Articles

The Right to Silence in The Hague International Criminal Courts

By MARK BERGER*

Introduction

IN THE YEARS SINCE WORLD WAR II, international judicial institutions have been increasingly utilized to resolve a wide array of legal disputes between nations.[1] At least in part, this suggests recognition that domestic legal systems may not always be suited to the task of handling legal problems that have significant international ramifications. Moreover, while the process of creating international courts and tribunals may be difficult and problematic, the frequent reliance on such institutions demonstrates that nations often conclude that their value is well worth the cost.

Perhaps the most logical environment for the use of international judicial institutions is in the resolution of disputes under international agreements. Specialized courts and tribunals focusing on specific treaties or compacts have the ability to develop expertise in the agreements they interpret, and are therefore likely to produce more consistent and acceptable decisions. Reflecting this approach, the European Union established the European Court of Justice to hear cases raising issues under European Union law,[2] and in a similar fashion,

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1. In particular, international judicial institutions have frequently been created to resolve disputes arising under international trade agreements. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401; North American Free Trade Agreement, U.S.-Can.-Mex., ch. 19, pt. 7, Dec. 17, 1992, 32 I.L.M. 289.

2. Consolidated Version of the Treaty on European Union art. 19, Feb. 7, 1992, 2010 O.J. (C 83) 13, 27.

under the auspices of the United Nations, the International Tribunal for the Law of the Sea was established to resolve disagreements arising under the United Nations Convention on the Law of the Sea.[3]

However, international judicial institutions that are not part of any nation's domestic legal system are increasingly being used to perform tasks beyond interpreting specialized treaties. In many circumstances, international tribunals have been established to resolve legal disputes arising under general international law principles. This is illustrated by the International Court of Justice, which was established under the United Nations Charter to hear international legal disputes submitted by national governments,[4] and to render advisory opinions on questions referred by organs of the United Nations, as well as specialized agencies authorized to request advisory opinions.[5] In a comparable fashion, the International Court of Arbitration of the International Chamber of Commerce acts as an umbrella organization[6] to promote and administer arbitration services for the resolution of international business and commercial disputes.[7]

Separately, international judicial institutions are also being used to interpret and protect human rights standards against infringement by individuals and national governments. The European Court of Human Rights ("ECHR"), which has responsibility for interpreting and enforcing the European Convention on Human Rights ("European Convention"),[8] is an important and influential illustration, but other declarations of international human rights standards and mechanisms for their enforcement have also been created.[9] International

3. United Nations Convention on the Law of the Sea art. 20–23, Dec. 10, 1982, 1833 U.N.T.S. 3, Annex VI.

4. Statute of the International Court of Justice arts. 34–38, Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

5. *Id.* at arts. 65–68.

6. As noted in the International Chamber of Commerce Arbitration Rules, the International Court of Arbitration "does not itself resolve disputes [but rather] administers the resolution of disputes by arbitral tribunals." International Chamber of Commerce, Arbitration and ADR Rules art. 1, § 2 (2011).

7. The website of the ICC International Court of Arbitration is located at http://www.iccwbo.org/about-icc/organisation/dispute-resolution-services/icc-international-court-of-arbitration/ (last visited Aug. 25, 2012). The International Chamber of Commerce Arbitration Rules of the International Court of Arbitration can be found at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ (last visited Aug. 25, 2012).

8. Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Mar. 20, 1952, 213 U.N.T.S. 221 [hereinafter European Convention].

9. The United Nations' International Covenant on Civil and Political Rights is illustrative. *See* United Nations' International Covenant on Civil and Political Rights, Dec. 19,

human rights are also central concerns of the specialized War Crimes Tribunals established by the United Nations to bring to justice those responsible for atrocities in various war-torn regions, including the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR").[10] Looking to the future, and following many years of effort, members of the international community voted to establish the International Criminal Court ("ICC")—an international judicial institution for the prosecution of crimes offending international human rights norms.[11]

1966, 999 U.N.T.S. 171 [hereinafter United Nations' International Covenant on Civil and Political Rights]. Compliance with the terms of the Covenant is monitored by the United Nations Human Rights Committee. *Id.* at art. 28. In the Western Hemisphere, the Organization of American States has adopted the American Convention on Human Rights. *See* American Convention on Human Rights "Pact of San Jose, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 [hereinafter Pact of San Jose]. Cases alleging violations of the Convention are heard by the Inter-American Court of Human Rights. *Id.* at art. 33. *See also* The African Charter on Human and Peoples' Rights, Jun. 27, 1981, 1520 U.N.T.S. 217. The treaty was adopted by the Organization of African Unity and is subject to the jurisdiction of the African Commission on Human and Peoples' Rights. *Id.* at art. 30.

10. Resolution 827, which was passed by the United Nations Security Council on May 25, 1993, established the International Criminal Tribunal for the Former Yugoslavia. Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], *adopted by* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), 32 I.L.M. 1203. In 1994, the United Nations Security Council passed Resolution 955, which created the International Criminal Tribunal for Rwanda. Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]. Special courts have also been established with United Nations involvement to try human rights offenses committed in Lebanon, Cambodia and Sierra Leone. The Special Tribunal for Lebanon was established under United Nations auspices to investigate the events that lead to the death of former Lebanese Prime Minister Rafiq Hariri and twenty-two others. *See* Statute of the Special Tribunal for Lebanon, Mar. 29, 2006, 2461 U.N.T.S. 293 [hereinafter Lebanon Statute], *adopted by* S.C. Res. 1757, U.N. Doc S/RES/1757 (Mar. 29, 2006). A special tribunal, known as the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, was also established to deal with offenses committed during the Khmer Rouge era in Cambodia. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, U.N. Doc. NS/RKM/1004/006 (Oct. 27, 2004). In addition, a Special Court for Sierra Leone was established by United Nations Security Council Resolution 1315, August 14, 2000, to try serious human rights offenses committed in that country. Statute of the Special Court for Sierra Leone, Aug. 14, 2000, 2178 U.N.T.S. 138 [hereinafter SCSL Statute], adopted by S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

11. *See* Rome Statute of the International Criminal Court, Annex II, Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute]. The ICC Statute was adopted on July 17, 1998 in Rome after an affirmative vote of 120 nations, and later came into force on July 1, 2002 following ratification by 60 countries. The United States is not a signatory of the ICC Statute. The negotiating process leading to the adoption of the ICC Statute is described in Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court,* 93 AM. J. INT'L L. 22, 22–24 (1999).

The War Crimes Tribunals and the ICC, however, are set apart from other international judicial entities. First, they do not address disputes between national governments or parties to commercial ventures. Beyond that, whereas the ECHR and other similar international courts act to review compliance by member nations with recognized human rights norms contained in the treaties that established the courts,[12] the War Crimes Tribunals and the ICC are courts of the first instance that try individuals accused of applicable human rights offenses in much the same way that national governments enforce their own criminal laws.[13]

In serving as international courts that try what are essentially criminal offenses, the War Crimes Tribunals and the ICC, like national criminal courts, have the responsibility to carefully balance the institutional goal of successfully prosecuting human rights offenders with the need to respect appropriate limits on the exercise of their enforcement authority. The fact that the governments responsible for the international criminal courts may have balanced these conflicting interests differently in their domestic legal systems adds a further complication to the process.

One area where the War Crimes Tribunals and the ICC have had to balance enforcement needs, human rights standards, and variations in the criminal procedure systems of member states is in the administration of the right to remain silent. This doctrine, which is based on the *nemo tenetur se ipsum accusare* principle that no one may be compelled to incriminate himself,[14] provides for a broad-based privilege to withhold information. It is frequently incorporated in human rights

12. Article 1 of the European Convention describes the obligation of the "High Contracting Parties [to] secure to everyone within their jurisdiction the rights and freedoms" defined in section I of the Convention, while Article 19 establishes the ECHR to "ensure the observance of the engagements undertaken by the High Contracting Parties." European Convention, *supra* note 8, at arts. 1, 19.

13. ICTY Statute, *supra* note 10, at art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."); ICC Statute, *supra* note 11, at art. 1 (stating that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern" as covered by the Statute).

14. For general background on the right to silence, see MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION (1980) [hereinafter TAKING THE FIFTH]; R. H. HELMHOLZ, CHARLES M. GRAY, JOHN H. LANGBEIN, EBEN MOGLEN & HENRY E. SMITH, THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT (1997); LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum,* 25 J. CLEV. BAR ASS'N 91 (1954).

declarations,[15] as well as in the constitutions and laws of many countries.[16] Even the European Convention on Human Rights, which does not include specific mention of a self-incrimination privilege, has been interpreted by the ECHR to include right to silence protection.[17] However, there are many variations in the formulation and scope of the right, which in turn can have significantly different practical consequences on how criminal justice is administered.

This article will examine how the right to silence has been incorporated in various international human rights declarations during the twentieth century. It will focus on the protection of the privilege of silence in the proceedings of the recently created international tribunals in The Hague that are trying individual offenders charged with war crimes and crimes against humanity. The analysis will include consideration of how these tribunals have applied right to silence doctrine in the wide variety of settings in which it is implicated. The War Crimes Tribunals and the ICC have adhered to the international consensus on the importance of protecting the right to a fair trial, including respecting the role that the privilege of silence plays in the criminal procedure process, and in so doing have ensured the legitimacy of its ultimate judgments.[18]

15. *See, e.g.*, Pact of San Jose, *supra* note 9, at art. 8(2)(g) ("[E]very person is entitled, with full equality . . . [to] the right not to be compelled to be a witness against himself or to plead guilty."); United Nations' International Covenant on Civil and Political Rights, *supra* note 9, at art. 14(3)(g) ("[E]veryone shall be entitled . . . [n]ot to be compelled to testify against himself or to confess guilt.").

16. *E.g.*, INDIA CONST. art. 20, § 3 (protecting a person accused of any offense against being compelled to be a witness against himself); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 11(c) (individuals "charged with an offense" may not be "compelled to be a witness in proceedings . . . in respect of the offense"); New Zealand Bill of Rights Act 1990 No. 109, § 25(d) (individuals charged with an offense are granted the right not to be compelled to be a witness or to confess guilt).

17. This has been the result of the Court's broad reading of the right to a "fair and public hearing" contained in Article 6(1) of the Convention. Mark Berger, *Europeanizing Self-Incrimination: the Right to Remain Silent in the European Court of Human Rights*, 12 COLUM. J. EUR. L. 339, 341 (2006) [hereinafter *Europeanizing Self-Incrimination*].

18. Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters,* 87 VA. L. REV. 1381, 1436–37 (2001) ("[T]he sui generis character of [the tribunals'] proceedings allows for the development of robust protections for the rights of the accused [and that] it is better for the credibility of a budding international criminal common law to err on the side of stronger protections rather than weaker."); Sara Anoushirvani, Comment, *The Future of the International Criminal Court: The Long Road to Legitimacy Begins With The Trial of Thomas Lubanga Dyilo,* 22 PACE INT'L L. REV. 213, 215 (2010) ("[Because of the] Tribunal's insistence upon upholding the principle of a defendant's right to a fair trial [in the "Lubanga" case] . . . the ICC has taken one step forward in establishing itself as a legitimate judicial institution.").

I. Background to International Criminal Law Enforcement

The creation of a system of criminal law that includes not only the definition of prohibited acts, but also provides for a process to identify, prosecute, and punish violators, is a core responsibility of any government. Nations are expected to legislate basic standards of behavior that protect persons and property against unwarranted interference, and to enforce those standards by apprehending violators, adjudicating their responsibility, and applying appropriate sanctions for the offenses they commit. However, domestic criminal law enforcement may not be effective when the offenses involve serious international human rights abuses.

Particularly where human rights standards are breached during wartime or civil disturbance, reliance upon domestic investigations and prosecutions can be uniquely problematic. In such cases there is no guarantee that an appropriate law enforcement response will be forthcoming. The problem is especially acute when national governments and their leaders are the responsible parties. Where that is true, the only possibility for a law enforcement response is through external intervention. However, the kind of cooperation among governments that is necessary to perform this task has been consistently difficult to achieve, except following armed conflicts where the victors have chosen to bring the vanquished to trial for the latter's conduct during the conflict, or where governments have selectively prosecuted their own personnel for extreme misconduct.[19]

The difficulty of prosecuting crimes connected with war-related human rights abuses, and the general pattern of limiting any such effort to participants on the losing side of the conflict, is illustrated by the unsuccessful Allied attempt after World War I to bring charges against Kaiser Wilhelm II for waging war.[20] Initially, efforts were made

19. One commentator observed that war crime prosecutions by national courts "were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army." WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (4th ed. 2011) [hereinafter THE INTERNATIONAL CRIMINAL COURT].

20. The Kaiser would have been tried for "a supreme offence against international morality and the sanctity of treaties." Treaty of Peace with Germany (Treaty of Versailles), art. 227, Jun. 28, 1919, 3 U.S.T. 1329 [hereinafter Treaty of Versailles]. Violations of the laws and customs of war by German military personnel were to be prosecuted pursuant to Articles 228 and 229 of the Treaty of Versailles, *id.* at arts. 228, 229, and suggestions were made that prosecutions of Turkish officials for the slaughter of Armenians should be undertaken. However, the tribunal to try Germans was never established and political considerations following the 1917 Russian Revolution put an end to any thought of Turkish

to begin the process by securing custody of the former German leader, but this was thwarted by his successful escape to the Netherlands where he was given refuge and allowed to live out his life.[21] Thereafter, the desire to prosecute the Kaiser waned, partly due to the passage of time, and partly out of concern for the stability of the Weimar government.[22] The goal of providing an international forum to try the Kaiser in the end was not achieved.

In contrast, the World War II Allies obtained custody of a number of German and Japanese war leaders and were able to bring them to trial for the human rights atrocities committed by their armed forces. While the Nuremberg and Tokyo War Crimes Tribunals[23] represent milestones in the internationalization of human rights standards and their enforcement through international mechanisms, both have been subject to criticism as more representative of victors' justice than illustrations of fair and objective adjudications of the violation of international norms of behavior.[24]

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prosecutions. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 395–99 (2003) [hereinafter INTRODUCTION TO INTERNATIONAL CRIMINAL LAW]; *see also* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 278–90 (1989) (describing additional political considerations leading to the suspension of Turkish prosecutions); Vincent M. Creta, Comment, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 385–86 (1998) (explaining that an international criminal tribunal was never created after World War I due partially to concerns of possible German resistance).

21. The Allies did not request extradition of the Kaiser from the Netherlands, whose monarch, Queen Wilhelmina, was his cousin. In formal terms, the Netherlands position was that the offense charged against the Kaiser for his decision to go to war was unknown to Dutch law and therefore not subject to extradition. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 400 & n.32; THE INTERNATIONAL CRIMINAL COURT, *supra* note 19, at 3.

22. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 401.

23. The International Military Tribunal at Nuremberg was created by the four victorious Allied powers: the United States, Great Britain, France, and the Soviet Union. It was established pursuant to a charter contained in the London Agreement of August 8, 1945. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. The International Military Tribunal for the Far East, in contrast, was established pursuant to an order promulgated by General Douglas MacArthur in his capacity as Supreme Commander for the Allied Powers. *See* Charter of the International Military Tribunal for the Far East (1946), *reprinted in* U.S. Dep't of State, Trial of Japanese War Criminals 39–44 (Pub. No. 2613, Far Eastern Series No. 12, 1946), 4 Bevans 20, 21–22 [hereinafter IMTFE Charter]; *see generally* INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 405–26.

24. The Tokyo Tribunal procedures, in particular, were the subject of widespread criticism. *See* INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 416–18. Justice Murphy objected to the proceedings that resulted in the conviction of Japanese General

In both the Nuremberg and Tokyo proceedings, the defendants were tried for crimes against peace, war crimes, and crimes against humanity[25] before military tribunals rather than civilian courts. In each case, the governing charters provided that the tribunals would not be bound by technical rules of evidence, but rather were to "admit any evidence which [the tribunal] deem[ed] to have probative value."[26] The Nuremberg Tribunal specifically held that this included the admission of voluntary pretrial statements of an accused, even though defendants could not be called to testify against their will.[27] The tribunals employed adjudicatory rules that were a mixture of the features of adversarial systems, where the parties retain primary control of the proceedings, and civil law systems in which the judge plays a more activist role.[28] In the end, the Nuremberg and Tokyo War Crimes Tribunal cases and the domestic prosecutions that followed[29]

Yamashita, describing his trial as the "uncurbed spirit of revenge and retribution, masked in formal legal procedure." *In re* Yamashita, 327 U.S. 1, 41 (1946) (Murphy, J., dissenting).

