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

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War crimes involve unimaginable atrocities, and therefore provoke an extreme sense of moral outrage. However, it 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.

On November 20, 1945, Robert H. Jackson, Chief Counsel for the prosecution in the Nuremberg Trials, stated in his opening statement, "There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate. . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."[1] Critics have characterized the Nuremberg trials as "victor's justice," and have criticized the tribunal's application of ex post facto laws and other procedural shortcomings.[2]

Criticism has likewise surrounded the 1945 conviction of General Tomoyuki Yamashita, commanding general of the 14th legion of the Japanese Imperial Army.[3] The forces under his command committed brutal atrocities in the Philippines, including mass executions, torture, murder, rape, and the

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1 Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement (Nov. 20, 1945).

2 Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 13 NOUVELLE ÉTUDES PÉNALES 259, 259 (1997); *see also* Gerry J. Simpson, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801 (1997). *But see* ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 36-38 (1993) (highlighting procedural protections afforded the Nuremberg defendants); Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 93-94 (1995) (noting that the Nuremberg trials, although imperfect in substantive and procedural law, provided psychological benefits to the victims of Nazi atrocities and may have averted a wave of vigilante justice).

3 Ann Marie Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 305 (1992).

wanton destruction of property.[4] The United States Army subsequently convened a military commission to try General Yamashita for these offenses.[5] In his dissent, Justice Murphy described Yamashita's trial as the "uncurbed spirit of revenge and retribution, masked in formal legal procedure."[6] He further cautioned that: "If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."[7]

The notion of establishing a permanent international criminal tribunal originated at the beginning of this century.[8] After World War I, the Treaty of Versailles granted the Allied Powers the authority to prosecute suspected war criminals in an international criminal tribunal. However, the tribunal was never created, in part due to fears of German resistance.[9] It was not until 1945 that the first international criminal tribunal came into being. There have now been four *ad hoc* international criminal tribunals: Nuremberg, Tokyo, the former Yugoslavia, and Rwanda. However, enforcement of international criminal law has been inconsistent. Victims of atrocities are often left with the sole option of pursuing justice in a domestic forum. More typically, war crimes victims have no effective legal recourse against their persecutors.[10]

Conflicts in the former Yugoslavia and in Rwanda have demonstrated these shortcomings. The judicial framework of a warring nation is often inadequate for trying war crimes, and no international forum has yet emerged to fill this void.[11] Nonetheless, the successful creation of two *ad hoc* tribunals in Rwanda and the former Yugoslavia have contributed to the increased support for the creation of a permanent international tribunal war

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4 *In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).

5 *Id.* at 5.

6 *Id.* at 41 (Murphy, J., dissenting). Justice Rutledge, also dissenting, condemned as an affront to a fair trial the denial of a reasonable opportunity to prepare Yamashita's defense and the sufficiency and admissibility of the evidence used to prove his guilt. *See id.* at 47 (Rutledge, J., dissenting).

7 *Id.* at 29 (Murphy, J., dissenting).

8 Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 CASE W. RES. J. INT'L L. 221, 221 (1996).

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

10 Michael P. Scharf, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 861-62 (1997) (citing the numerous conflicts in which the world community failed to take action to bring those responsible for atrocities to justice, including Stalin's purges, in which 4 million were killed; China's Cultural Revolution, in which 5 million were murdered; and Cambodia's killing fields, in which 2 million perished).

11 Lawyers Committee for Human Rights, *The International Criminal Court: The Case for U.S. Support*, (visited Apr. 25, 1999) *available at* gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/us&icc_lchr.txt.

crimes tribunal. Three goals are believed to be served by the creation of a permanent tribunal. First, a permanent court, able to establish consistent precedent, would strengthen the rule of law on the international level. Second, the creation of an international criminal court would promote stability and peace.[12] Finally, a permanent court would overcome the formidable barriers to establishing *ad hoc* tribunals, thereby allowing for the more consistent application of international criminal law.

As a result of these considerations, in July 1998, the Rome Diplomatic Conference adopted the Statute of the International Criminal Court ("Rome Statute" or "Statute").[13] A permanent international criminal tribunal will avoid the pitfalls of the World War II tribunals. A permanent and thus pre-existing tribunal, by definition, will not be established by the victors of any particular conflict. Pre-existing rules of procedure created during peace-time are more likely to be motivated by a desire for procedural fairness than by vengeance.

For the permanent International Criminal Court (ICC) envisaged by the Rome Treaty to pursue justice that accords with basic notions of human dignity, it must uphold the highest standards of due process and fundamental fairness. The fundamental liberty interests at stake in a criminal trial, and the climate of moral outrage surrounding war crimes, demands that much care be taken in crafting a tribunal to try such cases. The confluence of legal traditions represented by the international effort to establish a permanent international criminal tribunal presents the challenge of identifying what rights to guarantee the accused. This is a difficult task because different legal traditions are likely to disagree on what "fundamental fairness" requires.

This paper will assess whether the Rome Statute upholds the highest standards of due process and fundamental fairness. It will analyze the statute from the perspective of both American and international law. Part I will trace the development of fundamental fairness in the United States as well as the origins of due process standards in international law. Part II will explore the concepts of due process and fundamental fairness in American and international law, and examine how the Rome Statute measures up to these standards. And, finally, Part III will conclude whether the Rome Statute protects the fundamental due process rights of international criminal defendants.

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[12] *Id.*

[13] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, A/CONF. 183/9, art. 3. The treaty must be ratified by 60 countries before it comes into force. As of January 17, 2001, 139 countries had signed the treaty, and 27 had ratified it. Rome Statute Signature and Ratification Chart (visited Jan. 17, 2001) *available at* http://www.igc.apc.org/icc/rome/html/ratify.html.

I. FUNDAMENTAL FAIRNESS IN AMERICAN AND INTERNATIONAL LAW

A. AMERICAN LAW

The Bill of Rights was adopted by Congress in 1789.[14] It guarantees the freedom of speech, the freedom of religion, the right to counsel, and the freedom from double jeopardy, among others. The framers of the Bill of Rights were motivated by a concern for individual rights and liberties that were systematically denied under British rule.

As initially conceived, the amendments in the Bill of Rights were designed to limit federal power vis-à-vis individual citizens.[15] Fearful of a powerful centralized government, the framers did not extend the Bill of Rights to the states.[16] Mindful of the delicate balance between federal and State power, they were careful not to infringe on States' rights.[17] Moreover, several States had already adopted their own bills of rights in their constitutions.[18]

The enactment of the Civil War Amendments[19] caused the Court to revisit the issue of the applying the Bill of Rights to States. The focus of this inquiry was the Fourteenth Amendment's due process clause.[20] In 1908, the Court first recognized that the Bill of Rights may apply to the States as a necessary component of due process. There, the Court stated that it was possible that some of the personal rights safeguarded by the first eight amendments against national action might also be safeguarded against State action because a denial of such protections would be a denial of due process.[21]

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14 The Bill of Rights was ratified by the states in 1791.

15 Chief Justice Marshall, in Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), when confronted with the issue of the applicability of the fifth amendment's due process clause to the state of Maryland, held that: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. . . . These amendments [in the Bill of Rights] contain no expression indicating an intention to apply them to the state governments."

16 GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 806 (3d ed. 1996) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 3 (1978)).

17 *Id.*

18 JAMES L. ROARK ET AL., THE AMERICAN PROMISE: A HISTORY OF THE UNITED STATES TO 1877 284 (1988). Virginia passed the first bill of rights in June 1776, and five other states later followed suit. These bills of rights defined as inherent rights the freedom of speech, freedom of the press, and the trial by jury. *Id.*

19 The Thirteenth, Fourteenth, and Fifteenth Amendments, adopted between 1865 and 1870, are collectively referred to as the "Civil War Amendments."

20 The due process clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

21 Twining v. New Jersey, 211 U.S. 78, 99 (1908).

The due process clause of the Fourteenth Amendment therefore became the touchstone for determining fundamental rights.

In *Twining v. New Jersey*, the Court addressed the issue of whether the privilege against self-incrimination, embodied in the Fifth Amendment, was a necessary element of due process.[22] To determine whether the due process clause of the Fourteenth Amendment compelled States to respect the privilege, the Court asked whether the privilege was a "fundamental principle of liberty and justice which inhered in the very idea of a free government."[23] The notion of due process thus became synonymous with fundamental fairness. In answering the question whether a particular right was a fundamental principle of liberty and justice, the Court looked to various sources, including the Magna Carta and the Petition of Right, as well as the intent of the framers of the U.S. Constitution.[24]

From 1908 to 1937, the Court "incorporated," through the Fourteenth Amendment's due process clause, the freedom of speech, press, assembly, and religion, as well as the right to counsel.[25] In construing these guarantees as binding against the States, the Court determined that these rights were fundamental in nature. In *Palko v. Connecticut*, however, which concerned the constitutionality of a State statute permitting the State to appeal a judgment of acquittal in criminal cases, the Court held that the double jeopardy clause of the Fifth Amendment did not apply to the States.[26] In so holding, the Court noted that the right to a trial by jury and the right to freedom from double jeopardy were not to be ranked as fundamental.[27]

The Court's approach to incorporation changed in *Duncan v. Louisiana*.[28] In determining whether the Fourteenth Amendment incorporated a particular right, the Court asked whether the right was "fundamental to the American scheme of justice."[29] The test therefore shifted from a determination of universal or natural rights to an evaluation of rights from the viewpoint of a particular legal system. The identification of fundamental rights became

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22 *Id.* at 83.

