

# *Fordham International Law Journal*

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*Volume 19, Issue 2*

1995

*Article 9*

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## Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine

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# Foreign Private Investment in Palestine: An Analysis of the Law on the Encouragement of Investment in Palestine

David P. Fidler

## **Abstract**

This Article analyzes the Investment Law and its prospects for encouraging foreign businesses to invest in Gaza and the West Bank (collectively, “Palestinian Territories”).

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

*Joseph L. Falvey, Jr.\**

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### INTRODUCTION

On July 25, 1995, an international war crimes tribunal handed down indictments against the Bosnian Serb leader, Dr. Radovan Karadžić, and his top military commander, General Ratko Mladic.<sup>1</sup> With this indictment, the international community took another step in a process that began when the United Nations ("U.N.") Security Council created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ("Tribunal") in 1991.<sup>2</sup>

Since its creation, the Tribunal's jurisdiction and the substantive crimes it will likely consider have generated considerable academic interest.<sup>3</sup> The Tribunal's rules of procedure and

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1. Marlise Simons, *Conflict in the Balkans: War Crimes; U.N. Tribunal Indicts Bosnian Serb Leader and a Commander*, N.Y. TIMES, July 26, 1995, at A9. Dr. Karadžić and General Mladic were indicted along with 22 other individuals and were charged with genocide, crimes against humanity, and war crimes. *Id.* The Tribunal handed down its first indictment on November 7, 1994, against Dragan Nikolic, a former concentration camp commander. Roger Cohen, *Serb is First to Face Post-World War II War-Crimes Indictment*, N.Y. TIMES, Nov. 8, 1994, at A5. The Tribunal has now indicted 52 individuals. Fifty-one of those indicted, including Dr. Karadžić and General Mladic remain at large. Chris Hedges, *War Crimes Tribunal Indicts 6 Bosnian Croats*, N.Y. TIMES, Nov. 14, 1995, at A3. Only one, Dusan Tadic, has been extradited to the seat of the tribunal at The Hague, where he is currently awaiting trial. *Id.*

2. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993) (deciding that international tribunal should be established and directing Secretary-General to prepare proposal in this regard for Security Council consideration); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203, 1204. Security Council Resolution 827 created the Tribunal by adopting the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163 [hereinafter *Report On Establishing the Tribunal*]. The annex to the *Report On Establishing the Tribunal* contains the Statute of the International Tribunal. *Report on Establishing the Tribunal, supra*, Annex at 36, U.N. Doc. S/25704 (1993), 32 I.L.M. 1192 [hereinafter *Tribunal Statute*].

3. See generally, Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993); Theodore Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993) [hereinafter *Rape as a Crime*]; Theodore Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994) [hereinafter *War Crimes Law*]; James C. O'Brien, *The International Tribunal for*

evidence,<sup>4</sup> however, have not received the same scrutiny,<sup>5</sup> paralleling the academic treatment of the Nuremberg trials.<sup>6</sup> The practical application of the Tribunal's procedural and evidentiary rules compels analysis and deserves comment. As trials approach, we owe it to the international community, to the victims of war crimes, and to those who may stand accused before such tribunals ("the accused") to thoroughly analyze the Tribunal's procedural and evidentiary rules.

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*Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1994); Elizabeth A. Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor's Justice?*, 30 AM. CRIM. L. REV. 1373 (1993); 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 BERKLEY WOMEN'S L.J. 77 (1994); Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281 (1994); Paul C. Szasz, *The Proposed War Crimes Tribunal for Ex-Yugoslavia*, 25 N.Y.U. J. INT'L L. & POL. 405 (1993); Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845 (1995); Daniel B. Pickard, Comment, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435 (1995); Mark A. Bland, Note, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects*, 2 IND. J. GLOBAL LEGAL STUD. 233 (1994); David M. Kresock, Note, *"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203 (1994); Jordan J. Paust, Recent Development, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994); Keith E. Puls, Book Review, 12 B.U. INT'L L. J. 139 (1994) (reviewing AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA). See Symposium, *War Crimes: Bosnia and Beyond*, 34 VA. J. INT'L L. 255 (1994); *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM L.F. 223 (1995) (providing symposia discussions of Tribunal).

4. 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 (1994), amended by U.N. Doc. IT/32/Rev.1 (1994), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/32/Rev.3 (1995); 33 I.L.M. 484 [hereinafter I.T.R.P.E.].

5. But see Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM L.F. 507 (1995).

6. The American Bar Association has commented on the lack of scholarly analysis of the procedural rules used at the Nuremberg trials and the need for such analysis of the Tribunal's rules:

Particularly when compared to the analysis of substantive law applied by the [International Military Tribunal], discussion of the criminal procedures used at Nuremberg has been scant. . . . The lack of scholarly analysis of the Nuremberg procedures is unfortunate. Procedural issues at the Tribunal are likely to be complicated and difficult, and a more complete scholarly analysis of the Nuremberg procedures would have been helpful.

AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 8 (1993) (citations omitted)[hereinafter TASK FORCE REPORT].

Such analysis is important for two reasons. First, the establishment of the Tribunal is of precedential importance in what is likely to be an era marked by increased international cooperation<sup>7</sup> and humanitarian intervention.<sup>8</sup> In this regard, the Tribunal and its rules will serve as precedent not only for other *ad hoc* tribunals,<sup>9</sup> but also for a permanent international criminal court patterned after the International Court of Justice.<sup>10</sup> Thus, the Tribunal should ensure its rules are models of fairness and due process. Second, although concurrent with the jurisdiction of

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7. The likelihood of such tribunals may increase due to the collapse of international communism resulting in a commensurate increase in international cooperation and the fracturing of many countries resulting in a commensurate increase in "international" conflicts.

8. International consensus increasingly views humanitarian intervention as a legitimate purpose for the use of force. Historically, concepts of self-defense or collective self-defense justified use of force. The use of force to intervene in the internal domestic affairs of another state, however, has not generally been viewed as legitimate. See U.N. CHARTER arts. 2, ¶ 7, 51. There is, however, the evolving concept that the use of force may be justified on the grounds of "humanitarian intervention." See generally Lois E. Fieldink, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995).

The U.N. intervention in Somalia provides an example of humanitarian intervention. During 1992 and 1993, the images of starving Somali children prompted U.N. enforcement action under Chapter VII of the U.N. Charter in an internal situation. S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 1, U.N. Doc. S/RES/837 (1993). A further example is provided by the U.N. intervention in Haiti in 1994. S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 1, U.N. Doc. S/RES/940 (1994).

The reliance on humanitarian intervention to justify intervention in the internal affairs of another state heralds a "revolutionary change in our conception of the authority of the United Nations to enforce peace in such situations." *Rape as a Crime*, *supra* note 3, at 424.

9. See, e.g., S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (establishing *ad hoc* international tribunal to prosecute genocide in Rwanda); John D. McKinnon, *Traveling Human Rights Lawyer*, A.B.A. J., Mar. 1994, at 40 (discussing tribunal established to prosecute human rights violations in Ethiopia).

10. In 1950, the United Nations International Law Commission ("ILC") first proposed a permanent international criminal court. *Report of the International Law Commission on the Question of Criminal Jurisdiction* U.N. Doc. A/CN.4/15 (1950). For the next 45 years, the proposal languished because states could not come to a consensus as to the governing law, nor would states willingly cede a portion of their sovereignty. See generally 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 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991). The success of the international community in creating the Tribunal for the former Yugoslavia has sparked renewed interest in a permanent international criminal court. The ILC recently completed a draft statute for a permanent tribunal and a draft code of crimes. See generally James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994).

national courts, the Security Council resolution creating the Tribunal gives it primary jurisdiction over all war crimes committed within the territory of the former Yugoslavia including, at least theoretically, those committed by U.N. and U.S. forces.<sup>11</sup>

This jurisdictional issue becomes increasingly important as the United States and other nations prepare to deploy troops in Bosnia to act as peacekeepers.<sup>12</sup> Absent the primary jurisdiction of the Tribunal, the military would prosecute U.S. service members and foreign nationals in U.S. custody accused of violating international humanitarian law under the U.S. Uniform Code of Military Justice ("UCMJ").<sup>13</sup> Although commentators and jurists have often scrutinized and criticized the military justice system,<sup>14</sup>

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11. *Report On Establishing the Tribunal*, *supra* note 2, at 9, 18, ¶¶ 32-33, 69; *Tribunal Statute*, *supra*, note 2, art. 1, U.N. Doc. S/25704, at 36, 32 I.L.M. at 1192.

12. Elaine Scioleno, *All Sides Make Concessions to End 4 Years of Conflict*, N.Y. Times, Nov. 22, 1995, at A1.

13. 10 U.S.C. §§ 801-940 (1988 & Supp. V 1993). Article 2 of the Uniform Code of Military Justice ("UCMJ") confers courts-martial jurisdiction over various categories of U.S. service members. 10 U.S.C. § 802. Article 18 of the UCMJ authorizes the armed forces to try by general courts-martial anyone subject to trial for violations of the law of war. 10 U.S.C. § 818. Alternatively, Article 21 of the UCMJ authorizes the use of military commissions, tribunals, or provost courts to try individuals for war crimes violations. *Id.* If general courts-martial tried the accused, the rules of evidence and procedure contained in the MANUAL FOR COURTS-MARTIAL, UNITED STATES would govern the proceedings. If a military commission, tribunal, or provost court tried the accused, the President is required to establish rules of evidence and procedure. 10 U.S.C. § 836. Absent action by the President to set such rules, military commissions, tribunals, and provost courts are required to be guided by the principles of law and rules of procedure and evidence prescribed for courts-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pmbl., ¶ 2(b)(2) (1994). Thus, absent the international tribunal, military personnel and foreign nationals in U.S. custody would enjoy the protection of the UCMJ. *See generally* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

Certainly, the United States could require waiver of primary jurisdiction as a condition precedent to committing troops to the conflict. Such a "waiver back" provision is common to stationing agreements between the U.S. Government and host nations. *See, e.g.*, Supplementary Agreement to the NATO Status of Forces Agreement with Respect to the Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, art. 19, TIAS No. 5351, 14 U.S.T. 531, 552; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, art. XXII, ¶ 3(c), TIAS No. 6127, 17 U.S.T. 1677, 1695. Requiring a waiver of primary jurisdiction, however, risks calling into question the legitimacy of the Tribunal and the fairness of its rules and procedures.

14. *See generally* Michael I. Spak, *Military Justice: The Oxymoron of the 1980's*, 20 CAL. W. L. REV. 436, 438 (1984); ROBERT SHERRIL, *MILITARY MUSIC IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970). *See also* O'Callahan v. Parker, 395 U.S. 258, 265 (1969) ("A court-martial is not yet an independent instrument of justice but remains to a signifi-

the rules of the Tribunal have not received similar scrutiny to determine whether they adequately protect individual rights. The Tribunal's rules are no less important, should receive similar scrutiny and, insofar as the rules are found to be less protective of the accused than the UCMJ, criticism. For those who view Anglo-American notions of due process and substantive rights as the ultimate standards by which any criminal justice system is measured, the fundamental question should be whether such persons would allow themselves to be tried by such a tribunal.

This Article compares the protections and rights provided an accused before the Tribunal with those protections and rights provided an accused before U.S. courts-martial.<sup>15</sup> Part I provides an overview of the statute creating the Tribunal and identifies

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cant degree a specialized part of the overall mechanism by which military discipline is preserved. . . . [C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."); *Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("[M]ilitary tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.").

More recently, the U.S. Supreme Court has expressed confidence in the military justice system in a series of decisions. See *United States v. Solorio*, 483 U.S. 435, 450-51 (1987) (granting military universal jurisdiction over offenses committed by service members); *Weiss v. United States*, 114 S. Ct. 752, 762 (1994) ("[T]he applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."); *Davis v. United States*, 114 S. Ct. 2350, 2354 (1994) (using military justice system case to resolve split within Circuit Courts of Appeals). The military justice system is not without its defenders. For a favorable comparison of the military justice system to the U.S. civilian justice system, see Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice*, CRIM. JUST., Summer 1990, at 2.

15. Although the military justice system provides for three different types of courts-martial (general, special, and summary), for the purposes of this Article, "court-martial" refers to general court-martial. Depending on the severity of the offense, authorized general court-martial punishments include: punitive censure, punitive separation from the service such as bad conduct or dishonorable discharge, confinement for life, and death. *Manual for Courts-Martial, United States 1003* (1995 ed.), Rules for Court Martial [hereinafter R.C.M.]. A special court-martial is similar to a general court-martial except for the maximum punishment. In a special court-martial, authorized punishments include: confinement for six months, reduction to the grade of private, forfeitures totaling not more than two-thirds pay per month for six months, and a bad conduct discharge. R.C.M. 201(f)(2)(B). A summary court-martial provides a simple procedure for adjudicating relatively minor offenses. R.C.M. 1301(b). In a summary court-martial, the maximum punishment that may be adjudged is relatively minor. Punishments include: confinement for 30 days, reduction to the grade of private, and forfeiture of two-thirds pay per month for one month. R.C.M. 1301(d). The relatively low maximum punishments given in special and summary courts-martial make them highly unlikely forums for a war crime allegation.



the general principles the statute appears to advance. Part II analyzes the Tribunal's procedural and evidentiary rules, compares these rules to the analogous military rules, and discusses how well the Tribunal rules comport with the general principles advanced by the statute. This Article concludes that the Tribunal rules, although fundamentally sound, are not as protective of the individual rights of the accused as the military justice system and recommends modifications of the Tribunal rules to remedy the noted deficiencies.

## I. THE STATUTE OF THE INTERNATIONAL TRIBUNAL

### A. Background

Daily newscasts reveal that widespread atrocities were committed in the territory of the former Yugoslavia for much of the post four years.<sup>16</sup> These crimes include ethnically motivated killings, genocide, massacres, torture, systematic rape, the expulsion of thousands from their traditional homes, and the targeting of civilians.<sup>17</sup> The most notable atrocities involve the practice of ethnic cleansing.<sup>18</sup>

By February 1993, events persuaded the U.N. Security Council to declare that these atrocities constituted "a threat to inter-

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16. See, e.g., John Pomfret, *Atrocities Leave Thirst for Vengeance in Balkings*, WASH. POST, Dec. 18, 1995, at A1 (describing atrocities in war torn territory).

17. See, e.g., Steve Coll, *In the Shadow of the Holocaust*, WASH. POST MAG., Sept. 25, 1994, at 8 (describing acts of torture in wartime detention camps).

18. Letter Dated 24 May 1994 From the Secretary-General to the President of the Security Council, at 33, U.N. Doc. S/1994/674 (1994) (containing the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 Add. 2, Vol. 1-5 (1992)) [hereinafter *Final Report*]. Ethnic cleansing has been defined as "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area." *Id.* Professor Theodore Meron provides the following description of the practice of ethnic cleansing and its relationship to international human rights law:

Ethnic cleansing consists of harassment, discrimination, beatings, torture, summary executions, expulsions, forced crossing of the lines between combatants, intimidation, destruction of secular and religious property, mass and systematic rape, arbitrary arrests and executions, deliberate military attacks on civilians and civilian property, uses of siege and cutting off essential supplies destined for civilian populations. Many of these methods, considered in isolation constitute a war crime or a grave breach. Considered as a cluster of violations, these practices constitute crimes against humanity and perhaps also crimes under the Genocide Convention.

