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Marie Ghantous

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FREEDOM OF EXPRESSION AND CONTEMPT OF COURT BEFORE INTERNATIONAL CRIMINAL COURT: SELECTED ISSUES

INTRODUCTORY NOTE

Marie Ghantous[*]

In 2014, the Special Tribunal for Lebanon (STL) issued two summons to appear against two Lebanese journalists and their respective media for contempt of court. As a reminder, this *ad hoc* tribunal was created to try and punish the perpetrators of the "terrorist" crime[s] that killed former Prime, Rafic Hariri, and other linked murders.

Previously, the journalist Florence Hartmann had been sentenced by ICTY to imprisonment because she disclosed information about the Milosevic case, even after the case was closed due to the death of the former President. She has been arrested and serves currently her sentence in The Hague.

In both cases the Courts issued Orders forbidding disclosures of any information related to the case. But whereas Florence Hartmann[1] based her defense on freedom of expression, and the conditions of its restriction, this issue was totally absent from the pleadings of the parties before the STL, where the parties built their defense on errors of law and errors of fact.[2]

The offense of contempt was unknown in Lebanon, which follows the civil law system. LCIS found it useful to hold a Study Day to explore the relevant doctrine and jurisprudence, and study the scope of their application STL Rule 60 *bis* is the disposition of interest.[3] It seems clear that the rules set forth by all *ad hoc* international criminal tribunals and by the ICC have all inspired the drafters of the *STL Rules*.[4] However, the STL also integrated principles developed by the jurisprudence of the international courts and tribunals. An exhaustive study cannot be proposed here because the lack of time imparted to the presentation of this paper. We have tried to show the major trends regarding this very technical and procedural issue.

Common rule 77 of the *Rules of Procedure and Evidence* to the *ad hoc*

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* International Law and Human Rights Lecturer, Barrister-at-Law, President of LCIS.

1 *Florence Hartmann case*, IT-02-54-R77.5, Judgment on Allegations of Contempt (September 14 2009) (International Criminal Tribunal for the former Yugoslavia); *Florence Hartmann case*, IT-02-54-R77.5-A, Judgment (July 19 2011) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

2 *In the case against Al Jadeed [Co] S.A.L./New T.V. S.A.L. (N.T.V.) And Karma Mohamed Tahsin Al Khayat*, STL-14-05/ A/AP, Public Redacted Version of Judgment on Appeal (8 March 2016) (Special Tribunal for Lebanon).

3 Special Tribunal for Lebanon, *Rules of Procedure and Evidence*, r 60 *bis* [*STL Rules*].

4 ICTY, ICTR, SCSL, MICT.

Tribunals (ICTY, ICTR, SCSL) criminalizes what they call "contempt";[5] article 70 of the *Rome Statute* mentions "Offences against the administration of justice".[6] However, Rule 60 *bis* of the *STL Rules* tackles "Contempt and Obstruction to Justice", whereas Rule 90 of the RPE of the newly created Mechanism for International Criminal Tribunals (MICT) which will continue the residual cases remaining after the closure of the ICTY and ICTR, dryly states "Contempt". This variation in the use of terms does not bring any difference to the notion or the principle of contempt of court. Indeed, the content of all relevant dispositions is similar to a large extent. The use of the expression "obstruction to justice" does not change the content of the principle.

Furthermore, certain dispositions were inspired by the ICC *Rules of Procedure and Evidence*, such as paragraph A (i) that was inspired by the ICC *Rules* (false statements in situations other than those covered by Rule 152).[7]

However, in different areas valuable principles followed by ICC were totally disregarded, such as the "Period of limitation", either for triggering a prosecution or for enforcement of sanctions.

