Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia ad the International Criminal Tribunal for Rwanda

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NOTE

INFUSING DUE PROCESS AND THE PRINCIPLE OF LEGALITY INTO CONTEMPT PROCEEDINGS BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Contempt proceedings before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda suffer from two procedural defects: the hearings run afoul of the principle of legality and fail to afford calibrated procedural protection for accused contemnors. First, this Note contends that these two tribunals properly rely on their inherent powers to codify procedural rules for contempt proceedings. However, the tribunals’ inherent power to prosecute contempt does not allow the courts to punish contemptuous conduct that has not been explicitly proscribed. Such a prosecution contravenes the principle of legality, which provides that criminal responsibility may attach to conduct only when there is a known preexisting prohibition of that behavior. Second, this Note claims that while the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda may promulgate procedural rules governing contempt hearings, they are not empowered to create criminal contempt laws. Even though contempt proceedings before the tribunals are ostensibly noncriminal, they may be functionally criminal because they can impose substantial penalties. Whether criminal or noncriminal, because the proceedings may lead to severe sanctions, they lack the appropriate procedural protections that should accompany potential property and liberty deprivations.

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* J.D. Candidate, May 2011. I would like to thank my note editors, Peter Magnuson, Sada Jacobson Bâby, and David Gorlin, for their excellent editorial advice. Most importantly, I would like to thank my mother, whose unwavering support, love, and encouragement have made everything possible.
INTRODUCTION

In response to two sets of atrocities perpetrated during the 1990s, the crimes against humanity executed in the former Yugoslavia and the genocide committed in Rwanda, the United Nations ("UN") established the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") (together, "the Tribunals"). The Tribunals dramatically accelerated the maturation of the international criminal law regime, the body of law that imposes criminal responsibility on individuals and punishes abuses through international courts. As a result, the Tribunals have clarified the substantive law prohibiting crimes of genocide, crimes against humanity, and war crimes, and they have done much to develop the principles and procedures governing the investigation and prosecution of these crimes. Nonetheless, because the procedural principles guiding the Tribunals were adopted as experimental, they remain relatively embryonic and unpredictable across a number of key areas, perhaps most notably in the treatment of contempt of court.

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1. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 102 (2007).
2. Id.
3. Id. at 103.
4. See Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 54, U.N. Doc. A/49/342 (Aug. 29, 1994) ("As a body of a unique character in international law, the Tribunal has had little by way of precedent to guide it."). Because the rules of procedure from the two preceding international criminal tribunals, the Nuremberg and Tokyo tribunals, possessed only eleven and nine procedural rules respectively, the ICTY was left to resolve all other matters on a case-by-case basis. Id.
5. See, e.g., Michèle Buteau & Gabriel Oosthuizen, When the Statute and Rules are Silent: The Inherent Powers of the Tribunal, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 65, 65 (Richard May et al. eds., 2001) (stating that the ICTY has a rudimentary procedural structure); Christopher Gane, Commentary: Contempt and the ICTY, in 5 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2000–2001, at 236, 239 (André Klip & Göran
Like any court, the ICTY and ICTR must preserve the integrity of their proceedings to ensure the fair and effective administration of justice.\(^6\) It is especially important that the Tribunals develop a robust process for adjudicating the improprieties that occur inside and outside their courtrooms because they have been historically subject to pervasive allegations of foul play, with claims ranging from general misconduct\(^7\) to institutionalized bribery.\(^8\) Such accusations have led the Tribunals to function under a shadow of impropriety, eroding their legitimacy\(^9\) and imperiling their basic operation.\(^10\) During the past two years, the ICTY has more vigorously responded to such accusations of misconduct by prosecuting and punishing a defendant\(^11\) and former ICTY employee\(^12\) for the willful disclosure of confidential information.

As the Tribunals continue to prosecute and punish contempt, it is of vital importance that they employ a vigorous, principled process for the investigation and prosecution of contempt allegations. Contempt proceedings before the Tribunals suffer from incomplete adherence to the principle of

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8. In the 1990s, the UN Office of Internal Oversight Services identified the practice of fee-sharing arrangements, an institutionalized form of bribery, in both the ICTR and the ICTY. Rep. of the Office of Internal Oversight Servs. on the investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the Int'l Criminal Tribunal for Rwanda and the Int'l Tribunal for the Former Yugoslavia, ¶ 20, U.N. Doc. A/55/759 (Feb. 1, 2001).

9. The practice of fee-sharing not only diverts UN funds to suspected war criminals but also undermines the administration of justice by raising suspicion and disapproval of the mechanics of the Tribunals. 1997 OIOS ICTR Report, *supra* note 7.

10. See Int'l Crisis Grp. [ICG], *International Criminal Tribunal for Rwanda: Justice Delayed*, at iii, ICG Africa Report N. 30 (June 7, 2001) (describing how bureaucratic dysfunction has prevented the tribunal from carrying out its mandate and how the majority of Rwandans view the court as a "useless institution").


12. On September 14, 2009, the ICTY Trial Chamber found Florence Hartmann, a former spokesperson for the ICTY Office of the Prosecutor, guilty of contempt for "knowingly and willfully interfering with the administration of justice" by revealing the confidential contents of Appeals Chamber orders in her 2007 book. Case Against Florence Hartmann, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009).
legality, which in practice means that a potential contemnor may be punished for conduct that was not prospectively proscribed. For example, the ICTY Appeals Chamber prosecuted and punished defense counsel Milan Vujin for contumacious conduct even though the bench acknowledged that Vujin's conduct was not expressly banned. The Tribunals also provide deficient procedural protections for accused contemnors, such as permitting contempt trials in absentia, despite the substantial liberty and property deprivations faced by the accused contemnors.

This Note argues that the statutory overlay and the inherent powers of the Tribunals empower the judges to codify procedural rules governing contempt proceedings but do not permit the judges to adjudicate noncodified contempt offenses or to create new criminal offenses. This Note also suggests that the balancing test in Mathews v. Eldridge could be a viable alternative for establishing due process in the Tribunals’ contempt proceedings. Part I outlines the statutory framework animating the Tribunals’ contempt power. Part II describes the second central source of authority for prosecuting contempt, the inherent-powers doctrine. Part III explains why the principle of legality prevents the Tribunals’ judges from employing their inherent powers to prosecute conduct that is not explicitly prohibited. Finally, Part IV articulates why the Tribunals’ constitutive documents forbid the judges from employing their inherent powers to legislate criminal contempt laws. Part IV also illustrates that the procedural emphasis on the binary classification of criminal and noncriminal contempt proceedings allows for the underenforcement of procedural protections in non-criminal contempt proceedings. To ensure that accused contemnors receive basic procedural protection, Part IV proposes that the Tribunals apply the Eldridge test to determine which procedural rights should be afforded to each accused contemnor.


15. 424 U.S. 319 (1976). See infra Part IV for a discussion of the process that is due to accused contemnors.