Theodore Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1994, at 122, 132 [hereinafter *War Crimes Trials*].

national peace," and that the creation of an *ad hoc* international criminal tribunal would "contribute to the restoration of peace."<sup>19</sup> Accordingly, the Security Council requested the Secretary-General to prepare a report detailing all aspects of implementing its decision to create a tribunal.<sup>20</sup> On May 8, 1993, the Secretary-General completed his report and presented it to the Security Council with a proposed statute for an international tribunal.<sup>21</sup> On May 25, 1993, the Security Council established the Tribunal by unanimously adopting the proposed statute.<sup>22</sup>

The Tribunal is the first international war crimes tribunal since those established to judge German and Japanese leaders at the end of World War II.<sup>23</sup> Like the Tokyo and Nuremberg trials, the Tribunal will hold accuseds individually responsible for the charges against them,<sup>24</sup> and accuseds will not be able to argue that they acted under orders<sup>25</sup> or that subordinates actually

19. S.C. Res. 808, *supra* note 2. These two findings are necessary prerequisites to U.N. action. U.N. CHARTER arts. 39, 41, 42. These findings, in the context of violations of humanitarian law in the former Yugoslavia, are of precedential importance:

The singling out of violations of humanitarian law as a major factor in the determination of a threat to the peace creates an important precedent, and the establishment of the tribunal as an enforcement measure under the binding authority of chapter VII, rather than through a treaty creating an international criminal court whose jurisdiction would be subject to the consent of the states concerned, may foreshadow more effective international responses to violations of humanitarian law.

*War Crimes Law*, *supra* note 3, at 79.

20. S.C. Res. 808, *supra* note 2.

21. *Report On Establishing the Tribunal*, *supra* note 2, at 3, ¶¶ 1-3.

22. S.C. Res. 827, *supra* note 2.

23. *See generally* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280 (setting forth "London Charter" establishing "International Military Tribunal" or Nuremberg Tribunal to try Nazi war criminals); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20 [hereinafter *International Tribunal*]. *But see generally* AGAINST THE CRIME OF SILENCE (PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL) (J. Duffett ed., 1968) (chronicling case in which United States was found guilty of war crimes committed during Vietnam War); RAMSEY CLARK, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* (1992) (detailing war crimes allegedly committed by United States during Persian Gulf War and "international" tribunal which found United States guilty of these alleged crimes).

24. *Report On Establishing the Tribunal*, *supra* note 2, at 14-15, ¶¶ 53-59; *Tribunal Statute*, *supra* note 2, art. 7, U.N. Doc. S/25704, at 38-39, 32 I.L.M. at 1193-94.

25. *Report On Establishing the Tribunal*, *supra* note 2, at 15, ¶ 57; *Tribunal Statute*, *supra* note 2, art. 7, ¶ 4, U.N. Doc. S/25704, at 38-39, 32 I.L.M. at 1193-94.

carried out the alleged crimes.<sup>26</sup>

Unlike the Nuremberg and Tokyo trials, however, the Tribunal is unlikely to have the support of the governments in control of the territory where the crimes were committed or their assistance in delivering to the proper authorities those indicted by the Tribunal. This lack of support preempts the criticism aimed at the Nuremberg and Tokyo courts; that they were essentially victors' courts imposing victors' justice. This same lack of support, however, will make evidence gathering<sup>27</sup> and detention of suspects difficult. Moreover, the world community may lose interest in an international tribunal, looking instead to the leaders of the warring factions to provide leadership and stability in this volatile region.<sup>28</sup>

Despite these potential difficulties and the international community's initial skepticism, the Tribunal has made tremendous progress in the two years since its creation: judges have been selected; the Tribunal has adopted its rules of procedure and evidence; a prosecutor has been selected and has formed a prosecutorial team; construction has begun on a detention facility; indictments have been confirmed; and one suspect is in custody.<sup>29</sup> Trials appear imminent.

Before discussing the evidentiary and procedural rules and comparing them with analogous military rules it is important to identify and discuss the principles sought to be advanced by the United Nations in creating the Tribunal. Review of the Tribu-

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26. *Report On Establishing the Tribunal*, *supra* note 2, at 15, ¶ 56; *Tribunal Statute*, *supra* note 2, art. 7, ¶ 3, U.N. Doc. S/25704, at 39, 32 I.L.M. 1194.

27. Some commentators have indicated that evidence gathering may prove difficult due to the absence of a vast "paper-trail," similar to the one left by the Germans. *War Crimes Trials*, *supra* note 18, at 133. This difficulty is more than offset, however, by the investigative and evidence gathering efforts of the U.N. Commission of Experts and other organizations. See generally *Final Report*, *supra* note 18 (documenting efforts to investigate human rights violations in former Yugoslavia); 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).

28. Although the peace accord entered into on November 21, 1995 prohibits those indicted from running for political office, the accord is silent regarding any requirement to cooperate with the Tribunal or deliver those indicted to the Tribunal for trial. Sciolino, *supra* note 12, at A1. It is too early to judge whether the United States Military or other peacekeeping forces will attempt to take into custody those indicted by the Tribunal.

29. See generally Barbara Franklin, *A Tribunal Waiting for Work*, A.B.A. J., June 1995, at 30; Coll, *supra* note 17; Barbara Franklin, *Bosnia: The New Nuremberg*, NAT'L L.J., Sept. 26, 1994, at 1.

nal's statute—its charter—reveals three overriding principles: (1) a commitment to prosecuting only violations of well established customary international law; (2) a commitment to ensuring fair trials for those accused; and (3) a commitment to protecting victims and witnesses.

### B. *Substantive Law*

The U.N. Security Council established the Tribunal to try those responsible for the lengthy list of atrocities committed by the participants in the conflict in the former Yugoslavia.<sup>30</sup> The subject matter jurisdiction of the Tribunal, however, is limited to "serious violations of international humanitarian law."<sup>31</sup> The statute identifies four categories of crimes within this jurisdiction: grave breaches of the Geneva Conventions;<sup>32</sup> violations of the laws or customs of war;<sup>33</sup> genocide;<sup>34</sup> and crimes against humanity.<sup>35</sup>

In limiting the Tribunal's jurisdiction to these categories of crimes, the Security Council applied the principle of *nullum crimen sine lege* — no crime without law.<sup>36</sup> The Secretary-General stressed adherence to this principle, stating that the Tribunal would not be creating new law, but would have the task of applying existing international humanitarian law.<sup>37</sup> Thus, it appears that only these general categories of crimes that are "beyond doubt . . . part of international customary law . . . applicable in armed conflict,"<sup>38</sup> and specific acts that fall within the accepted definitions of these crimes, fall within the Tribunal's subject mat-

30. *Final Report*, *supra* note 18, ¶ 127.

31. *Report On Establishing the Tribunal*, *supra* note 2, at 9, ¶ 33.

32. *Tribunal Statute*, *supra* note 2, art. 2, U.N. Doc. S/25704, at 36, 32 I.L.M. at 1192.

33. *Id.* art. 3, U.N. Doc. S/25704, at 37, 32 I.L.M. at 1192.

34. *Id.* art. 4, U.N. Doc. S/25704, at 37-38, 32 I.L.M. at 1192-93.

35. *Id.* art. 5, U.N. Doc. S/25704, at 38, 32 I.L.M. at 1193-94.

36. *Report On Establishing the Tribunal*, *supra* note 2, at 9, ¶ 34.

37. *Id.* at 8, ¶ 29. The *Report On Establishing the Tribunal* states:

[I]n assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

*Id.* This will also avoid the difficulty presented by the "adherence of some but not all States to specific conventions." *Id.* at 9, ¶ 34.

38. *Id.* at 9, ¶ 35.

ter jurisdiction. Other violations of international humanitarian law, as well as ordinary crimes, do not fall within the Tribunal's jurisdiction and remain punishable only by national courts.

### C. *Fair Trials and Fundamental Rights*

The ultimate success of the Tribunal will not be measured by its volume of prosecutions, but by the perception of the Tribunal within the international community. A positive perception of the conduct of trials will add immeasurably to the legitimacy of the Tribunal and may create precedent for a permanent tribunal established to deal with violations of international humanitarian law. The Tribunal's statute requires it to ensure that trials are "fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused."<sup>39</sup> In addition to this broad mandate, the statute enumerates the specific rights of the accused. In enumerating these rights, the Secretary-General indicated that "the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings."<sup>40</sup> In his view, these internationally recognized standards are codified in Article 14 of the International Covenant on Civil and Political Rights.<sup>41</sup> These rights include the right to a fair and public hearing, the right to be informed of the nature and cause of the charges, the right to adequate time and resources to prepare a defense, the right to be tried without undue delay, the right to counsel, the right to examine (or have examined) witnesses, and the right against self-incrimination.<sup>42</sup>

In addition to these individual rights, the statute provides for a presumption of innocence.<sup>43</sup> Although the statute implicitly allocated this burden to the prosecution by indicating the presumption continues until the accused is proved guilty,<sup>44</sup> it did not provide for a standard by which the prosecutor overcomes

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39. *Id.* at 25, ¶ 99.

40. *Id.* at 27, ¶ 106.

41. *Id.* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 1977 Gr. Brit. T.S. No. 6 (Cmnd. 6702).

42. *Tribunal Statute, supra* note 2, art. 21, U.N. Doc. S/25704, at 44, 32 I.L.M. at 1198.

43. *Id.* art. 21, U.N. Doc. S/25704, at 44-45, 32 I.L.M. at 1198-99.

44. *Id.*

the presumption.<sup>45</sup> Commentators criticized the failure to establish such a standard and urged that the Tribunal require proof beyond a reasonable doubt to overcome this presumption.<sup>46</sup> Eventually, the Tribunal adopted this standard in its procedural and evidentiary rules.<sup>47</sup> Taken together, the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt will ensure that the accused receives a fundamentally fair trial. If the Tribunal adopted any lesser standard, it would call the validity of any convictions into question and cloud the process.

Finally, the Tribunal's statute provides that accuseds have the right to be present and participate in their own defense—trials *in absentia* are prohibited.<sup>48</sup> This conforms to the International Covenant on Civil and Political Rights which requires the accused's presence.<sup>49</sup> Absent total victory by the Bosnian Government, the Tribunal will probably not receive assistance from the authorities that control the territory where many of the crimes were committed.<sup>50</sup> Accordingly, some countries proposed conducting the trials *in absentia*.<sup>51</sup> Although the Nuremberg Charter permitted trials *in absentia*,<sup>52</sup> such trials would be inherently vulnerable to abuse and would violate basic norms of due process.<sup>53</sup> Therefore, the Security Council prohibited them.

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45. This is consistent with the Nuremberg and Tokyo trials where there was no expressed standard of proof. Charter of the International Military Tribunal, Aug. 8, 1945, art. 26, 59 Stat. 1546, 1552, 82 U.N.T.S. 284, 300 [hereinafter Nuremberg Charter]; International Tribunal, *supra* note 23, art. 17, T.I.A.S. No. 1589, at 11, 4 Bevens at 32.

46. TASK FORCE REPORT, *supra* note 6, at 26-29.

47. I.T.R.P.E., *supra* note 4, R. 87(A), at 36.

48. *Report On Establishing the Tribunal*, *supra* note 2, at 27, ¶ 101.

49. International Covenant on Civil and Political Rights, *supra* note 41, art. 14(3)(d), 999 U.N.T.S. at 171, 1977 Gr. Brit. T.S. No. 6 at 27.

50. *War Crimes Trials*, *supra* note 18, at 133. Even given lasting peace or total victory by one side or the other, it is likely the victorious government would resist efforts to prosecute alleged war-criminals within its own ranks.

51. See, e.g., Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, 5 CRIM. L. F. 341, 370 (1995).

52. Nuremberg Charter, *supra* note 45, art. 12, 59 STAT. at 1548, 82 U.N.T.S. at 290.

53. *War Crimes Trials*, *supra* note 18, at 125. As an alternative to trials in absentia, the United Nations could require delivery of suspects as a condition precedent to normalizing relations with the victor. *Id.* at 134. This could prove difficult, however, when the one sought is the one being negotiated with by the United Nations. Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 500 (1994).

[S]ome of the Serbian, Muslim, and Croatian political and military leaders

#### D. Victim and Witness Protection

Due to the nature of some of the crimes involved, particularly rape, the Security Council required the Tribunal to provide for victim and witness protection in its rules of procedure and evidence, including provision for *in camera* proceedings and the protection of victim identity.<sup>54</sup> The placement of this rule within the Tribunal's statute, immediately after the article governing the rights of the accused, recognizes that the rules must balance victim and witness protection with the rights of the accused, particularly the right to examine witnesses.

Thus, the Tribunal's statute appears to advance three general principles: (1) the Tribunal should only prosecute those crimes that are beyond doubt part of customary international law; (2) the accused should receive a fair trial with certain fundamental rights guaranteed; and (3) the Tribunal should protect victims and witnesses.<sup>55</sup> If a conflict arises between these principles, the first principle should control over the other two, and the second principle should control over the third. The basis of this assertion is that the first principle relates to subject matter jurisdiction. Absent such jurisdiction, the accused would not be before the Tribunal and there would be no trial. Once properly before the Tribunal, the right to a fair trial is fundamental. The protection of victims and witnesses, although a laudable goal, must yield to the right to a fair trial when the two conflict. The Tribunal's rules of procedure and evidence should reflect these three principles and balance one against the other when necessary.

## II. RULES OF PROCEDURE AND EVIDENCE

Despite the great detail of the resolution creating the Tribu-

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who are potential targets of the tribunal are participating in the peace negotiations. Is it realistic to expect them to agree to a peace settlement in Bosnia if, directly following the agreement, they may find themselves in the dock?

*Id.*

54. *Report On Establishing the Tribunal*, *supra* note 2, at 28, ¶ 108.

55. Beyond the provisions regarding subject matter jurisdiction, the rights of the accused, and victim and witness protection, the remainder of the statute details "the organization of the [I]nternational [T]ribunal, the investigation and pre-trial proceedings, trial and post-trial proceedings, and cooperation and judicial assistance . . . and a number of general and organizational issues." *Report On Establishing the Tribunal*, *supra* note 2, at 6, ¶ 16.

nal, the Security Council delegated certain responsibilities to the Tribunal including the responsibility to formulate "rules of procedure and evidence . . . governing the pre-trial phase of the proceedings, the conduct of trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."<sup>56</sup>

On May 28, 1993, the U.S. Government formed a working group composed of criminal and international lawyers to prepare proposed evidentiary and procedural rules for the Tribunal. The objective of the group was to create fair judicial processes—fair to the degree that would be acceptable for the prosecution of its own citizens. On November 18, 1993, the U.S. Government submitted proposed rules to the Tribunal through the American jurist serving on the Tribunal.<sup>57</sup> On February 11, 1994, the Tribunal adopted rules<sup>58</sup> that relied heavily on the proposal submitted by the U.S. Government.<sup>59</sup>

#### A. *Pretrial Procedure*

In general, the Tribunal's statute and rules provide for six procedural steps in the pretrial stage. First, the prosecutor has unlimited discretion to initiate an investigation.<sup>60</sup> During the investigative stage, the prosecutor has the power to "summon and question suspects, victims and witnesses . . . , collect evidence and conduct on-site investigations."<sup>61</sup> The prosecutor also has the broad power to take measures necessary to complete an investigation and to conduct a prosecution.<sup>62</sup> Second, if the prosecutor determines that a *prima facie* case exists, the prosecutor

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56. *Id.* at 21, ¶ 83; *Tribunal Statute*, *supra* note 2, art. 15, U.N. Doc. S/25704, at 42, 32 I.L.M. at 1196.

