

**THE SEARCH FOR JUSTICE IN THE FORMER  
YUGOSLAVIA AND BEYOND: ANALYZING THE  
RIGHTS OF THE ACCUSED UNDER THE  
STATUTE AND THE RULES OF PROCEDURE  
AND EVIDENCE OF THE INTERNATIONAL  
CRIMINAL TRIBUNAL FOR THE FORMER  
YUGOSLAVIA**

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*Justice, Sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race.*<sup>1</sup>

On May 7, 1997, the International Criminal Tribunal for the former Yugoslavia (Tribunal) rendered the first war crimes conviction by an international criminal tribunal since Nuremberg.<sup>2</sup> Dusko Tadic received a twenty-year prison sentence for his role in the concentration camp persecution and beatings of Bosnian Muslims and Croats in opstina Prijedor, Bosnia-Herzegovina.<sup>3</sup> At first, Tadic was one of only two indictees in the Tribunal's custody,<sup>4</sup> as onlookers predicted that he was only the tip of the iceberg.<sup>5</sup> In fact, to date, the Tribunal has issued over seventy indictments,<sup>6</sup> and its financial prospects are improving,<sup>7</sup> suggesting that Tadic's was the first in a line of trials yet to occur.

The Tribunal's creation and operation have mobilized the international community towards the establishment of a permanent international criminal tribunal.<sup>8</sup> The idea is as

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1. 3 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 300 (Little, Brown, & Co. 1903).

2. See *Trial and Error Tribunal*, LAWYER, May 20, 1997, available in LEXIS, News Library, Lawyer File.

3. See *International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion*, 36 I.L.M. 908, 908, 916-19, 969 (1997). The indictment, containing 34 counts, accused Tadic of murder, persecution, forcible sexual intercourse, and beating and abuse. See *id.* at 916-19.

4. See James Podgers, *The World Cries for Justice*, A.B.A. J., Apr. 1996, at 52, 53.

5. See Bruce T. Smith, *Vengeance on Trial: Sadism in the Dock*, FED. LAW., Jan. 1996, at 24, 29 (discussing the accusations against General Ratko Mladic and Radovan Karadzic and the political problems involved in their prosecution); see also *New Bosnian Serb Defense Minister Hopes Mladic Stays Free*, AGENCE FRANCE PRESSE, Jan. 27, 1998, available in LEXIS, News Library, AFP File (reporting that Karadzic and General Mladic remain at large); Tracy Wilkinson, *U.S. Troops in Bosnia Seize Genocide Suspect*, L.A. TIMES, Jan. 23, 1998, at A6 (noting that the most significant accused war criminals have not been arrested).

6. See Wilkinson, *supra* note 5.

7. See Charles Trueheart, *Tribunal Turnaround: Recent Arrest, Surrender of Bosnian War Crimes Suspects Improve Court's Prospects for '98 Budget Increase*, WASH. POST, Oct. 20, 1997, at A17.

8. See 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 INT'L L.J. 475, 478 n.10 (1995) (remarking that "[t]he success of the international community

ripe as it has ever been. With the possible exception of the Nazi aggressions during World War II culminating in the Nuremberg trials,<sup>9</sup> it is hard to imagine a more compelling catalyst for the establishment of a general international criminal judicial forum.

Few can deny that the atrocities that occurred at the Bosnian Omarska prison camps and the surrounding regions should be criminally sanctioned.<sup>10</sup> However, international zeal to punish the perpetrators must not blur the focus on the rights of the accused to fair treatment during every phase of adjudication. The Tribunal's Statute<sup>11</sup> and Rules of Procedure and Evidence<sup>12</sup> are deficient in several important respects. This Comment underscores those deficiencies and their implications, and reflects a concern for the accused and their defense counsel that practice before the Tribunal. Michail Wladimiroff, a Dutch defense attorney who represented Tadic, had doubts from the start whether his client could receive a fair trial.<sup>13</sup> Wladimiroff has commented that, under the current provisions, "there is little guidance to know what the rules mean. We face a lot of interpretive problems."<sup>14</sup> Moreover, in light of the upcoming formation of

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in creating the Tribunal for the former Yugoslavia has sparked renewed interest in a permanent international criminal court"). *But see* Dusan Cotic, *A Critical Study of the International Tribunal for the Former Yugoslavia, Introductory Remarks*, 5 CRIM. L.F. 223, 224–25 (1994) (assessing the political obstacles to the establishment of a permanent court; stating that "the community of nations is not likely soon to agree to a binding convention ceding jurisdiction to an international criminal regime"). Delegates representing over 100 countries recently met to discuss the details of a permanent international criminal court. *See A Criminal Court for the World*, *ECONOMIST*, Dec. 6, 1997, at 18 (describing the new international court as a "permanent version" of the Rwandan and former Yugoslavian tribunals). A U.N. conference to institute a new international criminal court is scheduled for June 1998. *See Indict Saddam*, *FIN. TIMES* (London), Feb. 5, 1998, at 19.

9. *See* Smith, *supra* note 5, at 36 (likening the Nazi camps with the camps in Northeastern Bosnia).

10. *See* Podgers, *supra* note 4, at 52.

11. *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*, 48th Sess., at 36, U.N. Doc. S/25704 (1993) [hereinafter *Statute*]. The Statute, Rules of Procedure and Evidence, and other important documents and updates are available from the International Criminal Tribunal for the former Yugoslavia Home Page at <<http://www.un.org/icty/index.html>>.

12. *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, Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.11 (1997) [hereinafter *Rules of Procedure and Evidence*].

13. *See* Podgers, *supra* note 4, at 60.

14. *Id.*

a permanent court based in part on the Tribunal's example,<sup>15</sup> now is the time to review the Tribunal's design with the defense in mind.

Part I of this Comment outlines the history of international criminal courts, illuminating the Tribunal's unique position in a historical context. Part II analyzes the Tribunal's most problematic rules and statutory provisions. Part III concludes that until the deficiencies in the Rules of Procedure and Evidence and the Statute of the Tribunal are corrected, the Tribunal should not serve as a model for a permanent international criminal court.

## I. HISTORY OF INTERNATIONAL CRIMINAL COURTS

### A. *Pre-World War I*

The concept of an international criminal court emerged nearly 500 years ago.<sup>16</sup> In 1474 the first international court convicted Peter Von Hagenbush for infractions against "God and man" after his rule as Governor of Breisach, an Austrian territory.<sup>17</sup> In the nineteenth century, international courts helped prevent slave trading by seizing and destroying the vessels involved.<sup>18</sup> These courts did not exercise dominion over the proceedings, however, because the masters and crews suspected of violations were prosecuted in their home states.<sup>19</sup>

The Hague Conventions of 1889 and 1907 established the Convention for the Pacific Settlement of Disputes and a Court of Arbitral Justice.<sup>20</sup> These Conventions produced the first traces of an international tribunal and penal code.<sup>21</sup> At the 1907 Convention, international leaders pressed for obligatory participation as a means to fully effectuate the spirit of international dispute resolution.<sup>22</sup> However, in part

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15. For commentary on how the Tribunal and the proposed permanent international criminal court are dissimilar, see Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 853-59 (1997) (discussing as one key difference "their respective relationship with national courts").

16. See Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223, 224 (1992).

17. *Id.*

18. See *id.*

19. See *id.*

20. See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 421 (1995).

21. See *id.*

22. See *id.*

because the United States feared jurisdictional tension between the international court and the U.S. Supreme Court,<sup>23</sup> the Court of Arbitral Justice never became a fixture of international criminal law.<sup>24</sup>

*B. Post-World War I*

Following World War I, the 1919 Treaty of Versailles contained provisions for an international criminal tribunal.<sup>25</sup> The treaty empowered the Allied Powers to prosecute suspected war criminals.<sup>26</sup> Another purpose of the court was to try Kaiser Wilhelm II for the “supreme offense against international morality and the sanctity of treaties.”<sup>27</sup> However, the tribunal was never created, due in part to the Allies’ concerns of possible German resistance.<sup>28</sup>

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23. *See id.* at 421–22. The members of the 1907 Commission would agree to the court’s creation only if the proposal of obligatory arbitration was agreed to and ratified at the Naval Conference of 1908. *See id.* at 421. However, in addition to U.S. reluctance for jurisdictional reasons, ratification was averted as the Conference never occurred. *See id.*

24. Countries fear that ceding jurisdictional authority to an international criminal court will mean a loss of adjudicatory control, which is a significant contemporary impediment to international cooperation. *See* M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT’L L. 151, 161 (1992). Professors Bassiouni and Blakesley distinguish between jurisdiction over crimes with political content and politically neutral crimes. *See id.* at 162. Some countries fear granting authority to an international criminal court because “its prosecutorial arm may become politicized, leading to unjustified or unwarranted accusation of public officials for political purposes.” *Id.* This fear seems reasonable; however, as the authors point out, prevention of the “abuse of power or process can be guaranteed effectively in the substance of the governing rules and the structure and mechanism of the court as controlled in the organic statute of the court.” *Id.* It is possible that Rule 47 of the Rules of Procedure and Evidence was designed to prevent these abuses by restricting, on its face, prosecutorial discretion. *See Rules of Procedure and Evidence, supra* note 12, Rule 47. However, as Part III.B *infra* illustrates, limiting the Prosecutor’s authority to refrain from indicting possible criminals is problematic.