25. IMT Charter, *supra* note 23, at art. 6; IMTFE Charter, *supra* note 23, at art. 5; INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 408.

26. IMT Charter, *supra* note 23, at art. 19; IMTFE Charter, *supra* note 23, at art. 13. Both Tribunals focused on the prosecution of higher-level policymakers, and therefore the evidence relied on by the prosecution was more likely to be documentary as opposed to testimonial. In contrast, the criminal tribunals established since 1990 have involved more frequent prosecutions of individuals directly responsible for the commission of atrocities. As a result, more reliance in these prosecutions has been placed on witness testimony. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 743–44 (1999) [hereinafter *Trends in International Criminal Evidence*].

27. *Trends in International Criminal Evidence, supra* note 26, at 761–62; *see also* United States v. Wilhelm von Leeb (High Command), 15 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 877 (1948) (upholding the admission of statements obtained without duress or promises of immunity). In contrast, statements obtained under duress were subject to exclusion. United States v. Ulrich Greifelt, (Ru SHA Case)—Statement from the Judgment of the Tribunal Concerning the Exclusion of Affidavits of Witnesses who Testified that They Had Executed the Affidavits Under Threats and Duress, 15 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 879 (1948).

28. *See generally* INTRODUCTION TO INTERNATIONAL CRIMINAL LAW *supra* note 20, at 407–08 (noting some input from the criminal justice system of the Soviet Union in the Nuremberg Tribunal procedures); Kai Ambos, *The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?,* in GLOBALIZATION OF CRIMINAL JUSTICE 461–503 (Michael Bohlander ed., 2010) (noting 'adversarial' and 'inquisitorial' elements of the law of the ICTY and the ICC).

29. Under the authority of the Allied Control Council in Germany, war crime prosecutions of lower ranking officials were undertaken in each of the four Allied zones, with evidence admissibility standards similar to those that governed the Nuremberg Tribunal. In Japan, the Yokohama trials followed the Tokyo Tribunal proceedings with procedural and evidentiary rules based upon the Nuremberg and Allied Control Counsel system. *See Trends in International Criminal Evidence, supra* note 26, at 732.

resulted in convictions that reflected the international community's condemnation of war-related atrocities. As such, they were an important first step in ending the legal impunity that war leaders who commit gross violations of human rights had come to rely upon.

Despite the revelations of the Nuremberg and Tokyo War Crime Tribunals, genocide, murder, sexual assaults, and other human rights offenses committed on a vast and coordinated scale have not disappeared. In the latter part of the twentieth century, the world has seen human rights outrages in such places as Cambodia under the Khmer Rouge, Rwanda during the ethnic war between the Hutus and Tutsies, and the former Yugoslavia as the country separated into historically hostile enclaves. The scale of the horror during these episodes may not have reached the total kill count of the Nazis, but the brutality was equivalent.[30]

Although, over the years, proposals for a permanent institution to oversee the prosecution of such human rights offenses had been made,[31] none had borne fruit by the time that the Yugoslav, Rwandan, and Cambodian horrors occurred. As a result, any response from the international community would have had to take the form of an ad hoc mechanism, much like the response of the Allies following World War II. The challenge was taken up by the United Nations, and the response agreed upon was the creation of special tribunals to investigate and prosecute responsible offenders. Most notable among them have been the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[32] and the International Criminal Tribunal for Rwanda ("ICTR").[33] Special tribunals were also established to deal with human

30. The human rights violations in Cambodia, Rwanda and the former Yugoslavia have been well documented. *See, e.g.*, Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia (Jul. 18, 2007), *available at* http://www.yale.edu/cgp/downloads/Statement_of_Co-Prosecutors18-July-2007.pdf; U.N. Secretary-General, *Report of the Secretary General on Human Rights Question: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, U.N. Doc. A/49/508/Add.1 (Nov. 14, 1994); U.N. Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 (May 27, 1994).

31. *See* Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 669–85 (1996).

32. The ICTY was established following the adoption of United Nations Security Council Resolution 827 in 1993. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). It was the first of the Security Council's special criminal tribunals. The ICTY website, which contains helpful links to the Tribunal's statute, rules and case law, is located at http://www.icty.org/ (last visited Aug. 25, 2012).

33. The creation of the ICTR was also the result of the adoption of a resolution by the United Nations Security Council. *See* S.C. Res 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The ICTR website is located at: http://www.ictr.org/ (last visited Aug. 25, 2012).

rights violations in Cambodia,[34] Sierra Leone,[35] and to investigate and prosecute those responsible for the assassination of former Lebanese Prime Minister Rafiq Hariri.[36] However, because of its significantly higher profile, the ICTY will be the focus of the War Crimes Tribunal discussion, which follows.[37]

The statutes creating both the Yugoslav and Rwanda tribunals focus on serious human rights violations that took place within defined jurisdictional and temporal limits.[38] They establish personal responsibility for individuals who committed or planned the violations,[39] and have demonstrated that "international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible."[40] However, while the tribunals cover such crimes as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the laws or customs of war,[41] they were established as ad hoc United Nations institutions and, as such, required agreement among the members of the United Nations Security Council to pass the implementing resolutions.

An obvious alternative to that approach is the creation of a permanent mechanism, not tied to any particular event, that would be able to respond to international human rights atrocities as they arise. Many have called for such a solution over the years.[42] And although

34. *See supra* note 10.

35. *Id.*

36. *Id.*

37. The ICTY came into existence before the other War Crimes Tribunals and has prosecuted defendants who are better known in Europe and North America, including the former Yugoslav President, Slobodan Milošević. *See, e.g.,* Prosecutor v. Slobodan Milošević, Case No. IT-99-37, Indictment, ¶¶ 90–100 (May 22, 1999). Moreover, ICTY proceedings are conducted in The Hague, while the other tribunals conduct their proceedings outside of Europe.

38. In the case of the ICTY, jurisdiction is limited to the territory of the former Yugoslavia, and the temporal starting point is 1991. ICTY Statute, *supra* note 10, at art. 1. The Rwanda Statute defines its geographical reach as Rwanda, along with neighboring states in the case of violations committed by Rwandan citizens, and establishes a temporal limitation of January 1 to December 31, 1994. ICTR Statute, *supra* note 10, at art. 1.

39. ICTR Statute, *supra* note 10, at art. 6; ICTY Statute, *supra* note 10, at art. 7. *See, e.g.*, Prosecutor v. Radovan Karadžić & Ratko Mladić, Nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶¶ 81–85 (Jul. 11, 1996) (identification of the bases of individual responsibility of the defendants).

40. Theodor Meron, *War Crimes Law Comes of Age*, 92 Am. J. Int'l L. 462, 463 (1998).

41. ICTR Statute, *supra* note 10, at arts. 2–4; ICTY Statute, *supra* note 10, at arts. 2–5. Violation of the laws of war are not part of the ICTR statute due to the absence of an armed conflict as was present during the breakup of the former Yugoslavia.

42. Wexler, *supra* note 31, at 669–85.

the process was long and tedious, in the end, sufficient support was secured for the adoption of the Rome Statute, creating the ICC as a permanent institution where serious and widespread human rights atrocities could be referred.[43] Currently, 120 states, not including the United States,[44] have become members of the court.[45]

This time, the U.N. Security Council was not the source of authority for the institution's creation and therefore global jurisdiction for the ICC was not achieved. Instead, the court was established by treaty,[46] thereby limiting the extent that nationals of non-signatories could be made subject to the court's reach.[47] Additionally, the court's

43. ICC Statute, *supra* note 11, at art. 1. The ICC Statute was approved by participating states on a vote of 120 in favor and 7 against, with 21 abstentions. *See* Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/2889 (Jul. 20, 1998).

44. The United States publicly indicated that it was voting against the establishment of the Court. The vote was unrecorded, but one author has speculated that other opponents of the ICC Statute were China, India, Iraq, Israel, Libya, Qatar, and Yemen. Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 384 n.8 (2000). The American concern was that, by granting automatic jurisdiction to the state in which the offense was committed, United States nationals serving in the military overseas would be subject to prosecution by the ICC, even if the United States did not agree to the treaty and objected to the prosecution. A compromise acceptable to the United States on this issue could not be reached. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court,* 93 AM. J. INT'L L. 22, 26 (1999). After not signing the treaty in Rome, the Bush Administration informed the United Nations that it did not intend to become part of the Court. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty,* AM. SOC. OF INT'L L. INSIGHTS, May 2002, *available at* http://www.asil.org/insigh87.cfm. Articles agreeing and disagreeing with the United States' position regarding the ICC, respectively, include Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty,* 14 AM. U. INT'L L. REV. 805 (1999) and Patricia M. Wald, *Why I Support the International Criminal Court,* 21 WIS. INT'L L.J. 513 (2003).

45. *See* ICC–The States Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Aug. 25, 2012).

46. One author described this as a "practical decision" with resulting "financing, bureaucratic structure, authority, and power" implications. Sadat, *supra* note 44, at 395.

47. GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 8 (2003). The ICC lacks the foundation of a Security Council resolution, which would result in "a mandatory obligation for States to cooperate." *Id.* at 7. However, the Security Council may refer cases for investigation involving nationals of non-signatory states to the ICC, pursuant to Article 13(b) of the ICC Statute. ICC Statute, *supra* note 11, at art. 13(b). This occurred with respect to genocide charges filed against President Omar Hassan al-Bashir of Sudan. *See ICC Prosecutor Seeks Charges Against Sudanese President for Darfur Crimes*, U.N. NEWS CENTRE (Jul. 14, 2008), http://www.un.org/apps/news/story.asp?NewsID=27361&Cr=Darfur&Cr1=&Kw1=al%2DBashir&Kw2=&Kw3=. It also occurred with respect to Muammar Al-Qadhafi and one of his sons, both indicted for crimes against humanity upon referral by the Security Council. *See ICC Issues Arrest Warrants for Libyan Officials for Alleged Crimes Against Humanity*, U.N. NEWS CENTRE (Jun. 27, 2011), http://www.un.org/apps/news/story.asp?NewsID=38855&Cr=Libya&Cr1=.

prosecutor was given circumscribed authority to initiate investigations, in contrast to the unrestricted authority bestowed on prosecutors of the Yugoslav and Rwanda Tribunals to investigate offenses covered by each statute.[48] Nevertheless, the final structure established under the ICC Statute remained sufficiently controversial that the United States and a number of other nations opted not to sign on.[49]

Identifying the offenses that the international criminal tribunals would prosecute[50] represented only one part of the human rights agenda that needed to be addressed. In addition, and despite the extent and brutality of the atrocities the War Crimes Tribunals and the ICC would have to confront, each of the institutions also faced the need to create a process that would respect the defense rights of those called to account for their conduct. Indeed, as one commentator persuasively argued,

48. While ICTY Statute Article 18 authorizes the prosecutor to initiate an investigation on his own authority, continuing onto a formal charge and trial requires a confirmed indictment by the Trial Chamber under ICTY Statute Article 19. ICTY Statute, *supra* note 10, at art. 18. The same procedure is required by ICTR Statute Articles 17 and 18(1). ICTR Statute, *supra* note 10, at arts. 17, 18(1). In contrast, ICC Statute Article 15(4) calls for the Pre-Trial Chamber of the ICC to determine whether "there is a reasonable basis to proceed with an investigation . . . [in which case it] shall authorize the commencement of the investigation." ICC Statute, *supra* note 11, at art. 15(4). Additionally, the "complementary" jurisdiction of the ICC can only be exercised if specific conditions are met. *Id.* at art. 1. These include the unwillingness or inability of a state to carry out an investigation or prosecute following an investigation. *Id.* at art. 17(1)(a)–(b). In contrast, the jurisdiction to pursue covered offenses is primary under the ICTY Statute, ICTY Statute, *supra* note 10, at art. 9, and the ICTR Statute, ICTR Statute, *supra* note 10, at art. 8.

49. *See supra* note 44.

50. Article 1 of the ICC Statute establishes ICC jurisdiction "over persons for the most serious crimes of international concern." ICC Statute, *supra* note 11, at art. 1. These are specified in Article 5(1)(a)–(d) of the ICC Statute which lists four specific offenses as falling within the jurisdiction of the ICC. They are genocide, defined in Article 6, crimes against humanity, defined in Article 7, and war crimes, defined in Article 8. *Id.* at arts. 6–8. Article 5 also identifies the crime of aggression, but the exercise of jurisdiction over aggression is subject to the qualification under Article 5(2) that a definition of the offense and conditions for enforcement be developed pursuant to Articles 121 and 123, and the requirement that the treatment of aggression be consistent with the United Nations Charter. *Id.* at arts. 5, 121, 123. Issues related to the interpretation of the definitions of the covered offenses are described in Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 421–38 (2000). The jurisdiction of the ICTY is limited to grave breaches of the 1949 Geneva Conventions, ICTY Statute, *supra* note 10, at art. 2, violations of the laws or customs of war, *id.* at art. 3, genocide, *id.* at art. 4, and crimes against humanity, *id.* at art. 5, where the offenses involve "serious violations of international humanitarian law committed in the territory of the former Yugoslavia" after 1991, *id.* at art. 1. The ICTR Statute confers jurisdiction over "serious violations" committed in Rwanda or by Rwandan citizens in neighboring states between January 1 and December 31, 1994, ICTR Statute, *supra* note 10, at art. 1, that involve genocide, *id.* at art. 2, crimes against humanity, *id.* at art. 3, and Geneva Conventions offenses, *id.* at art. 4.

> [I]t is precisely at those times when moral outrage is at its highest that the burden on adjudicating bodies is heaviest both to satisfy society's collective need for condemnation and punishment of war criminals and simultaneously to assiduously protect the rights of those accused of war crimes. In order for a war crimes tribunal to possess legitimacy, it must ensure that rights of the accused are protected by the principles of due process and fundamental fairness.[51]

The model of the Nuremberg and Tokyo military tribunals would not have been an appropriate choice given their distance from contemporary views of fair procedure in the administration of criminal justice.[52] Instead, the authorizing statutes of the War Crimes Tribunals and the ICC, along with subsequently issued rules, had to create a system that would present the world with a credible institutional framework for adjudicating responsibility. This inevitably meant being attentive to the dual objectives of efficiently bringing to justice those responsible for modern day mass atrocities, while at the same time "fully respect[ing] internationally recognized standards regarding the rights of the accused at all stages" of the enforcement process.[53]

Deciding whether to provide War Crimes Tribunal and ICC defendants with a right to silence, and determining what scope such a right would have, was one of the considerations faced by those who drafted the international court's statutes and rules. Arguments in support of the right to silence itself have been subject to criticism over the years as failing to justify a doctrine that thwarts the truth-seeking function of the adjudication process by removing potentially probative evi-

51. Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court,* 19 WIS. INT'L L.J. 197, 197 (2001). Another commentator has observed that if "international judges are to be successful in delivering their moral messages, they must be trusted by their audiences as legitimate authority and be perceived by them as fair." Mirjan Damaška, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals,* 36 N. C. J. INT'L & COM. REG. 365, 378 (2011).

52. KARIN N. CALVO-GOLLER, THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT: ICTY AND ICTR PRECEDENTS 16 (2006) ("The approaches taken to evidentiary and procedural matters at the post-World War II trials would, in view of the development of international human rights law, be unacceptable at present.").

