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Alternate Judges as Sine Qua Nons for International Criminal Trials

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Alternate Judges as *Sine Qua Nons* for International Criminal Trials

Megan A. Fairlie*

“[A]ny trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.”

—Justice Robert H. Jackson, April 13, 1945¹

ABSTRACT

When one of the three judges hearing the case against Vojislav Šešelj at the International Tribunal for the former Yugoslavia (ICTY) was disqualified during the deliberations phase of the prosecution, many observers assumed that the multi-year trial would have to be re-heard. Instead, the ICTY opted to begin deliberations anew once a judge—who had not spent a single day participating in the proceeding—had familiarized himself with the trial record. This Article demonstrates why the plan to proceed with a new judge in Šešelj’s case was both procedurally illegitimate and markedly at odds with the ICTY’s statutory guarantee of a fair trial. It also explains how ICTY proceedings came to be rendered vulnerable to the havoc created when a judge is lost mid-trial and considers how to mitigate the damage the Šešelj decision has wrought upon the reputation of the ICTY. Finally, this Article illustrates how the International Criminal Court is currently destined for its own Šešelj moment and contends that the proper way forward is through the liberal designation of alternate judges.

* Associate Professor of Law, Florida International University College of Law. The author thanks Hakan Friman, Ray Murphy, Peter Robinson, Sergey Vasliev, and the participants at the Spring 2014 JILSA Conference at Berkeley Law for valuable comments. She is also grateful to Marisol Floren, FIU’s outstanding Foreign & International Law Librarian, Clara Gomez and Kelly Kearns for research assistance, and Aileen and Maca for being themselves.

1. ROBERT E. CONOT, JUSTICE AT NUREMBERG 14 (1983) (quoting Nuremberg Prosecutor Robert Jackson).

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I. INTRODUCTION

For well over a year, Vojislav Šešelj's prosecution for war crimes and crimes against humanity at the International Criminal Tribunal for the former Yugoslavia² (ICTY) has been on hold. The delay is designed to allow replacement Judge Mandiaye Niang time to "familiarise himself" with the record of Šešelj's more than four-year trial. Although Niang was not present for a single day of the Šešelj proceedings, the plan is for him to ultimately form part of the three-

2. See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 26, Annex, U.N. Doc. S/25704 (May 3, 1993), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf [<http://perma.cc/ZHZ8-GH4P>] (archived Oct. 5, 2014) [hereinafter ICTY statute].

judge panel that determines whether Šešelj should be convicted of serious violations of international humanitarian law.³

This Article examines the procedural legitimacy—or illegitimacy—of the decision to continue Šešelj's case with a replacement judge and argues that the assignment of Niang to the Šešelj case conflicts with the ICTY's statutory guarantee of a fair trial before three independent judges. In so doing, it illustrates how the rights of accused persons at the ICTY and its sister tribunal, the International Criminal Tribunal for Rwanda⁴ (ICTR), have been incrementally sidelined in order to avoid costly and time-consuming re-trials. Establishing the significant harm that the Šešelj matter has wrought upon the ICTY's reputation, this Article then considers the steps that the Mechanism for the International Criminal Tribunals⁵ (MICT)—the ICTY and ICTR's successor tribunal—should take to mitigate the damage wrought in Šešelj. This Article then concludes by demonstrating how ICTY and ICTR precedent in general and the Šešelj debacle, in particular, should serve as a cautionary tale for the International Criminal Court⁶ (ICC).

II. BACKGROUND

Vojislav Šešelj's prosecution for instigating war crimes and crimes against humanity⁷ began on November 7, 2007 before ICTY Judges Antonetti, Harhoff, and Lattanzi.⁸ This three-judge panel,

3. See *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Continuation of Proceedings, ¶¶ 51, 53–55 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 13, 2013) [hereinafter Šešelj Continuation Decision] (ordering the continuation of proceedings as soon as Judge Niang familiarizes himself with the record).

4. See generally S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] (adopting the Statute of the International Criminal Tribunal for Rwanda, which established the ICTR).

5. See generally *Statute of the International Residual Mechanism for Criminal Tribunals* S.C. Res. 1966, Annex 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010) [hereinafter MICT statute] (establishing the MICT).

6. Created pursuant to the Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

7. See generally *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Second Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia June 25, 2007) (outlining the charges against Šešelj).

8. See Int'l Crim. Trib. for the Former Yugoslavia, *Fifteenth Annual Rep. 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*, ¶ 55, U.N. Doc. A/63/210–S/2008/515 (Aug. 4, 2008) [hereinafter *15th Annual Report*]. More specifically, the trial “began anew” on this date. See *id.* Earlier trial proceedings came to a halt when Šešelj initiated a hunger strike designed to get the Tribunal to meet certain demands, including acceptance of his *pro se* representation. See, e.g., Marlise Simons, *Serb Nationalist's Trial Begins in The Hague*, N.Y. TIMES (Nov. 8, 2007), <http://www.nytimes.com/2007/11/08/world/>

tasked to determine Šešelj's criminal responsibility, presided over the courtroom proceedings until their conclusion on March 20, 2012.⁹ Deliberations began quickly after closing arguments were heard.¹⁰ By the time of the deliberations stage, the trial's record consisted of more than 17,000 pages of transcript, nearly 1,400 admitted exhibits, and over 500 submissions made by the accused.¹¹ More than a year later, the ICTY President announced that the Trial Chamber would render its judgment in October 2013.¹²

Just days after that plan was made public, however, a controversial personal email from Judge Harhoff surfaced. The correspondence criticized the ICTY President and then-recent acquittals at the ICTY.¹³ The revelation prompted Šešelj to move for Harhoff's exclusion from the trial panel. Harhoff's subsequent disqualification for an unacceptable appearance of bias,¹⁴ the first of its kind at the ICTY,¹⁵ left uncertainty in its wake. Shortly after the

europa/08hague.html?_r=1& (subscription required) [<http://perma.cc/9AEX-MGY9>] (archived Sept. 28, 2014) (explaining that the trial was stopped due to a 28-day hunger strike to push various demands, several of which were met).

9. See Int'l Crim. Trib. for the Former Yugoslavia, *Nineteenth Annual Rep. 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*, ¶ 54, U.N. Doc. A/67/214-S/2012/592 (Aug. 1, 2012) [hereinafter *19th Annual Report*] (indicating that Judges Antonetti, Harhoff, and Lattanzi presided over the courtroom proceedings in Šešelj's prosecution from November 2007 until March 2012).

10. Some three months later, the ICTY President reported that Šešelj's "judgement is being prepared." See *id.*

11. See Šešelj Continuation Decision, *supra* note 3, at 29.

12. See, e.g., Theodor Meron, ICTY President, Remarks at the 6977th mtg. of the U.N.S.C., at 4, U.N. Doc. S/PV.6977 (June 12, 2013), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6977.pdf [<http://perma.cc/ZV5W-8X5G>] (archived Sept. 28, 2014) ("The Trial Chambers has now scheduled delivery of the judgment in this case for 30 October 2013 . . ."). President Meron acknowledged that the date for judgment delivery had been pushed back some three months because of the judges' involvement in other cases and the loss of senior staff at the Tribunal. See *id.*

13. See, e.g., Marlise Simons, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, N.Y. TIMES, June 15, 2013, at A4, available at http://www.nytimes.com/2013/06/15/world/europe/judge-at-war-crimes-tribunal-faults-acquittals-of-serb-and-croat-commanders.html?_r=0 (subscription required) [<http://perma.cc/APH4-LWVB>] (archived Sept. 28, 2014) (raising serious questions about the credibility of the court).

14. See Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 28, 2013) [hereinafter Harhoff Disqualification decision] ("Accordingly, the Majority finds that the allegation of bias against Judge Harhoff is founded.")

15. Despite countless, accused-engineered motions, no ICTY judge had ever been disqualified from hearing a prosecution for serious violations of international humanitarian law prior to the Šešelj decision. In fact, the only successful disqualification motion in the ICTY's history was made prior to the commencement of a contempt proceeding against a former Tribunal employee. See In the Case against Florence Hartmann, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer,

disqualification, the ICTY's spokesperson admitted, "[w]e're not completely sure what will happen" and acknowledged that the ICTY's rules needed to be consulted.¹⁶

What the ICTY ought to have done was engage in a careful analysis of the relevant rules of procedure, consider the rules' development and application over time, and pay particular attention to their express procedural protections. Proceeding in this way would have been transparent and predictable. It would also have had the added benefit of drawing from ICTY experience, including the product of multiple judicial plenaries that previously considered and addressed the fairness implications created by losing a judge mid-trial. Instead, Šešelj's newly constituted Trial Chamber charted a different course by issuing a decision that concludes, after four brief paragraphs that make no reference to the rules, "that the assignment of [a new judge] does not represent an obstacle to the continuation of proceedings."¹⁷

Fallout from the ruling was swift and well-deserved. Lending credence to longstanding Serbian suspicion of the ICTY,¹⁸ the thinly-reasoned opinion prompted speculation that it was little more than a preordained decision to proceed to a predetermined conviction.¹⁹

¶ 55(a)(ii) (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2009), available at http://www.icty.org/x/cases/contempt_hartmann/tdec/en/090327.pdf.

16. Agence France-Presse, *Yugoslav War Crimes Court Removes Judge over 'Bias'*, GLOBAL POST (Aug. 29, 2013, 7:46 AM), <http://www.globalpost.com/dispatch/news/afp/130829/yugoslav-war-crimes-court-removes-judge-over-bias> [<http://perma.cc/8AS2-H3CK>] (archived Oct. 22, 2014). Tribunal observers seemed similarly uncertain as to what process was required under the rules. See, e.g., Marko Milanovic, *Breaking: Judge Harhoff Disqualified from the Seselj Case*, EJIL: TALK! (Aug. 28, 2013), <http://www.ejiltalk.org/breaking-judge-harhoff-disqualified-from-the-seselj-case/> [<http://perma.cc/P3C4-RWPB>] (archived Sept. 28, 2014) (concluding that the case "is probably going bust" and opining that Rule 15 *bis* might be applied by analogy); see also Marko Prelec, Comment to *Breaking: Judge Harhoff Disqualified from the Seselj Case*, EJIL: TALK! (Aug. 29, 2013, 10:21 AM) (contending that the rules permit unfettered continuation of the proceedings with a new judge).

17. Šešelj Continuation Decision, *supra* note 3, ¶ 55.

18. See, e.g., Zorana Suvakovic, *The Politics of Justice at The Hague*, AL-JAZEERA (Jan. 28, 2014, 9:19 AM), <http://www.aljazeera.com/indepth/opinion/2014/01/politics-justice-at-hague-2014121141359532592.html> [<http://perma.cc/D8UE-FUTS>] (archived Sept. 28, 2014) (noting the Serbian public's "very negative view" of the ICTY and implicitly endorsing the argument that it would be "impossible for a new judge without any experience whatsoever at the Hague Tribunal to catch up with seven years of proceedings and review the numerous documents that were produced during the trial and be able to decide on a verdict"). On the persistently negative public view of the ICTY in Serbia, with accompanying data, see Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 92 (2009).

19. See, e.g., William A. Schabas, *Šešelj Gets a New Judge and Adds Another Few Years to his Pre-Trial Detention*, PHD STUDIES IN HUMAN RIGHTS (Dec. 18, 2013, 5:06 AM), <http://humanrightsdoctorate.blogspot.com/2013/12/Šešelj-gets-new-judge-and-adds-another.html> [<http://perma.cc/3X4Q-45VP>] (archived Sept. 28, 2014) [hereinafter Schabas, *Šešelj Gets a New Judge*] (opining that the two remaining judges had decided upon Šešelj's guilt during the initial deliberations).

Perhaps worse still,²⁰ the decision evoked powerful criticisms for its failure to meaningfully honor the ICTY's requirement of a three-judge trial panel,²¹ and its apparent disregard of the ICTY's rules.²²

In light of the recent confirmation of the ICTY's decision to proceed with a new judge with little discussion on appeal,²³ this Article undertakes the procedural analysis that both the Trial and Appeals Chambers failed to conduct by comprehensively evaluating the relevant rules. In so doing, this Article considers and analyzes pertinent case law from the ICTY and ICTR along with jurisprudence from their shared Appeals Chamber²⁴ to remedy existing misperceptions about the provisions relevant to Šešelj's case.

By providing a broader perspective on the role of replacement judges in international criminal justice, this Article's contribution extends well beyond the Šešelj matter. Drawing upon the experience of the post-WWII tribunals at Nuremberg and Tokyo, this Article establishes that the initial failure of the UN Security Council to provide for alternate ICTY judges was an unfortunate and avoidable error. It then illustrates how the ICTY's attempt to compensate for this shortcoming was initially robust, but regrettably short-lived. Tracking the ICTY's approach to substitute judges throughout its operation, this Article demonstrates how the history of replacement judges at the ICTY reveals an increasing disregard for the rights of the accused in favor of avoiding costly and time-consuming re-hearings.

Highlighting the pressure the UN Security Council has continuously placed upon the ICTY and ICTR to expedite their proceedings, this Article argues that the costs of not providing for alternate judges, exacted in terms of procedural fairness and the

20. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

21. See Schabas, *Šešelj Gets a New Judge*, *supra* note 19 ("Why not simply confer the gathering of evidence and the hearing of oral submissions by the parties to one judge, putting everything on videotape. Then, when it is all finished, bring in a couple of judges at the end to speed read everything and watch the YouTube proceedings?").

22. See, e.g., Kevin Jon Heller, *The Final Nail in the ICTY's Coffin*, OPINIO JURIS (Dec. 16, 2013, 6:37 AM), <http://opiniojuris.org/2013/12/16/final-nail-ictys-coffin/> [<http://perma.cc/9KGGJ-WCE3>] (archived Sept. 28, 2014) ("[A]pplying the rule as written would prevent Seselj from being convicted, so the Tribunal is simply ignoring what it says.").

23. See *Prosecutor v. Šešelj*, Case No. IT-03-67-AR15bis, Decision on Appeal against Decision on Continuation of Proceedings, ¶ 68 (Int'l Crim. Trib. for the Former Yugoslavia June 6, 2014) [hereinafter *Šešelj Appeal*] (concluding, with limited analysis, that neither the Statute nor the Rules prevented the Trial Chamber from exercising its discretion and that there was no discernible error in the exercise of discretion).

24. See ICTR Statute, *supra* note 4, art. 12(2) ("The members of the Appeals Chamber of the International Tribunal for the . . . Former Yugoslavia . . . shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.").

reputations of both tribunals, far exceed any money saved. As a result, this Article contends that, as the successor court to the ICTY and ICTR, the MICT would do well to learn from these mistakes and can play a key role in remedying the legacy of the ICTY and ICTR. The Article then illustrates how, given the opportunity, ICTY and ICTR precedent could be powerfully instructive for the International Criminal Court (ICC), an institution presently poised to follow their destructive path.

III. THE OMISSION OF ALTERNATE JUDGES IN THE ICTY STATUTE

The 1993 statute that created the ICTY called for both three-judge fact-finding panels and a majority vote for convictions.²⁵ The statute, however, did not include a provision for replacement or alternate judges. This was a remarkable omission, particularly in light of the practice of the two antecedents to the ICTY—the International Military Tribunal (IMT) at Nuremberg²⁶ and International Military Tribunal for the Far East²⁷ (IMTFE) at Tokyo—and the important role their precedent had on other aspects of the ICTY's enabling statute.²⁸ Indeed, because the IMT and IMTFE embodied the only limited precedent from which the ICTY could draw,²⁹ their experience with replacement judges ought to have been recognized as remarkably instructive.

25. See ICTY Statute, *supra* note 1, arts. 12, 23(2). The draft statute was initially prepared by persons appointed under the Moscow Human Dimension Mechanism of the Conference of Security and Cooperation in Europe. Several states submitted additional draft proposals prior to the Secretary-General's submission of a final version to the UNSC. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 11–12 (4th ed. 2011).

26. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, U.S.-Fr.-U.K.-U.S.S.R., Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], reprinted in VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 675, 677 (1995) [hereinafter 2 MORRIS & SCHARF] (establishing the International Military Tribunal).

27. See generally Proclamation by the Supreme Commander for the Allied Powers, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter IMTFE Charter] (establishing the IMTFE).

28. In fact, the text of the Nuremberg Charter directly inspired certain other aspects of the ICTY Statute. See, e.g., VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 69 (1995) [hereinafter 1 MORRIS & SCHARF] (arguing that the ICTY's Article 3 definition of the war crimes "is based primarily on the relevant provisions of the Nuremberg Charter").

29. Critically, both predecessor institutions were similarly constructed to the ICTY. As discussed in greater detail below, all three institutions relied upon a judicial panel to adjudicate criminal responsibility by a majority vote. In addition, all three tribunals adopted adversarial construct of party-driven evidence combined with a more

IMT convictions required a majority vote of a judicial panel of four judges.³⁰ The IMT Charter expressly addressed the issue of replacement judges, authorizing the replacement of a member of the IMT “for reasons of health or for other good reasons.”³¹ To that end, each of the Four Powers—France, the Soviet Union, the United Kingdom and the United States—appointed an alternate judge who was expected to “be present at all sessions of the Tribunal.”³² Although no ordinary judge needed to be replaced during the eight-month trial, the alternates “contributed greatly to both deliberations and judgment writing.”³³

The IMTFE experience was different, but ought to have proved equally (or perhaps more) informative for the drafting of the ICTY statute. While the IMTFE Charter also required a majority vote for convictions,³⁴ it called for a judicial panel of between six and eleven members,³⁵ made no reference to the replacement of judges, and did not provide for alternates to attend the proceedings.³⁶ Nevertheless, a replacement judge ultimately joined the eleven-member panel after more than seven weeks of testimony had been heard.³⁷ In spite of a protest from the defense that the mid-trial substitute “could not be

continental evidentiary approach through which judges freely evaluate evidence rather than depend upon extensive admissibility rules. See, e.g., Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 260–62, 268, 281 (2004); see also Alex Whiting, *The ICTY as a Laboratory of International Criminal Procedure*, in THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 83, 89 (Bert Swart, Alexander Zahar & Göran Sluiter eds., 2011) (“[T]o the extent that there was precedent in the Nuremberg and Tokyo tribunals, that model too was decidedly adversarial, with party-led investigations and submissions to the judges.”).

30. See Nuremberg Charter, *supra* note 26, art. 4(c).

31. See *id.* art. 3. This provision, along with the above-mentioned requirement of attendance for alternates, defies the argument that the existence of alternate judges was a purely political maneuver.

32. See *id.* art. 2. The politics inherent in the creation of the Charter required the arguably inefficient appointment of four alternates as opposed to one; each of the four nations wanted to ensure its own representation should the need for an alternate arise. See Otto Triffterer, *Article 74 Requirements for the Decision*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 953, 954, 960 (Otto Triffterer ed., 1999) (noting that the four Allied powers each wanted to make sure that each judge's incapacity would not change the composition of the Tribunal).

33. Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1577 (2006).

