

DUE PROCESS EROSION: THE DIMINUTION OF LIVE TESTIMONY AT THE ICTY

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"A paper trail is one thing, a paper trial quite another."

—Judge Patricia M. Wald, 2001

"[T]o sacrifice justice and accountability for the immediacy of realpolitik and accommodation is to choose expedience over lasting goals and more enduring values."

—M. Cherif Bassiouni, 2000

I. INTRODUCTION

Shortly after its creation in 1993, the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal")¹ adopted an adversarial construct and advocated a preference for the presentation of direct evidence, or live witness testimony, in the proceedings adjudicated before it. Since that time, the Tribunal has come under considerable pressure, from numerous sources and for a variety of reasons, to expedite its proceedings. This article examines the history of the Tribunal's establishment and identifies the factors that influenced the decisions made regarding its makeup. It then addresses the issues that have contributed to the delay in its proceedings, along with the forces exerted upon the Tribunal to remedy that delay. In view of all

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1. The ICTY was established by the United Nations, G.A. Res. 827, U.N. SCOR, 3217th mtg. at 2, U.N. Doc. S/Res/827 (1993), and functions in accordance with the provisions of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, U.N. Doc. S/25704, at 36 (1993) [hereinafter *Statute*].

of this, the paper assesses the Tribunal's Rules of Procedure and Evidence² and its jurisprudence, with particular regard given to the demise of live testimony before the Tribunal. The article questions the Tribunal's commitment to the principles espoused by it, discusses the Tribunal's potential for exposure to criticism akin to that received by its post-World War II predecessors and looks at the future of evidence before the ICTY.

II. BACKGROUND

In February 1993, in response to "continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia," the United Nations Security Council ("Security Council"), by Resolution 808, decided to establish an international tribunal to prosecute the perpetrators of the violations.³ The decision to create the international tribunal, the first of its kind established in more than forty years,⁴ had the accompanying aim of distinguishing the tribunal from its Nuremberg and Tokyo predecessors.⁵ Rather than be perceived as an example of "victors' justice," the Security Council highlighted the international dimension of the tribunal, particularly with regard to the acceptance of input from Member States.⁶

2. *International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence*, U.N. Doc. IT/32, reprinted in 33 I.L.M. 484 (1994) [hereinafter *ICTY RPE*]. At the date of this publication, the Rules of Procedure and Evidence were in their 28th revision. U.N. Doc. IT/32/Rev.28 (2003) at <http://www.un.org/icty/legaldoc/index.htm> [hereinafter *ICTY RPE revision 28*].

3. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993).

4. See Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 238 (1994). Throughout this period of time numerous atrocities were committed in territories located in Asia, Africa and the Middle East. See Richard J. Goldstone, *The Role of the United Nations in the Prosecution of International War Criminals*, 5 WASH. U. J.L. & POL'Y 119, 119-20 (2001) (implying that the commission of such heinous crimes in Europe provided the impetus for powerful nations to finally take international action).

5. See Special Proclamation by the Supreme Commander for the Allied Powers, Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (establishing the Tokyo tribunal) [hereinafter *Tokyo Charter*]; Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 56 Stat. 1544, 82 U.N.T.S. 279 (establishing the Nuremberg tribunal), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 675 (1995).

6. Natasha A. Affolder, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445, 449 (1998). Although the Tribunal's success with regard to its attempt to avoid being perceived as representative of victors' justice is a matter for debate, it is doubtful whether any amount of international involvement could counter the claim that its existence derives, in part, from the fact that "sovereign equality of states simply

In accordance with Resolution 808,⁷ the U.N. Secretary-General, some three months later, submitted his report on the potential tribunal.⁸ The report cites the power of the Security Council pursuant to Chapter VII of the United Nations Charter as the legal basis for the establishment of the Tribunal.⁹ This measure provides the Council with the authority to take preventive and enforcement measures in order to maintain international peace and security. The report also addresses the issue of *nullem crimen sine lege*, indicating that the international tribunal should apply only those laws “which are beyond any doubt part of customary law.”¹⁰ On May 25, 1993, the Security Council, through Resolution 827, adopted *The Statute of the International Tribunal* (“*Statute*”), which it annexed to the report.¹¹ Article 20(1) of the *Statute* dictates the manner in which individuals shall conduct proceedings before the International Tribunal. “The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”¹² The rules of procedure and evidence, referenced in Article 20(1), are not included in the *Statute*. Rather, Article 15 of the *Statute* directs that the judges of the Tribunal adopt these important regulations themselves.¹³ One critic subsequently referred to this delegation of power to the judiciary as “dynamic yet troubling.”¹⁴

does not exist.” Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *FORDHAM INT’L L.J.* 440, 454-55 (1999).

7. S.C. Res. 808, *supra* note 3, ¶ 2.

8. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, U.N. Doc. S/25704, ¶ 2 (1993) [hereinafter *Rep. of the Sec’y Gen.*].

9. *Id.* ¶¶ 18-30. The utilization of Chapter VII powers for this purpose was an issue of concern for certain Member States. See Simonovic, *supra* note 6, at 445. It also required that a link be established between the Tribunal and the restoration of peace in the former Yugoslavia. See Goldstone, *supra* note 4, at 120 (observing that this connection distinguishes the focus of international criminal law from that “in the domestic arena”).

10. *Rep. of the Sec’y Gen.*, *supra* note 8, ¶ 34. This limitation also recognizes that the Security Council has no law making powers. Goldstone, *supra* note 4, at 121. In spite of this, the Tribunal has been subject to criticism; it has been suggested that the *Statute* actually creates new law. Tomuschat, *supra* note 4, at 242.

11. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. ¶¶ 1-2, U.N. Doc. S/RES/827 (1993).

12. *Statute*, *supra* note 1, art. 20(1).

13. The relevant article reads: “The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” *Id.* art. 15.

14. Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 *INT’L LEGAL PERSP.* 111, 166 (1998).

III. THE DRAFTING OF THE RULES OF PROCEDURE AND EVIDENCE FOR THE ICTY

Article 15 of the *Statute* creates a unique situation. It bestows upon the judges of the ICTY the authority and responsibility to draft the rules of evidence and procedure that are to apply from the pre-trial phase through to appellate matters.¹⁵ Article 15 thus confers legislative powers upon the judiciary and requires the judges to draft the rules they will ultimately apply. This union of the legislative and judicial powers of the Tribunal in one entity is a merger that was, and continues to be, viewed as suspect by some.¹⁶

The initial task imposed upon the judges, that of designing a comprehensive set of international rules of procedure and evidence, was not easy and essentially came without an appropriate precedent to follow.¹⁷ Interested States and organizations provided assistance, however, in the form of submissions made on their own behalf.¹⁸ These proposals varied in length and depth. When the Tribunal finally adopted its *Rules of Procedure and Evidence (Rules)* in February 1994, after "extensive debate and revision,"¹⁹ the

15. *Statute*, *supra* note 1, art. 15.

16. See, e.g., Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 73 (2001) (noting that the union of legislative and judicial functions opened the Tribunal to criticism) [hereinafter Boas, *The Principle of Flexibility*]; Pavel Dolenc, *A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 451, 459 (1994); André Klip, *The Decrease of Protection Under Human Rights Treaties in International Criminal Law*, 68 INT'L REV. PENAL L. 291, 302-03 (1997). Disapproval has also been expressed about the fact that the rules and amendments made to them are not subject to review. See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 824, 827 (1996).

17. The *Nuremberg Rules of Procedure* contained merely eleven rules. *International Military Tribunal, Rules of Procedure*, adopted Oct. 29, 1945, reprinted in MORRIS & SCHARF, *supra* note 5, at 687. As a result, the precedential value of the same has been noted to be "minimal." Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 508 (1994). The ICTY Rules are believed to be "the first detailed set . . . ever drafted for an international criminal tribunal." *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. SCOR, 49th Sess., Provisional Agenda Item 152, at 2, U.N. Doc. A/49/342-S/1994/1007 (1994), available at <http://www.un.org/icty/pub/htm> [hereinafter *Ann. Rep.*].

18. These were received pursuant to Security Council Resolution 827. S.C. Res. 827, *supra* note 11, ¶ 3.

19. *Ann. Rep.*, *supra* note 17, ¶ 55. Though early on substantial interest was shown in the Tribunal's enumerated crimes and in its jurisdiction, its rules of procedure and evidence did not attract comparable attention. Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT'L L.J. 475, 476-77 (1995). Similarly, it has been noted that "[p]rocedural rulings at the international level generally receive less attention than substantive ones." Affolder, *supra* note 6, at 448.

comprehensive submissions received from the United States proved “particularly influential.”²⁰

The structure of the Tribunal that ultimately emerged was thus akin to the Anglo-American common law system.²¹ As such, the Tribunal does not have an investigating judge, as found in inquisitorial systems.²² Rather, the tasks of obtaining evidence and bringing indictments belong to the prosecutor.²³ Upon promulgation of the *Rules*, then President of the Tribunal, Antonio Cassese, attributed the choice of a predominantly adversarial approach to the limited precedent of the Nuremberg and Tokyo Trials and the need for “us, as judges, to remain as impartial as possible.”²⁴ Thus, in their original form, the adversarial mode of trial dominated the Tribunal’s *Rules*.²⁵

In drafting its *Rules of Procedure and Evidence*, the cloud of Nuremberg and Tokyo, recognized by members of the Security Council at the establishment of the Tribunal,²⁶ became the albatross of its newly formed judiciary. The judges inherited the duty of distinguishing the ICTY from its predecessors and made an affirmative effort to accomplish the task. In his first report to the United Nations General Assembly (“General Assembly”) and the Security Council, immediately after commenting on the rights bestowed upon the accused by the Tribunal and its full safe-guarding of the same, President Cassese noted: “One can discern in the statute and the rules

20. MORRIS & SCHARF, *supra* note 5, at 177. The submission of approximately seventy-five pages included commentary for guidance. *Suggestions Made by the Government of the United States of America*, U.N. Doc. IT/14 (1993) reprinted in MORRIS & SCHARF, *supra* note 5, at 509.

21. CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 223 (2001) (noting that the role of the prosecutor for the Tribunal greatly resembles its counterpart in adversarial procedural systems). See also Richard May & Marieke Wierda, *Evidence Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 249, 249 n.3 (Richard May et al. eds., 2001) (noting that each party presents evidence by direct examination of its witnesses and that those witnesses are then subject to cross-examination and re-examination).

22. *Ann. Rep.*, *supra* note 17, ¶ 71.

23. *Id.*

24. *Statement by the President Made at a Briefing to Members of Diplomatic Missions: Summary of the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. IT/29 (1994) [hereinafter *Statement of the President*], reprinted in MORRIS & SCHARF, *supra* note 5, at 650. The President noted exceptions to the adversarial construct in that the Tribunal would not be restricted by technical rules regarding the admissibility of evidence and that the Tribunal may order the production of additional evidence *proprio motu*. *Id.* at 650-51.

25. Patricia M. Wald, *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT’L L.J. 535, 537 (2001).

26. See *Provisional Verbatim Record of the 3217th Meeting*, U.N. SCOR, 48th Sess., 3217th mtg. at 10-12, U.N. Doc. S/PV.3217 (1993) (quoting the French representative’s distinction of the Tribunal from those at Nuremberg and Tokyo and the American representative’s reiteration that “this will be no victors’ tribunal”).

a conscious effort to avoid some of the often-mentioned flaws of Nürnberg and Tokyo.”²⁷

IV. THE USE OF WRITTEN EVIDENCE AT THE POST WWII TRIBUNALS

While comparisons to Nuremberg and Tokyo would not necessarily cause the ICTY to suffer from accusations of “victors’ justice” *per se*, such analogies would involve the allegations that contributed to the over-all dis-paragement of the post-World War II trials. To properly understand the driving force behind the efforts to distinguish the ICTY from its antecedents, it is instructive to examine some of the methods used by the Tribunals to perform the tasks assigned to them, along with appraisals of the same. Some have criticized the proceedings that took place under the authority of these two forerunners to the ICTY as failing to provide necessary and complete due process guarantees to individuals appearing before them.²⁸ The source of dis-approval may be due, in part, to the perceived excessive use and free admis-sion of written testimony in their trial proceedings.²⁹

At the outset of the Nuremberg proceedings, the prosecution intended to put forth a completely paper trial; the prospect of calling witnesses was merely a fallback position should the Tribunal reject its proffer of affidavit testimony.³⁰ Such a rejection was possible in light of the fact that the Nurem-berg Charter, unlike the Charter for the Tokyo Tribunal,³¹ did not specifically address the issue of affidavit admissibility.³² Arguing in favor of admission, Chief Prosecutor Robert Jackson alluded to the negative ramifications that exclusion would have upon the expediency of the proceedings, noting that the Tribunal’s acceptance of the sworn statements was indispensable “if we

27. *Ann. Rep.*, *supra* note 17, ¶ 71.

28. *See, e.g.*, RICHARD H. MINEAR, *VICTORS’ JUSTICE: THE TOKYO WAR CRIMES TRIAL* 122-23 (1971). *See also* Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 *DENV. J. INT’L L. & POL’Y* 305, 308-09 (1997).

29. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nur-emberg, Tokyo, The Hague and Arusha*, 37 *COLUM. J. TRANSNAT’L L.* 725, 751 (1999).

30. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 243 (1992). This intention to proceed with documentary evidence alone was ultimately modi-fied, a decision that no doubt saved the Tribunal from a severe academic backlash. *See, e.g.*, SAFFERLING, *supra* note 21, at 277 (noting that the presence of a witness is necessary for a thorough examination and that an attempt by the prosecution to interview witnesses prior to trial and use the signed record of the same at trial is not sufficient).

31. *See* Tokyo Charter, *supra* note 5, art. 13(c)(3) (admission of affidavits specifically sanctioned).

32. The Charter affirmatively notes, however, that the Tribunal should “not be bound by technical rules of evidence.” *Charter of the International Military Tribunal*, Aug. 8, 1945, art. 19, 59 Stat. 1544, 1551, 82 U.N.T.S. 279 [hereinafter *London Charter*], reprinted in MORRIS & SCHARF, *supra* note 5, at 677, 682. It is also noteworthy that, under the Charter, the Tribu-nal was required to take judicial notice of the “reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investiga-tion of war crimes. . . .” *Id.* art. 21. These documents included the testimony taken by State commissions regarding the Nazi atrocities. Wald, *supra* note 25, at 538.

are to make any progress with this case.”³³ Although the Nuremberg Tribunal chose not to provide a clear rule governing the admissibility of affidavits,³⁴ and its rulings regarding admission appear inconsistent,³⁵ the ultimate role that affidavit evidence played at Nuremberg was “extensive and very important.”³⁶

The pattern that eventually developed at Nuremberg was one wherein the tribunal admitted affidavits, but admission was conditional on the right of cross-examination or, alternatively, written interrogatories.³⁷ The provision of the right of cross-examination was consistent with Jackson’s proposal to the Tribunal.³⁸ However, it may not have pleased one of his principle aides, and ultimate successor, Telford Taylor. Taylor noted that, “it was likely that defense lawyers might seek to draw statements from the witnesses which would greatly weaken their direct testimony.”³⁹

The use of affidavit testimony at Nuremberg, even with this provision for cross-examination or the use of written interrogatories, has been criticized for its erosion of the right of the accused to a fair trial.⁴⁰ Additionally,

33. TAYLOR, *supra* note 30, at 242.

34. *Id.* at 243. The absence of rule clarity was a feature of the Tokyo proceedings as well. See MINEAR, *supra* note 28, at 121 (noting that “[p]erhaps the most unsettling aspect of the tribunal’s procedure was its very uncertainty”).

35. Witness availability initially appeared to be a factor in the Tribunal’s decisions regarding affidavit testimony. The Tribunal accepted the affidavit of a former American Minister to Austria, apparently in light of his advanced age and distance from the Tribunal. TAYLOR, *supra* note 30, at 241. An affidavit from the Austrian Prime Minister who was “nearby and readily available for court testimony” was later refused. *Id.* Counsel for one of the accused then requested the Tribunal to declare a general rule that individuals living in Germany, and available for testimony, could not testify by affidavit. *Id.* The court declined to comply with this request. *Id.* at 242. In a subsequent incident, an affidavit was admitted over defense objections, in spite of the fact that the affiant was in custody at Nuremberg. *Id.* at 242-43. The Tribunal’s attitude towards the admission of affidavit evidence has thus been referred to as ambivalent. May & Wierda, *supra* note 29, at 749.

36. See May & Wierda, *supra* note 29, at 749. “During the proceedings, the Nuremberg Tribunal . . . received 300,000 *ex parte* affidavits into evidence.” Scharf, *supra* note 28, at 309 (citing JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL* 94 (R.A. Downie, trans., 1962)).

37. Wald, *supra* note 25, at 539. The opportunity to submit written interrogatories, for example, was offered to the defense with regard to the admission of the affidavit of the former American Minister to Austria. May & Wierda, *supra* note 29, at 750. It would seem, however, that the use of written interrogatories does little to combat the charge that “*ex parte* affidavits seriously undermine the right of the defendants to confront the witnesses against them.” Scharf, *supra* note 28, at 309.

38. The proposal also limited the use of affidavits to those “which were not directed against any individual defendant.” TAYLOR, *supra* note 30, at 241-42. Arguably, this right to cross-examine was also consistent with the requirement in the London Charter that the “[d]efense . . . may cross-examine any witnesses . . . who give[] testimony.” *London Charter*, *supra* note 32, art. 24(g).

39. TAYLOR, *supra* note 30, at 241 (also noting that calling the witnesses would detract from the expediency of the proceedings and might not allow for cross-examination by the Prosecution).

40. Scharf, *supra* note 28, at 309 (averring that pro-prosecution rulings allowing for the admission of affidavit testimony restricted the due process guarantees of defendants, particu-

the value of such evidence was, and likely remains, a point of contention. Circumventing the rule against leading questions,⁴¹ affidavit evidence is the product of an environment wherein the court has no control over the process in which lawyer and witness formulate the proposed testimony.⁴² At the Tokyo Tribunal, the utility of affidavit testimony became doubtful to some, and, as one judge noted, the interrogatory that formed the basis of an affidavit “increase[d] the range but decrease[d] the accuracy of the narration.”⁴³ Further, as was noted by Taylor: “Total reliance on . . . untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy. . . . [N]ot only faulty observation but deliberate exaggeration must have warped many of the reports.”⁴⁴ In light of the aforementioned, it is not surprising that the use of *ex parte* affidavits “has in fact been a lightening [sic] rod for criticism of the Nuremberg Tribunal.”⁴⁵

Consequently, and in compliance with the intent to circumvent those blemishes that tarnish recollections of Nuremberg and Tokyo, the ICTY *Rules*, as originally drafted, established a preference for live testimony.⁴⁶ The ICTY made this choice despite the fact that the Tribunal must have recognized, as did one observer in the early days of the ICTY, that “testimonial evidence is the most expensive and time-consuming category of evidence.”⁴⁷ Although the controlling rule, sub-rule 90(A), did allow for exceptions to live testimony in the form of depositions, the initial *Rules* limited the use of the same to the discretion of the Trial Chamber and required a showing of “exceptional circumstances.”⁴⁸ In practice, the Tribunal’s interpretation of “exceptional circumstances” was rather narrow, and the use of depositions was further limited to testimony deemed essential.⁴⁹

larly with regard to instances where the affiants were available to testify). The proceedings at Tokyo have likewise been subject to allegations of imbalanced rulings. *See, e.g.*, MINEAR, *supra* note 28, at 122-23.

41. May & Wierda, *supra* note 29, at 751.

42. MINEAR, *supra* note 28, at 119.

43. May & Wierda, *supra* note 29, at 751 (quoting dissenting opinion of Justice Pal (July 25, 1946), reprinted in 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE), 29 APRIL 1946-12 NOVEMBER 1948 636 (BV.A. Roling & C.F. Ruter eds., 1977)).

44. TAYLOR, *supra* note 30, at 315.

45. Scharf, *supra* note 28, at 264.

46. The sub-rule provided: “Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.” ICTY RPE, *supra* note 2, R. 90(A).

47. Tomuschat, *supra* note 4, at 243.

48. ICTY RPE, *supra* note 2, R. 71(A).

49. Wald, *supra* note 25, at 545-46 (noting that the nonattendance of one or more judges and the physical inability of a witness to appear at The Hague actively qualified as exceptional circumstances).

V. THE TRIBUNAL'S ABILITY TO AMEND ITS RULES

The *Rules of Procedure and Evidence* formulated in February of 1994, however, were by no means considered to be final or complete. Thus, within the *Rules*, the judges designed a mechanism for subsequent amendments in the form of Rule 6.⁵⁰ The first subsection of the rule, as originally adopted, allowed for amendment proposals to be made by a Judge, the Prosecutor or the Registrar and provided that the proposals would be adopted if agreed to by at least seven Judges at a plenary meeting.⁵¹

A review of the annual reports of the Tribunal since its inception is illuminating with regard to this continuing "legislative power."⁵² In the early stages, an Inter-sessional Working Group for the Amendment of Rules, composed of five judges, was established to consider the comments of governments, non-governmental organizations and individuals; the Working Group submitted its report to the fifth plenary session in January 1995.⁵³ The report resulted in 41 amendments⁵⁴ and paved the way for the many amendments to come in the plenary sessions that followed.⁵⁵ The judiciary continued to develop the methods used in the exercise of its legislative powers, utilizing the Judicial Department, which assists with advice and suggestions for amendments, as a "channel of communication between the Tribunal and

50. See *ICTY RPE*, *supra* note 2, at R. 6.

51. *Id.* at R. 6(A). All judges must be given notice of the proposals. *Id.* There were eleven judges at the time of original adoption. *Ann. Rep.*, *supra* note 17, ¶ 1. There are presently sixteen permanent judges. *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 57th Sess., Provisional Agenda Item 45, ¶ 1, U.N. Doc. A/57/379-S/2002/985 (2002) [hereinafter *Ninth Ann. Rep.*]. Due to this increase in the number of judges, the assent of ten judges is now required for a proposed amendment to be adopted. See *ICTY RPE revision 28*, *supra* note 2, at R. 6(A).

52. Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37, 45 (1999). See also *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 51st Sess., Provisional Agenda Item 50, ¶ 3, U.N. Doc. A/51/292-S/1996/665 (1996) [hereinafter *Third Ann. Rep.*] (noting the "Judges of the Tribunal are obliged by the *Statute* to 'legislate' on procedural matters.").

53. *Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 50th Sess., Provisional Agenda Item 49, ¶ 20, U.N. Doc. A/50/365-S/1995/728 (1995).

54. *Id.* The Tribunal cited five goals for amendments. See *id.* ¶ 21. Among them were to take into account practical problems that have arisen in implementation of the *Statute* or the *Rules*, to broaden the rights of suspects and accused persons and to protect the rights of victims and witnesses. *Id.* ¶¶ 21, 24, 26.

55. Although fewer amendments were noted the following year, this is an anomaly among the Tribunal's annual reports and is arguably tempered by the fact that some amendments resulted in "significant changes." *Third Ann. Rep.*, *supra* note 52, ¶ 66.

the States.”⁵⁶ In December 1997, the Tribunal established a new working group, the Rules Committee, with the cited purpose of expediting the trial process while keeping in tact the rights of the accused.⁵⁷

The Tribunal has not been shy about utilizing its ability to revise its Rules of Procedure and Evidence.⁵⁸ Rather, it has used this authority extensively.⁵⁹ In the realm of amendments to the Rules, the Tribunal has actively availed itself of this “quasi-legislative”⁶⁰ process. According to the Tribunal, its ability to make amendments has enabled it to react to new and emerging issues experienced by it, in a manner that is consistent with the requirement that its proceedings be fair and expeditious and provide due regard for victims and witnesses.⁶¹ Thus, the amendment process can serve as a reactive tool, providing a mechanism for the judiciary to make necessary changes in response to issues and circumstances that it may not have anticipated. Indeed, according to Judge Richard May, “the amendments reflect the experience gained by the Tribunal.”⁶² However, it would likely be erroneous to ascribe to the position that this is the sole impetus, or even the primary motivating factor, for amendments made to the Tribunal’s *Rules of Procedure and Evidence*.

56. *Id.* ¶ 103.

57. *Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 53rd Sess., Agenda Item 48, ¶ 106, U.N. Doc. A/53/219-S/1998/737 (1998).

58. In fact, “the ICTY has pursued a level of flexibility in the process of creating, amending and interpreting its *Rules* with a frequency unknown to any other jurisdiction before it.” Boas, *The Principle of Flexibility*, *supra* note 16, at 42. The Tribunal’s use of its amendment ability has been referred to as prolific. Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. L.F. 167, 169 (2001) [hereinafter Boas, *Developments*].

59. According to one source, “[o]ne definitely needs a loose-leaf version of the Rules of Procedure and Evidence.” Dirk Ryneveld, Q.C. & Daryl A. Mundis, *The Contribution of the ICTY to the Emergence of the ICC: Procedural and Evidentiary Aspects from a Practitioner’s Perspective*, in THE INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY, THE CHANGING FACE OF INTERNATIONAL CRIMINAL LAW: SELECTED PAPERS 51, 61 (2002).

60. *Ann. Rep.*, *supra* note 17, ¶ 27; BASSIOUNI & MANIKAS, *supra* note 16, at 270.

61. *Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 54th Sess., Provisional Agenda Item 53, ¶ 107, U.N. Doc. A/54/187-S/1999/846 (1999) [hereinafter *Sixth Ann. Rep.*] (noting, “[a]s the Tribunal conducts more trials and begins hearing substantive appeals it will be necessary to review and, where appropriate, amend the Rules in order to ensure the proper administration of justice under the Tribunal’s mandate”).