16. The principle of legality, or nullum crimen sine lege, states that criminal responsibility may only be based on preexisting prohibitions of behavior that are understood to hold criminal consequences. CRYER ET AL., supra note 1, at 13.
I. STATUTORY FRAMEWORK FOR PROSECUTING CONTEMPT IN THE TRIBUNALS

The ICTY and ICTR Statutes, established by the UN Security Council, enable the Tribunals to promulgate their own rules of procedure and evidence ("RPE"). Under Article 1 of the ICTY Statute, the jurisdiction of the Tribunal is limited to the prosecution of the serious violations of international humanitarian law that were committed in the former Yugoslavia since 1991, suggesting the judges lack jurisdiction over contempt allegations. However, Article 15 of the ICTY Statute delegates authority to the judges of the tribunal to enact the RPE. Additionally, Article 20 empowers the judges to "ensure that a trial is fair and expeditious and that proceedings are conducted . . . [to allow for the] full respect for the rights of the accused and due regard for the protection of victims and witnesses." Therefore, while the ICTY Statute does not explicitly grant jurisdiction over contempt proceedings to the ICTY, it does empower the tribunal to promulgate procedural rules governing a broad range of conduct, including "appropriate matters" before the tribunal, and to take action to ensure that the proceedings are efficient and fair.

Likewise, Article 15 of the ICTR Statute empowers the judges with the same authority to promulgate RPE. Even though Article 1 limits the jurisdictional mandate of the ICTR to prosecuting "serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994,"


19. ICTY Statute, supra note 17, art. 1, at 5; see also Sluiter, supra note 6, at 632.

20. ICTY Statute, supra note 17, art. 15, at 10 ("The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.")

21. Id. art. 20, at 20.

22. ICTR Statute, supra note 17, art. 14, at 59.
Article 14 enables the ICTR judges to promulgate RPE for a wide range of procedural matters.\textsuperscript{23}

The Security Council provided that the Tribunals would share governing principles and constitutive architecture in two primary ways. First, with a few exceptions, the RPE of the ICTY and ICTR are identical.\textsuperscript{24} The Security Council stipulated that the Tribunals would share procedural and evidentiary rules, and Article 14 of the ICTR Statute provides that the ICTR RPE be patterned after the ICTY RPE. However, the Security Council ensured that the ICTR judges have authority to amend the RPE as necessary.\textsuperscript{25}

Second, the Security Council connected the Tribunals by providing that the ICTR would share the ICTY Appeals Chamber.\textsuperscript{26} Initially, the Appeals Chamber, which sits in The Hague,\textsuperscript{27} was composed entirely of ICTY judges.\textsuperscript{28} However, after the adoption of Security Council Resolution 1329,\textsuperscript{29} two judges from the ICTR are permanently assigned to sit on the Appeals Chamber in The Hague.\textsuperscript{30} The shared Appeals Chamber ensures that the Tribunals do not exercise conflicting jurisprudential approaches.\textsuperscript{31}

The procedural rules may be modified through a process outlined in RPE Rule 6(A), which states that the prosecutor, any judge, or the registrar may offer proposals for revisions.\textsuperscript{32} The original ICTY RPE was adopted on

\textsuperscript{23} Id. art. 14, at 71.
\textsuperscript{25} ICTR Statute, supra note 17, art. 14, at 71 (“The Judges of the International Tribunal for Rwanda shall adopt [the procedural rules] of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.”).
\textsuperscript{28} Article 12(2) of the ICTR Statute previously articulated that the members of the ICTY Appeals Chamber would serve as the members of the ICTR Appeals Chamber. S.C. Res. 955, supra note 26, art. 12(2).
\textsuperscript{30} ICTR Statute, supra note 17, art. 13, at 71.
\textsuperscript{31} It is formally unresolved if decisions of the ICTY Appeals Chamber are binding on the ICTR and vice versa, although for all practical purposes, Appeals Chamber judgments are binding on the Trial Courts. See, e.g., Clara Damgaard, International Criminal Responsibility for Core International Crimes 53 (2008).
\textsuperscript{32} ICTY RPE, supra note 18, r. 6(A), at 5. ICTY RPE Rule 6(C) also stipulates that the president of the tribunal may propose amendments consistent with the Practice Direction, which the president promulgated in 1998. Id. r. 6(C), at 5; see also President of the International Criminal Tribunal for the former Yugoslavia, Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal, U.N. Doc. IT/143 (Dec. 18, 1998). Amendments are adopted if a minimum of ten judges vote for the amendment during a plenary meeting. ICTY RPE, supra note 18, r. 6(A), at 5. If the judges unanimously agree on an amendment proposal, the RPE may also be revised outside of the plenary process. Id. r. 6(B), at 5.
February 11, 1994 and has been revised or amended by the judges forty-five times. Since the establishment of the ICTR RPE on June 29, 1995, it has been revised or amended twenty-seven times.

The frequent revisions to the Tribunals' RPEs have led to concerns regarding the Tribunals' compliance with the principle of legality because revised RPEs have occasionally been applied retroactively. Typically, the retroactive application of altered procedural rules does not implicate the principle of legality because the principle is concerned with substantive criminal prohibitions rather than procedural rules. However, because the contempt rules are contained in the RPE, changes to the contempt rules are substantive and if applied retroactively impinge upon the principle of legality. To avoid encroaching on the principle of legality, ICTY RPE Rule 6(D) makes clear that while amendments are to take effect seven days after the issuance of an official tribunal publication, the modified rules shall not operate to injure or prejudice the rights of the accused in any pending case. As discussed in Part III, critics have contested the extent to which judges have effectively implemented the mandate of Rule 6(D); these concerns about retroactive implementation of revisions to the rules have clouded the legitimacy of contempt hearings before the Tribunals.

A second source of controversy centers on the fact that the ICTR and ICTY Statutes are silent on the matter of prosecuting and punishing contempt. Article 15 of the ICTY Statute permits the promulgation of procedural rules over “appropriate matters,” which arguably include contempt. However, the power to create rules does not typically confer the power to prosecute and punish infractions of those rules. Consequently, a number of critics have argued that the Tribunals’ prosecution and punishment of contempt may be an ultra vires exercise of power.

The Tribunals’ judges have concluded that they are empowered to promulgate contempt rules under Article 15 of the ICTY Statute and are granted

33. Mundis, supra note 24, at 192.
34. See Rules of Procedure and Evidence, United Nations Int’l Tribunals for Former Yugoslavia, http://www.icty.org/sid/136 (last visited Mar. 20, 2011) (providing copies of each revision). On the date when this Note was completed, Revision 45 of the ICTY RPE was in effect. See id.
36. See infra Part III; see also O’Shea, supra note 5.
37. ICTY RPE, supra note 18, r. 6(D), at 5.
38. See, e.g., O’Shea, supra note 5 (explaining that the frequent amendment of the Tribunals’ rules abuses the procedural rights of defendants); see also Part III.
39. See Cryer et al., supra note 1, at 391.
40. ICTY Statute, supra note 17, art. 15, at 10.
42. See, e.g., id. at 117; André Klip, Witnesses before the International Criminal Tribunal for the Former Yugoslavia, 67 Int’l Rev. Penal L. 267, 276–77 (1996).
the authority to adjudicate and punish violations of these rules as a function of their inherent powers—the power derived from the judicial functions of the Tribunals. Accordingly, when the original ICTY RPE was adopted in February 1994, Rule 77 empowered the tribunal to fine or imprison contumacious witnesses. ICTY RPE Rule 77, entitled “Contempt of the Tribunal,” now defines contempt and provides the power to punish the offense:

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

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

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

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber . . . .

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

Following the procedures outlined in Rule 6, the ICTY judges have amended Rule 77 ten times, and the ICTR judges have revised Rule 77

43. E.g., Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, at 4 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2001); see also CRYER ET AL., supra note 1, at 391; Mundis, supra note 24, at 219.

44. Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Rules of Procedure and Evidence, r. 77, at 42–43, U.N Doc. IT/32 (Mar. 14, 1994) (“[A] witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber may be found in contempt of the Tribunal. The Chamber may impose a fine . . . or a term of imprisonment . . . .”).

45. ICTY RPE, supra note 18, r. 77, at 80–82 (amendment dates omitted). ICTR RPE Rule 77 is identical with the exception of subpart (G), which states, “The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD10,000, or both.” ICTR RPE, supra note 18, r. 77(G), at 93.

46. See Rules of Procedure and Evidence, supra note 34. ICTY RPE Rule 77 was amended or revised on January 30, 1995; July 25, 1997; November 12, 1997; July 10, 1998; December 4,
twice. Notably, in November 1997, the ICTY’s Rule 77 was amended to clarify that “[n]othing in this Rule affects the inherent power of the Tribunal to hold in contempt those who knowingly and wilfully interfere with its administration of justice.” The ICTR judges similarly amended Rule 77 to include language regarding the tribunal’s inherent powers.

II. THE INHERENT-POWERS DOCTRINE AS A BASIS FOR PROMULGATING PROCEDURAL RULES GOVERNING CONTEMPT

This Part considers whether the Tribunals possess the power to promulgate procedural rules, outside the power recognized in Rule 77, governing contempt proceedings and to prosecute infractions under these rules. If so, an ancillary question is whether the Tribunals’ judges are competent to define the scope of this inherent power. This Part discusses the source, development, and current application of the inherent-powers doctrine before the ICTY and ICTR; it concludes that the Tribunals possess the power to create procedural rules pursuant to Article 15 of the ICTY and ICTR Statutes and to adjudicate violations of such rules. Although the ICTY has interpreted the scope of its inherent powers more broadly than the ICTR and has offered inconsistent explanations for the source of the powers, this Part also endorses the competency of the Tribunals to employ and appropriately circumscribe their inherent powers to promulgate procedural rules and prosecute unambiguous infractions.

The inherent-powers doctrine flows from the idea that a court is vested with an inherent power to address certain issues as a result of the court’s “very creation.” While controversial in the scope of its application, the power is recognized in both domestic courts throughout the world and international courts. The U.S. Supreme Court has “firmly established that [t]he power to punish for contempts is inherent in all courts.” The Court clarified

1998; December 1, 2000; December 13, 2000; December 13, 2001; July 12, 2002; and July 22, 2009. See id.

47. See Rules of Procedure and Evidence, supra note 35. ICTR RPE Rule 77 was amended or revised on May 27, 2003 and November 10, 2006. See id.


49. See Rules of Procedure and Evidence, supra note 35 (locate “May 27, 2003”; then click “RULES OF PROCEDURE AND EVIDENCE”) (indicating this amendment to Rule 77 occurred on May 27, 2003).

50. Mundis, supra note 24, at 216.


52. See, e.g., 2 B.E. Witkin, CALIFORNIA PROCEDURE § 173 (5th ed. 2008).

53. Chambers, 501 U.S. at 44 (alteration in original) (quoting Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873)) (internal quotation marks omitted) (explaining that inherent powers are not controlled by statute or rules and that any statutory attempt to diminish these powers would be deemed ineffective).
that the power is expansive, covering conduct inside and outside the confines of the courtroom, because “[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.” The International Court of Justice (“ICJ”) similarly adopted an expansive interpretation of the power in the Nuclear Tests case, where the ICJ stated that it possessed an inherent power “to take such action as may be required . . . to provide for the orderly settlement of all matters in dispute.”

While a number of international courts rely on their inherent powers to justify the exertion of judicial powers not expressly conferred by their constitutive instruments, these courts rarely explain the basis of their authority to do so. Consequently, there is not a fully developed theory on the limits of its application.

The seminal case that explored and established inherent powers in international criminal tribunals was Prosecutor v. Tadic in August 1995, the first case to come before the ICTY. In response to a claim by the defense that questioned the legality of the establishment of the Tribunal, the Trial Chamber responded that it could not scrutinize the actions of the UN organs that created it because its jurisdictional power was limited to Article I of the ICTY Statute, which provided the “full extent” of the court’s power. However, the Tadic Appeals Chamber rejected this limited conception of the court’s jurisdiction. It distinguished “primary” or “original” jurisdiction, which the trial court considered to be the full extent of the Tribunal’s competence, from “inherent” jurisdiction. The Appeals Chamber explained that inherent jurisdiction is a “residual power[] which may derive from the requirements of the ‘judicial function’ itself” and continued that a court’s “jurisdiction to determine its own jurisdiction” is a critical component in the

54. Id. (alteration in original) (quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987)) (internal quotation marks omitted).


56. Paola Gaeta, Inherent Powers of International Courts and Tribunals, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 353, 356 (Lal Chand Vohrah et al. eds., 2003) (describing the use of inherent powers by a number of regional human rights courts, international criminal tribunals, and international arbitral tribunals).


58. Buteau & Oosthuizen, supra note 5, at 66.


61. Id.

62. Id.
exercise of a court’s functioning. Consequently, the tribunal concluded that it possessed an inherent power to examine the legality of its own establishment.

Once the Tadic bench established that it possessed the inherent power to determine the propriety of its own founding, the ICTY then applied this power to a number of different contexts, including the formulation of sentencing guidelines and the termination of defense counsel. Even though the ICTY granted itself broad discretion in the use of inherent powers over such areas, the judges have acknowledged elsewhere that the power cannot be used to enact measures that contravene principles of international law.

In the area of contempt, the Tadic Appeals Chamber concluded that it had the inherent power to compel a witness to testify, relying on the theory that such a power is necessary for carrying out its judicial functions and safeguarding the administration of justice. However, in the contempt proceedings against Duško Tadic’s lawyer, Milan Vujin, the Tadic Appeals Chamber asserted a different and more expansive justification for inherent powers. Rather than claiming that these powers arose from judicial necessity, as it did in the Tadic jurisdiction case and the Tadic decision on compelled witness testimony, the same Appeals Chamber in the contempt prosecution of Vujin asserted that its inherent power flowed from its mere existence as a judicial body. The court again emphasized this position in