57. Letter from James P. Terry, Legal Counsel to the Chairman, Joint Chiefs of Staff, to Michael C. Wholley, Staff Judge Advocate to the Commandant of the Marine Corps (Nov. 19, 1993) (on file with *Fordham International Law Journal*). The American jurist serving on the Tribunal is Professor Gabriel Kirk McDonald of the University of Houston Law School.

58. I.T.R.P.E., *supra* note 4.

59. Nsereko, *supra* note 5, at 508.

60. *Report On Establishing the Tribunal*, *supra* note 2, at 24-25, ¶ 98; *Tribunal Statute*, *supra* note 2, art. 18, U.N. Doc. S/25704, at 43, 32 I.L.M. at 1197-98.

61. I.T.R.P.E., *supra* note 4, R. 39(i), at 18.

62. *Id.* 39(ii), at 18. The prosecutor has the power to "undertake such other measures as may appear necessary for completing the investigation . . . and conduct of the prosecution." *Id.*



prepares an indictment.<sup>63</sup> Third, the prosecutor transmits the indictment to a designated trial chamber judge. Fourth, the designated trial chamber judge confirms the indictment if he or she agrees that it presents a *prima facie* case. Otherwise, the judge dismisses the indictment.<sup>64</sup> Fifth, if the indictment is confirmed, the judge issues an arrest warrant for the accused if the accused is not already in the Tribunal's custody.<sup>65</sup> After the accused's arrest and transfer to the control of the Tribunal, the accused is brought before a trial chamber judge for an arraignment proceeding and a date for trial is established.<sup>66</sup> During the pretrial stage, various issues arise concerning the right against self-incrimination, the right to counsel, the indictment and indictment-confirmation process, pretrial detention, speedy trial, and discovery.

### 1. The Right Against Self-Incrimination

The Tribunal's statute provides that the accused has the right "not to be compelled to testify against himself or to confess guilt."<sup>67</sup> The Tribunal enacted two procedural rules implementing this provision. In Rule 55, the Tribunal requires that arrest warrants issued by the Tribunal contain a statement of rights of the accused<sup>68</sup> including "the right to remain silent, and to be cautioned that any statement [made] shall be recorded and used in evidence."<sup>69</sup> Rule 63 provides that:

After initial appearance of the accused the prosecutor shall not question him unless his counsel is present. . . . The prosecutor shall at the beginning of the questioning caution the accused that he is not obliged to say anything unless he wishes to do so but that whatever he says may be given in

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63. *Report On Establishing the Tribunal*, *supra* note 2, at 24-25, ¶ 98. The Tribunal rules replace the phrase "*prima facie* case" with the phrase "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime." I.T.R.P.E., *supra* note 4, R. 47(A), at 21.

64. *Report On Establishing the Tribunal*, *supra* note 2, at 24-25, ¶ 98; *Tribunal Statute*, *supra* note 2, art. 19, ¶ 1, U.N. Doc. S/25704, at 43, 32 I.L.M. at 1198.

65. I.T.R.P.E., *supra* note 4, R.R. 54-61, at 23-26.

66. *Id.* R. 62, at 26.

67. *Report On Establishing the Tribunal*, *supra* note 2, at 27, ¶ 107; *Tribunal Statute*, *supra* note 4, art. 21.4(g), U.N. Doc. S/25704, at 45, 32 I.L.M. at 1199.

68. The Tribunal rules define "accused" as "[a] person against whom an indictment has been submitted" to the designated trial chamber judge for confirmation. I.T.R.P.E., *supra* note 4, R. 2(A), at 4.

69. *Id.* R. 55(A), at 24.

evidence.<sup>70</sup>

Under these rules, the right to remain silent, and the requirement that the accused be advised of this right, appear to attach, at the earliest, when an individual is the subject of an arrest warrant. Practically speaking, however, the accused will not be informed of this right until the arrest warrant is executed and the accused is arrested. The accused would again be advised of this right during questioning by the prosecutor after the initial appearance of the accused. The initial appearance of the accused occurs when the accused is "brought before a [t]rial [c]hamber" of the Tribunal to be formally charged after the individual has been indicted and arrested.<sup>71</sup> These rules parallel the protections of *Miranda v. Arizona*,<sup>72</sup> which requires a law enforcement officer to warn an individual of his or her rights under the Fifth Amendment of the U.S. Constitution before subjecting him or her to custodial interrogations.<sup>73</sup>

Under the Tribunal rules, an individual suspected of a crime who is not yet in custody is also warned of his or her right to remain silent. Under Rule 42, which details the rights of a "suspect who is to be questioned by the [p]rosecutor," the prosecutor is required to inform suspects<sup>74</sup> of "the right to remain silent" and "to caution them that any statement [made] shall be recorded and may be used in evidence."<sup>75</sup>

These provisions parallel military law, and like military law, are more protective of the individual's right to remain silent than provisions extant in civilian practice. Under Article 31(b) of the UCMJ, persons subject to the UCMJ who wish to question

70. *Id.* R. 63, at 27.

71. *Id.* R. 62, at 26.

72. 384 U.S. 436 (1966).

73. *Id.* at 444. The Fifth Amendment privilege against self-incrimination only applies to "custodial interrogations." *Id.* The prosecution may not use statements stemming from questioning initiated by law enforcement officers after a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way" absent appropriate rights advisement. *Id.* *Miranda* applies to the military. *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

74. The Tribunal rules define "suspect" as "[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." I.T.R.P.E., *supra* note 4, 2(A), at 4.

75. *Id.* R. 42(A)(iii), at 19. Originally, this rule was silent as to the requirement that a suspect be cautioned that any statement made may be used as evidence. As such, the rules could have been read to only provide for a right to remain silent during custodial interrogation.

a suspect are required to inform that individual of the nature of the accusation and to warn the individual that his or her response may be used at trial.<sup>76</sup> Article 31(b) applies whenever an individual questions a suspect or an accused in an official capacity, even if the questioning is noncustodial.<sup>77</sup> Thus, the rights warning requirement provided for in Article 31(b), which applies to any official questioning of a suspect, is broader than the Fifth Amendment requirement for warnings, which applies only to custodial interrogation. Two related issues, however, remain unanswered.

First, the Tribunal's rules do not indicate whether the requirement for the prosecutor to advise the suspect or the accused of these rights prior to questioning extends to others acting on behalf of the prosecutor. The UCMJ states under Article 31(b) that "[n]o person subject to this chapter" may question an accused or a suspect without first providing these rights warnings. The military courts have held that Congress did not intend that the courts apply this language restrictively.<sup>78</sup> The U.S. President, moreover, in promulgating the Military Rules of Evidence,<sup>79</sup> specifically extended the rights warning requirement to

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76. 10 U.S.C. § 831 (1988 & Supp. V 1993). Article 31 provides, in pertinent part, that:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

*Id.* § 831(b).

77. In *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), the Court of Military Appeals ruled that questioning is official when: (1) a questioner subject to the UCMJ conducts an inquiry in an official capacity, rather than through personal motivation; and (2) the person questioned perceives the inquiry to be more than a casual conversation. In *United States v. Loukas*, the court further defined the first part of the *Duga* "officiality plus perception" test — requiring rights warnings only when "questioning is done during official law-enforcement investigation or disciplinary inquiry." 29 M.J. 385, 387 (C.M.A. 1990).

78. See MANUAL FOR COURTS-MARTIAL UNITED STATES (1995), Military Rules of Evidence [hereinafter MIL. R. EVID.], MIL. R. EVID. 305(b)(1) analysis; accord *United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954).

79. Article 36, UCMJ, grants authority to the U.S. President to "prescribe rules" governing trial procedures including "modes of proof." 10 U.S.C. § 836 (1988 & Supp. V 1993). Pursuant to this authority, the U.S. President promulgated evidentiary rules contained in the Manual for Courts-Martial. These rules apply at all courts-martial. MIL. R. EVID. 101(a).

civilians acting as knowing agents of military law enforcement authorities.<sup>80</sup>

Because international law is undeveloped in this area, the Tribunal itself must fill the vacuum. The Tribunal, like the military, should extend the rights warning requirement to agents of the prosecutor. This will ensure that the intent of the rule is not circumvented and that accuseds are not prejudiced by the use of investigative agents who are not assigned to the prosecutor's office, but who act as agents of the prosecutor.

Second, the Tribunal's rules do not provide a standard to determine whether an individual has become a suspect, necessitating rights warnings. Under military law, the test to determine if a person is a suspect is whether, considering all facts and circumstances at the time of the interview, the government interrogator believed or reasonably should have believed that the individual being interrogated committed an offense.<sup>81</sup> The Tribunal should develop a similar objective standard for measuring whether an individual is a suspect, triggering the rights warning requirement. Otherwise, defense counsel and the Tribunal will have no standard against which to measure the prosecutor's actions.

## 2. The Right to Counsel

In addition to the right against self-incrimination, the Tribunal's rules provide for the right to counsel. The Tribunal's rules provide that a suspect shall be advised of "the right to be assisted by counsel of his own choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it."<sup>82</sup> Additionally, "[q]uestioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel."<sup>83</sup> Once the accused invokes the right to counsel, questioning must cease and may only be resumed when the suspect has obtained or is assigned counsel.<sup>84</sup> This right to counsel continues throughout the trial and the appeal.

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80. MIL. R. EVID. 905(b)(1).

81. *United States v. Morris*, 13 M.J. 297, 298 (C.M.A. 1982).

82. I.T.R.P.E., *supra* note 4, R. 42(A)(i), at 18.

83. *Id.* R. 42(B), at 19.

84. *Id.*

These provisions are consistent with military law, which similarly provides a right to counsel at a very early stage in the proceedings. The Sixth Amendment of the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>85</sup> This right to counsel, however, does not attach until the initiation of adversary judicial proceedings.<sup>86</sup> The military justice system codifies and broadens this right to counsel by requiring persons acting in a law enforcement capacity to advise an accused of his or her right to counsel before conducting an interrogation “subsequent to the preferral of charges or the imposition of pretrial restraint.”<sup>87</sup> These two events, preferral<sup>88</sup> and pretrial restraint,<sup>89</sup> typically occur earlier than civilian indictment, information, preliminary hearing, or arraignment. Thus, the military justice system, like the Tribunal’s rules, protects the right to counsel at an earlier stage in the proceedings. Attaching the right to counsel at this early stage ensures the fairness of the pretrial investigation by providing counsel not just during critical stages in the judicial proceedings, but also during critical stages in the investigative process. As such, defense counsel will be better able to ensure the accused understands his or her rights and knowingly exercises or waives those rights.

Under military law, however, military suspects are also entitled to counsel at line-ups or show-ups conducted after the preferral of charges or imposition of pretrial restraint.<sup>90</sup> The Tribunal’s rules make no provision for counsel during identifica-

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85. U.S. CONST. amend. VI.

86. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The Court has held that: “Whatever else it may mean, the right to counsel granted by the Sixth . . . [Amendment] means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him - ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”

*Id.* at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1971)).

87. MIL. R. EVID. 305(d)(1)(B).

88. “Preferral” of charges is the act of swearing to the validity of charges by one with personal knowledge of the charge or one who has investigated the charges. R.C.M. 307(b).

89. “Pretrial restraint” includes: conditions on liberty, restriction to specific limits, arrest, and confinement. R.C.M. 304.

90. MIL. R. EVID. 321(b)(2)(A). Civilian suspects are not entitled to this protection unless the line-up or show-up occurs after initiation of adversary judicial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972); *United States v. Wade*, 388 U.S. 218, 236-37 (1967).

tions, absent questioning by the prosecutor.<sup>91</sup> The absence of this procedural safeguard diminishes the ability of defense counsel to effectively represent his or her client. The presence of counsel at identifications, even where no questioning of the suspect or accused occurs, ensures that the defense counsel can reconstruct the lineup and effectively cross-examine the eyewitness at trial to challenge the reliability of the identification.<sup>92</sup> Moreover, the defense counsel's presence provides him or her the opportunity to suggest measures to ensure that the identification process is fairly and reliably conducted.<sup>93</sup>

The Tribunal rules present one final distinction regarding the right to counsel. Under the Tribunal rules, the accused has the right to counsel of his or her own choice or to have appointed counsel if he or she is indigent.<sup>94</sup> On the other hand, all service members, regardless of financial resources or indigency status, are entitled to military counsel, either appointed or of their own selection if that counsel is reasonably available. The military accused may also retain civilian counsel at his or her own expense instead of, or in addition to, military counsel.<sup>95</sup> The possibility of multiple counsel, some provided free of charge, some selected by the accused, ensures the adequacy of the accused's representation.

### 3. The Indictment Process

If, during the course of the investigation, the prosecutor is "satisfied that there is reasonable grounds for believing that a

91. I.T.R.P.E., *supra* note 4, R. 42(A)(i), at 18 (indicating that right to counsel warning required prior to questioning suspect); *Id.* R. 63, at 26 (stating right to counsel warning required prior to questioning accused after initial appearance before tribunal).

92. *See Wade*, 388 U.S. at 232 (requiring counsel at line-up even where no questioning occurs).

93. *Moore v. Illinois*, 434 U.S. 220, 230 n.5 (1977) (suggesting various ways defense counsel could have ensured fairness of identification process consisting of eyewitness identification of accused seated at counsel table during his preliminary hearing, including: seeking delay until legitimate line-up could be conducted; seeking exclusion of eyewitness from courtroom until identification; and seeking permission to seat accused with public).

94. I.T.R.P.E., *supra* note 4, R. 42(A)(i), at 18. Indigency status is to be determined by the Registrar of the Tribunal pursuant to criteria established by the Registrar. The Registrar of the Tribunal is required to maintain a list of qualified counsel willing to be assigned to indigent suspects or accused. *Id.* R.R. 44, 45, at 19-20.

95. R.C.M. 506.

suspect has committed a crime," the Tribunal rules require the prosecutor to prepare an indictment.<sup>96</sup> The prosecutor then forwards the indictment and accompanying material to a trial chamber judge for review.<sup>97</sup> On reviewing the indictment, the judge is required to "hear the [p]rosecutor, who may present additional material in support of the count," and then confirm or dismiss the indictment or adjourn the review.<sup>98</sup> Although the rules are silent regarding the standard for review of the indictment, it seems logical that the judge review the adequacy of the prosecutor's reasonable grounds or probable cause determinations. If the judge dismisses the indictment, the rules do not preclude the prosecutor from bringing a new indictment at a later date based upon additional evidence.<sup>99</sup>

To some degree, this indictment-confirmation process is similar to grand jury proceedings, with the reviewing judge playing the role of the grand jury. In this regard, the reviewing judge protects the suspect from meritless charges. This procedure does not, however, protect an innocent individual as well as the analogous military procedure: the pretrial investigation.

