IT-95-14/1-AR77
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UNITED
NATIONS

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

Case: IT-95-14/1-AR77

Date: 30 May 2001

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Richard May
Judge Patrick Robinson
Judge Fausto Pocar
Judge Mohamed El Habib Fassi Fihri

Registrar: Mr Hans Holthuis

Judgment of: 30 May 2001

PROSECUTOR

v

Zlatko ALEKSOVSKI

JUDGMENT ON APPEAL BY ANTO NOBILO AGAINST FINDING OF CONTEMPT

Office of the Prosecutor:

Mr Anura Meddegoda

Appellant:

Mr Anto Nobilo (in person)

Counsel for Zlatko Aleksovski:

Mr Goran Mikuličić
Mr Srdjan Joka

1 Introduction

1. Mr Anto Nobilo has appealed by leave from the decision of a Trial Chamber that he had acted in contempt of the Tribunal, by having disclosed information relating to proceedings in the trial of Zlatko Aleksovski before that Trial Chamber in "knowing violation" of an order which it had made prohibiting the disclosure of that information.[1]

2. Mr Nobilo appeared as counsel for the accused in an associated trial of Tihofil (aka Tihomir) Blaškić,[2] which was being heard by a differently constituted Trial Chamber. During the re-examination of a defence witness in the *Blaškić* trial, Mr Nobilo sought to tender a map which had been prepared by a witness who had been called in the *Aleksovski* trial. He named the *Aleksovski* witness, describing him as such, and he had the *Blaškić* witness identify the professional position held by the *Aleksovski* witness. The *Aleksovski* Trial Chamber, however, had – to use the terms which it adopted in its decision finding that Mr Nobilo had acted in contempt – granted protective measures, *inter alia*, in respect of that witness's identity, his face and his profession. The issue in this appeal is whether the Trial Chamber erred in either law or fact in finding that Mr Nobilo's violation of such an order was a "knowing" one, and thus that he was in contempt of the Tribunal.

2 The background

(A) The *Aleksovski* trial

3. When the protected witness was called by the prosecution in the *Aleksovski* trial, the Trial Chamber was informed by the prosecution that the witness sought to have the image of his face on the video recording distorted and to be referred to by way of a pseudonym. The prosecution also requested that the blinds between the body of the courtroom and the public be lowered whilst the witness gave his evidence. Counsel for Aleksovski (Mr Mikuličić) said that he had no objection to the protective measures requested by the prosecution. The Presiding Judge then said:[3]

> In that case, the measures requested are granted, and we will now go into private session.

The blinds were lowered when the witness was brought into court, and steps were taken to distort the witness's face on the video recording. After the witness had made the solemn declaration

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1 Finding of Contempt of the Tribunal, 11 December 1998 ("Trial Chamber Decision").
2 Case IT-95-14-T.
3 *Aleksovski* Transcript, pp 1322-1323.

required by Rule 90(B) of the Rules of Procedure and Evidence ("the Rules"), counsel for the prosecution said to him:[4]

> Witness, their Honours have granted you certain protective measures in relation to the giving of testimony in the Tribunal. You will be referred to by the name "Witness K", so you should not use your name, and the image of your face will not appear in public.

Although the transcript records the reference to "private session" already quoted, it continued to record the proceedings as being in "open session", except for certain passages of the witness's evidence from which he could be identified, when the proceedings proceeded in closed session.[5]

4. Witness K was examined and cross-examined in open session concerning his preparation of the map showing the deployment of various belligerent forces in the Lašva Valley area in Bosnia and Herzegovina in early 1993, and it was tendered by the prosecution.[6]

(B) The *Blaškić* trial

5. Blaškić was charged with crimes against humanity, with violations of the laws and customs of war and with grave breaches of the Geneva Conventions. The charges arose, in part, out of events occurring on 16 April 1993 and involving the destruction of the village of Ahmići, in the Lašva Valley within the Vitez municipality of Central Bosnia, and the massacre of civilians who lived there.

6. The prosecution case in relation to all three categories of charges, as presented to the Trial Chamber in its opening statement, was that the Vitez area had been assigned to the Bosnian Croats in the Vance-Owen plan,[7] that the Croats had threatened to implement the plan unilaterally if the Muslims did not agree by 15 April to permit them to exercise control over that area, and that the Bosnian Croat armed forces (the HVO), led by Blaškić, had on 16 April launched a well planned military attack upon the undefended Muslim civilians in the area in order to cleanse the area of Muslims.[8]

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[4] *Ibid*, p 1324.

[5] The expressions "open session" and "closed session" are derived from the headings to Rules 78 and 79. The former expression denotes that the proceedings are held in public. The latter expression denotes that the press and the public are excluded from the proceedings, so that they can neither see nor hear the proceedings. The expression "private session" is, as a matter of practice, used to denote a hearing in open session where the public can see the proceedings but cannot hear them.

[6] *Aleksovski* Transcript, p 1327-1328, 1336-1348, 1356-1360.

[7] This was a plan for a decentralised Bosnian State which had been negotiated between the parties to the dispute in Bosnia under the direction of Cyrus Vance and Lord Owen, whereby Bosnia was to be divided into ten provinces, each being controlled by one of the three ethnic groups. The plan had been accepted by the Bosnian Croats and the Muslims but not by the Bosnian Serbs, and therefore could not be implemented.

[8] *Blaškić* Transcript, pp 37-38.

7. The case for Blaškić, as presented to the Trial Chamber in his opening statement, was that it was the Muslim dominated Bosnian Army (the ABiH) which had launched an attack upon the HVO forces in the Vitez area in order both to gain control of an explosives and munitions factory there and to gain more territory for the accommodation of displaced persons. The HVO forces led by him were thus in conflict with the ABiH forces in the village of Ahmići, and both sides of the conflict were organised military forces. The destruction of the village and the massacre of civilians who lived there, according to this case, were no more than unintended and unauthorised by-products of the conflict resulting from the Muslim dominated ABiH Army's general offensive against the HVO forces.[9]

8. It was in this context that, during the re-examination of a defence witness,[10] Mr Nobilo introduced the map into evidence in the *Blaškić* trial. He asked the witness to look at the map and agree that it showed a unit of the ABiH Army was present in the village of Ahmići, and then to identify the particular position held by the author of the map (whom Mr Nobilo named and described as having been an expert witness in the *Aleksovski* case).[11] There was no protest by the prosecution at this use of that information from the *Aleksovski* trial.