62. May & Wierda, *supra* note 29, at 735.

VI. THREATS TO THE INDEPENDENCE OF THE TRIBUNAL

While “the Tribunal [is] required to perform its functions independently of political considerations and the control of the Security Council,”⁶³ whether the Tribunal can realistically act in such a manner remains to be seen. As an elementary matter, this presupposes independence on the part of the judiciary, all of whose members the General Assembly elects from a list of candidates supplied by the President of the Security Council.⁶⁴ Further, the Tribunal is completely dependent upon the General Assembly for its funding.⁶⁵ Of potentially greater importance, in order for the Tribunal to function on even a basic level, it must rely upon support both from States and from the Security Council.⁶⁶

The effect of States upon the Tribunal may not appear as obvious, at first blush, as that of the U.N. organs. However, States play a vital role in the Tribunal’s ability to carry out its mandate. There is likely no better example of this than the experience of the ICTY’s sister tribunal, the International Criminal Tribunal for Rwanda⁶⁷ (“ICTR”) in the *Barayagwiza* case.⁶⁸ In that matter, the Appeals Chamber found a number of the rights of the accused violated, including his right to be promptly charged and his right to an initial appearance without undue delay.⁶⁹ Based upon the facts of the case, the Appeals Chamber invoked the abuse of process doctrine⁷⁰ and dismissed the charges against the accused with prejudice.⁷¹ In response, the outraged Rwandan government virtually brought the ICTR’s activities to a standstill, refusing to allow witnesses to travel to its proceedings and denying visa privileges to the chief prosecutor of the ICTR.⁷² The stalemate persisted until Chief Prosecutor, Carla Del Ponte, asked the Court to reconsider its ruling,

63. Simonovic, *supra* note 6, at 443.

64. *Statute*, *supra* note 1, art. 13(2). Judges are also eligible for re-election. *Id.* art. 13(4). This “eligibility for reelection . . . could mitigate against the principle of judicial independence.” BASSIOUNI & MANIKAS, *supra* note 16, at 806.

65. *Statute*, *supra* note 1, art. 32.

66. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1155-56 (2000). Accordingly, it has been observed that the Tribunal “remains dependent on an uncertain and changing political context” and that it “lacks the relative autonomy of a court in a state with a strong tradition of an independent judiciary.” *Id.* at 1155.

67. Established under the *Statute of the International Criminal Tribunal for Rwanda*, 33 I.L.M. 1598, 1602, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/RES/955 (1994).

68. See *The Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72 (Nov. 3, 1999) (decision in the Appeals Chamber) [hereinafter *Barayagwiza Decision*]. See also William A. Schabas, *International Decision: Barayagwiza v. Prosecutor*, 94 AM. J. INT’L L. 563 (2000).

69. *Barayagwiza Decision*, *supra* note 68, ¶ 100.

70. *Id.* ¶ 101.

71. *Id.* ¶ 108.

72. See Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT’L L. 111, 135 (2002).

submitting a motion that cited new facts.⁷³ Appearing as *amicus curiae* before the Tribunal, the Rwandan Attorney General “openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review.”⁷⁴ He was not disappointed. Although the Court’s reversal stated that the original decision was based on incorrect facts, “[t]his did not assuage fears that political pressure was the real cause of the change.”⁷⁵

It would be even more difficult to deny the effect of political pressure on the Tribunals in light of the recent controversy regarding Carla Del Ponte, who, like her two predecessors, has jointly served as Chief Prosecutor of both the ICTY and the ICTR.⁷⁶ Del Ponte “publicly turned a page in the ICTR’s history by announcing . . . that her team had been investigating crimes committed by soldiers belonging to the Rwandan Patriotic Front.”⁷⁷ In the aftermath of this announcement, the Rwandan government imposed travel restrictions upon witnesses for the ICTR trials “as a way of bringing pressure on the ICTR.”⁷⁸ As a next step, it was noted that the Rwandan government was campaigning for Del Ponte’s removal from the position.⁷⁹ It was further reported that this campaign was intensified due to the fact that four active Rwandan army officers, including a general, were about to be the focus of indictments.⁸⁰ Approximately one month after the Rwandan government’s “heightened campaign” against Del Ponte, the Security Council

73. *Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, 39 I.L.M. 1181 (Mar. 31, 2000) (decision in the Appeals Chamber on Prosecutor’s request for review or reconsideration) [hereinafter Decision on Request for Review]. See also Cogan, *supra* note 72, at 135.

74. Decision on Request for Review, *supra* note 73, ¶ 34.

75. Sylvia de Bertodano, *U.S. in the Dock over International Justice*, TIMES (London), Jan. 7, 2003, at 8. It is perhaps not surprising that a former chief prosecutor has cited the need to diminish the Tribunal’s dependency on States. See Arbour, *supra* note 52, at 39. Arguably representative of the perpetual sphere of influence over the Tribunal, however, Arbour cites the need for the Security Council to enhance State cooperation. See *id.* at 43.

76. See *Statute of the International Criminal Tribunal for Rwanda*, *supra* note 67, art. 15(3) (mandating that the Prosecutor for the ICTY also serve as Prosecutor for the ICTR).

77. *Carla Del Ponte Replaced as ICTR Prosecutor*, AFR. NEWS, Aug. 29, 2003.

78. *Id.* (noting that, as a result, the ICTR was forced to suspend some of its trials). See also Jim Lobe, *Groups Urge U.N. to Ensure Impartiality of Rwanda Tribunal*, INTER-PRESS SERVICE, Aug. 12, 2003 (remarking that Del Ponte “has long been a thorn in the side” of the government, which has actively resisted investigation of its soldiers, and that the government imposed travel restrictions on trial witnesses to exert pressure in an attempt to stop one such investigation).

79. Marlise Simons, *Rwanda Is Said to Seek New Prosecutor for War Crimes Court*, N.Y. TIMES, July 28, 2003, at A2 (citing statements from “Western diplomats and tribunal officials” that the campaign for removal was in response to Del Ponte’s investigation of senior civilian and military members of the present government for their involvement in the atrocities that took place in Rwanda).

80. Steven Edwards, *U.N. Prosecutor Fights for Job*, LEADER-POST (Regina, Canada) Aug. 9, 2003, at A4 (noting that Del Ponte appealed to the Security Council to allow her to keep the post, alleging she was a victim of the Rwandan government’s campaign and that Secretary General Kofi Annan was “said to be under intense pressure from African leaders to make way for an African to head the prosecution office in the Rwandan court”).

passed a resolution separating the two prosecutorial posts.⁸¹ Although the Secretary-General has maintained that the severance of the two posts seemed to him “essential, in the interests of efficiency and effectiveness,”⁸² this argument is hardly a persuasive one. In addition, it contrasts starkly with the representations of Del Ponte, who earlier averred that a decision not to renew her mandate would make it harder for the Tribunal to function effectively⁸³ and ultimately maintained that the severance of the two prosecutorial positions was politically motivated.⁸⁴

In light of the forgoing, it is difficult to maintain that outside wishes and interests, be they attributed to the form of a U.N. organ, an individual State, or even the international community at large, fail to influence the activities of the Tribunal.⁸⁵ Just as an argument exists that such entities are capable of wielding their power in the realm of judicial decision-making, it can also be asserted that the amendment powers of the Tribunal are likewise susceptible to such activity. The fact that the Tribunal may be pressured to modify its procedure in response to outside pressure becomes particularly relevant with regard to the length of time involved in the Tribunal’s efforts to fulfill its function.

VII. THE PRESSURE TO EXPEDITE PROCEEDINGS AT THE ICTY

A. External Influences

It is perhaps trite to note that proceedings at the ICTY have not advanced quickly and that the Tribunal has been the subject of criticism for failing to move its docket expeditiously.⁸⁶ Consequently, “external” voices have made, and are continuing to make, themselves heard with regard to the length of proceedings before the ICTY. Along these lines, the General Assembly, in its adoption of a resolution on the financing of the Tribunal, requested that the Secretary-General evaluate the efficiency of the operation and function of the ICTY.⁸⁷ The resultant 1999 report suggested procedural

81. See, e.g., *U.N. War Crimes Prosecutor Stresses Independence After Losing Rwanda Job*, AGENCE FR. PRESSE, Aug. 29, 2003 [hereinafter *Rwanda Job*].

82. *Annan Recommends Change of Rwanda Tribunal Prosecutor*, U.N. WIRE, July 29, 2003, at http://www.unwire.org/UNWire/20030729/449_7028.asp (noting that if each tribunal had its own prosecutor, the tribunals would benefit from having an individual who would be able to give his or her undivided attention).

83. *AFP Europe News Summary*, AGENCE FRANCE PRESSE, Aug. 9, 2003.

84. *Rwanda Job*, *supra* note 81.

85. Both “[t]he ICTY and ICTR ‘have been troubled by their dependence on funding and political pressures.’” Bruce Zagaris, *U.S. Congress Has Oversight Hearing on International War Crimes Tribunals*, INT’L ENFORCEMENT L. REP., Apr. 2002, art. XI.

86. See, e.g., Wald, *supra* note 25, at 536.

87. The ICTR was subject to review as well. *Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 55th Sess., Provisional Agenda Item 52, ¶ 320, U.N. Doc. A/55/273-S/2000/777

modifications with the intent of expediting the trial process.⁸⁸ The Tribunal itself has acknowledged the effect of outside entities on its practice, even beyond its response to the aforementioned report.⁸⁹ In its own report, issued in 2000, the Tribunal noted as its goal the development of “flexible solutions” to enable the judges to work with their increased caseloads, and “with the *expectations* of the accused, the victims and the *international community*.”⁹⁰ Subsequently, in the course of trial proceedings, Judge May noted that: “It is a matter of concern to the international community that these trials have been taking up six months and more each.”⁹¹

The issue of the international community and its effect on the workings of the Tribunal is thus one of significance. The term “international community” is somewhat of an amorphous concept; arguably, it would include, but not be limited to, the body of the General Assembly. There is also “the court of public opinion” whose interests, in part, may be found in, and shaped by, the media. This could give one reason to pause with regard to the effect the group potentially has over the Tribunal’s practice. In the aftermath of the first case adjudicated before the ICTY, “[t]he fair trial process did not make headlines.”⁹² In addition, authors have criticized both the ICTY and the ICTR for a “relative lack of production, in terms of indictments and *convictions*, since their inception.”⁹³ Consequently, it is perhaps fitting that media coverage of the ICTY proceedings has been alleged to reveal a prosecutorial bias and that, generally speaking, “to be indicted by a UN tribunal is to be

(2000) [hereinafter *Seventh Ann. Rep.*]. The expert group appointed to this task was specifically asked to explain why, after six years and budgets totaling over \$400 million, only 15 ICTY and ICTR trials had been completed. See Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 197, 197 n.3 (Richard May et al. eds., 2001) (citing *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)*, U.N. GAOR, 54th Sess., ¶ 35, U.N. Doc. A/54/634 (1999) [hereinafter *Report of the Expert Group*]).

88. Wald, *supra* note 25, at 536.

89. “Nearly all the recommendations contained in the Expert Group report were applied or are about to be implemented with the exception of the recommendations involving amendments to the Statute of the Tribunal.” *Seventh Ann. Rep.*, *supra* note 87, at Summary.

90. *Id.* ¶ 330 (emphasis added).

91. Trial Transcript at 2441, Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T (Apr. 24, 2001).

92. Elise Groulx, *Presentation on the Rights of the Accused Before the ICTY 3* (paper presented at the International Conference on War Crime Trials, Humanitarian Law Center, Nov. 7-8, 1998, Belgrade, Yugoslavia) at <http://www.hri.ca/partners/aiad-icdaa/reports/belgrade.htm>.

93. George S. Yacoubian, Jr., *Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 165 *WORLD AFF.* 133 (2003) (emphasis added), available at http://www.findarticles.com/cf_0/m2393/3_165/97484236/print.jhtml. See also Peter Mackler, *U.N. Court Under Attack at Delicate Moment*, AGENCE FRANCE PRESS, Mar. 1, 2002 (noting that, “[o]thers complain justice has not been all that swift; the court here has handed down only 11 final convictions in nine years . . .”).

guilty.”⁹⁴ This perceived alignment with the prosecution is not limited to the media, however. Individuals and entities that championed the Tribunals’ creation also seem to share this affinity, and these forces are ones that heretofore advocated for the rights of the accused.⁹⁵ The influence of the international community over the practice of the Tribunal is, therefore, not only important with regard to its noted preference for more expeditious proceedings, but also for its potential indifference to the fair trial rights of the accused.

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

In fairness, one cannot disregard the fact that among those rights bestowed upon the accused is that of a speedy trial, a right that is enshrined in both major international and regional instruments.⁹⁶ Accordingly, pursuant to the ICTY *Statute*, its proceedings must not only be fair but *expeditious*.⁹⁷ That such a requirement inures to the benefit of the accused is obvious; a speedy trial enhances the ability of an accused to put forth an effective defense and limits the amount of time in which he remains uncertain as to his fate.⁹⁸ The right can have significant importance, particularly in light of the fact that those indicted by the Tribunal were initially subject to a presumption against pre-trial release and in favor of detention.⁹⁹ Though the Tribunal has since modified this preference,¹⁰⁰ the change has been met with an at-

94. Henri Astier, *Rights of the Despised*, 11 THE AM. PROSPECT, Aug. 14, 2000, available at <http://www.prospect.org/print/V11/18/astier-h.html>.