Article 32 of the UCMJ provides the military equivalent of grand jury proceedings.<sup>100</sup> Under military law, an individual may not be tried by general courts-martial, a felony level court, unless first subjected to a pretrial investigation pursuant to Article 32.<sup>101</sup> Article 32 pretrial investigations combine features of grand jury proceedings and preliminary hearings by holding open hearings<sup>102</sup> with the accused present<sup>103</sup> and represented by counsel.<sup>104</sup> In contrast, the Tribunal rules do not require a pub-

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96. I.T.R.P.E., *supra* note 4, R 47(A), at 21. The indictment must identify the suspect and include "a concise statement of the facts of the case and of the crime with which the suspect is charged." *Id.* R. 47(B), at 21.

97. *Id.* R. 47(C), at 21.

98. *Id.* R. 47(D), at 21.

99. *Id.* R. 47(E), at 21.

100. *United States v. Powell*, 17 M.J. 975, 976 (A.C.M.R. 1984).

101. 10 U.S.C. § 832 (1988 & Supp. V 1993); R.C.M. 405(a).

102. R.C.M. 405(h)(3). Although ordinarily the proceedings are open, the appointing authority or the investigating officer may close a hearing. *Id.*

103. R.C.M. 405(f)(3).

104. R.C.M. 405(f)(4). The right to counsel includes the right to appointed military counsel (detailed defense counsel), military counsel of the accused's own selection (individual military counsel), and civilian counsel. Military counsel are provided free of charge. Civilian counsel are retained at no expense to the U.S. Government. The accused could also proceed *pro se* if he or she does so in "good faith and not solely to vex

lic indictment-confirmation process<sup>105</sup> or the presence of the accused with his or her counsel. At an Article 32 pretrial investigation, not only is the accused and his or her counsel present, but the accused has the right to cross-examine Government witnesses,<sup>106</sup> to present evidence in his or her own behalf,<sup>107</sup> and to testify.<sup>108</sup> There is no comparable right to cross-examine witnesses or present a defense during the indictment-confirmation process. Finally, the accused in the military proceeding has a limited right of discovery prior to the Article 32 pretrial investigation.<sup>109</sup> The accused before the Tribunal has no right to discovery prior to or during the indictment-confirmation process.

Like the indictment-confirmation process and grand jury proceedings, the purpose of Article 32 pretrial investigations is to protect the accused from baseless charges by requiring that the charges be supported by probable cause. A comparison of the indictment-confirmation process and the analogous military proceeding, the Article 32 pretrial investigation, however, reveals that the indictment-confirmation process may not be as adequate as the military pretrial investigation in protecting an innocent individual from baseless charges.

Moreover, unlike the indictment-confirmation process and grand jury proceedings, pretrial investigations serve two other very important purposes. First, pretrial investigations provide the officer who convened the investigation with information upon which to base a disposition decision. Second, pretrial investigations present the defense with an opportunity for pretrial

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the prosecution or the court" and is deemed to be competent. *United States v. Bramel*, 29 M.J. 958, 966 (A.C.M.R. 1990).

105. *But see* I.T.R.P.E., *supra* note 4, R. 52, 53, at 22-23. These two rules require public disclosure of confirmed indictments unless the judge reviewing the indictment orders non-disclosure until it is served on the accused, or a judge or trial chamber orders otherwise "in the interests of justice." *Id.*

106. R.C.M. 405(f)(8). The accused is given broad latitude to cross-examine government witnesses. R.C.M. 405(h)(1)(A). *But see* R.C.M. 405(i) analysis (concerning Rule 303 of the Military Rules of Evidence, which prohibits degrading questions).

107. R.C.M. 405(f)(9) (indicating witnesses are to be produced if reasonably available); R.C.M. 405(f)(10) (indicating that evidence within government's control must be produced); R.C.M. 405(f)(11) (presenting evidence in defense, extenuation, and/or mitigation).

108. R.C.M. 405(f)(12). The accused may elect to make a sworn statement subject to cross-examination, to make an unsworn statement that may be rebutted but which does not subject the accused to cross-examination, or to remain silent. R.C.M. 405(h)(1)(B).

109. R.C.M. 405(g)(1)(B).



discovery.<sup>110</sup>

The indictment-confirmation process does not provide the accused with these two additional advantages. At the pretrial investigation the defense is able to challenge the Government's evidence and introduce its own evidence. In doing so, the defense may be able to influence the decision of the convening authority and have the charges dismissed. Because the accused and counsel are not present during the indictment-confirmation proceedings, however, the defense has no similar opportunity to influence the disposition of the case at this early stage. Furthermore, at the pretrial investigation, the defense has the opportunity to weigh, first-hand, the strength of the Government's case and its underlying theory. This gives the defense a head-start on preparing for trial. The accused before the Tribunal, however, is not afforded this opportunity. Consequently, the defense counsel before the Tribunal is at a disadvantage, compared to defense counsel in military criminal practice.

#### 4. Pretrial Detention

While civilian accuseds are entitled to bail set at an amount reasonably calculated,<sup>111</sup> the military justice system does not provide for a system of bail.<sup>112</sup> Instead, military law permits pretrial confinement only if the Government can establish: (1) probable cause that a crime has been committed, (2) the accused committed the crime, (3) confinement is necessary to ensure the accused's presence at trial or to prevent further serious misconduct, and (4) less severe forms of restraint would be inadequate.

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110. R.C.M. 405(a) discussion ("The primary purpose of the investigation . . . is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery."). See also *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981); *United States v. Hutson*, 42 C.M.R. 39 (C.M.A. 1970); *United States v. Samuels*, 27 C.M.R. 280, 285-86 (C.M.A. 1959).

111. The U.S. Constitution prohibits excessive bail. U.S. CONST. amend. VIII. This prohibition does not create a right to release but only provides that bail, if appropriate at all, not be excessive. This means that bail must not be fixed at "a figure higher than an amount reasonably calculated" to assure the accused's presence at trial. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

112. Although there is no bail provision in military law, the justifications for bail provisions are inapplicable to the military because service members continue to receive pay and benefits while in pretrial confinement and do not risk loss of employment. Gilligan & Wims, *supra* note 14, at 5.

quate.<sup>113</sup> These determinations, which are made by the suspect's commander, are subject to an elaborate review process before a neutral magistrate with the suspect present and entitled to representation.<sup>114</sup>

Under the Tribunal rules, once the prosecutor indicts a suspect and a trial chamber judge confirms the indictment,<sup>115</sup> the judge may issue an arrest warrant.<sup>116</sup> Upon arrest, the rules require the arresting State to transfer the accused to the Hague for detention pending arraignment and trial.<sup>117</sup> A trial chamber can only release a detained suspect or accused in exceptional circumstances.<sup>118</sup> Although the indictment-confirmation process includes a probable cause determination, the rule is silent regarding what exceptional circumstances might justify release. Moreover, the rule permits pretrial detention without requiring the prosecutor to demonstrate the necessity of the confinement. Instead, the accused is required to satisfy the trial chamber that he or she "will appear for trial and, if released, will not pose a danger to any victim, witness or other person."<sup>119</sup> This places an unfair burden on the accused to prove two negatives: that he will not flee and that he will not hurt anyone. Instead, the Tribunal rules should place the burden upon the prosecutor to demonstrate that the accused is a flight risk or a threat to another person. Given the nature of the crimes involved, the prosecutor should be able to satisfy this burden with ease. A *per se* rule, like the one adopted, does not seem to have any purpose.

The pretrial detention sentence credit provisions present an additional problem. In determining a sentence, the Tribunal rules require it to take into account "the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial."<sup>120</sup> and to give credit for any such time.<sup>121</sup> Thus, the Tribunal rules provide for a day-for-day credit for any detention served prior to trial to be applied toward any future sentence. The rules fail to indicate, however,

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113. R.C.M. 305(h)(2)(B).

114. R.C.M. 305(i).

115. I.T.R.P.E., *supra* note 4, R. 47, at 21.

116. *Id.* R.R. 54, 55, at 23.

117. *Id.* R. 57, at 24.

118. *Id.* R. 65, at 27.

119. *Id.* R. 65(B), at 27.

120. *Id.* R. 101(B)(iv), at 39.

121. *Id.* R. 101(E), at 39.

how this credit is to be calculated, whether additional credit is available for violations of any of the accused's procedural rights and whether credit is available for other forms of restraint tantamount to detention.

Under military law, the convicted accused is entitled to credit towards the sentence imposed under four separate theories. First, the accused is entitled to a day-for-day credit for any pretrial confinement.<sup>122</sup> Second, the accused is entitled to day-for-day credit for any "pretrial restriction equivalent to confinement."<sup>123</sup> Third, the accused is entitled to additional day-for-day credit for any confinement served in violation of his pretrial confinement procedural rights.<sup>124</sup> Finally, the accused is entitled to credit for illegal conditions of pretrial restraint.<sup>125</sup> These four theories for crediting an accused for pretrial confinement overlap and the accused may receive multiple credits.<sup>126</sup> The possibility of multiple credit for pretrial restraint compensates the accused for time-served awaiting trial, vindicates violations of the accused's rights, and deters intentional violations of the accused's rights. The Tribunal should similarly provide a means of vindicating the accused's rights when violated in this regard.

## 5. Discovery

Once the accused has been arrested and makes his or her initial appearance before the Tribunal, the Tribunal rules provide for broad and open discovery. "[A]s soon as practicable after the initial appearance of the accused," the prosecutor must

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122. *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984).

123. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (citing *United States v. Schilf*, 1 M.J. 251, 252 (C.M.A. 1976)).

124. R.C.M. 305(k). The accused, for example, may be entitled to additional credit when the decision to place the accused in pretrial confinement was not subject to a neutral and independent review before a magistrate. *See, e.g., United States v. Russell*, 30 M.J. 977, 978 (A.C.M.R. 1990) (defendant granted additional 44 days of credit because pretrial restraint not reviewed by neutral magistrate).

125. 10 U.S.C. § 813 (1988 & Supp. V 1993). *See also United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983).

126. For example, if an accused were ordered to remain in his barracks room under guard for 30 days prior to trial, this would constitute pretrial restraint that was equivalent to confinement. The accused would be entitled to at least 60 days credit: 30 days credit for the restraint tantamount to confinement, and 30 days for the violation of his procedural rights, with potential for additional credit if the conditions of confinement constituted illegal pretrial punishment. *See, e.g., United States v. Gregory*, 21 M.J. 952, 956 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986).

provide the defense "copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the prosecutor from the accused or from prosecution witnesses."<sup>127</sup> This presumably includes any additional material presented by the prosecutor during the indictment-confirmation process.<sup>128</sup> Additionally, on defense request, the prosecutor must permit the defense "to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the prosecutor as evidence at trial or were obtained from or belonged to the accused."<sup>129</sup> Prior to trial, the prosecution must notify the defense of the witnesses it intends to call in its case-in-chief and any witnesses it intends to call in rebuttal to an alibi defense or any other special defense, including diminished or lack of mental responsibility.<sup>130</sup> Finally, the prosecutor is required to disclose any exculpatory evidence or any evidence "which may affect the credibility of prosecution witnesses."<sup>131</sup>

The Tribunal rules also place a discovery burden upon the defense. The defense is required to disclose "any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial."<sup>132</sup> This requirement, however, is not triggered unless the defense has requested discovery of similar material from the prosecutor.<sup>133</sup> Also under the Tribunal rules, the defense is required to notify the prosecutor of its intent to present the defense of alibi or any other special defense.<sup>134</sup>

The obligation to disclose evidence or material continues until trial, and, if either the prosecutor or the defense discovers

127. I.T.R.P.E., *supra* note 4, R. 66(A), at 27.

128. See *supra* note 98 and accompanying text (outlining process of review of indictment during which prosecutor may present additional material).

129. I.T.R.P.E., *supra* note 4, R. 66(B), at 27-28. *But see id.* R. 66(C), at 28. Under Rule 66(C) the Prosecutor may apply, *in camera*, to the trial chamber to be relieved of this obligation where disclosure would prejudice ongoing investigations, would be contrary to public policy, or would affect a state's security interest. *Id.*

130. *Id.* R. 67(A), at 27.

131. *Id.* R. 68, at 29.

132. *Id.* R. 67(C), at 29.

133. *Id.* See also *supra* note 129 and accompanying text (discussing prosecution's required disclosure of evidence which is material to preparation of defense upon request).

134. I.T.R.P.E., *supra* note 4, R. 67(A)(ii), at 28.

additional evidence that should have been disclosed under any of the above rules, they must promptly notify the other party.<sup>135</sup> In discussing the Tribunal's discovery rules, one commentator has observed that:

[The] reciprocal disclosure of evidence by the prosecution and the defense is unusual, at least in many common law jurisdictions. Because the prosecution is considered to be the stronger of the two parties and bears the burden of proof, it is often obliged to disclose, whereas the defense is usually not required to disclose anything in advance. The procedure under the rule is commendable in that it conduces to an even combat and reduces the possibility of surprise at trial. Nevertheless, inasmuch as the prosecutor has an absolute obligation . . . to disclose incriminating evidence, the rules overall appear to tilt the scales in favor of the accused.<sup>136</sup>

This criticism is understandable given the unusual nature of the Tribunal's discovery rules. To those familiar with the discovery rules of military law, however, the Tribunal rules do not tilt the scales in favor of the accused, but rather tilt the scales in favor of truth-seeking instead of gamesmanship. Comparison of the Tribunal's discovery rules with the military's rules reveals they are similar to, and appear to be based on, the discovery rules used in courts-martial,<sup>137</sup> which are broader than their civilian counterparts.<sup>138</sup> The purpose of such broad discovery is summarized as follows:

The [discovery] rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure and to eliminate "gamesmanship" from the discovery process . . . .

Providing broad discovery at an early stage reduces pre-trial motions practice and surprise and delay at trial. It leads to better informed judgement about the merits of the case and encourages early decisions concerning withdrawal of

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135. *Id.* R. 67(D), at 29. Under military law, the prosecutor and defense counsel have a continuing duty to disclose. See R.C.M. 701(d).

136. Nsereko, *supra* note 5, at 536.

137. R.C.M. 701.

138. *United States v. Trimper*, 26 M.J. 534, 536 (A.F.C.M.R. 1988); (citing *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986)) ("Military law provides a direct means of discovery that is broader than that normally available to an accused in a civilian criminal prosecution").

charges, motions, pleas and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.<sup>139</sup>

Certainly, the justifications underlying the military's wide-ranging, open, and reciprocal discovery rules apply equally to the Tribunal. Such rules will advance the truth-seeking process, increase the Tribunal's efficiency, and lend itself to early resolution of issues. There are two areas of concern, however, in the Tribunal's discovery rules.

First, the rules fail to provide any guidance regarding the result of failure by the prosecutor to disclose discoverable information. Although the Tribunal rules indicate the "[f]ailure of the defence to provide notice [of special defenses] shall not limit the right of the accused to testify on the above defenses,"<sup>140</sup> the rules are silent regarding the result when the prosecutor fails to provide discovery. Military law details the remedies available for nondisclosure of discoverable information. If the failure is discovered after trial, the failure to disclose is a constitutional violation and the conviction or sentence is set aside.<sup>141</sup> If the failure is discovered during trial, the military judge has broad discretion to order discovery, dismiss the charges, grant a continuance, prohibit introduction of the evidence, or issue such other order as is just under the circumstances.<sup>142</sup> The Tribunal should amend its rules to similarly clarify the result of nondisclosure.

