

# THE PROSECUTOR V. ALEKSOVSKI, 30 MAY 2001, JUDGMENT ON APPEAL BY ANTO NOBILO AGAINST FINDING OF CONTEMPT: A CRITICAL ANALYSIS OF THE ICTY APPEALS CHAMBER'S ABANDONMENT OF WITNESS PROTECTION MEASURES

## I. INTRODUCTION

Witness testimony is a powerful evidentiary tool. For the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), witness testimony is integral to the proper identification and prosecution of the individuals who perpetrated the atrocities committed in the Former Yugoslavia. In Chief Prosecutor Carla Del Ponte's opening statement at Slobodan Milosević's trial, which she phrased as "clearly the most important trial to be conducted in the tribunal,"<sup>1</sup> she explicitly recognized witnesses for their courage and alluded to the relative reluctance of witnesses to come forward out of fear of persecution.<sup>2</sup> At one point, as if to alleviate their fears, Ms. Del Ponte promised witnesses the Tribunal's protection.<sup>3</sup> Lead Prosecutor Geoffrey Nice also emphasized the indispensable evidentiary value of witness testimony during his opening statement.<sup>4</sup>

Witness testimony is also compelling on a personal level. In her recently published book,<sup>5</sup> Elizabeth Neuffer followed the lives of various victims of the war and aptly described one witness's ("Hamdo") mixed

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1. Ian Fisher, *Power Drove Milosevic to Crime, Prosecutors Say as Trial Opens*, N.Y. TIMES, Feb. 13, 2002, at A1. The full opening statement is available at <http://www.un.org/icty/latest/index.htm> (last visited Dec. 25, 2002).

2. *Id.* at A16. "The witnesses must find in themselves the individual courage to give their accounts in public." *Id.* See also Diane Sabom, *ICC Fails Test of American Justice*, INSIGHT, MAY 27, 2002, available at 2002 WL 8158237 (stating that "practical problem for the ICTY has been the reluctance of witnesses to testify" and noting former ICTY Judge Patricia Wald's concern over the decreasing frequency of live witnesses).

3. Fisher, *supra* note 1 at A16. "I will seek to match [the witnesses'] strength by obtaining for them all appropriate measures of protection available under the tribunal's rules." *Id.* Ms. Del Ponte's mention of "all appropriate measures of protection" is in reference to the ICTY Rules of Procedure and Evidence. See *infra* notes 45–48 for a more complete discussion of measures of witness protection in the ICTY and ICTR.

4. *Id.* "This trial starts with a blank sheet of paper and writes on it only that which can be contributed by evidence." *Id.*

5. ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (2001). Ms. Neuffer is an award-winning reporter for the *Boston Globe*.

feelings about testifying at Dusko Tadić's trial.<sup>6</sup> Hamdo, a history teacher from Northwest Bosnia,<sup>7</sup> had known Mr. Tadić all his life; "[H]e could identify him beyond a shadow of a doubt."<sup>8</sup> But beyond its evidentiary value, for Presiding Judge Gabrielle Kirk McDonald, Hamdo's testimony allowed her and the rest of the world to hear the "inexplicable": how atrocities could be committed against Muslims by Serbs who formerly had been their friends and neighbors.<sup>9</sup> For this reason, of all the testimony that Judge McDonald heard in the Tadić case, Hamdo's was the most haunting.<sup>10</sup>

Because witness testimony is so important, the ICTY, as well as Rwanda's International Tribunal (the "ICTR") and the new International Criminal Court (the "ICC") provide for witness protection in their statutes,<sup>11</sup> rules of procedure and evidence,<sup>12</sup> and codes of professional conduct.<sup>13</sup> The ICTY, like many civil, common law, and international courts, recognizes that those who offend the judicial process by

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6. *Id.* at 183. "Hamdo was not frightened to testify, but he also wasn't eager to do it. Some of the witnesses, as they left the stand, had told him they had found the experience cathartic. They felt years drop off their shoulders when they finally confronted Tadić in a courtroom and told of his crimes. Hamdo felt differently; he saw testifying as his duty." *Id.* at 183–84.

7. *Id.* at 15.

8. *Id.* at 183.

9. *Id.* at 185. Judge McDonald asked Hamdo, in part, "How could you explain some of the atrocities that we have heard have been committed . . . . Given your background, your experience, knowing that Serbs and Muslims lived together, went to school together, intermarried, how did that happen?" To this Hamdo replied, in part,

I had the key to my next-door neighbor's [house] who was a Serb and he had my key. That is how we looked after each other. We visited each other for the holidays. My best man at my wedding was a Serb. We were friends and he was the same one who threatened us. It is inexplicable what happened to those people.

*Id.*

10. *Id.* at 183.

11. See generally Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter "ICTY Statute"], available at <http://www.un.org/icty/legaldoc/index.htm> (last visited Dec. 25, 2002); Statute of the International Criminal Tribunal for Rwanda [hereinafter "ICTR Statute"], available at: <http://www.ictcr.org/ENGLISH/basicdocs/statute.html> (last visited Dec. 25, 2002). See LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 313–89 (2002), for the most recent version of the Rome Statute of the International Criminal Court [hereinafter "Rome Statute"].

12. See generally ICTY Rules of Procedure and Evidence [hereinafter "ICTY RPE"], available at <http://www.un.org/icty/legaldoc/index.htm> (last visited Dec. 25, 2002); ICTR Rules of Procedure and Evidence [hereinafter "ICTR RPE"], available at <http://www.ictcr.org/ENGLISH/rules/index.htm> (last visited Dec. 25, 2002). See SADAT, *supra* note 11, at 391–480 (2002) for a complete finalized draft text of the Rules of Procedure and Evidence for the ICC [hereinafter "Rome Draft RPE"].

13. See generally ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal [hereinafter "ICTY Code of Professional Conduct"], available at <http://www.un.org/icty/legaldoc/index.htm> (last visited Dec. 25, 2002); ICTR Code of Professional Conduct for Defense Counsel [hereinafter "ICTR Code of Professional Conduct"], available at <http://www.ictcr.org/ENGLISH/basicdocs/codeconduct.htm> (last visited Dec. 25, 2002).

manipulating witness testimony or endangering protected witnesses<sup>14</sup> deserve punishment for acting in contempt of court.

In the most recent decision addressing allegations of contempt in the ICTY, *Prosecutor v. Aleksovski* (the “Nobilo Appeals Chamber Decision”),<sup>15</sup> Mr. Anto Nobilo appealed the Trial Chamber’s decision in *Le Procureur c/ Aleksovski* (the “Nobilo Trial Chamber Decision”),<sup>16</sup> which held that Mr. Nobilo acted in contempt of the Tribunal under Rule 77(A)(iii).<sup>17</sup> The Nobilo Trial Chamber held that Mr. Nobilo “knowingly violated” a witness’s protective order,<sup>18</sup> and he was fined.<sup>19</sup> An immediate appeal was allowed, and the Nobilo Appeals Chamber reversed the Trial Chamber’s decision.<sup>20</sup> The Appeals Chamber held that Mr. Nobilo did not have actual knowledge nor was he willfully blind to the fact that the witness in question was protected; therefore, he had not committed a knowing violation.<sup>21</sup> The Appeals Chamber directed the Registrar to repay Mr. Nobilo’s fine.<sup>22</sup> In its analysis and opinion, the Nobilo Appeals Chamber relied heavily upon *Prosecutor v. Tadić* (the “Vujin Appeals Chamber Decision”),<sup>23</sup> a recent Appeals Chamber decision.<sup>24</sup>

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14. Although the Ad Hoc Tribunals and the ICC generally allow victims and witnesses equal protection, this Recent Development is concerned specifically with witness protection and does not address special issues relating to victims of sexual assault who later take the witness stand. These issues fall outside the scope of this Recent Development. For a broader discussion of the issues surrounding sexual assault victim testimony, see KARINE LESCURE & FLORENCE TRINTIGNAC, *infra* note 41, at 43–57. See also Carlotta Gall, *A Croat’s Killing Prods Action on War Atrocities*, N.Y. TIMES, Sept. 17, 2000, at A3 (detailing a specific account of witness persecution).

