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-99-36-R77
		Date:	19 March 2004
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Hans Holthuis**

Date: **19 March 2004**

PROSECUTOR

v.

RADOSLAV BRĐANIN

CONCERNING ALLEGATIONS AGAINST MILKA MAGLOV

DECISION ON MOTION FOR ACQUITTAL PURSUANT TO RULE 98 *BIS*

Amicus Curiae Prosecutor:

Ms. Brenda J. Hollis

The Respondent:

Ms. Milka Maglov

Defence:

Mr. Jonathan Cooper

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I. INTRODUCTION

A. Procedural Background

1. This Trial Chamber ("the Trial Chamber") in the case *Prosecutor v. Radoslav Brđanin*[1] issued on 15 April 2003, an "Order Concerning Allegations Against Milka Maglov ("the Respondent")"[2], finding that facts before this Trial Chamber, if believed, could lead to the conclusion that: 1) the Respondent approached a potential Prosecution witness ("the Witness") and intimidated the Witness; and/or 2) the Respondent revealed the identity of the Witness to a member of the public in violation of an order of a Chamber; and on the basis of this there were sufficient grounds to proceed against the Respondent for contempt of the Tribunal on the basis of Rule 77(A)(iv) and Rule 77(A)(ii) of the Rules of Procedure and Evidence ("Rules"). On 8 May 2003, the Trial Chamber issued an "Order Instigating Proceedings Against Milka Maglov"[3], directing the Registrar to appoint an *Amicus Curiae* ("*Amicus Curiae* Prosecutor") and ordering the *Amicus Curiae* Prosecutor to prosecute the Respondent for: 1. the alleged intimidation of the Witness, and 2. the alleged disclosure of the identity of the Witness to a member of the public in violation of an order of a Chamber.

2. On 6 February 2004, the Trial Chamber granted the motion by the *Amicus Curiae* Prosecutor to amend the allegations for contempt of the Tribunal,[4] ordering the *Amicus Curiae* Prosecutor to prosecute the Respondent for the following allegations ("Allegations"):

1. Intimidating, or otherwise interfering with the Witness, pursuant to Rule 77(A)(iv); or, alternatively,

2. Attempting to intimidate, or otherwise interfere with the Witness, pursuant to Rule 77(B); and

3. Disclosing the identity and whereabouts of the Witness to a member of the public, in violation of an order of a Chamber, pursuant to Rule 77(A)(ii).

3. Trial proceedings against the Respondent commenced on 16 February 2004. The *Amicus Curiae* Prosecutor closed her case on 19 February 2004, after four days of trial, during which five witnesses were called to testify and seventeen documents were tendered into evidence. The Respondent tendered five documents into evidence.

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[1] *Prosecutor v. Radoslav Brđanin*, IT-99-36-T.
[2] *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Order Concerning Allegations Against Milka Maglov, 15 April 2003.
[3] *Prosecutor v. Radoslav Brđanin*, IT-99-36-R77, Order Instigating Proceedings Against Milka Maglov, 8 May 2003.
[4] *Prosecutor v. Radoslav Brđanin*, IT-99-36-R77, Decision on Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004.

4. On 24 February 2004, the Respondent confidentially filed a "Motion for Judgement of Acquittal – Rule 98 *bis*".[5] The *Amicus Curiae* Prosecutor confidentially filed a "Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *bis*" on 26 February 2004,[6] and a "Corrigendum to Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *bis*" on 27 February 2004.[7] On 4 March 2004, the Respondent confidentially filed "Milka Maglov's Reply to the Prosecutor's Response to Ms. Maglov's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*" [8]

5. The Respondent represented herself until 18 March 2004, when Registry appointed Mr. Jonathan Cooper to represent the Respondent in the proceedings concerning the allegations of contempt against her.

B. Rule 98 *bis*: The Law and Standard of Proof

6. Rule 98 *bis* (Motion for Judgement of Acquittal) of the Rules of Procedure and Evidence ("Rules") states that:

> (A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii).
>
> (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

7. The Respondent and the *Amicus Curiae* Prosecutor agree[9] that the Rule 98 *bis* standard of review to be applied is correctly set out in the *Jelisić* Appeals Judgement:

> The Appeals Chamber considers that the reference in Rule 98 *bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalić* appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact

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[5] *Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, Confidential Motion for Judgement of Acquittal – Rule 98 *Bis*, 24 February 2004 ("Rule 98 *bis* Motion").
[6] *Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *Bis*, 26 February 2004 ("*Amicus Curiae Prosecutor* Response").
[7] *Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, Corrigendum to Confidential Response to The Respondent's Motion for Judgement of Acquittal – Rule 98 *Bis*, 27 February 2004 ("*Amicus Curiae Prosecutor* Corrigendum").
[8] *Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, Confidential Milka Maglov's Reply to the Prosecutor's Response to Ms. Maglov's Motion for Judgement of Acquittal Pursuant to Rule 98 *Bis*, 4 March 2004, ("Reply to *Amicus Curiae* Prosecutor Response").
[9] Rule 98 *bis* Motion, pp. 12-13; *Amicus Curiae* Prosecutor Response, paras 5-9.

> arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt. [10]

8. Both the Respondent and the *Amicus Curiae Prosecutor* make various submissions with respect to the manner in which the Trial Chamber is to exercise its powers and jurisdiction in carrying out the Rule 98 *bis* exercise. These need not be repeated here in any detail because the jurisprudence of the Tribunal on this Rule already deals with them. However, there are some issues raised that the Trial Chamber needs to re-assert in light of the approach taken by the Respondent in her submissions on the evaluation of evidence.

9. The Trial Chamber agrees with the following submissions of the *Amicus Curiae* Prosecutor, which are in line with the jurisprudence of the Tribunal:

a) In applying the test, the Trial Chamber should not assess the credibility and reliability of the Prosecution evidence unless the "evidence is so manifestly unreliable or incredible that no reasonable tribunal of fact could credit it", i.e., unless the Prosecution case can be said to have 'completely broken down' in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue.[11]

b) In that regard, inconsistencies in the Prosecution evidence are matters for consideration in assessing credibility and reliability of the evidence, and, thus, are matters for consideration at the conclusion of the case, not at this stage.[12]

c) The Trial Chamber should not consider evidence favourable to the Respondent. It is at the conclusion of the proceedings, not at this midway point, that the Trial Chamber should consider the extent to which any evidence is favourable to the Respondent, and the overall effect of such evidence in light of the other evidence of the case.[13]

9. All this is being re-stated because the Respondent in her written submissions has adopted an approach that would require the Trial Chamber to go well beyond what is now the established law and practice of the Tribunal in dealing with Rule 98 *bis* motions. The factual findings of this decision are thus reached using the "Rule 98 *bis* standard", explained above, namely whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the Respondent as charged.

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[10] *Prosecutor v. Goran Jelisić,* Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement"), para. 37 (emphasis added).

[11] See *Prosecutor v. Dario Kordić and Mario Cerkez, Case* No. IT-95-14-2, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 28*; Prosecutor v. Galic*, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galic, 3 October 2002, para. 11.

[12] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16, Judgement, 23 October 2001 *("Kupreškić* Appeal Judgement*")*, paras 332 – 334.

[13] See *Prosecutor v.Radoslav Brdanin*, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *Bis*, 28 November 2003, para. 62.

C. Acts that the *Amicus Curiae* Prosecutor Concedes Have not Been Proven

(a) Disclosure of the Whereabouts of the Witness

10. By her own admission,[14] the Respondent disclosed the whereabouts of the Witness to witness R77-B. This would constitute a violation of the plain language of the order of the Trial Chamber dated 3 July 2000. However, it appears that witness R77-B knew the whereabouts of the Witness prior to that disclosure, as did many of the people in their community.[15] For this reason, the *Amicus Curiae* Prosecutor concedes that it is the disclosure of the identity of the Witness as a witness in the *Brdanin* case, and not the disclosure of the Witness' whereabouts, that allegedly violates both the letter and spirit of the Trial Chamber's order. She therefore requests that in the circumstances of this case, the allegation of disclosure of the whereabouts of the Witness be dismissed.[16]

11. Accordingly, the Trial Chamber holds that in relation to Count 3 of the Allegations, there is no case to answer with respect to the alleged disclosure of the whereabouts of the Witness to a member of the public in violation of an order of a Chamber pursuant to Rule 77(A)(ii).

(b) Joint Criminal Enterprise

12. The *Amicus Curiae* Prosecutor also concedes that there is no evidence from which a reasonable trier of fact could conclude beyond reasonable doubt that a joint criminal enterprise has been proven, and requests that the Trial Chamber dismiss this form of liability.[17]

13. In considering the pleading practices before the Tribunal[18] and the specificity of pleading required in proceedings pursuant to Rule 77,[19] the Trial Chamber is of the view that the Respondent has not been charged for participating in a joint criminal enterprise to commit any of the alleged offences. Regardless of the evidence presented by the *Amicus Curiae* Prosecutor, the Trial Chamber opines that it would be unfair to the Respondent to allow the *Amicus Curiae* Prosecutor to invoke a

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[14] Ex P 10.
[15] R77-B (T 192 - closed session, and T 105 – private session).
[16] *Amicus Curiae* Prosecutor Response, para. 10.
[17] *Amicus Curiae* Prosecutor Response, para. 11.
[18] See, *Kupreškić* Appeal Judgement, paras 88 and 116; see also: *Prosecutor v. Miroslav Kvočka et al*., Case No.: IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 23; *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 1999, para. 18; *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras 11-20; *Radoslav Brdanin and Momir Talić*, Case No.: IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 13.
[19] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt 30 May 2001, ("*Aleksovski* Contempt Decision"), para. 56. See also *Prosecutor v. Blagoje Simić et al*.,

joint criminal enterprise for whatever purpose.[20] The question of the potentiality of this form of criminal responsibility does not arise in any case; the matter and the submissions of the *Amicus Curiae* Prosecutor can thus be of no relevance and will not be considered by the Trial Chamber.

II. THE LAW ON CONTEMPT OF THE TRIBUNAL

A. Introduction

14. Historically, the law of contempt originated as, and has remained, a creature of common law. The general concept of contempt is said to be alien to civil law, but many civil law systems have legislated to provide offences that produce a similar result.[21]

15. Contempt of court is an act or an omission intended to interfere with the due administration of justice.[22] The Tribunal possesses an inherent power to hold in contempt those who knowingly and wilfully interfere with the Tribunal's due administration of justice.[23] Each of the formulations in the current Rule 77(A)(i) to (v), when interpreted in the light of the statement of the Tribunal's inherent power, fall within this inherent power, as each clearly amounts to knowingly and wilfully interfering with the Tribunal's due administration of justice.[24] The content of this inherent power

Case No. IT-95-9-R77, Scheduling Order in the Matter of Allegations Against Accused Milan Simić and his Counsel, 7 July 1999.

