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Muzzling the Press

When Does the Law Justify Reporting Restrictions? Contempt Cases Against Journalists at the ICTY and Beyond

Audrey Fino* and Sandra Sahyouni**,**

16.1 Introduction

‘Publicity is the very soul of justice’, the English philosopher Jeremy Bentham once wrote.¹ This and other maxims are a frequent leitmotiv to modern discourses on the need to ensure open and public trials as a means to deter abuses. Far from being shallow pronouncements, they illustrate how publicity has come to be considered one of the lynchpins of a fair trial, so intimately intertwined with it in the public consciousness as to be virtually indissociable.

In practice, however, the publicity of trials has limited capacity without other aids. The doors to a courtroom can be opened and a trial made accessible, but this only takes on effective meaning when those who can attend are also able to disseminate the details of judicial proceedings beyond the courtroom, to those who cannot. The necessary interplay between publicity and *publicizing* explains the significant role the press has assumed in concretizing the principle of a public trial, so much so that the press is now seen as being an extension of a courtroom’s public gallery.² Given this dynamic, it was perhaps inevitable that a court’s authority to limit the publicity of trials, and by extension, sanction those who contravene those limits, could be viewed as an infringement on the freedom of the press.

Constraints on freedom of the press have been most striking at international criminal tribunals, where violations of court-ordered measures have led to several landmark, yet contentious prosecutions of journalists for contempt of court, with the International Criminal Tribunal for the former Yugoslavia (ICTY), as the grandfather

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¹ J Bentham, ‘Bentham’s Draught for the Organization of the Judicial Establishments, Compared with that of the National Assembly, with a Commentary on the same’ in J Bowring (ed), *The Works of Jeremy Bentham* (vol 4, Simpkin, Marshall & Co 1863) 316.

² *R. v Burrell* (Reasons for refusing the Crown’s application for reporting restrictions on aspects of the complainant’s evidence) [2004] Central Criminal Court, 17 December 2004, para 25; *MacDougall v Knight* [1889] 14 AC 194, para 200.

of modern international criminal tribunals, paving the way. Despite developing the law on this issue, however, its prosecutions of journalists generated befuddlement, and at times controversy.

But to what extent is the controversy justified? In most jurisdictions, the right to freedom of expression, and by extension the freedom of the press, is not absolute, and subject to overriding societal priorities, such as national security, public order, and public morals.³ In the context of criminal proceedings, the right to a public trial can be curtailed if it would more adequately serve the interests of justice than publicity. Informed by a comparative look at laws and jurisprudence drawn from select common law and civil law jurisdictions, as well as those of the ICTY and the array of modern international criminal tribunals, this chapter posits that measures to restrict reporting in international criminal procedure are in fact fully in line with domestic trends and international human rights law. By extension, and despite the polemics it may cause, the ability of international criminal tribunals to hold in contempt those who violate such reporting restrictions also mirrors the powers conferred upon judges in domestic jurisdictions to sanction similar violations, whether by virtue of the common law, or on the basis of statutory provisions prohibiting the reporting of certain aspects of the judicial process. In short, the ability of international criminal tribunals to restrict the publicizing of certain information—for example, when it endangers vulnerable persons—and to subsequently punish it if it does occur, is unexceptional when considered in tandem with the ability of domestic courts to do the same.

This chapter begins by providing an overview of the facts leading to the contempt cases brought against journalists at the ICTY, International Criminal Tribunal for Rwanda (ICTR), and Special Tribunal for Lebanon (STL), exposing the criticism and controversy that the cases have sparked in the public domain, but also, to some extent, in the legal community. As these types of contempt cases often involve an underlying offence, namely the violation of a judicial order granting protective measures to victims and witnesses or an order of non-disclosure of confidential information, the chapter continues by discussing the law governing such orders—*i.e.* the law on reporting restrictions—both domestically and internationally in the context of freedom of the press. In doing so, the legal frameworks in place in the UK, Canada, France, and Italy are used as comparative reference points.⁴ Finally, the last section of the chapter analyses the actual law of contempt at international tribunals. In particular, it reviews the reasoning in the contempt judgments issued by the ICTY and the STL, with the four chosen domestic jurisdictions providing helpful reference points. On the basis of this discussion, the chapter hopes to demonstrate that criticisms against international tribunals unfairly overlook similar legal frameworks and practices domestically, and that the law of contempt at the ICTY and the STL is in line with human rights law.

³ One jurisdiction that comes to mind as evading this trend is of course the US. However, even its Supreme Court, despite upholding the primacy of the First Amendment to its Constitution on free expression and acknowledging the special role of the press under it, has held that there are cases where it is justifiable to limit or exclude the press. See *Bridges v California*, 314 US 252, 263 (1941); *Marshall v U.S.*, 360, US 310 (1959); *Estes v Texas*, 381 US 532 (1965); *Sheppard v Maxwell*, 384 US 333 (1966).

⁴ These jurisdictions were chosen, not only based on the authors' familiarity with them, but also because they offer a representative sample of legal trends in both common and civil law systems.

16.2 Factual Overview and Public Reactions to Prosecutions of Journalists at the International Tribunal

Of the larger number of contempt cases that have taken place at the international tribunals, a total of seven have involved journalists, five being at the ICTY and two at the STL.⁵ This number includes only those prosecutions that have been brought to conclusion, that is, with a final judgment being handed, whether of acquittal or guilt. In addition to these, on at least two occasions, notably at the ICTR, allegations of contempt have been brought before or by judges against the media, without however making it past this stage.

It is notable that contempt trials, while they are procedurally conducted as separate trials in their own right, typically unfold within the context of other judicial proceedings, and can be considered, in a way, their by-product. In order for anyone to be accused of interfering with the administration of justice, justice must necessarily be in the process of being administered, have been administered, or about to be administered. This will become apparent in the overview presented below, which places the contemptuous offences in the context of the broader judicial proceedings to which they are intrinsically linked.

16.2.1 The ICTY

The first contempt cases against journalists to ever be brought to trial in the modern era of the international criminal tribunals were against two Croatian journalists and an editor in the broader context of the *Blaškić* trial at the ICTY.⁶ Tihomir Blaškić was a former colonel in the Croatian Defence Council (HVO) and was in command of the HVO troops in Central Bosnia between 1993–1994 when war crimes were committed there against Bosnian Muslims.⁷ Not only was this one of the first ICTY cases against a Croat in 1996—and by then, Blaškić had been promoted to general of the army of the Republic of Croatia⁸—but,

⁵ At the ECCC, the investigating judges sought to prosecute Voice of America (Khmer) after it allegedly published confidential information. However, bar a few media releases, there is no further information publicly available on the ECCC's website: ECCC 'Statement from the Co-Investigating Judges Regarding Contempt of Court Proceedings Against Voice of America' (31 August 2011) <<https://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-contempt-court-proceedings-against-voice>> accessed February 2018; ECCC 'The Court Report (September 2011)' <<https://www.eccc.gov.kh/en/publication/court-report-september-2011>> accessed February 2018.

The SCSL has had six contempt cases, though none involved the press: *Independent Counsel v Samura* (Judgment in Contempt Proceedings) SCSL-2005-01 (26 October 2005); *Independent Counsel v Brima et al* (Sentencing Judgment in Contempt Proceedings) SCSL-2005-02 and SCSL-2005-03 (21 September 2005); *Prosecutor v Senesie* (Sentencing Judgment) SCSL-2011-01-T (12 July 2012); *Independent Counsel v Bangura et al* (Judgment in Contempt Proceedings) SCSL-2011-02-T (25 September 2012); *In the Matter of Contempt Proceedings Arising from the Case of Prosecutor v Taylor* (Judgment in Contempt Proceedings) SCSL-12-01-T (19 October 2012); *Independent Counsel v Taylor* (Judgment in Contempt Proceedings) SCSL-12-02-T (25 January 2013). The ICC has had one contempt case so far, for the offence of corruptly influencing defence witnesses and presenting their false evidence to the court under art 70 of the ICC statute: *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu, and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute') ICC-01/05-01/13 (8 March 2018).

⁶ *Prosecutor v Ivica Marijačić and Markica Rebić* IT-95-14-R77.2; *Prosecutor v Josip Jović* IT-95-14 and IT-95-14/2-R77; *Prosecutor v Domagoj Margetić* IT-95-14-R77.6; *Prosecutor v Tihomir Blaškić* IT-95-14-T.

⁷ *Prosecutor v Tihomir Blaškić* (Appeal Judgment) Case No IT-95-14-A (29 July 2004).

⁸ *Prosecutor v Tihomir Blaškić* (Judgment) IT-95-14-T (3 March 2000) para 2 and fn 2.

given the nationalistic bend of the government in Croatia at the time, any news related to this case was bound to make headlines.

It is, therefore, not surprising that in November and December 2000, the Croatian daily newspaper *Slobodna Dalmacija* published excerpts of statements by a protected witness, including his identity.⁹ The witness was none other than Stipe Mesić, who had gone on to become President of Croatia. Mesić had been granted protective measures as a prosecution witness and given testimony before the ICTY in closed session in the *Blaškić* case.¹⁰ Every few days, over a period of one month, the newspaper printed excerpts of statements he had given to the prosecution, as well as of transcripts of non-public court hearings concerning his testimony.¹¹ In spite of an order by the relevant trial chamber on 1 December 2000 to cease and desist the publications, refrain from publishing confidential information regarding any protected witness generally, and a warning that ignoring this order would expose the authors and those responsible for any publication to contempt of the tribunal, publication continued.¹²

Faced with the newspaper's continued failure to abide by the court's order, the prosecution charged *Slobodna Dalmacija's* editor-in-chief, Josip Jović, with contempt of the tribunal under Rule 77(A) and Rule 77(A)(ii) of the Rules of Procedure and Evidence (Rules) of the ICTY, which refer specifically to the ICTY's power to punish anyone who 'discloses information relating to those proceedings in knowing violation of an order of a Chamber'.¹³ Jović was charged with intentionally violating the orders of the tribunal and as such interfering with the administration of justice.¹⁴

A similar event transpired in November 2004, when the Croatian newspaper *Hrvatski List* published an article by Ivica Marijačić, the newspaper's editor-in-chief.¹⁵ The article revealed the identity of a protected witness who had testified in the *Blaškić* case in December 1997, and excerpts of a statement the witness had given to the prosecution prior to his testimony.¹⁶ The article, which also mentioned that the witness had testified in non-public proceedings before the ICTY,¹⁷ was printed next to an interview with Markica Rebić, formerly the head of the Croatian Security Information Service, an intelligence branch of the Croatian government, who was said to be the source.¹⁸

The ICTY prosecutor filed an indictment against both Marijačić and Rebić, charging them with contempt of the tribunal punishable under Rule 77(A)(ii) of the Rules for knowingly and wilfully interfering with the administration of justice, by publishing the identity

⁹ *Prosecutor v Josip Jović* (First Amended Indictment) IT-95-14 and IT-95-14/2-R77 (19 May 2006) para 4; *Prosecutor v Josip Jović* (Judgment) IT-95-14 and IT-95-14/2-R77 (30 August 2006) (Jović Trial Judgment) paras 1–2, 4.

¹⁰ Jović Trial Judgment (n 9) paras 1–2. The Appeals Chamber lifted the protective measures applicable to Mesić on 24 January 2006. Jović Trial Judgment, para 8.

¹¹ First Amended Indictment (n 9) para 4; Jović Trial Judgment (n 9) paras 3–7.

¹² First Amended Indictment (n 9) paras 5–12; Jović Trial Judgment (n 9) paras 4–6.

¹³ First Amended Indictment (n 9) paras 13–14; Jović Trial Judgment (n 9) para 10.

¹⁴ First Amended Indictment (n 9) paras 13–14; Jović Trial Judgment (n 9) para 15.

¹⁵ *Prosecutor v Ivica Marijačić and Markica Rebić* (Third Amended Indictment) IT-95-14-R77.2 (14 October 2005) paras 1, 5.

¹⁶ Third Amended Indictment (n 15) paras 3–7; *Prosecutor v Ivica Marijačić and Markica Rebić* (Judgment) IT-95-14-R77.2 (10 March 2006) (Marijačić and Rebić Trial Judgment) paras 1, 7.

¹⁷ Third Amended Indictment (n 15); Marijačić and Rebić Trial Judgment (n 16) paras 1, 7.

