Florida International University College of Law
eCollections

Faculty Publications

Faculty Scholarship

2013

Miranda and Its (More Rights-Protective) International Counterparts

Megan A. Fairlie
Florida International University College of Law, megan.fairlie@fiu.edu

Follow this and additional works at: https://ecollections.law.fiu.edu/faculty_publications

Part of the Courts Commons, Criminal Law Commons, and the International Law Commons

Recommended Citation

Megan A. Fairlie, *Miranda and Its (More Rights-Protective) International Counterparts* , 20 U.C. Davis J. Int'l L. & Pol'y 1 (2013).
Available at: https://ecollections.law.fiu.edu/faculty_publications/333

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections. For more information, please contact lisdavis@fiu.edu.

HEINONLINE

Citation: 20 U.C. Davis J. Int'l L. & Pol'y 1 2013-2014
Provided by:
FIU College of Law

Content downloaded/printed from HeinOnline

Mon Jul 31 15:02:52 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

MIRANDA AND ITS (MORE RIGHTS-PROTECTIVE) INTERNATIONAL COUNTERPARTS

Megan A. Fairlie, J.D., LL.M., Ph.D.[*]

ABSTRACT

Given that Miranda's *warnings are nearly identically reproduced in international criminal procedure, logic suggests that the rights of questioned suspects are equally valuable—and equally valued—in both realms. But history has its own logic, and* Miranda's *history in the United States includes a steady erosion of its ability to safeguard the rights of suspects. This is particularly true with respect to the limitations placed on* Miranda's *custodial trigger and the lessening of the requirements for an effective waiver. Recent efforts to eviscerate* Miranda *through these two channels, including* Berghuis v. Thompkins *(2010) and* Howes v. Fields *(2012), provide a stark contrast to the more rights-protective dictates of international criminal justice. As a result, "international* Miranda*" is now more faithful to both the text and intent of the* Miranda *opinion than current domestic practice.*

I. INTRODUCTION 2
II. BACKGROUND 4
III. THE MIRANDA DECISION 7
IV. INTERROGATION PROTECTIONS AT CONTEMPORARY INTERNATIONAL CRIMINAL COURTS 9
  A. The ICTY, ICTR and the SCSL's Shared Approach 9
  B. The International Criminal Court 10
V. THE MIRANDA COMPARISON 11
  A. The Custody Distinction 12
    1. Contemporary Miranda Custody 15
    2. Summary 18
  B. Invocation and Waiver 19

---

* Associate Professor, Florida International University College of Law. Thanks to Ray Murphy and Kelly Pitcher for comments on earlier drafts, Andrea Ferranti for being an excellent research assistant, and Aileen and Maca for being themselves. Thanks also, for opportunities to discuss earlier drafts of this Article, to the faculty and post-graduate students at the Irish Centre for Human Rights, the University of Essex School of Law and its Human Rights Centre (U.K.) and the Criminal Justice Research Centre at Brunel Law School (London).

1. The Standard of Proof for Effective Waiver 20
   a. The Miranda doctrine 20
   b. The Shared Approach 21
   c. The International Criminal Court 22
   d. Summary 23
2. The Form of an Effective Waiver 23
   a. The Miranda doctrine 23
      i. Contemporary waiver 25
   b. The Shared Approach 27
   c. The International Criminal Court 28
   d. Summary 28

C. Remedial Responses to Interrogation Violations 29
1. Automatic Versus Discretionary Rules of Exclusion 30
2. Rights Enforcement for Questioned International Criminal Suspects 33
   a. Robust Exclusion under the Shared Approach 33
   b. Automatic Exclusion despite Discretionary Rules? 36
   c. Making Further Sense of a Robust Practice of Exclusion: An Imitable Precedent for the ICC 39

VI. CONCLUSION 44

I. INTRODUCTION

A popular sentiment, both at home and abroad, is that the U.S. Supreme Court's decision in *Miranda v. Arizona*, which requires that U.S. custodial suspects be advised of certain rights before being questioned,[1] provides protections that are fundamental to a fair trial and well worthy of imitation. For "ordinary citizens" in the United States, "compliance with the Miranda safeguards is widely considered an elementary prerequisite of fair procedure and the decent restraint of police power."[2] Foreign jurists have likewise praised the decision as one that "provides the foundation for due process of law of the detained person."[3] As a result, it is no surprise that warnings virtually identical to those required by *Miranda* have become a mainstay in contemporary international criminal procedure, nor that commentators keen to establish the fairness of these proceedings are quick to emphasize this *Miranda* parallel.[4] Indeed, when this *Miranda* connection is made, it is

---

[1] Miranda v. Arizona, 384 U.S. 436, 471 (1966).

[2] Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 501 (1996).

[3] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 118-19 (Mar. 31) (separate opinion of Judge Sepulveda) (describing the *Miranda* warnings as "an integral part of the United States system of constitutional rights").

[4] *See, e.g.*, Wolfgang Schomburg & Jan-Christoph Nemitz, *The Protection of Human*

almost always designed to provide evidence that international criminal courts provide due respect for the human rights of their suspects.[5]

Of course, international criminal courts ought not to be able to enhance their perceived legitimacy by virtue of simply having incorporated *Miranda's* warnings into their procedural regimes. What is more, despite the popular support *Miranda* enjoys at home, the *Miranda* experiment simply does not inspire comparable confidence within the U.S. legal community. With many in this group concluding that *Miranda's* ability to protect suspects from coerced interrogations has become "extremely limited,"[6] the presence of comparable warnings at international courts says little about the fairness of international criminal proceedings. Accordingly, rather than accept the assumption that the presence of *Miranda* analogs in international criminal procedure contributes to the integrity of international criminal proceedings, this work examines the truth of that assumption. In so doing, this article establishes that international criminal practice in this area not only enhances the credibility of the courts in this relatively nascent field, but is actually more rights-protective than the *Miranda* doctrine currently in place in the United States.

This article begins by providing a brief overview of the *Miranda* decision, comparing the warnings required by it with the cautions provided to international criminal suspects upon questioning. This work then illustrates how the safeguards afforded in the international realm are more expansively applied than under current U.S. doctrine. In so doing, it demonstrates how the international approach is on the whole more closely aligned with both the tenor and aim of the *Miranda* opinion than current U.S. practice. In this vein, it illustrates how and why, despite the use of discretionary rules of exclusion, international courts have consistently evidenced a robust commitment to protecting the rights of interrogated persons by refusing to admit improperly obtained statements. It concludes by

---

Rights of the Accused before the International Criminal Tribunal for Rwanda, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAITY KAMA 89, 92 (Emmanuel Decaux et al. eds., 2007) (illustrating that the ICTR's approach to suspect interrogation adequately protects human rights by bestowing protections that correspond to "Miranda Rights"); Stefan Trechsel, *Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison,* 149, 161 *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, (Bert Swart et al. eds., 2011) (referring to the protection afforded by the ICTY as a "*Miranda* warning").

[5] *See, e.g.*, Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court, A Liberal Defence,* 4 J. INT'L CRIM. JUST. 765, 779 (2006); David Scheffer, *Advancing US Interests with the International Criminal Court,* 36 VAND. J. TRANSNAT'L L. 1567, 1571 (2003).

[6] Sandra Guerra Thompson, *Evading* Miranda: *How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 647 (2006).

arguing that this trend ought to be continued at the International Criminal Court[7] ("ICC"), demonstrating that such an approach would enhance the integrity of the ICC's proceedings and can be employed without unduly hampering ICC prosecutions.

II. BACKGROUND

There can be little doubt that *Miranda's* warnings have infiltrated the consciousness of much of the world's population.[8] Just over a decade ago, Justice Breyer estimated that "2 billion people throughout the world know [that a U.S. custodial suspect] must be warned, prior to any questioning, that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him. . . that's a hallmark of American justice"[9]

In fact, the impact of the U.S. Supreme Court's decision in *Miranda v. Arizona* has been felt both at home and overseas.[10] The opinion is routinely considered when foreign courts assess the fairness of suspect interrogations[11] and its safeguards have directly inspired investigatory reforms around the globe.[12] *Miranda* is credited abroad for "belong[ing] to the very essence of a

---

[7] Rome Statute of the International Criminal Court, A/CONF.183/9 (July 17, 1998) U.N. Doc. (1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

[8] *See* George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in our National Culture?*, 29 CRIME & JUST. 203, 246 (2002) ("[T]he daily stream of detective shows seems to have educated everyone (in America and abroad) about the existence and content of the *Miranda* warning and waiver requirements.") *See also* Patt Morrison, Op-Ed., *Patt Morrison Asks: 1st Prosecutor, Luis Moreno-Ocampo*, L.A. TIMES (Nov. 19, 2011), http://articles.latimes.com/2011/nov/19/opinion/la-oe-morrison-luia-moeno-ocampo-20111119 ("[F]rom'Perry Mason' to 'Law & Order,' [American] TV teaches the world about the law, and people like [it].... You exported the idea of justice.," as observed by the first Prosecutor of the International Criminal Court, Louis Moreno-Ocampo).

[9] Transcript of Oral Argument at 24, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), *available at* http://www.soc.umn.edu/~samaha/cases/dickerson_v_us_transcript .htm.

[10] *See* Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L L. 333, 335 (2010) (noting that the Miranda decision "ha[s] been very influential overseas").

[11] *See, e.g.*, McGowan v. B., [2011] UKSC 54, [37] in which the Supreme Court of the United Kingdom refers to the *Miranda* decision as "[t]he main source of comparative jurisprudence on the issue of waiver by a suspect of the right of access to a lawyer while being questioned by the police."

[12] *See, e.g.*, CONST. art. III, sec. 12(1) (Phil.); Philippine National Police Operational Procedures R.15, §1 (dictating that an "arresting officer... must inform the person arrested, detained or under custodial investigation of ....[his] rights under the Miranda Doctrine"); Committee against Torture, *List of issues to be considered during the examination of the second periodic report of the Philippines*, CAT/C/PHL/2 (2009); Cecile Suerte Felipe, *Cops*

fair trial"[13] and, "in the overwhelming majority of jurisdictions, if not quite all, [the] *Miranda* rule has become a fundamental legal provision enshrined in national legislation."[14]

At home *Miranda* enjoys equal support—at least among the general public—notwithstanding an initially shaky reception.[15] As the U.S. Supreme Court recognized in 2000, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[16] As a result, an overwhelming majority of Americans are now aware of the protections afforded by the decision[17] and believe in

---

getting to Know 'Miranda,' THE PHILIPPINE STAR, Apr. 7, 2008 (explaining Miranda's holding and noting "Miranda Rights were later adopted in the Bill of Rights of the Philippine Constitution, with the additional safeguard that these rights cannot be waived except in writing and in the presence of counsel"). *See also* R. v. Shaw, 57 A Crim. R. 425 (1991) (Court of Criminal Appeal for Victoria) (attributing certain 1998 amendments to Victoria's Crimes Act of 1958 to the "intellectual fount" of Miranda).

[13] Imbrioscia v. Switzerland, 17 Eur. Ct. H.R. 441 (1994) (Dissenting Opinion of J. De Meyer). *See also* Galstyan v. Armenia, Eur. Ct. H.R. (2007) (Partly Dissenting Opinion of Judge Fura-Sandström) (discussing the right to counsel under Miranda and "why it is so important to uphold"). The Miranda decision has even been summoned by foreign courts to address governmental overreaching unrelated to interrogation. *See, e.g.*, Kinoti v. Republic, [2011] eKLR (Kenya); Prosecutor v. Delalic et. al, Case No. IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, ¶ 49, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 19, 1998).

[14] O'Halloran v. United Kingdom, Eur. Ct. H.R. (2007) (Dissenting Opinion of Judge Pavlovschi). This is true, for example, of Spain, Italy, Canada, France, and Russia. *See, e.g.*, Stephen C. Thaman, *Miranda in Comparative Law,* 45 ST. LOUIS L.J. 581 (2001) (noting, however, that the precise nature of the rights provided vary in each jurisdiction). While these changes may have been influenced by Miranda, it is important to note that the decision was not the only, nor even the first domestic measure to address procedural rights related to interrogation. In fact, two years prior to the Miranda decision, Germany adopted the requirement that suspects be advised pre-interrogation that they are permitted to say nothing and have the right to ask questions of a lawyer. *Id.* at 594 (noting, however, that there was no right to have the lawyer present during the interrogation). *See also* Miranda v. Arizona, 384 U.S. 436, (1966) (Harlan, J, dissenting) (noting that, in England, "a caution as to silence but not counsel ha[d] long been mandated by the 'Judges' Rules,' which also place[d] other somewhat imprecise limits on police cross-examination of suspects").

[15] "At the time of the 1966 decision, only 32% of the public believed that the restrictions on police power laid out by the Court were correct and fair." Amy E. Lerman, *The Rights of the Accused,* in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 41, 51 (Nathaniel Persily, Jack Citrin & Patrick J. Egan, eds., 2008) (citing a 1966 poll). *See also* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution,* 152 U. PA. L. REV. 1361, 1422-4 (citing a series of (admittedly flawed) polling questions that indicated public approval of Miranda in 1966 was no higher than 65% and was perhaps as low as 24%). "By 1968, Miranda was undeniably unpopular..." *Id.* at 1424.

[16] Dickerson v. United States, 530 U.S. 428, 443 (2000).

[17] "A national poll in 1984 revealed that 93% of those surveyed knew they had a right to

their importance. Indeed, "the *Miranda* rule enjoys almost unanimous popular support in America."[18]

Given this global affection for the seminal opinion, it seems fair to assume that, having adopted comparable cautions, international criminal courts stand poised to enhance the esteem in which they are held. Yet this ought only to be true if the practice of these courts actually and adequately safeguards the international human rights of their suspects, in particular the privilege against compelled self-incrimination. As the U.S. experience has shown, however, such protection cannot be assumed from the availability of *Miranda*-like warnings.

