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Contempt Proceedings: Who has the Onus for Investigating and Initiating the Charges of Contempt – the Prosecutor, the Judge or a Third Party?

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Case Western Reserve University School of Law
International War Crimes Prosecution Project

(In conjunction with the New England School of Law)

Memorandum for the Office of the Prosecutor
International Criminal Tribunal for Rwanda

Issue 2: Contempt Proceedings: Who has the Onus for Investigating and Initiating
the Charges of Contempt – the Prosecutor, the Judge or a Third Party?

Prepared by Jennifer M. Wetmore
May 2002

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TABLE OF AUTHORITIES

Statutes and Rules

1. Contempt of Court Act of 1981, 1981, ch. 49 (Eng.) *reprinted in* 11 HALSBURY'S STATUTES OF ENGLAND AND WALES 192 (4th 2000).
2. Enforcement of Orders, Right to a Hearing; Ex parte motion; Burden of Proof; Service of Contempt Order, C.R.C., ch. 12, § 467 (1998) (Can.).
3. Enforcement of Orders, Assistance of Attorney General, C.R.C., ch. 12, § 471 (1998) (Can.).
4. FED. R. CRIM. P. § 42 (1987) *reprinted in* CHARLES ALAN WRIGHT, 3B FEDERAL PRACTICE AND PROCEDURE CRIMINAL app. (2001);
5. French Penal Code of 1994, arts. 433-5, 434-7-1, 434-8, 434-15 (as amended as of 1 January 1999) (Edward A. Tomlinson, trans. 1999).
6. Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.22, 13 December 2001.
7. Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., 31 May 2001.
8. Statute of the International Tribunal arts. 8, 15 (annexed to S/RES/827 (1993) and as amended by S/RES/1166 (1998) and S/RES/1329 (2000)).
9. Statute of the International Tribunal for Rwanda art. 14 (annexed to S/RES/955 (1994)).

Cases

10. *Attorney General v. Rich*, A. Crim. R. 389 (1998).
11. *Attorney General v. McLachlan*, 93 A. Crim. R. 557 (1997).
12. *Attorney General v. Newspaper Publishing*, [1987] 3 All ER 276 (H.L. 1987).
13. *Bassilis v. Royal Exchange Assurance Corp.*, (1922) 10 Ll. L. Rep. 766 (K.B. 1922).
14. *B.K. v. Regina*, [1995] 4 S.C.R. 186.
15. *Bloom v. Illinois*, 391 U.S. 194 (1968).
16. *Canada v. Heritage Front*, [1994] 3 F.C. 710.
17. *Dobson v. Hastings*, [1992] 2 All ER 94 (H.L. 1991).

18. *Gouriet v. Union of Post Office Workers*, [1977] 3 All ER 70 (H.L. 1977).
19. *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989).
20. *Hinch v. Attorney General*, 74 A.L.R. 353 (1987).
21. *In re Lonrho*, [1990] 2 A.C. 154 (H.L. 1990).
22. *Merck & Co. v. Apotex, Inc.* [1996] F.C. 223.
23. *Michaelson v. U.S.*, 266 U.S. 42 (1924).
24. *In re Oliver*, 333 U.S. 257 (1948).
25. *Pelechowski v. Registrar*, 162 A.L.R. 336 (1999).
26. *Pickering v. Liverpool Daily Post & Echo Newspapers*, [1991] 1 All ER 622 (H.L. 1991).
27. *Poje v. Attorney General*, [1953] 1 S.C.R. 516.
28. *Polo Fashions, Inc. v. Stock Buyers Int'l Inc.*, 760 F.2d 698 (6th Cir. 1985).
29. *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001.
30. *Prosecutor v. Nyiramasuhuko*, Case No.: ICTR-97-21-T, Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel, 10 July 2001.
31. *Prosecutor v. Simic*, Case No.: IT-95-9, Judgement in the Matter of Contempt Allegations Against an Accused and His Counsel, 30 June 2000.
32. *Prosecutor v. Tadic*, Case No.: IT-94-1, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2001.
33. *In re Reed*, 161 F.3d 1311 (11th Cir. 1998).
34. *Regina v. MacLeod*, [2001] Crim. L.R. 589 (CA(Crim. Div.) 2000).
35. *Regina v. Vermette*, [1987] 1 S.C.R. 577.
36. *In re Terry*, 128 U.S. 289 (1888).
37. *United Nurses of Alberta v. Alberta*, [1992] 1 S.C.R. 901, 931; *United Nurses of Alberta v Attorney-General for Alberta* (1992) 89 DLR (4th) 609.

38. *United States v. Lederer*, 140 F.2d 136 (7th Cir. 1944).
39. *United States v. Neal*, 101 F.3d 993 (4th Cir. 1996).
40. *United States v. Scott*, 2000 U.S. App. LEXIS 14197 (4th Cir. 2000).
41. *Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

Books and Articles

42. Michael Chesterman, *Contempt: In the Common Law, But Not the Civil Law*, 46 INT'L & COMP. L.Q. 521 (1997).
43. Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 CRIM. L.F. 179 (1996).
44. Craig Cleaver, *Ruling Without Reason: Contempt of Court and the Sub Judice Rule*, 110 S. AFR. L.J. 530 (1993).
45. Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 Transnat'l L. & Contemp. Prob. 81 (1997).
46. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337 (1998).
47. HALSBURY'S LAWS OF ENGLAND (4th 1998).
48. C.J. MILLER, CONTEMPT OF COURT (3rd 2000).
49. J R L MILTON, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOLUME II (3rd 1996).
50. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).
51. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).
52. Sally Walker, *Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared*, 40 INT'L & COMP. L. Q. 583 (1991).
53. 3 WHARTON'S CRIMINAL PROCEDURE (Charles E. Torcia ed., 13th 1991).
54. CHARLES ALAN WRIGHT, 3 FEDERAL PRACTICE AND PROCEDURE CRIMINAL (2nd 1988).

Miscellaneous

55. Report of the American Bar Association Task Force on War Crimes in the Former Yugoslavia, Commenting of the United States' Draft Rules of Procedure and Evidence for the International Tribunal, IT/INF.6/REV.2, 18 January 1994 *reprinted in* MICHAEL P. SCHARF & VIRGINIA MORRIS, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 585 (1995).
- a. Memorandum from Office of the Prosecutor, Topic 2.

Discussion

I. Introduction and summary of conclusions

A. Issue

Rule 77 of the ICTR Rules of Procedure and Evidence provide for contempt of the Tribunal where a party seeks to influence a witness. What is the procedure to be followed and who investigates where an application has been made for a contempt ruling?¹

B. Conclusions

- The Tribunal should recognize that contempt is an inherent power of its jurisdiction in order to overcome any challenge that contempt proceedings are outside the Tribunal's territorial and temporal jurisdiction.
- The Tribunal should follow the general procedures as outlined in the various common law jurisdictions where the Attorney General (or Prosecutor) normally investigates and initiates charges of contempt.