[20] See *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 21 September 2001, paras 124-144. See also *Kupreškić* Appeal Judgement, para. 114.

[21] *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Tadić* Contempt Decision"), para. 15. In footnote 20 of the *Tadić* Contempt Decision, the Appeals Chamber examined a number of respective criminal statues in civil law systems, stating: "For example, the German Penal Code punishes as a principal offender anyone who incites a witness to make a false statement (§§ 26, 153). The Criminal Law of the People's Republic of China punishes anyone who entices a witness to give false testimony (Article 306). The French *Nouveau Code Pénal* punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence (Article 434-15). More general statutory provisions exist which deal with such things as the control of the hearing (*police de l'audience*), "affronts" (*outrages*), offences committed during the hearings (for example, *delits d'audience*) and the publication of comments tending to exert pressure (*pression*) on the testimony of witnesses or on the decision of any court. The Russian Criminal Code punishes interference in any form whatsoever with the activities of the court where the purpose is to obstruct the effectuation of justice (Article 294), and also provides more specific offences such as the falsification of evidence (Article 303)."

[22] *Att.-Gen. v. Butterworth* (1963) 1 Q.B. 696; *The St James's Evening Post*, 2 Atk. 469 at 471; *Bahama Islands, re a special reference from* (1893) A.C. 138. For a modern summary of contempt of court, see *Att.-Gen. v. Times Newspapers Ltd* (1992) 1 A.C. 191, HL. See in this respect also the Judgement of the European Court of Human Rights, in *Sunday Times v United Kingdom*, Series A Vol 30 at paras 18 and 55 (1979) 2 EHRR 245 at 256 274 (accepting this statement as a correct assessment of the purpose and scope of the law of contempt).

[23] *Tadić* Contempt Decision, para. 26; *Aleksovski* Contempt Decision, para. 30.

[24] *Tadić* Contempt Decision, para. 26, which made reference to the version of Rule 77 as applicable on 31 January 2000.

must be discerned by reference to the usual sources of international law, and exists independently from the terms of Rule 77. Amendments made to Rule 77 do no limit this inherent power.[25]

16. There are differences in the states of mind required for each of the various types of conduct envisaged in Rule 77(A).[26] The *mens rea* has to be established on a case by case basis in relation to each of the conducts referred to in Rule 77(A)(i) to (v). For each form of criminal contempt, the Prosecution must establish that the accused acted with specific intent to interfere with the Tribunal's due administration of justice.[27]

B. Intimidation of a witness

(a) Submissions by the Respondent

17. With respect to the alleged offence of intimidating or attempting to intimidate a witness or a potential witness, the Respondent submits that the clear and unambiguous language of Rule 77 requires that for criminal contempt to be established, the offending conduct must be committed knowingly and wilfully.[28] Regarding the specific intent required to prove criminal contempt under Rule 77, she refers to the pronouncement of the Appeals Chamber in *Prosecution v. Aleksovski.*[29] With respect to the *actus reus*, the Respondent refers to the recommendations of the Committee of Experts on Intimidation of Witnesses and the Rights of the Defense of the Council of Europe ("Committee of Experts"), which defines intimidation as "[a]ny direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever."[30]

18. The Respondent objects to the use of the Merriam Webster Dictionary as proposed by the *Amicus Curiae* Prosecutor in her pre-trial brief to the extent that the definition proffered allows a finding of intimidation solely on the basis of the subjective point of view of the witness, i.e. "to

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[25] *Tadić* Contempt Decision, para. 24; *Aleksovski* Contempt Decision, para. 30; *Prosecutor v. Blagove Simić et al*, IT-95-9-R77, Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000, para. 91.
[26] *Aleksovski* Contempt Decision, para. 40 and 42.
[27] *R. v. Almon* (1770) 20 St. Tr. 803 at 839*; Ahnee v. DPP (1999)* 2 A.C. 294, PC (publication of matter scandalizing court); *Att.-Gen. v. Butterworth* (1963) 1 W.B. 696, CA (hostile action against witness committed with the intent to punish him for giving evidence); *Att.-Gen. v. Judd* (1995) C.O.D. 15 DC (harassment of former juror); *R. v. Schot and Barclay* (19972 Cr.App.R. 383, CA (juror's stubborn refusal to return a verdict); *Att.-Gen. v. News Group Newspapers plc* (1989) Q.B. 110, DC; *Re Lonrho plc* (1990) 2 A.C. 154, HL; *Att.-Gen. v. Times Newspapers* Ltd (1992) 1 A.C. 191, HL; *Att.-Gen. v. Newspaper Publishing plc* (1997) 1 W.L.R. 926, CA. (publications); Att.-Gen. v. Sport Newspapers Ltd (1991) 1W.L.R. 1194 at 1200, CA (Civ. Div.).
[28] Rule 98 *bis* Motion, p. 14.
[29] *Aleksovski* Contempt Decision, paras 45-46.
[30] Committee of Experts on Intimidation of Witnesses and the Rights of the Defense of the Counsel of Europe, *Intimidation of Witnesses and the Rights of the Defense: Recommendation No. R (97) 13, adopted by the Committee of Ministers of the Council of Europe on 10 September 1997, and explanatory memorandum,* at p. 7. See Rule 98 *bis* Motion, p. 15.

make timid or fearful."[31] However, she does not object to the more precise portion of the definition: "especially to compel or deter by or as if by threats; to intimidate through threats, insults or aggressive behaviour."[32]

(b) Submissions by the *Amicus Curiae* Prosecutor

19. The *Amicus Curiae* Prosecutor submits that the elements of the intimidation or other interference with the Witness are as follows:

> a) The accused, alone or with others, by act or omission, intimidated or otherwise interfered with a witness;
> b) The accused's act or omission was knowing and wilful.