Rather, while the 1966 decision continues to serve as a touchstone for foreign courts and fosters amongst Americans a sense of comfort in their legal system,[19] those more familiar with the Court's developing jurisprudence have actually begun to mourn *Miranda*.[20] Members of this group commonly lament the fact that the revered decision has been the repeated victim of stealth overruling,[21] "whittled away slowly, suffering a

---

an attorney if arrested, and a national poll in 1991 revealed that 80% knew they had a right to remain silent if arrested." Richard A. Leo, The *Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 651 (1996) (internal citation omitted); Jay Evenson, '*Popular Culture' Won out in Miranda*, DESERET NEWS (July 2, 2000), http://www.deseretnews.com/article/769029/Popular-culture-won-out-in-Miranda.html?pg=all (stating that "*Miranda* has been repeated so many times... that most Americans can recite it better than the 10 Commandments.").

[18] In a nation-wide survey conducted in 2000, 91% of persons polled expressed support for *Miranda* warnings. RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 144-45 (2006) (finding, in addition, that a majority of these strongly supported the decision). *See also* Lerman, *supra* note 15, at 51-2 (citing a 2000 survey in which 86% of Americans questioned registered their approval of informing suspects of the right to silence and counsel prior to questioning and noting strong support for *Miranda* warnings across racial, political, religious and geographical lines).

[19] *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 42 (2010) (noting that "the public supports Miranda and appears to believe it is alive and well").

[20] Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521 (2008) (concluding that the Supreme Court's gutting of *Miranda's* safeguards has rendered the decision's protective value "largely dead").

[21] "[Berghuis v. Thompkins] is but one of a series of high court rulings in recent months that have effectively nipped away at the infamous Miranda ruling... Perhaps because it is occurring incrementally, few outside the legal community have taken note of the trend." Mary Sanchez, *Supreme Court Diverges on Miranda*, KAN. CITY STAR, Jun. 4, 2010 (confirming the popular perception of *Miranda* in part by praising Justice Sotomayor's refusal to endorse it incursion by noting "America, she's got your back."). *See also* Christopher J. Peters, *Under the Table Overruling*, 54 WAYNE L. REV. 1067, 1090 (2008) (noting that most non-lawyers learn about Supreme Court decisions through the media and that the latter are unlikely to report that constitutional precedent had been overruled unless the Court expressly acknowledges having done so).

death by many cuts"[22] at the hands of the U.S. Supreme Court. As the following sections demonstrate, this persistent narrowing of *Miranda* both inhibits the aim of the decision in the United States while simultaneously rendering international criminal justice more rights-protective by comparison.

III. THE MIRANDA DECISION

Although a controversial decision from its inception[23] to the present day,[24] there is ample evidence that Chief Justice Warren's aim in penning *Miranda* was a noble one.[25] As the Court would later expressly acknowledge, the decision sought to "dissipate 'the overbearing compulsion. . .caused by isolation of a suspect in police custody.'"[26] Accordingly, the *Miranda* Court set its focus on the "incommunicado interrogation of individuals in a police dominated atmosphere,"[27] producing an opinion that necessarily lays bare an embarrassing array of U.S. law enforcement conduct employed to induce confessions.[28] The decision is also replete with language that makes it an attractive source for the development of international human rights law.[29] In support of the warnings it requires,

---

[22] Friedman, *supra* note 19, at 36.

[23] In the immediate aftermath of the 5-4 opinion, "some critics of the decision [were] sufficiently upset to recommend a constitutional amendment reversing [it]."Michael Wald, Richard Ayres, David W. Hess, Mark Shantz & Charles H. Whitebread, II, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519, 1521 (1967).

[24] "The words of the Fifth Amendment command that "No person . . . shall be compelled in any criminal case to be a witness against himself.' Nowhere is there any reference to a warnings and waiver regime, and never has any member of the Supreme Court.... actually said that the Constitution so commands." Ronald J. Allen, *The Misguided Defenses of* Miranda v. Arizona, 5 OHIO ST. J. CRIM. L. 205, 206 (2007) (averring that "[n]o plausible theory of constitutional interpretation....allows one to reach the conclusion the Court did") (internal citations omitted).

[25] "There seems to be general agreement among Warren's biographers that, as a result of his experiences as a prosecuting attorney, the feature of the criminal justice system that aroused his strongest emotions was the confession obtained during police custody." Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It--And What Happened to It,* 5 OHIO ST. J. CRIM. L. 163, 175 (2007).

[26] Minnesota v. Murphy, 465 U.S. 420, 340 (1984) (quoting United States v. Washington, 431 U.S. 181, 187, n.5 (1977)).

[27] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[28] From the "positive" identification of suspects in contrived line-ups to the provision of false legal advice, the decision directly admits to the ploys, patently unbefitting an enlightened system of justice, designed to obtain confessions by psychological coercion. *See generally id.* at 450-54.

[29] *See, e.g.*, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context,* 75 IND. L.J. 809, 828, n.116 (2000) (noting that in the case law of the European Court of Human Rights the *Miranda* opinion is used to argue for

the *Miranda* opinion exalts the significance of human dignity and integrity,[30] the imperatives of an accusatory system of justice,[31] and the importance of procedural equality.[32] It also provides valuable support for the notion that pre-trial protective measures may be an indispensable prerequisite for preserving trial rights such as, in its own case, the privilege against compelled self-incrimination.[33]

In substance, the *Miranda* holding requires the automatic exclusion of any statement produced by "custodial interrogation," unless the government can establish "the use of procedural safeguards effective to secure the privilege against self-incrimination."[34] These safeguards include informing the suspect, prior to questioning that he has the right to remain silent and to have the presence of counsel—appointed if necessary—before and during questioning.[35] In addition, the suspect must be made aware of the consequences of choosing to speak, by being provided with an "explanation that anything said can and will be used against the individual in court."[36] Only when a suspect voluntarily waives effectuation of these rights in a knowing and intelligent fashion will subsequent answers be rendered admissible.[37]

---

more expansive suspect rights).

[30] In so doing, the majority identifies *nemo tenetur* as among "the most cherished principles" in the United States and notes its "intimate connection" with custodial interrogation. *Miranda*, 384 U.S. at 458.

[31] "[O]ur accusatory system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labor, rather than by the cruel expedient of compelling it from his own mouth." *Id.* at 460.

[32] "The accused who does not know of his rights may be the person who most needs counsel." *Id.* at 470-71 (proceeding to quote favorably from a California Supreme Court opinion rejecting favorable treatment for defendants owing to "sophistication or status").

[33] *Id.* at 467 (noting that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is compelled in any significant way from being compelled to incriminate themselves"). "Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony...would become empty formalities in a procedure where the most compelling evidence of guilt, a confession, would have been already obtained at the unsupervised pleasure of the police.'" *Id.* at 466 (citing Mapp v. Ohio, 367 U.S. 643 (1961) (Harlan, J., dissenting)).

[34] *Id.* at 444.

[35] *Id.*

[36] *Id.* at 469.

[37] *Id.* at 444-45.

IV. INTERROGATION PROTECTIONS AT CONTEMPORARY INTERNATIONAL CRIMINAL COURTS

A. *The ICTY, ICTR and the SCSL's Shared Approach*

The *Miranda* warnings bear a distinct resemblance to the procedural safeguards later codified for international criminal suspects at the International Criminal Tribunal for the former Yugoslavia (ICTY)[38] and then replicated at the International Criminal Tribunal for Rwanda[39] (ICTR) and the Special Court for Sierra Leone[40] (SCSL). The shared approach of these three courts includes a statutory right for a questioned suspect "to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it."[41] This protection was then supplemented and explicated by Rule 42,[42] a provision "largely based" on the "Miranda requirement."[43]

Rule 42 provides that before a suspect can be questioned he must be

---

[38] Established under the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. S/25704, annex (1993) [hereinafter ICTY Statute].

[39] Established under the *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

[40] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (Jan. 16, 2002), UN Doc. S/2000/915, annex (2000) [hereinafter SCSL Statute].

[41] ICTY Statute, *supra* note 38, at Art. 18(3) (providing in addition the right to necessary translations into a language that the suspect speaks and understands).

[42] *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: Rules of Procedure and Evidence,* [hereinafter ICTY RPE], R. 42; *International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, entered into force 29 June 1995,* R. 42, UN Doc. ITR/3/Rev.1 (1995) [hereinafter ICTR RPE]. The ICTR adopted, *mutatis mutandis,* the ICTY's Rules of Procedure and Evidence. ICTR Statute, *supra* note 39, at art. 14. By and large, the ICTR also opted to adopt the later changes that the ICTY made to its RPE. *See, e.g.,* Prosecutor v. Bagosora, et. al, Case No. ICTR-97-7-T , Decision on Defence Motion for Pre-Determination of Rules of Evidence, (Int'l Crim. Trib. for the Former Yugoslavia July 8, 1998) (describing the ICTR RPE as a "replica" of the ICTY's Rules); *Rules of Procedure and Evidence of the Special Court for Sierra Leone,* R.42, (2002).) [hereinafter SCSL RPE]. By virtue of its statute, the SCSL inherited, *mutatis mutandis,* the Rules of Procedure and Evidence of the ICTR. SCSL Statute, *supra* note 40, at art. 14(1).

[43] VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 199, n.540 (1995). *See also* Prosecutor's Office of Bosnia and Herzegovina v. Trbic, Case No.: X-KRŽ-07/386, Second Instance Verdict, ¶31, (Ct. of Bosn. & Herz. Oct. 21, 2010) (noting that *Miranda* warnings "are similar to those required by the ICTY").

informed of the right to be assisted by counsel, appointed if necessary, and of the right to remain silent, including a caution that any statement made may be used in evidence.[44] The Rule further dictates that suspect questioning "shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel" and that, if a suspect who waives the right to have counsel present later changes his mind on the issue, "questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."[45] Failure to comply with these procedural safeguards may result in the exclusion of the suspect's statements at trial.[46]

B. The International Criminal Court

In similar fashion, the Rome Statute of the ICC ("Rome Statute") provides that "where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court," that person may not be questioned until he or she is informed of the right to remain silent.[47] In addition, the person must be informed of his right to have the legal assistance of counsel, assigned if needed,[48] and to be questioned in the presence of counsel.[49] While the ICC statutory provision does not have a parallel for the *Miranda* requirement that suspects be warned of the negative consequences of waiver, it instead requires that suspects are provided with important information not found in *Miranda's* warnings: that the decision to remain silent cannot be considered in determining guilt.[50] As under the

---

[44] R. 42(A)(i) and (iii)., ICTY RPE, *supra* note 42.

[45] ICTY R. 42(B), ICTY RPE, *supra* note 42.

[46] Although this remedy is not automatic, improperly obtained statements have been consistently excluded. *See infra* notes 196 *et. seq.* and accompanying text. For a general discussion of the rule governing the exclusion of evidence under the shared approach, see notes 175-78 and accompanying text.

[47] Rome Statute, *supra* note 7, at art 55(2)(b).

[48] *Id.* at art. 55(2)(c).

[49] *Id.* at art. 55(2)(d). The sub-article also requires that the person be informed that there are grounds to believe that he has committed a crime within the Court's jurisdiction. *Id.* at art. 55(2)(a).

[50] Rome Statute, *supra* note 7, at art 55(2)(b). On the need for such a warning in the United States, *see e.g.* Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law & Understandings*, 90 Minn. L. Rev. 718, 783, 793 (2006). *See also:* Geoffrey S. Corn, *The Missing Miranda Warning: Why What You Don't Know Really Can Hurt You*, 2011 UTAH L. REV. 761, 762 (2011) (arguing that "[t]his 'missing' *Miranda* warning is essential to enable a suspect confronted with custodial interrogation to meaningfully exercise the privilege against self-incrimination."). These contemporary observations map on to concerns raised in the immediate wake of the *Miranda* decision. *See, e.g.*, Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect*, 67 COLUM. L. REV. 645, 654 (1967).

shared approach, non-compliance with these safeguards may result in exclusion.[51]

V. THE MIRANDA COMPARISON

It is little wonder that Rule 42 has been recognized as having "transposed 'Miranda' into international criminal law."[52] Likewise, it is plain to see why it is that ICC suspects[53] are frequently said to enjoy "Miranda rights"[54] and that their statutory safeguards are "Miranda-esque."[55] At the same time, there are some notable differences. First, the approach of these international courts appears to provide less protection than the *Miranda* decision in that there is no requirement that questioning cease upon a suspect's decision to avail of his right to silence.[56] Rather, the international

---

[51] While the ICC has yet to deal with such a situation, it has somewhat analogously addressed—and rejected—the admissibility of statements obtained independently from the Court under rather troubling conditions. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-04, Decision on Prosecutor's Bar Table Motion, ¶ 63, (Dec. 17, 2010). For a general discussion of the ICC's statutory provision on the exclusion of evidence, *see infra* notes 176-181 and accompanying text.

[52] ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION 304 (2007).

[53] For ease of reference, this article will use the term "suspect" to denote individuals who fall within the ambit of Article 55(2), despite the fact that the term does not appear in the ICC Statute. In part, this absence can be attributed to the fact that no agreement could be reached regarding a definition for the term. Hakan Friman, *Rights of Persons Suspected or Accused of a Crime, in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS , 247, 248 (Roy S. Lee, ed., 1999). In addition, there were concerns that the use of the term might be seen as undermining the presumption of innocence. Christopher Keith Hall, 'Article 55' COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1089, 1097 (Otto Triffterer, ed., 1999) (noting the "resulting awkwardness" of the term's omission).

[54] *See, e.g.*, Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court, A Liberal Defence,* 4 J. INT'L CRIM. JUST. 765, 779 (2006); AM. SOC'Y INT'L L., *U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement,* 43, Mar. 2009; David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1010, 1055 (2008); Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes,* 7 J. INT'L CRIM. JUST. 1047, 1061 (2009).

[55] Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, The United States and The International Criminal Court,* 29 B.C. INT'L & COMP. L. REV. 1, 8 (2006); *see also* M. Cherif Bassiouni, *Court Is No Threat to Us,* CHI. TRIB., July 14, 2002, at 1 (noting that the ICC Statute requires a "Miranda-type warning").