23 *Id.* at 106.

24 *Id.* at 102-14. The Court in *Twining* held that the privilege against self-incrimination was *not* of a fundamental character. *Id.* at 114. However, *Twining* is an interesting case to look at from a modern perspective, because it reflects how the *zeitgeist* influences perceptions of which rights are fundamental. Although not considered a fundamental right in 1908, 56 years later, the Court held that the privilege against self-incrimination *was* a fundamental liberty right incorporated by the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964). As *Twining* and *Malloy* illustrate, the notion of fundamental fairness is an ever-evolving concept.

25 Palko v. Connecticut, 302 U.S. 319, 326-27 (1937).

26 *Id.* at 325.

27 *Id.*

28 Duncan v. Louisiana, 391 U.S. 145 (1968).

29 *Id.* at 148.

inextricably linked to the characteristics of the American justice system.[30] In *Duncan*, the Court held that the right to a trial by jury was fundamental because it was deeply rooted in the common law system.[31] However, it did recognize that a criminal process that made use of alternative protections serving the same purposes as the American jury could also satisfy due process.[32]

By limiting the fundamental fairness inquiry to the American justice system, the *Duncan* Court recognized that it was beyond the Court's institutional capacity to determine universal principles of due process. It therefore would be unhelpful to test provisions of the Rome Statute without looking to the role of particular standards in the American justice system. The fact that the American system is adversarial, and functions in the context of a large country where power is widely diffused, has influenced the construction of certain rights. "Miranda warnings," for example, are recognized as a prophylactic rule crafted in light of institutional needs within the American criminal justice system. Consequently, in determining what protections are necessary to satisfy due process in the ICC, this paper will dilucidate institutional differences between the United States' justice system and that of the ICC.

B. INTERNATIONAL LAW

International due process standards can be found in international agreements.[33] Different types of international agreements include treaties, conventions, understandings, and covenants. These agreements may be binding or non-binding. Binding agreements have the force of law, while non-binding agreements are merely precatory. This paper will focus on binding agreements, their *travaux preparatoires*, and interpretations of those agreements by the international bodies charged with interpreting them in determining what international due process requires.[34] In addition, this paper

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30 *Id.* at 149 n.14.

31 *Id.* at 149. The Court noted that every state in the U.S., including Louisiana, relies on the jury in criminal proceedings. More importantly, the Court emphasized that "the structure and style of the criminal process -- the supporting framework and the subsidiary procedures -- are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial." *Id.* at 149 n.14.

32 *Id.*

33 International law does not distinguish between due process and fundamental fairness; the two terms will therefore be used synonymously in the international law context.

34 Some reference will also be made to non-binding agreements, but to the extent they are more protective of due process rights than binding agreements, they will not be relied on in identifying the scope of international due process standards.

will examine the civil law origins of certain international standards to determine how such standards were intended to be applied.

II. FUNDAMENTAL FAIRNESS UNDER THE ROME STATUTE

The Rome Statute of 1998 provides that the permanent seat of the ICC will be in the Netherlands, at the Hague.[35] The ICC is to have jurisdiction over all serious crimes of concern to the international community, including genocide, crimes against humanity, war crimes, and crimes of aggression.[36] The Statute also sets forth fundamental principles of international criminal law, such as *nullum crimen sine lege, nulla poena sine lege*, and non-retroactivity.[37] Furthermore, the Rome Statute grants a number of due process rights to the accused, including the presumption of innocence,[38] the right of the accused to be present at trial,[39] the privilege against self-incrimination,[40] the right to confront adverse witnesses,[41] and the right to appeal.[42] These rights represent a considerable improvement over the scant protections in the Nuremberg Charter, and therefore are a significant step toward complying with the highest standards of fundamental fairness. The following section compares rights afforded to the accused under the Rome Statute with those afforded both under American law and international law. Moreover, it discusses this comparison in light of the nature of the decision-making procedures provided for in the ICC statute.

A. THE RIGHT TO BE PRESUMED INNOCENT

Many of the rights guaranteed by the Rome Statute are coextensive with rights guaranteed by the U.S. Constitution as well as those protected under international human rights agreements. For example, Article 66 of the Rome Statute provides that "Everyone shall be presumed innocent until proven guilty before the Court in accordance with the applicable law."[43] This article places the burden of proof on the prosecutor to prove the guilt of the

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35 Rome Statute, *supra* note 13, art. 3(1).

36 *Id.*, art. 5. The ICC may not exercise jurisdiction over the crime of aggression until that crime is further defined. *Id.*, art. 5(2).

37 *Id.*, arts. 22-33.

38 *Id.*, art. 66.

39 *Id.*, arts. 63, 67(1)(d).

40 *Id.*, arts. 55(2)(b), 67(1)(g).

41 *Id.*, art. 67(1)(e).

42 *Id.*, arts. 81, 82.

43 *Id.*, art. 66.

accused beyond a reasonable doubt. Article 67(1)(I) further provides that the accused shall not bear any burden of proof or onus of rebuttal.

In the United States, the presumption of innocence is a long-standing tradition and an imperative of due process.[44] The U.S. Supreme Court has noted that "the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[45] The presumption of innocence originated in Roman law. An examination of the following anecdote illustrates its importance. Upon being accused of a crime, Numerius, the governor of Narbonensis, came to trial before the Emperor Julian. There, Numerius simply denied his guilt, offering no proof of his own. In response, his adversary, Delphidius, realizing that he was not going to win a conviction due to his own insufficient proof, exclaimed, "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" To this, the emperor replied: "If it suffices to accuse, what will become of the innocent?"[46] It was this concern that prompted the Roman legal system and those of subsequent civilizations to impose the burden of proof on the accuser rather than on the accused. This principle came to be incorporated into canon law, and later into the common law, and thus has existed since the common law's early origins.[47]

The presumption of innocence has also been codified in a myriad of international and regional human rights instruments. For example, the International Covenant on Civil and Political Rights (ICCPR) guarantees this right in Article 14(2).[48] The presumption is found in Article 11 of the Universal Declaration of Human Rights (UDHR),[49] Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[50] Article XXVI of the American Declaration on the

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44 Delo v. Lashley, 507 U.S. 272, 278 (1993) (per curiam).

45 *Id.* (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976)). *See also* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

46 Coffin, 156 U.S. at 455 (citing an anecdote by Ammianus Marcellinus in Rerum Gestarum, L. XVIII, c. 1).

47 *Id.* at 455-56.

48 999 U.N.T.S. 171, 6 I.L.M. 368 (1967). Adopted by the General Assembly of the United Nations on December 16, 1966 (G.A. Res. 2200, U.N. GAOR, 21 Sess., Supp. 16, U.N. Doc. A/6316, at 52); entered into force on March 23, 1976. Over 100 countries are parties to the ICCPR, including Canada, France, Germany, Italy, Spain, United Kingdom, and the United States. 74 countries have ratified the Optional Protocol, which confers jurisdiction on the Human Rights Committee to adjudicate complaints filed by individuals. *See* Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967).

49 G.A. Res. 217, U.N. Doc. A/810 (III 1948).

50 213 U.N.T.S. 221, E.T.S. 5. Signed at Rome on November 4, 1950; entered into force on September 3, 1953. The following states are parties: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany,

Rights and Duties of Man (ADRDM),[51] and Article 8(2) of the American Convention on Human Rights (ACHR).[52] The right to be presumed innocent thus constitutes a fundamental precept of international law.

Given the presumption's roots in Roman law, it is no surprise that this principle is recognized by many nations. Various countries have demonstrated their commitment to this principle by codifying it in their national constitutions. Canada, Italy, Portugal, and 43 other countries have provisions in their national constitutions protecting the right to be presumed innocent.[53] Even in other countries where the presumption of innocence has not been codified, the examination phase in criminal proceedings of these countries tends to protect that right.[54] Moreover, other countries are bound by this principle by virtue of their ratification of binding international agreements.[55] Thus, the Rome Statute, in upholding the presumption of innocence, is fully consistent with both U.S. and international norms.

B. THE RIGHT TO BE PRESENT AT TRIAL

The U.S. Supreme Court has declared that one of the fundamental rights guaranteed by the Constitution is "the accused's right to be present in the courtroom at every stage of his trial."[56] This right is derived from the Confrontation Clause of the Sixth Amendment, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[57] In 1965, the Court incorporated the

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Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovkia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Armenia and Azerbaijan recently signed the treaty, but have not yet ratified it.

51 O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (Mar. 30 - May 2, 1948), Bogotá, OEA/Ser. L./V/I.4 Rev. (1965).

52 9 I.L.M. 101 (1970); OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Jan. 7, 1970.

53 SANDRA HERTZBERG & CARMELA ZAMMUTO, THE PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL PROCESS UNDER INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS 40 (Ass'n Internationale de Droit Pénal, 1981).

