The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look

Keywords: accused; fair trial; human rights; International Covenant on Civil and Political Rights; International Criminal Tribunal for the former Yugoslavia

1. INTRODUCTION

In a recent article lamenting the perception of partiality created by an activist judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), one commentator observed the general lack of scrutiny to which the ICTY is being held in its treatment of the rights of the accused.[1] He noted that it "is a court without legal critics: no complaint about its conduct may be made to the Human Rights Committee in Geneva or to the European Court [of Human Rights], and human rights lobbies have tended to look the other way."[2] Indeed, it is in a position that many governments, fatigued by what many of them consider to be cumbersome reporting obligations and troublesome individual complaints procedures under the United Nations treaty body system, would envy.

For a tribunal such as this one, charged with the punishment of individuals for the commission of some of the most heinous crimes imaginable, to succeed in its mandate, it must *scrupulously* observe the rights of the accused - tempting though it will doubtless be to cut corners here and there in the interest of ensuring that the maximum number of guilty people are punished. But putting people in jail will harm, rather than help, the ICTY, and its younger sibling the International Criminal Tribunal for Rwanda,[3] if those adjudged to be guilty are not afforded full human rights guarantees. The success of the Tribunals will not merely be

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1. G. Robertson, *War Crimes Deserve a Fair Trial*, Times (London), 25 June 1996, at 20. The article notes the headline-making activities of Antonio Cassese, one of the Judges of the ICTY, which include, *inter alia*, calling for the expulsion of Serbia from the Olympic Games in Atlanta unless it helped to arrest Radovan Karadžić and General Mladić.
2. *Id.*, at 20.
3. Although this discussion will focus on the International Criminal Tribunal for the former Yugoslavia and not the International Criminal Tribunal for Rwanda, many of the observations made in this article will apply to that tribunal as well. In particular, it should be noted that the Rules of Procedure and Evidence of both tribunals are virtually identical.

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measured by the number of guilty people who are jailed as a result of their work; the success or failure of the two *ad hoc* Tribunals may very well be measured by their contribution to the question of whether the proposed permanent criminal court is ever to become a reality.

Despite full guarantees of the rights of accused under the Statute of the ICTY,[4] and a very positive over-all track record, an alarming trend appears to be developing in the work of the ICTY. This is manifested in certain revisions to the Rules of Evidence and Procedure (the 'Rules') in the last year or so, which have led to a chipping away of certain rights of fair trial and a tendency in the jurisprudence to side-step international human rights jurisprudence under the International Covenant on Civil and Political Rights (ICCPR)[5] - and other regional bodies - by distinguishing the ICTY's obligations from those of state parties to the ICCPR. The following discussion will first give a general overview of the obligation of the ICTY to observe ICCPR and its practice in this regard, as illustrated by its Statute, its Rules and its jurisprudence. The discussion will then turn to some of the specific rights guaranteed in Article 14 of the ICCPR and will comment on some of the practices of the ICTY to date that give rise to concern.

2. OVERVIEW: GENERAL OBLIGATION ON THE ICTY TO OBSERVE THE ICCPR

2.1. The Statute

Unfortunately, the Statute does not provide that the ICTY must comply with the ICCPR or the holdings of the Human Rights Committee[6] - or, indeed, any international standards on human rights. The only indication of the obligations of the ICTY in this regard appears in paragraph 106 of

4. Statute of the ICTY, originally published as an annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993) and adopted pursuant to Security Council Resolution 827 of 25 May 1993.
5. The ICCPR, 6 ILM 368 (1967), was adopted by the General Assembly on 16 December 1966 and entered into force 23 March 1976.
6. The Human Rights Committee was established pursuant to Art. 28 ICCPR on 20 September 1976.

the Secretary-General's Report, in which the ICTY's Statute was proposed. It provides:

> [i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.[7]

Although the ICCPR is stressed in particular, it is the broader, "internationally recognized standards regarding the rights of the accused" which the ICTY is bound to observe. The wording in paragraph 106 implies that the ICTY must respect the ICCPR *at a minimum*.

Article 21 of the Statute[8] provides the rights contained in Article 14(1-3) of the ICCPR with the exception of the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law."[9] A related guarantee is found at Article 20(1) of the Statute, which

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7. Report of the Secretary-General, *supra* note 4.
8. Statute, *supra* note 4, Art. 21, states: "[r]ights of the accused[:] 1. All persons shall be equal before the International Tribunal. 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute. 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute. 4. 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: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (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; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal; (g) not to be compelled to testify against himself or to confess guilt."
9. *Id.* The reference to impartiality in the ICCPR is picked up at Art. 13(1) of the Statute, which requires judges to be of "high moral character, impartiality and integrity." The fact that the reference to the ICTY being 'established by law' is not contained in the Statute is hardly surprising. Although it is a provision that clearly belongs in the ICCPR, which covers countless tribunals the world over, it would not make sense for a Statute dealing with only one tribunal to include such a provision. Rule 21(2) provides that the right to "a fair and public hearing [is] subject to article 22 of the Statute." Art. 22 deals with the protection of victims and witnesses. The fact that the 'subject to article 22' wording qualifies the right to a *fair and public hearing*, and not just the right to a public hearing, may signal the view of the drafters that the rights of the accused may have to be limited in favour of the need

provides that a trial must be "fair and expeditious [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[10] It must be recalled that the rights guaranteed in Article 14(3) are themselves "minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by article 1."[11] Other rights in Article 14 of the ICCPR are found elsewhere in the Statute.[12]

2.2. The Rules

As of June 1996, the ICTY's Rules of Procedure and Evidence had been revised eight times.[13] This observation is not intended as a criticism;[14] indeed, the constant revising of rules of procedure can be a reassuring indication of a desire to perfect the rules. What is troubling, however, is when the revised version of the Rule affords a weaker guarantee of rights of due process to an accused.[15]

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to protect the victim or witness. For more on this subject, *see* the discussion of the right to a fair hearing and the right to a public hearing, in Sections 3.1. and 3.2., *infra*.