15. *Prosecutor v. Aleksovski*, IT-95-14/1, ICTY App. Ch. (May 30, 2001) [hereinafter the “Nobilo Appeals Chamber Decision”], available at <http://www.un.org/icty/aleksovski/appeal/judgement/nob-ajo10530e.htm> (last visited Dec. 25, 2002).

16. *Le Procureur c/ Aleksovski*, IT-95-14/1, ICTY Tr. Ch. (Dec. 11, 1998) [hereinafter the “Nobilo Trial Chamber Decision”], available at <http://www.un.org/icty/aleksovski/trialc/judgement/nob-tj981211f.htm> (last visited Dec. 25, 2002).

17. Nobilo Trial Chamber Decision, *supra* note 16, at 5. Author’s note: paragraph numbers were not provided in the Nobilo Trial Chamber Decision. The text uses only page numbers and therefore this Recent Development references page numbers for this decision. See *infra* note 47 for the text of Rule 77.

18. *Id.* at 4.

19. *Id.* at 7. Mr. Nobilo was fined 10,000 Dutch guilders (approximately 4,200 USD) 4,000 of which was deemed immediately payable. *Id.*

20. Nobilo Appeals Chamber Decision, *supra* note 15, at para. 57.

21. *Id.* at paras. 48, 52.

22. *Id.* at para. 57.

23. *Prosecutor v. Tadic*, IT- 94-1-A-R77, ICTY App. Ch. (Jan. 31, 2000) [hereinafter “Vujin Appeals Chamber Decision”], available at <http://www.un.org/icty/tadic/appeal/vujin-e/index.htm> (last visited Dec. 25, 2002).

24. The Appeals Chamber is common to both the ICTY and the ICTR. The ICTY Appeals Chamber later disposed of the Vujin Appeals Chamber Decision and upheld its initial judgment in *Prosecutor v. Tadic*, Case IT-94-1-A-AR77, ICTY App. Ch. (Feb. 27, 2001), available at <http://www.un.org/icty/tadic/appeal/vujin-e/vuj-aj010227e.htm> (last visited Dec. 25, 2002). The latter

Part II of this Recent Development presents the history of contempt in common law, civil law, and in the ad-hoc tribunals, as well as in the ICC. Part II also discusses the Vujin Appeals Chamber Decision, in which contempt of court was an issue of first impression. Part III examines in depth the background and holding of the Nobile Appeals Chamber Decision, starting with the proceedings below in the Nobile Trial Chamber Decision. Part III also examines Judge Patrick Robinson's separate opinion. Part IV critiques of the Nobile Appeals Chamber Decision's failure to consider public policy motivations, and of Judge Robinson's opinion. Part IV also suggests that a better approach to witness protection may be available in the ICC. Part V concludes that the Nobile Appeals Chamber Decision is a judicial anomaly in violation of public policy. Instead, the rationales of the Vujin Appeals Chamber, and of the Nobile Trial Chamber should be instructive on the issue. In this respect, the ICC's approach is more likely to achieve a sound public policy result.

## II. HISTORY

### A. Contempt of Court At Common Law and Civil Law

Contempt of court (*contemptus curiae*) has been firmly rooted in English common law since the 12th century.<sup>25</sup> In general, the common law definition of contempt of court is any conduct that might disrespect the authority and administration of the law, or might interfere with or prejudice parties to or witnesses to a proceeding.<sup>26</sup> With respect to witnesses, "it is contempt for a solicitor to interfere with a witness" in any way that might impede a fair trial.<sup>27</sup> Traditional contempt actions include intimidating a witness or a possible witness to not attend court, influencing a witness against a party, bribing a witness to suppress evidence, and

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appeals chamber decision did not introduce any new facts or holdings and therefore will not be discussed further in this Recent Development. In *Prosecutor v. Simic*, IT-95-9, ICTY Tr. Ch. (June 30, 2000), available at <http://www.un.org/icty/simic/trialc3/judgement/index.htm> (last visited Dec. 25, 2002), the ICTY Trial Chamber examined allegations of contempt with respect to witness harassment and bribery. In *Prosecutor v. Simic*, no one argued that the witness' allegations, if established, would not constitute contempt, rather the issue was whether the truth of the allegations made by the witness were established beyond a reasonable doubt. *Id.* at para. 92. Ultimately, the court held that the witness' allegations were not credible. *Id.* at para. 96-100. For this reason, *Prosecutor v. Simic* is not directly relevant to this Recent Development and will not be discussed further.

25. JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT 1 (1927).

26. JAMES FRANCES OSWALD, CONTEMPT OF COURT 6 (3d ed. 1911).

27. *Id.* at 52. In the United Kingdom a "solicitor" is a "legal advisor who consults with clients and prepares legal documents but is not generally heard in High Court . . . unless specially licensed." BLACK'S LAW DICTIONARY 1399 (7th ed. 1999).

threatening to dismiss a witness from his or her employment because of his or her evidence.<sup>28</sup> Legal scholars have said that contempt of court has a “dual impact”; it not only interferes with the due administration of justice in a particular case but also encourages similar acts in the future, and affects the due administration of justice in forthcoming matters.<sup>29</sup>

Contempt may be criminal or civil in nature<sup>30</sup> but the motivation in both cases is to uphold the effective administration of justice.<sup>31</sup> Civil contempt is the failure to comply with a court order.<sup>32</sup> Historically, criminal contempt has been classified in two categories: contempt in the face of the court (*in facie curiae*) and contempt committed outside the court (*ex facie curiae*). The distinction, however, is inconsequential substantively.<sup>33</sup> Contempt in the face of the court includes unlawful interruption, disruption, or obstruction of a court proceeding.<sup>34</sup> It is settled law that common law courts have an “inherent” power to punish contempt in the face of the court.<sup>35</sup>

In both the United Kingdom and in the United States there is a tension in the relationship between contemporary notions of freedom of speech and the due administration of justice. In the United Kingdom, there is

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28. OSWALD, *supra* note 26, at 89.

29. ANTHONY ARLIDGE & DAVID EADY, *THE LAW OF CONTEMPT* 32 (1982).

30. NIGEL LOWE & GORDON BORRIE, *BORRIE AND LOWE'S LAW OF CONTEMPT* 2 (2d ed. 1983). See John R. B. Palmer, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying*, 88 CORNELL L. REV. 215, 234–38 (2002) for a discussion of U.S. Supreme Court precedent regarding civil versus criminal contempt in the context of a collateral attack.

31. LOWE & BARRIE, *supra* note 30, at 3. “If a court lacked the means to enforce its orders, if its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.” *Id.*

32. *Id.*

33. *Id.* at 7. The main difference between contempt in the face of the court and contempt committed outside the court lies in the extent of the inherent jurisdiction of different courts. *Id.* Superior courts have jurisdiction over both forms whereas inferior courts can only punish the contempt in the face of the court. *Id.* The Tribunal incorporates aspects of both civil and criminal contempt at common law into its opinions.

Mr. Nobilo failed to obey a court order and was initially fined in money damages, which suggests civil contempt, however, the court’s claim of an “inherent” power to punish contempt comports with the common law definition of criminal contempt in the face of the court. The Tribunal rarely states explicitly whether contempt is criminal or civil in its nature, perhaps because it wished to maintain a neutral tone and to avoid using an overtly common law approach. See Michael Bohlander, *International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing Before International Criminal Tribunals*, 1 SAN DIEGO INT’L L.J. 75, 96–97 (2000), for a discussion of the common law approach exemplified in the ICTY Code of Professional Conduct and ICTY RPE. See also *infra* notes 85, 113, for examples of how the ICTY tries to avoid emphasizing its common law features.