Second, the Tribunal rules include two provisions regarding information not subject to disclosure. The first provision, making attorney work product nondiscoverable, does not present much difficulty.<sup>143</sup> The second provision, however, potentially renders a tremendous volume of information nondiscoverable. Rule 70(B) provides that:

If the [p]rosecutor is in possession of information which has

139. R.C.M. 701 analysis.

140. I.T.R.P.E., *supra* note 4, R. 67(B), at 29.

141. *Eshalomi*, 23 M.J. at 22-23.

142. R.C.M. 701(g)(3).

143. I.T.R.P.E., *supra* note 4, R. 70(A), at 29-30.

been provided him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the [p]rosecutor without the consent of the person or entity providing the information.<sup>144</sup>

Although the prosecutor is not permitted to introduce this evidence "without prior disclosure to the accused,"<sup>145</sup> the prosecutor does not have to disclose this information if he does not introduce it. Protection against discovery would seem to exist even if the information was exculpatory as long as the person providing the information did so on a confidential basis. Because of the nature of the crimes involved, situations in which information is received on such a confidential basis may be common. As these rules represent precedent for future tribunals, Rule 70(B) is too susceptible to abuse to remain a tool of the prosecution. An unscrupulous prosecutor could use such a rule to shield information and evidence by assuring witnesses of its confidential nature and then not make a good faith effort to obtain that person's consent. Due to its susceptibility to abuse, the Tribunal should discard Rule 70(B).

## 6. Speedy Trial

Although the Tribunal's statute requires that the accused be tried without undue delay,<sup>146</sup> the rules fail to provide procedures or standards for ensuring compliance with this requirement. The rules merely reiterate that once an accused has been arrested and transferred to the Tribunal, the accused "shall be brought before a [t]rial [c]hamber without delay"<sup>147</sup> for an Arraignment procedure.<sup>148</sup>

In contrast, a military accused must be brought to trial within 120 days of notice to the accused of a preferral of charges or imposition of pretrial restraint.<sup>149</sup> This rule is scrupulously protected and the accused must be brought to trial within this

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144. *Id.* R. 70(B), at 30.

145. *Id.*

146. *Report On Establishing the Tribunal*, *supra* note 2, at 28, ¶ 107; *Tribunal Statute*, *supra* note 2, art. 21, U.N. Doc. S/25704, at 44-45, 32 I.L.M. at 1198-99.

147. I.T.R.P.E., *supra* note 4, R. 62, at 26.

148. *Id.*

149. R.C.M. 707(a).

period unless a delay is approved in advance.<sup>150</sup> The remedy for a failure to comply with the right to a speedy trial is drastic: "dismissal of the affected charges."<sup>151</sup>

Although a 120 day speedy trial clock may be inappropriate given the potential logistical difficulties involved in the cases to be brought before the Tribunal, the rules should be amended to clarify the nature of the speedy trial right, and the remedy for failure to comply with this right. This is especially necessary because of the lack of a system of bail or pretrial release.

### B. *Trial Procedure*

The Tribunal rules generally provide for public<sup>152</sup> adversarial trials similar to trials in criminal cases in the United States. The rules provide for preliminary motions,<sup>153</sup> followed by: opening statements,<sup>154</sup> presentation of evidence,<sup>155</sup> closing argu-

150. R.C.M. 707(c) ("[A]ll other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in [R.C.M. 707(a)] has run."). See also *United States v. Carlisle*, 25 M.J. 426, 428 (C.M.A. 1988) ("[E]ach day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record.").

151. R.C.M. 707(d). The dismissal of affected charges may be with or without prejudice. *Id.* The dismissal must be with prejudice if the "accused has been deprived of his or her constitutional right to a speedy trial." *Id.*; see also *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Otherwise, whether dismissal is with or without prejudice is within the discretion of the military judge. The military judge makes this determination by considering "the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial." R.C.M. 707(d).

152. I.T.R.P.E., *supra* note 4, R. 78, at 33 ("[a]ll proceedings . . . other than deliberations . . . shall be held in public, unless otherwise provided"). A trial chamber may exclude the press and public "from all or part of [a] proceeding . . . for reasons of (i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or witness . . . ; or (iii) the protection of the interests of justice." *Id.* R. 79(A), at 33-34.

153. *Id.* R.R. 72, 73, at 31. Included in the list of preliminary motions are challenges based on the lack of jurisdiction or defects in the indictment, requests for exclusion of evidence, application for severance of charges or for separate trials, and objections based on denial of requested counsel. *Id.* R. 73, at 31.

154. *Id.* R. 84, at 35. Rule 84 provides that "[b]efore presentation of the evidence by the Prosecutor, each party may make an opening statement. The defense may however elect to make its statement after the Prosecutor has concluded his presentation of evidence and before the presentation of evidence for the defense." *Id.*

155. *Id.* R. 85, at 35. Rule 85 provides that, "[u]nless otherwise directed . . . in the interests of justice," the order of evidence presentation should be "(i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; [and] evidence ordered by the Trial Chamber." *Id.*



ments,<sup>156</sup> deliberations,<sup>157</sup> announcement of judgement,<sup>158</sup> and, if necessary, sentencing.<sup>159</sup> Within the trial procedures there are several areas that prompt comparison to the military justice system and analysis of whether the procedures adequately protect the accused.

### 1. Forum Choice

In the military justice system, the accused has the right to choose trial by a military judge alone or before the military equivalent of a jury.<sup>160</sup> This jury is selected by the officer who convened the court-martial based upon his or her judgement concerning who would be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."<sup>161</sup> Although the convening authority has broad discretion in selecting those among his command who are best qualified, the convening authority is forbidden from exerting influence on those selected.<sup>162</sup> The selected panel is sub-

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156. *Id.* R. 86, at 35. Rule 86 provides that, after the close of evidence, "the Prosecutor may present an initial argument, to which the defence may reply." *Id.* If the defense does reply, "[t]he Prosecutor may, if he wishes, present a rebuttal argument, to which the defence may present a rejoinder." *Id.*

157. *Id.* R. 87, at 36. Deliberations are conducted in private and a guilty verdict reached only if a majority of the trial chamber agree that guilt has been proven beyond a reasonable doubt. *Id.*

158. *Id.* R. 88, at 36. The verdict is required to be pronounced in public and accompanied with, or followed by, a reasoned written opinion to which any dissent may be appended. *Id.*

159. *Id.* R.R. 99-106, at 39-42.

160. R.C.M. 903. Although the accused may request to be tried by the military judge alone, the accused has no right to a trial by judge alone. *United States v. Ward*, 3 M.J. 365, 367 (C.M.A. 1977). The military judge, however, must state the reason for denying a request to be tried by judge alone. *United States v. Butler*, 14 M.J. 72, 73 (C.M.A. 1982).

161. 10 U.S.C. § 825(d)(2) (1988 & Supp. V 1993). The convening authority may not use rank as a device for deliberate exclusion of qualified court members. *United States v. Daigle*, 1 M.J. 139, 141 (C.M.A. 1975). The convening authority also may not manipulate the criteria to exclude those more likely to adjudge light sentences. *United States v. McClain*, 22 M.J. 124, 130 (C.M.A. 1986). Although deliberate exclusion is prohibited, it appears that deliberate "inclusion" is not prohibited if the inclusion is for a proper reason. *See, e.g., United States v. Smith*, 27 M.J. 242, 248-49 (C.M.A. 1988) (holding that it is appropriate to consider gender in selecting court members if done in good faith effort to assure panel is representative of military population). The accused is not entitled to a cross-sectional representation of the military community. *See United States v. Hodge*, 26 M.J. 596, 598 (A.C.M.R. 1988); *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988).

162. 10 U.S.C. § 837 (1988 & Supp. V 1993).

jected to *voir dire*<sup>163</sup> and challenges<sup>164</sup> before the final panel is seated. Although the service members selected are usually officers, an enlisted accused has the right to demand at least one-third enlisted representation on the panel.<sup>165</sup> Alternatively, the accused may waive his or her right to such a jury trial and elect to be tried before a military judge alone.<sup>166</sup>

This flexibility in forum selection is often advantageous to the accused. For example, the accused may elect to be tried before a military judge alone when the facts and circumstances of the case may inflame the passions of a lay jury but not of a seasoned jurist. Similarly, the accused may desire to be tried before a jury if the defense will be able to raise a reasonable doubt, fostered by the ingenuity, imagination, and skill of the defense counsel.

The accused before the Tribunal shares no similar flexibility in forum structure. The accused is tried before one of two trial chambers, with the right to appeal to an appeals chamber.<sup>167</sup> Although the accused may challenge the qualifications of a judge,<sup>168</sup> the basis for disqualification appears to be limited to those instances where a judge has a personal interest in the matter or an association that might affect his or her impartiality.<sup>169</sup> The only remaining limitations on qualifications are that the judge who reviews and confirms an indictment is disqualified from sitting as a trial chamber judge for the same accused,<sup>170</sup> and a judge may not act upon the appeal of a case in which he or she was a member of the trial chamber.<sup>171</sup>

## 2. Guilty Pleas

In *North Carolina v. Alford*,<sup>172</sup> the U.S. Supreme Court found

163. R.C.M. 912(d).

164. R.C.M. 912(f), (g). Each party is entitled to unlimited challenges for "cause" and one peremptory challenge. *Id.*

165. 10 U.S.C. § 825(c)(1) (1988 & Supp. V 1993).

166. *Weiss*, 114 S.Ct. at 756.

167. *Report On Establishing the Tribunal*, *supra* note 2, at 18, ¶¶ 69-71; *Tribunal Statute*, *supra* note 2, art. 11, U.N. Doc. S/25704, at 39, 32 I.L.M. at 1195.

168. I.T.R.P.E., *supra* note 4, R. 15(B), at 9-10.

169. *Id.* R. 15(A), at 9.

170. *Id.* R. 15(C), at 10.

171. *Id.* R. 15(D), at 10.

172. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970). *See also* Gilligan & Wims, *supra* note 14, at 37.

guilty pleas constitutional provided that there was a factual basis for the plea, even if the accused expressly maintained his or her innocence.<sup>173</sup> Such an inconsistent plea is not permitted under military law.<sup>174</sup> Under military law, if an accused chooses to plead guilty, he or she must expressly admit guilt in open court and under oath. Military law requires the judge to question the accused at length to determine whether there is a factual basis for the plea, whether any defense exists, and whether the accused is pleading guilty freely and voluntarily.<sup>175</sup> Such a procedure, although somewhat paternalistic, protects the military accused from government overreaching and collusion between the prosecutor and the defense counsel.

Moreover, the military justice system provides for conditional guilty pleas.<sup>176</sup> A conditional guilty plea permits the accused, with the approval of the military judge and the consent of the Government, to plead guilty while reserving the right to appeal an adverse determination on a specified pretrial motion. If successful on appeal, the accused may then withdraw the plea of guilty.<sup>177</sup>

By comparison, the Tribunal rules fail to establish a procedure for determining the validity or voluntariness of a guilty plea or a procedure for the accused to enter a conditional guilty plea. Instead, the rules merely provide that if the accused pleads guilty when called upon to enter a plea, then the trial chamber shall "instruct the Registrar to set a date for the pre-sentence hearing."<sup>178</sup> This failure leaves open the possibility of coerced, involuntary, or untruthful pleas. At a minimum, the Tribunal should establish procedures for ensuring the factual basis of the plea and that the plea is made voluntarily.

### 3. Immunity and Plea Bargaining

The absence in the Tribunal rules of a mechanism for the prosecutor to grant immunity and enter into a plea agreement

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173. *Id. Alford*, 400 U.S. at 38.

174. The military judge must resolve inconsistencies and apparent defenses and, if unable to do so, must reject the guilty plea. See *United States v. Jemmings*, 1 M.J. 414, 417-18 (C.M.A. 1976); *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R. 1986).

175. R.C.M. 910(c)-(e).

176. R.C.M. 910(a)(2).

177. *Id.*

178. I.T.R.P.E., *supra* note 4, R. 62(iv), at 26.

presents a related issue. In common law systems, the prosecutor has broad power to offer immunity to the accused in return for the accused's cooperation in the investigation or prosecution of other cases.<sup>179</sup> Often, the grant of immunity is in conjunction with a plea bargain agreement between the prosecutor and the accused whereby the accused agrees to plead guilty in return for a limitation on his or her punishment.<sup>180</sup>

The Tribunal could have adopted procedures similar to those of the military justice system, which permits the convening authority to grant immunity and enter into plea agreements with the accused and adopt procedures for the acceptance of the plea agreement by the Tribunal. Under the military justice system, the accused can enter into a pretrial agreement with the convening authority as to the offenses to which the accused will plead guilty.<sup>181</sup> In return, the convening authority may agree to a ceiling on the sentence and/or to withdraw and dismiss certain charges.<sup>182</sup> If the sentencing authority, the military judge or the jury, imposes a less severe sentence than the ceiling agreed upon, the convening authority may only approve the less severe sentence. Likewise, if the sentencing authority imposes a sentence that exceeds the limits of the pretrial agreement, the convening authority may only approve the sentence agreed upon.<sup>183</sup> To ensure this advantage to the accused, the sentencing authority does not know the sentence limitation terms of the pretrial agreement when independently imposing a sentence.<sup>184</sup>

The Tribunal, instead, adopted an approach that permits an abbreviated proceeding in which an accused merely acknowl-

179. TASK FORCE REPORT, *supra* note 6, at 54.

180. *Id.* Most civil law systems do not permit the prosecutor to unilaterally grant immunity or enter into plea agreements. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1080-82* (1994).

181. R.C.M. 705(b)(1). The accused may promise to enter into a stipulation of fact concerning the offenses to which he or she is pleading guilty; promise to testify against another person; promise to pay restitution; promise to conform his or her conduct to certain conditions of probation; or promise to waive certain procedural requirements. R.C.M. 705(c)(2).

182. R.C.M. 705(b)(2). Additionally, the convening authority may promise to refer charges to a court-martial with less punishment authority; refer a capital offense as non-capital; or order the prosecutor to present no evidence on one or more specifications resulting in a not guilty finding on the affected specifications. *Id.*

183. R.C.M. 1006(d)(3).

184. R.C.M. 705(e). *See also* R.C.M. 1005(e)(1) (military jurors instructed on maximum authorized sentence and any mandatory minimum sentence).

edges guilt and the court considers the accused's cooperation with authorities in mitigation of his or her punishment.<sup>185</sup> This does not, however, permit the accused to receive a commitment in advance of trial as to the exact exchange for his or her cooperation.

The absence of such mechanisms diminishes the prosecutor's ability to successfully prosecute higher-level suspects before the Tribunal through the cooperation of lower-level suspects. Moreover, the absence of such a mechanism hinders the prosecutor's ability to negotiate a just result without having to put vulnerable victims or witnesses through the ordeal of a trial or to negotiate victim compensation as part of the agreement.

### C. Sentencing

Consistent with its general adversarial framework, the Tribunal rules fashion an adversarial presentencing process somewhat similar to the presentencing process of the military justice system. Under the Tribunal rules, during a separate sentencing phase, both the prosecutor and the defense are entitled to submit "any relevant information that may assist the [t]rial [c]hamber in determining an appropriate sentence."<sup>186</sup> This permits both parties the opportunity to present evidence that may not have been admissible during the trial on the merits, but which is relevant to the determination of an appropriate sentence.