¹ See Memorandum From Office of the Prosecutor, Topic #2. [reproduced in accompanying notebook at Tab a]

II. Legal Analysis

A. Contempt, generally

Contempt is a power that courts have to maintain the integrity and the administration of justice. It is a power that has developed throughout common law jurisdictions.

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.²

Contempt of court is classified as either criminal or civil. Criminal contempt is that which interferes with the administration of justice, and civil contempt deals more with disobedience of a court order or other court process.³ The act of intimidating or impeding a witness to testify in court, therefore, would be classified as criminal contempt.

Within the ambit of criminal contempt, there are two types of contempt: that which is conducted in the view of the court (direct contempt) and that which is conducted outside of the court (indirect contempt). There are different procedural requirements set forth for each type. Contempt committed within the view of the court may be punished

² *United Nurses of Alberta v. Alberta*, [1992] 1 S.C.R. 901, 931. [reproduced in accompanying notebook at Tab 37]

³ *See* 9(1) HALSBURY'S LAWS OF ENGLAND 241, § 402 (4th 1998) [hereinafter HALSBURY'S LAWS] [reproduced in accompanying notebook at Tab 47]; *Poje v. Attorney General*, [1953] 1 S.C.R. 516, 522 [reproduced in accompanying notebook at Tab 27]; *see also* Report of the American Bar Association Task Force on War Crimes in the Former Yugoslavia, Commenting on the United States' Draft Rules of Procedure and Evidence for the International Tribunal, IT/INF.6/REV.2, 18 January 1994, *reprinted in* VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 585 (1995). [reproduced in accompanying notebook at Tab 55]

summarily with minimal due process of law.⁴ All other acts of contempt must be afforded their respective due process, whether by a show cause order⁵, an indictment⁶, or a motion⁷ served upon the accused.

Contempt generally is considered an inherent power of the court.⁸ “A court without contempt power is not a court.”⁹ That inherent power is considered essential to preserving the administration of justice.¹⁰

⁴ See *In re Terry*, 128 U.S. 289, 313 (1888) (holding that the defendant could be punished summarily without notice, testimony or hearing for attacking a marshal in open court) [reproduced in accompanying notebook at Tab 36]; *B.K. v. Regina*, [1995] 4 S.C.R. 186 [reproduced in accompanying notebook at Tab 14]; see also CHARLES ALAN WRIGHT, 3 FEDERAL PRACTICE AND PROCEDURE CRIMINAL §708 (2nd 1988) [reproduced in accompanying notebook at Tab 54]; but cf *In re Oliver*, 333 U.S. 257, 274, 274-75 (1948) (holding that only a narrowly limited category of contempts, such as that in *Terry*, could avoid due process requirements). [reproduced in accompanying notebook at Tab 24]

⁵ See FED. R. CRIM. P. § 42 (1987) reprinted in CHARLES ALAN WRIGHT, 3B FEDERAL PRACTICE AND PROCEDURE CRIMINAL app. (2001) [reproduced in accompanying notebook at Tab 4]; Enforcement of Orders, Right to a Hearing; Ex parte motion; Burden of Proof; Service of Contempt Order, C.R.C., ch. 12, § 467 (1998) (Can.). [reproduced in accompanying notebook at Tab 2]

⁶ See *Regina v. Vermette*, [1987] 1 S.C.R. 577 (holding that the Crown may elect to proceed by indictment or other means if it has the option). [reproduced in accompanying notebook at Tab 35]

⁷ See HALSBURY’S LAWS, *supra* note 2, § 425. [reproduced in accompanying notebook at Tab 47]

⁸ See Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN’S L. REV. 337, 338 (1998) [reproduced in accompanying notebook at Tab 46]; 3 WHARTON’S CRIMINAL PROCEDURE § 436 (Charles E. Torcia ed., 13th 1991). [reproduced in accompanying notebook at Tab 53]

In the United States, however, that inherent power may be subject to limitations per regulations. See *Michaelson v. United States* 266 U.S. 42, 65-67 (1924) [reproduced in accompanying notebook at Tab 23], *Bloom v. Illinois*, 391 U.S. 194, 196 n.1 (1968) [reproduced in accompanying notebook at Tab 15]. The power may be restricted by specific regulations as the Clayton Act in *Michaelson* required a jury trial for a finding of contempt. See *Michaelson*, 266 U.S. at 65-67. [reproduced in accompanying notebook at Tab 23]

⁹ See Gray, *supra* note 8, at 342. [reproduced in accompanying notebook at Tab 46]

¹⁰ See, e.g., *Michaelson*, 266 U.S. at 65 [reproduced in accompanying notebook at Tab 23]; *Canada v. Heritage Front*, [1994] 3 F.C. 710, 718 [reproduced in accompanying notebook at Tab 16]; *Pelechowski v. Registrar*, [1999] 162 A.L.R. 336. [reproduced in accompanying notebook at Tab 25]

B. How are contempt proceedings commenced in the International Tribunals?

The contemporary International Tribunals set forth various protections to preserve the administration of justice.¹¹ One of those protections is the power of contempt. Both the ICTY and ICTR have procedural rules dealing with contempt -- Rule 77. As will be discussed *infra*, each Rule 77 has subtle (and not so subtle) differences in both their form and application.

1. ICTY

a. Statutes and Rules – Inherent Choices

The ICTY Rule 77¹² describes a detailed list of contemptuous acts and a process by which such acts are investigated. Most importantly, however, the rule sets forth that contempt is an inherent power of the Tribunal.

¹¹ This Memorandum will only discuss the procedural issues related to the International Criminal Tribunals for the former Yugoslavia and Rwanda. The approach to evidentiary and procedural issues during the era surrounding the Nuremberg trials and shortly thereafter has changed drastically because there was not such an emphasis on the accused's rights as there is today with the development of international human rights. See Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROB. 81, 84 (1997) [reproduced in accompanying notebook at Tab 45]; see also VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 175 (1995) (noting the substantive development of international law since Nuremberg). [reproduced in accompanying notebook at Tab 50]

¹² The full text of Rule 77 is:

The judges of the International Tribunal shall 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.

(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

(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.

(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.

(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

(i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

(E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.

(G) 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.

(H) Payment of a fine shall be made to the Registrar to be held in a separate account.

(I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.

