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SCSL-11-01-T
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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty
Single Judge, Trial Chamber II

Registrar: Ms. Binta Mansaray

Date filed: 26 June 2012

SPECIAL COURT FOR SIERRA LEONE
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PROSECUTOR **v.** **Eric Koi SENESSIE**

Case No. SCSL-2011-01-T

PUBLIC

SENTENCING RECOMMENDATION

Office of Independent Counsel:
Mr. William L. Gardner

Defence Counsel for Eric Senessie:
Mr. Ansu B. Lansana

Office of the Principal Defender:
Ms. Claire Carlton-Hanciles

Sentencing Recommendation of the Independent Counsel

1. For the reasons stated herein, the Independent Counsel recommends that Defendant Eric Senessie ("Defendant") be sentenced to a term of imprisonment of 5 to 7 years, and be ordered to pay the maximum fine permitted by the Special Court of Sierra Leone Rules of Procedure and Evidence ("SCSL Rules") – 2 million Leones.[1]

2. At the outset, the Independent Counsel respectfully incorporates by reference the Office of the Prosecutor's ("OTP") excellent *Amicus Curiae* Brief filed on June 22, 2012.[2] The Independent Counsel found this brief quite helpful in its analysis of tribunal precedents and in its survey of the sentences meted out in past contempt cases.[3] Those cases provide what the Independent Counsel considers to be a starting sentence benchmark of approximately one year's imprisonment. However, in so stating, the Independent Counsel also notes that the facts of virtually all of those cases were far less egregious than the facts of the instant case.[4]

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1 *See* SCSL Rules, Rule 77(G).

2 *Prosecutor v. Senessie*, Case No. SCSL-2011-01-T, *Amicus Curiae* Brief (June 24, 2012) ("OTP *Amicus* Brief").

3 Id. at p. 8, n.27 (cataloging international criminal contempt convictions and their resulting sentences).

4 *See generally id.* at paras. 12-20 (summarizing prior contempt cases before SCSL and other international criminal tribunals). In *Independent Counsel v. Brima*, Case Nos. SCSL-2005-02, SCSL-2005-03, the accused—Brima Samura, Margaret Fomba Brima, Neneh Binta Bah Jallow, Anifa Kamara, and Ester Kamara—pled guilty to charges of contempt, admitting that they revealed the identity and threatened the security of a protected witness in the case of *Prosecutor v. Brima, Kamara, & Kanu*, Case No. SCSL-2004-16-A ("AFRC Trial"). *Independent Counsel v. Brima*, Case Nos. SCSL-2005-02, SCSL-2005-03, Sentencing Judgement in Contempt Proceedings, at paras. 23, 26 (21 Sept. 2005). During the sentencing phase of the Brima case, the Independent Counsel and the Defence Counsel urged the Trial Chamber for mercy and jointly recommended a conditional discharge of the accused. Id. at paras. 1-2. In sentencing the accused to a conditional discharge, the Trial Chamber noted that: (1) "there was no forethought" in the actions of the accused; (2) the accused, being the wives and friend of the accused in the AFRC Trial, were "very emotionally involved in the trial process"; (3) the accused did not "have any previous criminal convictions in Sierra Leone nor in the Special Court";

3. Rule 72 *bis*(iii) of the SCSL Rules provides that the applicable laws of the Special Court include "general principles of law derived from national laws of the world," which would certainly include the laws of the United Kingdom, France, and the United States. In the United Kingdom and France, the offence of contempt of court is punishable by fines and terms of imprisonment of up to 5 years and 3 years, respectively.[5]

4. The sentencing guidelines with which the Independent Counsel is most familiar are those applicable to federal crimes in the United States.[6] The guidelines in the United States Sentencing Commission's 2011 Federal Sentencing Guidelines Manual ("Sentencing Guidelines") are extremely complicated, involving a calculation that starts with an "offense level" for a particular crime, and then takes into account myriad factors including, *inter alia*, the seriousness of the offense, specific offence characteristics, monetary considerations, acceptance of responsibility, and personal factors.[7]

5. The two U.S. federal statutes implicated by the Defendant's conduct in this case are 18 U.S.C. § 201(b)(3), bribery of a witness, and 18 U.S.C. § 1512(b)(1), witness tampering. The corresponding provisions under the Sentencing Guidelines are

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and (4) all of the accused "entered pleas of guilty thereby avoiding the necessity of a trial." Id. at paras. 30-32.

5 Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties*, 5 J. INT'L CRIM. JUST. 735, 741 n.24 (2007) (observing that Article 434-15 of "the French *Code Penal* . . . punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence by 3 years of imprisonment and a fine of 45,000 Euros" and that "Section 51[(6)(a)] of the United Kingdom's Criminal Justice and Public Order Act of 1994 provides that a person guilty of an offence under that section can be sentenced to imprisonment for a term not exceeding 5 years or a fine or both").

6 United States Sentencing Commission, *2011 Federal Sentencing Guidelines Manual* (Nov. 1, 2011) ("Sentencing Guidelines").

7 United States Sentencing Commission, *An Overview of the Federal Sentencing Guidelines*, at pp. 1-2 (2011).

Section 2J1.3 and Section 2J1.2, respectively.[8] A defendant convicted under U.S. law of offenses similar to the offenses in this case—offering bribes to not one but four witnesses, and in a major case at that—could easily face a sentence of 8 to 17 years under the Sentencing Guidelines.[9]

6. Given these benchmarks, the Independent Counsel turns to the factors of Rule 101 of the SCSL Rules that this Trial Chamber must take into account at sentencing. These factors are "any aggravating circumstances"[10] and "mitigating circumstances," such as "substantial cooperation with the Prosecutor."[11] The Independent Counsel sees no mitigating circumstances whatsoever, but the Independent Counsel does see at least three aggravating circumstances.

7. First, this contempt prosecution arose not in some case of simple assault or robbery at the local level. Rather, this prosecution arose from and is inextricably linked to the Charles Taylor case, one of the most significant and momentous trials in the history of international criminal tribunals. Given the "utmost gravity in terms of the scale and brutality" of Taylor's crimes,[12] this factor alone would justify a sentence of 7 years, the statutory maximum (assuming concurrent sentencing).

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8 *See* Sentencing Guidelines at pp. 235-37 (containing the guidelines for Section 2J1.2 – "Obstruction of Justice"), pp. 237-38 (containing the guidelines for Section 2J1.3 – "Perjury or Subornation of Perjury; Bribery of Witness").

9 *See id.*; *see also id.* at 407 (containing the Sentencing Table).

10 SCSL Rules, Rule 101(B)(i).

11 SCSL Rules, Rule 101(B)(ii).

12 As observed by the Trial Chamber II in the *Taylor* case:

> The Accused has been found responsible for aiding and abetting as well as planning some of the most heinous and brutal crimes recorded in human history. The Trial Chamber is of the view that the offences for which the Accused has been convicted—acts of terrorism, murder, rape, sexual slavery, cruel treatment, recruitment of child soldiers, enslavement and pillage—are of the utmost gravity in terms of the scale and brutality of the offences, the suffering caused by them on victims and the families of victims, and the vulnerability and number of victims.

8. Second, the Defendant perjured himself at trial and likely suborned the perjury of others, including at least one adult member of his own family.

9. Third, and perhaps most aggravating, is the fact that the Defendant has managed to conceal the complete truth of the involvement of others in the offense. The Defendant did not act alone. The Independent Counsel does not for one minute believe that years after not one but five witnesses testified in the Taylor case at the Hague that the Defendant woke up one morning, ambled down to J.P. Combey's for a Marula Fruit Wine, and decided he would approach all five of these witnesses about recanting their testimony. The Defendant worked with and on behalf of someone else, and possibly more than one other person. But from the day he was contacted by the Independent Counsel, through a week of trial, and up to the present, the Defendant has stonewalled the truth. For whatever reason—pride, fear of loss of face, money, politics, or some factor about which we cannot even speculate—the Defendant never sought to cooperate or even plea bargain. For this aggravating factor alone, the Defendant deserves the maximum sentence.

10. Finally, there is the matter of a fine. The Independent Counsel recommends that the Defendant be ordered to pay the maximum fine permitted under the SCSL Rules: 2 million Leones.[13] The Independent Counsel appreciates that the Defendant may not have this amount of money, but the Independent Counsel is persuaded by the arguments of the OTP that "it is likely that [the Defendant] or [his] supporters could easily pay the maximum fine[.]"[14]

11. Your Honor may ask why the Independent Counsel recommends only a sentence of 5 to 7 years when he argues that aggravating circumstances warrant the maximum sentence. All the Independent Counsel can say is that he was a prosecutor for 9 years

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Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgement, at para. 70 (30 May 2012).

[13] SCSL Rules, Rule 77(G).

[14] OTP *Amicus* Brief at para. 20.

and a defense lawyer for 28 years. The Independent Counsel believes in some degree of mercy and is influenced by the likelihood that the Defendant is the major source of support for his family. A sentence of 5 to 7 years is a significant sentence here and will, the Independent Counsel believes, send the appropriate signal to the community that this kind of conduct will not be sanctioned but rather heavily punished. However, the Independent Counsel submits that, ultimately, the most appropriate sentence is the one Your Honor, given your decades of judicial experience, particularly in Sierra Leone, feels is the most appropriate.

Respectfully Submitted,

WL Gardner

William L. Gardner
Independent Counsel

INDEX OF AUTHORITIES

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***Prosecutor v. Senessie*, Case No. SCSL-2011-01-I**

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***Independent Counsel v. Brima*, Case Nos. SCSL-2005-02, SCSL-2005-03**

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United States Legal Materials

United States Sentencing Commission, *2011 Federal Sentencing Guidelines Manual* (Nov. 1, 2011)

United States Sentencing Commission, *An Overview of the Federal Sentencing Guidelines* (2011)

Law Review and Journal Articles

Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties*, 5 J. INT'L CRIM. JUST. 735 (2007)

ANNEX

for the
Sentencing Recommendation
of the Independent Counsel

United States Sentencing Commission, *2011 Federal Sentencing Guidelines Manual* (Nov. 1, 2011)

Note: This authority exceeds 30 pages. Pursuant to Article 7(E) of the SCSL Practice Direction on Filing Documents before the Special Court of Sierra Leone, the relevant portions have been excerpted: pages 1-5, 235-239, 406-408. A complete copy of this document is available online at: http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/index.cfm.