25. *See* Rose Marie Karadsheh, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT’L L. 243, 248–49 (1996).

26. *See* Treaty of Peace with Germany (Treaty of Versailles), art. 228, June 28, 1919, Ger.-Allies, 225 Consol. T.S. 188, 285–86.

27. *Id.* art. 227, 225 Consol. T.S. at 285.

28. *See* Cavicchia, *supra* note 16, at 225. The need for widespread extradition agreements and enforcement procedures was made clear in the case of Kaiser Wilhelm II. *See* Jamison, *supra* note 20, at 423. Fearing the threat of prosecution, the Kaiser fled to the Netherlands, which was a neutral territory at the time. *See id.* The Dutch government refused to extradite the Kaiser, claiming that his alleged offenses were purely political and did not violate Dutch law. *See id.*

Also in 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties at the Preliminary Peace Conference (1919 Commission), established by the Allied Powers, investigated alleged war criminals.<sup>29</sup> However, the fruits of the investigation were never fully realized, as there were “no institutional links between the investigative Commission and the judicial bodies subsequently established by the Treaty of Versailles.”<sup>30</sup> The Treaty of Sevres in 1920 required Turkey to relinquish accused war criminals within its borders to the Allies.<sup>31</sup> The Treaty of Sevres was never ratified, however, in light of political sensitivities.<sup>32</sup> Moreover, the Treaty of Lausanne, which replaced the Treaty of Sevres, did not provide for the criminal prosecution of Turkish suspects.<sup>33</sup>

In the 1920s the International Law Association (ILA) convened to discuss the establishment of a permanent international court.<sup>34</sup> The ILA prepared a draft statute for an international criminal court in 1926.<sup>35</sup> This draft statute was meant to remedy the weaknesses of the 1919 Commission’s efforts,<sup>36</sup> but “[t]he world, it was then said, was too disparate and not ready for such an international institution.”<sup>37</sup> Despite the collaborative efforts of the International Association of Penal Law and the Inter-Parliamentary Union, together with the ILA, the 1926 draft statute remained ineffective.<sup>38</sup>

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29. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Pamphlet No. 32 (1919), *reprinted in* 14 AM. J. INT’L L. 95 (1920).

30. M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT’L L.J. 1191, 1193 (1995).

31. See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sevres), art. 226, Aug. 10, 1920, Tur.-Allies, *reprinted in* 15 AM. J. INT’L L. 179 (Supp. 1921) (“The Turkish government shall hand over to the Allied Powers . . . persons accused of having committed an act in violation of the law and customs of war.”).

32. See Bassiouni, *supra* note 30, at 1194.

33. See Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11; Bassiouni, *supra* note 30, at 1194.

34. See Cavicchia, *supra* note 16, at 225.

35. See Report of the Permanent International Criminal Court, International Law Association, 33d Conference, Stockholm, Sept. 8–13, 1926 (available in Report of the 34th Conference of the International Law Association (1927)); Cavicchia, *supra* note 16, at 225.

36. See Karadsheh, *supra* note 25, at 249.

37. Bassiouni, *supra* note 30, at 1195.

38. See *id.*

C. *A Brief Look at the Conflict in the Former Yugoslavia*

The dissolution of the Socialist Federal Republic of Yugoslavia caused the conflict that erupted in the former Yugoslavia.<sup>39</sup> Six republics—Serbia, Croatia, Montenegro, Macedonia, Slovenia, and Bosnia-Herzegovina—dissolved and declared their independence, with the military often playing an important role.<sup>40</sup> Within these republics, religious and ethnic groups have fought for independence.<sup>41</sup>

Although in full view the conflict involves a complex factual background,<sup>42</sup> events beginning around World War II to the present are especially relevant.<sup>43</sup> Germany and Italy occupied Yugoslavia after the Axis powers invasion in 1941.<sup>44</sup> Those countries divided the territory and allowed certain associated countries to assume control of part of the region.<sup>45</sup> Croatia was divided between Italy and Germany, with Italy controlling the western region and Germany controlling the eastern region.<sup>46</sup> Bosnia-Herzegovina was then established within Croatia, where approximately two million Serbs lived.<sup>47</sup> Italian dictator Benito Mussolini selected the head of

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39. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 1 & n.1 (1996).

40. See *id.*

41. See *id.* at 1-2.

42. See *id.* at 1. For further discussion of the conflict and its background, with an emphasis on the events surrounding World War II, see *id.* at 1-63; MILOVAN DJILAS, *WARTIME* 3-88 (1977); PAUL N. HEHN, *THE GERMAN STRUGGLE AGAINST YUGOSLAV GUERRILLAS IN WORLD WAR II* 1-144 (1979); MATTEO J. MILAZZO, *THE CHETNICK MOVEMENT & THE YUGOSLAV RESISTANCE* 1-187 (1975); JOZO TOMASEVICH, *WAR AND REVOLUTION IN YUGOSLAVIA, 1941-1945: THE CHETNICKS* 3-89 (1975); Cotic, *supra* note 8, at 225-31; Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 HASTINGS L.J. 909, 912-15 (1995); Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 82-86 (1994); Lisa L. Schmandt, *Peace with Justice: Is It Possible for the Former Yugoslavia?*, 30 TEX. INT'L L.J. 335, 337-41 (1995); John Webb, Note, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 381-87 (1993).

43. See BASSIOUNI & MANIKAS, *supra* note 39, at 1.

44. See *id.* at 11.

45. See *id.*

46. See *id.*

47. See *id.* at 12.

state for Croatia, Ante Pavelic, to lead the *Ustasa*<sup>48</sup> movement.<sup>49</sup>

The Croatian *Ustasa* leadership “launched a campaign of annihilation against Croatia’s Serbian population” during World War II.<sup>50</sup> Massive numbers of Serbs were confronted with a trilemma: extermination,<sup>51</sup> conversion to Catholicism,<sup>52</sup> or expulsion from the region.<sup>53</sup> The conflict may be explained as a “form of historic revenge.”<sup>54</sup> “To many Serbs, the current war became an opportunity (or an excuse) to avenge the past.”<sup>55</sup>

Communist revolutionaries led the Partisans, who drew initially upon a radical and disenfranchised Yugoslavian workforce, into a vigorous resistance against the Axis powers within Yugoslavia.<sup>56</sup> Under the leadership of Josip Broz Tito, the Partisans secured Belgrade, in northern Serbia, for the Partisan communist forces in 1944.<sup>57</sup> The Partisans then eliminated some 40,000 to 100,000 Croat *Ustasa* members within the territory under Tito.<sup>58</sup> Tito eventually created the republics of Croatia, Serbia, Slovenia, Macedonia, Bosnia-Herzegovina, and Montenegro under a federal system.<sup>59</sup>

Threats of a Soviet invasion prompted the Socialist Federal Republic of Yugoslavia to mobilize a strong military force in the years following World War II.<sup>60</sup> During the 1960s and 1970s, “mutual antagonisms and distrust among the republics and provinces led to rising nationalist sentiments and growing defiance of the federal government.”<sup>61</sup> The

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48. The *Ustasa* (Uprising) were a group of Croatian activists committed to Croatian independence. *See id.* at 11.

49. *See id.* at 11–12.

50. *Id.* at 12.

51. Estimates of the number of Serbs killed during this time range from 200,000 to 1 million. *See id.* at 12 n.65.

52. *See* VLADIMIR DEDIJER, *THE YUGOSLAV AUSCHWITZ AND THE VATICAN* 136–37 (Harvey L. Kendall trans., 1992) (describing the military clergy’s “criminal interpretation of the Catholic concept of morality” to justify its support of Pavelic and the *Ustasa* movement).

53. *See* BASSIOUNI & MANIKAS, *supra* note 39, at 12.

54. *Id.* at 12 n.65.

55. *Id.*

56. *See* KIRK FORD, JR., *OSS AND THE YUGOSLAV RESISTANCE, 1943–1945*, 7–8 (1992).

57. *See* BASSIOUNI & MANIKAS, *supra* note 39, at 13.

58. *See id.* This massacre occurred in 1946 once the *Ustasa* surrendered to the British, who in turn handed over the *Ustasa* and their families to Tito’s Partisans. *See id.* at 13 & n.71.

59. *See id.* at 14.

60. *See id.* at 14–15.

61. *Id.* at 19.

military strength that was once poised to rebut a Soviet invasion became a weapon for the republics to gain independence.<sup>62</sup>

The current conflict started when Croatia and Slovenia declared their independence from Yugoslavia in 1991.<sup>63</sup> Slovenia declared that a “state of war” was in effect after the Yugoslav National Army invaded it.<sup>64</sup> This event marked the beginning of a “conflict that has evolved in fits and bursts” to the present.<sup>65</sup>

Today, all parties to the conflict are responsible for illegal acts, including the torture and relocation of civilians.<sup>66</sup> Practices have included “ethnic cleansing,”<sup>67</sup> rape and sexual assault,<sup>68</sup> the shelling of cities,<sup>69</sup> illegal imprisonment,<sup>70</sup> and the restraint of the delivery of humanitarian aid.<sup>71</sup>

## II. STATUTE AND RULES ANALYSIS

The Members of the United Nations<sup>72</sup> agree that the Security Council shall maintain “international peace and

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62. *See id.* at 15.