53. U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ¶ 106, U.N. Doc. S/25704 (May 3, 1993). In the words of one commentator, it is "extremely unlikely that the international community, believing in the importance of the rule of law, would accept an institution that would allow unfair trials to proceed." Anoushirvani, *supra* note 18, at 227. But it has also been suggested that "some departures by international criminal tribunals from domestic standards of fairness can be justified, given their *sui generis* goals, the complexity and atrocity of crimes they process, and the innate weaknesses of these tribunals." Damaška, *supra* note 51, at 380.

dence from the fact-finder's consideration.[54] Moreover, conduct that compels incriminating evidence from an accused may well violate other international human rights standards, thereby obviating the need for a particularized right to silence in such instances.[55] Nevertheless a clear international consensus has emerged that the right to silence is an essential component of any system that is designed to enforce criminal law standards.[56]

However, that there is widespread agreement that the right to silence must be incorporated as part of an international tribunal's delineation of defense rights does not answer the question of how far the right to silence must extend. Nevertheless, up until the framing of the statutes and rules of the War Crimes Tribunals, there had been only limited development of the concept by international institutions. The one major exception was the ECHR, which constructed a broad right to silence doctrine despite the fact that the European Convention on Human Rights, the treaty the ECHR interprets, does not in-

54. *E.g.*, JEREMY BENTHAM, A RATIONALE OF JUDICIAL EVIDENCE, in 7 THE WORKS OF JEREMY BENTHAM 446 (Bowring ed., Russell & Russell 1962) (1838–1843) (arguing that there is a connection between "delinquency on the one hand, and silence under inquiry on the other . . . ."). The more recent debate in Great Britain leading to the enactment of legislation permitting adverse inferences from silence was initiated by a report of the Criminal Law Revision Commission in 1972, which expressed concern that the right to silence deprived fact-finders of probative evidence and enabled the guilty to hide from justice. Criminal Law Revision Committee, Eleventh Report, Evidence (General) ¶ 30, 1972 Cmnd. 4991; Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences From Silence,* 31 COLUMBIA COLUM. HUM. RTS. L. REV. 243, 250–253 (2000) [hereinafter *Reforming Confession Law British Style*]; *see also, e.g.*, C. Theophilopoulos, *The So-Called 'Right' to Silence and the 'Privilege' Against Self-Incrimination: A Constitutional Principal in Search of Cogent Reasons,* 18 SAJHR 505, 528 (2002) ("Criticism of the right arouses a barrage of emotional defences often approaching near religious adulation. Yet in terms of utility, a protection against self-incrimination excludes the best kind of evidence increasing the risk of vexation, delay, and expense.").

55. As an illustration, the use of force to extract an admission would be covered by the U.N Covenant provision barring "torture . . . [and] cruel, inhuman or degrading treatment or punishment." United Nations' International Covenant on Civil and Political Rights, *supra* note 9, at art. 7. A comparable provision barring "torture [and] . . . inhuman or degrading treatment or punishment" is part of the European Human Rights Convention. European Convention, *supra* note 8, at art. 3. This provision was the basis of an ECHR decision which held that police threats of inhumane treatment designed to force a suspect to reveal the location of a kidnapping victim violated Article 3 of the of the Convention. Gäfgen v. Germany, App. No. 22978/05, 48 Eur. H.R. Rep. 13, ¶¶ 98–99 (2008). In American law, involuntary confessions were measured against the due process clause of the Fourteenth Amendment prior to the Supreme Court's application of the Fifth Amendment self-incrimination privilege as the standard for assessing confession admissibility. Miranda v. Arizona, 384 U.S. 436, 506–14 (1966) (Harlan, J., *dissenting*). *See generally* MARK BERGER, TAKING THE FIFTH, *supra* note 14, at 99–124 (describing the United States Supreme Court's "Road to *Miranda*.").

56. *See supra* notes 15–18 and accompanying text.

clude any specific reference to a right to silence or privilege against self-incrimination.[57] Functioning in the manner of an appellate court, the ECHR's right to silence decisions have proven to be particularly influential in the development of self-incrimination principles by the War Crimes Tribunals and ICC.[58]

II. The Right to Silence in the ICTY

A. Core Protection: Defendant Statements

The drafters of the statute governing the ICTY, the first of the post-Nuremberg/Tokyo international criminal tribunals, were faced with the enormously complex task of constructing a legal system to identify, investigate, and try suspects accused of human rights atrocities. Surrounding their efforts was skeptiscism that the war crimes offenders would ever be brought to justice,[59] as well as wariness as to whether the ICTY proceedings could be conducted in a fair and impartial manner.[60] Superimposed on these difficulties was the equally

57. The European Convention's incorporation of a right to a "fair and public hearing" in Article 6(1) was relied upon by the ECHR as the source of authority for its rulings that member states must respect the right to silence as defined in the Court's jurisprudence. *E.g.*, Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 68 (1996),; Murray v. United Kingdom, App. No. 18731/91, 22 Eur. H.R. Rep. 29, ¶ 45 (1996); Funke v. France, App. No. 10828/84, 16 Eur. H.R. Rep. 297, ¶ 44 (1993). The *Saunders* decision also referenced the presumption of innocence protected by Article 6(2) of the Convention in support of its ruling. Saunders v. United Kingdom, App. No. 19187/91, 23 Eur. H.R. Rep. 313, ¶ 68 (1996). *See generally Europeanizing Self-Incrimination, supra* note 17, at 342–346.

58. Although the jurisdiction of the ECHR is limited to member states, its rulings have had a wider significance. One commentator has observed that the ECHR "system of human rights protection enjoys an element of 'universality-legitimacy' in the dissemination of its judicial practice across various legal and judicial systems worldwide." Nicolas A. J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?,* 11 HUM. RTS. L. REV. 91, 123 (2011). Contributing to this result is the direction contained in Article 21(3) of the ICC Statute that its provisions be interpreted in a manner that is "consistent with internationally recognized human rights," a requirement, however, that is not contained in the ICTY's governing statute. ICC Statute, *supra* note 11, at art. 21(3). ECHR rulings have also had a substantial impact on the domestic law of signatories to the European Convention. *See* Georg Rees, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359 (2005).

59. It has been observed that since the Nuremberg trials following World War II, "governments have for the most part regressed to the convenient practices of *realpolitik*, whereby accountability and justice are bargained-for political compromises" as a result of which "instead of being held accountable for . . . international crimes, most of the perpetrators have benefited from impunity either *de facto* or *de jure*." INTRODUCTION TO INTERNATIONAL CRIMINAL LAW *supra* note 20, at 496.

60. Michail Wladimiroff, defense attorney for Duško Tadic, the first defendant brought to trial by the ICTY, raised concerns as to whether the difficulties of building a

serious problem of trying to reconcile the civil and common law systems that were represented among the ICTY Statute's drafters.

In the end, the ICTY Statute finally agreed upon attempted to balance these opposing interests. It created a mechanism to bring human rights offenders from the former Yugoslavia to justice, but in a manner that was responsive to contemporary views of fair procedure. Differences between representatives from common law and civil law countries were accommodated in the procedural structure of the Statute and subsequently-framed Rules, just as they were later accommodated in the statute creating the ICC.[61] The ICTY Statute creates a system where the case's presentation is placed primarily in the hands of the parties,[62] but with a more involved judiciary than is customary in common law courts. In this way, concepts from both the accusatorial system, which is more passive, and the inquisitorial system, which is more active,[63] were combined.[64] Initially, the post World War II ad

defense case would prevent the defendant from receiving a fair trial. James Podgers, *The World Cries for Justice,* 82 A.B.A. J. 52, 60 (1996). *See generally* Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia,* 20 HOUS. J. INT'L L. 381 (1998).

61. The approach to the admission of evidence in the ICTY structure has been described as "a very liberal one, paralleling that of civil law systems" but this "has been merged with a common law-derived adversarial framework." Sara Luzzati, *On the Admissibility of Statements Made by the Defendant Prior to Trial,* 8 J. INT'L CRIM. JUST. 221, 222 (2010). Similarly, it has been noted that, in describing the duties and powers of the prosecutor in ICC investigations, the relevant provision, Article 54, "attempts to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems." COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1078 (Otto Triffterer, ed., 2008).

62. One ICTY Trial Chamber observed, "[w]hile the procedure and evidentiary system of this Tribunal represents an attempt to blend elements of both civil and adversarial systems, it remains primarily adversarial. Hence, in contrast to the position normally found in a civil system, it is the parties who, in turn, call and question 'their' respective witnesses . . . ." Prosecutor v. Limaj, Case No. IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, ¶ 8 (Apr. 25, 2005).

63. CALVO-GOLLER, *supra* note 52, at 142 ("The most striking difference between the basic assumptions behind the two legal systems might be described as an active approach on the part of the court in the inquisitorial legal tradition, as opposed to a somewhat passive approach which is taken by the courts in the legal tradition of the common law.").

64. With respect to the ICTY, it has been noted that its earlier structure "enshrine[d] a basically adversarial approach, in which the procedure is 'advocate-led', rather than an inquisitorial approach, in which the procedure is 'judge-led.'" JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 163 (2d ed. 2000). However, over time, and due to the presence of numerous judges from civil law countries, more inquisitorial features have been added to the international court's procedures. Interview of Jean-Claude Antonetti, Judge, Int'l Criminal Tribunal for the Former Yugo., in The Hague, Netherlands (May 31, 2011). What has emerged is a legal structure that reflects the "[c]onscious efforts [that were] made to harmonize the general

hoc Tribunals borrowed most of their procedures from common law systems, whereas the ICC Statute was drafted with broader jurisdictional representation.[65] However, over time, even the ICTY system has been "moving more in the direction of the civil law approach."[66]

Adjudicatory procedures were an important focus of the drafters of the ICTY Statute, and an effort was made to make certain that the structure they created would ensure fair treatment for defendants facing trial. Article 21, entitled "Rights of the accused,"[67] reflects part of the effort to achieve that objective. It mandates a "fair and public hearing"[68] and that the accused be "presumed innocent until proved guilty."[69] Additionally, it provides the defendant with such standard due process protections as the right to be informed of the charges, to choose and communicate with counsel, to have counsel appointed without cost if required by the interests of justice, to be tried without undue delay, to examine opposing witnesses, and to secure the attendance of witnesses for their defense.[70] Article 21 also includes a specific right to silence protection through language providing that the accused has the right "not to be compelled to testify against himself or to confess guilt."[71] The same substantive protection was later included in the Rwanda and Lebanon Tribunals' authorizing statutes.[72]

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principles of criminal law and rules of procedure of the common law and civil law systems . . . . As a result, the provisions dealing with general principles and procedural issues are a hybrid of the common and the civil law." Arsanjani, *supra* note 44, at 25. However, one commentator maintains that the final blended product reflects "a largely adversarial approach" to the procedural issues involved in performing the tribunals' functions. Steafan Kirsch, *The Trial Proceedings Before the ICC, in* Globalization of Criminal Justice 542 (Michael Bohlander ed., 2010).

65. Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the* Ad Hoc *Tribunals,* 46 Neth. Int'l L. Rev. 343, 359 (1999). The majority of judges who drafted the ICTY rules came from common law legal systems, including an American judge who contributed a full set of rules that had been prepared by a special committee of the American Bar Association. M. Cherif Bassiouni, The Law of the International Criminal Tribunal for the Former Yugoslavia 864 (1996) [hereinafter Criminal Tribunal for the Former Yugoslavia].

66. Daryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence,* 14 Leiden J. of Int'l L. 367, 368 (2001). However, while the movement toward civil law practices may be taking place, the preparation of case dossiers in ICTY cases is less likely to highlight or segregate exculpatory evidence as would be the case for dossiers prepared in civil law countries. *Id.* at 380 & n.74.

67. ICTY Statute, *supra* note 10, at art. 21.

68. *Id.* at art. 21(2).

69. *Id.* at art. 21(3).

70. *Id.* at art. 21(4)(a)–(e).

71. *Id.* at art. 21(4)(g).

72. *See* ICTR Statute, *supra* note 10, at art. 20(4)(g); Lebanon Statute, *supra* note 10, at art. 16(4)(h). Both statutes correct the ICTY Statute's lack of gender neutrality by stating

However, the overall structure of the ICTY Statute strongly suggests that the category of accused persons possessing Article 21 rights is a narrow one that is limited to those who have passed through the investigatory process.[73] They are no longer persons of interest or even suspects, but rather have entered the ICTY legal process and become the objects of potential prosecution. The prosecutor will have determined that a prima facie case exists and will have fulfilled his or her responsibility to "prepare an indictment containing a concise statement of the facts and the crime or crimes with which the *accused* is charged."[74] The final step to formalizing the individual's status as an accused occurs when the Trial Chamber, the ICTY's trial level court, confirms the indictment submitted by the prosecutor based on its finding that the facts alleged would constitute a covered offense.[75] Then, as an accused, the individual is entitled to all Article 21 rights, including right to silence protection.

The right to silence language used in Article 21 describes the individual's right not to be compelled to testify against himself or to confess guilt. Its core component is the freedom to choose whether or not to take the witness stand at trial, since that is where testimony occurs. The right is waivable[76] and, according to the case law, if the defendant does choose to testify, he or she may not be compelled to testify prior to other defense witnesses.[77] However, the existence of

that the accused may not be compelled to testify against "himself or herself." The same language appears in the Sierra Leone Court's statute. SCSL Statute, *supra* note 10, at art. 17(4)(g).

73. ICTY Statute, *supra* note 10, at arts. 18–21.

74. *Id.* at art. 18(4) (emphasis added).

75. Pursuant to ICTY Statute art. 19(1), the prosecutor's charge is presented to a judge of the Trial Chamber who has the power to either confirm or dismiss the indictment. *Id.* at art. 19(1). As a result, "[a]n individual stands accused once he or she is actually indicted. Prior to indictment, the individual is only a 'suspect.'" WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 358 (2006) [hereinafter THE UN INTERNATIONAL CRIMINAL TRIBUNALS].

76. Questioning of individuals must comply with the procedural requirements of the ICTY Rules of Procedure and Evidence. Int'l Crim. Trib. for the Former Yugoslavia, R. P. Evid., r. 63, U.N. Doc IT/32/Rev. 46 (2011) [hereinafter ICTY Rules]. Where those requirements are followed, any resulting statement is "presumed to have been free and voluntary unless the contrary is proved." Id. at r. 92.

77. Prosecutor v. Delalić, Case No. IT-96-21-T, Order on the Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-Examination by the Prosecution and Counsel for the Co-Accused (Apr. 3, 1998). However, the court may take into account the fact that the accused chose to give evidence after the testimony of all other defense witnesses. Prosecutor v. Tadic, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶¶ 11 n.7, 129 (Jan. 31, 2000) (noting Appeals Chamber ruling that it would "take into account the fact that [the accused] had heard [the evidence of his witnesses] before giving his own.") (citation omitted).

the right does not necessarily mean that the decision not to testify is free of all costs. One inevitable cost is that the fact finder will not hear the suspect personally deny or explain the evidence produced by the prosecutor. However, a more significant question is whether the fact finder should be free to draw negative inferences from the defendant's decision not to testify.

Whether or not to draw adverse inferences from silence was a question that arose in the post-World War II Yokohama War Crimes Trials. There, applicable procedure permitted the prosecutor to comment on the failure of the accused to testify and allowed adverse inferences to be drawn from silence.[78] Conversely, the American approach in current domestic law bars judges from instructing the jury that it may consider the defendant's failure to take the witness stand to explain or deny negative evidence in reaching its verdict, even if the matter is one within the defendant's knowledge.[79] Such an instruction was viewed by the Supreme Court as "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[80] This is true even though the imposition of penalties for silence has been permitted in other settings.[81]

The decision to allow individuals to remain silent without evidentiary consequences, however, is not without its critics. The issue was the subject of a long running debate in the United Kingdom[82] leading up to the passage of the Criminal Justice and Public Order Act.[83] The act allows juries to be instructed that they may draw adverse inferences from both a defendant's failure to take the witness stand and a suspect's failure to answer police questions, and has itself been the sub-

78. Paul Spurlock, *The Yokohama War Crimes Trials: The Truth About a Misunderstood Subject*, 36 A.B.A. J. 387, 388 (1950).

79. Griffin v. California, 380 U.S. 609, 615 (1965). Based on the due process clause, the United States Supreme Court has also barred adverse comment on a defendant's silence following the administration of a *Miranda* warning. Doyle v. Ohio, 426 U.S. 610, 617–18 (1976). However, pre-arrest silence and post-arrest silence preceding a *Miranda* warning can be used to impeach a defendant's inconsistent testimony at trial. Fletcher v. Weir, 455 U.S. 603, 607 (1982); Jenkins v. Anderson, 447 U.S. 231, 238 (1980).