CHAPTER ONE - INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION AND AUTHORITY

Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ("Commission") when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be

"offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account

PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

§2J1.1. Contempt

Apply §2X5.1 (Other Offenses).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *In General.—Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply.*

2. *Willful Failure to Pay Court-Ordered Child Support.—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. In such a case, do not apply §2B1.1(b)(9)(C) (pertaining to a violation of a prior, specific judicial order). Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.*

3. *Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(9)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 170 and 171); November 1, 1993 (see Appendix C, amendment 496); November 1, 1998 (see Appendix C, amendment 588); November 1, 2001 (see Appendix C, amendment 617); November 1, 2003 (see Appendix C, amendment 653); November 1, 2009 (see Appendix C, amendment 736); November 1, 2011 (see Appendix C, amendments 752 and 760).

§2J1.2. Obstruction of Justice

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) (Apply the greatest):

(A) If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, increase by **4** levels.

(B) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.

(C) If the (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, increase by **12** levels.

(2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.

(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1001 (when the statutory maximum term of eight years' imprisonment applies because the matter relates to international terrorism or domestic terrorism, or to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code), 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Domestic terrorism" has the meaning given that term in 18 U.S.C. § 2331(5).

"International terrorism" has the meaning given that term in 18 U.S.C. § 2331(1).

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. *Chapter Three Adjustments.—*

   (A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

   (B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(C).

3. *Convictions for the Underlying Offense.—In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).*

4. *Upward Departure Considerations.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face) or a particularly serious sex offense, an upward departure would be warranted.*

5. *Subsection (b)(1)(B).—The inclusion of "property damage" under subsection (b)(1)(B) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1)(B) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.*

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401); January 25, 2003 (see Appendix C, amendment 647); November 1, 2003 (see Appendix C, amendment 653); October 24, 2005 (see Appendix C, amendment 676); November 1, 2006 (see Appendix C, amendment 690); November 1, 2007 (see Appendix C, amendment 701); November 1, 2011 (see Appendix C, amendment 758).

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by **8** levels.

(2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by **3** levels.

(c) Cross Reference

(1) If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely Related Counts).

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(b)(3), (4), 1621-1623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.*

2. *For offenses covered under this section, Chapter Three, Part C (Obstruction and Related Adjustments) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.*

3. *In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).*

4. *If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

5. *"Separate proceedings," as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.*

Background: This section applies to perjury, subornation of perjury, and witness bribery, generally prosecuted under the referenced statutes. The guidelines provide a higher penalty for perjury than the pre-guidelines practice estimate of ten months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 175); November 1, 1991 (see Appendix C, amendments 401 and 402); November 1, 1993 (see Appendix C, amendment 481); November 1, 2003 (see Appendix C, amendment 653); November 1, 2011 (see Appendix C, amendment 758).

§2J1.4. Impersonation

(a) Base Offense Level: **6**

(b) Specific Offense Characteristic

(1) If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by **6** levels.

(c) Cross Reference

(1) If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1987.

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

Commentary to Sentencing Table

Application Notes:

1. *The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*

2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.*

3. *The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462); November 1, 2010 (see Appendix C, amendment 738).

United States Sentencing Commission, *An Overview of the Federal Sentencing Guidelines* (2011)

An Overview of the FEDERAL SENTENCING GUIDELINES

How the Sentencing Guidelines Work

The sentencing guidelines take into account both the seriousness of the offense and the offender's criminal history.

Offense Seriousness

The sentencing guidelines provide 43 levels of offense seriousness — the more serious the crime, the higher the offense level.

Base Offense Level

Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of a particular offense. More serious types of crime have higher base offense levels (for example, a trespass has a base offense level of 4, while kidnapping has a base offense level of 32).

Specific Offense Characteristics

In addition to base offense levels, each offense type typically carries with it a number of specific offense characteristics. These are factors that vary from offense to offense, but that can increase or decrease the base offense level and, ultimately, the sentence an offender receives. Some examples:

- One of the specific base offense characteristics for fraud (which has a base offense level of 7 if the statutory maximum is 20 years or more) increases the offense level based on the amount of loss involved in the offense. If a fraud involved a $6,000 loss, there is to be a 2-level increase to the base offense level, bringing the level up to 9. If a fraud involved a $50,000 loss, there is to be a 6-level increase, bringing the total to 13.

- One of the specific offense characteristics for robbery (which has a base offense level of 20) involves the use of a firearm. If a firearm was brandished during the robbery, there is to be a 5-level increase, bringing the level to 25; if a firearm was discharged during the robbery, there is to be a 7-level increase, bringing the level to 27.

Adjustments

Adjustments are factors that can apply to any offense. Like specific offense characteristics, they increase or decrease the offense level. Categories of adjustments include: victim-related adjustments, the offender's role in the offense, and obstruction of justice. Examples of adjustments are as follows:

- If the offender was a minimal participant in the offense, the offense level is decreased by 4 levels.
- If the offender knew that the victim was unusually vulnerable due to age or physical or mental condition, the offense level is increased by 2 levels.
- If the offender obstructed justice, the offense level is increased by 2 levels.

Multiple Count Adjustments

When there are multiple counts of conviction, the sentencing guidelines provide instructions on how to achieve a "combined offense level." These rules provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine whether and how much to increase the offense level.

Acceptance of Responsibility Adjustments

The final step in determining an offender's offense level involves the offender's acceptance of responsibility. The judge may decrease the offense level by two levels if, in the judge's opinion, the offender accepted responsibility for his offense.

In deciding whether to grant this reduction, judges can consider such factors as:

- whether the offender truthfully admitted his or her role in the crime,
- whether the offender made restitution before there was a guilty verdict, and
- whether the offender pled guilty.

Offenders who qualify for the 2-level reduction and whose offense levels are greater than 15, may, upon motion of the government, be granted an additional 1-level reduction if, in a timely manner, they declare their intention to plead guilty.

Criminal History

The guidelines assign each offender to one of six criminal history categories based upon the extent of an offender's past misconduct. Criminal History Category I is the least serious category and includes many first-time offenders. Criminal History Category VI is the most serious category and includes offenders with serious criminal records.

Determining the Guideline Range

The final offense level is determined by taking the base offense level and then adding or subtracting from it any specific offense characteristics and adjustments that apply. The point at which the final offense level and the criminal history category intersect on the Commission's sentencing table determines the defendant's sentencing guideline range. In the following excerpt from the sentencing table, an offender with a Criminal History Category of I and a final offense level of 20 would have a guideline range of 33 to 41 months.

Sentencing Table (excerpt)
(in months of imprisonment)

	Criminal History Category					
Offense Level	I	II	III	IV	V	VI
	...	...	...	...	...	...
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
	...	...	...	...	...	...

Sentences Outside of the Guideline Range

After the guideline range is determined, if an atypical aggravating or mitigating circumstance exists, the court may "depart" from the guideline range. That is, the judge may sentence the offender above or below the range. When departing, the judge must state in writing the reason for the departure.

In January 2005, the U.S. Supreme Court decided United States v. Booker, 543 U.S. 220 (2005). The Booker decision addressed the question left unresolved by the Court's decision in Blakely v. Washington, 542 U.S. 296 (2004): whether the Sixth Amendment right to jury trial applies to the federal sentencing guidelines. In its substantive Booker opinion, the Court held that the Sixth Amendment applies to the sentencing guidelines. In its remedial Booker opinion, the Court severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the federal guidelines mandatory, and 18 U.S.C. § 3742(e), an appeals provision.

Under the approach set forth by the Court, "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing," subject to review by the courts of appeal for "unreasonableness." The subsequent Supreme Court decision in Rita v. United States, 551 U.S. 338 (2007), held that courts of appeal may apply a presumption of reasonableness when reviewing a sentence imposed within the guideline sentencing range.

The Supreme Court continued to stress the importance of the federal sentencing guidelines in its most recent sentencing-related cases. See Gall v. United States, 128 S. Ct. 586 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and initial benchmark" at sentencing); Kimbrough v. United States, 128 S. Ct. 558 (2007) (After Booker, "[a] district judge must include the Guidelines range in the array of factors warranting consideration").

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Disclaimer: The characterizations of the sentencing guidelines in this overview are presented in simplified form and are not to be used for guideline interpretation, application, or authority.

Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties*, 5 J. INT'L CRIM. JUST. 735 (2007)

Sentencing Contempt of Court in International Criminal Justice

An Unforeseen Problem Concerning Sentencing and Penalties

Silvia D'Ascoli*

Abstract

International criminal tribunals, like any criminal court, have been faced with offences against the administration of justice, such as contempt of court. The power of the UN ad hoc Tribunals to punish these offences has raised problematic issues mainly concerning respect for the principle of legality (including frequent amendments to contempt-provisions, and the substantial increase of the sentencing frame for contempt within only a few years). This article seeks to clarify some aspects concerning applicable penalties and sentencing for contempt of court through the examination of the case law of the ad hoc Tribunals and the Special Court for Sierra Leone, discussing its implications for the principle of legality. It is argued that the process followed in sentencing contempt is in many aspects not dissimilar to the traditional judicial practice of the Tribunals concerning purposes of punishment, aggravating and mitigating circumstances and guilty pleas.