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63. Id. ¶ 18 (internal quotation marks omitted).
64. Id. ¶ 22.
65. Facing the issue whether judicial discretion was appropriate in formulating minimum sentencing guidelines when the ICTY Statute and RPE did not provide for such discretion, the Tadic appeals bench concluded that judicial discretion to recommend minimum sentences “flows from the powers inherent in its judicial function and does not amount to a departure from the Statute and Rules.” Prosecutor v. Tadic, Case No. IT-94-1-A & IT-94-1-A R77, Judge-ment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).
66. In Prosecutor v. Delalic, the Trial Chamber decided it was appropriate to decide on a motion to terminate counsel, asserting that it could use its inherent power to control a fair and expeditious trial and to ensure the execution of justice. Case No. IT-96-21-A, Order on the Motion to Withdraw as Counsel Due to Conflict of Interest (Int’l Crim. Trib. for the Former Yugoslavia June 24, 1999).
67. For instance, the tribunal concluded that it did not have legal authority to issue subpoenas to states because this would run afoul of international law principles that allow only states to issue countermeasures against states. Prosecutor v. Blaskic, Case No. IT-95-14-AR108 bis, Judge-ment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997). Similarly, in Prosecutor v. Simic the Trial Chamber concluded that it could not compel a Red Cross employee to disclose information obtained during the course of his employment because of the customary norm of international law allowing nondisclosure from Red Cross employees. Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ¶ 74 (Int’l Crim. Trib. for the Former Yugoslavia July 27, 1999).
69. See supra notes 60–64 and accompanying text.
70. See supra note 68 and accompanying text.
the contempt prosecution of Florence Hartmann, where it stated that the tribunal’s inherent power to prosecute and punish contempt is “firmly established” and derives from the tribunal’s judicial power to ensure that it is not frustrated in the exercise of its basic judicial functions under the ICTY Statute.72

These opinions suggest that inherent powers may be used only to protect expressly conferred judicial functions. However, because the Vujin contempt opinion indicates that the employment of inherent powers is not contingent upon the powers delegated by the ICTY Statute, the Appeals Chamber granted itself much broader inherent powers.73

While the ICTY has expansively interpreted the reach of its inherent powers in contempt proceedings, the ICTR has been more cautious in applying its inherent powers to contempt allegations.74 In Prosecutor v. Nyiramasuhuko, the ICTR Trial Chamber concluded that the Office of the Prosecutor possessed the power to prosecute contempt even though its statute did not confer the prosecutor with such authority.75 Despite the court’s expansive interpretation of the contempt power,76 it couched its conclusion in statutory, rather than inherent, terms, demonstrating its preference for the narrow application of inherent powers.77

The Nyiramasuhuko court concluded that the power of the prosecutor “needs to be construed in light of the Tribunal’s statutory jurisdiction with respect to contempt.”78 Even though the ICTR Trial Chamber acknowledged that the Vujin contempt decision from the ICTY Appeals Chamber was dis-


73. In an analysis of the Nuclear Tests case, Chester Brown notes that the ICJ asserted two contradictory sources of inherent jurisdiction. Brown, supra note 57, at 223. First, the ICJ stated that its inherent power flows from the “mere existence of the Court as a judicial organ.” Id. (quoting Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, ¶ 23 (Dec. 20)) (internal quotation marks omitted). This suggests that the court possesses the power without the external delegation of any powers. Id. Second, the ICJ claimed that its inherent power exists in order to protect “its basic judicial functions,” suggesting that inherent jurisdiction is limited to safeguarding expressly conferred powers and functions. Id. (quoting Nuclear Tests, 1974 I.C.J. ¶ 23) (internal quotation marks omitted).

74. See Shahram Dana, Commentary, The Law of Contempt before the UN ICTR, in 10 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 2001–2002 278, 283 (André Klip & Göran Sluiter eds., 2006) (explaining that ICTR judges prudentially exercise their broad discretion over contempt proceedings, recognizing that such a finding seriously affects the basic rights of the accused contemnor).

75. The Office of the Prosecutor claimed that it did not possess the authority to investigate contempt because its power was limited to Article 15.1 of the ICTR Statute, which states that “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.” Nyiramasuhuko Contempt Decision ¶ 6, cited in Dana, supra note 74, at 282.

76. Nyiramasuhuko Contempt Decision ¶ 8 (stating that parties before the court are not empowered to investigate contempt but have an affirmative duty to do so), cited in Dana, supra note 74, at 282.

77. See Dana, supra note 74, at 282.

78. Nyiramasuhuko Contempt Decision ¶ 7, cited in Dana, supra note 74, at 282.
positive and authorized the use of inherent powers in contempt proceedings, the ICTR bench still chose to contextualize the justification of expanded powers in statutory, rather than inherent, powers.

The hesitancy of the ICTR to rely on its inherent powers is remarkable, especially in contrast to the more liberal approach of its sister tribunal. As one commentator notes, "It is quite puzzling why the [ICTR in Nyiramasuhuko] characterizes its jurisdiction over contempt as 'statutory' rather than 'inherent'" when the statute is silent on contempt and the Chambers recognized the availability of inherent powers under the Vujin contempt decision.

Thus, both tribunals have demonstrated their ability to limit the use of inherent power. The ICTR's prudent approach to the inherent-powers doctrine reflects its patterned policy of cautiously applying its inherent power. Even though its conservative application of the inherent-powers doctrine is guided by a tradition of prudence rather than a textual prohibition, because the ICTR explains its use of power in statutory rather than inherent terms, the text of the ICTR's constitutive documents circumscribes the exercise of power by the tribunal. The ICTY has similarly limited the use of its inherent powers. Even though the court has proffered different, arguably contradictory, justifications for the employment of its inherent powers, the ICTY's acknowledgement that it lacks the inherent power to issue subpoenas against states and that it cannot compel testimony from Red Cross employees demonstrates that the ICTY is also capable of limiting the exercise of its inherent powers.

Even though the two tribunals exercise their inherent powers on a different scale, both tribunals are competent not only to limit their use of power but also to appropriately conscribe their use of power consistent with international norms on the use of inherent powers. On one level, the scope of the Tribunals' inherent powers remains contested in both judicial decisions and academic literature. Despite this ongoing debate, most scholars and jurists...
agree that the use of inherent powers is prohibited in two circumstances: the Tribunals may not use inherent powers when the use would contravene the spirit or letter of their constitutive instruments or the principles of international law. Neither the ICTY nor the ICTR has applied its inherent powers in any of these proscribed manners, demonstrating that, even though the ICTR is more cautious than the ICTY in its use of inherent powers, both tribunals competently conscribe the exercise of their inherent powers.

First, the exercise of inherent powers in the ICTY and ICTR is not implicitly or explicitly inconsistent with their constitutive instruments. Neither statute prohibits the use of inherent powers. Despite its relatively expansive use of its inherent powers, the ICTY shows caution and deference for the spirit of its statute and RPE when deciding to use these powers. For example, when deciding whether judicial discretion was appropriate in formulating minimum sentencing guidelines, the Tadic Appeals Chamber explained that it would not use its inherent powers when such an exercise would “amount to a departure from the Statute and Rules.”

Second, the ICTY has also conformed to the ban on the use of inherent powers by declining to employ its inherent powers when their use would contravene principles of international law, as illustrated in Prosecutor v. Blaskic and Prosecutor v. Simic. ICTR jurisprudence demonstrates a “common theme” of restraint and “deliberate caution” when considering its inherent and statutory powers to adjudicate contempt. Accordingly, even though the ICTY

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86. Brown, supra note 57, at 239 (stating that an international tribunal is not permitted to use inherent powers when the exercise of such powers would be inconsistent with the principles and procedures of its constitutive instrument).

87. Id. (stating that an international court is not permitted to use inherent powers when its constitutive instrument explicitly prohibits the use of such powers).