34. LOWE & BARRIE, *supra* note 30, at 6.

35. *Id.* “Being an inherent power means that it cannot be lost by technicalities . . . nor should it be regarded as being taken away, restricted or controlled by statute save where it is clear that that must be the intention of the legislature.” *Id.* at 6–7.

strong authority that the most important public interest is the due administration of justice and free speech is protected only after a trial has concluded.<sup>36</sup> Accordingly, in 1981, the United Kingdom enacted the Contempt of Court Act.<sup>37</sup> In the United States, the Constitution protects freedom of expression;<sup>38</sup> constraints on free speech are allowed only to the extent that they present a clear and present danger to the administration of justice.<sup>39</sup> However, the United States Code also specifically reserves a court's power to punish acts of contempt of its authority, including "misbehavior" while in a courtroom and "disobedience" of a court decree,<sup>40</sup> which may in some cases offend an individual's interpretation of free speech.

Although contempt is primarily a common law concept, interference with the proper administration of justice is a mutual concern among common and civil law systems. For example, the question of protection of victims and witnesses in civil law national jurisdictions has been recently addressed in France's *Nouveau Code Pénal*.<sup>41</sup> In the Vujin Appeals Chamber Decision, discussed below, the Appeals Chamber noted that

36. C.J. MILLER, CONTEMPT OF COURT 13 (1989). In the U.K. landmark decision, *Att'y Gen. v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L. 1973), an injunction was granted on behalf of a drug manufacturer, Distillers, to restrain the Sunday Times newspaper from publishing an article regarding a thalidomide tragedy. The Sunday Times published the article, which in effect pressured Distillers to make a better settlement offer to affected families. *Id.* at 243. Distillers made a formal complaint contending that the article was contempt of court. *Id.* at 243–44. Despite arguments that it would best serve the public interest to publicize the issues involved, on appeal the House of Lords upheld the injunction, and declared that any public prejudgment of the issues in pending litigation constituted a contempt tantamount to "trial by newspaper." *Id.* at 44.

37. MILLER, *supra* note 36, at 14.

38. *Id.* See also U.S. CONST. amend. I.

39. MILLER, *supra* note 36, at 13. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

40. 18 U.S.C. § 401 (2000). This section provides that:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

*Id.*

41. NOUVEAU CODE PÉNAL art. 434–15 (Fr.). This article in France's New Code of Criminal Procedure provides that suborning of witnesses is an offense to the court. *Id.* Examples of such improper conduct include: "[u]sing promises, offers, presents, pressure, threats, actions, maneuvers or ruses during proceedings or with a view to an application to the courts or by the defense in order to force another person to either make or produce a mendacious deposition, statement or evidence . . . ." *Id.* See also KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 49–50 (1996) (discussing "the question of victim and witness protection before national jurisdictions" and specific provisions of France's New Code of Criminal Procedure).

while the law of contempt has now been codified in the United Kingdom, it is essentially a broad non-statutory power within the inherent jurisdiction of a common law court.<sup>42</sup> In civil law systems, however, conduct that interferes with the proper administration of justice is governed by statutes specifying more narrowly defined conduct.<sup>43</sup>

*B. Contempt of Court In International Criminal Tribunals: Statutes, Rules of Procedure and Evidence, and the Code of Professional Conduct in the ICTY, the ICTR and the ICC*

The statutes of the ICTY and the ICTR clearly establish protection for victims and witnesses.<sup>44</sup> Each body's Rules of Procedure and Evidence impose on the Registrar a duty to create a Victims and Witnesses Unit, to recommend protective measures, and to make counseling available.<sup>45</sup> The ICTY and ICTR further provide "Measures for the Protection of Victims and Witnesses."<sup>46</sup> Both Tribunals specifically define and reserve the right to punish "Contempt of the Tribunal."<sup>47</sup>

42. *See infra* note 66.

43. *See infra* note 71. *See also* Palmer, *supra* note 30, at 239–40 n.142 (2002) ("Although it is deeply ingrained in common law thinking, the contempt power is alien to most civil law countries, which tend to view it as both unnecessary and contrary to basic notions of governance.").

44. *See* ICTY Statute, *supra* note 4, at art. 22; ICTR Statute, *supra* note 11, at art. 21.

45. *See* ICTY RPE, *supra* note 12, at Rule 34; ICTR RPE, *supra* note 12, at Rule 34.

46. *See* ICTY RPE, *supra* note 12, at Rule 75; ICTR RPE, *supra* note 12, at Rule 75. Rule 75 is almost identical in both courts. ICTR Rule 75 provides in relevant part that:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an *in camera* proceeding . . .

(C) A Chamber shall . . . control the manner of questioning to avoid any harassment or intimidation.

*Id.*

47. *See* ICTY RPE, *supra* note 12, at Rule 77; ICTR RPE, *supra* note 12, at Rule 77. The ICTY's version of Rule 77 is significantly more detailed than that of the ICTR. The ICTY's version provides in relevant part that:

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

. . .

(ii) discloses information relating to those proceedings in knowing violation of an order of 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;

. . .

The ICC also provides considerable protection for witnesses and victims. Like the ICTY and the ICTR, the ICC's statutes directly provides for the "Protection of the Victims and Witnesses and their Participation in the Proceedings."<sup>48</sup> Unlike the ICTY and the ICTR, the ICC wishes to avoid common law terminology and to maintain a neutral tone. Therefore the ICC statutes do not specifically discuss "Contempt of Court," instead granting the ICC jurisdiction over "offenses against the administration of justice," which prohibits various means of witness corruption.<sup>49</sup> The ICC has the power to sanction those who commit such offenses.<sup>50</sup>

The most significant difference between the Ad-Hoc Tribunals and the ICC is that the ICC has a more detailed Victims and Witnesses Unit in its Rules of Procedure and Evidence, in which the Registrar is charged with broader responsibilities which include making long- and short-term plans for witness protection and with taking measures to emphasize the confidential nature of witness protection.<sup>51</sup> The ICC also provides specific measures for the "Protection of Victims and Witnesses,"<sup>52</sup> and explains the

(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.

ICTY RPE, *supra* note 12, at Rule 77. See Bohlander, *supra* note 33, at 83–90 for a detailed analysis of Rule 77.

48. Rome Statute, *supra* note 11, at art. 68. The ICC takes a broad approach to witness and victim protection, but incorporates some of the wording from the ICTY and ICTR Rules of Procedure and Evidence. Rome Statute, art. 68(1) provides, in relevant part, that: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses . . ." *Id.* at art. 68(1). Rome Statute, art. 68(2) states that: "[T]he Chambers or the Court may . . . conduct any part of the proceedings in camera or allows the presentation of evidence by electronic or other special means . . ." *Id.* at art. 68(2).

49. *Id.* at art. 70(1)(c). This section allows the Court jurisdiction over the offense of "[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence." *Id.* See *supra* note 47 for comparable provisions in the ICTY. See also Bohlander, *supra* note 33, at 87 (discussing the ICC's "explicit" sanctions for contempt and comparing them to the ICTY's penalties). See also *supra* note 33, *infra* note 118, for examples of how the ICTY attempts to maintain a neutral tone.

50. Rome Statute, *supra* note 11, at art. 71.

51. Rome Draft RPE, *supra* note 12, at Rule 17. See generally *id.* at Rules 16–19. See also *infra* notes 146–51.

52. *Id.* at Rules 87–93.

consequences of offenses and misconduct against the Court, including refusal to comply with a court order.<sup>53</sup>

The Code of Professional Conduct for Defense Counsel Appearing Before the International Tribunal is another important regulatory instrument in the protection of witnesses and prevention of interference with the proper administration of justice in the ICTY and ICTR.<sup>54</sup> In the ICTY, for example, the Code imposes a duty of fair representation<sup>55</sup> and specifically defines professional misconduct on the part of defense counsel.<sup>56</sup> The ICTY and ICTR consulted the ethical codes of several civil and common law countries in creating their own Codes of Professional Conduct.<sup>57</sup> Although the ICC does not yet have a separately titled Code of Professional Conduct,<sup>58</sup> witness protection and the court's administration provisions have been provided for directly in the ICC Statute itself and in its Rules of Procedure and Evidence.<sup>59</sup>

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53. *Id.* at Rules 162–72.

