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THE ABIDING PROBLEM OF WITNESS STATEMENTS IN INTERNATIONAL CRIMINAL TRIALS

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Recent amendments to the Rules of Procedure and Evidence for the International Criminal Court (ICC or "Court") give Trial Chambers the discretion to admit unexamined, party-generated witness statements in lieu of live testimony. The use of this evidence—which undermines the right of confrontation and prevents judges from independently assessing witness credibility—is now a hotly contested issue in each of the Court's ongoing trials. As ICC judges grapple with the thorny question of how to implement these new provisions without undermining the right to a fair trial, this Article—which is the first to examine the rule amendments and their early implementation—looks to the history of international criminal justice for answers. It traces the tension between more efficient written testimony and the importance of assuring procedural fairness from Nuremberg and Tokyo through the present day. It focuses on the experience of the International Criminal Tribunal for the former Yugoslavia (ICTY), whose rules served as a model for the ICC revisions, and it analyzes each of the rules imported from the ICTY from adoption to application. Through thorough analysis of ICTY and ICC precedent, this Article identifies the fairness concerns that ought to shape the Court's implementation of its recently revised rule, and highlights instances wherein the ICC has already fallen short of the mark.

The goal of this Article is to prompt the international legal community to revisit its tacit acceptance of ICTY practice as imitable precedent. This can lead to a debate that prompts more careful consideration of, and seeks out fairness-enhancing alternatives to, this controversial type of evidence.

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"That which has been is what will be, that which is done is what will be done, and there is nothing new under the sun."[1]

"No one knows what a witness is going to say at trial before they take the stand. We have an idea of what our witness[es] are going to say, and that's why we've decided that we're going to call them, but witnesses can and often do change their accounts on the stand and depart from prior statements, and that's obviously one of the reasons why we have trials at all."[2]

I. INTRODUCTION

In November 2013, the Assembly of States Parties of the International Criminal Court[3] (ICC or "Court") adopted the first-ever amendments to the Court's Rules of Procedure and Evidence (RPE).[4] Among the changes was a major revision of ICC Rule 68, a provision that initially made the introduction of prior recorded testimony dependent upon the safeguard of cross-examination.[5] In its stead lies a new rule that makes it easier to admit the statements of absent witnesses in lieu of live testimony.[6]

At first blush, this change may seem a welcome development for a Court that has produced only a handful of convictions in more than a decade of operation, and whose work has

1. *Ecclesiastes* 1:9.

2. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Transcript of Status Conference, 39 (June 12, 2012), https://www.icc-cpi.int/Transcripts/CR2012_06729.PDF (noting remarks of Sam Lowery, Trial Lawyer in the Office of the Prosecutor).

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

4. Int'l Criminal Court [ICC], *Resolution ICC-ASP/12/Res.7: Amendments to the Rules of Procedure and Evidence*, (Nov. 27, 2013) [hereinafter ICC 2013 Amendments].

5. Int'l Criminal Court [ICC], RULES OF PROCEDURE AND EVIDENCE, Rule 68(a)–(b), ICC-ASP/1/3 (2002) (requiring, for the purpose of admission under the original rules, either that the opposing party had an opportunity to examine the witness at the time of recording or that the witness was present and available for examination). For the reader's convenience, "ICC RPE" will be used to refer to the Rules of Procedure and Evidence of the ICC, with specific versions of the rules noted accordingly.

6. ICC RPE, Rule 68(2)(b)–(d), ICC-PIDS-LT-02-002/13_Eng (2013).

been repeatedly thwarted by witness tampering. Moreover, the revised rule might appear instantly credible because it essentially replicates the established practice of the ICC's predecessor court, the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY or "Tribunal").[7] Yet, the brief history of international criminal justice—including the experience of the ICTY—belies this rosy view of revised Rule 68. Rather, it reveals that attempts to expedite and streamline international criminal trials by replacing oral evidence with written statements is a risky maneuver at best.

With an eye towards preserving the ICC's normative and sociological legitimacy,[8] this Article argues that, despite the apparent appeal of the new rule, it ought to be used both sparingly and with caution. The analysis herein utilizes the experiences of the post-WWII Tribunals and the ICTY to identify and explain the reputational, truth-seeking, and efficiency costs of admitting party-generated witness statements in international criminal trials. It demonstrates why the lessons from these courts are directly relevant to the ICC, and analyzes each of the rules imported from the ICTY from adoption to application. Through thorough analysis of Tribunal and ICC precedent, this Article identifies the fairness concerns that ought to shape the Court's implementation of revised Rule 68 and highlights instances wherein the Court has already fallen short of the mark.