[56] "From the language of both the Statute and the rules it seems to be a fait accompli that the suspect must submit to the questioning process by the prosecutor." Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia,* 5 CRIM. L.F. 507, 524 (1994).

criminal suspect has "a right to remain silent during interrogation."[57] Indeed, international case law makes clear that the prosecution need not inform suspects that they have the right to terminate the interrogation[58] and, in practice, some persons questioned have opted to answer some questions and not others.[59]

At the same time, the shared approach and the protections afforded by the ICC Statute sweep more broadly than *Miranda: every* international criminal suspect is entitled to receive the requisite cautions prior to official questioning. As a result, these international protections are inconsistent with the seminal opinion in a seemingly striking way, as *Miranda* warnings are required only in cases of "custodial interrogation."[60] The following section considers the breadth of this divergence.

A. The Custody Distinction

Remarkably, the Warren Court's decision to limit the required warnings to custodial situations is not attributable to an effort to limit *Miranda's*

---

[57] K. de Meester, K. Pitcher, R. Rastan & G. Sluiter, *Investigation, Coercive Measures, Arrest and Surrender,* 171, 252 *in* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (2013). While this "right to remain silent during interrogation" seems a markedly different model from the right to silence enjoyed by U.S. suspects, the 2010 decision of Berghuis v. Thompkins noticeably narrows the gap between the two approaches. In that case, a majority of the Court held that "after giving a Miranda warning, police may interrogate a suspect who has neither invoked nor waived his or her Miranda rights." Berghuis v. Thompkins 130 S. Ct. 2250, 2264 (2010) (remarking, at 2254, that "had [the interrogated suspect] wanted to remain silent, he could have said nothing in response or unambiguously invoked his Miranda rights, ending the interrogation"). As a result, a U.S. suspect "must utter magic words" to transform the right "to remain silent while interrogation takes place" into the right "to avoid interrogation altogether." Sherry F. Colb, *The Supreme Court Holds That Responding to Police Interrogation Waives The Right to Remain Silent,* FindLaw,com (June 7, 2010) http://writ.news.findlaw.com/colb/20100607.html. A more detailed discussion of the *Thompkins* case appears *infra* at notes 147 *et. seq.* and accompanying text

[58] *See, e.g.*, Prosecutor v. Popovic et. al, Case No. IT-04-88-T, Decision on the Admissibility of the Boravcanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 25, 2007) (concluding that Rule 42 does not require the prosecutor's investigator to inform a suspect that he is "at liberty to leave the interview or not required to speak 'at all'").

[59] *See, e.g.*, Prosecutor v. Haradinaj et. al, Case No. IT-04-84-PT , Decision on Lahi Brahimaj's Motion for Provisional Release, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 3, 2005) (considering the accused's cooperation during a voluntary interview, while noting that "he remained silent to questions touching upon areas outside his own criminal responsibility"). Although the questioning of an ICTY accused is covered by a separate rule, Rule 63, that rule requires compliance with the cautions in Rule 42. ICTY RPE, *supra* note 42, at R. 63(B).

[60] The Court defines this term as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

application.[61] Rather, the custodial aspect of police questioning was essential to the Court's conclusion that warnings ought to be required in the first place. Searching through then-contemporary interrogation manuals, the *Miranda* Court identified ways in which the interrogation environment was manipulated so as to compel suspects to speak. Highlighting law enforcement efforts designed to isolate the suspect[62] and to obtain the advantage of an unfamiliar atmosphere,[63] so as to "subjugate the individual to the will of his examiner,"[64] the Court concluded that there is "compulsion inherent in custodial surroundings."[65]

At the same time, and in keeping with its theme of enlightened justice, the decision was arguably more generous than these observations required. Perhaps motivated by its determination that the US system of criminal justice ought, at a minimum, to be as rights-protective as the other jurisdictions whose interrogation practices it surveyed,[66] the Court concluded that its warnings are required before interrogation of a person in custody "or otherwise deprived of his freedom of action in any significant way."[67]

This initial description of custody could suggest that the divide between the applicability of *Miranda* and its international counterparts might not be all that severe. The Court's broad definition of custody "arguably casts a wide net with respect to the number and types of circumstances to which the

---

[61] The limitation is, however, the subject of both criticism and law enforcement gaming. As to the former, *see* Rinat Kitai-Sangero, *Respecting the Privilege Against Self-Incrimination: A Call for Providing* Miranda *Warnings in Non-Custodial Interrogations,* 42 N.M.L. REV. 203 (2012). For an example of the latter, *see* United States v. Slaight, 620 F.3d 816, 817 (2010) (concluding that the officers in the case attempted to disguise a custodial situation as non-custodial in order to circumvent *Miranda*).

[62] "To be alone with the subject is essential..." *Miranda*, 384 U.S. at 455.

[63] *Id.* at 457.

[64] *Id.*

[65] *Id.* at 458. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques described above cannot be otherwise than under compulsion to speak." *Id.* at 461.

[66] "[I]t is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described." *Id* at 489. The *Miranda* decision considered the interrogation safeguards employed in England, Scotland, India and Ceylon, as well as the practices employed by the FBI and required by the Uniform Code of Military Justice. *Id.* at 484-89. "[U]nder these other systems of criminal justice, warnings were typically given or required for 'both suspects and persons under arrest'" Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences,* 48 CATH. U. L. REV. 727, 754 (1999) (quoting a letter tendered by the US Solicitor General regarding FBI warning practices and noting the "Miranda Court intended its warning requirement to be at least as protective as [the countries whose practices it considered]").

[67] *Miranda*, 384 U.S. at 444.

decision applies,"[68] as appears to be reflected in the Court's early jurisprudence on the subject. Indeed, two years after *Miranda* was decided, a majority of the Court rejected the argument that its warnings are required only when the person being questioned is in custody because of the case under investigation.[69] The following year, the Supreme Court found *Miranda* custody when a suspect was questioned in his bedroom.[70] The Court as it was then constituted recognized narrowing the definition of custody as "contrary to the whole purpose of the *Miranda* decision," to wit: providing "meaningful protection" to the constitutional privilege against compelled self-incrimination.[71]

Over time, however, and particularly due to subsequent changes to the composition of the Court, a reorientation of the Miranda custody analysis came about that "emphasize[d] the formality of arrest as the determinative 'in custody' issue."[72] By 1983, although the Court continued to pay lip service to *Miranda's* freedom of action language[73] it had all but eliminated its import, redefining custody for *Miranda* purposes to situations where "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[74]

---

[68] Daniel R. Dinger, *Is there a Seat for Miranda at Terry's Table? An Analysis of the Federal Circuit Split Over the Need for Miranda Warnings During Coercive Terry Detentions*, 36 WM. MITCHELL L. REV. 1467, 1610 (2010) (noting how the Court narrowed the definition of Miranda custody to allow for Miranda-free questioning of temporarily detained persons).

[69] Mathis v. United States, 391 U.S. 1, 4 (1968). *See also* Thomas R. Harkness, *When an Accused is not Free to Leave, Failure by the Police to Advise Him of His Miranda Rights Prior to Interrogation Violates the Self-Incrimination Clause of the Fifth Amendment. Orozco v. Texas*, 394 U.S. 324 (1969), 48 TEX. L. REV. 955, 957 n.21 (1970) (attributing the conclusion that the suspect was in custody to an officer's testimony that, in his opinion, the suspect was not free to leave once his identity had been established).

[70] Orozco v. Texas, 394 U.S. 324, 326-27 (1969).

[71] *Mathis*, 391 U.S. at 4.

[72] Lunney, *supra* note 66, at 758. Lunney marks the 1976 decision in Beckwith v. United States as the turning point in this regard. *Id.* In Beckwith, Justice Brennan—then the sole remaining member of the *Miranda* majority on the Court—dissented from the majority's finding that the suspect was not in custody for Miranda purposes, emphasizing that formal custody is not a prerequisite for *Miranda* warnings. Beckwith v. United States, 425 U.S. 341, 349 (1976) (Brennan, J., dissenting).

[73] California v. Beheler, 463 U.S. 1121, 1123 (1983) (availing of the language in finding that at the time of his questioning Beheler was not significantly deprived of his freedom of action).

[74] *Id.* at 1125. *See also* Katherine M. Swift, *Drawing a Line between Terry & Miranda: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1079 (2006) (concluding that the *Beheler* custody test is narrower than the one set out in *Miranda*). This revised definition effectively sanctions *Miranda*-less questioning during most investigatory and traffic stops, although such stops may significantly curtail the freedom of action of their subjects and are "inherently somewhat coercive." United States v. Streifel, 781 F.2d 953, 958 (1st Cir.1986), quoting United States v. Bautista, 684 F.2d 1286, 1291 (9th Cir.1982). "In a sense, then, the

1. Contemporary Miranda Custody

This revised and ungenerous approach to *Miranda* custody has made it possible for warning-less and coercive interrogations to pass constitutional muster[75] even when conducted at a police station while employing techniques specifically decried by the *Miranda* decision.[76] In effect, the Court's narrow construction of *Miranda* custody has engendered decisions that "suggest a particular tactic to officers"[77] who are eager to avoid providing the warnings, yet invested in obtaining admissible statements. Sometimes referred to as "*Beheler* admonitions,"[78] this approach entails telling a suspect that he is not under arrest, regardless of the truth of the statement, and even when remaining objective factors not only indicate otherwise but tend to render the encounter coercive.[79]

To appreciate just how far afield these developments in "*Miranda* custody" bring current U.S. doctrine from the 1966 decision—and from the

---

[revised *Miranda* custody] test has narrowed so that detentions such as *Terry* stops can lawfully take place without the need for *Miranda* warnings." Dinger, *supra* note 68, at 1610.

[75] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (concluding that "a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment"").

[76] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE §24.07(B)(5) (5th ed. 2010) (discussing Mathiason, a case in which a parolee, interrogated upon complying with a request to appear at the police station, was falsely told that his fingerprints had been found at the scene of crime). Despite the state court's conclusion that this falsehood contributed to a coercive interrogation environment, the Supreme Court, *per curiam*, found that the lie "ha[d] nothing to do with whether respondent was in custody for purposes of the Miranda rule." *Mathiason*, 429 U.S at 496.

[77] Weisselberg, *supra* note 20, at 1541. *See also* Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century,* 99 MICH. L. REV. 1000, 1017 (2001) (discussing the same law enforcement strategy).

[78] In California v. Beheler, 463 U.S. 1121 (1983), the Court concluded that a suspect who voluntarily accompanied the police to the stationhouse for questioning, after being told he was not under arrest, was not in custody for the purposes of *Miranda.*

[79] This practice has proven so successful that some jurisdictions specifically train officers to inform their to-be-questioned detainees that they are not under arrest, irrespective of the truth of the statement. Interrogation Law 2003, POST Telecourse Reference Guide, Aug. 2003, at Appendix E: Beheler Admonishment, *available at* http://www.post.ca.gov/Data/Sites/1/post_docs/telecoursereferenceguides/Interrogation%20Law%202003.pdf *See also* KAREN M. HESS, CHRISTINE H. ORTHMANN & HENRY LIM CHO, POLICE OPERATIONS: THEORY AND PRACTICE 60 (2010) (noting that *Miranda* can be avoided by using a so-called "*Beheler* admonition, telling the suspect, 'You're not under arrest. You're free to leave anytime you want, ok?'"). For stationhouse interrogations, which present a predictably greater challenge to a finding of non-custody, a slightly different tactic is suggested: "tell[ing] the suspect in a believable way [that he is] *free to leave or not answer any questions* at any time.'" Interrogation Law 2003, *supra* note 79, at Appendix E (emphasis in original) (concluding "Then you may proceed with interrogation without the need for Miranda warnings").

protections enjoyed by questioned international criminal suspects—consider the 2012 case of jail inmate Randall Fields.[80] While serving a 45 day jail sentence for disorderly conduct, Fields was removed from his cell one evening by a corrections officer and two sheriff's deputies, without being told where he was being taken or for what purpose.[81] He was then brought through a door that divides the jail from the sheriff's department and placed in a stationhouse conference room.[82] There Fields was interrogated at length by two armed guards about his conduct outside of the jail.[83] The interrogating officers did not inform Fields of his *Miranda* rights, but did provide him with a *Beheler* admonition, informing Fields "that if he did not want to cooperate he was free to leave the room at any time."[84] Despite the fact that Fields told the officers numerous times that he did not want to speak with them anymore, the interrogation proceeded into the early morning.[85] Subjected to between 5 and 7 hours of apparently hostile questioning and deprived during that time of his daily-prescribed, vital medication,[86] Fields eventually confessed.[87]

In finding that Fields was not in custody for *Miranda* purposes, and therefore not entitled to *Miranda* warnings, the *Fields* majority illustrates how law enforcement can utilize *Beheler* admonitions to successfully affect the subsequent custody analysis, in this case by informing Fields that he was free to leave the room.[88] Perhaps more importantly, the *Fields* decision

---

[80] Howes v. Fields, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012).

[81] Fields v. Howes, 617 F.3d 813, 815 (2010).

[82] "Fields had to pass through the 'J door,' which is the door that divides the jail from the Sheriff's Department." *Id.* at 827, n.3 (McKeague, J., concurring).

[83] Howes v. Fields, 132 S. Ct. at 1186.

[84] Fields v. Howes, 617 F.3d at 815 (noting, however, that due to the jail setting, it would have taken nearly twenty minutes for Fields to depart the conference room).

[85] *Id.* (approximating that the interrogation lasted seven hours).

[86] Howes v. Fields, 132 S. Ct. at 1195 (Ginsberg, J., dissenting) (explaining that Fields, a kidney transplant recipient, was required to take two anti-rejection medications).

[87] *Id.* at 1186.

