

The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit

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‘In seeking inspiration for change, it is perhaps natural for lawyers to go browsing in a foreign law boutique. But it is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase – a legal pastiche – can produce a far less satisfactory fact finding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form’.^{**}

I. Introduction

At the time of its creation in 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was given an adversarial construct by virtue of its Statute.¹ In the following year, the Tribunal’s judiciary created and adopted the Rules of Procedure and Evidence² that would govern at the Tribunal. Widely acknowledged to be adversarial in nature, the Rules also implemented a continental evidentiary approach and provided for certain other continental features, including an active judiciary. To better understand the effect of combining features that derive from these two legal systems, this work surveys various aspects of the common law and continental legal traditions. It then assesses the way in which aspects of the two systems have been united at the Tribunal, with a specific focus given to the manner in which the amalgamation has altered the procedural safeguards bestowed upon the accused.

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** *Mirjan Damaška*, “The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments”, 45 *American Journal of Comparative Law* 839, 852 (1997).

¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, United Nations Document 5/25704, annex (1993) [hereinafter Statute].

Positing that the combined system leaves the accused in a precarious position at best, this work then acknowledges the pressures that have been exerted upon the Tribunal to expedite its proceedings and notes the consequent amendments made to its Rules. Highlighting numerous instances wherein the Tribunal has abandoned time consuming adversarial features in favor of approaches found in the continental system, a thorough analysis of the Tribunal's modified pre-trial practices is then undertaken. This examination questions the Tribunal's commitment to the principles espoused by it, particularly with regard to the issue of judicial impartiality, and expresses the concern that the protracted nature of due process has caused the same to become a casualty in the Tribunal's war against inefficiency.

II. Background

In May 1993, through the adoption of Resolution 827, the United Nations Security Council established 'an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'.³ The Statute of the new Tribunal was annexed to the Resolution; it required that the Tribunal's judiciary establish the rules of procedure and evidence that would govern at its proceedings.⁴ Accordingly, Resolution 827 called for the Secretary-General to provide the Tribunal's judiciary, once elected, with any suggestions regarding the potential rules that may be put forward by States.⁵

² International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, United Nations Document IT/32 (1994) [hereinafter ICTY RPE].

³ Security Council Resolution 827, United Nations Security Council Official Record, 48th Session, 3217th meeting, at paragraph 2, United Nations Document S/RES/827 (1993) [hereinafter Security Council Resolution 827].

⁴ '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'. Statute, *supra* note 1, at art 15. Article 15 is more exceptional than it may first appear. Although it is true that an international tribunal will often determine its own rules of procedure and evidence, the circumstances relevant to such a tribunal differ from that of the ICTY. In particular, states have agreed to the establishment of the tribunal; they are also given the opportunity to jointly consent to the rules that will control the proceedings or, alternatively empower the tribunal to determine what the rules will be. *Mojtaba Kazazi*, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals 3 (1996).

⁵ Security Council Resolution 827, *supra* note 3, at paragraph 3.

Such submissions were indeed proffered, including a lengthy proposal tendered by the United States that proved to be ‘particularly influential’.⁶

Consequently, the procedural system that was adopted by the Tribunal was closely aligned to that which would be found in the Anglo-American adversarial system of justice.⁷ Some adversarial procedural decisions were pre-ordained by the Statute. For example, in accord with the same and contrary to the continental approach, the Rules require that an accused enter a plea of guilty or not guilty upon his or her initial appearance before the Tribunal.⁸ Commenting on the ‘largely adversarial approach’ to the Tribunal’s procedures, then-President of the ICTY, Antonio Cassese, attributed the choice to the limited precedent of the Nuremberg and Tokyo Trials and the need for ‘us, as judges, to remain as impartial as possible’.⁹

Arguably, Cassese’s reference to judicial impartiality is in contradiction with the evidentiary rules created by the Tribunal.¹⁰ These rules confer extensive

⁶ *Virginia Morris and Michael P. Scharf*, 1 An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia 177 (1995) [hereinafter 1 *Morris & Scharf*]. The submission included commentary and was approximately 75 pages in length. Suggestions Made by the Government of the United States of America, United Nations Document IT/14 (Nov. 17, 1993) [hereinafter U.S. Suggestions] reprinted in *Virginia Morris and Michael P. Scharf*, 2 An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia 509 (1995) [hereinafter 2 *Morris & Scharf*].

⁷ See e.g., *Christoph J.M. Safferling*, Towards an International Criminal Procedure 223 (2001) (noting that the structure of the Tribunal’s procedure is along the lines of the Anglo-American System); *Antonio Cassese*, International Criminal Law 384 (2003) (remarking that the Tribunal adopted a system close to a U.S. prepared memorandum and that, accordingly, ‘the court was conceived of as a sort of referee’).

⁸ ICTY RPE, R.62 (iii), United Nations Document IT/32 (1994). The Statute provides for the accused to enter a plea before the Trial Chamber. Statute, supra note 1 at art. 20(3). In the continental system, ‘formal pleadings . . . are objectionable’. *Mirjan Damaška*, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 University of Pennsylvania Law Review 506, 582 (1972–73) [hereinafter *Damaška*, Evidentiary Barriers]. See also *Abraham S. Goldstein*, ‘Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure’, 26 Stanford Law Review 1009, 1019 (1973–74) (noting the absence of guilty pleas in the continental system due to the fact that the state may not abandon its duty to guarantee that the law is enforced and that the facts in each case support the relevant charge).

⁹ Statement by the President Made at a Briefing to Members of Diplomatic Missions, Summary of the Rules of Procedure at the International Criminal Tribunal for the Former Yugoslavia (1) United Nations Document IT/29 (1994), reprinted in 2 *Morris & Scharf*, supra note 6, at 650 [hereinafter Statement of the President]. The President noted exceptions to the adversarial construct in that the Tribunal would not be restricted by technical rules regarding the admissibility of evidence and that the Tribunal may order the production of additional evidence *proprio motu*. Id.

¹⁰ This issue is discussed in greater detail *infra* IV(B)(2)(a).

powers upon the judiciary regarding matters of evidence,¹¹ an approach that closely follows the practice employed in the continental system of justice.¹² Further in keeping with that system, the evidentiary rules implemented by the Tribunal, unlike those governing common law proceedings, are extremely minimal.¹³ To best appreciate the significance of the Tribunal's marriage of a common law construct with assorted continental rules, it is instructive to engage in a closer examination of the make-up of these two dominant Western systems of justice.

III. Continental and Common Law Criminal Procedure

A careful examination of the two processes is necessary for a number of reasons. First, not unlike the experience of the four Powers that met to establish the parameters for the Nuremberg proceedings,¹⁴ the tension between the two forms of criminal procedure played a role in the Tribunal's formation and continues in importance throughout its operation.¹⁵ Second, it has been noted that the comparisons made between the two systems are often 'too superficial' and frequently focus exclusively on the trial phase, as opposed to the entirety of the proceedings.¹⁶ Consequently, it is fair to observe that there are often miscon-

¹¹ The judges are given the authority to order either party to produce additional evidence; they may also, *proprio motu*, summon witnesses. ICTY RPE, R.98, United Nations Document IT/32 (1994).

¹² *Cassese*, supra note 7, at 384; see also *Mirjan Damaška*, 'Propensity Evidence in Continental Legal Systems', 70 Chicago Kent Law Review 55, 61 n. 16 (1994) (describing the Tribunal's rules of evidence as 'continental in orientation').

¹³ Of the 125 rules initially adopted, only ten were rules of evidence. *Dirk Ryneveld, Q.C. & Daryl A. Mundis*, 'The Contribution of the ICTY to the ICC: Procedural and Evidentiary Aspects from a Practitioner's Perspective' 51, 54, in *The Changing Face of International Criminal Law: Selected Papers* (2002).

¹⁴ See, e.g., *Cassese*, supra note 7, at 377–381 (describing the difficulties experienced in establishing a workable construct for the Nuremberg trials, highlighting, in particular, disagreements between representatives of the United States and the Soviet Union).

¹⁵ See, e.g., *Salvatore Zappalà*, *Human Rights in International Criminal Proceedings* 17 (2003) (noting that the two models dominated the debate in the drafting of the Tribunal's Statute and Rules 'to an overwhelming extent'). See also *Patricia M. Wald*, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court', 5 Washington University Journal of Law and Policy 87, 90–91 (2001) (remarking that the 'ICTY employs a sometimes uneasy and frequently awkward blend of the two systems', that 'there are numerous . . . areas where differing practices from the two systems clash' and that 'the lack of a common legal culture tends to produce frequent, small irritations and tensions throughout the trials').

¹⁶ *Goldstein*, supra, note 8, at 1020. See e.g., *Patrick L. Robinson*, 'Ensuring Fair And

ception on each side of the equation as to the characteristics of the other system.¹⁷ Finally, in order to appreciate the potential difficulties that may emerge, as a result of uniting the two systems, an appreciation of each system is necessary. This is particularly so in order for one to be aware of the manner in which each approach protects the procedural rights of the accused.¹⁸

Such an examination may appear to indicate a rejection of *Judge Robinson's* assertion that the legal system of the Tribunal ‘is neither common law accusatorial nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*’.¹⁹ However, *Judge Robinson* also notes that ‘in interpreting a provision that reflects a feature of a particular system, it would be incorrect to import that feature wholesale into the Tribunal without first testing whether this would promote the object and purpose of a fair and expeditious trial in the international setting of the Tribunal’.²⁰ It is submitted that a general assessment of the two systems is a necessary first step in performing such a test. Without an appreciation of how a system protects the fundamental rights of those who stand accused before it, it is impossible to appreciate the effect that a transplant of one of its features might have on the fair administration of justice in an alternate system.

At the outset, it is perhaps beneficial to highlight a difference between the two processes that is not procedural in nature, but rather operates to shape the procedures employed by each system. It has been observed that the two systems are not comparably committed to the pursuit of truth.²¹ The singular

Expeditious Trials At The International Criminal Tribunal For The Former Yugoslavia’, 11 European Journal of International Law 569, 574 (2000) (limiting the ‘main differences’ between the two systems to trial features, specifically, judicial control over proceedings and admissibility of evidence).

¹⁷ ‘American lawyers cling to the unfounded belief that modern systems of criminal procedure in civil law countries are wholly “inquisitorial”. *Rudolf B. Schlesinger*, ‘Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience’, 26 Buffalo Law Review 361, 363 (1976) (noting that the thought is 200 years out of date). See also *Gordon Van Kessel*, ‘European Perspectives on the Accused as a Source of Testimonial Evidence’, 100 West Virginia Law Review 799, 800 (1998) (commenting on American distrust of ‘anything inquisitorial’); *Renee Lettow Lerner*, ‘The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D’Assises’, 2001 University of Illinois Law Review 791, 819 (2001) (observing that it was difficult for a French judge and prosecutor to appreciate the degree to which American prosecutions are adversarial).

¹⁸ Given the complexity and depth of the subject matter, it is important to note that the author does not purport to provide herein an exhaustive analysis of the two systems. Rather the goal is to create a general understanding of the same in order to facilitate an appreciation of the interplay of the two systems at the Tribunal.

¹⁹ *Robinson*, supra note 16, at 569.

²⁰ *Id.* at 579.

²¹ *Damaška*, Evidentiary Barriers, supra note 8, at 513.

imperative in the continental system lies in establishing objective truth;²² the discovery of the same is considered to be a mandatory precursor to a just decision.²³ Truth is a necessity, therefore, not only in the natural operation of the system, but also because it serves as a linchpin with regard to achieving the ultimate goal or objective of the system. Conversely, the Anglo-American adversarial system focuses more on the ‘just settlement of dispute’²⁴ and evidences the willingness, as warranted, to subordinate the truth to other competing interests.²⁵ This difference in attitude towards the value of truth in criminal proceedings relates to the very essence of each system in such a way that discrepancies between the two systems become obvious at as early a point in the proceedings as the pre-trial phase.

A. Initiation of Proceedings

In the continental system, the trial phase is preceded by a ‘purportedly non-partisan investigation’.²⁶ This form of official evidence gathering varies amongst domestic jurisdictions²⁷ and, generally speaking, tends to manifest itself in one of two ways. In the more traditional fashion,²⁸ an investigating judge inherits an inquiry initiated by the prosecutor; the judge is then given the responsibility to ‘pursue all inquiries that he deems useful in discovering the truth’ and is required to seek out exculpatory evidence along with that which implicates the accused.²⁹ Some countries that employ the continental system of justice have

²² William Pizzi and Luca Marafioti, ‘The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation’, 17 Yale Journal of International Law 1, 7; *Van Kessel*, supra note 17, at 817.

²³ Damaška, *Evidentiary Barriers*, supra note 8, at 581.

²⁴ Id.

²⁵ An example of this can be found in American jurisprudence; reliable evidence may be excluded from the trial process if improperly obtained. *Pizzi & Marafioti*, supra note 22, at 7. One explanation for this evidentiary approach may be that the adversarial system is strongly motivated by distrust of public officials and thus incorporates safeguards against official abuse. Damaška, *Evidentiary Barriers*, supra note 8, at 583. Deterrence is not the only motivating factor behind the exclusion of such evidence in common law courts, however. In rendering improperly obtained evidence inadmissible at trial, ‘Irish courts . . . are motivated solely by the imperative of protecting the constitutional rights of the accused’. Dermot Walsh, *Criminal Procedure*, 460 (2002).

²⁶ Damaška, *Evidentiary Barriers*, supra note 8, at 511.

²⁷ See, e.g., *Van Kessel*, supra note 17, at 801–02 (1998) (noting that continental systems of criminal procedure are very diverse and often changing).

²⁸ France employs a ‘pure inquisitorial model’, *Goldstein*, supra note 8, at 1018. Holland provides another example of a ‘traditional’ system. *Van Kessel*, supra note 17, at 816.

²⁹ Lerner, supra note 17, at 802.

modified this practice: like responsibilities are now bestowed upon the prosecutor or an alternative investigating authority, who is then subject to ‘neutral judicial oversight’ to ensure compliance with its impartial duties.³⁰ In either form, ‘unilateral official inquiries’ remain central to the continental system of criminal justice.³¹ It is for the investigating judge to determine which cases ought to be brought to trial and which ought not to be pursued due to insufficient evidence,³² and in some continental systems, a decision to proceed will be subject to review by an indicting chamber.³³

Throughout the course of this non-partisan information gathering, the relevant official, a state actor, amasses a case file or dossier. The dossier must contain summaries of all testimony and records of proof-taking activity.³⁴ In compiling this information, the state official is subject to many rules with regard to the recording of statements, the authentication of documents and the like.³⁵ The materials amassed include those of both incriminating and exculpatory natures and, more often than not, will be informative as to what the accused will say at trial.³⁶ ‘Partisan evidence gathering’ is virtually non-existent, though both the prosecutor and defense counsel may request that the investigating official interview specific witnesses, ask certain questions and

³⁰ *Pizzi & Marafioti*, supra note 22, at n. 60 (noting the movement from judicial control to judicial oversight in such countries as Germany and Portugal). See also *Cassese*, supra note 7, at 368 (observing that abuse of power by those holding the position of investigating judge, in particular by placing undue pressure on suspects, resulted in the abolition of the role in certain civil law countries). It is noteworthy that, even under the French system, an investigating judge may delegate investigatory duties to the police, though their activities are then subject to periodic review. *Goldstein*, supra note 8, at 1019.

³¹ *Mirjan Damaška*, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’, 45 American Journal of Comparative Law 839, 843 (1997) [hereinafter *Damaška*, The Uncertain Fate].

³² *Cassese*, supra note 7, at 370. In some jurisdictions, the decision to go forward with a case is made by the public prosecutor upon receipt of the dossier from the official who conducted the impartial investigation. *Damaška*, Evidentiary Barriers, supra note 8, at 559.

³³ *Eric Manch*, ‘Throwing the Baby Out with the Bathwater: How Continental-Style Police Procedural Reforms Can Combat Racial Profiling and Police Misconduct’, 19 Arizona Journal of International and Comparative Law 1025, 1037 (2002). See also *Schlesinger*, supra note 17, at 366 (noting that, in the French system, the results of the investigation are subject to review by a three judge panel).

³⁴ *Damaška*, Evidentiary Barriers, supra note 8, at 533. The dossier will also include the prosecutor’s charge sheet which informs of the evidence that will be offered and the legal theories put forth. *Id.* at 534.

³⁵ *Goldstein*, supra note 8, at 1019. See, e.g., *Lerner*, supra note 17, at n. 40 (noting that, under the French system, each page of the dossier is signed by the investigating judge, the clerk of court and, as appropriate, by the relevant witness who is required to check the same for accuracy).

³⁶ *Damaška*, Evidentiary Barriers, supra note 8, at 535.

suggest the collection of physical evidence.³⁷ In the continental system, contact with a pre-trial witness by one of the parties is so disfavored that it may result in discounting the testimony of the relevant witness and may even be treated as an ethical violation on behalf of the offending attorney.³⁸ However, the suspect is generally allowed to challenge evidence during the investigative stages.³⁹ In fact, in many continental systems, ‘the accused has a two-fold opportunity to be heard – first in the course of the preliminary investigation and again when the three judge panel examines the dossier – *before* any decision is made whether he has to stand trial’.⁴⁰

By contrast, the events that lead up to a common law trial differ dramatically. While both procedural systems at the investigatory stage are acknowledged to be ‘essentially inquisitorial in nature’, ‘similarities in structure’ give way to ‘major dissimilarities in operation’.⁴¹ In the Anglo-American common law system, investigatory duties belong to the respective police force that, at least throughout the pretrial process, is not subject to a supervisory body with regard to its activities.⁴² While the relevant police force and, ultimately, the

³⁷ *Lerner*, supra note 17, at 802–803. Arguably, there is no place for such evidence gathering in the pre-trial phase of the continental system as ‘state organs bear responsibility during the process for the well-being of the defendant’. *Safferling*, supra note 7, at 75.

³⁸ *Damaška*, *The Uncertain Fate*, supra note 31, at 847 (noting that such attorney contact is nearly viewed as an attempt to ‘pollute’ the Court’s sources of information). In France, prosecutors and defense attorneys alike are forbidden to interview non-party witnesses and the penalty for a defense lawyer who disobeys is disbarment. *Lerner*, supra note 17, at 802–03.

³⁹ *M. Cherif Bassiouni and Peter Manikas*, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 899 (1996). See also *Pizzi & Marafioti*, supra note 22, at 4–5 (noting defense participation at the pre-trial phase under Italy’s continental-based system); *Scott T. Johnson*, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 *International Legal Perspectives* 111, 145 (1998).

⁴⁰ *Schlessinger*, supra note 17, at 366 (emphasis in original). See also *Safferling*, supra note 7, at 181 (remarking that, in the German system, the defense has the right to be heard before an indictment is confirmed). In the Slovenian system, a suspect may object to an indictment and have a motion hearing on the same. *Prosecutor v. Kabiligi & Ntabakuze*, Separate and Concurring Opinion of Judge Pavel Dolenc on the Prosecutor’s Motion to Amend the Indictment, at paragraph 72, Case Nos. ICTR-97-34-I, ICTR-97-30-I (Oct. 8, 1999) [hereinafter Separate Opinion of Judge Dolenc].

⁴¹ *Safferling*, supra note 7, at 55.

⁴² Id. at 64. See also, *Fionnuala Ni Aolain*, ‘The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis’, 19 *Michigan Journal of International Law* 957, 1000 (1998) (noting the differences between common law and continental systems regarding the role of the police in the investigatory phase). In the United States, the Supreme Court defines the appropriate method of police activity, though this often results in a post hoc procedural protection. *Safferling*, supra note 7, at 64. See also, *Lerner*, supra note 17, at 818 (noting virtually ‘no prosecutorial supervision’ of the San Diego Police Department in its investigation of a widely publicized double homicide).

prosecutor who handles the case upon completion of investigation are required to consider evidence that favors the accused, neither has the affirmative duty to investigate in favour of the suspect.⁴³

A further distinction between the two systems can be found with regard to the decision to proceed to trial. While continental systems allow for an accused, in open court, to dispute a charge prior to confirmation of an indictment,⁴⁴ at common law, the decision to proceed is the result of a non-adversarial proceeding.⁴⁵ For example, in the United States, more serious crimes must be charged by way of a grand jury indictment.⁴⁶ Grand jury proceedings are conducted in secret, with only the lay jury, attorneys for the government, the witness under examination and a court reporter permitted to be present.⁴⁷ Accordingly, counsel for the accused are not permitted to be part of the process and the accused, who will have no inkling of the testimony that has been submitted against him, may only be heard if he submits to appear as a witness.

While counsel for the accused is forbidden to take part in grand jury proceedings, this does not mean that he takes on a passive role throughout the pre-trial phase. Rather, unlike his continental counterpart at this phase, the defense attorney at common law assumes ‘the main burden to investigate exculpatory evidence’.⁴⁸ The aversion to witness contact by the parties noted in the continental system is thus not only non-existent at common law, but would be wholly inapplicable: such contact is absolutely vital to preparation for trial which is entirely dependent on ‘a lawyer-orchestrated system of proof-taking’.⁴⁹

⁴³ Though not bound to collect exculpatory evidence, there is an affirmative obligation on behalf of the prosecutor to reveal information that benefits the accused when discovered. See, e.g., *Brady v. Maryland*, 373 United States 83 (1963). Objectivity differs from the continental perception; at common law, this requirement is fulfilled when in addition to amassing sufficient evidence against a suspect, police investigators also consider ‘whether all reasonable alternatives have been rebutted’. *Safferling*, supra note 7, at 75.

⁴⁴ See, e.g., *Safferling*, supra note 7, at 181.

⁴⁵ *Schlessinger*, supra note 17, at 366.

⁴⁶ United States Constitution, Amendment V.

⁴⁷ Federal Rules of Criminal Procedure (United States), Rule 6(d)(1) (also allowing for an interpreter when necessary). All such persons, save the witness under examination, have a duty not to disclose matters occurring before a grand jury. *Id.* at Rule 6(e)(2).

⁴⁸ *Lerner*, supra note 17, at 818. A failure on behalf of defense counsel to perform this task would likely result in an appellate finding of ineffective assistance of counsel *Id.*

⁴⁹ *Damaška*, The Uncertain Fate, supra note 31, at 847.

B. The Trial Stage

1. *Development of Evidence*

This division of responsibility at the pre-trial stage is thus explained by the common law approach to criminal trials. The Anglo-American system is one that is both adversarial and accusatorial in nature. Though the two terms are often used intermittently, they do not share the same meaning. The word ‘adversarial’ connotes the ‘contest’ aspect of the proceedings: the prosecutor and defense counsel assume aggressive roles in presenting evidence, examining witnesses and shaping legal issues,⁵⁰ whilst the judge assumes a neutral role.⁵¹ This is merely ‘one way of fact finding’, however, and, in and of itself, does nothing more or less to protect the rights of the accused.⁵² It is the accusatorial aspect of the proceedings, we are told, which is aligned with the presumption of innocence: the burden rests with the accuser, the prosecutor, to present reasonably persuasive evidence of guilt.⁵³

Similarly, the relevance of a neutral pre-trial investigation in the continental system becomes apparent when one looks at the trial phase of that system. There, it is the presiding judge, as opposed to the prosecutor and defense counsel, who assumes the responsibility for developing the evidence at trial.⁵⁴ In this role, the judge is relied upon to make certain that the Court’s determinations of guilt, and the penalties imposed by it, are correct.⁵⁵ This requirement is logically aligned with the continental system’s commitment to truth in its criminal proceedings.

⁵⁰ *Goldstein*, supra note 8, at 1016. Perhaps an unjustly harsh criticism, it has been asserted that the adversarial system in the United States often ‘[focuses] the trial on the lawyers rather than on the accused and the search for the truth’. *Van Kessel*, supra note 17, at 839. The contribution made at trial by continental lawyers is decidedly less: they are limited to making observations and presenting their opinions as to the conclusions that should be drawn from the investigation. *Alphons Orie*, Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC’, in 2 *The Rome Statute of The International Criminal Court: A Commentary* 1439, 1445 (*Cassese, Gaeta & Jones*, eds., 2002).

⁵¹ It is often said that the common law judge plays a ‘passive’ role in trial proceedings. This does not mean that the judge is inactive; rather, the judge is reactive and serves to keep each of the parties in check by ‘acting as an umpire or evidentiary traffic warden’. *Gerald Walpin*, ‘America’s Adversarial and Jury Systems: More Likely to Do Justice’, 26 *Harvard Journal of Law and Public Policy* 175, 176 (2003). Given the competitive nature of the system, third party intervention is likely to be seen as favoring one side over the other. *Damaška*, *The Uncertain Fate*, supra note 31, at 850.

⁵² *Goldstein*, supra note 8, at 1017.

⁵³ *Id.*

⁵⁴ *Pizzi & Marafioti*, supra note 22, at 7.

⁵⁵ *Goldstein*, supra note 8, at 1019.