63. *See id.* at 26.

64. *Id.*

65. *Id.* at 1.

66. *See id.* at 48.

67. The Commission of Experts, which gathered and analyzed evidence of grave breaches of international humanitarian law in the former Yugoslavia for the Secretary-General, defined ethnic cleansing as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.” *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), at 33, para. 130, U.N. Doc. S/1994/674 (1994). For additional information, see generally M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994) (providing background and analysis of Resolution 780 and the formation of the Commission). Both Serbs and Croats have practiced ethnic cleansing as part of their campaigns of violence. *See* BASSIOUNI & MANIKAS, *supra* note 39, at 48. The Serbs, however, have engaged in ethnic cleansing more extensively. *See id.* at 49.

68. *See* BASSIOUNI & MANIKAS, *supra* note 39, at 54–56. Although there are reports of rape and sexual assault by all parties to the conflict, most of the victims have been Bosnian Muslims and most of the offenders have been Bosnian Serbs. *See id.* at 54.

69. *See id.* at 57–59.

70. *See id.* at 59–61. Apparently most of those imprisoned have been civilians and not prisoners of war. *See id.* at 60. The Bosnian Serbs appear to be the only group to have used prison camps as a method of ethnic cleansing. *See id.* at 59.

71. *See id.* at 61.

72. The U.N. Charter provides that “[a]ll Members, in order to ensure all of them the rights and benefits resulting from membership, shall fulfill in good

security.”<sup>73</sup> The genesis of the Tribunal is Security Council Resolution 771, which instructed states and international humanitarian organizations to report violations of international humanitarian law to the Security Council.<sup>74</sup> Resolution 780 then established a Commission of Experts to investigate and accumulate evidence regarding “grave breaches of the Geneva Conventions and other violations of international humanitarian law” occurring within the former Yugoslavia.<sup>75</sup> The Security Council adopted Resolution 808, which declared that “an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>76</sup> Resolution 827<sup>77</sup> established the Tribunal and was unanimously passed on May 25, 1993.<sup>78</sup>

Personnel in the Legal Office of the United Nations drafted the Statute with suggestions from a diverse group of experts and government officials.<sup>79</sup> Article 15 of the Statute charges the judges of the Tribunal with the responsibility of adopting rules of procedure and evidence, including rules governing the protection of victims and witnesses “and other appropriate matters.”<sup>80</sup> The Tribunal’s substantive jurisdiction under the Statute encompasses grave breaches of the Geneva Convention of 1949,<sup>81</sup> violations of the laws or

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faith the obligations assumed by them in accordance with the . . . Charter.” See U.N. CHARTER art. 2, para. 2.

73. *Id.* art. 24, paras. 1–2 (declaring in paragraph 1 that “Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf,” and in paragraph 2 that “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”). The U.N. Charter defines the Security Council’s powers in Chapters VI, VII, VIII, and XII. See *id.* para. 2.

74. See S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/771 (1992); Bassiouni, *supra* note 30, at 1202; Bassiouni, *supra* note 67, at 284.

75. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 2, U.N. Doc. S/RES/780 (1992); see Bassiouni, *supra* note 67, at 279–80. Professor Bassiouni is the Former Chairman and Rapporteur on the Gathering and Analysis of Facts, Commission of Experts Established pursuant to Security Council Resolution 780 (1992). See *id.* at 279 n.aa1.

76. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/808 (1993).

77. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

78. See Bassiouni, *supra* note 67, at 282.

79. See Bassiouni, *supra* note 30, at 1204.

80. *Statute*, *supra* note 11, art. 15.

81. See *id.* art. 2.

customs of war,<sup>82</sup> genocide,<sup>83</sup> and crimes against humanity.<sup>84</sup> The Rules are organized under nine subject headings: general provisions,<sup>85</sup> primacy of the Tribunal,<sup>86</sup> organization of the Tribunal,<sup>87</sup> investigations and rights of suspects,<sup>88</sup> pretrial proceedings,<sup>89</sup> proceedings before trial chambers,<sup>90</sup> appellate proceedings,<sup>91</sup> review proceedings,<sup>92</sup> and pardon and commutation of sentence.<sup>93</sup> A separate set of rules governs the detention unit established to hold detainees awaiting trial or appeal.<sup>94</sup> This section highlights the deficiencies in the

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82. *See id.* art. 3.

83. *See id.* art. 4.

84. *See id.* art. 5.

85. *See Rules of Procedure and Evidence, supra* note 12, Rules 1–7.

86. *See id.* Rules 8–13.

87. *See id.* Rules 14–38.

88. *See id.* Rules 39–46.

89. *See id.* Rules 47–73.

90. *See id.* Rules 74–106.

91. *See id.* Rules 107–18.

92. *See id.* Rules 119–22.

93. *See id.* Rules 123–25.

94. *See Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal*, U.N. Doc. IT/38/Rev.3 (1994), reprinted in 33 I.L.M. 1590, revised by U.N. Doc. IT/38/Rev.7 (1997) [hereinafter *Rules of Detention*]. These rules contain provisions for the management of the Detention Unit, rights of detainees, and removal and transport of detainees. *See id.* There is also a series of Basic Principles. *See id.* Rules 1–8. One Basic Principle divides the authority over and responsibility for the administration of the Detention Unit among the United Nations, the Tribunal, and the Commanding Officer. *See id.* Rule 2. The United Nations retains “ultimate responsibility and liability for all aspects of detention,” while the Tribunal maintains sole jurisdiction over all detainees. *Id.* Further, the Commanding Officer, a U.N. appointee and the head of staff, is responsible for day-to-day management and order. *See id.* Other Basic Principles of the Rules of Detention include an antidiscrimination provision, entitlement to the observance of religious beliefs, a presumption of innocence, and inspections of the conditions of the detention unit. *See id.* Rules 3–6.

The Rules of Detention also prescribe how the detention unit shall be managed. *See id.* Rules 9–59. Under the reception provisions, a duly issued arrest warrant must precede detention. *See id.* Rule 9. Other rules of reception provide that all information concerning detainees must remain confidential in most situations, that the detainee receive information regarding available legal representation, that the detainee’s body and clothing may be searched, and that the medical officer or his deputy shall examine the detainee and deliver any necessary medical treatment. *See id.* Rules 11–13, 15. The remaining rules on management regulate cell accommodation and maintenance, personal hygiene, clothing, food, exercise and recreation, medical services, discipline, segregation, isolation, restraint and the use of force, disturbances, suspension of the Rules of Detention, and information available to detainees. *See id.* Rules 16–59.

The rules covering the rights of detainees entitle detainees to certain communications and visits, legal assistance, spiritual welfare, participation in a work program, recreation, personal possessions, and a complaint procedure.

Statute of the Tribunal and the Rules of Procedure and Evidence. These inadequacies are significant because of how they affect the rights of the accused.

A. *Victim and Witness Protection*

It is an unfortunate reality that sometimes those who testify fear justifiably for their safety.<sup>95</sup> This reality is often especially acute for rape victims.<sup>96</sup> The drafters of the Statute of the Tribunal recognized that certain witnesses and victims might require special protection from violent reprisals after testifying. Article 20(1), governing the commencement and conduct of trial proceedings, requires the Trial Chambers to “ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”<sup>97</sup> With a little more specificity, Article 22 provides that “[t]he International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity.”<sup>98</sup>

In accordance with the Statute, the Rules of Procedure and Evidence contain measures that vest broad discretion in the Trial Chambers to protect victims and witnesses. Rule 69 provides:

- A. In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such

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*See id.* Rules 60–88. Finally, the Rules of Detention require that transported detainees enjoy minimal public exposure and the safeguards necessary to protect them from harassment by the public. *See id.* Rules 89–90.

95. *See* MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW’S RESPONSE 4–7 (1985) (defining witness intimidation as “threats made or actions taken by defendants or others acting on their behalf or independently to dissuade or prevent victims or eyewitnesses of crimes from reporting those crimes, assisting in the investigation, or giving testimony at a hearing or trial”).

96. *See* Laurel Fletcher et al., *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 322 (1993). For an examination of how rape falls within the Tribunal’s subject matter jurisdiction see Sharon A. Healy, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT’L L. 327, 334–69 (1995).

97. *Statute*, *supra* note 11, art. 20(1).

98. *Id.* art. 22.

person is brought under the protection of the Tribunal.

. . . .

- C. Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.<sup>99</sup>

Rule 75 provides further:

- A. A judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned . . . order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
- B. A Chamber may hold an *in camera* proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him . . . ; (ii) closed sessions . . . ; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
- C. A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.<sup>100</sup>

The measures under Rule 75(B)(i) include expunging identifying information from the Chamber's records; nondisclosure of records to the public; altering images and voices, or using closed circuit television during testimony; and assigning pseudonyms.<sup>101</sup>

Read in tandem, Rules 69 and 75 permit the prosecution to withhold the identities of certain witnesses from the defense.<sup>102</sup> The Trial Chamber granted the prosecution's motion to secure protective measures for several witnesses in

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99. *Rules of Procedure and Evidence*, *supra* note 12, Rule 69.

100. *Id.* Rule 75.

101. *See id.* Rule 75(B)(i).