20. The *Amicus Curiae* Prosecutor submits that "intimidate" should be considered in the normal usage of the term, i.e., "to make timid or fearful; inducing fear or a sense of inferiority into another; frighten; especially to compel or deter by or as if by threats; to intimidate through threats, insults, or aggressive behaviour."[33] In so far as the Respondent relies on the definition of intimidation recommended by the Committee of Experts, the *Amicus Curiae Prosecutor* submits that the dictionary definition is more consistent with the Tribunal's statutory mandate to provide for the protection of victims and witnesses. She argues that the Respondent's definition does not require a direct verbal or physical threat; nor does it require actual interference with the duty to give testimony free from influence. According to the *Amicus Curiae* Prosecutor, it is sufficient if the conduct of the accused, alone or with others, was an indirect or potential threat to a witness, which may have led to interference with the witness' duty to give testimony free from any influence.[34]

21. Regarding the second element, namely that the accused's act or omission was knowing and wilful, the *Amicus Curiae* Prosecutor submits that accused's conduct was knowing if the evidence showed any of the following: actual knowledge of the nature and effect of the conduct, wilful blindness (deliberate ignorance) to the nature and effect of the conduct, or reckless indifference to the nature and effect of the conduct. The *Amicus Curiae* Prosecutor also submits that wilful intimidation or other interference with a witness includes that the accused specifically intended the conduct, or that the conduct was deliberate, and not accidental. According to the *Amicus Curiae* Prosecutor, proof of either would be sufficient to prove wilful intimidation or other interference.[35]

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[31] *Prosecutor v. Radoslav Brdjanin*, Case. No. IT-99-36-R77, Pretrial Brief of *Amicus Curiae* Prosecutor, para. 42.
[32] Id. See Rule 98 *bis* Motion, p. 15.
[33] *See* Merriam Webster Dictionary.
[34] See, *Amicus Curiae* Prosecutor Response, paras 14, 20.
[35] See, *Amicus Curiae* Prosecutor Response, paras 17-18.

(c) The Trial Chamber's Position

22. Intimidation of a witness as contempt of court requires proof that: a) the accused engaged in conduct that is likely to intimidate a witness; and b) the accused acted knowingly and wilfully.[36]

23. The *actus reus* of the offence of intimidating a witness as contempt of court consists of acts or culpable omissions that are likely to constitute direct, indirect, or potential threats to a witness or a potential witness. In order for the conduct in question to amount to contempt of court, said conduct must be of sufficient gravity to be likely to intimidate a witness.[37] These acts or omissions must be evaluated in the context of the circumstances of each particular case.[38] Intimidation of a witness as contempt of court is crime of conduct, which does not require proof of a result. Whether the witness was actually intimidated is immaterial; the Prosecution need only prove that the conduct in question was intended to interfere with the Tribunal's due administration of justice.[39]

24. As to the *mens rea* of the offence of intimidation of a witness as contempt of court, the Prosecution must establish that the accused had knowledge that his conduct is likely to intimidate a witness. Proof is also required that the accused acted with the specific intent to interfere with the Tribunal's due administration of justice.[40]

C. Otherwise Interfering with a Witness

(a) Submissions by the Respondent

25. Regarding otherwise interfering with a witness, the Respondent makes reference to the following finding by the International Criminal Tribunal for Rwanda ("ICTR"): "[i]nterference with a witness as contempt is to be construed as prohibiting only undue influence with a witness. Undue

[36] *Att.-en. v. Sport Newspaper Ltd* (1991) 1 W.L.R. 1194 at 1200, CA (Civ. Div.). The proposed definition of the present crime is further clarified in the following paragraphs.
[37] *R. v .Kellet* (1976) 1 Q.B. 372, 61 Cr. App.R. 240. See, for example, 18 U.S.C.§ 1512 (2004) Federal Obstruction of Justice Statute. The following supports this proposition and constitutes the *opinion juris* of States: *Intimidation of Witnesses and the Rights of the Defence*: Recommendation No. R (97) 13, adopted by the Committee of Ministers of the Council of Europe on 10 September 1997, and explanatory memorandum, at p. 7.
[38] See, for example, *R. v. Clemente*, wherein the Supreme Court of Canada held in relation to section 264.1 of the Criminal Code of Canada (Offences Against the Person and Reputation), that the question of whether the accused had the intent to intimidate, or that his words were meant to be taken seriously will, in the absence of any explanation by the accused, usually be determined by the words used, the context in which they were spoken, and the person to whom they were directed (*R. v. Clemente* (1994) 2 S.C.R. 758).
[39] *Shaw v. Shaw* (1861) 2 Sw. & Tr. 517; *Bromilow v. Phillips* (1891) 40 W.R. 220; *R. v. Greenberg* (1919) 121 L.T. 288.
[40] *Wong Yeung Ng v. Secretary for Justice* (1999) 2 HKC 24. See also *ante*, para. 15.