10. *Id.*
11. General Comment 13 (Twenty-First Session 1984), UN Doc. HRI/GEN/1/Rev.2, at 14-17, para. 21.
12. The right of appeal, for example, is provided for in Art. 25 of the Statute; *see* Secretary-General's Report, *supra* note 4, para. 116, where reliance is again placed on "inter alia [...] the International Covenant on Civil and Political Rights [...]".
13. The Rules of Procedure and Evidence of the ICTY were adopted at the end of the second plenary session on 11 February 1994. Rule 96 was amended on 5 May 1994 at the third plenary. Rule 70 was amended in October 1994 outside plenary (this is provided for at Rule 6(B) of the Rules). At its fifth plenary session in January, 1995, the Judges adopted amendments to 41 of the 125 Rules (2, 3, 5, 8, 9, 10, 12, 13, 15, 28, 36, 37, 39, 40, 42, 43, 45, 47, 53, 54, 55, 57, 61, 62, 65, 66, 68, 70, 72, 75, 77, 88, 90, 91, 93, 95, 96, 101, 105, 108, and 117) and adopted one new Rule (116 *bis*). Three amendments to the Rules were adopted at the sixth plenary session, held 1-3 May 1995: 99(B) (French text only), 61(A), and 10(C). At the seventh plenary, on 15 June 1995 the following Rules were amended: 15(E), 62(iii), 69(B), and 75. At the eighth plenary in October 1995, Rules 15, 43, 54, 56, 58, 59, 70, and 93, were amended, and Rule 90 *bis* was added. On 18 January 1996, as a result of the ninth plenary, Rules 50, 55(B), 61(A), and 61(E) were amended, and Rule 59 *bis* (A) and (B) was added. Rules 28 and 61(D) were amended and 40 *bis* was added on 23 April 1996, arising out of the tenth plenary session.
14. The task of preparing rules for an unprecedented Tribunal such as the ICTY is an enormous one. The Rules are a remarkable accomplishment, particularly when contrasted with the two or three pages of rules used by the Nuremberg Tribunal.
15. It is interesting to note that the Rules provide that "[p]roposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar [...]". This fact, alone, gives the Prosecutor an advantage over the accused.

The rights of the accused guaranteed in Article 21 of the Statute are covered, to various extents, in different rules. One general rule is Rule 95, entitled 'Evidence Obtained by Means Contrary to Internationally Protected Human Rights.'[16] Unfortunately, its heading has become a bit misleading. Since its revision at the fifth plenary session, it no longer prohibits the evidence referred to in its heading.[17] Instead, it now only prohibits the admission of evidence that is "obtained by methods which cast *substantial* doubt on its reliability" or that is "antithetical to, *and* would *seriously* damage, the integrity of the proceedings."[18] The test seems very high: evidence obtained by methods that cast doubt on its reliability, but not *serious* doubt, would appear to be acceptable; evidence that is antithetical to, and damages the integrity of, the proceedings, but does not *seriously* damage that integrity, would not be excluded. In addition, the use of the word 'and' in the latter test indicates that the presence of one of the two elements is insufficient to exclude the evidence.[19] This revised version does not bind the ICTY to internationally recognized human rights standards; instead, it leaves matters entirely up to the judges.

2.3. Jurisprudence

Setting aside the four, sometimes elaborate, decisions under the Rule 61 procedure to date (and one would hope that the ICTY *would* set aside decisions that make findings of fact and law based on submissions by the Prosecutor's office and the testimony of the prosecution's witnesses only - indeed, one is left wondering why such pronouncements are being made in the first place),[20] the jurisprudence that has emerged from the ICTY

16. Rule 95 provides: "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."
17. Formerly, Rule 95 prevented the use of evidence that was obtained by illegal means in a manner that seriously violated internationally protected human rights standards, without a separate inquiry into whether the methods used to obtain the evidence affected its reliability or the integrity of the ICTY's proceedings.
18. Rule 95 (emphasis added).
19. *Cf.* Art. 55(c) of the Draft Declaration on the Right to a Fair Trial and a Remedy, which provides that "[e]vidence unlawfully obtained shall not be used as evidence against the accused or against any other person in any proceeding"; reproduced *in* S. Bassiouni & A. de Zayas, The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards 183 (1992).
20. The Rule 61 procedure, which only comes into play when an accused is not present before

comes mainly from two pre-trial motions brought in June 1995. These were brought in the case of Dusko Tadić, the first accused to be physically present before the ICTY. This trial is currently on-going in the Hague.[21] In one of the decisions arising from the two pre-trial motions, one of the two Trial Chambers dealt with a claim by Tadić that the ICTY lacked jurisdiction (*Tadić First Instance (Jurisdiction)*);[22] in the other, the Trial Chamber considered a request by the Prosecutor that certain steps be taken to protect witnesses (*Tadić First Instance (Witness Protection)*).[23] Only the decision relating to jurisdiction was appealed (*Tadić Appeal (Jurisdiction)*).[24] In *Tadić First Instance (Witness Protection)* and, to a lesser extent, in *Tadić Appeal (Jurisdiction)*, the ICTY considered the effect of Article 14 of the International Covenant on Civil and Political Rights and the law generated by the Human Rights Committee.