54. *See generally* ICTY Code of Professional Conduct, *supra* note 13.

55. *See generally* ICTY Code of Professional Conduct, *supra* note 13, at art. 3 (iii).

56. *Id.* at art. 20. Article 35 states:

It shall be professional misconduct for counsel, *inter alia*, to:

- (i) violate or attempt to violate the statute, the Rules, this Code or any other applicable law, or to knowingly assist or induce another person to do so, or to do so through the acts of another person;
- (ii) commit a criminal act which reflects adversely on counsel's honesty, trustworthiness or fitness as counsel;
- (iii) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (iv) engage in conduct which is prejudicial to the proper administration of justice before the Tribunal; or
- (v) provide inaccurate information or fail to disclose information regarding counsel's qualifications to practice before the Tribunal as set out in the Rules and, where counsel has been assigned to a client, the Directive.

*Id.*

57. *See* Bohlander, *supra* note 33, at 81–82 (noting that the American Bar Association Code of Ethics clearly influenced the contents and wording of the ICTY Code of Professional Conduct).

58. *See* Rome Draft RPE, *supra* note 12, at Rule 8. A Code of Professional Conduct will soon be adopted. *See also* Bohlander, *supra* note 33, at 97–98 for a discussion of the future of defense ethics in the ICC.

59. *See supra* notes 48–53 for a detailed description of measures for the protection of victims and witnesses in the Rome Statute.

C. ICTY “Precedent”:<sup>60</sup> *The Vujin Appeals Chamber Decision*

Contempt of court was an issue of first impression for the Appeals Chamber in the Vujin Appeals Chamber Decision,<sup>61</sup> which set out the public policy, jurisdictional, procedural, and sentencing guidelines for future decisions.<sup>62</sup>

First, the Vujin Appeals Chamber held that public policy favors strict enforcement of the due administration of justice.<sup>63</sup> In order to ensure peace and orderly conduct, courts must have the power to enforce the judicial process and to maintain a certain appearance of dignity in the face of the public.<sup>64</sup> The law of contempt was not developed in response to offended judges or simply to punish rude behavior in court, rather, “it is justice itself which is flouted by a contempt of court[.]”<sup>65</sup>

Second, the Vujin Appeals Chamber held that the Tribunal has a pre-existing power to deal with contempt—“inherent jurisdiction.”<sup>66</sup> The Vujin Appeals Chamber began by citing Rule 77(E) of the Tribunal’s Rules of Procedure and Evidence as evidence of its inherent power to deal with contempt.<sup>67</sup> Next, the Vujin Appeals Chamber acknowledged that

60. In international law, the concept of precedent differs from that of the common law. Essentially, all opinions—judicial and academic—are of value and are incorporated into judicial opinions. There is no such thing as “binding” precedent in international law. Where “precedent” is used in this Recent Development, the author means to refer to decisions pre-dating the Nobile Appeals Chamber Decision that had a persuasive influence on its outcome. See Cecile E.M. Meijer, *News From the International Criminal Tribunal: Part I-International Criminal Tribunal for the Former Yugoslavia (ICTY)*, 9 No.1 HUM. RTS. BRIEF 27, 29–30 (2001), for a discussion of the ICTY’s complete and independent competence, even with respect to ICJ opinions.

61. *See supra* note 24.

62. *See supra* notes 63–85.

63. Vujin Appeals Chamber Decision, *supra* note 23, at para. 16.

64. *Id.*

65. *Id.* The Judgment specifically states that:

In order to avoid any misconception, it is perhaps necessary to emphasise that the law of contempt as developed at common law is not designed to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the individual court or judge who is attempting to administer justice.

*Id.*

66. *See id.* at para. 19. “The Tribunal has, since its creation, assumed the right to punish for contempt.” *Id.* Mr. Vujin made the argument that changes in the ICTY RPE prejudiced his rights. *Id.* at para. 27. The Appeals Chamber rejected this argument by saying that the Tribunal’s power is not contingent upon specific reference in the ICTY RPE. *Id.* at para. 28.

67. *Id.* at para. 12. “Nothing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice.” *Id.* (quoting ICTY RPE 77(E)). This language is now incorporated in Rule 77(A). *See supra* note 47. Later the Appeals Chamber stated that the content of its inherent power to punish contempt may not be discerned by reference to the wording of Rule 77. *Id.* at para. 24.

although the Tribunal's statute does not mention an express power to deal with contempt, the Tribunal's jurisdiction derives from its judicial functions, which are to ensure that the exercise of jurisdiction is not frustrated and to protect the basic judicial objectives; thus, the Tribunal's jurisdiction is "inherent."<sup>68</sup>

In order to ascertain the content of its inherent power, the Vujin Appeals Chamber cited the "usual sources of international law."<sup>69</sup> Absent any specific customary international law directly on point, the Charter of the International Military Tribunal, the Allied Control Council Law No. 10 (20 December 1995), and the U.S. Military Tribunals all provided an "international analogue"; that is, examples of other courts' exercise of the right to punish contempt of court.<sup>70</sup> In addition, the Vujin Appeals Chamber found the "general principles of laws common to the major legal systems of the world" to be instructive on the issue.<sup>71</sup>

Third, the Vujin Appeals Chamber determined the procedural structure of a contempt proceeding. After setting forth the specific allegations of contempt,<sup>72</sup> and examining the witnesses' statements in detail,<sup>73</sup> the Vujin Appeals Chamber cited two principles of general application particularly relevant to the issue at hand.<sup>74</sup> The first principle states that a Tribunal must look at all evidence collectively.<sup>75</sup> The second principle states that

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68. *Id.* at para. 13. *See also id.* at para. 18.

69. *Id.* at para. 13.

70. *Id.* at para. 14.

71. *Id.* at para. 15. The Vujin Appeals Chamber noted that although historically the law of contempt has always been and remains a "creature of the common law" unknown to civil law, nevertheless, many civil law systems had established similar offenses. *Id.* *See also id.* at para. 17.

Although the law of contempt has now been partially codified in the United Kingdom, the power to deal with contempt at common law has essentially remained one which is part of the inherent jurisdiction of the superior courts of record, rather than based on statute. On the other hand, the analogous control exercised in the civil law systems . . . is based solely upon statute. *Id.* (footnote omitted). The Appeals Chamber then went on to cite the German Penal Code, the Criminal Law of the People's Republic of China, the French Nouveau Code Pénal, and the Russian Criminal Code as examples. *Id.* at para. 17 n.20. Later the Chamber stated, "the *content* of [its inherent power to punish contempt] may be discerned by reference to the usual sources of international law, but not by reference to the wording of [Rule 77]." *Id.* at para. 24.

72. *Id.* at para. 41. The specific allegations against Mr. Vujin were: putting forward a case known to be false, manipulating proposed witnesses, and bribing a witness to tell lies. *Id.* For the details of the allegations and the Vujin Appeals Chamber's specific holdings for each, see *id.* at para. 131-60.

73. *Id.* at 42-90.

74. *Id.* at para. 91-93.

75. *Id.* at para. 92. This general principle states:

[A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may

statements made by witnesses out of court that conflict with statements made in court are admissible as far as they have probative value, consistent with the Tribunal's civil law hearsay approach.<sup>76</sup> In addition to the rules regarding evidence, preceding events may also be considered in order to demonstrate a particular course of conduct or to explain the events at issue.<sup>77</sup>

Fourth, the Vujin Appeals Chamber made it clear that contempt is a serious violation<sup>78</sup> requiring punishment.<sup>79</sup> Mr. Vujin committed professional misconduct.<sup>80</sup> Although the Code does not provide a specific sanction for misconduct, pursuant to the ICTY's Rules of Procedure and Evidence, Rules 45<sup>81</sup> and 46<sup>82</sup> and Article 20 of the Directive on

appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.