34. See IMTFE Charter, *supra* note 27, art. 4(b).

35. See *id.* art. 2 (“The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers . . .”).

36. Minear attributes this omission to the large size of the IMTFE bench. See RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 86 (1971).

37. See Gordon Ireland, *Uncommon Law in Martial Tokyo*, in 4 YEARBOOK OF WORLD AFFAIRS 54, 59 (George W. Keeton & Georg Schwarzenberger eds., 1950); see also R. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonance*, 149 MIL. L. REV. 25, 27 (1995) [hereinafter Pritchard, *Contemporary Resonance*] (noting that “one American judge resigned and another was appointed to take his place” on the eleven member court).

familiar with the record of the trial,"³⁸ and although more than 2,300 pages of testimony had by then been taken, a majority of the IMTFE justices voted to overrule the defense's objection to the new judge.³⁹ As one of the IMTFE prosecutors later reported, the substitution was not only "most objectionable," but also likely to damage the IMTFE's legacy.⁴⁰

Based on the experiences of these post-WWII courts, logic suggests that the enabling statute for the ICTY should have provided for alternate judges. Indeed, not only did the Nuremberg alternates actually improve the output of the IMT, but the mere act of incorporating the judges enhanced the perceived fairness of the IMT proceedings.⁴¹ What is more, by the time the ICTY came about, it was generally accepted that "Nuremberg [stood] out from a procedural perspective as a relatively fair trial,"⁴² "[b]oth objectively, and in contrast to its Tokyo counterpart."⁴³

38. MINEAR, *supra* note 36, at 87.

39. See Carrington Williams, *The Tokyo War Crimes Trial before the International Military Tribunal for the Far East*, in 1 INTERNATIONAL HUMANITARIAN LAW 105, 149 app. A (John Carey, William V. Dunlap & R. John Pritchard eds., 2003).

40. According to the Associate Prosecutor from New Zealand, "it would appear most objectionable . . . that a new member should be appointed during the trial . . . There can be little doubt, I think, that the replacement . . . will provoke strong criticism when jurists and others come to examine the proceedings of the I.M.T.F.E." DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGMENTS lvi (Neil Boister & Robert Cryer eds., 2008) [hereinafter TOKYO DOCUMENTS] (footnote omitted) (quoting Brigadier R.H. Quilliam, Associate Prosecutor for NZ, Jan. 29, 1948, Macmillan Brown Archives, 9).

41. In the view of one commentator, providing "for alternate judges was only reasonable and certainly preferable to the possibilities of starting the trial all over again . . . [] of introducing a new member in the course of the trial, or of continuing the trial with a gradually dwindling bench." Georg Schwarzenberger, *Judgment of Nuremberg*, 21 TUL. L. REV. 329, 335 (1947) (noting that the anticipated length of the trial increased the likelihood of losing a member of the judicial panel); see also Elizabeth Borgwardt, *Re-Examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 457 (2005) (noting that an "important facet of the trial's rule of law legacy was procedural" and that its components affected even "German defendants' own evolving perception of this procedural fairness").

42. M. Cherif Bassiouni, Remarks at the 80th Annual Meeting of the American Society of International Law, in *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 62 (1986); see Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT'L L. 335, 339 (2002) ("By most accounts, the trial was fair and conducted with objectivity . . .").

43. See Bassiouni, *supra* note 42. "It must . . . be noted that the Nuremberg trial offered more guarantees of procedural fairness to the defendants [than the Tokyo trial]." *Id.*; see also Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 673 n.46 (1996) (explaining that IMT precedent is more valuable than that of the IMTFE, partially because of "the perception that the Tokyo proceedings were substantially unfair to many of the defendants").

If anything, then, the IMTFE approach should have served as a warning. As an initial matter, the failure of the Tokyo Charter—which established the IMTFE—to provide for alternates was consistent with its perceived procedural inferiority to that of the IMT. This omission, coupled with the subsequent decision to allow a new, unfamiliar judge to assume the bench during the proceedings supported later critiques that the IMTFE proceedings were “shamefully unfair and riddled procedurally.”⁴⁴ The Tokyo experience also put the designers of the ICTY on notice of the very real possibility of losing a judge during protracted proceedings.⁴⁵ Coupled with the recognized need for the ICTY to incorporate the human rights developments of the near half-century that followed the post-WWII proceedings,⁴⁶ these observations ought to have mandated the inclusion of a provision on alternate judges for the ICTY.

In fact, a Special Task Force of the American Bar Association (ABA) recognized as much when it reviewed the ICTY 1993 enabling act. The Task Force called upon the UN Security Council to implement a “directive providing for the selection of two or more alternate judges.”⁴⁷ As the ABA report rightly recognized, the ICTY should provide “every reasonable structural and procedural guarantee of impartiality,” including the “safeguard” of alternate judges.⁴⁸ Nevertheless, the ABA’s call to the UN Security Council

44. See Bassiouni, *supra* note 42, at 62. Warwick and Bassiouni conclude that replacing judges mid-trial “creates grave problems of perceived injustice.” Thomas S. Warwick & M. Cherif Bassiouni, *Organization of the International Criminal Court: Administrative and Financial Issues*, 25 DENV. J. INT’L L. & POL’Y 333, ¶ 180 (1997) (considering the possibility in the context of a then-proposed International Criminal Court).

45. Trial proceedings at IMTFE ran far longer than at the IMT, commencing in May 1946 and concluding in April 1948. See Pritchard, *Contemporary Resonance*, *supra* note 37, at 30–31. By the close of the case, the transcripts from the trial took up 48,412 pages. JOHN R. PRITCHARD, 2 THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST cxxxiii (1998). In the view of IMTFE Judge Röling, “the Tokyo Trial was far more difficult and complicated than the Nuremberg one.” B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER 87 (1993).

46. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 130 (1996) (indicating that the ICTY and ICTR “rules of procedure incorporate positive developments over the past fifty years with respect to the rights of criminal defendants under international law”). These developments include the recognition of the right to a fair trial as a human right. David Harris, *The Right to a Fair Trial as a Human Right*, 16 INT’L & COMP. L.Q. 352, 376–78 (1967).

47. SPECIAL TASK FORCE OF THE ABA SECTION OF INT’L LAW & PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 22 (1993) [hereinafter ABA TASK FORCE REPORT] (adding that the UNSC should also adopt a procedure for “select[ing] additional Trial Judges in the event that Tribunal resources and the interests of justice so require”).

48. *Id.* at 23–24 (noting that this objective was particularly important because of the ICTY’s “important precedential value”).

went unanswered and, “probably for reasons of cost and efficiency,”⁴⁹ no alternate judges were appointed. Indeed, costs for the new court were kept down by allocating no more judges than were strictly necessary to operate the ICTY’s newly designated Trial and Appeals Chambers. To that end, the statute remained unchanged, limiting the total number of ICTY judges to eleven,⁵⁰ precisely the figure necessary to run the ICTY’s two Trial Chambers⁵¹ and its five-member Appeals Chamber.⁵²

As a result, the statute creating the ICTY—like the one that would be generated soon thereafter for the ICTR—not only failed to provide for alternate judges but, assuming activity before each Trial Chamber, precluded the possibility of existing judges serving as alternates on an *ad hoc* basis. This, in turn, created a serious challenge for the ICTY judiciary, who were then tasked with creating the Rules of Procedure and Evidence (RPE) that would govern at the ICTY⁵³ and later at the ICTR.⁵⁴ In tackling the major assignment of crafting the first comprehensive set of international rules of procedure and evidence,⁵⁵ the ICTY judges had to divine a way to

49. Larry D. Johnson, *Ten Years Later: Reflections on the Drafting*, 2 J. INT'L CRIM. JUST. 368, 374 (2004); see also Michael P. Scharf, *The Legacy of the Milosevic Trial*, in BRINGING POWER TO JUSTICE?: THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 25, 39 (Joanna Harrington, Michael Milde & Richard Vernon eds., 2006) (criticizing the failure to provide for an alternate judge in the Milosevic proceedings and concluding that this lacuna was attributable to the decision “to save money”); William A. Schabas, *The Influence of International Law and International Tribunals on Harmonized or Hybrid Systems of Criminal Procedure*, 4 WASH. U. GLOBAL STUD. L. REV. 651, 658 (2005) [hereinafter Schabas, *Influence of International Law*] (surmising that the prospect of employing alternate judges had been thought of but considered to be too expensive). The inference that the UNSC would have been resistant to inflating the Tribunal’s budget by providing for additional judges seems a fair one to draw particularly because, at the time of its creation, “nobody really believed that [the ICTY] would work.” See Testimony of Madeleine K. Albright, in Transcript of Sentencing Hearing, at 497, 507, Prosecutor v. Plavsic, Case No. IT-00-39&40 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2002) (noting that the representatives to the UNSC at the time of the ICTY’s creation actually believed there would never be indictments, trials, or convictions).

50. See ICTY Statute, *supra* note 2, art. 12.

51. See *id.* art. 12(a).

52. See *id.* art. 12(b).

53. “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.

54. Pursuant to its Statute, the ICTR adopted, *mutatis mutandis*, the Rules of Procedure and Evidence of the ICTY. See ICTR Statute, *supra* note 4, art. 14.

55. The Nuremberg Rules of Procedure contained only eleven rules. See Rules of Procedure of the International Military Tribunal, adopted Oct. 29, 1945, reprinted in 2 MORRIS & SCHARF, *supra* note 26, at 687. As a result, the precedential value of the same has been noted to be “minimal.” See 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

preserve the statutory promise of a fair trial⁵⁶ before independent⁵⁷ and impartial⁵⁸ judges without the prospect of utilizing an alternate judge.⁵⁹

IV. REPLACEMENT JUDGES UNDER THE ICTY RULES

Remarkably, the first set of rules adopted by the ICTY judiciary seemed to ably sidestep any fair trial concerns created by the absence of judicial alternates. Specifically, Rule 15(E) of the RPE provided that:

If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise he shall report to the President who may assign another Judge to the case and order either a rehearing or, with the consent of the accused, continuation of the proceedings from that point.⁶⁰

Consistent with the ICTY Judges' "conscious effort to make good the flaws of Nuremberg and Tokyo" through their drafting of the RPE,⁶¹ this provision in 15(E) appeared to ensure that the unfortunate Tokyo precedent would not be repeated at the ICTY. This distinction was of critical importance, and not simply because the mid-trial replacement of a judge over defense objection "did little to inspire confidence" in the fairness of the Tokyo proceedings.⁶² Of at least comparable

set . . . ever to be drafted for an international criminal tribunal." Int'l Crim. Trib. for the Former Yugoslavia, *Annual Rep. 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*, Summary, U.N. Doc. A/49/342-S/1994/1007 (Aug. 29, 1994) [hereinafter *Annual Report*].

56. See ICTY Statute, *supra* note 2, art. 21(2) ("In the determination of charges against him, the accused shall be entitled to a fair and public hearing . . .").

57. See *id.* arts. 11(A)(1), 12.

58. The Tribunal's judges "shall be persons of high moral character, impartiality and integrity." *Id.* art. 13(1). ICTY jurisprudence makes clear that this is more than a general prerequisite to judicial appointment, but required *in concreto* in each proceeding. "[I]t is a fundamental right of all persons facing criminal charges to be tried before an independent and impartial tribunal." *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2, Bureau Decision (Int'l Crim. Trib. for the Former Yugoslavia May 4, 1998).

59. See, e.g., MOHAMED SHAHABUDEEN, INTERNATIONAL CRIMINAL JUSTICE AT THE YUGOSLAV TRIBUNAL: A JUDGE'S RECOLLECTION 45 (2012) (noting that the rules aimed to devise "a practical mechanism for achieving substantial justice in a situation in which there was no provision for reserve judges").

60. Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, R.15(E), U.N. Doc. IT/32 (Mar. 14, 1994) [hereinafter ICTY RPE].

61. See Judge Antonio Cassese, President of the ICTY, Statement by the President Made at a Briefing to Members of Diplomatic Missions, U.N. Doc. IT/29 (Feb. 24, 1994), reprinted in 2 MORRIS & SCHARF, *supra* note 26, at 649, 650.

62. TOKYO DOCUMENTS, *supra* note 40, at lxi; see also Warwick & Bassiouni, *supra* note 44, ¶ 180 ("[G]oing forward after replacing a judge with another judge who has not heard the evidence and been able to form a first-hand opinion about the

significance, the provision was notably consistent with the ICTY's statutory guarantee of a fair trial. In seemingly every case, the accused could require that his fate be decided by a judicial panel whose members had been present for the entirety of the proceedings against him, "[a]n essential guarantee of the proper administration of justice and of the parties' rights."⁶³

Rule 15(E) empowered the accused to insist that only knowledgeable fact-finders decide guilt. At the same time, by requiring a rehearing whenever consent was withheld, Rule 15(E) facilitated the ability of the replacement judge to become both independent from—and on par with—the originally assigned judges. Indeed, independence and equality are not simply desirable qualities for a replacement judge. Rather, these qualities are critical to the fact-finding advantage that the ICTY's three-judge trial panel was designed to afford.⁶⁴ In effect, by making a rehearing the default rule in the absence of consent, Rule 15(E) preserved the newly constituted panel's ability to serve as a procedural safeguard against erroneous convictions.⁶⁵

To be sure, a verdict rendered by a three-judge panel can live up to its designated aim of being more reliable than one delivered by a single judge only if all three members are able to act independently. In accordance with international human rights law, this, of course, requires that the judges perform their roles free from external political interference.⁶⁶ The enhanced ability of the panel to arrive at

credibility of the witness - creates grave problems of perceived injustice to one or both sides in the trial.”).

63. Frank Terrier, *The Procedure before the Trial Chamber*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1277, 1312–13 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (describing the importance of assuring the presence of every judge throughout each stage of the trial).

64. “[T]he main way of reducing the luck involved in adjudication is to establish large judicial panels.” Menachem Mautner, *Luck in the Courts*, 9 THEORETICAL INQUIRIES L. 217, 224 (2007); see also Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1143–44 (2012) (noting the “persistent belief that three judges are more likely to reach a correct outcome than one”).

65. “The presence of three judges simultaneously receiving testimony, observing witnesses, and deliberating and conferring before rendering a verdict in a criminal case arguably presents strong protection against error or bias” Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT’L L.J. 111, 114 (2001).

66. This absolute and non-derogable right is memorialized in countless international and regional instruments. See, e.g., Universal Islamic Declaration of Human Rights art. V(a), adopted on Sept. 19, 1981, 21 Dhul Qaidah 1401 (“No person shall be adjudged guilty of an offence . . . except after proof of his guilt before an independent judicial tribunal.”); African Charter on Human and People’s Rights art. 26, adopted on June 27, 1981, 21 I.L.M. 58 (“States parties to the present Charter shall have the duty to guarantee the independence of the Courts.”); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 14(1) (entered into force Mar. 23, 1976) [hereinafter ICCPR] (“[E]veryone shall be entitled to a fair and public hearing by a

the right result, however, requires the additional ingredient of “intra-judicial independence.”⁶⁷ That is to say, the judges on the panel must also be able to exercise their decision-making power without undue influence from one another.⁶⁸ Re-hearings foster this indispensable type of independence. Equal access to all the relevant evidence qualifies the new judge to formulate an autonomous opinion of all evidence presented, and thereby enables the replacement to “make proper findings without relying on the other two judges.”⁶⁹

This, in turn, leaves a newly constituted panel capable of engaging in the “collaborative juridical process that promotes decisional accuracy.”⁷⁰ Rather than suffer from an objective inequality that makes him “reluctant to dissent from the views of the other members of the panel,”⁷¹ presence throughout the rehearing best empowers the new judge to engage effectively in deliberations.⁷² By so fostering the capacity of the three judges to test and challenge

competent, independent and impartial tribunal established by law.”); American Convention on Human Rights art. 8(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR] (“[E]very person has the right to a hearing . . . by a competent, independent, and impartial tribunal.”); Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222, [hereinafter European Convention] (“[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 10 (Dec. 10, 1948) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . political or other opinion . . .”).

67. See Vicki C. Jackson, *Judicial Independence: Structure, Context, Attitude*, in *JUDICIAL INDEPENDENCE IN TRANSITION* 19, 49 (Anja Seibert-Fohr ed., 2012); see also Michael Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563, 577 (2002) (suggesting that judges joining a panel “may be reluctant to dissent from the views of the other members of the panel”).

68. See Megan A. Fairlie, *Adding Fuel to Milosevic’s Fire: How the Use of Substitute Judges Discredits the UN War Crimes Tribunals*, 16 CRIM. L.F. 107, 151–52 (2005).

69. See Marlise Simons, *Milosevic Judge Resigns Owing to Poor Health*, N.Y. TIMES, Feb. 23, 2004, at A11 (quoting a former ICTY official’s concern that the then-to-be-appointed replacement in the Milosevic proceedings “risks not being an independent judge”); see also *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-T, Decision Pursuant to Rule 15 bis (D), ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 16, 2004) [hereinafter *Krajisnik*, Decision Pursuant to Rule 15 bis (D)] (accepting “that a gap between the level of familiarity of the continuing judges and the substitute judge remains, at least in theory” when a new judge joins the panel one-third of the way into the prosecution’s case).

70. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991).

71. Solimine, *supra* note 67, at 577.

72. Admittedly, however, the new judge may not be poised to contribute as effortlessly as his colleagues. See, e.g., Deborah H. Gruenfeld et al., *Group Composition and Decision Making: How Member Familiarity and Information Distribution Affect Process and Performance*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 2–4 (1996) (outlining the difficulties that accompany being the new member in a group).

one another's theories as equals, the deliberative exercise becomes more apt to bring about the right result.⁷³

As initially adopted, Rule 15(E) likely reflected the collective experience of the ICTY judges. As a foundational matter, the ICTY's statutory requirement of a three-judge panel is consistent with the notion, shared by common law and continental systems, that "three heads are better than one."⁷⁴ In the U.S. appellate system, for example, "the whole point of multimember panels is to increase the possibility of reaching the 'correct' result."⁷⁵ Comparably, in the overwhelming majority of U.S. states, twelve-member juries are required to prosecute more serious crimes,⁷⁶ consistent with the U.S. Supreme Court's observation that "progressively smaller juries are less likely to foster effective group deliberation . . . lead[ing] to inaccurate fact-finding."⁷⁷ In parallel, continental systems employ a panel of judges to adjudicate guilt when trying more serious offences⁷⁸ in order to best ensure a just result.⁷⁹

73. "[O]ur colleagues' reactions are a fine screen through which our actions are filtered." Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 906 (1987).

74. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 847 (1994) (concluding that "collegial deliberation . . . adds to" what is otherwise a "purely numerical argument").

75. Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 483 (2011).

76. "Only two states—Florida and Connecticut—rely on six-person juries in serious felony prosecutions." Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FLA. L. REV. 441, 442 (2008); see also Adam M. Chud & Michael L. Berman, *Six Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 748 (2000) ("State courts frequently employ small juries for the trial of less serious offenses." (footnote omitted)). While a single judge is permitted to adjudicate more serious criminal cases in federal criminal trials, this requires the consent of the parties and the approval of the court. See FED. R. CRIM. P. 23(a), (c).