In *Tadić First Instance (Witness Protection)*, the defence argued that certain measures requested by the Prosecutor, requiring certain information to be withheld from the public and allowing some witnesses to testify anonymously, were in contravention of the accused's rights to a public hearing and a fair trial as guaranteed under Article 14 of the ICCPR and Articles 20 and 21 of the ICTY's Statute. The defence argued that the

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the ICTY, is said not to be a trial *in absentia*; it is said to be merely a review by a panel of three judges of the indictment (which had earlier been confirmed by a single judge). However, rather than merely confirming or denying the indictment with a one-word pronouncement, a practice has developed whereby Judges pronounce on highly controverted facts and highly controverted law (though, as the decisions will point out, the pronouncements are based on a 'reasonable grounds for believing' standard), after having heard only the submissions by the Prosecutor's office and witnesses called by the Prosecutor's office.

21. In the almost three years since the ICTY began its functioning in November 1993, it has created very little in the way of jurisprudence. This is in by no means due to a lack of motivation on the part of the prosecution or the judges of the ICTY. It is a symptom of the fact that the states (primarily Serbia, Croatia, and the Bosnian Serb part of Bosnian Herzegovina) where most of the persons indicted are located have not cooperated fully with the ICTY by delivering to the ICTY the accused persons within their borders; nor has the Implementation Force (IFOR) indicated a willingness to assist the ICTY by arresting accused persons.
22. The jurisdictional motion, Case No. IT-94-1-T, was originally heard by Trial Chamber II, which issued a decision on 10 August 1995.
23. Case No. IT-94-1-T, 10 August 1995 (hereinafter Tadić First Instance (Witness Protection)).
24. Case No. IT-94-1-AR72, 2 October 1995 (hereinafter Tadić First Instance (Jurisdiction)). The fact that the defence did not appeal the decision on witness protection is presumably not based on an acceptance by the defence of the finding. It is more likely based on the fact that Rule 72(B) only allows interlocutory appeals in cases of dismissal of an objection based on lack of jurisdiction.

ICTY was bound by international standards, as expressed, *inter alia*, under the ICCPR.

In a preliminary section on sources of law, the Trial Chamber considered the ICTY's relationship with the ICCPR and the jurisprudence generated under it. In the words of the Trial Chamber:

> [a] fundamental issue raised by this motion is whether, in interpreting and applying the Statute and Rules of the International Tribunal, the Trial Chamber is bound by interpretations of other international judicial bodies or whether it is at liberty to adapt those rulings to its own context.[25]

After considering the issue, the Trial Chamber followed the latter course.

The Trial Chamber stated that it was troubled by the lack of guidance in the Secretary-General's Report on the question of how to treat decisions of, *inter alia*, the Human Rights Committee:

> [a]lthough the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies.[26]

The Trial Chamber stated:

> The drafters of the [Secretary-General's] Report recognized that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future. [...] In response to these concerns, the drafters adopted a liberal approach in procedural matters. Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standards of due process set forth in Article 14 of the ICCPR [...]. In fact, the Statute provides greater rights than the ICCPR by extending judicial guarantees to the pre-trial stage of the investigation.[27]

However, the Trial Chamber stressed the need to interpret the provisions of the ICCPR "within the context of the 'object and purpose' and unique

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25. Tadić First Instance (Witness Protection), *supra* note 23, para. 17.
26. *Id.*, para. 19.
27. *Id.*, para. 25.

characteristics of the Statute."[28] These 'unique characteristics' are discussed in paragraphs 20 to 23 of the decision and include the fact that the ICTY is "distinct form its closest precedents", the ICTY's merger of common law and civil law aspects,[29] and certain "elements of the armed conflict in the former Yugoslavia", including the view that the nature of the crimes may lead to a fear on behalf of witnesses of reprisals against them or their families. Among its primary considerations was the ICTY's "affirmative obligation to protect victims and witnesses [...]",[30] something not found under Article 14 of the ICCPR. In view of this difference, the Trial Chamber found the Human Rights Committee's interpretations of Article 14 to be "only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal [...]".[31] The Trial Chamber stated:

> In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique legal framework.[32]

The Trial Chamber found further support for the need to interpret its provisions within its own legal context, rather than relying on interpretations made by other judicial bodies, in the fact that it is "adjudicating crimes which are considered so horrific as to warrant universal jurisdiction."[33]

The Trial Chamber described the ICTY as "in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence."[34] It distinguished itself from "courts dealing with offences purely under national law"[35] and noted its right to have "more elastic rules of evidence".[36] In support of these

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28. *Id.*, para. 26.
29. It is, of course, the case that the ICCPR represents the accommodation of various systems of civil and common law.
30. Tadić First Instance (Witness Protection), *supra* note 23, para. 26.
31. *Id.*, para. 27.
32. *Id.*
33. *Id*, para. 28.
34. *Id.*
35. *Id.*
36. *Id.*

contentions, the Trial Chamber gave the example of the use of affidavits or hearsay evidence. It relied on the 1949 publication *Law Reports of Trials of War Criminals*[37] for the principle that hearsay evidence has been relied on "under the laws governing at least most of the countries which have conducted trials of offences under international criminal law."[38] The same work was cited with reference to the use of written evidence.[39]

This part of the decision is troubling. It is almost as though the Trial Chamber is saying that because military tribunals have operated with limited due process rules, that procedure is somehow more correct. The operation of military tribunals has been of particular concern to the Human Rights Committee. It has made clear its view on the applicability of the guarantees in Article 14 to such tribunals:

> [t]he provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. [...] While the Covenant does not prohibit [military or special courts which try civilians], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and should take place under conditions which genuinely afford the full guarantees stipulated in article 14.[40]

As one commentator noted:

> [a]lthough [General Comment 13] only expressly deals with the problem of the trial of civilians by special courts and tribunals, during the discussion of the draft comment concern was also expressed at the lack of fair trial guarantees for military personnel in such bodies.[41]

In conclusion, the Trial Chamber acknowledged that Article 21 of the Statute provides minimum judicial guarantees to which all defendants are entitled and reflects the internationally recognized standards of due process set forth in Article 14 of the ICCPR.[42] Indeed, the Trial Chamber

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37. XV Law Reports of Trials of War 198 (1949).
38. Tadić First Instance (Witness Protection), *supra* note 23, para. 28.
39. *Cf.* D. McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1991), in which the author notes that "[i]t is difficult to see how [reliance by the authorities on written evidence alone] could comply with Article 14(3e) or indeed the general fair hearing requirement in Article 14(1)." *Id.*, at 409.
40. General Comment 13, at 14, para. 4.
41. McGoldrick, *supra* note 39, at 400.
42. Judge Stephen, in his Separate Opinion on the question of anonymous witnesses, noted the

boasted that accused persons before the ICTY are provided with greater rights than under the ICCPR.[43] However, the Trial Chamber proceeded to distance itself from the ICCPR, or at least from the jurisprudence created under it, thereby allowing itself full authority to determine when it wants to comply with the ICCPR. This will be considered below in the discussion of the Trial Chamber's decision regarding anonymous witnesses and confidentiality.[44]

3. OBLIGATION OF THE ICTY TO OBSERVE ARTICLE 14 OF THE ICCPR

3.1. Fair trial; Equality of arms; Right to examine witnesses

Article 14 of the ICCPR states in part:

> 1. [...] In the determination of any criminal charge against him [...] everyone shall be entitled to a fair and public hearing by a [...] tribunal [...] established by law [...].
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> [...]
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> 3. In the determination of any criminal charge against him, everyone 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 [...].[45]

3.1.1. Rule 70(B-F)

One area for concern under the Rules is Rule 70, which, at sub-rules (B) to (E), provides certain rights to the Prosecutor, but not to the accused,

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"express and unqualified terms of Article 21 with its spelling out of specific rights of the accused, including the 'minimum guarantees' in Article 21(4)," and noted that "Article 20(1) requires the Trial Chamber to ensure that they are accorded full respect [...]". Tadić First Instance (Witness Protection), *supra* note 23 (the pages and paragraphs of the Separate Opinion are unnumbered).

43. *See id.*, para. 25, where the Trial Chamber relies on the fact that the Statute extends judicial guarantees to the pre-trial stage to support this assertion.

44. *See* Sections 3.1. and 3.2., *infra*.

45. Art. 14, ICCPR, *supra* note 5.

regarding the receipt, presentation, and cross-examination of evidence and information that the source deems to be confidential. The rule appears to be designed to address the fear on the part of bodies - presumably inter-governmental organizations, non-governmental organizations, and states - that if they share confidential information with the ICTY, they will be required to disclose its source. According to Rule 70(B),[46] this information can only be used as a basis of collecting other evidence; it may not be used as evidence without prior disclosure to the accused.[47] Furthermore, there can be no disclosure of the evidence or its origin without the consent of the source, and the Prosecutor may not be compelled to disclose the information or its origin.

Rule 70(C)[48] provides that if the Prosecutor decides to present the material discussed in Rule 70(B) as evidence, and if the consent spoken of is obtained, the Trial Chamber may not order additional evidence or summon an individual - notwithstanding its power to do so under Rule 98. Rule 70(D)[49] provides that if the Prosecutor decides to call the provider

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46. Rule 70(B) provides: "[i]f the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused."
47. Although it is not entirely clear, it appears that Rule 70(B) contemplates that where the confidential evidence is to be relied upon by the Prosecutor, both the information and its origin must be disclosed to the accused. If it were the information only (and not the source), the result would be the admission of evidence with no indication of its origin - something which would be of extremely limited value to a court and would be extremely unfair to the opposing party. For example, a photograph of an accused beside a mass grave, with no possibility for the accused's counsel to determine who took the photograph or under what circumstances, would be extremely prejudicial to the accused; moreover, it would be of virtually no assistance to the Chamber. In addition, if evidence were to be admitted without allowing the defence to ask questions regarding its source, there would be no way for the accused - and, indeed the Trial Chamber - to ensure that the evidence was not obtained in such a manner that its admission would seriously damage the integrity of the proceedings, contrary to Rule 95.
48. Rule 70(C) provides: "[i]f, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber, for the purpose of obtaining such additional evidence, itself summon that person or a representative of that entity as a witness or order their attendance."
49. Rule 70(D) provides: "[i]f the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds

of the information (or a representative) as a witness, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on the basis of confidentiality. In short, the ICTY has delegated its power to determine whether a question should be answered by a prosecution witness to that witness.

Rule 70(E)[50] provides that the accused's right to challenge the evidence presented by the prosecution is unaffected - subject to the limitations in Rule 70(C) and Rule 70(D).[51] Presumably, this reference to Rule 70(C) is intended to interfere with the right the defence would normally have to call any necessary witnesses (including witnesses who are not willing to appear without a subpoena). If so, this restriction is a very substantial limitation on the defence's rights under Article 14(3e) of the ICCPR and Article 21(4e) of the Statute. The reference to Rule 70(D) in Rule 70(E) makes clear that the accused has no right to have its question answered if the witness deems the answer to be confidential. Rule 70(F)[52] provides that the limitation on the Trial Chamber's right to call additional evidence or its right to compel the witness to answer certain questions does not affect a Trial Chamber's right to *exclude* certain evidence where its probative value is substantially outweighed by the need to ensure a fair trial. This seems to emphasize the fact that even though the Trial Chamber's hands are tied with respect to calling additional evidence or compelling a witness to answer, the Trial Chamber is not giving up the power to exclude or discount evidence.