*Id.*

76. *Id.* at para. 93. This general principle states that:

Where such out of court statement is merely hearsay, the common law denies it any value as evidence of the truth of what has been said out of court, and restricts its relevance to the issue of the witness's credit. On the other hand, the civil law admits the hearsay material without restriction, provided that it has probative value; the weight to be afforded to it as evidence of the truth of what was said is considered at the end of all the evidence. This Tribunal has, by its Rules effectively rejected the common law approach.

*Id.* (footnote omitted). The Appeals Chamber then acknowledged that, "the weight to be afforded to [hearsay] material will *usually* be less than that given to testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay material." *Id.* See ICTY RPE, *supra* note 12, at Rule 89(C); ICTR RPE, *supra* note 12, at Rule 89(C) ("A Chamber may admit any relevant evidence which it deems to have probative value."). See also Rome Statute, *supra* note 11, at art. 69(4) (allowing the ICC to determine admissibility of evidence taking into account probative value of the evidence); Rome Draft RPE, *supra* note 12, at Rule 63.

77. Vujin Appeals Chamber Decision, *supra* note 23, at para. 94. In this decision, the Vujin Appeals Chamber considered the following: (1) entries that Mr. Tadic made in his diary regarding his concern that Mr. Vujin was not conducting a proper defense, and (2) a Yugoslav journalist's article reporting that the Serbian legal profession was working to ensure that persons before the Tribunal did not expose those connected with State leadership to risk of prosecution, regardless of a particular defendant's needs. *Id.* See also *id.* at para. 105–15.

78. *Id.* at para. 166. "Courts and tribunals necessarily rely very substantially upon the honesty and propriety of counsel in the conduct of litigation. Counsel are permitted important privileges by the law which are justified only upon the basis that they can be trusted not to abuse them." *Id.* The Appeals Chamber later stated that, in light of the additionally offensive fact that in this case, Mr. Vujin, in his capacity as defense counsel to Mr. Tadic, had acted against the interest of his client, "[t]he contempt in this case remains a serious one, no matter what disadvantage was or was not in fact caused to Tadic." *Id.* at para. 167.

79. *Id.* at para. 168. "The contempt requires punishment which serves not only as retribution for what has been done but also as deterrence of others who may be tempted to act in the same way." *Id.*

80. *Id.* at para. 169.

81. *Id.* at para. 170–72. See also ICTY RPE, *supra* note 12, at Rule 45. Rule 45(A), (B) states:

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and

Assignment of Defense Counsel, the Registrar has the power to strike any defense counsel from the list of assigned counsel, and the Chamber strongly suggested that Mr. Vujin's name be removed.<sup>83</sup> The Vujin Appeals Chamber concluded that imprisonment was too severe a punishment, but that a substantial fine, amounting to 15,000 Dutch guilders (approximately 6,250 USD), was necessary to achieve the purposes for which punishment is imposed,<sup>84</sup> namely retribution and deterrence.<sup>85</sup>

### III. THE NOBILO TRIAL CHAMBER AND APPEALS CHAMBER DECISIONS

#### A. General Background: Conflict in the Former Yugoslavia

On May 8, 1989, Slobodan Milosevic became president of Serbia.<sup>86</sup> In June of 1991, Slovenia and Croatia seceded from Yugoslavia and, soon thereafter, Slovenia won its independence.<sup>87</sup> In Croatia, however, conflict between Serbian troops and Croatian defense forces resulted in full-scale war, which did not end until January 1992.<sup>88</sup> In April of 1992, just as the United States and European countries recognized the independence of Bosnia and Herzegovina, Bosnian Serb forces attacked the Herzegovinian

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approved by the permanent Judges.

(B) A list of counsel who, in addition to fulfilling the requirements of Rule 44, have shown that they possess reasonable experience in criminal and/or international law and have indicated their willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, shall be kept by the Registrar.

*Id.*

82. Vujin Appeals Chamber Decision, *supra* note 23, at para. 170–72. See also ICTY RPE, *supra* note 12, at Rule 46. Rule 46(A)(i), (ii) states:

A) (i) A Chamber may, after a warning, refuse audience to counsel if, in its opinion, the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings.

(ii) The Chamber may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal pursuant to Rule 44 and 45.

*Id.*

83. Vujin Appeals Chamber Decision, *supra* note 23, at para. 171–172. See ICTY Statute, *supra* note 11, at art. 17, for a detailed list of the Registry's responsibilities. See Bohlander, *supra* note 33, at 83, for a discussion of the broader implications of the ICTY Code of Professional Conduct, art. 46.

84. Vujin Appeals Chamber Decision, *supra* note 23, at para. 173.

85. *Id.* at para. 168. The Tribunal imposed civil sanctions but never directly addressed whether contempt was criminal or civil in nature. See *supra* note 33, *infra* note 118, regarding the Tribunal's mixed treatment of the offense of contempt.

86. See Ian Fischer, *Milosevic on Trial: The Accusations*, N.Y. TIMES, Feb. 11, 2002, at A10, for a succinct summary of the events leading up to the conflict in the Balkans.

87. *Id.*

88. *Id.*

city of Sarajevo.<sup>89</sup> From March of 1992 until December of 1995, approximately 200,000 Bosnian Muslims, Bosnian Croats and other non-Serbs died and millions were forced to leave their homes.<sup>90</sup> It was during this time that the allegations of contempt addressed in this Recent Development took place. The ICTY has jurisdiction over crimes against humanity taking place in the Former Yugoslavia from 1991 onward.<sup>91</sup> Subsequent clashes between Serbian forces and non-Serbs continued until 1999.<sup>92</sup>

### *B. The Nobile Trial Chamber Decision*

The Nobile Trial Chamber held that when defense counsel deliberately abstains from learning the protective circumstances under which a witness gave evidence, and subsequently reveals that witness's identity, he acts in contempt of the Tribunal.<sup>93</sup>

Mr. Nobile, in his capacity as defense counsel, presented a map prepared by a protected witness in open court and asked the defense witness to identify the author of the map, thus naming Witness K, a protected witness.<sup>94</sup> On September 25, 1998, the Prosecutor lodged a

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89. *Id.*

90. *Id.* See Human Rights Watch, *Europe/Central Asia: Bosnia and Herzegovina*, at <http://www.hrw.org/europe/b-h.php> (last visited Feb. 24, 2002), for a reputable non-governmental organization's detailed account of the atrocities committed during the conflict in the Balkans.

91. Nobile Trial Chamber Decision, *supra* note 16, at 1.

92. In November 1995, Mr. Milosevic and leaders in Croatia and Bosnia signed the Dayton Accords to end the crimes being committed by Serbs against non-Serbs. Unfortunately, this did not end the violence. See Human Rights Watch, *Bosnia-Herzegovina: A Failure in the Making: Human Rights and the Dayton Agreement*, at <http://www.hrw.org/summaries/s.bosnia966.html> (last visited Feb. 24, 2002) (discussing the violence committed after the Dayton Accords).

Mr. Milosevic's trial is underway at the time of the writing of this Recent Development. This Recent Development presents a prospective approach to future decisions in the ICTY. Although this Recent Development is limited to addressing the specific decisions available at the time of its writing, should the issue of contempt arise in conjunction with Mr. Milosevic's trial, for example, it is likely that the same general issues and concerns articulated herein would apply.

93. Nobile Trial Chamber Decision, *supra* note 16, at 5. See *supra* notes 15–19, for details of Mr. Nobile's fine and punishment at the Trial Court level. All references made to the Nobile Trial Chamber have been translated by the author of this Recent Development from the original French into English. The decision is published only in French.