88. Id. at 240 (clarifying that even when an international court’s constitutive instrument does not expressly forbid the use of inherent powers, the exercise of inherent powers would nonetheless be inconsistent with the instrument or rules).

89. Id.

90. When a court’s constitutive instrument expressly forbids the use of inherent powers, the inherent powers of the court are displaced. In Nottebohm, the ICJ concluded that the inherent powers of an international court exist only “in the absence of any agreement to the contrary.” Preliminary Objection (Liech. v. Guat.), 1953 I.C.J. 111, 119 (Nov. 18).


94. Dana, supra note 74, at 278.
uses its inherent powers more broadly than the ICTR, neither court has transgressed the two primary prohibitions on the use of inherent powers.

III. THE INHERENT-POWERS DOCTRINE AND CONTEMPTUOUS CONDUCT SANCTIONS

While the Tribunals’ power to promulgate procedural rules governing the prosecution of contempt is grounded in the inherent powers of the courts, the principle of legality requires that the judges codify these rules so that potential contempt defendants have prospective notice of forbidden conduct. Punishment of conduct not explicitly classified as prohibited would violate fundamental human rights and the due process principle of legality, which mandates that a person may only be held criminally liable for acts that constituted a crime at the time they were committed.95 The principle of legality is rooted in the protection of individuals against capricious government power;96 it is “the citizen’s bulwark against the State’s omnipotence.”97

The Tribunals’ compliance with the principle of legality is of vital importance because it is considered a fundamental human right and an essential principle of international criminal-procedure law. Several core human rights treaties mandate compliance with this principle,98 including the Third and Fourth Geneva Conventions, the European Convention on Human Rights,101 and the American Convention on Human Rights.102 The Universal Declaration of Human Rights (“UDHR”)103 and the International

95. See, e.g., Sluiter, supra note 6, at 634.

96. Id. In contrast to the principle of legality, some criminal law systems are grounded on the concept of substantive justice, where the legal order focuses primarily on prohibiting and punishing harmful or dangerous conduct whether or not that behavior was criminalized at the moment it occurred. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 36 (2d ed. 2008). This approach favors the protection of society over the individual. Id. Professor Cassese states that “for a long period, and until recently, international law has applied the doctrine of substantive justice, and it is only in recent years that it is gradually replacing it with the doctrine of strict legality . . . .” Id. at 38–39.

97. Franz von Liszt, Die deterministischen Gegner der Zweckstrafe [Deterministic Opponents of Purposive Punishment], 13 DIE GESAMTE STRAFRECHTSWISSENSCHAFT 325 (1983), as reprinted and translated in 5 J. INT’L CRIM. JUST. 1009, 1010 (2007). Note, however, that until recently, international law applied the doctrine of substantive justice not because of an authoritarian streak in the international community but because states had not yet formulated treaties establishing criminal rules and customary rules had not yet evolved. CASSESE, supra note 96, at 39.

98. CASSESE, supra note 96, at 40.


Covenant on Civil and Political Rights ("ICCPR") also require adherence to the legality principle. As the rights afforded to criminal defendants were both codified and expanded through the proliferation of international treaties, including the 1948 Convention on Genocide, the 1949 Geneva Conventions, and the 1984 Convention on Torture, the rights flowing from the principle of legality became embedded in international criminal law. The principle is implicitly required by the ICTY and ICTR and expressly articulated in Article 22 of the Rome Statute. Although the international community is ostensibly committed to the principle of legality, the Tribunals have failed to adhere to this fundamental principle in the practice of adjudicating contempt.

The ICTY has taken a relaxed stance on enforcement of the principle of legality. Rather than looking to the precise text available at the time that the crime was committed, the tribunal looks to the much looser standard of foreseeability and accessibility of the law. The ICTY Appeals Chamber has explained:

As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, acces-

any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.

104. International Covenant on Civil and Political Rights art. 15(1), adopted on Dec. 19, 1966, S. TREATY Doc. No. 95-20, 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.").

105. Cassese, supra note 96, at 40–41.


1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Id. art. 22.


109. Id.
sibility does not exclude reliance being placed on a law which is based on custom.110

The ICTY’s approach to the principle of legality is relatively casual because the court typically applies the principle to substantive crimes rather than to procedural violations.111 But applying the foreseeability and accessibility standard to procedural offenses jeopardizes legal certainty because there is “no evidence as to the existence and content of procedural offences under international law.”112 This means potential contemnors will lack knowledge of what conduct the tribunal may decide to punish through its inherent powers.113

The ICTY judges made the scope of prohibited conduct more ambiguous by amending Rule 77 to grant the tribunal the power to prosecute and punish any supposed contempt offense under its inherent powers, changing the formerly particularized contempt offense into a hazy, ill-defined violation. Prior to November 1997, ICTY RPE Rule 77 granted contempt power over individuals who committed specific offenses, such as refusal to testify, interference with witnesses or other persons, or illegal disclosure of information.114 The judges then amended the introductory sentence of Rule 77 to read, “The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice . . . .”115 This transformed the formerly exhaustive list of offenses to mere examples of actions that fall under the court’s inherent jurisdiction, allowing for the prosecution and punishment of conduct that is not explicitly defined.

The Vujin contempt decisions116 illustrate this inconsistency with the principle of legality. Some of Vujin’s conduct was prohibited by explicit provisions in the RPE: Rule 77 prohibited “interfer[ence] with, [sic] a wit-


111. See Sluiter, supra note 6, at 635.

112. Id.

113. Id.


witnesses to lie. However, Vujin was also found in contempt for behavior not proscribed by the RPE. For example, he gave a list of potential defense witnesses to a municipal police chief, an infraction that might have been due to inexperience rather than conscious violation of Rule 77. Even though Rule 77 requires the violation to be “knowing[] and willfull[],” the Tribunal relied on its inherent powers to prosecute arguably negligent conduct. The Vujin bench held that it had the inherent power to punish contempt in order to ensure the exercise of its jurisdiction and safeguard its fundamental judicial functions, whether or not the specific conduct was explicitly prohibited in Rule 77.

Recognizing that Vujin’s conduct was not expressly banned, the Appeals Chamber asserted that it was empowered to prosecute his behavior because it violated the “immutable standard of conduct required for the Tribunal’s proper functioning.” If the immutable standard was not established or made public, however, then the conduct is not properly punishable—a notice requirement is embedded in the principle of legality. Vujin argued that these norms were not fully publicized at the time of his alleged conduct and that his behavior was improperly judged according to undeveloped criminal norms.

Uncertainty about the scope and content of the immutable standard of conduct is inevitable in the context of the Tribunals’ contempt jurisprudence, where the behavioral customs are nascent and scarce. Defense attorneys who are experienced in domestic law may be unfamiliar with the unwritten code of conduct in conflict and postconflict situations and may need to reference expressly articulated codes of conduct. For example, in a typical domestic court, a common sense approach would posit that a trial lawyer should not disclose a confidential witness list. However, in the complex and politically thorny endeavor of defending a war criminal, an inexperienced
lawyer before the ICTY or ICTR might reasonably provide the police with a witness list for fear of the witnesses' safety without perceiving that she was interfering with the administration of justice.