102. *See Falvey*, *supra* note 8, at 516 (describing the confusion Rule 69 produces and the implicit permissibility of the nondisclosure to the defense of victims and witnesses pursuant to Rule 75).

the *Tadic* case.<sup>103</sup> The Trial Chamber distinguished measures relying on confidentiality from those securing anonymity.<sup>104</sup> The former category of measures involves nondisclosure to the public while the latter involves nondisclosure to the accused.<sup>105</sup> Noting that the discretion to grant anonymity “must be exercised fairly, and [that] only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him,” the Trial Chamber balanced the interests of the defendant against the interests of society and witnesses.<sup>106</sup> The inquiry involved:

On the one hand, . . . the public interest in the preservation of anonymity . . . [and on] the other hand, . . . the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favorable outcome to the proceedings.<sup>107</sup>

As discussed below, the Trial Chamber’s ruling and the proposition it stands for can hardly be reconciled with the statutory mandate that the accused receive a fair trial, or with broader notions of justice in a criminal proceeding. Article 20(1), mentioned above, requires a Trial Chamber to ensure a fair trial for the accused.<sup>108</sup> Considering article 20(1) and Rule 75(A), which states that protective measures must

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103. See *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T (Aug. 10, 1995), reprinted in 7 CRIM. L.F. 139, 175–76 (1996) [hereinafter Decision on Protective Measures].

104. See *id.* para. 4, at 144.

105. See *id.*

106. *Id.* paras. 55–66, at 163–66.

107. *Id.* para. 55, at 163 (quoting Judge Brooking in *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others* [1994] V.R. 84, 88 (S. Ct. Vict.)). The Trial Chamber narrowed this totality of the circumstances approach by delineating five factors that militate in favor of granting anonymity. See *id.* paras. 62–66, at 165–66. First, the witness or the witness’s family must entertain a “real” fear. See *id.* para. 62, at 165. A fear is real if it is subjectively held and objectively reasonable. See *id.* Second, the witness whose protection is sought must be able to testify about “important” matters underlying the prosecution’s case. See *id.* para. 63, at 165. Third, there must be no prima facie evidence of the witness’s untrustworthiness. See *id.* para. 64, at 165. Fourth, “the ineffectiveness or non-existence of a witness protection program . . . has a considerable bearing on any decision to grant anonymity.” *Id.* para. 65, at 166. Finally, there must be no less restrictive measures available to protect witnesses. See *id.* para. 66, at 166.

108. See *Statute*, *supra* note 11, art. 20(1).

be “consistent with the rights of the accused,”<sup>109</sup> motions seeking victim and witness anonymity should not be granted. The proviso in Rule 75(A) was included in the rule governing protective measures for victims and witnesses; therefore, the rule must be construed as a baseline of fairness below which certain measures may not descend. It is difficult to believe that the drafters would have placed the Rule 75(A) proviso within Rule 75 while contemplating that the identities of victims and witnesses crucial to a defendant’s case would remain a secret to the defense. One can scarcely conceive of a court action *less* consistent with a defendant’s right to mount an effective defense.

Article 21(4)(e) grants the accused the right “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>110</sup> In addition, Rule 85(A) entitles each party “to call witnesses and present evidence”<sup>111</sup> and Rule 85(B) provides that “[e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case.”<sup>112</sup> Rule 85 is not made subject to Rule 75; therefore, Rule 85 can be viewed as granting an absolute right to confront witnesses.<sup>113</sup> Article 21(2), however, contains a subject-to clause: “In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.”<sup>114</sup> The question surrounding this provision is whether the subject-to clause qualifies the words “fair and public hearing” or “public hearing.”<sup>115</sup> The modification should apply only to the “public hearing” antecedent. The broader modification would unduly hamper the defendant’s rights because “one would be accepting the possibility that a

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109. *Rules of Procedure and Evidence*, *supra* note 12, Rule 75(A).

110. *Statute*, *supra* note 11, art. 21(4)(e).

111. *Rules of Procedure and Evidence*, *supra* note 12, Rule 85(A).

112. *Id.*

113. However, under principles of statutory construction, one could resolve this conflict by reading Rule 85 *in pari materia* with the Statute. *See, e.g.*, Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 299 (1993). The result could be that Rule 85 implicitly contains a subject-to clause referring to Rule 75. But recall that Rule 75 requires that the rights of the accused nonetheless coincide with protective measures. *See supra* note 109 and accompanying text.

114. *Statute*, *supra* note 11, art. 21(2).

115. *See* Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT’L L. 235, 236 (1996) (discussing Judge Stephen’s argument against allowing the identities of witnesses to remain secret).

trial might be unfair if that were the only way to protect the identity of victims and witnesses.”<sup>116</sup>

Fundamental notions of fairness and international standards of due process<sup>117</sup> should prevent the prosecution’s use of testimony if the witness is unknown to the defense throughout the trial. The right of a defendant to face one’s accusers is a venerable tradition.<sup>118</sup> A Trial Chamber of the Tribunal paid respect to the right of confrontation:

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author’s reliability or cast doubt on his credibility.<sup>119</sup>

By providing an avenue to remove witnesses from the defense’s view and to secure the nondisclosure of their identities, the Statute and Rules of Procedure and Evidence essentially abrogate the defense’s ability to conduct skillful confrontation and cross-examination.<sup>120</sup> Successful impeachment, for example, relies on the ability of counsel to maintain rapport with the witness and to adjust the questioning based on physical cues. This requires the use of eye contact and a close study of the witness’s demeanor.<sup>121</sup> This fact has long been recognized in the United States,<sup>122</sup>

116. *Id.*

117. Article 21 of the Statute, listing the rights of the accused, reflects the due process standards set forth in Article 14 of the International Covenant on Civil and Political Rights. *See* Decision on Protective Measures, *supra* note 103, para. 25, at 152.

118. *See* Acts 25:16 (noting that “Roman law does not convict a man before . . . [h]e is given an opportunity to defend himself face to face with his accusers”); Frank R. Herrmann, S.J. & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481, 483 (1994) (documenting that “the justice of bringing accusing witnesses before the accused has been acknowledged for at least 1,500 years”).

119. Decision on Protective Measures, *supra* note 103, para. 54, at 163 (quoting the European Court of Human Rights in *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A), para. 42 (1989)).

120. *See* *Trial and Error Tribunal*, *supra* note 2.

121. *See* HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES IN THE TRIAL OF CRIMINAL CASES 52 (1961).

122. *See, e.g.,* *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988). The Court in *Coy* held that a state statute that permitted child victims of sexual abuse to testify from behind a screen so that the defendant could perceive only an obscured

where the Confrontation Clause of the Sixth Amendment of the Constitution provides: “In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . . .”<sup>123</sup> The Supreme Court has held:

[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt.<sup>124</sup>

In a more recent case, the Supreme Court stressed that witness confrontation upholds the values of both symbolic and functional justice.<sup>125</sup> Writing for a majority, Justice Brennan focused on the importance of society’s perception that “the accused and accuser engage in an open and even

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witness violated the defendant’s Sixth Amendment right of confrontation. *See id.* at 1020. The Court stated that “[i]t is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter.” *Id.* Two years later the court addressed an open question in *Coy* whether the right to face-to-face confrontation “may give way to more important interests.” *Id.* The Court upheld a statutory procedure allowing the use of one-way closed circuit television to supply the testimony of alleged child abuse victims. *See Maryland v. Craig*, 497 U.S. 836, 855 (1990). The Court required a strict showing of necessity, however, where the child witness “cannot reasonably communicate” because he has suffered extreme emotional trauma. *Id.* 497 U.S. at 840–41 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989)).

123. U.S. CONST. amend. VI.

124. *Kirby v. United States*, 174 U.S. 47, 55 (1899). A related issue is the admissibility of hearsay testimony against a defendant where the declarant is unavailable. The Supreme Court has held that, where sufficient “indicia of reliability” exist, such testimony does not necessarily offend the Confrontation Clause of the Sixth Amendment. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980). This may be the sort of hearsay evidence that the drafters envisioned would be admissible in the Tribunal when Rule 90(A) was enacted. Rule 90(A) requires direct testimony by a witness “unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.” *Rules of Procedure and Evidence*, *supra* note 12, Rule 90(A). Rule 90(A) thus places discretion in the Tribunal to order a deposition in lieu of live testimony. *See id.* The Tribunal should read this Rule restrictively to protect the accused’s right to “examine . . . witnesses against him” granted by Article 21(4)(e). *Statute*, *supra* note 11, art. 21(4)(e); *see BASSIOUNI & MANIKAS*, *supra* note 39, at 943–44.

125. *See Lee v. Illinois*, 476 U.S. 530, 540 (1986).

contest in a public trial.”<sup>126</sup> The Court placed primary importance, though, on the proclivity of the right of confrontation to produce more trustworthy results.<sup>127</sup> Reliable results are more likely, as the jury can observe the witness’s demeanor and judge the witness’s credibility.<sup>128</sup>

The fallibility of the victim and witness protection provisions became glaringly apparent during Tadic’s trial. A prosecution witness testified that he had seen Tadic commit beatings, rapes, and murders, and that he had been unlawfully imprisoned.<sup>129</sup> The witness requested and received anonymity,<sup>130</sup> disabling the defense’s ability to effectively impeach and cross-examine him. The defense discovered, however, after disobeying the order of anonymity, that the witness had lied about these and other facts.<sup>131</sup> Eventually the witness recanted and the Prosecutor dropped the charges the witness was to prove.<sup>132</sup> The witness explained that he lied after government forces threatened to execute him unless he claimed to be an eyewitness.<sup>133</sup> Unfortunately for the defense, the extent of presented testimony that was manufactured and coerced to secure Tadic’s conviction is uncertain. What is clear is that had the defense followed the anonymity order, the witness would have gone unchallenged.