In contrast to his common law counterpart, prior to trial, the presiding judge has access to the materials accumulated throughout the pre-trial investigation. This access contributes to the efficiency of the proceedings: material in the file that is uncontested need not be addressed at trial;⁵⁶ pre-trial access also enables the presiding judge to perform the task of proof taking at trial.⁵⁷ As the ‘bulk of questioning comes typically from the bench’,⁵⁸ pre-trial access to the dossier aids in the judicial examination of witnesses.⁵⁹ The accused is ordinarily called upon to speak first;⁶⁰ normally after having an opportunity to speak in a narrative form, he is then subject to questioning from the bench.⁶¹ The parties may then address the accused after the judicial interrogation has been completed.⁶²

The trial proceeding, or ‘official inquiry’, thus is one wherein judicial activity operates with a mediating result: a disassociation between the means of proof and the party who offered it results in sources of information that are, in effect, ‘neutral’.⁶³ As a result, this ‘sterile’ inquiry creates a forum wherein ‘the adequate manner and proper degree of testing informational sources’⁶⁴ at trial need not be as intense as that found at common law. By contrast, the adversarial construct of the common law system creates a forum wherein proof taking is competitive and, as such, requires that evidence be tested more forcefully than in ‘officialized’ systems.⁶⁵ This distinction between the two systems plays a vital role in the different approach to the rules of evidence that govern their respective trial proceedings.

⁵⁶ *Orie*, supra note 50, at 1444.

⁵⁷ *Van Kessel*, supra note 17, at 816. A continental criminal trial is a ‘case file centered process’. *Id.* at 817.

⁵⁸ *Damaška*, Evidentiary Barriers, supra note 8, at 525.

⁵⁹ *Pizzi & Marafioti*, supra note 22, at 7. See also *Damaška*, The Uncertain Fate, supra note 31, at 850 (noting that an information rich dossier assists the continental judge in his fact-finding role and that this preparation creates a situation wherein continental judges have more work to do than their common law counterparts).

⁶⁰ *Goldstein*, supra note 8, at 1018.

⁶¹ *Lerner*, supra note 17, at 828. Throughout the proceeding, questions can continually be asked of the accused. *Damaška*, Evidentiary Barriers, supra note 8, at 527.

⁶² Additional witnesses are treated in a like manner. *Mirjan Damaška*, ‘Of Hearsay and its Analogues’, 76 Minnesota Law Review 425, 433 (1992) (noting that this interrogation technique decreases the need to interview witnesses pre-trial) [hereinafter *Damaška*, Of Hearsay].

⁶³ *Damaška*, The Uncertain Fate, supra note 31, at 845–46 (observing how this disassociation distinguishes continental from common law procedure). ‘According to a long-standing view, after a litigant has offered a witness to the court, he is treated as “common” to both sides’. *Id.* at 845. ‘No distinction is usually made between the evidence adduced by the prosecution or by the accused’. *Orie*, supra note 50, at 1444.

⁶⁴ *Damaška*, The Uncertain Fate, supra note 31, at 845.

⁶⁵ *Id.* at 846.

2. *Evidentiary Rules*

Consonant with its competitive construct, the adversarial system ‘employs strict and detailed rules of evidence’.⁶⁶ These rules relate primarily to whether or not a piece of evidence is admissible.⁶⁷ For example, at common law, when a piece of evidence is proffered by one of the interested parties, it is required that the same be authenticated prior to admission to ensure that ‘the matter in question is what the proponent claims’.⁶⁸ By contrast, in the continental system, evidence is normally liberally admitted;⁶⁹ the dossier in the possession of the trial judge is generally considered to be evidence.⁷⁰ Consequently, the law of evidence in a continental construct plays a very different role: it ‘mainly serves as a normative instrument for the judge while evaluating the content of the dossier and what has been adduced at trial’.⁷¹

The important effect that objective truth has upon the evidentiary approach employed in the Continental system is twofold. Because truth plays a seminal role in continental criminal proceedings, proof is amassed by a ‘neutral’ party in the form of a dossier and then assessed in open court by yet another ‘neutral’ party, the presiding judge. Procedurally speaking, then, the objective inquiry that follows the impartial investigation obviates the need for ‘gate-keeping’ with regard to evidence coming before the court. In addition, the system’s commitment to truth seeking would find an inconsistent match in ‘fixed evidentiary rules [that] might lead to the exclusion of important probative evidence’.⁷²

⁶⁶ Cassese, *supra* note 7, at 374.

⁶⁷ Orie, *supra* note 50, at 1451 (noting that the primary issue is whether evidence should be admitted or excluded and that such determinations may turn on the content of the evidence, the manner in which it was obtained and the manner in which it is presented to the court).

⁶⁸ Federal Rules of Evidence (United States), Rule 901(a).

⁶⁹ Richard May & Marieke Wierda, *International Criminal Evidence* 18 (2002).

⁷⁰ Orie, *supra* note 50, at 1451. Although this would be the opinion of continental lawyers, their common law complements would view the dossier as potential evidence. The position of the former can be explained by the fact that ‘the presentation of evidence is often limited to a mere reference to the dossier’. *Id.* (noting this would not be so in the case of a dispute). Compare with Damaška, *Evidentiary Barriers*, *supra* note 8, at 519 n. 19 (affirming the ease with which material from the dossier may be introduced and noting that while material contained in the dossier does not constitute evidence if not introduced at trial, ‘it does in fact influence the presiding judge and, through him, other members of the adjudicating panel’).

⁷¹ Orie, *supra* note 50, at 1452. In comparison to common law rules, this approach to evidence has been described as ‘a shift away from presentation rules towards rules of decision or augmentation’. Sean Doran, John D. Jackson and Michael L. Seigel, ‘Rethinking Adversariness in Nonjury Criminal Trials’, 23 *American Journal of Criminal Law* 1, 21 (1995).

⁷² Pizzi & Marafioti, *supra* note 22, at 7.

Accordingly, ‘the idea that criminal proceedings could justifiably be used for purposes other than those of establishing the truth and enforcing substantive criminal law is simply not part of the continental legal tradition’.⁷³ Continental criminal procedure does not allow for alternative interests to compete with the sanctity of truth-finding. This is perhaps best exemplified by the relative absence of exclusionary rules regulating admissible evidence in civil law systems.⁷⁴ The continental opposition to the application of such rules springs from the fact that they may be used to limit access to the truth. Thus, for the most part, the system does not employ exclusionary rules *per se*; however, it does avail itself of specific ‘devices’ the application of which can, in effect, act as the functional equivalent of the former. In line with their ever-present commitment to the truth, continental jurisdictions are primarily disposed to use these mechanisms to exclude relevant evidence that may, in fact, hinder truth finding.⁷⁵

Conversely, the common law system does not share the continental aversion to exclusionary rules. In fact, it is known to utilize two types of such rules: those that, like the aforementioned continental devices, are designed to improve fact-finding accuracy,⁷⁶ as well as rules that are ‘governed by considerations extraneous to truth-finding’.⁷⁷ A popular explanation for the distinctive approaches of the two systems to the exclusion of evidence derives from yet another difference between them: in adjudicating guilt, Continental criminal proceedings turn upon the finding of either a single judge, a panel of judges or a ‘mixed panel’ of both professional and lay jurists.⁷⁸ As a result, the

⁷³ *Damaška*, Evidentiary Barriers, *supra* note 8, at 586.

⁷⁴ *Id.* at 516.

⁷⁵ ‘Not all evidence that is to a continental lawyer relevant is *ipso facto* admissible’. *Id.* Continental devices that lead to the exclusion of logically relevant evidence include judicial power to so order when appropriate (for example, when such evidence would be superfluous). *Id.* at n. 14. Another such device is the ‘principle of immediacy’ which evidences a preference for original evidence. *Id.* at 517–18 .

⁷⁶ The rules against hearsay would fall within this category.

⁷⁷ On these two types of rules, see generally *Damaška*, Evidentiary Barriers, *supra* note 8, at 514–525. ‘Considerations extraneous to truth-finding’, according to *Wigmore*, are ‘extrinsic policy’ rules that ‘do not aim at the strengthening of the mass of evidence but at the avoidance of collateral disadvantages unconnected with the object of securing good evidence’. *Dale A. Nance*, ‘The Best Evidence Principle 73 Iowa Law Review’ 227, 277 (1988) (quoting 4 *John Wigmore*, *Evidence* §1171, at 297–98 (3d ed. 1940)). An example of the same would be the exclusion of illegally obtained evidence. *Damaška*, Evidentiary Barriers, *supra* note 8, at 522.

⁷⁸ *Cassese*, *supra* note 7, at 369. See also, *Nancy Armoury Combs*, ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’, 151 University of Pennsylvania Law Review 1, 34 (2002) (noting that, in mixed panels, ‘professional judges guide their lay colleagues’). It is noteworthy, however, that ‘[m]ost cases are tried exclusively by professional judges’. *Orie*, *supra* note 50, at 1454.

determination of law and fact, along with guilt and punishment, are unified in one body.⁷⁹ This provides a marked contrast to trial proceedings in the adversarial system where the presiding judge decides questions of law and guilt determination is normally the obligation of a jury, whose composition embodies members of the general public.⁸⁰

This distinction between fact-finding responsibilities in the two systems creates a number of arguments regarding their different approaches to rules governing evidence admissibility. It has often been said, with varying degrees of emphasis, that evidentiary rules at common law exist due to the presence of a lay jury.⁸¹ Rules regulating admissibility are often associated with the principle that a certain piece of evidence may have an impact that is disproportionate to its actual probative weight; many take the view that this type of error is one more likely made by lay jurors than professional judges.⁸²

At the very least, it is clear that erroneous assessment of evidence credibility and its subsequent effect on fact-finding is perceived at common law to present more of a problem than in the continental system.⁸³ Additionally, the common law system maintains the position that the adjudicator of guilt must be insulated from the impact of potentially inadmissible evidence;⁸⁴ an argument of this type fails, or at least loses its force, when the body that determines

⁷⁹ *Bernard Michael Ortwein II*, ‘The Swedish Legal System: An Introduction’, 13 Indiana International and Comparative Law Review 405, 431 (2003).

⁸⁰ *Cassese*, supra note 7, at 368. Though less often observed in literature on the adversarial criminal system, bench trials are also employed wherein the presiding judge assumes the role of finder of law and fact. *Walpin*, supra note 51, at 176.

⁸¹ See, e.g., *David Leonard*, *The New Wigmore: A Treatise on Evidence Selected Rules on Limited Admissibility* §1.7 (2000) (noting that ‘evidence law is a product of the jury system’ (quoting *James B. Thayer*, *Preliminary Treatise on Evidence at Common Law* 509 (1898)) and the more extreme view that evidence rules ‘are absurdly inappropriate to any tribunal or proceeding where there is no jury’ (quoting *Charles T. McCormick*, ‘Evidence’, in 5 *Encyclopedia of Social Sciences* 637, 644 (1931)).

⁸² ‘It has been argued that the complicated American rules of evidence are largely based on distrust of the jury, the idea that they need to be screened from information they will not be able to handle properly’. *Lerner*, supra note 17, at 816. However, the validity of such an assumption is far from clear. It is difficult to assess the manner in which lay jurors evaluate evidence in light of the fact that they return a verdict rather than a judgment. *John H. Langbein*, ‘Historical Foundations of the Law of Evidence: A View from the Ryder Sources’, 96 *Columbia Law Review* 1168, 1194–95 (1996).

⁸³ *Damaśka*, *Evidentiary Barriers*, supra note 8, at 514. Continental lawyers seem ‘more optimistic than their common law brethren that the factfinders, lay or professional, will be capable of disregarding the influence of relevant but untrustworthy evidence – for example, some types of hearsay – and, having heard it, exclude it from the calculus of decision’. *Id.*

⁸⁴ *Id.* at 523.

law also adjudicates fact.⁸⁵ Thus, one might argue that rules governing evidence admissibility exist in response to the presence of a lay jury and, consequently, have no place in a forum wherein law and fact are determined by the same individual or group of individuals.⁸⁶

To ascribe to such a position, however, is to fall prey to the danger noted prior to this discussion on the two systems: the comparison is too myopic in its approach; it focuses solely on the trial stage of the proceedings.⁸⁷ Consequently, the argument that such rules are *partly* attributable to the presence of a jury at common law⁸⁸ is unquestionably the more correct one. This approach quite rightly takes into account the entirety of the two proceedings, rather than focusing on the presence or absence of one particular feature, at one particular phase, to the exclusion of all others.⁸⁹

In observing the difference in evidentiary styles between the continental and common law systems, *Damaška* notes two contributing factors in addition to the need for common law rules of evidence to be responsive to the demands of a jury trial. The importance (and absence) of the ‘purportedly non-partisan’ pre-trial investigation, whose results are shared with the trial judge in the form of

⁸⁵ This set-up makes exclusion of proof less practical. ‘Where the need for screening of information arises at the trial, the difference between bifurcated and unitary decision making is highly significant’. *Damaška*, Of Hearsay, *supra* note 62, at 427. Though there are potential remedies to the difficulty created by unitary decision making in this regard, such as a pre-trial hearing on admissibility of contested evidence before another judge, such alternatives have not been embraced on the Continent. *Damaška*, Evidentiary Barriers, *supra* note 8, at 524. Such a set-up would arguably be thought to be too costly and too time consuming. *Damaška*, Of Hearsay, *supra* note 62, at 446.

⁸⁶ This stance is unquestionably challenged by the fact that, at common law, exclusionary rules are also applicable in bench trials. *William Twining*, Rethinking Evidence: Exploratory Essays, What is the law of evidence? 178, 182 (1990). ‘Some common law lawyers currently find exclusionary rules, though somewhat modified, to be imperative in non-jury cases’. *Damaška*, Evidentiary Barriers, *supra* note 8, at n. 9. For an example of a common law plea for the creation of special rules with which to govern bench trials, see *Kenneth Culp Davis*, ‘Hearsay in Nonjury Cases’, 83 Harvard Law Review 1362 (1970).

⁸⁷ See *supra* note 16 and accompanying text. ‘Inquisitorial theory . . . encompasses the entire process from investigation to conviction . . .’ *Goldstein*, *supra* note 8, at 1020.

⁸⁸ See, e.g., *Kevin M. Clermont* and *Emily Sherwin*, ‘A Comparative View of Standards of Proof’, 50 American Journal of Comparative Law 243, 245 (2002).

⁸⁹ An excellent example can be found in the use of documents as evidence at trial. Safeguards in the continental system that ensure document authenticity can be found not only in the employment of a neutral investigating official who complies the materials for the dossier, but also in the presence of rules governing the inclusion of material in the file. See *supra* note 35 and accompanying text. Conversely, common law jurisdictions do not have similar rules governing the pre-trial collection of evidence and therefore require that documents be authenticated at trial. See *supra* note 68.

a dossier before trial, along with the presentation of evidence solely by interested parties as opposed to evidence production by a judge also play vital roles in the divergent approaches to evidence found in the two systems.⁹⁰ As a result, it is fair to say that the continental ‘free evaluation principle’⁹¹ regarding admissibility of evidence is a product of the totality of the continental criminal process, with the principle of neutrality that governs both the pre-trial investigation and the trial, along with pre-trial access to the case file, playing as significant a role as the absence of a lay jury.

In a like manner, it is necessary to examine the seminal role that exclusionary rules serve at common law. Given the adversarial nature of its trial proceedings, the use of certain exclusionary rules is ‘closely associated with considerations of fairness’.⁹² Where evidence is put forth not by a neutral party for the purpose of examination but proffered by an interested party attempting to gain an advantage in an adversarial construct, it will, perhaps obviously, be used ‘in a manner that best advances [the party’s] tactical interests’.⁹³ As a result, certain rules governing evidentiary admissibility are a necessity in order to keep the parties in check as well as to ensure the integrity of trial proceedings. Thus, as in continental systems, the common law position regarding exclusionary rules stems from more than the mere presence of a lay jury; it is also intricately connected with its adversarial construct.

Of at least comparable importance is the value that the presence of exclusionary rules confers upon the common law system as opposed to its continental counterpart. Calling attention to those exclusionary rules that relate to extraneous matters, rather than those which have as their goal the enhancement of fact-finding, one is presented with a ‘conscious sacrifice of factfinding accuracy for the sake of other values’.⁹⁴ Numerous examples of this can be found in Irish and Scottish jurisprudence, as well as in the American system of criminal procedure ‘which frequently subordinates the finding of truth to the protection of [the] constitutional rights’ of the accused.⁹⁵ In fact, in an exhaus-

⁹⁰ *Damaška*, *Evidentiary Barriers*, supra note 8, at 510–11.

⁹¹ *Clermont & Sherwin*, supra note 88, at 245.

⁹² *Damaška*, *Of Hearsay*, supra note 62, at 432. ‘These rules are necessary in the contest model . . . to ensure that the parties contest against each other fairly’. *Doran, Jackson & Seigel*, supra note 71, at 20.

⁹³ *Damaška*, *Of Hearsay*, supra note 62, at 431.

⁹⁴ *Damaška*, *Evidentiary Barriers*, supra note 8, at 525.

⁹⁵ *Pizzi & Marafioti*, supra note 22, at 7. ‘Exclusion is used to deter improper police conduct and protect the rights of citizens despite the potential effect on the outcome of certain trials’. *Id.* at 7–8. The Scottish approach also takes into consideration both deterrence and the protection of the rights of the individual. See, e.g., *Lawrie v. Muir*, 1950 Scots Law Times 37, 40 (1949) (noting that ‘the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the individual to vanish, and of offering a positive inducement to the author-

tive comparison between continental and common law criminal procedures, *Damaška* concludes that '[t]he Anglo-American adversary system's commitment to values other than the pursuit of truth has caused it to erect higher evidentiary barriers [to conviction] than its continental non-adversary counterpart'⁹⁶ and that 'in the criminal process, concern for individual rights will often set limits to the pursuit of truth and conflict with the desire to establish the facts of the case'.⁹⁷

C. Summary

In sum, then, the continental system evidences a commitment to truth that manifests itself in an impartial investigation wherein the accused is afforded the opportunity to challenge the evidence amassed against him throughout the investigation and prior to confirmation of the charges against him. If so confirmed, the results of the investigation then form the basis of an official truth-finding inquiry. The impartiality that defines the investigation continues at trial with witnesses who are, in effect, disassociated from the defense and the prosecution, and are primarily questioned by the judge, a non-party. The cumulative effect of this non-adversarial set-up creates a forum wherein a system of 'free proof' enjoys a symbiotic relationship with the construct and goal of the proceedings. This creates what can only be referred to as a marked contrast with the common law experience. As the same maintains an adversarial construct, operates at trial with the presence of a lay jury and exhibits a willingness to subjugate truth-finding to individual rights, its evidentiary system requires the use of rules governing the admissibility of evidence in order to function in a manner that is effective and assures the integrity of its proceedings.

This review of the two systems confirms the position that 'the operation of any model and of the procedure reflecting it will depend on the interaction of many factors'.⁹⁸ Accordingly, 'individual features cannot be untied from the system in which they appear'.⁹⁹ Given the same, it is certainly fair to observe that an attempt to transpose certain rules or procedures from one system to the

ties to proceed by irregular methods'). By contrast, Irish rulings in this area relate exclusively to the need to protect the constitutional rights of the accused. See *supra* note 25.

⁹⁶ *Damaška*, Evidentiary Barriers, *supra* note 8, at 587 (noting the same to be a 'natural out-growth' of the two system's disparate commitment to the pursuit of truth).

⁹⁷ *Id.* at 589.

⁹⁸ *Goldstein*, *supra* note 8, at 1021 (noting among the factors at work: 'the normative content of the standards to be applied in making decisions, how the participants are perceived and trained, the controls introduced at strategic points, and the resources assigned to implement policies and controls').

⁹⁹ *Orie*, *supra* note 50, at 1442.

other, without more, will likely be problematic. The importance of this concept comes to the fore in an assessment of the ‘competition’ between the two legal systems, and the resultant efforts made to amalgamate them, that can be found throughout the twentieth century.

IV. Adversarial and Continental Systems in an International Context

A. Nuremberg and Tokyo

1. To Be Adversarial or Continental?

Perhaps the first great showdown between the continental criminal system and that of the common law took place in London in 1945. There, the four Allied Powers (France, the Soviet Union, the United Kingdom and the United States) met to establish a plan for prosecuting the atrocities perpetrated by German major war criminals throughout the course of World War II.¹⁰⁰ With regard to creating an international forum that provided for individual criminal responsibility as well as one that pierced the veil of state sovereignty, the creation of the International Military Tribunal (IMT) was monumental.¹⁰¹ It would not necessarily be accurate to ascribe comparable significance to the decision to employ an adversarial construct for the IMT, however. As has been illuminated by Cassese, from a practical point of view, the possibility of employing a continental style proceeding at the IMT was essentially a foreclosed option. Such a system would have required the appointment of an investigating judge whose job it would have been to evaluate the inculpatory evidence collected by the prosecutors designated by each of the four Powers.¹⁰² Politically speaking, the appointment of an individual to this position would have resulted in a deadlock; a power struggle amongst the four countries as to which would obtain the appointment of its national to the post would have precluded the Powers from proceeding in their attempt to establish a tribunal.¹⁰³

¹⁰⁰ Bradley F. Smith, *The Road to Nuremberg* 4 (1981).

¹⁰¹ Id. at 3–4 (noting that there were no guiding historical precedents for the trial and that the Nuremberg proceedings ‘transformed the way we look at acts of warring governments and the consequences we expect to follow victory or defeat’).

¹⁰² Cassese, *supra* note 7, at 377. ‘[T]he four Chief Prosecutors at Nuremberg were not independent, but acted on behalf of their respective states. Id. at 378. Had the position of investigating judge been created, the appointed individual would have received evidence from each of them and ‘would then have gathered further evidence supporting the charges as well as evidence directed to prove the innocence of the defendants’. Id. at 377.

¹⁰³ Each country already had a representative in its designated prosecutor; it was highly

The presence of this arguably insurmountable hurdle to employing a continental construct at the IMT, however, does not appear to have stilted the continental-common law debate in London. The meeting was far from absent of controversy with regard to the issue of which system of justice would be employed at the IMT, and tension arose between the choices of an adversarial or inquisitorial approach.¹⁰⁴ In London, the US submitted a proposal for the tribunal that had been developed and drafted throughout the last ten months of the war¹⁰⁵ and was premised on the model of an adversary system.¹⁰⁶ In response, the continental powers, France and the Soviet Union, presented separate proposals, each with the intent to modify the American draft by including certain inquisitorial features.¹⁰⁷ Robert Jackson, the US delegate to the London meeting who ultimately served as the Chief American Prosecutor at Nuremberg, was ‘driven close to distraction’ by the efforts to ‘reconcile two very different systems of procedure’.¹⁰⁸

Ultimately, the adversarial system won out. This victory potentially had positive human rights ramifications for those who would appear before the IMT. The contradictory proposals of France and the Soviet Union ‘on the whole were not such as to meet the requirements of a fair trial, and were not suitable for duly protecting the rights of the accused’.¹⁰⁹ By contrast, though ‘international

unlikely that three would accede to a scenario that which gave the fourth double representation in the make-up of the Tribunal. Id. The possibility of assigning this post to another allied country, or even a neutral one, was equally unthinkable: such a move would dilute the power held by the four nations. Id. at 377–378. Further, conferring this authority upon a neutral country would have been unlikely without regard to the dilution of power. Such countries were often looked upon with disfavor in the aftermath of World War II for failing to take a stand or for altering their perceived alliances depending upon which side appeared to have the upper hand in the war. *Michael R. Marrus*, The Nuremberg War Crimes Trial 1945–1946 A Documentary History 251 (1997).

¹⁰⁴ The US delegate to the London meeting observed ‘a fundamental cleavage, which persisted throughout the negotiations’ as a result of the distinctions between the adversarial and inquisitorial systems. International Conference on Military Trials at vi, available at <www.yale.edu/lawweb/avalon/imt/jackson/preface.htm>.

¹⁰⁵ *Smith*, supra note 100, at 4.

¹⁰⁶ *Cassese*, supra note 7, at 377.

¹⁰⁷ See, e.g., Observations of the French Delegation on the Draft Agreement Submitted by the American Delegation, 28 June 1945, at paragraph 2(a), International Conference on Military Trials available at <www.yale.edu/lawweb/avalon/imt/jackson/jack15.htm>. [hereinafter French Observations]; Comments and Proposals of Soviet Delegation on American Draft, 28 June 1945, International Conference on Military Trials, available at <www.yale.edu/lawweb/avalon/imt/jackson/jack16.htm>.

¹⁰⁸ *Telford Taylor*, The Anatomy of the Nuremberg Trials 64 (1992).

¹⁰⁹ *Cassese*, supra note 7, at 381 (noting that, in hindsight, the choice of an adversarial system was a ‘sensible and wise move’).

human rights law was in its infancy when the allies planned the Nuremberg Tribunal in August 1945,¹¹⁰ the American proposal specifically provided certain due process protections for those accused¹¹¹ and the policy-making meetings in London were replete with ‘expressions of an intention to provide war crimes defendants with a “fair trial”’.¹¹²

2. *Rules of Evidence*

Of course ‘triumph’ in the context of negotiations normally does not exist in the absence of concessions made. Accordingly, it could be argued that, as a reward for ultimately agreeing to an adversarial construct for the IMT, the French and Soviet delegations ‘won’ in other areas, including the rules of evidence that would govern the proceedings at Nuremberg.¹¹³ With regard to the same, the IMT Charter declares, in true continental fashion, that ‘[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value’.¹¹⁴ As the importance of evidentiary rules in the adversarial-accusatorial system has been established, one might assume that this provision for ‘free evidence’, so contrary to the common law standard, might well have been one of the ‘crude but workable compromises’¹¹⁵ reached between the proponents of the two systems at the London meeting.

Then again, it would be fair to ask whether the essential absence of evidentiary rules truly represented a victory for the two Continental powers. To find in the affirmative presupposes that the establishment of ‘free evidence’ at the IMT was a concession on behalf of Great Britain and the United States. As opposed to the French and Soviet response to the proposal of an adversarial construct for the IMT, however, the record from the London meetings does not

¹¹⁰ William A. Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’, 7 Duke Journal of Comparative and International Law 461, 514 (1997).