54 JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 124-32 (2d ed. 1985).

55 *See, e.g.*, MARC CHÂTEL, *Human Rights and Belgian Criminal Procedure at the Pre-Trial and Trial Level*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY 196 (J.A. Andrews ed., 1982) (discussing a provision of the Belgian Code of Criminal Procedure protecting the presumption of innocence that mirrors the country's obligations under the ECHR).

56 Illinois v. Allen, 397 U.S. 337, 338 (1970); *see also* Lewis v. United States, 146 U.S. 370 (1892); LEONARD CAVISE, *Human Rights in the Trial Phase of the American System of Criminal Law*, in PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL PROCEDURE OF EGYPT, FRANCE AND THE UNITED STATES 106-08 (Ass'n Internationale de Droit Pénal, 1989).

57 U.S. CONST. amend. VI.

Confrontation Clause into the Fourteenth Amendment, making it obligatory upon the States as an imperative of due process and a fair trial.[58]

The right of the accused to be present at his trial, however, is not absolute. In *Illinois v. Allen*, the Court held that a criminal defendant can lose his right to be present at his trial by engaging in behavior so disorderly and disruptive that the trial cannot be carried on with him in the courtroom and after being warned that he will face removal if he continues to conduct himself in such a manner.[59] The Court emphasized that removal was not unconstitutional in the case because the defendant was repeatedly warned that he would be removed from the courtroom if he continued to act in an obstreperous and disruptive manner.[60] Further, the Court found that the defendant would not have been dissuaded by the trial judge's use of his contempt powers, and was constantly informed that he could return if he agreed to act properly.[61] Thus, the exception has been construed very narrowly.

Likewise, the Court has held that a criminal defendant who voluntarily fails to appear at his own trial for a non-capital offense, effectively waives his right to be present under the Confrontation Clause.[62] In such a case, the court is entitled to proceed with the trial as if the defendant were present.[63] The voluntary absence exception is necessary to avoid the untoward result of placing in the hands of a defendant free on bail the power to prevent his trial, once begun, from proceeding.[64]

International law also protects the right of the accused to attend his trial. The ICCPR provides the accused the right "to be tried in his presence."[65] From a purely textual point of view, the mandate is absolute, and thus grants the accused a broader right to be present at his trial than under United States law. The Human Rights Committee[66] has recognized exceptions to this

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58 Pointer v. Texas, 380 U.S. 400, 403 (1965).

59 Allen, 397 U.S. at 343.

60 *Id.*

61 *Id.* at 345-46.

62 Taylor v. United States, 414 U.S. 17, 20 (1973) (per curiam).

63 Diaz v. United States, 223 U.S. 442, 455 (1912). In Crosby v. United States, 506 U.S. 255 (1993), the Court reversed the conviction of a criminal defendant who absconded prior to trial and was thus absent at the beginning of the proceedings. Although the Court based its decision on Rule 43 of the Federal Rule of Criminal Procedure and expressly declined to reach the defendant's constitutional claims, the outcome is consistent with the pre-Rule 43 holding of the Court in Diaz. *Id.*

64 *Id.* at 457.

65 ICCPR, *supra* note 48, art. 14(3)(d).

66 The Human Rights Committee is a permanent and independent body of experts established by Article 28 of the ICCPR that may hear complaints of individuals against a state party under the ICCPR's Optional Protocol. . The Human Rights Committee also reviews the human rights situation in each signatory State and monitors the adherence to the standards set forth by the Covenant. See Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and*

principle. In *Mbenge v. Zaire*, the Committee held that "[i]t is permissible to try an accused in *absentia* only when he was summoned in a timely manner and informed of the proceedings against him."[67] Although this standard, requiring only that the accused be provided with timely notice, and be informed of the nature of the proceedings, appears relatively permissive, the Human Rights Committee's General Comments caution that *in absentia* trials may be held for justified reasons.[68] Commentators on the ICCPR, however, have explained that the former, more permissive standard, as written, is the one that governs *in absentia* trials under the Convention.[69]

The ECHR addresses *in absentia* proceedings in a different manner. Article 6(3)(c) provides that any person charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." Textually, one could interpret the use of the disjunctive "or" to signify that the accused has the right *either* to defend himself in person *or* to defend himself through his attorney. Such an interpretation would mean that, where the accused is represented by counsel, he does not enjoy the right to attend his own trial. However, the Commission has found that, notwithstanding the lack of an express right to attend his one's own hearing, the structure of Article 6 implicitly guarantees international criminal defendants the right to be present at their own proceedings.[70]

In *Colozza and Rubinat v. Italy*, the Commission stated that "the right to be present at the hearing is, more especially in criminal matters, a vital ingredient of the notion of a fair trial."[71] This Commission reasoned that other rights guaranteed in the ECHR could not be exercised if the accused did not have a right to attend his hearing.[72] The Commission found further support for its interpretation in Article 5(3), which provided that any arrestee or detainee shall be brought promptly before a judge or other judicial officer.[73]

Consular Protection in the Context of Criminal Justice, 19 HOUS. J. INT'L L. 375, 399-400 (1997).

67 Mbenge v. Zaire, No. 16/1977, §§ 14.1, 21 (1977).

68 Human Rights Committee, General Comment 13/21, § 11 (1984) (*reprinted in* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 859-60 (1993)).

69 MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 260 (1993); David Harris & Sarah Joseph, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 226 (1995).

70 Colozza and Rubinat v. Italy, 5 May 1983, §§ 111 (9024/80 and 9317/81) (Op. Com. 1983) (*reprinted in* Council of Europe, 2 Digest of Strasbourg CaseLaw Relating to the European Convention of Human Rights 4, §6.3.4.1 (1984)).

71 Colozza and Rubinat, at § 112.

72 *Id.*

73 *Id.* at § 111.

Similarly, Articles 63 and 67(1)(d) of Rome Statute provide that a defendant has the right to be present during the trial.[74] The Statute is thus consistent with the express language of the ICCPR, interpretations of the Sixth Amendment of the U.S. Constitution, and the ECHR. Article 63 of the Rome Statute provides for an exception to this right by permitting, but not requiring, the Trial Chamber to remove the accused from the courtroom in the event that he "continues to disrupt the trial."[75] The word "continues" suggests that the accused would be subject to removal only where he repeatedly engages in disruptive behavior. Article 63 clarifies the scope of this narrow disruption exception, indicating that removal shall only be undertaken in "exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required."[76]

This exception is analogous to the Sixth Amendment exception recognized in *Allen*. Both exceptions are extremely narrow, and may only be invoked after the accused is warned repeatedly that his conduct may result in his removal from the courtroom. In addition, both exceptions require that the accused be permitted to return to the courtroom if he agrees to conduct himself appropriately.[77]

International law has not explicitly addressed the issue of removing a defendant from trial once the trial has already begun. However, general rules about when a trial may proceed *in absentia* have been set forth. The ICCPR has been interpreted to require only that a defendant be provided with timely notice of the proceedings against him.[78] This relaxed standard is derived from the same language in the Rome Statute requiring the presence of the accused at trial.[79] This interpretation of the Rome Statute would conflict with the U.S. rule that a defendant must be present at the outset of the proceedings, even though the trial may proceed if the defendant later voluntarily absents himself. On the other hand, it is clear from the General Comments that the ICCPR has a strong preference for the attendance of the defendant, and that a trial should proceed without him only in exceptional

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[74] Rome Statute, *supra* note 13, arts. 63, 67(1)(d).

[75] In such an event, the Rome Statute directs the Trial Chamber to make available to the accused a means to observe the trial and to instruct his counsel. *Id.*, art. 63(2).

[76] *Id.*, art. 63.

[77] The U.S. Supreme Court, in *Illinois v. Allen*, upheld the conviction of a defendant removed from his trial because the judge constantly reminded the defendant that he could return if he agreed to behave properly. *Allen*, 397 U.S. at 343. Because Article 63 of the Rome Statute countenances the defendant's removal "only for such duration as is strictly required," if the defendant agreed to behave, he would have to be returned to the courtroom. Rome Statute, *supra* note 13, art. 63.

[78] Mbenge v. Zaire, No. 16/1977, §§ 14.1, 21 (1977).

[79] Rome Statute, *supra* note 13, art.63.

circumstances.[80] Given these conflicting views on how permissive the ICCPR exceptions are in allowing *in absentia* trials, it cannot be said with certainty what the international standard requires. Moreover, because the Rome Statute's language tracks that of the ICCPR, much uncertainty remains regarding the scope of exceptions under the Rome Statute itself.