The most striking feature of Rule 70 is the extent of the power it places in the hands of the person or entity providing the 'confidential' information.[53] Firstly, the decision as to whether information provided

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of confidentiality."

50. Rule 70(E) provides: "[t]he right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected, subject only to the limitations contained in Sub-rules (C) and (D)."

51. The references to Rules 70(C) and 70(D) are not quite clear; after all the accused has no equivalent to the Trial Chamber's right (discussed at 70(C)) to call additional evidence or certain witnesses under Rule 98 or to the Trial Chamber's right (discussed at 70(D)) to compel a witness to answer a question.

52. Rule 70(F) provides: "[n]othing in Sub-rules (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence it its probative value is substantially outweighed by the need to ensure a fair trial."

53. Limitations on disclosure of evidence or testimony, of a sort similar to those set out in Rule 70, are not unheard of in common-law municipal systems, which frequently provide for

to the Prosecutor is to be considered confidential, and therefore covered by Rule 70(B), is one which lies with the provider of the information. Secondly, the decision under Rule 70(B) as to whether the information or its source may be "disclosed by the Prosecutor" lies with the provider of the information. Thirdly, the Prosecutor's decision under Rule 70(C) as to whether the evidence may be presented to the Trial Chamber is dependent on the consent of the individual or entity providing the information. Finally, under Rule 70(D) the decision whether to decline to answer any question on the ground of confidentiality lies with the provider of the information. In light of the fact that it is the provider of the information that takes these decisions - and not the Chamber - it is difficult to judge the scope of the exception.

The provision in Rule 70(D) leaving it entirely to a witness's discretion whether he or she will answer any question or refuse to do so on the grounds of confidentiality is a remarkable limitation on the right of the accused to cross-examine a witness. In contrast to the process engaged in by national courts of weighing the protection to the individual against the right of the accused to confront a witness against him, this limitation on cross-examination under the Rules applies when the witness determines that it does - regardless of the importance of the testimony and without any judicial analysis of the legitimacy of the reason for the limitation. Thus, Rule 70(D) severely limits an accused person's right to cross-examine without providing the protection of a judicial determination that such restriction is appropriate.

'public interest immunity' in cases where certain compelling interests are believed to outweigh the need for full disclosure and the right to fully cross-examine a witness. However, two distinctions must be drawn between Rule 70 and the rules in place in the common-law jurisdictions with which I am familiar. Firstly, the municipal 'public interest immunity' tends to be far narrower. It involves a balancing of competing public interests and tends to be granted only "where the public interest involved in maintaining the confidentiality of the facts sought to be proven outweighs the public interest in having all relevant interest adduced in court." P. Gillies, Australian Evidence Cases & Commentary 489 (1988); *see also* C. van den Wyngaert, Criminal Procedure Systems in the European Community 210 (1993), in which the Irish system is discussed. Secondly, a decision of this nature in a domestic system would be one that almost invariably lies with the court, rather than the witness. In rare cases it may be a governmental organ or its representative, and not the court, which determines whether information or documents are too sensitive to be disclosed. This will involve matters of parliamentary freedom or national security and the documents tend to be extremely limited in type. *See, e.g.,* J. Sopinka, S. Lederman & A. Bryant, The Law of Evidence in Canada 781 (1992); or P. Gillies, Australian Evidence Cases & Commentary 487-488 (1988), in which he quotes Sankey *v.* Whitlam, 142 CLR 1 (1978).

As the determination of whether a question is suitable is left to the witness and not the Chamber, one could easily envisage a situation in which a representative of a state or intergovernmental organization (or indeed a victim)[54] could be called by the Prosecutor, answer all of the questions put to him or her by the Prosecutor - and these would presumably be questions that the Office of the Prosecutor would have spent considerable time discussing with the witness - and simply decline to answer the defence's questions, one after the other. Unless the Trial Chamber then excludes the evidence after determining that "its probative value is substantially outweighed by the need to ensure a fair trial", the accused's right to cross-examine a witness as guaranteed under the Statute and the ICCPR is violated. Article 21(4e) provides an accused with the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him.*"[55] Clearly, Rule 70 disregards this provision: the accused's guilt or innocence may be determined, at least in part, based on testimony which the accused may not be permitted to cross-examine. Even if one relies on the judges to ensure procedural fairness by discounting evidence that is unfair to the accused on the basis that its probative value is substantially outweighed by the need to ensure a fair trial, gross inequality still exists as the witnesses for the accused have no similar right to provide evidence confidentially, nor does the accused have the right to call witnesses who may refuse to answer questions on the grounds of confidentiality.

The problem with the sub-rules may, in part, be a result of their developing piecemeal. Pursuant to Rule 70(B),[56] evidence provided by a secret source was to be solely for the basis of generating new evidence - not as evidence admissible against the accused. This evolved at fifth plenary, so that the evidence provided by the secret source could, indeed, be used as evidence against the accused - so long as the defendant was provided with it in advance.[57] The Rule became one where not only

54. Nothing in the wording of the sub-rules limits their application to organizations; indeed, the provisions could be used to restrict questioning of any prosecution witness who has provided information to the Prosecutor on a confidential basis, including a victim.
55. Art. 21(4e) (emphasis added).
56. Agreed to in October 1994, outside of plenary.
57. Before the words "and shall in any event not be given in evidence without prior disclosure

could such evidence be used against an accused before a Trial Chamber, but the evidence could be presented entirely on the terms of the secret source.[58] Under the current incarnation of the provision, the rights of the Trial Chamber and the accused to demand additional evidence or call a witness relating to the evidence (no matter how much the material or witness may be required to make the evidence sensible or fair) are suspended; the Trial Chamber's right to ask the witness questions is suspended, and the right of the accused to have a full cross-examination is suspended.