[88] *Id.* at 1193 (citing the fact that Fields was informed that he could leave the room as the "most important" objective factor that weighed against a finding of custody). Remarkably, the issue of custody was not necessary to decide the case, which could have been resolved by merely reversing the Sixth Circuit's grant of habeas corpus. All the Court's members agreed that Fields was not entitled to habeas relief, because existing law on custody was not "clearly established" in Fields' favor, as required by applicable law. *Id.* at 1188-89, 1194 (Ginsburg, J., dissenting). This result would certainly have been preferable to a decision that undoubtedly will further incentivize law enforcement to conduct *incommunicado* interrogations of non-Mirandized prisoners after informing them that they may return to their cells if they wish—something this author would deem an "error cost" of the decision. "Good judges try to minimize the sum of .... error costs." Cass Sunstein, *Leaving Things Undecided,* 110 HARV. L. REV. 6, 16 (1996) (explaining, at 18, that "error costs are the costs of mistaken judgments as they affect the social and legal systems as a whole").

demonstrates how utterly faithless the current doctrine on *Miranda* custody is to the original opinion, There can be little doubt that the *Miranda* majority would have found that circumstances attendant to Fields' interrogation fell within its expansive definition of custody..

In fact, the five members of the seminal majority opinion (tacitly) found *Miranda* custody under analogous yet less compelling facts in the 1968 case of *Mathis v. United States.*[89] In *Mathis,* a suspect was twice subjected to warning-less interrogations while serving an unrelated prison sentence. Citing to the *Miranda* opinion's broad language regarding custody, the *Mathis* court concluded that a "person so held must be given his warnings about his right to be silent and his right to have a lawyer."[90] Accordingly, the Court found that it was error to admit the self-incriminating evidence obtained in the absence of the requisite warnings.[91]

In reaching this conclusion, the original *Miranda* members explicitly rejected the argument that *Miranda* warnings are required only when the person questioned is in custody in relation to the matter under investigation.[92] At the same time, they implicitly found that Mathis was in custody for the purposes of *Miranda,*[93] even without any indication in the record that Mathis had been subjected to any form of coercion.[94] Rather plainly, this was an essential pre-requisite to their determination that the seminal decision required a reversal of Mathis's conviction.[95] Apparently then, the members of the *Miranda* majority interpreted that decision's "clear and unequivocal" language safeguarding the person "taken into custody or otherwise deprived of his freedom by the authorities in any significant

---

[89] Mathis v. United States, 391 U.S. 1, 4 (1968).

[90] *Id.* at 5.

[91] *Id.*

[92] *Id.* at 4-5. Mathis was interrogated by a federal Internal Revenue agent while serving a state prison sentence. *Id.* at 2.

[93] *Cf.* Howes v. Fields, 132 S. Ct. 1181,1188 (2012) (arguing that the holding in *Mathis* is quite limited).

[94] The Fields majority would later maintain that "it is impossible to tell ....whether [Mathis'] interview was routine or whether there were special features that may have created an especially coercive atmosphere." *Id.* at 1188, n.4. As Justice White noted in Mathis, however: "Neither the record nor the Court suggests reasons why [Mathis] was 'coerced'...." Mathis v. United States, 391 U.S. at 7 (White, J., dissenting). Moreover, counsel for Mathis acknowledged in oral argument that coercive methods had not been used against his client. Instead, counsel simply pointed to the fact that custodial status makes unwitnessed, coercive methods possible. Oral Argument at 9:48-10:07. Mathis v. United States. 391 U.S. 1 (No. 726), *available at* http://www.oyez.org/cases/1960-1969/1967/1967_726 (audio only).

[95] The Mathis Court "granted certiorari to decide whether the *Miranda* case calls for reversal." *Mathis,* 391 U.S. at 3. Its inquiry, therefore, was not restricted to the factors upon which the intermediate court relied, as the Fields majority would later allege. Howes v. Fields, 132 S. Ct. 1188.

way"[96] to mean that "that prisoners are *per se* in custody."[97]

2. Summary

In sum, as the *Fields* case demonstrates, modern decisions employ a narrower assessment of what qualifies as "*Miranda* custody," relegating *Miranda's* actual definition of the term to dissenting opinions,[98] and bringing about results that are at odds with the seminal decision. Indeed, under the current doctrine, categorical exceptions to *Miranda* custody appear to have now become feasible.[99] Perhaps most strikingly, as Justice Ginsburg points out, the current approach to *Miranda* custody enables courts to sanction warning-less questioning despite the presence of the key attributes that gave rise to *Miranda's* command: incommunicado interrogation of a suspect, placed against his will and with his freedom significantly curtailed, in an inherently stressful, police-dominated atmosphere.[100]

By contrast, the international practice of cautioning all suspects regardless of their custodial status—although a decidedly broader application than the *Miranda* decision requires for its safeguards—is actually more in line with the aim and tenor of the *Miranda* decision. The international approach precludes the possibility that the types of warning-less interrogations that so troubled the *Miranda* Court might somehow pass procedural muster.

What is more, the sweeping applicability of the protections afforded to questioned suspects by international criminal courts better comports with the equal protection basis of the *Miranda* decision[101] than current US practice. This is because the existing emphasis placed by U.S. courts on *Beheler* admonitions renders contemporary custody determinations an arbitrary exercise at best. After a suspect has been informed that the police would like to question him, but that he is free to leave, the suspect either has to know, or guess correctly, that the appropriate response is to request to leave the place of interrogation. Expressing, as Fields did, the wish to not be interrogated at all—a statement that is sufficient to bring questioning to an end once *Miranda* warnings have been given[102]—is seemingly irrelevant to

---

[96] *Mathis*, 391 U.S. at 5 (citing Miranda v. Arizona, 384 U.S. 436, 478 (1966)).

[97] Kitai-Sangero, *supra* note 61, at 205.

[98] *See, e.g.*, *Howes*, 132 S. Ct. at 1194 (Ginsburg, J., dissenting).

[99] "Today, for people already in prison, the Court finds it adequate for the police to say: 'You are free to terminate this interrogation and return to your cell.'" *Id.*

[100] *Id.*

[101] *See, e.g.*, Henry J. Friendly, *The Fifth Amendment Tomorrow: A Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 711 (1968) (describing equal protection as "a ground bass that resounds throughout the Miranda opinion").

[102] *Miranda*, 384 U.S. at 473-74.

the custody question.[103]

In effect, the now crabbed definition of *Miranda* custody, and the consequent mechanisms used by law enforcement to avoid findings of it, tends to render the very persons the *Miranda* Court sought to safeguard protection-less.[104] As a result, the international approach of providing warnings to *all* questioned suspects, regardless of custodial status, is not only more rights-protective than current U.S. practice, but is a process that is better poised to further *Miranda's* goal of insuring that the privilege against compelled self-incrimination is meaningfully protected across the board. Turning now to the issues of invocation and waiver, this phenomenon of greater fidelity to the *Miranda* decision on the international level appears yet again, and even more strikingly.

B. Invocation and Waiver

The *Miranda* Court took a liberal approach in its discussion regarding rights invocation, holding that an interrogation must cease whenever a suspect indicates "in any manner, at any stage of the process" either the desire to consult with a lawyer[105] or the wish to remain silent.[106]Addressing the other side of the invocation coin—waiver—the Court again evidenced a commitment to making the warnings it required meaningful. Allocating the "heavy burden" of establishing waiver to the government, the opinion notes that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[107] Rather, the decision proclaims that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings have been given."[108]

---

[103] The Fields majority only once acknowledged Fields' contention that "he said several times during the interview that he no longer wanted to talk to the deputies." Howes v. Fields, 132 S. Ct. at1186. No reference was made to this aspect of the interrogation encounter when the majority later identified the factors that "lend some support to [the] argument that *Miranda's* custody requirement was met." *Id.* at 1192-93 .

[104] "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." *Miranda*, 384 U.S. at 470-71 (rejecting a procedural paradigm that provides varying levels of protection based upon sophistication or status).

[105] *Id.* at 444-45.

[106] *Id.* at 473-74.

[107] *Id.* at 475.

[108] *Id.* at 470. *See also id.* at 504 (Harlan, J., dissenting) (observing that "[t]o forgo these rights, some affirmative statement of rejection is seemingly required"). Justice Brennan, a member of the five-justice *Miranda* majority has likewise interpreted the quoted language to require affirmative waiver. North Carolina v. Butler, 441 U.S. 369, 377 (1979) (Brennan, J, dissenting).

1. The Standard of Proof for Effective Waiver

a. *The Miranda doctrine*

In arriving at the conclusion that the government ought to bear a "heavy burden" if it is to establish that a custodial suspect waived the protections set out in *Miranda's* warnings, the Court noted that it "has always set high standards of proof for the waiver of constitutional rights."[109] Similarly, as a member of the *Miranda* majority would later explain, the decision to characterize the state's burden as heavy was '[i]n recognition of the importance of the Due Process Clause and the Fifth Amendment."[110] Later decisions, at least ostensibly, adhered to the *Miranda* standard, describing the government's burden as either "great"[111] or "heavy"[112] and concluding that "courts must presume that a defendant did not waive his rights."[113]

As descriptors like "great" and "heavy" are not traditional standards of proof, however, one must consider the effect of these words upon the customary benchmarks employed in American law. In the U.S. system, the standard of proof spectrum ranges from preponderance of evidence as the least exacting to proof beyond a reasonable doubt as the most rigorous, with clear and convincing evidence as an intermediate standard.[114] With these three options in mind, the *Miranda* court's "heavy burden" language logically requires, at a minimum, that the government establish waiver by clear and convincing evidence.[115]

Yet again, however, the evolution of the so-called *Miranda* doctrine led to a standard contrary to that indicated by its parent opinion. Despite the compelling reasoning that *Miranda's* heavy burden language signified an intention to impose a rigorous standard of proof for waiver, the Court ultimately adopted a standard that is anything but exacting. Disingenuously dismissing *Miranda's* heavy burden language as a comment made "in passing,"[116] a majority of the Court held in the 1986 decision of *Colorado v.*

---

[109] *Miranda*, 384 U.S. at 475.

[110] Colorado v. Connelly, 479 U.S. 157, 185 (1986) (Brennan, J., dissenting).

[111] *Butler*, 441 U.S. at 373.

[112] Fare v. Michael C., 442 U.S. 707, 724 (1979) (concluding, at 725, that this burden required courts to consider whether, based upon the totality of the circumstances, "the accused *in fact* knowingly and voluntarily decided to forgo his rights. . .").

[113] *Butler*, 441 U.S. at 373.

[114] JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW 19-20 (1998).

[115] Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections,* 49 U. PITT. L. REV. 1007, 1024 (1988) (noting that the preponderance standard, as "the lightest burden persuasion among the available choices," is inapposite to the "heavy burden" language).

[116] *Connelly*, 479 U.S. at 167.

Connelly that "the State need prove waiver only by a preponderance of the evidence."[117]

Justice Brennan—who formed part of the *Miranda* majority in 1966—"emphatically dissent[ed]" in *Connelly*. Brennan maintained that the decision to impose the preponderance standard "ignores the explicit command of *Miranda*."[118] In Brennan's view, even an intermediate standard would have fallen short of *Miranda's* intended "heavy burden." Brennan rather contended that "[t]he constitutional ideal that involuntary confessions should never be admitted against the defendant in criminal cases deserves protection by the highest standard of proof—proof beyond a reasonable doubt."[119] Remarkably, this is precisely the standard that international prosecutors have been required to meet in order to establish waiver.

b. The Shared Approach

The shared statutory and procedural approach to suspect interrogations at the ICTY, ICTR and SCSL, unlike the *Miranda* decision's "heavy burden" language, provides no descriptors regarding the requisite standard of proof for either establishing waiver of the right to counsel or the voluntary nature of suspect statements. The ICTY's *Celebici* Trial Chamber appears to have been the first to confront either question when, in 1997, it considered the admissibility of a statement made by then-suspect Zdravko Mucic to members of the Office of the Prosecutor (OTP). Noting that the statements must be reliable in order to be admitted,[120] the Chamber concluded that the OTP, as the proponent of the statements, bore the burden of establishing beyond a reasonable doubt that they had been voluntarily made.[121]

---

[117] *Id.* at 168.

[118] *Id.* at 184 (Brennan, J., dissenting). In addition, Brennan criticized the *Connelly* majority for even considering the standard of proof issue, as it had not been raised in the government's petition. *Id.* at 183-84. For this reason, Justice Blackmun did not join the majority opinion, opting instead to file an opinion concurring in part and concurring in the judgment. *Id.* at 171. In effect, the *Connelly* court decided, *sua sponte,* that despite *Miranda's* heavy burden language, the requisite standard should be "the weakest possible burden of proof for waiver." *Id.* at 185.

[119] *Connelly*, 479 U.S. at 186.

[120] Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶ 41, (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1997). The Trial Chamber was applying the ICTY's exclusionary rule, which provides that evidence is inadmissible "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." ICTY RPE, *supra* note 42, at R. 95. The ICTY's exclusionary rule is discussed in greater detail *infra* at note 172 and accompanying text.

[121] Delalic, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, at ¶ 42. OTP later accepted the burden to prove the voluntariness of proffered statements beyond reasonable doubt. *See* Prosecutor v. Halilovic, Case No. IT-01-48-T,

Building on this foundation, in 2004, the *Bagosora* Trial Chamber at the ICTR concluded that the standard set out by the *Celebici* Trial Chamber applied equally to the OTP's obligation to establish that the suspect's right to counsel had been voluntarily waived.[122] In 2007, the *Karemera* Trial Chamber followed suit.[123] By 2008, this existing jurisprudence caused Trial Chamber I of the Special Court for Sierra Leone to "recognise[] the *established principle of law* which lays on the Prosecution the burden of proving 'convincingly and beyond a reasonable doubt' the voluntariness of an Accused's statement made in a custodial setting and of the waiver of his right to counsel during interrogation."[124]

c. *The International Criminal Court*

Neither the ICC Statute nor its Rules of Procedure and Evidence dictate the standard that ought to be met in order to establish a valid waiver of a questioned suspect's rights under Article 55 and, given that it is still relatively early days for the ICC, the Court's jurisprudence has yet to speak to the question. When the ICC ultimately addresses the issue, however, it is likely to turn to the precedent established by its predecessor courts, in particular, the ICTY.[125] This the Court has already done in other contexts,[126] with ICTY precedent having particular force when the Court's provisions closely track those in place at the Tribunal.[127] Indeed, although the ICC has

---

Decision on Admission into Evidence of Interview of Accused, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 20, 2005).