95. “[B]ecause NGOs have led the good fight against impunity for dictators, the war crimes tribunals are in many ways their offspring.” *Id.* See also Cogan, *supra* note 72, at 112 (noting, in the international context, that those from the “political left,” who have historically been sensitive to fair trial rights, have favored the prosecutor in their endeavor for an effective court).

96. See, e.g., African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, art. 7(1)(d), O.A.U. Doc. CAB/LEG/67/3/Rev. 5, *reprinted* in 21 I.L.M. 58; American Convention on Human Rights: “Pact of San Jose, Costa Rica,” Nov. 22, 1969, art. 8(1), 1144 U.N.T.S. 144, 147; International Covenant of Civil and Political Rights, *adopted* Dec. 16, 1966 art. 14(3)(c), 999 U.N.T.S. 171, 174 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 221.

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

98. Lahiouel, *supra* note 87, at 198.

99. ICTY RPE, *supra* note 2, at R. 65(B) (declaring that release may be ordered only in exceptional circumstances). This provision is contrary to the principle espoused in the ICCPR which provides that, “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody” ICCPR, *supra* note 96, art. 9(3). The provision of pre-trial release is considered “an accoutrement of the presumption of innocence.” Patricia Wald & Jenny Martinez, *Provisional Release and the ICTY: A Work in Progress*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 231, 231 (Richard May et al. eds., 2001).

100. Wald & Martinez, *supra* note 99, at 233-34 (noting the removal of the requirement of “exceptional circumstances” in response to the 1999 *Report of the Expert Group*). The effect of the amendment is uncertain. *Id.* at 234.

tempt on behalf of the prosecution to make provisional release more difficult to obtain.¹⁰¹

Accordingly, efforts to expedite the proceedings at the Tribunal do have the potential to enhance the status of the accused. To complete the picture, however, it is important to recognize that the right to a speedy trial is intended to accomplish more than the protection of the interests of the accused. Verdicts rendered long after the date of the charged offense tend to cause the confidence of the public in its justice system to deteriorate; thus, inherently, the right is also meant to enhance the credibility of the relevant system of criminal justice.¹⁰² As a result, the interests of the Tribunal, *vis-à-vis* the manner in which outsiders perceive it, actually lie within this right of the accused. Arguably, the relevant perception of the Tribunal involves not only the level of confidence maintained in it by the residents of the former Yugoslavia, but the sentiment adopted by the international community regarding the Tribunal as well. It is therefore logical that the Tribunal's "need to expedite trials is not a motivation born only out of the right of an accused person to a fair and expeditious trial, but also of the political pressures under which the International Tribunal operates."¹⁰³

C. Addressing the Causes of the Delay

Turning to the issue of the prolonged activities of the ICTY itself, it is important to note that one cannot attribute the delays incurred by the Tribunal to a single source. The Tribunal has experienced numerous hurdles in its efforts to obtain evidence and to secure those it has charged, including "politically inspired delays in the arrest of indicted war criminals."¹⁰⁴ Once the accused is before the Tribunal, a new series of difficulties emerge. Proceedings become protracted due to such issues as language difficulties¹⁰⁵ and the

101. While one of the judges of the Tribunal recently noted the success of some applications for release, he also pointed to a consequent attempt on behalf of the Prosecution to "stem the tide" of successful applications. *See* Prosecutor v. Sainovic, ICTY Case No. IT-99-37-AR65, ¶ 1 (Oct. 30, 2002) (dissenting opinion of Judge David Hunt in the Appeals Chamber on provisional release).

102. Lahiouel, *supra* note 87, at 198 (noting the importance of this interest in light of the fact that part of the "Tribunal's mandate includes bringing peace in the territory of the former Yugoslavia"). It has also been asserted that a delay in justice is grossly unfair to victims. Goldstone, *supra* note 4, at 123-24.

103. Boas, *Developments*, *supra* note 58, at 167.

104. Goldstone, *supra* note 4, at 124 (noting that such delays have the potential to seriously undermine the credibility of the ICTY and ICTR). The difficulty in securing custody of those indicted is also the result of the limited number of voluntary surrenders, a fact that purportedly may be attributed to the tendency for pre-trial detention at the ICTY to be protracted. *See* Arbour, *supra* note 52, at 41.

105. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 443 (2003). The ICTY has two working languages, English and French. *Statute*, *supra* note 1, art. 33. The Conference and Language Services Section at the ICTY provides simultaneous interpretation not only from and into English and French, but also from and into Bosnian/Croatian/Serbian. *Third Ann.*

required proof of “predicate conditions” to establish the crimes over which the Tribunal has jurisdiction, such as a showing of a widespread or systematic practice to prove the charge of crimes against humanity.¹⁰⁶ In addition, virtually all cases go to trial; contrary to the experience and practice in most common law jurisdictions, guilty pleas are the exception to the rule.¹⁰⁷ However, according to Cassese, the length of international criminal proceedings “results primarily from the adoption of the adversarial system, which requires that all the evidence be scrutinized orally through examination and cross-examination.”¹⁰⁸ Live testimony is, of course, part and parcel of this process. “[T]he most time consuming aspect of any criminal trial,” it has proven to be “particularly so in the ICTY jurisdiction.”¹⁰⁹

VIII. RULE CHANGES MADE TO EXPEDITE PROCEEDINGS

As a result, it is not surprising that the Tribunal has responded to the pressure to expedite its proceedings at the expense of live testimony. Of course, such changes run the risk of exposing the Tribunal to the criticisms that plague the memories of Nuremberg and Tokyo and, additionally, censure with regard to the Tribunal’s inconsistent commitment to the principles espoused by it in favor of live testimony. The original *Rules*, with their stated preference for such evidence pursuant to sub-rule 90(A), only provided for a positive exception in the case of depositions and further limited the use of the same to “exceptional circumstances.”¹¹⁰ It is particularly noteworthy that, shortly after the adoption of the first version of its *Rules*, the Tribunal remarked that “in order to protect ‘equality of arms’ (and, *in particular, the rights of the accused*), the procedure for taking depositions allows for the cross-examination of the witness.”¹¹¹ The Tribunal, however,

Rep., *supra* note 52, ¶ 134. “In addition, simultaneous interpretation of other languages is provided as required.” *Id.*

106. Wald, *supra* note 25, at 536. “Much of the problem lies in the nature of the beast. The scope of most war crimes tends to cover wide swaths of territory and implicate hundreds, sometimes thousands of actors.” *Id.* at 554. “[H]ow can trials of such potentially endless complexity be reduced to manageable proportions for a criminal court? No issue taxes the Tribunals as this one does.” Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT’L L. 759, 773 (2000) (quoting *Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. Doc. A/54/850).

107. See CASSESE, *supra* note 105, at 398 (observing that very few defendants have pled guilty before the ICTY). See also Wald, *supra* note 25, at 549 (noting that, although controversial, a prosecutorial policy of encouraging guilty pleas by dropping some charges and recommending lesser sentences “could help clean up the backlog of less heinous cases”).

108. CASSESE, *supra* note 105, at 442 (noting that, conversely, in the inquisitorial system, the investigating judge selects the evidence prior to trial).

109. Boas, *Developments*, *supra* note 58, at 178.

110. ICTY RPE, *supra* note 2, at R. 71(A).

111. *Ann. Rep.*, *supra* note 17, ¶ 79 (emphasis added). This right “did not itself provide any right for the defendant to be present at all depositions.” Wald, *supra* note 25, at 546.

made this statement before the commencement of its first case and, accordingly, before it began to experience the push to accelerate its proceedings.

The Tribunal first acknowledged the need to expedite its proceedings in 1996, noting that “procedures for expeditious decision-making by the Tribunal would be developed and would take effect immediately” pursuant to the Dayton Accord.¹¹² From that point on, the Tribunal would continue to make changes to its procedures for the purpose of expedition; along these lines, Rule 94 *ter* was introduced in 1998.¹¹³ The rule provided that a party may move to introduce affidavit evidence, for corroborative purposes, to “prove a fact in dispute,” and, unlike the rule governing depositions, Rule 94 *ter* did not confer an automatic right of cross-examination upon the non-moving party.¹¹⁴ In spite of the introduction of this Rule, the Tribunal continued to call attention to its reliance upon live testimony, highlighting the benefits of the same and distinguishing its procedure from that of Nuremberg and Tokyo.¹¹⁵

In early 2000, however, the Tribunal’s preference for live testimony began to erode further still. The Tribunal amended its rule governing deposition testimony (Rule 71), omitting the requirement that a Trial Chamber must find “exceptional circumstances” before it can order that deposition

112. *Third Ann. Rep.*, *supra* note 52, ¶ 80.

113. *See, e.g., Sixth Ann. Rep.*, *supra* note 61, ¶ 116.

The purpose behind Rule 94 *ter* was the desire to contribute to the expedition of cases before the International Tribunal, by providing a mechanism whereby affidavit evidence could be brought before a Trial Chamber in certain circumstances, avoiding the need to call every witness relied upon in relation to a fact in dispute especially when the testimony is cumulative.

Prosecutor v. Kordic, ICTY Case No. IT-95-14/2-AR73.6, ¶ 25 (Sept. 18, 2000) (decision in the Appeals Chamber regarding the admission into evidence of seven affidavits and one formal statement) [hereinafter *Kordic Seven Affidavits Decision*].

114. The Rule, in its final version, provided:

To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits are signed. These affidavits or statements are admissible provided they are filed prior to the giving of the testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.

ICTY Rules of Procedure and Evidence, revision 17, Rule 94 *ter*, U.N. Doc. IT/32/Rev.17 (1999) (deleted Dec. 2000) [hereinafter *ICTY RPE revision 17*]. This provision for the admission of affidavit testimony was one of several “trial management tools” created to reduce the length of trials. *See, e.g., Sixth Ann. Rep.*, *supra* note 61, ¶ 14.

115. “[U]nlike the Nuremberg and Tokyo trials, a great deal of reliance is placed on the testimony of witnesses rather than on affidavits, and the Tribunal is committed to ensuring that the rights of the accused are fully respected in accordance with contemporary human rights norms.” *Sixth Ann. Rep.*, *supra* note 61, ¶ 13.

testimony be taken for use at trial.¹¹⁶ The Tribunal made the amendment just four months after the Appeals Chamber strictly upheld the rule's "exceptional circumstances" requirement, holding that the unavailability of one of the presiding judges on a case failed to meet the requisite threshold for a finding of such circumstances.¹¹⁷ The amendment, however, received no more than a casual mention in the Tribunal's *Seventh Annual Report (2000)*.¹¹⁸ In the year following this change, the use of written testimony at the Tribunal served as the subject of numerous interlocutory appeals on behalf of the accused.

IX. WRITTEN TESTIMONY IN THE CASE OF *PROSECUTOR V. KORDIC*

A. *The Statement of Deceased Witness, Haskic, Offered Pursuant to Rule 89(C)*

In February 2000, in the case of *Prosecutor v. Kordic*, the Prosecution successfully admitted into evidence an unsworn statement, taken by one of its investigators and made by witness Midhat Haskic.¹¹⁹ Haskic had died before the Prosecution offered the statement at trial.¹²⁰ Haskic's statement alleged that the accused, Kordic, was seen in a certain village on the day prior to its being attacked; it further claimed that Kordic was seen there in the company of a particularly notorious unit of the Croatian Defense Council, the group implicated in the raid.¹²¹ The Prosecution argued that "in the case of a deceased witness, the complete unavailability of his or her live evidence justifies an exception to the principle of direct testimony enshrined in Rule 90."¹²² Over the objections of the defense, which had succeeded in excluding

116. Wald, *supra* note 25, at 545-46 (noting that no substitute conditions were placed in its stead and that, even with the "exceptional circumstances" requirement, the ICTY rule governing deposition testimony represented a deviation from due process standards established in the United States).

117. See *Prosecutor v. Kupreskic*, Case No. IT-95-16, ¶ 21 (July 15, 1999) (decision on appeal by Dragan Papic against ruling to proceed by deposition). Rule 15 *bis* (A) now enables a Chamber to continue proceedings with only two judges, for a period of up to five days if the absence of the third judge is due to illness, urgent personal reasons or for reasons of authorized Tribunal business. See *ICTY RPE revision 28*, *supra* note 2, at R. 15 *bis*.

118. *Seventh Ann. Rep.*, *supra* note 87, ¶ 294 (stating that change would provide more easily for the taking of deposition evidence).

119. *Prosecutor v. Kordic*, ICTY Case No. IT-95-14/2-AR73.5, ¶ 5 (July 21, 2000) (decision in the Appeals Chamber regarding statement of a deceased witness) [hereinafter *Kordic Deceased Witness Decision*].