Part II considers the liberal use of written evidence at the Nuremberg and Tokyo trials that were conducted after the Second World War. This section then explores the fairness implications of using such evidence in adversarial proceedings as opposed to judge-led investigations and trials. Most signifi-

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7. 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, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

8. Normative legitimacy requires one to ask "whether there are good reasons why [an institution] should have the right to make the decisions it does." Daniel Bodansky, *Legitimacy*, in THE OXFORD HANDBOOK OF INT'L ENVTL. L. 704, 709 (Daniel Bodansky et al. eds., 2007). Perceived or sociological legitimacy is equally important, as "multilateral institutions will only thrive if they are viewed as legitimate by democratic publics." Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 407 (2006).

cantly, it demonstrates why party-driven evidence production renders an opponent's ability to effectively test such evidence a prerequisite to a fair trial. Part III traces the history of witness statements at the ICTY, establishing how the drive for efficiency ultimately eradicated the Tribunal's initially strong preference for live testimony. Part IV considers the ICTY's initial shift towards increased admission of written evidence. This section highlights how the Tribunal's adversarial construct contributed to the concerns that accompanied this change, and demonstrates why—despite ostensible framework differences—these concerns apply with equal effect at the ICC. Parts V-VIII critique, respectively, each of the ICTY Rules that were recently adopted by the ICC. Each of these parts identifies the problems the rules presented in Tribunal practice, tracks the early implementation of their ICC analogues, and identifies instances wherein ICC practice has replicated—or appears poised to replicate—Tribunal missteps. In its conclusion, the Article contends that the proper way forward, both in terms of fairness and legitimacy, is for the Court to impose careful limits on the use of written testimony.

II. PRIOR RECORDED STATEMENTS IN THE POST-WWII PROCEEDINGS

A. *Written Witness Statements at Nuremberg*

The conflict between the time-consuming process of introducing live witness testimony and the desire to make international prosecutions efficient reaches back as far as the International Military Tribunal (IMT) proceedings at Nuremberg.[9] In the lead up to these post-WWII prosecutions, U.S. Prosecutor Robert Jackson argued that admitting sworn written statements was absolutely imperative "if we are to make progress with this case."[10] At the same time, Jackson implicitly recog-

9. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

10. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 242 (1992) (quoting Jackson). Jackson went on to note: "I think that the Tribunal should receive affidavits, and we have prepared them—we hope carefully, we hope fairly—to present a great many things that would take days and days of proof." 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS VOLUMES (THE BLUE SET) 543 (1945), http://avalon.law.yale.edu/imt/12-14-45.asp.

nized the dangers of such evidence and limited his proposal to affidavits "which were not directed against any individual defendant."[11] Because the IMT was not bound by technical rules of evidence,[12] its judges enjoyed great discretion on the matter and, ultimately, affidavit evidence proved "both extensive and important."[13] While no definitive rule ever emerged regarding affidavit admissibility,[14] this type of evidence was generally accepted and, in some cases, admitted without the test of cross-examination.[15]

In light of the fact that more than 300,000 affidavits were successfully introduced over the course of the eight-month trial,[16] there can be little doubt that the use of written evidence enhanced the efficiency of IMT proceedings. The most notable cost for this gain, however, was the negative effect this type of evidence had on the perceived fairness of the trial and

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11. TAYLOR *supra* note 10, at 241 (providing that despite this limitation, the defense should retain the right to call the affiants for questioning).

12. Nuremberg Charter, *supra* note 9, art. 19. The Charter also requires the Tribunal to take judicial notice of "the reports of the United Nations, including the acts and documents of the committees set up in various Allied countries for the investigation of war crimes." *Id.* art. 21. Notably, these documents included testimony taken by State commissions regarding the Nazi atrocities. Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in the Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 538 (2001).

13. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 749 (1999).

14. TAYLOR, *supra* note 10, at 243. Previously in the work, Taylor noted that the relevant rulings regarding affidavit admissibility seemed inconsistent. *Id.* at 242.

15. Robert Jackson, *Some Problems Developing an International Legal System*, 22 TEMP. L.Q. 147, 150 (1948) (acknowledging that affidavits were sometimes admitted even when made by persons unavailable for cross-examination). *See also* Wald, *supra* note 12, at 539 (noting that, ordinarily, affidavits were admitted with the right of cross examination or, alternatively, written interrogatories).