¹⁸ Rebić was not a journalist. Third Amended Indictment (n 15) paras 5, 7, 9; Marijačić and Rebić Trial Judgment (n 16) paras 1, 7.

of the protected witness, his statement, and the fact that he had testified in non-public proceedings.¹⁹

The intrigue around the *Blaškić* case came to a head in July 2006 when a freelance journalist from Zagreb, Domagoj Margetić,²⁰ authored an article about protected witnesses, acknowledging that their identities were protected, and published the complete witness list of the *Blaškić* case on his website.²¹ A few days later, the article was published on another website with a hyperlink to the witness list on Margetić's own website.²² Around this time, Margetić also published two more articles on his website, revealing the identity of two of the protected witnesses in the *Blaškić* case, as well as the date of their testimonies and the fact that they had testified in closed session.²³ These second and third articles were also published on other websites which hyperlinked to Margetić's own website.²⁴ On 28 July 2006, the ICTY issued an order to Margetić to immediately cease and desist from publishing the identities of protected witnesses and to remove the witness list from his website.²⁵ On 1 August 2006, the web host ceased operation of the website.²⁶

Margetić was charged with contempt of the tribunal under Rule 77(A) of the Rules for knowingly and wilfully interfering with its administration of justice when he published, for nearly a month, the witness list and related articles on his website.²⁷ The indictment further alleged that by exposing this protected material to a wider audience—through its publication and dissemination by other internet web users and by hyper-linking to the protected information—Margetić committed contempt under Rule 77(A)(iv) of the Rules by interfering with witnesses.²⁸

The fourth ICTY contempt case against the media took place in 2005 in connection with the prosecution of the Kosovar Albanians Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj.²⁹ When he was indicted, Haradinaj was about to become the prime minister of Kosovo and he was the first high-ranking Kosovar politician to be charged by the ICTY. During the Kosovo war in 1998, he was a commander of the Kosovo Liberation Army (KLA).³⁰ Balaj and Brahimaj were both members of the KLA, and Balaj was also commander of the Black Eagles, a special unit of the KLA.³¹ All three men were charged with crimes committed by KLA forces under their command in 1998 against Serb, Kosovar Roma/Egyptian civilians, and Kosovar Albanian civilians perceived to be collaborating

¹⁹ Third Amended Indictment (n 15) paras 10–12; Marijačić and Rebić Trial Judgment (n 16) paras 3–4, 7–8.

²⁰ Domagoj Margetić had been previously charged with contempt for having published protected information regarding a witness from the *Blaškić* case in the newspaper *Novo Hrvatsko Slovo*. *Prosecutor v Stjepan Šešelj, Domagoj Margetić, Marijan Križić* IT-95-14-R77.5. The prosecutor withdrew the indictment in that case before the trial started. *Prosecutor v Stjepan Šešelj, Domagoj Margetić and Marijan Križić* (Decision on the Prosecution Motion to Withdraw the Indictment) IT-95-14-R77.5 (20 June 2006).

²¹ *Prosecutor v Domagoj Margetić* (Indictment) IT-95-14-R77.6 (30 August 2006) paras 3–4; *Prosecutor v Domagoj Margetić* (Judgment on Allegations of Contempt) IT-95-14-R77.6 (7 February 2007) (Margetić Trial Judgment) paras 1–2.

²² Indictment (n 21) para 6; Margetić Trial Judgment (n 21) para 3.

²³ Indictment (n 21) paras 5, 7; Margetić Trial Judgment (n 21) para 4.

²⁴ Margetić Trial Judgment (n 21) para 4.

²⁵ Indictment (n 21) para 8; Margetić Trial Judgment (n 21) para 5.

²⁶ Indictment (n 21) para 9; Margetić Trial Judgment (n 21) para 5.

²⁷ Indictment (n 21) paras 12–13, 15; Margetić Trial Judgment (n 21) para 9–10.

²⁸ Indictment (n 21) paras 14–15; Margetić Trial Judgment (n 21) para 12.

²⁹ *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Judgment) IT-04-84-T (3 April 2008) (Haradinaj et al Trial Judgment).

³⁰ *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Fourth Amended Indictment) IT-04-84-T (16 October 2007) (Haradinaj et al Indictment) paras 2, 4–7.

³¹ Haradinaj et al Indictment (n 30) paras 9, 12.

with Serb forces in the Dukagjin area of Kosovo.³² The trial was marred by witness intimidation and fear,³³ and set against a background of deep political unrest in Kosovo, which was seeking independence from Serbia.

With political tensions around the case running high, in December 2007, during the trial, Baton Haxhiu, the editor of a Kosovar newspaper, published the name of a protected witness from the case.³⁴ The article further referred to the protected witness's supposed place of residence and mentioned that his name 'was found on the list of witnesses who were to testify under full confidentiality against Ramush Haradinaj's group'.³⁵ Haxhiu was charged on 27 June 2008 under Rule 77(A)(ii) of the Rules for writing and publishing an article in a newspaper which revealed the identity of a protected witness who had appeared in the *Haradinaj* et al trial.³⁶ According to the indictment, Haxhiu knowingly and wilfully interfered with the administration of justice in knowing violation of orders by a trial chamber of the tribunal.³⁷

The fifth case at the ICTY is in many ways distinct from the ones that came before it. Formerly a correspondent for the French newspaper *Le Monde*, Florence Hartmann had been employed as spokesperson for the office of the prosecutor of the ICTY from 2000 to 2006.³⁸ In September 2007, she authored a book entitled *Paix et Châtiment*,³⁹ which disclosed information related to two confidential decisions of the appeals chamber in the *Slobodan Milošević* case, including the content and purported effect of these decisions, as well as a specific reference to their confidential nature.⁴⁰ On 21 January 2008, she wrote an article entitled 'Vital Genocide Documents Concealed', published by the Bosnian Institute, a UK-registered charity aiming to provide education and information on the history and culture of Bosnia-Herzegovina. The article disclosed information relating to the same two confidential decisions she had discussed in her book.⁴¹

The Amended Order in Lieu of Indictment charged Hartmann with contempt punishable under Rule 77(A)(ii) of the Rules.⁴² She was indicted for knowingly and wilfully interfering with the administration of justice by disclosing confidential information in knowing violation of two decisions of the appeals chamber filed in the *Slobodan Milošević* case.⁴³

³² *ibid* paras 14, 24.

³³ *Haradinaj* et al Trial Judgment (n 29) paras 22–25, 28; *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Judgment) IT-04-84-A (19 July 2010) paras 48–49. *Haradinaj* and *Balaj* were acquitted on retrial. *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Public Judgment with Confidential Annex) IT-04-84bis-T (29 November 2012).

³⁴ The newspaper article was redacted in the indictment. *Prosecutor v Baton Haxhiu* (Order Lifting Confidentiality of the Indictment) IT-04-84-R77.5 (20 May 2008) (Public Redacted Indictment) paras 1–2; *Prosecutor v Baton Haxhiu* (Judgment on Allegations of Contempt) IT-04-84-R77.5 (24 July 2008) (*Haxhiu* Trial Judgment) para 17.

³⁵ *Haxhiu* Trial Judgment (n 34) paras 3, 17 and fn 10.

³⁶ Public Redacted Indictment (n 34); *Haxhiu* Trial Judgment (n 34) para 3.

³⁷ Public Redacted Indictment (n 34); *Haxhiu* Trial Judgment (n 34) para 3.

³⁸ In the case against *Florence Hartmann* (Amended Order in Lieu of an Indictment on Contempt and Annex to Order in Lieu of an Indictment) IT-02-54-R77.5 (27 October 2008) ((Amended Order) and (Annex) respectively) para 1, 4; in the case against *Florence Hartmann* (Judgment on Allegations of Contempt) IT-02-54-R77.5 (14 September 2009) (*Hartmann* Trial Judgment) para 1.

³⁹ Amended Order (n 38) para 1; Annex (n 38) para 2; *Hartmann* Trial Judgment (n 38) paras 2–3.

⁴⁰ Amended Order (n 38) para 1; Annex (n 38) paras 1–2; *Hartmann* Trial Judgment (n 38) paras 2–3; *Prosecutor v Slobodan Milošević*. IT-02-54-T. The two decisions of the Appeals Chamber ordered to be filed confidentially in the *Slobodan Milošević* case were (a) a decision on the request for review of the Trial Chamber's oral decision of 18 July 2005 (IT-02-54-R108bis.2), filed on 20 September 2005; and (b) a decision on the request for review of the Trial Chamber's decision of 6 December 2005 (IT-02-54-AR108bis.3), filed on 6 April 2006.

⁴¹ Amended Order (n 38) para 1; Annex (n 38) para 3; *Hartmann* Trial Judgment (n 38) para 4.

⁴² Annex (n 38) para 5.

⁴³ *ibid* para 5; *Hartmann* Trial Judgment (n 38) paras 3–4.

The case generated a great deal of public interest and controversy. Article 19, a non-governmental human rights organization that monitors threats to freedom of expression, not only called Hartmann's case 'troubling', but filed an *amicus* brief in the proceedings.⁴⁴ Its submissions included a discussion of international and national legal standards regarding freedom of expression and set out some ways in which domestic jurisdictions addressed freedom of expression in the context of contempt of court.⁴⁵ To this day, the case is the target of critical commentary. An article in the British newspaper *The Guardian*, not mincing its words, called it '[a]mong the more outrageous farces along the tribunal's long and winding road'.⁴⁶

16.2.2 The STL

The STL is unique amongst the international tribunals for having been established to try those accused of a single crime: the terrorist attack which killed the former Lebanese Prime Minister Rafik Hariri and others on 14 February 2005—though it also has jurisdiction on other attacks if these are considered connected.⁴⁷ As a result of this singular focus and given the absence, until very recently, of other cases to deflect and dilute the public's attention, the institution was particularly exposed to scrutiny. This was exacerbated by the pace of its prosecutorial work, which saw a six-year gap between the crime and the filing of an indictment in the main case under the STL's jurisdiction,⁴⁸ and a further three years between the filing of the indictment and the opening of trial on 16 January 2014.⁴⁹

It is amidst a climate of intense speculation and cynicism within Lebanon, fuelled by this long wait for results, that the events which led to the STL's two contempt prosecutions took place. Following the now familiar pattern seen at the ICTY, both cases concerned the revelation of the identities of alleged witnesses. The offences occurred six months apart, in 2012 and 2013, and built on the general curiosity about the evidence upon which the prosecution might rely to prove its case in *Prosecutor v Ayyash et al.*

In the first of the two STL contempt cases, an *amicus curiae* prosecutor recommended charges against the Lebanese television network *Al Jadeed* TV and its deputy head of news and political programmes, Karma Al Khayat. The accused had broadcast a series of reports titled 'Tribunal Witnesses' in August 2012, in which eleven purported confidential

⁴⁴ Article 19 'ICTY: Hartmann case troubling' (10 October 2011) <<https://www.refworld.org/docid/4e9437ce2.html>> accessed February 2018. In the case against *Florence Hartmann* (*Amicus Curiae* Brief on Behalf of Article 19) IT-02-54-R77.5 (18 February 2010).

⁴⁵ In the case against *Florence Hartmann* (*Amicus Curiae* Brief on Behalf of Article 19) IT-02-54-R77.5 (18 February 2010).

⁴⁶ E Vuliamy, 'Ratko Mladić Will Die in Jail. But Go to Bosnia: You'll See He Won' (*The Guardian*, 22 November 2017) <https://www.theguardian.com/commentisfree/2017/nov/22/ratko-mladic-bosnia-camps-mass-murder-torture-rape-serbian?CMP=share_btn_wa> accessed February 2018.

⁴⁷ Art 1 of the STL's Statute; Rules 11 and 12 of the STL's Rules. Three cases were found to be 'connected' to the Hariri case by the pre-trial judge: *Prosecutor v Ayyash* (Public redacted version of 'Decision on the Prosecutor's connected case submission of 30 June 2011' of 5 August 2011) STL-18-10/I/PTJ (16 September 2019). In 2019, the pre-trial judge confirmed an indictment in relation to these connected cases: *Prosecutor v. Ayyash* (Public redacted version of the 'Decision on the 13 June 2019 version of the indictment and the documents filed pursuant to the decision of 15 May 2019', dated 19 June 2019) STL-18-10/I/PTJ (16 September 2019).

⁴⁸ *Prosecutor v Ayyash et al* (Decision Relating to the Examination of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi, and Mr Assad Hassan Sabra) STL-11-01/I (28 June 2011) para 5.