Balancing the interests should not lead the Tribunal to allow the prosecution to conceal the identities of victims and witnesses. Other measures are available for protection against possible retaliation against witnesses. Under certain circumstances, the Tribunal may order that identities and identifying information of victims and witnesses remain confidential.<sup>134</sup> However, since a public hearing helps to ensure fairness and educate the public, closed proceedings must remain a rarity.<sup>135</sup> Another possible measure is for the international community to fund an effective witness

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126. *Id.*

127. *See id.*

128. *See id.*

129. *See* Robert M. Hayden, *Perjury at the Hague: Robert M. Hayden Casts a Cold Eye on the Yugoslav War Crimes Trial*, PITT. POST-GAZETTE, Nov. 10, 1996, at E1.

130. *See Trial and Error Tribunal*, *supra* note 2.

131. *See id.*; Hayden, *supra* note 129.

132. *See* Hayden, *supra* note 129.

133. *See id.*; *Trial and Error Tribunal*, *supra* note 2.

134. *See* Decision on Protective Measures, *supra* note 103, paras. 31–43, at 154–60.

135. *See id.*

protection program.<sup>136</sup> Other commentators have recognized the potential for such a program:

[Anonymity and confidentiality of certain witnesses] challenges due process if one pushes it too far; it is not going to be a long-term acceptable argument to limit the confrontation between defendant and witness, or even to lessen the didactic quality of the trials, by allowing anonymous witnesses if one could have accommodated the witnesses' need for safety by having a developed witness relocation program. There is nothing that prevents the United Nations from setting up a witness program.<sup>137</sup>

A relocation program to remove victims, witnesses, and their families to other regions or countries at their own request should be established, perhaps patterned after the U.S. model.<sup>138</sup>

The interpretive and public policy rationales mentioned above should lead the Tribunal to amend its Rules of Procedure and Evidence so that victim and witness anonymity is not an option. Otherwise, the accused's right to a fair trial is diluted beyond recognition, and the Tribunal's credibility is seriously diminished.

#### *B. The Indictment Process*

Since the office of the Prosecutor is responsible for holding violators of international humanitarian law within the former Yugoslavia criminally accountable for their actions,<sup>139</sup> the Prosecutor plays a pivotal role in the search for justice within the Tribunal.<sup>140</sup> He "shall act independently as a separate organ of the International Tribunal [and] shall not seek or receive instructions from any Government or from

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136. See Ruth Wedgwood, *Prosecuting War Crimes*, 149 MIL. L. REV. 217, 221 (1995).

137. *Id.*

138. See 18 U.S.C. § 3521 (1994). The federal Witness Protection Program allows the Attorney General to provide for the protection and relocation of witnesses if he concludes that a crime of violence "is likely to be committed" against a witness. *Id.* § 3521(a)(1).

139. See *Statute*, *supra* note 11, art. 16(1).

140. See Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 516 (1994).

any other source.”<sup>141</sup> The drafters thus recognized the importance of prosecutorial independence and sovereignty.<sup>142</sup>

Rule 47 provides the basis for issuing indictments.<sup>143</sup> Rule 47(A)(i) requires the following course of action:

If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.<sup>144</sup>

Considering the otherwise independent nature of the Office of the Prosecutor, Rule 47(A) is paradoxical. By its terms, Rule 47(A) denies the Prosecutor the discretion to withhold the filing of an indictment for reasons other than insufficiency of the evidence.<sup>145</sup> The Rules do not, therefore, allow the Prosecutor to weigh other considerations in making the decision to prosecute.<sup>146</sup> For example, witnesses may notify the Prosecutor in advance of their intentions to refuse to cooperate out of fear<sup>147</sup> or for other reasons. Further, at the moment the evidence becomes sufficient “to provide reasonable grounds for believing that a suspect has committed a crime,”<sup>148</sup> it may be premature to bring an indictment.

Instead, the Prosecutor should be able to refrain from indicting a suspect where it appears that additional inculpatory evidence would come to light in the future. Postponement would advance the interests of both the Prosecutor and an innocent suspect. The Prosecutor could wait until the suspect implicates additional suspects during

141. *Statute, supra* note 11, art. 16(2).

142. *See* Nsereko, *supra* note 140, at 517 (explaining that “[b]y forbidding the prosecutor to seek or receive instructions from any quarter, the Statute clearly underscores the functional independence of this office”).

143. *See Rules of Procedure and Evidence, supra* note 12, Rule 47.

144. *Id.* Rule 47(A)(i).

145. *See id.*

146. *But see* Nsereko, *supra* note 140, at 518–19. Nsereko supports the mandatory language of Rule 47. *See id.* He argues that “[g]iven the widespread media coverage of the atrocities committed in the territory of the former Yugoslavia it would be an outrage to the international public were the prosecutor to decline to go forward with a case for reasons other than insufficiency of evidence.” *Id.* at 519. This sentiment is likely to be widespread. However, this conviction need not, and should not, be enforced through unbending codification.

147. *See supra* Part II.A.

148. *Rules of Procedure and Evidence, supra* note 12, Rule 47(A).

an investigation.<sup>149</sup> Moreover, an innocent, albeit suspected, person could be cleared through the Prosecutor's discovery of exculpatory evidence in an ongoing investigation.<sup>150</sup>

### C. *The Right Against Self-Incrimination*

Article 21(4)(g) of the Statute grants the accused the right "not to be compelled to testify against himself or to confess guilt."<sup>151</sup> Rules 42(A)(iii),<sup>152</sup> 55(A),<sup>153</sup> and 63<sup>154</sup> are the corresponding Rules. Three separate, though related, issues

149. Subject to an agreement between the judge and the Prosecutor under Rule 53, Rule 52 requires that a confirmed indictment be made public. *See id.* Rule 52. Publishing the indictment would greatly hamper an investigation of then unknown suspects by giving them notice.

150. One could argue that Rule 47 does not contemplate cutting short an active investigation. Rather, the Rule could be read to implicitly require an indictment sometime, though not necessarily immediately, after the Prosecutor forms a reasonable belief of suspicion based on sufficient evidence.

151. *Statute, supra* note 11, art. 21(4)(g).

152. Rule 42(A)(iii) provides:

- A. A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(iii) the right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

*Rules of Procedure and Evidence, supra* note 12, Rule 42(A)(iii).

153. Rule 55(A) provides:

- A. A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 21 of the Statute, and in Rules 42 and 43 *mutatis mutandis*, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.

*Id.* Rule 55(A).

154. Rule 63 states the following:

- A. Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.
- B. The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii).

*Id.* Rule 63.

must be resolved for a full understanding of this right. The accused is entitled to know when the right attaches, what triggers the right, and what the effect of exercising the right will be. By way of definition, a suspect is a “person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction.”<sup>155</sup> In contrast, an accused is a “person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.”<sup>156</sup>

The right against self-incrimination attaches at three different stages: during a prosecutorial investigation,<sup>157</sup> upon the execution of an arrest warrant, and upon the questioning of an accused.<sup>158</sup> Under Rule 42(A)(iii), the Prosecutor must advise the suspect prior to questioning of “the right to remain silent” and caution the suspect “that any statement he makes shall be recorded and may be used in evidence.”<sup>159</sup> Unless the suspect is initially the subject of an arrest warrant,<sup>160</sup> the prosecutorial questioning stage is the earliest stage at which the right attaches. When the Tribunal issues an arrest warrant,<sup>161</sup> Rule 55(A) requires the warrant to state the accused’s rights, including the right to remain silent.<sup>162</sup> The last stage at which the right against self-incrimination attaches is apparently when the Prosecutor questions the accused some time after the initial appearance.<sup>163</sup> Rule 63 then requires the Prosecutor to advise the accused of his right against self-incrimination.<sup>164</sup>

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155. *Id.* Rule 2(A).

156. *Id.*

157. The Rules define “investigation” as “[a]ll activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed.” *Id.*

158. *See id.* Rule 63.

159. *Id.* Rule 42(A)(iii).

160. Rules 54 and 55 govern the issuance and execution of warrants. *See id.* Rules 54–55. Article 19(2) is the basis for these rules, which permits the judge to, “at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.” *Statute, supra* note 11, art. 19(2); *see* BASSIOUNI & MANIKAS, *supra* note 39, at 908.

161. Except when the Prosecutor obtains a provisional arrest under urgent circumstances pursuant to Rule 40(i), an arrest must be made with a warrant. *See* BASSIOUNI & MANIKAS, *supra* note 39, at 909 & n.78.

162. *See Rules of Procedure and Evidence, supra* note 12, Rule 55(A).

163. Rule 62 describes the protocol regarding the initial appearance. *See id.* Rule 62. It provides, inter alia, that the accused must be “brought before a Trial Chamber without delay, and . . . formally charged.” *Id.*

164. *See id.* Rule 63(A).