[122] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), ¶¶ 17-18 (Int'l Crim. Trib. for Rwanda Oct. 14, 2004) (citing the *Mucic* decision while highlighting "the importance of the right to counsel and the precariousness of its exercise by a suspect in detention").

[123] Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, ¶ 31 (Int'l Crim. Trib. for Rwanda Nov. 2, 2007).

[124] Prosecutor v. Sesay, Case. No. SCSL-04-15-T, Written Reasons- Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, ¶ 36 (Special Ct. for Sierra Leone June 30, 2008) (citing to both Bagosora and the Celebici decision). *See also* Prosecutor v. Sesay, Case. No. SCSL-04-15-T, Ruling on *Voir Dire* - Written Reasons, ¶ 15 (Special Ct. for Sierra Leone Nov. 2, 2007).

[125] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 44 (2006) (remarking upon the legacy of the work of the ICTY and noting that its case law, and that of its sister tribunal, the International Criminal Tribunal for Rwanda, "will provide immense guidance to the International Criminal Court").

[126] *See, e.g.*, Megan A. Fairlie, *The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled*, 33 FORDHAM INT'L L.J. 1101 (2010) (considering the influence of ICTY precedent upon ICC pre-trial release determinations).

[127] *See, e.g.*, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 11, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18

yet to address the matter directly, parties have already argued before it for the Court follow the existing international precedent by requiring that waiver be established beyond a reasonable doubt.[128]

d. Summary

In sum, international courts have thus far evidenced a commitment to ensuring that their prosecutors do indeed bear a heavy burden when it comes to establishing waiver of a questioned suspect's rights. In effect, and in line with the *Miranda* command, the beyond a reasonable doubt standard in place creates a strong assurance that involuntary confessions will not be admitted at international criminal trials. By contrast, having adopted the least exacting standard of proof for *Miranda* waiver, the US approach objectively increases the likelihood that suspect statements will be erroneously admitted at trial,[129] eases the government's path to conviction, and lies indisputably at odds with the language and tenor of the original opinion. What is more, when coupled with the Supreme Court's current approach to the form required for an effective waiver, as discussed in the next section, the chasm between contemporary *Miranda* doctrine and the original Supreme Court decision (and the aligned international approach) continues to widen.

2. The Form of an Effective Waiver

a. The Miranda doctrine

Although the *Miranda* opinion fails to specifically require an express waiver, the decision is replete with language indicating that this was its intention. Indeed, the Court found fault with the process provided in one of *Miranda's* companion cases in part because there was no evidence of "an articulated waiver of rights."[130] More directly, the *Miranda* majority noted that the "failure to ask for a lawyer does not constitute a waiver;"[131] that

---

January 2008, ¶ 78 (July 11, 2008).

[128] *See, e.g.*, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-T-41Transcript, pp 6-7 (July 2, 2008) (relying on the standard for establishing voluntariness and waiver as set out respectively by the Celebici and Bagosora Trial Chambers), *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/transcripts/Pages/index.aspx; Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07- OA 8, Defence Objections to Admissibility in Principal and Substance, ¶ 71 (Oct. 23, 2009).

[129] "The standard of proof influences the relative frequency of....erroneous outcomes." In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

[130] Miranda at 496.

[131] *Id.* at 470.

"[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made;"[132] and that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given."[133] In light of this language, it is little surprise that Justice Harlan presumed, in a dissent joined by Justices Stewart and White, that "some affirmative statement" was required for waiver.[134]

Notwithstanding this observation, both Stewart and White would later maintain that *Miranda* waiver can be inferred.[135] Writing for five members of the Court on this issue in *Butler v. North Carolina,* one-time *Miranda* dissenter Justice Stewart made note of Miranda's conclusion that "a valid waiver will not be presumed simply from the silence of the accused"[136] and then employed an analysis that placed particular emphasis on the word "simply."[137] This enabled Stewart to craft an argument that harmonized waiver by inference with *Miranda*; according to the *Butler* court, while silence alone cannot constitute waiver, "silence, coupled with an understanding of [] rights and a course of conduct indicating waiver" can.[138]

Yet, as other commentators have observed, waiver by inference is rather plainly contrary to both the tenor and intent of *Miranda.*[139] Indeed, Justice Brennan—again the only remaining *Miranda* majority member then on the Court—pointed to *Miranda's* language that waiver must be "specifically made"[140] in support of the more plausible conclusion that *Miranda* requires affirmative waiver.[141] More significantly, Brennan highlighted an

---

[132] *Id.*

[133] *Id.* at 475.

[134] *Id.* at 504 (Harlan, J., dissenting). *See also id.* at 516-17 (criticizing numerous additional aspects of the rules created by Miranda, including a perceived express waiver requirement). Remarkably, Justice Clark's dissent expressed the view that the majority opinion actually enabling a suspect to implicitly invoke his rights. *Id.* at 500 (Clark, J., dissenting) (interpreting Miranda's rules as requiring that interrogation cease if "the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel").

[135] North Carolina v. Butler, 441 U.S. 369, 373 (1979). By that time, Justice Harlan was no longer on the Court.

[136] *Id.* at 373 (citing *Miranda*, 384 U.S. 436).

[137] *Id.* (concluding that "silence alone" cannot constitute waiver).

[138] *Id.*

[139] *See, e.g.*, James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1045 (1986) (describing Butler's acceptance of implicit waiver as "[c]ontrary to the apparent intent of the *Miranda* opinion"); *see also* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 393 (5th ed. 2009) ("[T]he tone and language of the majority opinion in *Miranda* seemed to indicate that the Court would be receptive to nothing short of an express waiver of the rights involved.").

[140] *Butler*, 441 U.S. at 377 (Brennan, J., dissenting) (citing *Miranda*, 384 U.S. at 470).

[141] *Id.*

irreconcilable tension between the *Butler* opinion and *Miranda*. *Miranda's* determination that custodial interrogation is inherently coercive and designed to "subjugate the individual to the will of his examiner,"[142] logically dictates that any uncertainties surrounding the interrogation—such as those that are bound to accompany an assessment of waiver by inference—ought to be interpreted against the state.[143]

After the *Butler* court sanctioned implied waiver, lower courts picked up on the cue that the government's "heavy burden" could actually be established by a rather light showing.[144] In fact, a review of pertinent appellate opinions conducted some two decades later revealed that "once the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show— basically that the suspect answered police questions after saying that he understood the warnings."[145] Similar to the custody analysis above, an examination of another recent decision rendered by the Roberts Court is illustrative of the incongruence between the current Supreme Court doctrine regarding waiver and the *Miranda* opinion.

i. Contemporary waiver

In the 2010 case of *Berghuis v. Thompkins,* the Supreme Court considered whether Thompkins, a homicide suspect, had effectively waived his *Miranda* rights before he made incriminating statements.[146] At the outset of his interrogation, Thompkins was provided with a form delineating his rights under *Miranda* as five separate warnings.[147] Upon being asked, he read the fifth warning aloud; the remaining warnings were then read to him by one of the interrogating officers.[148] It is unclear if Thompkins was then asked if he understood his rights.[149] He was, however, expressly asked to sign a waiver form so as demonstrate his understanding, which he refused to do.[150]

---

[142] *Id.* at 377-78 (quoting *Miranda*, 384 U.S. at 457).

[143] *Id.*

[144] Kamisar, *supra* note 25, at 181-82.

[145] George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases,* 99 MICH. L. REV. 1081, 1082 (2001) ("The Miranda version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel.").

[146] Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

[147] *Id.* at 2256.

[148] *Id.*

[149] *Id.* at 2266-67 (Sotomayor, J., dissenting). The officer who provided Thompkins with the *Miranda* form at one point testified that he believed he asked Thompkins if he understood his rights and that Thompkins assented. He later testified, however, that he didn't know whether he asked Thompkins if he understood his rights. *Id.* at 2267, n.1.

[150] *Id.* at 2256.

What followed then was an almost three hour interrogation, described by one of the interrogating officers as "nearly a monologue."[151] For two hours and 45 minutes of that time, Thompkins said almost nothing beyond responding to the offer of a peppermint and complaining about the chair in which he was seated.[152] Thompkins ultimately broke down, however, when asked if he believed in God.[153] To this question and the two that followed, Thompkins answered "yes," admitting that he prayed and that he asked God for forgiveness for the homicide for which he was a suspect.[154]

That waiver was even a debatable question under this set of facts demonstrates how far afield current doctrine has ventured from the *Miranda* opinion and the concerns that animated it. As if speaking to the facts in *Thompkins*, the *Miranda* court noted that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained."[155] The *Miranda* court further maintained that where a suspect is—as Thompkins was—subjected to lengthy, incommunicado interrogation before making a statement, this would constitute strong evidence against a finding of waiver.[156] Indeed, the opinion points out that when a suspect ultimately succumbs to interrogation under such circumstances, the very fact of capitulation reinforces "the conclusion that the compelling influence of the interrogation finally forced him to do so."[157]

Despite this language, in a decision that "fired point-blank at *Miranda*,"[158] five members of the Court concluded that Thompkins had waived his rights by confessing.[159] According to the *Thompkins* Court, the government had met its *Miranda* burden by establishing that warnings were given, understood and followed—albeit several hours later—by an uncoerced statement.[160] Part and parcel of the *Thompkins* decision,

---

[151] *Id.* at 2267.

[152] *Id.* at 2256-57 (Sotomayor, J., dissenting).

[153] *Id.* at 2257.

[154] *Id.*

[155] Miranda at 475. *See* Yale Kamisar, *The Rise, Decline and Fall(?) of* Miranda, 87 WASH. L. REV. 965, 1018 (2012) ("This caution no longer appears to be operative.").

[156] *Miranda*, 384 U.S. at 476.

[157] *Id.*

[158] Kamisar, *supra* note 155, at 1019.

[159] "Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent." *Berghuis*, 130 S. Ct. at 2263 (concluding, at 2260, that Thompkins' post-*Miranda* silence of almost three hours was insufficient to invoke his rights to cut off questioning and to remain silent).

[160] "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent . . . The record in this case shows that Thompkins waived his right to remain silent." *Id.* at 2262 (concluding, at 2262-63, that there was no basis for concluding that

therefore, is the conclusion that interrogating officers are not required to obtain a waiver before commencing an interrogation.[161] In effect, then, the message from *Thompkins* is that the government may use the compulsion inherent to incommunicado custodial interrogation to obtain the very statement that constitutes waiver, resulting in a tension with the *Miranda* decision that could hardly be more profound.[162] By contrast, the international criminal courts require that suspects waive the right to be questioned in the presence of counsel *before* such questioning can take place and that the suspect's waiver be expressly made.

b. The Shared Approach

The language of Rule 42, shared by the ICTY, ICTR and SCSL, prohibits questioning a suspect outside the presence of counsel unless and until the suspect has voluntarily waived the right to the presence of counsel.[163] That Rule 42 so requires was reaffirmed by the *Bagosora* Trial Chamber of the ICTR[164] in a decision that also considers an issue not expressly addressed by the Rule: the appropriate form of waiver.[165] Drawing support both from existing ICTY jurisprudence[166] *and the 1966* Miranda *decision*,[167] the Trial Chamber concluded that suspect waiver cannot be implied. Rather, waiver "must be express and unequivocal, and must clearly

---

Thompkins didn't understand his rights, that "[i]f Thompkins wanted to remain silent, he could have said nothing" and that there was no evidence of coercion).

[161] *Id.* at 2263 (alleging that a requirement that the government first establish waiver is inconsistent with the prospect of implicit waiver made possible by *Butler*).

[162] "It is hard to believe that the Miranda Court, a Court which was so troubled by in-custody police interrogation, would (a) require the police to warn custodial suspects of their rights, yet (b) permit the police to intimidate, mislead, deceive, bluff, coax, or trick these same suspects into "waiving" their rights by subjecting them to interrogation." Kamisar, *supra* note 155, at 1015.

[163] "Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel." ICTY RPE, *supra* note 42, at R. 42(B); ICTR RPE, *supra* note 42, at R. 42(B); SCSL RPE, *supra* note 42, at R. 42(B).

[164] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), ¶ 17 (Int'l Crim. Trib. for Rwanda Oct. 14, 2004).

[165] Prior to the *Bagosora* decision, it could have been argued that express waiver was not required in the case of suspect questioning, as the Rules do not explicitly require this form of waiver regarding the questioning of an accused person. *See* ICTY RPE, *supra* note 42, at R.42(B); ICTR RPE, *supra* note 42, at R. 42(B); SCSL RPE, *supra* note 42, at R. 42(B).

[166] Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), at n.16 (citing the *Celebici* decision).

[167] *Id.* (using *Miranda's* assertion that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver").

relate to the interview in which the statement in question is taken."[168]

c. *The International Criminal Court*

At the ICC, a to-be questioned suspect must be informed of the right "[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."[169] That waiver must then be affirmatively obtained prior to questioning is implicitly required by the ICC Rules. These provide that whenever the Prosecutor conducts questioning outside the presence of counsel, she is required to record the questioned person's waiver in writing, and, if possible, to either audio or videotape it.[170]

Thus, the international approach to waiver adheres to *Miranda's* command that waiver be "specifically made." In addition, the relevant temporal requirements imposed for waiver by international criminal courts mean that a *Berghuis*-type[171] situation, in which an investigator advises the suspect of his right to counsel but opts to commence with a lengthy interrogation without confirming the suspect has voluntarily waived his rights, would constitute a procedural violation. As such, unlike contemporary U.S. practice, and wholly in accord with the *Miranda* decision,[172] the international approach precludes the possibility that the compelling atmosphere of interrogation may somehow be utilized to obtain a valid waiver.

d. *Summary*

With the now lessened burden for waiver, both by allowing for waiver by inference and requiring that waiver need only be proved by a preponderance of the evidence, "establishing a valid waiver [has] turned out to be a much less formidable feat than one would have supposed from reading the *Miranda* opinion."[173] Coupled with the narrowing of *Miranda's* custodial trigger earlier discussed, the picture that begins to emerge is one in which "international *Miranda*" appears both more in tune with the original opinion than contemporary U.S. practice and more rights-protective. Yet this

---

168 *Id.* ¶ 18.