⁴⁹ *Prosecutor v Ayyash et al* (Scheduling Order) STL-11-01/PT/TC (10 December 2013).

witnesses in the *Ayyash* et al case, were approached by journalists of the network using hidden cameras and asked about their involvement with the STL.⁵⁰ The reports were broadcast over a number of days, and then uploaded on the network's website, YouTube channel, and Facebook page.⁵¹ The day after the first broadcast, the STL began undertaking a number of measures to stop the dissemination, starting with a notice of cease and desist emailed to Khayat and culminating with an order from the pre-trial judge for the immediate removal of any confidential information or material allegedly related to witnesses from *Al Jadeed's* websites and any other public platforms.⁵² Finally, on 31 January 2014, Khayat and *Al Jadeed* TV were charged with knowingly and wilfully interfering with the administration of justice, first by 'broadcasting and/or publishing information on purported confidential witnesses, thereby undermining the public confidence in the STL's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses', and second by failing to remove the information from *Al Jadeed* TV's public platforms, thereby violating the pre-trial judge's order.⁵³

In the second contempt case, Ibrahim Al Amin, the editor-in-chief of the Lebanese newspaper *Al Akhbar*, was alleged to have co-authored and published two articles, on 15 and 19 January 2013, identifying and publishing the photographs of thirty-two so-called 'confidential' witnesses. The first article, 'STL Leaks: The Prosecution's Surprise Witnesses' was followed days later by one titled 'The STL List: Why We Published'. Both articles were also made available on the newspaper's website.⁵⁴ On 31 January 2014, Al Amin and *Al Akhbar* were charged with knowingly and wilfully interfering with the administration of justice.⁵⁵

The case against Al Amin and *Al Akhbar* drew comparatively less attention than the first, largely because, save for an aborted participation at the initial appearance, both refused to engage in the proceedings; they elected to remain silent during the proceedings and refused to appoint counsel.⁵⁶ Al Khayat, in contrast, appointed seasoned counsel and seized the opportunity at the opening of her trial to make an impassioned statement in court about freedom of the press.⁵⁷ Her case was widely covered in both the local and international press, the reporting often revealing a sympathetic slant to her plight and juxtaposing the case against the slow pace of the *Ayyash* et al trial and its un-apprehended accused.⁵⁸

⁵⁰ In the case against *New TV S.A.L Karma Mohamed Thasin Al Khayat* (Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment) STL-14-05/I/CJ/ (31 January 2014) paras 36, 38. The Order in Lieu of Indictment was later amended to correct the name of the corporate accused.

⁵¹ In the case against *Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (NTV) Karma Mohamed Tahsin Al Khayat* (Public Redacted Version of Judgment) STL-14-05/T/CJ (18 September 2015) (*Al Jadeed* Judgment) paras 51, 74, 130–40; in the case against *Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat* (Public Redacted Version of Judgment on Appeal) STL-14-05/A/AP (8 March 2016) (*Al Jadeed* Appeal Judgment) paras 124–53.

⁵² *Al Jadeed* Judgment (n 51) paras 9–10.

⁵³ *ibid* para 5.

⁵⁴ In the case against *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al Amin* (Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment) STL-14-06/I/CJ (31 January 2014) paras 51, 54.

⁵⁵ *ibid* Disposition.

⁵⁶ Specifically, Mr Al Amin, appearing on his behalf and that of *Al Akhbar S.A.L.*, walked out of the hearing: in the case against *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al Amin* (Transcript) STL-14-06/I/CJ (29 May 2014) 13–14.

⁵⁷ In the case against *Al Jadeed [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat* (Transcript) (20 April 2015) 48–55.

⁵⁸ O Bowcott, 'Trial of Lebanese Broadcaster Charged with Contempt of Court Opens in Hague' (*The Guardian*, 16 April 2015) <<https://www.theguardian.com/world/2015/apr/13/hezbollah-suspect-at-large-journalists-in-dock-at-hague-un-tribunal>> accessed February 2018; BBC, 'Lebanese Journalist on Trial for Contempt at Hague' (*BBC News*, 6 April 2015) <<http://www.bbc.co.uk/news/world-middle-east-32331559>> accessed February 2018; A Taylor, 'The U.N.'s Tribunal in Lebanon has Cost Millions and Made No Arrests. Now the Journalists are on Trial'

Civil society also sounded in on the debate, echoing the accused's arguments on freedom of speech and the press. When the defence filed a preliminary motion challenging the STL's jurisdiction to try a legal person—which was a first in international criminal justice—the judge invited *amicus* briefs on the issue. Eighteen briefs were received, most from past and present political figures in Lebanon, academics, and various professional associations.⁵⁹ Nearly all ignored the narrow legal issue before the judge, contending instead that the STL had no jurisdiction over contempt and that freedom of the press should override other considerations.⁶⁰

16.2.3 The ICTR

The ICTY's sister tribunal saw two contempt prosecutions brought to a procedural conclusion during its lifespan, though neither were against journalists.⁶¹ On two occasions, however, a party attempted to bring charges of contempt against the media, unsuccessfully. The first attempt unfolded during the *Bagosora* et al trial, which concerned four senior military officers charged notably with genocide, crimes against humanity, and war crimes.⁶² The prosecution became aware that Thierry Cruvellier, a journalist for the French agency *Diplomatie Judiciaire*, had mentioned the identity and profession of a would-be prosecution witness in an article published on the agency's website.⁶³ After unsuccessfully requesting Cruvellier to remove the article from the internet, the prosecution filed a motion *ex parte* before the trial chamber, arguing that he had violated standing protective measures and was therefore in contempt of court.⁶⁴ The chamber concluded, however, that based on the information in the motion, the witness was not actually covered by any protective measures.⁶⁵ Moreover, it pointed out that some of the information allegedly publicized by Cruvellier had already been mentioned in the prosecution's pre-trial brief, which was a public document, and that the witness, when he had been contacted by Cruvellier, had not appeared particularly concerned about protecting his anonymity.⁶⁶ On this basis, the chamber dismissed the motion.⁶⁷

Some years later, a Radio Rwanda journalist, Jean Gatere, faced a similar situation in another case. The defence for Augustin Ndindiliyimana, a Rwandan general charged with

(*The Washington Post*, 7 April 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/04/07/the-un-s-tribunal-in-lebanon-has-cost-millions-and-made-no-arrests-now-the-journalists-are-on-trial/?utm_term=.a88944fb7d3e> accessed February 2018; R Fisk, 'Ten Years Later, and we Still Don't Know Who Assassinated Lebanon's Leader. So Why is the Court Tasked with the Inquiry Going After a Journalist?' (*The Independent*, 12 April 2015) <<http://www.independent.co.uk/voices/comment/ten-years-later-and-we-still-don-t-know-who-assassinated-lebanons-leader-10171414.html>> accessed February 2018.

⁵⁹ In the case against *New TV S.A.L. Karma Mohamed Tahsin Al Khayat* (Decision on motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment) STL-14-05/PT/CJ (24 July 2014) para 18.

⁶⁰ *ibid* paras 14–22.

⁶¹ *Prosecutor v GAA* (Judgment and sentence) ICTR-07-90-R77-I (4 December 2007); *Prosecutor v Léonidas Nshogoza* (Judgment) ICTR-07-91-A (15 March 2010).

⁶² *Prosecutor v Bagosora et al* (Judgment and sentence) ICTR-98-41-T (18 December 2008) para 2.

⁶³ *Prosecutor v Bagosora et al* (Decision on the Prosecution motion *ex parte* in the matter of violation of the Trial Chamber's witness protection orders, and contempt of court) ICTR-98-41-T (5 July 2002).

⁶⁴ *ibid* paras 1–3.

⁶⁵ *ibid* paras 13–19.

⁶⁶ *ibid* para 20.

⁶⁷ *ibid* para 21.

genocide, claimed Gatare had published the names of two protected witnesses who had agreed to testify for the defence, in violation of a judicial order.⁶⁸ The defence made a number of related arguments, not least of which that Gatare's publication seriously undermined Ndindiliyimana's ability to defend himself because potential defence witnesses were now reluctant to testify.⁶⁹ The trial chamber concluded that no contempt had been committed.⁷⁰ It attributed the blame roundly to all the actors in the courtroom for not being more diligent in mentioning the names and pseudonyms of protected witnesses and the details of their testimony.⁷¹ The chamber also made it a point to mention that some of that sensitive information had in fact been revealed in open court by defence counsel himself, before being picked up by Radio Rwanda and redacted from the court record.⁷²

Drawing on both his and Gatare's experiences before the ICTR, Cruvellier penned a report for the non-governmental organization Reports Without Borders in the wake of the contempt proceedings against the Croatian journalists at the ICTY.⁷³ He denounced the procedural laws, arguing that in his case, the filing of the prosecution motion *ex parte* was 'contrary to the most elementary rules of due process.'⁷⁴ While he acknowledged the judges' gatekeeping role against frivolous or unsubstantiated claims of contempt, he was nevertheless highly critical of both the ICTY and ICTR for allowing such cases to even come to light. Cruvellier qualified the allegations made against him by the prosecution, and against Gatare by the defence, as a 'disturbing illustration of the dangers of arbitrariness and perversion when journalists are accused of violating orders issued by these courts.'⁷⁵

Cruvellier's pessimistic assessment of the law on contempt and his forewarning of its potential for abuse is emblematic of the reactions the cases surveyed above have often elicited in the press. This is perhaps unsurprising, for two main reasons. First, the media is arguably the entity that is the most directly impacted by reporting restrictions other than the person to whom they may be granted, since the measures typically do not conceal identities of witnesses or other information from the accused, but rather from the public at large. By definition, such restrictions constrain the press's ability to carry out its role as the public purveyor of information. It is therefore natural that the larger the constraint on its voice, the more forcefully it feels and articulates its frustration at not being able to use it.

Second, and more relevantly for the purposes of this chapter, the media's focus on what it portrays as the unfettered authority of international criminal tribunals to hold journalists in contempt is out of context, and as a result, distorted. It overlooks the fact that legislation and judicial power have been developed at the domestic level for the same purpose and with the same design. To demonstrate this relationship, the next section of this chapter will analyse reporting restrictions at the international tribunals side-by-side with their procedural equivalent in domestic jurisdictions. This will provide the backdrop to the subsequent section of the chapter, which will examine the law on contempt itself and what happens

⁶⁸ *Prosecutor v Ndindiliyimana et al* (Decision on request for certification of appeal from the decision of Trial Chamber dated 13 June 2004 (sic) dismissing applicant's request for a citation for contempt of the journalist Gatare of Radio Rwanda for publishing the names of protected witnesses) ICTR-2000-56-T (1 July 2005).

⁶⁹ *ibid.*, paras 1–6.

⁷⁰ *ibid.*, para 20.

⁷¹ *ibid.*, para 21.

⁷² *ibid.*, para 17.

⁷³ T Cruvellier, 'Why Journalists Should be Worried by the Rwanda Tribunal Precedents' (*Reports Without Borders*, 10 July 2006) <https://rsf.org/sites/default/files/rapport_gb.pdf> accessed February 2018.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

when reporting restrictions are violated by the media. In doing so, it hopes to answer the question of whether, and if so to what extent, Cruvellier's criticism is legitimate.

16.3 The Legal Basis for Restricting Reporting of Judicial Proceedings

16.3.1 In Human Rights Law

The starting point for any discussion on the media's role in reporting judicial proceedings is to underline that Bentham's dictum on the publicity of trials embodies the general rule. It is, as such, enshrined in most major international and regional human rights instruments.

The Universal Declaration of Human Rights, considered by many to be the foundation of the modern human rights framework, provides at its Article 10 that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in both civil and criminal matters.⁷⁶ The right to a public trial is further reiterated at its Article 11, which deals specifically with penal offences. Article 10 of the Universal Declaration is by and large reproduced at Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR),⁷⁷ which provides that everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal. Both the Universal Declaration and the ICCPR are phrased in a way that juxtaposes publicity with fairness and identifies the two as distinct elements, rather than one being a component of the other. The dichotomy is explained by the fact that, contrary to a fair trial, a public trial is not an end in and of itself in the context of human rights.⁷⁸ It is instead a means to assess whether the components that render a trial fair are present. By being subjected to society's watchful eye, the reasoning goes, a court is much less likely to engage in abuses.⁷⁹

In laying out the general principle on the publicity of trials, regional human rights instruments reprise the language from the ICCPR. The American Convention on Human Rights⁸⁰ and the European Convention on Human Rights⁸¹—which are the two oldest regional human rights treaties and the ones with the most extensive body of jurisprudence—as well

⁷⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 127 A (III) (Universal Declaration). On the status of the Universal Declaration in public international law, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 57; *United States v Iran* (Judgment of 24 May) [1980] ICJ Rep 3, para 42; H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–1996) 25 *Georgia Journal of International and Comparative Law* 287; N S Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 *International and Comparative Law Quarterly* 326, 333.

⁷⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷⁸ B McLachlin, 'Courts, Transparency and Public Confidence—To the Better Administration of Justice' (2003) 8 *Deakin Law Review* 1, 11.