¹¹¹ Among these, that defendants be given reasonable notice of the charges against them and be given a fair opportunity to be heard either personally or through counsel before the Tribunal. Revision of American Draft of Proposed Agreement, 14 June 1945, at paragraph 16, available at <www.yale.edu/lawweb/avalon/imt/jackson/jack09.htm>.

¹¹² Evan J. Wallach, ‘The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?’, 37 Columbia Journal of Transnational Law 851, 868 (1999).

¹¹³ Cassese, *supra* note 7, at 381–382.

¹¹⁴ Charter of the International Military Tribunal, art. 19, 8 Aug. 1945, 59 Stat. 1544, 82 United Nations Treaty Series. 279 [hereinafter Nuremberg Charter] reprinted in 2 Morris & Scharf, *supra* note 6, at 677, 682

¹¹⁵ Taylor, *supra* note 108, at 64.

reveal staunch opposition in this area by the two common law nations.¹¹⁶ To the contrary, it has been observed that the two ‘easily accepted the idea that rules should be simplified, the more so because there was no jury’.¹¹⁷ As another critic noted: ‘What is surprising is the ease with which the representatives of Great Britain and the United States acceded in – indeed proposed – the abandonment of their domestic rules’.¹¹⁸ This behavior supports the hypothesis that the absence of evidentiary rules at the IMT was not a concession at all on behalf of the common law nations. This theory is bolstered by the fact that the Tokyo Charter, established pursuant to an executive order issued by US General Douglas MacArthur,¹¹⁹ provided for even broader admission of evidence than that allowed in the Nuremberg trials.¹²⁰

Why would representatives from adversarial-accusatorial backgrounds exhibit this willingness to eliminate the evidentiary rules that play such a critical role in their systems of criminal justice? One explanation, of course, can be found in the fact professional judges rather than lay jurors would ultimately adjudicate the guilt of those appearing before the Tribunals.¹²¹ However, it

¹¹⁶ Though Jackson would later imply that the abandonment of the common law rules of evidence was reluctantly agreed to on the part of the US, as the employment of the same would have been vigorously opposed by the Continental powers, this assertion ‘might fairly be described as disingenuous’. *Wallach*, supra note 112, at 855, n. 12.

¹¹⁷ *Cassese*, supra note 7, at 382, n. 35. Chief Prosecutor Robert Jackson, referred to the common law evidentiary rules as ‘a complex and artificial science to the minds of Continental lawyers, whose trials usually are conducted before judges and do not accord the jury the high place it occupies in our system’ International Conference on Military Trials at xi, available at <www.yale.edu/lawweb/avalon/imt/jackson/preface.htm>.

¹¹⁸ *Richard H. Minear*, Victors’ Justice: The Tokyo War Crimes Trial 118 (1971).

¹¹⁹ See, e.g., *1 Morris & Scharf*, supra note 6, at 8 n. 42 (noting that MacArthur issued the executive order in his capacity as Supreme Allied Commander for Japan after the war).

¹²⁰ ‘The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible’. Charter of the International Military Tribunal for the Far East, art. 13(a), available at <www.yale.edu/lawweb/avalon/imtfech.htm>. Among other provisions, the Charter also provided for the admission of affidavits, depositions, and signed statements as well as documents issued or signed by the armed forces of any government without further authentication. Id. at 13(c). ‘It was clearly MacArthur’s intention that as much evidence as possible would be admitted against the defendants’. *Wallach*, supra note 112, at 866. See also *James C. O’Brien*, ‘The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia’, 87 American Journal of International Law 639, 655 (1993) (noting that the Article XIII of the Tokyo Charter stipulated that certain documents would be admitted despite the fact that their origin and authenticity could not be determined).

¹²¹ Nuremberg Charter, supra note 114, Arts. 2–4. At London, Jackson’s ‘only justification’ for the abandonment of the rules of evidence was that the rules were ‘designed to protect juries untrained in the law and would be superfluous for judges well trained in the law’. *Minear*, supra note 118, at 119.

seems fair to ask whether this disregard for the rules, noted at both Nuremberg and Tokyo, was also related to the observation that ‘the common law of evidence presents much more formidable obstacles to introducing incriminating evidence than does the civil law’.¹²² Without even suggesting anything untoward, pragmatically speaking, to do away with the rules would facilitate efficient prosecutions.

From a fairness perspective, however, the problem created by the abandonment of evidentiary rules is obvious. Contrary to the assertion that Jackson gave to the Tribunal,¹²³ and as has been illustrated, the rules of evidence at common law relate to more than just the presence of a lay jury. In making the decision to eradicate common law evidentiary rules at Nuremberg and Tokyo, ‘[t]he protections afforded by a host of evidence rules were put aside’.¹²⁴ Consistent with this assertion, Jackson informed the Court that the IMT was created to be a military tribunal, as opposed to a court of law, in order that its activities would neither set domestic precedent nor be subject to it.¹²⁵ This creates the impression that, in establishing the IMT, it was intended that the rights conferred upon those accused at Nuremberg would be inferior to those conferred upon individuals accused in the domestic realm. This position finds support in *Jackson’s* June 1945 report to the President wherein he notes that ‘the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials’.¹²⁶ Of course, an alternative view of the rules obviated at Nuremberg, and one that is consistent with their domestic

¹²² *Damaška*, Evidentiary Barriers, *supra* note 8, at 525. Also, ‘the common law jury trial presents the prosecutor with more evidentiary obstacles than does the continental criminal trial’. *Id.* at 554.

¹²³ Arguing before the Tribunal on the matter, Jackson noted, ‘We have no jury. There is no occasion for applying jury rules’. 3 International Military Tribunal, Blue Series 543 [hereinafter Jackson address], available at <www.holocaust-history.org/works/imt/03/htm/t543.htm>.

¹²⁴ Stephen Landsman, ‘Legal History: Those Who Remember the Past May Not Be Condemned to Repeat It’, 100 Michigan Law Review 1564, 1571 (2002) (book review) (noting, additionally, that ‘[m]any of the safeguards that ensure the integrity of adversary proceedings were abandoned at Nuremberg’). At the Tokyo trials, Judge Pal noted that the evidentiary rules that had been discarded were ‘devised by various national systems of law, based on litigious experience and to guard against erroneous persuasion . . .’ *Minear*, *supra* note 118, at 119 (quoting the opinion of Judge Pal reprinted in 2 The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946–12 November 1948 at 629 (1977)).

¹²⁵ Jackson address, *supra* note 123, at 543.

¹²⁶ *Justice Jackson’s Report to the President on Atrocities and War Crimes III*, at paragraph 2, (June 7, 1945), available at <www.ibiblio.org/pha/policy/1945/450607a.html>. This statement is preceded by the comment that: ‘[t]hese hearings, however, must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But . . .’ *Id.*

origin, is that the rules ‘enable the defense to counter and test the prosecution’s case effectively’.¹²⁷ Accordingly, it has been noted that ‘the American position [regarding rules of evidence] was indeed designed to provide a summary procedure . . . which would deny defendants charged in war crimes trials the advantages of Anglo-American evidentiary and procedural rules’.¹²⁸

The magnitude of this decision cannot be overstated. The procedures devised for the proceedings at Nuremberg and Tokyo embodied the ‘first marriages’ of the continental and adversarial systems.¹²⁹ Consequently, their historical and precedential value was, and remains, incalculable. However, each system resulted in a set-up wherein common law evidence gathering¹³⁰ denied those accused the protection afforded by a continental, neutral pre-trial inquiry.¹³¹ The proceedings that followed, both on the Continent and in the Far East, then denied those same accused the protections inherent in common law evidentiary rules that, amongst other things, serve to keep battling parties in check in the adversarial system.¹³² As a result, the union of the two systems at these post-World War II tribunals, procedurally speaking, represented the worst of both worlds for those who appeared before them. Accordingly, it became the responsibility of the judiciary to assure fairness in the trial proceedings. While their success in so providing is subject to debate,¹³³ the overriding issue is that the union of the two processes created a construct that, standing alone, failed those accused, leaving them with less protection than they would have enjoyed in either system.

¹²⁷ Doran, Jackson & Seigel, *supra* note 71, at 24.

¹²⁸ Wallach, *supra* note 112, at 857.

¹²⁹ See, e.g., Morris & Scharf, *supra* note 6, at 7 (referring to ‘the blending and balancing’ of elements from the Continental and Anglo-American systems as ‘an innovative feature of the Nuremberg Charter and Rules of Procedure’).

¹³⁰ See *supra* note 102 and accompanying text. See also Orie, *supra* note 50, at 1460 (observing that ‘the pre-trial investigations and the prosecutions were the responsibility of the four Chief Prosecutors’).

¹³¹ See, e.g., Ni Aolain, *supra* note 42, at 1000 (noting that when a common law system of evidence gathering is imposed upon a civil law system, safeguards present in the civil law system are lost, including those provided by the presence of the investigating magistrate, a ‘pivotal figure in the civil law system’).

¹³² ‘[T]he overriding reality [is] that the rules of evidence and procedure which governed the trials were flexible beyond not just the norms of criminal trials in democratic systems, but beyond the bounds of fairness as well’. Wallach, *supra* note 112, at 869.

¹³³ See, e.g., Landsman, *supra* note 124, at 1571 (noting the ‘outstanding fairness and care of the judges’ at Nuremberg); Minear, *supra* note 118, at 119 (remarking that the performances of the justices at Tokyo gave rise to doubt regarding the trust that one can place in the judiciary *vis-à-vis* the provision of a fair trial); Wallach, *supra* note 112, at 881 (observing that ‘the results of the rules used in the post-World War II tribunals varied from relative success to abject failure’).

B. Post-World War II Developments

In assessing the construction of the Nuremberg and Tokyo Tribunals, it is important to note that the right of an accused to a fair trial has developed considerably throughout the last half-century.¹³⁴ The human rights movement gained significant momentum in the years following World War II.¹³⁵ In 1948, the right to a fair trial was recognized as a basic human right, both regionally and internationally,¹³⁶ in such instruments as the American Declaration of the Rights and Duties of Man¹³⁷ and the Universal Declaration of Human Rights.¹³⁸ These advancements on the international level can also be found in developments in the domestic criminal procedure of the United States whose ‘political philosophy undoubtedly influenced the Universal Declaration of Human Rights’.¹³⁹

America’s criminal procedure provisions, contained in its Bill of Rights,¹⁴⁰ were aspirational in nature when originally adopted in the late eighteenth century, essentially impossible to confer in a fledgling nation whose crime control bodies were rudimentary.¹⁴¹ In the years that followed, a ‘tradition of rough justice in a young country’ developed.¹⁴² Public acceptance of ‘cutting corners’

¹³⁴ See, e.g., *Zappalà*, supra note 15, at 80 (noting that, since 1945, ‘considerable improvements have been made in ensuring the protection of individual rights in the administration of international criminal justice’). See also, *Diane Marie Amann*, ‘Harmonic Convergence? Constitutional Criminal Procedure in an International Context’, 75 Indiana Law Journal 809, 820 (2000) (noting that the post-World War II trials took place prior to a host of US Supreme Court decisions that declared many aspects of constitutional criminal procedure to be fundamental components of the trial process). ‘The right to a fair trial, as it is conceived today is judgemade human rights law. It does not stand still but keeps developing’. *The Universal Declaration of Human Rights: A Common Standard of Achievement* 225 (*Gudmundur Alfredsson & Asbjørn Eide*, eds. 1999).

¹³⁵ *David Harris*, ‘The Right to a Fair Trial as a Human Right’, 16 International & Comparative Law Quarterly 352, 378 (1967).

¹³⁶ *Id.* at 352.

¹³⁷ Organization of American States Resolution XXX, Signed May 2, 1948, available at <www.cidh.oas.org/Basicos/basic2.htm>.

¹³⁸ General Assembly Resolution 217A (III), Arts. 9–12, United Nations General Assembly Official Record, 3rd Session, Supp. No. 16, United Nations Document A/810 (1948), available at <www.un.org/Overview/rights.html> [hereinafter Universal Declaration].

¹³⁹ *Edward D. Re*, ‘International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law’, 40 St. Louis Law Journal 1091, 1095 (1996).

¹⁴⁰ Among other provisions, these amendments to the United States Constitution protect the individual against warrantless search and seizure, self-incrimination and excessive bail. United States Constitution, Amendments IV, V & VII.

¹⁴¹ *Goldstein*, supra note 8, at 1009 (noting that, as time passed, the gap between these enumerated ideals and reality continued to expand).

¹⁴² *Id.* at 1010 (remarking on the employment of such measures as illegal searches, arrests

procedurally, in an effort to repress crime, continued into the early half of the twentieth century; law enforcement actions remained unchallenged until the creation of a new class of crimes enabled the community at large to identify with the accused.¹⁴³ Consequently, the theory of idealism emerged and, with it, a willingness to ‘sacrifice efficiency in the criminal process in order to prevent abuse of official power’; the public sentiment supporting this position grew following World War II: exposure to the ills of totalitarian police regimes such as those employed in Germany and Russia made members of the public more sensitive to unacceptable state activity.¹⁴⁴

Thus, in the aftermath of the Second World War, the United States further developed a body of law that protected the rights of individuals and created national standards for law enforcement activity.¹⁴⁵ In the sphere of legal scholarship, substantive law took a back seat to the manner in which the law was administered.¹⁴⁶ Meanwhile, ‘the international community witnessed parallel developments’ in the recognition and growth of fundamental rights for the accused to that observed in America.¹⁴⁷ Accordingly, ‘the advantages of Anglo-American evidentiary and procedural rules’, to which those accused at Nuremberg and Tokyo were denied access due to the tribunals’ ‘continental approach’ to evidence, expanded and flourished in the years that followed the post-World War II trials. As such, the right of an accused to a fair trial had taken on a new role by the close of the century, when the two criminal justice systems would again meet in an international context, in response to the atrocities that took place in the former Yugoslavia.

in the absence of probable cause and the manipulation of bail for the purpose of preventative detention).

¹⁴³ Id. Most notably, crimes and infractions related to the use of automobiles, ‘prohibition and ‘public welfare offenses’ brought the public into contact with law enforcement’.

¹⁴⁴ Id. at 1011 (noting that the American Constitution codifies this position). The American commitment to the idealist theory went from strength to strength with the invocation of prosecutions related to war protests, the civil rights movement and drug use. Id. at 1012. ‘[T]he discrepancy between a number of criminal offenses and the values shared by substantial segments of the population’, continues to affirm the American view that the usefulness of criminal procedure is not limited to providing a method for the application of substantive law. *Damaška*, *Evidentiary Barriers*, supra note 8, at 587.

¹⁴⁵ *Goldstein*, supra note 8, at 1012 (noting decisions in the areas of searches, use of the body, interrogation, and the right to counsel).

¹⁴⁶ Id. at 1013.

¹⁴⁷ *Amann*, supra note 134, at 821 (surmising that these similar advances made in the field of criminal procedure represented a continuing movement toward a ‘global criminal procedure’ in the aftermath of Nuremberg and Tokyo). ‘The trend in Europe during the last half of the twentieth century has been towards greater protections for criminal defendants’. *Van Kessel*, supra note 17, at 803. *Zappalà* refers to this process as ‘international “law-making” on the rights of individuals in the administration of criminal justice’. *Zappalà*, supra note 15, at 22.

V. The Adversarial System at the ICTY

A. The Statute

As has been noted, the establishment of an adversarial construct at the ICTY was assured by the wording of its Statute.¹⁴⁸ The blessing order for the Tribunal failed to provide for an investigating judge or its equivalent,¹⁴⁹ moreover, it precluded any type of official oversight for its pre-trial investigations by making the same the responsibility of the ICTY prosecutor¹⁵⁰ and mandating that the prosecutor act independently.¹⁵¹ The system established for the preparation and confirmation of indictments was also of a common law type.¹⁵² As such, the Prosecutor prepares the indictment upon her determination that a *prima facie* case exists¹⁵³ and a judge of the Trial Chamber reviews the same.¹⁵⁴ In further common law fashion, the Statute makes no provision for an opportunity on behalf of the defense to contest the evidence that supports the indictment.

It could be argued that, when the Security Council gave the Secretary-General the tasks of reporting on the prospective tribunal and giving specific proposals regarding its operation, one might well have anticipated that he would return with the suggestion that an adversarial system be adopted. Numerous reasons pointed towards the selection of an adversarial structure.¹⁵⁵

¹⁴⁸ See supra note 8 and accompanying text. See also *Gideon Boas*, ‘Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility’, 12 Criminal Law Forum 41, 66 (2001) (noting that ‘the ICTY has been given an adversarial structure by virtue of its Statute’) [hereinafter *Boas*, The Principle of Flexibility].

¹⁴⁹ *Cassese*, supra note 7, at 384 (remarking that the Statute ‘discarded the model based upon an investigating judge responsible for gathering evidence on behalf of both parties’ and that the document ‘laid down the fundamental features of the adversarial system’).

¹⁵⁰ Statute, supra note 1, at Art. 18 (authorizing the prosecutor to initiate investigations, question suspects and witnesses and to prepare indictments when, according to her determination, a *prima facie* case exists for prosecution). The decision to indict is then subject to a judicial determination that a *prima facie* case exists, however. *Id.* at Art. 19.

¹⁵¹ *Id.* at Art. 16(2) (proclaiming that ‘[t]he prosecutor shall act independently as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any Government or from any other source’). “Any other source” must . . . include the Tribunal and the Security Council’. *Daniel D. Ntanda Nsereko*, ‘Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia’, 5 Criminal Law Forum 507, 517 (1994).

¹⁵² *Bassiouni & Manikas*, supra note 39, at 899 (observing that, at common law, investigations are initiated and conducted by the Prosecutor, charges are contained in an indictment and suspects are not permitted to contest evidence).

¹⁵³ Statute, supra note 1, at Art. 18(4).

¹⁵⁴ *Id.* at Art. 19(1).

¹⁵⁵ Substantive considerations aside, the potential for a common law bent may have existed simply due to the fact that the majority of individuals at the United Nations Office of Legal

As ‘it is generally accepted that the adversarial system is more suitable when it comes to offering protection to the rights of the accused’,¹⁵⁶ the increased importance ascribed to those rights in the aftermath of World War II supported the selection of the system. This approach is also consistent with the fact that, as a derivative of the Security Council, the Tribunal ought to ‘practice what the United Nations preaches’ and provide ‘fair criminal proceedings that may be emulated by member states’.¹⁵⁷ Along these lines, it is not negligible that the Draft Statute of the United Nations International Law Commission (ILC) for an International Criminal Court provided for an adversarial process.¹⁵⁸ Accordingly, given the fact that ‘international and regional human rights law affecting criminal justice have clearly evolved in the direction of an adversary-accusatorial system of justice’,¹⁵⁹ and that, as a ‘human rights tribunal’, the ICTY is ‘mandated to provide a model of enlightened justice’,¹⁶⁰ many signs

Affairs (OLA), who prepared the Secretary-General’s report, came from common law systems. *Bassiouni & Manikas*, supra note 39, at 863. See also *Johnson*, supra note 39, at 115 (remarking that interested States were able to influence the process of drafting the proposal by making recommendations to the OLA and that, as a result, power and influence on the process went unchecked and prevented the creation of a legislative history). Johnson also observes that this method of drafting the Statute had political advantages for the three most interested of the Security Council’s Permanent Members (France, the United Kingdom and the United States). With this approach, the States were better able influence the outcome of the report than they would in an open debate, with the added benefit of confidentiality. [T]he limited amount of time, the lack of public discussion and the omnipresence of the Security Council member States in the OLA drafting process meant that the practical solution was to follow the suggestions of the great powers . . .’ *Id.* at 131–32.

¹⁵⁶ *Zappalà*, supra note 15, at 16.

¹⁵⁷ *Nsereko*, supra note 151, at 510.

¹⁵⁸ *Kai Ambos*, ‘International Criminal Procedure: “adversarial”, “inquisitorial” or “mixed?”’, 3 *International Criminal Law Review* 1, 5 (2003). ‘The initial work done by the ILC in 1992 was an influence upon the ICTY Statute’. *Johnson*, supra note 39, at 150 (noting that it provided the drafters of the ICTY Statute with a model against which they could test their own ideas).

¹⁵⁹ *Bassiouni & Manikas*, supra note 39, at 864. (pointing to ‘contemporary developments’ in the field of human rights, including the growth of international and European standards, as well as adversarial style modifications that have been made to domestic criminal systems in order to comply with those standards). See also *Van Kessel*, supra note 17, at 802 (remarking that ‘[i]nspired by the [European] Court of Human Rights, . . . Continentals have been moving toward more adversary forms of procedure’). The assertion that human rights law has fostered a movement toward adversarial criminal procedure is also supported by the subsequent establishment of International Criminal Court (ICC), created pursuant to the Rome Statute of the International Criminal Court, Adopted at the United Nations Diplomatic Conference of Plenipotentiaries, 17 July 1998, United Nations Document A/CONF.183/9 (1998). The ICC also adopted an adversarial-accusatorial framework, a decision ‘motivated by a desire to protect the rights of the accused’. *M. Cherif Bassiouni*, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, 32 *Cornell International Law Journal* 443, 465 (1999).

¹⁶⁰ *Schabas*, supra note 110, at 516 (noting that judges across the globe will be influenced by

pointed to the adoption of the adversarial model. However, the determination as to the manner in which the model would operate was bestowed upon the Tribunal's judiciary.

B. The Summary of the Rules of Procedure

In accord with the Statute, the judiciary assumed the responsibility of drafting the Rules of Procedure and Evidence for the ICTY. In so doing, the Tribunal elaborated on some of the adversarial elements mandated by the Statute. For example, the Rules detail the investigatory powers bestowed upon the prosecution by delineating the parameters of the conduct of investigations, as well as the rights of suspects during investigation.¹⁶¹ The common law aspect of the indictment phase was also further specified. The *prima facie* standard, required by the Statute, is given a fixed definition in the Rules.¹⁶² The Rules also make clear that a formal hearing or an extensive oral proceeding is not required to confirm an indictment.¹⁶³ As such, an *ex parte* hearing on the same, as opposed to what would be required in a continental construct,¹⁶⁴ represents the only pre-trial judicial intervention expressly authorized by the original Rules.¹⁶⁵

In keeping with the common law approach, the Rules also provide that case presentations consist of witnesses called and evidence offered by both the prosecution and defense; in addition, the Rules require that witnesses shall be sub-

the Tribunal's approaches to criminal law). See also *Michail Wladimiroff*, 'The Rights of Suspects and Accused', in 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts 419, 430 (*Gabrielle Kirk McDonald & Olivia Swaak-Goldman*, eds., 2000) (remarking that the Tribunal 'should ensure the right to a fair trial in accordance with the highest UN and other international standards at all stages of the proceedings').

¹⁶¹ ICTY RPE, R.39, R.42, United Nations Document IT/32 (1994).

¹⁶² Id. at R.47(A) (providing that a *prima facie* standard is met when 'the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a person has committed a crime within the jurisdiction of the Tribunal'). See 1 *Morris & Scharf*, supra note 6, at 202–03 (discussing the intentional omission of a definition in the Statute).

¹⁶³ 1 *Morris & Scharf*, supra note 6, at 204. See also ICTY RPE, R.47(C),(D) United Nations Document IT/32 (1994) (providing that the indictment and supporting materials be forwarded to one of the Judges of the Trial Chamber and that a date be set for the Judge to hear from the Prosecutor on the indictment prior to its confirmation or dismissal).

¹⁶⁴ See supra notes 39–40, and accompanying text. The continental/common law divide is heightened by the fact that the indictment remains private until the confirmation. ICTY RPE, R.52, United Nations Document IT/32 (1994). In addition, an indictment that has been confirmed may remain secret until such time as it has been served, if necessary in the interest of justice. Id. at R.53.

¹⁶⁵ ICTY RPE, R.47(D), United Nations Document IT/32 (1994). See also *Zappala*, supra note 15, at 23.

ject to examination-in-chief, cross-examination and re-examination by the parties.¹⁶⁶ The Rules also impose no affirmative duty upon the prosecutor to seek out exculpatory evidence, though disclosure of such evidence is required if known to him.¹⁶⁷ Objectivity, so central in continental criminal proceedings at both the pre-trial and trial stage, is noticeably absent. The Tribunal's participants and observers alike have commented the adversarial nature of the ICTY.¹⁶⁸

In the Summary of the Rules of Procedure, released in February of 1994 and given by then-president of the Tribunal, Antonio Cassese, the procedures adopted by the Tribunal are avowed to be 'largely adversarial'.¹⁶⁹ The Summary attributes the adoption of an adversarial nature for the Tribunal's proceedings, over that of an inquisitorial type, to 'the limited precedent of the Nuremberg and Tokyo Trials' and the need for the judges of the ICTY 'to remain as impartial as possible'.¹⁷⁰ As the forthcoming assessment reveals, however, '[I]awyers and commentators should guard against too readily assuming that the Judges adopted a modified adversarial system for the [Tribunal.]'¹⁷¹

1. *Nuremberg and Tokyo Precedents*

In assessing the statement made by then-President Cassese, the reference to Nuremberg and Tokyo certainly deserves attention. It is widely known that the two tribunals have, since the time of their creation to the present day, suffered from severe criticism and allegations of 'victors' justice'.¹⁷² Accordingly, it

¹⁶⁶ ICTY RPE, R. 85, United Nations Document IT/32 (1994) (providing also, consistent with the adversarial construct, that evidence for the prosecution be presented first).