3.1.2. The majority decision on anonymous witnesses

When dealing with issue of testimony by anonymous witnesses, the Trial Chamber in *Tadić First Instance (Witness Protection)* set itself the task of balancing various factors in interpreting the accused's rights: "the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness."[59] It continued:

> The balancing of these interests is inherent in the notion of 'fair trial'. A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses.[60]

The use of the right to a fair trial under the Statute - which, of course, had its origin in the ICCPR - to ensure fair treatment of the prosecution, is surprising.[61]

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to the accused" were added at the end of the Rule at the fifth plenary. The phrase in Rule 70(B) "and which has been used solely for the purpose of generating new evidence" seems to be contradictory to the wording added subsequently. If information is said to be solely for the purpose of generating new evidence, this would appear to exclude its use as evidence. It may be that this apparent contradiction is due to the fact that the language allowing the information to be used in evidence (once disclosed to the accused) was an afterthought. This seems to represent a 'chipping away' of the earlier expressed provision.

58. Rules 70(C-F) were added after the eighth Plenary.
59. Tadić First Instance (Witness Protection), *supra* note 23, para. 55.
60. *Id.*
61. Provisions exist in the Statute which qualify the accused's right to a fair trial by providing rights for victims and witnesses (Article 20(1) of the Statute mentions the need for a fair trial and notes the need for full respect for "the rights of the accused and due regard for the protection of victims and witnesses", and Article 21(2), which provides the accused's right to a fair hearing, is subject to Article 22 (protection of victims and witnesses)) and which represent changes from the fair trial right under the ICCPR (which deals only with the rights of the accused). However, nowhere in the Statute is there support for the prosecu-

The Trial Chamber found that it has a discretion to "restrict the right of the accused to examine or have examined witnesses against him [...]" but noted that the "discretion must be exercised fairly and only in exceptional circumstances [...]".[62] To show the exceptional nature of the circumstances, the Trial Chamber cited the nature of the conflict, finding the situation of armed conflict in the former Yugoslavia to be "exceptional circumstances *par excellence.*"[63] It noted that "[i]t is for this kind of situation that most major international human rights instruments allow some derogation from recognized guarantees"[64] and cited, *inter alia*, Article 4 of the ICCPR. Although the Trial Chamber relied on the existence of derogation clauses as showing "that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification [...]",[65] it did not go on to consider the work of the Human Rights Committee[66] or other international jurisprudence on the subject of derogation from the right to fair trial. Instead it sought "[g]uidance as to which other factors are relevant when balancing all interests with respect to granting anonymity to a witness"[67] from domestic law. One is left with the impression that the Trial Chamber relied on international human rights norms when it considered them to be supportive of its decision, and when it could find no further support, it looked elsewhere - in this case it looked to domestic law.[68]

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tion's right to fair trial.

62. Tadić First Instance (Witness Protection), *supra* note 23, para. 60.
63. *Id.*, para. 61.
64. *Id.*
65. *Id.*
66. Here it seems to have ignored the implications of Draft Optional Protocol 3, reproduced *in* Bassiouni & de Zayas, *supra* note 19, at 188-190, which would make the rights under Art. 14 non-derogable.
67. Tadić First Instance (Witness Protection), *supra* note 23, para. 61.
68. Based on domestic law, the Trial Chamber set out five factors, the consideration of which will be relevant in deciding when anonymous evidence may be permissible: 1. the depth of the fear for the safety of the witness or his or her family; 2. the importance of the testimony to the Prosecutor's case; 3. the reliability of the witness (there must be no *prima facie* evidence that the witness is untrustworthy); 4. the ineffectiveness of non-existence of a witness protection programme; and 5. the existence of other less restrictive ways of ensuring protection to the witness.

The Trial Chamber held that anonymity of a witness does not necessarily violate the right of the accused to examine, or have examined, the witnesses against him. The Trial Chamber noted that that:

> right is laid down in Article 21(4) of the Statute of the ICTY. Anonymity of a witness does not necessarily violate this right, as long as the defence is given ample opportunity to question the anonymous witness. Witness anonymity will restrict this right to the extent that certain questions may not be asked or answered, but, as noted above and as evidenced in national and international jurisdictions applying a similar standard, it is permissible to restrict this right to the extent that is necessary.[69]

The only case of "international jurisdictions applying a similar standard", which the Trial Chamber "noted above" in relation to witness anonymity, is the case of *Kostovski*,[70] a decision of the European Court of Human Rights. Thus, this must be the international jurisprudence the Trial Chamber is relying on in the above passage. In the very next paragraph, however, the Trial Chamber takes steps to distance itself for the *Kostovski* case. In response to the assertion by the defence that *Kostovski* describes the 'bottom line' on the rights of the accused in this matter, the Trial Chamber states that the *Kostovski* case "is not directly on point".[71]

At paragraph 75, the Trial Chamber concluded on the issue:

> [t]he limitation on the accused's right to examine, or have examined, the witnesses against him, which is implicit in allowing anonymous testimony, does not, standing alone, violate his right to a fair trial.[72]

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69. Tadić First Instance (Witness Protection), *supra* note 23, para. 67.
70. Decision of 23 May 1989, Ser. A, No. 166. The case involved a proposal of the Dutch government to enact legislation allowing anonymous testimony for witnesses who had justification for fearing reprisals. The Commission held that where a witness would run an unacceptable risk if his or her identity were known, an anonymous witness statement could be admitted as evidence if certain precautions were taken. The European Court, however, held that such constraints would interfere with an accused's right to receive a fair trial.
71. Tadić First Instance (Witness Protection), *supra*, note 23, para. 68.
72. The Trial Chamber provided the following guidelines to ensure a fair trial when granting anonymity: 1. the judges must be able to observe the demeanour of the witness; 2. the judges must know the identity of the witness "in order to test the reliability of the witness"; 3. "the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable" (para. 71); and 4. "the identity of the witness must be released when there are no longer reasons to fear for the security of the witness" (para. 71).