⁷⁹ *Attorney-General v Leveller Magazine Ltd*, [1979] AC 440, para 450; J J Spigelman, 'Seen to be Done: The Principle of Open Justice—Part II' (2000) 74 *Australian Law Journal* 378, 378; A Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 19, 162.

⁸⁰ American Convention on Human Rights (adopted on 22 November 1969, entered into force July 1978) 1144 UNTS 123 (American Convention) art 8(5).

⁸¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (entered into force on 4 November 1950) ETS 5 (European Convention) art 6(1).

the Association of Southeast Asian Nations (ASEAN) Declaration on Human Rights⁸² and the Arab Charter on Human Rights,⁸³ which are more recent offshoots, all explicitly state that judicial proceedings shall be public in criminal matters. The African Charter of Human and Peoples' Rights is unique in making no mention of publicity at its provision on the right to fair trial.⁸⁴ Despite this textual lacuna—or perhaps, because of it—the African Commission on Human and Peoples' Rights has nevertheless made it clear that the right to a fair trial also includes the right to a public hearing.⁸⁵

None of these texts, however, make the right to a public trial absolute and non-derogable. The Universal Declaration allows for the exercise of rights and freedoms to be subjected to legal limitations so long as they are for the purpose of 'securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.⁸⁶

The ICCPR contains a detailed limitation to the right to a public trial:

[...] The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁸⁷

The publicity of a trial can also be limited under the ICCPR because of the 'special duties and responsibilities' that accompany freedom of expression.⁸⁸ Article 19(3) on the right to freedom of expression specifies that it may be subject to certain restrictions, on condition that these are provided by law, and necessary for the respect of the rights and reputations of others, the protection of national security, public order, public health, or morals. In commenting on this provision, the ICCPR's monitoring body, the Human Rights Committee, has stated that the restrictions must be appropriate to achieve their protective function, proportionate to the interest to be protected, and the least intrusive option available.⁸⁹

⁸² ASEAN Human Rights Declaration (Adopted on 18 November 2012) art 20(1). The ASEAN Declaration is not a binding treaty as such: see C S Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 13 Human Rights Law Review 557.

⁸³ Arab Charter on Human Rights (Adopted 22 May 2004, entered into force 15 March 2008) (2005) 12 International Human Rights Report 893 (Arab Charter) art 13(2).

⁸⁴ The African Charter of Human and Peoples' Rights (Adopted 27 June 1981, entered into force 21 October 1981) (1982) 21 ILM 58, art 7. It should be noted that both the ASEAN Human Rights Declaration and the Arab Charter have been criticized for not meeting international norms on human rights: UN News Centre, 'Arab rights charter deviates from international standards, says UN official' (30 January 2008) <<http://www.un.org/apps/news/story.asp?NewsID=25447#.Wep1a0x7FBw>> accessed February 2018; Human Rights Watch, 'Civil society denounces adoption of flawed ASEAN Human Rights Declaration' (19 November 2012) <<https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>> accessed February 2018.

⁸⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) DOC/OS (XXX)247, (A) (3); Amnesty International 'A Guide to the African Charter on Human and Peoples' Rights' (2006) <<https://www.amnesty.org/download/Documents/76000/ior630052006en.pdf>> accessed February 2018.

⁸⁶ Universal Declaration art 29(2).

⁸⁷ ICCPR art 14(1).

⁸⁸ ICCPR art 19(3).

⁸⁹ UN Human Rights Committee 'General Comment No 34' (12 September 2011) CCPR/C/GC/34 paras 22, 34.

The European Convention very closely mirrors the ICCPR's formulation of the right to a public trial, though it also includes the interests of juveniles amongst the grounds on the basis of which the press and public can be excluded from judicial hearings:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁹⁰

Similarly to the ICCPR, the European Convention's provision on the right to a public trial should, for completeness sake, be read side-by-side with its provision on freedom of expression.⁹¹ In the same way that trial publicity is subjected to limitations, the European Convention conditions the right to freedom of expression (including the freedom to impart information), to 'special duties and responsibilities.'

The other regional instruments equally subject the right to a public trial and the freedom of expression to other overriding interests, but with some nuances. Although the ASEAN Human Rights Declaration does not qualify the right to a fair trial in any way, it contains a general provision stating that rights and freedoms can be curtailed if provided by law and solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the requirements of national security, public order, health, public safety, public morality, and the 'general welfare of the peoples in a democratic society'.⁹²

The American Convention on Human Rights and the Arab Charter stand somewhat apart from their counterparts by subjecting the publicity of criminal trials only to the interests of justice, rather than broader societal interests.⁹³ In this sense, they create what is arguably the narrowest exception to publicity amongst both the regional and international human rights instruments. Again, however, as with the other human rights instruments, this is counterbalanced by the provision limiting the right to freedom of expression in wording that is nearly identical to Article 19(3) of the ICCPR.⁹⁴

16.3.2 Domestic Jurisdictions

The bases on which the international human rights instruments allow limitations to the publicity of a trial have been conjugated at the domestic level in a variety of ways. With respect to the rights of the accused, it has meant that journalists can be restricted from reporting on aspects of a trial if doing so would undermine the presumption of innocence. In Canada for instance, at the stage of deciding on an accused's interim release, the prosecutor or the accused may request a judge to order that certain matters not be published for a specific period.⁹⁵ The temporal scope of the reporting ban or restriction issued under this

⁹⁰ European Convention art 6(1).

⁹¹ European Convention art 19(2)—(3).

⁹² ASEAN Human Rights Declaration art 8.

⁹³ American Convention art 8(5); Arab Charter art 13(2).

⁹⁴ American Convention art 13(2); Arab Charter art 32(2).

⁹⁵ Criminal Code, RSC, 1985, c C-46 (Canadian Criminal Code) s 517.

provision is noteworthy: it must essentially remain in force until the proceedings against the accused come to a close. This is summed up quite aptly in a guidebook designed to explain the Canadian justice system to journalists: ‘Once the need to protect the right to a fair trial evaporates, the media can report everything said at the hearing.’⁹⁶ In addition, where the law grants a judge the discretion to order a publication ban, the Canadian Supreme Court has held that a test of necessity applies. Specifically, a publication ban should only be ordered when it is necessary to prevent real and substantial risk to the fairness of a trial, and because the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.⁹⁷

Similar legislation to protect the presumption of innocence exists in France and Italy, where the law governing the freedom of the press forbids the dissemination of images of anyone in handcuffs or other types of restraints if that person has not yet been found guilty.⁹⁸ More fundamentally of course, these civil law jurisdictions have as a cornerstone to their criminal justice system ‘*le secret de l’instruction*’, the principle according to which the investigation led by the *juge d’instruction* (the investigating magistrate) must remain secret, notably in order to protect the rights of the accused to a fair trial.⁹⁹ In a case concerning the publication of secret judicial documents by a Swiss journalist, the European Court of Human Rights observed that the disclosure of information protected by the ‘*secret de l’instruction*’ was punishable in thirty Council of Europe States.¹⁰⁰

Notwithstanding the fact that protecting the rights of the accused also serves the broader interests of society, legislation in various domestic jurisdictions also imposes limits on the publicity of trials with the goal of protecting the rights of persons other than the accused, the most salient example being the protection of vulnerable persons, such as victims of serious crimes and minors. A State’s sense of responsibility towards vulnerable persons permeates both criminal and civil proceedings. It is the reason, for instance, that in family law cases, where divorce proceedings and child custody battles often risk exposing children to the media’s glare, the names of minors and their parents remain confidential. The protection of such identifying information often does not even need to reach judicial consideration to come into play; it is laid down as a rule by law, in what is known as an ‘automatic’ reporting restriction.¹⁰¹

As to criminal proceedings, the United Kingdom, for instance, gives victims of sexual offences lifetime anonymity.¹⁰² At the stage where only an allegation of a sexual offence is made, the name and address of the victim cannot be published if they can lead to the victim’s identification. Where a suspect has formally been accused of committing a sexual offence, however, the prohibition is categorical and broad: nothing that is likely to lead members of the public to identify the victim can be published during his or her lifetime.¹⁰³ Somewhat less forceful, Canadian criminal law makes reporting restrictions for sexual

⁹⁶ Canadian Judicial Council, *The Canadian Justice System and the Media* (Ottawa 2007) 24.

⁹⁷ *Dagenais v Canadian Broadcasting Corporation* [1994] 3 RCS 835, 875, 878.

⁹⁸ Loi du 29 juillet 1881 sur la liberté de la presse (last modified 29 January 2017) art 35 *ter*; Codice di procedura penale art 114 (6)(bis).

⁹⁹ Codice di procedura penale art 114 (1)-(2), 329.

¹⁰⁰ *Bédat v Switzerland* (2016) ECHR 313, 80–81.

¹⁰¹ Children Act 1989 (UK), s 97; Child and Family Services Act, RSO 1990, c C-11 (Canada), sub-s 45 (8); Loi du 29 juillet 1881 sur la liberté de la presse, art 39 *bis*; Cass No 6338/1994. Referring to DPR fn 448, art 13, 22 September 1988 (Italy).

¹⁰² Sexual Offences (Amendment) Act 1992 (UK) s 1.

¹⁰³ *ibid.*

offences automatic, but only once it is requested from the victim.¹⁰⁴ French law is equally protective of victims of sexual crimes.¹⁰⁵

In addition to protections afforded to victims, the identities of witnesses can also be protected from the public during criminal proceedings, whether because the witnesses are vulnerable, or because their anonymity is part and parcel of what allows them to conduct their work, as is the case with law enforcement officers and informants.¹⁰⁶ Moreover, the Canadian Criminal Code allows judges to order that any information that could identify a witness not be disclosed in the course of the proceedings if it is in the interests of the proper administration of justice, taking into account factors such as the right to a fair and public hearing, the existence of effective alternatives, and society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process.¹⁰⁷

It is worth specifying that forbidding the media from publishing information is not necessarily tantamount to barring them from the courtroom. In fact, the two are quite distinct, as the law can restrict reporting without limiting access to a courtroom, and vice versa.¹⁰⁸ Implicit in allowing access while forbidding publicization, is an assumption (and trust) that journalists, despite being privy to information, will refrain from disseminating it knowing that doing so is against the law. Judges often remind the public of this obligation orally in court, or with a notice prefacing their judgments.¹⁰⁹ On a more substantial level, 'exclusion orders' limiting access to a courtroom often fulfil a more immediate and short-termed purpose than reporting restrictions, namely to reduce the intimidating nature of the setting, particularly when vulnerable persons are testifying.¹¹⁰

This review of domestic legislation is representative rather than exhaustive. It illustrates nevertheless that in jurisdictions of distinct legal traditions, despite procedural nuances, the exceptions on the basis of which the publicity of trials can be limited are similar, if not identical. It is interesting to observe that there is a decent level of awareness of this legal landscape within journalistic communities. Large media outlets have detailed guidelines for both their employees and the public, explaining the legal context within which they operate. As an example, the United Kingdom's British Broadcasting Corporation (BBC) and Channel 4 networks have handbooks and editorial guidelines on their websites outlining the parameters of reporting on legal proceedings.¹¹¹ The Canadian Broadcasting Corporation (CBC)'s website on Journalistic Standards and Practices similarly declares:

¹⁰⁴ Canadian Criminal Code, s 486.4.

¹⁰⁵ Loi du 29 juillet 1881 sur la liberté de la presse (n 98) art 39 *quinquies*.

¹⁰⁶ Serious Organised Crime and Police Act 2005 (UK), s 75; Canadian Criminal Code (n 95) s 486.4, 486.5, 486.31; Loi du 29 juillet 1881 sur la liberté de la presse (n 98) art 39 *sexies*.

¹⁰⁷ Canadian Criminal Code (n 95) s 486.31.

¹⁰⁸ See Serious Organised Crime and Police Act 2005 (UK), s 75 (2) (a) (b); Codice di procedura penale art 473(2)

¹⁰⁹ In Canada: *Children's Aid Society of the Region of Peel v F.* (K.J.) [2009] ONCJ 252 (CanLII); *R v J.S.D.* [2014] BCCA 284 (CanLII); *R v Waterhouse* [2017] BCSC 999 (CanLII); *R v Mastop* [2013] BCCA 494 (CanLII); *Carlson v CBD* [2013] SKQB 351; *R v El Aitki* [2011] QCCQ 914; Barnes (Re) [2016] CanLII 35043 (NL SCTD). In the United Kingdom: Re R (Closed Material Procedure: Special Advocates: Funding) [2017] EWHC 1793 (Fam); *B v D* [2017] EWCOP 15; *Appleton v Gallagher* [2015] EWHC 2689 (Fam).