94. *Id.* at 3. The proceedings against Mr. Nobile arose out of the previous trial of Zlatko Aleksovski, in which Mr. Nobile was Aleksovski's defense counsel. Nobile Appeals Chamber Decision, *supra* note 15, at para. 2. The Aleksovski trial involved the evidence of a map prepared by Witness K, whose identity, face, and profession were specifically protected in order that he not face persecution for what the map revealed. *Id.* at para. 3. In order to protect his identity, the Tribunal lowered the blinds when Witness K was in the courtroom, intentionally distorted witness K's facial features on the video recording and, at all times when he could be identified, held the proceedings in "closed session." *Id.* This information was recorded in the Aleksovski transcript. See *id.* at n.3. Nobile Appeals Chamber Decision, *supra* note 15, at para. 3. The map Witness K had prepared revealed the

complaint with the Trial Chamber against Mr. Nobile<sup>95</sup> in accordance with Rule 77 of the ICTY Rules of Procedure and Evidence,<sup>96</sup> which states that those who knowingly violate the Tribunal's orders act in contempt of the Tribunal.<sup>97</sup> Mr. Nobile's defense was that he did not know of Witness K's protected status, and therefore he could not have acted in "knowing violation" as required by Rule 77.<sup>98</sup>

The Nobile Trial Chamber asserted that Mr. Nobile, in his capacity as defense counsel before the Tribunal, had certain professional and ethical obligations.<sup>99</sup> The Trial Chamber specifically emphasized the public policy

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deployment of various military forces in the Lašva Valley area in Bosnia and Herzegovina in early 1993. *Id.* at para. 4.

95. Nobile Trial Chamber Decision, *supra* note 16, 2–3.

96. *Id.* See *supra* note 47, for the text of Rule 77.

97. *Id.* The Nobile Trial Chamber relied on an earlier version of ICTY RPE 77 (A)(iii) and (v). Nobile Trial Chamber Decision, *supra* note 16, 5–6. See *supra* note 47, for an up-to-date version of ICTY RPE 77.

98. Nobile Trial Chamber Decision, *supra* note 16, at 4. Mr. Nobile pled his actions were "bonne foi," or "bona fide" ("good faith"). *Id.* According to Mr. Nobile's statement, Nobile was told that "a" witness (Witness K) had the facts, Mr. Nobile presented a map in the Aleksovski trial, which showed the deployment of military forces in the Lašva Valley area. Nobile Appeals Chamber Decision, *supra* note 16, at para. 4. Mr. Mikulicic, counsel to Mr. Aleksovski, and Mr. Nobile's roommate at The Hague, later confirmed this, and provided him with a copy of the map. Nobile Appeals Chamber Decision, *supra* note 15, at para. 12. Mr. Nobile inferred that Witness K was the sole author of the map, which Mr. Nobile later used in the Blaškic trial during witness examination, when he revealed Witness K's identity. *Id.* Although the transcript was available to him, Mr. Nobile did not read the transcript of the Aleksovski trial, which would have revealed Witness K's protected status. See Nobile Appeals Chamber Decision, *supra* note 15, at para. 12. Despite the fact that Mr. Mikulicic was present when Witness K was granted protective measures, Mr. Nobile did not ask whether Witness K was protected because Nobile never intended to reveal the witness' identity during the Blaškic trial—it was a spontaneous decision. See Nobile Appeals Chamber Decision, *supra* note 15, para. 14. See *supra* note 47, for the text of Rule 77.

99. Nobile Trial Chamber Decision, *supra* note 16, at 4. His professional obligations were to comply with the rules and decisions of the Tribunal, to take all necessary steps to ensure that his activities did not discredit the Tribunal, and to verify that none of his actions violated a Tribunal decision. *Id.* The Trial Court cited ICTY RPE 44(B), now designated as 44(C) ("Appointment, Qualifications, and Duty of Counsel") in support of this assertion. Rule 44(C) states:

In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel set out by the Registrar and approved by the permanent Judges.

ICTY RPE, *supra* note 12, at Rule 44(C). See ICTY RPE, *supra* note 12, at Rule 44–46, for the detailed qualifications expected of counsel appearing before the Tribunal.

The Nobile Trial Chamber also relied on ICTR Code of Professional Conduct, art. 12(1) ("Rules of the Tribunal") and art. 15(1) ("Impartiality of the Tribunal") for support. Nobile Trial Chamber Decision, *supra* note 4. Article 12(1) states: "[c]ounsel must at all times comply with the Rules and such rulings as to conduct and procedure as may be applied by the Tribunal in its proceedings. Counsel must at all times have due regard to the fair conduct of proceedings." ICTR Code of Professional Conduct, *supra* note 13, at art. 12(1). Article 15(1) states, "[c]ounsel must take all necessary steps to

reasons supporting witness protection, namely, that it not only protects witnesses' lives but also protects the proper functioning of the Tribunal.<sup>100</sup> The Trial Chamber held that it is a knowing violation not only to deliberately violate a court order,<sup>101</sup> but also to deliberately abstain from learning the protective circumstances under which a witness gave evidence,<sup>102</sup> as was the case with Mr. Nobile.<sup>103</sup> Neither actual knowledge nor willful blindness was specifically proven.

### C. *The Nobile Appeals Chamber Decision*

The Nobile Appeals Chamber held that there was no basis in the evidence that Mr. Nobile had actual knowledge or was willfully blind to Witness K's protective court order.<sup>104</sup> Therefore, defense counsel did not act in contempt of court in knowing violation of the Tribunal's order under Rule 77.<sup>105</sup> The Nobile Appeals Chamber thus reversed the Trial Chamber's findings, and directed the Registrar to repay Mr. Nobile the fine imposed by the Trial Chamber.<sup>106</sup>

On appeal, Mr. Nobile asserted that Rule 77 requires actual knowledge.<sup>107</sup> The prosecution countered that actual knowledge is not necessary to prove a knowing violation where willful blindness has been proven.<sup>108</sup> To resolve the matter, the Nobile Appeals Chamber relied

ensure that their actions do not bring proceedings before the Tribunal into disrepute." *Id.* at art. 15(1).

100. Nobile Trial Chamber Decision, *supra* note 16, at 4. The Chamber stated that the responsibility to protect witnesses extends to all the participants of the Tribunal's work, including lawyers. *Id.*

101. *Id.* ("Une Violation délibérée.")

102. *Id.* ("L'abstention délibérée.")

103. *Id.* at 5. The court's reasoning was fourfold. First, Mr. Nobile had assured himself that the map was a public document. Therefore, he clearly understood the importance of proper presentation of evidence. *Id.* Second, an experienced lawyer before the ICTY such as Mr. Nobile should have known to assure himself that Witness K was not protected before divulging his profession and identity before the Tribunal. *Id.* Third, the information was easily ascertainable through simple and direct means. *Id.* Finally, had he merely sought the information in a superficial manner, it would have afforded him the necessary awareness to avoid such a violation. *Id.*

104. Nobile Appeals Chamber Decision, *supra* note 15, at 48–54.

105. Nobile Appeals Chamber Decision, *supra* note 15, at para. 48–52. See *supra* note 47, for the text of Rule 77.

106. *Id.* at para. 57. See also *supra* notes 20–24.

107. *Id.* at para. 25. First, Mr. Nobile argued that that Rule 77 "requires proof of actual knowledge" of a protective order and intent to disregard it. *Id.* Second, he argued that "constructive notice is insufficient to prove actual knowledge" and there was no evidence thereof. *Id.* Third, he argued that "willful blindness is not a substitute for actual knowledge" and there was no evidence thereof. *Id.* Fourth, he argued that "any standard imposed other than actual knowledge was not an offense [understood under] international law at the time." *Id.* See *supra* note 47, for the text of Rule 77.