1. Introduction

In recent years, the International Criminal Tribunal for the former Yugoslavia (ICTY),[1] the International Criminal Tribunal for Rwanda (ICTR) and the Special

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1 In chronological order, as of 30 April 2007, the cases in which convictions were pronounced for contempt of the tribunal at the ICTY are the following: Finding of Contempt of the Tribunal, *Aleksovski* (IT-95-14/1-R77), Trial Chamber, 11 December 1998; Judgment on Allegations of Contempt against Prior Counsel Milan Vujin, *Tadić* (IT-94-1-A-R77), Appeals Chamber, 31 January 2000; Decision on Contempt of the Tribunal, *Milošević (Contempt Proceedings Against Kosta Bulatović)* (IT-02-54-R77.4), Trial Chamber, 13 May 2005; Judgment on Contempt Allegations, *Beqa Beqaj* (IT-03-66-T-R77), Trial Chamber, 27 May 2005; Judgment, *Marijacić and Rebić* (IT-95-14-R77.2), Trial Chamber, 10 March 2006; Judgment, *Jović* (IT-95-14/2-R77),

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Court for Sierra Leone (SCSL) have all been called upon to consider cases of contempt of court. Contempt, which is only one of the so-called 'offences against the administration of justice', can be defined as an act or an omission intended to obstruct or interfere with the due administration of justice.[2] The law of contempt aims at protecting the public interest in the proper administration of judicial functions, and at promoting respect for the rule of law. Founded in the Anglo-American tradition,[3] where it is characterized by substantial flexibility both with regard to the statutory definition and to the discretion enjoyed by judges in imposing appropriate penalties, the offence of contempt also has ample recognition in civil law systems, although it is there grounded on different bases and characterized by fixed penalties and less flexibility.[4]

Contempt of court in international criminal justice seems to have been, at least at the outset, an unforeseen problem. Especially in the system of the ad hoc Tribunals punishing contempt presented some difficulties in so far as the offence and the applicable penalties were not even mentioned in the Statutes of the Tribunals. Nonetheless, contempt has always been considered as an offence falling within their jurisdiction.

This article mainly deals with the problem of *sentencing* in cases of contempt of international courts/tribunals and with the related aspect of *penalties* provided for in such cases.[5] Furthermore, the article seeks to answer the question of how contempt of court relates to the traditional principles of criminal law of the *nullum crimen sine lege* and *nulla poena sine lege*. In particular, it will be clarified whether or not the ad hoc Tribunals have violated the principle of *nulla poena sine lege* and whether the differences

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Trial Chamber, 30 August 2006; Judgment on Allegations of Contempt, *Margetić* (IT-95-14-R77.6), Trial Chamber, 7 February 2007.

2 Cf. *Att.-Gen. v. Butterworth* (1963) 1 Q.B. 696, also recalled in the Decision on Motion for Acquittal pursuant to Rule 98*bis*, *Brđanin (Concerning Allegations against Milka Maglov)* (IT-99-36-R77), Trial Chamber, 19 March 2004, § 15.

3 For a more detailed reconstruction of the law of contempt, cf. J.C. Fox, *The History of Contempt of Court* (London: Professional Books Limited, 1972); C.J. Miller, *Contempt of Court* (Oxford: Oxford University Press, 2000); N. Keijzer, *Contempt of Court* (Deventer: Gouda Quint, 2000).

4 Countries of a civil law system do not recognize the common law concept of inherent powers (which will be explained later on), as on the contrary any offence or any sanction must be expressly provided for by the law. Understanding the different approach between common law and civil law systems is necessary in order to better grasp the approach adopted by the ad hoc Tribunals to the offence of contempt of court. In fact, as it will be seen later on, this approach seems to be the common-law one.

5 For other aspects of the law of contempt, such as the existence and the extent of the inherent powers of international criminal tribunals/courts, or the influence of the case law of the European Court of Human Rights, see M. Bohlander, 'International Criminal Tribunals and Their Power to Punish Contempt and False Testimony', 12 *Criminal Law Forum* (2001) 91–118; L. Symons, 'The Inherent Powers of the ICTY and ICTR', 3 *International Criminal Law Review* (2003) 369-404; G. Sluiter, 'The ICTY and Offences against the Administration of Justice', 2 *Journal of International Criminal Justice (JICJ)* (2004) 631–641; A.C. Emilianides, 'Contempt in the Face of the Court and the Right to a Fair Trial', 13 *European Journal of Crime, Criminal Law and Criminal Justice* (2005) 401–412.

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in penalties for contempt between the Rules of Procedure and Evidence (RPE) at the ICTY and ICTR are justified.

2. The Offence of Contempt of Court in the System of Ad Hoc Tribunals

A. The Power of the Ad Hoc Tribunals to Deal with Cases of Contempt of Court

The ICTY and ICTR Statutes make no mention of the offence of contempt or of the Tribunals' powers to deal with it. The judges, however, decided to deal with this issue in the RPE; hence, the offence of contempt was laid down in Rule 77 RPE.

This in itself could have constituted a problematic aspect (and indeed has been criticized), as notoriously the RPE should not be used to create criminal offences. Article 15 of the ICTY Statute empowers the judges to:

> ... adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[6]

However, neither this provision nor any other rule in the Statute *explicitly* empowers the judges to use the RPE to create new criminal offences, or to deal with criminal offences that are not serious violations of humanitarian law (war crimes, crimes against humanity or genocide).[7] Nonetheless, the Chambers of the ad hoc Tribunals have consistently pointed out that the judges are allowed to adopt rules for the conduct of matters falling within the *inherent jurisdiction* of the Tribunals.[8] In particular, the Appeals Chamber held that any court or tribunal does possess an inherent power,

6 Art. 14 of the ICTR Statute has a similar content: 'The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.'

7 With regard to similar provisions in the Statute of the SCSL, Art. 14, under the heading of 'Rules of Procedure and Evidence', first specifies that the Special Court will apply *mutatis mutandis* the ICTR RPE to the conduct of the legal proceedings before the Special Court, and then provides that: '... 2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone'.

8 See e.g. Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin, *Tadić* (IT-94-1-A-R77), Appeals Chamber, 31 January 2000 ('*Vujin* Judgement'), § 24; Judgment on Contempt Allegations, *Beqa Beqaj* (IT-03-66-T-R77), Trial Chamber, 27 May 2005 ('*Beqa Beqaj* Judgment'), § 13; Judgment, *Jović* (IT-95-14/2-R77), Trial Chamber, 30 August 2006 ('*Jović* Judgment'), § 11.

deriving from its judicial function, to ensure that the exercise of its jurisdiction is not frustrated and that its basic judicial functions are safeguarded.[9]

It is worth mentioning that the International Court of Justice (ICJ), in the *Northern Cameroons* case (1963) and then in the *Nuclear Tests* case (1974) had already recognized the existence of an inherent jurisdiction of any international judicial organ which would enable it:

> . . . to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction . . . shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute to ensure the observance of the inherent limitations on the exercise of the judicial function of the Court and to maintain its judicial character.[10]

According to the ICJ, this jurisdiction would derive from the mere existence of the court as a judicial organ and from the power conferred upon it in order to safeguard its basic judicial functions.[11] Moreover, the content of such an inherent power must be derived by reference to the sources of international law.[12]

It follows that international courts and tribunals — like the UN ad hoc Tribunals and the SCSL — possess by definition the inherent power to deal with conducts interfering with their administration of justice; accordingly, the power to deal with contempt — within the ICTY and ICTR — has always been recognized as being part of the inherent powers of judges.[13]

9 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14-AR108*bis*), Appeals Chamber, 29 October 1997, note 27, § 25; *Vujin* Judgment, *supra* note 8, § 13; Judgment on Appeal by Anto Nobilo Against Finding of Contempt, *Aleksovski* (IT-95-14/1-AR77), Appeals Chamber, 30 May 2001 ('*Nobilo* Judgment'), § 30; *Beqa Beqaj* Judgment, *supra* note 8, § 13; Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, *Milošević* (IT-02-54-A-R77.4), Appeals Chamber, 29 August 2005, § 21; *Jović* Judgment, *supra* note 8, § 11.

10 Cf. *Case Concerning the Northern Cameroons*, Judgment of 2 December 1963, ICJ Reports 1963, at 29.

11 Cf. *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, 259–260, § 23.

12 *Ibid.*, § 23; *Northern Cameroons Case*, *supra* note 10, at 29.

13 This issue was analysed in detail by the Appeals Chamber in the *Vujin* (*Tadić*) contempt case: *Vujin* Judgment, *supra* note 8, § 18. It was thereby held that the power to deal with contempt was within the inherent jurisdiction of the Tribunal, deriving from its judicial function, and allowing judges to hold in contempt those who knowingly and wilfully interfere with the Tribunal's administration of justice. *Ibid.*, §§ 13, 18 and 26(a), where it was considered necessary that a Tribunal have powers to punish conducts tending to obstruct, prejudice or abuse its administration of justice, in order to ensure the exercise of its jurisdiction. Although it seems that there is no clear rule of customary international law applicable to this issue, guidance was derived from conventional international law, for example, from the Charter of the International Military Tribunal of Nuremberg (IMT), which — in its Art. 18(c) — gave the Tribunal the power to deal with 'any contumacy' by 'imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.' No case of contempt arose before the IMT, but three cases of contempt were dealt with by the US Military Tribunals, sitting in Nuremberg and acting in accordance with the Allied Control Council Law No. 10 of 20 December 1945, a law which incorporated the Charter of the IMT. Cf. *Vujin* Judgment, *supra* note 8, § 14. The US Military Tribunals interpreted their judicial powers as including the power to punish cases of contempt of court, thus dealing with the three matters appearing before them. For these three cases,

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Moreover, various Chambers of the ad hoc Tribunals have clarified that the power to hold in contempt of court those who interfere with the administration of justice is also a well established principle both in common law and civil law legal systems.[14]

To sum up, one can say that although the jurisdiction of the ad hoc Tribunals on contempt cases is not expressly established in their Statutes, it is a consistent finding in their case-law that: (i) they possess an inherent power to hold in contempt those who knowingly and wilfully interfere with the Tribunal's due administration of justice; (ii) that the scope of such inherent power, which derives from their judicial function, is to ensure that the exercise of the jurisdiction given to them by the Statutes is not frustrated and that their basic judicial functions are safeguarded;[15] (iii) that the content of this inherent power must be discerned by reference to the usual sources of international law and exists independently from the terms of Rule 77; and that (iv) amendments made to Rule 77 do not limit that inherent power.[16]

B. Rule 77 of the RPE: 'Contempt of the Tribunal'

The offence of contempt is explicitly dealt with in Rule 77 of the Tribunals' RPE. The original version of Rule 77, adopted for the ICTY on 11 February 1994, provided for a fine or a term of imprisonment not exceeding 6 months in the case a witness 'refuses or fails contumaciously to answer a question relevant to the issue before a Chamber'.