120. *Id.*

121. *Id.*

122. *Prosecutor's Response to Accused Dario Kordic's Application for Leave to Pursue an Interlocutory Appeal of a February 21, 2000 Ruling of the Trial Chamber to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordic Could Neither Confront Nor Cross-Examine at 3*, ICTY Case No. IT-95-14/2 (Mar. 9, 2000) (on file with author).

the statement at an earlier time in the proceedings,¹²³ the Trial Chamber admitted the statement pursuant to sub-rule 89 (C).¹²⁴ The Trial Chamber, acknowledging that Haskic neither made the statement under oath nor subject to cross-examination, remarked that such factors go to the weight of the evidence and not its admissibility.¹²⁵

Kordic sought leave to pursue an interlocutory appeal on the matter, targeting the Trial Chamber's use of sub-rule 89(C).¹²⁶ According to the accused, the Trial Chamber had "arrogate[d] to itself the *absolute* discretion under Rule 89(C) to admit *any* evidence 'which it deems to have probative value,' while at the same discarding . . . the fundamental right of an accused person to confront and have cross-examined the witnesses against him."¹²⁷ Kordic further attributed the decision to the Tribunal's "understandable search for efficiency, streamlined procedures and swifter justice," but maintained that, in so doing, the Tribunal "must not allow itself to lose sight of one of the most fundamental protections afforded to those who stand accused of crimes."¹²⁸ Kordic further alleged that "the Prosecution is seeking to

123. Kordic Deceased Witness Decision, *supra* note 119, ¶ 5. Although the Prosecution's May 1999 attempt to admit the statement was unsuccessful, the Court left open the possibility of admission at a later date. *Id.* The parties continued to dispute the matter, along with the proposed admission of additional written statements attributed to other unavailable or unwilling witnesses, via written submissions until the Trial Chamber finally admitted the statement in an oral ruling on February 21, 2000. *Id.*

124. *Id.* ¶ 6. Sub-rule 89(C) provides that "a Chamber may admit any relevant evidence which it deems to have probative value." *ICTY RPE*, *supra* note 2, at R. 89(C).

125. Kordic Deceased Witness Decision, *supra* note 119, ¶ 6. The Trial Chamber reasoned that:

The real issue is this: Should this statement be admitted un-cross-examined, so that the Defence have had no chance to test it, we have come to the conclusion that it would be wrong to deny the Chamber this statement simply on that technical ground. That goes very much to the matter of weight.

Trial Transcript at 14,701, Prosecutor v. Kordic, ICTY Case No. IT-95-14/2-T (Feb. 21, 2000). The admission was tempered by the Trial Chamber's acknowledgment that, in accord with the jurisprudence of the European Court of Human Rights, "it would not be possible to convict the accused on the basis of this statement alone if the evidence is uncorroborated." *Id.* at 14,702.

126. See Kordic Deceased Witness Decision, *supra* note 119, ¶ 10.

127. Accused Dario Kordic's Application for Leave to Pursue an Interlocutory Appeal of a February 21, 2000 Ruling of the Trial Chamber to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordic Could Neither Confront Nor Cross-Examine, at 14, ICTY Case No. IT-95-14/2 (Feb. 28, 2000) [hereinafter Kordic Application for Leave] (emphasis in original). The right of examination is conferred upon the accused pursuant to the *Statute*:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality . . . (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Statute, *supra* note 1, art. 21(4)(e).

128. Kordic Application for Leave, *supra* note 127, at 14. The right of the accused to confront the witnesses against him "has always been found the most effectual method for dis-

change proceedings before the Tribunal from trials with live testimony to ‘trials by uncorroborated, unsworn documents’” and cautioned against the admission of the statement *vis-à-vis* the proverbial slippery slope.¹²⁹

The Appeals Chamber granted Kordic’s application to appeal.¹³⁰ In addressing his application, the Appeals Chamber observed that it was faced with the question of whether the “unsworn, uncross-examined, out-of-court statement of a deceased witness should have been admitted into evidence as the only proof of the accused’s presence in a particular place at a particular time.”¹³¹ Arguably, the manner in which the Appeals Chamber framed the decision was telling with regard to its likely outcome.

At the outset, the Appeals Chamber confirmed the Tribunal’s preference for live testimony and cited four exceptions to the general rule of direct evidence.¹³² Noting that the statement at issue failed to fall within the parameters of any of the delineated exceptions, the Appeals Chamber then addressed the issue of sub-rule 89(C). The Appeals Chamber acknowledged that the sub-rule confers broad discretion upon the Trial Chambers, but also noted that such discretion is not unfettered and that employment of the provision ought “to be in harmony with the Statute and the other Rules to the greatest extent possible.”¹³³

Consequently, the Appeals Chamber observed that, of the four exceptions to direct testimony, three, by right, provide for cross-examination and the fourth, Rule 94 *ter*, contains “strict procedural protections.”¹³⁴ Accordingly, statements admitted pursuant to Rule 89(C) must also be subject to safeguards that will ensure reliability.¹³⁵ Because Haskic did not give his

covering the truth.” David Lusty, *Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 373 (citing *Duke of Dorset v. Girdler*, 24 E.R. 238 (1720)). This ability to so test evidence was observed to be “the greatest legal engine ever invented for the discovery of truth.” *Id.* at 362 (quoting J.H. WIGMORE, A TREATISE IN THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1367, at 29 (1940)).

129. Kordic Application for Leave, *supra* note 127, at 13. According to the accused, the admission of the statement would open the door for the admission of further written statements of the unavailable, unwilling or even for the sake of convenience. *Id.*

130. See *Prosecutor v. Kordic*, ICTY Case No. IT-95-14/2-AR73.5 (Mar. 28, 2000) (decision in the Appellate Chamber on application for leave to appeal and scheduling order).

131. Kordic Deceased Witness Decision, *supra* note 119, ¶ 18. The contents of the statement were also not corroborated by any other evidence. *Id.* ¶ 27.

132. The exceptions addressed were that of deposition testimony, testimony by video-conference link, expert witness statements and the submission of affidavit evidence pursuant to Rule 94 *ter*. *Id.* ¶ 19.

133. *Id.* ¶ 20.

134. *Id.* ¶ 21. According to the Appeals Chamber, the procedural protections contained in Rule 94 *ter* are threefold. *Id.* The statements are to be used to corroborate a fact in dispute contained in the live testimony of another witness, the proffered statements must have been executed in accord with the law and procedure of the State in which they were signed and the Trial Chamber may order, or rule in response to a party’s objection, that the witness be called for cross-examination. *Id.*

135. “[I]t would be odd to find that a statement that met none of the requirements of those other rules was nonetheless admissible under Rule 89(C) without any other compensat-

statement under oath, was not subject to cross-examination, and his testimony appeared to be uncorroborated, the Appeals Chamber observed an absence of any indicia of reliability. This finding, according to the Court, was exacerbated by the fact that the Haskic statement was not “first-hand” but rather “more removed” hearsay, and “multiple translations in an informal setting” occurred in its taking.¹³⁶ As a result, rather than finding the statement inadmissible under sub-rule 89(D),¹³⁷ the Appeals Chamber found that the statement was “so lacking in reliability that it should have been excluded as without probative value” under Rule 89(C).¹³⁸

B. Seven Affidavits and One Formal Statement Offered Pursuant to Rule 94 *ter*

Kordic’s difficulties with written testimony did not stop at the Haskic statement, however. Perhaps inspired by the Trial Chamber’s willingness to admit the deceased witness’ statement, the Prosecution also attempted to enter into evidence seven affidavits pursuant to Rule 94 *ter*¹³⁹ and one formal statement claiming, as authority for its proffer, either Rule 94 *ter* or the provisions of sub-rule 89(C).¹⁴⁰ One of the primary points at issue regarding the admission of the statements was non-compliance with the time constraints imposed by Rule 94 *ter*. The Prosecution admitted that it had not filed the statements at issue before calling a witness whose testimony the statements

ing evidence of reliability.” *Id.* ¶ 22. Though recognizing the Tribunal’s admission of hearsay evidence throughout its analysis, the Appeals Chamber clearly acknowledged that cross-examination enhances reliability. *Id.* ¶¶ 23-27. The Court further notes that admission of the statement “is in marked tension with the guarantee in Article 21(4) that the accused has the right to examine the witnesses against him.” *Id.* ¶ 23.

136. The statement was taken by a native Dutch speaker, translated from Croatian into written English by an interpreter and then orally translated back into Croatian to obtain the witness’ signature. *Id.* ¶ 27. Judge Patricia Wald, the presiding judge in this instance, subsequently remarked on scenarios such as these stating, “[t]here is much margin for error in such a system, and indeed in the courtroom years later, many witnesses say they were misunderstood or misquoted in the earlier statement.” Wald, *supra* note 25, at 551.

137. “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” See *ICTY RPE*, *supra* note 2, at R. 89(D).

138. Kordic Deceased Witness Decision, *supra* note 119, ¶ 28. In reaching this decision, the Appeals Chamber noted that the “reliability of a statement is relevant to its admissibility and not just to its weight.” *Id.* ¶ 24. This holding is consistent with the theory espoused by the Trial Chamber in *Prosecutor v. Delalic*, ICTY Case No. IT-96-21-T, ¶ 32 (Jan. 19, 1998) (decision on motion of Prosecution for admissibility of evidence) (remarking that, “reliability is the invisible golden thread which runs through all the components of admissibility”). However, the appellate decision has been criticized by a member of the Tribunal who, in fact, presided over the Kordic matter at Trial Chambers. In the opinion of Judge May, the appellate decision should rather have been based on a finding by the Appeals Chamber that the probative value of the statement was substantially outweighed by the need to ensure a fair trial. RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* 226 (2002).

139. See *ICTY RPE revision 17*, *supra* note 114, R. 94 *ter*.

140. Kordic Seven Affidavits Decision, *supra* note 113, ¶ 4.

were meant to corroborate, as required by the Rule.¹⁴¹ A second point of contention was the appropriate meaning to ascribe to Rule 94 *ter*'s phrase "fact in dispute." The Prosecution called for a broad reading of the phrase;¹⁴² the defense maintained that "because it is an exception to the general preference in Rule 90 for live testimony, the requirement that an affidavit should corroborate a live witness's testimony as to a specific "fact in dispute" should be interpreted restrictively."¹⁴³

The Trial Chamber admitted all of the affidavits despite the lack of compliance with the timing provisions of Rule 94 *ter*. The Trial Chamber deemed the tardiness of the submissions to be a mere technical breach.¹⁴⁴ In making this determination, the Trial Chamber noted that: "[T]he rules must be interpreted to give them useful effect."¹⁴⁵ Further, the Trial Chamber agreed with the Prosecution's interpretation of "facts in dispute" and held that the limiting phrase should be interpreted broadly.¹⁴⁶ Inexplicably, the Trial Chamber also found the formal statement admissible pursuant to Rule 94 *ter*,¹⁴⁷ though its purpose was not to prove a fact in dispute, in corroboration of witness testimony, but rather to supplement the prior testimony of a live witness.¹⁴⁸

Appealing from the Trial Chamber's ruling, Kordic argued, *inter alia*, that the admission of the statements clearly violated the requirements of Rule 94 *ter*.¹⁴⁹ Kordic alleged that the admission of the statements thus constituted an abrogation of the Court's responsibility to ensure that its proceed-

141. Citing "practical problems," the Prosecution conceded that it had not adhered to the timing requirements of Rule 94 *ter*. Trial Transcript at 16,481-16,482, Prosecutor v. Kordic, ICTY Case No. IT-95-14/2-T (Mar. 10, 2000). The Prosecution's failure to so comply was attributed to difficulties faced by it in finding "a procedure suitable for the national authorities in Bosnia." *Id.* at 16,481. Disturbingly, it appears possible that the Prosecution *could have* complied with the timing provisions, but did not as a matter of trial strategy. In recapping the arguments of the parties at the Trial Chamber level, Judge May, though mistakenly attributing the statement to the defense, notes that an argument was made to the effect that complying with the timing requirements would have necessitated holding back important witnesses "until virtually the end of the case." *Id.* at 16,486.

142. "The Prosecution . . . say[s] . . . that the term of 'fact in dispute' should be given a broad interpretation." *Id.* at 16,488.

143. Kordic Seven Affidavits Decision, *supra* note 113, ¶ 12.

144. According to the Trial Chamber, the timing requirement of 94 *ter* was merely of a formal, procedural nature and to decide otherwise could defeat the interests of justice. *Id.* ¶ 9. The affidavits, in fact, were submitted at the end of the Prosecution's case, "in some cases months after the live testimony which they were supposed to corroborate had concluded." *Id.* ¶ 31.

145. *Id.* ¶ 23.

146. *Id.* ¶ 9.

147. *Id.*

148. *Id.* The Appeals Chamber ultimately found that the statement could not be so admitted and that the only possible mechanism for introduction of the statement would have been sub-rule 89(C). *Id.* ¶ 47. Observing that the Prosecution failed to provide detailed submissions regarding the same, the Court limited its ruling to the fact that the Trial Chamber erred by admitting the statement under Rule 94 *ter*. *Id.* ¶¶ 43-48.