77. *Ballew v. Georgia*, 432 U.S. 223, 232 (1978).

78. For example, the Swiss Code of Criminal Procedure prohibits a single judge from adjudicating a case in which a penalty in excess of two years is sought. See CODE DE PROCÉDURE PÉNALE SUISSE [CPP] [SWISS CRIMINAL PROCEDURE CODE] Oct. 5, 2007, SR 312.0, RS 312.0, art. 19(2)(b) (Switz.) [hereinafter SWISS CRIMINAL PROCEDURE CODE]; see also KONRAD ZWEIGERT & HEIN KÖTZ, 1 AN INTRODUCTION TO COMPARATIVE LAW: THE FRAMEWORK 128–29 (2d ed. 1987) (translated by Tony Weir) (noting that in France, single judges may preside only over minor cases). In the Swedish system, which also uses mixed panels comprised of professional and lay judges, "[t]hree justices sit as a panel on all matters that are considered of a minor nature whereas five justices are necessary to decide more serious issues." Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405, 422 (2003). Similarly, in the former Yugoslavia, "serious criminal cases" merited panels of five rather than three judges. Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 976 (1982).

79. "Continental law does not permit major criminal trials to be conducted by a single judge, who might be swayed by some bias against the defendant." James Q.

Consequently, both the continental and common law judges who penned the ICTY's initial RPE were likely familiar with domestic safeguards designed to ensure the collaborative ability of their respective fact-finding panels, such as requiring the uninterrupted presence of those called upon for judgment.⁸⁰ Further to the same end, the prospect of having alternate fact-finders present throughout the proceedings exists in both systems.⁸¹ What is more, in the absence of such alternates, numerous continental systems employ protections quite similar to the remedy initially adopted by the ICTY. Indeed, Rule 15(E) rather closely followed the Swiss approach, present in varying forms elsewhere,⁸² which provides that when a member of the judicial panel "becomes unable to attend during the main hearing, the entire main hearing shall be held again unless the parties waive this requirement."⁸³

That Rule 15(E), as initially adopted, required consent from the accused to continue hearings with a replacement judge was not the product of the judges' unreflective acceptance of one of the many

Whitman, *Equality in Criminal Law: Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 140 (2009). "The telling French expression is: 'Juge unique, juge inique.' ('A single judge is an inequitable judge')." Mitchel De S.-O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 1012 n.91 (2005).

80. A continental example can be found in Germany's criminal procedure code. See STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, Teil I [BGBl. I], 1074, 1319, as amended, § 226(1) (Ger.) ("The main hearing shall be held during the uninterrupted presence of the persons called upon to reach a judgment, as well as of the public prosecution office and a registry clerk."). In the U.S. common law system, uninterrupted presence is likewise required. See, e.g., *Horne v. United States*, 264 F.2d 40, 43 (5th Cir. 1959) ("The only time that provision [can] be made for alternates [is] at the commencement of the trial."); see also *Diaz v. State*, 740 A.2d 81, 86 (Md. Ct. Spec. App. 1999) (upholding a decision that deemed a juror "unable or disqualified" after the juror missed fewer than 10 minutes of the trial due to inclement weather).

81. For a common law rule, see FED. R. CRIM. P. 24(c) ("The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties."). For a continental counterpart, see *Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act]*, May 9, 1975, BGBl I, § 192(2) (Ger.), translated by Kathleen Müller-Rostin ("At hearings of lengthy duration, the presiding judge may order that additional judges be called in to attend the hearing and take the place of a judge in the event that he is unable to be present."). Thanks to Markus Wagner for helping to locate the relevant sections of German law.

82. For example, the Russian Federation's Code of Criminal Procedure provides that when a professional judge is replaced mid-trial, "the court proceedings must restart from the beginning." RSFSR Code of Criminal Procedure, art. 241, translated in *Moiseyev v. Russia*, 53 Eur. H.R. Rep. 9, ¶ 110 (2011). Other continental systems appear to permit mid-trial substitutions but actually forbid them in practice. For example, the Egyptian Code of Criminal Procedure provides that if one judge cannot attend in the high court, a substitution may be made by the President of the Court of Appeal. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, art. 367, ¶ 2 (Egypt). Nevertheless, the commentary to the Code provides that if a substitute judge has not heard all the oral proceedings, a re-hearing is the only remedy. AHMED FATHI SOROOR, ALWASEETFEE KANOUN AL SGRAAT ALGENAIA (THE INTERMEDIATE ON THE LAW OF CRIMINAL PROCEDURE) 829-30 (1996).

83. SWISS CRIMINAL PROCEDURE CODE, *supra* note 78, art. 335(2).

proposals they received to assist them in drafting the rules,⁸⁴ but rather the result of the judiciary's "extensive debate and revision."⁸⁵ In fact, of all the rulemaking suggestions the judges received, only one addressed the issue of replacement judges.⁸⁶ The proposed rule in that submission allowed the new judge to seamlessly step into his predecessor's role without any safeguards whatsoever.⁸⁷ In effect, when the judges "turned their minds to the issue," they decided that trial proceedings could continue with a replacement judge "only if the accused agreed."⁸⁸ If the defense did not agree, a rehearing would be required.

Finally, as the ICTY's first President explained, the judges aimed to improve upon the practice employed in the post-WWII prosecutions.⁸⁹ Presumably, this included an affirmative decision to reject the IMTFE's "most objectionable" practice of introducing a judicial substitute mid-trial. In fact, all other things being equal,⁹⁰ introducing an unfamiliar judge into on-going proceedings would have posed a much graver threat to the ICTY's ability to deliver a fair trial than was the case at Tokyo. At the IMTFE, the new member's vote could only have resulted in a conviction if five of the original panelists were likewise convinced of the accused's guilt. By contrast, at the ICTY, only two members of the judicial panel are required for a determination of guilt. As a result, introducing an unfamiliar adjudicator into ICTY proceedings could conceivably render an ICTY

84. See, e.g., S.C. Res. 827, ¶ 3, U.N. Doc. S/RES/827 (May 25, 1993) (seeking judicial input on the rules by "request[ing] the Secretary-General to submit to the judges . . . any suggestions received from States for the rules of procedure and evidence"). The judges were "much assisted" by these submissions in the rulemaking process. See *Annual Report*, *supra* note 55, ¶ 55.

85. See *Annual Report*, *supra* note 55, ¶ 55.

86. See Fairlie, *Adding Fuel to Milosevic's Fire*, *supra* note 68, at 119–20.

87. "In the event of disqualification or recusal, another judge of the International Tribunal may act in the matter in place of the disqualified or recused judge." Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia, R.6.2(C), U.N. Doc. IT/14 (Nov. 17, 1993) [hereinafter U.S. Suggestions], reprinted in 2 MORRIS & SCHARF, *supra* note 26, at 509, 520. The U.S. proposal was "by far the most comprehensive" and "particularly influential." 1 MORRIS & SCHARF, *supra* note 28, at 177. The submission of approximately seventy-five pages included commentary for guidance. See *id.*

88. Schabas, *Influence of International Law*, *supra* note 49, at 658–59.

89. See Cassese, *supra* note 61, at 649–50 (pointing out the inadequacies of the rules of the Nuremberg and Tokyo Tribunals and urging the ICTY "to adopt precise and detailed rules . . . and to provide a solid basis for the rights of the defence").

90. Admittedly, all other things were not equal. Among other issues, the IMTFE suffered from "[a] unique problem of judicial absenteeism." Guido Acquaviva et al., *Trial Process*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 489, 775 (Göran Sluiter et al. eds., 2013).

Trial Chamber's verdict no more reliable than one delivered by a single judge.⁹¹

A. More Comprehensive Look at Rule 15

The Rule that was first home to Rule 15(E), titled "Disqualification of Judges," included a number of additional provisions essential to the assurance of a fair proceeding before an independent and impartial trial panel. In this vein, the rule precluded a judge who had confirmed the indictment in a particular case from later adjudicating the guilt or innocence of the accused.⁹² It also prohibited a member of the Trial Chamber on a case from subsequently hearing its appeal.⁹³ In addition, the rule required judges to withdraw in cases where their impartiality might be affected,⁹⁴ and created the right for parties "to apply . . . for the disqualification and withdrawal of [such] judge[s]."⁹⁵

Reason suggests that the protections afforded by Rule 15(E) were meant to apply every time a judge needed to be replaced during an on-going trial, whether the departing judge was the subject of a self or party-initiated disqualification or was rendered ineligible for some other reason. Indeed, the fair trial concerns created by introducing a new and unfamiliar judge into ongoing proceedings are matters unrelated to the reasons why a departed judge may have departed. Regardless of the circumstances of departure, concerns about the replacement's ability to capably assess the evidence presented in his absence, and unease regarding his independence and equality, remain the same. This view is further supported by the text of Rule 15(E), which expressly dictated the practice to be followed when "a

91. Indeed, an existing member could theoretically use his seniority to convince the new judge to join in an aberrational result. *See, e.g.*, Ten Cate, *supra* note 64, at 1145 ("[T]he collegial nature of multi-member courts presents the risk that a decision-maker who favors an aberrational result convinces at least one other member of a panel to change his or her mind (perhaps because the first person is more authoritative . . .).") Notably, the prospect of holding ICTY trials before a single judge had previously been raised and rejected. *See, e.g.*, President of the International Tribunal for the Former Yugoslavia, *Rep. on the Operation of the International Criminal Tribunal for the Former Yugoslavia*, ¶¶ 78–81, U.N. Doc. A/55/382–S/2000/865 (Sept. 14, 2000), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/478/21/img/N0047821.pdf?OpenElement> [<http://perma.cc/SER9-ZJ6G>] (archived Oct. 23, 2014) (concluding that ICTY proceedings could not be expedited by holding trials before a single judge "[g]iven the complexity of the cases" and "because the credibility of international justice would be too seriously affected").

92. ICTY RPE, R.15(C), U.N. Doc. IT/32 (Mar. 14, 1994).

93. *Id.* R.15(D). This provision became necessary because the judges decided to provide for judicial rotation between Trial and Appeals Chambers. *Id.* R.27(A).

94. *See* ICTY RPE, R.15(A), U.N. Doc. IT/32 (1994).

95. *Id.* R.15(B).

judge is, *for any reason*, unable to continue sitting in a part-heard case."⁹⁶

Outside of Rule 15(E) in particular, *all* the provisions in the original version of Rule 15 can rather effortlessly be read in a harmonious fashion to arrive at this result. The sub-rules governing self and party-initiated judicial disqualifications, for example, dictated that the ICTY President appoint a replacement for a disqualified judge.⁹⁷ However, neither provision indicates how the President is to be informed about the disqualification,⁹⁸ nor addresses the requisite procedure that is to follow the appointment of the new judge. These issues, instead, were suitably addressed by Rule 15(E), which required the Presiding Judge to report to the President about the need for a replacement and dictated that a part-heard case could continue with the new judge only with the consent of the accused.⁹⁹

B. *The Significance of a Rules-Based Analysis*

One might be tempted to sideline the importance of this rules-based assessment by noting that the overriding concern regarding the use of replacement judges relates not to the ICTY's fidelity to its rules, but instead to its ability to deliver on its statutory obligation to ensure a fair trial. This view, however, overlooks the integral relationship between the rules and the fairness of ICTY proceedings.

96. *Id.* R.15(E) (emphasis added).

97. *See id.* R.15(A), (B). In an effort to sever these two provisions from 15(E), one might point out that the former *require* the President to appoint a replacement judge while the latter appears to make the appointment *optional*, because the President "*may* assign another judge to the case and order either a rehearing or, with the consent of the accused, continuation of the proceedings from that point." *Id.* R.15(E). Although perhaps inartfully placed, a more reasonable reading of this permissive language in 15(E) is that it pertains to what happens *after* the replacement has been appointed, as opposed to the appointment itself. On this reading, even with the consent of the accused to continue proceedings, the President retains the right to conclude that a rehearing would be the only suitable choice. On the other hand, if appointing a replacement were optional under the sub-rule, so would continuing with the prosecution. *See* ICTY Statute, *supra* note 2, art. 12(a) (requiring a three-judge Trial Chamber). This seems an unlikely decision from a group of judges whose affirmative aim it was to "minimise the possibility of a charge being dismissed on technical grounds . . ." Cassese, *supra* note 61, at 651 (explaining why the Rules were designed to provide for a more active judiciary rather than rely on technical evidentiary rules). Given this sentiment, based in no small part on the gravity of the crimes at issue, the authority to terminate a prosecution ought only to be an exceptional measure rather than a simple option under the sub-rule.

98. The only potential exception to this observation is when a party-initiated disqualification is decided by the Bureau. ICTY RPE, R.15(A), (B), U.N. Doc. IT/32 (Mar. 14, 1994). Because the President is part of that body, it could be argued that notice in such cases is unnecessary. *See id.* R.23(A) ("The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.").

99. *See id.* R.15(E).

As the ICTY recognized when it first undertook its work, in addition to the fair trial guarantees contained in the ICTY Statute, “[o]ther fair trial guarantees appear in . . . the Rules of Procedure and Evidence.”¹⁰⁰ This certainly is true of the rule provisions regarding the mid-trial use of replacement judges. In effect, the relevant sub-rules both create a practice that raises potential fair trial concerns and simultaneously provide remedies for these prospective shortcomings.

In addition, as the shared Appeals Chamber has recognized, the substantive rights of the accused include “a legitimate expectation to be tried in a certain way in order to achieve the fundamental objective of a fair trial.”¹⁰¹ This is an integral part of *nullum iudicium sine lege*, the procedural principle of legality. In determining how to proceed in the case against him, an accused ought to be able to rely on a tribunal’s compliance with its own rules. What is more, the impact and importance of adhering to the designated rules extends beyond simply ensuring justice in the case at hand. Of at least comparable importance, faithfulness to the rules speaks to the integrity of the institution.¹⁰² Because the perceived legitimacy of the ICTY derives, at least in part, from “the commitment to fundamental fairness” evidenced in its RPE,¹⁰³ the judges “must abide” by the rules they create.¹⁰⁴ Lest the ICTY lose that credibility, it ought to operate in a way that evidences a meaningful commitment to accepting procedural constraints. As a result, the question of whether the ICTY has acted in a manner consistent with its obligations under the rules is intimately tied to both to its “fragile legitimacy”¹⁰⁵ and, as

100. See Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 4 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<http://perma.cc/7BEP-3K6V>] (archived Sept. 28, 2014) [hereinafter Tadic Jurisdiction Appeal] (providing, as an example, Article 13, which ensures the high moral character, impartiality, competence, and integrity of the tribunal).

101. Prosecutor v. Nyiramasuhuko, Joint Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15 bis (D), ¶ 12 (Sept. 24, 2003) [hereinafter Butare Appeals Chamber decision].

102. “Nothing can destroy a government more quickly than its failure to observe its own laws . . .” *Mapp*, 367 U.S. at 659; see Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 434 (1982) (“Legitimacy demands attention to the institutional justifications underlying particular laws and the legal system as a whole.”).

103. See Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 843 (2000) (suggesting that the “commitment to fundamental fairness” unifies “the tribunal’s statutes and rules,” which are composed from “dissimilar systems”).

104. See *id.*

105. See Mirjan Damaska, *Assignment of Counsel and Perceptions of Fairness*, 3 J. INT’L CRIM. JUST. 3, 4 (2005) (noting that it is important for “[a]n adolescent justice system . . . with still fragile legitimacy” to be perceived as fair); see also Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*,

the ICTY winds up its operations,¹⁰⁶ its institutional legacy.¹⁰⁷ Unfortunately, as the following section illustrates, “the Tribunal [has] not [been] bound to its procedure in any meaningful sense.”¹⁰⁸

C. Subsequent Amendments

The ICTY's early commitment to ensuring an independent and impartial trial panel appears to have been genuine. In fact, the first time that the ICTY judges amended Rule 15 (E),¹⁰⁹ the changes made provided a very broad interpretation for what qualified as a “part-heard” case and emphasized the accused's ability to demand a rehearing in cases where a judge needed to be replaced mid-trial. The

28 FORDHAM INT'L L.J. 1566, 1566 (2005) (observing that “the legal-political environment in which international and internationalized criminal courts function brings greater attention to the credibility of these institutions” and that they must work to maintain credibility and integrity).

106. In December 2010, the UNSC created the MICT to “continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR.” See MICT Statute, *supra* note 5, ¶ 4. The resolution allowed for a temporal overlap of the work of the new institution and the ICTY, calling upon the latter to complete its remaining work by the close of 2014. See *id.* ¶¶ 1, 3; see also *The Mechanism for International Criminal Tribunals*, ICTY, <http://www.icty.org/sid/10874> [<http://perma.cc/N97W-H9PE>] (archived Oct. 7, 2014) (explaining the role of the MICT).

107. “This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.” Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 21, 2003); see also Darryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 952 (2001) (“[F]rom the long-term perspective, [international] institutions must render judicial decisions of high quality and a relatively consistent jurisprudence that conforms with emerging international norms . . . [because] the integrity of the nascent international criminal justice system is at stake.”).

108. Cristian Defrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1430 (2001).

109. In drafting its rules, the ICTY judiciary included a provision that enabled it to continue with its “quasi-legislative” function in order to make ongoing changes to its RPE. See ICTY RPE, R.6, U.N. Doc. IT/32 (Mar. 14, 1994) (governing the method by which amendments to the rules are made). This power is shared by the judges at the ICTR. The ICTR RPE has, over time, generally followed the changes employed by the ICTY. “[I]t may be mentioned that similar Rules have been adopted by our sister Tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY). Our Rules are, as it were, a replica of those Rules . . .” Prosecutor v. Theoneste Bagosora, Case No. ICTR-96-7-T, Decision on the Defence Motion for Pre-Determination of Rules of Evidence (July 8, 1998); see also Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, ¶ 20 (Oct. 20, 2000) (noting that the ICTY has several rules that are identical to ICTR rules). Nevertheless, the ICTR is not required to mimic the changes adopted at the ICTY, so there are limited differences between the procedures employed at the two *ad hoc* tribunals. See, e.g., Prosecutor v. Casimir Bizimingu, Case No. ICTR-99-50-T, Decision on Bizimingu's Motion for Provisional Release, ¶ 27 (Nov. 4, 2002) (noting that the ICTR “has its own applicable Rules,” which the ICTR is “bound to apply . . . as [they] stand”).

revised provision dictated that, after opening statements or the beginning of the presentation of evidence, "the continuation of the proceedings [could] *only* be ordered with the consent of the accused."¹¹⁰

Over time, however, and as the ICTY began to confront serious pressure to expedite its proceedings, other protections afforded by Rule 15 began to give way to changes designed to accelerate trials, beginning with a 1996 amendment to Rule 15(E) that permitted trial chambers to hear routine matters in the absence of one of the three judges.¹¹¹ By 1998, the ICTY had begun to engage in a self-described "overall effort . . . to expedite its proceedings,"¹¹² an undertaking that drew praise—and encouragement to continue—from the UN Security Council.¹¹³

In late 1999, the ICTY's dedication to this commanded efficiency enterprise became incontestable, as the ICTY adopted a host of amendments aimed "to speed up trials and . . . to minimize delays."¹¹⁴ The casualties created by this quest for efficiency included the protection in Rule 15 that barred the judge who confirmed an indictment from later hearing that case at trial.¹¹⁵ In effect, freeing up confirming judges to try the consequent cases trumped "[t]he importance of impartiality [that was] *illustrated* by" the initial prohibition.¹¹⁶

Ironically, with the removal of this "procedural safeguard for the accused" which aimed "to ensure that the three Judges hearing the case . . . have [not] seen, reviewed, or in any way . . . appear to be

110. ICTY RPE, R.15(E), U.N. Doc. IT/32/Rev.5 (June 15, 1995) (emphasis added).

111. See ICTY RPE, R.15(E), U.N. Doc. IT/32/Rev.9 (July 5, 1996).

112. Int'l Crim. Trib. for the Former Yugoslavia, *Fifth Annual Rep. 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*, ¶ 86, U.N. Doc. A/53/219-S/1998/737 (Aug. 10, 1998) [hereinafter *5th Annual Report*].