(C) The complaint of contempt

9. At the instigation of Witness K, the Embassy for Bosnia and Herzegovina in The Hague brought these events to the notice of the Prosecutor and of the Registrar of the Tribunal.[12] Thereafter, the prosecution filed a motion in the *Blaškić* trial by which it sought to bring these events to the notice of the *Aleksovski* Trial Chamber, so that that Trial Chamber might call upon Mr Nobilo to explain what had happened.[13] The prosecution identified Rule 77(A)(iii) as stating the offence which *prima facie* had been committed, which at that time relevantly provided:

> Any person who [...] discloses information relating to those proceedings in knowing violation of an order of a Chamber [...] commits a contempt of the Tribunal.[14]

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[9] *Ibid*, pp 11,201, 11,221-11,222.

[10] Although the *Blaškić* witness was initially named in the *Aleksovski* transcript, and referred to by his name in open session, protective measures were later granted in his favour, and he was thereafter referred to as Witness "Alpha". See *Aleksovski* Transcript, p 3903.

[11] *Blaškić* Transcript, p 11,902.

[12] Letter, 25 Sept 1998, filed as "Letter Related to the Incident of Disclosure of Identity of One of the Protected Witnesses".

[13] Confidential Motion Concerning Alleged Violation of Order of the Trial Chamber, 25 Sept 1998 ("Motion").

[14] Rule 77(A)(iii) is now Rule 77(A)(ii). There is no difference in substance so far as this provision is concerned between the Rule at the time it was being considered by the Trial Chamber and Rule 77 as it presently stands. The reference to "*those* proceedings" would appear to have been intended to be to "proceedings before a Chamber". That was the wording when the provision was first introduced as Rule 77(D) in July 1997.

The Trial Chamber called upon Mr Nobilo to appear, noting the prosecution's Motion but not otherwise identifying the proposed charge as being that upon which the prosecution relied in its Motion.[15]

3 The contempt proceedings

10. Mr Nobilo provided a statement before he appeared, in which he explained that the prosecution in the *Blaškić* trial revealed the identity of its witnesses only forty-eight hours before calling them, and that he had earlier received information from a source whose identity he did not wish to reveal that Witness K was to give evidence in that trial. When that evidence was not given, he learnt that a professional person had given evidence in the *Aleksovski* trial in open session concerning a map which he had drawn and which showed the deployment of the ABiH Army. He consulted Mr Mikuličić (counsel for *Aleksovski*), with whom he shared accommodation in The Hague, and who confirmed that such evidence had been given in the *Aleksovski* trial in open session. Mr Mikuličić had shown him the map, and had told him that he could use it in *Blaškić* as it had been used as evidence in open session during *Aleksovski*. Mr Nobilo asserted that he had not known that the witness had been granted protective measures, that his only interest was in using the map and that he had had no motive in disclosing the witness's name. He said that he had acted in good faith and that he was very sorry that the witness's name had been revealed.[16]

11. The issue was mentioned before the *Aleksovski* Trial Chamber,[17] after which further representations were made by the Embassy for Bosnia and Herzegovina.[18] Mr Nobilo again appeared before that Trial Chamber, represented by Mr Mikuličić and Mr Joka. The Embassy was also represented.[19] Mr Nobilo was invited to give his explanation, which he did in the form of an unsworn statement.

12. Mr Nobilo said that, because of the prosecution's practice of revealing the identity of its witnesses only forty-eight hours in advance, he was obliged to research everyone who might be a witness, and that he relied upon a number of sources for that information. He had been told by either a journalist or a professional colleague that a witness had produced a map in the *Aleksovski*

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[15] Strictly Confidential Order Concerning Alleged Violation of Order of the Trial Chamber, 15 Oct 1998.
[16] Anto Nobilo Statement, 19 Oct 1998.
[17] *Aleksovski* Transcript, p 3678, *et seq.*
[18] Letter, 17 Nov 1998, filed 19 Nov 1998.
[19] *Aleksovski* Transcript, p 3901, *et seq.*

trial which showed the deployment of the forces (including the ABiH) in the relevant area. At first, he thought that the witness would be called in both the *Blaškić* and the *Aleksovski* trials, but he then heard that the witness had returned home after giving evidence in the *Aleksovski* trial only. He later spoke to Mr Mikuličić, who confirmed that "a" witness had given such evidence in the *Aleksovski* trial in open session, and that the map showed the ABiH Army deployed in the Ahmići village. He was later provided with a copy of the map by Mr Mikuličić. He formed the view that it was a crucial piece of evidence which answered the prosecution case that the HVO had waged war against unarmed civilians in the Lašva Valley area. He had not read the transcript of the evidence which had been given in the *Aleksovski* trial, as he had not had time. In any event, he was focusing on the map. He had had no idea that the witness had been granted protective measures. In hindsight, he said, he probably should have, but in any event he had thought of him as an expert witness, whereas typically it is the victims who are granted protective measures. He had acted *bona fide*. No-one in the courtroom had told him that the witness was protected. He had had no motive to reveal the witness's identity, as his identity was immaterial. Mr Nobilo also raised his character as indicating that it is unlikely that he would have done this deliberately.[20]

13. The other parties present were then invited to ask Mr Nobilo questions, although he remained unsworn. Only the prosecution accepted the invitation. Mr Nobilo declined to identify his first source of information, upon the basis that there was a relationship of lawyer and client, and upon the additional basis that, as the source was an investigator for the defence, his safety may be jeopardised if his identity as the source were disclosed. Mr Nobilo explained that he had drawn the inference that the witness who gave the evidence in the *Aleksovski* trial was the person who was to have given evidence in the *Blaškić* trial but did not – namely Witness K, whom he knew by name. There had been only one witness in the *Aleksovski* trial who fell within the description of Witness K, and none in the *Blaškić* trial. That witness had told others in Sarajevo that he had given evidence in the *Aleksovski* trial but would not be giving it again in the *Blaškić* trial. Mr Nobilo accepted that the identity of the witness corroborated the authenticity of the map. He also said that his anonymous source had not told him that it was this witness who had produced the map, and that Mr Mikuličić had not told him the name of the witness who had done so. He nevertheless had a high degree of certainty that it was Witness K who had done so when he told the *Blaškić* Trial Chamber the identity of the person who had prepared the map. He did not read transcripts himself, leaving that to his co-counsel whose English was better than his. He was aware of the importance of witness protection, as it is important also for defence witnesses.[21]

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[20] *Ibid*, p 3904-3912.
[21] *Ibid*, p 3933-3949.