169 Rome Statute, *supra* note 7, at art. 55(2)(d).

170 Rules of Procedure and Evidence of the International Criminal Court r. 112(1)(b), (Sept. 3, 2002).

171 *See supra* notes 158 *et. seq.* and accompanying text.

172 "It is hard to believe that the Miranda Court, a Court which was so troubled by in-custodial police interrogation, would (a) require the police to warn custodial suspects of their rights, yet (b) permit the police to intimidate, mislead, deceive, bluff, coax, or trick these same suspects into "waiving" their rights by subjecting them to interrogation." Kamisar, *supra* note 155, at 1015.

173 Kamisar, *supra* note 25, at 180.

conclusion can, of course, only prove true if procedural violations are accompanied by valuable remedies.[174] In this regard, one can anticipate that naysayers will be quick to point out that the international approach comes up short, because it fails to require exclusion as the automatic remedy. Before considering the value of the international protections in practice, then, it makes sense to examine these disparate approaches to exclusion, and to probe the assumption that Miranda's automatic exclusionary rule is automatically more rights-protective.

C. Remedial Responses to Interrogation Violations

Unlike *Miranda,* which mandates both the rights of questioned suspects and the remedy of exclusion for relevant violations, statements obtained in violation of the rights delineated by international criminal courts are not automatically excluded. Rather, under the shared approach, such statements are analyzed primarily pursuant to Rule 95, which provides: "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[175] In similar—albeit more exacting—language, ICC Article 69(7) requires exclusion whenever evidence is obtained in violation of the ICC Statute or internationally recognized human rights and the evidence is either consequently unreliable or its admission "would be antithetical to and would seriously damage the integrity of the proceedings."[176]

---

[174] "Remedies are the life of rights . . . Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away." Campbell v. Holt, 115 U.S. 620, 631 (1885) (Bradley, J., dissenting). *See also* Michael Mello, *Nine Scorpions in a Bottle,* 44 No. 1 CRIM. L. BULL. ART 1, 4 (2008) (noting that a right can be eviscerated by attacking its remedy).

[175] ICTY RPE, *supra* note 42, at R. 95; ICTR RPE, *supra* note 42, at R. 95. The SCSL's exclusionary rule focuses solely on the integrity of the proceedings: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." SCSL RPE, *supra* note 42, at R. 95. At the ICTY, Rule 89(D) provides an additional basis for exclusion, bestowing upon chambers the power to "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." As there is no such provision at either the ICTR or the SCSL, and the sub-rule does not play a role in the ICTY case-law considered herein, it is not the subject of further discussion in this piece.

[176] Rome Statute, *supra* note 7, at art . 69(7). This language has been legitimately criticized: "Does admission of evidence obtained in violation of human rights not by definition damage the integrity of the proceedings?" ZAHAR & SLUITER, *supra* note 52, at 382. An additional ICC sub-article, 69(4) might also be viewed as an exclusionary rule of a sort, as it permits the Court to consider "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness" when ruling on the admissibility of a piece of evidence.

1. Automatic Versus Discretionary Rules of Exclusion

At first blush, the presence of these non-automatic exclusionary rules suggests a significant divergence from *Miranda's* mandate of exclusion. Faithfully applied, the international exclusionary rules dictate a discretionary approach to admissibility.[177] Every violation of a suspect's interrogation rights requires a case-by-case analysis, in which the relevant Chamber considers whether, in its view and bearing in mind the circumstances in which the statements were obtained, the statements are reliable. Assuming the answer to this question is "yes," the Chamber must then assess and opine as to whether admitting the statements would nevertheless damage the integrity of the proceedings. Given this flexibility, it is perhaps understandable that there is a certain amount of skepticism regarding such an approach.[178]

Amongst other potential problems,[179] a discretionary approach to exclusion may in fact render rights protections weak.[180] Even still, however, it is not necessarily true that a discretionary approach to exclusion "simply does not provide the protections against illegally obtained evidence to which

---

[177] This article frequently distinguishes Miranda's rule of automatic exclusion from the international approach to exclusion by describing the former as mandatory and the latter as discretionary in nature. This approach merits a brief explanation in light of the fact that Rule 95 and ICC Article 69(7) are sometimes described as "mandatory exclusion rules." *See, e.g.*, Amal Alamuddin, *Collection of Evidence, in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 231, 239, 284 (Karim A. A. Khan, et al. eds., 2010). Kweku Vanderpuye, *The International Criminal Court and Discretionary Evidential Exclusion,* 14 TUL. J. INT'L & COMP. L. 127, 129 (2005) ("[N]otwithstanding an established violation of either the [the ICC Statute] or [international human rights], the admissibility of the evidence obtained is further qualified and relegated to the discretion of the court."). Presumably the decision to so describe these provisions stems from the fact that whenever a Chamber concludes that the evidence at issue is unreliable or that its admission would seriously damage the integrity of the proceedings, exclusion is *required.* Describing these provisions as "mandatory exclusion rules," however, is unhelpful if not misleading, as exclusion is "mandatory" only in the wake of a Chamber's *discretionary* analysis regarding the reliability of the evidence at issue and/or the manner in which its admission would affect the integrity of the proceedings. *Cf* Kelly Pitcher, *Addressing Violations of International Criminal Procedure,* 17, Amsterdamn Law School Research Paper No. 2013-42, Amsterdam Center for International Law No. 2013-14 (2013).

[178] *See, e.g.,* David Admire, *The International Criminal Court Re-visited: An American Perspective,* 15 TEX. REV. L & POL. 339, 357 (2011).

[179] *See, e.g.,* Vanderpuye, *supra* note 177, at 176 (opining that a flexible approach to exclusion undermines "the certainty of legal outcomes, and uniformity in the administration of justice . . . . [thereby] inject[ing] instability into the process").

[180] *See, e.g.,* Binyamin Blum, *"Exclude Evidence, You Exclude Justice"? A Critical Evaluation of Israel's Exclusionary Rule After* Issacharov, 16 SW. J. INT'L L. 385, 447 (2010) (deriding Israel's adoption of a discretionary exclusionary rule as having "provided a false hope that from now on police abuses would bear consequences").

Americans are accustomed."[181] Rather, it seems more accurate to conclude that discretionary rules of exclusion do not provide the protections Americans *believe* their system affords.

Indeed, and quite likely unbeknownst to most non-lawyers,[182] *Miranda's* reach (and, therefore, the reach and import of the decision's mandatory exclusionary rule) has been significantly limited, even well beyond the narrowing the definition of *Miranda* custody and the easing of the requirements for waiver thus far considered. In fact, there is a veritable laundry list of exceptions to *Miranda*'s mandate of exclusion, the seminal decision's admonition that "the prosecution may not use statements, whether exculpatory or inculpatory. . .unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"[183] notwithstanding. Pursuant to post-*Miranda* Supreme Court jurisprudence, statements obtained in violation of *Miranda* may later be used by the government for a number of purposes, including grand jury proceedings[184] and in order to impeach a defendant at trial.[185] In addition, a warning-less statement obtained during custodial interrogation may be used at trial to establish the guilt of its maker whenever the public safety exception applies.[186]

What is more, even when *Miranda's* automatic exclusionary rule actually does come into effect, it precludes only the use of the compelled statements in the government's case-in-chief, but erects no admissibility barrier to the fruits of those statements. Despite *Miranda's* admonition that without warnings and waiver "no evidence obtained as a result of interrogation can be used,"[187] language that Justice Ginsburg rightly noted "sounds like . . . a derivative evidence rule,"[188] the Supreme Court has since

---

[181] Admire, *supra* note 178, at 357.

[182] *See, e.g.:*, Friedman, *supra* note 19 at 42 (contending that Supreme Court decisions narrowing *Miranda* successfully speak to two audiences, leaving the public unaware of the limitations placed upon the decision they highly favor, and the media ill-equipped to rectify this problem); Peters, *supra* note 21, at 1090 (noting that most non-lawyers learn about Supreme Court decisions through the media and that the latter are unlikely to report that constitutional precedent had been overruled unless the Court expressly acknowledges having done so); Sanchez, *supra* note 21.

[183] Miranda at 444 (1966).

[184] United States v. Calandra, 414 U.S. 338 (1974).

[185] Harris v. New York, 401 U.S. 222 (1971). "Prior to *Harris*, [*Miranda*] had been widely—indeed almost unanimously—interpreted to preclude the impeachment use of statements obtained in violation of its rules." Alan M. Dershowitz & John Hart Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1208 (1971).

[186] New York v. Quarles, 467 U.S. 649 (1984).

[187] *Miranda*, 384 U.S. at 479.

[188] Oral Argument at 6:47, United States v. Patane, 542 U.S. 630 (2003) (No. 02-1183),

sanctioned the admission of physical evidence discovered as a direct result of *Miranda* violations,[189] irrespective of whether or not the violation was intentional.[190]

In effect, *Miranda's* automatic exclusionary rule has inspired the Court to find ways around its applicability, resulting in a doctrine that weakens *Miranda's* ability to protect the rights of questioned suspects and providing little to no incentive for law enforcement to honor those rights. A dubiously obtained statement will provide fodder for impeachment should the accused testify, may lead to admissible derivative evidence[191] and just might, depending on the circumstances, be deemed admissible.

Undeniably, this string of exceptions to *Miranda's* remedy of exclusion further causes the current doctrine to be markedly at odds with the *Miranda* decision. Simply put, each potential exemption incentivizes the very conduct that the *Miranda* court found so objectionable.[192] As with the narrowing of the definition of *Miranda* custody, the message from these post-*Miranda* decisions has affected law enforcement training and practice, with officers taught to "go outside" *Miranda* in order to obtain useful evidence.[193] As Justice Brennan once observed, such exceptions "only invite the very [interrogation] methods" that the *Miranda* court sought to terminate.[194]

As a result, this whittling of *Miranda's* aims and values has caused even its supporters to conclude that the opinion is "on the verge of

---

available at http://www.oyez.org/cases/2000-2009/2003/2003_02_1183.

[189] United States v. Patane, 542 U.S. 630, 643-44 (2004). *See also* Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda Poisoned Fruit Cases,* 2 OHIO ST. J. CRIM. L. 97, 111 (2004) ("I have no doubt that if the case had come before the Supreme Court a short time after Miranda was decided, the Court would have thrown out the fruits of a deliberate failure to comply with Miranda whether or not the fruits were 'testimonial'.").

[190] Wisconsin v. Knapp, 542 U.S. 952 (2004) (vacating a lower court decision to exclude physical evidence obtained as a direct result of an intentional Miranda violation pursuant to *Patane*).

[191] Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming* Miranda: A Content Analysis of the Miranda Portion of Police Interrogation, 49 IDAHO L. REV. 1, 6 n.31 (2012) ("[R]egardless of the law, the police are always better off by interrogating a suspect even if he refuses to waive his Miranda rights.").

[192] *See, e.g.*, People v. Peevy, 17 Cal.4th 1184, 1214 (1998) (holding that the Harris impeachment rule applies even when a police officer deliberately fails to honor a suspect's request for counsel with the objective of securing evidence for impeachment purposes).

[193] "Going outside *Miranda* is simply a euphemism for violating *Miranda.*" Linda Deutsch, Miranda *Rights Again Come to Light*, ASSOCIATED PRESS, Nov. 9, 1999, http://www.apnewsarchive.com/1999/Miranda-Rights-Again-Come-to-Light/id-80f578a7bf484951adbc0d456671d161 (quoting Yale Kamisar).

[194] Oregon v. Elstad, 470 U.S. 298, 320 (1985) (Brennan, J., dissenting) (citing Nardone v. United States, 308 U.S. 338, 340 (1939)).

extinction,"[195] and that "little is left of Miranda's vaunted safeguards and what is left is not worth retaining."[196] Accordingly, it is against this more complete picture of contemporary *Miranda* that the international approach—in particular its use of discretionary rules of exclusion—ought to be assessed. With that noted, however, the protections afforded by international criminal practice do not require the weaknesses of the contemporary *Miranda* doctrine to make them appear more just. In fact, despite the existing concerns that discretionary rules of exclusion afford weak protection, this has not proven to be the case in any instance in which international criminal courts have assessed faulty suspect interrogations.

2. Rights Enforcement for Questioned International Criminal Suspects

As the following discussion illustrates, violations of the rights bestowed upon international criminal suspects during questioning realm have consistently resulted in exclusion,[197] notwithstanding the applicability of discretionary suppression rules. In fact, in sharp contrast to the U.S. trajectory post-*Miranda,* the jurisprudence elucidating the rights that international criminal suspects are due when questioned has become increasingly robust over time. As a result, the jurisprudence of the ICTY, ICTR and the SCSL has developed in a way that is on the whole more faithful to the values of *Miranda* than contemporary U.S. jurisprudence.

a. Robust Exclusion under the Shared Approach

The first earnest consideration of the rights enjoyed by a questioned international suspect occurred in 1997 in the ICTY's *Celebici* trial. In that matter, Trial Chamber I contemplated the admissibility of statements made by then-suspect Zdravko Mucic to the Austrian officials who had arrested him at the Tribunal's request.[198] Consistent with both existing Austrian law and, arguably, international human rights law as it then was,[199] but contrary

---

[195] Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?,* 10 ST. THOMAS L. REV. 461, 462 (1998) ("[T]here is not much left to *Miranda* — the patient is either on life support or clinically dead."); Illan M. Romano, *Is* Miranda *on the Verge of Extinction? The Supreme Court Loosens* Miranda's *Grip in Favor of Law Enforcement,* 35 NOVA L. REV. 525 (2011).

[196] Weisselberg, *supra* note 20, at 1524.

[197] Alamuddin, *supra* note 177, at 280.