¹⁶⁷ *Id.* at R.68.

¹⁶⁸ See, e.g., *Safferling*, supra note 7, at 223 (noting that the structure of the Tribunal's procedure is along the lines of the Anglo-American system and that the role of the prosecutor strongly resembles that of its counterpart in adversarial procedural systems). See also, *Louise Arbour*, 'The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results', 3 Hofstra Law and Policy Symposium 37, 46 (1999) (observing that the Tribunal is 'completely dominated by the Anglo-American system').

¹⁶⁹ Statement of the President, supra note 9, reprinted in 2 *Morris & Scharf*, supra note 6, at 649.

¹⁷⁰ *Id.* at 650.

¹⁷¹ *Rod Dixon*, 'Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals', 7 Transnational Law and Contemporary Problems. 81, 97 (1997). The author proceeds to note that despite the fact that certain rules 'have an adversarial inclination, they simultaneously reflect civil law characteristics'. *Id.* at 98.

¹⁷² 'The backlash against the Nuremberg and Tokyo war crimes tribunals began even before those trials ended and continues to this day as judges, lawyers and academics decry the imposition of "victors" justice', the application of retroactive laws and the denial of procedural rights essential to a fair trial'. 'Developments in the Law – International Criminal Law: Fair Trials and

may seem puzzling that the Summary positively cites the Tribunal's forerunners in support of its decision to adopt a similar construct.¹⁷³ Had the Tribunal endorsed the procedures employed at Nuremberg and Tokyo carte blanche, this allusion would have been very troubling indeed. However, it appears that the rationale behind the reference to these two predecessors to the ICTY is that there is an inherent advantage in experience. In drafting the rules that would ultimately govern its procedures, the judges were able to capitalize on a benefit that was absent in London in 1945: the resource of lessons learned by its predecessors. Thus, the judiciary was in a position to take advantage of the ability to enhance the prior attempts at international criminal justice. In effect, it could be said that the Tribunal took on board the words of *Robert Jackson*, who was 'consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future'.¹⁷⁴

This explanation for the Summary's reference to Nuremberg and Tokyo can be supported. Prior to the drafting of the Rules, then-future President Cassese had occasion to interview a former Tokyo judge. Throughout the course of this interview, Judge Röling informed Cassese of certain failures that can be attributed to the post World War II Tribunals, giving particular regard to the issue of inequality of arms and non-disclosure of documents at the trials.¹⁷⁵ These shortcomings provoked *Judge Röling* to remark that the 'Anglo Saxon system provides "only a veneer of fairness, not true fairness"'.¹⁷⁶ One can clearly see the effect of this interview reflected not only in the Rules, but also in Cassese's Summary of them. The President emphasizes the fact that the Rules ensure equality of arms and reciprocal disclosure, as well as the fact that these provisions represent an improvement from the proceedings at Nuremberg and Tokyo.¹⁷⁷ Thus, as opposed to embarking on a new and unknown path in the

the Role of International Criminal Defense', 114 Harvard Law Review 1982, 1982 (2001) [hereinafter Developments in the Law].

¹⁷³ 'The reference to Nuremberg and Tokyo as precedents is not very compelling'. *Orie*, supra note 50, at 1464 (citing, instead, the American influence on the Rules).

¹⁷⁴ *Robert H. Jackson*, Report to the President, 7 Oct. 1946.

¹⁷⁵ *Orie*, supra note 50, at 1461. (quoting Cassese's interview of Judge Röling as excerpted from *B.V.A. Röling*, The Tokyo Trial and Beyond: Reflections of a Peacemonger 51 (1993)). Citing the fact that the prosecution was in possession of all the documents, had the manpower to prepare its case and that the defense was clearly in an inferior position, *Röling* maintained that '[t]he Anglo Saxon Party system may have its advantages, but it can only work effectively if there is a certain equality of arms between the parties. That was not the case in the post war trials'. *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 'We have made considerable efforts to put both the prosecution and defence on the same footing, with full disclosure of documents and witnesses by both sides, so as to safeguard the rights of the accused and ensure a fair trial. In this respect, we have made a conscious effort to

practice of international criminal justice, a case is created for the continued use of an adversarial approach. In this respect, the antecedents to the ICTY afford its judiciary the opportunity to learn from past mistakes in an effort to fine-tune the process at the Tribunal.

2. *Judicial Impartiality*

The second reason cited for employing a largely adversarial approach at the Tribunal is the need for judicial impartiality. According to the Summary of the Rules of Procedure, ‘... in order for us, as judges to remain as impartial as possible, we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and elsewhere’.¹⁷⁸ Thus, the Summary not only aligns judicial impartiality with the adversarial system, it does so in a manner that suggests that the adversarial approach is superior in this regard to that which is known in the continental system. Arguably, this position seems peculiar; our review of the continental system certainly shows that its judges are meant to be nothing if not impartial.¹⁷⁹ One is left then to engage in a careful evaluation of the aspects of the two systems to discover that which would inspire this contention on behalf of the then-president of the Tribunal.

(a) *Judicial Passivity*

The first logical step in this inquiry is to establish that which is deemed to comprise judicial impartiality in the adversarial system. According to *Damaška*, the traditional common law understanding of the same developed ‘against the background of a competitive factfinding process’.¹⁸⁰ Accordingly, in the adversarial system, judicial impartiality manifests itself in judicial passivity: ‘it is risky for a third party to intervene in the forensic contest without appearing to offer assistance to one or the other litigant’.¹⁸¹ In fact, judicial passivity plays such a seminal role in the adversarial process, that it is essential to *Damaška*’s definition of the adversary system as a whole.¹⁸² Further, judicial passivity in

make good the flaws of Nuremberg and Tokyo’. Statement of the President, *supra* note 9, reprinted in 2 *Morris & Scharf*, *supra* note 6, at 650.

¹⁷⁸ Statement of the President, *supra* note 9, reprinted in 2 *Morris & Scharf*, *supra* note 6, at 650 (appearing in a subsection titled ‘The adversarial system versus the inquisitorial system’).

¹⁷⁹ See generally *supra* at II.

¹⁸⁰ *Damaška*, *The Uncertain Fate*, *supra* note 31, at 851.

¹⁸¹ Id. This is consistent with the adversarial construct: ‘If the structure of the proceeding is envisaged as a dispute between two parties, where each of them bears the burden of proving the facts stated in court, any official adducing of evidence will indeed inevitably help one of the two sides’. *Elisabetta Grande*, ‘Italian Criminal Justice: Borrowing and Resistance’, 48 *American Journal of Comparative Law* 227, 245 (2000).

¹⁸² The adversary system is one wherein ‘procedural action is controlled by the parties and

the common law is a pivotal element with regard to neutrality: it is symbolic of the ‘defendant’s protection against official abuses of power’.¹⁸³

While some critics have asserted that those who associate judicial passivity with impartiality misunderstand the matter and betray an adversarial bias, this itself is a misconception.¹⁸⁴ The argument goes that a continental judge can be very active and remain impartial and, therefore, equating impartiality with passivity reveals a prejudice against that which is continental.¹⁸⁵ However, it is submitted that, in the adversarial context, impartiality is not ‘confused’ with passivity; rather, the two are integrally related based on the system of justice employed. This argument does not allege that judges cannot be active and impartial *in a continental or other alternative system*, rather that activity undermines impartiality in a competitive construct wherein the judge sits as ‘umpire’, regulating the activities of the two contestants. The importance of this cannot be overstated: a ‘judge’s questioning may confer an unintended advantage upon one party that the lawyer could not have obtained otherwise and that the opposing party cannot counteract during the trial’.¹⁸⁶

The potential for this difficulty may be exacerbated when judges sit not only to determine questions of law, but also as triers of fact: responsibility for fact-finding may well entice judges to intervene not simply to elucidate that which is unclear, but to develop evidence as well.¹⁸⁷ In his assessment of the Rules, *Nsereko* cautions against this, expressing the hope that the Tribunal’s judges will leave witness interrogation to the parties and ask questions only to clarify ambiguities.¹⁸⁸ He notes that to act otherwise might impinge on the appearance of impartiality, hinder the judges’ ability to remain objective and detached, and may intimidate or unduly influence the statements of the witnesses.¹⁸⁹ These very difficulties emerged in Italy after the country’s 1988 decision to alter its traditionally inquisitorial system by adopting an essentially adversarial con-

the adjudicator remains essentially passive’. *Grande*, supra note 181, at 249 (quoting *Mirjan Damaška*, Evidence Law Adrift 74 (1997)).

¹⁸³ *Grande*, supra note 181, at 251.

¹⁸⁴ See, e.g., *Ellen E. Sward*, ‘Values, Ideology and the Evolution of the Adversary System’, 64 Indiana Law Journal 301, 321 n. 96 (1989).

¹⁸⁵ *Id.*

¹⁸⁶ *Doran, Jackson & Seigel*, supra note 71, at 37 n. 157 (quoting *Stephen A. Saltzburg*, ‘The Unnecessarily Expanding Role of the American Trial Judge’, 64 Virginia Law Review 1, 55 (1978)).

¹⁸⁷ *John D. Jackson and Sean Doran*, ‘Conventional Trials in Unconventional Times’, 4 Criminal Law Forum 503, 513 (1993) (noting that judicial intervention for the purpose of clarification fits acceptably within the ‘adversarial ideal’).

¹⁸⁸ *Nsereko*, supra note 151, at 538.

¹⁸⁹ *Id.* at 538–539.

struct.¹⁹⁰ There, judges raised on the ‘official-dominated search-for-truth approach’ fought against and defeated the imported adversarial approach; as one critic put it, the ‘judges’ cognitive needs regained predominance over the fairness of the trial’.¹⁹¹

The Italian experience also provides another good example as to why judicial activity may be dangerous in an adversarial construct. As a result of the country’s ‘transplant’ of an adversarial system for criminal trials, pre-trial access to the prosecution’s dossier was drastically altered: under the new Code, the trial judges receive some but not all of the case file.¹⁹² The result is a situation wherein counsel know more of the facts of the case than the judge who, ‘partially informed and innocent of details’, may be turned into ‘a blind and blundering intruder’ in the area of evidence development.¹⁹³ In sum, one is left with a scenario wherein the examination of evidence is less efficient, judicial activity may create bias or the impression of bias and traditional continental truth finding is hindered: ‘[t]he result seems to be the worst of both worlds’.¹⁹⁴

Consequently, in light of the set-up adopted at the ICTY, to observe that the implications of this assessment are troubling is likely to underestimate the matter. As an initial matter, considered in the context of the foregoing, it is not only difficult but impossible to establish a link between the Tribunal’s choice of an adversarial approach with judicial impartiality. Straying from the common law construct, the Rules adopted by the Tribunal confer upon its trial judges the authority to play an active role in evidence development. The Summary describes this ability as one of two ‘important adaptations to that general adversarial system’.¹⁹⁵

¹⁹⁰ ‘One of the most significant reforms attempted in the new Code is the restructuring of criminal trials along adversarial lines’. *Pizzi & Marafioti*, supra note 22, at 5. Italy’s adoption of an adversarial construct contributed to *Bassiouni*’s assertion that international criminal justice has evolved in an adversarial direction. See supra note 159 and accompanying text.

¹⁹¹ *Grande*, supra note 181, at 251. ‘[L]awyers accustomed to a purely civil law system may have trouble adapting to adversarial procedures’. *Pizzi & Marafioti*, supra note 22, at 6. Though, due to the 1988 changes, some have reclassified the Italian system as an example of the common law model, the reaction of the judiciary to the importation of the adversarial system, along with legislative changes, have showed a tendency away from the accusatorial and a return to the inquisitorial. *Orie*, supra note 50, at 1441 n. 5.

¹⁹² *Pizzi & Marafioti*, supra note 22, at 13–14 (noting that the trial judges receive the charging documents, physical evidence and evidence ‘frozen’ under judicial supervision). But see *Grande*, supra note 181, at 251 (asserting that ‘trial judges . . . know of the prosecution’s dossier only what the parties want them to be aware of’).

¹⁹³ *Damaška*, Uncertain Fate, supra note 31, at 850 (remarking, also, that the judge could thus disrupt the interrogation strategies of counsel).

¹⁹⁴ *Grande*, supra note 181, at 251.

¹⁹⁵ Statement of the President, supra note 9, reprinted in 2 *Morris & Scharf*, supra note 6, at

Pursuant to the Rules, trial judges may order the production of additional or new evidence *proprio motu*,¹⁹⁶ they may also question witnesses for the prosecution or defense at any stage.¹⁹⁷ These provisions not only fail to comply with impartiality as it is defined in the adversarial system, the reasons cited for their presence in the Rules also belie a general assertion of impartiality. The Summary explains that these rules are necessary in order to ensure the judiciary's full satisfaction with the evidence on which they will make their determinations and 'to ensure that the charge has been proved beyond reasonable doubt'.¹⁹⁸ This explanation is entirely incompatible with an adversarial construct and its latter half unquestionably portrays a 'conviction centered' bias. In the 'contest theory', it is well accepted that a charge that has not been proven beyond a reasonable doubt is synonymous with the prosecution's failure to meet its burden,¹⁹⁹ the result is an acquittal. As we have seen, judicial intervention in an adversarial construct naturally serves to shift the delicate balance of power in trial proceedings and, disturbingly, the Summary's rationale for authorizing activism implies that its beneficiary will be the prosecution.²⁰⁰ This inference is strengthened as the Summary goes on to note that the authorized activism will 'minimise the possibility of a charge being dismissed on technical grounds for lack of evidence'.²⁰¹ With respect, lack of evidence does not constitute 'technical grounds' for dismissal, as that term is commonly understood.²⁰² Rather, a lack of evidence produced at trial means that an accusation

650–51. The other adaptation, the absence of technical rules governing the admissibility of evidence, is discussed infra at V.

¹⁹⁶ ICTY RPE, R.98, United Nations Document IT/32 (1994). According to one source, this Rule responds directly to the concerns expressed by judges who served at the Tokyo Tribunal. The jurists felt stilted in the proceedings and would have preferred an opportunity to have access to additional evidence. 1 *Morris & Scharf*, supra note 6, at 258. The source of this discontent appears to relate directly to the continental/common law divide regarding the issue of truth.

¹⁹⁷ ICTY RPE, R.85(B), United Nations Document IT/32 (1994).

¹⁹⁸ Statement of the President, supra note 9, reprinted in 2 *Morris & Scharf*, supra note 6, at 651.

¹⁹⁹ See, e.g., *Nsereko*, supra note 151, at 537–538 (noting that, at common law, 'a court may acquit the accused at the close of the prosecution's case if . . . the prosecution fails to prove all the essential elements of the offense charged, . . . or the prosecution evidence is so fragmentary as to be unsafe of belief').

²⁰⁰ A similar conclusion is reached by *Johnson*, supra note 39, at 120 (remarking on the ability of the judiciary to order the production of new evidence, *Johnson* notes, 'it is only brought out if the prosecutor has not, it would seem, met her level of proof').

²⁰¹ Statement of the President, supra note 9, reprinted in 2 *Morris & Scharf*, supra note 6, at 651.

²⁰² Rather, this expression generally connotes a situation wherein exclusionary rules preclude a party from introducing an otherwise reliable, inculpatory and critical piece of evidence. See generally *Barry F. Shanks*, 'Comparative Analysis of the Exclusionary Rule and Its

of a criminal nature has not been substantiated. To assume otherwise runs counter to the internationally recognized principle of the presumption of innocence.²⁰³

The Summary further maintains that judicial intervention best serves the interest of justice in the international sphere and that ‘the diminution, if any, of the accused’s rights is minimal by comparison’.²⁰⁴ But, given the adversarial construct of the Tribunal and the types of crimes that fall within the purview of its jurisdiction, it is fair to question this assertion. It has been observed that ‘the outrage provoked by the commission of crimes could tempt lawyers and judges to approve carelessness toward, or disregard for, the legality of their efforts of suppressing crime’.²⁰⁵ This problem can only be exacerbated by the gravity of the crimes over which the Tribunal has subject matter jurisdiction.²⁰⁶ Accordingly, given the competitive construct at the ICTY, one can hardly think of a better reason why prosecutors need to be watched and judges need to be passive.²⁰⁷ In such a forum, the arguably most vital role of the judiciary is that of protector against official abuse of power²⁰⁸ by applying the rules of

Alternatives’, 57 Tulane Law Review 648 (1983). See also *Kenneth Williams*, ‘Do We Really Need the Federal Rules of Evidence?’ 74 North Dakota Law Review 1, 17 (1998) (noting that, as the decisions of international tribunals tend to affect thousands of individuals as well as international relations, ‘[t]he court is therefore reluctant to allow a case to turn upon a technical rule of evidence’).

²⁰³ Universal Declaration, *supra* note 138, at Art. 11; International Covenant of Civil and Political Rights, entered into force 23 Mar. 1976, Art. 14(2), 999 United Nations Treaty Series 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 Sept. 1953, Art. 6 (2), 213 United Nations Treaty Series 221 [hereinafter European Convention], American Convention on Human Rights, entered into force 18 July 1978, Art. 8(2), 1144 United Nations Treaty Series 123[hereinafter ACHR], African Charter on Human and People’s Rights, adopted on 15 Sept. 1994, Art. 7(1)(b), Organization of African Unity Document CAB/LEG/67/3, 21 International Legal Materials 58[hereinafter African Charter]; Universal Islamic Declaration of Human Rights, 19 Sept. 1981, Art. III (1982) 4 European Human Rights Reports 433.

²⁰⁴ Statement of the President, *supra* note 9, reprinted in 2 *Morris & Scharf*, *supra* note 6, at 651.

²⁰⁵ *Mia Swart*, ‘Ad Hoc Rules for Ad Hoc Tribunals? The Rule-Making Powers of the Judges of the ICTY and ICTR’, 18 South African Journal on Human Rights 570, 577 (2002).

²⁰⁶ Id. An accused appearing before the Tribunal will have been charged with one or more of the following crimes: grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, genocide and crimes against humanity. Statute, *supra* note 1, at Arts. 2–5.

²⁰⁷ This is particularly true in light of the observation that ‘[a]n *ad hoc* court is by nature mission-oriented, and missionaries (judges, prosecutors and administrators) tend to form a sense of camaraderie and community’. *Developments in the Law*, *supra* note 172, at 1995 (noting that this can lead to a less obvious form of bias with regard to prosecutions at the Tribunal).

²⁰⁸ See, e.g., *Grande*, *supra* note 181, at 251.

procedure with a necessary detachment; one who ‘descends into the arena’, is ‘liable to have his vision clouded by the dust of the conflict’.²⁰⁹

In addition, the absence of judicial passivity at the ICTY gives rise to the question of whether, like the Italian experience, the lack of or limited access to case information pre-trial²¹⁰ would result in judicial intervention that is inefficient and a scenario wherein truth-finding is hampered. Thus, the authorization of judicial intervention at the ICTY is an ‘important adaptation’ to the Tribunal’s general adversarial system whose effect should not be overlooked. Far from operating to ensure impartiality, it actually calls the same into question. As a result, one can assume that the impartiality referenced in the Summary is not a by-product of the ‘passive’ role played by common law judges. If this were so, the cited need for neutrality would be emasculated by the extensive powers conferred upon the judges of the ICTY by its Rules. Thus, it seems the reference to judicial impartiality must derive from a comparison of common law and continental procedure that is related to something other than the passive/active dichotomy.

(b) *Pre-Trial Access to Case Information*

Though the difference in the level of judicial activity is perhaps the most common distinction made regarding the role played by the judiciary in each system, it is not representative of the only dissimilarity between judicial operation on the continent and that at common law. Another major distinction, affiliated with the active role played by judges in the continental system, is that of pre-trial access to case information on behalf of the judiciary. As has been indicated, the continental judge, unlike his common law counterpart, does not approach each criminal case as a *tabula rasa*.²¹¹ This ‘blank slate’ aspect of criminal proceedings at common law, in which the presiding judge is for the most part unfamiliar with material relating to the pre-trial investigation, is by its very nature ‘an effort to preserve neutrality’.²¹² In effect, it ensures that any determination of guilt is based solely on evidence that is adduced in the courtroom.²¹³

The idea that pre-trial exposure to the case file or dossier may impede a judge’s ability to be impartial is not a novel concept. It is widely acknowledged that exposure to the dossier may result in bias and may inevitably affect a

²⁰⁹ *Yuii v. Yuii*, 1945 Court of Appeal 15, 20 (1944) (Eng.) (noting also that an active judge ‘unconsciously deprives himself of the advantage of calm and dispassionate observation’).

²¹⁰ See supra note 165 and accompanying text. See also infra at IV(B)(2)(b) and IV(B)(2)(c).

²¹¹ *Grande*, supra note 181, at 243.

²¹² *Pizzi & Marafioti*, supra note 22, at 7.

²¹³ *Doran, Jackson & Seigel*, supra note 71, at 2.

judge's decision regarding guilt determination.²¹⁴ Further, judicial access to certain information requires the court to 'resist the temptation to draw conclusions from that material while deliberating on the guilt of the accused'.²¹⁵ Accordingly, some continental systems have employed safeguards in this area such as limiting pre-trial access to the case file to only one member of the panel of judges trying the case.²¹⁶ In the case of the aforementioned Italian reform, pre-trial access to the case file has essentially been eradicated in response to bias-based abuse.²¹⁷

It is worthwhile to note that the use of such precautionary measures, as well as the example of the elimination of pre-trial access to information altogether, have occurred in 'officialized' systems that either employ, or employed, 'purportedly non-partisan investigation[s]'.²¹⁸ Accordingly, one can reasonably anticipate that like hazards would be all the more probable in the context of the ICTY. The Tribunal's structure calls for partisan information gathering on behalf of the prosecutor,²¹⁹ who is not subject to the continental requirement that exculpatory information be sought and whose actions are not subject to a supervising body.²²⁰

²¹⁴ See, e.g., *Damaška*, Evidentiary Barriers, *supra* note 8, at 544 (acknowledging that 'the impact of the dossier on guilt deliberations of the mixed panel cannot in candor be denied'). See also *Grande*, *supra* note 181, at 229 (noting the widely held view, under the Italian system prior to its 1988 reform, that 'the trial court's review of the pre-trial material inevitably affected the court's decision and encouraged – consciously or unconsciously – the trial judge to accept the approach taken by the public official during the pre-trial phase'). Referring to the effect of pre-trial access to the dossier upon judicial impartiality, it has been observed that,

'A by-product of the Continental practice is that the president cannot come into court with a perfectly open mind. Since the task of interrogation devolves upon him, he must spend as much time studying the bulky dossier as an English prosecuting counsel in getting up his instructions and proof of evidence . . . [The procedure] creates a danger that the point of view of the prosecution will communicate itself to the judge before the case has been heard'.

Abraham S. Goldstein & Martin Marcus, 'The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany', 87 *Yale Law Journal* 240, 265 (1977–8) (quoting *G. Williams*, *The Proof of Guilt*, 31–32 (1963)).

²¹⁵ *Orie*, *supra* note 50, at 1455.

²¹⁶ *Pizzi & Marafioti*, *supra* note 22, at 8 (observing that this is so 'in all but the most minor cases' and that the 'collegial approach to decision-making counterbalances at least some of the inherent dangers of the inquisitorial system').

²¹⁷ *Grande*, *supra* note 181, at 243 (noting that the change would 'avoid the prosecution's dossier unduly influencing the presiding judge's mind').

²¹⁸ *Damaška*, Evidentiary Barriers, *supra* note 8, at 511.

²¹⁹ Statute, *supra* note 1, at Art. 18; ICTY RPE, R.39, United Nations Document IT/32 (1994).

²²⁰ See, e.g., *Damaška*, Evidentiary Barriers, *supra* note 8, at 544 (noting that the danger of bias depends on the practices employed in a particular jurisdiction, such as the thoroughness of

Further, the risk of bias associated with pre-trial access to case information is exacerbated as a general principle when the evidentiary material at issue is one-sided, a fact that was observed at the establishment of the IMT. Though the French suggested a proposal wherein one of the trial judges would be given access to the prosecution's evidence in advance of trial,²²¹ the delegation noted that its proposal might subject the court to the charge that it was not operating impartially.²²² According to *Cassese*, this acknowledgment suggests the French concern that the judiciary's pre-trial access to 'a "case file" containing the prosecution's evidence alone might be regarded as "contaminating" the Court'.²²³ The issue was one of considerable debate amongst the four Powers and, in practice, 'evidentiary material was not handed over to the court prior to trial, but was submitted in court during the hearings'.²²⁴

(c) *Summary*

Thus, as it is judicial passivity rather than activity that reinforces the notion of neutrality in the adversarial system, the ICTY's employment of the latter does not support the connection asserted to exist between the Tribunal's adversarial approach and judicial impartiality. However, the hazards of judicial bias associated with pre-trial access to case information in an adversarial system serves to create an alternative argument for a link between the two. Preventing pre-trial access to case information by the trier of fact, consistent with the adversarial approach, would serve to support a bond between the approach and judicial impartiality.

Indeed, when one surveys the Rules adopted by the Tribunal in 1994, the drafting of the same is consistent with the idea of approaching each case as a *tabula rasa*, reinforcing the asserted connection between the Tribunal's 'largely adversarial approach' and judicial impartiality. The rule governing judicial disqualification, Rule 15, notes that, in addition to having a personal interest in a case, judicial impartiality might be affected by an association that a judge has, or has had, with a case.²²⁵ As such, the rule '[takes] meticulous care to ensure

the investigation and whether or not the investigating official registers an opinion on the strength of the case).