14. In answer to the Presiding Judge, Mr Nobilo said that he had not asked Mr Mikuličić whether the witness who produced the map was protected. He had not intended to identify the person who produced the map, and that he had spontaneously done so by way of improvisation at the time of its tender. He saw now that he had made a mistake by doing so, but at the time he had identified the person in order to give added weight to the facts marked on the map. He repeated his acceptance that protection is the rule for witnesses rather than the exception, but that he did not think that this witness, as an expert, was of the kind to whom protective measures were granted, who were usually the victims. He did not think that there was any possibility that the witness was protected, nor did he think that there was a risk that he may have been.[22]

15. Mr Mikuličić similarly made an unsworn statement, corroborating that he had never told Mr Nobilo anything about the witness who had given evidence in the *Aleksovski* trial, and saying that he had not been asked by Mr Nobilo to do so. He had seen no reason to warn Mr Nobilo about the protective measures granted to the witness because they had not discussed the person at all.[23]

16. Mr Nobilo was then permitted to address the Trial Chamber. He pointed out that the witness himself had later, in Sarajevo, disclosed the fact that he had given evidence, and that it was only as a result of that disclosure by the witness himself that he (Mr Nobilo) had come to know that he had.[24]

17. At no time during the hearing did the Trial Chamber formulate a specific charge against Mr Nobilo which identified the nature of the contempt alleged as being that upon which the prosecution had relied in its Motion ("knowing violation of an order of a Chamber"). Nor was there at any time a discussion as to what constituted a "knowing" violation of the order of a Trial Chamber.

4 The decision of the Trial Chamber

18. The Trial Chamber nevertheless proceeded upon the basis of Rule 77(A)(iii) as requested by the prosecution in its Motion.[25]

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[22] *Ibid*, p 3952-3962.
[23] *Ibid*, p 3949-3952.
[24] *Ibid*, p 3963-3964.
[25] The terms of the rule are set out in par 9, *supra*.

19. The Trial Chamber concluded that there had been a violation of its protective measures order, an issue which had not been contested, and it identified the issue which it had to determine as being whether that violation by Mr Nobilo had been a "knowing" one.[26] Although the Trial Chamber described this issue as a "legal question",[27] the issue involves both a question of interpretation as to what must be proved to establish that the violation was a knowing one (a legal question), and a question of fact, as to whether Mr Nobilo's state of mind fell within that interpretation. This appears to have been the way in which the Trial Chamber did in fact approach its task.

20. The Trial Chamber ruled that a knowing violation –

> [...] means not only a deliberate violation but also a deliberate failure to ascertain the circumstances under which a witness testified.[28]

The Trial Chamber reached this conclusion by reference to the following circumstances stated by it:[29]

(1) A counsel appearing before the Tribunal is obliged under all circumstances –

(a) to comply with the Tribunal's Rules and with its decisions;

(b) to take all necessary steps to ensure that his actions do not discredit the Tribunal; and

(c) to verify that nothing he does violates a decision of the Tribunal.

These obligations are said to arise from Rule 44(B)[30] and from Articles 12(1) and 15(1) of the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal.[31]

(2) A decision of the Trial Chambers relating to the protection of witnesses (which may be written or oral, public or confidential) is of the utmost importance, not only for the lives of the witnesses but also for the operations of the Tribunal.

(3) Witness protective measures are considered to be so crucial that both the Tribunal's Statute and its Rules make specific provision for them.

(4) This means that all persons striving to achieve justice at the Tribunal, including counsel, are duty bound to take all necessary steps to guarantee absolute compliance with measures adopted for the protection of witnesses. This obligation is an imperative one.[32]

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[26] Trial Chamber Decision, p 3.
[27] *Ibid,* p 3.
[28] *Ibid,* p 4.
[29] *Ibid,* p 4.
[30] That Rule is now designated as Rule 44(C).
[31] IT/125.
[32] The final sentence is taken from an observation of law made in the course of the Trial Chamber's factual findings, at p 5.

21. The Trial Chamber found that Mr Nobilo's state of mind fell within its definition by reference to the following circumstances stated by it:[33]

(5) Mr Nobilo was aware of the obligation to ascertain the circumstances under which a witness testified, because he had been careful to confirm with Mr Mikuličić that the map in question was a public document which had been presented in open session.

(6) Even though it is a common practice within the Tribunal for a protected witness to appear in open session (a fact which Mr Nobilo, as an experienced counsel at the Tribunal, must have known), he had not taken the trouble to verify whether this witness was protected.

(7) Mr Nobilo had at least two very simple and direct ways to find this out: he could have asked Mr Mikuličić, or he could have consulted the transcripts of the *Aleksovski* trial, which are public and easily available, even if only through Mr Mikuličić.

(8) Such a source of information was both readily available and logical to consult, and which, if consulted by Nobilo in even a cursory manner, would have given him the information needed to avoid the violation which occurred.

Mr Nobilo had accordingly deliberately failed to ascertain whether a protective measures order had been made in relation to Witness K. There was no finding made either that Mr Nobilo had *actual* knowledge that such an order had in fact been made, or that he had intended to violate or disregard that order (that is, that such was the result which he had sought to achieve).

22. The Trial Chamber, after considering the various matters in relation to the sanction to be applied, imposed a fine of NLG 10,000, but suspended the payment of NLG 6000 for a period of one year upon a condition that Mr Nobilo was not found in contempt of the Tribunal (again) during that period.[34] The balance of NLG 4000 was subsequently received by the Registrar.[35]

23. Leave to appeal from this decision was granted by a Bench of the Appeals Chamber on the basis that both the proper interpretation of the expression "in knowing violation" [in Rule 77(A)] and the obligations imposed on counsel appearing before the Tribunal were matters of general importance to proceedings before the Tribunal or in international law generally.[36]

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[33] Trial Chamber Decision, pp 4-5.

[34] This was clearly the intention of the Trial Chamber, although the wording of the Order in the English translation may perhaps fail to carry this intention into effect.

[35] Letter from Latham & Watkins, Attorneys at Law, California, USA, 18 Dec 1998.

[36] Decision on Application of Mr Nobilo for Leave to Appeal the Trial Chamber Finding of Contempt, 22 Dec 1998, p 2.