It is worth noting, however, that the protections contained in the Rome Statute guaranteeing the presence of the accused at trial represent a tremendous improvement over the International Law Commission's 1994 Draft Statute of the International Criminal Court ("1994 Draft Statute"), which merely stated a preference for the accused to attend his own trial.[81] In particular, Article 37 of the 1994 Draft Statute provided that, "[a]s a general rule, the accused *should* be present during trial."[82] Article 37 further permitted the Trial Chamber to hold a trial *in absentia* if, "for reasons of security or the ill-health of the accused it is undesirable for the accused to be present."[83] Such a permissive exception would have seriously undermined the rights of accused war criminals.[84]

With respect to the "reasons of security" grounds for proceeding *in absentia* under the 1994 Draft Statute, the Trial Chamber would have been vested with the power to determine whether "reasons of security" merely rendered it "undesirable" for the accused to be present, a surprisingly low threshold. The 1994 Draft Statute did not define "reasons of security," which itself is exceedingly vague. Regarding the "ill-health" grounds, again the Trial Chamber would have been empowered to decide whether the accused's ill-health made it "undesirable" for him to attend his own trial. Both the "reasons of security" and "ill-health" in the 1994 Draft Statute compromised the fundamental right of the accused to participate in his own defense.[85]

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[80] Human Rights Committee, General Comment 13/21, § 11 (1984) (*reprinted in* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 859-60 (1993)).

[81] Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute of an International Criminal Court, May 2 - July 22, 1994, U.N. GAOR, 49th Sess., Supplement No. 10, U.N. Doc. A/49/10; see also Christopher L. Blakesley, Jurisdiction, Definition of Crimes and Triggering Mechanism, in The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications, 13 NOUVELLE ÉTUDES PÉNALES 177, 213-16 (1997) (criticizing Article 37 of the 1994 ILC Draft Statute because trials in absentia raise serious problems in common law systems and violate Article 14(3)(d) of the ICCPR).

[82] 1994 ILC Draft Statute, *supra* note 81.

[83] *Id.*

[84] AMNESTY INTERNATIONAL, ESTABLISHING A JUST, FAIR, AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 48-49 (1994).

[85] Christopher Keith Hall, *Current Development: The First Two Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177, 184 (1997); *see also* Leila Sadat Wexler, *First Committee Report on Jurisdiction, Definition of Crimes and Complementarity*, in M. CHERIF BASSIOUNI ED., THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-98 PREPARATORY COMMITTEE; AND

The accused does not have a fundamental right to be present during criminal proceedings in several civil law jurisdictions.[86] However, proceedings before the ICC resemble those in the U.S., allowing for the presence of the accused at his own trial. This represents an important international step toward increasing procedural fairness.[87]

C. THE RIGHT TO COUNSEL

The United States' Bill of Rights guarantees a criminal defendant the right to legal representation, providing that "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[88] The U.S. Supreme Court has emphasized the fundamental nature of this right, stating that:

> [The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[89]

ADMINISTRATIVE AND FINANCIAL IMPLICATIONS 214 (1997) (calling the 1994 ILC Draft Statute's allowance of trials in absentia a "serious defect").

[86] Permanent Representative to France to the UN, Letter dated 10 Feb. 1993, addressed to the Secretary General of the U.N., ¶ 108, U.N. Doc. S/25266 (*Report of the Committee of French Jurists*); Ruth Wedgewood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 267-70 (1994). In the civil law system, criminal proceedings can be divided into three stages: the investigative phase, the examining phase, and the trial. Most of the evidence is collected in the investigative phase, in which a written record is compiled for the benefit of the examining judge. The examining phase is supervised by the examining judge, who conducts further research and prepares a complete written record. Only if the examining judge concludes a crime was committed will the case go to trial. The trial is much more abbreviated, though, because the evidence has already been taken and the record made. MERRYMAN, *supra* note 54, at 1064-65.

[87] James C. O'Brien, *Current Development: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 656 (1993) (praising the ICTY's requirement that the accused be tried in his presence as a substantial advance over the Nuremberg proceedings, in which Martin Bormann was convicted in absentia); American Bar Association, Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia 43 (1993).

[88] U.S. CONST. amend VI. The right to counsel has been made applicable to the States through the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 68 (1932); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[89] Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

Legal assistance is fundamental to the vindication of legal rights. Therefore, in order to offer a fair trial, the right to counsel must exist in all criminal prosecutions where the accused face possible imprisonment, even where the defendant is unable to pay.[90] This is because one unschooled in the law is ill-equipped to vindicate his legal rights before a court of law; and the criminal process is one in which liberty interests are at stake.[91] The right to counsel therefore attaches upon the questioning of an individual suspect[92] and applies to all critical stages of investigation,[93] including post-indictment, pre-trial lineups,[94] preliminary hearings,[95] and arraignments.[96]

In *Argersinger v. Hamlin*, the Court held that the right to counsel extends even to cases involving misdemeanors or petty offenses where a prospect of imprisonment exists, even for a short duration.[97] The defendant in *Argersinger*, for example, was charged with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000 fine, or both; he was ultimately sentenced to 90 days in jail.[98] In holding that this defendant could not be imprisoned without legal representation at trial, the Court found that counsel was one of those "certain fundamental rights applicable to all [] criminal prosecutions . . ."[99] The increasing complexity of the law and a concern for the defendant's inability to fully exercise his rights without the assistance of counsel were important to the holding. But the Court's decision also rested on concerns particular to the U.S. legal system, including a large volume of misdemeanor cases, a perception of "assembly-line justice" in the processing of those cases, and a study that showed that misdemeanors represented by counsel were five times as likely to have all charges dismissed as were defendants appearing without counsel.[100] Thus, characteristics unique to the American system of criminal justice were highly relevant to the Court's holding.

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90 Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

91 Gideon, 372 U.S. at 344. Many American legal scholars believe, however, that the right to counsel has been seriously eroded by the Court's standard for ineffective assistance of counsel enunciated in Strickland v. Washington, 466 U.S. 668 (1984). That standard requires the defendant show: (1) that his counsel's performance was so deficient and full of errors that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) that the deficient performance was so serious as to deprive the defendant of a fair trial whose result is reliable. *See Strickland*, 466 U.S. at 687-96. Moreover, the Strickland standard is applied in a "highly deferential" manner. *Id.* at 689.

92 Escobedo v. Illinois, 378 U.S. 478 (1964).

93 Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964).

94 United States v. Wade, 388 U.S. 218 (1967).

95 White v. Maryland, 373 U.S. 59 (1963).

96 Hamilton v. Alabama, 368 U.S. 52 (1961).

97 Argersinger, 407 U.S. at 37.

98 *Id.* at 26.

99 *Id.* at 32.

100 *Id.* at 33-36.

A number of international instruments entitle indigent defendants to assigned counsel.[101] However, this right has not been construed as broadly as it has in the United States. The ICCPR provides that all persons charged with a criminal offense are entitled to legal counsel "in any case where the interests of justice so require."[102] However, because the "interests of justice" remains largely undefined, the interpreting body retains a great amount of discretion in determining when counsel should be appointed. Similarly, the ECHR guarantees the assignment of counsel to the indigent defendant where the "interests of justice" test is satisfied.[103] Like the ICCPR, however, the EHCR fails to define "interests of justice." Case law and commentary provide some guidance in interpreting the scope of this test. However, no bright-line rules govern its application in the international context.

Cases applying the right to counsel provisions of the ICCPR suggest that a State's duty to assign legal counsel to indigent criminal defendants depends on the seriousness of the offense and the potential maximum punishment.[104] The Human Rights Committee, the U.N. body charged with interpreting and enforcing the ICCPR, has held that "it is axiomatic that legal assistance be available in capital cases."[105] On the other hand, the Committee has held that "the interests of justice" do not require assigned counsel for minor offenses such as traffic violations. Therefore, where a defendant was ordered to pay 1,000 Norwegian krones or serve a ten-day prison term for a traffic violation, the State's refusal to provide legal counsel did not violate the ICCPR.[106] Between these two extremes, however, there is little interpretive material indicating when counsel must be provided.[107]

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101 While the international instruments use the term "assigned," U.S. jurists are more familiar with the word "appointed." As these terms are synonymous, both describing a lawyer designated by the court to represent a defendant free of charge, I use them interchangeably.

102 ICCPR, *supra* note 48, art. 14(3)(d).

103 ECHR, *supra* note 50, art. 6(d)(c).

104 NOWAK, *supra* note 69, at 260; Robinson v. Jamaica, No. 223/1987, § 10.3, G.A.O.R. A/Supp. (A/44/40) at p. 241 (1989); O.F. v. Norway, No. 158/1983, § 3.4, 5.6, G.A.O.R. A/Supp. (A/40/40) at p. 204 (1985).

105 Robinson v. Jamaica, No. 223/1987, § 10.3, G.A.O.R. A/Supp. (A/44/40) at p. 241 (1989). Under the ICCPR, the right to assigned counsel in capital cases applies at both the trial and appellate levels. *See* DAVID HARRIS & SARAH JOSEPH, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 226 n.261 (1995); Pinto v. Trinidad and Tobago, No. 232/1987, § 12.5, G.A.O.R. A/Supp. (A/45/40) at p. 69 (1990).