Beyond permitting both parties the opportunity to present evidence, the Tribunal rules fail both to establish detailed procedures for conducting the presentencing hearing and to clearly indicate whether the rules of evidence apply during presentencing.<sup>187</sup> In contrast, the military justice system provides detailed procedures covering the order of evidence production,<sup>188</sup> per-

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185. I.T.R.P.E., *supra* note 4, R. 101(B)(ii), at 40.

186. *Id.* R. 100, at 39.

187. The Tribunal rules indicate "[t]he rules of evidence . . . shall govern the proceedings before the Chambers." *Id.* R. 89(A), at 36-37. It remains unclear whether "proceedings before the Chambers" include presentencing hearings.

188. R.C.M. 1001(a)(1)(A). Ordinarily, the following sequence is followed: (1) presentation by the prosecutor; (2) presentation by the defense; (3) rebuttal and surrebuttal; (4) argument by the prosecutor on sentence; (5) argument by the defense on sentence; and (6) rebuttal arguments in the discretion of the military judge. R.C.M. 1001(a)(1).

missible evidence,<sup>189</sup> sworn and unsworn statements by the accused,<sup>190</sup> rebuttal and surrebuttal,<sup>191</sup> production of witnesses,<sup>192</sup> and argument.<sup>193</sup> The rules of evidence apply as well, although the defense may request that the rules be relaxed during sentencing.<sup>194</sup>

In determining an appropriate sentence, the Tribunal rules require the Tribunal to consider a non-exhaustive list of factors. These factors include: any aggravating or mitigating circumstances, the sentencing practice of the courts of the former Yugoslavia, any period of pretrial detention, and any punishment imposed for the same act by a national court and already served.<sup>195</sup> Additionally, the Tribunal's statute requires it to consider the "gravity of the offense and the individual circumstances of the convicted person."<sup>196</sup> Finally, although the Tribunal rules do not provide a mechanism for the accused to exchange cooperation for sentence limitations,<sup>197</sup> the rules do require the court to consider as a mitigating factor the "substantial cooperation with the [p]rosecutor by the convicted person before or after conviction."<sup>198</sup> Although the Tribunal rules require guilt to be determined by majority vote of the three judges composing the trial chamber hearing the case,<sup>199</sup> the rules do not establish pro-

189. The prosecutor is permitted to introduce the service and personal data concerning the accused and his or her prior service, evidence of prior convictions, evidence in aggravation, and evidence of rehabilitative potential. R.C.M. 1001(b). The defense is entitled to introduce evidence in extenuation or mitigation. R.C.M. 1001(c).

190. R.C.M. 1001(c)(2). If the accused gives sworn testimony, the prosecutor is entitled to cross-examine the accused. *Id.* If the accused makes an unsworn statement, the prosecutor is not permitted to cross-examine the accused. *Id.* The prosecutor may, however, introduce evidence in rebuttal to any assertions made in an unsworn statement. *Id.*

191. R.C.M. 1001(d).

192. R.C.M. 1001(e).

193. R.C.M. 1001(g).

194. R.C.M. 1001(c)(3). If the rules of evidence are relaxed for the defense, the rules are similarly relaxed for the prosecutor during rebuttal. R.C.M. 1001(d). *See also* MIL. R. EVID. 101(a) analysis ("Although the Rules apply to sentencing they may be 'relaxed' under Rule 1101(c).").

195. I.T.R.P.E., *supra* note 4, R. 101(B), at 40.

196. *Report On Establishing the Tribunal*, *supra* note 2, at 29, ¶ 115; *Tribunal Statute*, *supra* note 2, art. 24, U.N. Doc. S/25704, at 45, 32 I.L.M. at 1198-99.

197. *See supra* note 185 and accompanying text (discussing how acknowledgement of guilt and cooperation permit abbreviated trials and mitigated sentences).

198. I.T.R.P.E., *supra* note 4, R. 101(B)(ii), at 40.

199. *Id.* R. 87(A), at 36.

cedures by which the chamber determines an appropriate sentence.

In the military justice system, if the accused elects to be tried before a military judge alone, the judge closes the court for deliberations and determines an appropriate sentence, which is then announced in open session. If the accused elects to be tried before jurors, the jurors close for deliberation, discuss appropriate sentences, and vote by secret written ballot on suggested sentences in order of least severity. Once at least two-thirds of the members agree on a sentence, that sentence is the adjudged sentence and is announced in open court.<sup>200</sup> Courts-martial have broad latitude in adjudging an appropriate sentence and the sentence can range from no punishment to the maximum authorized punishment for the particular crime.<sup>201</sup>

The Tribunal also has broad latitude in adjudging sentences in that "[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life."<sup>202</sup> The Tribunal's discretion, however, is not limited by stated maximum punishments. The Tribunal should consider establishing punishment ranges for various crimes within its jurisdiction. Uncertainty as to the maximum punishment an accused faces prevents informed decisions regarding pleas and inhibits guilty pleas.

#### D. Appellate Procedures

The appellate review process is another aspect of the military justice system that distinguishes it from the Tribunal. The process is largely automatic. It provides multiple avenues for independent examination of the accused's court-martial for both legal and factual sufficiency.

Under the Tribunal rules, an appellant must file a notice of appeal within thirty days after judgement or sentence is pro-

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200. R.C.M. 1006(d)(4). Three-fourths of the jurors must agree on the sentence if the sentence includes confinement for more than 10 years or life. R.C.M. 1006(d)(4)(B). Unanimity on both findings and sentence is required to impose the death penalty. R.C.M. 1006(d)(4)(A).

201. R.C.M. 1002. This is true unless the *Manual for Courts-Martial, United States* imposes a mandatory minimum sentence. *Id.* The *Manual for Courts-Martial, United States*, enumerates the maximum authorized punishments for each offense under the UCMJ. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, app. 12 (1995) (containing the Maximum Punishment Chart).

202. I.T.R.P.E., *supra* note 4, R. 101(A), at 39-40.

nounced,<sup>203</sup> and must file an appellate brief within ninety days of the certification of the trial record.<sup>204</sup> The respondent is given thirty days from receipt to respond.<sup>205</sup> After expiration of the time-limits for briefs, a hearing is scheduled.<sup>206</sup> Either party may request permission to present any evidence that was unavailable at the time of trial at this hearing.<sup>207</sup> In deciding the issues before it, the appeals chamber considers the record, any additional evidence presented, and, presumably, arguments of counsel.<sup>208</sup> The decision of the appeals chamber must have the support of a majority of its five judges and must be supported by a reasoned opinion.<sup>209</sup>

Interestingly, the Tribunal's statute and rules apparently permit the prosecutor to appeal acquittals and to seek review of judgements. Article 25 of the Tribunal's statute details the grounds for appeal and permits either party to appeal: "(1) an error on a question of law invalidating the decision; or (2) an error of fact which has occasioned a miscarriage of justice."<sup>210</sup> Moreover, both the statute and the rules permit either party to seek review of the judgement based upon newly discovered evidence that was not known or discoverable through the exercise of due diligence.<sup>211</sup> As noted by a Special Task Force of the American Bar Association Section of International Law and Practice ("ABA Task Force"), "[i]n either case, an appeal by the [p]rosecutor, resulting in the reversal of the judgement of the [t]rial [c]hamber would necessitate a new trial for the same offense, thus evidently violating the principle of *non bis in idem*—the prohibition against double jeopardy."<sup>212</sup>

203. *Id.* R. 108, at 42.

204. *Id.* R. 111, at 43.

205. *Id.* R. 112, at 43. The appellant may file a reply brief within 15 days of receipt of the respondent's brief. *Id.* R. 113, at 43.

206. *Id.* R. 114, at 43.

207. *Id.* R. 115, at 43. The appeals chamber is required to permit such additional evidence if "the interests of justice so require." *Id.* Such motion must be filed within 15 days before the hearing. *Id.*

208. *Id.* 117(A).

209. *Id.* 117(B).

210. *Report On Establishing the Tribunal*, *supra* note 2, at 30, ¶ 120; *Tribunal Statute*, *supra* note 2, art. 25, U.N. Doc. S/25704, at 45, 32 I.L.M. at 1199.

211. I.T.R.P.E., *supra* note 4, R. 119, at 44. The defense may petition for review of the judgement at any time, while the prosecutor must petition for review within one year after the final judgement was pronounced. *See also Tribunal Statute*, *supra* note 2, art. 26, U.N. Doc. S/25704, at 46, 32 I.L.M. at 1199.

212. TASK FORCE REPORT, *supra* note 6, at 42.



The ABA Task Force criticized this right of prosecutorial appeal:

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>213</sup>

The ABA Task Force recommended that the Tribunal's statute be amended to permit only the convicted accused to appeal a final judgement or seek review of a judgement. Under the ABA Task Force recommendation, however, either party could make an interlocutory appeal of a legal issue.<sup>214</sup> Neither the Security Council nor the Tribunal implemented these recommendations and the rules still permit prosecutorial appeal. Implementation of these recommendations would have aligned the Tribunal with the practice of most modern legal systems, including the military justice system.

A military accused is privileged to have several different and independent levels of judicial review, depending upon the sentence adjudged by the court-martial and approved by the convening authority.<sup>215</sup> Additionally, the accused has several differ-

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213. *Id.* at 43.

214. *Id.*

215. After an accused is convicted and sentenced, a verbatim record of trial is prepared and forwarded to the convening authority for review and action. R.C.M. 1103-06. Before acting, the convening authority must consider the results of the trial, any written matters submitted by the accused or his counsel, the staff judge advocate's recommendation concerning the sentence, and the defense counsel's response to that recommendation. R.C.M. 1107(b)(3). The convening authority may then approve, modify, or disapprove any finding of guilty; approve, disapprove, mitigate, or suspend all or part of the sentence; or order a rehearing. R.C.M. 1107(c)-(e).

Thereafter, the appellate rights of an accused convicted by a general court-martial are determined by the sentence adjudged and approved. General courts-martial that include an approved sentence of confinement for one year or more, a bad conduct or dishonorable discharge, or a dismissal are reviewed as follows:

If the accused does not waive appellate review after the convening authority acts, the record of trial is then automatically forwarded to the cognizant Court of Criminal Appeals under Article 66, UCMJ. 10 U.S.C. § 866 (1988 & Supp. V 1993); R.C.M. 1203.

ent statutory remedies available beyond judicial review.<sup>216</sup> The prosecutor has no right to appeal a final judgement, although he or she may make an interlocutory appeal on a matter of law.<sup>217</sup>

Another distinguishing feature of appellate practice in the military justice system is the appointment of appellate defense counsel to represent the accused without charge during these

If the accused is dissatisfied with the decision of that court, he may petition a civilian court, the U.S. Court of Appeals for the Armed Forces ("USCAAF"). 10 U.S.C. § 867 (1988 & Supp. V 1993); R.C.M. 1204. This court is established under Article I of the U.S. Constitution and is composed of five civilian jurists. 10 U.S.C. §§ 941-45 (1988 & Supp. V 1993); U.S. CONST. art. I. The USCAAF is independent of the military and operates as a "clear check on abuse." Gilligan & Wims, *supra* note 14, at 39. In limited circumstances, the accused may petition the U.S. Supreme Court for further review of his case under Article 67a, UCMJ. 10 U.S.C. § 867a (1988).

Other general courts-martial (those that do not include an approved sentence of confinement for one year or more, a bad conduct or dishonorable discharge, or a dismissal) are reviewed as follows:

If the accused does not waive appellate review of his case, the record of trial is forwarded for mandatory examination in the office of the cognizant Judge Advocate General under Article 69(a), UCMJ. 10 U.S.C. § 869(a) (1988 & Supp. V 1993). The cognizant Judge Advocate General may modify or set aside the findings of guilt, the sentence, or both and may direct that the cognizant Court of Military Review to review the case under Article 69(c), UCMJ. 10 U.S.C. § 869(c) (1988 & Supp. V 1993).

The accused is required to be advised of these appellate rights after being convicted by courts-martial. R.C.M. 1010. Normally, the accused is also provided with a written explanation of these appellate rights.

216. Within two years from the date of the convening authority's action, the accused: (1) may petition the cognizant Judge Advocate General for a new trial under Article 73, UCMJ, based on newly discovered evidence or fraud on the court; and (2) may apply to the cognizant Judge Advocate General under Article 69(b), for relief based on newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicing his substantive rights, or inappropriateness of sentence. 10 U.S.C. §§ 873, 869(b) (1988 & Supp. V 1993). These "statutory" remedies are separate and distinct from "appellate judicial review." Additionally, under Article 38(c), UCMJ, "[i]n any court-martial proceeding resulting in conviction, the defense counsel . . . may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review." 10 U.S.C. § 838(c) (1988 & Supp. V 1993). Article 74, UCMJ, provides that the Secretary concerned may "remit or suspend any part or amount of the unexecuted part of any sentence." 10 U.S.C. § 874 (1988 & Supp. V 1993).

217. R.C.M. 908(a). Under this rule, the Government may not appeal "an order or ruling that is, or amounts to, a finding of not guilty." *Id.* The Government may appeal, however, an "order or ruling that terminates the proceedings with respect to a charge or specification," or an "order which excludes evidence . . . that is substantial proof of a fact material in the proceedings." *Id.* Additionally, the Government may appeal an order that is the "functional equivalent" of an order that terminates the proceedings. See *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989) (abatement order functional equivalent of order terminating proceedings).

appellate proceedings regardless of the accused's financial status. The accused may also retain civilian appellate counsel at his or her own expense.<sup>218</sup> The appellate defense counsel, whether civilian or military, is typically a different attorney than the trial defense counsel, which operates as a check on that counsel's effectiveness.<sup>219</sup> The Tribunal appellate process does not provide similar advantages to the accused.

#### E. *Victim and Witness Protection*

As noted above, the Security Council required the Tribunal to provide for the protection of victims and witnesses in its rules, including provision for *in camera* proceedings and the protection of victims' identities.<sup>220</sup> In meeting this obligation, the Tribunal created a victims and witnesses unit to recommend protective measures and provide counseling and support for victims and witnesses;<sup>221</sup> recognized the possibility of compensation to victims;<sup>222</sup> and established various rules intended to protect victims and witnesses.<sup>223</sup>

Most notable of these protective measures is Rule 75, Measures for the Protection of Victims and Witnesses. Rule 75 provides the following:

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218. 10 U.S.C. § 870 (1988 & Supp. V 1993); R.C.M. 1202.

219. Gilligan & Wims, *supra* note 14, at 34; United States v. Dupas, 14 M.J. 28, 30 (C.M.A. 1982).

220. See *supra* note 54 and accompanying text (discussing provisions for protection of witnesses).

221. I.T.R.P.E., *supra* note 4, R. 34, at 15.

222. *Id.* R. 106, at 41-42. This rule has been criticized for assuming "incorrectly in many cases, that appropriate claims mechanisms exist at the national level and that convicted persons will be able to satisfy judgements for compensation, a promise on the part of the international community that is likely to remain unfulfilled." Nsereko, *supra* note 5, at 553-54.