149. *Id.* ¶ 10.

ings comply with the *Rules* of the Tribunal.¹⁵⁰ Kordic took issue with the finding of the Trial Chamber that the time constraints imposed by Rule 94 *ter* were of a technical nature only. He averred that “the timing requirement [is] intended to afford the opposing party the opportunity to test not only the credibility of the subsequent live witness but also the truthfulness and accuracy of the statements contained in the affidavit.”¹⁵¹ Kordic further maintained that the Trial Chamber erred in its expansive interpretation of the term “facts in dispute.”¹⁵²

In rendering its decision, the Appeals Chamber acknowledged that Rule 94 *ter* was instituted for the purpose of expediting the Tribunal’s proceedings, but noted that the “desire for expedition is . . . constrained by the need to protect the rights of an accused.”¹⁵³ The Appeals Chamber then reiterated its finding in Kordic’s prior appeal, namely, that “Rule 94 *ter* . . . includes strict procedural protections.”¹⁵⁴ In accord with the position put forth by the defense, the Appeals Chamber found that the time constraints in the rule played an integral role with regard to these protections¹⁵⁵ and, consequently, reversed the Trial Chamber decision.¹⁵⁶ The Appeals Chamber also addressed the issue of the proper interpretation to be given to the phrase “fact in dispute,” holding that “a clear link must be established between the testimony and the affidavit and the corroborating evidence must be focused on the facts contained in the live testimony and not on the surrounding events of the case in general.”¹⁵⁷

X. THE AFTERMATH OF THE KORDIC APPEALS

The Appeals Chamber rendered these two decisions on interlocutory appeal in July and September of 2000, respectively. The rulings maintained

150. “[B]y admitting the Statements in derogation of the plain terms of Rule 94 *ter*, the Trial Chamber abrogated its responsibility to ensure that trial proceedings are conducted in accordance with the Rules.” *Id.* ¶ 12.

151. *Id.*

152. *Id.* ¶ 12.

153. *Id.* ¶ 25.

154. *Id.* ¶ 26 (emphasis in original) (noting the first of these protections is that the statements admitted pursuant to it “be used to corroborate a fact in dispute contained in the live testimony of another witness”).

155. The Appeals Chamber determined that the timing requirement was an integral and fundamental part of the rule:

It ensures that a party is informed of the facts in question and in doing so enables them to cross-examine the future live witness . . . challenging both the credibility of the live witness together with the truthfulness and accuracy of the statements contained in the affidavits.

Id. ¶ 31. Further, the Appeals Chamber noted: “The terms of Rule 94 *ter* should not be extended so that it becomes a general mechanism by which a party may file unchallenged affidavit evidence to support oral testimony which has already concluded.” *Id.* ¶ 33.

156. *Id.* ¶ 34.

157. *Id.* ¶ 40.

the importance of direct testimony, highlighted the value of cross-examination and informed the lower courts of the need to comply strictly with the procedural protections present in the *Rules*. The decisions thus appeared to represent a victory not only for Kordic, but also for others appearing accused before the Tribunal. In addition, the rulings could very well have served to dispute criticisms that the Tribunal was “carrying out its work in a manner that disregards the rights of accused persons.”¹⁵⁸

The Tribunal’s reaction to the decisions, however, was swift. At the twenty-third session of the plenary, 29 November – 1 December 2000, they deleted Rule 94 *ter* and, in its stead, put in place Rule 92 *bis*.¹⁵⁹ The Tribunal’s *Eighth Annual Report (2001)* addressed the deletion of the rule governing affidavit testimony only briefly, noting the difficulties experienced with the same due to the fact that clear rules governing affidavits did not exist within the law of the former Yugoslavia.¹⁶⁰ Although the Working Group’s consequent recommendation was for amendment of the rule, without further elaboration, the Tribunal omitted the rule.¹⁶¹ The deletion of Rule 94 *ter* and its replacement with Rule 92 *bis*, in the aftermath of the *Kordic* Decisions on Interlocutory Appeal, provide evidence, according to one critic, that “the Tribunal is not bound to its procedure in any meaningful sense.”¹⁶²

In its *Eighth Annual Report*, the Tribunal makes no mention of the proceedings at Nuremberg or Tokyo. While just two years earlier, the Tribunal proudly distinguished itself from its predecessors and averred its procedural commitment to “the rights of the accused . . . in accordance with contemporary human rights norms,”¹⁶³ such declarations were notably absent from the later report. The reasoning for this may be attributed to the fact that the

158. Boas, *The Principle of Flexibility*, *supra* note 16, at 48 (noting that the fair trial rights of the accused must be maintained in order that the Tribunal not be seen as a “procedural pirate”).

159. *Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 56th Sess., Provisional Agenda Item 53, ¶ 51, U.N. Doc. A/56/352-S/2001/865 (2001) [hereinafter *Eighth Ann. Rep.*] (noting that of the four new rules created, the most significant was Rule 92 *bis* and that the rule “provides a framework for the admission of formal written statements and transcripts . . . at the discretion of the Trial Chamber”). Rule 92 *bis* is discussed in detail *infra*, Part XI.

160. *Eighth Ann. Rep.*, *supra* note 159, ¶ 55. This difficulty was acknowledged by the Prosecution in the *Kordic* case. See *Kordic Seven Affidavits Decision*, *supra* note 113, ¶ 4. Similar difficulties were noted in the cases of accused Martinovic and Naletilic. *Seventh Ann. Rep.*, *supra* note 87, ¶ 40.

161. *Eighth Ann. Rep.*, *supra* note 159, ¶ 55.

162. Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1430 (2001). “Where Appeals Chamber judgments frustrate the Trial Chamber’s desire to admit any manner of written statement, the fact that they can simply change the rules to accommodate the interests of a lower standard offends the basic procedural integrity of the institution.” *Id.* at 1431. In contrast, Judge May referred to Rule 94 *ter* as “a short-lived experiment for the admission of affidavits.” MAY & WIERDA, *supra* note 138, at 217.

163. *Sixth Ann. Rep.*, *supra* note 61, ¶ 13.

twenty-third session of the plenary was a noteworthy one, not only for its deletion of Rule 94 *ter*, but also because the plenary proceedings marked the end of the Tribunal's preference for live testimony. Although one might consider such a revision to be monumental (the obviation of a long-standing policy that, according to the Tribunal itself, served to bolster the integrity of its proceedings), the conversion only merited a mention in a footnote of the *Annual Report*.¹⁶⁴ New Sub-rule 89(F), which establishes a "no preference alternative," likewise finds its only mention in the same note.¹⁶⁵

Unlike the Tribunal's subdued "description" of this turn of events, many have recognized the modification as extreme. Noted to be a "dramatic change in the way in which evidence is to be received by the International [sic] Tribunal,"¹⁶⁶ "the 'revisions represent a 180 degree turn from earlier emphasis on the 'principle' of live testimony."¹⁶⁷ Further, the Tribunal adopted the revisions "not without some dissent."¹⁶⁸

XI. RULE 92 *BIS*

Rule 92 *bis* contains detailed provisions that provide for the introduction of written evidence. Pursuant to the rule, parties may submit evidence in the form of written statements (declared and verified in a form prescribed by the rule), written statements by unavailable declarants (un-sworn and in no specified form) and transcripts from prior proceedings before the Tribunal.¹⁶⁹ In the first case to address the application of Rule 92 *bis*,¹⁷⁰ the Trial Chamber noted that the intent of the rule was "to try and cut down the lengths of these trials. . . . [A] large amount of time in this Tribunal has been taken up with pointless and repetitive cross-examination, and this Rule is aimed at dealing with it."¹⁷¹ Accordingly, the rule "clearly evinces the trend towards broader resort to the admission of written evidence."¹⁷²

164. *Eighth Ann. Rep.*, *supra* note 159, ¶ 51 n.1. The note is appended to the statement indicating Rule 94 *ter*'s replacement by Rule 92 *bis*. *Id.* ¶ 51.

165. The note reads: "Paragraph (F) of rule 89 was created providing for the Chamber to receive the evidence of a witness in written form, where the interests of justice allow. This changes the previous position under paragraph (A) of rule 90 (now deleted), which had stated a preference for oral testimony." *Id.* ¶ 51 n.1. The new rule provides: "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form." *ICTY RPE revision 28*, *supra* note 2, at R. 89(F).

166. Boas, *The Principle of Flexibility*, *supra* note 16, at 48.

167. Wald, *supra* note 25, at 548 (noting that Rule 89(F) states a "counter-principle" to the Tribunal's "distinct preference for live witness testimony").

168. *Id.*

169. See *ICTY RPE revision 28*, *supra* note 2, at R. 92 *bis*.

170. See Ryneveld & Mundis, *supra* note 59, at 55.

171. Trial Transcript at 2441, Prosecutor v. Sikirica, ICTY Case No. IT-95-8-T (Apr. 24, 2001).

172. SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 138 (2003).

Rule 92 *bis* is divided into five parts. Its first part (section (A)) confers authority upon a Trial Chamber to admit into evidence a written statement “which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.”¹⁷³ Section (A) also provides a non-exhaustive list of factors in favor of and against the admission of such evidence.¹⁷⁴ Section (B) (the second section) addresses the difficulty noted by the Tribunal regarding the application of Rule 94 *ter*. Section (B) provides that written statements shall be admissible, pursuant to Rule 92 *bis*, if a declaration, appropriately witnessed and attesting to its accuracy, is attached to each statement.¹⁷⁵ The third section of the rule applies in the case of written statements that do not meet the technical requirements of Section (B). The application of the third section is limited to statements made by presently unavailable declarants, namely individuals who, since making the statements, have died, gone missing, or have become unable to testify due to a mental or physical infirmity. The section requires that admission of such a statement be predicated upon a finding that the statement was made and recorded under circumstances that provide “satisfactory *indicia* of its reliability.”¹⁷⁶ The fourth section (Section (D) of the Rule) provides for the admission of witness testimony in the form of a transcript from a prior proceeding of the Tribunal, “which goes to proof of a matter other than the acts and conduct of the accused.”¹⁷⁷ The final section provides that a party availing itself of the Rule must provide notice to the opposing party and that the non-moving party may object within seven days of receipt of notice. After hearing from both parties, it is in the discretion of the Trial Chamber to determine “whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.”¹⁷⁸

Thus, the Rule, unlike its predecessor, does not provide the assurance of any type of cross-examination with regard to the content of the written statements admitted pursuant to it. In addition, the Rule does not limit the content of such statements to that which will be, or even has been, corroborated by a live witness. Of course, one of the main guarantees for the rights of the accused under the Rule may be found in its requirement that an admitted statement “[go] to proof of a matter other than the acts and conduct of

173. See *ICTY RPE revision 28*, *supra* note 2, at R. 92 *bis* (A).

174. *Id.*

175. The section also specifies the procedure that is to be followed in making the declaration. *Id.* at R. 92 *bis* (B).

176. *Id.* at R. 92 *bis* (C) (emphasis added). This section has thus been adjudged by one member of the Tribunal as a codification of the Kordic Deceased Witness Decision. See MAY & WIERDA, *supra* note 138, at 226. See also Boas, *The Principle of Flexibility*, *supra* note 16, at 81.

177. *ICTY RPE revision 28*, *supra* note 2, at R. 92 *bis* (D). The practice of admitting transcripts of prior testimony as evidence is one that existed prior to the creation of the rule. As such, “the creation of Rule 92 *bis* (D) was not a foray into virgin terrain.” Boas, *Developments*, *supra* note 58, at 179.

178. *ICTY RPE revision 28*, *supra* note 2, at R. 92 *bis* (E).

the accused as charged in the indictment.”¹⁷⁹ However, the value of such a guarantee depends entirely upon the manner in which one interprets the phrase.¹⁸⁰ As an initial matter, one could argue that the phrase does not preclude the use of witness statements that bear upon the acts or conduct of the accused, so long as the statements also go to proof of another matter.¹⁸¹ Although the Tribunal seems to consistently read the rule as allowing a witness statement “so long as it *does not go to proof of the conduct or acts of the accused*,”¹⁸² it is worth mentioning that this is not a literal interpretation of the Rule.

XII. BACKGROUND OR BACKDOOR?

A. *The Sikirica Case (Rule 92 bis (D))*

Upon implementation of Rule 92 *bis*, the Tribunal averred that “[t]he purpose of the rule is to facilitate the admission by way of written statement of *peripheral or background evidence* in order to expedite proceedings *while protecting the rights of the accused under the Statute*.”¹⁸³ This pronouncement is arguably akin to what, in the domestic context, most know as “legislative intent.” The need for such a rule, particularly with regard to evidence such as that which “relates to relevant historical, political or military background,”¹⁸⁴ is arguably necessary in light of the unique context of the Tribunal.¹⁸⁵ While such a limitation would not obviate an argument for cross-examination,¹⁸⁶ if so applied, evidence admitted pursuant to the Rule would likely not run afoul of the personal preference espoused by one member of the Tribunal: “it is . . . essential. . . . that any written statements truly be lim-

179. ZAPPALA, *supra* note 172, at 138.

180. See Boas, *The Principle of Flexibility*, *supra* note 16, at 82 (noting that “the interpretation of what constitutes the ‘acts and conduct of the accused’ will be pivotal to the fair and effective application of the Rule”).