²²¹ French Observations, *supra* note 107, at §2(a).

²²² Id. at §3.

²²³ *Cassese*, *supra* note 7, at 378.

²²⁴ Id. at 381 (noting, however, that, whether or not used in practice, compromise language was reached wherein some official documents, such as treaties and public reports, could accompany the indictment presented to the court).

²²⁵ 'A Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in such circumstances withdraw, and the President shall assign another judge to sit in his place'. ICTY RPE, R.15(A), United Nations Document IT/32 (1994).

that no judge will sit on a case where, given the particular circumstances, he or she might not be, or appear to be impartial'.²²⁶ Accordingly, the Rule, as originally adopted, precluded the judge who confirmed the indictment of an accused from later adjudicating the guilt or innocence of that person.²²⁷ According to *Bassiouni*, '[t]he importance of impartiality is illustrated by the Rule's prohibition of a Judge who reviews an indictment against an accused from hearing that case at trial'; in addition, the wording of Rule 15 '[implies] that Judges should interpret their obligations under the Rule broadly to avoid even the appearance of impropriety'.²²⁸

VI. The Tribunal's Approach to Evidence

It is against this purportedly adversarial background that the judiciary, in its creation of the Tribunal's evidentiary rules, crafted an evidentiary system that is unquestionably continental in nature. Trials at the ICTY 'resemble criminal trials held under civil law systems, operating under a "free evaluation of evidence"'.²²⁹ In support of this tactic, the Summary favourably cites the evidentiary approach employed at both Nuremberg and Tokyo, noting that the post-World War II Tribunals also disregarded technical rules regarding the admissibility of evidence.²³⁰ Unlike the reference to its forerunners in the context of the ICTY's adoption of an adversarial approach, this allusion is not accompanied by a promise to 'make good the flaws' of its predecessors. Rather, in a manner akin to Jackson's argument in London, the Summary avers that admissibility rules 'have developed out of the ancient trial by jury system' and that the absence of a jury that '[needs] to be shielded from irrelevancies or given guidance as to the weight of evidence' renders such rules unnecessary.²³¹

²²⁶ *Nsereko*, supra note 151, at 534.

²²⁷ ICTY RPE, R.15(C), United Nations Document IT/32 (1994). Similarly, Rule 15 also provides: 'No member of the Appeals Chamber shall sit on any appeal in a case in which he sat as a member of the Trial Chamber'. Id. at R.15(D).

²²⁸ *Bassiouni & Manikas*, supra note 39, at 805. As opposed to personal impartiality, 'the most important part is the requirement of "impartiality" in individual cases'. *Safferling*, supra note 7, at 94.

²²⁹ *May & Wierda*, supra note 69, at (quoting *Musema*, Judgment and Sentence, at paragraph 75, Case No. ICTR-96-13-T (Jan. 27, 2000)).

²³⁰ Statement of the President, supra note 9, reprinted in 2 *Morris & Scharf*, supra note 6, at 650.

²³¹ Id. at 651. 'We, as judges, will be solely responsible for weighing the probative value of the evidence before us'. Id.

However, it has been established that rules governing admissibility in the adversarial system relate to more than simply the presence of a lay jury.²³² Further, in light of the previous discussion regarding the absence of admissibility rules and the effect of the same on the procedural rights of those accused at Nuremberg and Tokyo, one could say that this favorable reference to the evidentiary approach employed by the two is troubling. Nevertheless, it would be inaccurate to state that the Tribunal's Rules do not represent an improvement over the method employed by its antecedents. In spite of the fact that only ten of the 125 rules originally adopted by the Tribunal were rules of evidence,²³³ within this finite number, additional provisions may be found which reflect post World War II developments.²³⁴ These advances represent progressions made with regard to the status of victims²³⁵ and defendants alike.

A. Admissibility of Evidence

Rule 89 is the primary evidentiary rule; consistent with Article 19 of the Nuremberg Charter, it establishes the general provision that relevant evidence²³⁶ with probative value²³⁷ is admissible.²³⁸ Reliability is 'an inherent and implicit component of relevance and probative value under Rule 89'.²³⁹ However, rather than a blanket admission of 'any evidence . . . deem[ed] to have probative value',²⁴⁰ the Rule also includes the caveat that such evidence may be excluded if its probative value is substantially outweighed by the need

²³² See generally *supra* at II(B) and II(C). See also *Orie*, *supra* note 50, at 1439 (noting that, in the adversarial system, evidence law functions as a mechanism at trial for 'keeping the parties on the right path in their presentation of evidence').

²³³ *Ryneveld & Mundis*, *supra* note 13, at 54.

²³⁴ *1 Morris & Scharf*, *supra* note 6, at 280.

²³⁵ See, e.g., ICTY RPE, R.96, United Nations Document IT/32 (1994) (providing that, in cases of rape, no corroboration of victim testimony is required, under certain circumstances consent shall not be allowed as a defense and that the victim's prior sexual conduct may not be admitted into evidence). The rule's carte blanche prohibition against the defense of consent was later amended; the revised rule delineates those circumstances under which the defense cannot be raised. See *Bassiouni & Manikas*, *supra* note 39, at 948, 953–54.

²³⁶ 'Relevant evidence is evidence that must tend to prove or disprove a factual proposition'. *Patricia Viseur Sellers*, 'Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and 95?', in *Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald* 275, 277 (*Richard May et al.*, eds., 2001).

²³⁷ 'Evidence with "probative value" is evidence that has persuasive value or tends to prove or disprove a matter in issue'. *Nsereko*, *supra* note 151, at 541.

²³⁸ ICTY RPE, R.89(C), United Nations Document IT/32 (1994).

²³⁹ *Sellers*, *supra* note 236, at 278 (noting that the *Delalic* Trial Chamber 'opined that reliability is the invisible golden thread that runs through all components of admissibility').

²⁴⁰ *Nuremberg Charter*, *supra* note 114, at Art. 13.

to ensure a fair trial.²⁴¹ Further, in light of the Tribunal's 'bare bones' approach to its rules of evidence, Sub-rule 89 (B) provides that when evidentiary matters arise for which the Rules make no provision, the Trial Chamber 'shall apply rules of evidence which will best favour a fair determination of the matter before it'.²⁴²

1. *The Use of Written Testimony*

An additional distinction can be found regarding the Tribunal's approach to written evidence. In drafting its Rules, the Tribunal was arguably sensitive to certain criticisms of the proceedings at Nuremberg and Tokyo. The perceived excessive use and free admission of written testimony in the post-World War II trial proceedings²⁴³ resulted in assertions that the two tribunals failed to provide the necessary and complete due process guarantees to the individuals appearing before them.²⁴⁴ Accordingly, the Rules, as originally adopted by the Tribunal, established a preference for live testimony.²⁴⁵

2. *The Exclusionary Rule*

The Tribunal also failed to follow the example set at Nuremberg and Tokyo when it chose to adopt a general exclusionary rule. As originally adopted, Rule 95 provided that 'evidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall

²⁴¹ ICTY RPE, R. 89(D), United Nations Document IT/32 (1994). Even if evidence has been admitted as relevant and having probative value, it may later be excluded. See, e.g., *Prosecutor v. Tadic*, Decision on Defence Motion on Hearsay, at paragraph 18, Case No. IT-94-I-T (Aug. 5, 1996).

²⁴² ICTY RPE, R. 89(B), United Nations Document IT/32 (1994) (instructing that the rules applied need to be consonant with the Statute and general principles of law).

²⁴³ Richard May and Marieke Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', 37 Columbia Journal of Transnational Law 725, 751 (1999) [hereinafter May & Wierda, Trends].

²⁴⁴ See, e.g., Minear, *supra* note 118, at 122. See also Michael P. Scharf, 'A Critique of the Yugoslavia War Crimes Tribunal', 13 Nouvelles Études Pénales 259, 263 (1997). The need to adopt an alternative approach to written evidence than that of Nuremberg was recognized by a member of the United Nations Commission of Experts for the Former Yugoslavia. To his observation, a highly document-based prosecution 'would not be acceptable today because of post-World War II developments in international human rights law'. Dixon, *supra* note 171, at 84 (quoting W.J. Fenrick, 'In the Field with UNCOE: Investigating Atrocities in the Territory of the Former Yugoslavia', 34 The Military Law and Law of War Review 33, 36 (1995)).

²⁴⁵ The Sub-rule provided: 'Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that witness be heard by means of a deposition as provided for in Rule 71'. ICTY RPE, R.90(A), United Nations Document IT/32 (1994).

not be admissible'.²⁴⁶ In his assessment of the Rule, *Nsereko* notes that the provision would apply to evidence gathered by means of torture, would cover both confessions and statements and would also include 'fruit of the poisonous tree'.²⁴⁷ However, by limiting the prohibition to evidence obtained by a means which constitutes a serious violation of human rights, the language of the Rule specifically authorized the admission of some evidence that was improperly obtained.²⁴⁸

The fact that the Rule left open the door for admission of such evidence can arguably be explained by the fact that, generally speaking, the use of an exclusionary rule is often controversial. It is not uncommon for rules of this type to be decried, particularly if an acquittal or dismissal results from the operation of such a rule and the barred evidence was inculpatory and reliable. The issue can become increasingly sensitive when evidence gathering is the result of arduous toil, as in the case of the Tribunal.²⁴⁹ Further, the types of crimes over which the Tribunal has subject matter jurisdiction and the watchful eyes of victims, potential perpetrators and the international community could certainly make the Tribunal 'reluctant to allow a case to turn upon a technical rule of evidence'.²⁵⁰ However, the point has been made that '[e]ven if particular evidence were suppressed, it is likely that overwhelming other evidence will exist to support a conviction'.²⁵¹ Further, the presence of an exclusionary rule not only shows respect for the rights of the individual, it also sets an example to be followed on the domestic level.²⁵² In addition, its presence is consistent with the fact that international human rights law was drawn upon in the establishment of the Tribunal.²⁵³

In the context of evidence gathering, it is also worthwhile to ask whether there is a suitable alternative for safeguarding the rights of those accused at the Tribunal. It is true that states that do not avail of the exclusionary rule have

²⁴⁶ *Id.* at R.95.

²⁴⁷ *Nsereko*, *supra* note 151, at 543–545 (noting that the language 'directly or indirectly' mandates the exclusion of evidence discovered by virtue of improperly obtained evidence).

²⁴⁸ *Id.* at 545 (noting that the Rule provides the Tribunal with the power to overlook some violations).

²⁴⁹ See *Sellers*, *supra* note 236, at 275–76 (noting the 'foreseeable constraints on gathering evidence in the course of an on-going armed conflict'); *Williams*, *supra* note 202, at 17–18 (remarking that, when great difficulties have been incurred in obtaining evidence, international tribunals are reluctant to pare down that which can be admitted).

²⁵⁰ *Williams*, *supra* note 202, at 17.

²⁵¹ *George E. Edwards*, 'International Human Rights Law Challenges the New International Criminal Court: The Search and Seizure Right to Privacy', 26 *Yale Journal of International Law* 323, 334 (2001).

²⁵² *Id.*

²⁵³ See, e.g., *Schabas*, *supra* note 110, at 514.

alternative mechanisms in place that are designed to curb official abuse and protect the rights of the accused. Examples of the same include holding offending officials civilly and criminally liable, subjecting law enforcement activity to prosecutorial oversight and enforcing strict internal discipline.²⁵⁴ However, given the fact that evidence may be obtained not only by the Tribunal but also by national authorities,²⁵⁵ with regard to the latter, such remedies would be largely ineffectual. Given its limited jurisdiction, the Tribunal cannot hold national authorities criminally or civilly responsible for violating the rights of those accused,²⁵⁶ and national authorities are not be subject to the prosecutorial oversight of the ICTY. Finally, although the Tribunal could opt to discredit the reliability of evidence obtained by improper methods,²⁵⁷ admitting such information could be seen as tainting the judicial process and failing to ensure respect for international human rights standards, in contravention of one of the fundamental principles in its Statute.²⁵⁸

With regard to the Tribunal's continental evidentiary approach, it could well be argued that Rule 95 represents a common law modification. After all, 'many continental provisions regulating the interrogation of defendants are silent as to the admissibility of testimony obtained in violation of proper interrogation procedures' and 'the "poisonous fruit" doctrine sounds almost fantastic to civil law lawyers'.²⁵⁹ Further, although it has often been asserted that the exclusionary rule is an 'American peculiarity',²⁶⁰ variations of the same can be found in a number of common law jurisdictions, including Ireland, Scotland, New Zealand, England and Canada.²⁶¹

²⁵⁴ Erik G. Luna and Douglas J. Sylvester, 'Beyond Breard', 17 Berkeley Journal of International Law 147, 179 (1999).

²⁵⁵ See, e.g., 1 Morris & Scharf, *supra* note 6, at 261 (noting that the standard was intended to ensure that evidence gathered internally and externally be treated in the same manner).

²⁵⁶ The Tribunal does have the power to hold individuals in contempt for knowing and willful interference with its administration. ICTY RPE, R.77, United Nations Document IT/32 (1994). While this type of official misconduct would arguably fall within the parameters of the same, an attempt to use this power on behalf of the Tribunal to discipline national authorities would no doubt come with its own share of difficulties.

²⁵⁷ See, e.g., Shanks, *supra* note 202, at 667.

²⁵⁸ 1 Morris & Scharf, *supra* note 6, at 261 (remarking as well that the standard established by the rule was intended to discourage human rights violations). Of course, it remains true that the effectiveness of an exclusionary rule is diminished due to the fact that the Trial Chamber is responsible for fact finding in addition to ruling on questions of law. See, e.g., Orie, *supra* note 50, at 1472.

²⁵⁹ Damaška, Evidentiary Barriers, *supra* note 8, at 522. See also Orie, *supra* note 50, at 1472 (observing that 'Continental European countries have had their doubts in adopting an exclusionary rule of a general character, but case law has adopted it to some extent').

²⁶⁰ See Luna & Sylvester, *supra* note 254, at 178.

²⁶¹ In Ireland, evidence obtained by a State act that is a deliberate and conscious violation of

Nevertheless, whether the rule could be deemed an adversarial adaptation to the Tribunal's approach to evidence would be a matter for judicial interpretation. Suppression of evidence obtained as a result of torture, for instance, would not necessarily run contrary to a continental approach, given the system's commitment to truth and the fact that 'departures from the prescribed manner of interrogation are typically considered dangerous to truthfinding'.²⁶² By contrast, were the Rule interpreted to exclude evidence that was gathered pursuant to illegal search and seizure or by trickery, irrespective of its credibility, such an application would certainly represent an adversarial alteration to the Tribunal's continental evidentiary approach. However, an answer to the pervasive continental/common law question failed to materialize.

Prior to its confirmation of indictments in the case that would become the first trial ever before the ICTY, the Tribunal amended Rule 95.²⁶³ The Rule's language regarding violations of international human rights standards was eliminated,²⁶⁴ replaced by the provision that 'no evidence shall be admissible

the constitutional rights of the accused is generally excluded at trial. See *Walsh*, supra note 25, at 458–472. '[I]t would appear that the Irish courts may be even more fastidious in the protection of the constitutional rights of the accused than their American counterparts'. Id. at 460. With regard to the Scottish approach, '[i]n criminal cases . . . evidence illegally or irregularly obtained is inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court'. *Regina (Respondent) v. Sang (Appellant)*, 1980 Appeal Cases 402, 457 (1979) (Eng.) (quoting Sheriff MacPhail, *Law of Evidence in Scotland*, at paragraph 21.01 (April, 1979)). Until recently, New Zealand employed a *prima facie* exclusionary rule that placed the 'onus on the prosecution to demonstrate why the court should not follow the normal course of excluding tainted evidence'. *Richard Mahoney*, Abolition of New Zealand's *Prima Facie* Exclusionary Rule, 2003 Criminal Law Review 607. Pursuant to a 2002 Court of Appeal decision, judges are now required to consider numerous balancing factors, reflecting public and private interests, when the prosecution seeks to rely on improperly obtained evidence. Id. at 608. With regard to English and Canadian approaches, see, respectively, *Peter Murphy*, Murphy on Evidence 81–100 (7th ed., 2000) (noting that while British jurisprudence rejects the theory that evidence should be held inadmissible merely on the ground of the manner in which it was obtained, pursuant to statute, improperly obtained evidence may be excluded if admission would have an adverse effect on the fairness of proceedings); *Orie*, supra note 50, at 1472 (noting that the Canadian exclusionary rule finds its origin in Article 24 of the Canadian Charter); *Luna & Sylvester*, supra note 254, at 179 (remarking that the Canadian system employs a three part test in determining whether evidence should be suppressed).

²⁶² *Damaška*, Evidentiary Barriers, supra note 8, at 522 n. 26.

²⁶³ Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, United Nations General Assembly Official Record, 50th Session, Item 49 of the Provisional Agenda, at paragraph 20, United Nations Document A/50/365–S/1995/728 (1995) [hereinafter 2nd Annual Report]. The Rule was amended on 30 January 1995. *Sellers*, supra note 236, at 288 n. 80. For a discussion on the Tribunal's ability to amend its Rules, see *infra* VII.

²⁶⁴ Despite this, its title 'Evidence Obtained by Means Contrary to Internationally Protected

if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, or would seriously damage the integrity of the proceedings'.²⁶⁵ According to the Tribunal, the amendment was made to '[put] parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods'.²⁶⁶ Ironically, the revised language of the Rule creates the opposite effect by linking exclusion in the first instance with a lack of reliability.²⁶⁷ In addition, as noted by *Bassiouni*, 'by requiring findings that evidence to be excluded must be of dubious reliability or injurious to the Tribunal's integrity, the Rule apparently disregards the rationale that this exclusion will deter state actors from violating individuals' human rights in the conduct of a criminal investigation'.²⁶⁸

In sum, though the Tribunal categorized its amendment of Rule 95 as one made 'to broaden the rights of suspects and accused persons',²⁶⁹ it arguably fails to match up to this description.²⁷⁰ Admittedly, the original version of the Rule was not entirely in line with the theory that 'the admission of evidence obtained through the violation of human rights should be per se considered damaging to the integrity of the proceedings'.²⁷¹ However, the Rule, in its first

Human Rights' would remain in tact for more than two years until amended to read 'Exclusion of Certain Evidence'. *John R.W.D. Jones*, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda 427–428 (2000). The fact that the title remained appears to have caused a certain amount of confusion. See, e.g., *Bassiouni & Manikas*, supra note 39, at 952 n. 168 (remarking that it 'is unclear what effect the Rule's heading . . . is to have on the substance of the Rule, which does not refer to a violation of internationally protected rights').

²⁶⁵ See *Bassiouni & Manikas*, supra note 39, at 948 (noting that the rule was adopted on 30 January 1995).

²⁶⁶ 2nd Ann. Rep, supra note 263, at n. 9 (remarking also that the amendment was made on the basis of proposals received from the governments of Great Britain and the United States).

²⁶⁷ The element of paradox with regard to the new Rule is not limited to this observation. 'Commentators had noted that the previous version of the Rule gave rise to ambiguities'. *Jones*, supra note 264, at 427. Yet, the amended version suffers from the same criticism. *Dixon*, supra note 171, at 86 (referring to the Rule as vague).

²⁶⁸ *Bassiouni & Manikas*, supra note 39, at 952 n. 169. *Bassiouni* also observes that the Rule provides no guidance as to what methods of evidence gathering would result in damage to the integrity of the proceedings. *Id.* at 953 (noting that the prior version of the Rule was 'seemingly absolute: no evidence obtained through a "serious violation" of internationally protected human rights was admissible').

²⁶⁹ 2nd Annual Report, supra note 263, at paragraph 26.

²⁷⁰ 'In my conviction, this aim is not achieved'. *Safferling*, supra note 7, at 295 (noting that the new version 'only covers the internal side of the trial' and that 'evidence obtained by methods contrary to human rights do not seem to fall automatically within the ambit of this norm').

²⁷¹ *Zappalà*, supra note 15, at 80–81 (criticizing the similar, but not identical, exclusionary rule adopted for the ICC). See also *Safferling*, supra note 7, at 295 (expressing the same view regarding the amended version of Rule 95).

draft, did mandate the exclusion of evidence based solely on certain human rights violations. By comparison, the new version of the Rule became a ‘supplement’ to Rule 89’s general provisions: pursuant to the amended version of Rule 95, ‘[t]o be admitted or to avoid exclusion, evidence must have source reliability and maintain respect for the integrity of the proceedings before the Tribunal’.²⁷²

3. Summary

Thus, though certain advances can be observed *vis-à-vis* the evidentiary approach employed at Nuremberg, the Tribunal’s Rules of Evidence bear many similarities to the mode adopted by its predecessor. In spite of its adversarial construct, documents presented by the contesting parties need not be authenticated.²⁷³ Further, there is no prohibition on hearsay²⁷⁴ and evidence obtained by improper means is admissible, provided that it is reliable and its admission would not damage the integrity of the proceedings. While one can observe some steps taken by the Tribunal to incorporate contemporary international standards in its Rules, the ICTY, like its predecessors, employs ‘a free system of evidence, both with regard to admissibility and evaluation’²⁷⁵ and, thus, its evidentiary system is primarily continental in nature. Accordingly, it has been observed that the Tribunal’s liberal approach ‘has led to the admission of more or less any evidence’.²⁷⁶

VII. Continental and Common Law Interplay at the Tribunal: A Due Process Deficit?

After thus having given due attention to the Tribunal’s approach to its procedure and evidentiary matters, one can better understand *Dixon*’s caution against the wholesale assumption that the Tribunal employs a modified adversarial

²⁷² *Sellers*, supra note 236, at 290.

²⁷³ ICTY RPE, R.89(E), United Nations Document IT/32 (1994) (providing that ‘A Chamber may request verification or authentication of evidence obtained out of court). This is designed to expedite trial proceedings. *Cassese*, supra note 7, at 423. The problem with this rule, however, as the Nuremberg experience represents, is that documents presented may not always be reliable. *Zappalà*, supra note 15, at 20.

²⁷⁴ See generally ICTY RPE, United Nations Document IT/32 (1994); see also *Prosecutor v. Tadic*, Decision on the Defence Motion on Hearsay, Case No. IT-94-I-T (Aug. 5, 1996).

²⁷⁵ *Almíro Rodrigues and Cécile Tournaye*, Hearsay Evidence, in Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald 291, 296 (*Richard May et al.* eds., 2001)

²⁷⁶ *Zappalà*, supra note 15, at 133–134.

approach.²⁷⁷ Despite this, the Summary maintains that the Tribunal's approach is 'largely adversarial'. Accordingly, it is perhaps reasonable to ask whether any incentives existed with regard to such an assertion. In the domestic context, it has been noted that the adoption of a particular procedural approach may be related to the perceptions associated with the model in question. For example, it has been averred that the Italian imitation of the adversarial model was a 'matter of prestige'.²⁷⁸ In support of the same, it is argued that '[b]eing associated with Lockean liberal values, distrust of state, restraint of state power and freedom from the state's intrusion into private lives, adversary criminal procedure symbolizes the procedural model that would appear to best safeguard the individual against state abuses'.²⁷⁹

As we have seen, protection of the rights of the individual has taken on a role of significant importance in the post-World War II era.²⁸⁰ In line with the Italian opinion, it has been observed that the adversarial model has come to be considered the more appropriate one with regard to protecting the rights of the accused.²⁸¹ Accordingly, it is not beyond the realm of possibility that the Tribunal's assertion of a predominately adversarial approach might in part be affiliated with the perception associated with the model. Further, a predominately adversarial approach would appear to make the most sense in light of the fact that, pursuant to its Statute, the Tribunal employs an adversarial construct. However, one must take care not to assume that the presence of such a model represents, in and of itself, a guarantee that the rights of the accused will be protected.

Consequently, it is necessary to probe further and examine those attributes of the adversarial system that serve to specifically protect the rights of the accused. As our assessment of the adversarial system thus far reveals, a great many of the protections bestowed upon the individual find their enforcement at the trial stage of the proceedings. This may be attributed to the fact that common law investigations are essentially carried out without external supervision.²⁸² This, of course, does not mean that procedural safeguards are not implemented at this stage. Rather, these safeguards are enforced *post hoc*, for example, in the form of the admissibility rules that govern at trial.²⁸³ Further,

²⁷⁷ See supra note 171 and accompanying text.

²⁷⁸ *Grande*, supra note 181, at 230.

²⁷⁹ Id. at 231.

²⁸⁰ See supra at III(B).

²⁸¹ See supra at IV(A).

²⁸² See, e.g., *Safferling*, supra note 7, at 64.

²⁸³ This method of enforcement is, of course, not without its critics. It has been observed that the 'correction of possible inaccuracies through rules of evidence is unreliable'. Id. at 73 (attributing this unreliability to the fact that an innocent person should not be encumbered by

as has also been illustrated, the accused (and the prosecution) benefit from additional rules of evidence at trial that are designed to ensure that the contesting parties are kept in check and the proceeding remains fair.