113. See, e.g., S.C. Res. 1166, pmbl., U.N. Doc. S/RES/1166 (May 13, 1998) (praising the Tribunal's efforts by "[n]oting the significant progress being made in improving the procedures of the International Tribunal, and convinced of the need for its organs to continue their efforts to further such progress").

114. See Int'l Crim. Trib. for the Former Yugoslavia, *Seventh Annual Rep. 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*, ¶ 288, U.N. Doc. A/55/273-S/2000/777 (Aug. 7, 2000) [hereinafter *7th Annual Report*].

115. See ICTY RPE, R.15(C), U.N. Doc. IT/32 (Mar. 14, 1994). Similarly, Rule 15 also provides: "No member of the Appeals Chamber shall sit on any appeal in a case in which he sat as a member of the Trial Chamber." *Id.* R.15(D).

116. M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 805 (1996) (emphasis added) (concluding that the prohibition "impl[ie]d that Judges should interpret their obligations under the Rule broadly to avoid even the appearance of impropriety").

biased by the [pretrial] material,"¹¹⁷ came a new provision that enabled members of the trial panel to adjudicate guilt despite *not* having seen or reviewed material introduced at trial, and without the consent of the accused. The possibility appeared as part of a new rule, Rule 15 *bis*, titled "Absence of a Judge," in a provision that permitted trials to continue for a period of up to three days before an incomplete judicial panel.¹¹⁸ Significantly, this provision—Rule 15*bis*(A)—which was later extended to a period of five days,¹¹⁹ was adopted with the expectation (but not the requirement) that the absent judge would read the transcript of the missed proceedings and have the opportunity to view the video-recordings of them, "in order to judge for himself or herself with the demeanour of the witnesses."¹²⁰

Rule 15 *bis*, later adopted by the ICTR as well,¹²¹ also included a verbatim transfer—and consequently an affirmative endorsement for

117. Prosecutor v. Kabiligi & Ntabakuze, Case Nos. ICTR-97-34-I, ICTR-97-30-I, Separate and Concurring Opinion of Judge Dolenc, Decision on the Prosecutor's Motion to Amend the Indictment, ¶ 25 (Oct. 8, 1999). The importance of the protection against this is well-illustrated by the description of the confirmation process as shared by former Chief Prosecutor Richard Goldstone. According to Goldstone, the indictment process usually involves requests for further information on the part of the judge; "not infrequently the merits of the indictments or aspects of it are debated [by the judge and chief prosecutor]. Th[is] review process might take days or even weeks." RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 108 (2000). For more on how this process might undermine the fairness of later proceedings, see, for example, I MORRIS & SCHARF, *supra* note 28, at 155 (observing also that, as a result of having confirmed the indictment, the judge "may have already formed an opinion [about] the charges" or may seem to have a vested interest in conviction). For a contrary view, espoused by a former member of the ICTY's Office of the Prosecutor, see Whiting, *supra* note 29, at 90 (maintaining that the *prima facie* standard for obtaining an indictment "has not been difficult to satisfy, and has generally been applied by the judges deferentially").

118. ICTY RPE, R.15 *bis* (A), U.N. Doc. IT/32/Rev.17 (Nov. 17, 1999). As explained in its next annual report, the provision was designed to enable for continued proceedings upon "the unavoidable and legitimate absence of a judge owing to illness or for urgent personal reasons." See *7th Annual Report*, *supra* note 114, ¶ 295; see also ICTY RPE, R.15 *bis* (A), U.N. Doc. IT/32/Rev.17 (Nov. 17, 1999).

119. ICTY RPE, R.15 *bis* (A), U.N. Doc. IT/32/Rev.26 (Dec. 12, 2002).

120. See Prosecutor v. Nyiramasuhuko, Joint Case No. ICTR-98-42-A15*bis*, Dissenting Opinion of Judge David Hunt, ¶ 26 (Sept. 24, 2003) [hereinafter Dissenting Opinion of Judge David Hunt]. The importance that a fact-finder be able to make an independent assessment regarding the demeanor and, therefore, the reliability of witnesses is one that has been recognized by, among other entities, the European Court of Human Rights. See, e.g., *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A), ¶ 43 (1989) (noting that "caution in evaluating the statements" of absent, anonymous witnesses "can scarcely be regarded as a proper substitute for direct observation").

121. The provision was adopted in Arusha nearly a year and a half later. See Rules of Procedure and Evidence of the International Tribunal for Rwanda, R.15 *bis*, U.N. Doc. ITR/3 (May 31, 2001) [hereinafter ICTR RPE]. The subsequent Annual Report of the ICTR limits its comment on the new rule to noting that it enables proceedings to continue before two judges for an abbreviated period. See Int'l Crim. Trib. for Rwanda, *Sixth Annual Rep. of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of*

the continued vitality—of the provision in Rule 15 that conditioned continuing part-heard proceedings before a substitute judge upon the accused's consent.¹²² Given the addition of the new rule, this revised location made sense. The sub-rule set out the appropriate procedure to be followed upon a judge's long-term absence from a case, a condition that could of course stem from the "disqualification of judges" (the title of Rule 15), but also from a host of other causes. Moreover, that the ICTY decided to retain the protective language of the original Rule 15(E) in its entirety—despite, by then, significant pressure to expedite ICTY proceedings—suggests that the ICTY judges recognized the important role Rule 15(E) played in ensuring a fair process.¹²³

Notably, the ICTY would continue to impose the consent requirement for an additional three years. Indeed, the provision survived even the "wide-scale reforms" undertaken in 2000¹²⁴ to enhance its efficiency.¹²⁵ Ultimately, however, as the UN's focus on the exit strategies of the ICTY and ICTR remained intense,¹²⁶ the

International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, ¶ 74, U.N. Doc. A/56/351-S/2001/863 (Sept. 14, 2001) (indicating that the amended rule permits a case to be heard by two judges "for a period not exceeding five days, if the third judge is unable to sit at this hearing due to certain reasons").

122. See ICTY RPE, R.15 *bis* (C), U.N. Doc. IT/32/Rev.17 (Nov. 17, 1999).

123. Admittedly, there is always an element of speculation in ascertaining the legislative intent behind rule amendments. See Darryl A. Mundis, *The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals*, 1 INT'L CRIM. L. REV. 191, 207 (2001) (explaining that the intent behind rule amendments is often unclear because "[t]he records of the ICTY and ICTR Plenaries are not publicly available"). This stems from the fact that the plenary sessions at which amendments are made and the records of these meetings are private. See Mia Swart, *Ad Hoc Rules for Ad Hoc Tribunals? The Rule-Making Powers of the Judges of the ICTY and ICTR*, 18 S. AFR. J. ON HUM. RTS. 570, 573 (2002).

124. Int'l Crim. Trib. for the Former Yugoslavia, *Rep. on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, ¶ 5 n.1, Annex, U.N. Doc. S/2002/678, (June 19, 2002).

125. See Chairman of the Expert Group, *Rep. 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*, 22, U.N. GAOR, 54th Sess., U.N. Doc. A/54/634 (Nov. 22, 1999) (reporting that the changes were made in response to an externally created expert report that evaluated the efficiency of the ICTY and ICTR); see also *7th Annual Report*, *supra* note 114, ¶ 320 (explaining that the expert group was tasked to report on the functioning of the ICTY and ICTR pursuant to the General Assembly's request that the Secretary-General evaluate the efficiency of the operation and function of the Tribunals).

126. See Press Briefing, ICTR, Press Briefing by the ICTR Spokesman, ICTR/INFO-9-13-020.EN (Nov. 15, 2001) (noting that the issue of completion was the "clear undercurrent" of meetings held in New York that year and projecting that the ICTR, with the assistance of additional *ad litem* judges, could complete trials in the first instance in 2008 or 2009). At the same time, proposals regarding completion strategies were made by the President and Prosecutor of the ICTY. See Int'l Crim. Trib. for the Former Yugoslavia, *Ninth Annual Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International*

ICTY judges responded in late 2002 by essentially eviscerating the accused's veto power. While an accused could continue to object to continuing an ongoing trial with a new judge, new Rule 15*bis*(D) authorized the remaining two trial judges to override the accused's wishes whenever they unanimously agreed that "doing so would serve the interests of justice."¹²⁷

As the ICTY President acknowledged, the amendment was meant to be an important tool in the ICTY's quest to comply with its completion strategy. By "reducing the chances of mistrials necessitating time-consuming re-trials," the change was intended to enhance the speed with which the ICTY fulfilled its mission.¹²⁸ A similar story emerged from the ICTR, which adopted the amended version of Rule 15 *bis* shortly thereafter.¹²⁹ Like his ICTY counterpart, the ICTR President identified the amended rule as a reform "implemented with a view to accelerat[e] the proceedings."¹³⁰ More than a decade later, however, it's unclear to what extent the amendment has fulfilled this goal. What is apparent, though, is that the revision has come at no small cost to either the ICTY or ICTR in terms of its reputation for providing just proceedings.

Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Summary, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002).

127. The amended rule also specifies that the decision to so proceed is subject to interlocutory appeal, the new judge may only sit after certifying familiarity with the record of the proceedings, and a substitution that is contrary to the wishes of the accused may only be made once. ICTY RPE, R.15 *bis* (D), U.N. Doc. IT/32/Rev.26 (2002).

128. Press Release, Statement of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, Before the Commission on Security and Cooperation in Europe, U.N. Doc. JL/P.I.S./786-e (Oct. 14, 2003), available at <http://www.icty.org/sid/8186> [<http://perma.cc/TJ4-AEQT>] (archived Sept. 24, 2014).

129. See ICTR RPE, R.15 *bis* (D), U.N. Doc. ITR/3/Rev.11 (May 27, 2003) (amending the ICTR Rules of Procedure and Evidence to permit "the remaining judges [to] decide to continue the proceedings before a Trial Chamber with a substitute Judge" even if "the accused withholds his consent"). Although this amendment may appear to have been inspired by a then-existing case in which it was immediately used, Judge Hunt maintains that "[t]he judges of the Rwanda Tribunal were merely following their usual practice of adopting relevant amendments which had previously been made by the judges of the Yugoslav Tribunal to the Tribunal's Rules." Dissenting Opinion of Judge Hunt, *supra* note 120, ¶ 9.

130. U.N. SCOR, 58th Sess., 4838th mtg., at 9, U.N. Doc. S/PV.4838 (Oct. 9, 2003); see Int'l Crim. Trib. for Rwanda, *Completion Strategy for the International Criminal Tribunal for Rwanda*, ¶ 42, U.N. Doc. S/2004/341 (May 3, 2004) (indicating that the amended version of Rule 15 *bis* allows cases to continue in certain circumstances).

V. THE APPLICATION OF NEW RULE 15BIS(D)

The earliest applications of the amended rule proved problematic from a fairness perspective for reasons beyond its permitting trial proceedings to continue with a new judge over the accused's objection. At both the ICTY and ICTR, the amended rule was first applied in cases that commenced prior to the respective rule amendments. As a result, the use of new Rule 15*bis*(D) appeared an affront to the RPE requirement that rule amendments "shall not operate to prejudice the rights of the accused . . . in any pending case."¹³¹

Remarkably, however, the ICTR Appeals Chamber concluded in the *Butare* case that the amended rule did not operate to prejudice the rights of the accused, as the consent requirement was not in fact a substantive right.¹³² Conspicuously at odds with then-recent jurisprudence noting "the great weight attached to consent as a means of determining and safeguarding the rights of the accused to a fair hearing,"¹³³ the Appeals Chamber instead maintained that consent "was *only* a safeguard" that "gave protection against possible arbitrariness in the exercise of the power of the Tribunal to continue the hearing with a substitute judge."¹³⁴ Puzzlingly, the Appeals Chamber then decided that empowering the two remaining judges to continue the proceedings somehow amounted to "a safeguard of equivalent value."¹³⁵

Of course, if the accused was originally given a veto power in order to prevent judges from acting arbitrarily, it seems illogical—if not disingenuous—to suggest that subsequently enabling the judges to override that power might amount to a comparable protection.¹³⁶ Moreover, the assertion is particularly dubious when one considers that the two deciding judges will not only have been part of the trial from the start, but also part of a system now operating under significant pressure to expedite its proceedings. Indeed, the decision

131. ICTR RPE, R.6 (C), U.N. Doc. ITR/3/Rev.11 (May 27, 2003); ICTY RPE, R.6 (D), U.N. Doc. IT/32/Rev.28 (July 28, 2003).

132. See *Butare Appeals Chamber decision, supra* note 101, ¶ 13 ("The Appeals Chamber will . . . proceed on the footing that the amendment concerns a substantive right, in the sense of there being a legitimate expectation to be tried in a certain way in order to achieve the fundamental objective of a fair trial, and that retrospectivity is consequently involved in applying the amendment to a pending trial.").

133. Prosecutor v. Théoneste Bagosora, Case No. ICTR-98-41-T, Decision on Continuation or Commencement *De Novo* of Trial (June 11, 2003) [hereinafter *Bagosora, Continuation Decision*].

134. See *Butare Appeals Chamber Decision, supra* note 101, ¶ 17 (emphasis added).

135. See *id.* ¶¶ 18–19.

136. See, e.g., Fairlie, *Adding Fuel to Milosevic's Fire, supra* note 68, at 138–39 (arguing that the consent of the accused, originally created because "the judiciary determined that its own activity needed to be subject to the veto power of an outside entity," becomes meaningless when "a determination made by two of [the judiciary's] own members [can] override such a safeguard").

to continue proceedings before a substitute judge in *Butare*—which, in the matter, overrode the objections of five out of six jointly-tried defendants—provides ample evidence of this latter concern.¹³⁷

Not long after, the ICTY used Rule 15 *bis* in a manner that similarly demonstrated a preference for avoiding costly and time-consuming retrials over assuring the fairness of its proceedings. After the loss of the Presiding Judge in the *Milosevic* case, the two remaining judges opted to continue the then-lengthy proceedings,¹³⁸ just three months after the ICTY President informed the UN Security Council “Rule 15 *bis* cannot be used in cases in which a lengthy trial is significantly under way.”¹³⁹ At the time, the Prosecution had presented evidence for over two years, and was in the final stages of its case-in-chief.¹⁴⁰ With trial transcripts then exceeding 32,000 pages and more than 300 witnesses called, it is little wonder that what seemed a pre-ordained decision to proceed with a replacement judge¹⁴¹ prompted observers to question the fairness of the process

137. The two remaining judges in the *Butare* case considered such extraneous factors as the right to a speedy trial for those still in custody and the financial costs to the public in making its “interests of justice” determination. The two judges also expressed concern about the ramifications of finding in favor of those accused. According to the pair, “while consideration of the need for every judge to assess demeanour is certainly a very important one, we note that it must be considered with care, for any precedent that sets it up as the overriding consideration of what it means to have a fair trial will make it extremely difficult – if not impossible – ever to order continuation of a trial pursuant to Rule 15*bis*(D).” *Prosecutor v. Nyiramasuhuko*, Joint Case No. ICTR-98-42-T, Decision in the Matter of Proceedings Under Rule 15*bis*(D), ¶ 33(e) (July 15, 2003).

138. See *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Order Pursuant to Rule 15 *bis* (D) (Int'l Crim. Trib. for the Former Yugoslavia Mar. 29, 2004) (determining that, in the interest of justice, the proceedings should continue with a substitute judge).

139. See President of the International Criminal Tribunal of the Former Yugoslavia, Letter dated Jan. 13, 2004 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 addressed to the President of the Security Council, annexed to U.N. Secretary-General, Letter dated Jan. 20, 2004 from the Security-General addressed to the President of the Security Council, U.N. Doc. S/2004/53 (Jan. 21, 2004) (emphasis added). The relevant portion of the letter stresses that the Rule's requirement that a judge certify familiarity with the proceedings is “not a mere formality but a requirement of fairness.” *Id.*

140. See *Former Yugoslavia: Justice on Trial*, *ECONOMIST* (Feb. 26, 2004), available at http://www.economist.com/printededition/printerfriendly.cfm?Story_ID=2460574 [<http://perma.cc/Q2RG-KULA>] (archived Sept. 28, 2014) (predicting that the two remaining judges would opt to continue the trial).

141. Before the remaining judges considered whether it would be in the interests of justice to continue the proceedings, a Tribunal spokesperson asserted that “the court was nevertheless planning to continue with Milosevic trial ‘as planned.’” Ana Uzelac, *Milosevic Back to Old Self*, *INST. FOR WAR & PEACE REP.* (Nov. 9, 2005), <http://iwpr.net/report-news/milosevic-back-old-self> [<http://perma.cc/4T6W-3VJM>] (archived Oct. 30, 2014) (quoting Jim Landale). In fact, even before Milosevic's position was

and the ICTY's integrity.¹⁴² Commentators were likewise quick to criticize the ICTY for what it had failed to do, describing the lack of an alternate judge as "inexcusable."¹⁴³

Later cases similarly buttress the notion that concerns about expediency militated in favor of continuing trial proceedings despite potential fairness concerns. In fact, every single interests of justice determination made in the wake of an accused's objection resulted in a decision by the two remaining judges to continue the proceedings,¹⁴⁴ including one decision in which the parties were not even initially consulted on the matter.¹⁴⁵ What is more, ICTR jurisprudence

sought on the matter, the Tribunal's President announced that "Judge May's resignation will not have an unduly disruptive effect on any proceedings before the Tribunal." Press Release, ICTY, Statement of Judge Theodor Meron, President of the ICTY, upon the Resignation of Judge Richard George May, MF/P.I.S./824e (Feb. 22, 2004).