5 The appeal

24. The prosecution, although not strictly a party to the appeal, was requested to participate in the appeal.[37] Thereafter both Mr Nobilo and the prosecution filed their Briefs in relation to the appeal.[38] In response to a request by the Appeals Chamber, additional Briefs were filed concerning a particular line of authority followed in some common law countries concerning the power of courts to punish the disclosure of a witness's identity where protective measures had been granted to avoid such disclosure, not for disobedience of the order granting the protective measures but because the disclosure interfered with the administration of justice.[39]

25. In light of the events which have since occurred,[40] it is unnecessary to refer to the detail of these submissions. In relation to the matters raised which have not subsequently been covered by binding authority, it is sufficient to say that Mr Nobilo argued:

(1) that Rule 77(A)(iii)[41] requires proof of *actual* knowledge of the Trial Chamber's order,[42] and of an intention consciously to disregard it;[43]

(2) that constructive notice is insufficient to prove actual knowledge, and there was in any event no evidence of constructive notice on his part;[44]

(3) that wilful blindness is not a substitute for actual knowledge, and there was in any event no evidence of wilful blindness on his part;[45] and

(4) that any standard imposed other than actual knowledge was not an offence known to international law at the time when it was alleged to have been committed.[46]

In relation to the same matters, the prosecution argued in response:

(5) that knowledge may be inferred from the acts and circumstances of the case,[47] and that there is no reasonable explanation other than knowledge available from the evidence;[48]

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[37] Scheduling Order, 29 Jan 1999, p 2.
[38] Anto Nobilo's Appellant's Brief re Finding of Contempt of the Tribunal, 12 Feb 1999 ("Appellant's Brief"); Prosecution's Response to Appellant's Brief re Finding of Contempt of the Tribunal, 19 Feb 1999 ("Prosecution Brief"); Appellant's Reply Brief re Finding of Contempt of the Tribunal, 26 Feb 1999 ("Appellant's Reply Brief").
[39] Prosecution's Additional Submissions Regarding Finding of Contempt of the Tribunal, 18 Mar 1999 ("Prosecution's Additional Brief"); Appellant's Additional Brief re Finding of Contempt of the Tribunal, 22 Mar 1999 ("Appellant's Additional Brief").
[40] See Section 6 of this Judgment, *infra*, "The *Vujin* Case".
[41] Now Rule 77(A)(ii).
[42] Appellant's Brief, p 6.
[43] *Ibid*, p 7.
[44] *Ibid*, p 11.
[45] *Ibid*, pp 12-15.
[46] *Ibid*, pp 17-18.
[47] Prosecution Brief, par 40.
[48] *Ibid*, par 53.

(6) that the evidence supports a finding of *actual* knowledge on the part of Mr Nobilo,[49] but actual knowledge is not required where wilful blindness has been proved;[50]

(7) that the evidence supports a finding of wilful blindness,[51] which may have been the intention of the Trial Chamber in its finding that there had been a "deliberate failure to ascertain the circumstances";[52]

(8) that there is no requirement to prove a wilful intention to disobey the order, it is sufficient to establish that the act which constituted the disobedience of the order was itself deliberate and not accidental;[53] and

(9) that ignorance of the proper standard to be imposed is no excuse for its violation.[54]

In reply, Mr Nobilo repeated the submissions which he had made in his Appellant's Brief, and added:

(10) that mere negligence cannot establish wilful blindness.[55]

26. Mr Nobilo was also ordered to file either affidavits or formal statements containing any evidence which he would seek leave to tender.[56] A number of documents were subsequently filed by Mr Nobilo.[57] The prosecution responded to these documents.[58]

27. Subject to the limitations imposed by Rule 115, the Appeals Chamber may, in the same way as a Trial Chamber, admit evidence which is relevant and probative of the issues which it has to determine.[59] Rule 115, however, limits the admissibility of such evidence in the Appeals Chamber where it relates to an issue or a fact litigated in the trial, and where it is additional to the evidence presented at the trial. The Appeals Chamber will admit such additional evidence upon application by the party seeking to tender it where it was not available to that party at the trial by the exercise of

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[49] *Ibid*, par 61.
[50] *Ibid*, pars 62-63.
[51] *Ibid*, par 64.
[52] *Ibid*, par 63.
[53] *Ibid*, pars 70-75.
[54] *Ibid*, par 78.
[55] Appellant's Reply Brief, pp 15-16.
[56] Scheduling Order, 29 Jan 1999, p 2, as elaborated by Scheduling Order, 7 Dec 1999, p 3.
[57] Appellant's Statement re Reliance on Declaratory Evidence, 5 Jan 2000; Re-Filing of Declaration of Anto Nobilo in Support of Appellant's Reply Brief re Finding of Contempt of the Tribunal, 5 Jan 2000; Re-Filing of (Second) Declaration of Anto Nobilo in Support of Appellant's Reply Brief re Finding of Contempt of the Tribunal, 5 Jan 2000; Re-Filing of Declaration of Nika Grospić in Support of Appellant's Reply Brief re Finding of Contempt of the Tribunal, 5 Jan 2000.
[58] Prosecution's Response to "Appellants Statement re Reliance on Declaratory Evidence" Pursuant to Scheduling Order of 7 December 1999, 10 Jan 2000; Prosecutor's Corrigendum to "Response to 'Appellant's Statement re Reliance on Declaratory Evidence' Pursuant to Scheduling Order of 7 December 1999", 13 Jan 2000; Prosecution's Statement Pursuant to Scheduling Order of 7 December 1999, 14 Jan 2000.
[59] Rule 89(C).

reasonable diligence, and where the Appeals Chamber considers that the interests of justice require its admission in the appeal. It is in the interests of justice to admit such evidence where it is relevant to a material issue, it is credible, and it is such that it would probably show that the conviction or sentence was unsafe (in the sense that, had the Trial Chamber had such evidence before it, it would probably have come to a different result). The Appeals Chamber also has the inherent power to admit such evidence even when it was available at trial where its exclusion would lead to a miscarriage of justice. The party seeking the admission of additional evidence carries the burden of persuasion in relation to these matters.[60]

28. None of the material now put forward by Mr Nobilo in addition to that put forward at the time when he sought to answer the charge of contempt has been shown to have been unavailable to him at that time, and the Appeals Chamber is not satisfied that the exclusion of that additional evidence would lead to a miscarriage of justice. Notwithstanding the absence of any objection by the prosecution to its admission an appeal,[61] this additional evidence is rejected.