(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(iii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Notwithstanding the provisions of the rule that list potential contemptuous acts, the Tribunal has the ability to “exercise [] its inherent power [to] hold in contempt those who knowingly and wilfully interfere with its administration of justice”¹³ As a result, the Tribunal’s scope of authority is broadened to include any act that interferes with the administration of justice.¹⁴ The Tribunal must be given the inherent jurisdiction to deal with contempt (even if that specific power is not granted under its Statute) so that “its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.”¹⁵ Moreover, the Tribunal finds that the inherent power exists independent of any amendment to the rules.¹⁶

This inherent power cures any challenge that an offense of contempt falls outside the purview of the Tribunal’s territorial and temporal jurisdictional requirements.¹⁷ “The inherent power of the Tribunal to deal with contempt has necessarily existed ever since its creation.”¹⁸ While this

Rules of Procedure and Evidence, International Criminal Tribunal for the former Yugoslavia, Rule 77 [hereinafter ICTY Rules]. [reproduced in accompanying notebook at Tab 6]

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Prosecutor v. Tadic*, Case No.: IT-94-1, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, para. 13 (explaining that even though Rule 77 had been amended several times to later include the language of an inherent power in the Tribunal, the Tribunal held that the inherent power was implicit with the Tribunal’s judicial function). [reproduced in accompanying notebook at Tab 32]

¹⁶ *See id.*; *see also Prosecutor v. Simic*, Case No.: IT-95-9, Judgement in the Matter of Contempt Allegations Against an Accused and His Counsel, para. 91. [reproduced in accompanying notebook at Tab 31]

¹⁷ *See Statute for the International Criminal Tribunal for the former Yugoslavia*, art. 8 [hereinafter ICTY Statute]. [reproduced in accompanying notebook at Tab 8]

¹⁸ *Tadic*, para. 28. [reproduced in accompanying notebook at Tab 32]

power is not expressed in the Statute, it is a necessary power derived from the Tribunal's functioning as a judicial body.¹⁹

The power to adopt procedural rules is articulated in the Statute:

The judges of the International Tribunal shall 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.²⁰

While this power does not allow for the introduction of new *offenses*, it does allow for the “adopt[ation of] *rules of procedure and evidence* for the conduct of matters falling within the inherent jurisdiction of the Tribunal . . .”²¹ Any procedural rule must “be consistent with the Statute . . . and the exclusive basis for its competence and authority.”²² In that manner, the Tribunal adopted a procedural rule for contempt. Therefore, a contempt charge may be viewed under either the statutory provisions of Rule 77 or the inherent power of the Tribunal.

Either type of contempt action will commence in a similar fashion. Section C of Rule 77 states:

When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

- (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
- (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus

¹⁹ See *id.*, para. 13; see also *Simic*, para. 91 [reproduced in accompanying notebook at Tab 31]; *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1, Judgment on Appeal by Anto Nobile Against Finding of Contempt, para. 30. [reproduced in accompanying notebook at Tab 29]

²⁰ ICTY Statute, art. 15 [reproduced in accompanying notebook at Tab 8]; see also MORRIS & SCHARF, *supra* note 11, at 177-79 (describing the scope of the rules and the limitations of the Tribunal to promulgate rules). [reproduced in accompanying notebook at Tab 50]

²¹ *Tadic*, para. 24. [reproduced in accompanying notebook at Tab 32]

²² MORRIS & SCHARF, *supra* note 11, at 178. [reproduced in accompanying notebook at Tab 50]

curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.²³

The rule establishes these three choices for bringing contempt charges. Since the rule does not state a preference for how contempt charges should commence, the case law might shed some light on how the Tribunal interprets that section of the rule.

b. Case law sheds light on who investigates and brings charges of contempt

Clearly, the Tribunal has three possible avenues to proceed in investigating and bringing charges of contempt: by the prosecutor, by a third party or by itself. It is not clear, however, what triggers the Tribunal's "reason to believe" one might be in contempt. In *Aleksovski*, counsel for an accused in a separate proceeding (the *Blaškić* trial) appealed his contempt finding for knowingly violating an order that prohibited disclosure of certain information discovered in the earlier *Aleksovski* trial.²⁴ The embassy of Bosnia and Herzegovina (at the insistence of a witness) brought this information to the attention of the Prosecutor and Registrar of the Tribunal.²⁵ The Prosecutor, thereafter, filed a motion in the *Blaškić* trial for the alleged

²³ ICTY Rules, Rule 77. [reproduced in accompanying notebook at Tab 6]

²⁴ See *Aleksovski*, para. 1. [reproduced in accompanying notebook at Tab 29]

²⁵ See *id.*, para. 9.

misconduct to be revealed to the *Aleksovski* trial.²⁶ The *Aleksovski* Trial Chamber called upon counsel to answer the allegations.²⁷

Moreover, the Prosecution in *Simic* sought an *ex parte* hearing on allegations that the defendants and defense counsel intimidated a witness.²⁸ The Trial Chamber held an *ex parte* hearing to hear from Prosecution.²⁹

Finally, in *Tadic*, the Prosecution initially filed a motion alleging intimidation of witnesses by defense counsel; however, the Appeals Chamber dismissed the complaint.³⁰ Shortly thereafter, a witness brought similar allegations to the attention of the Deputy Registrar.³¹ The Appeals Chamber issued a scheduling order requiring the accused to respond to the allegations. No mention is made as to whether the Prosecution actively participated in the hearing because it appears that the Appeals Chamber called all the witnesses.³²

In the above-mentioned cases there appears to be some similarities and differences in regard to who initiates the contempt proceedings. In each case, the Prosecution (initially) filed a motion of an alleged contemptuous act. The cases then split as to who then prosecutes the case: in one case, the Prosecution manages the proceedings; in another, it is the Trial Chamber; and in

²⁶ See *id.* The *Aleksovski* Trial Chamber found the counsel in contempt. The Appeals Chamber, however, allowed the counsel's appeal. It found that the Trial Chamber initiated the contempt proceedings, but did not do so with the "ordinary procedures" whereby the counsel would be able to answer to a precise charge. See *id.*, para. 56.

²⁷ See *id.*, para. 9.

²⁸ See *Simic*, para. 3. [reproduced in accompanying notebook at Tab 31]

²⁹ See *id.* The Trial Chamber did not find proof beyond a reasonable doubt to sustain the charges of contempt. See *id.*, paras. 99-100.

³⁰ See *Tadic*, para. 8. [reproduced in accompanying notebook at Tab 32]

³¹ See *id.*, para. 9. The Appeals Chamber found the counsel in contempt.

the last, it is unclear but appears to be the Appeals Chamber. There appears to be no clear cut preference for who prosecutes the contempt charge. The Tribunal has not addressed, however, when, and whether, a third party may be appointed to prosecute contempt.

2. ICTR

- a. Rule 77 – a comparison and contrast with the ICTY Rule 77 – how similar/dissimilar are they?

In contrast, the ICTR Rule 77 is not similar in form to its counterpart at the ICTY. In form, Rule 77 does not outline the detailed acts that would be considered contempt.³³ It merely sets forth vague, generalized language whereby one may be brought up on contempt charges: “any person who attempts to interfere with or intimidate a witness . . .”³⁴

More importantly, the rule does not explicitly state that the Tribunal has the inherent power of contempt. Nor has the Tribunal recognized an inherent contempt power as was recognized by

³² See *id.*, para. 10. Indeed, the Prosecution appears only to have given partial consent for the hearing to be heard in closed session. See *id.*, para. 11. There is not mention of the Prosecution calling witnesses or cross examining them.