142. See, e.g., Scharf, *supra* note 49, at 39 (noting that the Tribunal's handling of the loss of the Presiding Judge in the *Milosevic* matter "does not receive high marks for fairness" and that "[i]n a domestic case, this would have been grounds for a retrial or dismissal"); Elizabeth Sullivan, *Putting a Twist on Justice, Tribunal's Tactics in Milosevic Case are a Cause for Concern*, PLAIN DEALER, Aug. 1, 2004 (describing the decision as "cause for concern") (on file with author). Among the fairness concerns raised were doubts that the new judge could actually familiarize himself with the record of the proceedings within the Tribunal's preferred timeframe. "Had a replacement figure been waiting in the wings on [the day that the two remaining judges opted to continue the case], with [the proposed] start date of 1 June, he would have needed to read in excess of 500 pages of transcript per day in order to catch up on the written record of the proceedings." Fairlie, *Adding Fuel to Milosevic's Fire*, *supra* note 68, at 143 (emphasis omitted) (footnotes omitted) (noting that in the same space of time the judge would also have to review the nearly 200 decisions that had already been rendered and more than 300 exhibits then entered into evidence).

143. See Geoffrey Robertson, *Fair Trials for Terrorists?*, in HUMAN RIGHTS IN THE "WAR ON TERROR" 169, 179 (Richard Ashby Wilson ed., 2005) ("Certainly it was a mistake, for a trial of even half [its] length, not to make provision for an alternate judge . . ."); Scharf, *supra* note 49, at 39 (concluding that an alternate judge ought to have been appointed "given the expected length of the trial, the importance of the defendant, and the age of the judges").

144. See *Karemera v. Prosecutor*, Case No. ICTR-98-44-AR15bis.2, For Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, ¶¶ 3-4 (Oct. 22, 2004) [hereinafter *Karemera*, Reasons for Decision on Interlocutory Appeals] (noting two separate decisions by the remaining judges to continue proceedings). Other sets of remaining judges similarly found it in the interests of justice to continue proceedings at both the ICTY and ICTR. See Krajisnik, Decision Pursuant to Rule 15 bis (D), *supra* note 69, ¶¶ 10, 14; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on the Continuation of the Proceedings, Rule 15 bis of the Rules of Procedure and Evidence (Mar. 6, 2007) (noting at ¶ 71, that only 13 of more than 100 intended prosecution witnesses had by then testified); see also *Prosecutor v. Karemera*, Case No. ICTR-98-44-T-AR15bis.3, Decision on Appeals Pursuant to Rule 15bis (D), ¶¶ 18-24, 40-46 (Apr. 20, 2007) [hereinafter *Karemera*, Decision on Appeals Pursuant to Rule 15bis (D)] (upholding the judges' decision to continue the trial despite the fact that the defendants withheld consent and "find[ing] that the continuation . . . would not result in a failure to uphold their fair trial rights").

145. In 2004, the two remaining judges in the *Karemera* case first decided to continue on-going proceedings with a replacement judge without hearing from the parties. After being directed by the Appeals Chamber to give the parties the

expressly rejected the time-consuming suggestion that the substitute judge be required to view the entirety of the available video-recordings of witness testimony.¹⁴⁶

At the same time, the developing jurisprudence was not entirely hostile to the defense. In at least one matter, for example, the Appeals Chamber found that the remaining judges had abused their discretion in deciding to continue a case.¹⁴⁷ Of broader significance, some of the decisions applying revised Rule 15 *bis* included an apparent recognition that, at some stage in the proceedings, a decision to continue with the trial would constitute an abuse of discretion.

An early articulation of this view can be found in the *Butare* case, in which the Appeals Chamber recognized that it would not always be in the interests of justice to proceed with a replacement judge in every part-heard case. In *Butare*, the Appeals Chamber rejected the notion that there could be a pre-determined, “hard and fast relationship between the proportion of witnesses who have already testified and the exercise of the [discretionary] power to order a continuation . . . with a substitute judge,”¹⁴⁸ concluding instead that it is up to the two remaining judges “to establish the *precise point* within a margin of appreciation at which a continuation should be ordered.”¹⁴⁹ Implicit in these observations is the notion that in every case there will be a juncture at which continuation would not serve the interests of justice, although “[t]he stage reached in each case need not always be the same.”¹⁵⁰

In harmony with this interpretation, and citing to *Butare*, the remaining judges in the *Krajisnik* case endorsed the view that there is such a thing as a “cut-off line,” at which the interests of justice will require a rehearing, although where that line lies “is not clear in the abstract.”¹⁵¹ Accordingly, the judges focused on whether the new judge would be able to “master[] the case within a reasonable amount of time,” considering such factors as the amount of witnesses already

opportunity to be heard, the judges again decided to continue the proceedings. See Karemera, Reasons for Decision on Interlocutory Appeals, *supra* note 144, ¶¶ 3–4.

146. Prosecutor v. Karemera, ICTR-98-44-T, Decision on Joseph Nzirorera’s Submission to Substitute Judge, ¶ 11 (June 8, 2007) (affording great deference regarding the methods employed by the substitute judge to familiarize himself with the proceedings conducted in his absence and maintaining that it would be “offensive” to require the judge to detail his familiarization process).

147. See Karemera, Reasons for Decision on Interlocutory Appeals, *supra* note 144, ¶ 72.

148. Butare Appeals Chamber decision, *supra* note 101, ¶ 27.

149. *Id.* ¶ 23 (emphasis added).

150. *Id.* ¶ 27.

151. Krajisnik, Decision Pursuant to Rule 15 *bis* (D), *supra* note 69, ¶ 13 (“Since a given case is likely to differ significantly from another in its nature and history, it is preferable that a court limits itself to an assessment of its own particular circumstances in the light of applicable principle.”).

heard and “the fidelity and accessibility of the trial record.”¹⁵² Critically, the decision also highlighted the importance of the “gap between the level of familiarity of the continuing judges and the substitute judge.”¹⁵³ In ultimately deciding to continue with the part-heard case, and in accord with the collegiality concerns noted above, the judges concluded that “[m]ost importantly, the gap in mastery of the case between the substitute judge and the sitting judges is likely to be of little practical significance.”¹⁵⁴

VI. THE INTRODUCTION OF ALTERNATE JUDGES

The notion that mid-trial judicial substitutions will at some stage offend the interests of justice is likewise consistent with subsequent amendments made to the ICTY’s Statute and Rules, which provided at least a partial answer to critics of the *Milosevic* case. In December 2005, the ICTY judiciary authorized its newly elected President, Fausto Pocar, to propose that the UN Security Council appoint *ad litem* judges who could serve as judicial alternates, or “reserve judges,” for Trial Chamber panels in multi-accused trials.¹⁵⁵ By that time, joint trials had become a key part of the ICTY’s efforts to comply with its completion strategy,¹⁵⁶ with some cases bulging to encompass as many as nine accused¹⁵⁷ and prompting the reconstruction of ICTY courtrooms to accommodate the increased number of co-accused.¹⁵⁸

The move to incorporate reserve judges—“the most visible sign of unhappiness” with the practice of replacing judges in pending trials¹⁵⁹—was ultimately successful. New Rule 15 *ter* was adopted

152. *Id.* ¶ 14.

153. *Id.* ¶¶ 14–15 (acknowledging that a gap remained in the case “at least in theory” despite its conclusion, at ¶ 14, that “the difference between a first-hand experience of the case [under consideration in which just over one-third of the Prosecution’s witnesses had been heard], and a second-hand review of it, is very limited”).

154. *Id.* ¶ 18 (emphasis added).

155. See Int’l Crim. Trib. for the Former Yugoslavia, *Thirteenth Annual Rep. 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*, ¶ 26, U.N. Doc. A/61/271–S/2006/666 (Aug. 21, 2006) [hereinafter *13th Annual Report*].

156. See Mariam Ahmedani et al., *Updates from the International Criminal Courts*, 13 HUM. RTS. BRIEF, no. 2, 2006, at 41 (describing the detailed measures that the ICTY had taken, including joint trials, to comply with the “completion strategy”).

157. See, e.g., Prosecutor v. Popovic, Case No. IT-02-57-PT, Decision on Motion for Joinder, ¶ 36(c) (Int’l Crim. Trib. for the Former Yugoslavia Sept. 21, 2005) (approving the joinder of six cases, over the objection of the relevant accused).

158. See *13th Annual Report*, *supra* note 155, ¶ 112.

159. See William A. Schabas, *Independence and Impartiality of the International Criminal Judiciary*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW:

once the UN Security Council approved the necessary additional judges.¹⁶⁰ Rule 15 *ter* introduced the possibility of assigning a reserve judge to sit with the three judges assigned to a case, with the crucial requirement that the “reserve Judge . . . be present at each stage of a trial to which that Judge has been assigned.”¹⁶¹ Rule 15 *ter* also protected against the possibility of losing a judge in the midst of deliberations by requiring that reserve judges “shall be present, but shall not vote, during any deliberations in a trial.”¹⁶² Although rightly heralded as “a long-awaited reform” and a move that perhaps “reflect[ed] dissent and unhappiness among the judges themselves about the previous practice,”¹⁶³ the new rule nevertheless failed to cure all the Tribunal’s ills.

Rather than provide for a reserve judge in every case, whether an alternate is to be assigned at all is a matter of Presidential discretion.¹⁶⁴ As a result, the possibility of employing a substitute judge in the midst of trial and over the objections of the accused endured.¹⁶⁵ In fact, the revised rules peculiarly appear to permit an unfamiliar judge to join the bench—mid-trial and over the objection of the accused—even when a reserve judge has been assigned.¹⁶⁶ Moreover, gearing the new rule’s protections solely to the trials of multi-accused¹⁶⁷ further narrowed the promise reserve judges

STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAITY KAMA 571, 589–90 (Emmanuel Decaux, Adama Dieng & Malick Sow eds., 2007).

160. See S.C. Res. 1660, art. 12, Annex, U.N. Doc. S/RES/1660 (Feb. 28, 2006) (providing for the appointment of *ad litem* judges who could serve as reserve judges).

161. ICTY RPE, R.15 *ter* (B), U.N. Doc. IT/32/Rev.37 (Apr. 6, 2006).

162. *Id.* R.15 *ter* (D).

163. Schabas, *supra* note 159, at 590.

164. See ICTY RPE, R.15 *ter* (A), U.N. Doc. IT/32/Rev.37 (Apr. 6, 2006).

165. See *id.* R. 15 *bis* (D). “The perceived harm to the accused in being tried by a substitute judge that has not been present during all parts of the trial may be minimised by . . . the allocation of reserve judges . . .” Sarah Williams, *The Completion Strategy of the ICTY and the ICTR*, in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 153, 179 (Michael Bohlander ed., 2007).

166. “If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 *ter*, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.” R.15 *bis* (G), U.N. Doc. IT/32/Rev.37 (Apr. 6, 2006). This anomalous provision was corrected in the rules created for the MICT, which provide that, “If, in a trial where a reserve Judge has been assigned in accordance with Rule 20, a Judge is unable to continue sitting, the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.” Mechanism for International Criminal Tribunals Rules of Procedure and Evidence, R.19(E), U.N. Doc. MICT/1 (2012) [hereinafter MICT RPE].

167. See *13th Annual Report*, *supra* note 155, Summary & ¶¶ 20, 26, 115 (reporting changes to the Tribunal to accommodate multiple defendants including the appointment of additional reserve judges and changes to the courtrooms). Consistent with this plan, as of July 2009, reserve judges had been assigned only in multi-accused cases, specifically, *Popovic et al.* (5 co-accused), *Milutinovic et al.* (6 co-accused), and *Prlic et al.* (6 co-accused). See Int’l Crim. Trib. for the Former Yugoslavia, *Sixteenth*

afforded.¹⁶⁸ The ICTY later deviated from this narrow policy in the high profile *Karadzic* case in late 2009,¹⁶⁹ but the decision to expand the use of reserve judges beyond cases involving multiple accused was not followed in the *Šešelj* prosecution.

VII. THE ŠEŠELJ MATTER

The failure to provide for a reserve judge in the *Šešelj* case, then, resulted in an outcome that was not only unfortunate, but also avoidable. If anything, *Šešelj*'s conduct prior to the start of his trial in 2007 ought to have provided sufficient notice that the length of his prosecution might well rival that of any multi-accused case and was, correspondingly, likely to benefit from the insurance provided by a reserve judge. Indeed, *Šešelj* had all but single-handedly engineered the more than four year gap between his first (and decidedly vexatious) courtroom appearance¹⁷⁰ and when his "trial started anew on 7 November 2007."¹⁷¹ By that stage, *Šešelj*'s penchant for using his *pro se* status to obstruct tribunal proceedings had been amply demonstrated¹⁷² and, having just regained the right to self-represent by orchestrating a hunger strike,¹⁷³ could only have been expected to continue.¹⁷⁴

Annual Rep. 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, ¶¶ 38, 45, 46, U.N. Doc. A/64/205-S/2009/394 (July 31, 2009) [hereinafter *16th Annual Report*].

168. Despite these limitations, the new Rule gave the ICTY an advantage over its companion tribunal. Remarkably, the ICTR neither adopted Rule 15 *ter* nor in any other fashion adopted a provision regarding reserve judges. See ICTR RPE, U.N. Doc. ITR/3/Rev.22 (Apr. 10, 2013).

169. See *Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Order Assigning *ad litem* Judges to a Case Before a Trial Chamber (Int'l Crim. Trib. for the Former Yugoslavia Sept. 4, 2009).

170. See Transcript of Hearing at 54, *Prosecutor v. Šešelj*, Case No. IT-03-67-I (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2003) (demanding to be heard regarding the judiciary's "strange clothing," allegedly reminiscent of "the inquisition of the Roman Catholic Church," and contending "psychologically I find this unacceptable, and I insist that everyone should wear normal civilian clothing").

171. Int'l Crim. Trib. for the Former Yugoslavia, *Seventeenth Annual Rep. 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*, ¶ 44, U.N. Doc. A/65/205-S/2010/413 (July 30, 2010).

172. See generally *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶¶ 32–66 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 21, 2006) (providing examples of *Šešelj*'s inappropriate and disruptive behavior).

173. See, e.g., David Scheffer, *Atrocity Crimes Litigation: Year-in-Review (2011) Conference Abridged Transcript*, 11 NW. U. J. INT'L HUM. RTS. 146, 159, ¶¶ 110–11 (2013) (providing Mark Harmon's suggestion that *Šešelj*'s success was tied to the contemporaneous death of Slobodan Milošević). "No doubt concerned about *Šešelj*'s grave condition and the negative publicity his death would have generated, the Appeals Chamber essentially capitulated to *Šešelj*'s demands." Nancy Amoury Combs,

Predictably, Šešelj's conduct contributed markedly to the length of his 2007 trial,¹⁷⁵ although his three-judge panel remained intact until well after closing arguments were heard in March 2012. Upon Judge Harhoff's disqualification after more than a year of the panel's deliberations,¹⁷⁶ however, there was no reserve judge waiting to take his place.¹⁷⁷ As a result, the Šešelj case presented the ICTY with an unprecedented set of facts. It furthermore presented the novel question of how to proceed once a trial panel is rendered incomplete in the midst of deliberations.

A. The September 2013 Order

Less than a week after Judge Harhoff's disqualification, Acting President Agius issued a follow-up order that began by noting that when a new judge replaces a disqualified one pursuant to Rule 15, the rule "does not set out any procedures to be followed in the event of such a replacement."¹⁷⁸ Rather, the Acting President noted, it is Rules "15bis(C) and 15bis(D) of the Rules [that] set out the procedures to be followed in the event that a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration."¹⁷⁹

1. Accuracy

As noted above, this view that the relevant provisions in Rules 15 and 15 bis are interrelated is consistent with the text of 15bis(C), which sets out the procedure to be followed whenever "a Judge is, for

Legitimizing International Criminal Justice: The Importance of Process Control, 33 MICH. J. INT'L L. 321, 352 (2012).

174. Indeed, the one year lag between the reinstatement of Šešelj's right to self-represent and the commencement of the 2007 case was "largely . . . a consequence of Šešelj's pretrial demands." Combs, *supra* note 173, at 352–53.

175. See, e.g., Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 10, 2010) (noting that the proceedings against Šešelj had to be suspended in order for him to answer the charge of contempt of the Tribunal).

176. See Harhoff Disqualification Decision, *supra* note 14, ¶ 13 (finding that, in light of Judge Harhoff's letter, "an unacceptable appearance of bias exists").

177. "Undoubtedly, had there been a reserve Judge in the Chamber, the replacement of the disqualified Judge would not have created any problems and the reserve Judge would have sat as a regular Judge. Consequently, the judgement would have been delivered at 0900 hours on 30 October 2013." Prosecutor v. Šešelj, Case No. IT-03-67-T, Judge Antonetti's Concurring Opinion on Decision Inviting the Parties to Make Submissions on Continuation of Proceedings, at 6 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 13, 2013) [hereinafter Judge Antonetti's Concurring Opinion].

178. Prosecutor v. Šešelj, Case No. IT-03-67-T, Order Following Decision of the Panel to Disqualify Judge Harhoff, at 1 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 2013) [hereinafter September 2013 Order], available at <http://www.icty.org/x/cases/seselj/tord/en/130903.pdf> [<http://perma.cc/H6EK-JBLC>] (archived Oct. 6, 2014).

179. *Id.*

any reason, unable to continue sitting in a part-heard case.”¹⁸⁰ What is more, the broad language in the sub-rule is fundamentally sound. Logic suggests that the decision to provide procedural safeguards in the event that a new judge joins a case mid-trial reflects the judiciary’s view that the practice raises fair trial concerns. Indeed, case law expressly acknowledges this by describing “consent as a means of determining and safeguarding the rights of the accused to a fair hearing”¹⁸¹ and maintaining that the procedures required when proceedings are continued in the absence of consent include “safeguards [that] ensure that fair trials rights are not compromised.”¹⁸² That these safeguards are sweepingly applicable reflects the fact that the fair trial concerns they are designed to address exist irrespective of the reasons why a Chamber has been rendered incomplete. Accordingly, failing to apply them in the wake of a mid-trial judicial disqualification would render the trial process at best arbitrary and at worst unfair. Critically, however, Rules 15 and 15 *bis* could not be applied in tandem to the *Šešelj* matter, as the procedure set out in the latter applies only to *part-heard* cases, a prerequisite that the Acting President acknowledged did not align with the “more advanced stage” of the *Šešelj* proceedings.¹⁸³

2. The Procedural Misstep

Assuming, as this work does, that the above interpretation is correct,¹⁸⁴ it would have been proper for the Acting President to then conclude that the RPE prohibited the use of a replacement judge in *Šešelj*’s case. Because the Rules permit the use of replacement judges only in *part-heard* cases, and only then upon compliance with designated procedural safeguards, it is reasonable to conclude that the prospect of introducing new judges to completely heard cases is simply not permitted. In this regard, Judge Robinson’s comments in the *Aleksovski* trial are instructive: “Where, as in the instant case, the particular subject . . . is dealt with, but a potential aspect or modality of it has been omitted, the proper construction is that that aspect or modality is prohibited.”¹⁸⁵ Remarkably, however, rather than conclude that the specificity of the existing rules curtailed the

180. ICTY RPE, R.15 *bis* (C), U.N. Doc. IT/32/Rev.49 (May 22, 2013) (emphasis added).

181. Bagosora, Continuation Decision, *supra* note 133.

182. Karemera, Decision on Appeals Pursuant to Rule 15 *bis* (D), *supra* note 144, ¶ 43 (noting that the replacement must certify familiarity with the record of the proceedings before assuming the bench).