¹¹⁰ Children and Young Persons Act 1933 (UK) s 37; Code de procédure pénale, art 306, 306-1; Codice di procedura penale, art 472(3*bis*); *R v Burrell* (n 2) para 38. Exclusion orders have declined in recent years in Canada because of the increased use of videotaping and shielding screens during the testimony of vulnerable persons: Canadian Judicial Council *The Canadian Justice System and the Media* (n 96) 22.

¹¹¹ BBC, Editorial Guidelines <<http://www.bbc.co.uk/editorialguidelines/guidelines/law>> accessed February 2018; Channel 4, Producers Handbook <<http://www.channel4.com/producers-handbook/media-law/contempt-and-reporting-legal-proceedings>> accessed February 2018.

We take care not to compromise the proper course of ongoing or potential legal proceedings and to take into account the presumption of innocence enjoyed by every person accused of a crime.

In many situations the law imposes restrictions such as publication bans, sealing of documents and closed-door proceedings. Such orders are sometimes automatic or sometimes issued in the course of a proceeding. Reporters have a duty to inform themselves of the existence and nature of these orders and to understand their scope.¹¹²

The CBC even undertakes not to disclose any information that would identify a victim, witness, or accused ‘by deduction’ if a publication ban is in place.¹¹³

In France, the news agency *Agence France Press* (AFP) calls for its journalists to be cognizant of the legal definition of minors before interviewing or filming children and to make themselves aware of any legislation governing the media coverage of minors whether they are victims, authors of, or witnesses to a crime.¹¹⁴ Lastly, in Italy, the Order of Journalists has guidelines on the responsibilities of journalists when reporting on, for instance, minors and other vulnerable individuals, and information surrounding criminal proceedings.¹¹⁵ *Radio Televisione Italiana* (RAI), the Italian state media corporation, has a Code of Ethics for its employees outlining the same responsibilities.¹¹⁶

16.3.3 At the ICTY

The right to a public trial, as well as the related string of exceptions, has been repressed by the international criminal tribunals. As one ICTY trial chamber stated, ‘[o]ver and above the reasons that public proceedings facilitate public knowledge and understanding and may have a general deterrent effect, the public should have the opportunity to assess the fairness of the proceedings. Justice should not only be done, it should be seen to be done.’¹¹⁷ While the accused at the ICTY were entitled to a fair and public hearing, this could be restricted on a number of grounds¹¹⁸

Rule 79(A) of the ICTY Rules covered these grounds. Thus, a trial chamber could order that the press and the public be excluded from all or part of the proceedings for reasons of: public order or morality; the safety, security, or non-disclosure of the identity of a victim or witness; or the protection of the interests of justice.¹¹⁹

¹¹² CBC, Reporting to Canadians, Journalistic Standards and Practices <<https://cbc.radio-canada.ca/en/vision/governance/journalistic-standards-and-practices>> accessed February 2018.

¹¹³ *ibid.*

¹¹⁴ Charte AFP des bonnes pratiques éditoriales et déontologiques (22 juin 2016) 10 <https://www.afp.com/sites/default/files/paragraphrich/201704/22_juin_2016_charte_deontologique.pdf> accessed February 2018. The major French news outlets do not otherwise appear to have editorial guidelines like those of the CBC, BBC, and Channel 4, at least not publicly available.

¹¹⁵ Testo unico dei doveri del giornalista (19 February 2016) art 5–6 <<http://www.odg.it/content/testo-unico-dei-doveri-del-giornalista>> accessed February 2018.

¹¹⁶ RAI Codice Etico 8 <http://www.rai.it/dl/doc/1507016930316_CODICE%20ETICO%20cda%2027%20luglio%202017_Eng.pdf> accessed February 2018.

¹¹⁷ *Prosecutor v. Kunarac et al* (Order on Defence Motion pursuant to Rule 79) IT-96-23-T (22 March 2000) para 5; see also *Prosecutor v. Karadžić* (Decision on Prosecution’s Motion for Protective Measure for Witness KDZ487) IT-95-5/18-T (24 November 2009) para 18.

¹¹⁸ ICTY Statute, art 20(4), 21(2) 22; ICTY Rule 78.

¹¹⁹ ICTY Rule 79.

Furthermore, the ICTY Rules allowed the prosecutor to be relieved of the obligation to disclose information not only to the public, but even to the defence, if such disclosure affected the prosecution's further or ongoing investigations,¹²⁰ was contrary to the public interest, for any other reasons, or affected the security interests of any State.¹²¹ The Rules referred to an exhaustive list of exceptions to a public trial. It is, however, testimony to the fact that restricted access to information surrounding a trial was an exception, that the ICTY Rules required chambers to publicly reason any decision to order such a restriction.¹²²

The protection of vulnerable victims and witnesses was most often the reason why the public and the press were excluded from attending or reporting on ICTY proceedings. At the pre-trial stage, the protective measure usually took the form of delayed disclosure to the defence (and to the public at large) of the identity of the prosecution witnesses and the likely subject of their testimony at trial.¹²³ In exceptional circumstances, it was permissible to delay disclosure until such time as the preparation of the defence would not be adversely affected.¹²⁴ Disclosure of the identity of witnesses was at times even delayed until after the trial commenced.¹²⁵ During the trial itself, however, an order of confidentiality given by a chamber, as envisaged in Rules 69 and 75 of the ICTY Rules, was the most common way to protect victims and witnesses. Rule 69(A) held that in exceptional circumstances, either party could request the non-disclosure of the identity of a victim or witness who was in danger or at risk until such person was brought under the protection of the tribunal. Rule 75 listed the measures that could be taken, even *proprio motu* by the chamber, as long as they were consistent with the rights of the accused. These were:

- (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
 - (a) expunging names and identifying information from the Tribunal's public records;
 - (b) non-disclosure to the public of any records identifying the victim or witness;
 - (c) giving of testimony through image—or voice—altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
- (ii) closed sessions, in accordance with Rule 79;
- (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Good cause had to be shown for protective measures to be granted.¹²⁶ The ordering of closed session was the most extreme protective measure that could be taken.¹²⁷ It meant

¹²⁰ ICTY Rule 66(C).

¹²¹ ICTY Rules 66(C), 68(iv).

¹²² For instance, the appeals chamber held that a trial chamber had erred by holding a hearing in closed session without prior notice to the public. This did not however amount to a miscarriage of justice or prejudice to the accused Jokić. *Contempt proceedings against Jokić* (Judgment on Allegations of Contempt) IT-05-88-R77.1-A (3 July 2009) para 26.

¹²³ ICTY Rule 69.

¹²⁴ *ibid.*

¹²⁵ See e.g. *Prosecutor v Šešelj* (Decision on Vojislav Šešelj's Appeal against the Trial Chamber's Oral Decision of 7 November 2007) IT-03-67-AR73.6 (24 January 2008) para 15; *Prosecutor v Karadžić* (Decision on Accused's Sixty-Sixth Disclosure Violation Motion) IT-95-5/18-T (8 February 2012) para 17.

¹²⁶ *Prosecutor v Brđanin & Talić* (Decision on Motion by Prosecution for Protective Measures) IT-99-36-PT (3 July 2000) para 53.

¹²⁷ *Prosecutor v Milošević* (Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)) IT-02-54-T (30 July 2002) para 6.

that the audio and video broadcast of the court proceedings was suspended and blinds were lowered in the courtroom so that members of the press and public sitting in the public gallery would not be able to see or hear any part of the proceedings.¹²⁸ The transcript of a closed session was marked as such, and was not made available to the public.¹²⁹ A private session was similar in nature to a closed session but was generally used for short periods during proceedings.¹³⁰ When a chamber ordered a private session, the audio and video broadcast was suspended, but the blinds in the courtroom were not lowered; therefore those sitting in the public gallery were able to see the proceedings, though they were unable to hear anything being said.¹³¹ Those parts of the proceedings that were conducted in private session were redacted from the public version of the transcript.¹³² A public hearing could be turned into a private session at any time if the need arose.

ICTY jurisprudence required that there be an objective risk to the security or welfare of a witness or his or her family for protective measures to be granted.¹³³ The more extreme the protection sought, the more onerous the obligation upon the party requesting it to establish the risk involved.¹³⁴ The minimum measure required to protect the witness' legitimate fears was normally taken.¹³⁵

Protective orders were also necessary to protect the right to privacy of victims and witnesses in cases of violent crime, such as sexual assault. Rules 75(A) and 79(A)(ii) of the Rules were broad enough to cover such cases. Moreover, protective measures were also necessary to protect not only victims and witnesses but also their families from serious threats, for instance, in situations where the victims or potential witnesses, by giving testimony before the ICTY, were perceived by their community as collaborating with the enemy.¹³⁶ Despite the end of the conflict, this protection was vital in the cases heard before the ICTY, where ethnic divisions, if not tensions, persisted.

Another established practice of the ICTY was to issue redacted versions of judicial documents, when the latter contained information which, if disclosed, could cause prejudice, concerns about safety, or serious embarrassment to a party or a witness.¹³⁷

¹²⁸ *Marijačić & Rebić* Trial Judgment (n 16) para 24.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *Prosecutor v Milutinović et al* (Decision on Lazarević Motion for Protective Measures for Witness SD3) IT-05-87-T (28 November 2007) para 3.

¹³⁴ *Prosecutor v Milošević* (n 127) para 5; *Prosecutor v Milošević* (Decision on Prosecution's Motion for Protective Measures) IT-98-29/1-T (12 February 2007) 11; *Prosecutor v Milutinović et al* (Decision on Lazarević Motion for Protective Measures for Witness SD3) IT-05-87-T (28 November 2007) 3.

¹³⁵ *Prosecutor v Milošević* (Decision on Prosecution's Motion for Protective Measures) IT-98-29/1-T (12 February 2007) para 11; *Prosecutor v Milošević* (n 127) para 5. Closed session was granted, for example, in the case of a prosecution Muslim witness who lived in a community with violent Serb nationalist elements, where it was shown that there could be repercussions from supporters of the Serb accused. The fact that the accused's case had a higher profile than the previous case in which the witness had testified in public session was also a consideration in favour of closed session. *Prosecutor v Popović et al* (Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084) IT-05-88-A and IT-95-5/18-T (10 May 2012) para 3.

¹³⁶ Furthermore, information relating to the genetic material of alleged victims, including the genetic material of family members, was kept confidential under Rule 75 in order to protect their privacy. *Prosecutor v Karadžić*, (Decision on the Accused's Motion to Unseal ICMP Exhibits) IT-95-5/18-T (25 April 2012) para 9.

¹³⁷ *Prosecutor v Popović et al* (Judgment) IT-05-88-A (30 January 2015) para 1957.

The practice also extended to judgments.¹³⁸ As such, the public redacted version of a judgment sufficiently allowed for public scrutiny of the judgment in order to safeguard the right to a fair trial.¹³⁹

In the broader context of large-scale atrocities and armed conflict, national security interests were of particular relevance to international criminal proceedings. Absent its own police force, the prosecution, in its role of investigating international crimes, was therefore heavily dependent on intelligence and sensitive information provided by States and international organizations. Disclosure of maps, aerial photographs (of mass graves sites, for instance), and intercepted communications or other contemporaneous evidence, in the form of internal reports or communications, at times shed light on the context of an armed conflict, and the linkage evidence needed for effective prosecution of high-level political and military leaders. Because of national State security interests, States or organizations would consequently only be forthcoming with information on condition of confidentiality.¹⁴⁰ This was regulated by Rule 70 of the ICTY Rules, on the basis of which the identity of the sources of the information could be redacted, as well as contacts with intelligence agencies of other countries.¹⁴¹ States have nonetheless not been allowed to use Rule 70 ‘as a blanket right to withhold, for security purposes, documents necessary for trial from being disclosed’ for use as evidence, as this would defeat the very purpose of the ICTY.¹⁴² Indeed, such an interpretation of Rule 70 would conflict with a State’s obligation under Article 29 to co-operate with the ICTY.¹⁴³

As to the ‘public order’ as a reason to limit publicity of some aspects of a trial,¹⁴⁴ the Hartmann Appeal Judgment held that the protection of public order in Article 19(3) of the ICCPR was intended to ‘include the prohibition of the procurement and dissemination of confidential information.’¹⁴⁵ The broader notion of the protection of the public order has also been understood to include the narrower one of the prevention of disorder or crime.¹⁴⁶ ICTY’s Judge Shahabuddeen once noted that the term ‘public order’ has been interpreted to include restrictions necessary for the protection of the ‘essential elements of

¹³⁸ *ibid.*

¹³⁹ *ibid* para 1958.