interference […] could have occurred […] if the individuals concerned […] tried to induce them to change their testimony."[41]

(b) Submissions by the *Amicus Curiae* Prosecutor

26. The *Amicus Curiae Prosecutor* submits that in the circumstances of this case, "otherwise interfere with" relates to undue interference, and would include conduct that influences or induces the witness to change his testimony.[42]

(c) The Trial Chamber's Position

27. The following must be proven in order for a person to be held responsible for otherwise interfering with a witness as a form of contempt of court: a) the accused engaged in conduct that is likely to deter a witness or a potential witness from giving evidence, or to influence the nature of the witness' or potential witness' evidence; and b) the accused acted knowingly and wilfully.[43]

28. The *actus reus* for the offence of otherwise interfering with a witness may take one of a number of different forms. Such forms include, but are not limited to, keeping a witness out of the way, by bribery or otherwise, so as to avoid or prevent service of a subpoena;[44] assaulting, threatening or intimidating a witness or a person likely to be called as a witness;[45] endeavouring to influence a witness against a party by, for instance, disparagement of the party;[46] or endeavouring by bribery to induce a witness to suppress evidence.[47] The Trial Chamber is of the view that interference with a witness by threatening, intimidating, causing an injury, or by offering a bribe ought to be so charged specifically, while "otherwise interfering with a witness" refers to other acts or conduct of a similar gravity that equally seek to influence the outcome of a pending case by interfering with a witness or a potential witness. The acts or omissions of the accused, viewed in light of the circumstances of the case, have to be likely to deter a witness or a potential witness from giving evidence, or to influence the nature of the evidence. As in the case of intimidation of a

[41] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Motion to hold members of the Office of the Prosecutor in Contempt of the Tribunal, 15 November 2002, ("*Kajelijeli* Contempt Decision"), para. 9.
[42] See *Kajelijeli* Contempt Decision, para. 9.
[43] The proposed definition of the present crime derives from the discussion in the following paragraphs.
[44] *Clement v. Williams* (1836) 2 Scott 814; *Lewis v. James* (1887) 3 TLR 527.
[45] *Partridge v. Partridge* (1639) Toth 40; *Shaw v. Shaw* (1861) 2 Sw & Tr 517; *Bromilow v. Phillops* (1891) 40 W.R. 220; *R v Castro, Onslow's and Whalley's Case* (1873) LR 9 QB 219; *Re B* (A) (1965) Ch 1112, (1965) 2 All ER 168; see also the County Courts Act 1959, s. 157 (I)(a) ("willfully insults a witness").
[46] *Welby v. Still* (1892) 66 LT 523.
[47] *Re Hooley, Rucker's Case* (1898) 79 LT 306. With respect to the different forms that interference with a witness may take, see also: *R. v. Kellet* (1976) 1 Q.B. 372, 61 Cr.App.R. 240; *Martin's case* (1747) 2 Russ. & My. 674; *Macgill's case* (1848) 2 Fowler's Exch. Prac., 2nd ed., p 404; *R. v. Gurney* (1867) 10 Cox C.C. 550; Ex p. Jones (1806) 13 Ves. 237; *Re Ludlow Charities; Lechmere Charlton's case* (1837) 2 My. & Cr. 316 at 229; *Kajelijeli* Contempt Decision,, para. 9; and *Prosecutor v. Kanyabashi et al,* Decision on Prosecutor's Further Allegations of Contempt, 30 November 2001.

witness as a form of contempt of court, it is not necessary for the Prosecution to prove that the witness was actually deterred or influenced.[48]

29. The *mens rea* for otherwise interfering with a witness requires proof of the accused's knowledge that his conduct is likely to deter a witness or a potential witness from giving evidence, or that his conduct is likely to influence the nature of the evidence.[49] The Prosecution must also prove the accused's specific intent to interfere with the Tribunal's due administration of justice.[50]

D. Attempt to Intimidate or Otherwise Interfere with a Witness

(a) Submissions by the Respondent

30. The Respondent, neither in the Rule 98 *bis* Motion, nor in the Reply to *Amicus Curiae* Prosecutor Response, makes any legal submissions in relation to the "attempt" to intimidate or otherwise interfere with a witness, charged in Count 2 of the Allegations. However, in her "Response of the Accused to the Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal", the Respondent objects to the admissibility of Count 2 of the Allegations on the ground that an attempt to intimidate is not feasible. She contends that each intimidating act would amount to a completed intimidation. The Respondent argues that the amendments proposed by the *Amicus Curiae* Prosecutor would cause her unfair prejudice, since no one can be found guilty of an act or of an omission that did not constitute a criminal offence under national or international law at the time it was committed.[51]

(b) Submissions by the *Amicus Curiae* Prosecutor

31. The *Amicus Curiae* Prosecutor argues that an attempt to intimidate or otherwise interfere with a witness materializes if an accused's conduct constitutes a substantial step commencing the intimidation or other interference with a witness, and that, despite said conduct, the crime did not occur because the witness was not put in fear or otherwise interfered with.[52]