The Appeals Chamber ultimately found Vujin guilty of violations of the immutable standard of conduct.\textsuperscript{128} Inconsistencies with the principle of legality did not appear to factor in the decision. The outcome is partially explained in Judge Wald's dissent from the finding of jurisdiction, in which she stated that "various [written and well-established] procedural safeguards" do not apply to contempt proceedings.\textsuperscript{129} Judge Wald did not elaborate on why accused contemnors were not entitled to such procedural protections. This is especially conspicuous because the ICTY unambiguously stated in \textit{Blaskic}\textsuperscript{130} and \textit{Simic}\textsuperscript{131} that inherent powers may not contravene general principles of international law, including the principle of legality.

During the drafting of the ICTY Statute, the UN Secretary-General was particularly sensitive to compliance with the principle of legality, stating that "the application of the principle [of legality] requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."\textsuperscript{132} Because the relatively nascent and imprecise content of international criminal-procedure law has frustrated its development as customary law,\textsuperscript{133} potential contemnors may not be aware of the unwritten immutable standard of conduct. Therefore, to avoid running afoul of the principle of legality, the Tribunals should only prosecute conduct that has been codified as prohibited.

IV. The Prohibition on Creating Criminal Offenses and the Dearth of Due Process in Nominally Noncriminal Cases: Applying the \textit{Eldridge} Solution

Although the Tribunals possess statutory and inherent powers to promulgate procedural rules governing contempt proceedings and to prosecute infractions, the judges are not empowered to employ inherent powers to


\textsuperscript{129} \textit{Id.} (Wald, J., dissenting) (finding that neither the ICTY Statute nor the Rules of Procedure and Evidence granted jurisdiction to the Appeals Chamber). The majority opinion was silent on the principle of legality. \textit{Id.} (majority opinion). While Judge Wald agreed with the majority's judgment, she wrote separately to explain that various procedural safeguards are not needed in contempt proceedings. \textit{Id.} (Wald, J., dissenting).


\textsuperscript{131} Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, \\textit{\S} 74 (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999).

\textsuperscript{132} \textit{Rep. of the U.N. Secretary-General, supra} note 106, \\textit{\S} 34.

\textsuperscript{133} \textit{See Sluiter, supra} note 6, at 635; \textit{see also, e.g., Cryer et al., supra} note 1, at 12.
define and punish contempt as a criminal offense. As a result, judges may be disguising criminal offenses as administrative infractions to conceal *ultra vires* creation of criminal offenses.\textsuperscript{134} Section IV.A recognizes that the Tribunals have the power to create procedural rules for contempt proceedings but argues that the Tribunals' definition and punishment of criminal contempt is an *ultra vires* exercise of power.\textsuperscript{135} Section IV.B argues that, even if contempt proceedings are deemed noncriminal, a higher level of procedural protection must be afforded to contempt defendants since they face substantial liberty and property deprivations.

A. Permissible Promulgation of Procedural Rules Versus Prohibited Legislation of Criminal Offenses

The Security Council empowered the ICTY with the enforcement of existing law and did not intend for the ICTY to enact new law.\textsuperscript{136} In his report to the Security Council regarding the establishment of the ICTY, the UN Secretary-General emphasized that "in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law."\textsuperscript{137} As noted by the *Tadic* appeals bench, "it is open to the Security Council . . . to adopt definitions of crimes in the Statute . . . ."\textsuperscript{138}

Recognizing this distinction, the *Tadic* Appeals Chamber emphasized that Article 15 of the ICTY Statute gives judges the authority to promulgate procedural rules consistent with the court's inherent powers but does not permit the tribunal to establish new offenses.\textsuperscript{139} In the Vujin contempt decision, the Appeals Chamber recognized this problem and attempted to resolve it by stating that "[c]are 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."\textsuperscript{140} The Chamber continued:

Article 15 of the Tribunal's Statute gives power to the judges to adopt only . . . *rules of procedure and evidence* . . . . That power does not permit rules to be adopted which constitute *new* offences, but it does permit the judges

\textsuperscript{134} See Mundis, supra note 24, at 220 (explaining that the Tribunals' rules may impermissibly criminalize conduct that is not provided for in their statutes); O'Shea, supra note 5 (explaining that the frequent amendment of the Tribunals' rules abuse the procedural rights of defendants).

\textsuperscript{135} See Sluiter, supra note 6, at 633–34.

\textsuperscript{136} SCHABAS, supra note 108, at 63.

\textsuperscript{137} Rep. of the U.N. Secretary-General, supra note 106, ¶ 29.


\textsuperscript{140} Id.
to adopt rules of procedure and evidence for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction.\textsuperscript{141}

Not surprisingly, the line between promulgating rules with sanctions and creating criminal offenses is imprecise. In fact, in Nyiramasuhuko, the ICTR stated outright that "contempt is by its very nature a criminal charge."\textsuperscript{142} Michael Bohlander, an experienced ICTY practitioner, concludes that because Rule 77 prescribes such serious penalties, "[t]here should be no debate" that it creates a criminal offense rather than an administrative sanction.\textsuperscript{143}

Precedent from the European Court of Human Rights ("ECHR") supports Bohlander's contention that attaching severe penalties to a contempt finding transforms an administrative contempt proceeding into the adjudication of a criminal offense.\textsuperscript{144} In Weber v. Switzerland\textsuperscript{145} and Benham v. United Kingdom,\textsuperscript{146} the ECHR concluded that when contempt sanctions are substantial, particularly when they involve the loss of liberty, contempt proceedings are properly characterized as criminal.\textsuperscript{147} However, other cases from the ECHR, including Ravnsborg v. Sweden\textsuperscript{148} and Putz v. Austria,\textsuperscript{149} suggest that when the purpose of the contempt proceeding is "principally directed at maintaining the order and dignity of the [judicial process],"\textsuperscript{150} the contempt proceeding will be considered to be administrative rather than criminal.\textsuperscript{151}

Following this distinction, mere administrative proceedings would not give rise to severe punitive sanctions, meaning a line might be drawn between permissible administrative hearings and prohibited criminal

\textsuperscript{141} Id. (emphasis in original) (quoting ICTY Statute, supra note 17, art. 15, at 10) (internal quotation marks omitted).

\textsuperscript{142} Nyiramasuhuko Contempt Decision, cited in Dana, supra note 74, at 282.

\textsuperscript{143} Bohlander, supra note 41, at 92 n.6. Indeed, both courts impose harsh punishments for contempt violations. ICTY RPE Rule 77(G) allows for 7 years of imprisonment, a fine of €100,000, or both as a punishment for contempt. ICTY RPE, supra note 18, r. 77(G), at 82. Similarly, ICTR RPE Rule 77(G) calls for up to 5 years imprisonment, a fine of $10,000, or both as punishment for contempt. ICTR RPE, supra note 18, r. 77(G), at 93. While 7–10 years of imprisonment may reasonably be viewed as an outrageous consequence for a disciplinary infraction, the law of international criminal procedure provides little guidance in determining the threshold punishment that transforms an administrative hearing into a criminal proceeding. See Gane, supra note 5, at 240 ("[T]he question [when contempt proceedings are criminal hearings that must give rise to a special host of due process protections] has not, as such, been addressed by the Tribunal . . . .").

\textsuperscript{144} Because the ICTR and ICTY have not addressed when the contempt proceedings might be labeled as administrative and the ICC employs decentralized contempt proceedings, the ECHR is a primary source of case law on the subject.