¹⁴⁰ *Prosecutor v Milošević* (Public Version of the Confidential Decision on the Interpretation and Application of Rule 70) IT-02-54-AR108bis and AR73.3 (23 October 2002) para 19.

¹⁴¹ *Prosecutor v Stanišić & Simatović* (Decision on the Republic of Serbia’s Request for Protective Measures for Four Documents) IT-03-69-T (12 April 2012) paras 12–14; *Prosecutor v Stanišić & Simatović* (Decision on the Republic of Serbia’s Request for Protective Measures for Three Witnesses) IT-03-69-T (17 April 2012) paras 22, 25; *Prosecutor v Stanišić & Simatović* (Decision on the Republic of Serbia’s Request for Protective Measures in Relation to Defence Documents) IT-03-69-T (18 July 2012) para 23; See also ICTY Rule 54bis.

¹⁴² *Prosecutor v Milutinović et al* (Decision on Request of United States of America for Review) IT-05-87-AR108bis.2 (12 May 2006) para 38 and fn 91.

¹⁴³ *Prosecutor v Milutinović et al* (n 142). The disclosure of the means and methods used by security services twenty years earlier did not damage a State’s national security interests. *Prosecutor v Stanišić & Simatović* (Decision on the Republic of Serbia’s Request for Protective Measures in Relation to Defence Documents) IT-03-69-T (18 July 2012) paras 22–25. While protective measures were granted for documents containing the name of current State security operatives, documents containing the names of former operatives were not redacted. *Prosecutor v Stanišić & Simatović* (Decision on the Republic of Serbia’s Request for Protective Measures for Three Witnesses) IT-03-69-T (17 April 2012) para 21; *Prosecutor v Mladić* (Decision on Republic of Serbia’s Motion for Protective Measures) IT-09-92-T (15 July 2014) paras 14–15.

¹⁴⁴ ICTY Rule 79(A)(i); see text to n 119 in s 16.3. The Legal Basis for Restricting Reporting of Judicial Proceedings, sub-s 16.3.3. At the ICTY.

¹⁴⁵ In the case against *Florence Hartmann* (Judgment) IT-02-54-R77.5-A (19 July 2011) (Hartmann Appeal Judgment) para 160.

¹⁴⁶ See ECHR art 10(2); see also ICTY Rule 66(c).

the administration of justice'.¹⁴⁷ Arguably, the latter would also be covered by the 'interests of justice',¹⁴⁸ a useful catch-all term.

Even though the ICTY Rules incorporated the notion of 'public interest', absent in Articles 14(1) and 19(3) of the ICCPR,¹⁴⁹ they did not expand the range of exceptions to a public trial permitted under human rights law. This is because these exceptions, as described above, have been interpreted restrictively.¹⁵⁰

16.3.4 Beyond the ICTY

The extent of the ICTY's impact on international criminal law is evident from the legal texts of the other international criminal tribunals, which have to a large degree been modelled on those of the ICTY. The ICTR, Special Court for Sierra Leone (SCSL), and STL have reproduced Article 21(2) of the ICTY's statute and similarly subject the accused's right to a public hearing to measures ordered by the chamber for the protection of victims and witnesses.¹⁵¹ In addition, the ICTY's Rules on delayed disclosure, open and closed hearings, and measures to protect victims and witnesses, and confidential information are closely mirrored in the Rules of the ICTR, SCSL, and STL.¹⁵²

It is interesting to note that an inconsistency between Article 21(2) of the ICTY's statute and Rule 75 of its Rules has been carried over at the ICTR, SCSL, and STL. Specifically, the statute for each of those institutions expresses the right of the accused to a public trial as being subject to the need to protect victims and witnesses. In contrast, the Rules of each institution reverses the formula, by stating that judges can order measures for the privacy and protection of victims and witnesses, provided that those measures are consistent with the rights of the accused.¹⁵³ The case law on the subject, however, relies on the language found in the relevant Rule, as opposed to the statutory provision.¹⁵⁴

Although the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICC statutes' general provisions on the publicity of trials depart from those of the other

¹⁴⁷ *Prosecutor v Brđanin & Talić* (Decision on Interlocutory Appeal) IT-99-36-AR73.9 (11 December 2002) Separate Opinion of Judge Shahabuddeen para 8.

¹⁴⁸ ICTY Rule 79(A)(iii); see text to n 119 in s 16.3. The Legal Basis for Restricting Reporting of Judicial Proceedings, sub-s 16.3.3. At the ICTY.

¹⁴⁹ See text to nn 77, 87–89 in s 16.3. The Legal Basis for Restricting Reporting of Judicial Proceedings, sub-s 16.3.1. In Human Rights Law.

¹⁵⁰ In any event, some of these notions may be redundant in an international criminal tribunal environment—what public morality should an international tribunal be required to safeguard?

¹⁵¹ ICTR Statute, art 19(4), 20(2)-21; SCSL Statute, art 17(2); STL Statute, art 16(2).

¹⁵² cf ICTY Rules 66, 69, 70, 75, 78–79 and ICTR Rules 66, 69, 70, 75, 78–79; STL RPE, Rules 115–18, 133, 136, 137; SCSL Rules 69, 70, 75, 78–79; ICC Statute art 54(3), 72–73 and ICC Rules 76, 81, 82, 86–88.

¹⁵³ cf ICTY Statute, art 21(2) and ICTY Rule 75(A); ICTR Statute, art 20(2)-21 and ICTR Rule 75(A); SCSL Statute, art 17(2) and SCSL Rule 75(A); STL Statute, art 16(2) and STL Rule 133(A).

¹⁵⁴ *Prosecutor v Milošević* (n 127) para 4: 'The hierarchy between these interests is clearly reflected in Article 20 of the Statute, which provides expressly that the rights of the accused take precedence over the protection of the victims, as they are to be given "full respect", while the protection of victims is to be given "due regard"'. The chamber overlooked art 21(2) of the statute, which explicitly subjects the accused's right to a fair and public hearing to the protection of victims and witnesses; *Prosecutor v Karadžić* (Decision on Prosecution's motion for delayed disclosure for KDZ456, KDZ493, KDZ531, and KDZ532, and variation of protective measures for KDZ489) IT-95-5/18-PT (5 June 2009) para 1; *Prosecutor v Ayyash et al* (Consolidated decision on the Prosecution Motions for Protective Measures regarding Ten Witnesses) STL-11-01/T/TC (2 July 2014) para 6: 'The Trial Chamber will grant protective measures case-by-case, on the basis of persuasive evidence for each application, and only when it is satisfied that the protective measures will not prejudice the rights of the Accused to a fair trial.'

international criminal tribunals,¹⁵⁵ the influence of the ICTY is noticeable. For one, the ECCC reproduces the ICTY statute's Article 20(4) on the court's duty to provide for the protection of victims and witnesses through measures including the conduct of *in camera* proceedings.¹⁵⁶ Although it does not explicitly condition a fair and public hearing on the protection of victims and witnesses in the manner that the ICTY, ICTR, SCSL, and STL statutes do, it articulates the principle of trial fairness and expeditiousness 'with full respect for the rights of the accused and for the protection of victims and witnesses', effectively placing the protection of victims and witnesses on equal footing with the rights of the accused.¹⁵⁷

The ICC statute departs the most from the statutes of other tribunals in how it legislates the exception to public trials. This variation is largely textual, however, rather than an alteration of the principle. For one, it enshrines the judicial authority to limit a trial's publicity at its Article 68, which governs the protection of victims and witnesses, whereas the statutes of other tribunals place that limitation in their provision on the rights of the accused. This conveys clearly that the rights of the accused must be balanced by the safety concerns of victims and witnesses. It also allows the ICC to legislate the protection of victims and witnesses in far greater detail than do the other tribunals in their statutes, a level of detail which would be incongruous in a provision on the rights of the accused.

The ICC statute also details certain procedural aspects of the law on reporting restrictions which other tribunals have instead placed in their Rules, such as the advisory role of the Victims and Witnesses Unit¹⁵⁸ and a State's ability to request an order for non-disclosure of its information.¹⁵⁹ Most significantly, Article 68 lays down an automatic restriction to publicity for victims of sexual violence or children who are victims or witnesses. It is unique amongst the international tribunals for reversing the presumption in this manner, since protective measures and orders for non-disclosure of information are normally granted at other international tribunals upon request, but always on the basis of judicial discretion.¹⁶⁰ Interestingly, Rule 87 of the ICC's Rules appears to reverse the statute's presumption back to bring it more in line with the procedure at the other international criminal tribunals, by making judges' decision to order protective measures a discretionary rather than an automatic one.¹⁶¹ Despite this inconsistency, however, the normal practice at the ICC is for protective measures to be granted upon request from the party calling a witness.¹⁶²

This survey of domestic and international trends demonstrates that both national and international jurisdictions apply comparable principles when it comes to reporting restrictions. With the array of measures available at international tribunals to restrict reporting, and the extent to which the measures' integrity depends upon the compliance of not only the participants in the judicial process, but also those outside it, it is crucial to have an

¹⁵⁵ Law on the establishment of the extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, art 34 new; ICC Statute, art 7.

¹⁵⁶ Law on the establishment of the extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, art 33 new.

¹⁵⁷ *ibid.*

¹⁵⁸ ICC Statute art 68(4); W A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2013) 822–24.

¹⁵⁹ ICC Statute art 68(6).

¹⁶⁰ ICC Statute art 68 (2); Schabas (n 158) 825–26. See also Kosovo Specialist Chambers (KSC)'s Rule 80(4)(e) of its Rules.

¹⁶¹ ICC Rule 87 (1).

¹⁶² *Prosecutor v Lubanga* (Decision on the prosecution's oral request regarding applications for protective measures) ICC-01/04-01/06-1547 (9 December 2008) para 6.

enforceable sanctioning system. This is where the power to hold in contempt of court those who violate its orders comes into play.

16.4 The Law of Contempt

Given the politically charged nature of their work, it was perhaps inevitable that the international tribunals would eventually come to face the situation of having their orders flouted. The sanctioning mechanism they resorted to in these situations was the offence of contempt of court.

16.4.1 Domestic Jurisdictions

Contempt of court, is of course, in its purest sense, a common law concept. It developed in English law on the premise that judges are invested with the power to maintain law and order in the courtroom as an inherent and essential component of their judicial function.¹⁶³ This power extends beyond the courtroom and includes the authority to prevent the judicial process from being obstructed, namely by punishing non-compliance with court orders.¹⁶⁴ In common law countries, although courts continue to be able to exercise this inherent authority, some forms of contempt have more recently come to be codified in legislation. The United Kingdom's *Contempt of Court Act 1981* creates, specifically in relation to publications, a strict liability rule for interference with the course of justice regardless of the intent to do so.¹⁶⁵

Canada's law on contempt, evolved as it is from English law, is now similarly based both in the unwritten common law and in legislation.¹⁶⁶ The Canadian Supreme Court has held that proof of criminal contempt rests on proving that the accused defied a court order in a public way (the *actus reus*), with intent, knowledge, or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*).¹⁶⁷

More broadly, and moving away from the common law nomenclature of contempt, the Canadian Criminal Code and other Canadian legislation consider violations of reporting restrictions to be offences that can result in sanctions. Even when they are not labelled contempt as such, these types of violations attack the core authority of a court by resisting or frustrating its administration of justice. Sanctions for violating reporting restrictions in Canada include fines of up to CA\$10,000, imprisonment for up to three years, or a combination of both.¹⁶⁸ Fines and prison sentences are not the only consequence of publication ban

¹⁶³ G Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 764.

¹⁶⁴ I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 27–28; *AG v Punch Limited et al* [2002] UKHL 50; *AG v Times Newspapers Ltd* [1992] 1 AC 191.

¹⁶⁵ *Contempt of Court Act 1981*, ss 1 and 2. The strict liability rule applies only to publications which create a substantial risk that the course of justice will be seriously impeded or prejudiced, and if proceedings are active at the time of the interference. The threshold of 'substantial risk' is a high one. The publication must namely add sufficiently to the existing risk of prejudice to the proceedings to create a substantial risk: *R v Burrell* (n 2); *AG v Express Newspapers* [2004] EWHC 2859 (Admin); *Chief Constable of Greater Manchester v Channel 5 Broadcast Ltd* [2005] EWCA Civ 739.

¹⁶⁶ Canadian Criminal Code, s 9, 484; *R v Publications Photo-Police Incorpor e* [1990] 1 SCR 851; *AG v Qu eb ecor M dia Inc*, 2011 QCCQ 15413, 35, 43.

¹⁶⁷ *United Nurses of Alberta v Alberta* (Attorney General) 1992 1 SCR 910 25.