181. This is somewhat analogous to a frequent experience in common law systems: the admission of, for the proof of something other than the matter asserted, a statement that would otherwise be hearsay. See, e.g., Fed. R. Evid. 801.

182. Wald, *supra* note 25, at 548 (emphasis added).

183. *Eighth Ann. Rep.*, *supra* note 159, ¶ 51 (emphasis added).

184. This quality of evidence, pursuant to the Rule, is to be considered by a Trial Chamber as favorable with regard to admission. *ICTY RPE revision 28*, *supra* note 2, at R. 92 *bis* (A)(i)(b). Among other factors in favor of admission are circumstances in which the evidence is cumulative or “consists of general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates.” *Id.* at R. 92 *bis* (A)(i)(a), (c).

185. “A trial at the ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.” Wald, *supra* note 25, at 536-37.

186. See, e.g., *id.* at 550 (noting that “even when the written testimony is concededly background or jurisdictional, defendants can be expected to raise the core issue of whether written testimony not subject to cross-examination violates the ICTY statutory Article 21 mandate that the accused be allowed to question witnesses against him”).

ited to non-incriminating evidence.”¹⁸⁷ The jurisprudence of the Tribunal reveals that in practice, however, the application of the rule has not been so limited.

Less than four months after Rule 92 *bis* came into effect,¹⁸⁸ the Prosecution sought, and was granted, the opportunity to admit transcript testimony in the case of *Prosecutor v. Sikirica*.¹⁸⁹ While the Trial Chamber briefly addressed the issue of admissibility regarding evidence proffered pursuant to Rule 92 *bis*,¹⁹⁰ the decision focused primarily on the Trial Chamber’s determinations regarding whether to afford an opportunity for cross-examination of each of the witnesses whose testimony the Trial Chamber had admitted. The analysis employed by the Trial Chamber is quite telling with regard to the manner in which it used the Rule in that case.

According to the Trial Chamber, in determining whether a witness, whose statement has been admitted pursuant to Rule 92 *bis*, should be required to appear for cross-examination, “among the matters for consideration [is] whether the transcript goes to proof of a *critical element* of the Prosecution’s case.”¹⁹¹ This declaration is immediately troubling. While such an assessment is certainly relevant with regard to the statutory right of the accused to examine the witnesses against him, it reveals a use of Rule 92 *bis* that is wholly irreconcilable with the Tribunal’s assertion regarding its purpose, namely the expeditious introduction of *background or peripheral evidence*.

Throughout the Trial Chamber’s analysis in this regard, the Court addressed each of the six transcripts of prior testimony. Though the Trial Chamber admitted all six, only the content of half are capable of falling within these “innocuous” parameters.¹⁹² The Trial Chamber noted two of the remaining admitted statements, respectively, as capable of “[constituting] a means of proof of an element of the genocide charge against the accused”¹⁹³ and “capable of going towards the proof of the crime of genocide with which Mr. Sikirica is charged.”¹⁹⁴ The Trial Chamber found that a third transcript of testimony, also admitted pursuant to Rule 92 *bis*, related to the cases of all

187. *Id.* at 551.

188. The Rule became active pursuant to U.N. Doc. IT/183, an official document of the ICTY, on January 19, 2001. *Eighth Ann. Rep.*, *supra* note 159, ¶ 51.

189. *Prosecutor v. Sikirica*, ICTY Case No. IT-95-8 (May 23, 2001) (decision in the Trial Chamber on Prosecutor’s application to admit transcripts under Rule 92 *bis*). Though the motion was originally granted orally on May 2, 2001, Trial Chamber III later supplied its reasons for so ruling in this written decision. *Id.* at Introduction.

190. Specifically, the Trial Chamber noted that evidence admitted pursuant to the rule must also meet the requirements of Rule 89(C) and (D); that is, the evidence must have probative value and that the same must not be outweighed by the need to ensure a fair trial. *Id.* ¶ 3.

191. *Id.* ¶ 4 (emphasis added).

192. One transcript testimony was noted to provide “helpful background material.” *Id.* ¶ 16. Another, pertaining to a witness referred to as “an expert historian,” was noted to provide “a helpful overview of events.” *Id.* ¶ 30.

193. *Id.* ¶ 11.

194. *Id.* ¶ 21.

three accused in a “significant and direct way.”¹⁹⁵ Thus, the use of Rule 92 *bis* in *Sikirica*, as evidenced in “the first reasoned decision on the new Rule,”¹⁹⁶ gives no heed to the Tribunal’s original contention regarding the purpose of the Rule. Rather than prove to be an anomaly, however, this application arguably set the stage for future employment of the Rule.

B. The Milosevic Case (Rule 92 *bis* (A))

The following year, in *Prosecutor v. Milosevic*, the prosecution sought to admit twenty-three written statements pursuant to Rule 92 *bis* (A).¹⁹⁷ Specifically, the Prosecution tendered statements regarding events such as attacks, killings and assaults in Kosovo, events that constitute the widespread or systematic campaign of terror and violence that the Prosecution charged the accused with having committed.¹⁹⁸ According to the Prosecution, such statements ought to be admissible as a “crime base”; further, the evidence complies with the standard set in the Rule, as the statements pertain to crimes committed in Kosovo, but not to the acts and conduct of the accused.¹⁹⁹ In its decision on the matter, the Trial Chamber evaluated the meaning of the term “acts and conduct of the accused” in order to determine, in accord with the Rule, that which can and cannot be submitted into evidence in written form. In its assessment, the Trial Chamber noted that:

The phrase “acts and conduct of the accused” in Rule 92 *bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.²⁰⁰

195. *Id.* ¶ 35.

196. Boas, *Developments*, *supra* note 58, at 177.

197. *Prosecutor v. Milosevic*, ICTY Case No. IT-02-54, ¶ 1 (Mar. 21, 2002) (decision in the Trial Chamber on Prosecution’s request to have written statements admitted under Rule 92 *bis*) [hereinafter *Milosevic Decision*]. Drawing on the limited jurisprudence of the Tribunal regarding the use of the Rule, the Trial Chamber cited the decision in *Sikirica* along with that of *Prosecutor v. Brdjanin*. *Id.* ¶¶ 6-8 (noting that, in the latter case, the Court strictly construed the limitation on evidence admitted pursuant to Rule 92 *bis* regardless of its repetitious nature, that evidence which fits within the parameters of the Rule is still subject to the Court’s discretion regarding admissibility, and that the Trial Chamber would exercise extreme caution before admitting statements going to the act and conduct of subordinates in cases involving alleged superior responsibility). Lengthy arguments regarding procedural issues, including the conditions governing the application of Rule 92 *bis* were noted by the Tribunal to be a prominent feature of the *Brdjanin* trial. *Ninth Ann. Rep.*, *supra* note 51, ¶ 76.

198. *Milosevic Decision*, *supra* note 197, ¶¶ 16-18.

199. *Id.* ¶ 10.

200. *Id.* ¶ 22.

Thus, albeit with the right of cross-examination, the Trial Chamber admitted the statements into evidence.²⁰¹ In light of the decision of the Trial Chamber, an argument against admission and calling to mind the “legislative intent” behind the introduction of the rule, that it be used to establish that which is background or peripheral, would somehow fall within the category of “fanciful interpretation.” The finding by the Trial Chamber, of course, does not have binding force on the decisions of the other Trial Chambers.²⁰² The Appeals Chamber, an entity whose decisions do have such binding effect,²⁰³ however, has since addressed the matter in a similar manner.

C. The Appellate Decision (Rule 92 bis (C))

In the case of *Prosecutor v. Galic*, the prosecution introduced into evidence, pursuant to Rule 92 bis (C), the statements of two witnesses, since deceased.²⁰⁴ Granting an interlocutory appeal with regard to one of the statements, the Appeals Chamber favorably cites the *Milosevic 92 bis* decision, concerning the acts of co-perpetrators and subordinates.²⁰⁵ Far from determining that the rule is in any way meant to be limited to evidence of a background or peripheral nature, the decision arguably expands the application of the Rule beyond that which is delineated in the prior Trial Chamber decisions. The decision observes that parties may use 92 bis statements to establish the acts and conducts of others.²⁰⁶ Parties may then use such acts and conduct to establish the state of mind of the accused.²⁰⁷

According to the Appeals Chamber:

[w]here the evidence is *so pivotal* to the Prosecution case, and where the person whose acts and conduct the written statement describes is *so proximate* to the accused, the Trial Chamber *may* decide that it would not be fair to the accused to permit the evidence to be given in written form.²⁰⁸

201. *Id.* ¶ 27.

202. *Prosecutor v. Aleksovski*, ICTY Case No. IT-95-14/1-A, ¶ 114 (Mar. 24, 2000) (Judgment in the Appeals Chamber) (noting, however, that the Trial Chambers are free to follow the decisions of one another).

203. According to the Appeals Chamber, “a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers.” *Id.* ¶ 113.

204. *See Prosecutor v. Galic*, ICTY Case No. IT-98-29-AR73.2, at 1 (June 7, 2002) (ICTY Judicial Supplement No. 34, decision on interlocutory appeal concerning Rule 92 bis (C) [hereinafter Judicial Supplement 34]).

205. The appellate decision also elaborates on the same. *Id.* at 2 (detailing that which falls within the confines of “acts and conduct of the accused,” namely evidence that goes to the *actus reus* or *mens rea* of the accused and, additionally, evidence “that he was a superior to those who actually did commit the crimes”).

206. Judicial Supplement 34, *supra* note 204, at 1.

207. *See* Daryl A. Mundis, *Current Developments at the ad hoc International Criminal Tribunals*, 1 J. INT’L CRIM. JUST. 197, 218 (2003) (commenting on the *Galic* decision).

208. Judicial Supplement 34, *supra* note 204, at 3 (emphasis added).

In a like manner, although noting “the short step,”²⁰⁹ in cases of command responsibility, between the acts constituting the crime charged and a finding that the accused knew or had reason to know of the same, the decision leaves open the door for the introduction of such statements under the Rule, even when the declarant is unavailable.²¹⁰ That these interpretations of the Rule are a far cry from its “original purpose” is evident. It is further worth noting, however, that the admission of such statements without cross-examination, as the decision suggests, and as the Rule allows, runs contrary even to the precedent established at Nuremberg.²¹¹

One could certainly argue that a parallel exists between the legal analysis present in the aforementioned decisions interpreting Rule 92 *bis* and that found in the appellate decisions in the *Kordic* matters. Each of the decisions employs a strict interpretation of the rule under consideration. The outcome of the decisions, *vis-à-vis* the rights of the accused, is solely dependent upon the content of the relevant rule, and therein lies the difference in the results. In the *Kordic* decisions, assessing the application of Rule 94 *ter* necessarily involved the procedural safeguards within the Rule and, thus, served to inure to the benefit of the accused. By comparison, it is fair to say that the procedural safeguards in Rule 92 *bis* are more minimal and that the rights of the accused are more vigilantly addressed in the non-binding rhetoric of the Tribunal’s *Eighth Annual Report* than in the Rule itself. Thus, a strict application of the rule has the tendency to impinge upon the rights of the accused rather than bolster them.

It cannot be sufficiently stressed that, in adopting Rule 92 *bis*, the Tribunal contended that the rule would be used to establish background or peripheral evidence. The Tribunal’s Annual Reports are not simply missives to the international community. Rather, the Tribunal is *statutorily required* to submit the reports to the Security Council and the General Assembly.²¹² Obviously, the purpose of such reports is to keep the two U.N. organs abreast of the Tribunal’s activities. Inherently then, one of the functions of the reports is to provide a means of assuring that the Tribunal is acting in a manner that is consistent with the *Statute* as approved by the Security Council. Accordingly, the reports provide a mechanism for the Security Council to ensure that the proceedings before the Tribunal fully respect the rights of the accused as mandated in Article 20 and delineated in Article 21 of the *Statute*.

209. *Id.*

210. In such cases, the Appeals Chamber noted “it may well be” that the evidence should not be admitted in written form or that an absence of the opportunity to cross should preclude admission of such statements. *Id.* Prior to *Galic*, Judge Robinson expressed a contrary opinion on the matter. In his view, if the Trial Chamber is permitted to expose the accused to liability *vis-à-vis* a charge of command responsibility, “cross-examination is not at the discretion of the Trial Chamber; it is a right of the accused.” *Milosevic Decision*, *supra* note 197, (separate opinion of Judge Patrick Robinson).

211. *See, e.g.*, Wald, *supra* note 25, at 549.

212. *See Statute*, *supra* note 1, art. 34.