106 O.F. v. Norway, No. 158/1983, § 5.6; *see also* NOWAK, *supra* note 69.

107 The Human Rights Committee has held that the interests of justice require that counsel provide *effective* representation. In *Kelly v. Jamaica*, a death penalty case, the Committee held that "while article 14, paragraph 3(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice." No. 253/1987, § 5.10, G.A.O.R. (A/46/40) p. 241 (1991). In capital cases, the accused has a right to contest the choice of court-appointed counsel on appeal where there is some evidence of ineffective representation by the same counsel in the

Another international instrument, the non-binding U.N. Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment ("Draft Principles"), addresses the issue of a detainee's right to counsel. Under this document, Principle 15 grants indigent detainees an absolute right to legal counsel, providing that:

> 1. A detained person shall be entitled to have legal assistance as soon as possible after the moment of arrest.
> 2. If a detained person does not have legal assistance he *shall be entitled to have a lawyer assigned to him* by a judicial or other authority, without payment by him if he does not have sufficient means to pay.[108]

This lower standard only requires a showing of indigence. It therefore goes further in guaranteeing the right to counsel than either the ICCPR or the ECHR. This standard has been most consistent with the American rule.[109]

Unlike the ICCPR and the ECHR, the Rome Statute explicitly provides that the right to legal counsel attaches once a person comes under investigation for a crime within ICC jurisdiction.[110] Pursuant to Article 55(2) of the Rome Statute, a suspect has a right to have his counsel present during questioning by the Prosecutor or by national authorities, and must be informed of this right prior to the initiation of any such questioning.[111]

Article 67(1)(d) further extends this right to the accused at trial.[112] While Articles 55(2)(c) and 67(1)(d) provide that an indigent suspect will not be required to pay for assigned counsel if an inability to pay is demonstrated, they also state that counsel will only be assigned if "the interests of justice so require."[113] To trigger the right to counsel, an indigent suspect must show both an inability to pay and that the appointment of legal counsel is necessary to further "the interests of justice." Nonetheless, like the ICCPR and the ECHR, the Rome Statute does not define what the "interests of justice" requires.[114]

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first instance. Pinto v. Trinidad and Tobago, No. 232/1987 § 12.5, G.A.O.R., A/Supp. (A/45/40) p. 69 (1990).

[108] United Nations Body of Principles of the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Agenda Item 138, Principle 17(2), at 6, U.N. Doc. A/RES/43/173 (1989).

[109] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[110] Rome Statute, *supra* note 13, art. 55(2).

[111] *Id.*, art. 55(2)(d).

[112] *Id.*, art. 67(1)(d).

[113] *Id.*, arts. 55(2)(c), 67(1)(d).

[114] The Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY Statute"), in Article 21(4)(d), also conditions the appointment of counsel on satisfaction of the "interests of justice" test. *See* Statute of the International Tribunal for the Prosecution of Persons

One commentator has opined that the interests of justice test, in the context of the ICTY Statute, appears to undercut the right to legal representation, and that a showing of indigence should be sufficient to trigger the appointment of counsel.[115] This extra hurdle to obtaining legal representation could impede the ability of the accused to exercise other procedural rights guaranteed under the Rome Statute and could further threaten his ability to mount a successful defense. As eloquently stated by Justice Sutherland in *Powell v. Alabama*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[116]

Because only very serious crimes will be tried before the ICC,[117] if the interests of justice test operates to exclude a right to assigned counsel in cases before the ICC, the Rome Statute could fairly be said to be inconsistent with U.S. notions of due process and fundamental fairness. It would also jeopardize the legitimacy of the ICC proceedings.

However, the concerns raised above are most likely ill-founded. The interests of justice test, also found in the Statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), has never been construed to deny the right to counsel in a war crimes trial. The only litigation in either tribunal concerning the scope of the right to assigned counsel concerned the question of whether the accused had a right to *choose* his assigned counsel.[118] As to that question, the ICTR held that while the indigent defendant does not have an absolute right to the assigned counsel of

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Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, 48th Sess., at 36, U.N. Doc. S/25704 (1993).

[115] *See* 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, 414-15 (1998).

[116] Gideon v. Wainwright, 372 U.S. 335, 344-35 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

[117] The ICC only has jurisdiction over the crime of genocide, crimes against humanity, and war crimes, which the Rome Statute itself identifies the "most serious crimes of international concern." Rome Statute, *supra* note 13, arts. 1, 5.

[118] Ntakirutimana case, 18 HUM. RTS. L.J. 340, 342 (1997).

his or her own choosing, in order to ensure that he receives a fair trial and effective defense, the "accused should be offered the possibility of designating the counsel of his or her own choice from the list drawn up by the [ICTR's] Registrar for this purpose."[119] In so holding, the ICTR specifically noted its desire to adopt a "progressive" approach to interpreting the right to counsel.[120]

In the case of *Prosecutor v. Tadic*, the first war crimes prosecution before the ICTY, the defendant sought assigned counsel due to indigence.[121] In determining whether to assign counsel, two documents complemented the general provision in the ICTY Statute: the Directive on Assignment of Defense Counsel ("Directive")[122] and criteria set forth by the Registry and approved by the judges.[123] Together, these sources provide that an indigent defendant has the right to assigned counsel free of charge if he demonstrates that he "does not have sufficient means to engage counsel of his choice and to have himself legally represented or assisted by counsel of his choice."[124] The interests of justice test is essentially irrelevant to this determination, and the defendant in *Tadic* was assigned legal counsel merely based on his showing of indigence.[125]

It should be noted, however, that detailed rules of procedure found in the Directive have considerable influence over the extent to which counsel would be provided. In the *Tadic* case, for example, more than one attorney became necessary to secure effective representation.[126] However, the Directive only provided for the assignment of one.[127] Once the need for additional counsel became apparent, the Court assigned additional representatives under a provision that permitted the discretionary use of funds to secure an adequate defense.[128]

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[119] *Id.*

[120] *Id.*

[121] Mark S. Ellis, *Symposium: Achieving Justice in Cataclysm Criminal Trials in the Wake of Mass Violence: Comment: Achieving Justice Before the International War Crimes Tribunal: Challenges for Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 521 (1997).

[122] Directive on Assignment of Defense Counsel, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. IT/73/Rev. 1 (1994), reprinted in 33 I.L.M. 1576 (1994).

[123] Ellis, *supra* note 121, at 521.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 528.

[127] *Id.*

[128] *Id.*

D. FREEDOM FROM DOUBLE JEOPARDY (*NON BIS IN IDEM*)

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."[129] This guarantee against double jeopardy is implicated where there has been an acquittal or conviction on the merits by a court of competent jurisdiction.[130] Although the U.S. Supreme Court initially held in *Palko v. Connecticut*[131] that the Fifth Amendment double jeopardy clause did not apply to the states, it reversed itself in *Benton v. Maryland*,[132] making this protection binding on States through the Fourteen Amendment's due process clause. The Double Jeopardy Clause protects a criminal defendant against successive prosecutions for the same offense after acquittal or conviction as well as against multiple criminal punishments for the same offense.[133]

The Double Jeopardy Clause has its roots in three common law pleas; *autrefois acquit, autrefois convict,* and pardon.[134] Its underlying purpose is to prevent repeated attempts at convicting a single person for the same offense, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[135] As Justice White observed in *United States v. Dixon*, repeated prosecutions also violate the principle of finality and increase the risk of a mistaken conviction.[136] Likewise, the Supreme Court recognized in *United States v. Scott* that a verdict of acquittal could not be reviewed without putting a defendant twice in jeopardy, and thereby violating the Constitution.[137] To be sure, permitting a re-trial after an acquittal "would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that even though innocent he may be found guilty."[138]

The bar on prosecutorial appeal in a criminal acquittal, however, is not absolute. A prosecutor may appeal an acquittal entered on a ground of

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[129] U.S. CONST. amend. V

[130] CHRISTOPHER OSAKWE, *The Bill of Rights for the Criminal Defendant in American Law*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY 286 (Andrews, J.A., ed., 1982).

[131] 302 U.S. 319, 323 (1937).

[132] 395 U.S. 784, 795 (1969).

[133] Monge v. California, 524 U.S. 721 (1998); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *See also* OSAKWE, *supra* note 130, at 286-88 (outlining contours of double jeopardy clause as developed in case law).

[134] United States v. Scott, 437 U.S. 82, 87 (1978). These common law pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense. *See id.*

[135] *Id.* (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

[136] United States v. Dixon, 509 U.S. 688, 724 (1993) (White, J., concurring in part and dissenting in part).

[137] Scott, 437 U.S. at 90 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)).