Some dispositions were proper to the *STL Rules*. For example, paragraph A (vii) of Rule 60 *bis* is very interesting, because it tackles a very sensitive issue, which is the issue of contradiction between the prohibition of disclosing information and freedom of expression.[8] This disposition does not exist in other RPEs but it was developed by the jurisprudence of the *ad hoc* tribunals. Paragraph G also integrated principles developed by the jurisprudence of the ICTY and ICTR at the occasion of trials for contempt.[9]

> According to the *West's Encyclopedia of American Law* contempt of court is: "An act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority, such as a court or legislative body."[10] It is described as a behavior that opposes or defies the authority, justice, and dignity of the court. Contempt charges may be brought against parties to proceedings; lawyers or other court officers or personnel; jurors; witnesses; or people who insert themselves in a case, such as protesters outside a courtroom.[11]

Criminalizing contempt of court is important to judiciary institutions. The integrity of any judicial system depends on the possibility for all the actors of a trial to act according to their consciousness and without fear of reprisals.

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5 *Rules of Procedure and Evidence*, Published by the International Criminal Court, ISBN No. 92-9227-278-0.

6 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 art 70 (entered into force 1 July 2002) [*Rome Statute*].

7 *STL Rules*, *supra* note 3 at r 60 *bis* para A (i).

8 *Ibid* at r 60 *bis* para A (vii).

9 *Ibid* at r 60 *bis* para G.

10 "Contempt of Court" in *West's Encyclopedia of American Law*, 2nd ed by Jeffrey Lehman & Shirelle Phelps (Detroit: West's Encyclopedia of American Law, 2008), online: <http://legal-dictionary.thefreedictionary.com/Contempt+of+Court>.

11 *Ibid*.

For this reason, any threat to any of the trial actors, corruption of any of them, the destruction of evidence, or any attempt to do that, or to interfere in the due process of a trial are considered as contempt of court and obstruction to justice.

Contempt of court is a notion that exists in most of the domestic legal systems.

In the USA, Title 18 USCA, §§ 1501–1517, mainly § 1503, punish obstruction of justice and aim to protect the integrity of federal judicial proceedings as well as agency and congressional proceedings.[12]

The *French Criminal Code*, Chapter IV, Titre III, Livre IV (de l'article 434-7-1 à l'article 434-23-1) punishes contempt to Court which is considered as an attempt to the State authority, and it classifies these actions as a threat to the nation, the State and the public peace.[13] Moreover, Section 2, Ch. IV criminalizes as well the attempt to the International Criminal Court.

In Canada, criminal offences are found within the *Criminal Code* of Canada and also in other federal and provincial laws.[14] However, contempt of court is the only remaining common law offence in Canada. Under *Federal Court Rules*, at Appeal level, Rule 466, and Rule 467 apply to a person accused of contempt.[15] Different procedures exist for different provincial courts.

In the British law, the law on contempt is partly set out in case law, and partly specified in the *Contempt of Court Act 1981*.[16]

Famous examples of cases of contempt of court is the Watergate affair in 1970 involving President Richard M. Nixon, where a number of Nixon's top aides were convicted of obstruction of justice, including former attorney general John N. Mitchell. A federal Grand Jury named Nixon himself as an unindicted co-conspirator for the efforts to prevent disclosure of White House involvement in the 1972 burglary of Democratic National Committee headquarters at the Watergate building complex in Washington, D.C.

Another famous example is the affair Monica Lewinsky raised against former US President Bill Clinton. His refusal to admit a relationship with Ms. Lewinsky was considered as contempt of court.

The *Lebanese Criminal Code* contains dispositions very close to contempt. Article 382 (last amended in 1993) of the *Lebanese Criminal Code*[17] states:

> Whomever threatens by any means, a judge, or any person vested by a judicial mission, or implementing a legal duty before the judiciary, such as an arbitrator, or a lawyer, or an expert, or a syndic, or a witness, with the intention of influencing his/her immunity or opinion, or judgment, or to

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12 USCA tit 18 §§ 1501–1517 (West 1997).

13 Art 434-7-1 to 434-23-1 C pén.

14 *Criminal Code*, RSC 1985, c C-46.

15 *Federal Court Rules*, SOR/98–106 r 466–467.

16 *Contempt of Court Act 1981* (UK), c 49.

17 The *Lebanese Criminal Code,* (adopted: 1943-03-01)*,* Beyrouth.

> impede him/her from doing his/her duty or mission, is punished by imprisonment between one and 3 years and a fine between 100.000.- to one million Lebanese pounds.
>
> If the threat includes a promise to use of weapons or to attack individuals or property, or if it is coupled with one of these acts, the perpetrator is punished by temporary forced labor.