Additional examples of procedural safeguards in the adversarial system, not previously discussed, can also be found in the trial stage of the proceedings. For example, ‘a central and defining feature of the adversarial system of criminal trial is the right of the accused to confront his or her accusers’.²⁸⁴ Inherent in this right is ‘the right to test their evidence through cross-examination – regarded by *Wigmore* as “the greatest legal engine ever invented for the discovery of truth”’.²⁸⁵ Further, at common law, the accused has the right not to testify.²⁸⁶ In keeping with the same, the accused is not required to put forth any evidence at the trial phase and is entitled to move for and receive an acquittal at the close of the prosecution’s case, should the latter not have met its burden of proof.²⁸⁷ The silence of the accused is further protected by the fact that, at common law, the sentencing hearing is distinct from the determination of the guilt or innocence of the accused.²⁸⁸

Thus, whether an adversarial construct and a procedural system that is ‘largely adversarial’ results in an over-all model that best protects the rights of the accused depends upon the procedural safeguards present in the system. Some important, common law-oriented, protective features can be found in the original ICTY model. For example, cross-examination is preserved in the Rules²⁸⁹ and the Rules, as originally adopted, implied that the sentencing hearing would be held separately from the adjudication of guilt.²⁹⁰ Structurally

the burden of a trial and that the truly guilty may reap the rewards of an improperly conducted investigation).

²⁸⁴ David Lusty, ‘Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials’, 24 Sydney Law Review 361, 361 (2002).

²⁸⁵ Id. at 362 (quoting John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 29, §1367 (3rd ed., 1940)).

²⁸⁶ See, e.g., James Mullineux, ‘Re-examining the Common Law Right of an Accused not to Testify’, 12 Criminal Law Forum 359, 359 (2002) (noting that the right to silence at all stages of the criminal justice process is ‘a fundamental principle of the accusatorial criminal justice system’ and also remarking on the widely recognized common law rule that the prosecution cannot comment on the silence of the accused).

²⁸⁷ See, e.g., Nsereko, *supra* note 151, at 537–38.

²⁸⁸ See, e.g., Andrew N. Keller, ‘Punishments for Violations of International Criminal Law: An Analysis of Sentencing of the ICTY and the ICTR’, 12 Indiana International and Comparative Law Review 53, 69 (2001).

²⁸⁹ ICTY RPE, R.85(B), United Nations Document IT/32 (1994).

²⁹⁰ ICTY RPE, R.100, United Nations Document IT/32 (1994) (providing that ‘[i]f a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defense may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence’).

speaking, however, one cannot overlook the absence of the protection afforded the accused by the presence of a passive trial judge, who does not act to advance the interests of either party, but instead acts to guard the accused against official abuses of power. Further, the adversarial system's willingness to place other values, including concern for individual rights, ahead of truth finding manifests itself, in one respect, by 'excluding reliable evidence illegally procured'.²⁹¹ The exceedingly limited 'exclusionary rule' at the ICTY hardly provides comparable protection to the accused. Further, the essential absence of rules governing admissibility of evidence generally results in a loss of protection for the accused. In light of the foregoing, it is certainly possible that the 'largely adversarial approach' of the Tribunal could itself give new life to the perception that the adversarial system provides 'only a veneer of fairness'.

The argument advanced is not, however, that the Tribunal suffers from an adversarial deficit; rather, it is that there exists a danger of a due-process deficit. Accordingly, from the standpoint of the accused, it is equally important to recognize what was lost due to the fact that the Tribunal did not adopt a continental construct. Contrary to the trend observed at common law, procedural protections in the continental system are arguably at their strongest prior to the trial phase. The safeguards inherent in the system stem largely from the element of neutrality associated with its pre-trial investigation, a factor that is absent in the workings of the ICTY. As such, no organ '[bears] responsibility during the process for the well-being of the defendant'.²⁹² This fact has significance for the accused not only because pre-trial investigation at the ICTY does not include the requirement that exculpatory evidence be sought, but also due to the fact that 'the prosecutor's work goes largely unchecked by the judges'.²⁹³ Further, though the Rules provide standards for the questioning of suspects,²⁹⁴ contrary to what would be found in the continental system, there is no specific opportunity for an individual to challenge evidence during the investigative phase. Moreover, under the Rules, it is possible that an accused may never even be aware that he is the subject of an investigation until such

²⁹¹ Regarding evidentiary barriers to conviction that 'limit the search for truth' at common law, *Damaška* also cites testimonial privileges and many facets of appellate procedure. *Damaška*, Evidentiary Barriers, *supra* note 8, at 579.

²⁹² *Safferling*, *supra* note 7, at 75.

²⁹³ *Johnson*, *supra* note 39, at 176. See also *Stuart Beresford*, 'Non-Compliance with the Rules of Procedure and Evidence', in *Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald* 403, 403 (*Richard May et al.* eds., 2001)(noting that 'the investigation and pre-trial stages of the proceedings receive only modest supervision').

²⁹⁴ ICTY RPE, R.42, 43, United Nations Document IT/32 (1994) (delineating the rights of suspects during investigation in the first instance and requiring that suspect questioning be recorded, that a transcript be made and that the original be sealed in the presence of the suspect in the second).

time as he is served with an indictment.²⁹⁵ Therefore, apart from possibly being questioned by the Prosecutor, an accused is essentially precluded from having any opportunity to be heard prior to the point when the decision is made that he must stand trial.²⁹⁶ Additionally, with the exception of the aforementioned Rules related to questioning, there are no standards governing the gathering,²⁹⁷ preservation or authentication of evidence on behalf of the prosecution. Finally, a trial proceeding at the ICTY does not embody the element of neutrality that can be found in ‘official inquiries’ where witnesses and evidence are disassociated from the parties.

Without the need to advocate for either system, what is noteworthy about the employment of the features of each at the Tribunal is the manner in which they have been united. Rather than an admittedly inefficient union that includes the procedural safeguards found in both systems, the amalgamation employed by the Tribunal disregards many of the protections found in each.²⁹⁸ As a result, those accused before the Tribunal have virtually none of the pre-trial protections afforded by the continental system and are then denied many of the protections common to the adversarial system at trial, including the presence of a passive judge. Not unlike the Nuremberg experience, the merger of the two systems fails to create a situation wherein the procedure itself provides the nec-

²⁹⁵ See id. at R.53. Even in the absence of exceptional circumstances that merit such non-disclosure, ‘[t]he submission that the prosecution must interview or offer to interview every proposed accused person before seeking a confirmation of an indictment has no merit’. *Prosecutor v. Janko Bobetko*, Decision on Challenge by Croatia to Decisions and Orders of Confirming Judge, at paragraph 13, Case IT-02-62-AR54bis & IT-02-62-AR108bis (Nov. 29, 2002).

²⁹⁶ The case law of the Tribunal solidifies this inference from the Rules by declaring that challenges made to a confirmed indictment are reserved for determination at trial. *Prosecutor v. Delalic, Delic & Landzo*, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), Case No. IT-96-21-A, at IV(e) (Dec. 6, 1996). The Appeals Chamber also declined to consider Delic’s assertion that ex parte review of the Indictment pursuant to Rule 47 offends the principle of *audi alteram partem*. Id. See also *Judge Lal Chand Vohra*, ‘Pre-Trial Practices and Procedures’, in 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts 477, 535 (*Gabrielle Kirk McDonald & Olivia Swaak-Goldman*, eds., 2000) (observing that ‘[t]here is no possibility of appeal against the confirmation of an indictment by a single judge pursuant to Rule 47’).

²⁹⁷ See, e.g., *Nsereko*, supra note 151, at 527 (noting that the Rules fail to provide any guidelines for the interrogator with regard to the manner in which suspects should be questioned); *Johnson*, supra note 39, at 174 (observing that the Rules provide the Prosecutor with no guidance regarding the seizure of evidence).

²⁹⁸ ‘The cobbling together of the common and civil law traditions erodes the rights of the defendant. Both of these systems offer protection to the accused through different means’. *Johnson*, supra note 39, at 119–120.

essary safeguards;²⁹⁹ as a result, the assurance of fairness in the proceedings is entirely dependent upon the discretion of the judiciary.

Consequently, the admonition given by *Judge Wald* seems fitting: '[t]he emerging body of trial practices must be regularly scrutinized to assure fundamental fairness'.³⁰⁰ While such a caution could also have been applied to the proceedings at Nuremberg and Tokyo, the warning is arguably of even greater importance with regard to the Tribunal. At the ICTY, the judiciary not only assumed responsibility for safeguarding the rights of the accused in its drafting of its Rules, it has an on-going duty to ensure the same both in the operation of its proceedings and in relation to its continuing 'quasi-legislative' power. The latter derives from the fact that the Rules of Procedure and Evidence, formulated in February of 1994, do not constitute a fixed set of directives: within the Rules, the judges designed a mechanism for subsequent amendments in the form of Rule 6.³⁰¹

Therefore, in addition to monitoring and ensuring fairness at trial, the judges of the ICTY bear a similar burden with regard to their ability to alter the procedures employed by the Tribunal. Accordingly, it is incumbent upon the judiciary in exercising its powers to ensure that the rights of the accused under the mixed system are sufficient. It has been asserted that, in joining the civil and common law systems, the Rules originally adopted by the Tribunal resulted in a 'delicate balance'³⁰² between the two with regard to the fair trial rights of the accused. However, it is submitted that, even if the validity of this assertion is accepted, the fragility of the same left the accused, at best, on the brink of a due process deficit.

As a matter of course, then, in making amendments to the Rules, it is imperative that due regard be given to the potential for further depreciation of the rights of the accused. In order to assess the Tribunal's compliance with the same, it is worthwhile to review the judicial power to amend the Rules. In addition, it is instructive to regard the Tribunal's use of its power to amend in light of its experiences and with due attention given to those forces that have the potential to affect the Tribunal's activities.

²⁹⁹ See *id.* at 120 (concluding that the 'ICTY's hybrid common-civil law system . . . in the end, is less favorable to the defendant than when either system functions on its own').

³⁰⁰ *Patricia M. Wald*, 'To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in the Yugoslavia War Crimes Tribunal Proceedings', 42 Harvard International Law Journal 535, 537 (2001)[hereinafter, *Wald*, *Incredible Events*] (observing that the Tribunal operates 'largely in isolation, not as part of a national system of courts or governmental bodies capable of oversight').

³⁰¹ ICTY RPE, R.6, United Nations Document IT/32 (1994).

³⁰² *Daryl A. Mundis*, 'Improving the Operation and Function of the International Criminal Tribunals', 94 American Journal of International Law 759, 766 (2000).

VIII. The Tribunal's Ability to Amend its Rules

As has been noted, Rule 6 confers upon the Tribunal an ongoing ability to amend its Rules. Since the inception of the ICTY, its judiciary has frequently availed of this rule's authority. Accordingly, the judges have adopted a variety of techniques throughout the years in order to facilitate its use. Reporting to the General Assembly in 1998 on amendments to the Rules of Procedure and Evidence, then-President McDonald noted that the Rules Committee had been created and given the task of '[investigating] the objective of conducting trials more expeditiously without jeopardising respect for the rights of accused persons'.³⁰³

This assertion to the General Assembly not only confirms that the possibility for tension between amendments to the rules and due process rights exists, it also expressly recognizes that the Tribunal's noted objective for amendments (expediency) may jeopardize those rights. The introduction of the concept of expediency as an objective of the Tribunal also highlights the fact that the Tribunal's authority to amend its rules cannot be contemplated in a vacuum. Accordingly, one must consider that the 'objectives' of the Tribunal play a relevant role in the amendment process, bearing in mind both the substance of the same and the sources that advocate for them.

IX. Threats to the Independence of the Tribunal

With regard to the latter, it ought to be acknowledged that numerous entities have the potential to wield influence over the Tribunal's activities. Relevant aspects in this regard include the fact that each judge at the ICTY has been elected, and may be re-elected, by the General Assembly.³⁰⁴ The Tribunal is further at the mercy of that UN organ with respect to funding³⁰⁵ and it is wholly dependent upon the support of the Security Council and States.³⁰⁶ For an

³⁰³ Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, United Nations General Assembly Official Record, 53rd Session, Item 48 of the Agenda, at paragraph 106, United Nations Document A/53/219-S/1998/737 (1998) [hereinafter, 5th Annual Report].

³⁰⁴ The judges are elected from a list of candidates submitted by the Security Council. Statute, *supra* note 1, at Art. 13(2), 13(4). The possibility for re-election 'could mitigate against the principle of judicial independence'. *Bassiouni & Manikas*, *supra* note 39, at 806.

³⁰⁵ Statute, *supra* note 1, at art. 32.

³⁰⁶ *Henry J. Steiner and Philip Alston*, *International Human Rights in Context: Law, Politics and Morals* 1156 (2000). Accordingly, *Steiner* and *Alston* further note that the Tribunal 'remains

example of the extent to which a lack of State assistance may affect the activity of the Tribunal, one need only look at the experiences of the ICTY's sister tribunal, the International Criminal Tribunal for Rwanda³⁰⁷ (ICTR). Not only did the non-cooperation of the Rwandan government with the ICTR cause the Appeals Chamber shared by the two tribunals to overturn its ruling in the *Barayagwiza* case,³⁰⁸ Rwandan political pressure also arguably resulted in the removal of Carla DelPonte from her post as Chief Prosecutor of the ICTR.³⁰⁹ Given the nation's proven ability to affect a judgment rendered by the Tribunal as well as to effectuate a personnel change at its upper-most level, it would be counterintuitive to assume that the amendment powers of the Tribunal are not likewise subject to manipulation.³¹⁰

X. The Pressure to Expedite Proceedings at the ICTY

A. External Influences

The fact that the Tribunal may be pressured to modify its procedure in response to outside forces becomes particularly relevant with regard to the amount of time it has taken for the Tribunal to comply with its responsibilities. Trial proceedings at the ICTY are notorious for their protracted nature and the Tribunal has unquestionably received its share of criticism for failing to move its docket expeditiously.³¹¹ As a result, the ICTY has been under pressure from numerous sources to rectify this problem. Many parties appear to have a vested interest in a speedier fulfilment of the Tribunal's mandate, including the General

dependent upon an uncertain and changing political context' and that it 'lacks the relative autonomy of a court in a state with a strong tradition of an independent judiciary'. *Id.* at 1155.

³⁰⁷ Established under the Statute of the International Criminal Tribunal for Rwanda, 33 International Legal Materials 1602, adopted by Security Council Resolution 955, United Nations Security Council Official Record, 49th Session, 3453rd meeting at 3, United Nations Document S/RES/955 (1994).

³⁰⁸ See Decision on Prosecutor's Request for Review or Reconsideration, *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, 39 International Legal Materials. 1181, 31 Mar. 2000; see also *William A. Schabas*, 'International Decision, Barayagwiza v. Prosecutor', 94 American Journal of International Law 563 (2000); *Jacob Katz Cogan*, 'International Criminal Courts and Fair Trials: Difficulties and Prospects', 27 Yale Journal of International Law 111, 135 (2002).

³⁰⁹ On this issue, see *Megan A. Fairlie*, Due Process Erosion: The Diminution of Live Testimony at the ICTY, 34 California Western International Law Journal 47, 58–59 (2003).

³¹⁰ See, e.g., *Swart*, *supra* note 205, at 573 (remarking on the existence of amendments made as a result of 'mere convenience or political pressure').

³¹¹ See, e.g., *Wald*, Incredible Events, *supra* note 300, at 536.

Assembly³¹² and ‘the international community’.³¹³ The position of the latter may be of particular significance with regard to procedural issues. It was duly noted that the Tribunal’s first trial ‘was not a model of fairness’.³¹⁴ However, public interest has essentially focused on the crimes and jurisdiction of the Tribunal, rather than its rules of procedure and evidence and, in contradiction with its ability to serve as a tool to ensure fair trial compliance at the Tribunal, the media has in fact played a role in undermining the presumption of innocence and, in contradiction with its ability to serve as a tool to ensure fair trial compliance at the Tribunal, the media has in fact played a role in undermining the presumption of innocence.³¹⁵ In addition, once ‘defendant-friendly’ voices in the international community, such as human rights organizations, have

³¹² In 1999, the General Assembly adopted a resolution on the financing of both the ICTY and ICTR, requesting that the Secretary-General evaluate the efficiency of the operation and function of the two tribunals. Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, United Nations General Assembly Official Record, 55th Session, Item 52 of the Provisional Agenda, at paragraph 320, United Nations Document A/55/273-S/2000/777 (2000) [hereinafter 7th Annual Report]. The expert group assigned the responsibility of evaluating the Tribunals was required to explain why, after six years and budgets totalling over USD 400 million, only 15 ICTY and ICTR trials had been completed. See *Hafida Lahiouel*, ‘The Right of the Accused to an Expeditious Trial’, in Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald 197, 197 (*Richard May et al.* eds., 2001) (citing the Report of the Expert Group to Conduct a Review of the Effective and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, United Nations General Assembly Official Record, 55th Session, at paragraph 35, United Nations Document A/54/634 (1999)) [hereinafter Report of the Expert Group].

³¹³ In the aftermath of the Report of the Expert Group, the Tribunal noted that ‘flexible solutions’ were required in order for the judiciary to work with their increased caseloads, and ‘with the expectations of the accused, the victims and the international community’. 7th Annual Report, *supra* note 312, at paragraph 330. The relevance of the perspective of the international community upon the Tribunal can be further gleaned by referring to an observation made by Judge May in the course of trial proceedings: ‘It is a matter of concern to the international community that these trials have been taking up six months and more each’. *Prosecutor v. Sikirica and Others*, Case No. IT-95-8-T, Trial Transcript 2441 (Apr. 24, 2001).

³¹⁴ *Sara Stapleton*, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’, 31 New York University Journal of International Law and Politics 535, 543 (1999)

³¹⁵ *Joseph L. Falvey, Jr.*, ‘United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia’, 19 Fordham International Law Journal 475, 476–477 (1995). Similarly, it has been noted that ‘[p]rocedural rulings at the international level receive much less attention than substantive ones’. *Natasha A. Affolder*, ‘Tadić, the Anonymous Witness and the Sources of International Procedural Law’, 19 Michigan Journal of International Law 445, 448 (1998). *Zappalà*, *supra* note 15, at 86 (noting that by referring to as yet unconvicted individuals as ‘war criminals’ and christening them with such titles as the ‘Butcher of Omarska’, the media fails to ‘contribute to fostering a balanced perception of criminal justice by the public’).

developed interests far afield from that of fair trial rights, having made the ‘remarkable transformation’ ‘from persuasion to prosecution’.³¹⁶ It thus becomes necessary to regard the influence of the international community over the practice of the Tribunal with caution; in light of the group’s desire for more expeditious proceedings, one cannot overlook the risk that it may turn a blind eye towards the sanctity of a fair trial.

B. The Right of the Accused to an Expeditious Trial and to be Tried Without Undue Delay

Of course, efforts to expedite the proceedings at the Tribunal also have the potential to enhance the status of the accused. One would be remiss not to acknowledge the correlation between the right of an accused to a speedy trial³¹⁷ and amendments aimed at addressing the extended nature of the Tribunal’s proceedings. Moreover, the Tribunal is statutorily required to provide the accused with a timely prosecution.³¹⁸ Benefits to the accused in this regard are numerous and varied³¹⁹ and are perhaps most obvious in instances wherein an accused is detained prior to trial, as was originally standard at the Tribunal.³²⁰ However, it bears mentioning that the right to a speedy trial is as much a benefit for the relevant tribunal as it is for the individual accused. Timely judgments are more likely to bolster the public’s faith in its legal system whilst delayed proceedings would cause the same to appear ineffective and unreliable.³²¹

³¹⁶ Robert M. Hayden, ‘Biased “Justice.” Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia’, 47 Cleveland State Law Review 549, 550 (1999). See also, Schabas, *supra* note 110, at 501 (marking on a similar trend with regard to sentencing: ‘Activists whose social vision is normally pervaded by tolerance and forgiveness become, in the name of retribution, militant advocates of severe punishment’).

³¹⁷ See, e.g., ICCPR, *supra* note 203, at Art. 14 (3)(c); European Convention, *supra* note 203, at Art. 6(1); ACHR, *supra* note 203, at Art. 8(1); African Charter, *supra* note 203, at Art. 7(1).

³¹⁸ Statute, *supra* note 1, at Art. 20(1).

³¹⁹ See, e.g., *Lahliouel*, *supra* note 312, at 198 (noting that a timely proceeding enhances the ability of an accused to put forth an effective defense and limits the amount of time in which he remains uncertain as to his fate).

³²⁰ ICTY RPE, R.65(B), United Nations Document IT/32 (1994) (declaring that release may be ordered only in exceptional circumstances). This provision is contrary to the principle espoused in the ICCPR which provides that, ‘It shall not be the general rule that persons awaiting trial shall be detained in custody . . .’ ICCPR, *supra* note 203, at Art. 9(3). The provision of pre-trial release is considered ‘an accoutrement of the presumption of innocence’. Patricia Wald and Jenny Martinez, ‘Provisional Release and the ICTY: A Work in Progress’, in Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald 231, 231 (*Richard May et al.* eds., 2001). Though the Tribunal has since modified this preference, the effect of the amendment is still uncertain. *Wald & Martinez*, *supra*, at 233–234 (noting the removal of the requirement of ‘exceptional circumstances’ in response to the 1999 Report of the Expert Group).

³²¹ *Lahliouel*, *supra* note 312, at 198 (noting the importance of this interest in light of the fact

C. Addressing the Causes of the Delay

In light of the foregoing, it is perhaps not surprising that ‘the expeditious conclusion of trials . . . has become an obsession of the ICTY’.³²² In order to appreciate the efforts made on behalf of the Tribunal to render its functioning more efficient, it is worthwhile to recognize some of the causes that have contributed to the delay in its proceedings. Impediments of all kinds have been noted, from ‘politically inspired delays in the arrest of indicted war criminals’,³²³ to difficulties associated with language issues³²⁴ and the time consuming proof of certain ‘predicate conditions’ such as the element of a widespread or systematic practice in a charge of crimes against humanity.³²⁵ In addition, though with some change in this regard of late, very few matters have been resolved by guilty pleas, as would be commonplace in a common law jurisdiction.³²⁶ It is also noteworthy that, though the function of trial proceed-

that part of the ‘Tribunal’s mandate includes bringing peace in the territory of the former Yugoslavia). It has also been asserted that a delay in justice is grossly unfair to victims. *Richard J. Goldstone*, ‘The Role of the United Nations in the Prosecution of International War Criminals’, 5 Washington University Journal of Law and Policy 119, 123–24 (2001).

³²² *Boas*, The Principle of Flexibility, supra note 148, at 45.

³²³ *Goldstone*, supra note 321, at 123 (noting that such delays have the potential to seriously undermine the credibility of the ICTY and ICTR). The difficulty in securing custody of those indicted is also the result of the limited number of voluntary surrenders, a fact that purportedly may be attributed to the tendency for pre-trial detention at the ICTY to be protracted. See *Arbour*, supra note 168, at 41.

³²⁴ *Cassese*, supra note 7, at 443. The ICTY has two working languages, English and French. Statute, supra note 1, at Art. 33. The Conference and Language Services Section at the ICTY provides simultaneous interpretation not only from and into English and French, but also from and into Bosnian/Croatian/Serbian. In addition, simultaneous interpretation of other languages is provided as required. Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 United Nations General Assembly Official Record, 51st Session, Item 50 of the Provisional Agenda, at paragraph 134, United Nations Document A/51/292-S/1996/665 (1996) [hereinafter 3rd Annual Report].

³²⁵ *Wald*, Incredible Events supra note 300, at 536. ‘Much of the problem lies in the nature of the beast. The scope of most war crimes tends to cover wide swaths of territory and implicate hundreds, sometimes thousands of actors’. *Id.* at 554. ‘How can trials of such potentially endless complexity be reduced to manageable proportions for a criminal court? No issue taxes the Tribunal as this one does’. *Mundis*, supra note 302, at 773 (2000) (quoting Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Annex I, at paragraph 40, United Nations Document A/54/850).

³²⁶ See *Cassese*, supra note 7, at 398 (observing that very few defendants have pled guilty before the ICTY). See also *Wald*, Incredible Events, supra note 300, at 549 (noting that, although controversial, a prosecutorial policy of encouraging guilty pleas by dropping some charges and recommending lesser sentences ‘could help clean up the backlog of less heinous cases’).

ings is primarily that of the adjudication of guilt, compliance with the mandate of the Tribunal requires the non-expedient development of a factually accurate historical record of the conflict.³²⁷

It is the opinion of many, however, that the length of international criminal proceedings at the Tribunal can be attributed to the adoption of the adversarial system for the ICTY.³²⁸ As a result, it is perhaps not surprising that, in its effort to expedite its proceedings, the Tribunal has replaced several of its adversarial characteristics with features normally employed in the continental system. Among these alterations, one can find the decision to eliminate the Tribunal's preference for live testimony,³²⁹ a change which addresses the fact that live testimony, 'the most time consuming aspect of any criminal trial', had proven to be 'particularly so in the ICTY jurisdiction'.³³⁰ In addition, though separate sentencing hearings were initially held at the Tribunal, in true adversarial style, and separate sentencing decisions were issued,³³¹ in 1998 the Rules were amended to clearly provide that guilt and sentencing be determined in a unitary as opposed to a bifurcated fashion.³³² Such changes, however, have not been made in the absence of criticism.³³³

³²⁷ President Gabrielle Kirk McDonald, 'Trial Procedures and Practices', in 1 Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts 547, 621 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., 2000). See also *Minna Schrag*, 'The Yugoslav War Crimes Tribunal: An Interim Assessment', 7 Transnational Law and Contemporary Problems 15, 19(1997) (noting the importance of the Tribunal's role in creating an accurate record in order to prevent denials of the atrocities in the future).

³²⁸ See, e.g., *Cassese*, supra note 7, at 442 (noting that the same requires that evidence be scrutinized orally through examination and cross-examination while conversely, the investigating judge selects the evidence prior to trial in the inquisitorial system).