While reserving the right to alter its decision at the end of the trial,[73] the majority of the Trial Chamber held "that the Prosecutor has met the necessary criteria to warrant anonymous testimony"[74] in respect of certain witnesses and ordered that the identity of the certain witnesses be withheld from the accused and his defence counsel.[75]

3.1.3. The Separate Opinion on anonymous witness

On the question of anonymous testimony, Judge Stephen disagreed with the majority of the Trial Chamber and added a Separate Opinion. Like the majority, he also relied on *Kostovski* - but to support his opposite conclusion. Like the majority, Judge Stephen expressed caution about using international jurisprudence, but then made liberal use of the decisions under the European Convention on Human Rights.[76] At the outset, he made several findings relating to the nature of the rights guaranteed under Article 21 and, to a lesser extent, Article 20 of the Statute. As was noted above, the guarantee of the right to a "fair and public hearing" in Article 21(2) is made "subject to article 22 of the Statute", which deals with witness protection. He noted the

> striking difference between the entitlement to a 'fair and pubic trial' conferred by Article 21(2), expressly made 'subject to article 22', and all the other rights of the accused specified in the remainder of Article 21, which are wholly unqualified by any reference to Article 22. The fact that Article 21(2) is made subject to Article 22 makes all the more significant the unqualified nature of the other rights conferred on the accused by Article 21. It surely is tantamount to an assertion that the remainder of Article 21 is not subject to Article 22; otherwise I find the confining of the reference to Article 22 solely to Article 21(2) as inexplicable.[77]

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73. *See* Tadić First Instance (Witness Protection), *supra* note 23, para. 84, in which the Trial Chamber noted: "[i]f, after considering the proceedings as a whole, as suggested in the *Kostovski* case, the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded."
74. *Id.*
75. *Id.*, Disposition, paras. 11 and 14.
76. Tadić First Instance (Witness Protection), *supra* note 23 (the pages and paragraphs of the Separate Opinion are unnumbered).
77. *Id.*

Judge Stephen rejected the majority view that the right to cross examination, as guaranteed in Article 21(4) of the Statute, can be limited to allow for anonymous witnesses. He stated:

> [t]he express terms of Article 21: that all persons shall be equal and that the accused shall have "the following minimum guarantees, in full equality" including a guarantee of being tried in his own presence and of having the right "to examine, or have examined, the witnesses against him ..." is wholly consistent with this interpretation of the Statute and sits ill with any other view of it.[78]

Thus, he concluded that the Statute does not authorize anonymity of witnesses "where this would, in a real sense, affect the rights of the accused specified in Article 21 and in particular the 'minimum guarantee' in (4)".[79]

3.1.4. Conclusion on the decision on anonymous witnesses

In sum, the majority made a finding that would severely limit the right of the accused to cross-examine witnesses against him,[80] all the while invoking the rights contained in the ICCPR and, while insisting that it is not bound by it, invoking the case law under the European Convention of Human Rights. This despite the fact that the finding of the majority seems to be contrary to the wording of Article 14(3e) of the ICCPR and Article 21(4e) of the ICTY's Statute, as well as the views of at least one expert on the ICCPR,[81] General Comment 13,[82] and the Draft Declar-

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78. *Id.*
79. *Id.*
80. *Id.*, as noted by Judge Stephen in his Separate Opinion: "The cumulative effect [of the relief sought (and, with the exception of the request to place the accused in a special room, granted by the majority)] would permit, for the testimony of these important and vulnerable witnesses, hearings in camera, the name and other identifying data of a witness withheld from the defence and the testimony given from a special room linked to the courtroom by closed circuit television and the use of voice altering devices and the image of the witness either so distorted as to be unrecognizable or not transmitted at all to the defence. The consequence could be that to the defence the accuser would appear as no more than a disembodied and distorted voice transmitted by electronic means. Yet this could be the means of bringing before the Chamber evidence which the prosecution has described as either very important or important, evidence which could lead to the accused's conviction on very serious charges."
81. *See* M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 262 (1993), in which the author notes that the right at Article 14(3) is "an essential element of 'equality of arms' and thus of a fair trial." He notes that the accused's right to examine, or have examined, witnesses for the prosecution, is without restriction, unlike the right of the

ation on the Right to a Fair Trial and a Remedy.[83]

3.2. Public hearing

In *Tadic First Instance (Witness Protection),* the Trial Chamber noted the need to balance the right to a public hearing with "other mandated interests, such as the duty to protect victims and witnesses",[84] and it held that the "special concerns of victims of sexual assault"[85] must be given consideration in the balancing process. The Trial Chamber ruling appears to comply with the provisions of its Statute, and, despite its reiteration that it was not bound by the findings of international judicial bodies such as the Human Rights Committee, with the provisions of the ICCPR. It stated:

> [e]ven if the rulings of other international judicial bodies were binding on the Trial Chamber, they would not necessarily prohibit measures to protect the confidentiality of victims and witnesses, as these bodies tend to balance the interests of the victims and witnesses with the rights of the accused without the affirmative duty to do so. Article 14(1) of the ICCPR and Article 6(1) of the [European Convention on Human Rights] state that everyone is entitled to a fair and public hearing. Nevertheless, both articles provide that the press and public may be excluded in the interest of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary

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accused to obtain the examination of witnesses on his behalf. *Id.*, at 262-263.