80. *Griffin,* 380 U.S. at 614.

81. *See, e.g.*, McKune v. Lile, 536 U.S. 24, 35 (2002) (adverse consequence for refusal to make admissions required for participation in sexual abuse treatment program permissible); Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (adverse inference from silence at prison disciplinary hearing permitted).

82. For a discussion of the lead up to the enactment of the legislation, as well as of the impact of a similar procedure in Northern Ireland under the Criminal Justice (Evidence) (Northern Ireland) Order, SI 1988/1847 (1988), see *Reforming Confession Law British Style*, *supra* note 54.

83. Criminal Justice and Public Order Act, 1994, c. 33.

ject of a number of rulings from the ECHR. The conclusion of the court has been that carefully structured adverse inference instructions are not inconsistent with the "fair hearing" requirement of Article 6(1) of the European Convention.[84] Thus, given that the ICTY Statute and Rules do not explicitly address the permissible consequences that may be imposed on the exercise of the right to silence, adoption of the British approach by the ICTY would have had European Convention law to rely on for support.

In the end, however, the ICTY has not used the silence of an accused during questioning or at trial as a negative factor when determining guilt or innocence. This is exemplified by an ICTY Appeals Chamber observation that "an absolute prohibition *against* consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute."[85] Subsequently, one Trial Chamber judgment supported the ban against drawing adverse inferences from silence by relying on the fact that the accused has the benefit of the presumption of innocence, as well as the requirement that the prosecutor must prove guilt beyond a reasonable doubt to secure a conviction.[86] While the Chamber found that the burden of proof had been met by the prosecutor without reliance on the accuseds' silence, it went on to comment, "Article 21(4)(g) of the Statute provides that no accused shall be compelled to testify against him or herself. Mladen Naletili and Vinko Martinovi decided not to testify at trial. In line with Article 21(4)(g), the Chamber has not attached any probative value to their decisions."[87]

The principle that no adverse inferences may be drawn from the failure of the accused to testify commonly goes unexplained in subse-

84. Murray v. United Kingdom, App. No. 81731/91, 22 Eur. H.R. Rep. 29, 69 (1996). However, the adverse inference instruction should incorporate notice that the inference should not be drawn unless the jury was satisfied that "the applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination." Condron v. United Kingdom, 31 Eur. H.R. Rep. 1, ¶ 61 (2000). To the same effect is the ECHR ruling in *Beckles v. United Kingdom*. 36 Eur. H.R. Rep. 162, ¶ 52 (2003). *See generally Europeanizing Self-Incrimination*, *supra* note 17; Mike Redmayne, *English Warnings,* 30 CARDOZO L. REV. 1047 (2008).

85. Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 783 (Feb. 20, 2001). The Court opined that specific language authorizing the drawing of adverse inferences would be required if that result had been intended by the Statute's drafters. *Id.*

86. Prosecutor v. Naletilic & Martinovic, ICTY Case No. IT-98-34-T, Judgment, ¶ 9 (Mar. 31, 2003).

87. *Id.*

quent ICTY rulings.[88] A similar approach has also been used by the ICTR as illustrated in a Rwanda Tribunal Trial Chamber proceeding in which the Chamber observed that the accused in a case before it did not testify at his trial, but went on to state that the "[d]efence made submissions concerning the right to remain silent and the right not to testify. The Chamber is mindful of the Accused's rights in this regard and has not drawn any adverse inference in the present case."[89]

The conclusion that no adverse inferences may be drawn against an individual who chooses to remain silent is based on the notion that imposing such a consequence interferes with the exercise of the right to be free of compulsion to testify. However, whether or not the threat of an adverse inference constitutes compulsion, it clearly makes exercise of the right not to testify more costly than would otherwise be the case. In choosing not to use the evidence of silence against the accused, the ICTY and ICTR courts have sought to give maximum protection to the accused's right to choose whether or not to exercise his or her right to silence. Such an approach, moreover, is consistent with the general policy to interpret the ICTY Rules on evidence questions in a manner "which will best favour a fair determination of the matter before it and [which is] consonant with the spirit of the Statute and the general principles of law."[90]

The fact that an accused may not be compelled to testify does not prevent the accused from choosing to take the witness stand. In that event, the accused becomes a witness subject to full cross-examination.[91] However, in a concession to practice in civil law systems, under the ICTY Rules, the accused may, with court permission, make an unsworn statement in which case he or she "shall not be examined about the content of the statement."[92] In such cases, the Trial Chamber is

88. *E.g.,* Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 44 (Apr. 15, 2011) ("Article 21 (4) (g) of the Statute provides that no accused shall be compelled to testify against himself. In the present case all of the Accused chose not to testify. No adverse inferences were drawn from this fact.").

89. Prosecutor v. Niyitegeka, Case No. ICTR-96-14T, Judgment and Sentence, ¶ 46 (May 16, 2003). Despite this conclusion, the Court noted that "human rights case law does not contain a general prohibition against the drawing of adverse inferences from an accused's silence," citing the *Murray* and *Condron* decisions of the ECHR. *Id.* ¶ 46 n.12.

90. ICTY Rules, *supra* note 76, at r. 85(B).

91. *Id.* Rule 85(B) describes the procedure for the examination-in-chief, cross-examination and re-examination of witnesses. *Id.* Rule 85(C) provides that the accused "may appear as a witness in his or her own defence." *Id.* at 85(C).

92. *Id.* at r. 84(A) *bis.* This rule was added in 1999 and is illustrative of the incorporation of inquisitorial features into the ICTY system. Interview of Jean-Claude Antonetti, Judge, Int'l Criminal Tribunal for the Former Yugo., in The Hague, Netherlands (May 31,

given discretion to decide what weight, if any, the statement shall have.[93] However, since the ICTY Rules do not specifically authorize the Trial Chamber to give negative weight to a decision by the accused to present an unsworn statement free of subjection to cross-examination, it is more likely that, given the prohibition against drawing negative inferences from silence, negative inferences from unsworn and uncross-examined statements would similarly be barred.

In settings other than the guilt/innocence determination, however, the right to silence may be significantly less protected in ICTY proceedings. One such area where ICTY courts have considered the relevance of silence, other than in choosing not to take the witness stand at trial, has been with respect to defendant applications for provisional release. One ICTY ruling noted that an accused's agreement to be interviewed by the prosecutor was relevant to his provisional release application,[94] while another noted that provisional release rulings have considered whether an accused has substantially cooperated with the prosecutor.[95] At the same time, however, ICTY courts have recognized the implications of this factor with respect to the right to silence and have indicated that failure to cooperate with the prosecutor does not constitute grounds to penalize the accused by denying provisional release.[96]

As a result, although denial of provisional release solely due to a lack of cooperation with the prosecutor would seem improper, the accused is clearly at a disadvantage by losing "cooperation consideration" if he or she invokes the right to silence. This can prove signifi-

2011). Slobodan Milošević, former President of Yugoslavia and Serbia, was among those who took advantage of this option. Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Public Transcript of Hearing February 13–18, 2002, 215–509 (Feb. 13, 2002). The variety of possible approaches was illustrated in Prosecutor v. Kvočka, where two defendants testified at the start of the trial but were not cross-examined until the presentation of their cases was finished. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 779 (Nov. 2, 2001). One defendant gave a statement not under oath pursuant to Rule 84 (A) *bis*; and two defendants declined to testify under oath and chose not to offer a statement without taking the oath. *Id.*

93. ICTY Rules, *supra* note 76, at r. 84(B) *bis*.

94. Agreement to be interviewed by the prosecutor was listed as a factor relevant to the provisional release decision in *Prosecutor v. Šainović & Ojdanić*. Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 6 (Oct. 30, 2002).

95. Prosecutor v. Jokić, Case No. IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, ¶ 26 (Feb. 20, 2002).

96. Prosecutor v. Halilović, Case No. IT-01-48-T, Decision of Admission Into Evidence of Interview of the Accused, ¶ 13 (Jun. 20, 2005); Prosecutor v. Šainović and Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 8 (Oct. 30, 2002); Prosecutor v. Hadžihasanović, Case No. IT-01-47-PY, Decision Granting Provisional Release to Enver Hadžihasanović, ¶ 15 (Dec. 19, 2001).

cant when the cooperation factor is an important consideration in a provisional release decision. The problem is similar in the context of sentencing, although it has been noted in an ICTY sentencing judgment that the ban against adverse inferences from silence applies in the context of sentencing.[97]

Case law demonstrates that the ICTY has resisted efforts to take advantage of silence by an accused in assessing whether guilt has been proven and has also declined to rely on negative inferences from silence as the basis for reaching other decisions under the controlling ICTY Statute and Rules. This reflects the court's effort to construct a system of justice that leaves the accused free to insist that the prosecutor prove guilt without pressuring the accused to participate by giving evidence. The right to silence is thereby protected from serious intrusion and the larger system achieves a balance that contributes to the broader acceptability of its results.

B. Non-Verbal Evidence

Even where oral testimony is not being sought from a suspect or an accused, self-incrimination issues arise in other ways. As long as official compulsion is involved, or a penalty is imposed that undermines the value of the right to remain silent, and the result of the pressure is the production of evidence that is incriminating, the subject of the pressure can be said to have been compelled to testify against him or herself. This problem is illustrated by official efforts to force the production of bodily samples through the issuance of orders directing an individual, upon threat of contempt, to perform some action that will produce adverse evidence in a future prosecution. Arguably, in situations such as these, the individual is "compelled to testify against himself" in violation of Article 21(4)(g) of the ICTY Statute.

Domestically, the United States Supreme Court has addressed this issue in a number of cases involving compelled identification pro-

97. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, ¶ 64, Sentencing Judgment (Feb. 27, 2003), noting that the "accused's unwillingness to give evidence is not a factor to be taken into account in determining sentence." However, one commentator has observed that "[f]or this right [to silence] to be effective, the consequence must be that no adverse inference at trial can be drawn from a suspect's refusal to cooperate or to be questioned. Nevertheless, cooperation with the Tribunal from the earliest stage may well take on relevance as a mitigating factor in the event that the suspect is later convicted." THE UN INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 75, at 504.

cedures.[98] The Court concluded that these types of procedures are permissible over a Fifth Amendment challenge on the theory that physically identifying evidence is not testimonial for purposes of the self-incrimination privilege.[99] Individuals may even be ordered to perform affirmative acts that ultimately produce incriminatory evidence, as long as the act itself does not contain a factual assertion or disclose information.[100]

Similarly, the ECHR has adopted an approach in the application of Article 6 of the European Convention that allows some physical evidence to be compelled from a suspect or an accused. In *Saunders v. United Kingdom*,[101] the ECHR stated that right to silence protections are inapplicable to demands for items "which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."[102] Whether the ECHR decision would allow compulsion to force a suspect to personally turn over self-incriminatory documents, however, has not been fully developed.[103]

98. Schmerber v. California, 384 U.S. 757, 761 (1966) (holding compelled blood samples are not protected by the Fifth Amendment right against self-incrimination); *see also* Holt v. United States, 218 U.S. 245, 252–253 (1910) (finding no Fifth Amendment violation where defendant was required to put on a blouse to demonstrate that it fit).

99. *Schmerber*, 384 U.S. at 761. Because the Fifth Amendment precludes compelling a defendant to be a "witness" against him or herself, and the role of a witness is to testify or communicate, the scope of the self-incrimination privilege is limited to testimonially communicative evidence. *Holt*, 218 U.S. at 252–53 ("[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.").

100. *See generally* Doe v. United States, 487 U.S. 201 (1988) (holding defendant may be forced to execute order to reveal his bank records over self-incrimination objection where order does not relate any testimonial fact); Fisher v. United States, 425 U.S. 391, 397 (1976) (holding a subpoena for documents does not violate the Fifth Amendment unless the act of producing the documents involves implicit admissions of the existence of the documents, their authenticity, or their possession or control by the recipient of the subpoena). However, if the act of producing a subpoenaed document reveals the existence, possession or authenticity of the item, the Fifth Amendment will bar the enforcement of the subpoena. Doe v. United States, 465 U.S. 605, 614 n.11 (1984) (Fifth Amendment barred subpoena for documents directed to sole proprietor based on district court conclusion that enforcement would "admit that the records exist, that they are in [the defendant's] possession, and that they are authentic.") (quoting *In re* Grand Jury Empanelled Mar. 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981).

101. Eur. Ct. H.R. 313 (1996).

102. *Id.* at ¶ 69.

103. Andrew Ashworth, *Self-Incrimination in European Human Rights Law–A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751, 758–60 (2008).

An issue comparable to those addressed by the United States Supreme Court and the ECHR was confronted in one ICTY Trial Chamber decision in which the prosecution sought to compel the production of a handwriting sample.[104] That case, *Prosecutor v. Delalić*,[105] involved an effort by the prosecutor to introduce a letter allegedly written by the accused to a witness approximately a month prior to that witness' testimony.[106] The defense objected that there was no evidence in support of the claim that the accused actually wrote the letter. As part of the prosecution's response, it sought an order directing the accused to produce a handwriting sample subject to the threat of an adverse inference if the accused failed to comply.[107] In support of its request, the prosecutor emphasized that it did not "seek a statement wherein [the defendant would] admit guilt or through which knowledge of specific circumstances [might] be inferred . . . ."[108] However, the defense countered that it was enough that providing a handwriting sample would "enable the determination of the authorship of the letter [which] would have the effect of compelling [the accused] to contribute to the process of incriminating himself, which [would] be a violation of his protection against self-incrimination, an essential element of a fair trial."[109]

Nevertheless, despite the existence of precedents from other courts favoring the prosecution's theory, the Trial Chamber held that "where the material factor absent in the incriminating elements is the handwriting sample of the accused, the Trial Chamber cannot compel the accused to supply the missing element. To do so will be to infringe the provisions of Article 21 sub-paragraph 4(g) which protects the accused from self-incrimination."[110] Forcing the accused to "assist the Prosecution in its investigation, and probably provide the evidence to incriminate himself"[111] was enough to implicate the right to silence

104. Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, ¶ 5 (Jan. 19, 1998).

105. Case No. IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, ¶ 5 (Jan. 19, 1998).

106. *Id.*

107. *Id.* ¶ 6.

108. *Id.* ¶ 18.

109. *Id.* ¶ 24.

110. *Id.* ¶ 47.

111. Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, ¶ 48 (Jan. 19, 1998).

interests protected by the ICTY Statute and Rules, since "[t]here is no duty in law or morals for the accused to fill a vacuum created by the investigative procedural gap of the Prosecution."[112] Relying on the language of Article 21, the ruling found the controlling language to be "clear and unambiguous" and not "qualified, or restricted to testimonial evidence."[113]

The decision to deny an order compelling the production of a handwriting sample is separate from the question of whether production of an incriminatory document would be compellable. Providing a handwriting sample involves an act of will significantly greater than the act of turning over an identified item, and it is arguable that the right to silence prohibits the former without necessarily prohibiting the latter.

How the ICTY might decide this matter is somewhat unclear, despite a decision by the ICTY President in *Prosecutor v. Delalić*[114] on a motion to compel the production of notes passed between two incarcerated defendants that the ICTY Registrar had seized.[115] The notes were categorized as material that was "produced, circulated or communicated in breach of the Rules of Detention or Regulations," but the Registrar was deemed to have "discretion whether or not to provide such material to the Prosecutor."[116] However, the President of the ICTY had the ultimate decision making authority as to whether the notes had to be produced, given the fact that a motion to compel their disclosure had been filed.[117] He concluded that the decision whether to order production required that the prosecutor demonstrate that the documents would be "necessary (not simply useful or helpful) for the purposes of the investigation or for the preparation or conduct of the trial,"[118] a standard the President found the prosecutor had met.[119] As a result, disclosure could be ordered.