108. *Id.* First, the prosecution countered that "knowledge may be inferred from acts and

heavily upon the recently decided Vujin Appeals Chamber Decision.<sup>109</sup> There is no specific mention in the ICTY Statute of the Tribunal's power to punish contempt.<sup>110</sup> The issue had been one of first impression for the Vujin Appeals Chamber,<sup>111</sup> and according to the Nobile Appeals Chamber, the Vujin Appeals Chamber "clearly set out the Tribunal's power to prosecute and punish contempt."<sup>112</sup> Contempt was known to international law at the time the offense was committed and therefore the court determined that the principle of *nullum crimen sine lege* did not apply.<sup>113</sup>

In its determination of whether a knowing violation requires actual knowledge,<sup>114</sup> the Nobile Appeals Chamber examined common law cases of contempt<sup>115</sup> and determined that actual knowledge could not be

circumstances" and the evidence points to such knowledge. *Id.* Second, although the "evidence supported a finding of actual knowledge[,] . . . actual knowledge is not required where wilful blindness has been proved." *Id.* Third, the evidence supported a finding of wilful blindness. *Id.* Fourth, "there is no requirement to prove a wilful intention to disobey the [protective] order, [and] it is sufficient to establish that the act . . . was . . . deliberate and not accidental." *Id.* Fifth, ignorance of the standard imposed is no excuse for its violation. *Id.*

109. *Id.* at para. 30–35 (referring to the Vujin Appeals Chamber Decision, *supra* note 23, at para. 12–18, 25–26).

110. Nobile Appeals Chamber Decision, *supra* note 15, at para. 30 (referring to the Vujin Appeals Chamber Decision, *supra* note 23, para. 13).

111. *Id.* In the Vujin Appeals Chamber case, the court concluded that the Tribunal had, by virtue of its judicial function, the inherent jurisdiction to ensure that its express jurisdiction is not frustrated, and to punish conduct that interferes with its proper administration of justice. *Id.* See *supra* notes 60–85, for a more detailed summary of the Vujin Appeals Chamber Decision.

112. Nobile Appeals Chamber Decision, *supra* note 15, para. 35 (referring generally to Prosecutor v. Tadić, Case IT-94-I-A-AR77, ICTY App. Ch. (Feb. 27, 2001)), reaffirmed the Vujin Appeals Chamber Decision.

113. Nobile Appeals Chamber Decision, *supra* note 15, at para. 38. Mr. Nobile had argued that the international world did not know about the offense at the time and the prosecution countered that ignorance of the law is no excuse. *Id.* at para. 37. Relying upon the principle of *nullum crimen sine lege* ("no crime without a law"), the Nobile Appeals Chamber quickly disposed of this issue. *Id.* at para. 38. This principle requires that an act must constitute a crime at the time of its commission in order for a person to be found guilty of such a crime. *Id.* The Nobile Appeals Chamber reiterated that "[t]he Tribunal's inherent power to deal with contempt has necessarily existed ever since its creation, and the extent of that power has not altered by reason of the amendments made to the Tribunal's rules or by reason of its decisions interpreting or clarifying that power." *Id.*

114. *Id.* at para. 39–48.

115. *Id.* at 41. The Nobile Appeals Chamber stated:

[T]he law of contempt originated as, and has remained, a creature of common law . . . . It is therefore to the common law that reference must *initially* be made to determine the scope of the law of contempt—recognising of course that an international tribunal . . . must take into account its different setting within the basic structure of the international community.

*Id.* (footnotes omitted). The Nobile Appeals Chamber noted the following cases as examples: *Oldham's Press Ltd.*; *ex parte Attorney General* [1957] 1 Q.B. 73, 79 (discussing the deliberate publication of material with knowledge of the existence of a trial with the specific intent to influence the result); *Smith v. Lakeman* [1856] 26 Ch 306, 306 (discussing the deliberate publication of material with knowledge of the existence of a trial with the specific intent to influence the result); *Attorney Gen. v. Times Newspapers Ltd.* [1974] AC 273, 299–300, 306–07, 322–25 (H.L.) (discussing the

presumed.<sup>116</sup> The Appeals Chamber held that if the Trial Chamber had found that Mr. Nobile actually read the transcript of Witness K's evidence, or that someone told Mr. Nobile that Witness K was protected, the Appeals Chamber would conclude that Mr. Nobile had actual knowledge of the protective order.<sup>117</sup> Because the Nobile Trial Chamber had not made either finding, actual knowledge was not proven. The Appeals Chamber surmised that based on its opinion, the Trial Chamber could not have been fully satisfied of Mr. Nobile's actual knowledge beyond a "reasonable doubt."<sup>118</sup>

The Nobile Appeals Chamber accepted the prosecution's submission that willful blindness to a protective order was equally culpable as having actual knowledge and disregarding it.<sup>119</sup> The prosecution argued that because the Trial Chamber found Mr. Nobile guilty of a "deliberate failure to ascertain the circumstances surrounding Witness K's protected status,"<sup>120</sup> it intended to find that Mr. Nobile was "willfully blind."<sup>121</sup> The Appeals Chamber rejected this argument.<sup>122</sup> Alternatively, the prosecution argued that the Trial Court should have found Mr. Nobile to have been willfully blind<sup>123</sup> based on the circumstances supporting its holding.<sup>124</sup> The Appeals Chamber, however, concluded that willful blindness cannot exist

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deliberate publication of material where the material would have the effect of influencing the result); *Att'y Gen. v. News Paper Publ'g Plc.* [1988] Ch 333, 314–15, 383 (Eng. C.A.) (involving the publication of a witness' identity where protective measures have been granted on behalf of that witness with knowledge of those measures and with the specific intent to frustrate the effect of such protective measures); *Attorney Gen. v. Leveller Magazine Ltd.*, at 452, 467–68, 471–72 (discussing interference with the due administration of justice).

116. Nobile Appeals Chamber Decision, *supra* note 15, at para. 42.

117. *Id.* at para. 46–47.

118. *Id.* at para. 47. Because the Nobile Trial Chamber felt the need to extend the meaning of actual knowledge to include not only a "deliberate violation" but also a "deliberate failure to ascertain," the Appeals Chamber inferred that the Trial Chamber was not convinced that there was actual knowledge. See *supra* notes 101–02. The Tribunal's reference to proof beyond "reasonable doubt" suggests that it is treating contempt as a criminal offense, although the punishment imposed (fine) suggests that the offense is civil in nature. The Tribunal's unclear treatment of the offense appears in other contexts in which the court tries to maintain a neutral tone. See *supra* notes 33, 85.

119. Nobile Appeals Chamber Decision, *supra* note 15, at para. 43, 46. The Nobile Appeals Chamber also noted that mere negligence could never amount to "knowing and wilful" conduct, but that willful blindness is sufficiently culpable to warrant the punishment for contempt. *Id.* at para. 44–45. The Nobile Appeals Chamber left open the determination of whether other states of mind, such as reckless indifference to the existence of an order, would constitute contempt in terms of a knowing violation of the order. *Id.*

120. Nobile Appeals Chamber Decision, *supra* note 15, at para. 49.

121. *Id.*

122. *Id.*

123. *Id.* at para 50.

124. See *supra* notes 99–103.

unless there is already a suspicion that the order exists, and Mr. Nobile had no reason to suspect that Witness K was protected.<sup>125</sup>

#### *D. Judge Robinson's Separate Opinion*

In a separate opinion, Judge Patrick Robinson concurred with the Nobile Appeals Chamber's holding, although he did not believe the proceedings should have been instituted at all.<sup>126</sup> In Judge Robinson's opinion, counsel's job is to present evidence in the manner most favorable to his client.<sup>127</sup> In this case, Mr. Nobile did just that: without evidence of *mala fides*,<sup>128</sup> "counsel should be given the benefit of the doubt."<sup>129</sup> In the end, Judge Robinson concluded that "much judicial time ha[d] been unnecessarily expended in [the] matter."<sup>130</sup>

### IV. CRITIQUE

#### *A. The Nobile Appeals Chamber Sets Bad Precedent*

The Nobile Appeals Chamber carefully followed the established precedent of the Vujin Appeals Chamber Decision by asserting its inherent jurisdiction over allegations of contempt,<sup>131</sup> and procedurally, by specifically allowing evidence with probative value.<sup>132</sup> Unlike the Nobile

125. Nobile Appeals Chamber Decision, *supra* note 15, at para. 51. First, the Nobile Appeals Chamber reasoned that the fact Mr. Nobile had been told the map in question was a public document presented in open session might have given him the impression that all circumstances surrounding the map were public. *Id.* Second, the Appeals Chamber reasoned that the fact that many protected witnesses give evidence in open session does not necessarily give rise to the suspicion that the witness is protected. *Id.* Finally, the Appeals Chamber noted that had Witness K been a victim as opposed to an expert witness, "it could perhaps be argued that counsel experienced in the Tribunal's practices would be aware of the risk" of Witness K possibly being protected, but because Witness K was not a victim, circumstances requiring protective measures were not "immediately apparent." *Id.*

126. Nobile Appeals Chamber Decision, Separate Opinion of Judge Patrick Robinson, *supra* note 15, at para. 1.

127. *Id.* at para. 4.