29. Both Mr Nobilo and the prosecution indicated that they were content for the Appeals Chamber to determine the appeal entirely on the basis of the written briefs.[62]

6 The *Vujin* Case

30. It was at this stage that the Appeals Chamber (sitting as a Chamber of first instance in the *Vujin* Case) examined in detail the Tribunal's power to punish for contempt.[63] There is no mention in the Tribunal's Statute of its power to deal with contempt. The Appeals Chamber nevertheless concluded that the Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not

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[60] These propositions are taken from the following decisions of the Appeals Chamber: *Prosecutor v Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 Oct 1998, pars 32, 44, 48, 50, 52; *Prosecutor v Delalić et al*, Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villobos Brenes, 14 Feb 2000, p 3; *Ibid*, Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, p 2; *Prosecutor v Jelisić*, Decision on Request to Admit Additional Evidence, 15 Nov 2000, p 3; *Prosecutor v Kupreškić et al*, (Confidential) Decisions on the Motions of Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 Feb 2001, pars 11-15; *Ibid*, (Confidential) Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 Apr 2001, pars 5-9.

[61] Prosecution's Additional Submissions and Motion to Withdraw Request for Cross-Examination, 23 Feb 2000 ("Prosecution's Further Submissions"), par 12.

[62] *Ibid*, par 7; Appellant's Statement re Request for Oral Argument, p 2. See Rule 116*bis*(A).

[63] *Prosecutor v Tadić*, Case 94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000 ("*Vujin* Judgment"), pars 12-18, 25-26.

frustrated and that its basic judicial functions are safeguarded.[64] As an international criminal court, the Tribunal possesses the inherent power to deal with conduct which interferes with its administration of justice.[65] Such interference may be by way of conduct which obstructs, prejudices or abuses the Tribunal's administration of justice.[66] Those who knowingly and wilfully interfere with the Tribunal's administration of justice in such a way may therefore be held in contempt of the Tribunal.[67] The *content* of that inherent power, however, must be discerned by reference to the usual sources of international law, and not by reference to the wording of Rule 77,[68] although the Appeals Chamber held that each of the formulations in the current Rules 77(A) to (D), *when interpreted in the light of that statement of the Tribunal's inherent power*, falls within – but does not limit – that inherent power, as each clearly amounts to knowingly and wilfully interfering with the Tribunal's administration of justice.[69]

31. Mr Vujin applied for leave to appeal against that judgment,[70] and leave was granted.[71] In the meantime, both Mr Nobilo and the prosecution were granted leave to file further submissions upon the issue of contempt in the light of the *Vujin* Judgment.

32. Mr Nobilo submitted that the Appeals Chamber's description of the Tribunal's inherent power as relating to those who "knowingly and wilfully" interfere with its administration of justice requires the phrase "knowing violation of an order of a Chamber" in Rule 77(A) to be interpreted in the light of that standard. The Trial Chamber's interpretation of that phrase as including "a deliberate failure to ascertain" whether a protective measures order had been made was therefore erroneous. He re-argued that a "knowing" violation would require proof of *actual* knowledge on his part that an order had been made. There was, he said, no evidence upon which such a finding of fact could be made.[72] Mr Nobilo repeated his previous submission that there was, in any event, no evidence upon which the Trial Chamber could reasonably have made its finding that he had deliberately failed to ascertain the circumstances under which Witness K testified.[73]

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[64] *Ibid*, par 13.
[65] *Ibid*, par 13.
[66] *Ibid*, par 18.
[67] *Ibid*, par 26(a). That proposition was stated as one which was adequate for the purposes of that case. It is discussed later in this Judgment, at pars 39-42, *infra*.
[68] *Ibid*, par 24.
[69] *Ibid*, par 26(b). The emphasis has been added for the purposes of the present judgment.
[70] Application for Leave to Appeal Against Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 7 Feb 2000.
[71] Decision on the Application for Leave to Appeal, 25 Oct 2000.
[72] Appellant's Submission re Appeals Chamber Contempt Judgment, 3 Mar 2000 ("Appellant's Further Submissions"), pp 2-3.
[73] *Ibid*, p 4.

33. The prosecution did not refer in its further submissions to the Appeals Chamber's description of the Tribunal's inherent power as relating to those who "knowingly and wilfully" interfere with its administration of justice. It merely submitted that Mr Nobilo's appeal should be dismissed for the reasons which had been expressed by the Appeals Chamber in the *Vujin* Judgment, as well as for the reasons which it had previously put forward.[74] So far as the complaint by Mr Nobilo that the Trial Chamber made an erroneous finding of fact is concerned, the prosecution submitted that the factual finding has not been shown to be one which no reasonable tribunal of fact could have reached.[75] The prosecution also repeated that the Appeals Chamber should render its decision based upon the written submissions which had been filed.[76]

34. Both Mr Nobilo and the prosecution argued that, as the Trial Chamber based its finding upon Rule 77(A), it would be inappropriate for the Appeals Chamber to consider whether he should nevertheless have been found in contempt upon some other basis which may have been available under the Tribunal's inherent power.[77]

35. The appeal against the *Vujin* Judgment has now been dismissed by a differently constituted Appeals Chamber.[78] The submission by Mr Vujin that the Tribunal has no power to punish contempt was rejected, the Appeals Chamber holding that the *Vujin* Judgment clearly set out the Tribunal's power to prosecute and punish contempt.[79] The law as stated in the *Vujin* Judgment is accordingly the law to be applied in the present appeal.

7 Analysis

36. Before considering the issues raised in this appeal by Mr Nobilo and by the prosecution, it is necessary to emphasise (as did the Appeals Chamber in the *Vujin* Judgment) two important matters:

(1) Both the purpose and the scope of the law of contempt to be applied by this Tribunal is to punish conduct which tends to obstruct, prejudice or abuse its administration of justice in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded.[80]

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[74] Prosecution's Further Submissions, pars 18-19.
[75] *Ibid*, pars 14-17.
[76] *Ibid*, par 20(ii).
[77] Appellant's Additional Brief, p 2; Prosecution's Additional Brief, par 3.
[78] *Prosecutor v Tadić*, Case 94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb 2001.
[79] *Ibid*, p 4.
[80] *Vujin* Judgment, par 18.

(2) The law of contempt is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.[81]

37. There are three principal issues which arise from the submissions of Mr Nobilo and the prosecution:[82]

(i) Is it necessary for the prosecution to establish *actual* knowledge of the order of the Chamber which was violated? Mr Nobilo says that it is necessary. The prosecution says that it need not, as it is sufficient to establish wilful blindness as to the existence of the order.

There are three factual issues which arise in relation to that issue:

(a) Should the Trial Chamber have found that Mr Nobilo had *actual* knowledge of the order?

(b) Did the Trial Chamber find that Mr Nobilo was wilfully blind as to the existence of the order?

(c) If it did not, should the Trial Chamber have found that he was?