16. Heydecker and Leeb assert that the Tribunal "checked 300,000 sworn statements." JOE J. HEYDECKER & JOHANNES LEEB, THE NUREMBERG TRIAL 94 (1962). While this figure seems high, it is found in multiple sources, including the writing of Nuremberg prosecutor Henry King. *See, e.g.*, Henry T. King, Jr., *Robert H. Jackson and the Triumph of Justice at Nuremberg*, 35 CASE W. RES. J. INT'L L. 263, 270 (2003). Notably, the figure encompasses all submissions (both prosecution and defense).

the subsequent criticism the practice engendered.[17] In fact, the value of the *ex parte* affidavits remains contested to this day, both because they included leading questions[18] and because their use, in some cases, "seriously undermine[d] the rights of the defendants to confront the witnesses against them."[19] As Jackson's assistant, Telford Taylor, later acknowledged, "[t]otal reliance on . . . untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy" and "deliberate exaggeration must have warped many of the reports."[20] Consequently, and consistent with the effective use of cross-examination to expose false (live) witness testimony in the same trial,[21] the IMT's decision to admit untested affidavit evidence stands out as a procedural shortcoming, even if the Nuremberg experiment is generally viewed as having been fair overall.[22]

B. *Written Witness Statements at Tokyo*

The use of untested written evidence proved even more problematic at the IMT's companion tribunal, the Interna-

17. *See* Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 13 DENV. J. INT'L L. & POL'Y 305, 363 (1997) (averring that pro-prosecution rulings allowing for the admission of affidavit testimony restricted the due process guarantees of defendants, particularly in instances where the affiants were available to testify but were not called).

18. May & Wierda, *supra* note 13, at 751.

19. Scharf, *supra* note 17, at 309.

20. TAYLOR, *supra* note 10, at 315 (indicating that the affidavits likely contained "faulty observation" as well). Accused Rudolf Hess's prepared statement went further, charging that some of the affidavits were forged. NORBERT EHRENFREUND, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY 85 (2007).

21. *See, e.g.*, ANDREW DEWAR GIBB, PERJURY UNLIMITED: A MONOGRAPH ON NUREMBERG 17–20 (1954) (providing numerous examples of lies exposed through cross-examination).

22. *See, e.g.*, Antonia Sherman, *Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT'L L. REV. 833, 865 (1996) (describing the contents of the affidavits as "largely cumulative"). *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 153–54 (2011) (expressing a similar view about the overall fairness of the Nuremberg proceedings despite the decision to admit untested affidavits as "valid evidence"); NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 11 (2010) (noting the Nazi's own "meticulous written records" comprised the critical and most damning written evidence at Nuremberg).

tional Military Tribunal for the Far East (IMTFE or "Tokyo Tribunal"),[23] consistent with the latter institution's fewer guarantees of procedural fairness in comparison to its Nuremberg counterpart.[24] The IMTFE Charter specifically sanctioned the admission of testimony in the form of "affidavit, deposition and other signed document,"[25] as well as any "diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge."[26] In other words, unbothered by the fairness concerns that troubled Jackson, the Tokyo Charter expressly endorsed admitting directly incriminating written evidence.

On the back of these provisions, the prosecution "decided at the very outset to rely principally on documentary evidence and utilize Japanese witnesses only when their testimony was indispensable."[27] Echoing Jackson's words, the President of the Tokyo Tribunal defended this expansive approach to written testimony, noting that "affidavits must be used to a large extent if the trial is not going to be prolonged for many

23. *See* Proclamation by the Supreme Commander for the Allied Powers, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter Tokyo Charter] (establishing the Tokyo Tribunal).

24. *See, e.g.*, M. Cherif Bassiouni, *Remarks at the 80th Annual Meeting of the American Society of International Law, in Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 62 (1986) (noting that "that the Nuremberg trial offered more guarantees of procedural fairness to the defendants [than the IMTFE]"). Minear questions whether better rules of evidence would have resulted in a fairer trial, however, noting that the prosecution did not take place in a void. RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 123 (remarking as well that "[t]he rules of evidence at the Tokyo trial functioned to facilitate the prosecution and impede the defense"). *See also* 1 DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGMENTS lxiii (Neil Boister & Robert Cryer eds., 2008) (concluding that the "procedure followed at Tokyo has not commended itself to the judgment of history").

25. Tokyo Charter, *supra* note 23, art. 13(c)(3).

26. *Id.* art. 13(c)(4).