82. General Comment 13, para. 12, states that Article 14(3e) "is designed to guarantee the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."

83. The Draft Declaration on the Right to a Fair Trial and a Remedy provides: "2. A 'fair [...] hearing' requires respect for the principle of equality of arms between parties to the proceedings, whether they be civil, criminal, administrative, or military. [...] 55. In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor: [...] (b) Prosecution and defence witnesses shall be given equal treatment in all procedural matters; [...] 60. The accused has a right to examine or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her: [...] (j) *The use of testimony of anonymous witnesses during a trial is a violation of the defendant's right to examine witnesses against him or her.*" Draft Declaration on the Right to a Fair Trial and a Remedy, reproduced *in* Bassiouni & de Zayas, *supra* note 19, at 169-187 (emphasis added).

84. Tadić First Instance (Witness Protection), *supra* note 23, para. 33.

85. *Id.*, para. 50.

> in special circumstances where publicity would prejudice the interests of justice.[86]

3.3. Established by law

In *Tadić Appeal (Jurisdiction)*, the "Appellant challenge[d] the establishment of the International Tribunal by contending that it [had] not been established by law."[87] In support of this assertion, he relied on Article 14(1) of the ICCPR.[88] The Appeals Chamber, in its Majority Decision, found that the right to have a criminal charge determined by a tribunal established by law is a

> general principle of law imposing an international obligation [on states and requiring them] to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right [...].[89]

However, the Appeals Chamber held that the right to be tried by a tribunal established by law did not apply to proceedings conducted before an *international* court, based on the fact that there is "no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community."[90]

The Majority of the Appeals Chamber then gave a different interpretation to the concept of 'established by law', concluding that it required that the ICTY be established *in accordance with the rule of law*. It held that for the ICTY

> to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.[91]

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86. *Id.*, para. 37.
87. Tadić Appeal (Jurisdiction), *supra* note 23, para. 41.
88. As discussed in note 9 *supra*, the provision of Art. 14(1) providing the right to be tried by a tribunal established by law was not included in Art. 21 of the Statute.
89. Tadić Appeal (Jurisdiction), *supra* note 23, para. 42.
90. *Id.*, para. 43.
91. *Id.*, para. 45.

3.4. Presumption of innocence[92]

According to the terms of Rule 92,[93] an accused who objects to the admission of an earlier confession that he gave must prove to the Chamber that it was not freely and voluntarily given. The standard of proof is not discussed; it is not clear if the accused would be required to raise only a reasonable doubt about the existence of either element for the confession to be considered inadmissible, or for the onus to shift to the Prosecutor to prove that the confession was, in fact, freely given. A requirement that the accused must disprove the Prosecutor's assertion that the confession is free and voluntary seems onerous.[94]

The Rule may also run contrary to General Comment 13, which provides:

> [b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence imposes a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.[95]

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92. Art. 14(2) of the ICCPR provides: "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

93. Rule 92 provides: "[a] confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved".

94. Requiring an accused to satisfy a court that his confession was *not* free and voluntary (rather than requiring the prosecution to prove that it *was*) runs contrary to the law in certain common law-jurisdictions. One commentator, dealing with the law in Canada, states that "[o]n a preliminary hearing and at trial, the Crown has the burden of proof to establish the voluntariness of a statement beyond a reasonable doubt." *See* Sopinka *et al.*, *supra* note 53, at 358. He notes that the standard is the same in the United Kingdom. This view is based on the reasoning that since a confession is potentially determinative of the issue of guilt or innocence, the criminal standard of proof should be maintained. *Id.*, at 359.

95. General Comment 13, para. 7. *But cf.* the Draft Declaration on the Right to a Fair Trial and a Remedy, *supra* note 88, at 169-187, which, at Article 59(c), provides: "[l]egal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence."

4. CONCLUSION

The ICTY is by no means an institution which wantonly disregards internationally guaranteed human rights as expressed in the ICCPR. Indeed, it is the case that for the most part the ICTY is working very hard to safeguard internationally protected human rights. Many of the documents created by the ICTY - including the majority of its Rules, only a few of which are discussed critically above - indicate a genuine desire to ensure the implementation of international human rights standards.[96] But what has emerged to some degree in the ICTY's practice is a tendency for the judges of the ICTY to place distance between their obligations and the obligations of state parties to the ICCPR in achieving the same objective: the implementation of certain rights guaranteed under that Covenant. For the ICTY to succeed, it must be careful not to develop a 'do-as-I-say-and-not-as-I-do' attitude when it comes to the observation of international human rights norms.

The intention of the above discussion is not to assert that the ICTY is fatally or even significantly flawed. It is merely to outline areas where certain shortcomings are perceived by one observer. The pattern discussed is one which the ICTY must resist: that of arguing away rights of the accused - rights which have been hard fought in the national setting - based on the ICTY's international character, the heinousness of the crimes being considered, or other obstacles. If the rights of the accused, as defined in an international setting, are a step back from those same rights in the national setting, then the ICTY will be wavering from its course.

James Sloan[*]

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96. *See, e.g.*, the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, adopted on 5 May 1994, as amended 14 July 1995, UN Doc. IT/38/REV.4 (1995), and the regulations established thereunder. *See also* the Letter Agreement between the ICTY and the International Committee of the Red Cross, dated 28 April and 5 May 1995 (Tribunals Basic Documents 1995 (Sales no. E/F.95.III.P.1)), at 397 *et seq.*

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