(ii) Is it necessary for the prosecution *also* to establish an intention to violate or disregard that order? (Was that the result which he sought to achieve?) Mr Nobilo says that it is necessary. The prosecution says that it need not, as it is sufficient to establish that the act which constituted the violation was deliberate and not accidental.

There is one factual issue which arises out of that issue:

(d) Should the Trial Chamber have found that Mr Nobilo had such an intention?

(iii) Was the offence (so far as it imposed any standard other than *actual* knowledge) known to international law at the time when the offence was alleged to have been committed? Mr Nobilo says that it was not known, so that he cannot be found to have been in contempt. The prosecution says that ignorance of the law is no excuse.

It is convenient to dispose of this third issue first.

Nullum crimen sine lege

38. The principle of *nullum crimen sine lege*, or of legality, requires that a person may only be found guilty of a crime in respect of acts which constituted a crime at the time of their

[81] *Ibid*, par 16.
[82] See par 25, *supra*.

commission.[83] That principle does not, however, mean that decisions of this Tribunal (or of any other court) which interpret or clarify the elements of a particular crime change the law which existed at the time the offences are alleged to have been committed.[84] The Tribunal's inherent power to deal with contempt has necessarily existed ever since its creation, and the extent of that power has not altered by reason of the amendments made to the Tribunal's Rules,[85] or by reason of its decisions interpreting or clarifying that power.

***Actual* knowledge**

39. In support of his submission that a charge of contempt based upon a "knowing" violation of a court order requires proof of *actual* knowledge on the part of the person alleged to be in contempt, Mr Nobilo has relied strongly upon the statement in the *Vujin* Judgment that those who "knowingly and wilfully" interfere with its administration of justice by way of conduct which obstructs, prejudices or abuses that administration of justice may be held in contempt of the Tribunal.[86] The Appeals Chamber was, however, careful to qualify that statement as one which adequately encompassed the inherent power of the Tribunal to deal with contempt "for present purposes",[87] that is, for the disposition of that particular charge of contempt. The Appeals Chamber also went on to say in its *Vujin* Judgment:[88]

> In the opinion of the Appeals Chamber [...] each of the formulations in the current Rules 77(A) to (D), when interpreted in the light of that statement of the Tribunal's inherent power,[89] falls within – but does not limit – that inherent power, as each clearly amounts to knowingly and wilfully interfering with the Tribunal's administration of justice.

Both statements make it clear that the formulations in Rule 77 of various situations which amount to contempt do not limit the Tribunal's inherent jurisdiction to punish for contempt.

40. This qualification was necessary because the offence of contempt (at least so far as the common law is concerned) is a protean one. It is concerned with many widely diverse types of conduct and, for different types of conduct to amount to contempt, different states of mind are required. Three different types of conduct which amount to contempt (at least at common law), and which exemplify that this is so, are:

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[83] See, for example, the International Covenant on Civil and Political Rights, Article 15: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

[84] *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Judgment"), pars 126-127; *Prosecutor v Delalić*, Case IT-96-21-A, Judgment, 20 Feb 2001 ("*Čelebići* Judgment"), par 173.

[85] *Vujin* Judgment, par 28.

[86] *Ibid*, par 26(a).

[87] *Ibid*, par 26(a).

[88] *Ibid*, par 26(b).

[89] Rule 77(E): "[...]to hold in contempt those who knowingly and wilfully interfere with its administration of justice."

(a) the deliberate publication of material presenting a real risk of prejudice to the fair trial of an accused, where the act of publication may have occurred even in ignorance of the existence of the trial;[90]

(b) the deliberate publication of material with knowledge of the existence of the trial and either with the specific intention of influencing its result,[91] or where that material would have the effect of influencing its result;[92] and

(c) the publication of a witness's identity where protective measures have been granted to avoid such disclosure, with knowledge of the existence of those measures and with the specific intention of frustrating their effect,[93] where the contempt is based not upon the violation of the order granting protective measures but because the disclosure interfered with the administration of justice.[94]

41. The Appeals Chamber does not refer to these different types of contempt for the purpose of determining whether they are included in the power to punish for contempt which forms part of the Tribunal's inherent jurisdiction. It is unnecessary for the disposition of this appeal to determine that issue. However, the law of contempt originated as, and has remained, a creature of the common law and, as a general concept, is unknown to the civil law.[95] It is therefore to the common law that reference must *initially* be made to determine the scope of the law of contempt – recognising of course that an international tribunal such as this Tribunal must take into account its different setting within the basic structure of the international community.[96] Nor does the Appeals Chamber refer to these different types of conduct for the purpose of considering whether Mr Nobilo should have been found in contempt upon some basis available under the Tribunal's inherent power other than the "knowing violation of an order of a Chamber" which the Trial Chamber considered.[97] The Appeals Chamber agrees entirely with the united argument of both Mr Nobilo and the prosecution that it would be inappropriate for it to do so.

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[90] *Odham's Press Ltd; ex parte Attorney-General* [1957] 1 QB 73 (Divisional Court), at 79.

[91] *Smith v Lakeman* (1856) 26 LJ(NS) Ch 306 (Chancery Division), *per* Stuart V-C (at 306).

[92] *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (House of Lords), per Lord Reid (at 299-300), Lord Cross of Chelsea (at 322-325) and Lord Morris of Borth-y-gest (at 306-307).

[93] *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (House of Lords), *per* Lord Diplock (at 451-452), Viscount Dilhorne (at 458) and Lord Scarman (at 472-473); *Attorney-General v News Publishing Plc* [1988] Ch 333 (Court of Appeal), *per* Sir John Donaldson MR (at 374-375) and Lloyd LJ (at 383).

[94] *Attorney-General v Leveller Magazine Ltd*, *per* Lord Diplock (at 452), Lord Russell (at 467-468) and Lord Scarman (at 471-472).

[95] *Vujin* Judgment, pars 15, 17.

[96] *Ibid*, pars 16, 18.

[97] Both Mr Nobilo and the prosecution appear to have assumed, wrongly, that this was the Appeals Chamber's purpose in seeking submissions in relation to one particular line of authority: See pars 24 and 34, *supra*.

42. But that does not mean that regard cannot be had to the mental element of contempt as it exists in relation to other situations of contempt known to the common law when determining whether the mental element required in the particular contempt which the Trial Chamber found to have been committed in this case (and which was taken from the same source) requires *actual* knowledge of the order which was violated. There are stark differences in the states of mind required for each of the different types of conduct to which the Appeals Chamber has referred. In this context, Mr Nobilo clearly cannot have the benefit of any necessary *presumption* that the word "knowing" in the expression "in knowing violation of an order" used in Rule 77(A) means having *actual* knowledge of the order which has been violated. The question remains, however, whether "knowing" in that expression implies that *actual* knowledge is required before a contempt may be found.