³³ Rule 77 states:

(A) Subject to the provisions of Rule 90 (E), a witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber may be found in contempt of the Tribunal. The Chamber may impose a fine not exceeding USD 10,000 or a term of imprisonment not exceeding six months.

(B) The Chamber may, however, relieve the witness of the duty to answer, for reasons which it deems appropriate.

(C) Any person who attempts to interfere with or intimidate a witness may be found guilty of contempt and sentenced in accordance with Sub-Rule (A).

(D) Any judgement rendered under this Rule shall be subject to appeal.

(E) Payment of a fine shall be made to the Registrar to be held in a separate account.

Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 77 [hereinafter ICTR Rules]. [reproduced in accompanying notebook at Tab 7]

³⁴ ICTR Rules, Rule 77 [reproduced in accompanying notebook at Tab 7]. Indeed, the rule also sets forth that one may be brought up on contempt for refusing or failing to testify before the Tribunal, however, that basis for finding one in contempt is beyond the scope of this Memorandum.

the ICTY.³⁵ In not recognizing an inherent contempt power, the ICTR may have problems with the territorial and temporal jurisdiction limitations of the Statute.³⁶ Article 7 limits the jurisdiction of the ICTR to only crimes committed “in the territory of Rwanda or in neighboring States by Rwandan citizens” and “for the period beginning on 1 January 1994 and ending on 31 December 1994.”³⁷ Since the alleged contemptuous acts of intimidating witnesses occurred post-1994 (or have yet to occur), any charge brought against an alleged contemtor may run afoul of article 7. Nonetheless, even though the Tribunal has not explicitly recognized the inherent power of contempt, there is no indication that the Tribunal has explicitly excluded the inherent power of contempt.³⁸

In addition to not recognizing an inherent power of contempt, the ICTR Rule 77 does not include a provision that explains the process by which the Tribunal may investigate and prosecute a contempt allegation. The ICTY rules state that upon the Tribunal’s reasonable belief that a person’s acts may be contemptuous, it may direct the Prosecution, appoint an amicus curiae or on its own investigate and bring the charges.³⁹ The ICTR has no equivalent sub-section in Rule 77. The reasons why Rule 77 does not mirror that of the ICTY are unknown.

³⁵ See *Tadic*, para. 28 [reproduced in accompanying notebook at Tab 32]; see also *supra* notes 15-20 and accompanying text.

³⁶ See ICTR Statute, art. 7 [reproduced in accompanying notebook at Tab 9]. For a detailed discussion of article 7, see VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 291-303 (1998). [reproduced in accompanying notebook at Tab 51]

³⁷ *Id.*

³⁸ See *Prosecutor v. Nyiramasuhuko*, Case No.: ICTR-97-21-T, Decision on the Prosecutor’s Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor’s Counsel. [reproduced in accompanying notebook at Tab 30]

³⁹ See ICTY Rules, Rule 77. [reproduced in accompanying notebook at Tab 6]

It is clear, however, that the same rationale for adopting Rule 77 is applicable to the ICTR as to the ICTY. And, the ICTY settled the issue that acts of contempt were not new offenses and fell within the jurisdiction of the Tribunal.⁴⁰ The Tribunal has the authority to adopt procedural rules. Similarly, the ICTR

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*.⁴¹

A difference stated in this rule is that procedural rules may follow that of the ICTY with changes as necessary. It is important to note this distinction because, then, the omissions of the ICTR's Rule 77 may have been intentionally crafted to not include the same procedures as is included in the ICTY.⁴² Since it is unclear from the statute or the rules whether these omissions were intentional or not, the case law must be examined. Only the *Nyiramasuhuko* case sheds light as to whether the Tribunal has the inherent power of contempt and who initiates and prosecutes contempt charges.

⁴⁰ See *Tadic*, para. 24. [reproduced in accompanying notebook at Tab 32]

⁴¹ Statute for the International Criminal Tribunal for Rwanda, art. 14 (emphasis added) [hereinafter ICTR Statute]. [reproduced in accompanying notebook at Tab 9]

⁴² Those omissions include the language of inherent power and the power of the Tribunal to either appoint the Prosecution or amicus or proceed on its own. See ICTY Rules, Rule 77. [reproduced in accompanying notebook at Tab 6]

b. The *Nyiramasuhuko* case

i. Does *Nyiramasuhuko* incorporate the inherent power of contempt from the ICTY?

In *Nyiramasuhuko*, the Prosecution filed a motion for an investigation into an alleged contemptuous act.⁴³ The Trial Chamber dismissed the contempt allegations because it was not based upon “properly prepared and substantiated submissions.”⁴⁴ While the Trial Chamber discussed various ICTY decisions,⁴⁵ it did not comment on an inherent contempt power of the Tribunal. It relied solely on Rule 77.⁴⁶

Even though the Trial Chamber did not discuss the inherent power of contempt, this does not necessarily imply that it does not have such power. It simply might not have addressed it in the context of this case. The Trial Chamber did, however, cite to various ICTY cases to justify its conclusion and holding.⁴⁷ In doing so, the Tribunal might be inclined to use the holding and discussion of the inherent power of contempt from the *Tadic* holding, or later cases.⁴⁸

⁴³ See *Nyiramasuhuko*, para.1. [reproduced in accompanying notebook at Tab 30]

⁴⁴ *Nyiramasuhuko*, para. 12. [reproduced in accompanying notebook at Tab 30]

⁴⁵ The Trial Chamber cited to *Simic* and *Aleksovski*. See discussion of these cases in Part II.A.1.b.

⁴⁶ See *Nyiramasuhuko*, paras. 3, 5, 6. [reproduced in accompanying notebook at Tab 30]

⁴⁷ See *id.*, paras. 7-8.

⁴⁸ See *Tadic*, para. 28. [reproduced in accompanying notebook at Tab 32]

- ii. Does *Nyiramasuhuko* incorporate the choices laid out in the ICTY for the Tribunal to initiate contempt proceedings?

In *Nyiramasuhuko*, the Trial Chamber addresses the issue of *prima facie* proof of allegations of contempt.⁴⁹ In this case, the Prosecution brought the allegation of contempt. The Trial Chamber emphasized that the Prosecution “bear[s] the onus of establishing the charge” because of the danger of the Chamber being both the prosecutor and the judge.⁵⁰ The Trial Chamber may have wrongly placed emphasis upon the notion of proceeding only at the initiation of the Prosecution. In doing so, it relied on *Aleksovski*. *Aleksovski*, however, only mentioned this in dicta. It clearly stated that “[i]t is not the intention of the Appeals Chamber to enter this debate” referring to the debate as to whether the Chamber, *proprio motu*, should initiate contempt proceedings or direct the Prosecution to do so.⁵¹

It, therefore, appears that the Trial Chamber has placed the burden upon the Prosecution to investigate and bring charges of contempt. The dangers of the Chamber representing both the prosecutor and the judicial interest weighed more heavily in the decision than in that set forth in *Aleksovski*. The concern also is expressed in the Trial Chamber’s emphasis on handling “with due care” and “the gravity of allegations of contempt.”⁵² The holding states, however, that