183. September 2013 Order, *supra* note 178.

184. See *supra* notes 95–98 and accompanying text.

185. Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Dissenting Opinion of Judge Patrick Robinson, ¶ 22 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999).

ICTY's ability to proceed with a replacement judge, the Acting President opted instead to disregard the specificity of the Sub-rule entirely. Jettisoning the "part-heard case" requirement, the September Order concluded that Rules 15*bis*(C) and 15*bis*(D) "ought to be applied *mutatis mutandis*" (with the necessary changes).¹⁸⁶

a. Fairness and Credibility Considerations

Contrary to the Acting President's assertion that this modification would advance the aims of "fairness and transparency," the suggested scheme could only have had the opposite effect. As to the former concern, jettisoning the "part-heard case" requirement could scarcely be deemed to enhance the fairness of the proceedings, particularly in light of the collegiality considerations noted above. Rather, reason—and germane case law¹⁸⁷—suggests that the greater the gap in familiarity between the new and existing judges, the greater the negative effect on the fairness of the proceedings. Moreover, the blitheness of the proposal to eliminate the express requirement hardly contributes to any transparency aim. To the contrary, it suggests a disconcerting willingness to ignore the rule constraint simply because it proves inconvenient to continuing the proceedings.¹⁸⁸ In effect, by ordering that the ICTY ought not to be bound by its rules as written, this aspect of the September order creates the impression that the ICTY is not even "somewhat just,"¹⁸⁹ a perception hardly remedied by the events that followed.

b. The Rejection of the Order

Immediately following the September Order, the Presiding Judge rejected the Acting President's plan, maintaining that applying Rules 15 and 15 *bis*, in tandem, amounted to "play[ing] around" with the Rules, as 15 *bis* ("Absence of a Judge") "concerns an entirely different situation" than Rule 15 ("Disqualification of Judges").¹⁹⁰ In other

186. September 2013 Order, *supra* note 178.

187. See *supra* notes 146–52 and accompanying text (providing examples of Tribunal rulings that address the use of substitute judges).

188. "The Acting President claims (without explanation) that [Rule 15 *bis*] applies 'mutatis mutandis.' Apparently, that's Latin for 'because we want it to.'" Kevin Jon Heller, *What Part of "Part" Does the ICTY Not Understand?*, OPINIO JURIS (Oct. 31, 2013, 10:47 PM), <http://opiniojuris.org/2013/10/31/part-part-icty-understand> [http://perma.cc/WY2K-WZJE] (archived Oct. 6, 2014).

189. "[I]f a legal system is at least somewhat just, the rational and legitimate expectations it induces may have some prima facie moral claim to be honored." Munzer, *supra* note 102.

190. Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision to Unseal the Report of the Presiding Judge to the President of the Tribunal or Alternatively to the Judge Designated by Him Regarding the Motion for Disqualification of Judge Harhoff, at 3

words, the Presiding Judge somehow decided that substitutions made in the wake of judicial disqualification do not benefit from the protections that are otherwise available whenever a judge is replaced mid-trial.

This conclusion, however, overlooks the text of Rule 15*bis*(C),¹⁹¹ its initial placement as Rule 15(E) under the title “Disqualification of Judges”,¹⁹² and its later word-for-word transfer to a new rule governing absent judges (which, indeed, disqualified judges are).¹⁹³ What is more, it renders the trial process arbitrary; although fairness concerns are created whenever a mid-trial substitution is made, under the Presiding Judge’s interpretation, a select class of cases (substitutions made pursuant to judicial disqualification) are exempted from the protections afforded in all other cases. In response, the Acting President rejected this questionable interpretation, yet also implicitly authorized its application, leaving it to the newly constituted Šešelj Trial Chamber to decide upon the procedure to be followed in determining whether the trial should proceed.¹⁹⁴

B. The December 2013 Decision

Free to interpret the rules as they saw fit, the newly constituted Šešelj Chamber operated from the assumption that the alleged disconnect between Rule 15 and Rule 15 *bis* created a lacuna in the rules, permitting the Chamber to consider the question of continuation pursuant to Rule 54.¹⁹⁵ Dubbed the “General Rule,” Rule 54 enables a Judge or Trial Chamber to issue orders “as may be necessary . . . for the conduct of trial”¹⁹⁶ and applies in the absence of

(Int’l Crim. Trib. for the Former Yugoslavia Sept. 4, 2013) [hereinafter Decision to Unseal], available at <http://www.icty.org/x/cases/seselj/tdec/en/130910.pdf> [<http://perma.cc/F34J-SDW5>] (archived Oct. 6, 2014).

191. ICTY RPE, R.15 *bis* (C), U.N. Doc. IT/32/Rev.49 (2013) (setting out the procedure to be followed whenever “a Judge is, for any reason, unable to continue sitting in a part-heard case” (emphasis added)).

192. See *supra* note 60 and accompanying text (providing the original text of Rule 15(E), which addressed judicial substitutions).

193. See *supra* notes 121–22 and accompanying text (discussing the adoption of New Rule 15 *bis*, which addresses substitute judges).

194. Prosecutor v. Šešelj, Case No. IT-03-67-T, Order Assigning a Judge Pursuant to Rule 15 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 31, 2013) (continuing to maintain that “the interests of fairness and transparency are indeed better protected by the application of the regime envisaged in Rule 15*bis* of the Rules, and that this Rule may correctly be applied *mutatis mutandis*”).

195. See Šešelj, Continuation Decision, *supra* note 3, ¶ 2 (indicating that the Tribunal would make its decision “[p]ursuant to Rule 54 of the Rules of Procedure and Evidence” and failing to mention Articles 15 or 15 *bis*).

196. Rule 54 (“The General Rule”) provides: “At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.” ICTY RPE, R.54, U.N. Doc. IT/32/Rev.49 (May 22, 2013). The Rule is based upon Article 19(2) of the ICTY Statute.

more specific rules of procedure.¹⁹⁷ Not surprisingly, the broadness of Rule 54 has been criticized both for being “a bold act of judicial self-aggrandizement” and for the amorphous powers it appears to bestow: “one must already know what the limits of the judicial power at the international tribunal are in theory or in practice to know when one is entitled to rely upon the rule.”¹⁹⁸

Arguably, however, there are cases when deciding upon the legitimate use of Rule 54 does not involve a Herculean undertaking. Indeed, at least some limits on judicial power ought to be immediately apparent and others ascertainable upon thoughtful consideration of the Statute and Rules. In these latter cases, however, and as the December decision demonstrates, the use of the General Rule may present a different problem: judicial unwillingness to engage in the analysis required to divine the appropriate limits of a Trial Chamber’s authority.¹⁹⁹ Indeed, had the *Šešelj* panel endeavored to ascertain the constraints on its ability to act, it would have avoided a decision that results in unfairness to the accused and brings the ICTY into serious disrepute.

1. The Procedural Misstep

In anticipation of the December decision, the Presiding Judge promised to proceed in a way that “w[ould] best favour a fair determination of the matter,”²⁰⁰ language drawn directly from Rule 89, the rule that addresses evidentiary lacunae.²⁰¹ In fact, the Presiding Judge’s avowed intention to use Rule 89 as a template²⁰² appeared rather well aligned with Trial Chamber’s obligation to

See BASSIOUNI & MANIKAS, *supra* note 116, at 908. Article 19(2) provides that a “judge may . . . issue such orders and warrants for the arrest, detention, surrender or transfer of any persons, and any other orders as may be required for the conduct of the trial.” ICTY Statute, *supra* note 2, art. 19(2).

197. “Rule 54 contains a general power vested in the Trial Chamber to fill up lacuna.” *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Decision on the Prosecutor’s Motion for an Order requiring Advance Disclosure of Witnesses by the Defence, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 4, 1998).

198. Alexander Zahar, *International Court and Private Citizen*, 12 NEW CRIM. L. REV. 569, 576 (2009) (criticizing the judiciary’s decision to bestow such broad authority upon itself).

199. This will certainly be the case when the rule is being used to provide “plausible cover.” *Id.* at 577 (citing this as the reason for using the rule to authorize a raid in Kosovo).

200. Judge Antonetti’s Concurring Opinion, *supra* note 177, at 4–5.

201. “In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.” ICTY RPE, R.89(B), U.N. Doc. IT/32/rev.49 (May 22, 2013).

202. “By taking as an example the circumstances described in respect of evidence, I believe that I can then apply certain rules in keeping with the Statute and the general principles of law to deliver a judgement expeditiously.” Judge Antonetti’s Concurring Opinion, *supra* note 177, at 5 (emphasis removed).

ascertain the limits of its powers under the General Rule, as Rule 89 requires the judges to use their discretion “in harmony with the Statute and other rules to the greatest extent possible.”²⁰³

All told, however, the December decision in *Šešelj* provides no evidence of compliance with this plan. Although much could certainly have been learned from reviewing the Tribunal’s significant history in crafting and interpreting its rules on replacement judges and in considering their impact on the accused’s right to a fair trial, none of this is addressed in the decision. Instead, after four brief paragraphs in which no reference is made to either the ICTY’s Statute or its Rules, the Trial Chamber concludes that assigning a new judge at the deliberations stage “does not represent an obstacle to the continuation of proceedings.”²⁰⁴ In other words, the newly constituted Trial Chamber made no effort to determine the limits of its discretionary power.

Had it done so, it would have had to contend with Rule 15 *bis*, even assuming the provision is not directly applicable to the situation in *Šešelj*. In effect, the fact that the rules expressly limit the use of replacement judges to part-heard cases suggests that, absent a compelling reason to the contrary, a comparable limit governs the Chamber’s Rule 54 powers. More definitively still, the appellate case law interpreting Rule 15 *bis* not only acknowledges the link between Rule 15 *bis* safeguards and fair trial rights,²⁰⁵ but also indicates that, even in cases that are only partly heard, there will be a stage at which continuation with a replacement judge would not serve the interests of justice.²⁰⁶ Reaching beyond a mere interpretation of 15 *bis*, this jurisprudence speaks more broadly to the relationship between the use of replacement judges and the ICTY’s statutory obligation to provide a fair trial and, accordingly, establishes that the decision to continue the *Šešelj* case exceeded the limits of the power bestowed by Rule 54.

a. Fairness and Credibility Considerations

Existing jurisprudence not only establishes that the *Šešelj* panel was out of bounds in its use of Rule 54, but that its end result—

203. “A Trial Chamber’s exercise of discretion under Rule 89(C) ought, pursuant to Rule 89(B), to be in harmony with the Statute and the other Rules to the greatest extent possible.” Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 20 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

204. *Šešelj* Continuation Decision, *supra* note 3, ¶ 55.

205. See Karemera Decision on Appeals Pursuant to Rule 15 *bis* (D), *supra* note 144, ¶ 43.

206. See *supra* notes 146–52 and accompanying text (providing examples of Tribunal rulings that concluded substitute judges would not serve the interests of legal writing).

introducing a new judge during the deliberations phase—is unfair. Considering the observations made in the *Krajsnik* case,²⁰⁷ under any legitimate analysis, “the gap in mastery of the case” between Judge Niang, upon familiarizing himself with the record of a multi-year trial conducted in his absence, and that of the sitting judges would be one of striking significance. Similarly, it could hardly be said that the difference between the first-hand experience of the remaining judges and that of Judge Niang would be in any way limited. Rather, the gap between the level of familiarity of the continuing judges and Judge Niang would not exist simply in theory but in fact.

What is more, this disparity is not something that can be cured upon viewing even the entirety of video recordings available for Judge Niang “to study the conduct of witnesses in court and to evaluate their credibility.”²⁰⁸ With the remaining judges having observed all the evidence first-hand over a course of years, it runs counter to reason to suggest that Niang’s condensed research will result in vigorous deliberations in which he can meaningfully advance his views and effectively test those of the original panel members.²⁰⁹ Under the circumstances, both social science research as well as logic indicate that there will be a patent hierarchy within what is meant to be a panel of equals and, consequently, irreparable damage to the deliberative process.²¹⁰ As French jurist and former ICTY Prosecutor Frank Terrier explains, “[t]he collegial nature of the decision is effective only if all the judges making up the Chamber are fully informed, in the same way, of all elements of the trial.”²¹¹

While this disparate access to evidence alone arguably denies Šešelj a judicial panel poised to engage in the collaborative enterprise essential for a verdict of enhanced accuracy, the most profound threat to the revised Chamber’s collegiality stems from another source: the eighteen months of prior deliberations engaged in by the two remaining judges. Indeed, even if all members of the modified panel genuinely embrace the plan to resume the proceedings from the close of hearings, it strains the limits of imagination to suggest that the remaining judges will be able to do so unaffected by their prior

207. See *supra* notes 151–54 and accompanying text (discussing the *Krajsnik* determination that, at a certain point, a rehearing will be necessary in order for the substitution judge to fairly consider the case).

208. Šešelj Continuation Decision, *supra* note 3, ¶ 53.

209. Moreover, viewing the entirety of the available footage of witness testimony is not even required. Rather, “each Judge, as a professional Judge, has his own method when seeking to familiarise himself with the proceedings.” Nzirorera’s Submission to Substitute Judge, *supra* note 144, ¶ 11.

210. “[F]amiliar group members are likely to trust one another more than unfamiliar group members.” Gruenfeld et al., *supra* note 72, at 11. By contrast, when the new judge—as stranger—introduces a perspective that differs from those held by the remaining judges, his assessment is likely to be dismissed. See *id.*

211. Terrier, *supra* note 63, at 1313.

deliberations. As a an initial matter, this time spent pondering “the amount of evidence and the complexity of events and applicable law”²¹² can have no effect other than to cement the inferior status of the new judge and evoke a natural tendency to teach him all that was learned in his absence.

Notably, domestic practice provides important evidence of the lingering effect of prior deliberations by including measures that prohibit or limit the prospect of substituting alternate jurors, post-submission, owing to the likelihood that “the continuing jurors would be influenced by the earlier deliberations.”²¹³ Despite likely assertions to the contrary, this analogy cannot properly be dismissed on the basis that the relevant players in the *Šešelj* case are “professional judges, who by virtue of their training and experience” are not susceptible to the same influences on their decision-making as their lay counterparts.²¹⁴ In fact, the details of the *Šešelj* matter suggest far greater impediments to the ability of the remaining judges to “erase from their minds their past deliberations and start anew”²¹⁵ than any that might encumber their lay counterparts.

As a starting point, it is inconceivable that a lay jury’s initial deliberations would rival even a fraction of the eighteen months expended in the *Šešelj* matter, or that its original jurors would be significantly beholden to ensuring that this was time well spent. By contrast, the revised *Šešelj* panel has expressly defended the duration of the prior considerations by directly tying the length to “the complexity of the proceedings, especially the number of counts, the amount of evidence and the complexity of events and applicable law.”²¹⁶ Assuming this is accurate, as the matter approaches eight years in duration, three years post-trial, and as UN Security Council

212. *Šešelj* Continuation Decision, *supra* note 3, ¶ 23.

213. *See, e.g.,* United States v. Cencer, 90 F.3d 1103, 1107 (6th Cir. 1996) (quoting FED. R. CRIM. P. 23 advisory committee’s note (1983)). Until 1999, the U.S. Federal Rules of Criminal Procedure prohibited the post-submission substitution of alternate jurors, a practice now permitted as a matter of judicial discretion. *See* FED. R. CRIM. P. 24(c)(3) committee notes (1999); *see, e.g.,* Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1517 (2001) (concluding that the amendment “demonstrate[s] the significance of efficient trial management and the desire to avoid costly mistrials”). Similarly, Illinois permits the practice on a discretionary basis, although it acknowledges that “substitution of an alternate juror during deliberations involves substantial potential for prejudice.” *People v. Roberts*, 824 N.E.2d 250, 260 (Ill. 2005). Other states continue to prohibit the practice. *See, e.g.,* *Hayes v. State*, 735 A.2d 1109, 1120 (Md. 1999).

214. *See, e.g.,* *Prosecutor v. Oric*, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 21, 2004) (quoting *Prosecutor v. Delalić*, Case No. IT-96-21, Decision on the Motion of the Prosecution for the Admissibility of Evidence, ¶ 20 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 19, 1998)).

215. *United States v. Phillips*, 664 F.2d 971, 985 (5th Cir. Unit B Dec. 1981).

216. *Šešelj* Continuation Decision, *supra* note 3, ¶ 23.

members “closely follow and study the course of [the] protracted case[],”²¹⁷ there could scarcely be a greater impetus to rely—consciously or unconsciously—upon the work already done. Finally, the prospect that the two remaining judges may be infected by their prior considerations is unlike the abstract contamination concerns that motivate domestic practice in this area. The extensive deliberations in the *Šešelj* case involved a judge later disqualified by the ICTY for having “demonstrated a bias in favour of conviction,”²¹⁸ a fact that, standing alone, raises questions about the fairness of all the prior proceedings in which Judge Harhoff participated.²¹⁹

This observation leads to a final and significant collegiality concern: the disconcerting possibility that the two remaining judges already believe in *Šešelj*'s guilt. Indeed, at least one commentator has posited that this conclusion is implied by the decision to continue the proceedings, a move “that will delay the verdict by perhaps another two years.”²²⁰ Considering this postponement in light of the Presiding Judge's contention that *Šešelj*'s then-long-term stint in provisional detention “should be given absolute priority over any other considerations,”²²¹ the belief that it is “unthinkable that the two remaining judges might have been inclined to acquit”²²² is certainly understandable.²²³ If true, this would, in turn, render the collegial

217. Comments of Evgeny Zagaynov (Russian Federation), U.N. SCOR, 68th Sess., 7073d mtg., at 25–26, UN Doc. S/PV.7073 (Dec. 5, 2013). When the respective tribunal presidents and prosecutors addressed the UNSC in December 2013, and members of the Council responded, numerous additional speakers directly referred to the *Šešelj* matter against a backdrop that emphasized the need for expediency in the Tribunals' completion strategies more than fifteen times.

218. Harhoff Disqualification Decision, *supra* note 14, ¶ 14.

219. “In my view, since a Bench of the Tribunal found an apprehension of bias against Judge Harhoff and he is disqualified in the *Šešelj* case on that basis, it is already implied that all the proceedings in which Judge Harhoff participated could have been unsafe.” Prosecutor v. *Šešelj*, Case No. IT-03-67-AR15bis, Decision on Appeal against Decision on Continuation of Proceedings, Dissenting Opinion of Judge Koffi Kumelio A. Afande, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia June 6, 2014).