Despite recognizing the importance and relevance of the evidence, the *Delaliæ* opinion was careful to caution that disclosure of the

112. *Id.* ¶ 49.
113. *Id.* ¶ 58.
114. Prosecutor v. Delalić, Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić (Nov. 11, 1996).
115. *Id.* ¶ 1.
116. *Id.* ¶ 31. However, it is also necessary to provide "prior notice and disclosure to counsel for the detainee" since this will "ensure that the detainee's rights are respected." *Id.*
117. *Id.* ¶¶ 9,10.
118. *Id.* ¶ 38.
119. *Id.* ¶ 42.

notes to the prosecutor would not automatically warrant the admissibility of the notes at trial,[120] thus distinguishing between investigatory disclosure of evidence and the later effort to have that evidence admitted at trial. It thus remains possible that, if documents created by an individual remain in his or her possession, their compelled disclosure and subsequent introduction at trial could be barred, even if the defendant was required to turn over the documents to the prosecutor during the investigatory phase of the proceeding. Presumably, the reason for this possible result might be the fact that the individual would be compelled to perform an affirmative act that would reveal testimonial evidence he or she created through an effort of will, and this would be barred because of the defendant's right to silence at trial.

C. Pre-Trial Investigations

The ICTY Statute anticipates that an investigatory stage will precede the decision to present an indictment to the Trial Chamber. This is the thrust of Article 18 of the ICTY Statute, which provides that the prosecutor has the authority to initiate investigations based upon information received from "any source,"[121] during the course of which he or she may "question suspects, victims, and witnesses . . . ."[122] However, no reference to a right to remain silent appears in the Statute at this point. That occurs only after the suspect is turned into an accused who is possessed of Article 21 due process rights,[123] thereby suggesting that the Article 21 right to silence, at least in its Article 21 form, would not be applicable to an Article 18 investigation. This is a distinction recognized in a Trial Chamber ruling that Article 21(4)(d) legal assistance rights are inapplicable in connection with the interrogation of a suspect. Simply put, an "Accused cannot claim the benefit of Article 21(4)(d)—benefit due to an accused—at a time when he was still a suspect."[124]

120. *Id.* ¶ 45.

121. ICTY Statute, *supra* note 10, at art. 18(1).

122. *Id.* at art. 18(2).

123. The Statute's description of the required procedure first refers to "the accused" at the point that the Trial Chamber reads the indictment to the individual and instructs him or her to enter a plea. ICTY Statute, *supra* note 10, at art. 20(3). Nevertheless, suspects are given the right to have the assistance of counsel if questioned during the investigatory phase, and counsel may be provided without cost to the individual if he or she cannot afford to pay for representation. ICTY Statute, *supra* note 10, at art. 18(3).

124. Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on the Motion for the Exclusion of Evidence by the Accused, Zejnil Delalić, ¶ 36 (Sept. 25, 1997). Professor Bassiouni has also recognized this distinction, observing that "[t]he Statutes and rules of the ICTY, ICTR, and the ICC make a distinction between the rights of suspects and those of the

The fact that there is a distinction between accused persons and suspects is further developed in the definitions section of the ICTY Rules. The relevant provisions identify suspects as those about whom the prosecutor has reliable information tending to show that he or she committed a covered offense, while accused persons are those who have been charged in a confirmed indictment.[125] Despite the difference between the two categories, however, there can be no serious doubt that suspects may be in as much need of self-incrimination protection as those who have been charged and therefore have acquired Article 21 rights.[126] Thus, it is not surprising that the ICTY insists that statements offered by the prosecutor in a Tribunal proceeding be shown to have been "obtained voluntarily . . . [and] in compliance with the requirements set out in the Rules . . . ."[127] Nevertheless, there is no explanation as to why the ICTY Statute provided a right to silence protection to accused persons, but failed to address the issue with respect to suspects.[128]

The absence of a statutory right to silence did not prevent the drafters of the ICTY Rules from incorporating language that provides

accused. Thus, the rights that attach to each category are not separable since the rights of a suspect necessarily have an impact on the rights of that person as an accused." INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 646 (footnotes omitted). More generally, however, the ICTY Statute and procedural rules must be interpreted in conformance with international human rights standards. CALVO-GOLLER, *supra* note 52, at 164. This general principle may lessen the significance of the suspect/accused distinction otherwise created by the ICTY Statute.

125. ICTY Rules, *supra* note 76, at r. 2(A).

126. "Unless [the right to silence] is recognized to operate at this stage, it would have little significance to the accused later on, because the fate of the criminal case is usually determined by what goes on at the pretrial interrogation sessions." Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 524 (1994).

127. Prosecutor v. Halilović, Case No. IT-01-48-T, Decision on Admission into Evidence of Interview of the Accused, ¶ 10 (Jun. 20, 2005). In its ruling, the Tribunal explained that it found no evidence to support the claim that voluntariness of the statement by the accused was undermined as a result of prosecutor promises for provisional release and/or withdrawal of the indictment. *Id.* ¶ 11.

128. Some difference of opinion exists as to the significance of the omission of specific reference to the right to silence in the Article 18 description of suspects' rights during an ICTY investigation. One author has stated that the right to silence contained in the Article 21 statement of the rights of the accused "means that from the earliest stage in the investigation, a 'suspect' or an accused need not speak to investigators or otherwise cooperate by providing information." THE UN INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 75, at 532. However, another commentator noted the absence of a definition of the term "suspect" in the Statute and observed that it is "difficult to know when exactly a person becomes a 'suspect' and whether the investigation of the Prosecutor was appropriately conducted during every one of its phases." CALVO-GOLLER, *supra* note 52, at 27.

suspects with a right to be free of compelled self-incrimination.[129] Rule 42, titled "Rights of Suspects during Investigation," lists specific rights available to suspects who are subject to questioning by the prosecutor, with an additional requirement that suspects be warned of their rights before questioning begins.[130] The protections available to suspects include the right to the assistance of counsel, free of charge if necessary,[131] and the right to an interpreter if he or she does not speak the same language as the questioner.[132] But the suspect also has protection against compelled self-incrimination, even though this right was not part of the ICTY's statutory framework.

The form of the right to silence protection afforded by Rule 42 has both substantive and procedural components. Substantively, the rule specifically provides suspects who are to be questioned by the prosecutor with "the right to remain silent."[133] Procedurally, the suspect must be informed that he has the right to remain silent,[134] but also that any statement he makes "shall be recorded and may be used in evidence."[135] Additionally, counsel must be present during questioning unless there has been a voluntary waiver, although the right to

129. The inclusion of a rule-based right to silence is appropriate since it is certainly unlikely that the Statute's drafters intended to deprive suspects who have not yet been charged of that right, and in any event prosecutorial practice has been to respect the decision of individuals at the pre-indictment stage to decline to answer official questions. Interview of Mark B. Harmon, Prosecutor, Int'l Criminal Tribunal for the Former Yugo., in The Hague, Netherlands (June 5, 2011). However, unlike the accused, who are free to decline to take the witness stand at trial, ICTY suspects are not free to avoid questioning entirely. One author stated, "it seems to be a fait accompli that the suspect must submit to the questioning process by the prosecutor." Ntanda Nsereko, *supra* note 126, at 524. Unlike American criminal procedure, in which suspects may refuse to be questioned by invoking their *Miranda* rights (unless they have been summoned before a grand jury), ICTY procedure appears to contemplate that suspects are subject to questioning, although they may protect themselves by invoking the right not to be compelled to incriminate themselves. However, it is not clear whether a suspect in such a situation has any obligation to answer any question, self-incriminatory or not. Beyond that, the right to counsel—available to suspects at this point, pursuant to ICTY Rule 42(A)(1)—should minimize the risk that interrogator tactics will pressure suspects into answering questions.

130. ICTY Rules, *supra* note 76, at r. 42(A).

131. *Id.* at r. 42(A)(i).

132. *Id.* at r. 42(A)(ii).

133. *Id.* at r. 42(A)(iii).

134. As a suspect's Rule 42 right, it must be part of the warning given by the prosecutor prior to questioning. *Id.* at r. 42(A).

135. *Id.* at r. 42(A)(iii). Rule 43 reaffirms the prosecutor's obligation to inform the suspect that the questioning is being recorded, *id.* at r. 43(i), and adds other details, including the obligation to provide the suspect with a copy of the recorded tape, *id.* at r. 43(iv), along with the transcript if the suspect becomes an accused, *id.* at r. 43(vi).

counsel may be reasserted following a waiver, in which case questioning must cease until counsel has been obtained or assigned.[136]

Further procedural protection for suspects subjected to questioning is provided by Rule 43. In order to insure the accuracy of any evidence of statements made during the questioning of a suspect, that rule creates a duty to record the interrogation in audio or video form.[137] In at least one case, failure to satisfy this requirement led to the exclusion of a statement at the ICTY,[138] even though the individual who made the statement had not yet been accused of a covered offense, nor was clearly a suspect in the crime with which he was later charged.[139]

Pursuant to Rule 43, the suspect may also provide a clarification of anything he or she has said and add further information.[140] Additionally, a copy of the recording must be given to the suspect,[141] and a transcription must be made if the suspect becomes an accused.[142] Perhaps because of the substantial procedural protections that are incorporated in the interrogation process, the ICTY Rules go on to provide that a "confession by the accused given during questioning by the prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved."[143] While this provision clearly allocates the burden of persuasion to the defendant when he or she challenges the admissibility of a confession, the standard of proof on this issue is not set forth in the rules.

136. *Id.* at r. 42(B).

137. *Id.* at r. 43. The duty is a mandatory one arising out of language providing that the questioning of a suspect by the prosecutor "shall" be audio or video recorded. *Id.*

138. Prosecutor v. Halilović, Case No. IT-01-48, Decision on the Motion for Exclusion of Statement of Accused, ¶ 27 (Jul. 8, 2005).

139. *Id.* ¶ 12. Halilović was interviewed on his own initiative. As a result, a twenty-five page statement was produced. *Id.* ¶ 2. The Court opined that a voluntary statement taken in compliance with the Rules could be tendered as evidence, *id.* ¶ 18, and that there had been a proper warning of the right to remain silent followed by a voluntary waiver. *Id.* ¶ 22. However, the extensive questioning of Halilović made it necessary to have a recording available to allow the defense to verify the accuracy of the statement without forcing testimony from the defendant. Since no recording was made, exclusion of the statement was required. *Id.* ¶¶ 25–27. *See generally* Luzzati, *supra* note 61, at 224–25.

140. ICTY Rules, *supra* note 76, at r. 43(iii).

141. *Id.* at r. 43(iv).

142. *Id.*

143. *Id.* at r. 92. The requirements of Rule 63 pertain to the right to counsel in connection with questioning of an accused. *Id.* at r. 63. In such cases counsel's presence is required unless specifically waived. *Id.* at r. 63(A). Recording is required of any waiver of the right to counsel as well as of any statements the individual may make in accordance with the procedures set forth in Rule 43. *Id.* at r. 63(B).

It would have been a grievous flaw had the ICTY failed to recognize the need to protect the silence interests of individuals who had not yet been formally charged with an offense. In the end, however, this statutory omission was corrected in the ICTY Rules in a manner that provides the full range of self-incrimination protection. Suspects receive a warning, are protected by the right to counsel, and have the benefit of the accuracy provided by audio or video recordings. If all of the steps are followed, it would not seem difficult for the prosecutor to establish the voluntariness of any resulting statement. In this light, presuming the voluntariness of any resulting statement seems a bit unnecessary and heavy handed. Establishing flaws in the questioning process that could have affected the resulting statement is difficult enough without adding the extra weight of a thumb on the prosecutor's side of the scale.

D. Witnesses and the Right to Silence

Although suspects and accused persons have an absolute right to silence protection under the ICTY Statute and Rules, a different approach applies to witnesses.[144] One variant is the absence of any specific requirement in either the Statute or Rules for administering a warning to witnesses describing their right to silence if the response to a question could be self-incriminatory. If the witness' statement is nevertheless voluntary, the structure of the Statute and Rules suggest the possibility of using that statement in the witness' own trial.

However, one ICTY Trial Chamber reviewing the admissibility of a voluntary witness statement obtained under such conditions declined to admit the statement on the grounds that the witness' rights were not adequately protected at the time that he made the unwarned declaration. The decision noted that:

> [F]or [the right to remain silent] to be not merely theoretical but truly effective, the witness must know not only that, should this be necessary, he may refuse to answer the questions if his answers might incriminate but also that, if despite everything, he chooses to answer such questions voluntarily, his statements might, depending on the case, be used against him. Only in this last scenario, that is, when a witness is aware of the existence of this right and the conse-

144. Although international human rights documents may not be worded in a manner that includes any self-incrimination protection for witnesses, it has been noted that the application of the right to remain silent to witnesses under international declarations is justified by a "*systematic and teleological interpretation,* supported by comparative law . . . ." Kai Ambos, *The Right of Non-Self-Incrimination of Witnesses Before the ICC*, 15 LEIDEN J. INT'L L., 155, 161–2 (2002) [hereinafter *The Right of Non-Self-Incrimination of Witnesses Before the ICC*] (emphasis in original).

> quences deriving from a possible waiver of this right, can the waiver be valid.[145]

Whether or not a witness is warned of his right to silence and the consequences of waiving that right, if the questions asked of him are potentially self-incriminatory, the witness, like suspects and accused persons, may object based upon the right to silence.[146] Significantly, however, per the conditions applicable to suspects and accused persons, the ICTY Statute and Rules allow the court to direct that the witness answer the question even over a self-incrimination based objection. But where such a direction is given, any information so provided, except for false testimony, may not be used against the individual in a subsequent proceeding.[147]

The idea of providing a form of immunity in return for compelled testimony is a familiar one, but the language of the applicable rule states only that "[t]estimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony."[148] This limited use immunity does not go as far as the use and derivative use protection required for compelled testimony under the United States Constitution's Fifth Amendment.[149] Moreover, there is also no indication in the applica-

145. Prosecutor v. Prlić, Case No. IT-04-74-T, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the case of Naletelić and Martinović, ¶ 19 (Sept. 5, 2007). In the case before it, the Trial Chamber added that "the only way it can be certain that the witness expressly waived his right to remain silent is to have a guarantee that he was duly informed of and cautioned about that right at the time of his testimony." *Id.* ¶ 20.

146. *Id.*

147. ICTY Rules, *supra* note 76, at r. 90(E). The International Criminal Court allows compelling, potentially self-incriminatory information from a witness in return for a form or immunity, labeled an "assurance" in ICC Rule 74. ICC Statute, *supra* note 11, at art. 93 ¶ 2; Int'l Criminal Court, R. P. & Evid., r. 74, U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter ICC Rules]. ICC Rule 74 states that the evidence provided by the witness in response to questions following an assurance will not be used "directly or indirectly" against the individual in any future ICC proceeding, *id.* at r. 74(3)(c)(ii), and will be kept confidential by not being disclosed publicly or to any state, *id.* at r. 74(3)(c)(i).

148. ICTY Rules, *supra* note 76, at r. 90(E). A broader view of the underlying right might suggest that no potentially self-incriminatory statement may be compelled from a witness, even with a grant of some form of immunity, since this would offend the 'general right of personality' which includes protection of the individual's reputation. However, "virtually no legal system attributes to the *nemo tenetur* principle a meaning as wide as to encompass the right of personality." *The Right of Non-Self-Incrimination of Witnesses Before the ICC, supra* note 144, at 163.

149. Kastigar v. United States, 406 U.S. 441, 462 (1972) (finding use and derivative use immunity coextensive with the Fifth Amendment privilege against self-incrimination); Zicarelli v. N.J. State Comm'n of Investigation, 406 U.S. 472, 475–76 (1972) (finding that a New Jersey statute providing use and derivative use immunity satisfies the Fifth Amendment). In the United States, use and derivative use immunity cover evidence discovered

ble ICTY Rules as to the standards that should govern the decision of a Trial Judge in determining whether the circumstances warrant compelling testimony from the witness in return for use immunity.[150]

The drafters of the ICTY Statute and Rules, while allowing testimony to be compelled from a witness as long as some immunity protection is provided in return, did not provide that option in the treatment of suspects or accused persons. There is no mechanism under any of the international tribunal authorizing documents to compel testimony from a resistant suspect or defendant, regardless of the immunity offer the prosecutor is prepared to make, even to the point of full transactional immunity. However, that does not mean that testimony from an accused cannot be acquired through other methods.

