals who had testified in the *Blaškić* Case, many of whom were subject to protective measures put in place by the *Blaškić* Trial Chamber pursuant to Rule 75 of the Rules in order to ensure the security of these witnesses and to prevent the disclosure of their identities to the public or the media. What the Accused has done is to reverse the effect of such protective measures by publishing the Witness List, thus undermining the confidence of the witnesses in the Tribunal's ability to protect them. The Trial Chamber therefore finds that the Accused's conduct is likely to dissuade these protected witnesses from testifying in the future before the Tribunal, and that if they do, their evidence may be affected and given in fear.

70. While proof is not required that such effects actually occurred, the Trial Chamber notes Witness Carry Spork's testimony that two of the witnesses – MC1 and MC2 – told him that they are only willing to provide evidence to the Tribunal in the future under very strict protective measures because of fears for their safety.[131] The Trial Chamber notes that the Defence did not

[129] *See supra* para. 16.
[130] *Beqaj* Trial Judgement, para. 21; *Brđanin* Decision, para. 29.
[131] Witness Spork, First Trial Session, T. 96.

challenge the statements of MC1 and MC2 at trial.[132] MC3 also expressed his reluctance to testify before national courts or before the Tribunal in the future for fear that his security would be endangered.[133] The Trial Chamber finds that it is likely that other protected individuals on the Witness List will also be similarly affected as a result of the Accused's conduct.

71. The Trial Chamber further notes that the disclosure of the identities of these protected witnesses also allows other individuals to identify them and that it is likely that they will be exposed to threats, intimidation or injury in the future.

72. The Trial Chamber finds that the conduct of the Accused is likely to dissuade the protected witnesses on the Witness List from giving evidence, to influence the nature of their evidence should they testify in the future, or to expose them to threats, intimidation or injury by a third party. The *actus reus* element of contempt with respect to "otherwise interfering with a witness or potential witness" is therefore satisfied.

3. Mens Rea

73. With respect to the question of knowledge, the Trial Chamber has already satisfied itself that the Accused knew that the Witness List was confidential and that many of the witnesses on the list were protected.[134]

74. The Trial Chamber is further satisfied beyond reasonable doubt that the Accused knew that the publication of these witnesses' identities was likely to dissuade them from giving evidence in the future, influence the nature of their testimony, or expose them to threats, intimidation, or injury from a third party. In the First Article, the Accused stated that he would "sooner or later, publish that confidential document, because I have done so before. I have said that I would always and regardless of the people in question, do the same: publish the information I obtained."[135] While noting the denial of the Accused at trial that he had wanted to single out these witnesses,[136] the Trial Chamber is satisfied beyond reasonable doubt that the Accused also wilfully published the Witness List without consideration of the consequences.

75. The Trial Chamber thus finds that the *mens rea* with respect to Rule 77(A)(iv) of the Rules has been proven.

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[132] First Trial Session, T. 78.
[133] Witness MC3, First Trial Session, T. 116. *See also supra* para. 32.
[134] *See supra* para. 61.
[135] Prosecution Exhibit 6 (under seal). *See also* Prosecutor's Closing Submissions, para. 35.
[136] First Trial Session, T. 156.

4. Conclusion

76. In sum, the Trial Chamber is satisfied beyond reasonable doubt that the Accused committed the *actus reus* and possessed the *mens rea* of contempt of the Tribunal as described in Rule 77(A)(iv) of the Rules.

D. Rule 77(A) – Interference with the Administration of Justice.

77. With respect to Rule 77(A) of the Rules, the *actus reus* of contempt is committed by those who "interfere with the administration of justice". The *mens rea* of contempt is the knowledge and the will to interfere, and this is the general *mens rea* applying to all sub-rules.[137]

78. The Prosecution argues that Rule 77(A)(ii) of the Rules incorporates the general language and requirements of Rule 77(A) of the Rules. The Prosecution submits that it has established a factual basis for the Accused's liability under Rule 77(A)(ii) of the Rules and has therefore automatically established a sufficiently clear factual basis for the Accused's liability under Rule 77(A) of the Rules.[138]

79. The Trial Chamber notes that Rule 77(A) of the Rules does not contain any legal or factual elements separate from Rules 77(A)(ii) and 77(A)(iv) of the Rules in that it contains both the material element (*i.e.* interference with the administration of justice) and the mental element (*i.e.* knowledge and wilfulness) of the offence of contempt whereas sub-Rules 77(A)(ii) and 77(A)(iv) are non-exhaustive examples of conduct constituting contempt.[139] Thus, since the Trial Chamber has found that the Accused committed contempt of the Tribunal pursuant to Rules 77(A)(ii) and 77(A)(iv) of the Rules, it also finds that the Accused committed the *actus reus* and possessed the *mens rea* of contempt of the Tribunal as described in Rule 77(A) of the Rules.