¹⁶⁸ Child and Family Services Act, R.S.O. 1990, c C-11, s 85 (3); Canadian Criminal Code, s 517 (2), s 787 (1).

violations, as courts can also order that the violating material be withdrawn from the public domain. In an age of quick-spreading information, however, courts have nevertheless pondered the fairness of punishing media outlets who fail to comply with orders to pull information from the public domain, when the information in question has meanwhile been picked up and further disseminated through news aggregation websites.¹⁶⁹

Even in jurisdictions where the notion of contempt does not exist per se, conduct that undermines judicial authority is sanctioned in other ways. In France, many of the forms of conduct which the common law treats as criminal contempt constitute an offence under the French Criminal Code or Code of Criminal Procedure, such as disobeying an order to appear or produce documents before the court, giving false testimony and interfering with witnesses.¹⁷⁰ To prevent publication bans from being meaningless, the French law on freedom of the press imposes fines when information that by law cannot be published finds its way in the media. These range from €3,750 to €18,000 for publishing the following: the details of an indictment before it is read in a public hearing; information enabling the identification of minors who have left their guardians, committed suicide, or were victims of a crime; information allowing the identification of victims of sexual crimes; the identities of police, military, personnel from the ministry of defence, or certain kinds of customs agents; and details of hearings and court records on family law matters.¹⁷¹ These sanctions are in addition to damages that can be awarded if the publication of information or images, for instance of victims of crimes, are considered an intrusion into their or their families' private lives.¹⁷²

A similar offence against the administration of justice is found in the Italian Criminal Code.¹⁷³ Its Article 684 provides that whoever publishes, in whole or in part, even in summary form or for information purposes only, judicial acts or documents from criminal proceedings the publication of which is prohibited by law, is punishable by imprisonment of up to thirty days or with a fine from €51 to €258. The prohibition against publication under Italian law covers any medium as long as the publication is directed at an indeterminate number of persons.¹⁷⁴ The Italian Court of Cassation has held that it is irrelevant to the existence of this offence that the information had already been disseminated by others.¹⁷⁵ The reasoning behind this was that this subsequent publication increased the dissemination of the judicial act which should not have been publicized.¹⁷⁶

16.4.2 The ICTY and ICTR

There is no mention in either of the ad hoc tribunals' statutes of a power to deal with contempt. The ICTY appeals chamber has held, however, that the tribunal possesses an inherent

¹⁶⁹ *R v The Canadian Broadcasting Corporation* [2017] ABQB 329.

¹⁷⁰ Code pénal, art 434-11, 434-13, 434-14, 434-1, 434-15-1; M Chesterman, 'Contempt: In the Common Law, But Not the Civil Law' (1997) 46 *International and Comparative Law Quarterly* 521, 521.

¹⁷¹ Loi du 29 juillet 1981 sur la liberté de presse, art 38, 39, 39 bis, 39 quinquies, 39 sexies.

¹⁷² *Affaire Société de Conception de Presse et d'Édition c France* [2016] ECHR 216; *Hachette Filipacchi Associates v France* [2007] ECHR 5567.

¹⁷³ Codice di Procedura Penale art 684.

¹⁷⁴ Codice di Procedura Penale art 114.

¹⁷⁵ Cass No 7674/1984; Cass No 473/2013.

¹⁷⁶ Cass No 7674/1984; Cass No 473/2013.

jurisdiction, deriving from its judicial function, to ensure that the exercise of its jurisdiction, expressly given to it by the statute, is not frustrated, and that its basic judicial functions are safeguarded.¹⁷⁷

The appeals chamber, called to address this issue early on in the ICTY's life, cautioned that 'care must be taken not to treat the considerable amount of elaboration which has occurred in relation to Rule 77 over the years as if it has produced a statutory form of offence enacted by the judges of the Tribunal'.¹⁷⁸ It reasoned that judges' power to adopt rules of procedure and evidence did not entail a power to create rules which prohibited new offences. It was a power to adopt rules for the conduct of matters falling within both the inherent jurisdiction of the tribunal, and its statutory jurisdiction.¹⁷⁹ It considered that the content of these inherent powers could be discerned from the usual sources of international law.¹⁸⁰

The inherent power of the ad hoc tribunals as international criminal courts to hold in contempt those who 'knowingly and wilfully interfere with its administration of justice' thus encompasses conduct that would necessarily fall within the general concept of contempt—'conduct which tends to obstruct, prejudice or abuse the administration of justice'.¹⁸¹ At both the ICTY and the ICTR, this includes, though is not limited to, disclosing information relating to tribunal proceedings in knowing violation of an order of a chamber.¹⁸² In addition, inciting and aiding and abetting contempt is also punishable under Rule 77(B) of the Rules.¹⁸³ The maximum penalty for contempt at the ICTY is a term of imprisonment not exceeding seven years, or a fine not exceeding €100,000, or both.¹⁸⁴ The ICTR has lighter penalties, with terms of imprisonment not exceeding five years, or a fine not exceeding US\$10,000, or both.¹⁸⁵

A violation of a court order as such constitutes an interference with the tribunal's administration of justice.¹⁸⁶ No additional proof of harm to its administration of justice is required.¹⁸⁷ In other words, once a court order is violated (*actus reus*), there need be no further inquiry into the actual interference that took place, nor whether there was a real risk to the administration of justice, because the violation in itself was an interference with the administration of justice.¹⁸⁸ As a corollary, the fact that information disclosed by an accused

¹⁷⁷ *Prosecutor v Tadić* (Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin) IT-94-1-A-R77 (31 January 2000) (Vujin Contempt Judgment) paras 13–18, referring to eg *Northern Cameroons Case (Cameroon v United Kingdom)* [1963] ICJ Rep 29; *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 259–60, para 23; *Prosecutor v Aleksovski* (Judgment on Appeal by Anto Nobile Against Finding of Contempt) IT-95-14/1-AR77 (30 May 2001) paras 30, 36; *Prosecutor v Beqaj* (Judgment on Contempt Allegations) IT-03-66-T-R77 (27 May 2005) (Beqaj Contempt Judgment) para 9; *Prosecutor v Marijačić & Rebić* (Appeal Judgment) IT-95-14-R77.2.A (27 September 2006) (*Marijačić et al* Appeal Judgment).

¹⁷⁸ Vujin Contempt Judgment (n 177) para 24.

¹⁷⁹ *ibid* paras 24–25.

¹⁸⁰ *ibid* paras 13–18 and fn 11, 24, 28; Beqaj Contempt Judgment (n 177) para 9.

¹⁸¹ ICTY Rule 77(A); ICTR Rule 77(A); Vujin Contempt Judgment (n 177) paras 25–26. The 'Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal' was issued on 6 May 2004, IT/227.

¹⁸² ICTY Rule 77(A)(ii); ICTR Rule 77(A)(ii).

¹⁸³ *Prosecutor v Marijačić & Rebić* (Decision on Prosecution's Motions to Amend the Indictment) IT-95-14-R77.2 (7 October 2005) para 39. There is an automatic right of appeal in contempt cases. ICTY Rule 77(J)–(K).

¹⁸⁴ ICTY Rule 77(G). See also ICTY Rule 77(I)–77bis.

¹⁸⁵ ICTY Rule 77(G). See also ICTR Rule 77(I).

¹⁸⁶ *Prosecutor v Jović* (Judgment) IT-95-14 and IT-95-14/2-R77-A (15 March 2007) (Jović Appeal Judgment) para 30; *Marijačić et al* Appeal Judgment (n 177) para 44; Hartmann Appeal Judgment (n 145) para 107.

¹⁸⁷ Jović Appeal Judgment (n 186) para 30; Hartmann Appeal Judgment (n 145) para 107.

¹⁸⁸ Hartmann Appeal Judgment (n 145) para 107.

in contempt proceedings was already in the public domain is not a defence in cases of violations of judicial orders of non-disclosure, including protective measures.¹⁸⁹ The *mens rea* requirement for a violation of Rule 77(A)(ii) of the Rules is knowledge that the disclosure in question is in violation of a chamber's order.¹⁹⁰ The appeals chamber has also held that individuals, including journalists, cannot decide to publish information covered by confidentiality on the basis of their own assessment of the public interest in that information.¹⁹¹

As to the discrete issue of contempt and journalists, the Hartmann Appeal Judgment addressed Hartmann's right to freedom of expression as a journalist quite extensively.¹⁹² The appeals chamber held that there is no strong presumption of unrestricted publicity in criminal proceedings on matters that a chamber had ruled should remain confidential.¹⁹³ Recalling the Jović Appeal Judgment on the disclosure of testimony given in closed session, it held that the effect of a closed session was similar, in that it was intended 'to exclude the public, including members of the press, from the proceedings and to prevent them from coming into possession of the protected information being discussed therein. In such cases, the presumption of public proceedings under article 20(4) of the Statute does not apply'.¹⁹⁴

In so ruling, the appeals chamber unequivocally held that there was no inconsistency with freedom of expression principles enshrined in the ICCPR.¹⁹⁵ Noting that Article 21 of the ICTY statute mirrored Article 14 of the ICCPR, the appeals chamber recalled that the Human Rights Committee interpreted Article 14(1) of the ICCPR to require that courts' judgments be made public, with 'certain strictly defined exceptions'.¹⁹⁶ Guided by the standard set out under Article 19 of the ICCPR, and its *travaux préparatoires*, the appeals chamber considered that Hartmann's freedom of expression was legitimately restricted as it was not only provided by law, but also proportionately necessary to protect against the dissemination of confidential information.¹⁹⁷

The appeals chamber further noted that the trial chamber had correctly assessed that the effect of Hartmann's disclosure of confidential information decreased the likelihood that States would co-operate with the ICTY in the future, thereby undermining its ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law.¹⁹⁸

¹⁸⁹ Jović Appeal Judgment (n 186) para 30; Marijačić et al Appeal Judgment (n 177) para 45; Hartmann Appeal Judgment (n 145) paras 91–92.

¹⁹⁰ Jović Appeal Judgment (n 186) para 27.

¹⁹¹ Marijačić et al Trial Judgment (n 16) para 39; *Prosecutor v Haxhiu* (Judgment on Allegations of Contempt) IT-04-84-R77.5 (24 July 2008) para 28. See also Hartmann Appeal Judgment (n 145) para 113. The ICTR appeals chamber has also relied on the jurisprudence of the ICTY in its contempt cases. This is hardly surprising given that at the time, many judges sat on the appeals chamber of both ad hoc tribunals. See *Léonidas Nshogora v Prosecutor* (Judgment) ICTR-07-91-A (15 March 2010) paras 56, 65; *Eliézer Niyitegeka v Prosecutor* (Decision on Motion for Clarification) ICTR-96-14-R75 (20 June 2008) para 11.

¹⁹² Hartmann Appeal Judgment (n 145) paras 158–65.

¹⁹³ *ibid* para 158.

¹⁹⁴ *ibid* para 158 referring to Jović Appeal Judgment (n 186) 21.

¹⁹⁵ Hartmann Appeal Judgment (n 145) paras 160–61. The appeals chamber also noted that it was not bound by the findings of regional or international courts including the ECtHR jurisprudence. Hartmann Appeal Judgment (n 145) para 159.

¹⁹⁶ Hartmann Appeal Judgment (n 145) para 160.

¹⁹⁷ *ibid* para 161. The appeals chamber considered that the two appeal decisions in the case of *Prosecutor v Slobodan Milošević* that Hartmann disclosed, contained restrictions on the freedom of expression that were 'provided by law'. This was because they were filed confidentially under measures granted pursuant to Rule 54 *bis* of the Rules. Furthermore, the appeals chamber held that restricting Hartmann's freedom of expression in this manner was both proportionate and necessary because it protected the 'public order' by guarding against the dissemination of confidential information. These restrictions were therefore within the ambit of art 19(3) of the ICCPR. Hartmann Appeal Judgment (n 145) para 161.

¹⁹⁸ Hartmann Appeal Judgment (n 145) para 162.

In this context, prosecuting an individual for contempt was proportionate to the effect Hartmann's actions had on the ICTY's ability to administer international criminal justice.¹⁹⁹

16.4.3 Beyond the Ad Hoc Tribunals

Of the STL's two contempt cases, the most mediatised one, against *Al Jadeed* and Al Khayat, was overturned on appeal (essentially for procedural reasons to do with proper service of court documents to the accused).²⁰⁰ This means the STL has only ever issued one conviction for contempt, which was in the case against *Al Akhbar* and its editor-in-chief Al Amin, a conviction which was not appealed.