⁴⁹ See *Nyiramasuhuko*, para. 7 [reproduced in accompanying notebook at Tab 30]. The Trial Chamber relied on the aforementioned ICTY cases to sustain its holding that contempt must be proven by *prima facie* proof. It is unquestionable that these cases relied on a *prima facie* proving of a beyond a reasonable doubt standard. See, e.g., *Tadic*, *supra* note 15 [reproduced in accompanying notebook at Tab 32]; *Simic*, *supra* note 16 [reproduced in accompanying notebook at Tab 31]; *Aleksovski*, *supra* note 17. [reproduced in accompanying notebook at Tab 29]

⁵⁰ *Nyiramasuhuko*, para. 7 (citing *Aleksovski*, para. 56). [reproduced in accompanying notebook at Tab 30]

⁵¹ *Aleksovski*, para. 56. [reproduced in accompanying notebook at Tab 29]

⁵² *Nyiramasuhuko*, paras. 6, 12. [reproduced in accompanying notebook at Tab 30]

“should any such allegations be brought in the future *by a party*, this must be done on the basis of properly prepared and substantiated submissions.”⁵³ It is, therefore, unclear whether it is the absolute onus of the Prosecution to investigate and bring the charges of contempt. Depending upon the factual circumstances, some other party may bear the burden.

C. Contempt powers in the civil and common law jurisdictions

Contempt of court was created in England in the twelfth century. Historically, contempt powers were used to “protect the dignity of the courts.”⁵⁴ Its object in present time, however, is to protect the administration of justice.⁵⁵ The administration of justice in common law jurisdictions is centered on the adversarial model where the accused confronts his accuser.⁵⁶ In civil law jurisdictions, instead, the administration of justice is centered on the inquisitorial model where greater weight is placed upon the compilation of written evidence.⁵⁷

⁵³ *Id.*, para. 12 (emphasis added).

⁵⁴ C.J. MILLER, CONTEMPT OF COURT 2 (2000). [reproduced in accompanying notebook at Tab 48]

⁵⁵ *See id.*; Michael Chesterman, *Contempt: In the Common Law, But Not the Civil Law*, 46 INT’L & COMP. L.Q. 521, 523 (1997). [reproduced in accompanying notebook at Tab 42]

⁵⁶ *See* Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 CRIM. L.F. 179, 193 (1996). [reproduced in accompanying notebook at Tab 43]

1. Contempt is a wholly common law creation.

In common law jurisdictions, the aim of contempt is to protect the public interest in the proper administration of justice.⁵⁸ These jurisdictions view the contempt power as inherent and incontrovertible.⁵⁹ The purpose of this power is “a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally.”⁶⁰

2. Contempt is “non existent” in civil law jurisdictions.

The concept of contempt is “simply unknown” to civil law jurisdictions.⁶¹ Since most criminal offenses in civil law codes are defined reasonably precise, there is no leeway for a court to impose a contempt sentence on a “perceived ‘challenge to [the] authority of [the] court[]’” unless the action has been defined by the codes.⁶² Moreover, judges in common law jurisdictions usually have broad sentencing power for contempt charges, where in civil law

⁵⁷ See *id.* at 197.

⁵⁸ See Sally Walker, *Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared*, 40 INT’L & COMP. L. Q. 583 (1991) [reproduced in accompanying notebook at Tab 52]; MILLER, *supra* note 54, at 2. [reproduced in accompanying notebook at Tab 48]

⁵⁹ See Chesterman, *supra* note 55, at 521 [reproduced in accompanying notebook at Tab 42].

⁶⁰ See *Tadic*, para. 16 n.16 (quoting Report of the Committee on Contempt of Court, UK Cmnd 5794, para. 1 (1974)) [reproduced in accompanying notebook at Tab 32]. Footnote sixteen in *Tadic* also cites to a variety of common law jurisdictions that generally accept this common principle of contempt. See *id.* at n.16.

⁶¹ See Chesterman, *supra* note 55, at 521 [reproduced in accompanying notebook at Tab 42]. “The[] major differences between the common law and [civil] law are attributed chiefly to differing positions of the judiciary in the structure of State power and differing approaches to trial procedure.” *Id.* at 553.

⁶² *Id.* at 528.

jurisdictions, judges usually are restricted in imposing sentences.⁶³ The notion that a court can have unfettered, inherent contempt power and can assume “extensive law-making powers” is “unthinkable.”⁶⁴

While the concept of contempt is unknown, many civil law jurisdictions have adopted various offenses that establish comparable grounds of liability.⁶⁵ The most common offenses under the French Code⁶⁶ include control of hearings (*police de l’audience*), “affronts” (*outrages*) and offenses committed during hearings (*delits d’audience*).⁶⁷ Most scenarios involving these three offenses occur under the purview of the court.⁶⁸ The common law equivalent would be a direct contempt, which has different procedural requirements from those requirements that apply to actions that occur outside of the court (indirect contempt).⁶⁹

⁶³ See *id.* at 528-29.

⁶⁴ *Id.* at 549.

⁶⁵ See *id.* at 526; see also *Tadic*, paras. 15, 17 [reproduced in accompanying notebook at Tab 32]. In *Tadic*, the Appeals Chamber lists various offenses within the German, Chinese, French and Russian codes as examples of some contemptuous acts. See *id.* at n.20.

⁶⁶ See notebook at Tab 5 for English translation of the French Penal Code of 1994 (as amended as of Jan. 1, 1999) and relevant sections to the administration of justice.

⁶⁷ See Chesterman, *supra* note 51, at 527 [reproduced in accompanying notebook at Tab 42]. Chesterman compares the general categories of contempt to relevant provisions of the French Code. He then analyzes the four common types of conduct that would be considered contempt at common law and how each legal system would handle each type. The four types of conduct he analyzes are contempt in the face of the court, “scandalizing the court,” *sub judice*, and non-compliance with a court order. See *id.* at 522.

⁶⁸ See *id.* at 527.

⁶⁹ Indeed, the procedural requirement for direct contempt is much simpler because the judge usually observes the alleged contemptuous action and summarily charges the contemtor.

3. Comparative common law – who initiates, investigates and brings contempt charges?

- a. United Kingdom – It is preferable that the Attorney General bring the contempt charge.