E. Freedom of Expression and Freedom of Press

80. The Trial Chamber notes the Accused's argument that he published the Witness List and the related articles because he, as an investigative journalist, wanted to inform the public about who the witnesses in the *Blaškić* Case were.[140]

[137] *Jović* Preliminary Motion Decision, para. 28. *See supra* para. 14, fn. 27.
[138] Prosecutor's Closing Submissions, para. 40.
[139] *Jović* Preliminary Motion Decision, para. 28. *See supra* para. 14 fn. 27.
[140] First Trial Session, T. 138.

81. The Trial Chamber notes that journalists are free to report and comment on all proceedings before the Tribunal, including the testimony of witnesses, as long as they respect orders of a Chamber and protective measures granted to witnesses. The Trial Chamber fully agrees with the *Jović* Trial Chamber that a journalist has no right to violate a Chamber's orders.[141] It is undeniable that legal instruments relevant to the work of the Tribunal protect freedom of expression and freedom of the press. As the *Jović* Trial Chamber has clearly outlined, these rights have, however, qualifications in relation to court proceedings.[142] While freedom of expression and freedom of the press are fundamental rights,[143] such rights can be limited in relation to court proceedings. Human rights law allows for a court to restrict freedom of expression and freedom of the press when such a restriction is authorised by law and necessary for "the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".[144] In particular, Article 20(4) of the Tribunal's Statute authorises a Chamber to close the proceedings in accordance with the Rules and to make certain evidence confidential.[145] As discussed above, the Tribunal's Rules also authorise a Chamber to grant protective measures to witnesses. The orders by the *Blaškić* Chamber were issued to protect witnesses in this case and to prevent disclosure of their names and identities. These orders constituted valid limitations of the Accused's rights to free expression.

82. As the Accused did not respect the orders issued by the *Blaškić* Chamber and the protective measures granted to witnesses, he cannot invoke the principle of freedom of expression or freedom of the press to excuse his conduct.

F. Conclusion With Regard to the Charge of Contempt

83. In light of the aforesaid, the Trial Chamber finds that by publishing the Witness List, the Accused committed contempt of the Tribunal pursuant to Rule 77(A) of the Rules, by disclosing information in violation of an order pursuant to Rule 77(A)(ii) of the Rules and by interfering with witnesses pursuant to Rule 77(A)(iv) of the Rules.

[141] *Jović* Trial Judgement, para. 23.
[142] *Jović* Trial Judgement, para. 23.
[143] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10(1); International Covenant on Civil and Political Rights, Art. 19(2); Universal Declaration of Human Rights, Art. 19.
[144] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 10(2); International Covenant on Civil and Political Rights, Art. 19(3); Universal Declaration of Human Rights, Art. 29(2).
[145] *Jović* Trial Judgement, para. 23.

VI. PUNISHMENT

A. Purposes of Punishment

84. The Trial Chamber considers that the two most important factors to be taken account of in determining the appropriate penalty in contempt cases are the gravity of the conduct and the need to deter repetition and similar action by others.[146]

85. The Trial Chamber has given primary consideration to these two factors, and has also considered whether there are any aggravating and mitigating circumstances.

B. Gravity of the Offence

86. The Trial Chamber regards the contemptuous behaviour in the instant case as particularly egregious. The Accused published protected witness information in relation to not just one or a few witnesses,[147] but instead in relation to a high number of protected individuals, with no effort to distinguish between the vulnerability of these individuals. The Trial Chamber also takes into account the potential personal and psychological consequences for all of the protected witnesses and the proven personal and psychological consequences the disclosure had on the lives of three of the witnesses – MC1, MC2 and MC3. The Trial Chamber considers that these factors make the Accused's contemptuous behaviour all the more severe.