However, unlike the "Offences to the Court" known in common law countries and countries that have adapted their legislation to the ICC, and unlike "Contempt to Tribunal" before *ad hoc* tribunal and court, the offence in the Lebanese law is to "threaten by any mean" with the intention of influencing the outcomes of a judicial proceeding that is taking place before the judiciary. The Code requires a threat with a specific intention, or *mens rea*, consisting in the will to interfere in the justice proceedings. Other acts cited in the *ad hoc* tribunals RPE, and implemented with the same *mens rea* of interfering in the judicial proceeding, are not necessarily punished in the Lebanese legal system.

Threatening a judge or any actor in the Lebanese system is an offence (*délit* جنحة) punished by 3 years of prison maximum. It can be upgraded to become a felony (جناية) if it contains a promise of use of weapons, or a threat to harm someone or someone's property. The prison becomes assorted of temporary forced labor.

In certain cases, contempt orders forbid any disclosure of any information about the case and they are clearly a limitation of freedom of expression (FOE). On the other hand, FOE is guaranteed by international conventions that are very widely ratified. They set conditions for the limitation of FOE. ICCPR Article 19, in particular, clearly established the conditions where FOE limitation is possible.[18] The question that is raised by such situation is the legality of contempt orders and the extent of their compliance with conditions set by international conventions, ICCPR in particular, especially if fundamental rights are considered as peremptory norms. In cases where disclosure is restricted, we are clearly facing a classical pattern of opposition of two fundamental rights, a tension in fact, between FOE and the right to a fair trial.

International criminal justice offers very few examples where FOE was opposed to the Court. The case of Florence Hartmann before the ICTY was probably the first where FOE was a major ground of defense, followed by the cases of Al Amine and Khayat, and their respective media before the STL.

LCIS organized a Study Day, trying to explain the notion of contempt of court which is unknown in Lebanese legal system – even if there are mechanisms which tend to a similar result. The Study Day also tried to explore FOE in depth and its different components to see till which extend they apply before international criminal courts, or if they apply bore such courts.

This publication selected a certain number of issues, and does not pretend to

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[18] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 19 (entered into force 23 March 1976) [ICCPR].

be exhaustive. Only articles that shed light on certain aspects of the restriction of freedom of expression were selected. Freedom of expression as a whole is not dealt with in this selection. The relevant case-law of the ICTY was first reviewed, followed by research on "*Ordre Public* Protection as Legitimate Aim for FOE Restriction", then "Freedom of Expression and Margin of Appreciation".

If we leave it to the reader to make his/her own opinion about this critical issue, one thing clearly appears: States are the main protectors of FOE, and they hold all the cards in their hands, as members of the courts and as members of the conventions protecting human rights. Another issue appears to be more and more critical: the credibility of international criminal courts which raises in turn the accurate and current question of the future of international criminal justice. We are today, at a critical crossroad, after the withdrawal of many countries from the ICC, the end of the ICTY and soon the ICTR, and the tense relations between Russia and the USA, which presage a return to a sort of cold war that is not conducive to international criminal justice. But what is the purpose of any academic study if not to push for thinking?

The Study Day, which led to this publication, was organized in cooperation with the Embassy of the Netherlands in Beirut, the Outreach Bureau of STL, and the Faculty of Law of Notre Dame University (NDU). We therefore address a special thanks to HE Mrs. Hester Somsen, Ambassador of the Netherlands in Beirut, and Ms. Olga Kavran, Head of the Outreach and Legacy Section, STL, Lebanon, and Professor Maan Bousaber, Dean of the Faculty of Law and Political Science, NDU, who made this event possible and participated in the promotion of legal academic effort.

We would like also to thank the Presidents of panels, namely professor Georges Khadige, Me Bassam Dayeh, Bâtonnier of the Tripoli Bar, and Professor Camille Habib, Dean of the Faculty of Law, Political and Administrative Studies at the Lebanese University; all researchers who contributed to the Study Day; all our esteemed guests: legal expert judges, lawyers, or professors, and all the students who shared with us their interest and curiosity for this uneasy topic.