In January 1995 the Rule was revised and broadened as to include attempts to interfere with or intimidate a witness [Rule 77(C)]. Moreover, a right of appeal was granted [Rule 77(D)].[17]

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see World War II Collections, *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10* ('Green Series') October 1946–April 1949: *US v. Karl Brandt*, 27 June 1947, at 968-970; *US v. Joseph Altstoetter*, 17 July 1947, at 974–975, 978, 992; and *US v. Alfried Krupp von Bohlen und Halbach*, 21 January 1948, at 1003, 1005–1006, 1008, 1011.

14 In common law systems, the power exists independently of legal codification, as it is considered an inherent power; on the opposite, in civil law systems such power must be expressly codified. See for all, *Beqa Beqaj* Judgment, *supra* note 8, § 12.

15 *Vujin* Judgment, *supra* note 8, § 13; *Nobilo* Judgment, *supra* note 9, § 36; Concerning Allegations against Milka Maglov/Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, *Brđanin* (IT-99-36-R77), Trial Chamber, 19 March 2004 ('*Maglov* Decision'), § 15; Judgment, *Marijacić and Rebić* (IT-95-14-R77.2-A), Appeals Chamber, 27 September 2006 ('*Marijacić and Rebić* Judgment'), §§ 23–24. See also *Nuclear Tests Case*, *supra* note 11, § 23, followed by the Appeals Chamber in *Blaškić* (IT-95-14- AR108*bis*), 29 October 1997, note 27, § 25.

16 *Vujin* Judgment, *supra* note 8, § 24; *Nobilo* Judgment, *supra* note 9, § 30; Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, *Simić and others* (IT-95-9-R77), Trial Chamber, 30 June 2000, § 91.

17 It has been rightly observed that the introduction — and the consequent recognition of the importance — of the right of appeal in respect of contempt proceedings, in the lack of a specific provision to that effect, would confirm the commitment of UN Tribunals to the fair administration of justice, and the firm intention to guarantee to the accused, no matter whether in principal or ancillary proceedings, the highest guarantees of due process.

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In July 1997, another amendment to the Rule extended it also to any party, witness or other person participating in proceedings before the Tribunal who discloses information relating to the proceedings in violation of an order of the Chamber (Rule 77, new letter D).

In November 1997 the wording of Rule 77 was, then, completely changed to include references to a detailed procedure for allegations of contempt, and to require that leave be granted before an appeal could be brought.[18] Furthermore, for the first time, it was explicitly stated that nothing in the Rule affects '...the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice' (Rule 77, new letter F),[19] which is consistent with the idea that the power of the Tribunals to punish the offence of contempt is part of their inherent jurisdiction.

In December 1998, other references were included to any person who threatens, intimidates, causes any injury or offers a bribe to, or otherwise interfere with, a witness or a potential witness, and to other conducts constituting contempt such as those directed to prevent other persons from complying with an obligation under an order of a judge or Chamber, or incitement to commit contempt. Additionally, the procedure in case of allegations of contempt was spelled out in more detail and the maximum punishment was increased.[20]

Finally, on 13 December 2001, the current wording of Rule 77 has been adopted.[21] The Rule indicates that the Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with the administration of justice, and then lists some forms of contempt.[22] In particular, letter (A) of the Rule identifies a number of specific situations as well as forms of commission constituting contempt of the Tribunal, and reads as follows:

> (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

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Cf. S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), 160–161.

18 The time provided for a leave to appeal was then changed in July 1998 in order to take into account the absence of the party challenging a determination of contempt where that determination had been made orally.

19 This statement will then disappear in the new version of December 2001, where it results inserted at the very beginning of letter A of Rule 77.

20 Letter H of Rule 77, in the version of December 1998, provided for a term of imprisonment not exceeding 12 months or 7 years (depending on the punishable conducts), and/or a fine not exceeding Dfl.40,000 or Dfl.200,000 (again depending upon the different conducts).

21 This was Revision n. 22 of the ICTY RPE. Recently, on 5 August 2002 (Revision n. 24) a new paragraph (K) has been introduced in Rule 77, providing for the possibility of appealing even decisions rendered under Rule 77 by the Appeals Chamber sitting as a Chamber of first instance.

22 For a better understanding of the material and mental element required for the different forms of contempt, see Trial Chamber, *Maglov* Decision, *supra* note 15, §§ 36–41; *Beqa Beqaj* Judgment, *supra* note 8, §§ 15–26.

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

The list in Rule 77(A)(i) to (v), however, is deemed to be non-exhaustive. This reading of the rule is prompted by the wording of the provision ('including . . .') and has been consistently upheld by the Tribunals' Chambers.[23]

C. *Applicable Penalties*

With regard to the applicable penalties for the offence of contempt, up to 1998 the maximum punishment prescribed by Rule 77 was a term of imprisonment not exceeding 6 months or a fine of Dfl.20,000 (USD 10,000 up to November 1997), or both. Now, in the current version of Rule 77, letter (G) stipulates that:

> The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

Therefore, the RPE leaves broad discretion to Chambers to choose between three forms of punishment: a term of imprisonment, a fine or a combination thereof. In this regard, Trial Chambers at the ICTY have underlined that in many domestic jurisdictions judges are also granted similar discretion in punishing the offence of contempt of court.[24]

23 The Appeals Chamber in the *Vujin/Tadić* contempt case took the view that the forms of contempt listed in Rule 77 do not limit the inherent powers of the Tribunal to prosecute and punish contempt, as such powers may be discerned generally by reference to the usual sources of international law and not only by reference to the wording of Rule 77. *Cf. Vujin* Judgment, *supra* note 8, §§ 24–26. See also *Nobilo* Judgment, *supra* note 9, § 39; Decision on Motions to Dismiss the Indictment Due to Lack of Jurisdiction and Order Scheduling a Status Conference, *Marijacić and Rebić* (IT-95-14-R77.2), Trial Chamber, 7 October 2005, § 17; *Jović* Judgment, *supra* note 8, § 11; Judgment on Allegations of Contempt, *Margetić* (IT-95-14-R77.6), Trial Chamber, 7 February 2007, § 13. It was thus clarified that the amendments made to Rule 77 from time to time do not limit the inherent power of the Tribunal. See Judgment, *Simić and others*, *supra* note 16, § 91; *Beqa Beqaj* Judgment, *supra* note 8, § 15; *Vujin* Judgment, *supra* note 8, §§ 27–28.

24 Cf. *Beqa Beqaj* Judgment, *supra* note 8, § 66, where the Chamber refers to provisions in the French Criminal Code and British criminal system. Arts 434–415 of chapter IV 'Infringements

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Various intertwined questions arise from the scope of applicable penalties for contempt described earlier. First of all, how should one consider the substantial increase of the sentencing frame operated through the amendments to the RPE? Secondly, can such an increase be justified 'by reference to the usual sources of international law'? Thirdly, are the (frequent) amendments concerning maximum penalties for the offence of contempt in violation of the principle of *nulla poena sine lege*, given that a potential offender may not be aware of the penalty s/he will eventually incur?

Other questions arise when considering the penalties provided for by the ICTR RPE. Rule 77 ICTR RPE is substantially identical to the ICTY version. However, a difference can be identified in its letter (G), which deals with applicable penalties and reads as follows:

> The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding *five* years, or a fine not exceeding USD *10,000*, or both. (Emphasis added.)

True, the two ad hoc Tribunals are separate and independent of each other and they can adopt and apply different RPEs; however, it is legitimate to speculate how one may explain the difference in penalties for the offence of contempt between the ICTY and the ICTR, given that both Tribunals should apply the same general principles of international law.

With references to the provisions on contempt in the RPE of the SCSL, once again we find a Rule 77, under the heading of 'Contempt of the Special Court' which is similar to ICTY and ICTR provisions as far as the punishable conduct and the punishment of any incitement or attempt are concerned.[25] It differs from those provisions for the procedure that a judge or a Trial Chamber should follow when having reasons to believe that a person may be in contempt of the Special Court.[26] Moreover, letter (G) of Rule 77 SCSL RPE deals with the applicable penalties, distinguishing between the case in which the matter has been dealt with summarily by a judge or a Trial Chamber of the Special Court, and the case in which the matter has been extensively investigated, prosecuted

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on the Administration of Justice' of the French *Code Pénal* (which entered into force on 1 March 1994) punishes those who pressure a witness to give false evidence or to abstain from giving truthful evidence by 3 years of imprisonment and a fine of 45,000 euros. Section 51 of the United Kingdom's Criminal Justice and Public Order Act of 1994 provides that a person guilty of an offence under that section can be sentenced to imprisonment for a term not exceeding 5 years or a fine or both and — on summary conviction — to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

25 Cf. Rule 77(A)-(B) of the RPE of the SCSL in the version adopted at Seventh Plenary, 13 May 2006.

26 Cf. Rule 77(C)-(D), and (K)-(L).

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and then assigned to and judged by a specific Chamber.[27] Rule 77(G) thus provides:

> ...The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to Sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not exceeding 2 million Leones, or both; and the maximum penalty pursuant to Sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding 2 million Leones, or both.