[138] *Id.* at 91.

law.[139] This is because an appeal under these circumstances would not require a second trial.[140] In 1975, the Court in *United States v. Wilson* emphasized that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact."[141] Thus, to permit a re-trial on issues of fact would undermine the jury's role as fact-finder. In fact, after carefully parsing the double jeopardy case law, some scholars have concluded that jury nullification is the primary interest protected by the double jeopardy clause.[142] The protection of jury nullification is "the only thing that explains why, though a defendant can be retried following an erroneous conviction, he cannot be retried following an erroneous acquittal."[143]

In *Kepner v. United States*, the U.S. Supreme Court was squarely presented with a case in which the civil law and common law conceptions of double jeopardy conflicted.[144] *Kepner* involved a criminal prosecution in the Philippines, then a U.S. territory to which Congress had made the Double Jeopardy Clause applicable.[145] The defendant in *Kepner* had been acquitted by the trial court, but criminal procedure in the Philippines permitted an appeal of the acquittal.[146] On appeal, the defendant was convicted.[147] However, the U.S. Supreme Court reversed, stating that "[t]he court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense."[148]

In opposition to the unqualified application of the Double Jeopardy Clause, Justice Holmes wrote a strong dissent, advancing a theory of "continuing jeopardy."[149] Under this theory, the first jeopardy should be treated as continuing until both sides have exhausted their appeals on claimed errors of law, regardless of the possibility that the defendant may be subjected to a retrial after a verdict of acquittal.[150] The following excerpt from his dissent illustrates an alternative construction of the Double Jeopardy Clause:

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[139] *Id.*
[140] *Id.* Thus, an acquittal based on any ground other than insufficiency of the evidence is permitted. *See id.* at 90-91.
[141] United States v. Wilson, 420 U.S. 332, 342 (1975).
[142] *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP CT. REV. 81, 84.
[143] *Id.* at 132.
[144] 195 U.S. 100 (1904).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 133.
[149] *Id.* at 134-35.
[150] *Id.*

> The jeopardy is a one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm.[151]

Justice Holmes' formulation draws support from the U.S. rules permitting prosecutorial appeals of sentences,[152] acquittal notwithstanding the verdict,[153] and dismissal of indictments.[154] Nonetheless, his position has never gained wide acceptance. The prevailing view is that the civil law tradition, permitting prosecutorial appeal, is inconsistent with the principle of double jeopardy in U.S. law.[155]

The Double Jeopardy Clause is not violated, however, where separate sovereigns seek to prosecute an individual for the same conduct where the conduct in question violates laws of both.[156] The "dual sovereignty doctrine" is based on the common law notion of crime as an offense against the sovereignty of a government.[157] A person therefore commits two distinct offenses in a single course of action where he violates the laws of two separate nations.[158] To determine the applicability of the dual sovereignty doctrine to a successive prosecution of a defendant for the same course of conduct, a court must inquire into whether the two entities "draw their authority to punish the offender from distinct sources of power."[159] In the

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151 *Id.*

152 United States v. DiFrancesco, 449 U.S. 117, 132 (1980).

153 United States v. Ceccolini, 435 U.S. 268, 270-71 (1978).

154 Wilson, 420 at 352-53.

155 *See* Kepner, 195 U.S. at 133; United States v. Wilson, 420 U.S. 332 (1975); *see also* Sanabria v. United States, 437 U.S. 54, 75 (1978) (holding that there is no exception to double jeopardy's prohibition on retrials after acquittal regardless of how egregiously erroneous the legal rulings were that led to the acquittal).

156 Heath v. Alabama, 474 U.S. 82, 88 (1985); United States v. Lanza, 260 U.S. 377, 382 (1922). Note that the Full Faith and Credit Clause, which requires that each State of the United States give full legal effect to the judgments of all other States, only applies to civil judgments. *See* Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 175 (1997).

157 Heath, 474 U.S. at 88.

158 *Id.*; Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852).

159 Heath, 474 U.S. at 88.

United States, the Court has recognized that States are separate sovereigns vis-à-vis both the federal government and other State governments.[160]

Civil law systems recognize a principle similar to double jeopardy, known as "*non bis in idem*."[161] The nature of this protection in civil law jurisdictions, however, differs in important ways from the American doctrine, as seen in *Kepner*. The most fundamental difference is that *non bis in idem* permits the prosecutor to appeal an acquittal of the accused.[162] In civil law, the right to appeal includes a review of the facts, law, judgment, and sentence.[163] This makes the appeal "part and parcel of one single proceeding."[164]

Non bis in idem is a fundamental principle of international criminal law.[165] The scope of the protection, however, is narrower than that furnished by U.S. law. It provides that "no one shall be liable to be tried or punished against for an offense for which he has already been finally convicted or acquitted *in accordance with the law and penal procedure of each country*."[166] Article 4 of Protocol No. 7 of the ECHR contains a similar provision.[167] Limited in nature, however, the double jeopardy protections of the ICCPR and ECHR are triggered only after a final conviction or acquittal, leaving the definition of "finality" open to interpretation through the "law and penal procedure of each country." As discussed above, the prevailing view in civil law countries is that a conviction or an acquittal is not final until all appeals have been exhausted. By leaving the definition of a "final" conviction or acquittal to domestic penal law, the international double jeopardy standard thereby permits prosecutorial appeal of an acquittal where permitted by a country's domestic law.[168]

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[160] *Id.* at 89; United States v. Wheeler, 435 U.S. 313, 320 (1978). In this context, "States" refers to the 50 states of the United States.

[161] The *non bis in idem* principle is guaranteed in almost every country's domestic legal system. *See* Berg, *supra* note 8, at 242-43.

[162] Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 491 (1975); *see also* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 82-85 (1977).

[163] Damaska, *supra* note 162.

[164] *Id.*; *see also* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 682 (1990) (noting that research has found that French criminal appeals are both infrequent and unlikely to result in a change in outcome).

[165] *See* Berg, *supra* note 8, at 242.

[166] ICCPR, *supra* note 48, art. 14(7) (emphasis added).

[167] 24 I.L.M. 535, 6 H.R.L.J. 80 (1985). Done at Strasbourg on November 22, 1984. The following states are parties: Austria, Denmark, Finland, France, Greece, Hungary, Iceland, Italy, Luxembourg, Norway, San Marino, Sweden, and Switzerland. The American Convention restricts its non bis in idem protection to "accused persons acquitted by a non-appealable judgment."

[168] Similarly, Article 8(4) of the ACHR appears to defer to the civil law model, providing that "an accused person acquitted by a nonappealable judgment shall not be subject to a new trial for the same cause."

In Protocol No. 7, Article 4(2) provides that the double jeopardy provision in Article 4(1) "shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."[169] Thus, Protocol No. 7 is more explicit than other provisions in international agreements,[170] and demonstrates an approach that differs markedly from the U.S. tradition of proscribing a second trial of a criminal defendant *even if* there is new evidence or defects in the previous proceedings.[171] This is similar to the appeals procedure in many civil law countries.[172]

1. Multiple Prosecutions under the Rome Statute

Article 81 of the Rome Statute provides that both the prosecutor and convicted persons have equal right to appeal a final decision of the Trial Chamber on the grounds of procedural error or an error of law or fact.[173] The convicted person may also appeal on "any other ground that affects the fairness or reliability of the proceedings or decision."[174] Article 83 grants the Appeals Chamber all of the powers of the Trial Chamber in reviewing final decisions of the latter, and provides the Appeals Chamber with the authority to order a new trial before a different Trial Chamber or to reverse or amend the Trial Chamber's decision or sentence.[175] The Appeals Chamber may not, however, review a final judgment of acquittal.[176]

The appeal structure established by the Rome Statute grants an expansive right of prosecutorial appeal and provides the Appeals Chamber broad authority to revisit issues determined by the Trial Chamber. Because the international *non bis in idem* principle is flexible, it can accommodate

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Whether a judgment is nonappealable is not defined in the agreement itself, and presumably thus becomes is an issue of domestic penal law.

169 24 I.L.M.535, *supra* note 167, art. 4(2).

170 Although the Human Rights Committee has recognized that proceedings may be reopened in "exceptional circumstances" for newly discovered evidence or for fundamental defects in the previous proceedings which could affect the outcome of the case, the lack of an explicit exception in the ICCPR itself caused a number of countries to make reservations to Article 14(7). *See* STEPHANOS STAVROS, THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 297 n.920 (1993).

171 United States v. Scott, 437 U.S. 82, 91 (1978).

172 *See* STAVROS, *supra* note 170, at 297-98.

173 Rome Statute, *supra* note 13, art. 81(1).

174 *Id.*

175 *Id.*, arts. 83(1), 83(2). In reviewing factual issues, the Appeals Chamber may call evidence itself to determine the issue or remand the issue to the Trial Chamber for resolution. *See id.*, art. 83(2).

176 Article 84 only permits revision of a final judgment of conviction or sentence. *Id.*, art. 84(1).

both civil and common law standards without violating the international principles codified in the ICCPR and Protocol No. 7 of the ECHR. However, because civil law and common law standards are to some extent irreconcilable, incorporation of the civil law standard undermines the protection offered under the common law double jeopardy rule.

From a common law perspective, the appeals structure threatens the principle of finality that double jeopardy seeks to protect.[177] Furthermore, it increases the risk that the prosecutor will wear down the accused until a conviction is won.[178] The prosecutorial right of appeal combined with the Appeals Chamber's ability to order a new trial, make the accused vulnerable to repeated and even endless criminal prosecutions for the same offense.[179] This would expose him to "embarrassment, expense and ordeal, and [compel] him to live in a continuing state of anxiety and insecurity"[180] the result that American double jeopardy rules seek to prevent. Moreover, prosecutors in war crimes trials will be under tremendous pressure to win a conviction in order to satisfy the collective need for vindication. This might undermine the objectivity of such trials and erode the fundamental fairness that an international criminal court was intended to preserve.