[198] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[199] It was not until eleven years later that the European Court of Human Rights declared that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of

to the dictates of the Tribunal, Mucic was denied the opportunity to have access to counsel until after his interrogation.[200] Although the Trial Chamber found that the Austrian officials were not acting as agents of the prosecutor, and that the purpose of the Austrian interview was directed toward Mucic's extradition,[201] the Chamber nevertheless opted to provide robust protection for Mucic's rights as a suspect, excluding the statements made to the Austrian authorities because they had been obtained in breach of his right to counsel as set out in the Tribunal's Statute and Rules.[202]

The decision to hold the Austrian interrogation to the standards in place at the ICTY was not an obvious one. Indeed, the safeguards imposed by Rule 42 are expressly triggered only when a suspect "is to be questioned *by the prosecutor*." Judicial commentary during oral arguments suggests that the determination to nevertheless apply the Tribunal's rules to the Austrian interrogation may have been motivated by the worry that a contrary conclusion could lead to objectionable results. The panel expressed concern that admitting information acquired in the domestic interrogation might incentivize the prosecution to utilize statements obtained under less protective domestic standards, rather than obtaining its own evidence under the rigors of Rule 42.[203] While this hardly seems an idle concern, it nevertheless does little to support the Chamber's ultimate conclusion that the statements to the Austrian authorities were obtained in violation of Rule 42 and, consequently, "null and inadmissible in proceedings before [the ICTY]."[204]

By excluding the statements on this basis,[205] rather than availing of

---

each case that there are compelling reasons to restrict this right." Salduz v. Turkey, 49 Eur. Ct. H.R. 421, ¶ 55 (2008).

[200] Prosecutor v. Delalic, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶¶ 8-9 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1997).

[201] *Id.* ¶ 40.

[202] *Id.* ¶ 52. *See also* Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Transcript 4050 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 1997), *available at* http://www.icty.org/x/cases/mucic/trans/en/970612IT.htm.

[203] As Judge Jan observed, by "only producing the statement recorded under the national system and national laws[,] Rule 42 can be bypassed easily." Delalic, Case No. IT-96-21-T, Trial Transcript 4050.

[204] Delalic, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, at ¶ 55 (excluding the statements pursuant to ICTY Rule 5, a provision titled "Non-compliance with Rules"). *See also id.* ¶ 47 (noting that non-compliance with Rule 42 "will render the act null under Rule 5"). The only remedy then available under Rule 5 was to declare the non-compliant act a nullity. The rule was amended shortly after the 1997 decision. It now provides Trial Chambers broad discretion in determining the appropriate relief for rule violations. ICTY RPE, *supra* note 42, at R.5.

[205] *See also* MOHAMED SHAHABUDDEEN, INTERNATIONAL CRIMINAL JUSTICE AT THE YUGOSLAV TRIBUNAL: A JUDGE'S RECOLLECTION 136 (2012) (attributing exclusion in the matter to Rule 5, a provision governing non-compliance with the rules).

Rule 95[206]—the aforementioned exclusionary rule—the Chamber avoided concluding that the Austrian procedures then employed were in violation of international human rights law.[207] In fact, the Chamber expressly concluded that the Austrian practice "[did] not fall below fundamental fairness and such as to render admission [of the statements] antithetical to or to seriously damage the integrity of the proceedings."[208] At the same time, however, the Trial Chamber made a rather sweeping statement in dictum: "It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability."[209] Rather remarkably, this non-essential observation appears to have notably contributed to an ultimately robust application of Rule 95 at the ICTR[210] in cases addressing rights violations of international criminal suspect's rights during interrogation.

In fact, the language from the *Celebici* decision was later cited expressly by both the *Bagosora* and *Karemera* Trial Chambers in support of their rulings to exclude statements that had been obtained improperly by the prosecution.[211] In effect, these later decisions came to embrace the notion,

---

[206] Because the opinion is not a model of clarity, many have mistakenly concluded that the Chamber suppressed Mucic's statements pursuant to Rule 95, the tribunal's aforementioned exclusionary rule. *See, e.g.*, VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND EVIDENCE 253 (2008); ZAHAR & SLUITER, *supra* note 52, at 305 (attributing exclusion of the statements to Austrian police to the application of ICTY R. 95); Alamuddin, *supra* note 177, at 280; Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha,* 37 COLUM. J. TRANSNAT'L L. 725, 762 (1999) (contending that Rule 95 was applied);). *See also* Gregory S. Gordon, *Toward an International Criminal Procedure,* 45 COLUMB. J. TRANSNAT'L L. 635, 672 n.228 (2007) (concluding that the Court found a violation of international human rights law and that this mandated exclusion).

[207] "Even if it is conceded that the Austrian provision restricting the right to counsel is within Article 6(3)(C) as interpreted, there is no doubt it is inconsistent with the unfettered right to counsel in Article 18(3) and Sub-rule 42(A)(i)." Delalic, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, at ¶ 51.

[208] *Id.* ¶ 55. In addition, the Chamber also implicitly acknowledged the reliability of the statements, concluding that the Austrian officials had not induced Mucic to speak, as "telling a suspect that a confession would on conviction assist in mitigation of punishment is not so strong as to induce a confession." *Id.* at ¶ 54.

[209] *Id.* ¶ 43.

[210] Notably, unlike the ICTY, the ICTR does not have a provision that enables its chambers to exclude evidence when its probative value is substantially outweighed by the need to ensure a fair trial. *See* ICTR RPE, *supra* note 42, at R. 95. As a result, greater use has been made of Rule 95 at the ICTR than at the ICTY. Nancy Amoury Combs, *Evidence, in* HANDBOOK OF INTERNATIONAL CRIMINAL LAW 323, 328 (William A. Schabas & Nadia Bernaz eds., 2010).

[211] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's

in cases where the prosecution was at fault, that "it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95."[212] Indeed, by late 2007, the belief that exclusion was the required remedy for a violation of Rule 42 had become firmly entrenched at the Rwandan court. As the *Nchamihigo* Trial Chamber maintained upon finding that OTP investigators had not adequately respected a suspect's right to counsel, "[i]t is well settled that a statement taken from a suspect would not be admitted into evidence at his trial if his rights during the investigation were not respected."[213]

b. *Automatic Exclusion despite Discretionary Rules?*

Given the force of the aforementioned language, coupled with a consistent pattern of exclusion for Rule 42 violations, it is perhaps no surprise that these decisions excluding wrongfully obtained statements have drawn criticism for appearing to "come closer to an *automatic* exclusion of evidence . . .than the explicit language of Rule 95 requires"[214] and that perhaps "the test [set out in Rule 95] is not triggered at all."[215] Before disputing these critiques, though, it is worthwhile to first consider whether a move towards automatic exclusion would make sense for these courts.

Generally speaking, it seems unlikely that any trial chamber would opt to automatically exclude wrongfully obtained statements, particularly in light of the judiciary's self-generated, discretionary authority to rule on admissibility.[216] Indeed, after drafting and adopting the rules that would

---

Motion for the Admission of Certain Materials under Rule 89(C), ¶ 21 (Int'l Crim. Trib. for Rwanda Oct. 14, 2004); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, ¶ 25 (Int'l Crim. Trib. for Rwanda Nov. 2, 2007).

[212] Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, at ¶ 25.

[213] Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defense's Request to Hold a *Voir Dire*, ¶ 21 (Int'l Crim. Trib. for Rwanda Feb. 5, 2007). In fact, even the Extraordinary Chambers of the Courts of Cambodia recognize that exclusion is the "usual remedy" in such circumstances. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Decision on the Admissibility of the Case File as Evidence, ¶ 19 (May 26, 2009).

[214] Alamuddin, *supra* note 177, at 281.

[215] *Id.* at 303 (suggesting that Rule 42 contains a "set of 'super' rights whose violation automatically results in exclusion").

[216] "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." S.C. Res. 827, art. 15, U.N. Doc. S/25704 (May 25, 1993).

govern the ICTY—and that would later form a template for the ICTR and SCSL—then-President Antonio Cassese emphasized that the rules were designed to "minimise the possibility of a charge being dismissed on technical grounds for lack of evidence."[217] Early ICTY and ICTR jurisprudence arguably evidences a resolute commitment to this concern. In fact, as of 2002, Rule 95 appeared never to have been applied at either the ICTY or ICTR, prompting one commentator to conclude that "the lack of mandatory exclusionary rules amounts to no exclusionary rule at all."[218]

While later jurisprudence puts this concern to rest, it likewise refutes any notion of automatic exclusion. As ICTY Trial Chamber II made plain, "in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged."[219] In addition to this faithfulness to the rules, there is an even more basic argument against the possibility that evidence would automatically be excluded: it is highly unlikely that judges would opt to surrender their discretionary authority. The rules governing tribunal proceedings "grant the trial chambers a great deal of leeway in determining the admissibility of evidence, certainly more than that available to courts in common law criminal jurisdictions."[220] It therefore seems fair to ask whether it would make sense for any judicial panel to elect to trade this discretionary authority in order to be bound by a rule of automatic exclusion.

Finally, even if the oft-quoted language from the *Celebici* Chamber conveys the view that evidence obtained in violation of Rule 42 ought to always, or at least almost always, be excluded, not one of the Chambers

---

[217] *Statement by the President Made at a Briefing to Members of Diplomatic Missions, Summary of the Rules of Procedure at the International Criminal Tribunal for the Former Yugoslavia* (1) UN Doc IT/29 (1994), *reprinted in* VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 649 (1995).

[218] SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 151 (2003).

[219] Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-T, Decision on Defence "Objection to Intercept Evidence", ¶ 61 (Int'l Crim. Trib. for the Former Yugo. Oct. 3, 2003), available at http://www.icty.org/x/cases/brdanin/tdec/en/031003.htm (noting, in ¶ 54, that "it is obvious that the drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained"). Notably, the *Brdjanin* Chamber's analysis of Rule 95 was cited favorably by the *Karemera* Chamber in its decision to exclude wrongfully obtained statements. Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, ¶ 4 (Int'l Crim. Trib. for Rwanda Nov. 2, 2007). *See also* Prosecutor v. Milosevic, Case No. IT-02-54T, Decision on Prosecution Motion for *Voir Dire* Proceeding (Int'l Crim. Trib. for the Former Yugoslavia June 9, 2005).

[220] Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 49 (2001).

citing the decision was bound to follow it.[221] Considered together, these observations indicate that the Trial Chambers chose to avail of their discretionary authority by excluding the wrongfully obtained statements. And, while the chambers could perhaps have been more explicit in sharing their reasoning, the decisions rendered certainly provide sufficient evidence to support exclusion.

In *Bagosora*, for example, the Trial Chamber found that the OTP's investigators proceeded to questioning after the interrogee had invoked his right to have counsel present during questioning,[222] while at the same time failing to correct his "misperception that his right to counsel was conditional upon being informed of the case against him."[223] The violations in the *Karemera* case were even more egregious. In that matter, the Trial Chamber found that the OTP had ignored the suspect's specific request to have counsel present, violating Rule 42 by then seeking the suspect's "agreement to waive his rights to counsel and silence in respect of non-'tendentious' or 'delicate' questions."[224] What is more, the investigator then proceeded with further questioning despite the fact that the suspect twice refused to answer questions without counsel present and then expressed his desire to meet with counsel.[225] Finally, in *Nchamihigo*, a custodial suspect was questioned by an OTP investigator, without the presence of counsel, despite his having asked for the assistance of an attorney.[226] Nchamihigo's attorney-less interrogation continued for two days, notwithstanding his having expressed a desire to have legal assistance for which he could not pay. The investigator, to whom "it did not occur" to defer the questioning until the suspect had the benefit of counsel,[227] later maintained that he was both unaware of the fact that temporary counsel had at the time of interrogation been appointed to represent the suspect and, in fact, denied knowing that the tribunal had a

---

[221] Had the pronouncement even been central to the Trial Chamber's decision, the finding of one Trial Chamber has no binding force on the decisions of other Trial Chambers, even within the same tribunal. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (noting, however, that the Trial Chambers are free to follow the decisions of one another).

[222] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), ¶ 20 (Int'l Crim. Trib. for Rwanda Oct. 14, 2004).

[223] *Id.* ¶ 19.

[224] Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, at ¶ 27 (Int'l Crim. Trib. for Rwanda Nov. 2, 2007).

[225] *Id.* at ¶¶ 28-29.

[226] Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defense's Request to Hold a *Voir Dire*, ¶ 17 (Int'l Crim. Trib. for Rwanda Feb. 5, 2007).

[227] *Id.* at ¶ 18.

practice of appointing temporary counsel.[228]

The decision in each of these cases was that Rule 95 precluded the admission of the wrongfully obtained statements, although each Trial Chamber appeared to find this conclusion nearly self-evident. Indeed, the *Nchamihigo* Chamber made only one express reference to the rule.[229] To be fair, however, after delineating the actions on behalf of the OTP, conduct committed in blatant disregard of the rights and protections expressly conferred upon the three suspects, it is arguably a small leap to conclude that their admission would be "antithetical to, and would seriously damage, the integrity of the proceedings."[230] In fact, the *Karemera* Chamber took this one step further, concluding that the continued questioning in the wake of unanswered requests for counsel meant not only that admitting the statements would be antithetical to the integrity of the proceedings, but also rendered the statements unreliable and, therefore, inadmissible under both prongs of Rule 95.[231] These cases therefore suggest that the OTP's violation of the expressly conferred rights to counsel and silence, despite the presence of a discretionary exclusionary rule, "will always satisfy one or both prongs of [Rule 95's] dual test."[232] The next section articulates a sound basis for this pattern and argues that it ought to be followed by the International Criminal Court.

c. *Making Further Sense of a Robust Practice of Exclusion: An Imitable Precedent for the ICC*

A vigorous approach to exclusion is perhaps best harmonized with the

---

[228] Understandably, the Trial Chamber had a hard time accepting these assertions. "It is difficult for the Chamber to understand this ignorance . . . ." *Id.* at ¶ 23.