3. Contempt Cases before Ad Hoc Tribunals and SCSL

A. Contempt Cases before the ICTY and ICTR

One of the first cases in which Chambers of the ICTY were called upon to deal with the offence of contempt was an ancillary proceeding in the *Tadić* case, regarding Milan Vujin, one of the leading members of the Defence team.[28] During Appeal proceedings, Mr. Vujin had interfered with some of the witnesses; thus he was tried for contempt of court before the same Appeals Chamber which had heard the *Tadić* Appeal. On 31 January 2000, the Chamber found him in contempt of the Tribunal on various grounds,[29] and sentenced him with a fine of Dfl.15,000 to be paid to the Registrar of the Tribunal, plus the direction given to the Registrar to consider striking Mr Vujin's name from the list of assigned counsel; the Appeals Chamber further ordered that the decision be made public.[30] With regard to the purported purposes of punishment, the Appeals Chamber mentioned retribution (for what has been done) and deterrence (deterrence of others who may be tempted to act in the same way).[31] No mitigating or aggravating circumstances were considered. Subsequently Mr Vujin filed an appeal against that conviction, but the first decision was also confirmed on appeal by a differently composed Appeals Chamber.[32]

In a subsequent case (against Kosta Bulatović, a Defence witness in the *Milošević* case) consideration of mitigating and aggravating circumstances

27 Rule 77(G) of the SCSL RPE could present the danger of inequality or discrimination in punishment because the penalty to be imposed varies considerably (from a rather low range to a significantly higher one). In this way, respondents could be discriminated simply depending on which procedure a judge or a Trial Chamber chooses to follow.

28 Judgment on Allegations of Contempt Against Prior Counsel Milan Vujin, *Tadić* (IT-94-1-A-R77), Appeals Chamber, 31 January 2000 (*supra* note 8).

29 *Ibid.*, § 160. It regarded the contempt of the counsel as very serious, especially considering the relevance and the importance of honesty of counsels in litigation before the Tribunal. Furthermore, the Chamber noted that the lawyer's conduct had been against his client's interest, and that such a conduct struck at the very heart of the criminal justice system (*Ibid.*, § 167).

30 *Ibid.*, §§ 172–174.

31 *Ibid.*, § 168.

32 Cf. Appeal Judgment on Allegations of Contempt against Prior Counsel Milan Vujin, *Tadić* (IT-94-1-A-AR77), Appeals Chamber, 27 February 2001, at 6–7.

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became a relevant issue and had a substantial weight in the imposition of the appropriate penalty.[33] On 13 May 2005, the Trial Chamber found Bulatović guilty of 'serious contempt of the Tribunal' and noted that his conduct 'would normally merit the immediate imposition of a custodial sentence in order to mark the gravity of the offence and to deter the Respondent, and others who might be tempted to follow the same course, from defying the authority of the Trial Chamber'.[34] Nonetheless, when imposing the penalty, the Chamber took into account a circumstance considered significant: that is, the fact that the Accused was suffering from serious health problems which would render a sentence of imprisonment heavier in his case than in that of an average person. It, therefore, sentenced the Accused to 4 months of imprisonment but it suspended the operation of that sentence for a period of 2 years, 'so that the sentence shall not take effect unless during that period the Respondent commits another offence anywhere that is punishable with imprisonment, including contempt of court'.[35]

In *Beqa Beqaj*,[36] the Trial Chamber dealt again with the purposes of punishment and considered that 'contempt requires punishment as retribution for actions of the Accused. This punishment has then a deterrent effect which serves to protect the interests of justice'.[37] Moreover, in order to establish the right punishment to impose, the Chamber took into account both the gravity of the offence and the individual circumstances of the Accused, including aggravating and mitigating factors. The Chamber thus regarded the contempt of the Accused as serious and accepted as aggravating circumstance the fact that the Accused was aware of the vulnerability of the victim.[38] As for mitigating circumstances, the Chamber accepted the good character

33 Cf. Decision on Contempt of the Tribunal, *Milošević (Contempt Proceedings Against Kosta Bulatović)* (IT-02-54-R77.4), Trial Chamber, 13 May 2005 ('*Bulatović* Judgment'). Bulatović was charged, under Rule 77(A)(i) RPE, of having knowingly and wilfully interfered with the administration of justice by contumaciously refusing to answer questions asked by the Prosecution during his testimony before Trial Chamber III of the ICTY on 19 and 20 April 2005.

34 *Ibid.*, § 18.

35 *Ibid.*, §§ 18–19. The appeal then filed by Bulatović against the sentence was entirely dismissed by the Appeals Chamber on 29 August 2005. Cf. Decision on Interlocutory Appeal on Kosta Bulatovic Contempt Proceedings, *Milošević* (IT-02-54-A-R77.4), Appeals Chamber, 29 August 2005. In particular, it is interesting to note that the Appeals Chamber was not satisfied that the Trial Chamber did not give due weight to the individual circumstances of the Accused, and therefore erred by imposing a sentence of 4 months: in fact, the Appeals Chamber stressed that the Chamber of first instance suspended the sentence for 2 years exactly because of the medical conditions of the Accused (§§ 44, 59 and 62).

36 On 27 May 2005, the ICTY Trial Chamber was satisfied beyond reasonable doubt that the Accused Beqa Beqaj knowingly and wilfully obstructed the administration of justice and committed contempt by interfering with a witness in the *Limaj and others* case. See Judgment on Contempt Allegations, *Beqa Beqaj* (IT-03-66-T-R77), Trial Chamber, 27 May 2005, §§ 40, 55 (*supra* note 8).

37 *Ibid.*, § 58. In mentioning those purposes, the Chamber also recalled Art. 34, Chapter III of the Provisional Criminal Code of Kosovo, which considers the following as purposes of punishment: to prevent the perpetrator from committing criminal offences in the future and to rehabilitate him; to deter other persons from committing criminal offences (§ 58, note 77).

38 *Ibid.*, §§ 60 and 62.

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of Beqaj, his personal situation (father of six children), his lack of criminal record and his good conduct during his provisional release.[39] In conclusion, considering in particular the gravity of the offence, the Trial Chamber found that a term of imprisonment was the appropriate punishment to achieve the aforementioned sentencing purposes and, thus, sentenced the Accused Beqaj to 4 months of imprisonment.[40] For the accuracy of its sentencing section the judgment in the *Beqaj* contempt case can certainly be considered the most complete as far as the sentencing process is concerned, thus differing from the other judgments in contempt cases, which are often less accurate in their sentencing reasoning.

More recently, in the course of 2006 and 2007, the ICTY delivered three more judgments in cases of contempt of the Tribunal. First, on 10 March 2006, Ivica Marijacić and Markica Rebić were both found guilty of contempt under Rule 77(A)(ii), for having disclosed information relating to proceedings before the Tribunal (the *Blaškić* case) in knowing violation of an order of a Chamber.[41]

In the sentencing section of the judgment, the Trial Chamber observed that the most important factors to be taken into account for determining the appropriate penalty in the case at hand were the gravity of the offence of contempt and the need to deter repetition and similar conducts by others.[42] On the other hand, no individual circumstances, mitigating or aggravating, were mentioned or considered. Recognizing the gravity of the breach and the need for deterrence,[43] the Trial Chamber sentenced each of the accused to pay a fine of €15,000 to the Registrar of the Tribunal within one month of the judgment.[44]

39 *Ibid.*, §§ 63–64.

40 *Ibid.*, § 67.

41 Judgment, *Marijacić and Rebić* (IT-95-14-R77.2), Trial Chamber, 10 March 2006, §§ 45 and 53. In its decision, the Trial Chamber stated that Marijacić (journalist and editor-in-chief of the Croatian newspaper *Hrvatski List*) and Rebić (former head of the Security Information Service of the Republic of Croatia, an intelligence branch of the Croatian government) deliberately disclosed — in a published article-interview — the identity, statement and testimony of a witness who testified in closed session as a protected witness in the case against General Tihomir Blaškić (cf. §§ 40, 42 and 45). Although no harm was done to the protected witness as a result of the disclosure of his identity and content of his testimony, the Trial Chamber found that the deliberate and calculated manner in which Marijacić and Rebić disregarded the closed session order was a serious matter which tended to diminish the authority of the Trial Chamber in the *Blaškić* trial (see §§ 48–50).

42 *Ibid.*, § 46.

43 The deterrent objective was stressed and recalled with particular emphasis. See, for instance, § 51 of the judgment, where the Trial Chamber affirmed: '... it is also necessary to recognize the need to discourage this type of behaviour. The work of the Tribunal has a long way to go. It is a matter of great public interest in the former Yugoslavia. It remains vital that its work should not be interfered with by irresponsible conduct on the part of journalists. ... It is incumbent upon this Trial Chamber to take such steps as it can to try to ensure that there is no repetition of such conduct on the part of either of these Accused or any other person'.

44 *Ibid.*, §§ 52–53. Subsequently, on 20 March 2006, Marijacić and Rebić both filed their notices of appeal alleging, amongst other matters, that the sentence handed down was excessive. The Appeals Chamber, in its judgment rendered on 27 September 2006, dismissed all the

Secondly, on 30 August 2006, Trial Chamber III delivered its judgment in the contempt case of Josip Jović, former editor of a Croatian daily newspaper, accused of having violated a court order that forbade the public disclosure of the identity of a witness appearing in a trial before the Tribunal.[45] When dealing with sentencing, the Trial Chamber recalled and shared the findings of the *Marijacić and Rebić* case (and of other cases) as to the importance of the gravity of the offence and of deterrence.[46] A peculiar mitigating factor (which was considered significant in the case at hand) was the fact that the protected witness had publicly acknowledged both his identity and the fact that he testified in the *Blaškić* case; this was interpreted by the Trial Chamber as an implicit assertion by the witness that the protective measures were no longer necessary.[47] Nonetheless, recognizing the 'grossly disrespectful and repeated nature' of the Accused's conduct, the Trial Chamber found appropriate the imposition of a fine of 20,000 euros.[48]

To conclude, on 7 February 2007, Trial Chamber I of the ICTY found Domagoj Margetić guilty of contempt of the Tribunal for disclosing and publishing on the Internet protected witness lists, and sentenced him to a prison term of 3 months and a fine of 10,000 euros.[49] The purposes of punishment recalled by the Chamber as 'the two most important factors to be taken account of in determining the appropriate penalty in contempt cases' were the gravity of the conduct and the need to deter repetition and similar action by others,[50] thus endorsing the findings of the *Marijacić* and *Jović* Trial Chambers. The fact that the Accused not only acted intentionally but 'showed reckless disregard for the safety of witnesses' was considered as an aggravating factor, whereas the health of the accused was taken into account for purposes of mitigation, although it was not given substantial weight.[51] The Trial Chamber also took into account the personal and psychological

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grounds of appeal filed by the Appellants and confirmed the Trial Chamber's sentence (a fine of 15,000 euros on each of the Appellants). Cf. *Marijacić and Rebić* Judgment, *supra* note 15.