\textsuperscript{147} Gane, supra note 5, at 240 (explaining that the ECHR has also looked to the nature of the conduct in question as a factor in considering whether the proceeding is criminal); see also Engel v. Netherlands, Application 1 Eur. H.R. Rep. 647, ¶¶ 81–82 (1976).


\textsuperscript{150} Gane, supra note 5, at 240.

\textsuperscript{151} Id.
proceedings by severity of the punishment.\textsuperscript{152} Under this theory, even if it were possible for a severe punitive sanction to be “principally directed at maintaining the order and dignity of [the judicial process],”\textsuperscript{153} the ICTY and ICTR could not inflict severe sanctions for contempt and also maintain the jurisdictional mandate proscribing the creation of criminal offenses because a serious penalty would cause a proceeding to become criminal in nature.\textsuperscript{154}

However, this paradigm is deeply problematic because it is possible to distinguish between criminal and noncriminal proceedings only after the attachment of penalties. Accordingly, it is impossible to know in advance of the hearing whether the proceeding will be criminal or administrative. Yet because higher levels of procedural protection attach in criminal hearings,\textsuperscript{155} it is critical that the tribunal identify the nature of the proceeding before the trial begins.

Currently, the ICTY does not formally consider whether its contempt proceedings are criminal as a preliminary matter,\textsuperscript{156} because it considers all contempt proceedings to be administrative even when the imposition of serious sanctions may mean the proceedings are functionally criminal.\textsuperscript{157} As a result, imposition of serious sanctions may not only be ultra vires, but may also violate the accused’s due process and human rights guarantees.

If a contempt proceeding were criminal rather than administrative, the tribunal would be required to respect the “internationally recognized standards regarding the rights of the accused,”\textsuperscript{158} which includes the criminal trial protections afforded by a number of international instruments.\textsuperscript{159} The ICCPR requires that defendants receive a fair trial before an independent tribunal.\textsuperscript{160} Likewise, the UDHR,\textsuperscript{161} the American Convention on Human Rights, and the European Convention on Human Rights all require a fair trial by an independent and impartial tribunal.

\textsuperscript{152} See id.

\textsuperscript{153} Id.

\textsuperscript{154} Mundis, supra note 24, at 220–21; see also Klip, supra note 42, at 276–77 (arguing that Rule 77 “is beyond the powers of the judges of the Tribunal and does neither legally bind individuals nor states” and that Rule 91 is similarly “not binding, being beyond the mandate given to the judges under Article 15 of the Statute”).

\textsuperscript{155} See, e.g., International Covenant on Civil and Political Rights, supra note 104, art. 14(1).

\textsuperscript{156} See Gane, supra note 5, at 239–40.

\textsuperscript{157} Id.


\textsuperscript{160} International Covenant on Civil and Political Rights, supra note 104, art. 14(1) (affording the right “[i]n the determination of any criminal charge” to a “fair and public hearing by a competent, independent, and impartial tribunal established by law”).

\textsuperscript{161} Universal Declaration of Human Rights, supra note 103, art. 10 (“Everyone is entitled . . . to a fair . . . hearing by an independent and impartial tribunal . . . .”).
Rights, and the European Convention on Human Rights all mandate that criminal defendants have the right to a fair trial before an impartial tribunal. Taken together, a host of procedural protections are afforded to a defendant in a criminal trial that are not extended to an accused in a noncriminal contempt proceeding, including an independent and impartial trial; the presumption of innocence; a public, fair, and expeditious proceeding; and the opportunity to confront adverse witnesses.

The current paradigm for affording process in contempt hearings before the Tribunals is unsatisfactory because accused contemnors face serious property and liberty deprivations yet are denied procedural protections that would accompany similar punishments in a criminal trial. The method that distinguishes criminal proceedings from noncriminal proceedings based on the severity of the imposed sanction is flawed because the Tribunals cannot determine the severity of the sanction before the proceeding takes place. As a result, the Tribunals afford inadequate procedural protection to the accused contemnor, leaving the defendant vulnerable to situations such as contempt trials in absentia and contempt hearings without the possibility of appeal.

B. Applying Eldridge to Nominally Noncriminal Cases

It is critical that the Tribunals employ the appropriate standards of due process in contempt proceedings; yet, for two reasons, forcing the court to draw a bright-line distinction between criminal and noncriminal contempt proceedings risks a scheme where criminal defendants are given either vigorous or scarce procedural protection. First, a judge on the ICTY or ICTR may be hesitant to candidly identify contempt proceedings as criminal when this classification would require her to relinquish jurisdiction over the very cases of conduct that insult and frustrate her court. Second, the binary understanding of a proceeding as criminal or noncriminal may lead to

162. American Convention on Human Rights: "Pact of San José, Costa Rica," supra note 102, art. 8(1) ("Every person has the right to a hearing . . . by a competent, independent, and impartial tribunal . . . ").

163. Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 101, art. 6(1).

164. Cryer et al., supra note 1, at 353–58.

165. Gane, supra note 5, at 242.


167. ICTY RPE Rule 77(J) only provides for appeals from decisions rendered by the Trial Chamber. Cockayne, supra note 121, at 199. When Vujin filed an appeal against the finding of contempt by the Appeals Chamber, he was forced to rely on Article 14 of the ICCPR as a jurisdictional basis for his appeal because there is no provision for such an approach in either the ICTY Statute or the RPE. See Prosecutor v. Tadic, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, at 4 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2001).
underenforcement of due process rights for proceedings that fall just shy of the criminal threshold.

Therefore, a bright-line rule demarcating administrative and criminal contempt proceedings would either overenforce or underenforce procedural protection for the cases at the margin. While this drawback accompanies the operation of all bright-line rules, the impact is especially injurious in the context of the Tribunals, where the international community is loath to afford additional time and funding to the hearings for unwarranted process yet insufficient procedural protection for accused contemnors may contravene fair trial guarantees required by international human rights law. In response, this Section proposes application of the balancing test in *Mathews v. Eldridge* to calibrate procedural protection for accused contemnors.

The Tribunals lack a coherent, all-encompassing framework to determine due process for accused contemnors in Rule 77 proceedings. Recognizing that due process is "flexible and calls for such procedural protections as the particular situation demands," the Tribunals should not employ "a technical conception with a fixed content unrelated to time, place and circumstances." Instead of the current scheme, which affords process based on the two categories of criminal or noncriminal proceedings, the Tribunals should employ a context-specific, fact-bound approach.