An unsettling issue from the suspect's perspective is whether questioning by someone other than the Prosecutor triggers the right against self-incrimination.<sup>165</sup> Rules 42<sup>166</sup> and 63<sup>167</sup> concern the questioning of a suspect and an accused by the Prosecutor. The question is open, therefore, whether agents acting for the Prosecutor must caution a suspect or an accused that he has the right against self-incrimination.<sup>168</sup> Because the Prosecutor may not always personally conduct the questioning,<sup>169</sup> unwary suspects and accuseds face a large potential pitfall. A better approach to uphold the spirit of the right against self-incrimination would be to rephrase the applicable rules to encompass questioning by the Prosecutor or any agent<sup>170</sup> of the Prosecutor.<sup>171</sup>

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165. See Falvey, *supra* note 8, at 491.

166. *Rules of Procedure and Evidence*, *supra* note 12, Rule 42.

167. *Id.* Rule 63.

168. See Falvey, *supra* note 8, at 491.

169. Due to the staffing constraints in the Prosecutor's office, Non-Governmental Organizations may aid in interviewing witnesses who later become suspects. See BASSIOUNI & MANIKAS, *supra* note 39, at 876.

170. The Rules should define "agent" broadly enough to include any individual who undertakes questioning to obtain information that could possibly be used at trial against the defendant. Regarding the wisdom of attaching the right against self-incrimination to police interrogation, compare Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 19-36 (A.E. Dick Howard ed., 1965) (likening the police station to a "gatehouse" with "bare back rooms and locked doors" and arguing that when the police do not advise a suspect of his rights, "many an incriminating statement will be extracted under 'color' of law"), and Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 75 (1989) (proposing the rule "that out-of-court statements made by defendants while in custody, whether or not the result of interrogation, cannot be used to establish guilt in criminal trials" because "the realities of police detention and human nature" preclude the exercise of a suspect's free will), with JOSEPH D. GRANO, CONFESIONS, TRUTH, AND THE LAW 129-36 (1993) (explaining the differences in protections granted suspects between the investigative and adjudicative stages in terms of separation of powers and arguing that "[b]ecause successful investigation often depends on the questioning of reluctant witnesses and suspects, and on other intrusive strategies as well, the investigative stage, as a practical matter, cannot be subject to the same restraints that govern the adjudicative stage"), and HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 79 (1996) (arguing that "requiring a police officer to tell a murder or rape suspect that he need not answer questions seems altogether too charitable").

171. See Falvey, *supra* note 8, at 491. Falvey notes that the Military Rules of Evidence (MRE) protect the right against self-incrimination when agents question suspects. See *id.* at 491-92. The MRE extend the rights warning requirement to "civilians acting as knowing agents of military law enforcement authorities." *Id.*

Although the Rules expressly provide a right to remain silent,<sup>172</sup> they fail to resolve whether the Tribunal may draw incriminating inferences from a suspect who remains silent.<sup>173</sup> In some nations, the fact finder is prohibited from drawing adverse inferences based upon a defendant's prior silence or silence on the witness stand.<sup>174</sup> In other countries, however, negative inferences are permitted.<sup>175</sup> The question should be whether penalizing the accused with the use of adverse inferences renders the right against self-incrimination a nullity.<sup>176</sup> Cautioning suspects that their statements can be used against them and applying their resultant silence toward proof of guilt makes the fact-finding process harshly incongruous.

#### D. Guilty Plea Negotiations

Plea bargaining typically involves a promissory exchange where a defendant waives certain rights and promises to plead guilty in return for the prosecutor's promise to recommend a particular sentence.<sup>177</sup> U.S. courts have held that plea bargaining is proper and necessary:

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172. A suspect under Rule 42(A)(iii) must be advised by the Prosecutor of "the right to remain silent" before questioning. *Rules of Procedure and Evidence*, *supra* note 12, Rule 42(A)(iii). Arrest warrants must contain a statement of the right to remain silent. *See id.* Rule 55(A). Rule 63 also requires the Prosecutor to advise an accused that he may remain silent. *See id.* Rule 63(A).

173. *See* Nsereko, *supra* note 140, at 539.

174. The U.S. Supreme Court has held that the Fifth Amendment prohibits comments by judges and prosecutors on the defendant's refusal to testify. *See Griffin v. California*, 380 U.S. 609, 615 (1965) (noting that allowing the government to "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . which the Fifth Amendment outlaws"). State courts have held similarly. *See, e.g., State v. Reed*, 627 A.2d 630 (N.J. 1993) (holding that under New Jersey law, suspects have "an absolute right to remain silent while under police interrogation, and at trial the State may draw no negative inferences from that silence").

175. In England, for example, a recent law adopted by the Parliament allows judges and juries to draw negative inferences when suspects remain silent during police interrogations or at trial. *See* Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994) (criticizing the new law for "jeopardiz[ing] many of the benefits protected by the accusatorial system of justice"). Northern Ireland and Singapore adopted similar proposals. *See id.* at 404.

176. *See* Nsereko, *supra* note 140, at 540.

177. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921 (1992). The authors explain guilty plea negotiations by applying principles of typical executory contracts. *See id.* at 1914. That is, "the parties to plea bargains do not actually trade the entitlements per se; instead they exchange the risks that future contingencies may materialize ex post that will lead one or the other to regret the ex ante bargain." *Id.*

Throughout history the punishment to be imposed upon wrongdoers has been subject to negotiation. Plea negotiation, in some form, has existed in this country since at least 1804. Even in England, where there are no public prosecutors, no inflexible sentencing standards, and considerably less pressure on the trial courts, a limited form of plea negotiation seems to be developing . . . . History and perspective suggest . . . that plea negotiation is not caused solely, or even largely, by overcrowded dockets. . . . [P]lea negotiation serves the ends of justice. It enables the court to impose “individualized” sentences, an accepted ideal in criminology, by avoiding mandatory, harsh sentences adapted to a class of crime or a group of offenders but inappropriate, and even Draconian, if applied to the individual before the court.<sup>178</sup>

Italy has also recently emphasized the practice of *patteggiamento* (bargaining) in its new code of criminal procedure.<sup>179</sup> Accordingly, “parties to a criminal proceeding may negotiate agreements to use simplified procedures in return for statutorily diminished penalties or to forego trial entirely and enter into a type of plea bargain in which the parties agree on the appropriate sentence.”<sup>180</sup>

The Rules make no provision for guilty plea negotiations.<sup>181</sup> Nor do the Rules give the Prosecutor the power to grant immunity, which could be used to obtain benefits similar to those obtained after a plea agreement.<sup>182</sup> The benefits to the Prosecutor from plea bargaining are manifest: time and resources are saved, the public is protected from offenders who would continue criminal conduct during pretrial release, and the disposition is largely final.<sup>183</sup> Perhaps the primary advantage from the Prosecutor’s perspective is that often a term of the agreement requires the accused to cooperate in assisting the capture of, and the compilation of evidence against, larger criminal figures.<sup>184</sup>

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178. *People v. Selikoff*, 318 N.E.2d 784, 788 (N.Y. 1974) (citations omitted).

179. See Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 372 (1994).

180. *Id.*

181. See Falvey, *supra* note 8, at 507–08.

182. See *id.*

183. See *Santobello v. New York*, 404 U.S. 257, 261 (1971).

184. See, e.g., *United States v. Kelly*, 18 F.3d 612, 615 (8th Cir. 1994) (providing language from a plea agreement).

Although a plea bargaining defendant loses important protections,<sup>185</sup> the advantages to the accused of having the option to negotiate substantially outweigh the loss of trial rights. One important benefit is finality: the defendant can avoid the expense, humiliation, and uncertainties of trial because the plea bargain is considered a final judgment.<sup>186</sup> Moreover, plea negotiation may lead to more suitable sentences. This is achieved when the negotiated plea represents the intermediate position between “the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime . . . where an intermediate judgment is the fairest and most ‘accurate’ (or most congruent).”<sup>187</sup> The plea bargaining defendant also begins the rehabilitation process more quickly when a trial is avoided.<sup>188</sup>

Further, a plea bargaining mechanism should be included in the Rules out of respect for the dignity of the accused to enter freely into a contract.<sup>189</sup> The accused should be permitted to take advantage of guilty plea negotiations as an alternative to a trial, and it is hoped that a procedure for doing so is soon codified.

#### *E. Appellate Proceedings: Non bis in idem*

There is considerable confusion surrounding the current status of the *non bis in idem* provisions under the Statute and Rules.<sup>190</sup> *Non bis in idem* (not twice for the same) is the principle applied in noncommon law countries that a person

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185. For example, the right to confront witnesses, the right to a jury trial, and the presumption of innocence are relinquished in a U.S. guilty plea negotiation. See Eric R. Komitee, Note, *Bargains Without Benefits: Do the Sentencing Guidelines Permit Upward Departures to Redress the Dismissal of Charges Pursuant to Plea Bargains?*, 70 N.Y.U. L. REV. 166, 187 (1995).

186. See *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).

187. ARNOLD N. ENKER, PERSPECTIVES ON PLEA BARGAINING, in PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112–14 (1967).

188. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

189. See Scott & Stuntz, *supra* note 177, at 1913 (distinguishing unenforceable contracts to enslave from plea agreements). *But see* Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 n.230 (1989) (arguing that many plea bargains are unconscionable given “[t]he opportunity for prosecutorial abuses . . . because of the prosecutor’s unique power, resources, and access to information”).