Contempt of court in the United Kingdom had solely been developed at common law until the passage of the Contempt of Court Act of 1981.⁷⁰ The Contempt of Court Act of 1981 does not apply to all areas of contempt; it creates a standard of strict liability in contempt for certain publications.⁷¹ In all other areas of contempt, the common law traditions are retained. One of those common law contempt traditions is described as follows:

Any interference with a witness to a pending or imminent suit, the purpose of effect of which is to deter the witness from giving evidence . . . is a serious interference with the administration of justice and a contempt of court.⁷²

In establishing a claim of contempt, the English courts have held that it is not necessarily required to have the consent of the Attorney General to institute contempt proceedings.⁷³ The courts, however, prefer that a complaining party refer his claim to the

⁷⁰ Contempt of Court Act of 1981, 1981, ch. 49 (Eng.) *reprinted in* 11 HALSBURY'S STATUTES OF ENGLAND AND WALES 192 (4th 2000) [reproduced in accompanying notebook at Tab 1]. The Contempt of Court Act of 1981 was enacted to implement recommendations from a report on contempt and to harmonize British law with recent European Court of Human Rights decisions. *See* HALSBURY'S LAWS, *supra* note 3, §403. [reproduced in accompanying notebook at Tab 47]

⁷¹ *See* Contempt of Court Act of 1981, § 2. [reproduced in accompanying notebook at Tab 1]

⁷² HALSBURY'S LAWS, *supra* note 3, § 435 [reproduced in accompanying notebook at Tab 47]. Indeed, the English courts have viewed intimidation of witnesses as grave offenses. *See* *Bassilis v. Royal Exchange Assurance Corp.*, (1922) 10 Ll. L. Rep. 766, 768 (K.B. 1922) (holding that the uncorroborated testimony of one witness was not sufficient to find the defendant in contempt). [reproduced in accompanying notebook at Tab 13]

⁷³ *See generally* HALSBURY'S LAWS, *supra* note 3, § 425. [reproduced in accompanying notebook at Tab 47]

Attorney General to initiate proceeding.⁷⁴ As will be demonstrated, the preference for that referral depends upon the nature of the proceeding and the nature of the contempt.

When a private party attempts to assume the role of the prosecutor, he should have some actual injury or be a party to the claim in which the contempt arose.⁷⁵ More particularly, the private party may have to bring the claim only upon a breach of a court order (which would be considered a civil contempt). Private parties may not be able to bring actions for contempt solely for the public interest.⁷⁶

In *Gouriet*, the postal union announced that its workers would not handle mail to be delivered to South Africa for one week. Mr. Gouriet, a private citizen, applied to the Attorney General for consent to bring action in the Attorney General's name for an injunction against the postal union for "soliciting or procuring any person wilfully to delay any postal package in the course of transmission between this country and South Africa."⁷⁷ The Attorney General refused consent, and Mr. Gouriet filed for the injunction in his own name. The House of Lords dismissed the claim because Mr. Gouriet had not suffered any actual injury. The public interest injury is solely within the scope of the

⁷⁴ See MILLER, *supra* note 54, at 114 [reproduced in accompanying notebook at Tab 48]. It should be noted that while it is a preference for the Attorney General to initiate proceedings, when the contemptuous act is of a specific factual nature that is before the House of Lords serving in its judicial function, the House of Lords may initiate contempt proceedings *sua sponte* and reject the Attorney General's ability to initiate proceedings. See *In re Lonrho*, [1990] 2 A.C. 154 (H.L. 1990) (dealing with a merger and acquisition case). [reproduced in accompanying notebook at Tab 21]

⁷⁵ See *Attorney General v. Newspaper Publishing*, [1987] 3 All ER 276, 294 (H.L. 1987) [reproduced in accompanying notebook at Tab 12]; *Pickering v. Liverpool Daily Post & Echo Newspapers*, [1991] 1 All ER 622, 636 (H.L. 1991) [reproduced in accompanying notebook at Tab 26]; *Dobson v. Hastings*, [1992] 2 All ER 94, 108 (H.L. 1991). [reproduced in accompanying notebook at Tab 17]

⁷⁶ See *Gouriet v. Union of Post Office Workers*, [1977] 3 All ER 70, 83 (H.L. 1977) (dismissing a private party's claim for injunctive relief when injury suffered was of a public interest and not suffered by the private party). [reproduced in accompanying notebook at Tab 18]

⁷⁷ *Id.* at 76.

Attorney General's discretion. "It can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public."⁷⁸ While this case was *not* a contempt action, it is important to understand the reasoning behind the public/private which English courts have subsequently applied to contempt proceedings.

The English courts begin to make this distinction in modern contempt proceedings. In *Newspaper Publishing*, for example, the court distinguished between the two types of contempt (civil and criminal): a breach of a court order is "treated as a matter for the parties to raise by complaint to the court, whereas other forms of contempt are in general considered to be a matter for the Attorney General to raise."⁷⁹ The Attorney General acts as "the guardian of the public interest in the due administration of justice."⁸⁰ The court also noted that because of the nature of the punishment involved in these criminal contempt actions, committal or fine, the Attorney General, generally, would be the appropriate actor to bring the charge.⁸¹

Even in those circumstances where the Attorney General is not represented, the courts have noted that it is preferable for, at a minimum, the Attorney General to be heard on the issue. In *Pickering*, the proceeding was before a mental health tribunal, and the plaintiff requested that the defendant, a publication, be enjoined from reporting certain

⁷⁸ *Id.* at 80.

⁷⁹ *Newspaper Publishing*, [1987] 3 All ER at 294. [reproduced in accompanying notebook at Tab 12]

⁸⁰ *Id.*

⁸¹ *See id.*

information.⁸² The court held that the plaintiff had standing to bring an action under the Contempt of Court Act of 1981. The court noted, however, that while it did not need to reach the issue of whether the Attorney General should intervene, it is “eminently desirable” for the Attorney General to be heard.⁸³ In addition, in *Dobson*, two company directors brought a contempt action against a newspaper that published a report that the Companies Court registry erroneously gave to one of its journalists.⁸⁴ While the court decided that the act itself was not contemptuous, it noted, in *dicta*, that the Attorney General did not necessarily possess the sole right to bring contempt when the actions are not based upon a breach of a court order.⁸⁵ Generally, the Attorney General is regarded as the preferred actor to bring this type of contempt, however, the court left that discussion for another case.⁸⁶

Lastly, the English courts have allowed, in limited situations, contempt proceedings to commence *sua sponte*. “A judge should act of his own motion only when it is *urgent* and *imperative* to act immediately.”⁸⁷ In *MacLeod*, the judge received information that a witness was harassed after giving testimony. The judge initiated contempt proceedings and conducted the inquiry.⁸⁸ The Court of Appeals upheld the decision because the judge received well-founded

⁸² See *Pickering*, [1991] 1 All ER at 622. [reproduced in accompanying notebook at Tab 26]

⁸³ *Id.* at 636.

⁸⁴ See *Dobson*, [1992] 2 All ER, at 94. [reproduced in accompanying notebook at Tab 17]

⁸⁵ See *id.* at 108.

⁸⁶ See *id.* “In my view, this important point calls for more extended treatment than it was accorded before me. It is a point I ought not to decide unless that is necessary.” *Id.*

⁸⁷ *Regina v. MacLeod*, [2001] Crim. L.R. 589 (CA (Crim Div) 2000) (*citing* *Balogh v. St. Alban’s Crown Court* [1975] QB 73 at 85E (Lord Denning)) (emphasis added). [reproduced in accompanying notebook at Tab 34]

⁸⁸ See *id.*

information of a witness' harassment.⁸⁹ The court emphasized, however, that this is an exception to the preference of the Attorney General initiating and prosecuting contempt proceedings.