223. See, e.g., I.T.R.P.E., *supra* note 4, R. 39, at 16-17 (permitting prosecutor to take "special measures to provide for the safety of potential witnesses and informants"); *id.* R. 40 (iii), at 17 (permitting prosecutor to request state "take all necessary measures to prevent . . . injury to or intimidation of a victim or witness"); *id.* R. 65(B), at 27 (prohibiting provisional release of accused from pretrial detention if accused poses "a danger to any victim, witness, or other person"); *id.* R. 69(A), at 29 (permitting prosecutor in exceptional circumstances to seek order from trial chamber to conceal "identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal"); *id.* R. 77, at 33 (providing for contempt charges against anyone who attempts to intimidate witness); *id.* R. 79(ii), at 33-34 (providing for closed trial sessions to ensure "nondisclosure of the identity of a victim or witness" whose identity Tribunal has ordered concealed); *id.* R. 105(A), at 41 (providing restitution of property taken from victim by accused).

(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 *ex parte* 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 [or her] . . . ; (ii) closed sessions . . . ; [or] (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 harassment or intimidation.<sup>224</sup>

These measures represent a strong commitment to protecting the safety, privacy, and dignity of victims and witnesses. Although there are no analogous provisions within the military justice system to compare, these provisions raise two concerns.

First, Rule 75(B)(i) enumerates measures to prevent public disclosure of the identity of a victim or witness. These measures include expunging names and identifying information from records; non-disclosure of any records identifying the victim; altering the voice or image of a witness; using closed-circuit television; and use of pseudonyms.<sup>225</sup> This rule should be read to permit such measures only to prevent disclosure of witness identity to the public or the media, but not to prevent disclosure to the accused.

Rule 69 creates some confusion, however, regarding this contention. Under Rule 69(A), the prosecutor may seek an order concealing the "identity of a victim or witness who may be in danger until such person is brought under the protection of the Tribunal."<sup>226</sup> Rule 69(B) states, however, that "[s]ubject 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>227</sup> Implicitly, Rule 75 thus permits non-disclosure of the identity of victims and witnesses to the defense under certain circumstances. To avoid this implication, the Tri-

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224. *Id.* R. 75, at 32.

225. *Id.* R. 75(B)(i), at 32.

226. *Id.* R. 69(B), at 29.

227. *Id.*

bunal should amend both Rule 69 and 75 to make clear that Rule 75(B)(i) does not apply to the defense. Most would agree that applying the measures described to the defense would not be "consistent with the rights of the accused,"<sup>228</sup> particularly the right to confront and cross-examine witnesses. If the rules are not amended, they would appear to permit the prosecutor to obtain an *ex parte* hearing to receive permission to call an unnamed, unidentified witness to testify against the accused by closed circuit television from another location, and for the witness's image to be scrambled and voice distorted.

The second concern raised by these measures relates to the apparently unbridled discretion of a trial chamber to order appropriate measures for victim and witness protection<sup>229</sup> and to control the manner of questioning whenever necessary.<sup>230</sup> The vagueness of the terms appropriate and necessary permit the trial chamber judges unfettered discretion to direct virtually any protective measure, for any reason. This presents a two-fold problem: (1) the protective measures imposed may violate the accused's right to confront and cross-examine the witness; and (2) the protective measure imposed may appear to abandon the presumption of innocence.<sup>231</sup>

The rules regarding protecting victims and witnesses should strike a balance and be consistent with the accused's right to confront and cross-examine the witness. Absent effective confrontation and cross-examination rights, witnesses could lie with impunity without fear of their lies being revealed. A better rule, one that is more consistent with the accused's rights and that somewhat limits the judge's discretion, might be patterned after

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228. *Id.* R. 75(A), at 32.

229. *Id.*

230. *Id.* R. 75(C), at 32.

231. Elaborate protective measures send the not-so-subtle message that the offense occurred and the accused is the perpetrator. Otherwise, such measures would not be necessary. In effect, this reverses the presumption of innocence. See Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig*, 27 ST. MARY'S L.J. (forthcoming 1995). In a jury trial, this would present a difficult problem and an instruction to the jury to draw no adverse inference from the protective measures would not adequately address this concern. In a trial before a panel of distinguished jurists like the Tribunal, this is not such a difficulty because one would presume that judges follow the law. Equally important as doing justice, however, is that the Tribunal appear to do justice, especially given the precedential nature of this undertaking. Elaborate protective measures may create the appearance to outside observers that the accused has already been tried and convicted.

the U.S. Supreme Court decision in *Maryland v. Craig*,<sup>232</sup> regarding confrontation of child victims. Such a rule would require face-to-face confrontation unless the prosecutor could make a case specific showing of necessity based on impairment of the victim's ability to communicate caused by the emotional distress that would result from being forced to testify in the presence of the accused. If such a case specific showing of necessity is made, the Tribunal could permit the use of protective measures, such as *in camera* proceedings, screens, closed circuit testimony, and the accused's confrontation right would be protected by cross-examination of the witness under oath and under the observation of the trial chamber and the accused.

#### F. Evidentiary Rules

As noted above, the Tribunal's statute contains no evidentiary rules and, therefore, the Tribunal was charged with adopting such rules.<sup>233</sup> Faced with this requirement, the Tribunal adopted a simple set of rules stressing the admissibility of relevant evidence.<sup>234</sup> Although this approach is consistent with the approach taken at the Nuremberg and Tokyo trials,<sup>235</sup> it is in marked contrast to the extensive evidentiary rules used in the military justice system, which are virtually identical to the Federal Rules of Evidence.<sup>236</sup>

Arguably, such extensive rules are unnecessary before a body such as the Tribunal and would only complicate the process. Many evidentiary rules are designed to keep untrustworthy or inflammatory evidence from the fact-finder;<sup>237</sup> and evidence

232. 497 U.S. 836, 857 (1990).

233. See *supra* note 56 and accompanying text (discussing responsibilities delegated by Security Council to Tribunal).

234. I.T.R.P.E., *supra* note 4, R. 89(C), at 36.

235. Compare *id.* R. 89(C), at 36 ("A Chamber may admit any relevant evidence which it deems to have probative value.") with Nuremberg Charter, *supra* note 45, art. 19, 59 Stat. at 1551, 82 U.N.T.S. at 296 ("The Tribunal . . . shall admit any evidence which it deems to have probative value.").

236. FED. R. EVID. 101. "These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions [stated within these rules]." *Id.*

237. For example, most hearsay evidence is inadmissible because it is inherently untrustworthy. Hearsay with a "sufficient indica of reliability" or "circumstantial guarantees of trustworthiness," however, is admissible. Similarly, a proper foundation and authentication of evidence is required prior to the admission of hearsay to guarantee its trustworthiness.

to which fact-finders, normally lay juries, may attach undue weight. The Tribunal, however, is composed of respected jurists capable of attaching the appropriate weight to evidence presented and disregarding untrustworthy evidence. Instead of a series of complex rules designed to filter untrustworthy or inflammatory evidence, a simple logical relevance standard would suffice to determine admissibility of evidence.<sup>238</sup>

In large measure, the Tribunal took this approach. The central principle of the evidentiary rules is the admissibility of logically relevant evidence—if the evidence has probative value, the evidence is admissible.<sup>239</sup> Under some circumstances, however, logically relevant evidence may be inadmissible if its probative value is substantially outweighed by “the need to ensure a fair trial.”<sup>240</sup> In receiving evidence, a trial chamber “may request verification of the authenticity of evidence obtained out of court.”<sup>241</sup> The rules permit a trial chamber to take judicial notice of facts of common knowledge.<sup>242</sup> Regarding testimonial evidence, the rules require live testimony unless a trial chamber has previously ordered that the witnesses’ testimony be taken by

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238. Additional evidentiary rules concerning judicial notice, stipulations, privileges, and other “judicial” issues would also be necessary. A “legal relevance” standard like Rule 403 of the Federal Rules of Evidence would not be required because, for example, unfair prejudice would not substantially outweigh the probative value of the evidence because the Tribunal would be capable of attaching proper weight to the evidence. FED. R. EVID. 403.

239. I.T.R.P.E., *supra* note 4, R. 89(C), at 36.

240. I.T.R.P.E., *supra* note 4, R. 89(D), at 36. This “legal relevance” standard is somewhat more vague than the military standard, which provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the [jurors], or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MIL. R. EVID. 403. *See also* FED. R. EVID. 403. The evils sought to be avoided by this rule, however, relate to protecting a jury from evidence that might tend to “do more harm than good.” STEVEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* 434 (3d ed. 1991). The question remains as to what types of relevant evidence will the Tribunal exclude under this broad authority. One commentator suggests that the Tribunal might properly exclude hearsay evidence and non-expert opinion testimony under this rule. *See* Nsereko, *supra* note 5, at 542.

241. I.T.R.P.E., *supra* note 4, R. 89(E), at 37.

242. *Id.* R. 94, at 38. Under military law, the judge may take judicial notice of an adjudicative fact or of the law. MIL. R. EVID. 201(b). “[A fact] must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” MIL. R. EVID. 201(A).

deposition.<sup>243</sup> Witnesses testify under oath<sup>244</sup> and are subject to penalty for perjury.<sup>245</sup>

### 1. Pattern of Conduct

Although the Tribunal's evidentiary rules provide a basic framework for receiving evidence, some of the remaining rules raise more questions than they resolve. For example, the rules indicate "[e]vidence of a consistent pattern of conduct may be admissible in the interests of justice."<sup>246</sup> This rule could be read to permit evidence of other bad acts to demonstrate that the accused had the propensity to engage in such conduct. The analogous military rule prohibits such propensity evidence.<sup>247</sup> To the extent the interests of justice may permit such patterns of conduct to be introduced for other purposes, the Tribunal should clarify the rule.

### 2. Confessions

Another area of concern relates to the evidentiary rule regarding confessions. This rule indicates that confessions are "presumed to have been free and voluntary unless the contrary is proved."<sup>248</sup> Three problems are noted with this rule. First, although the rule indicates the confession must be obtained in strict compliance with the rule governing questioning the accused after his or her initial appearance,<sup>249</sup> the rule does not require strict compliance with the rule regarding the rights of suspects during investigation.<sup>250</sup> Second, the rule places the burden of overcoming the presumption that the confession was free

243. I.T.R.P.E., *supra* note 4, R. 90(A), at 37.

244. *Id.* R. 90(B), at 37.

245. *Id.* R. 91, at 37-38.

246. *Id.* R. 93, at 38.

247. *See* MIL. R. EVID. 404(b).

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*Id.*

248. I.T.R.P.E., *supra* note 4, R. 92, at 38.

249. *Id.* Rule 92 refers to Rule 63. *Id.* Rule 63 provides that the accused's counsel must be present for any questioning of the accused after his or her initial appearance and that the accused be warned regarding the right to remain silent. *Id.* R. 63, at 26.

250. *Id.* R. 42, at 18. *See also supra* notes 74-81 and accompanying text (discussing



and voluntary on the accused. Finally, the rule fails to establish a standard by which the accused overcomes the presumption.

The military evidentiary rule regarding confessions and admissions, meanwhile, provides a detailed framework for determining admissibility that avoids these problems.<sup>251</sup> Under this rule, involuntary statements are not admissible against an accused who has moved for its suppression or objected to the admissibility of the statement.<sup>252</sup> An involuntary statement is any statement taken "in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement."<sup>253</sup> As noted above, Article 31 applies to the questioning of a suspect.<sup>254</sup> Thus, questioning in violation of a suspect's rights is included within the military rule. Moreover, once the accused objects to the admissibility of a confession or admission, the prosecutor has the burden of establishing the statement was voluntary by a preponderance of the evidence.<sup>255</sup>

### 3. Evidence in Cases of Sexual Assault

Assuming rape and other sexual assault crimes are punishable before the Tribunal,<sup>256</sup> three issues are presented by the

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situations in which Tribunal rules requiring warnings of right to remain silent may be circumvented).

251. See generally MIL. R. EVID. 304.

252. MIL. R. EVID. 304(a).

253. MIL. R. EVID. 304(c)(3). See *supra* notes 72-77 and accompanying text (discussing Article 31 and its relationship to Fifth Amendment).

254. See *supra* note 77 and accompanying text (discussing Article 31 as more protective of individuals' right to remain silent than civilian provisions).

255. MIL. R. EVID. 304(e)(1).

256. The "evidentiary" rule regarding evidence in cases of sexual assault presents a preliminary issue concerning the conditions under which rape and other crimes of sexual violence constitute "serious violation of international humanitarian law" within the Tribunal's jurisdiction. Although the answer to this question is beyond the scope of this Article, the following paragraphs provide a brief discussion. For a more detailed discussion, see C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 CRIM. L.F. 471 (1994); MacKinnon, *supra* note 3; *Rape as a Crime*, *supra* note 3; *War Crimes Trials*, *supra* note 18; Tompkins, *supra* note 3.

Rapes committed within the context of a "widespread or systematic" attack against a civilian population on "national, political, ethnic, racial, or religious grounds" constitute crimes against humanity as that term is understood. *Report On Establishing the Tribunal*, *supra* note 2, at 13, ¶ 48. Proof of systematic governmental planning and action, however, is generally considered a necessary element of crimes against humanity. *War*

*Crimes Trials*, *supra* note 18, at 130. See also *Rape as a Crime*, *supra* note 3, at 428. Acquiring evidence of such planning or action may be difficult and present an obstacle to effective prosecution.

Similar difficulties arise in charging widespread or systematic rape as genocide. Under the Genocide Convention, certain acts committed with "intent to destroy . . . a national, ethnic, racial or religious group" constitutes genocide. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277, 1970 Gr. Brit. T.S. No. 58 (Cmnd. 4421) at 4; *Tribunal Statute*, *supra* note 2, art. 4, ¶ 2, U.N. Doc. S/25704, at 37-38, 32 I.L.M. 1193. These acts include: "(b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions calculated to bring about its destruction [and] (d) imposing measures intended to prevent births within the group." *Id.* The difficulty in such cases would be establishing the specific intent requirement.

Given these proof problems, the only remaining options are to prosecute rape as a "lesser" offense of "violation of the laws or customs of war" or as a "grave breach" of the Geneva Conventions. *War Crimes Law*, *supra* note 3, at 84 ("The possibility of prosecuting the far more frequent cases of rape that are regarded as 'lesser' war crimes or grave breaches should not be neglected."). This may be more problematic, however, given the "conventional" meaning of "violations of the laws or customs of war" and "grave breaches."

"Violations of the laws or customs of war" are crimes against the conventional or customary law committed by persons on one side of a conflict against persons or property of the other side. *Rape as a Crime*, *supra* note 3, at 426. Generally, these "war crimes" prohibit certain means and methods of warfare such as use of poisonous weapons, wanton destruction of cities not justified by military necessity, and attack or bombardment of undefended towns. *Tribunal Statute*, *supra* note 2, art. 3, U.N. Doc. S/25704, at 37, 32 I.L.M. at 1192. Rape would not appear to fall within this definition. Even if rape is considered within the conventional or customary definition of "war crimes," rape of a citizen of your own nationality may not. *Rape as a Crime*, *supra* note 3, at 427 n.19.