190. See, e.g., Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT’L L. & COM. 1, 15 (1995) (criticizing the Statute’s drafting).

shall not be repeatedly prosecuted or punished for the same conduct among different legal systems.<sup>191</sup> Article 10 provides:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
  - (a) the act for which he or she was tried was characterized as an ordinary crime; or
  - (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.<sup>192</sup>

Article 10 thus governs the extent to which a single defendant may be tried for serious violations of international humanitarian law in both a national court and the Tribunal within a framework of concurrent jurisdiction.<sup>193</sup> Whereas Article 10(2)(b) appears to be self-explanatory,<sup>194</sup> Article 10(2)(a) requires more precise articulation. The Secretary-General has attempted to clarify subparagraph (a) to mean that “[t]he characterization of the act by the national court did not correspond to its characterization under the

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191. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 288 (1993). Common law countries are more familiar with the term “double jeopardy.” See *id.* Double jeopardy differs from *non bis in idem* in that it prohibits repeated prosecutions by a single sovereign. See *id.*

192. *Statute*, *supra* note 11, art. 10.

193. Article 9(1) grants concurrent jurisdiction among the Tribunal and national courts and Article 9(2) vests the Tribunal with “primacy over national courts.” *Id.* arts. 9(1)–(2). “Primacy” refers to the authority of the Tribunal to “formally request national courts to defer to the competence” of the Tribunal. *Id.* art. 9(2).

194. That subparagraph (b) is self-explanatory does not free the provision of problems. It is unclear what factors point toward a “design[ ] to shield the accused.” *Id.* art. 10(2)(b). In any event, the Tribunal will need to conduct a potentially expensive and time-consuming hearing to determine whether the provision applies. See *Levie*, *supra* note 190, at 15–16.

statute.”<sup>195</sup> This apparent attempt to avoid a violation of the doctrine of *non bis in idem* will fail in some situations, depending upon how the Tribunal defines “characterization” under the Statute. For example, if a national court tries a person for “theft,” does Article 10(2)(a) then permit a subsequent trial for “plunder of public or private property”<sup>196</sup> under Article 3(e)?<sup>197</sup> Does “characterization” refer to a national court’s label, the basic elements of the offense, or neither? Will the national court’s mens rea requirement differ from the Tribunal’s? Does it matter that an affirmative defense was available in one national court but not in another?

It is foreseeable that two individuals who commit the same act, with similar states of mind, will be treated differently before the Tribunal under the current scheme. The divergent analyses of what constitutes rape among different jurisdictions illustrates the point. In California, a man who has sexual intercourse with a woman without her consent may use as a defense his genuine and reasonable belief that the woman consented.<sup>198</sup> In Massachusetts, however, a genuine and reasonable mistake as to consent is not a defense.<sup>199</sup> In further distinction, English law has recognized that a man who acts unreasonably as to consent, but not recklessly, has not formed the requisite mens rea for rape.<sup>200</sup>

Applying Article 10(2)(a) to a case where a man has sexual intercourse with a woman without her consent, where he genuinely, though unreasonably, believes she has consented, it appears that the man could be prosecuted under Article 5(g) (listing rape as an indictable offense)<sup>201</sup> if the national court applies the English rule, but not if the national court applies the California or Massachusetts rule. Likewise, where a man reasonably and honestly believes the woman consented, his act is indictable under the Statute if the national court applies the English or California rule, but not if the national court applies the Massachusetts rule, because a “rape” has occurred only in Massachusetts under

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195. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, 48th Sess., para. 66, at 17, U.N. Doc. S/25704 (1993).

196. *Statute*, *supra* note 11, art. 3(e).

197. *See* Levie, *supra* note 190, at 15.

198. *See, e.g.,* *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (en banc).

199. *See* *Commonwealth v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989); *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1142 (Mass. App. Ct. 1991).

200. *See* *Regina v. Morgan*, App. Cas. 182 (1976).

201. *See* *Statute*, *supra* note 11, art. 5(g).

these facts and Article 10(2)(a) would therefore bar the Tribunal's jurisdiction.

To equalize treatment among indictees and uphold the sound policy of *non bis in idem*, Article 10(2)(a) could provide instead that a defendant who has been tried in a national court may be tried thereafter by the Tribunal only if the national offense requires actions and mental states that are not substantially similar to the offense listed in the Statute. This change would more closely uphold the letter and spirit of the Statute that "[a]ll persons shall be equal before the International Tribunal."<sup>202</sup>

Article 25 of the Statute is objectionable for similar reasons. It provides:

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
  - (a) an error on a question of law invalidating the decision; or
  - (b) an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.<sup>203</sup>

The apparent lack of limitations on the Prosecutor's right to appeal raises the issue of double jeopardy.<sup>204</sup> Where the Tribunal acquits a defendant based upon the facts, the Prosecutor should not be permitted to take an appeal. In addition to the Article 25 threat, Rule 119 allows the Prosecutor, within one year after the final judgment, to move a Trial Chamber for review "[w]here a new fact has been discovered which was not known to the [Prosecutor] at the time of the proceedings . . . and could not have been discovered through the exercise of due diligence."<sup>205</sup> Not only does the potential for prosecutorial abuse exist, but the Statute also allows a diligent and zealous prosecutor to

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202. *Id.* art. 21(1).

203. *Id.* art. 25.

204. See BASSIOUNI & MANIKAS, *supra* note 39, at 979. It should be noted that civil law and common law systems define the concept of double jeopardy differently. See *id.* Whereas the United States considers an acquittal a final disposition, European countries allow the state to appeal acquittals based upon errors of law or fact. See *id.*

205. *Rules of Procedure and Evidence*, *supra* note 12, Rule 119.

pursue an acquitted defendant for several months as additional evidence becomes known.

The U.S. Supreme Court has held that, regarding U.S. law, "it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."<sup>206</sup> The Court expressed the policy underlying the ban on double jeopardy:

[T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.<sup>207</sup>

A special Task Force of the American Bar Association Section of International Law and Practice voiced its disapproval of the Prosecutor's right to appeal with the following statement:

While there certainly is a legitimate and strong interest in seeing those who have committed crimes against humanity brought to justice, there appears to be no reason to suppose that this interest is so compelling that it ought to override the considerations that underpin the widespread prohibition against double jeopardy. No civilized legal system places ascertainment of guilt and conviction above all other considerations. In the face of the enormous costs the possibility of a second trial for the same offense inflicts on an individual, and the slim chance that a second trial might result in a conviction, the prosecutorial appeal . . . hardly seems justified.<sup>208</sup>

Accordingly, the Statute should be changed so that defendants are not placed in double jeopardy through prosecutorial appeal.

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206. *Green v. United States*, 355 U.S. 184, 188 (1957).

207. *Id.* at 187-88.

208. Falvey, *supra* note 8, at 513 (quoting AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES IN THE FORMER YUGOSLAVIA 43 (1993)).

### F. The Right to Counsel

There are express provisions for the right to counsel<sup>209</sup> in the Statute,<sup>210</sup> Rules,<sup>211</sup> Rules of Detention,<sup>212</sup> and the Tribunal's Directive on Assignment of Defence Counsel (Directive).<sup>213</sup> Under the Statute, an accused has the right "to defend himself in person or through legal assistance of his own choosing."<sup>214</sup> Both the Statute<sup>215</sup> and the Rules<sup>216</sup> entitle suspects to the assistance of counsel when questioned by the Prosecutor. The Directive, which "lays down the conditions and arrangements for assignment of counsel,"<sup>217</sup> traces Rule 42 of the Rules of Procedure and Evidence and adds that an accused who has been served with an indictment has the right to counsel.<sup>218</sup> Finally, a detainee is entitled to communicate with his counsel on reasonable grounds.<sup>219</sup>

The imprecise definition of "suspect"<sup>220</sup> under the Rules creates a confused separation between suspects and mere witnesses. Although the Prosecutor should wield enough discretion to empower him to perform his functions effectively, whether the Prosecutor "possesses reliable information," and whether that information "tends to show that [a suspect] may have committed a crime" within the Tribunal's jurisdiction will often be difficult to answer. The result is a malleable definition. This unclear definition allows an opportunity for abuse because suspects, and not

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209. For an excellent discussion of the impediments defense counsel face before the Tribunal, see generally Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519 (1997).

210. See *Statute*, *supra* note 11, arts. 18(3), 21(d).

211. See *Rules of Procedure and Evidence*, *supra* note 12, Rule 42.

212. See *Rules of Detention*, *supra* note 94, Rule 12.

213. See *Directive on Assignment of Defence Counsel*, *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*, U.N. Doc. IT/73/Rev.4 (1997) [hereinafter *Directive*].

214. *Statute*, *supra* note 11, art. 21(4)(d).

215. See *id.* art. 18(3).

216. See *Rules of Procedure and Evidence*, *supra* note 12, Rule 42(A).

217. *Directive*, *supra* note 213, art. 1.

218. See *id.* art. 3.

219. See *Rules of Detention*, *supra* note 94, Rule 67. Rule 67 of the Rules of Detention also raises a privilege covering all communications between detainees and their defense counsel. See *id.* Detention unit staff may see, but may not directly or indirectly hear, meetings between counsel and detainee. See *id.* Additionally, the Registrar may refuse counsel access "if he has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media." *Id.* Rule 63(B). For an outline of the Rules of Detention, see *supra* note 94.