³²⁹ See, e.g., ICTY RPE, R. 90(A), United Nations Document IT/32 (1994) (establishing a preference for live testimony). New sub-rule 89(F), establishes a 'no preference alternative'. The new rule provides: 'A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form'. ICTY RPE, R.89(F), United Nations Document IT/32/Rev.28 (2003).

³³⁰ *Gideon Boas*, 'Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court', 12 Criminal Law Forum. 167, 178 (2001).

³³¹ See, e.g., *Keller*, supra note 288, at 66.

³³² See, e.g., ICTY RPE, R. 87(C), United Nations Document IT/32/Rev.13 (1998) (providing that, if the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt). '[T]his change was probably an effort to save time and money by having only one proceeding instead of two'. *Keller*, supra note 288, at 68.

³³³ See generally on the issue of written evidence, *Fairlie*, supra note 309; on the issue of unitary sentencing, *Keller*, supra note 288.

As a matter of course, then, it seems fair to ask whether it is the adversarial system itself that is non-expeditious, or rather, whether the procedural protections and safeguards inherent in a system of justice are in fact the forces that serve to delay the criminal process. If it is the latter, it will be difficult to import a continental feature that will, in fact, expedite the Tribunal's proceedings if that same feature is accompanied by the elements in the continental system that function to protect the rights of the accused. The result, then, is a 'catch 22': import the feature with the protection and run the risk of not making the proceedings more efficient or, worse still, even less so, or import the feature on its own and disregard the consequent effects on the fair trial rights of the accused. It is submitted that the Tribunal has imprudently adopted the latter approach. In this vein, it is helpful to review the actions taken by the Tribunal regarding its pre-trial practices.

XI. Pre-Trial Practices at the Tribunal

As discussed earlier, the *tabula rasa* aspect of guilt adjudication at the Tribunal is the only, and therefore indispensable, link between the Tribunal's choice of a 'largely adversarial approach' and judicial impartiality. This connection was established under the original version of the Rules by a provision in Rule 15. Subsection (C) of the original Rule provided that a judge who confirms the indictments against an accused is automatically disqualified from adjudicating the guilt of the same accused in the Trial Chamber.³³⁴ Throughout the confirmation proceedings, the relevant Judge is exposed not only to a copy of the indictment, but also to the supporting material submitted with the same; further additional such material may be presented by the Prosecutor at the hearing.³³⁵ Accordingly, Sub-rule 15(C) is supported by *Morris and Scharf* who note that, as a result of having participated in the confirmation hearing, the

³³⁴ ICTY RPE, R. 15(C), United Nations Document IT/32 (1994).

³³⁵ ICTY RPE, R. 47(C), (D), United Nations Document IT/32 (1994). Former Chief Prosecutor *Richard Goldstone* provides some insight into the proceedings. 'After the chief prosecutor signs the indictment . . . [t]he judge usually calls in the chief prosecutor and requests further information; not infrequently the merits of the indictments or aspects of it are debated. [The] review process might take days or even weeks'. *Richard J. Goldstone*, *For Humanity: Reflections of a War Crimes Investigator* 108 (2000). With regard to delay in decision-making, see ICTY RPE, R. 47(D) (providing that the confirming judge may adjourn the review). See also *Bartram S. Brown*, 'Nationality and Internationality in International Humanitarian Law', 34 *Stanford Journal of International Law* 347, 370 n. 106 (1998) (remarking that after an informal review, the confirming judge may question the prosecutor and that '[t]he indictment, as ultimately confirmed, may be transformed by this process of dialogue between the judge and the prosecutor').

confirming judge may have been privy to information that would be inadmissible at trial.³³⁶ Elaborating on the protection afforded by the Rule, an ICTR judge observed that the Rule provides a ‘procedural safeguard for the accused that attempts to ensure that the three Judges hearing the case will not have seen, reviewed, or in anyway appear to be biased from the supporting material’.³³⁷

Thus, the mechanism provided by Rule 15 guaranteed that the relevant Trial Chamber would approach each case as a blank slate: ‘[i]n the initial form of the RPE, the judicial organ intervened in the pre-trial phase only as a “confirming judge”’.³³⁸ However, no provision was made within the Rules to require that judicial pre-trial activity be limited to the confirmation hearing. As such, subsequent modifications to the Tribunal’s *tabula rasa* approach, either through its practice or in the form of amendments to the Rules, were not specifically precluded. Consequently, it would not take long for the Tribunal, under pressure to expedite its proceedings, to sever the connection between pre-trial access to case information and the Tribunal’s avowed commitment to ‘adversarial-style’ judicial impartiality.

A. Rules 65 bis, 65 ter, 73 bis and 73 ter

In *Tadic*, the Tribunal’s first case, the Trial Chamber made the unilateral decision to expand its pre-trial role beyond that of indictment confirmation by making use of a series of ‘closed session status conferences’ in order to determine readiness for trial.³³⁹ Following suit, the Trial Chamber in the *Aleksovski* case also employed a status conference³⁴⁰ and the tool was subsequently codified

³³⁶ 1 *Morris & Scharf*, supra note 6, at 155 (observing also that, as a result of having confirmed the indictment, the judge may have formed an opinion about the charges and that a judge may simply appear to be impartial: having confirmed the indictment, he may seem to have a vested interest in conviction). The effect that evidence subsequently deemed inadmissible may have on a judge cannot be easily discounted. ‘Expunging such information from the mind’ may require judges to ‘disregard their actual credal states. A fragmented mental process is postulated in which zero weight is assigned to a specified item of information’. *Damaska, Of Hearsay*, supra note 62, at 428 n. 4.

³³⁷ Separate Opinion of Judge Dolenc, supra note 40, at paragraph 25.

³³⁸ *Zappalà*, supra note 15, at 23.

³³⁹ Third Annual Report, supra note 324, at paragraph 43 (noting that both parties were present at the conferences).

³⁴⁰ Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, United Nations General Assembly Official Record, 52nd Session, Item 49 of the Agenda, at paragraph 46, United Nations Document A/52/375-S/1997/729 (1997) (noting that the conference was held just over one month after the initial appearance of the accused).

in the summer of 1997 in the form of Rule 65 bis.³⁴¹ As originally adopted, the Rule provided that status conferences were not mandatory, but that they may be convened by a Trial Chamber or a Trial Chamber Judge, and that their purpose was to ‘organize exchanges between the parties so as to ensure expeditious preparation for trial’.³⁴² Some four months later, the Trial Chamber in the *Dokmanovic* case used the Rule, along with Rule 54, the ‘General Rule’³⁴³ to require the defense to make formal admissions and stipulations ‘for the purposes of expediting the trial and defining the issues therein’.³⁴⁴

Thus, though Rule 65 bis did not specifically provide for a Trial Chamber to have pre-trial access to case information, the door to the same was opened by this practice. While this is no doubt disconcerting with regard to the *tabula rasa* judicial approach in adversarial proceedings, which is meant to ensure that an adjudication of guilt derives solely from evidence adduced at trial, this practice was only the tip of the iceberg. Also in the *Dokmanovic* case, ‘[t]o the same end of ensuring a speedy trial’, the Trial Chamber orally ordered that witness statements be presented to the Trial Chamber before trial, ‘not as evidence, but rather to enable the Chamber to familiarise itself with the case’.³⁴⁵ ‘This is exactly how civil-law judges prepare for trial’.³⁴⁶

Of course, these actions taken by the Trial Chamber in the *Dokmanovic* case can arguably be attributed to the absence of any rules governing this type of pre-trial activity, save the relatively amorphous Rule 65 bis. Accordingly, shortly after the case, the Tribunal responded with the addition of three new rules. However, rather than affirmatively prevent such activity on the part of a Trial Chamber, the substance of the new rules essentially sanctioned (though rejected in part) the *Dokmanovic* approach. The newly adopted Rules mandated that a ‘Pre-Trial Conference’ be held (Rule 73 bis),³⁴⁷ as well as provided for the possibility of a ‘Pre-Defence Conference’ (Rule 73 ter).³⁴⁸

³⁴¹ ICTY RPE, R.65 bis, United Nations Document IT/32/Rev.11 (1997).

³⁴² Id.

³⁴³ Id. at R.54 (providing that ‘[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas and warrants as necessary for the purposes of an investigation or for the preparation or conduct of the trial’).

³⁴⁴ *Boas*, The Principle of Flexibility, supra note 148, at 45.

³⁴⁵ Id. at 45–46 (noting also that the Trial Chamber required both parties to file pre-trial briefs and opening statements and that the defense was further required to indicate any intent to avail of an alibi defense as well as provide admissions and denials with regard to the indictments in the case, with explanations given as to the latter).

³⁴⁶ *Orie*, supra note 50, at 1470.

³⁴⁷ ICTY RPE, R.73 bis, United Nations Document IT/32/Rev.13 (1998) (providing in part that, ‘[p]rior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference’).

³⁴⁸ ‘Prior to the commencement by the defence of its case the Trial Chamber may hold a conference’. Id. at R.73 ter (A).

With regard to the former, it has been rightly observed that its title is to an extent a misnomer, as it essentially governs the management of the Prosecution's case during the trial.³⁴⁹ In its original form, the Rule provided that a Trial Chamber may order that the Prosecution file, among other things, a pre-trial brief, admissions and stipulations, and a statement of contested matters of fact and law.³⁵⁰ In addition, the prosecution may be required to provide a list of witnesses, with summaries of their anticipated testimony, and an indication as to which points in the indictment their testimony will address.³⁵¹ The Rule also provided that the Trial Chamber may call upon the Prosecution to shorten the estimated length of its examination of some of its witnesses, as well as reduce the number of witnesses it plans to call.³⁵² Finally, Rule 73 *bis* was not entirely 'prosecution-centric': it also provided that the defense may be called upon at the Pre-Trial Conference to file, before trial, a statement of admitted facts and law as well as a pre-trial brief addressing the outstanding factual and legal issues.³⁵³

With the exception that a pre-Defence Conference is permissive rather than mandatory and that it does not come into play until after the close of the Prosecution's case, Rule 73 *ter* essentially reflects the provisions of 73 *bis*, placing the aforementioned prosecutorial requirements on the defense. In addition to these two new Rules, the Tribunal also created, through Rule 65 *ter*, the position of Pre-Trial Judge. Acting as a delegate of the Trial Chamber, the Pre-Trial Judge, who is also a member of the three judge trial panel,³⁵⁴ may be entrusted with all or part of the functions associated with the Pre-Trial and Pre-Defence Conferences.³⁵⁵ As part of these duties, the Pre-Trial Judge is required to 'record points of agreement and disagreement on matters of law and fact' and

³⁴⁹ Boas, *The Principle of Flexibility*, supra note 148, at 61.

³⁵⁰ ICTY RPE, R.73 *bis* (B)(i),(ii),(iii), United Nations Document IT/32/Rev.13 (1998).

³⁵¹ Id. at R.73 *bis* (iv)(b),(c).

³⁵² Id. at R.73 *bis* (C),(D). However, provision is made for a motion on behalf of the prosecution to reinstate witnesses. Id. at R.73 *bis* (E).

³⁵³ Id. at R.73 *bis* (F).

³⁵⁴ Id. at R.65 *ter* (A). According to *Judge Vohrah*, thought was given to delegating this position to a judge who would not be responsible for the adjudication of the case, similar to the Tribunal's approach to the confirming judge, and due to analogous concerns regarding contamination. However, 'these concerns were outweighed by the benefits which would be derived if the pre-trial judge was a member of the trial chamber hearing the case'. The rationale given for the same was that, under such circumstances, the Trial Chamber effectively has control of a case from the very beginning and 'judges by their training are capable of casting aside from their minds previously disclosed incriminatory statements from witnesses and of deciding the case only on evidence produced before the trial chamber'. *Vohrah*, supra note 296, at 544.

³⁵⁵ ICTY RPE, R.65 *ter* (D) United Nations Document IT/32/Rev.13 (1998) (providing also that the Pre-Trial Judge may be responsible for determining motions made pursuant to R.73).

'in this connection, he or she may order the parties to file written submissions with the Trial Chamber'.³⁵⁶ Though provided with numerous responsibilities, the Pre-Trial Judge is distinguishable from the investigating judge or magistrate found in civil law systems, in that the Pre-Trial Judge has no power to gather evidence.³⁵⁷

Many of the new pre-trial filings made possible pursuant to Rules 73 *bis* and 73 *ter* endorse the *Dokmanovic* Trial Chamber's approach. Parallels can be found in the filing of pre-trial briefs, admissions and stipulations (delineated in the Rules as 'other matters which are not in dispute'). However, the Rules arguably also represent a scaling back of the *Dokmanovic* Court's actions: a summary of the facts on which each witness will testify is called for, as opposed to the actual witness statements. Thus, only the parties themselves know the exact content of their evidentiary materials when operating under such an approach.³⁵⁸ Of course, whether these Rules and their later versions, which employ similarly 'restrictive' language, actually precluded pre-trial access to witness statements on the part of the Trial Chamber is another question.³⁵⁹

From the standpoint of the accused, it could be argued that Trial Chamber access to witness statements is less favorable than access to summaries of the same, or vice versa. Such academic arguments are arguably irrelevant for the purpose of this discussion. Either practice undermines the Trial Chamber's ability to approach the adjudication of guilt from a 'clean slate' point of view. In fairness, the Rules represent an attempt on behalf of the judiciary to exercise control over the pre-trial process in order to address the fact that 'early Tribunal trials were labeled excessively lengthy and inefficient'.³⁶⁰ However, the mechanisms employed by it to combat the problems, either in the form of pre-trial access to summaries of witness statements or the actual witness statements, are wholly at odds with the concept of adversarial judicial impartiality.³⁶¹

³⁵⁶ Id. at R.65 *ter* (E).

³⁵⁷ See, e.g., *Vohrah*, supra note 296, at 543–44.

³⁵⁸ See, e.g., *Orie*, supra note 50, at 1470.

³⁵⁹ 'In the ICTY practice, copies of statements instead of summaries of the facts on which the witnesses would testify were sometimes ordered to be filed . . . and were indeed filed'. Id. at 1465 n. 108.

³⁶⁰ *Combs*, supra note 78, at 73 (noting that the Rules have been amended in order to provide greater judicial control over the pre-trial and trial phases).

³⁶¹ See, e.g., *Damaška*, The Uncertain Fate, supra note 31, at 850–851 (noting that judicial access to an information-rich dossier, 'would seriously strain the traditional common law understanding of judicial impartiality'). The deleterious effect of the changes upon the accused was in no way addressed by the Tribunal. The Annual Report which followed the creation of the pre-trial rules noted only that the amendments were made 'to enhance Chambers' ability to

Despite this fact, pre-trial access to evidentiary material became more deeply entrenched at the ICTY as, in line with the Tribunal's penchant for altering its Rules, subsequent amendments were made to Rules 65 *ter*, 73 *bis* and 73 *ter*. In November of 1999, the Trial Chamber's pre-trial access to summaries of the prosecution's witness statements was assured in every case by making the filing of the same mandatory.³⁶² Another amendment to the Rule would subsequently expand the type of material required to be included in the Prosecutor's filing: the pre-trial brief must now delineate, for each count in the indictment, a summary of the evidence the Prosecution intends to bring.³⁶³ Certain filings also became mandatory for the defense. In each case, an accused is required to file a brief prior to the Pre-Trial Conference.³⁶⁴ The brief must distinguish the factual and legal issues in the case.³⁶⁵ Further, it must include a written statement that sets out the general nature of the accused's defense, the matters with which the accused takes issue in the Prosecutor's pre-trial brief and, for each such matter, the reason why the accused takes issue with it.³⁶⁶ The Pre-Trial Judge is then required to transmit the case file, which includes the filings of the parties, to the Trial Chamber.³⁶⁷

accommodate the large number of accused on trial'. 5th Ann. Rep, supra note 303, at Summary. The report also remarked that the appointment of a pre-trial judge in the *Kunarac* case would 'ensure that the matter proceeds swiftly to trial'. Id. at paragraph 86.

³⁶² ICTY RPE, R.65 *ter* (E)(iv)(b), United Nations Document IT/32/Rev.17 (1999) (providing that the Pre-Trial Judge shall order the Prosecutor to file a list of witnesses including a summary of the facts on which they will testify). Previously, such filings could be required by the Trial Chamber, but were not mandatory in each case. See supra note 350 and accompanying text.

³⁶³ ICTY RPE, R.65 *ter* (E)(i), United Nations Document IT/32/Rev.20 (2001).

³⁶⁴ ICTY RPE, R.65 *ter* (F), United Nations Document IT/32/Rev.17 (1999) (requiring that the pre-trial brief be filed at least seven days before the Pre-Trial Conference). The pre-trial brief must now be filed three weeks prior to the Pre-Trial Conference. ICTY RPE, R.65 *ter* (F), United Nations Document IT/32/Rev.28 (2003).

³⁶⁵ ICTY RPE, R.65 *ter* (F), United Nations Document IT/32/Rev.17 (1999).

³⁶⁶ ICTY RPE, R.65 *ter* (F)(i),(ii),(iii), United Nations Document IT/32/Rev.17 (1999) requiring as well that the accused set out those matters in the Prosecution's brief with which he takes issue and the reasons behind the disagreement.

³⁶⁷ Id. at R.65 *ter* (K)(i), (providing also for the inclusion of transcripts of the status conferences and minutes of meetings held). Although this Rule provides that the transmission of the same takes place after the filings made by the Prosecutor pursuant to Sub-rule (E), it would appear that it should actually provide that the submission take place after the defense filing pursuant to Sub-rule (F). This is so because the latter takes place subsequent to the former and, pursuant to Sub-rule (K) the file to be transmitted to the Trial Chamber shall consist of 'filings of the parties'. Further, to assume otherwise would result in a case file that consists of prosecution submissions alone and would also obviate the need for defense filings prior to the commencement of the prosecution's case. This provision can now be found in ICTY RPE, R.65 *ter* (L)(i), United Nations Document IT/32/Rev.28 (2003).

B. Defense Participation

It is not a negligible factor that Rules 65 *ter*, 73 *bis* and 73 *ter* were all created at a time when ‘the defence [had] no input, no formal way of making a contribution in the direction that the Tribunal’s Rules of Evidence and Procedure would take’.³⁶⁸ Though the Tribunal’s Rules Committee would ultimately be reformed in order to provide for representation of the defense,³⁶⁹ by the time the defense was in a position to register an opinion with regard to the judiciary’s pre-trial access to case information, the horse was already out of the barn. This problem is compounded by the fact that, though the new rules created a situation that obliterated judicial impartiality at the Tribunal in the adversarial sense, those standing accused before the Tribunal had nowhere to turn to seek redress. As ‘the Tribunal is its own legislator’, ‘[i]t plays an active role in creating the situations of which it later will have to judge the legality of the actions taken’.³⁷⁰

C. The Pre-Trial Rules from a Continental Perspective

It is by no means suggested, however, that the Tribunal ought to have been precluded from altering its pre-trial approach. Such a submission, among other things, would essentially obviate the benefit of the Tribunal’s power to amend its Rules in order to ‘[reflect] the experience gained from their application’.³⁷¹ Accordingly, it would be counterproductive to maintain that the Tribunal ought to have been bound by the adversarial-style impartiality referenced by then-President Cassese, if the same served to impede the Tribunal in carrying out its functions. However, an alteration made to this approach, like any wherein a modification is intricately tied to the procedural rights of the accused, must be carefully monitored to ensure that the new approach provides a comparable, though naturally different, form of protection for the accused. Simply

³⁶⁸ *Arbour*, supra note 168, at 45.

³⁶⁹ Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, United Nations General Assembly Official Record, 57th Session, Item 45 of the Provisional Agenda, at Summary, United Nations Document A/57/379–S/2002/985 (2002). According to the Tribunal, the now broader representation on the Rules Committee serves to strengthen the Committee’s advisory role. *Id.* at paragraph 38. The Rules Committee had previously been criticized due to the fact that it did not include the defense bar within its consultative process. See, e.g., *Arbour*, supra note 168, at 45; *Johnson*, supra note 39, at 173.

³⁷⁰ André Klip, ‘The Decrease of Protection under Human Rights Treaties in International Criminal Law’, 68 International Review of the Penal Law 291, 303 (1997).

³⁷¹ *McDonald*, supra note 327, at 621.

because the new rules provide for judicial pre-trial access to case information in a manner that is contrary to judicial impartiality as it is understood in the adversarial system, does not mean that the situation created by the new rules is *per se* objectionable. As our review of the continental system reveals, pre-trial access to case information is part and parcel of that legal tradition. Accordingly, it is equally necessary to consider the rules within the context of the continental approach.

In so evaluating the pre-trial scenario created by the Rules, it is worthwhile to recall one of the French proposals made in London in 1945 for the IMT. There, the French suggested the appointment of one of the IMT judges as a rapporteur who would, prior to trial, be provided with the prosecution's evidence and report to the Court on the same.³⁷² According to the proposal, under such a set-up, 'the Court are acquainted with the case before the trial and the trial is mainly devoted to clearing up certain matters on which discussion appears to be necessary'.³⁷³ In addition, the proposal provided for defense access to the prosecution materials submitted to the court, along with an opportunity for the defense to 'lodge observations with the Court before the opening of the trial' on the same.³⁷⁴

Defense access and the opportunity to comment on the prosecution's evidence was cited by the proposal to counter the anticipated argument that the 'solution' which 'naturally offers the advantage of a speedy procedure', would be 'prejudicial to the impartiality of the Court'.³⁷⁵ The proposal acknowledged, however, that '[a]gainst this method may be raised the argument that the Court must sit, with absolute impartiality, on the day of the trial'.³⁷⁶ According to *Cassese*, '[t]his proposition seems to indicate that the French probably feared that for the Court to have available at the beginning of the trial a "case file" containing the prosecution's evidence alone, might be regarded as "contaminating" the Court'.³⁷⁷

How does the French proposal compare with the Tribunal's activities pursuant to Rule 65 *ter*? Each utilizes the services of a judge, who is not separate and independent from the Court, but rather will assume an active role in the adjudication of guilt. Each provides this judge and, in turn, the court responsible for adjudicating the guilt of the accused, with pre-trial access to the prosecution's evidentiary material. Each affords the accused the opportunity

³⁷² French Observations, *supra* note 107, at §2(a).

³⁷³ *Id.* at §3.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Cassese*, *supra* note 7, at 378.

to inform the relevant court, prior to trial, of those aspects of the prosecution's evidence with which the accused takes issue.

In fairness, certain differences between the two approaches do exist. The Court would have been provided with actual evidentiary material under the French proposal, while Rule 65 *ter* calls for the provision of summaries thereof.³⁷⁸ Further, the French plan required the judge rapporteur to submit a report to the Court pursuant to his study of the case whereas Rule 65 *ter* does not call for the inclusion of such an assessment in the file forwarded to the Trial Chamber by the Pre-Trial Judge.³⁷⁹ Finally, though the defense is afforded an opportunity to air its difficulties with the prosecution's case before trial under each plan, only Rule 65 *ter* specifically provides for the inclusion of the same in the case file.³⁸⁰

An argument exists that these filings on behalf of the defense, along with defense participation in the pre-trial process at the ICTY, distinguish the Tribunal's approach from the French proposal. It could thus be claimed that the materials that comprise the Tribunal case file are not entirely one-sided. Mandated pre-trial discussions between the defense and the prosecution related to the preparation of the case can possibly have an effect upon the prosecution's submissions to the Trial Chamber.³⁸¹ Of course, such an argument is by its very nature tenuous. Further, the Pre-Trial Judge is by no means fully exposed to defense representations at such meetings, as the same are now the responsibility of a Senior Legal Officer acting under his supervision.³⁸²

In addition, while the case file submitted to the Trial Chamber includes certain defense filings, its contents are predominantly derived from the prosecution. To illustrate, the Trial Chamber will be exposed to the Prosecutor's

³⁷⁸ But see *supra* note 359 and accompanying text.

³⁷⁹ But see *Boas*, *The Principle of Flexibility*, *supra* note 148, at 87 (noting that the case file submitted pursuant to Rule 65 *ter* might include a report from the pre-trial judge).

³⁸⁰ Inclusion is presumed to be the case. See *supra* note 367. Unlike the French proposal, Rule 65 *ter* also requires that the accused set out, in general terms, the nature of his defense. This is arguably a distinction that does not injure to the benefit of the accused. See, e.g., *Boas*, *The Principle of Flexibility*, *supra* note 148, at 89 (observing that the Trial Chamber could likely draw negative inferences from the fact that an accused sets out inconsistent defenses 'or without justification he or she puts forward at trial a defense which is different from that set out in the pre-trial brief'). Most troublesome is the concern that the Trial Chamber, in such cases as the setting out of inconsistent defenses or replacement at trial of an alternative theory of defense, could draw the inference that the accused is guilty of the offense charged. *Id.* (noting that this is so pursuant to a very similar provision found in the United Kingdom's Criminal Procedures and Investigations Act 1996 and maintaining that such a severe sanction should be set out specifically in the Rules).

³⁸¹ See, e.g., ICTY RPE, R.65 *ter* (C)(iv), United Nations Document IT/32/Rev.28 (2003).