87. Further, the Trial Chamber finds that the actions of the Accused undermined the Tribunal's ability to safeguard the evidence of protected witnesses. It endorses the ruling of the Trial Chamber in *Marijačić and Rebić* that "[a]ny deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal."[148] The Accused's behaviour undermined confidence in the effectiveness of such orders and was likely to dissuade witnesses from the *Blaškić* Case from cooperating with the Tribunal. To minimise such a risk and discourage this type of behaviour, it is necessary for the Tribunal to take whatever steps it can to attempt to ensure that there is no repetition of such conduct.[149]

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[146] *Marijačić* Trial Judgement, para. 46; *Jović* Trial Judgement, para. 26.
[147] In the *Marijačić and Rebić* case, for example, the accused disclosed information in relation to one witness. In the *Jović* Case, the accused also disclosed information in relation to one witness.
[148] *Marijačić* Trial Judgement, para. 50. *See supra* para. 15.
[149] *See Marijačić* Trial Judgement, para. 52; *Jović* Trial Judgement, para. 26.

C. Aggravating and Mitigating Circumstances

88. The Trial Chamber considers the fact that the Accused not only acted intentionally but showed reckless disregard for the safety of witnesses when he published the Witness List and related articles on the internet over a long period of time. The Trial Chamber notes, however, that the Accused did not persist with this attitude at trial.[150]

89. The Trial Chamber notes the Defence submission that the health of the Accused and of the Accused's pregnant wife may deteriorate if a jail term is imposed.[151] The Trial Chamber acknowledges the impact of a jail term on the well-being of the Accused and his relatives but does not attach great weight to it as a mitigating circumstance in the instant case.

D. Punishment to be Imposed

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

91. The Prosecution suggested that the Accused be sentenced to a term of imprisonment of six months and that, additionally, a fine of 50,000 euros be imposed.[152]

92. In the *Marijačić and Rebić* Case, which involved two accused found guilty of publishing a single newspaper article disclosing information in relation to one protected witness in violation of a Tribunal order, the Trial Chamber imposed a fine of 15,000 euros on each accused.[153] In the *Jović* Case, which involved one accused publishing several newspaper articles disclosing information in violation of a Tribunal order in relation to one protected witness who was a public figure, the Trial Chamber imposed a fine of 20,000 euros on the accused.[154] In the *Beqaj* Case, the Trial Chamber sentenced the accused, who repeatedly tried to influence the testimony of one witness, to a term of imprisonment of four months.[155]

93. In the instant case, in view of the gravity of the offence and taking due account of the aggravating circumstance considered above, the Trial Chamber considers that a combination of a

[150] *See* First Trial Session, T. 155.
[151] Defence Closing Submissions, p. 6.
[152] Prosecution Closing Submissions, para. 47.
[153] *Marijačić* Trial Judgement, para. 53.
[154] *Jović* Trial Judgement, para. 27.
[155] *Beqaj* Trial Judgement, para. 67.

term of imprisonment and a fine is the appropriate punishment to achieve the purpose for which punishment is imposed.

VII. DISPOSITION

94. **FOR THE FOREGOING REASONS**, having considered all of the evidence and the arguments of the parties, the Trial Chamber makes the following disposition pursuant to the Statute of the Tribunal and Rules 77 and 77*bis* of the Rules:

1. The Accused, Mr. Domagoj Margetić, is **guilty** of Contempt of the Tribunal, punishable under Rule 77(A), Rule 77(A)(ii), and Rule 77(A)(iv) and Rule 77(G);

2. Mr. Margetić is hereby sentenced to a term of imprisonment of **three months**. He is entitled to credit for the 34 days he spent detained in custody in Croatia;

3. Mr. Margetić is further sentenced to a fine of **10,000 Euros.** The full amount of the fine shall be paid to the Registrar of the Tribunal within 30 days of this Judgement.

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

Dated this seventh day of February 2007
At The Hague
The Netherlands

Judge Alphons Orie
Presiding

Judge Christine Van Den Wyngaert

Judge Bakone Justice Moloto

[Seal of the Tribunal]