220. See *supra* note 155 and accompanying text.

witnesses, are entitled to the assistance of counsel.<sup>221</sup> The lack of judicial pretrial supervision or habeas corpus protection further heightens the potential for injustice.<sup>222</sup>

Consistent with several international conventions<sup>223</sup> and numerous national constitutions,<sup>224</sup> an indigent suspect or accused is entitled to appointed counsel.<sup>225</sup> Approved counsel are listed with the Registrar.<sup>226</sup> The criteria for determining indigence are established by the Registrar subject to judicial approval.<sup>227</sup> The mandatory language of Rule 45(C)(iii) provides: “[I]f [the Registrar] decides that the criteria are met, he *shall* assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.”<sup>228</sup>

However, it is unclear whether Article 21 of the Statute undercuts the right to counsel as provided in the Rules.<sup>229</sup> Article 21(4)(d) implicates a threshold burden, it appears, by allowing the assignment of counsel “in any case where the interests of justice so require.”<sup>230</sup> A showing of indigence should suffice to trigger the right to appointed counsel, and a *per se* rule should accordingly be established.

221. See Christopher L. Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT’L L. & POLY 233, 275 (1997) (commenting that many Continental and Common Law nations confront the same problem).

222. See *id.*

223. See *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Agenda Item 138, Principle 17(2), at 6, U.N. Doc. A/RES/43/173 (1989); *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16; *International Convention on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 54, U.N. Doc. A/6316 (1966) pt. III, art. 14(3)(d); *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 6(3)(c), 213 U.N.T.S. 221 § 1.

224. See Bassiouni, *supra* note 191, at 282.

225. See *Rules of Procedure and Evidence*, *supra* note 12, Rule 45(C)(iii).

226. Lawyers are eligible for appointment if they “speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44 and have indicated their willingness to be assigned.” *Id.* Rule 45(A). Counsel meets the requirements of Rule 44 by filing a power of attorney with the Registrar promptly after the suspect or accused engages him, and if he is either admitted to practice law in a State or is a university professor. See *id.* Rule 44.

227. See *id.* Rule 45(B).

228. *Id.* Rule 45(C)(iii) (emphasis added).

229. See BASSIOUNI & MANIKAS, *supra* note 39, at 876.

230. *Statute*, *supra* note 11, art. 21(4)(d). One could argue that these words pertain to an initial determination of indigence and nothing more; however, the Secretary-General’s comments do not clarify the meaning of this subparagraph, and it is possible that “the interests of justice” include something extra.

The counsel approval requirements of Rule 45(A)<sup>231</sup> fail to ensure that indigent defendants receive competent representation given the Tribunal's unique legal structure and its jurisdiction over violations of international humanitarian law. First, the Statute and Rules draw from both civil law and common law jurisprudence.<sup>232</sup> The differences between these two systems should not be discounted.<sup>233</sup> Defense attorneys accustomed to the adversarial common law system will be uneasy with the lack of technical rules to guide the admission of evidence, the judges' sole responsibility to determine the probative weight of evidence, the lack of plea bargaining, and the freedom of the Trial Chambers to order the production of new evidence on its own motion.<sup>234</sup> Further, the trial judges are from common law and civil law nations, whose backgrounds necessarily influence their decisions.<sup>235</sup> Defense lawyers must have the flexibility and confidence to argue issues persuasively with both systems in mind.<sup>236</sup> The counsel approval requirements under the Rules should be changed to require counsel to demonstrate some level of expertise in common law and civil law systems.<sup>237</sup> Next, the Rules should mandate that appointed defense counsel are competent to try cases involving international humanitarian law.<sup>238</sup> While the Tribunal focuses heavily on violations of international humanitarian law,<sup>239</sup> the "average attorney simply is not schooled in this practice."<sup>240</sup> Consequently, more is required of assigned counsel to effectively handle an international war crimes case than the Rules provide.<sup>241</sup>

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231. See *supra* note 226.

232. See Decision on Protective Measures, *supra* note 103, para. 22, at 150; Blakesley, *supra* note 221, at 270 ("The system created for the [Tribunal] straddles precariously between the Anglo-American or Common Law Systems and those of the 'Civil Law' world.").

233. See Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 SW. U. L. REV. 1161, 1161-62 (1990) (noting that, between the two systems, cultural, economic, and political "factors have created individuals with diverse attitudes and very distinct points of view about the legal norms that should regulate our conduct").

234. See Decision on Protective Measures, *supra* note 103, para. 22, at 150-51.

235. See Ellis, *supra* note 209, at 523.

236. See *id.* at 523-24.

237. See *id.* at 523.

238. See *id.*

239. See *supra* notes 81-84 and accompanying text.

240. Ellis, *supra* note 209, at 523.

241. See *id.*

Unless the Prosecutor questions the suspect, a suspect does not have a right to counsel during pretrial identifications under the Statute and Rules.<sup>242</sup> This lack of protection for suspects before the Tribunal poses great problems of fairness and reliability<sup>243</sup> during the identification process.<sup>244</sup> The U.S. Supreme Court has noted “the dangers inherent in a pretrial identification conducted in the absence of counsel:”

Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in subsequent testimony at trial.<sup>245</sup>

The court noted further that defense counsel can prevent any “suggestive features” of the identification procedure<sup>246</sup> through objections at the identification.<sup>247</sup> The Supreme Court of Canada has also held that lineup identification must be excluded from evidence when the police do not allow the suspect a reasonable opportunity to obtain counsel.<sup>248</sup>

The Rules also fail to express what the defense counsel’s role is during questioning.<sup>249</sup> For example, it is not clear upon what grounds defense counsel may base objections.<sup>250</sup>

242. See Falvey, *supra* note 8, at 493–94.

243. As the Statute contemplates that victims will bring allegations of rape and “other inhumane acts” to the Tribunal, the likelihood that a witness-victim will be susceptible to suggestiveness may be magnified. See *United States v. Wade*, 388 U.S. 218, 230 (1967). This is because these types of prosecutions “present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives.” *Id.*

244. See Falvey, *supra* note 8, at 494.

245. *Moore v. Illinois*, 434 U.S. 220, 224–25 (1977).

246. Suggestive practices sometimes involve photographs. See, e.g., *Simmons v. United States*, 390 U.S. 377, 383 (1968). The Court in *Simmons* recognized that the danger of misidentification “will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.” *Id.*

247. See *Moore*, 434 U.S. at 225.

248. See *Regina v. Ross* [1989] 1 S.C.R. 3. For additional reading, see Robert Harvie & Hamar Foster, *When the Constable Blunders: A Comparison of the Law of Police Interrogation in Canada and the United States*, 19 SEATTLE U. L. REV. 497, 520–21 (1996).

249. See BASSIOUNI & MANIKAS, *supra* note 39, at 877.

250. See *id.*

It seems that the Tribunal will need to cope with this issue as it arises.<sup>251</sup>

### III. CONCLUSION

As an ad hoc forum, the Tribunal is designed to prosecute and punish offenders within the unique context of a complex and inveterate conflict. Patterning a permanent international criminal court after this ad hoc tribunal, which was meant to “fit the task at hand,”<sup>252</sup> is problematic. For example, while the drafters of the Statute and Rules considered the provision granting victim and witness protection important under the circumstances, these same protections will be unnecessary in settings where threats to witnesses and victims are not as imminent.<sup>253</sup>

Moreover, the statute for a permanent international criminal court must accommodate the national sensitivities and reluctance that have historically hampered international cooperation.<sup>254</sup> The permanent tribunal’s legitimacy will depend in large part on the procedures used to determine guilt. There will be a positive correlation between fair treatment of the accused and a nation’s willingness to abjure jurisdiction to a permanent forum.

Accordingly, the Tribunal’s Statute and Rules pose a dual threat. First, the current provisions fail to guarantee the accused a fair trial before the Tribunal. Second, as models for a permanent tribunal, the Statute and Rules would endanger the legitimacy and threaten the prospects of a successful and enduring international criminal court.<sup>255</sup>

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251. *See id.* Some commentators suggest that Rule 71(E), which requires the Presiding Officer to keep a record of depositions, should guide the conduct of questioning suspects. *See id.*

252. Decision on Protective Measures, *supra* note 103, para. 23, at 151.

253. For criticism of the victim and witness protection provisions under the Statute and Rules, see *supra* Part II.A.

254. *See, e.g., supra* Part I.A.

255. *See* Falvey, *supra* note 8, at 478. The notion of “victor’s justice” has hindered past efforts to establish a permanent court. *See, e.g.,* Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 192 (1995). The criticism is that it is unfair for the successful countries in a conflict to be the only arbiters of guilt in trials solely against the citizens of defeated countries. *See id.* For example, at the Nuremberg trials before the International Military Tribunal, all of the judges were citizens of Allied countries while the defendants were citizens of Axis power countries. *See id.*; *see also* Bernard D. Meltzer, “War Crimes”: *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 896 (1996). The Tribunal, however, is “free from concern about ‘victor’s justice.’” *Id.* at 909. Rather, it is the political and military leaders

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of the group that dominated—the Bosnian Serbs—who are the targets for prosecution. *See id.*

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