Regarding grave breaches of the Geneva Conventions, grave breaches are serious acts committed against an individual protected by the Geneva Conventions including willful killing, torture, inhuman treatment, and willfully causing great suffering to body or health. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Aug. 12, 1949, art. 147, 75 U.N.T.S. 287; 1958 Gr. Brit. T.S. No. 39 (Cmnd. 550) at 296. At a minimum, rape should be considered by the Tribunal to fall under inhuman treatment or willfully causing great suffering to body or health; and, under some circumstances, it may rise to the level of torture. *Rape as a Crime*, *supra* note 3, at 426.

The difficulty, however, is that the offense is only a grave breach if committed against a "protected person." Generally, the Geneva Conventions only protect wounded and sick combatants, medical and religious personnel, shipwrecked combatants, prisoners of war, and civilians in occupied territory who are not of the same nationality as protected persons. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Geneva Convention I), Aug. 12, 1949, art. 13 (wounded and sick combatants), arts. 24, 26 (medical and religious personnel) TIAS No. 3362, at 20, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), Aug. 12, 1949, art. 4, TIAS No. 3363, at 6, 75 U.N.T.S. 75 (shipwrecked combatants); Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), Aug. 12, 1949, art. 4, TIAS No. 3364, at 6, 75 U.N.T.S. 135 (prisoners of war); Geneva Convention Relative to the Pro-

rule concerning evidence in cases of sexual assault:<sup>257</sup> the absence of a corroboration requirement, the issue of consent, and the rape shield provision.

First, the rule provides that "no corroboration of the victim's testimony shall be required" in sexual assault cases.<sup>258</sup> Historically, such a corroboration requirement in rape cases was common, although it was not a common law requirement.<sup>259</sup> There are three justifications typically advanced for the corroboration requirement. The first justification is based on a fear of false rape charges.<sup>260</sup> The corroboration requirement would, in theory, prevent such frivolous claims. The second justification is based on the highly charged emotional nature of rape allegations and the fear that the judge and jury might be so enraged by the allegation that they would convict without adequate evidence.<sup>261</sup> Thus, the corroboration requirement was thought to protect the accused from an unfair conviction. The final justification is based on the difficulty in defending against an accusation of rape.<sup>262</sup> Without corroboration, only the conflicting testi-

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tection of Civilian Persons in Time of War (Geneva Convention IV), Aug. 12, 1949, art. 4, ¶ 1, TIAS No. 3365, at 6, 75 U.N.T.S. 287 (civilians in occupied territory). If the rape victim is not a "protected person," then the rape would not be considered a "grave breach."

Thus, in some circumstances, absent evidence of a "widespread or systematic attack" required of crimes against humanity or the specific intent required of genocide, certain rapes do not appear to fall within the definitions described above. A Bosnian national raping another Bosnian national, for example, would not constitute rape under the above definitions.

It may be time for the international community to reconcile this aberration either by treaty or validation of the evolution of customary law by successful prosecution before the Tribunal. International law is evolving, and "customary" international law may evolve beyond "treaty" or "convention" definitions. In this regard, the Tribunal may enforce "customary" law not yet reflected in "treaty" law. In doing so, the Tribunal would validate the customary law, much like the Nuremberg trials validated crimes against humanity as a violation of international humanitarian law. Until validated by successful prosecutions, however, such evolution remains merely speculative. Also, the question could arise regarding which came first — much like the proverbial chicken or egg — the customary law that was then validated by the Tribunal, or the Tribunal "validation" of nonexistent law.

257. I.T.R.P.E., *supra* note 4, R. 96, at 38-39. There is no analogous rule in the military justice system.

258. *Id.* R. 96(i), at 38.

259. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1137 n.155 (1986).

260. Note, *The Rape Corroboration Requirement: Repeal not Reform*, 81 YALE L.J. 1365, 1373 (1972).

261. *Id.* at 1378.

262. *Id.* at 1382. See, e.g., 1 MATTHEW HALE, PLEAS OF THE CROWN 686 (1680)

mony of the victim and the accused remain.

Although "few jurisdictions have abolished this practice, and many more still insist on it,"<sup>263</sup> the modern trend has been toward abolishing the corroboration requirement. In U.S. courts, twenty-two states have decreed that corroboration of a victim's testimony is not required when the testimony is credible, clear, and convincing, or sufficient to prove the elements of rape beyond a reasonable doubt.<sup>264</sup> Seven states have eliminated the requirement by statute.<sup>265</sup>

That the Tribunal has followed this modern trend is not surprising given that the justifications typically advanced to support such a requirement are not relevant to proceedings before a body such as the Tribunal. First, although possible, false claims are not as likely within the context of war crimes as in other contexts. Second, the Tribunal is unlikely to be so enraged by an allegation that it is unable to appropriately weigh the evidence and hold the prosecution to its burden of proof. Finally, although the absence of a corroboration requirement makes it

(Rape "is an accusation easily made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."). The Model Penal Code ("MPC") retained the corroboration requirement in its 1980 revision based on the perceived difficulty in defending against the claim of rape. MODEL PENAL CODE § 213.6, at 428 (Official Draft and Revised Commentaries 1980). The MPC drafters claim that the corroboration requirement is not an attempt to discount female testimony, but is "only a particular implementation of the general policy that uncertainty should be resolved in favor of the accused." *Id.* at 429. See also Estrich, *supra* note 259, at 1138.

263. Nsereko, *supra* note 5, at 548.

264. See generally Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4TH 120 (1994 Supp.) (Lockett v. State, 518 So.2d 877 (Ala. 1987); Roper v. State, 756 S.W.2d 124 (Ark. 1988); People v. Poggi, 753 P.2d 1082 (Cal. 1988); Mitchell v. State, 335 S.E.2d 150 (Ga. 1985); People v. Brown, 461 N.E.2d 71 (Ill. 1984); Fields v. State, 455 N.E.2d 601 (Ind. 1983); State v. Lile, 699 P.2d 456 (Kan. 1985); State v. Montana, 533 So.2d 983 (La. 1988); State v. Philbrick, 551 A.2d 847 (Me. 1988); State v. DeBaere, 356 N.W.2d 301 (Minn. 1981); Christian v. State, 456 So.2d 729 (Miss. 1984); State v. Van Doren, 657 S.W.2d 708 (Mo. 1983); State v. Medina, 798 P.2d 1032 (Mont. 1990); State v. Hunter, 677 P.2d 618 (N.M. 1984); People v. Mattison, 97 A.D.2d 621, 468 N.Y.S.2d 932 (3d Dep't 1983); State v. Oasheim, 353 N.W.2d 291 (N.D. 1984); State v. Love, 550 N.E.2d 951 (Ohio 1988); Binder v. State, 713 P.2d 1134 (Okla. 1986); Commonwealth v. Ritchie, 472 A.2d 220 (Pa. 1984); Grogan v. State, 713 S.W.2d 705 (Tex. 1986); Barker v. Commonwealth, 337 S.E. 2d 729 (Va. 1985); State v. Gilbert, 339 S.E.2d 851 (W.Va. 1990); Story v. State, 721 P.2d 1020 (Wyo. 1986)).

265. FLA. STAT. ANN. § 794.022 (West 1990); N.M. STAT. ANN. § 30-9-15 (Michie 1994); R.I. GEN. LAWS § 11-37-11 (1993); S.C. CODE RECS. § 16-3-657 (Law. Co-op 1993); VT. STAT. ANN. tit., § 3255(a)(2) (Supp. 1994); WASH. REV. CODE ANN. § 9A-44-020(1) (West 1994); WYO. STAT. § 6-2-311 (Supp. 1994).

somewhat more difficult to defend a rape allegation and eases the prosecution's burden of production, it does not diminish its burden of proof. The prosecutor must still convince the trial chamber of the accused's guilt beyond a reasonable doubt. This may often require the prosecutor to introduce corroborating evidence.

The second issue related to the Tribunal rule concerning evidence in sexual assault cases involves the issue of consent.<sup>266</sup> Originally, the rule merely provided that "[c]onsent shall not be allowed as a defence" in sexual assault cases. Subsequently, the Tribunal amended the rule to provide that consent is not a defense "if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression; or (b) reasonably believed that if the victim did not submit, another might be subjected to, threatened or put in fear."<sup>267</sup>

This rule may be criticized in that the rule is substantive and not evidentiary or procedural. The Security Council only authorized the Tribunal to adopt rules of procedure and evidence.<sup>268</sup> Any attempt by the Tribunal to define substantive criminal offenses is beyond the scope of authority granted them by the Security Council. Arguably, this is exactly what the Tribunal did regarding sexual assaults. Most would regard the ab-

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266. Admittedly, this discussion is largely academic given the nature of the allegations arising in the former Yugoslavia. According to the Commission of Experts, rape and sexual assault allegations fall into five different patterns:

The first pattern involves individuals or small groups committing sexual assault in conjunction with looting and intimidation of the target ethnic group. . . .

The second pattern of rape involves individuals or small groups committing sexual assaults in conjunction with fighting in an area, often including the rape of women in public. . . .

The third pattern of rape involves individuals or groups sexually assaulting people in detention because they have access to the people. . . .

The fourth pattern of rape involves individuals or groups committing sexual assaults against women for the purpose of terrorizing and humiliating them often as part of the policy of "ethnic cleansing". . . .

The fifth pattern of rape involves detention of women in hotels or similar facilities for the sole purpose of sexually entertaining soldiers, rather than causing a reaction in the women.

*Final Report*, *supra* note 18, ¶¶ 245-49. Consent would not likely be an issue in cases arising in the context of any of these "patterns."

267. I.T.R.P.E., *supra* note 4, R. 96(ii), at 38.

268. *Report On Establishing the Tribunal*, *supra* note 2, at 21, ¶ 84; *Tribunal Statute*, *supra* note 2, art. 15, U.N. Doc. S/25704, at 42, 32 I.L.M. at 1196.

sence of consent to be an element of the offense or the presence of consent to be an affirmative defense.<sup>269</sup> In either case, the issue of consent is part of the substantive definition of the crime.

Besides being beyond the scope of the authority of the Tribunal, the question arises whether this substantive provision reflects "those provisions of international law that are clear and generally accepted."<sup>270</sup> It is tempting to try drafting substantive definitions of the specific offenses within the general categories of crimes within the Tribunal's jurisdiction. Such definitions appear necessary when the burden of proof is on the prosecutor to prove the accused's guilt under a standard of proof. Without definitions or elements, the prosecutor may have difficulty determining what is to be proven, and the judges may be incapable of determining whether the prosecutor has met the burden of proof.

This temptation, however, should be avoided. Either the crime is part of international customary law and capable of determination or it is not. Attempting a restatement of international customary law risks creating new law.<sup>271</sup> The Tribunal should apply only those provisions of international law that are clear and generally accepted. Any attempts by the Tribunal to venture into substantive criminal definitions should be subjected to extensive scrutiny to ensure the definition reflects accepted norms of international, conventional, or customary law.

269. For two thought-provoking articles concerning the relationship of consent to allegations of rape and sexual assaults see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992) (arguing for reclassification of sexual assaults into two categories: (1) sexual assaults (forcible acts); and (2) sexual expropriation (non-consensual acts)); Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988) (arguing that definitions of sexual assault crimes focus on force, but that consent remain as affirmative defense).

270. *War Crimes Trials*, *supra* note 18, at 128. See also *supra* notes 30-38 (discussing Tribunal's application of existing international humanitarian law, and Tribunal's inability to create new law). Although this question is posed here, its answer is beyond the scope of this Article.

271. Arguably, this is what the Tribunal accomplished with the original version of Rule 96. In the original version, the rule provided that "consent shall not be allowed as a defence." U.N. Doc. IT/32 (1994), 33 I.L.M. 484, 536. The question could then be asked that if consent is not a defense and, implicitly, the absence of consent is not an element of the crime, what constitutes the crime of rape? Perhaps to resolve this question, the Tribunal amended the rule to, in effect, state that consent is not a defense if the consent was non-consensual. See *supra* notes 266-267 and accompanying text (discussing circumstances in which consent would not be allowed as defense).

The final issue related to the rule concerning evidence in sexual assault cases involves the rape shield provision which excludes all evidence concerning the prior sexual history of the victim.<sup>272</sup> Arguably, this rule is overly broad. It excludes not only prior consensual acts of the victim with others, but prior consensual acts of the victim with the accused and prior non-consensual acts of others.

Most commentators would agree that prior consensual acts of the victim with others have no probative value and should be properly inadmissible.<sup>273</sup> Prior consensual acts of the victim with the accused and prior non-consensual acts of others, however, may have probative value. The military rules of evidence recognize this possibility by permitting evidence of past sexual behavior of the victim with the accused offered to show that the victim consented<sup>274</sup> and evidence of past acts of others offered to show the accused was not the source of semen or injury.<sup>275</sup>

Taken alone, the rules regarding evidence in sexual assault cases and the measures to protect victims and witnesses might seem appropriate. Taken together, however, the rules deny the accused the right to confront and cross-examine witnesses against him and to present a defense. The Tribunal should amend the rules by eliminating the unnecessary and confusing provision regarding consent and narrow the rape shield provision to permit legitimate cross-examination while protecting legitimate privacy interests of victims.

### CONCLUSION

The creation of an *ad hoc* international tribunal and adoption of rules of procedure and evidence for such a tribunal are steps in an evolutionary process. As with any evolutionary process, there is opportunity for erosion as well as progress. The failure of this first attempt by the United Nations to act against war criminals would erode the rule of international law. Instead

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272. I.T.R.P.E., *supra* note 4, R. 96(iv), at 39. Article 96(iv) excludes all evidence concerning "the prior sexual conduct of the victim." *Id.*

273. See Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using Rape Victim's Sexual History to Show the Defendants Mistaken Belief in Consent*, 79 Cal. L. Rev. 541, 542, n.6 (1991) (stating consensual sexual acts with others have no probative value).

274. Mil. R. Evid. 412(b)(2)(B).

275. *Id.* 412(b)(2)(A).

of the rule of law, trial and punishment would again be linked to total victory and "victor's justice."

Equally important, however, is whether the international community views the trials as fundamentally fair. The legitimacy of the Tribunal turns not only on whether the Security Council had the authority to establish such a Tribunal, but whether, once established, the Tribunal observes basic norms of due process. States will only willingly cede a portion of their sovereignty to such international undertakings if they comport with fundamental notions of due process and fairness.

As noted above, the Tribunal's statute advanced three laudable general principles: a commitment to prosecuting only those crimes that are beyond doubt part of customary international law; a commitment to ensuring the accused receives a fair trial with certain fundamental rights guaranteed; and a commitment to protecting victims and witnesses.<sup>276</sup> The rules of procedure and evidence adopted by the Tribunal reflect these same principles. These principles conflict, however, where the Tribunal fails to adequately protect the rights of individual accused in favor of protecting victims and witnesses. The Tribunal should reevaluate its rules to ensure these general principles are properly balanced.

Comparison of the Tribunal rules with the analogous provision of military law reveals numerous ways in which the military justice system is more protective of individual rights. The Tribunal should consider these comparisons and, where appropriate, amend their rules to provide similar protections. Moreover, the international community should seriously consider the model provided by the military justice system in future attempts to punish violations of international humanitarian law. If the Tribunal does not adequately protect individual rights, or properly balance those rights against other concerns such as the protection of victims and witnesses, the Tribunal will erode, instead of advance, the rule of international law.

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276. See *supra* notes 30-55 and accompanying text (discussing general principles advanced by Tribunal).