45 Judgment, *Jović* (IT-95-14/2-R77), Trial Chamber, 30 August 2006 (*supra* note 8). Specifically, the prosecution alleged that between 27 November and 29 December 2000, the accused published the identity of the witness and some extracts of the testimony of that witness (§§ 1–9).

46 *Ibid.*, § 26.

47 *Ibid.*, § 26.

48 *Ibid.*, §§ 26–27. By way of comparison, as seen before, in the *Marijacić and Rebić* case, which involved two accused found guilty of publishing a single newspaper article in violation of a Tribunal order, the Trial Chamber imposed a fine of €15,000 on each accused (*Marijacić and Rebić* Judgment, *supra* note 15, § 52). The Trial Chamber's judgment in the contempt case against Josip Jović was recently upheld by the Appeals Chamber, which dismissed all 7 grounds of appeal filed by Jović and confirmed the penalty of a €20,000 fine. Cf. Judgment, *Jović* (IT-95-14&14/2-R77-A), Appeals Chamber, 15 March 2007, § 45.

49 See Judgment on Allegations of Contempt, *Margetić* (IT-95-14-R77.6), Trial Chamber, 7 February 2007, §§ 83, 93–94. Margetić was previously an accused in another contempt case, but the indictment against him was withdrawn before trial.

50 *Ibid.*, §§ 84–85.

51 *Ibid.*, §§ 88–89.

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consequences that the disclosure of identity had on the lives of at least three of the protected witnesses.

There have been other cases of contempt in which Chambers of the Tribunal have either allowed the appeal and cleared the Respondent of contempt,[52] or directly acquitted the Respondent(s).[53] In another case concerning allegations of contempt, the Prosecutor filed a motion to withdraw the indictment (against the Respondents Krizic, Šešelj and Margetić, in the *Blaškić* case) 'in the interests of justice and judicial economy' and the Trial Chamber granted leave for it.[54]

With regard to the ICTR case-law on contempt, no conviction results so far before the Tribunal, notwithstanding the fact that numerous motions, requests and orders to investigate allegations of contempt have been put forward.[55]

B. Contempt Cases before the SCSL

The SCSL had to face two cases of contempt in 2005.[56] The first one of these is worth mentioning since its outcome is extremely interesting from the point of

52 This happened in the *Aleksovski* case: Anto Nobilo, one of the Defence Counsel for General Blaškić, had been found guilty — on 11 December 1998 — of contempt of the tribunal for having disclosed information relating to proceedings in the *Aleksovski* trial in knowing violation of an order of the Chamber, and thus sentenced to the payment of a fine of NLG 10,000 (of which, payment of NLG 6,000 was suspended for a year). Following appeal by the Respondent, the Appeals Chamber which dealt with the case cleared Mr Nobilo of the accusation of contempt on the basis that his violation of the witness protection order was not a 'knowing' one. Cf. Judgment on Appeal by Anto Nobilo Against Finding of Contempt, *Aleksovski* (IT-95-14/1-AR77), Appeals Chamber, 30 May 2001 (*supra* note 9).

53 This is the case of the contempt proceedings in the course of the *Simić and others* case ('Bosanski Samac') against Milan Simić and his counsel (Mr Branislav Avramovic) for 'bribery, intimidation of witness and suborning perjury of witness'. On 30 June 2000, the Trial Chamber unanimously found that neither the allegations against Milan Simić nor those against Mr Avramovic had been 'established beyond reasonable doubt', and therefore neither Respondent was found to be in contempt of the Tribunal. Cf. Judgment in the matter of Contempt Allegations against an Accused and his Counsel, *Simić and others* (IT-95-9-R77), Trial Chamber, 30 June 2000, §§ 100–101 (*supra* note 16).

54 Cf. Decision on the Prosecution Motion to Withdraw the Indictment, *Krizić, Šešelj and Margetić* (IT-95-14-R77.5), Trial Chamber, 20 June 2006.

55 In the first sense, see for instance: Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal, *Kajelijeli* (ICTR-98-44A-T), Trial Chamber, 15 November 2002; Decision on Defence Motion to Hold the First Deputy Prosecutor of Rwanda in Contempt of the Tribunal, *Kajelijeli* (ICTR-99-44A-T), Trial Chamber, 28 November 2003. In the second sense, see for instance: Decision on the Prosecutor's Allegations of Contempt, *Nyiramasuhuko and others* (ICTR-97-21-T), Trial Chamber, 10 July 2001; Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure, *Ntakirutimana and Anor* (ICTR-96-10-T), Trial Chamber, 16 July 2001; Oral Decision (Rule 115 and Contempt of False Testimony), *Kamuhanda* (ICTR-99-54A-A), Appeals Chamber, 19 May 2005; Order Assigning Judges to a Case Before the Appeals Chamber, *Kamuhanda* (ICTR-99-54A-A), Appeals Chamber, 4 April 2006.

56 Sentencing Judgment in Contempt Proceedings, *Independent Counsel v. M.F. Brima, N.B. Bah Jalloh, E. Kamara and A. Kamara* (SCSL-2005-02/SCSL-2005-03), Trial Chamber,

view of sentencing. This case, linked to the ongoing case before the Special Court of *Brima, Kamara and Kanu* (the so-called AFRC trial), was characterized by the guilty pleas of all the Respondents, who were the wives and friend of the three Accused in the AFRC trial.[57]

The Trial Chamber, after having recalled the relevant legal principles on contempt of court before the SCSL,[58] recognized that the acts of the Respondents constituted such an offence and acknowledged their guilty pleas.[59] What is worthy of interest from the perspective of sentencing analysis, is the weight attributed to such guilty pleas and to other mitigating circumstances by the Chamber in order to grant the joint submission made by the Independent Counsel and the Defence Counsel who urged the Court for mercy and recommended a conditional discharge of all the Respondents. The Chamber, while analysing and commenting on Rule 77 of the SCSL RPE, noted that the Rules were silent as to both the minimum penalty to impose, generally, on a person found guilty of contempt and the minimum penalty to impose in cases of guilty pleas.[60] Hence, considering the inherent powers of the Court with regard to contempt, the judge was satisfied to having the power to impose as minimum penalty a sentence resulting in a penalty differing from the ones indicated in Rule 77 (that is, a fine or a term of imprisonment) and that 'consequently, a sentence such as a *conditional discharge* could be imposed subject to the particular circumstances of the case'.[61]

Anyhow, in determining the appropriate sentence to be imposed, the judge of Trial Chamber I followed the traditional two-step approach, considering first the gravity of the offence and then the individual circumstances, including mitigating and aggravating factors. With regard to individual circumstances, the Trial Chamber stressed the emotional status of the Respondents, obviously very involved in the trial of their husbands and friends, underlined that none of them had any previous criminal convictions, acknowledged the mitigating value of their guilty pleas, which facilitated and expedited the proceedings, and appreciated their genuine remorse.[62] The Trial Chamber also recalled Rule 101(B) of the RPE which deals generally with the penalties applied by the Special Court and with the factors to be considered in sentencing, and found the Rule applicable also to cases of contempt.[63] Finally, the judge

21 September 2005 ('*Brima and others* Judgment'); Judgment in Contempt Proceedings, *Independent Counsel v. Brima Samura* (SCSL-2005-01), Trial Chamber, 26 October 2005. This last case resulted in an acquittal.

57 See *Brima and others* Judgment, *supra* note 56. The Respondents all entered a guilty plea to the charges against them, admitting that — after a protected witness testified, under pseudonym, for the first time in the AFRC trial — at the end of trial proceedings on 9 March 2005, they called out the first name of the witness, saying that they knew she was testifying, and they pronounced words for threatening and intimidating the witness (cf. § 23).

58 *Ibid.*, §§ 9–19.

59 *Ibid.*, § 26.

60 *Ibid.*, § 17.

61 *Ibid.*, § 19. Emphasis added.

62 *Ibid.*, §§ 30–32 and § 34.

63 *Ibid.*, § 33.

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considered that the appropriate sentence for the case at hand was neither a fine nor imprisonment, that is not a criminal conviction for contempt, but a conditional discharge, on the reasoning that 'the Rules define only the maximum sentence that may be imposed and do not preclude the imposition of such a sentence by a Trial Chamber'.[64]

C. *Some Comments on the Case Law of the Ad Hoc Tribunals on Contempt of Court*

First, in sentencing contempt all Chambers have followed the traditional two-pronged approach, considering on one hand the gravity of the offence and, on the other, the individual circumstances of the case at hand.

Secondly, in dealing with the purposes of punishment the judges considered *retribution* and *deterrence* as the most important aims in punishing contempt. This seems in conformity with the consolidated findings of ICTY and ICTR Chambers, which broadly speaking have all recognized retribution and deterrence as the main purposes of punishment.[65]

Strong similitarities can also be identified in the application of mitigating and aggravating factors.[66] That the judges in sentencing contempt cases have adopted the same approach they have in sentencing core crimes under the jurisdiction of the Tribunals is confirmed by the approach to guilty pleas. As those were consistently considered mitigating factors by the hoc Tribunals,[67] it is noteworthy that in the only case of contempt in which the Respondents pleaded guilty (before the SCSL), this factor was indeed

64 *Ibid.*, § 35. The Trial Chamber also imposed a number of conditions to be respected by the Respondents during their period of probation of one year (§§ 36–39).