One such method is a voluntary plea agreement in which the prosecutor grants a concession acceptable to the accused in return for his or her testimony.[151] The concession may involve a reduced sentence or, at the extreme, provide the individual with full transactional immunity. Either way, the effect of the individual's acceptance of the concession is to change his or her status into that of a witness who gives voluntary testimony. What is less clear is whether the prosecutor may treat the individual as a witness before charges are filed, even though it seems likely that he or she will ultimately be charged with a covered offense. Theoretically, the prosecutor could then seek compelled testimony in return for an appropriate immunity grant and thereafter be barred from using the testimony when the individual becomes an accused. In formal terms the process would seem permissible, even though it is clearly manipulative. However, if the manipulation could be proven, it would seem that this would constitute

through reliance on the content of the compelled statement, as well as the compelled statement itself. *See* TAKING THE FIFTH, *supra* note 14, at 66–72.

150. Under American law, the decision to grant immunity is viewed as an executive responsibility, although federal prosecutors are obligated to comply with the procedural requirement of the immunity statute. United States v. Doe, 465 U.S. 605, 616–17 (1984) ("We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the [federal immunity] statute requires.").

151. Guilty pleas are permitted pursuant to ICTY Rules 62(vi), 62 *bis*, and 62 *ter*, as long as they are voluntary, informed, unequivocal and supported by a factual basis. ICTY Rules, *supra* note 76, at r. 62(vi), 62 *bis*, 62 *ter*. Similar requirements are part of the guilty plea procedures of the International Criminal Court. ICC Statute, *supra* note 11, at art. 65. However, ICTY plea procedure practices have been questioned. Julian A. Cook, III, *Plea Bargaining at The Hague,* 30 YALE J. INT'L LAW 473, 506 (2005).

adequate grounds for the tribunal to refuse to compel the testimony being sought.

If the individual is compelled to provide testimony as a witness, a separate question arises as to the inter-jurisdictional scope of immunity the international tribunal can provide. It is clear under the ICTY Rules that compelled testimony cannot be used in any ICTY proceeding, other than in the context of a false testimony prosecution.[152] But can immunity provided by the ICTY have an impact on national government proceedings where the compelled testimony would be of evidentiary relevance and incriminatory to the individual who was compelled to provide it? In one instance, a prosecutorial effort was made to limit the scope of the defense's cross-examination of a witness—who was the subject of a criminal investigation by the government of Bosnia and Herzegovina—by barring questions regarding instances of that witness's conduct.[153] (No formal charges had yet been filed in the national government case.). While the court refused to curtail cross-examination of the witness because of the potential relevance of the subject to the witness' credibility and reliability, it did state that "the safeguards provided by Rule 90(E) to the witness only apply before the Tribunal, and do not bind the BiH [Bosnia and Herzegovina] authorities."[154]

The court did offer alternative suggestions to protect the witness, such as holding closed cross-examination sessions, or reminding the parties that the witness may also avail himself of the assistance of counsel. Of course, these solutions would not prevent information from leaking out and reaching prosecuting officials in any location where the individual was being investigated. On the other hand, the court also noted that the trial judge has the authority to control questioning pursuant to Rule 90(F), although the rules state that the purpose behind this authority is to "(i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time."[155] It is not clear that special concerns related to testimony compelled from a witness are a relevant Rule 90(F) consideration.

What the court did not discuss, and perhaps should have, is whether potential prosecution by a national government should play a

152. ICTY Rules, *supra* note 76, at r. 90(E).

153. Prosecutor v. Perišić, Case No. IT-04-81-T, Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross-Examination, ¶ 20 (Jun.12, 2009).

154. *Id.* ¶ 21.

155. ICTY Rules, *supra* note 76, at r. 90(F)(i)–(ii).

role in the ICTY decision to compel the witness to testify over a self-incrimination claim. ICTY Rule 90(E) makes the decision to compel testimony a discretionary one,[156] and the risk of incrimination by another sovereign could be taken into account in deciding whether to compel the testimony in return for a use immunity grant. Despite arguments in favor of this approach,[157] the United States Supreme Court declined to consider potential foreign incrimination in deciding whether a valid self-incrimination claim could be raised,[158] and the ICTY court seems to have taken the same view.

In broader terms, there is a certain logic in separating witnesses from suspects and accused persons in defining the scope of the right to silence in ICTY proceedings. True witnesses are sought only for the information they can provide, and therefore, it is theoretically unlikely that compelled testimony coupled with a use immunity grant presents much of a risk that they will also be prosecuted in the ICTY. On the other hand, it may well be true that many witnesses are, or become, entangled in the proceedings to the point that they do face real risks of prosecution. For that reason, full-scale warnings and procedural protections are necessary when witnesses are questioned, and extreme care must be taken that they are not compelled to answer questions when a real risk of their ultimate prosecution can be identified.

E. The Exclusion Remedy

The enforcement of international standards of conduct is at the core of the ICTY's responsibility. This is reflected in not only the offenses within the court's jurisdiction, but also in the standards of behavior required in the performance of the court's function. Toward this end, the ICTY Statute grants the court substantial authority to develop evidentiary rules that comply with international norms, and this power has been used to develop a standard to govern the exclusion of evidence when those norms have been violated. In its original form, adopted in 1994, the applicable rule stated that "[e]vidence obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be

156. *Id.* at r. 90(E).

157. *See, e.g.*, Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. Rev. 1201, 1270 –94 (1998).

158. United States v. Balsys, 524 U.S. 666, 669 (1998) (holding foreign prosecution beyond the scope of the Self-Incrimination Clause).

admissible."[159] Exclusion pursuant to this language was mandatory in cases involving serious human rights violations, although the identification of the applicable standards and the level of violation that would be considered serious were not specified.

In 1995, however, that rule was amended to its present form, which calls for exclusion if evidence was "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[160] The amendment thus involved a refocus from the objective of protecting human rights standards as applied to the enforcement process, to an assessment of the impact of the methods used on the reliability of the evidence and the integrity of the proceedings. This formulation is more attuned to the civil law inquisitorial system in which the proceedings are seen much more as a search for truth rather than an adversarial battle. Indeed, as noted by one commentator, the ICTY "adopted a discretionary approach to the admission of evidence that favored the inquisitorial model for admissibility. This approach gives judges a greater role in weighing evidence."[161] As a result, it is impossible to predict whether a violation of right to silence standards in the acquisition of evidence will lead to the application of the exclusionary remedy in ICTY proceedings.

Nevertheless, even though the ICTY's approach to the admission of evidence is in line with the inquisitorial system's preference for admitting contested evidence and then subsequently weighing its probative value, as opposed to the accusatorial system's preference for more carefully crafted evidence admissibility standards, violation of the right to silence principles has resulted in the exclusion of a statement obtained as the result of an official interrogation. This occurred following a challenge to statements made to Austrian Police in Vienna under a local rule that informed the suspect, "You may not have legal Counsel present when you are questioned for a criminal offence."[162] Although other aspects of the interrogation were found not to run

159. ICTY Rules, *supra* note 76, at r. 95.

160. *Id.*

161. DeFrancia, *supra* note 18, at 1397–98.

162. Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, ¶ 50 (Sept. 2, 1997). In a subsequent ruling involving defendant Delalić, the Trial Chamber denied exclusion of statements where the claim was made that the recording process violated the terms of Article 43. The denial was based on the conclusion that there was no substantial doubt as to the reliability of the statements, nor was there any risk to the integrity of the proceedings. Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on the Motion for the Exclusion of Evidence by the Accused, Zejnil Delalić, ¶ 45 (Sept. 25, 1997).

afoul of admissibility standards, the denial of counsel alone was deemed to warrant suppression.[163] So too, statements found to be involuntary or obtained by oppressive methods would be inadmissible, since they "cannot pass the test under Rule 95."[164] In contrast, statements that are voluntary and follow voluntary waivers of the right to silence, will be admitted in an ICTY proceeding.[165]

Over time the ICTY has moved toward an exclusion principle governed by the reliability of the evidence that is being challenged.[166] The current exclusion standard also seeks to protect the integrity of the proceedings, but this seems to be more of an afterthought. In contrast, the initial formulation of the exclusion principle focused on the extent to which the conduct that produced the evidence seriously violated international human rights standards. This approach could lead to the exclusion of even reliable evidence if the human rights violation is serious enough.

The ultimate question to be decided, assuming sufficient confidence in the reliability of the evidence, is how far the system is willing to go to enforce standards through the deterrent effect of the exclu-

163. The Trial Chamber concluded that "the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible." Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, ¶ 52 (Sept. 2, 1997). The Trial Chamber further noted that violations of ICTY Rules 42(A)(1) and 42(B) relating to the assistance of counsel in connection with an interrogation "by themselves would be sufficient by virtue of Rule 5 to render the statements before the Austrian Police null and inadmissible in proceedings before us and to be excluded." *Id.* ¶ 55. In contrast, it was also found that "[t]here was no evidence that the duration of the interview excited in [the defendant] hopes of release or any fears which made his will crumble thereby prompting statements he otherwise would not have made." *Id.* ¶ 69.

164. *Id.* ¶ 41. *See also* Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused From the Bar Table, ¶¶ 63–66 (Aug. 19, 2005) (excluding statements upon Appeals Chamber finding that the Trial Chamber failed to consider prosecutor inducements and competence of counsel, respectively, in ruling on statement admissibility).

165. Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on Hazim Delić's Motions Pursuant to Rule 73, ¶ 18 (Sept. 1, 1997) (denying exclusion where waiver of right to silence was voluntary, even if based on a mistake as to the consequence of the waiver); Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Prosecution's Motion to Admit Documentary Evidence, ¶ 44 (Oct. 10, 2006) (finding that where statement is free and voluntary, the right to silence may not be retroactively invoked).

166. Professor Mirjan Damaska argues that the nature of the crimes dealt with by international criminal courts, the practical difficulties encountered in securing evidence of guilt, and the heightened weight given to the goal of securing justice for the victims of the offenses has had an impact on the courts' view of what constitutes fair procedure. Damaška, *supra* note 51, at 387. On how this has affected admission standards for evidence obtained through oppressive interrogation techniques and illegal intercepts, see *id.* at 385–86.

sion of evidence. Deterrence has been the guiding principle of the American exclusionary rule, although its role has been limited in situations other than the trial itself.[167] Nevertheless, it might be a more difficult principle to enforce in situations where evidence has not been acquired by Tribunal investigators. In the final analysis, however, a sensitive view of how evidence acquisition techniques can impact the integrity of the ICTY structure may well be adequate to produce the desired results.

F. Post-Charge Questioning

As a practical matter, questioning of victims, witnesses and suspects is an inevitable part of the ICTY prosecutor's investigatory responsibility. However, once a suspect has become an accused person, his or her status changes substantially. Accused persons have been filtered through the investigation process to become indicted individuals. They have been formally charged and will most likely be prosecuted unless they plead guilty or have their cases dismissed for some other reason.

As a result, further questioning of suspects who have become accused persons would not further the purpose of determining whether there are sufficient grounds to believe a crime was committed by the accused, since confirmation of the indictment by the Trial Chamber already indicates this objective has been achieved. Instead, the questioning of the accused most likely would be for the purpose of amassing further evidence of guilt. Because of this different purpose, the decision whether to allow interrogation at this stage of the proceedings presents issues that are distinct from the questions that arise in determining whether *suspects* may be required to respond to the prosecutor's inquiries.

It is true that Article 21 of the ICTY statute identified the right not to be compelled to testify or confess guilt as one of the rights of the accused. Both the language of the self-incrimination protection contained in Article 21, as well as the context of the entire article, suggests that its focus is the adjudicatory process before the court. Strictly read, however, Article 21(4)(g) allows the accused to be free from compulsion to take the witness stand at trial or plead guilty to any charges that have been filed against him or her. It does not neces-

167. The U.S. Supreme Court has looked for an "incremental deterrent effect" in situations where it must decide whether to extend the exclusionary rule beyond the confines of the criminal trial itself. United States v. Calandra, 414 U.S. 338, 351 (1974) (declining to apply the exclusionary rule to a grand jury investigation).

sarily mean that the prosecutor may subject the accused to further questioning outside of the courtroom. Nor does any other provision of the ICTY Statute suggest that there is any such right.[168]

In the end, the drafters of the ICTY Rules included language specifically covering the questioning of accused persons as opposed to suspects.[169] Indeed, Rule 63 is entitled "Questioning of Accused" and refers to "[q]uestioning by the Prosecutor of the accused, including after the initial appearance . . . ."[170] However, having provided for right to silence protection for suspects during the investigatory phase, the rules naturally afford similar protection to those further along in the process.

Initially, the prosecutor must administer a warning to the accused that informs him or her of the right to remain silent and that any statement that the accused makes will be recorded and may be used in evidence.[171] In addition, no questioning of an accused may take place "without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present."[172] The Rules provide that the accused is free to change his or her mind and reassert the right to counsel. Where this option is exercised, questioning must cease until counsel is present.[173] Finally, both the questioning and any waiver of the right to counsel are subject to the recording requirements of Rule 43, which includes the obligation to provide the individual questioned with a copy of the tape and a transcription if the individual later becomes an accused.[174] Clearly, the objective of the right to silence protections is to ensure that the accused is not im-

168. The issue is one that has been under consideration in the United Kingdom, with the suggestion that its scope might be limited to judicial examination in cases of terrorism or other complex offenses. Clive Walker, *Post-Charge Questioning of Suspects,* CRIM L. REV., no. 7, 2008 at 509, 516–17. If structured in this fashion, the "intervention of the judge would answer the demand for equality of questioning opportunities and would reduce concerns about voluntariness and fairness." *Id.* at 517. However, the ICTY Statute and Rules do not provide for judicial involvement in this manner.

169. As noted by one commentator, this is true despite the fact that "the general practice in common law jurisdictions [is] that once an accused person has been arraigned, the prosecutor is not allowed to question him. The contest is already set." Ntanda Nsereko, *supra* note 126, at 531.

170. ICTY Rules, *supra* note 76, at r. 63(A).

171. *Id.* at r. 63(B) (obligating the prosecutor to administer the warning required by Rule 42(A)(iii), which informs the individual being questioned both of his or her right to silence, and of the fact that all statements are recorded and can be used in court).

172. *Id.* at r. 63(A).

173. *Id.*

174. *Id.* at r. 63(B) (mandating compliance with the recording requirements contained in Rule 43).

properly treated following the issuance of an indictment. But whether this objective warrants continuing to subject indicted individuals to the full array of prosecutorial investigatory authority is a more debatable matter.

G. Discovery and Disclosure

As part of its overall procedural environment, the ICTY Rules include broad discovery and disclosure requirements. This reflects a structure designed to minimize trial surprises and improve the efficiency of the trial process. As such, the broad discovery structure parallels the discovery and disclosure systems common in the United States. However, while the imposition of a prosecutorial duty to turn over evidence to the defense is a straightforward policy judgment, right to silence issues are raised when a similar duty is imposed on the accused.

Depending on the evidence and the inferences that defense disclosure generates, the ultimate result can amount to pressure on the accused that is inconsistent with the Article 21(g) right "not to be compelled to testify against [oneself] or to confess guilt."[175] This concern can arise where the disclosure sought from the accused is for documents in his or her possession that may later serve to bolster the prosecution's case, or where the prosecutor seeks physically identifying samples from the defendant such as blood, handwriting or DNA samples, or psychological or psychiatric examinations designed to evaluate the defendant's mental capacity.