- b. United States – contempt may be initiated by disinterested third parties, and it is disfavored for judges to initiate proceedings *sua sponte*

Contempt of court in the United States is governed by Rule 42(b) of the Federal Rules of Criminal Procedure.⁹⁰ All contempt proceedings, except those narrow exceptions where it may be punished summarily, require notice and a hearing.⁹¹

The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.⁹²

The court may appoint the U.S. Attorney or another attorney to prosecute the contempt, but is not required to do so.⁹³ The U.S. Supreme Court has not directly decided on whether courts may proceed *sua sponte*. Moreover, the circuit courts have split in deciding who is the appropriate party to initiate contempt proceedings.

The Supreme Court has determined that as part of the court's inherent authority to initiate contempt proceedings

[c]ourts cannot be at the mercy of another Branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-

⁸⁹ See *id.*

⁹⁰ See FED. R. CRIM. P. *supra* note 5, § 42. [reproduced in accompanying notebook at Tab 4]

⁹¹ See *id.*; see also WRIGHT, *supra* note 4, § 709. [reproduced in accompanying notebook at Tab 54]

⁹² FED. R. CRIM. P. *supra* note 5, § 42(b). [reproduced in accompanying notebook at Tab 4]

⁹³ See WRIGHT, *supra* note 4, § 711. [reproduced in accompanying notebook at Tab 54]

protection, without which courts would be "mere boards of arbitration whose judgments and decrees would be only advisory."⁹⁴

It, therefore, determined that the courts may appoint a private attorney and do not have to necessarily appoint a U.S. attorney to prosecute the contempt charge.⁹⁵ In *Young*, the district court appointed an interested party's attorney to prosecute the alleged violation of an injunction for trademark infringement.⁹⁶ The Court held that an *interested* private attorney should not be appointed to prosecute contempt. It would blur the lines of what the prosecutor's role is ("to pursue the public interest in vindication of the court's authority"⁹⁷) and what his role is as the interested attorney (advocating the best for his client). The interested attorney may, however, assist the U.S. Attorney with its investigation and prosecution.⁹⁸

The courts have found it appropriate to appoint *disinterested* private counsel to serve as prosecutor.⁹⁹ The courts are not limited to choosing only U.S. attorneys.

When the judge decides to proceed on his own, the circuits have held differently. In *In re Grand Jury*, the First Circuit concluded that the judge was within his discretion to conduct the proceedings himself – to serve as both judge and prosecutor.¹⁰⁰ The court qualified its holding,

⁹⁴ *Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) (*quoting* *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). [reproduced in accompanying notebook at Tab 41]

⁹⁵ *See id.* at 812-14.

⁹⁶ *See id.* at 805-06.

⁹⁷ *See id.* at 804.

⁹⁸ *See Polo Fashions, Inc. v. Stock Buyers Int'l Inc.*, 760 F.2d 698 (6th Cir. 1985) (holding that it was an abuse of the district court's discretion to allow plaintiff's attorney to prosecute a contempt charge for a trademark infringement suit). [reproduced in accompanying notebook at Tab 28]

⁹⁹ *See United States v. Lederer*, 140 F.2d 136 (7th Cir. 1944). [reproduced in accompanying notebook at Tab 38]

¹⁰⁰ *See In re Grand Jury Proceedings*, 875 F.2d 927, 928 (1st Cir. 1989). [reproduced in accompanying notebook at Tab 19]

or narrowed its holding to this specific type of fact pattern. It stated “where . . . the judge is impartial and the evidence is so simple that the judge is not diverted from the role of impartial judge and factfinder” then it is not necessary to appoint a prosecutor.¹⁰¹ On the other hand, in *United States v. Neal*, the Fourth Circuit held differently – a district judge who investigated and presented the case for contempt “improperly assumed a prosecutorial role.”¹⁰²

The melding of the judicial and prosecutorial functions is a fundamental error that undercuts the dispersion of power among the branches and, as a result, casts doubt on the integrity of the judicial process.¹⁰³

A judge cannot serve the public interest if he must both decide the factual and legal issues *and* actively prosecute the case.¹⁰⁴

Lastly, a defendant may waive the appointment of an independent prosecutor. The Eleventh Circuit decided that a defendant may knowingly, voluntarily and effectively waive his right to have an independent prosecutor appointed.¹⁰⁵ The court did not reach the issue of whether a prosecutor needs to be appointed in all out of court contempt proceedings, as was decided by the First and Fourth Circuits.

¹⁰¹ *Id.* at 933.

¹⁰² *United States v. Neal*, 101 F.3d 993, 998 (4th Cir. 1996). [reproduced in accompanying notebook at Tab 39]

¹⁰³ *See id.* at 999.

¹⁰⁴ *See id.* at 999-1000; *United States v. Scott*, 2000 U.S. App. LEXIS 14197 *3 (4th Cir. 2000). [reproduced in accompanying notebook at Tab 40]

¹⁰⁵ *See In re Reed*, 161 F.3d 1311, 1316 (11th Cir. 1998). [reproduced in accompanying notebook at Tab 33]

- c. Canada – contempt is preferably initiated by the Attorney General, but courts appear more accepting of third parties or on their own initiating the charge

Contempt of court in Canada is similarly handled as is in the other common law countries.

“Criminal contempt for conduct ex facie the court is generally initiated by the Attorney General.”¹⁰⁶ Canada also has codified many procedural rules dealing with contempt. Contempt ex facie the court must be commenced by serving on the alleged contemtor an order, “made on the motion of a person who has an interest in the proceeding or at the Court’s own initiative.”¹⁰⁷ In addition, if the court finds it necessary, it may request the assistance of the Attorney General in any contempt proceeding.¹⁰⁸ The case law sheds some light on when that assistance may or may not be necessary.

In *Merck & Co.*, the plaintiff initiated contempt proceedings for violation of a court order in relation to a patent infringement matter.¹⁰⁹ The court found that the defendant’s argument to have the plaintiff’s counsel removed from investigating and bringing this contempt allegation was unnecessary. The court was not persuaded that any rule of fundamental justice or due process was infringed upon the defendant by having the plaintiff prepare for the show cause hearing.¹¹⁰

¹⁰⁶ *Merck & Co. v. Apotex, Inc.* [1996] F.C. 223, 241. [reproduced in accompanying notebook at Tab 22]

¹⁰⁷ *Enforcement of Orders, Right to a Hearing; Ex parte motion; Burden of Proof; Service of Contempt Order*, C.R.C., ch. 12, § 467 (1998) (Can.). [reproduced in accompanying notebook at Tab 2]

¹⁰⁸ *See Enforcement of Orders, Assistance of Attorney General*, C.R.C., ch. 12, § 471 (1998) (Can.). [reproduced in accompanying notebook at Tab 3]