65 Cf., for example, Sentencing Judgment, *Tadić* (IT-94-1-*T*bis-R117), Trial Chamber, 11 November 1999, §§ 7–9; Sentencing Judgment, *Erdemović* (IT-96-22-T), Trial Chamber, 29 November 1996, §§ 58, 64; Judgment, *Kupreškić* (IT-95-16-T), Trial Chamber, 14 January 2000, § 848; Judgment, *Blaškić* (IT-95-14-T), Trial Chamber, 3 March 2000, § 762; Judgment, *Kunarac* (IT-96-23-T), Trial Chamber, 22 February 2001, § 838; Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, §§ 900–902; Judgment, *Kayishema and Ruzindana* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 2; Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, §§ 2–19; Judgment and Sentence, *Kambanda* (ICTR-97-23-S), Trial Chamber, 4 September 1998, §§ 28, 58–59; Judgment and Sentence, *Ruggiu* (ICTR-97-32-I), Trial Chamber, 1 June 2000, § 33; Judgment, *Elizaphan and Gerard Ntakirutimana* (ICTR-96-10/96-17-T), Trial Chamber, 21 February 2003, § 882.

66 Cf. *Bulatović* Judgment, *supra* note 33, § 18–19 (mitigating factor); *Beqa Beqaj* Judgment, *supra* note 8, §§ 59, 60–62 (aggravating factors) and 63–64 (mitigating factors); *Jović* Judgment, *supra* note 8, § 26 (mitigating factor); *Brima and others* Judgment, *supra* note 56, §§ 30–34 (mitigating factors).

67 See, for instance, for the ICTY: Sentencing Judgment, *Babić* (IT-03-72-S), Trial Chamber, 29 June 2004, § 68; Judgment, *Banović* (IT-02-65/1-S), Trial Chamber, 28 October 2003, § 68; Sentencing Judgment, *Plavšić* (IT-00-39&40/1), Trial Chamber, 27 February 2003, § 81; Sentencing Judgment, *Todorović* (IT-95-9/1), Trial Chamber, 31 July 2001, § 80. For the ICTR: Sentencing Judgment, *Serushago* (ICTR-98-39-S), Trial Chamber, 5 February 1999, §§ 35, 42; Judgment and Sentence, *Ruggiu* (ICTR-97-32-I), Trial Chamber, 1 June 2000, §§ 53–55; Judgment, *Rutaganira* (ICTR-95-1C-T), Trial Chamber, 14 March 2005, §§ 147–152; Judgment, *Bisengimana* (ICTR-00-60-T), Trial Chamber, 13 April 2006, § 201; Judgment, *Nzabirinda* (ICTR-2001-77-T), Trial Chamber, 23 February 2007, § 68.

considered in mitigation.[68] However, despite similarities in at least two cases there are some significant differences: in these two cases there is no mention at all of individual circumstances.[69] This seems in contrast with the duty of Appeals and Trial Chambers to take into account mitigating and aggravating circumstances in the determination of the appropriate sentence.[70]

4. The Principle of Legality and the Offence of Contempt in the System of the Ad Hoc Tribunals

A. The Principle of Nullum Crimen Sine Lege

As already mentioned, establishing jurisdiction over offences that are not provided for in the Statute, and for which no criteria for identifying applicable penalties are spelled out, raises concerns in light of the traditional principle of the *nullum crimen, nulla poena sine praevia lege poenali.*

It is well known that the *nullum crimen* principle implies that a person may only be found guilty of conduct which already constituted a crime at the time of their commission and that the provision proscribing such a conduct must be clear and detailed as to the elements of the offence.[71] A criticism which has often been raised with regard to Rule 77 is that the Rule violates the principle of *nullum crimen* for it creates a new offence and for the vagueness of its wording.

It is hereby submitted, sharing the opinion of ICTY Chambers, that it cannot be said that the offence of contempt of court did not exist at the time, or before, the creation of the ad hoc Tribunals, but has been created only afterwards. In every jurisdiction, conducts which are meant to obstruct the due administration of justice are liable and punishable with sanctions of various natures.

In the *Beqaj* case, the Trial Chamber — in relation to the *nullum crimen* principle and to the Defence's argument that the Accused did not know about

68 *Brima and others* Judgment, *supra* note 56, §§ 30–34, where the Trial Chamber even considered the guilty pleas as one of the elements justifying the imposition of a conditional discharge of the Respondents. However, in this case one may consider that too much weight was given to mitigating circumstances such as guilty pleas which led to the choice of justifying a conditional discharge sentence.

69 See *Vujin* Judgment, *supra* note 8; and *Marijacić and Rebić* Judgment, *supra* note 15.

70 Cf. Art. 24(2) ICTYSt., Art. 23(2) ICTRSt., Rule 101(B) RPE. This was confirmed *inter alia* by Appeals Chambers in judgments in *Miodrag Jokić* (IT-01-42/1-A), 30 August 2005, § 47; *Babić* (IT-03-72-A), 18 July 2005, § 43; *Kordić and Čerkez* (IT-95-14/2-A), 17 December 2004 ('*Kordić and Čerkez* Appeals Judgment'), §§ 1051, 1087–1091; *Delalić and others* (IT-96-21-A), 20 February 2001, § 777. Also by the Trial Chamber in *Deronjić* (IT-02-61-S), 30 March 2004, § 155 where it was recognized that: 'In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances.'

71 See, for example, the International Covenant on Civil and Political Rights (ICCPR), Art. 15(1): '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 . . .'

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the specific elements of contempt of court in Tribunal's Rule 77, considering also its frequent modifications — supported the Prosecution's submissions that ignorance of the law (specifically, of the offence of contempt) could not be pleaded, and endorsed the Appeals Chamber's statement in the *Kordić and Čerkez* case that the *nullum crimen sine lege* principle does not require that an accused be cognizant of the specific legal definition of each element of the given crime.[72] In sum, it is sufficient that the conduct already be prohibited by law and that the accused be aware of the illegality of similar conducts (for example, in this case, the prohibition to interfere with witnesses), although not knowing in details all the legal elements of the crime.[73]

Another aspect which needs to be evaluated, and which also relates to the principle of legality, is the issue of the various amendments and modifications made to Rule 77 over the time. It has been argued that this aspect as well would not violate the *nullum crimen* principle. This principle does not, in fact, mean that decisions of the ad hoc Tribunals (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.[74] In the opinion of the Chambers of the Tribunals — given the fact that their contempt power was not a creation of the RPE but already existed due to the Tribunal's inherent powers — Rule 77 does not establish the content of such inherent powers on contempt, but only makes some aspects of the law of contempt applicable by the Tribunal more explicit.[75] By the same token, all the different amendments made to Rule 77 do not prejudice any right of a defendant because the existence and the extent of the inherent powers of the Tribunal on contempt do not depend upon references made in the RPE, nor are they altered by reason of the amendments made to the Rules, or by reason of the decisions interpreting or clarifying those powers.[76] In sum, the inherent powers of the Tribunals to deal with contempt, already existing at the time of the creation of the Tribunal, are not limited to the letter of Rule 77 but can

72 *Beqa Beqaj* Judgment, *supra* note 8, § 14; cf. *Kordić and Čerkez* Appeals Judgment, *supra* note 70, § 311.

73 The fact that neither ignorance of law nor violation of the *nullum crimen* principle can be pleaded with regard to the offence of contempt was confirmed — in the same *Beqaj* contempt case — by the Trial Chamber by reference to the supposed knowledge by the Accused of the rules on contempt of court in Kosovo. In fact, in order to argue that the Accused knew that his alleged behaviour was criminal in nature, reference was made to Art. 309(1) of the provisional Criminal Code of Kosovo, which deals with contempt of court: 'Whoever, by use of force, by threat to use force or any other means of compulsion or by a promise of a gift or any other form of benefit induces a witness or an expert to give a false statement in court proceedings, minor offence proceedings, administrative proceedings or in proceedings before a notary public or disciplinary proceedings shall be punished by imprisonment of six months to five years.' Cf. *Beqa Beqaj* Judgment, *supra* note 8, § 14.

74 Cf., for example, Judgment, *Aleksovski* (IT-95-14/1-A), Appeals Chamber, 24 March 2000, §§ 126–127; Judgment, *Delalić and others*, *supra* note 70, § 173.

75 *Vujin* Judgment, *supra* note 8, § 24.

76 *Ibid.*, § 28.

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be broader than that and the provisions laid down in the Rule are only intended to provide the parties with some guidance.

Certainly, this explanation is not completely satisfactory from the point of view of legal certainty, especially considering that the full content of the inherent powers of the Tribunal on contempt may be discerned by reference to the sources of international law.[77] This inevitably causes vagueness and lack of legal precision in the definition of the offence of contempt of the Tribunal. This is also directly linked to the fact that the Tribunals have adopted for the offence of contempt an approach very similar to that found in the common law, which implies that the offence is not precisely defined and a large number of different types of conduct may amount to contempt.[78]

Although no violation of the *nullum crimen* principle is deemed to subsist, certainly the provision cannot be considered as ideal from the point of view of legal precision and respect of the rights of the accused. This vagueness characterizing the common law offence of contempt undoubtedly creates even more problems with regard to the other component of the principle of legality, that is, the *nulla poena sine lege* principle.