Rule 66 establishes the ICTY's system of broad prosecutorial disclosure, including the obligation to provide witness statements to the defense as well as to allow it to inspect a wide range of items that 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."[176] This duty is supplemented by an independent prosecutorial obligation to disclose material within the prosecutor's knowledge that "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."[177]

However, the ICTY Rules also impose significant disclosure obligations on the defendant. The duty extends to providing the prosecutor with documents and various tangible objects "which are intended

175. ICTY Statute, *supra* note 10, at art. 21(4)(g).
176. ICTY Rules, *supra* note 76, at r. 66(B).
177. *Id.* at r. 68(i).

for use by the Defence as evidence at trial,"[178] as well as statements of witnesses the defense intends to call to testify at trial.[179] There is, however, a timing differential with respect to the obligation to disclose witness lists during pretrial proceedings. This duty is part of the prosecutor's responsibility during pretrial proceedings,[180] but it does not become a defense duty until "[a]fter the close of the Prosecutor's case and before the commencement of the defence case . . . ."[181] This would serve to prevent the prosecution from using information from a defense witness to help establish its case-in-chief. However, it is also true that after the conclusion of the examination-in-chief of a prosecution witness, the defense must turn over any documents it intends to use in cross-examining that witness, despite the fact that those documents may later be used by the prosecution in its case-in-chief. Rather than viewing this as an instance of compelled self-incrimination, one ICTY Trial Chamber ruling saw it as simply a possible negative consequence of the defendant's decision to use a particular document.[182]

In one ICTY preceding, the prosecutor sought earlier disclosure of defense witness lists, relying upon the ICTY Rules.[183] The ICTY Trial Chamber rejected this effort, noting that "[t]he general provisions of Rule 54 may not be used to circumvent the specific require-

178. *Id.* at r. 67(A)(i). In contrast, an earlier version of the Rule did not require the defense "to make any disclosure whatever, unless it intends to rely on an alibi defence or any special defence," although reciprocal disclosure was required if the defense sought disclosure from the prosecutor. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 3 (Nov. 27, 1996). Interestingly, the Rules of the Rwanda Tribunal do not create an independent defense duty to allow inspection of books, documents, photographs or other items intended for use at trial. Instead, they provide that such access shall be granted by the defense following a defense request for access to these items from the prosecutor. *See* Int'l Crim. Trib. of Rwanda, R. Evid. & P., r. 67(C), U.N. Doc. ITR/3/Rev.18 (2010) [hereinafter ICTR Rules]. Presumably, the defense can avoid providing disclosure to the prosecutor by not requesting disclosure from the prosecutor.

179. ICTR Rules, *supra* note 178, at r. 67(A)(ii). Also covered by the disclosure duty are statements that may be admitted in lieu of oral testimony pursuant to ICTY Rules 92 *bis*, 92 *ter*, and 92 *quater*. ICTY Rules, *supra* note 76, at r. 92 *bis*, 92 *ter*, 92 *quater*.

180. *Id.* at r. 65 *ter* (E)(ii).

181. *Id.* at r. 65 *ter* (G); JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 658–659, §§ 8.5.349–8.5.352 (3d ed. 2003).

182. Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution, ¶ 10 (Dec. 5, 2008).

183. ICTY Rule 54 grants the court general authority to issue "such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." ICTY Rules, *supra* note 76, at r. 54.

ments enunciated in [Rules 66 and 67]."[184] However, the Trial Chamber also noted that where defenses of alibi, diminished responsibility or lack of responsibility are offered, the Rules specifically call for timely witness list disclosure by the defense.[185] In addition, asserting an alibi defense obligates the defendant to provide sufficiently specific notice of the details of where the defendant claims to have been and any evidence the defendant intends to rely upon in support of his or her alibi claim.[186]

Subject to Rules 66 and 67, work-product is not subject to disclosure for either the defense or prosecution,[187] and it is highly likely that the protective umbrella will cover at least some self-incriminatory items in the defense's possession. Where that is not the case, broad disclosure requirements can easily raise the risk that the defense will be forced to grant the prosecutor access to items that will help to prove the defendant's guilt. Some of this risk arises during the pretrial process when the defense is obligated to provide the prosecutor with a witness list[188] along with a list of exhibits the defense intends to offer.[189] The Rules restate these obligations as requirements prior to trial, but significantly, at this point, the defense must also provide the prosecutor with statements of witnesses the defense intends to call.[190]

Further self-incrimination risks may arise out of the accused's duty to notify the prosecution of his or her intent to rely on an alibi defense or other special defenses such as diminished capacity or lack of mental responsibility. The required disclosure in such instances in-

184. Prosecutor v. Delalić, Case No. IT-91-21-PT, Decision on the Applications Filed by the Defence for the Accused Zenjnil Delalić and Esad Lanžo on 14 February 1997 and 18 February 1997 Respectively, ¶ 9 (Feb. 21, 1997).

185. *Id.* ¶ 10. This obligation is contained in ICTY 67(B)(i)(a) and (b). ICTY Rules, *supra* note 76, at r. 67(B)(i)(a)–(b). The provision of such notice obligates the prosecutor to provide the defense with the names of rebuttal witnesses the prosecutor intends to call. *Id.* at r. 67 B(ii).

186. Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence, ¶¶ 14–16 (Dec. 1 2010).

187. ICTY Rules, *supra* note 76, at r. 70(A). Work product is defined therein to include "reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case." *Id.* One Trial Chamber Order concluded that a war diary and military log—detailed evidence that was relied upon by the witness and necessary for his testimony—must be produced for the prosecutor in the interest of justice. Prosecutor v. Blaškić, Case No. IT-95-14-T, Order for the Production of Documents Used to Prepare for Testimony, (Int'l Crim. Trib. for the Former Yugoslavia Apr. 22, 1999). That order also held that such documents are not covered by the work product exemption from disclosure requirements. *Id.*

188. ICTY Rules, *supra* note 76, at r. 65 *ter* (G)(i).

189. *Id.* at r. 65 *ter* (G)(ii).

190. *Id.* at r. 67 (A)(ii).

cludes details and witnesses in support of the alibi, as well as witnesses and evidence to be offered in support of the special defense,[191] following which the prosecutor must provide the defense with its list of intended rebuttal witnesses.[192] The Rules specify, in addition, that while sanctions may be applied pursuant to Rule 68 *bis* for an accused's failure to comply with disclosure obligations, pursuant to Rule 67(C) these may not include barring the accused from offering his own testimony in support of the non-disclosed defense.[193]

Whether or not defense disclosure duties implicate the right to silence depends upon how broadly that right is defined. This issue arose in a Trial Chamber decision seeking to prohibit the use by the prosecution of evidence supplied to it pursuant to the disclosure obligations of the defense. In *Prosecutor v. Gotovina*,[194] the Trial Chamber ruled on a joint defense motion that sought to bar the prosecutor from using such disclosed documents in its case-in-chief.[195] The defense saw this as a violation of the protection against self-incrimination, because it involved prosecution use of evidence whose disclosure was compelled by a court ruling and thus was obtained against the will of the accused.[196] The court, however, did not view this as impermissible compulsion under the ICTY Statute, but rather as a procedural consequence of the defense's decision to use particular evidence as part of its case, regardless of whether the prosecutor might later use

191. *Id.* at r. 67(B)(i)(a), 67(B)(i)(b). One Trial Chamber decision described the obligation as "clear and unambiguous," and noted that in such a case "it is not open to either of the parties to challenge their duties . . . ." Prosecutor v. Delalić, Case No. IT-91-21-T, Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses, ¶ 11 (Jun.13, 1997). That case made it clear that the defense may request protective measures in such cases, rather than seeking to avoid disclosure entirely. *Id.* ¶ 12.

192. ICTY Rules, *supra* note 76, at r. 67(B)(ii).

193. This was confirmed in a Trial Chamber decision that nevertheless allowed the defense to present alibi witnesses, despite failing to provide their names to the prosecutor. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Decision on the Defence of Alibi for the Accused Zoran Žignić, 3 (Jul. 21, 2000). The defense in that case relied, in part, on the authority contained in ICTY Rule 127(A)(i) to enlarge time limits, along with the prosecutor's representation that allowing the defense to go forward would not lead to any prejudice. *Id.* at 2. In another proceeding, an ICTY Trial Chamber commented that, while an accused has the right to offer his own alibi testimony, "if counsel does not file an appropriate alibi notice under Rule 67(A)(ii)(a) of the Rules, the evidence of other witnesses as to alibi *is liable* to be excluded by the Trial Chamber." Prosecutor v. Kupreškić, Case No. IT-95-16-T, Decision, Order Subsection (v) (Jan. 11, 1999) (emphasis added).

194. Case No. IT-06-90-T, Decision on Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution (Dec. 5, 2008).

195. *Id.* ¶ 2.

196. *Id.*

the evidence in support of its own case.[197] As such, the disclosure was the result of the tactical choice the defense made to use a particular document to cross examine a prosecution witness, rather than compulsion that required the defendant to "testify against himself or to confess guilt."[198]

The *Gotovina* proceeding demonstrates that defendants before the ICTY are at least theoretically free to claim a right to silence in response to their compliance with disclosure obligations. Perhaps most often those obligations will not provide the prosecutor with potentially incriminatory information. If so, the disclosure requirements would not be inconsistent with protection of the right to silence. However, where disclosure requirements imposed on the defense could aid the prosecutor in proving guilt, it can be argued that they reflect compulsion that will result in self-incrimination. However, even the somewhat broader language of the United States Constitution's Fifth Amendment has not been an obstacle to broad criminal discovery systems.[199] Instead, these have been found permissible in part on the theory that they simply reflect the disclosure of information that would be disclosed at trial anyway,[200] as well as on the grounds that the discovery system itself does not involve impermissible compulsion.[201] The ICTY system seems very much in line with this approach.

III. The Right to Silence in the ICC

The drafters of the International Criminal Court Statute and Rules also confronted questions concerning the self-incrimination rights of suspects and accused persons during and after investigation. As was true of the ICTY Statute and Rules, the drafters of the ICC

197. *Id.* ¶¶ 10–11.

198. ICTY Statute, *supra* note 10, at art. 21(4)(g).

199. Williams v. Florida, 399 U.S. 78, 81–82 (1970) (authorizing pre-trial discovery regarding defendant's alibi defense). However, "many states viewed Williams as an invitation to expand prosecutorial discovery against criminal defendants—free from the limitations of the Constitution." Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1577 (1986).

200. *Williams*, 399 U.S. at 85 (rule requiring pretrial notice of an alibi defense "only compelled petitioner to accelerate the timing of his disclosure," and as such did not violate the Fifth Amendment); *see also* Izazaga v. Superior Court, 815 P.2d 304, 310–11 (Cal. 1991) (discovery by the prosecution of names and addresses of witnesses the defendant intends to call at trial permissible under the rationale of *Williams*).

201. In the context of upholding Florida's alibi notice requirement, the Supreme Court observed that "[h]owever 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments." *Williams*, 399 U.S. at 84.

foundational documents gave prominent consideration to framing a right to silence that would appropriately balance conflicting investigatory and due process interests. Although the ICC solutions in many respects parallel those of the ICTY, the language chosen is not always the same and in some settings self-incrimination rights are clearly different.

Article 55 of the ICC Statute identifies individual rights during an investigation.[202] With respect to investigations of covered offenses, the article states that a person "[s]hall not be compelled to incriminate himself or herself or to confess guilt."[203] Arguably, the language is broader than the comparable provision of the ICTY Statute in that it applies to all persons, not merely those who have been accused of a covered offense pursuant to a confirmed indictment. Thus anyone, regardless of the category he or she may be in, has the right to be free of compelled self-incrimination during an ICC investigation as a result of having the right "not be compelled to incriminate himself or herself or to confess guilt" during an investigation.[204] In contrast, Article 21(4)(g) self-incrimination protection focuses on trial proceedings, creating a right "not to be compelled to *testify* against himself or to confess guilt."[205] To the extent that the ICTY Statute's Article 21 statement of rights suggests a setting limited to giving testimony before a court during the post-indictment process, the ICC Statute is again broader, as it extends coverage to all forms of compelled self-incrimination, including those preceding the issuance of a confirmed indictment.[206]

Additional rights related to protection of the right to silence are granted by the ICC statute for situations where "there are grounds to believe that a person has committed a crime within the jurisdiction of

202. ICC Statute, *supra* note 11, at art. 55. One ICC Pre-Trial Chamber ruled that the investigatory rights protected by the ICC Statute are applicable to the preliminary phase of ICC Court proceedings in which a 'situation' is being investigated, and there is no focus on any defendant. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2. VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ¶¶ 35–36 (Mar. 31, 2006). This is consistent with the observation that "it would be inconceivable if the Court were to say that [investigatory rights] were not applicable to investigators conducting preliminary examinations with a view to determining whether to open an investigation." Triffterer, *supra* note 61, at 1093.

203. ICC Statute, *supra* note 11, at art. 55(1)(a).

204. *Id.*

205. *See* ICTY Statute, supra note 10, at art. 21(4)(g) (emphasis added).

206. ICC Statute, supra note 11, at art. 55

the Court and that person is about to be questioned."[207] This reference is narrower than the general category of persons, and appears instead to be focused on suspects who have not yet been formally charged. Suspects' rights prior to questioning include the right to be informed that there are grounds to believe they have committed a covered crime,[208] and that they are entitled to the assistance of counsel, including free counsel "where the interests of justice so require."[209] Questioning is also limited to circumstances where counsel is present, unless the individual has voluntarily waived that right.[210] But whether or not counsel is present, the suspect has the central right to remain silent "without such silence being a consideration in the determination of quilt [sic] or innocence."[211]

The rights of the accused in connection with determination of any charge before the ICC are addressed in Article 67 of the ICC Statute. Since this is the point when the formal process has focused on a particular individual, and with charges filed and adjudicatory proceedings underway, more substantial protections are to be expected. These protections are found in the Article 67 language identifying the accused's self-incrimination protection as encompassing the right "not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence."[212]

Once again, the drafters of the ICC Statute chose to deal with an issue left untouched in the ICTY's authorizing legislation. Indeed, whereas both the ICTY Statute and Rules avoided stating what consequences might follow from the decision to remain silent, the ICC Statute directly addresses that issue. It prohibits using silence in the determination of guilt or innocence both where there are reasonable grounds to believe the individual has committed a covered offense,[213] and where the individual has been charged and therefore has become an accused.[214] Interestingly, however, individuals who are not yet for-

207. *Id.* at art. 55(2). The questioning may be performed by the prosecutor or by national authorities where a request has been made for their assistance under Part 9 of the ICC Statute (International Cooperation and Judicial Assistance). *Id.* at arts. 86–102.

208. *Id.* at art. 55(2)(a).

209. *Id.* at art. 55(2)(c).

210. *Id.* at art. 55(2)(d). The right to be questioned in the presence of counsel only, absent a waiver, has been viewed as "a significant advance in the protection of suspects over previous international instruments . . . ." Triffterer, *supra* note 61, at 1103.

211. ICC Statute, *supra* note 11, at art. 55(2)(b).

212. *Id.* at art. 67(1)(g).

213. *Id.* at art. 55(2)(b).

214. *Id.* at art. 67(1)(g).

mally suspects or accused persons must look to the language of Article 55(1)(a) for right to silence protection. There, the ICC Statute also identifies the right to be free of compulsion to self-incriminate or confess guilt, but no mention is made of potential consequences if the individual opts to remain silent.[215]

The ICC Statute's approach, similar to that of the ICTY,[216] permits the accused to make "an unsworn oral or written statement in his or her defence."[217] The proposal to permit this procedure surfaced in preliminary discussions in 1996 and ultimately was adopted as part of the statutory structure in the final Rome conference leading to the adoption of the ICC Statute.[218] Since taking an oath is not required, perjury for intentional misstatements may not be charged. However, while the ICC will not consider silence or the giving of an unsworn statement as evidence of guilt, it is not clear whether the unsworn statement itself can be considered evidence at all. At best it is likely to be given less probative weight than sworn testimony, but at worst the information revealed in the unsworn statement might not be viewed as having any probative value.[219]

The ICC Statute also parallels the ICTY Statute and Rules in requiring that those who are to be questioned must first be informed of their rights, including the right to remain silent.[220] Beyond applying this requirement to interrogations conducted by the ICC prosecutors, the ICC Statute specifically applies the duty to warn where questioning is undertaken by national authorities, pursuant to an official request from the ICC.[221] Extensive requirements also exist under the ICC Rules for the process of recording the interrogation session.[222] However, if the individual questioned is a suspect, or the object of either an arrest warrant or a summons to appear, the requirements are somewhat more substantial.[223]

215. *Id.* at art. 55(1)(a).

216. *Id.*

217. ICC Statute, *supra* note 11, at art. 67(1)(h).

218. Triffterer, *supra* note 61, at 1268.

219. *See id.* at 1269.

220. ICC Statute, *supra* note 11, at art. 55(2).

221. *Id.* The rights identified in ICC Statute art. 55(2)(a)–(d), including the right to silence contained in ICC Statute art. 55(2)(b), are applied to both national authorities and the ICC prosecutor, pursuant to ICC Statute art. 55(2). *Id.* at art. 55(2).