¹⁰⁹ *See Merck & Co.*, [1996] 2 F.C. at 229-32. [reproduced in accompanying notebook at Tab 22]

¹¹⁰ *See id.* at 245. Indeed, the court cited cases that held the opposite but was not convinced that the same results were warranted. In *Iron Ore Co.*, the Supreme Court itself initiated proceedings against those engaged in illegal strikes. “The normal procedure, and certainly the preferable one, is that such proceedings be taken by the Attorney General.” *Id.* at 244-45 (*quoting Iron Ore Co. v. United Steel Workers of America* [1979] 20 Nfld. & P.E.I.R. 27, 45 (C.A.)). Moreover, in *Canada Post Corp.*, the court stated that it “must request in these circumstances that the

Further demonstrating that private parties may initiate contempt proceedings is *Canada v. Heritage Front*.¹¹¹ The Canadian Human Rights Commission initiated contempt proceedings against the defendants for disobeying a court order to cease delivery of telephone messages advocating hatred against minority ethnic groups.¹¹² The court mentioned that the procedural requirements of serving the accused contemtor with a show cause order were met.¹¹³ It did not discuss the way in which the charges were brought.

d. South Africa – most likely follows the United Kingdom approach to contempt proceedings

Contempt of court in South Africa has been developed by, and is a product of, English law.¹¹⁴ Over the years, the courts have tended to follow the substantive law from English cases.¹¹⁵ Therefore, it must be inferred that the courts have applied the same rules as the United Kingdom as to whether the Attorney General is the appropriate actor to initiate contempt proceedings.

Attorney General become involved so as to maintain the integrity of the judicial system in a matter of such public importance.” *Id.* (quoting *Canada Post Corp. v. Canadian Union of Postal Workers* [1991] O.J. No. 2472, 39-40 (Gen. Div.) (QL)).

¹¹¹ [1994] 3 F.C. 710. [reproduced in accompanying notebook at Tab 16]

¹¹² *See id.* at 715.

¹¹³ *See id.* at 719.

¹¹⁴ *See* J R L MILTON, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE VOLUME II* 168 (3rd 1996) [reproduced in accompanying notebook at Tab 49]; *see also* Craig Cleaver, *Ruling Without Reason: Contempt of Court and the Sub Judice Rule*, 110 S. AFR. L.J. 530 (1993). [reproduced in accompanying notebook at Tab 44]

¹¹⁵ *See* MILTON, *supra* note 114, at 171 [reproduced in accompanying notebook at Tab 49]. South African courts, however, have distinguished themselves from English courts in some specific aspects of contempt not applicable to this Memorandum. *See id.* (setting forth that “well-established principles of our own law’ [] must be applied in preference to English law.” quoting De Villiers CJ in *Fein and Cohen v. Colonial Government*, (1906) 23 SC 750, 756).

- e. Australia – the Attorney General is the preferred actor to initiate contempt proceedings.

The law of contempt in Australia is derived from the common law. An Australian Law Reform Commission recommended that the law contempt should be changed to be solely statutory based.¹¹⁶ That recommendation, however, has not been codified.

There appears to be no case law that directly addresses the issue of whether the Attorney General is the sole initiator of contempt proceedings.¹¹⁷ As in the United Kingdom, the Attorney General, or the Director of Public Prosecutions, is the *preferred* initiator of contempt proceedings.¹¹⁸ This preference stems from the public/private dichotomy where the public interest is the foundation of the Attorney General's function.

¹¹⁶ See Walker, *supra* note 58, at 585. [reproduced in accompanying notebook at Tab 52]

¹¹⁷ It may be possible for a third party to initiate contempt proceedings when dealing with the narrow area of *sub judice* contempt. See *id.* at 588.

In *Hinch*, the Attorney General filed a motion alleging that the defendants committed contempt by broadcasting certain materials related to the identity of an alleged child molester. See *Hinch v. Attorney General*, 74 A.L.R. 353 (1987) [reproduced in accompanying notebook at Tab 20]. The court held that it is for the court to determine whether an act constitutes contempt through a balancing of the competing public interests. See *id.*

In *Rich*, the Attorney General sought an order that the defendant be found in contempt of court for actions committed in the face of the court, namely, threatening the judge and the prosecutor. See *Attorney General v. Rich*, A. Crim. R. 389, 390 (1998) [reproduced in accompanying notebook at Tab 10]. The court found the defendant in contempt based upon the videotaped evidence of his actions. See *id.* at 395-96.

In *Pelechowski*, however, a private party filed a motion with the court to find the defendants in contempt for breaching a restraining order that restricted them from selling or encumbering a piece of land. See *Pelechowski*, 162 A.L.R. at 336 [reproduced in accompanying notebook at Tab 25]. This action was initiated by one who had suffered an actual injury so that this was the type of private action allowed for the breach of a court order.

¹¹⁸ One case, however, presents a different factual scenario. It appears the defendant sought contempt of a police officer witness who threatened a defense witness with a charge of perjury. See *Attorney General v. McLachlan*, 93 A. Crim. R. 557, 558-59 (1997) [reproduced in accompanying notebook at Tab 11]. The case makes no mention, however, of how the process commenced. Clearly, from the stated name of the case, it can be inferred that the Attorney General prosecuted and, probably, investigated.

III. Conclusion

In order for the Rwandan Tribunal to succeed as a fully functioning judicial body, it must recognize that the power of contempt is an inherent judicial function, as is recognized by the Yugoslavia Tribunal. In doing so, the Tribunal will benefit from all the procedures and rules that have developed over the years in the common law tradition of contempt. Not only will it benefit from this substantive body of law, but it will overcome any difficulty that may arise in regards to territorial and temporal jurisdiction.

By following the common law traditions for out of court contempt proceedings, the Tribunal will earn greater legitimacy as a judicial body. While there are a variety of exceptions existing in common law jurisdictions, it is most commonly favorable for the Prosecutor to initiate the contempt proceedings. At times, a disinterested third party may be appointed by the judge to prosecute the contempt charge, usually, only in the limited circumstances where the prosecutor declines to prosecute.¹¹⁹ Other times, the judge may initiate proceedings, usually only when it is urgent and imperative¹²⁰ or when the facts are so simple that the judge's impartiality is unquestionable.¹²¹ The Prosecutor, however, is favored over the judge because by having the judge initiate investigations, prepare witnesses and prosecute the case, the line between the judiciary and the prosecution becomes blurred, thus, creating a perception of partiality. The judge performing the prosecutor's work "casts doubt on the integrity of the judicial process."¹²²

¹¹⁹ See *Lederer*, 140 F.2d at 136. [reproduced in accompanying notebook at Tab 38]

¹²⁰ See *MacLeod*, [2001] Crim. L.R. 589. [reproduced in accompanying notebook at Tab 34]

¹²¹ See *Grand Jury*, 875 F.2d, at 933. [reproduced in accompanying notebook at Tab 19]

¹²² *Neal*, 101 F.3d, at 999. [reproduced in accompanying notebook at Tab 39]