43. The prosecution's submission that wilful blindness as to the existence of the order is sufficient is based upon the common law's acceptance of such a state of mind (also called deliberate ignorance) as being equally culpable as *actual* knowledge of the particular fact in question in certain areas of the criminal law. It is accepted, for example, in relation to charges of possession of a prohibited substance (where the defendant must be shown to have knowledge that the substance is a prohibited one), and charges of murder based upon the act of the defendant with knowledge that death or grievous bodily harm will probably result from that act. Proof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist). In some cases, it has been suggested that such a state of mind is capable of giving rise to the inference of *actual* knowledge, but in most cases it is merely said to be sufficient to prove knowledge.

44. It is, of course, important to emphasise that common sense propositions of fact are not transformed into propositions of law. It can never be said that a requirement of *actual* knowledge may be established by anything less than *actual* knowledge. But the acceptance in certain areas of the law of wilful blindness as establishing knowledge is of some assistance in determining whether, in any particular case, a "knowing" violation implies a requirement of *actual* knowledge of what has been violated. What must be identified in the present context is the type of conduct which can properly be described as "knowing and wilful", which interferes with the Tribunal's administration of justice and which is appropriately dealt with as contempt, with its liability for imprisonment or a substantial fine.

45. Mere negligence in failing to ascertain whether an order had been made granting protective measures to a particular witness could never amount to such conduct. It is unnecessary in this appeal to determine whether any greater degree of negligence could constitute contempt. Negligent conduct could be dealt with sufficiently, and more appropriately, by way of disciplinary action, but it could never justify imprisonment or a substantial fine even though the unintended consequence of such negligence was an interference with the Tribunal's administration of justice. At the other end of the spectrum, wilful blindness to the existence of the order in the sense defined is, in the opinion of the Appeals Chamber, sufficiently culpable conduct to be more appropriately dealt with as contempt. Whether other states of mind, such as reckless indifference to the existence of the order, constitute contempt by a knowing violation of the order can be left to the cases in which they arise for determination.

46. The prosecution has argued that the evidence nevertheless supports a finding of *actual* knowledge on the part of Mr Nobilo of the order which he violated.[98] To reach such a conclusion, the prosecution would have needed the Trial Chamber to make one or the other of two important findings of fact:

(1) that, despite his denial, Mr Nobilo had in fact read the transcript of Witness K's evidence;[99] or

(2) that, despite the denials of both Mr Nobilo and Mr Mikuličić, Mr Mikuličić had in fact told Mr Nobilo that Witness K was a protected witness.[100]

Neither finding was made by the Trial Chamber.

47. Although there were many inconsistencies within the various statements made by Mr Nobilo concerning other issues which could have discredited him as a witness in relation to these issues, a mere disbelief of a witness's denial of a particular fact does not by itself logically permit a tribunal of fact to accept beyond reasonable doubt the truth of fact which he denied. There is no other evidence upon which the Trial Chamber could have made those findings. The circumstances that the Trial Chamber did not in fact make any finding that Mr Nobilo did have *actual* knowledge of the order which he violated, and that the Trial Chamber felt the need to extend the meaning of a "knowing violation" to include not only a "deliberate violation" but also a "deliberate failure to

[98] Prosecution Brief, par 53.
[99] *Ibid*, pars 38-48.
[100] *Ibid*, par 41.

ascertain" the existence of the order, suggest very strongly that the Trial Chamber was *not* satisfied beyond reasonable doubt that Mr Nobilo did have *actual* knowledge.

48. Where a Trial Chamber has not made a particular finding, the party seeking to have the Appeals Chamber make that finding for itself must demonstrate that such a finding is the only reasonable conclusion available.[101] That has not been shown to be the case here. The Appeals Chamber does not accept the prosecution's argument that the Trial Chamber should have found that Mr Nobilo had *actual* knowledge of the order.

Wilful blindness

49. The prosecution next argues that, by its finding that Mr Nobilo was guilty of "a deliberate failure to ascertain the circumstances under which [Witness K] testified", the Trial Chamber may have been intending to make a finding of wilful blindness (or deliberate ignorance) on his part, and that the "absence of nuanced or explanatory language" in the Trial Chamber Decision should not be fatal to that decision.[102] The precise meaning intended by the Trial Chamber to the word "deliberate" is certainly unclear, and the Appeals Chamber is not prepared to accept that finding as being one of wilful blindness.

50. The prosecution then argues that the Trial Chamber should have made such a finding. The circumstances in which the failure was found by the Trial Chamber to have occurred were that (1) Mr Nobilo had been careful to confirm with Mr Mikuličić that the map in question was a public document presented in open session, (2) Mr Nobilo, as an experienced counsel at the Tribunal, must have known that it was common practice for a protected witness to give evidence in open session, (3) a readily available and logical source of information as to whether this witness was protected was Mr Mikuličić, and (4) if he had consulted that source, Mr Nobilo would have been told that he was.[103]

51. The Appeals Chamber does not accept that these circumstances constituted wilful blindness on the part of Mr Nobilo as to the existence of the order. The prosecution accepts that he had been told that the map in question was a public document presented in open session. This may well have given Mr Nobilo the impression that all circumstances surrounding the map were public. The fact that many protected witnesses give evidence in open court does not readily give rise to either the

[101] *Aleksovski* Judgment, par 172; *Čelebići* Judgment, par 441.
[102] Prosecution Brief, par 63.
[103] Trial Chamber Decision, pp 4-5.

suspicion or the awareness of the high probability that a witness who gives evidence in open session is the subject of an order granting protective measures. If the witness in question were a victim, it could perhaps be argued that counsel experienced in the Tribunal's practices would be aware of the risk that there will be an order granting protective measures to that witness. But Witness K was not a victim. Mr Nobilo described him as an expert giving evidence for the prosecution. This was not disputed. Although some such witnesses may have been given the benefit of protective measures orders, it is not immediately apparent why protective measures would usually be needed for them, and there is no reason to suspect that all such witnesses may be the subject of such orders. There can be no wilful blindness to the existence of an order unless there is first of all shown to be a suspicion or a realisation that the order exists. If the Trial Chamber's description of Mr Nobilo's failure to make inquiries as "deliberate" was intended to be a finding of wilful blindness to the existence of the order, then the Appeals Chamber is satisfied that there was no basis in the evidence for such a finding.