220. Schabas, *Šešelj Gets a New Judge*, *supra* note 19.

221. Decision to Unseal, *supra* note 190, at 3.

222. Schabas, *Šešelj Gets a New Judge*, *supra* note 19.

223. *Šešelj*'s long-term detention had been a matter of consistent concern for the Presiding Judge. See, e.g., Decision to Unseal, *supra* note 190, at 3; Judge Antonetti's Concurring Opinion, *supra* note 177, at 2. As a result, the revised Trial Chamber attempted *proprio motu* to explore the possibility of *Šešelj*'s release during Niang's familiarization period, but *Šešelj* refused to cooperate. See Prosecutor v. *Šešelj*, Case No. IT-03-67-T, Order Terminating the Process for Provisional Release of the Accused *Proprio Motu* (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2014). Controversially, and likely motivated by the concern that *Šešelj* would die incarcerated in advance of a verdict, the two remaining judges recently opted to grant him provisional release. Prosecutor v. *Šešelj*, Case No. IT-03-67-T, Order on the Provisional Release of the Accused *Proprio Motu* (Int'l Crim. Trib. for the Former Yugoslavia Nov. 6, 2014). Judge Niang, still in the process of familiarization, dissented “with regret” in

ability of the revised Chamber even less tenable. As domestic law instructs, when prior deliberations lead to a conclusion of guilt, the subsequent coercive effect upon the new fact finder is bound to be substantial and, if a judgment of guilt is rendered rapidly, “manifestly inherent.”²²⁴

On this latter point it bears mentioning that, if a judgment appears quickly after Niang certifies his familiarity with Šešelj’s case,²²⁵ the speedy delivery might have an alternate explanation, although one that does not constitute an improvement from a fairness perspective. Instead, it involves the troubling possibility that the newly constituted Trial Chamber’s avowed intention to resume its proceedings from the close of hearings is nothing more than “fiction.”²²⁶ Under this theory, Judge Niang might simply “add his name to the final decision that must already have been in a definitive draft form when Judge Harhoff departed,”²²⁷ a seemingly tempting option when ICTY judgments require extensive time to draft and routinely run “several-hundred-pages-long.”²²⁸ That this possibility has even been raised bespeaks the damage the Šešelj matter has wrought upon the ICTY’s reputation.

C. *The Recent Appeal*

Regrettably, the problems particular to the September order and the December decision have been reinforced, rather than mitigated, on appeal. Not only does the June 2014 Appeals Chamber decision fail to meaningfully address the Trial Chamber’s use of Rule 54,²²⁹ it simultaneously endorses the President’s September order, concluding that Rule 15 *bis* ought to govern the Šešelj matter *mutatis mutandis*.²³⁰ In other words, the Appeals Chamber decided that

light of Šešelj’s prior—and never disavowed—unwillingness to abide by conditions of release. Prosecutor v. Šešelj, Case No. IT-03-67-T, Dissenting Opinion of Judge Mandiaye Niang to the Order on the Provisional Release of the Accused *Proprio Motu* (Int’l Crim. Trib. for the Former Yugoslavia Nov. 11, 2014).

224. See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (finding that a reconstituted jury failed to conscientiously and carefully reconsider a case upon finding guilt after just 29 minutes of deliberations).

225. In June 2014, Judge Niang indicated that he would need more time to adequately familiarize himself with the case. Prosecutor v. Šešelj, Case No. IT-03-67-T, Order Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*, at 2 (Int’l Crim. Trib. for the Former Yugoslavia June 13, 2014). This remains unchanged as this article goes to press.

226. See Schabas, *Šešelj Gets a New Judge*, *supra* note 19 (describing the notion that deliberations will begin anew as an “implausible claim”).

227. *Id.*

228. See Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 93 (2001).

229. See Šešelj Appeal, *supra* note 23, ¶ 16 (recognizing simply “that the Trial Chamber acted pursuant to Rule 54 . . . instead of pursuant to Rule 15*bis*”).

230. See *id.* ¶ 20.

Šešelj was due all the fair trial safeguards provided by the Rule other than its part-heard case limitation. The decision then acknowledges, yet essentially leaves unexamined, the statutory right to a fair trial. Disregarding the collegiality concerns noted above, and neglecting to engage with the dissent's contention that "it cannot be in the interests of justice to continue with proceedings which have been contaminated by the apprehension of bias,"²³¹ the Appeals Chamber instead concluded that the Trial Chamber's decision to continue the proceedings with a new judge was an act of discretion performed with no discernible error.²³²

D. Summary

Driven by an apparent desire to see the *Šešelj* proceedings come to an end as quickly as possible, the Tribunal's decision-making in the wake of Judge Harhoff's disqualification has consistently fallen short of the mark. By ordering the remaining judges to disregard an express limitation on the use of replacement judges, rather than recognize it as a barrier to continuation, the Acting President made credible the view that the ICTY is "a rogue court with rigged rules."²³³ Followed by the decision of the newly constituted Trial Chamber that turned a blind eye to the rules, the constraints existing jurisprudence placed upon its authority to act, and the impact its ruling had upon the statutory obligation to ensure a fair trial, this negative perception of the ICTY only intensified.

With these procedural missteps now reinforced on appeal, the ICTY has missed out on an important opportunity to repair both the *Šešelj* prosecution and its own reputation. In years to come, *Šešelj*'s case may well be remembered for his vexatious, disrespectful and contemptuous conduct,²³⁴ but this view is likely to be overshadowed by the long reach of the ICTY's ultimate faithlessness to its rules and complete failure to genuinely consider the fairness implications of inserting a new judge into a completely heard case. In the moment, these failings have already empowered the ICTY's critics, who legitimately question the feasibility of the familiarization process

231. Prosecutor v. Šešelj, Case No. IT-03-67-AR15bis, Decision on Appeal against Decision on Continuation of Proceedings, Dissenting Opinion of Judge Koffi Kumelio A. Afande, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia June 6, 2014).

232. See *Šešelj* Appeal, *supra* note 23, ¶¶ 40–45.

233. See John Laughland, *The Anomalies of the International Criminal Tribunal are Legion*, TIMES (London) (June 18, 1999), <http://www.oldsite.transnational.org/SAJT/features/haaganomaly.html> [<http://perma.cc/DDB2-8B4G>] (archived Sept. 23, 2014).

234. See Scheffer, *supra* note 173, at 159, ¶ 112 (using all three adjectives to describe the accused).

required of the new judge,²³⁵ and compellingly contend that the ICTY's completion strategy has preempted a conversation about "the criteria for justice in The Hague."²³⁶ Worse still, the *Šešelj* ignominy has distanced equally vocal, long-standing supporters of the ICTY,²³⁷ who have lamented its fall.²³⁸

VIII. LESSONS LEARNED

Perhaps the most evident lesson to be learned from the problems associated with the use of replacement judges at both the ICTY and ICTR, and the *Šešelj* matter in particular, is that alternate judges in international criminal proceedings—despite their price tag—are worth their weight in gold. While it of course costs money to designate alternates, there are huge expenses associated with the events liable to occur in their absence. Most apparently, retrying a case from the start is a costly undertaking. Perhaps less obviously, continuing with a replacement judge likewise has its costs, including the time afforded for replacements to familiarize themselves with the proceedings, the recalling of necessary witnesses, and related appeals. Regardless of whether a case is retried or continued, the resultant proceedings will be more protracted than the seamless continuation made possible by having an alternate, rendering the relevant court less efficient overall.

What is more, and as the *Šešelj* case amply demonstrates, there are numerous non-monetary costs involved whenever a judicial panel is rendered incomplete. Trials meant to foster post-conflict reconciliation seem rather more likely to alienate that portion of the domestic population that might identify with the accused, with members in this group almost certain to view continuing the

235. See, e.g., *ICTY Decides to Continue Trial to Vojislav Seselj*, INNEWS (Serb.) (Dec. 16, 2013, 9:16 PM), <http://inserbia.info/news/2013/12/icty-decides-to-continue-trial-to-vojislav-seselj/> [<http://perma.cc/5R4Q-TBPG>] (archived Sept. 30, 2014) (quoting a Serbian Radical Party Official's assertion that it will take the new judge two years to get up to speed on the trial "if he reads at the speed of light"); see also Suvakovic, *supra* note 18.

236. See Suvakovic, *supra* note 18 ("[I]t seems that the international community and those who initiated the formation of the ICTY no longer have the time or the patience to discuss the criteria for justice in the Hague, but wish that the Tribunal ceases its operations according to the Completion Strategy without further discussion.").

237. See, e.g., Heller, *The Final Nail in the ICTY's Coffin*, *supra* note 22 ("I've always defended the legitimacy of the ICTY . . . But no longer.").

238. See William A. Schabas, *Prosecutor Applies to Reverse Final Acquittal of Perišić*, PHD STUDIES IN HUMAN RIGHTS (Feb. 7, 2014, 7:33 AM), <http://humanrightsdoctorate.blogspot.com/2014/02/prosecutor-applies-to-reverse-final.html> [<http://perma.cc/SHR8-3DZU>] (archived Sept. 30, 2014) (denouncing the mid-deliberations judicial replacement as one in a series of recent decisions causing "damage to the reputation of this troubled institution").

proceedings with a new judge as unfair and suspect. This perception will undoubtedly be amplified—and rightly so—if replacements are made in cases whose proceedings are significantly underway, as was the case in *Milosevic* and, most egregiously, in *Šešelj*. While in such cases a rehearing will undoubtedly seem more just, this option also has non-monetary costs.

Non-expeditious proceedings not only have the potential to undermine the rights of the accused,²³⁹ but also to damage the perception of the relevant institution, as delayed verdicts tend to undermine public confidence in the relevant system of justice.²⁴⁰ This will especially be true when the accused is—as most international criminal accused are—lingering in provisional detention. Indeed, given the already marked disparity between international criminal practice in this area and the dictates of international human rights law, adding to the average amount of time a presumed-innocent accused spends in detention is apt to undermine the relevant court's reputation as a whole.²⁴¹

In as much as the *Šešelj* case is a cautionary tale about the importance of appointing judicial alternates, it likewise signifies the imperative that international criminal courts prioritize the fairness of their proceedings by ensuring fidelity to the provisions that govern them. While it is true that established justice systems will also suffer from credibility problems when they disregard rule constraints, this problem is far more pronounced for relatively nascent courts. As international criminal courts endeavour to establish their legitimacy both with local populations²⁴² and within the international

239. The right to be tried without undue delay is recognized in all the major international human rights law documents. See, e.g., ICCPR, *supra* note 66, art. 14(3)(c); ACHR, *supra* note 66, art. 8(1) (“Every person has the right to a hearing, with due guarantees and within a reasonable time.”); European Convention, *supra* note 66, art. 6(1) (“[E]veryone is entitled to a fair and public hearing within a reasonable time.”).

240. 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, 198 (Richard May et al. eds., 2001) (noting the importance of the public's interest in expeditious proceedings in light of the fact that “[t]he Tribunal's mandate includes bringing peace in the territory of the former Yugoslavia”). Justice delayed also seems likely to cause the relevant institution to lose the support of victims. See, e.g., Richard J. Goldstone, *The Role of the United Nations in the Prosecution of International War Criminals*, 5 WASH. U. J.L. & POL'Y 119, 123–24 (2001) (contending that a delay in justice “is grossly unfair to . . . victims”).

241. See Megan A. Fairlie, *The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled*, 33 FORDHAM INT'L L.J. 1101, 1174 (2010) (discussing how the ICTY's approach to provisional release falls short of international human rights law standards, undermining the value of its precedent).

242. See, e.g., Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 434–35 (2011) (arguing that international courts must “address public concerns about their work and engage in meaningful outreach to affected populations [in order to] build public trust in justice and the rule of law”).

community, it is incumbent upon them to demonstrate that their authority is proper.²⁴³

A. *The Significance for the MICT*

The institution perhaps best positioned to learn from the ICTY and ICTR experience with replacement judges is the MICT. The MICT was recently created to carry on and conclude the work of the ICTY and ICTR, prosecuting the outstanding cases of both Tribunals.²⁴⁴ In almost all relevant respects, the provisions governing the MICT mirror those in place at its predecessor institutions,²⁴⁵ meaning that it is equally possible to introduce a new judge in the midst of trial (or, in the wake of the now-settled *Šešelj* precedent, during deliberations) and over the objections of the accused. In other words, it is within the realm of possibility for the MICT, geared to prosecute only “the most senior leaders suspected of being most responsible” for the atrocities committed in the former Yugoslavia and Rwanda,²⁴⁶ to encounter in these prosecutions a repeat of the events in *Milosevic* or, worse still, those in *Šešelj*, should the MICT fail to appoint a reserve judge.²⁴⁷

Accordingly, in order for the MICT to ensure that the legacy of the ICTY is not further tarnished, it will be incumbent upon the MICT to refrain from repeating the mistakes of its predecessor courts. This means ensuring fidelity to the statutory obligation to provide a fair trial²⁴⁸ and scrupulously honoring the express terms of the provisions that govern its operations. It also requires thoughtful consideration of existing jurisprudence, including a good faith effort

243. See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 579 (Samantha Besson & John Tasioulas eds., 2010); see also Damaska, *supra* note 105.

244. See MICT Statute, *supra* note 5, Annex 1, art. 1(2)–(3) (granting the MICT the authority to prosecute ICTY and ICTR cases). The MICT also has authority to hear appeals from decisions rendered by the ICTY and ICTR. See *id.*, Annex 2, art. 2(2).

245. Three-judge Trial Chambers will adjudicate alleged violations of international humanitarian law, with a majority vote required for conviction. See MICT Statute, *supra* note 5, Annex 1, arts. 12(1), 21(2). In provisions strikingly akin to Rule 15 *bis*, replacement judges may join part-heard cases with the consent of the accused or by judicial override in “the interests of justice” when “a Judge of a Trial Chamber is, for any reason, unable to continue sitting in a part-heard case” for long duration. MICT RPE, *supra* note 166, R.19(C)–(D).

246. Although the MICT may prosecute a less senior figure, it is only meant to do so “after it has exhausted all reasonable efforts to refer the case” to a national jurisdiction. MICT Statute, *supra* note 5, art. 1(3).

247. As at the ICTY, the trials conducted by the MICT may—but need not—have a reserve judge appointed to be present at each stage of the trial. MICT RPE, *supra* note 166, R.20(A).

248. See MICT Statute, *supra* note 5, art. 18(1) (requiring that “the trial is fair and expeditious and . . . conducted in accordance with the Rules of Procedure and Evidence”).

to identify the “cut-off line” at which the interests of justice militate against continuing a case with a replacement judge.

Better still, however, ICTY and ICTR precedent should serve to incentivize the MICT to designate reserve judges for its trials. Indeed, pragmatic considerations support the conclusion that this would be sound practice for the MICT, particularly if it is to live up to the expectations attendant to its role as “an exit strategy for International Criminal Justice 2.0.”²⁴⁹ In effect, the MICT has become operational with the accompanying intention that it will efficiently bring its particular chapter of international criminal justice, including its own operations, to an efficient end. Dependency on replacement judges could pose serious hurdles to this aim. At a bare minimum, the judge who joins a part-heard case will need time to familiarize himself with the proceedings conducted in his absence. In addition, it can almost certainly be expected that when a replacement judge is introduced without consent, the accused will exercise his automatic right to appeal the continuation of the trial.²⁵⁰ Designating a reserve judge, by contrast, would be consistent with the MICT’s efficiency mission.

Designating reserve judges could also prove beneficial to the MICT in ways beyond these practical concerns. Like the Nuremberg Tribunal before it, the mere act of incorporating an alternate judge in the MICT proceedings could enhance its perceived fairness, regardless of whether the judge’s services end up being necessary.²⁵¹ Put plainly, given the harm sustained by the ICTY in relation to the *Šešelj* matter, the MICT’s use of alternates could constitute a form of damage control. While once it was thought that it would be incumbent upon the MICT to strive to maintain the ICTY and ICTR’s “legacy and judicial integrity,”²⁵² it instead seems that the MICT could help to repair them. As the “last word” of the ICTY and ICTR, the practice of the MICT should endeavor to fulfill this role, both because doing so could help to revitalize the important contributions otherwise made by these two important courts, and also because the long-term support for the nascent international criminal justice system depends in no small part upon how these parent institutions are perceived.

249. See Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT’L L. 525, 541 (2013).

250. MICT RPE, *supra* note 166, R.19 (D) (“If . . . the accused withholds his consent, the remaining Judges may nonetheless . . . continue the proceedings before a Trial Chamber with a substitute Judge . . . This decision is subject to appeal as of right.”).

251. See *supra* note 41 and accompanying text.

252. See Valerie Oosterveld, *International Law and the Closure of the International and Hybrid Criminal Tribunals*, 104 AM. SOC’Y INT’L L. PROC. 37, 37 (2010).

B. *The Significance for the ICC*

Just as distinctly, the experiences of the ICTY and ICTR ought to prompt the ICC, which similarly employs three-judge trial panels that render judgment by majority,²⁵³ to ensure the presence of judicial alternates for all its trials. Like the IMTFE before them, the work of the ICTY and ICTR amply demonstrates that the loss of a judge in the midst of lengthy, international criminal proceedings is a predictable rather than anomalous event. This fact alone ought to prompt the appointment of judicial alternates at the ICC, as the Rome Statute appears to preclude the possibility of a new judge replacing a member of a three-judge ICC Trial Chamber mid-trial.²⁵⁴ Consequently, with ICC proceedings thus far averaging more than three years in duration,²⁵⁵ and no detained person accused of one of the Court's core crimes yet successful in obtaining interim release,²⁵⁶ the wisdom of appointing judicial alternates for ICC trials ought to be strikingly apparent. Nevertheless, the ICC's President has yet to use his discretionary authority to designate an alternate judge.²⁵⁷ This omission, and the ICC's only public discussion on the subject to date, suggest that the ICC has thus far overlooked much if not all that can be learned from ICTY and ICTR precedent.

1. Designating an Alternate Judge

Prior to the commencement of the ICC's first trial, the prosecution "encouraged the [Trial] Chamber to designate an

253. See Rome Statute, *supra* note 6, arts. 39(2)(b)(ii), 74(3).

254. As its first "[r]equirement[] for [a] decision," the Statute dictates that "[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations." *Id.* art. 74(1). This issue is discussed in greater detail *infra* at notes 261–69 and accompanying text (suggesting that Tribunal judges are often unable to complete trials due to death or illness).

255. To date, the ICC has completed three trials, each of which lasted more than three years from the commencement of the trial proceedings until the delivery of judgment. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Jugement rendu en application de l'article 74 du Statut*, ¶ 18 (Mar. 7, 2014) (noting that the trial began on November 24, 2009); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04–01/06, *Judgment Pursuant to Article 74 of the Statute*, ¶ 10 (Mar. 14, 2012) (noting that the trial began on January 28, 2009); *Prosecutor v. Mathieu Ngujolo Chui*, Case No. ICC-01/04–02/12, *Judgment Pursuant to Article 74 of the Statute*, ¶ 19, (Dec. 18, 2012) (noting that the trial began on November 24, 2009).

256. Four individuals, charged solely with offenses against the administration of justice (the ICC equivalent of contempt of court) were recently granted release pending trial. In the Case of Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mandenda Kabongo, Fidèle Babala Wandu & Narcisse Arido, Case No. ICC-01/05-01/13-703, *Decision Ordering the Release of Aimé Kilolo Musamba, Jean-Jacques Mandenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Oct. 21, 2014).