In *Eldridge*, the U.S. Supreme Court concluded that a recipient of state-provided disability payments did not have a Fourteenth Amendment due process right to a pretermination hearing, even though the disability benefits constituted a property interest. *Eldridge* was decided six years after *Goldberg v. Kelly*, which concluded that a welfare recipient is constitutionally entitled to a pretermination hearing, primarily because the cessation of aid might deprive an eligible recipient of the very means to live. The *Eldridge* Court held that the U.S. Constitution required less procedural protection for a disability beneficiary than a welfare recipient, reasoning that the termination of disability benefits does not necessarily impose the same hardship as the cessation of welfare benefits because welfare recipients are per se destitute while disability recipients are not categorically indigent. The *Eldridge* Court concluded that due process should correspond to the facts of each

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169. See Gane, supra note 5, at 242 (describing the scattershot underenforcement of human rights and due process protection in contempt proceedings).
173. *Id.* at 349.
In its three-factor test, process is determined by the weight of the private interest, the risk of error, and the governmental interest.\(^\text{177}\)

The *Eldridge* test would allow the Tribunals to consider procedural protection with principle and consistency while still balancing the exigencies of each case. For example, the first factor is based on the idea that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."\(^\text{178}\) The possible length of the wrongful deprivation is also a relevant consideration.\(^\text{179}\) An accused contemnor before the ICTR faces up to five years imprisonment, a $10,000 fine, or both,\(^\text{180}\) and an accused contemnor before the ICTY may be imprisoned for seven years, fined €100,000, or both.\(^\text{181}\) The severity of the possible deprivation suggests that, at a minimum, alleged contemnors should be afforded the opportunity to be heard at a meaningful time in a meaningful manner.\(^\text{182}\)

The first *Eldridge* factor is especially relevant because, despite the substantial penalties prescribed by Rule 77, the Tribunals have not consistently provided accused contemnors with a meaningful opportunity to be heard. In *Blaskic*, for example, the Trial Chamber made a factual finding on a critical question of the contempt issue, namely the knowledge of the accused contemnor, without allowing the accused contemnor to respond to that allegation.\(^\text{183}\) On the other hand, in *Nyiramasuhuko*, the ICTR demonstrated "sensitivity to safeguard[ing] fundamental procedural rights."\(^\text{184}\) The Prosecution attempted to file an ex parte contempt motion alleging witness tampering and the attempted theft of documents and arguing that witness protection required an ex parte filing.\(^\text{185}\) Considering "the gravity of the allegations made," the court ordered the prosecution to immediately file the motion *inter partes* so that the defense would have an opportunity to be heard through written and oral submissions.\(^\text{186}\) It is precisely the type of procedural caution in *Nyiramasuhuko* that the first factor of the *Eldridge* test promotes.

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176. *Id.* at 334.
177. *Id.* at 335.
178. *Id.* at 341; see also *Goldberg*, 397 U.S. at 262–63.
180. ICTR RPE, *supra* note 18, r. 77(G), at 93.
181. ICTY RPE, *supra* note 18, r. 77(G), at 82.
182. *Goldberg*, 397 U.S. at 267. In the context of welfare deprivation, due process requires timely and adequate notice explaining the reasons for proposed termination and the opportunity to confront any adverse witness. *Id.* at 267–68.
184. Dana, *supra* note 74, at 278.
185. *Id.* at 280.
186. *Id.*
The second *Eldridge* factor considers the risk of erroneous deprivation, which turns on "the fairness and reliability of the existing . . . procedures . . . [and] the risk of error inherent in the truth-finding process." In American law, this factor evaluates the adequacy of the communicative method—written submissions or oral testimony—as an effective means for a party to convey information to the decisionmaker. In ICTY and ICTR contempt proceedings, this factor is particularly relevant because much of the evidence may rely on contested testimony. For example, in the *Ntakirutimana* case before the ICTR, the Trial Chamber emphasized the importance of the factual finding to the case and dismissed the contempt allegations resting on contested oral testimony so as not to "unduly infringe on [the] fundamental due process and fair trial rights of the defense." The third *Eldridge* factor is the public interest, which includes the administrative burden and other social costs associated with providing additional procedural safeguards to accused contemnors. Because the Tribunals are widely criticized for the time and expense they incur in adjudicating proceedings, critics who view the slow pace of the Tribunals as an impediment to their effectiveness will not warmly greet the time and expense of additional process. Nonetheless, the improprieties that flow from due process violations threaten the integrity of the Tribunals' work because they compromise international guarantees of impartiality and diminish the perception of justice. Controversy over the violation of human and due process rights within the Tribunals can prevent postconflict justice from playing a cathartic role in community rebuilding. Because the effective functioning of a court system requires justice to be executed in both perception and reality, if judicial officers are seen as trampling on fair trial

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188. *Id.* at 345.
189. *See, e.g.*, Dana, supra note 74, at 279.
190. *Id.*
194. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 12 (1998). In fact, bureaucratic and procedural controversies at the ICTR have led Rwandans to perceive the court as a "useless institution." ICG, supra note 10, at iii.
rights, then society may accept the judicial outcomes as a sham—a "grave insult" to the victims and survivors of mass human rights violations.197

It may be argued that the *Eldridge* inquiry, a balancing test predicated on the process afforded in administrative proceedings under the U.S. Constitution, is poorly equipped to govern contempt proceedings before the Tribunals. However, even though international procedural law lacks a precise analogue to the Due Process Clauses of the Fifth and Fourteenth Amendments, caselaw from the Tribunals demonstrates that defendants before the ICTY and ICTR who face substantial property and liberty deprivations are afforded a panoply of human and procedural rights, which, taken together, guarantee that property or liberty may not be taken away without some procedural protection. For example, while neither the ICTY Statute nor the ICTY Statute explicitly references a habeas remedy, the ICTR Appeals Chamber held in *Barayagwiza v. Prosecutor* that a detained individual must have judicial recourse to challenge the legality of his detention.198 This conclusion has been upheld by both the ICTY199 and ICTR.200 In *Prosecutor v. Kajelijeli*, the ICTR concluded that violations of a defendant's procedural rights may be challenged, including the right to be promptly informed of the reason for detention, the right to be promptly seen by a judge, the right to be assisted by counsel, and the right to be present at the proceeding.201 Even though differences remain between domestic and international law, the advantage of the *Eldridge* test is that it is adaptable to "virtually any question of procedural adequacy."202

Criminal proceedings must always afford the due process protections provided by international law, and the Tribunals' judges should never legislate criminal contempt offenses. Regardless of whether the contempt proceedings are classified as administrative or criminal, the fact remains that serious penalties may be imposed with scant procedural protection under the Tribunals' current rules. As such, the Tribunals should adopt a flexible model of due process to consider the unique procedural issues before the ICTY and ICTR. The *Eldridge* test would provide a principled guideline for the Tribunals to identify the appropriate standards of process to be afforded in their contempt hearings.

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196. See id.
197. See Ciorciari, supra note 193.
Two procedural defects undermine the legitimacy of contempt proceedings before the ICTR and the ICTY: the violation of the principle of legality and the failure to provide tailored procedural protection. First, to act in a manner consistent with the principle of legality, the Tribunals should only prosecute contemptuous conduct that has been proscribed in their respective procedural rules. Rather than relying on the ill-defined immutable standard of conduct that is contested in the nascent body of international criminal procedure, the Tribunals should prospectively adopt rules prohibiting the targeted behavior. Second, while the Tribunals may adopt procedural rules governing contempt, they may neither legislate nor prosecute criminal contempt offenses. Because international law prescribes a host of procedural protections to criminal defendants but not to accused contemners facing administrative sanctions, the Tribunals should adopt the Eldridge test to establish principled guidelines for determining the process to be afforded to each accused contemnor. Compliance with the principle of legality and employment of flexible due process standards will inject due process protection into the Tribunals’ contempt proceedings and consequently fortify the procedures governing international criminal law.