128. *Id.* at para. 4. Judge Robinson found there to be no evidence of bad intent on Mr. Nobile's part based on the fact that he "provided a statement . . . in which he made it clear that he had not known that the witness had been granted protective measures, . . . that 'he had no motive in disclosing the witness's name . . . that he had acted in good faith and that he was very sorry that the witness's name had been revealed.'" *Id.* at para. 3.

129. *Id.* at para. 4.

130. *Id.* at para. 5. Judge Robinson declared that "[n]othing in this Opinion should be construed as in any way derogating . . . the protection of victims and witnesses . . . . However, in the result . . . much judicial time has been unnecessarily expended in this matter." *Id.*

131. See *supra* notes 66–71, 111–12.

132. Vujin Appeals Chamber Decision, *supra* note notes 15, at para. 94. Evidence was submitted in support of Mr. Nobile's contentions that he was not "willfully blind" to Witness K's protective

Trial Chamber Decision however, the Nobile Appeals Chamber patently failed to take into account<sup>133</sup> the public policy reasons supporting strict enforcement of the due administration of justice emphasized in the Vujin Appeals Chamber Decision.<sup>134</sup>

There are differences between the two cases. Namely, the Vujin Appeals Chamber was given clear evidence of contempt,<sup>135</sup> and the Nobile Trial Chamber dealt with less-conspicuous circumstances—whether or not Mr. Nobile should have known he was acting in contempt.<sup>136</sup> Also, each decision had a different Presiding Judge which may naturally account for some difference in opinion. Nevertheless, these differences are not strong enough to account for the remarkable fact that the Nobile Appeals Chamber made no reference to either the Nobile Trial Chamber or the Vujin Appeals Chamber’s emphasis on public policy.<sup>138</sup>

When an Appeals Chamber decision fails to mention the public policy repercussions of defense counsel’s violation of a witness’s court-ordered protective status, and overturns a Trial Chamber’s decision that punished such an offense, the message to potential witnesses is clear: court-ordered protection is meaningless. Such a decision contravenes the prominent public policy reasons in favor of protecting witness and punishing those who offend the judicial process. What is more, the Nobile Appeals Chamber’s message poignantly contradicts Ms. Del Ponte’s promise to protect witnesses in the ICTY.<sup>139</sup>

Judge Robinson’s separate opinion suggests that public policy considerations are irrelevant if Mr. Nobile had good intentions when he revealed Witness K’s identity.<sup>140</sup> Judge Robinson assumed that Mr. Nobile

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order.

133. The Nobile Appeals Chamber quotes verbatim the Vujin Appeals Chamber’s general submission that “it is justice itself which is flouted by a contempt of court.” Nobile Appeals Chamber Decision, *supra* note 15, at para. 36 (referring to Vujin Appeals Chamber Decision, *supra* note 23, at para. 16).

134. *See supra* notes 63–65.

135. *See supra* note 72. In the Vujin Appeals Chamber Decision, defense counsel had actual knowledge that he was presenting a false case, and expressly instructed witnesses not to name names. Vujin Appeals Chamber Decision, *supra* note 23, at para. 131–60.

136. Nobile Trial Chamber Decision, *supra* note 16, at 4. *See also supra* notes 94, 98. By presenting a map in court, and in the process of cross-examining a protected witness, defense counsel divulged the protected witness’s identity and profession. *Id.* Essentially, the difference between the two situations is that in *Vujin*, it was clear that defense counsel knew what he was doing was wrong. *See supra* notes 134–36. In the *Nobile* decisions, however, the issue came down to whether defense counsel “should have known” that he might be violating a court order. *See supra* notes 41–46, 103–10.

138. *See supra* notes 133–34.

139. *See supra* note 3.

140. Nobile Appeals Chamber Decision, Separate Opinion of Judge Patrick Robinson, *supra* note 15, 3–4.

acted in good faith and in the best interests of his client,<sup>141</sup> and concluded that without evidence of bad faith, defense counsel should be given the benefit of the doubt and prosecutorial discretion ought to be exercised in his favor.<sup>142</sup> To impute an ethical motive on the part of Mr. Nobile is overgenerous, and certainly contradicts any public efforts to protect witnesses under the Tribunal's authority and to encourage witness testimony.<sup>143</sup>

*B. The Rome Statute for the ICC—A Better System?*

Like the ICTY and the ICTR, the ICC has a special Victims and Witnesses Unit, and provides significant safeguards for their protection.<sup>144</sup> Unlike the ICTY and ICTR, the ICC places greater responsibility for witness protection on the Registrar, wherein public policy considerations are built into the system.<sup>145</sup> Among the Registrar's responsibilities in the ICC, it must provide witnesses with "adequate protective and security measures and formulat[e] long and short-term plans for their protection,"<sup>146</sup> and it must recommend a code of conduct "emphasizing the vital nature of security and confidentiality for investigators of the Court" including defense.<sup>147</sup>

Similarly, "adequate" measures in the ICTY should require specifically that the Registrar give appropriate and timely notice of a witness's protected status in the form of a court directive to counsel. Given clear directions about confidentiality and who is protected, counsel would have no excuse for revealing a protected witness's identity, whether intentional or not. In such a situation, when counsel fails to observe a court directive, he automatically commits misconduct and is subject to civil sanctions.<sup>148</sup>

With a simple amendment akin to the ICC's provisions, the ICTY and ICTR could impose a similar responsibility on the Registrar and thus

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141. See *supra* note 128.

142. See *supra* note 129.

143. See *supra* notes 2–3.

144. See *supra* notes 44–53. But see Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 128–31 (2002) (critiquing the international criminal courts incapacity to guarantee the observance of witness protection orders due to lack of state cooperation). The issue of state cooperation, although an interesting feature of the debate, falls outside the scope of this Recent Development.

145. See *infra* notes 146–47.

146. Rome Draft RPE, *supra* note 12, at Rule 17(2)(i).

147. See *id.* 17(2)(v).

148. *Id.* at Rule 171.

eliminate the problematic issue of proving actual knowledge or willful blindness.

## V. CONCLUSION

The Nobile Appeals Chamber Decision conspicuously fails to acknowledge the severe public policy repercussions of its decision, which will undoubtedly further discourage potential witnesses from coming forward in the ICTY. As it is, witnesses are reluctant to come forward, and with good reason.<sup>149</sup> In contrast, the Nobile Trial Chamber and the Vujin Appeals Chamber take a more balanced approach in their analysis of allegations of contempt, appropriately taking into account the public policy supporting witness protection measures in their final decision.<sup>150</sup> As the ICTY is not bound to follow its decisions,<sup>151</sup> the Appeals Chamber hopefully will recognize its public policy oversight in the Nobile Appeals Chamber Decision. Nevertheless, a better overall system is needed: one that accounts inherently for public policy. If notice of witness protection were a court-ordered directive in the ICTY and ICTR as it is in the ICC, any failure to comply would be professional misconduct worthy of civil sanctions. This would send the appropriate message to witnesses that their protective status is taken seriously. As it now stands, the ICC will likely achieve more consistent, public policy-oriented results for witnesses.

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149. *See supra* note 2. *See also* Gall, *supra* note 14, at A3.

150. *See supra* notes 63–65, 100–03.

151. *See supra* note 60.

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