B. *The Principle of* Nulla Poena Sine Lege

The *nulla poena sine lege* principle is an important component of the principle of legality. The principle that there must be no punishment except in accordance with fixed and pre-determined penalties provided for by the law resides at the very heart of criminal law as one of the basic rights of the accused and as a self-evident principle of justice.[79]

There are three main issues to be discussed. First, it has to be clarified whether or not the fact that penalties for contempt of court did not exist in the Statutes of the ad hoc Tribunals violates the *nulla poena sine lege* principle. Secondly, one may wonder whether the numerous amendments to Rule 77, increasing the maximum applicable penalty for contempt is legitimate. Finally, the differences in applicable penalties between ICTY, ICTR and SCSL RPEs is perplexing and seems to lack any clear justification.

Starting from this last point, if one looks at the penalty provisions on contempt of the ICTY, ICTR and SCSL, it is evident that there is little or no correspondence between them. As seen above, while Rule 77(G) ICTY RPE establishes a maximum penalty of 7 years of imprisonment or €100,000 of

77 *Ibid.*, § 28.

78 The Appeals Chamber, in the *Nobilo* contempt case as part of *Aleksovski*, recognized this problem regarding the common law offence of contempt, and tried to summarize some of the conduct constituting contempt. Cf. *Nobilo* Judgment, *supra* note 9, § 40.

79 See, again, the ICCPR, Art. 15(1) (second part): '. . . Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.'

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fine, or both; Rule 77(G) ICTR RPE limits the maximum term of imprisonment to 5 years and the maximum amount of the fine to USD 10,000. Under the RPE of the SCSL, the maximum penalty that may be imposed on a person found to be in contempt of the Court depends on the contempt procedure chosen and thus varies from 6-month imprisonment or a 2-million Leones fine, or both (for cases dealt with summarily), to 7 years of imprisonment or a fine not exceeding 2 million Leones, or both (for cases which follow a proper proceeding).[80]

While in the case of the SCSL it may seem justified to provide for a different range of penalties when the contempt matter is dealt with summarily by the same Judge or Chamber which had reason to believe that contempt was committed, the discrepancy between penalties for contempt before the ICTY and before the ICTR surprises on different levels. In particular, from the legal point of view it seems at odds with the fact that the two Tribunals derive from the same authority, are given the same powers (including inherent ones) and must apply the same law.[81]

Moving forward to the principle of *nulla poena*, it is true — on the one hand — that the principle does not seem to be violated concerning the prohibition of retroactive penalties. In fact, as it was observed that certainly the criminalization of conducts of contempt pre-existed the establishment of the ad hoc Tribunals, the same has to be said in relation to penalties for those conducts: also sanctions were previously prescribed for contempt. Thus, the only subsequent insertion of the offence of contempt and of penalties for it in the RPE of the two Tribunals does not violate the prohibition of retroactive penalties.[82] The RPE only spelled out what were already pre-existing penalties.

On the other hand, it must be recalled that the *nulla poena sine lege* principle also prescribes that the penalties to be applied shall not be heavier than the ones applicable at the time when the criminal offence was committed. Furthermore, the principle implies that sanctions be precisely outlined as to their duration. Consequently, in relation to these other two aspects of the principle, one could say that their respect is questionable and their violation probable for a number of reasons.

First, maximum applicable penalties for contempt of court have been increased with impressive speed over the course of only a few years, starting with a fine not exceeding USD 10,000 and a term of imprisonment not

80 Cf. Rule 77(G) of the SCSL RPE.

81 Additionally, the discrepancy does not even seem to be supported by penal policy reasons. If one thinks that the ICTR has its seat in a neighbouring country to Rwanda, which may imply more risks of threats to witnesses, one would have expected more severe penalties for contempt of the Tribunal, instead of more lenient ones.

82 A different matter is whether the insertion of penalties in the RPE breaches other provisions. In fact, it can be recalled that Art. 15 ICTYSt./Art. 14 ICTRSt. do not confer any right to create rules in the RPE dealing with penalties (unless one accepts that the reference to 'other appropriate matters' includes those issues). On the other hand, Rule 77 contains such provisions in so far as it prescribes the penalties to be imposed in cases of contempt of the Tribunals. Is this another provision *ultra vires?*

exceeding 6 months, passing through a maximum fine of Dfl. 40,000 and a maximum term of imprisonment of 12 months, and arriving at the actual provision which imposes a maximum fine of €100,000 and a maximum term of imprisonment of 7 years before the ICTY. It seems clear that these frequent modifications of the upper limits of penalties for contempt can have the effect of endangering the respect of the rights of the accused, particularly in relation to the uncertainty they cause for the quantity of penalty that the accused will face. Secondly, it would be possible that two persons, accused and then convicted of similar (or even identical) conduct of contempt in different times, be sentenced to very different penalties due to the changes of the maximum sanctions in Rule 77. Thirdly, the statement made by Chambers of the Tribunals that the content and extent of the offence of contempt be derived by reference to the 'usual sources of international law' renders very vague the law of contempt applied by the ad hoc Tribunals, again hindering legal certainty. Which are, in effect, the 'usual sources of international law' from which guidance could be derived as to the *penalties* to be applied for contempt of court? Do usual sources of international law justify changes in the maximum term of imprisonment prescribed for contempt? That does not appear to be the case.

It has been noted already that the common law approach chosen by the ad hoc Tribunals is not helpful in this regard, given the vast flexibility which characterises contempt of court and the penalties to be applied for it in common law systems.[83] Moreover, one should note that in the common law there is a very large number of cases dealing with contempt and such a case-law gives much clearer guidance as to the elements of the offence and the applicable penalties.

In any case, it is worth recalling that punishment of contempt before the ad hoc Tribunals — notwithstanding numerous flaws — also has in some ways enacted previously inexistent measures for ensuring protection to witnesses, accused and other individuals involved in proceedings before the Tribunals, thus improving legal protection for such categories.

Therefore, in the effort to strike a balance between fairness and effectiveness, between increasing the protection of the rights of the accused and other individuals before international courts/tribunals and respecting important legal principles such as the principle of legality, it could be stressed that, *de facto*, the punitive sanctions for cases of contempt have only been applied in a moderate way (the penalty of 4-month imprisonment has been the most serious applied so far before the ICTY).[84] This trend is maybe indicative of a *symbolic approach to the law of contempt*, more severe in theory than in practice.

83 For example, as noted by G. Sluiter in his analysis of the offences against the administration of justice in the ICTY system, judges have great discretion in the imposition of the appropriate penalty for cases of contempt and, while in the United Kingdom, a statutory maximum of 2 years' imprisonment is provided for, US Federal law does not provide for a maximum penalty. Cf. Sluiter, *supra* note 5, at 632.

84 Cf. *Beqa Beqaj* Judgment, *supra* note 8, § 67.

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5. Conclusion

It is certainly important that the ad hoc Tribunals, like any criminal court, have the power to address offences against the administration of justice, such as contempt of the tribunal, in order to preserve the integrity of the proceedings and to ensure an effective administration of justice. The respect of court orders is of vital importance especially in the case of ICTY and ICTR protected witnesses, where the effect of the protective measures ordered by the Tribunals depends, in practice, on the respect paid to those measures. Nonetheless, their powers to punish contempt — and the way the law of contempt has been interpreted by the Tribunals — raise some concerns, especially in relation to the principle of legality and legal certainty. These problems are mainly due to the fact that the approach chosen by the ad hoc Tribunals with regard to the offence of contempt has been the common-law one, characterized by a not always precise statutory definition and by great discretion left to the judges in the determination of the appropriate penalty. Such an approach can be criticized with regard to penalty concerns and, more generally, from the perspective of the rights of the accused to a fair trial.[85] The law of the ad hoc Tribunals on contempt of court has probably not been the most respectful of the principles of legal certainty and of the rights of the accused, although it has served the purpose of ensuring the integrity of proceedings and — ultimately — the respect of the Tribunals' administration of justice.[86]

The alternative of having a more formalized and precise codification of procedural offences (such as contempt of court) seems to be the option chosen by the International Criminal Court (ICC) in its approach towards such offences as contained in Articles 70 and 71 of the Rome Statute.[87] Therefore, it seems that a lesson has been learned from the past, and that

85 For instance, Rule 77 does not require necessarily that the trial be held in the presence of the accused, as it is normally required by the Statute (Art. 21). It would seem, therefore, that at least in some respect, Rule 77 restricts the rights of the accused. On the other hand, the chosen common-law approach may be better understood and justified if considering that, especially in the case of the ad hoc Tribunals, the novelty of their work and the unique mixed system never experienced before would render practically impossible to think about and to codify all the possible situations and circumstances which could arise in practice. It is probably also because of this consideration that the Tribunals found more practicable the more flexible common-law approach.

86 It can be recalled, with S. Zappalà, a positive feature of the rules on contempt: they cover a gap of protection in the Statutes given that, without such provisions, individuals before the ad hoc Tribunals might have been left without any protection, for example, with regard to their defence counsel's inability to act, or to their misconduct. Cf. Zappalà, *supra* note 17, at 26.

87 The ICC is explicitly empowered by Arts 70 (Offences against the administration of justice) and 71 (Misconduct before the Court) of its Statute to impose sanctions for offences against the administration of justice. There is here no reference to 'inherent powers' and it seems that the civil law approach prevailed over the common law one. In relation to penalties, Art. 70(3) establishes that the ICC, in the event of a conviction, may impose a term of imprisonment not exceeding 5 years, or a fine in accordance with the RPE, or both.

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unexpected issues and problems emerged in the novelty of the ad hoc Tribunals' system have helped found a clearer path for the future.

Besides the aforementioned considerations, and on a conclusive note regarding the sentencing practice of international tribunals/courts on the offence of contempt, it must be recalled what has been found in the course of this analysis: namely, that the process followed in sentencing cases of contempt is in many aspects similar to the traditional judicial practice of the Tribunals, when sentencing international crimes, concerning purposes of punishment, aggravating and mitigating circumstances, as well as guilty pleas. This is noteworthy and may be read as suggestive of the emergence of general patterns in international sentencing law at least regarding its most basic and fundamental aspects of purposes of punishment and individual circumstances.

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