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[48] *Re B* (J.A.) (an infant) (1965) Ch 1112, (1965) 2 All ER.
[49] See Judgement of Lord Denning MR and Donovan LJ in Re A-G's *Application, A-G v Butterworth* (1963) I QB 696, (1962) 3 All ER 326, CA. In this context, see also: *Re Johnson* (1887) 20 Q.B.D. 68; *Gariboldo v. Gagnoni* (1704) 6 Mod. 90; *Purdin v. Roberts*, 74 J.P. 88; Re de Court, The Times, November 27 1997, Ch D.
[50] See *ante,* para. 15.
[51] *Prosecutor v. Radoslav Brdanin Concerning Allegations Against Milka Maglov*, IT-99-36-R77, Response of the Accused to the Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 24 January 2004, pp. 3-4.
[52] *Amicus Curiae* Response, para. 38.

(c) The Trial Chamber's Position

32. The Trial Chamber is coming to the conclusion that the Rule 98 *bis* standard has been met in relation to Count 1 of the Allegations, namely intimidating or otherwise interfering with the Witness. A discussion on the legal issues pertinent to the alternative charge of attempting to intimidate or otherwise interfere with the Witness pursuant to Count 2 of the Allegations, is superfluous at this stage considering that in any event, the attempt of a crime is a constituent part of its commission.[53] The Trial Chamber will deal with the details of this alternative charge at a later stage of the proceedings in the event that the case of the *Amicus Curiae* Prosecutor in relation to the charges in Count 1 should fail, and after hearing detailed arguments from the parties.

E. Disclosing the Identity of a Witness to a Member of the Public in Violation of an Order of a Chamber

(a) Submissions by the Respondent

33. The Respondent's submissions on the elements that the *Amicus Curiae* Prosecutor must be proven beyond reasonable doubt are almost entirely dedicated to factual submissions. The Trial Chamber is unable to notice any submission of a legal nature by the Respondent on the law relating to this charge.

(b) Submissions by the *Amicus Curiae* Prosecutor

34. With regard to the charge of the violation of an order of a Chamber by disclosing the identity of the Witness to a member of the public, the *Amicus Curiae* Prosecutor submits that the elements of this offence are the following:

1. The accused, alone or jointly, by act or omission, disclosed the identity (and whereabouts) of a witness to member of the public;
2. The disclosure was in violation of an order of a Chamber;
3. The violation was knowing

35. The *Amicus Curiae* Prosecutor submits that the definition of "knowing" applies to knowing violations of an order of a Chamber: actual knowledge of the order violated, wilful blindness (deliberate ignorance) to the existence of the order violated, or reckless indifference to the existence of the order violated. With regard to the definition of "wilful" for purposes of a knowing violation of an order, the *Amicus Curiae Prosecutor* submits that it is necessary to establish that either the accused specifically intended the conduct or that his conduct was deliberate and not accidental.

[53] *Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, IT-99-36-R77, Decision on Motion by Amicus Curiae Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004, p. 4.

(c) The Trial Chamber's Position

36. In order to hold a person in contempt of the Tribunal for disclosing the identity of a witness to a member of the public in violation of an order of a Chamber, the Prosecution must establish that: a) the accused disclosed the identity of a witness to a member of the public; b) the disclosure was in violation of an order of a Chamber; and c) the violation was knowingly and wilfully committed.[54]

37. In determining whether an order of a Chamber has been violated, reference must be made to the exact content of the order that is subject to the alleged contempt of court. The relevant order in this case is that issued by the Trial Chamber on 3 July 2000 in the *Brđanin* case ("Protective Measures Order"), which allows the *Brđanin* Defence[55] to disclose the identity of a witness or a potential witness identified to them by the Prosecutor, if it is directly and specifically necessary for the preparation and presentation of the *Brđanin* case.[56] For the *Amicus Curiae* Prosecutor to prove the alleged violation of the Protective Measures Order, she must establish not only that the Respondent disclosed the identity of a witness or a potential witness to a member of the public, but also, that such disclosure was not directly and specifically necessary for the preparation and presentation of the *Brđanin* case. The Trial Chamber emphasises that the burden of proof remains with the *Amicus Curiae* Prosecutor.

38. The Prosecution must also establish that the accused's violation of an order of a Chamber was both knowingly and wilfully committed. Actual knowledge of the allegedly breached order is not required before it can be knowingly violated, in the event that the person charged with violating an order of a Chamber acted in wilful blindness of said order.[57] Wilful blindness (also called deliberate ignorance) is considered to be as equally culpable as actual knowledge of a particular fact in question.[58] With respect to wilful blindness, proof of knowledge of the existence of the relevant fact is accepted in cases where the Prosecution establishes that the accused suspected that the fact existed (or was aware that its existence was highly probable), but refrained from finding out whether it did exist, so as to be able to deny knowledge of it.[59]

39. The jurisprudence of the Tribunal does not answer the question if other states of mind, such as reckless indifference to the existence of an order, are sufficient to constitute a "knowing"

[54] The proposed definition of the present crime derives from the discussion in the following paragraphs.
[55] The Trial Chamber notes that the evidence before it shows that at the time relevant to the Allegations, the Respondent was a member of the *Brđanin* Defence.
[56] *Prosecutor v. Radoslav Brđanin and Momir Talić,* IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, ("Protective Measures Order"), admitted into evidence as Ex P 4, para. 65(4).
[57] *Aleksovski* Contempt Decision, para. 45.
[58] *Aleksovski* Contempt Decision, para. 43.

violation of an order.[60] The Trial Chamber notes the submission of the *Amicus Curiae* Prosecutor that reckless indifference to the existence of an order is sufficient to establish a "knowing" violation of an order.[61] At this stage of the proceedings, however, the Trial Chamber does not determine whether reckless indifference to the existence of an order would be sufficient to constitute contempt. It will make a finding in relation to this issue only in its final judgement, should it arise for determination.