257. See Rome Statute, *supra* note 6, art. 74(1) (granting the ICC president the authority to, "on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial").

alternate judge as a precaution against one of the judges becoming permanently unavailable.”²⁵⁸ Because this discretionary authority is reserved for the President, however, the Trial Chamber opted to consider the request in terms of whether it would recommend that the President make such an appointment. In so doing, the Trial Chamber also weighed in on what the pre-established procedure should be for such appointments,²⁵⁹ approving by majority a test proposed by the prosecution.²⁶⁰ The test includes two principal considerations: (1) whether the ICC has the resources necessary to make the appointment, “particularly in terms of a judge who is available to attend the entirety of the trial,” and (2) whether there is “an identifiable risk that, for reasons such as the length of the trial, or the personal circumstances of one or more of the judges, a member of the bench may not be able to complete the trial.”²⁶¹

Critically, the Trial Chamber then narrowly applied the second prong of the test by considering whether any specific facts about the case before it suggested that a judge might be lost mid-trial.²⁶² By limiting its consideration to this restrictive class of risks, the Chamber overlooked the ICTY and ICTR experience, which suggests that in many cases, if not most, future threats to judicial composition will be unknown at the start of a trial. Indeed, given the requirements of independence and impartiality, when a trial commences there should never be an identifiable risk that a trial panel member will later be disqualified for the apprehension of bias, like in the *Šešelj* matter. However, that event cannot properly be casually dismissed as aberrational. In fact, at least one ICTR matter

258. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01-04-01/06, Decision on Whether Two Judges Alone May Hold a Hearing and Recommendations to the Presidency on Whether an Alternate Judge Should Be Assigned for the Trial, ¶ 5 (May 22, 2008) [hereinafter *Lubanga, Recommendation on the Assignment of an Alternate Judge*].

259. The ICC Rules provide that “[a]lternate judges shall be designated in accordance with a procedure pre-established by the Court.” Rules of Procedure and Evidence of the International Criminal Court, R. 39, U.N. Doc. ICC-ASP/1/3 (Part II-A) (2013) [hereinafter *ICC RPE*], available at <http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf> [<http://perma.cc/FS4Q-GNCQ>] (archived Oct. 24, 2014).

260. See *Lubanga, Recommendation on the Assignment of an Alternate Judge*, *supra* note 257, ¶ 17. Because the authority for appointing an alternate judge is allocated to the ICC President, Judge Blattmann concluded that the matter was “not within [the Trial Chamber’s] competency.” *Id.* Separate and Concurring Opinion of Judge Blattman, ¶ 11.

261. *Lubanga, Recommendation on the Assignment of an Alternate Judge*, *supra* note 258, ¶ 17.

262. See *Lubanga, Recommendation on the Assignment of an Alternate Judge*, *supra* note 258, ¶ 19 (considering the scope of the evidence and whether the trial was likely to be lengthy).

also resulted in the mid-trial loss of a judge due to allegations of bias.²⁶³

What is more, ICTY and ICTR precedent is replete with examples of sudden, mid-trial departures resulting from sudden and severe ill health or the unexpected death of a judge, including that of the presiding judge in the *Milosevic* matter.²⁶⁴ Perhaps the most common cause of loss at the ICTY and ICTR, events of this type are both undetectable and ubiquitous. Indeed, the ICC has already experienced the surprise death of one of its judges at the age of 65,²⁶⁵ just after she was elected to a nine-year term,²⁶⁶ and mere months before her designated Trial Chamber began to hear the *Katanga* and *Chui* case.²⁶⁷

This leads to the question of whether the age of a Trial Chamber member does (or should) constitute an “identifiable risk” of later unavailability. Much suggests that the answer to this question ought to be “yes,” perhaps most particularly that “[j]udges at the international criminal courts have usually been of a rather advanced age.”²⁶⁸ In fact, the ICTY was specifically criticized for not taking the

263. In the *Karamera* case, then-Presiding Judge Vaz opted to recuse herself from the on-going trial under the shadow of a defence motion to disqualify her “on the basis of an alleged association between the Judge and a member of the Prosecution team working on the case.” *Prosecutor v. Karamera*, Case No. ICTR-98-44-A15bis, Decision in the Matter of Proceedings under Rule 15 BIS(D), ¶ 3 (June 21, 2004). The ICTR reported that “[t]he decision [to withdraw] was made in order to dispel any possible doubt about the integrity of the proceedings.” Press Release, International Criminal Tribunal for Rwanda, Presiding Judge Withdraws from Karamera et al. Case, ICTR Press Release ICTR/INFO-9-2-390.EN (May 18, 2004), available at <http://www.unict.org/tabid/155/Default.aspx?ID=207> [<http://perma.cc/T89F-EADZ>] (archived Sept. 30, 2014).

264. Judge May’s unexpected resignation in the midst of the *Milosevic* due to the rapid onset of a grave “illness clearly upset members of the [Tribunal’s] staff.” Simons, *Milosevic Judge Resigns*, *supra* note 69. At the ICTR, Judge Kama’s mid-trial death was a “tremendous shock.” See *Rwanda Tribunal Staff and Judges Pay Tribute to Former President Kama*, HIRONDELLE NEWS AGENCY (May 7, 2001), <http://www.hironellenews.com/ictr-rwanda/404-ictr-institutional-news/18000-en-en-rwanda-tribunal-staff-and-judges-pay-tribute-to-former-president-kama70517051> [<http://perma.cc/NA3Z-BQL6>] (archived Sept. 30, 2014) (quoting then-ICTR President Navanethem Pillay).

265. ICC Judge Fumiko Saiga, 65, who “died suddenly of a heart attack.” Afua Hirsch, *Study Condemns ‘Toxic’ System of Appointing Judges*, IRISH TIMES (Sept. 9, 2010) (subscription required).

266. See Press Release, International Criminal Court, Passing of Judge Fumiko Saiga, ICC Press Release ICC-CPI-200904240PR407 (Apr. 24, 2009), available at http://www.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202009/Pages/passing%20of%20judge%20fumiko%20saiga.aspx [<http://perma.cc/AK9B-HPCG>] (archived Oct. 28, 2014) (indicating that Judge Saiga was re-elected to the ICC in January 2009, four months before her death).

267. *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision Replacing a Judge in Trial Chamber II (Apr. 29, 2009) (indicating that Judge Hans-Peter Kaul would replace Judge Fumiko Saiga just six months after the judges were appointed to Trial Chamber II).

268. See Alette Smeulers, B. Hola & T. van den Berg, *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, 13 INT’L CRIM. L. REV. 7, 13

factor into account before Judge May, at age 65, became unable to complete the *Milosevic* trial. For one critic, the Tribunal's failure to have provided for an alternate judge in that high profile case was "inexcusable" in part due to "the age of the judges."²⁶⁹ Remarkably, concern about the anticipated age of future ICC judges was present when the Rome Statute was being drafted, as is evidenced by a proposal (later defeated) "that a judge could not be over the age of 65 at the time of election."²⁷⁰

Notwithstanding this history, the *Lubanga* Trial Chamber at the ICC apparently concluded that judicial age does not constitute an identifiable risk in deciding whether to designate an alternate judge. Rather, the Trial Chamber pronounced that there were "no known personal circumstances relating to any of the judges which raise any concerns that one of [sic] more of them will be unable to complete this trial,"²⁷¹ although one of its number was then nearly 69. This suggests further problems with the proposed test, as it seems likely that future judges and, similarly, the ICC President, will be disinclined to acknowledge advanced age as an identifiable risk. This can only spell trouble for the ICC where, as of May 2012, the average judicial age was 62 and the oldest serving member 81.²⁷²

Finally, even when there are risks that militate in favor of designating an alternate, the resource-based aspect of the recommended test may nevertheless preclude the appointment. In effect, this prong of the test prompts the ICC to follow ICTY and ICTR precedent rather than learn from it. Indeed, if the analysis in the *Lubanga* decision provides a workable frame of reference for what the future holds, the ICC may never have the necessary "availability" of resources for a judicial alternate. In *Lubanga*, the first—and at that time only—ICC trial, the Trial Chamber appeared to cast doubt as to whether the numerous judges available to serve as alternates constituted adequate resources, by noting that the impending start of the ICC's second trial could create "significant competing judicial commitments" for some of the would-be alternates.²⁷³ In light of that

(2013) (positing that this may be attributed to the requirements for such positions, including extensive professional experience).

269. Scharf, *supra* note 49, at 39.

270. Medard R. Rwelamira, *Composition and Administration of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 153, 157 (Roy S. Lee ed., 1999) (noting that the proposal was rejected as arbitrary and unsupported by domestic and international practice).

271. *Lubanga*, Recommendation on the Assignment of an Alternate Judge, *supra* note 258, ¶ 20.

272. Smeulers, Hola & van den Berg, *supra* note 268, at 14 tbl.2 (showing age distribution for all major international criminal tribunals).

273. See *Lubanga*, Recommendation on the Assignment of an Alternate Judge, *supra* note 258, ¶ 21.

observation, and given the ICC's now burgeoning caseload,²⁷⁴ it is perhaps of little surprise that not a single alternate judge has been appointed to date.

In sum, these observations suggest that, unless changes are made, it is only a matter of time before an ICC Trial Chamber is rendered incomplete mid-trial. Indeed, this seems the natural outcome of applying a procedure for designating alternate judges that, unmindful of ICTY and ICTR precedent, is limited to known risks and invites—or at least allows—judicial age to be excluded from the risk analysis. What is more, by making it possible for resource considerations to trump identified risks, the procedure enhances the likelihood that those trials most needing of judicial alternates will nevertheless be undertaken without one. These factors, considered alongside the ICC President's thus far persistent failure to designate judicial alternates for ICC trials, indicate that the ICC is nearly destined to have one of its future trials come to an abrupt halt upon losing a Trial Chamber member. This prompts the question of how the ICC can—and should—handle the mid-trial loss of a judge in cases where an alternate has not been appointed.

2. Does the Rome Statute Permit Mid-trial Judicial Replacements?

Concern regarding how the ICC could address the problems created when a judge is lost mid-trial, when no alternate has been appointed, animated the discussions that accompanied the drafting of the ICC Rules. To that end, Denmark proposed a provision that authorized the ICC President to appoint an alternate mid-trial for the purpose of either continuing the trial or holding a rehearing.²⁷⁵ Similar to early ICTY practice in this regard, the proposal further provided that continuing the proceeding with the unfamiliar replacement would require “the consent of the accused and the Prosecutor.”²⁷⁶ This aspect of the Danish proposal failed, however, because of its apparent incompatibility with the Court's Statute.²⁷⁷

The conflict presented involves Article 74 of the Rome Statute which provides that, as a requirement for a decision, “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and

274. To date, “21 cases in 9 situations have been brought before the . . . Court.” *Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [http://perma.cc/BV3L-HHJQ] (archived Sept. 30, 2014).

275. See Socorro Flores Liera, *Single Judge, Replacements, and Alternate Judges*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 310, 313–14 (Roy S. Lee ed., 2001). Because “there were doubts as to whether [that aspect of] the Danish proposal was fully-compatible with the Statute[,] . . . it was decided not to retain it in the final text of Rule 39.”

276. *Id.* at 313.

277. See *id.* at 313–14 (indicating that the effort was unsuccessful because it “intended to address an issue that the Statute already regulated in a different form”).

throughout their deliberations.”²⁷⁸ At further odds with the Danish proposal, Article 74 also requires that, when designated, the alternate judge’s presence is likewise required “at each stage of the trial.”²⁷⁹ Properly applied, then, these provisions dictate that a trial “can, consequently, not be completed if one of the members falls out and no alternate judge has been designated.”²⁸⁰

Yet, with the ICC budget already stretched thin and donor countries reluctant to give more,²⁸¹ restarting a costly and time-consuming international trial would likely have a devastating effect on the Court. Consequently it will be of little surprise if, when the times comes, the option of replacing a lost judge with one who has not previously attended the trial is mooted, despite the fact that such a replacement “seems impossible”²⁸² under the Rome Statute.²⁸³

Here, the *Šešelj* matter ought to prove instructive. Before even contemplating a move that seems an obvious violation of statutory command, the ICC would do well to remember the damage wrought when the ICTY engaged in comparable conduct. Maligned before it even commenced its first trial for its alleged “unchecked judicial power,”²⁸⁴ it would hardly become the ICC to ignore the Statute’s express constraints on its conduct. Like the ICTY before it, the ICC can expect that infidelity to its own requirements—in particular because these derive from a treaty forged by the states that created the Court—is all but certain to undermine the ICC’s emerging

278. Rome Statute, *supra* note 6, art. 74(1).

279. *Id.* The ICC Rules further clarify that the Alternate Judge shall also sit through the deliberations on the case although he may not take part unless and until required to serve as a replacement. ICC RPE, *supra* note 259, R.39.

280. Håkan Friman, *Procedural Law of the Criminal Court – An Introduction*, in 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 201, 226 (Flavia Lattanzi & William A. Schabas eds., 2003).

281. See, e.g., Lilian Ochieng & Simon Jennings, *ICC Secures Budget Increase*, INST. FOR WAR & PEACE REPORTING (Jan. 20, 2014), <http://iwpr.net/report-news/icc-secures-budget-increase> [<http://perma.cc/7MY9-STZX>] (archived Sept. 30, 2014) (noting that, although the Assembly of States Parties agreed to an increase in the Court’s budget, the approved funds fall short of the request by more than four million euros and at least one state has already suggested it will lobby for zero-growth in 2015).

282. William A. Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 1105 (2010).

283. Indeed, states may have even been sensitive to this fact back when the ICC Rules were being drafted. Rather than dispositively reject the Danish proposal noted above as strikingly at odds with the relatively clear language of Article 74(1), instead “there were doubts as to whether [it] was fully-compatible with the Statute.” Flores Liera, *supra* note 275, at 313–14.

284. John R. Bolton, Under Sec’y for Arms Control & Int’l Sec., Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), available at <http://2001-2009.state.gov/t/us/rm/15158.htm> [<http://perma.cc/S9K2-DFU8>] (archived Sept. 30, 2014) (arguing that the United States should not support the ICC because the ICC has “unchecked judicial power,” which is unconstitutional).

reputation while legitimizing the arguments of its opponents and driving a wedge between the ICC and some of its supporters.

IX. CONCLUSION

The decision to create the ICTY and ICTR without the protection that alternate judges provide was reckless at best. As the precedent from Nuremberg and Tokyo made plain, administering justice in the presence of judicial alternates enhances the perceived fairness of international criminal proceedings, while operating in their absence is apt to lead to objectionable results. The ABA's 1993 Special Task Force further emphasized the important role that alternates serve before the ICTY even became operational, cautioning the UN Security Council that because the ICTY should have "every reasonable structural and procedural guarantee of impartiality," it needed to have multiple alternate judges.²⁸⁵ Nevertheless, the UN Security Council appeared more focused on what these judicial figures would cost rather than the benefit they could bring to ICTY proceedings.

This set the tone for the years that followed, with a fair portion of the blame for the ICTY and ICTR's increasingly questionable use of replacement judges directly attributable to ever-growing, external pressures to make their proceedings quicker and more cost-effective. The wake-up call for all involved, however, ought to have come with the *Milosevic* proceedings, when the late-trial imposition of a new judge raised legitimate doubts about the ICTY's integrity.²⁸⁶ In considering the critiques following that high profile trial, the ICTY should have listened, in particular, to the admonishment that "a war crimes tribunal should appoint at least one alternate judge who observes the trial from its commencement."²⁸⁷

The combined response from the ICTY and the UN Security Council, however, suggests that they only half-heard what was being said. Although finally prompted to incorporate judicial alternates into ICTY practice, ever-prevalent cost concerns tempered the reform attempt, resulting in a rule that made the appointment of reserve judges discretionary. As a consequence, proceedings remained vulnerable to a repeat of events like those in the *Milosevic* case or, worse still, the loss of an essential judge at an even later stage in the proceedings, as in *Šešelj*.

285. ABA TASK FORCE REPORT, *supra* note 47, at 23–24.

286. See *supra* notes 138–43 and accompanying text.

287. See Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT'L L. 155, 166 (2006-2007) (arguing that standby alternate judges are just as important as standby alternate counsel); see also *supra* note 143 and accompanying text.

Indeed, had an alternate been required in the *Šešelj* case, the relatively seamless continuation in proceedings would likely have proven to be little more than of passing academic interest. Instead, in its scramble to attempt to rescue the years-long prosecution, the ICTY demonstrated a profound faithlessness to its rules that attracted unwelcome attention, empowered its critics, and distanced its allies. Plainly speaking, the taint of the decision to import a new judge post-trial is likely to linger well beyond the ICTY's imminent closure. As the ICTY prepares to close its doors then, it seems likely that, in the words of the former Chief Prosecutor at Nuremberg, ICTY and ICTR actors will need to be "consoled by the fact that in proceedings of this novelty, errors and missteps may... be instructive to the future."²⁸⁸

As this Article demonstrates, these lessons ought to bear immediate significance for the MICT. Tasked with continuing and concluding the important work of the ICTY and ICTR, the MICT would do well to ensure that it does not retrace their errors and missteps. At a minimum, the MICT should faithfully adhere to its statutory and rules-based obligations. More strategically, however, the MICT could and should ensure that ICTY and ICTR work ends on a high note by affording all accused persons tried before it the procedural safeguard of an alternate judge. Consistent with the mission to bring its phase of international criminal justice to an efficient end, the move would ensure that MICT practice is not delayed in order for substitute judges to learn about the proceedings conducted in their absence, witnesses to be recalled, or substitution-related appeals to be heard. Of comparable or perhaps even greater importance, by concluding the work of the ICTY and ICTR in a way that prioritizes fairness over cost, the MICT could enhance the long-term perception of the ICTY and ICTR while setting an important precedent within the still-developing framework of international criminal justice.

Finally, ICTY and ICTR practice makes an even more compelling case for the liberal designation of alternate judges at the ICC. As ICTY and ICTR practice makes clear, the ICC should expect that a certain number of its trial judges will need to be replaced mid-trial for unexpected reasons. This fact, coupled with the ICC's failure to designate even a single alternate judge to date, suggests that it is only a matter of time before an expensive and time-consuming ICC prosecution comes to an abrupt halt. At that stage, the ICC will be

288. Report to the President by Robert H. Jackson, U.S. Chief Prosecutor for the Int'l Military Tribunal, International Conference on Military Trials: London, 1945 (Oct. 7, 1946), available at <http://avalon.law.yale.edu/imt/jack63.asp> [<http://perma.cc/5ADX-YFZ5>] (archived Sept. 30, 2014).

faced with an unhappy alternative of either repeating the mistakes in *Šešelj* or commencing a costly and time-consuming rehearing.

In order to avoid these unattractive options, the ICC ought to seize the opportunity to learn from the precedent set by the ICTY and ICTR. In so doing, with some cost and otherwise little effort, the ICC will be able to avoid many of the reputational hits sustained by these slightly older institutions while delivering a more efficient version of justice. Indeed, inasmuch as the ICTY and ICTR's problems with replacement judges stem from a failure to incorporate into their practice the lessons from Nuremberg and Tokyo, it would be beyond regrettable if the ICC were to replicate that error by overlooking all that can be learned from the experience of the ICTY and ICTR.