[229] The only reference in fact, is just under the title of the opinion, which reads "Article 17 of the Statute; Rules 42, 43 and 95 of the Rules of Procedure and Evidence." *Id.*

[230] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C), ¶ 21 (Int'l Crim. Trib. for Rwanda Oct. 14, 2004). This is made all the more likely by the fact that the interrogations were videotaped, providing the judges with the opportunity to personally observe and assess the misconduct. "Affording the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable." United States v. Lewis, 355 F. Supp. 2d 870, 873 (E.D. Mich. 2005). On the recording requirement under the shared approach, *see, e.g.*, ICTR RPE, *supra* note 42, at R. 43 (requiring audio or video recording whenever the Prosecutor questions a suspect). This taping requirement, of course, further enhances rights protection in the international realm. Indeed, U.S. scholars have increasingly called for a taping requirement to better assure suspect protections. *See, e.g.*, Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003).

[231] Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, ¶ 32 (Int'l Crim. Trib. for Rwanda Nov. 2, 2007).

[232] Alamuddin, *supra* note 177, at 301.

discretionary exclusionary rules governing international criminal proceedings in an ICTY decision that, incidentally, better correlates to *Miranda's* blanket directive prohibiting the use of statements obtained in the absence of procedural safeguards,[233] than contemporary U.S. practice.[234] Faced with a motion by the OTP to use statements it had improperly obtained for the limited purpose of impeachment, the *Simic* Trial Chamber rejected OTP's argument that the Chamber ought to follow U.S. precedent in this regard.[235] Instead, the Chamber concluded that permitting the use of the improperly obtained statements, even for a purpose other than establishing the guilt of the declarant, "would damage the overall fairness and integrity of the trial. . .in effect[] condon[ing]" the prosecution's misconduct in obtaining the statements. [236]

This latter observation evinces concern for the judicial integrity rationale,[237] an issue that falls squarely within the discretionary rules of exclusion employed by the three predecessor courts to the ICC.[238] As was recognized at the time Rule 95 was first adopted at the ICTY, admitting improperly obtained evidence could be seen as tainting the judicial process.[239] In effect, admitting statements wrongfully obtained would seriously damage the integrity of these courts' proceedings not simply because procedural safeguards were disregarded pre-trial, but also because their admission at trial would implicate the judiciary in that misconduct.[240]

---

[233] Miranda at 444.

[234] *See supra* notes 184 *et. seq.* and related text.

[235] Prosecutor v. Simic, Case No. IT-95-9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2003). As discussed above, in the United States, statements obtained in violation of *Miranda* are admissible for the purpose of impeachment. Harris v. New York, 401 U.S. 222 (1971).

[236] Simic, Case No. IT-95-9-T, Reasons for Decision on Prosecution's Motion to Use Telephone Interviews, at ¶ 8. This emphasis perhaps explains the different outcome in the Mrksic trial, in which the statements at issue--obtained by non-compliance with the Tribunal's safeguards not by OTP, but by unrelated non-tribunal actors—were admitted for the purpose of impeaching the declarant turned accused. Prosecutor v. Mrksic, Case No. IT-95-13/1-T, Decision Concerning the use of Statements given by the Accused (Int'l Crim. Trib. for the Former Yugoslavia Oct. 9, 2006).

[237] This reasoning once animated the application of the exclusionary rule in U.S. Fourth Amendment cases. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961). A majority of the Court, however, has since "ditched the judicial integrity rationale entirely." *The Role of Exclusion in Removal Hearings*, 126 HARV. L. REV. 1633, 1636 (2013).

[238] "No evidence shall be admissible if . . . its admission is antithetical to, or would seriously damage the integrity of the proceedings." ICTY RPE, *supra* note 42, at R. 95; ICTR RPE, *supra* note 42, at R. 95. "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute." SCSL RPE, *supra* note 42, at R. 95.

[239] 1 MORRIS & SCHARF, *supra* note 43, at 261 (remarking as well that the standard established by the rule was intended to discourage human rights violations).

[240] *See, e.g.*, Sharon L. Davies, *The Penalty of Exclusion--A Price or Sanction?*, 73 S.

By employing this rationale, chambers that are not in a position to protect the integrity of the investigatory process,[241] instead protect the integrity of the adjudicatory process.[242] What is more, it is perhaps increasingly incumbent upon international criminal courts to do just that, precisely because of their discretionary exclusionary power. As every decision to admit tainted evidence will—or at least ought to—require an explanation as to why admission is not antithetical to the integrity of the proceedings, "[t]he most visible and lasting feature of dismissing motions to exclude is not their rebuke of the [misconduct], that by now rings hollow, but judges' justifications for the [violation].[243]

Strict adherence to the judicial integrity rationale, by contrast, not only assures compliance with the discretionary rule's aim of ensuring the honorableness of the instant proceedings, it also bolsters the relevant court's authority in general. Naturally viewed with a type of skepticism generally unknown to their established, domestic counterparts,[244] it is essentially incumbent upon institutions in this fledgling field of law to self-generate their authority, establishing their legitimacy "by the quality of justice they deliver."[245]

Prioritizing the judicial integrity rationale likewise fosters the ability of

---

CAL. L. REV. 1275, 1299-1300 (2000) (relaying the arguments in support of the rationale, including that admission compounds the harm, places a seal of approval on this misconduct and openly defies constitutional commands).

241 The shared approach does not afford its accused the protections available in continental systems that derive from a neutral, pre-trial inquiry conducted either by judicial officials or under judicial supervision. Instead, an adversarial construct is employed, with a prosecutor whose role is more akin to that of her common law counterparts and who conducts her investigations without immediate judicial oversight. *See, e.g.*, Megan Fairlie, *The Marriage of Common and Continental Law and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 248-51, 268 (describing the differences between the pre-trial investigations conducted in continental systems and those performed at common law and assessing the adversarial construct in place at the ICTY).

242 *See, e.g.*, Pitcher, *supra* note 177, at 36 n.201 (opining that when courts are unable to protect the integrity of the investigatory process, they may nevertheless utilize remedial measures at trial so as "to protect the integrity of the adjudicatory process").

243 Blum, *supra* note 180, at 447 (citing injury to judicial reputation and integrity as one of the "costs of a flexible exclusionary standard").

244 "[O]ne must be realistic about the challenges tribunals face in demonstrating credibly to the local population that impunity is being punctured for egregious crimes and that justice can be fair." Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 435 (2011).

245 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* Mirjan Damaška, *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).

international criminal courts to meet broader and, some have argued, more important interests. In order for these courts to "spread human rights culture," their judges "must be perceived by their audience as fair."[246] This goal would be difficult to meet if international criminal judges are seen to endorse conduct inapposite to their institutions' procedural protections, and are thereby deemed lacking in the "judicial integrity so necessary in the true administration of justice."[247]

In addition, by virtue of having excluded improperly obtained statements, the predecessor courts to the ICC kept intact judicial integrity at seemingly little cost to their prosecutions. As Zahar and Sluiter explain, suspect statements "are not as important [for these institutions] as in domestic jurisdictions. There is not the situation of immediate arrest followed by interrogation, offering a conducive environment for a confession. The general practice is for an accused person to determine their defence strategy and adequately prepare for a trial beforehand." [248] To this observation one might cynically add that the price of exclusion in the international realm is further lessened, due to the fact that international judges serve as finders of both law and fact.[249]

In sum, while some have puzzled over the "over-protective" approach to the rights of suspects at the ICTY, ICTR and SCSL[250] and still others have criticized their exclusion of improperly obtained statements as holdings that "come closer to an *automatic* exclusion of evidence . . .than the explicit language of Rule 95 requires,"[251] the robust precedent of exclusion established by these courts both makes sense and aligns well with the applicable discretionary rules of exclusion. At apparently little cost, the

---

246 Mirjan Damaška, *Keynote Address at the Concluding Conference of the International Criminal Procedure Expert Framework: General Rules and Principles of International Criminal Procedure* (Oct. 27, 2011) (on file with author).

247 Mapp v. Ohio, 367 U.S. 643, 660 (1961).

248 ZAHAR & SLUITER, *supra* note 52, at 307 (2008) (describing the approach of international criminal tribunals as "over-protective from a human rights perspective"). Interestingly, the *Miranda* Court concluded the "'need' for confessions" in the domestic realm was likewise overstated, citing Miranda and its three companion cases as "graphic examples" of this. Miranda v. Arizona, 384 U.S. 436, 481 (1966).

249 *See, e.g.,* Blum, *supra* note 180, at 397 (2010) ("[T]he true significance of an exclusionary rule . . . is derived from bifurcation and the law-finder's ability to conceal the evidence's content, or even its existence, from the fact-finder."). *See also* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC,' in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1439, 1472 (Antonio Cassese, et al. eds., 2002) (acknowledging that the effectiveness of exclusionary rules is diminished when the Trial Chamber is responsible for fact finding in addition to ruling on questions of law).

250 *See, e.g.,* ZAHAR & SLUITER, *supra* note 52, at 307.

251 Alamuddin, *supra* note 177, at 281.

decisions in this area dispense the type of "champagne-quality due process" required for these institutions to establish their legitimacy.[252] At the same time, they comport with Rule 95's command that the integrity of the proceedings remain whole and unharmed, by assuring that the procedural injury endured by suspects is not compounded by judicial approval of the misconduct. Finally, with their judiciaries seen as upholding—rather than defying—the human rights protections their institutions profess to endorse, the work of these courts becomes more likely to garner the support of the affected communities and foster respect for the rule of law.

With these reasons in mind, it is of at least equal importance for the ICC to follow the existing trend of exclusion by refusing to admit statements obtained in violation of the rights expressly bestowed by the ICC Statute and Rules. Although a permanent institution, the ICC remains as responsible for establishing its authority as its *ad hoc* predecessors.[253] In fact, as the world's most prominent international criminal justice institution, it is arguably even more important for the Court to ensure that its procedures are not only fair, but seen to be fair.[254] This the Court can accomplish by opting to not be complicit—or allowing itself to be perceived as being complicit—in violations of a suspect's expressly bestowed rights. In this respect, the argument advanced is not that the ICC should apply an automatic rule of exclusion that is contrary to the discretionary provision agreed upon in Rome.[255] Rather, it is that, at least in most cases, excluding evidence obtained in violation of the protections explicitly conferred in Article 55 would advance the statutory aim of ensuring the integrity of the Court's proceedings.[256]

---

[252] Luban, *supra* note 245, at 580.

[253] *Id.*

[254] The fairness inherent in the ICC's procedures addresses the issue of "procedural" or "normative legitimacy;" the assessments formed regarding the fairness of the Court's procedures make up the second and more subjective dimension of the concept of legitimacy: "sociological legitimacy" or "substantive legitimacy." Hitomi Takemura, *Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court,* 4 AMSTERDAM L.F. 3, 5-6 (2012). These two aspects of legitimacy are, of course, intimately related. *Id.* at 6.

[255] Rome Statute, *supra* note 7, at Art.69 (7)(a) & (b).

[256] *Id.* Ideally, and unlike the example set at the ICTR, ICC decisions to exclude wrongfully obtained statements would thoughtfully explain why exclusion meets this statutory goal. When the offending party is the prosecution, this approach should always be feasible. If, however, a statement is obtained by a state upon whom the ICC is dependent for cooperation, a Chamber may be more hesitant to make plain that the state's conduct fell so short of the mark as to render admission of the evidence antithetical and seriously damaging to the integrity of the proceedings. *See, e.g.*, Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-04, Decision on Prosecutor's Bar Table Motion, ¶ 63 (Dec. 17, 2010) (omitting this discussion from the Chamber's decision to exclude the statements obtained by Congolese authorities under rather troubling conditions).

IV. CONCLUSION

Despite the high esteem in which the *Miranda* decision is popularly held, the doctrine created in its wake in the United States has moved increasingly afield from the tenor and aims of the seminal opinion. Through a series of incremental incursions, *Miranda's* ability to protect the rights of U.S suspects has grown ever weaker and promises to become feebler still. As this work demonstrates, the diminution of *Miranda* persists under the Roberts Court, which has contributed to the serious curtailment of the applicability of *Miranda's* warnings and has further diminished the prosecution's burden in establishing waiver, guaranteeing that *Miranda's* goal of protecting vulnerable suspects from compelled interrogation will be progressively thwarted.

By contrast "international *Miranda*" goes a long way towards fulfilling *Miranda's* purposes in a manner that is not only more in step with the language and goals of the 1966 opinion, but is also more rights-protective than current U.S practice. As has been demonstrated, this enhanced conformity with *Miranda* extends beyond the requirements governing suspect interrogations; it is also evinced in the remedial responses to rights violations. While current *Miranda* doctrine makes clear that an automatic exclusionary rule is not automatically more rights-protective, existing international jurisprudence dispels the notion that a discretionary exclusionary rule, by definition, will be less so.

Because of the unique status of international criminal courts, conformity with *Miranda's* mandate of exclusion whenever expressly bestowed rights of international suspects are violated is an important practice that ensures the integrity of international criminal proceedings and spares the administration of justice from being brought into disrepute. In effect, the fragility of the novel institutions that comprise this fledgling field of international law, coupled with the exclusionary rules they have adopted, dictate that they adhere to this "more majestic conception" of exclusion.[257]

It is now incumbent upon the International Criminal Court to stay this more majestic course. Doing so will help to dispel lingering concerns about the fairness of international criminal practice, in particular that of its only permanent institution. This, in turn, will enhance the ICC's credibility, not only within the communities affected by its prosecutions, but also in the eyes of states that support the Court's work and those yet to do so. If ICC judges assume their designated role as "moral teachers,"[258] the results yielded may extend beyond the ICC's ability to foster the rule of law in post-conflict states. Perhaps if Americans discover that *Miranda* is not "on life support or

---

[257] *See* Herring v. United States, 555 U.S. 135, 151-52 (2009) (Ginsburg, J., dissenting).

[258] Damaška, Keynote, *supra* note 246.

clinically dead,"[259] but alive, well, and living abroad, we might be inspired to take the steps necessary to bring *Miranda* home.

---

[259] Garcia, *supra* note 195, at 462.