40. Mere negligence in failing to ascertain whether an order had been made does not amount to contempt. Such conduct could be dealt with sufficiently, and more appropriately, by way of disciplinary action; it could never justify imprisonment or a substantial fine, even though the unintended consequence of reckless indifference or negligence may amount to an interference with the Tribunal's due administration of justice.[62]

41. A finding that the accused intended to violate an order would almost necessarily follow in most cases where the Prosecution establishes that the accused had knowledge of the existence of an order (either *actual* knowledge or a wilful blindness at to its existence). There may, however, be cases where an accused acted with reckless indifference as to whether his conduct was in violation of an order of a Chamber. This Trial Chamber notes that this is not equivalent to reckless indifference to the existence of an order of a Chamber.[63] In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, regardless of whether or not the Prosecution established a specific intent to violate an order of a Chamber. According to the Appeals Chamber, it is sufficient to establish that the conduct that constituted the violation was deliberate and not accidental.[64] The Trial Chamber is of the opinion that, even though no specific intent to violate an order is required for an accused to be held in contempt, the Prosecution must nevertheless establish that the accused had the specific intent to interfere with the Tribunal's due administration of justice.[65]

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[59] *Aleksovski* Contempt Decision, para. 43.
[60] The Appeals Chamber in the *Aleksovski* Contempt Decision left the issue to be decided by other Chambers (para. 45).
[61] *Amicus Curiae* Prosecutor Response, para. 17. The *Amicus Curiae* Prosecutor adopts and incorporates by reference the arguments set forth in her Confidential Pre-Trial Brief at paras 44-46 (*Prosecutor v. Radoslav Brdanin, Concerning Allegations Against Milka Maglov*, Confidential Pre-Trial Brief of *Amicus Curiae* Prosecutor, 18 January 2004).
[62] *Aleksovski* Contempt Decision, para. 45.
[63] This is a reckless indifference to the consequences of the act by which the order is violated, rather than a reckless indifference to the existence of the violated order, to which reference was made in para. 45 of the *Aleksovski* Contempt Decision.
[64] *Aleksovski* Contempt Decision, para. 54.
[65] See *ante*, para. 15.

III. FACTUAL SUBMISSIONS

A. Arguments of the Respondent

42. The Respondent in her Rule 98 *bis* Motion argues that the evidence presented thus far, even when viewed most favourably to the *Amicus Curiae* Prosecution, fails to establish any of the offences charged, and moves for an acquittal on all charges.[66]

43. The Respondent argues that the evidence before the Trial Chamber shows that the Witness was treated politely throughout the interview at issue in this case, and that threats were not made either during or after said interview. The Respondent maintains that she introduced herself, that her demeanour was correct, and that the Witness' concerns were not due to any kind of misconduct on her part. She maintains that the Witness himself stated that she did nothing to intimidate or interfere with the Witness. The Respondent argues that the fact that the Witness apparently became afraid is due to the failure of the Office of The Prosecutor to advise the Witness of the Witness' true position under the Protection Order, including the fact that the defence is entitled to interview witnesses. According to the Respondent, there is no evidence suggesting that, before she visited the Witness on 13 September 2001, she knew that the Witness had given a statement to the Prosecution. The Respondent argues that the evidence suggests that the aim of the meeting was to ask the Witness if the Witness would agree to testify for the Defence in the *Brđanin* case.[67] The Respondent also argues that no reasonable Trial Chamber can infer from the evidence that a defence counsel knowingly and wilfully intimidated a witness by simply interviewing a potential witness and asking that he testify for the defence.[68]

44. The Respondent maintains that according to the evidence before the Trial Chamber, when she visited the Witness on 19 December 2001, she did not disclose to witness R77-B that the Witness had given a statement to the Prosecution, or that the Witness planned to testify for the Prosecution. Instead, she asked the Witness a second time whether the Witness would consider testifying for the *Brđanin* Defence. In addition, the Respondent claims that the same evidence does not establish when the lead counsel in the *Brđanin* case gave her access to the Protective Measures Order.[69]

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[66] Rule 98 *bis* Motion, p. 2.
[67] Rule 98 *bis* Motion, pp. 2-7.
[68] Reply to *Amicus Curiae* Prosecutor Response, pp. 2-4.
[69] Rule 98 *Bis* Motion, pp. 7-12; Reply to *Amicus Curiae* Prosecutor Response, pp 2, 5-7.