The U.S. Supreme Court squarely rejected, in *Kepner*, the civil law model of *de novo* appellate review of the law and the facts. In fact, the framers of the U.S. Constitution expressly rejected a model of the judiciary which allowed for appellate jurisdiction extending to matters of both law *and* fact.[181] The American Bar Association has also spoken out against the idea of permitting the prosecutor to appeal an acquittal of the accused in the war crimes context.[182]

It is incontrovertible that ICC appeals are contrary to what the U.S. would allow in its own courts of law. However, the question then becomes whether the ICC structure can be reconciled with general notions of fundamental fairness and due process. One commentator argued that the Court has recognized so many exceptions to the Double Jeopardy Clause that the values the clause allegedly protects are not in fact of a fundamental

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177 Berg, *supra* note 8, at 251.

178 *Id.*

179 *Id.*

180 United States v. Scott, 437 U.S. 82, 87 (1978) (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

181 RICHARD H. FALLON et al., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 19 (4th ed. 1996). The right to freedom from double jeopardy was later secured in the Seventh Amendment. *See id.*; U.S. CONST. amend. VII.

182 American Bar Association, *Task Force Report on an International Criminal Court*, 28 INT'L LAWYER 475, 505-06 (1995). The ABA expressed with opinion with respect to the ILC Draft Statute, whose double jeopardy provisions were similar to those in the Rome Statute.

nature.[183] As stated earlier, the only value that double jeopardy jurisprudence has consistently protected is jury nullification.[184] Because the ICC does not employ juries as factfinders, a stringent double jeopardy rule is not necessary in the ICC context. Consequently, to the extent that the lack of juries does not violate due process, permitting prosecutors to appeal acquittals of defendants does not contravene the Double Jeopardy Clause.

2. *Successive Prosecutions under the Rome Statute*

The issue of multiple prosecutions for the same offense implicates questions of dual sovereignty. Both the Preamble and Article 1 of the Rome Statute emphasize that the ICC is complimentary to national criminal jurisdiction. More specifically, Article 20 defines the relationship between the ICC, national jurisdiction, and the principle of *non bis in idem*. Article 20(1) provides that "no person shall be tried *before the Court* with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."[185] This provision acts only upon the Court, prohibiting the ICC itself from twice subjecting an individual to prosecution for the same course of conduct.[186] Thus, if an individual is tried and acquitted before the ICC for war crimes, he may not be subjected to prosecution before the ICC for crimes against humanity or genocide where those charges are based upon the same conduct at issue in the first trial.

Article 20(2) further provides that no person who has been convicted or acquitted by the ICC shall be tried again *before another court or before the*

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[183] Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND. L. REV. 353, 374 (1998).

[184] Westen & Drubel, *supra* note 142.

[185] Rome Statute, *supra* note 13, art. 20(1).

[186] Article 20(3) further restricts the jurisdiction of the ICC, providing that the Court shall not try any individual for conduct proscribed in Articles 6, 7, or 8 (defining the crimes of genocide, crimes against humanity, and war crimes) if that person has been tried already by another Court. This operates as an exception to the customary international law principle that does not require one sovereign to recognize criminal judgments of another sovereign; the U.S. analogue to this principle is the dual sovereignty doctrine. Article 20(3) does not, however, preclude subsequent prosecution of such international crimes by the ICC if the proceedings in the other court "(a) were for the purposes of shielding the person concerned from criminal responsibility for the crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." Rome Statute, *supra* note 13, art. 20(3). The ICTY and ICTR Statutes contained similar provisions. *See* Jordan J. Paust, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 663 (1997).

ICC for the crimes of genocide, crimes against humanity, or war crimes.[187] This provision implicates both the ICC and the national courts. While Article 20(1) speaks of the "conduct which formed the basis of crimes," Article 20(2) speaks only of specific crimes which the Court has jurisdiction. This variance in the statutory language creates a loophole, allowing states to prosecute individuals of different crimes, even if those crimes arise out of the same course of conduct. Because Article 20(2)'s prohibition on double jeopardy extends only to particular crimes, not the course of conduct, this means that an acquittal at the ICC for the crime of genocide, for example, would only preclude a State from later trying the same person for a violation of its domestic penal code that criminalizes genocide. Article 20 would *not* preclude a State from trying the person for the same *course of conduct* at issue before the ICC, so long as the crimes charged were not the *same crime* prosecuted in the international tribunal. This means that a State could still prosecute an individual convicted of "genocide" for murder.

Under U.S. law, the double jeopardy guarantee is concerned with attempts by the same sovereign to repeatedly force a criminal defendant to stand trial until winning a conviction. Thus, the dual sovereignty exception to the Double Jeopardy Clause allows two separate sovereigns to punish an individual for the same course of conduct where that conduct constitutes a crime under laws of both.[188] The question, therefore, is whether the ICC and American courts "draw their authority to punish the offender from distinct sources of power."[189] The U.S. Supreme Court has found that the federal government is a distinct sovereign from the State governments within the U.S., even though the lines of authority between the two are often blurred or overlapping. If federal and state courts draw their sovereignty from different sources of authority, the distinction between the ICC's authority and that of the U.S. courts is even more pronounced. The ICC derives its authority from a community of nations that both make up the U.N. and that are parties to the Rome Treaty. U.S. courts, on the other hand, draw their authority to punish offenders from the U.S. Constitution and the American people. Accordingly, Article 20 of the Rome Statute falls squarely within the dual sovereignty exception to the Double Jeopardy Clause.

No international agreements address the issue of *non bis in idem* in the context of multiple prosecutions by different sovereigns because, as a matter of customary international law, States are not bound to recognize the

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[187] Rome Statute, *supra* note 13, art. 20(2).
[188] Heath v. Alabama, 474 U.S. 82, 88 (1985).
[189] *Id.*

penal judgments of other sovereigns.[190] Allowing for multiple prosecutions by separate national sovereigns therefore does not violate the principle of *non bis in idem* as a matter of international law.[191] States may, however, agree to recognize each other's criminal judgments in a treaty.[192] The ICC would constitute such a treaty. Thus, while there is no applicable international standard against which to measure the Rome Statute, the Statute is consistent with practices under customary international law.

E. ICC DECISION-MAKING

The Trial Chamber of the ICC, comprised of a three judge panel, conducts the trial.[193] Judges who serve on the court are required to have demonstrated competence in both criminal and international law, and must possess relevant professional experience in both.[194] The panels are comprised exclusively of professional judges, contrary to the practice in most continental legal systems of convening mixed panels of professional and lay judges in criminal trials involving serious crimes.[195] Some critics have insisted that the lack of community participation in criminal proceedings before the ICC violates notions of fundamental fairness.[196] Whether or not the lack of juries is truly unfair, however, depends on the underlying purpose that juries were intended to serve. An examination of the American right to a jury and the continental tradition of the "mixed bench" is therefore helpful to this inquiry.

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190 Ballard, *supra* note 156, at 172-73 (explaining that the international doctrine of comity, pursuant to which one State will generally give legal effect to the civil judgments of other States, does not apply to criminal judgments).

191 Kenneth J. Harris & Robert Kushen, *Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 598 (1996).

192 Ballard, *supra* note 156, at 173, 180. The U.S. has done so in its Status of Forces Agreements, which it has entered into with countries that serve as long-term hosts to U.S. troops. *Id.* (citing Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189 (1992)).

193 Rome Statute, *supra* note 13, arts. 39, 64.

194 *Id.*, art. 36(3).

195 John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. BAR. FOUND. REAS. J. 195, 195 (1981); Damaska, *supra* note 162, at 492-93 (calling the mixed bench, where professional and lay judges decide jointly, the "representative continental adjudicative body in criminal matters"). *See generally* JOHN P. DAWSON, A HISTORY OF LAY JUDGES (1960) (relating the history of mixed courts).

196 Paul Marquandt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 102 (1995).

1. Community Participation in Criminal Prosecutions: The American Approach

The Sixth Amendment of the U.S. Constitution guarantees the right to "trial by an impartial jury" in all criminal prosecutions.[197] Thus, a defendant is entitled to have a jury determine his final verdict, and every element of the offense with which he has been charged.[198] In 1968, the U.S. Supreme Court extended this right to a jury to the states through the Fourteen Amendment, finding that the right to trial by a jury was "fundamental to the American scheme of justice."[199] While the right to a jury trial extends to all criminal prosecutions for serious crimes,[200] in the prosecution of "petty offenses," no right to a jury attaches.[201]

There is no question that crimes tried before the ICC necessarily constitute "serious crimes." Therefore, the question becomes whether the denial of the right to a jury trial in the ICC would be fundamentally unfair.

The use of jury trials in criminal cases dates back several centuries before the U.S. Constitution was written.[202] In England, the jury was designed to guard against the oppression and tyranny of rulers, and served as a bulwark of civil and political liberties.[203] That tradition was then carried over to the American colonies, where it was codified as part of the U.S. Constitution.[204]

The primary purpose of the jury was "to stand between the accused and the powers of the State," thereby preventing oppression and arbitrary action by the government.[205] A jury, consisting of members of the community, safeguards the accused against politically motivated prosecutions, overzealous prosecutors, and biased judicial bodies.[206] Thus, the institution of jury trials

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197 U.S. CONST. amend. VI.