³⁸² See *id.* at R.65 *ter* (C)(iii).

pre-trial brief, in which a summary of the evidence it intends to present is delineated count by count, along with the contested matters of fact and law as determined by the prosecution.³⁸³ In addition, a list of prosecution witnesses, a summary of the facts on which each will testify, the points in the indictment as to which each witness will testify and a list of exhibits which the Prosecutor intends to offer are also included in the case file.³⁸⁴ As a result, it appears that some of the inculpatory information in the case file will even be repetitive, as there will no doubt be overlap between the count by count summary of evidence and the witness statement summaries. By contrast, defense information in the case file is limited to the nature of the defense of the accused and the matters in the Prosecutor's pre-trial brief with which the accused takes issue, accompanied by reasons for the same.³⁸⁵ Thus, the case file provided to the Trial Chamber is by no means comparable to the results of an impartial investigation; rather, it contains partisan submissions, and its contents, at best, are heavily lopsided in favor of the prosecution.³⁸⁶

Accordingly, while the temptation exists to draw a parallel from the Tribunal's pre-trial rules to the practice of the continental system, wherein pre-trial access to evidentiary material is a matter of course, the dossier in that

³⁸³ Id. at R.65 *ter* (E)(i).

³⁸⁴ Id. at R.65 *ter* (E)(ii),(iii).

³⁸⁵ Id. at R.65 *ter* (F)(i),(ii),(iii). The value added by such limited input may be even less than one might expect. 'While some [defense counsel] contributed to the filing by the Prosecutor of a brief highlighting points of agreement and disagreement, others informed the pre-trial judge that going beyond the general rejection of all of the charges and the supporting facts listed in the indictment, but for the identity of the accused, would infringe on the presumption of innocence of the accused'. *Olivier Fourny*, Powers of the Pre-Trial Chambers, in The Rome Statute of The International Criminal Court: A Commentary 1207, 1229 (*Cassese, Gaeta & Jones*, eds., 2002).

³⁸⁶ An alternative argument must also be acknowledged. It could be asserted that the Tribunal's approach is acceptable in terms of impartiality in that, at the close of the prosecution's case, the defense is required to make filings similar to those required of the prosecution. See ICTY RPE, R.65 *ter* (G), United Nations Document IT/32/Rev.28 (2003). This argument is difficult to sustain for several reasons. First, it still results on a scenario that is devoid of neutral and impartial investigation. Further, pursuant to the Tribunal's Rules, the Trial Chamber will have been exposed to the evidence of the prosecution at least twice (possibly three times, due to the fact that the evidence in the case file may be repetitious) prior to the accused being given an opportunity to plead his case. This contrasts sharply with the continental scenario wherein, after exposure to the impartially assembled dossier, the accused is generally permitted to present his case first. Further, it is submitted that this system of 'pre-case' filings generally does not inure to the benefit of the accused. A particularly inflammatory piece of evidence included in the prosecution's submission that fails to materialize at trial might likely remain in the minds of those adjudicating the guilt of the accused. By contrast, should the accused include exculpatory evidence in his filings that he is unable to substantiate at trial, such a failure would arguably serve to his detriment, whether this fact is officially recognized or not.

system is markedly different from the case file composed pursuant to the new rules. As we have seen, the non-partisan compilation of evidentiary material is an integral aspect of the over-all impartiality and neutrality required for the effective functioning of the continental system.³⁸⁷ Accordingly, the effect of judicial review of a dossier so assembled provides no similarity to the potential for contamination present under the Tribunal's Rules.

As a result, it is submitted that in spite of the differences noted between the Tribunal's approach and the French proposal, the distinctions made fail to undo the harm noted to be present under the French proposal.³⁸⁸ Thus, pursuant to the Tribunal's Rules, pre-trial access to evidence by the members of the judicial panel that will adjudicate the guilt or innocence of the accused essentially amounts to access to the prosecution's evidence alone. Accordingly, it is submitted that the Tribunal's pre-trial approach, despite its provision for marginal input from the accused, is not only incompatible with an adversarial understanding of impartiality, but also runs counter to the continental concept of fairness.

D. Rule 15(C)

Further, the argument that defense participation, no matter how minimal, can avert the potential for prosecutorial bias simply does not exist with regard to indictment confirmation. As has been noted, Sub-rule 15(C) also played an integral role with regard to judicial impartiality. It may be recalled that, in the original version of the Rules, the Sub-rule acted to preclude pre-trial exposure to evidence by a member of the judicial panel responsible for adjudicating the guilt of the accused. In the jurisprudence of the Tribunal, the Sub-rule has only been addressed tangentially, for example, in cases when the prosecution has sought leave to amend an indictment.³⁸⁹ In this regard, the Sub-rule was noted by the Tribunal to serve as a bulwark against 'any contamination spreading from the *ex parte* nature of the confirming procedure to the Trial Chamber'.³⁹⁰

However, in light of the effect of the rules just discussed, it is arguably fair to ask whether, existing alongside rules that either allow or require judicial access to evidentiary material at the pre-trial phase, Rule 15(C) could continue to serve its purpose. A judge of the ICTR made indeed such a point. In advo-

³⁸⁷ See generally *supra* at II.

³⁸⁸ See, e.g., *Cassese*, *supra* note 7, at 378–79 (noting that the judge rapporteur would have examined the prosecution's evidence alone, though with 'observations' lodged by the defense and that the French were likely 'aware of how lopsided their proposal was').

³⁸⁹ See generally Separate Opinion of Judge Dolenc, *supra* note 40.

³⁹⁰ *Prosecutor v. Krnojelac*, Decision on Prosecutor's Response to Decision of 24 February 1999, at paragraph 11, Case. No. IT-97-25-PT (20 May 1999).

cating for the elimination of the Sub-rule, *Judge Dolenc* noted that the practice of the judges of the Trial Chamber was to review summaries of the facts on which each witness will testify.³⁹¹ According to the Judge, '[t]his fact alone obviates any purpose for the distinction made by Rule 15(C) . . . and the purported procedural safeguard that it affords is impractical and unnecessary'.³⁹²

This, of course, is not the only possible response to the observation that the rules governing pre-trial access to evidentiary materials, in effect, serve to nullify a procedural protection originally bestowed upon the accused by the Rules. The recognized incompatibility of Rules 65 *ter*, 73 *bis* and 73 *ter* with the goal of Sub-rule 15(C) could alternatively have served as an impetus to restore the 'delicate balance' achieved by the Rules in their original form. For the Tribunal to so act, however, would result in further delay, something that could hardly be afforded in light of the pressure upon it to expedite its proceedings. The setback involved would result not only from the fact that the Tribunal would be forced to seek alternative means for expedition. The rationale behind any alterations ultimately made in this regard might also create additional grounds of appeal for those accused who had been subject to the pre-trial rules. Accordingly, it is perhaps not surprising that the disparity created by the new rules governing the pre-trial phase did not result in an effort on behalf of the Tribunal to restore the procedural protections of the accused.

Rather, the Sub-rule itself was subsequently modified. In November of 1999, the Rule was amended from providing that a confirming judge 'shall not sit as a member of the Trial Chamber for the trial of that accused',³⁹³ to impart that such a judge 'shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused'. Thus, the provision, deemed illustrative of the importance of impartiality at the Tribunal,³⁹⁴ was completely eradicated by the amendment. As the records of the plenary sessions, at which amendments are made, are not made public,³⁹⁵ one can often turn to the ICTY's annual reports to glean 'legislative intent'. However, contrary to what is often the case, insight into the rationale behind the decision to make the amendment

³⁹¹ Separate Opinion of *Judge Dolenc*, supra note 40, at paragraph 78. The ICTR rules at the time were still permissive in nature, providing that the Trial Chamber may order the prosecution or defense to file a summary of the facts on which each witness will testify. Id. at paragraphs 12 and 13.

³⁹² Id. at paragraph 78.

³⁹³ ICTY RPE, R.15(C), United Nations Document IT/32/Rev.16 (1999).

³⁹⁴ *Bassiouni & Manikas*, supra note 39, at 805.

³⁹⁵ See, e.g., *Swart*, supra note 205, at 573 (remarking that this impedes one's ability to establish the rationale behind certain amendments, that 'the official reason for the confidentiality of these documents is unclear', and that when asked for an explanation regarding the same, none was forthcoming from either the legal officers or the Press Information Unit of the ICTY).

was not included in the Tribunal's Annual Report and, thus, no information regarding the amendment was forthcoming from the Tribunal. The next Annual Report acknowledges that 28 rules were amended at the plenary and that many 'were intended to speed up trials and the pre-trial process and to minimize delays, while others were required to promote internal efficiency'.³⁹⁶ However, the report makes no mention of the Sub-rule, nor the issue of judicial disqualification.

It is perhaps instructive then, to look to the activities of the tribunal to which the ICTY is 'joined at the hip'.³⁹⁷ Approximately two months after the ICTY made its major amendment of Sub-rule 15(C), the ICTR followed suit. However, unlike its companion tribunal, the ICTR chose to provide a rationale for the change. Remarking on the amendment, the Rwandan Tribunal noted that the previous version 'had resulted in interlocutory appeals about recompositions of Trial Chambers, which has delayed proceedings for several months in some cases'.³⁹⁸ Accordingly, at the least in the case of the ICTR, it could be argued that the decision to so amend was made in order to provide the accused with a speedy trial, as required by Statute.³⁹⁹ Of course, in terms of fairness, when proceedings are delayed due to an appeal which derives from the violation of a procedural safeguard bestowed upon the accused, the decision to alleviate the delay by eliminating the safeguard, is nothing short of ludicrous.⁴⁰⁰

In fact, had the ICTY a similar motivation for its amendment, one can better understand its silence on the matter. The Tribunal has commented at least once on the amended version of the Sub-rule, however. In the *Galic* case, the accused made a motion to disqualify one of the Trial Chamber judges assigned to his case due to the fact that the judge in question had confirmed an indictment in a different case, the supporting materials in which implicated *Galic*.⁴⁰¹

³⁹⁶ Seventh Annual Report, *supra* note 312, at paragraph 288.

³⁹⁷ William A. Schabas, *An Introduction to the International Criminal Court* 30 (2001).

³⁹⁸ ICTR Press Briefing, ICTR/INFO-9-13-007, 22 Feb. 2000.

³⁹⁹ See *supra* at IX(B).

⁴⁰⁰ Disconcertingly, one can find a parallel to this rationale in the Rwandan Tribunal's recent decision in the *Butare* cases. The decision describes a rule amendment made by the ICTR in which the right of the accused to have a determinative say as to whether or not his or her trial can proceed under the services of a substitute judge was eliminated. In the matter, a member of the three-judge panel was unable to proceed with the cases and all of the accused, save one, requested recommencement of the trial. In so requesting, the group relied upon the procedural safeguard present in the Rules at the start of the case. In denying the request, the Trial Chamber strangely found that to hold otherwise would prejudice the rights of the accused, including the right to a speedy trial. See *Prosecutor v. Nyiramasuhuko et al.*, Decision in the Matter of Proceedings Under Rule 15 bis (D), Case Nos. ICTR-97-21-T et al., July 15, 2003.

⁴⁰¹ See Bureau Decision, *The Prosecutor v. Galic*, Decision on Galic's Application Pursuant to Rule 15(B), 2, Case No. IT-98-29-AR54 (28 Mar. 2003) [hereinafter Bureau Decision].

In rejecting *Galic*'s motion, the five-judge panel noted that 'the tentative determination made in confirming an indictment is based on evidence that is very likely to be introduced at trial. It is, thus, an initial judgement based on relevant evidence. The making of such tentative judgements . . . does not demonstrate bias'.⁴⁰² The panel then draws upon the amended Sub-rule for support, noting that 'this conclusion is embodied in Rule 15(C).'⁴⁰³

Of course, given the history of the Sub-rule, this assertion is hardly convincing. It leaves unaddressed the issue as to how the procedural safeguard created 'due to the need to ensure the independence and impartiality of the judges participating in the consideration of the case at every stage of the proceedings'⁴⁰⁴ had been rendered wholly unnecessary. Rather than provide such enlightenment, the decision instead appears to take the position that, because the Sub-rule is presently so constructed, the situation that it enables is acceptable. In other words, 'because we now allow this, it is right'. However, remarking on the amended Sub-rule, *Zappalà* notes that it 'is not entirely persuasive in terms of respect for the principle of impartiality and the presumption of innocence'.⁴⁰⁵ In so observing, he comments that the 'amendment implies that a judge who has full knowledge of the materials supporting the charges against the accused is allowed to be a member of the Trial Chamber'.⁴⁰⁶

Thus, the Rule is clearly incompatible with judicial impartiality as that term is defined in the adversarial system. It further clashes with the continental approach: the Tribunal's proceedings prior to and including confirmation of the indictment provide for no defense input whatsoever. Therefore, the confirming judge, far from being presented with an impartial assessment or even both sides of the case, is exposed to the prosecution's case alone. Further, throughout the course of the *ex parte* proceeding, the confirming judge may question the prosecutor and '[t]he indictment, as ultimately confirmed, may be transformed by this process of dialogue between the judge and the prosecutor'.⁴⁰⁷ With such a result, it is difficult to ascertain how such a judge, in general terms, could subsequently sit to adjudicate the guilt of the accused whilst being, and appearing to be, impartial.

⁴⁰² *Id.* at 1.

⁴⁰³ *Id.* (concluding that, if a judge may adjudicate the guilt of an accused whose indictment the judge has confirmed, a judge can certainly confirm an indictment in one case and then sit as a member of the trial bench in a second case, though some of the evidence supporting the indictment in the first case will be adduced in the trial of the second).

⁴⁰⁴ 1 *Morris & Scharf*, *supra* note 6, at 155.

⁴⁰⁵ *Zappalà*, *supra* note 15, at 23.

⁴⁰⁶ *Id.* at 23 n. 88 (commenting further that the change 'seems a clear move towards a more inquisitorial system').

⁴⁰⁷ *Brown*, *supra* note 335, at 370 n. 106.

E. The Practice of the Prosecution

Unfortunately, the difficulties for the accused in this regard extend even further. As the Trial Chamber's approach in the *Dokmanovic* case illustrates, rule amendments are not the only potential mechanism for depreciating the procedural protections available to an accused. Such a result can equally be obtained by the unilateral action of a Trial Chamber or of another of the Tribunal's organs. This can be a particularly thorny issue when the relevant organ is that of the Office of the Prosecutor. With regard to the actions of that organ, the continental/common law divide is once again a relevant factor. Just, as in comparison to the common law system the continental judge is less passive, so is the continental prosecutor less partisan.⁴⁰⁸ When assembling those materials that will constitute the case file, the continental prosecutor does not act as an advocate, but as an 'impartial fact-finder for the state'.⁴⁰⁹ By contrast, as has been established, this is not the function of the prosecution at the ICTY, despite the opinion registered from time to time by the Tribunal.

In particular, the representations made by the Trial Chamber in the *Kupreskic* case, have received a fair amount of academic attention. In that matter, the Trial Chamber addressed the issue of whether communications can be made between the parties and their witnesses throughout trial proceedings.⁴¹⁰ In rendering its decision, the Trial Chamber notes that 'the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover truth in a judicial setting'.⁴¹¹ While it is difficult to take issue with such a lofty pronouncement, it must be recognized that these words are not only obiter dicta,⁴¹² but that they also do not reflect the responsibilities of

⁴⁰⁸ *Mary Ann Glendon, Michael Wallace Gordon and Christopher Osakwe*, Comparative Legal Traditions 180 (1985) (noting that these issues connote the two major distinctions between common law and continental systems).

⁴⁰⁹ *Raneta Lawson Mack*, 'It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System', 7 Indiana International and Comparative Law Review 63, 72–73 (1996) (noting the same to be true of examining magistrates).

⁴¹⁰ *Prosecutor v. Kupreskic, et al.*, Decision on Communications between the Parties and their Witnesses, Case No. IT-95-16-T (21 Sept. 1998).

⁴¹¹ *Id.* at para ii.

⁴¹² Had the assertion been central to the Trial Chamber's decision, the finding of one Trial Chamber has no binding force on the decisions of other Trial Chambers. *Prosecutor v. Aleksovski*, Judgement, at paragraph 114, Case No. IT-95-14/1-A (24 March 2000) (noting, however, that the Trial Chambers are free to follow the decisions of one another).

the office of the Prosecutor as delineated in the Tribunal's Rules.⁴¹³ Accordingly, it has been rightly noted that 'no appropriate legal framework supported this aspiration'.⁴¹⁴

Moreover, there is an inherent danger in assuming that the rights of the accused will be protected in a manner for which the Tribunal's Statute and Rules make no provision. One can appreciate the fact that the Tribunal's judges, particularly those members whose prior experience is of a continental nature, may ascribe to the position that the Prosecutor 'represents the public interest of the international community and has to act with objectivity and fairness appropriate to that circumstance' and that the Prosecutor 'is in a real sense a minister of justice'.⁴¹⁵ However, such non-binding rhetoric is cold comfort to an accused. Further, it's substance contradicted by the fact that the Prosecution has been non-compliant with its lesser responsibilities, namely the disclosure of exculpatory evidence, as delineated in the Rules.⁴¹⁶ Accordingly, it is necessary to have a keen appreciation for the partisan nature of the Office of the Prosecution when assessing its actions.

Such a frame of reference is particularly valuable with regard to understanding the impact of the organ's approach to judicial access to evidentiary materials in the pre-trial phase. In response to the 1999 report evaluating the efficiency and functioning of the Tribunal, the Chief Prosecutor took the position that 'the key to shortening trials is to ensure that the judges are 'fully informed' in advance of the case'.⁴¹⁷ Thus, in 2000, arguing that the judges should have the assistance of a 'complete' case file in advance of trial, she 'directed her trial attorneys to present a complete dossier to the trial chamber and defense counsel "immediately after the initial appearance of the accused"'.⁴¹⁸ Of course, these materials proffered by the Prosecution would by

⁴¹³ The Rules only provide for disclosure to the defense of exculpatory materials known to the prosecution. ICTY RPE, R.68, United Nations Document IT/32 (1994).

⁴¹⁴ *Zappalà*, supra note 15, at 41 (remarking that 'the Prosecutor is the dominus of the investigative phase' and that the Tribunal might consider amending its Rules to provide that the Prosecutor search for exculpatory evidence).

⁴¹⁵ *Prosecutor v. Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, at paragraph 18, Case No. IT-02-54-AR.73.2 (30 Sept. 2002) (citing, as the basis of these assertions, representations made by representatives of the Office of the Prosecutor throughout the course of trial proceedings, along with a regulation issued by the Chief Prosecutor in 1999).

⁴¹⁶ See, e.g., *Zappalà*, supra note 15, at 41 n. 39 (noting 'a number of problems relating to non-compliance by the Prosecution with its obligations under Rule 68').

⁴¹⁷ *Mundis*, supra note 302, at 766.

⁴¹⁸ Id. (quoting Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Annex I, at paragraph 54, United Nations Document A/54/850).

no means comprise a ‘complete dossier’, but rather a complete file of the prosecution’s evidence. This seemingly unilateral decision on behalf of the Prosecutor, for which there is absolutely no basis in the Rules, thus creates a situation wherein a member of the Trial Chamber may have been privy to prosecution’s evidence three times over prior to the start of trial. First, with regard to the *ex parte* confirmation hearing, then pursuant to this unauthorized sharing of materials after the initial appearance of the accused and again, potentially with internal repetition, pursuant to the new rules governing pre-trial ‘case management’. The deleterious effect of the same upon judicial impartiality – be it continental or adversarial – is obvious.

F. Summary

Thus, under pressure to expedite its proceedings, the Tribunal’s approach to its pre-trial practices has had a dramatic impact on the procedural protections afforded to those who stand accused before it. Noticeably absent from the changes that have been noted are consequent amendments made to protect the rights of the accused under the altered system. Rather, one is presented with a scenario wherein it is perhaps trite to observe that adversarial style impartiality is now completely unknown to the Tribunal. Thus, left to address the amendments from a continental perspective, the end result is no more promising.

Pursuant to the new Rules, the compilation of a ‘case file’ for the Trial Chamber results in judicial access by the entirety of the three-judge panel to prosecution-oriented materials. Absent are the safeguards we have noted to be contained in the continental system, namely, the use of ‘neutral’ evidence and the limitation of access to the same to only one judge. Further, the indictment of the accused is obtained in an adversarial fashion, allowing for no input on the part of the defense. In addition, the complete over-haul of Sub-rule 15(C) allows for the confirming judge to adjudicate the guilt of the accused in the aftermath of this *ex parte* confirming process. Finally, the unilateral action regarding pre-trial access to case information taken on behalf of the prosecution, an adversarial party to the proceedings, definitively obviates any argument that such access to case materials on the part of those adjudicating guilt is in any way comparable to judicial access to the neutral, impartial information amassed in the continental system. As a result, under this new approach, the accused is left in a position that is far inferior to that which would be known in the continental system.

XII. Conclusion

The Tribunal's Rules have come a long way from their composition in 1994. Indeed, to make this observation, one need only recognize that a link can no longer be made between the Tribunal's 'adversarial inclination' and the impartiality of its judges. This transition has been inspired by the ICTY's need for expedition, which derives not only from the right of an accused to a speedy trial, but at the urging of the international community and pursuant to financial and political pressures. Sadly, the Tribunal's actions appear to primarily reflect concern for the position of external entities, with a focus that appears far more centered upon efficient convictions than on procedural protections for the accused. Indeed, the world's reaction to the Tribunal is far from what was anticipated by one academic who articulated the view that the media could play a role in holding the Tribunal to high standards with regard to the due process protections afforded to those accused before it.⁴¹⁹

Even in the absence of this influence, the Tribunal should not succumb to the pressure for expedition at the cost of the procedural rights of the accused. To do so would be to obviate the human rights advancements made in the field of criminal procedure in the post-World War II era.⁴²⁰ Perhaps an ability to identify with an individual accused of a crime was required in order for domestic systems to recognize the importance of respecting the rights of an accused.⁴²¹ The pivotal issue, however, is that the need to respect those rights has ultimately been generally and internationally recognized, and is not restricted to those accused with whom society at large can identify.⁴²² Accordingly, it is incumbent upon the Tribunal to fully respect the rights of every individual who stands accused before it.

⁴¹⁹ *O'Brien*, supra note 120, at 654.

⁴²⁰ See, e.g., *Schabas*, supra note 110, at 516 (observing that '[w]rong or even confusing signals from [the Tribunal] may set human rights back decades, within the context of criminal justice').

⁴²¹ See supra note 143 and accompanying text.

⁴²² Further, although some might be hard pressed to appreciate the need to bestow procedural safeguards upon individuals alleged to have committed the most horrific of acts, one cannot disregard the fact that an accused person enjoys a presumption of innocence. Indeed, it is not impossible to conceive of the possibility that an accused appearing before the Tribunal may not even be the individual intended to be charged. See, e.g., *Faiza Patel King and Anne-Marie La Rosa*, 'The Jurisprudence of the Yugoslavia Tribunal: 1994–1996', 8 European Journal of International Law 123, 171–172 (1997) (detailing the arrest of an innocent person who had the misfortune of sharing the same name and date of birth as the actual accused).

As we have seen, full respect for these rights can be a complicated issue when one is dealing with a *sui generis* system that does not have a long and learned history of its own from which to draw. This issue becomes even more difficult when the system, as does the Tribunal's, essentially represents an amalgamation of two well-established legal traditions. One can understand the temptation to draw upon the most expedient measures in each, particularly given the pressure upon the Tribunal to accelerate its proceedings. However, as we have seen, such transplants require an appreciation of the legal system from which they are taken. Further, particular regard must be given to the manner in which a transplant may affect the fair trial rights of an accused; relocating certain provisions will often require consequent modifications in order to keep procedural safeguards in tact.

This review of the amendments made to the pre-trial practices of the Tribunal reveals that, to the detriment of the accused, such considerations are not part and parcel of the Tribunal's amendment process. As a result, not unlike the experience at Nuremberg, the rights conferred upon those accused have become inferior to that which would be found in the domestic realm. Accordingly, contrary to what might be believed, the amendments made do not represent a 'victory' for the continental system. Rather, their modified presence in the Tribunal's system, absent of the safeguards present in the domestic context, is in fact not representative of the continental system at all. A superficial analysis, however, of the Tribunal's approach might well lead the casual observer to draw the mistaken conclusion that it is the continental system that provides only a veneer of fairness and not true fairness.

It cannot be forgotten that the judge-made Rules 'essentially amount to a code of procedure for international criminal law'⁴²³ and that the Tribunal is 'developing the common law of criminal evidence and procedure'.⁴²⁴ Should the Tribunal continue to allow its preoccupation with expediency to take precedence over the integrity of its proceedings, the result will be a major blow to international human rights law. An inferior template for that which qualifies as acceptable procedure will not only mean a regression in the context of international criminal law; a faulty model may also well be used to justify a depreciation of the rights bestowed upon the accused in the domestic sphere. Accordingly, the ICTY should be cognizant of the fact that it is 'mandated to provide a model of enlightened justice'.⁴²⁵ Such a model, of course,

⁴²³ *May & Wierda*, Trends, *supra* note 243, at 735.

⁴²⁴ *Cristian DeFrancia*, 'Due Process in International Criminal Courts: Why Procedure Matters', 87 *Virginia Law Review* 1381, 1399 (2001).

⁴²⁵ *Schabas*, *supra* note 110, at 516.

requires that due regard be given to the protection of the rights of those who stand accused before the Tribunal. ‘The course of justice, conducted in scrupulous compliance with fair trial procedures, is often by nature a slow process’.⁴²⁶

⁴²⁶ UN Assembly appraises progress made by war crimes tribunals – judges describe obstacles, M2 Presswire, 9 Nov. 1999 (quoting then-President of the ICTR, Navanethem Pillay).

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