The failure to remain true to the express intent of the Rule is exacerbated by the very make-up of the Tribunal. In the domestic context, when the judiciary applies a statute or rule in a manner that is contrary to its legislative intent, the legislature can respond accordingly. In the context of the Tribunal, such an avenue simply does not exist.²¹³ In view of this, the assertion that the judiciary's ability to draft and amend the same rules it interprets is "disturbing," calls into question its ability to be impartial, and enables it to act arbitrarily, is perhaps not a surprising one.²¹⁴ A related additional cause for concern is the nearly limitless discretion conferred upon the Trial Chambers in the employment of the Rule.²¹⁵ Inherent in this enhanced discretion is the fact that determinations made by a Trial Chamber would likely only be reversed if the decision at issue evidences a clear abuse of discretion,²¹⁶ a fact that conceivably may not bode well *vis-à-vis* the fair trial rights of the accused.

XIII. THE FUTURE OF WRITTEN TESTIMONY AT THE TRIBUNAL

Rule 92 *bis* "appears to have had a dramatic impact on the way in which parties, and in particular the Prosecution, are seeking to present their cases before the International Tribunal."²¹⁷ Aggressive use of the provision gives rise to the possibility that "much of the live testimony in the prosecution case may disappear."²¹⁸ Some might argue that the Tribunal's new position

213. "Since the French Revolution it has been considered a basic requirement of true administration of justice that the separation of powers is strictly observed in legal proceedings." Otto Kranzbuhler, *Challenge to Nuremberg Procedures*, in *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* 248, 249 (Michael R. Marrus, ed., 1997).

214. Klip, *supra* note 16, at 302-03. It has also been noted that an accused has no recourse to an appeal to a monitoring body such as the Human Rights Committee regarding an alleged wrongdoing. "All supervisory mechanisms regarding human rights only receive complaints against states." *Id.* at 301.

215. The Tribunal noted the "number of fundamental amendments . . . [which] 'reflect an increase in the capacity of the Tribunal to fulfil its mandate more expeditiously as well as an increase in the power of judges to control the proceedings before it.'" *Eighth Ann. Rep.*, *supra* note 159, ¶ 50. The amendments at issue included the introduction of Rules 92 *bis* and 89(F). *Id.* ¶ 51.

216. Wald, *supra* note 25, at 550 (noting that "the bottom line responsibility for conducting a fair trial will sit more squarely than ever with the trial court"). That the Trial Chamber will act accordingly is not a foregone conclusion. "It is hoped that the criteria set out in paragraph (A) of the Rule will sufficiently constrain trial chambers from allowing untested evidence of direct importance to the guilt or innocence of an accused to be admitted." Boas, *The Principle of Flexibility*, *supra* note 16, at 82.

217. Boas, *Developments*, *supra* note 58 at 176 (noting, in particular, the Prosecution's 92 *bis* application in the *Plavsic* case, which identified approximately 170 witnesses). In its most recent report, the Tribunal observed that the rule has become increasingly implemented. *Ninth Ann. Rep.*, *supra* note 51, ¶ 289.

218. Boas, *Developments*, *supra* note 58, at 179.

on written testimony represents a victory for the Office of the Prosecutor;²¹⁹ however, far from being satisfied with this development, the Prosecution continues to push the envelope on the issue.

Indeed, it would be more than fair to say that the Prosecution has not been shy in its attempts to expand upon the admission of written testimony and that its lack of temerity in this vein continues. In April 2003, in the wake of the *Galic* decision and in what is beyond any doubt the highest profile case ever before the Tribunal, that of *Milosevic*, the Prosecution asked the Trial Chamber for permission to submit the evidence-in-chief of its witnesses in writing pursuant to sub-rule 89(C).²²⁰ This request was made in spite of the fact that the *Galic* Appellate Decision clearly states that a party cannot be permitted to tender such written statements under the Sub-rule, thus avoiding the stringency of Rule 92 *bis*.²²¹ The decision maintains that the purpose of Rule 92 *bis* was to “restrict the admissibility of this very special type of hearsay to that which falls within its terms.”²²² Consequently, the Trial Chamber ruled against the motion, but only by majority vote.²²³

Judge Kwon’s dissenting opinion on the matter is not only representative of the lack of unanimity amongst the judiciary regarding the issue of written statements, it also raises a valid question about the future role of such statements in the proceedings of the Tribunal. The basis of the dissent is arguably erroneous, in that it proposes: “Rule 92 *bis* should be interpreted as being applicable to the admissibility issue of written statements when they are to be admitted without cross-examination.”²²⁴ However, Judge Kwon persuasively argues that Rule 89(F) is a potential vehicle for the admission of written testimony that does not fall within the parameters of Rule 92 *bis*.²²⁵

219. “The Prosecutor has stated on several occasions her belief that, for expedition’s sake, more evidence should be submitted in the civil-continental written form, as opposed to live witnesses.” Wald, *supra* note 25, at 541.

220. See Prosecutor v. Milosevic, ICTY Case No. IT-02-54-T (Apr. 16, 2003) (decision in the Trial Chamber on Prosecution motion for the admission of evidence-in-chief of its witnesses in writing).

221. See Prosecutor v. Milosevic, ICTY Case No. IT-02-54-AR.73.2, ¶ 18(3) (Sept. 30, 2002) (decision in the Appeals Chamber on admissibility of Prosecution Investigator’s evidence) (summarizing the *Galic* Decision).

222. *Id.*

223. See Prosecutor v. Milosevic, ICTY Case No. IT-02-54-T (Apr. 16, 2003) (decision in the Trial Chamber on Prosecution motion for the admission of evidence-in-chief of its witnesses in writing) (Kwon, J., dissenting) [hereinafter Dissenting Opinion of Judge Kwon].

224. *Id.* ¶ 4. Such a reading fails to recognize the fact that Rule 92 *bis* specifically provides that the Trial Chamber may require the witness to appear for cross-examination. *ICTY RPE, supra* note 2, at R. 92 *bis* (E). “[A]n elementary rule of interpretation [is] that one should not construe a provision . . . as if it were superfluous and hence pointless . . .” Prosecutor v. Tadic, ICTY Case No. IT-94-1-A, ¶ 284 (July 15, 1999) (Judgment in the Appeals Chamber).

225. Dissenting Opinion of Judge Kwon, *supra* note 223, ¶¶ 3-4.

Of perhaps even greater importance, Judge Kwon's support for the principle of broader admission of written statements before the Tribunal²²⁶ is not a singular point of view. Judge Shahabuddeen has registered a similar opinion,²²⁷ while advocating the utilization of procedures employed at Nuremberg, in order to enable the Tribunal to receive witness statements summarized for the Court by prosecution personnel.²²⁸ Consequently, it appears that the issue of written testimony before the Tribunal may well continue to find itself in a state of flux. In light of this, and because the Tribunal "operates largely in isolation" and is free from the oversight inherent in domestic systems of adjudication, it has been rightly noted that the Tribunal's "emerging body of trial practices must be regularly scrutinized to assure fundamental fairness."²²⁹

XIV. CONCLUSION

The Tribunal has come a long way from its initial decision to exercise a preference for live testimony. Its transition has been inspired by the need for expedition, both with regard to the right of the accused to a speedy trial and at the urging of the international community. The pressures upon the Tribu-

226. See, e.g., Prosecutor v. Milosevic, ICTY Case No. IT-02-54, ¶¶ 2-3 (Mar. 21, 2002) (decision in the Trial Chamber on Prosecution's request to have written statements admitted under Rule 92 *bis*) (Kwon, J., declaration).

[I]t is not entirely clear as to how the practice of the International Tribunal not to admit witness statements as a matter of course has developed. While I appreciate that the International Tribunal is an amalgam of the legal systems of common law and civil law countries, I do not see the reason for limiting the circumstances in which the written statement of a witness can be introduced into evidence before the court.

Id.

227. See, e.g., Prosecutor v. Milosevic, ICTY Case No. IT-02-54-AR.73.2, ¶ 32 (Sept. 30, 2002) (decision in the Appeals Chamber on admissibility of prosecution Investigator's evidence) (Shahabuddeen, J., partial dissenting opinion) (proffering the opinion that Rule 92 *bis* does not preclude recourse to Rule 89(C)) [hereinafter Partial Dissenting Opinion of Judge Shahabuddeen]. To effectuate this position, Judge Shahabuddeen advocates that the *Galic* decision should be overturned. *Id.* ¶ 38 (noting that it is permissible, in limited instances, to depart from prior rulings of the Appeals Chamber).

228. *Id.* ¶ 35. Recognizing that Nuremberg's approach has been overtaken by an increasing emphasis on human rights, Judge Shahabuddeen notes "the problem at Nuremberg remains, and so does the need to find a solution." *Id.* Although rejecting a solution that violates fundamental norms, he contends that a balance must be struck between respecting the rights of the accused and the public interest in ensuring that crimes are properly investigated and duly prosecuted. *Id.* ¶ 36. He adds, "I do not see how both of these important public interests can be satisfied if a decision is taken which effectively means the Trial Chamber's appreciation will rest on partial material." *Id.* ¶ 37.

229. Wald, *supra* note 25, at 537. The importance of this scrutiny was recently emphasized *vis-à-vis* Rule 92 *bis*, as Judge Wald admonished defense counsel that the Rule must be vigorously policed. Patricia M. Wald, *Ten Observations From the Bench About ICTY Trials: Remarks on International Humanitarian Law Before the ICTY Conference* (Feb. 11-12, 2002), at http://www.soros.org.ba/en/programi/pravni/icty_lectures.doc.

nal are enormous and it seems more than likely that they have served to dim the memory of the criticisms of Nuremberg and Tokyo.

One cannot forget, however, that the judge-made *Rules* “essentially amount to a code of procedure for international criminal law”²³⁰ and that the Tribunal is “developing the common law of criminal evidence and procedure.”²³¹ Should the Tribunal give in to the pressure for expediency at the integrity of its proceedings, as it seems well on its way to doing, the wrath will be mighty, and likely more so than in the cases of Nuremberg and Tokyo. The Tribunal’s predecessors had a luxury that it does not, that of a relatively clean slate. The international community will hold the ICTY, in turn, to a higher standard; though it now pressures the ICTY to hurry up, it will likely advocate in the future that the Tribunal should have learned from the mistakes of its forerunners. Indeed, the former Chief Prosecutor at Nuremberg, Robert Jackson, noted, “I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future.”²³² Accordingly, it is beholden upon the Tribunal to be aware that by proceeding with written evidence “something intangible will be lost.”²³³

Of seminal importance, the Tribunal must be mindful that its amendments to its *Rules of Procedure and Evidence* are in serious conflict with its adversarial construct. Indeed, in the continental system, an investigating judge, required to act in an independent and impartial manner, is responsible for vetting written statements. The ICTY was not based on such a paradigm, in part, we are told, due to the intent that its judges remain as impartial as possible.²³⁴ However, the Tribunal continues to engage in “cafeteria inquisitorialism,” drawing upon aspects of the process that will enable it to save time, yet passing over the inherent procedural safeguards in the system.²³⁵ The frustration born of the amalgamation of both processes is significant.²³⁶

230. May & Wierda, *supra* note 29, at 735.

231. DeFrancia, *supra* note 162, at 1399.

232. Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nuremberg War Crimes Trial*, in 20 *TEMPLE L.Q.* 338, 344 (1946-47).

233. “There is a certain moral effect produced in court upon a witness brought face to face with the accused and . . . the use of affidavits would rob the defense of the ‘elusive and incommunicable evidence of a witness’ deportment while testifying.” MAY & WIERDA, *supra* note 138, at 214 (citing ARNOLD BRACKMAN, *THE OTHER NUREMBERG* 147 (1987) (quoting Captain Alfred W. Brooks)).

234. See *Statement of the President*, *supra* note 24.

235. With respect, Judge Shahabuddeen’s observation that the Prosecutor “represents the public interest of the international community and has to act with objectivity and fairness appropriate to that circumstance,” Partial Dissenting Opinion of Judge Shahabuddeen, *supra* note 227, ¶ 18, does not alleviate the absence of civil law safeguards in an adversarial system. The difficulties at the ICTY have caused one observer to remark, “[i]f the ICTY is to become an inquisitorial proceeding along the lines of the civilist tradition, then keep to that course.” Johnson, *supra* note 14, at 183.

236. Indeed, the difficulties of an amalgamated system are well known. At Nuremberg, the Chief Prosecutor was “driven close to distraction” by the “intractable problem[s] . . . caused by the differences between Continental and Anglo-American criminal procedures.” TAYLOR, *supra* note 30, at 63.

For as long as the Tribunal continues to employ an adversarial system, it needs to be mindful of the needs particular to that classification, especially the right to confront one's accusers.²³⁷ The pressure for expedition at the ICTY is only likely to intensify and, given the recent activity of the Tribunal, one can only wonder what the future holds. It is likely time for the Tribunal to revisit its roots, to be mindful that the more it aligns itself with the system employed by its predecessors, the more likely it will be subject to similar criticism and, of greater importance, the more likely that such criticisms will be valid.

237. "[I]t is beyond any question that the right [of confrontation] is a central and defining feature of common law criminal procedure." Lusty, *supra* note 128, at 375.