198 United States v. Gaudin, 515 U.S. 506, 522-23 (1995). To reach a guilty verdict, the jury must make a determination on each element of the offense beyond a reasonable doubt. *Id.*

199 Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

200 *Id.*

201 Lewis v. United States, 518 U.S. 322, 325 (1996) (citing Duncan v. Louisiana, 391 U.S. 145, 159 (1968)). Federal law defines a petty offense as one which carries a less than six month maximum prison term. *Id.* at 324. The Court held in *Lewis* that a criminal defendant has no right to a jury trial where he is charged with multiple petty offenses such that he faces an aggregate prison term in excess of six months. *Id.* at 330.

202 Duncan, 391 U.S. at 151.

203 Gaudin, 515 U.S. at 510-11 (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

204 Duncan, 391 U.S. at 152. In a resolution adopted by the First Congress of the American Colonies on October 19, 1765, the trial by jury was deemed an "inherent and invaluable right." *Id.*

205 Lewis, 518 U.S. at 335 (Kennedy, J., concurring).

206 Duncan, 391 U.S. at 156. *See also* Note, *The Case for Black Juries*, 79 YALE L.J. 531, 531 (1970). ("[L]ay participation is a creative process by which community standards are injected

arose out of an American reluctance to place excessive power in the hands of government authority, especially where the life and liberty of its citizens was at stake.[207] "Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[208]

In addition to checking State power, juries benefit citizens who serve on them. Professor Akhil Amar has noted that juries offer citizens a chance to participate in government and learn democracy by actively participating in it.[209] Alexis de Tocqueville similarly praised the benefits of serving on a jury, although he questioned whether juries were really ideal means of fact-finding.[210]

2. *Community Participation in Criminal Prosecutions: The Continental Approach*

While the predominant model on the Continent from the later Middle Ages to the eighteenth century was one of exclusively professional adjudicators, after the French Revolution the Anglo jury increased in popularity on the Continent.[211] Although the Anglo jury never became firmly established in European legal systems, the notion of lay participation in the adjudication of criminal cases did.[212]

Looking at the use of lay participants in legal systems of Germany and Spain provides a comparative view of lay persons' role within continental criminal justice systems. Furthermore, this comparison provides insight into the purposes that such participation serves. Whether lay participation in the ICC would be valuable, however, ultimately turns on the relevance of those values in the context of an international criminal tribunal.

During the 1850s and 1860s, Germany began to experiment with the "mixed court" -- a panel of lay and professional judges who decided cases

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into the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.").

207 Duncan, 391 U.S. at 156.

208 *Id.*

209 Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 500 (1991).

210 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (1963) ("I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them . . .").

211 Damaska, *supra* note 162, at 492.

212 *Id.*

jointly.[213] The mixed court has since come to be the "representative continental adjudicative body in criminal matters."[214] German mixed courts are comprised of two lay and three professional judges for serious crimes ("five-judge court"), and two lay and one professional judges for less serious offenses ("three-judge court").[215] A two-thirds majority is required in order to convict or render a sentence.[216] Anything less than a two-thirds vote becomes an acquittal.[217] Under this system, it therefore becomes possible for the lay judges to force an acquittal over the opposition of the professional judges.[218]

The rationale for lay participation in criminal adjudications in Germany is similar to that underlying the Anglo-American jury.[219] Placing decision-making authority in the hands of lay participants who do not depend on the criminal justice system for their livelihood is said to reduce political influence over the judicial decision-making process, thereby serving as a protection against arbitrary action and furthering judicial independence.[220] Lay participation also fosters democracy, promotes social solidarity, and legitimates public authority by helping to guarantee basic fairness in the judicial process.[221] In addition, lay judges bring special insight to the fact-finding process by drawing upon their own backgrounds and practical experiences.[222]

The Spanish jury differs from the German mixed courts both in composition and rationale. The Spanish Constitution of 1978 provides for a jury trial in criminal cases, and the Spanish Parliament, in 1995, passed

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213 Langbein, *supra* note 195, at 198. The favorable results achieved with the "mixed court" eventually led to the complete abolishment of the Anglo jury in Germany and its replacement by the mixed court in 1924. *Id.*

214 Damaska, *supra* note 162, at 493; *see also* Langbein, *supra* note 195, at 195 ("[T]he 'mixed court' of lay and professional judges . . . has become the prevalent form of court structure for cases of serious crime in modern Europe.").

215 Langbein, *supra* note 195, at 198-99. The five-judge mixed court is known as *Grosse Strafkammer* or *Schwurgericht*, depending on the type of offense being tried. The three-judge court is called the *Schoffengericht*. *See id.* By way of comparison, the French mixed court employs three professional judges and nine lay judges to hear the most serious criminal cases. *See also* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 462 (1997). A mixed panel of two professional and six lay judges try Italy's most serious crimes. *See id.*

216 Langbein, *supra* note 195, at 199-200.

217 *Id.* The German system does not have an analogue to the "hung jury." *Id.* at 200.

218 *Id.* at 199-200.

219 *Id.* at 209.

220 *Id.*

221 David S. Clark, *USC Symposium on Judicial Election, Selection, and Accountability: Article: The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1830 (1988) (citing J. RICHERT, WEST GERMANY LAY JUDGES: RECRUITMENT AND REPRESENTATIVENESS 1, 9-13 (1983)); *see also* Langbein, *supra* note 195, at 209.

222 Clark, *supra* note 221, at 1830.

legislation implementing that mandate.[223] The Spanish jury consists of nine citizens, selected at random from registered voter lists.[224] The Spanish jury thus looks more like an Anglo jury than a German mixed court. Although earlier uses of the jury in Spain, patterned on the post-French Revolution model, were designed to serve as a counterweight against State power,[225] the purpose of the recently revived Spanish jury is to guarantee the right of the citizenry "to participate directly in the constitutional function of judging."[226] Thus, the right to a jury focuses on the citizen's right to serve on the jury, rather than on the right of the accused to be tried by one.[227]

3. Does Lay Participation in the ICC Make Sense?

Both primary purposes served by the jury would be served using lay participants in ICC proceedings. Jurors could act as a buffer between government authority and the accused and they would also benefit from participating in the rendering of a decision that affects the international community. In the aftermath of war, for example, the use of lay judges might counter-balance the pressure on professional judges to convict. On the other hand, given the outrage that accompanies the commission of war crimes, the use of lay judges could also have the opposite effect. Although lay participation may be beneficial in the ICC, fundamental fairness and due process do not demand it.

Regardless of the benefit lay participation could render in ICC war crimes proceedings, important differences between the international system and that of individual countries make juries less relevant in the ICC context. The first of these differences is that an international "State" does not exist. While various international bodies exist which, together, could possibly combine to form a "world government" of sorts, the reality of how these bodies function, and the scope of their power, simply do not justify calling it a "State." Moreover, the ICC has no independent enforcement mechanism. There is no police force at its disposal. This weakness was recently demonstrated by the ICTY's difficulty, at least initially, in securing jurisdiction over the worst war criminals involved in the Balkans conflict.[228]

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[223] Stephen Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241, 241-42 (1998).

[224] *Id.* at 267.

[225] *Id.* at 246.

[226] *Id.* at 257.

[227] *Id.*

[228] Rocco P. Cervoni, *Beating Plowshares into Swords--Reconciling the Sovereign Right to Self determination with Individual Human Rights Through an International Criminal Court: the Lessons*

Another problem with lay participation in the ICC is juror bias. Studies have shown that juries often render decisions based on personal biases rather than on the evidence presented.[229] As majoritarian bodies, juries do little to protect unpopular defendants, who may have more to fear from lay participants than the government itself.[230] This is especially true in the climate of moral outrage that will surround prosecutions of the "most serious crimes of concern to the international community."[231] Here, professional judges may be better equipped to render impartial decisions. Perceived as the counterweight to an enraged public, decision-making by judges without lay participation may enhance the perception of fairness within ICC proceedings and may in fact be more efficient in rendering justice.

III. CONCLUSION

The challenge of creating a permanent ICC that meets the highest standards of due process and fundamental fairness is a goal that the Rome Statute has attempted to meet. It complies with international due process standards set forth in key international agreements, and represents a marked improvement over the procedures applied in post-World War II war crimes trials.

However, drafters of the Rome Statute have had to confront differences in legal traditions that rendered comprise difficult. In resolving tensions between these legal traditions, the Rome Statute incorporated both common law principles, such as the rule prohibiting *in absentia* trials, as well as civil law principles, such as the *non bis in idem* rule. The Rome Statute does incorporate some due process guarantees from U.S. standards. However, it recognizes the limitations of U.S. standards as applied in an international context. The Statute therefore satisfies principles of fundamental fairness, establishes a system that lends the ICC legitimacy, and permits the court to pursue evenhanded justice in a climate of moral outrage.

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of the Former Yugoslavia and Rwanda as a Frontispiece, 12 ST. JOHN'S J. LEGAL COMMENT. 477, 503-06 (1997).

[229] JAMES GOBERT, JUSTICE, DEMOCRACY AND THE JURY 72-77 (1997).

[230] *Id.* at 73.

[231] Rome Statute, *supra* note 13, Preamble and art. 1.