B. Arguments of the *Amicus Curiae* Prosecutor

45. The *Amicus Curiae* Prosecutor argues that there is sufficient evidence before the Trial Chamber, upon which, if believed, a reasonable trier of fact could conclude beyond reasonable doubt that the Respondent knowingly and wilfully intimidated or attempted to intimidate the Witness, or attempted to otherwise interfere with the Witness, and that the Respondent disclosed the identity of the Witness in violation of an order of a Chamber. She therefore requests that the Rule 98 *bis* Motion be denied.[70]

46. According to the *Amicus Curiae* Prosecutor, the conduct of the Respondent should be seen in the context of the hostile environment in which the Witness lived and worked, and of the Witness' vulnerability within this environment.[71] The *Amicus Curiae* Prosecutor argues that the Respondent, alone or with Mr. Peric, committed the intimidation or attempted intimidation and other interference through her conduct. As for the Respondent acting with deliberate ignorance or with reckless disregard, the *Amicus Curiae* Prosecutor argues that the Respondent committed the intimidation or other interference through her omissions, namely in her failure to avail herself of the material in her possession or to which she had access. The *Amicus Curiae* Prosecutor submits that the Rule 98 *bis* standard is reached in that the Respondent acted knowingly and wilfully.[72]

47. In addition, the *Amicus Curiae* Prosecutor submits that assuming, *arguendo*, the Witness was not intimidated, the evidence sufficiently establishes that the Respondent attempted to intimidate the Witness because the Respondent's conduct constituted a substantial step that commenced the intimidation. The *Amicus Curiae* Prosecutor submits that despite the Respondent's conduct, the crime of intimidation did not occur because the Witness was not actually in fear.[73]

48. The *Amicus Curiae* Prosecutor concedes there is no evidence that the Respondent's conduct caused the Witness to change his testimony before the Tribunal. Nevertheless, she moves that the evidence before the Trial Chamber, if believed, is sufficient to allow a reasonable trier of fact to conclude that the Respondent attempted to interfere with the Witness' evidence. The *Amicus Curiae* Prosecutor argues that the Respondent's conduct could be reasonably characterized as constituting a substantial step to influence the Witness to change the Witness' testimony despite the fact that the Witness was not influenced and did not change his testimony.[74]

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[70] *Amicus Curiae* Prosecutor Response, para. 52.
[71] *Amicus Curiae* Prosecutor Response, paras 16, 19-27 and 35. The related evidence is listed on pp. 6-13.
[72] *Amicus Curiae* Prosecutor Response, paras 17-18 and 28-29. The related evidence is listed on pp. 14-17.
[73] *Amicus Curiae* Prosecutor Response, paras 37-40. The related evidence is listed on pp. 6-13.
[74] *Amicus Curiae* Prosecutor Response, paras 38-39.

49. In relation to Count 3, the *Amicus Curiae* Prosecutor argues that the evidence before the Trial Chamber sufficiently establishes that the Respondent disclosed the identity of the Witness to a member of the public in knowing violation of an order of a Chamber.[75] The *Amicus Curiae* Prosecutor submits that on 13 September 2001, the Respondent was aware that the Witness gave a statement to the Prosecution and that protective measures were in place for potential Prosecution witnesses.[76]

C. Conclusions of the Trial Chamber

50. Considering the above legal definitions of the crimes in question, and regardless of the concession of the *Amicus Curiae* Prosecutor that the evidence does not sufficiently establish that the Respondent's conduct caused the Witness to change the Witness' testimony before the Tribunal,[77] the Trial Chamber concludes that a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the Respondent for contempt of the Tribunal for:

1. Intimidating or otherwise interfering with, the Witness, pursuant to Rule 77(A)(iv); or alternatively,

2. Attempting to intimidate or otherwise interfere with, the Witness, pursuant to Rule 77(B); and

3. Disclosing the identity of the Witness to a member of the public, in violation of an order of a Chamber, pursuant to Rule 77(A)(ii).

51. The Trial Chamber concludes that a reasonable trier of fact could not be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the Respondent for contempt of the Tribunal for disclosing the whereabouts of the Witness to a member of the public in violation of an order of a Chamber pursuant to Rule 77(A)(ii).

52. The Rule 98 *bis* Motion thus fails with respect to Counts 1 and 2 of the Allegations. It also fails with respect to Count 3 of the Allegations in relation to the alleged disclosure of the identity of the Witness to a member of the public in violation of an order of a Chamber. The Rule 98 *bis* Motion is granted only with respect to Count 3 of the Allegations regarding the alleged disclosure of the whereabouts of the Witness to a member of the public in violation of an order of a Chamber.

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[75] *Amicus Curiae* Prosecutor Response, paras 42-49. The related evidence is listed on pp. 14-17 and 24-27.
[76] *Amicus Curiae* Prosecutor Response, paras 17-18 and 30-36.
[77] See para 27 of this decision defining otherwise interfering with a witness as a conduct crime, which does not require proof that the witness was actually deterred or influenced.

IV. DISPOSITION

For the foregoing reasons, the Trial Chamber, pursuant to Rule 98 *bis*:

(1) GRANTS the Rule 98 *bis* Motion only with respect to Count 3 of the Allegations regarding the alleged disclosure of the whereabouts of the Witness to a member of the public in violation of an order of a Chamber, and declares that with regards to this specific part of the Charge, that there is no case to answer on the part of the Respondent; and

(2) DISMISSES the Rule 98 *bis* Motion with respect to all other issues raised by the Respondent, and rejects her motion for acquittal for Counts 1 and 2, and for the remaining part of Count 3.

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

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Judge Carmel Agius
Presiding

_____ _____
Judge Ivana Janu Judge Chikako Taya

Dated this 19th day of March 2004
At The Hague
The Netherlands

[Seal of the Tribunal]