Putting aside the outcomes, the evidentiary thresholds applied by the STL in the two cases were consonant with each other, and relied on the precedents that had broken ground at the ICTY with regards to the elements of the crime of contempt. The trial judge, who was the same in both cases, held that any conduct charged under Rule 60*bis*(A) of the STL's Rules must, if proven, amount to a knowing and wilful interference with the administration of justice.²⁰¹ One charge that had been brought against the accused in both cases (knowingly and wilfully interfering with the administration of justice by publishing information about purported confidential witnesses) did not entail the violation of a judicial order.²⁰² The judge noted that the disclosure of information on purported confidential witnesses in the absence of a judicial order does not necessarily interfere with the administration of justice, though it could do so, if certain effects and a culpable state of mind are proved.²⁰³ He therefore concluded that the prosecution had to establish that the accused deliberately published information on purported confidential witnesses, and in doing so, knew that their conduct was objectively likely to undermine public confidence in the STL's ability to protect the confidentiality of information about witnesses or potential witnesses.²⁰⁴ In essence, this meant that the publication of information could be punished on the basis that it interferes with the administration of justice, even where no judicial order actually prohibited the publication per se.

In the *Al Jadeed* case, however, a second charge had also been brought against the accused, one that specifically involved the violation of a judicial order, namely the one issued by the pre-trial judge ordering the removal of the witness information from the public domain, which the STL's Registry had repeatedly attempted to serve upon the accused.²⁰⁵ Relying upon what he considered to be the ICTY's clear jurisprudence, the judge reasoned that if the publication of witness information was in violation of a court order, the very act of that publication would amount to an interference with the administration of justice, so long as the accused had knowledge that the disclosure was in violation of an order.²⁰⁶ The judge was convinced the prosecution had relieved itself of its burden of proof and convicted one of the accused, Al Khayat, on that basis. The issue of whether the two accused were

¹⁹⁹ *ibid.*

²⁰⁰ *Al Jadeed Appeal Judgment* (n 51) paras 156–73.

²⁰¹ *ibid* para 38.

²⁰² *ibid* para 37.

²⁰³ *ibid* para 40.

²⁰⁴ *ibid* para 50.

²⁰⁵ *ibid* para 51.

²⁰⁶ *ibid* paras 45, 54.

aware of the existence of the pre-trial judge's order (in other words whether it had been properly served on them) became a contentious issue, and one on the basis of which the appeal panel ultimately overturned Al Khayat's conviction.²⁰⁷

No discussion of contempt at the international criminal jurisdictions would be complete without pointing out the extent to which the ICC's legal framework stands apart from those of the ICTY and the other international criminal tribunals. The ICC statute corrects one fundamental lacuna that the ICTY and its counterparts had to grapple with early on: the absence of any explicit jurisdiction in their statutes to hold someone in contempt. The ICC statute, in contrast, has two provisions dealing with offences against the administration of justice and misconduct before the court: Articles 70 and 71.²⁰⁸ This foresight contains its own shortcomings, however, as it is unclear which of these two provisions, if any, would form the basis for prosecuting those who publish confidential information in violation of judicial orders.

Article 70 covers conduct that is fundamentally egregious to the administration of justice, such as false testimony, forged evidence, witness interference, and corrupting court officials. But it makes no mention of violations of judicial orders or unlawful disclosures. Moreover, it lists the offences exhaustively, not leaving any room for conduct that is not explicitly mentioned in the provision. It certainly does not contain a *chapeau* in the way the Rules of the other tribunals do to cover interference with the administration of justice in a general way.²⁰⁹

Article 71 of the ICC statute covers misconduct that is of a less serious nature than that listed at Article 70 and that occurs 'before' the court, in other words, that takes place in the courtroom.²¹⁰ As a result, the provision would not cover the publication or broadcasting of confidential information, particularly if it had been done by third parties who would not under normal circumstances even be in the courtroom—such as journalists. In any event, Article 71, read together with Rule 171 of the ICC's Rules, provides sufficient indication that the situations it intends to cover are where the offender is physically in the courtroom, and for offences of a less serious nature than those covered at Article 70.

It is therefore anyone's guess how the ICC will handle violations of judicial orders, including those granting protective measures. Perhaps, as some have speculated, the reason for this apparent omission in the ICC statute is so that the ICC can refer such matters to States Parties on the basis of the principle of complementarity.²¹¹ Complementarity, however, requires the existence of a crime in the ICC statute, which is obviously not the case when it comes to violations of judicial orders. Alternatively, these concerns could be nothing more than a red herring if judges invoke regulation 29 of the Regulations of the Court,²¹² which stipulates:

1. In the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made hereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.

²⁰⁷ *ibid* paras 156–73.

²⁰⁸ ICC Statute, art 70–71.

²⁰⁹ Sluiter et al (n 163) 755.

²¹⁰ ICC Statute art 71(1) states: 'The Court may sanction persons *present before it* who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions [...].' (Emphasis added.)

²¹¹ Sluiter et al (n 163) 755.

²¹² W A Schabas, *An Introduction to the International Criminal Court* (CUP 2014) 156.

2. This provision is without prejudice to the inherent powers of the Chamber.

Relying on a legal text that is even lower in the hierarchy of norms than the Rules, however, would no doubt trigger a controversy comparable to the one the ICTY faced when it invoked the doctrine of inherent jurisdiction for its first contempt case. Moreover, the provision only appears to apply to persons who are participating in the proceedings, like the parties and the legal representatives of victims. Time will tell.

Like the ICC, the International Residual Mechanism for Criminal Tribunals (IRMCT), the successor of the ICTR and ICTY, has been given the power to prosecute cases of contempt under Article 4 of its founding statute, thus clearly ensuring this power is a statutory one, and no longer relying on customary international law as the ICTY had done. The IRMCT's jurisdiction covers not only knowing and wilful interference with the administration of justice or false testimony before the IRMCT itself, but also before the ICTY and ICTR.²¹³ On the other hand, Rule 90 of its Rules replicates, almost verbatim, that of the ICTY. It also echoes the respective rules on publicity of trials and its limitations in the case of judicial orders of non-disclosure, including protective measures granted by a chamber.²¹⁴ Nonetheless, it is incumbent on the IRMCT to consider referring such cases to the authorities of a State, taking into account the interests of justice and expediency.²¹⁵ Whether this requirement will affect the number and kind of contempt cases the IRMCT itself will prosecute remains to be seen.

Interestingly, the newly set-up Kosovo Specialist Chambers (KSC) has jurisdiction over crimes against humanity and war crimes, as well as over offences against the administration of justice—some similar to contempt cases—which are recognized under the Kosovo Criminal Code.²¹⁶ As a derivative of Kosovar law, the constituent Law on the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC Law) also conceives of certain restrictions to an accused's right to a public trial.²¹⁷ It further provides for a penalty in cases of non-compliance with non-disclosure orders.²¹⁸

²¹³ UNSC Res 1966 (22 December 2010) UN Doc S/Res/1966 1(4).

²¹⁴ IRMCT Rules 55, 71(C), 73(D), 75, 86, 92–93. There have been some contempt-related decisions by the IRMCT but no contempt judgments have been rendered as yet. See e.g. *Prosecutor v Maximilien Turinabo et al and Prosecutor v Augustin Ngirabatware* (Decision on Prosecution Motion for Joinder of the Ngirabatware and Turinabo et al Contempt Cases) MICT-18-116-PT and MICT-19-121-PT (10 December 2019).

²¹⁵ UNSC Res 1966 (22 December 2010) UN Doc S/Res/1966 1(4), 6.

²¹⁶ Law on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, Law No 04/L-274; Law on Specialist Chambers and Specialist Prosecutor's Office, Law No 05/L-053 (KSC Law) art 6, 15(2) refer to ch XXXII, arts 384–86, 388, 390–407, ch XXXIII, arts 409–11, 415, 417, 419, 421, and ch XXXIV, arts 423–24 of the Kosovo Criminal Code 2012, Law 04/L-082.

²¹⁷ KSC Law (n 216), art 21(2) stipulates the right to 'a fair and public hearing, subject to Article 23 of this Law and any measures ordered by the Specialist Chambers for the protection of victims and witnesses'. The Rules before the KSC, also provide for restrictions to a public trial for reasons of public order, security, national security interest of Kosovo or a third State, non-disclosure of the identity of a witness or a victim participating in the proceedings, or in the interests of justice. KSC Rule 120. See also KSC Rules 80, 82–84, 105, 108, 111. Rule 80 of the KSC Rules goes further than the ICTY Rules in that it allows, 'in exceptional circumstances and subject to any necessary safeguards' for the possibility of total anonymity of a witness. KSC Rules 80(4)(e)(ii), 147; *KSC Constitutional Court (Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office)* KSC-CC-PR-2017-01 (26 April 2017) paras 132–40. KSC Rule 77(4)(e) referred to therein is the revised KSC Rule 80(4)(e). See KSC-BD-03/Rev1/2017.

²¹⁸ KSC Rules 65, 165.

The KSC Law also explicitly provides for customary international law as a source of law, and indicates that in determining the customary international law applicable at the time of the alleged crimes, the panels of the KSC may resort to subsidiary sources, such as the jurisprudence of the international ad hoc tribunals, the ICC, and other criminal courts.²¹⁹ It will be interesting to see how this is interpreted by the panels, and whether the ICTY's jurisprudence on contempt of court in general, and by journalists in particular, will be adopted as customary international law by the panels, or whether it will be merely considered instructive, if at all.

16.5 Conclusion

Orders for protective measures and the non-disclosure of information in international criminal trials are very closely linked to the increased level of visibility of these trials in comparison to most domestic ones,²²⁰ as a result of the crimes under their jurisdiction. This high visibility goes hand-in-hand with sophisticated outreach and public information strategies that are rarely found in domestic jurisdictions, including the live streaming of proceedings online, exposure through actively managed Facebook, Twitter, LinkedIn, and Flickr accounts and the posting of videos on YouTube channels. This is in addition to more traditional methods of educating the public and affected communities, which the ICTY had notably done by allowing access to the public gallery, regularly issuing press releases, holding weekly press conferences, and managing a multitude of educational campaigns throughout the years. The downside of such high visibility, however, is the increased exposure to the media and the public at large of the witnesses who testify, the victims whose harrowing experiences are described at length, and politically sensitive intelligence gathered by States and other entities.

Despite these unique aspects, however, restrictions on the publicity of international criminal trials follow rules no different than those at the domestic level. That these restrictions are more striking than they would normally be in domestic jurisdictions is, ironically, only a sign of how much more visible international criminal trials are.

Despite a relatively widespread recognition of these unique realities, international tribunals' prosecution of journalists for contempt has not been spared the occasional criticism within the legal community itself. Even supporters of international justice find the ICTY's forays into prosecuting and punishing contempt of court, a waste of time and resources. Some argue that the international criminal tribunals should leave the investigation and prosecution of contempt cases and any offences against the administration of justice to national courts.²²¹ How this would be feasible in practice, let alone effective, is unclear, particularly considering the difficulties encountered at times in securing States' co-operation with international tribunals.

²¹⁹ KSC Law, art 3(2)-(3).

²²⁰ See generally D Stepniak, *Audio-visual Coverage of Courts* (Cambridge University Press 2009). *Loi sur la liberté de presse*, art 38 ter; Contempt of Court Act 1981, s 9; Criminal Justice Act 1925, s 41; *R. v Pilarinos* 2001 BCSC 1332 (CanLII) 40–42; Ontario Court of Justice Act, s 136; *R. v Squires* (1989) 69 C.R. (3d) 337 (Ont Dist Ct).

²²¹ W A Schabas, 'The Yugoslavia Tribunal also Engages in Debt Collection' (25 March 2016) <<http://humanrightsdoctorate.blogspot.nl/2016/03/the-yugoslavia-tribunal-also-engages-in.html>> accessed February 2018.

Current international practice seems to indicate that the opposite view has nevertheless established itself. Indeed, there is no longer anything exceptional in the international criminal tribunals' ability to prosecute and punish violations of protective measures and orders of non-disclosure as part of their power to ensure the proper administration of justice and ultimately the rule of law. Absent such a power, these institutions would be unable to uphold the integrity of their own proceedings. In any event, and as demonstrated, these limitations are wholly in line with human rights law and the practice in various domestic jurisdictions.

At the end of the day, as is so often the case in criminal justice, judges need to undertake a balancing act on a case-by-case basis between equally important but at times competing interests. The right of the accused to a public trial, that of the public to be informed of criminal proceedings and the role of the press to act as the bridge between the two, have to be weighed against other legitimate rights and interests, namely, the safety and security of witnesses and victims, their right to privacy, the security concerns of States and international organizations, public order, and the interests of justice. Despite the relative clarity of the law, however, the sensitivity and importance of the issues are such that the controversy will most likely persist.