52. The Appeals Chamber is also satisfied that there was no basis in the evidence for the necessary conclusion (which in any event the Trial Chamber did not express) that Mr Nobilo's failure to make an inquiry as to the existence of the order resulted from his wish to be able to deny knowledge of its existence or because he just did not want to find out that it did exist. Such a state of mind is an extremely serious one. As already pointed out, it is as culpable as *actual* knowledge. If a Trial Chamber intends to make such a finding, the Appeals Chamber expects the Trial Chamber to make it expressly, and to give reasons for that finding. The Appeals Chamber does not accept the prosecution's argument that the Trial Chamber should have found that Mr Nobilo was wilfully blind as to the existence of the order.

Intention to violate or disregard order

53. In the light of these conclusions, it is strictly unnecessary for the Appeals Chamber to determine whether it is necessary for the prosecution *also* to establish an intention to violate or disregard the order which was violated, but the issue is an important one for future prosecutions for contempt and the matter has been fully argued. The Appeals Chamber accordingly proposes to express its opinion upon that issue.

54. In most cases where it has been established that the alleged contemnor had knowledge of the existence of the order (either *actual* knowledge or a wilful blindness of its existence), a finding that he intended to violate it would almost necessarily follow. There may, however, be cases where such an alleged contemnor acted with reckless indifference as to whether his act was in violation of

the order.[104] In the opinion of the Appeals Chamber, such conduct is sufficiently culpable to warrant punishment as contempt, even though it does not establish a specific intention to violate the order. The Appeals Chamber agrees with the prosecution that it is sufficient to establish that the act which constituted the violation was deliberate and not accidental. It was therefore unnecessary for the Trial Chamber to have found that the result which Mr Nobilo sought to achieve was a violation of the order.

8 A procedural issue

55. There has been some debate concerning the procedure laid down by Rule 77(F) under which it is for a Chamber, *proprio motu*, to initiate the proceedings whereby a person is called upon to answer the allegations against him when the Chamber has reason to believe he may be in contempt. This is in contrast with the procedure laid down by Rule 91, whereby a Chamber may direct the Prosecutor to investigate whether a witness has knowingly and wilfully given false testimony, with a view to the preparation and submission of an indictment for false testimony. The suggestion has been made that it should be for the Prosecutor to initiate proceedings for contempt by way of indictment or, where the alleged contemnor is associated with the prosecution, for an *amicus curiae* appointed by a Chamber to do so.

56. It is not the intention of the Appeals Chamber to enter this debate, but its existence underlines the danger of a Chamber being both the prosecutor and the judge in relation to a charge of contempt, and the possibility in such a case that the ordinary procedures and protections for the parties are overlooked. The Appeals Chamber has already observed that the Order by which Mr Nobilo was called upon to appear did not identify the precise charge that he had to answer,[105] that at no time during the hearing was a specific charge formulated against Mr Nobilo which identified the nature of the contempt alleged against him,[106] and that there was no discussion at any time as to what constituted a "knowing" violation of an Order.[107] Such lapses of the ordinary procedures would not have occurred if the contempt proceedings had proceeded by way of indictment, with the prosecution bearing the onus of establishing the charge. It is therefore essential that, where a Chamber initiates proceedings for contempt itself, it formulates at an early stage the

[104] 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 par 45, *supra*.
[105] Paragraph 9, *supra*.
[106] Paragraph 17, *supra*.
[107] Paragraph 17, *supra*.

nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved. It is only in this way that the alleged contemnor can be afforded a fair trial.[108]

9 Disposition

57. For the foregoing reasons, **the Appeals Chamber allows the appeal by Mr Anto Nobilo, and directs the Registrar to repay to Mr Nobilo the sum of NLG 4000 paid as the fine imposed by the Trial Chamber.**

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

Dated this 30th day of May 2001
At The Hague
The Netherlands

Judge David Hunt, Presiding

Judge Richard May

Judge Patrick Robinson

Judge Fausto Pocar

Judge Mohamed El Habib Fassi Fihri

Judge Robinson appends a separate opinion to this Judgment.

[Seal of the Tribunal]

[108] An example of what is required may be found in *Prosecutor v Simić et al*, Case IT-95-9-R77, Scheduling Order in the Matter of Allegations Against Accused Milan Simić and his Counsel, 7 July 1999, pp 3-6.

SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1. I am entirely in agreement with the decision of the Chamber in this matter. Indeed, I do not believe the proceedings should have been instituted in the first place, and it is on this issue that I would like to comment.

2. No court can function efficiently without a relationship of trust between counsel and the judges. Counsel is an officer of the court, and in judicial proceedings quite often a court must act on counsel's word, which, given as an officer of the court, is accepted as true, unless there is good reason to doubt his *bona fides*.

3. In the instant case, Mr. Nobilo provided a statement before he appeared in the contempt proceedings, in which he made it clear that he had not known that the witness had been granted protective measures, and that "his only interest was in using the map and that he had had no motive in disclosing the witness's name. He said that he had acted in good faith and that he was very sorry that the witness's name had been revealed."[1]

4. The matter should have ended with that explanation, unless there was a substantial basis for attributing *mala fides* to Mr. Nobilo. I say this, well aware that Mr. Nobilo's later explanation - that he revealed the identity of the witness in order to give added weight to the facts marked on the map[2] - shows that he had a motive in making the revelation. However, in my view, it is not a motive such as would warrant the attribution of *mala fides* to him. His motive was that of any lawyer, that is, to present his evidence in the most advantageous way. In making this comment I am well aware that there have been cases of misconduct by counsel appearing before the Tribunal. However, unless there is evidence of *mala fides*, counsel should be given the benefit of the doubt, and the prosecutorial discretion should be exercised in his favour.

5. Nothing in this Opinion should be construed as in any way derogating from the importance of the Tribunal's regime for the protection of victims and witnesses, or as in any way reflecting a lack of appreciation of the significance which that regime has for the work of the Tribunal.

[1] Judgement, para. 10, referring to Anto Nobilo Statement, 19 Oct. 1998.
[2] Judgement, para. 14, referring to *Aleksovski* Transcript, pp. 3952 – 3962.

However, in the result, I have to conclude that, although the legal issues raised by the case are very important, much judicial time has been unnecessarily expended in this matter.

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

Patrick Robinson

Dated this thirtieth day of May 2001
At The Hague
The Netherlands

[Seal of the Tribunal]