222. ICC Rules, *supra* note 147, at r. 111.

223. *Id.* at r. 112. (applicable to suspects, because grounds exist to believe they have committed an offense, or to those who are objects of either an arrest warrant or a summons to appear).

One of the realities when investigating human rights atrocities is that individuals from whom information is sought may not be readily identifiable as suspects. For purposes of the ICC Statute, they must first be considered "persons" under Article 55 and, as such, retain the right to be free of compulsion to incriminate themselves, or to confess guilt.[224] As an investigation proceeds, whatever information the individual possesses may prove relevant in the prosecution of one or more ICC defendants, and nothing in the ICC Statute would prevent the prosecutor from seeking to have the individual testify as a witness. Though the ICTY Statute and Rules did not address the self-incrimination rights of individuals in this situation, the ICC Rules do.[225]

Pursuant to Rule 74, ICC procedure specifically recognizes the self-incrimination rights of anyone called as a witness in an ICC matter.[226] However, rather than providing for an absolute right to silence comparable to the self-incrimination protection afforded defendants, the ICC Rule allows the court to require that the witness answer the self-incriminatory questions in return for a form of immunity, titled in the Rules as an "assurance."[227] While the Rule suggests a conflict with Article 55 of the ICC Statute, since it provides a mechanism for compelling witness testimony that is not part of the Article 55 structure, overriding the right to silence in return for a form of use immunity has been viewed as an appropriate balance between the competing enforcement needs of the ICC and the interest of the individual in not being compelled to provide testimony against himself or herself.[228]

Should the court deny the witness an assurance, the witness may continue to refuse to answer potentially self-incriminating questions,[229] whereas the granting of an assurance subjects the witness to penalties if he or she fails to respond.[230] However, the decision

224. ICC Statute, *supra* note 11, at art. 55(1)(a).

225. ICC Rules, *supra* note 147, at r. 74.

226. *Id.* at r. 74(3)(a) ("A witness may object to making any statement that might tend to incriminate him or her.").

227. Before providing assurances to a witness, Rule 74 directs the Chamber to seek the views of the prosecutor, and to consider: (1) the importance of the anticipated evidence; (2) whether the witness' evidence would be unique; (3) the nature of the potential incrimination; and (4) the sufficiency of the protections available for the witness, in the particular circumstances. *Id.* at r. 74(4), 75(5)(a)–(d).

228. *See The Right of Non-Self-Incrimination of Witnesses Before the ICC, supra* note 144, at 172–74.

229. ICC Rules, *supra* note 147, at r. 74(6). Pursuant to this rule, however, questioning may proceed on other matters. *Id.*

230. *See id.* at r. 65(1). Rule 65(1) compels witnesses who appear before the court to provide testimony, subject to Rules 73, 74, and 75. *Id.* By virtue of being granted an assur-

whether to grant an assurance appears to be one that is committed to the discretion of the Court,[231] and it is uncertain whether the decision to deny an assurance or compel a witness to answer a question would be reversed on abuse of discretion grounds. Beyond that, it does not appear that self-incriminatory answers can be compelled in return for an assurance against prosecution in the context of prosecutor interviews as opposed to court appearances. Both Articles 93(2) and 57(3)(c) of the ICC Statute, along with ICC Rule 74(2), contemplate an appearance before the court in The Hague. Therefore, assurances against the use of responses to questions as part of an earlier investigation cannot be given.[232]

The substance of an assurance provides both privacy and self-incrimination protection. The privacy protection arises out of the requirement that answers compelled from a witness who has been given an assurance will be "kept confidential and will not be disclosed to the public or any State."[233] The self-incrimination protection of the rule stems from the fact that any statement the court requires the witness to make after providing an assurance "[w]ill not be used either directly or indirectly against that person in any subsequent prosecution by the Court,"[234] except for offenses relating to the giving of false testimony, conduct interfering with the administration of justice, or where the witness deliberately refuses to comply with the court's order

ance, the individual becomes a compellable witness with respect to the questions covered by the assurance. Thereafter, failure to respond to question[s] subjects the individual to penalties under Rule 171 for refusing to comply with a direction of the Court. *Id.*

231. *Id.* at r. 74(2).

232. Situation in the Republic of Kenya, Case No. ICC-01/09, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, ¶¶ 11–14 (Jan. 31, 2011) (noting that the "plain wording of [ICC Statute art. 93(2)] suggests that the witness is required to *appear* before the court in The Hague," and that because the applicants' testimony would be given in the Republic of Kenya, the provision was inapplicable). Separately, the applicants relied on ICC Statute art. 57(3)(c) as grounds for an assurance against prosecution prior to testifying. The court rejected that argument, responding that the cited provision was designed to provide protection for the "physical or psychological well-being" of the individual, not for protection against prosecution. *Id.* ¶ 14. The court then looked to Article 55 of the ICC Statute, *id.* ¶ 16, which provides a person the right to "not be compelled to incriminate himself or herself or to confess guilt." ICC Statute, *supra* note 11, at art. 55(1)(a). By identifying this as the appropriate remedy for the applicants to employ, the court implicitly recognized that witnesses who are not provided with an assurance have the options available under that article to either refuse to answer incriminatory questions, or risk that any statement made will be considered voluntary. Situation in the Republic of Kenya, Case No. ICC-01/09, Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor, ¶¶ 11–14; s*ee also The Right of Non-Self-Incrimination of Witnesses Before the ICC, supra* note 144, at 157–58.

233. ICC Rules, *supra* note 147, at r. 74(3)(c)(i).

234. *Id.* at r. 74(3)(c)(ii).

or otherwise engages in conduct disrupting court proceedings.[235] However, how far non-use protection extends beyond the introduction at trial of the compelled statement itself is not entirely clear, although it has been argued that the fact that the assurance covers both direct and indirect use of the compelled evidence should result in a rule similar to the American fruit of the poisonous tree standard.[236]

Significantly, however, the immunity authority available to the court is limited to its own proceedings. It does not include a legally protectable interest against prosecution by a national government[237] and, as such, has parallels to the approach of the United States Supreme Court.[238] Therefore, for witnesses before the ICC, there is a real risk that compelled testimony will in fact be used in a national government prosecution where efforts to ensure the confidentiality of the witness' statement are unsuccessful. The drafters of the ICC Statute did not address this issue, even though the Statute's signatories could potentially have committed themselves to respect ICC assurances of both the confidentially and non-use of compelled statements.[239]

Although not a self-incrimination issue per se, the ICC rules broaden protection against compelled incrimination by allowing certain individuals to claim the right to silence when questions asked of them as a witness would potentially incriminate an accused person.[240] This right is given to anyone who is a spouse, child or parent of the accused, although the individual is free to answer questions if he or she so chooses.[241] Unlike the spousal and other privileges in American

235. *Id.* The exceptions provided for in ICC Rule 74(3)(c)(ii) refer to two provisions of the ICC Statute: Article 70, listing "Offenses against the administration of Justice," and Article 71, describing "Sanctions for misconduct before the Court." ICC Statute, *supra* note 11, at art. 70–71.

236. *The Right of Non-Self-Incrimination of Witnesses Before the ICC, supra* note 144, at 176–77. Arguably, the consequences of compelling testimony through the grant of an assurance will have been considered by the court before any assurance is granted. Therefore the broader view, that an assurance should be interpreted to include derivative evidence, represents the proper interpretation of ICC use immunity.

237. *Id.* at 175.

238. Balsys v. United States, 524 U.S. 666, 672–74 (1998) (refusing to recognize the risk of foreign prosecution as a valid basis for a domestic self-incrimination privilege claim). In the United States, *Balsys* implicitly limits the privilege against self-incrimination to the jurisdiction seeking to compel testimony. Therefore, United States courts may compel testimony if the risk of prosecution is limited to a foreign jurisdiction and would not be bound by a foreign immunity grant, unless an international treaty directs otherwise.

239. *The Right of Non-Self-Incrimination of Witnesses Before the ICC, supra* note 144, at 174–75.

240. ICC Rules, *supra* note 147, at r. 75(1).

241. *Id.*

law, the ICC provision gives control over the decision to answer to the witness, rather than the individual who could be incriminated by the statement.[242] Significantly, when evaluating a witness' testimony, the ICC Chamber may weigh the individual's refusal to answer when the question prompting an objection was asked for the purpose of contradicting a previous statement of the witness, or where the witness was selective in choosing what questions to answer.[243]

Finally, the ICC structure includes broad prosecutorial discovery and disclosure responsibilities that largely parallel the procedures of the ICTY. With certain restrictions, the ICC prosecutor must provide the defense with a list of witnesses he or she intends to call, as well as those witnesses' prior statements,[244] and must allow the defense to inspect any books, documents, photographs or other objects that are "material to the preparation of the defence or are intended for use by the Prosecutor as evidence . . . or were obtained from or belonged to the person."[245] These duties reflect the policy consideration that the fairness and evenhandedness of the trial process, and the avoidance of the defense being placed at a substantial disadvantage in trial preparation, will be promoted if the prosecutor is subject to a duty to disclose both incriminating and exonerating evidence.[246]

In a similar fashion, the defense has the reciprocal duty to allow the prosecutor to inspect items in its possession that are intended for use as evidence.[247] But significantly, the ICC Rules as written do not provide for a general defense duty to disclose its witness list or any witness statements in its possession.[248] Presumably, items that the defense intends to introduce at trial would involve exculpatory evidence that would not raise a risk of self-incrimination. However, because witness statements in the possession of the defense are testimonial in

242. *Id.*

243. *Id.* at r. 75(2).

244. *Id.* at r. 76(1).

245. *Id.* at r. 77.

246. Sabine Swaboda, *The ICC Disclosure Regime – A Defence Perspective*, 19 CRIM. L.F. 449, 450–51 (2008). The broad disclosure obligations created by ICC Rules 77 and 78 are limited where the prosecutor has "documents or information . . . obtain[ed] on the condition of confidentiality and solely for the purpose of generating new evidence . . . ." ICC Statute, *supra* note 11, at art. 54(3)(e). Pursuant to ICC Rule 82, such items may not be disclosed without the prior consent of the provider. ICC Rules, *supra* note 147, at r. 82(1). In such cases, the considerations supporting disclosure are offset by the risk that information-providers would not provide the prosecutor with evidence. *See* Anoushirvani, *supra* note 18, at 218–21.

247. ICC Rules, *supra* note 147, at r. 78.

248. *Id.* at r. 79. The Rules do, however, provide for particular instances requiring disclosure by the defense. *Id.*

character, they are more likely to raise the risk that incriminatory inferences advantaging the prosecution could be drawn. Beyond that, the simple act of identifying the witnesses would permit the prosecution to conduct interviews that could bolster the prosecution's case, rather than merely aid in cross-examining the defense's witnesses. By not providing the prosecution with a general right of access to defense witness lists and witness statements, the ICC rules provide greater protection from self-incrimination than is found in the ICTY system.

Nevertheless, the ICC has shown itself willing to order disclosure by the defense where the material sought would relate to the identification of "defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise."[249] One ICC Trial Chamber rejected the argument that such disclosure would infringe the defendant's right to silence, since disclosure is only be required "if the accused decides to advance a positive case (thereby waiving the right to silence)."[250] The dissenting opinion of Judge René Blattmann, however, clearly exposed the fundamental flaw in the majority's reasoning, noting:

> [A]n accused person's right to silence is fundamental and it cannot be considered that an accused person has only two options; either to sit in silence throughout the entirety of the proceedings without advancing any sort of defence, or to waive their right to silence. This would be extremely disadvantageous to an accused person and could hardly be considered a fundamental protection to the accused.[251]

Separately, and consistent with disclosure requirements generally applicable in the United States[252] as well as at the ICTY,[253] where the defense relies on an alibi, or on grounds that would exclude criminal responsibility under the ICC Statute, the ICC Rules require the disclosure of witnesses to be offered in support of the defense.[254] This will enable the prosecution to be prepared to rebut the defense once those witnesses are offered at trial. However, even if the defense does not comply with the disclosure requirement, it may still raise the defense and present supporting evidence.[255] It is likely, though, that the

249. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Defence Request for Leave to Appeal the Decision on Disclosure by the Defence, § I(2)(b) (May 8, 2008).

250. *Id.* § III(B)(13).

251. *Id.* § I(12) (Blattmann, J., dissenting).

252. *See supra* notes 199–201 and accompanying text.

253. *See supra* notes 216–51 and accompanying text.

254. ICC Rules, *supra* note 147, at r. 79(1).

255. *Id.* at r. 79(3).

credibility of the defense would be undermined unless the non-disclosure was justified. Significantly, the defendant's witness list disclosure duty does not include an obligation to turn over witness statements in the possession of the defense.[256] Thus, any self-incriminatory references that might be contained in such statements cannot be used by the prosecution to bolster its case-in-chief.

Conclusion

The International Criminal Court and the International Criminal Tribunals that have been established in The Hague are unique judicial institutions. They function as civilian trial courts that have been given international jurisdiction to deal with war crimes and crimes against humanity by their enabling statutes, and as such, they can trace their roots to the tribunals that were created after World War II to try German and Japanese war criminals.[257] Significantly, however, broad international consensus lies behind their formation. The ICTY was created by United Nations action[258] while the ICC was the result of a treaty that has been signed by 120 independent nations as of this date.[259] This is not a setting in which the tribunals can be accused of imposing victors' justice on the vanquished.

At the same time, however, the broad international participation in the formation of The Hague international criminal courts complicated the process of formulating a structure and set of governing principles that would define how those courts would function. Participants in the formation of both the ICTY and the ICC included representatives of both civil and common law systems.[260] As a result, there were differing views on the role judges should play in the investigatory and adjudicatory processes. Additionally, the drafters of the ICTY and ICC statutes had to balance the overall objective of bringing those responsible for human rights atrocities to justice with general notions of procedural due process. Justice in this context could not be defined exclusively by convictions, but rather had to include both the reality and appearance of fairness. The handling of the right to silence by The Hague international criminal courts illustrates how the process of accommodating so many conflicting interests was able to protect the

256. *Id.* at r. 79(1).
257. *See* supra Part I.
258. *See supra* note 10.
259. *See supra* note 11.
260. *See supra* notes 61–66 and accompanying text.

values underlying an important international human rights standard, while still achieving the courts' important objectives.

In many respects, however, the development of the right to silence by The Hague international criminal courts has been an evolving process. For example, the ICTY Statute did not originally directly provide for self-incrimination protection during the investigatory interviews performed before an individual had become an "accused."[261] Subsequently, this gap was remedied by explicitly including a ban against compelling suspects to testify against themselves during interrogations in the ICTY Rules.[262] Similarly, the ICTY courts, through case development, barred adverse use of silence against an individual who had properly invoked his or her right against self-incrimination, even though this issue had not been addressed in any of the ICTY foundation documents.[263]

Nevertheless, the end result for both the ICTY and the ICC are systems that are strongly protective of right to silence interests. Suspects, accused persons, and defendants have the right not to testify against themselves without their silence being used against them, and have even been held free from compulsion to provide non-testimonial identifying evidence. Moreover, unlike American law, The Hague criminal courts may not supplant the right to silence through an immunity grant unless the individual in question is a witness.[264] On the other hand, post-accusation questioning of individuals who have been indicted is permitted, albeit subject to protections that include warnings of the right to silence and right to the presence of counsel, along with the right to have the questioning session recorded.[265]

While the ICTY is approaching its final stages, the ICC is envisioned as a court with a continuing responsibility to prosecute human rights atrocities within its jurisdiction. Based on how the courts have functioned thus far, there is no reason to doubt that the ICTY in the cases it has yet to decide, and the ICC in future matters, will continue to respect the right to remain silent as an important defense interest. Each court has proven that the goal of bringing those responsible for violating international human rights to justice is not inconsistent with the protection of the international human rights of the defendants in those proceedings.

261. *See supra* notes 121–24 and accompanying text.
262. *See supra* notes 129–30 and accompanying text.
263. *See supra* notes 85–86 and accompanying text.
264. *See supra* notes 147–53, 226–27 and accompanying text.
265. *See supra* notes 169–74 and accompanying text.