27. Gregory Townsend, *Structure and Management* 171, 216 *in* INTERNATIONAL PROSECUTORS, 797, 841-42 (Reydams, Wouters & Ryngaert, eds., 2012) (quoting SOLIS HORWITZ, THE TOKYO TRIALS 539 (1950)). Due to interpretation difficulties, those witnesses called ended up submitting written statements, so that the only *viva voce* testimony was that of cross-examination. *Id.* at 224.

years."[28] In the end, the affidavits of prisoners of war comprised the preponderance of the prosecution's admitted testimony[29] and, unlike at Nuremberg, were routinely admitted without the opportunity to examine the affiant.[30] Judge Pal, a strident critic of this untested, party-generated evidence,[31] noted in his dissent that its admission "increases the range but decreases the accuracy of the narration."[32] Of even greater concern, a conviction could be secured based on affidavit information, even if its contents were uncorroborated and its author unexamined.[33] Accordingly, contemporary academic commentary decries the decision to restrict the right to examine witnesses in the name of efficiency, concluding "that the use of affidavits puts the trial's fairness into question."[34]

C. *Relevant Framework Considerations*

This unequivocal condemnation of the Tokyo Tribunal's reliance on affidavit evidence may seem extreme to those familiar with the Continental ("inquisitorial") tradition. In Continental proceedings, recorded witness statements or their summaries commonly form part of the written case file ("dos-

28. NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL lxii (2008) (quoting from the Transcript of the Tokyo Trial at 4453). For the original transcription, see 28 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 4453 (R. John Pritchard & Sonia Zaide eds., 1987).

29. TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 57 (2001). According to Ehrenfreund, 417 witnesses appeared in person, while 719 submitted affidavits or depositions. EHRENFREUND, *supra* note 20, at 113.

30. BOISTER & CRYER, *supra* note 28, at 108-09.

31. MINEAR, *supra* note 24, at 119.

32. May & Wierda, *supra* note 13, at 751 (quoting the dissenting opinion of Judge Pal as reprinted in 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.), 29 APRIL 1946–12 NOVEMBER 1948 636 (B.V.A. Röling & C.F. Rüter eds., 1977)).

33. Christine Twomey, *POWs of the Japanese in Australia, 1945-60: Testimony, Truth and Compensation* 282, 284 *in* THE PACIFIC WAR: AFTERMATHS, REMEMBRANCE & CULTURE (Christina Twomey & Ernest Koh eds., 2015) (explaining that this practice was defended on the basis that cases would otherwise be difficult to prove, owing to widespread evidence destruction and the number of victims killed).

34. BOISTER & CRYER, *supra* note 28, at 109.

sier") provided to judges in criminal trials.[35] Moreover, Continental judges normally rely on the contents of these dossiers as part of their decision-making process.[36] This trust placed in the materials amassed pre-trial, however, is entirely dependent upon the relevant investigatory process, which includes a multitude of safeguards designed to ensure the integrity of the dossier's contents.

Perhaps the primary safeguard of dossier material is that, in Continental systems, the state official tasked with interviewing witnesses and collecting documents pre-trial is meant to do so neutrally,[37] animated by the system's overarching goal of discovering the objective truth.[38] This means that the statements are accurately recorded by a nonpartisan figure who questioned the witnesses firsthand and who may have, in the context of her broader official investigation, deemed the witnesses credible—all factors that warrant giving the statements "much greater weight than out of court statements related by parties in the course of a contested trial."[39]

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35. *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, 249 (2004) (describing the investigation phase of Continental criminal proceedings and noting that the resulting case file "must contain summaries of all testimony and records of proof-taking activity"). *See also* Karel de Meester et al., *Investigations, Coercive Measures, Arrest and Surrender*, *in* INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES 171, 279 (Goran Sluiter et al. eds., 2013) (noting that "interrogation transcripts" are included in the dossier).

36. de Meester et al., *supra* note 35, at 279 ("The out of court statements included in the case file can normally be considered by the judges during the trial proceedings."). *See also* FRANCIS PAKES, COMPARATIVE CRIMINAL JUSTICE 91 (2012) (noting that, in inquisitorial criminal justice, "great emphasis is placed on information in the case file" and that courts "might base much of their decision-making on its contents").

37. *See, e.g.*, Fausto Pocar & Linda Carter, *The Challenge of Shaping Procedures in International Courts*, 1, 20–21, *in* INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS (Linda Carter & Fausto Pocar, eds., 2013). *See also* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PENN. L. REV. 506, 511 (1973) (describing Continental investigations as "purportedly non-partisan").

38. *See, e.g.*, JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE 67 (2005); Fairlie, *supra* note 35, at 254; William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7 (1992).

39. Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 21 (1995).

In addition, Continental pretrial statements are often taken in a formal setting, sometimes under oath.[40] Even in jurisdictions where oath-taking is not the norm, this safeguard may nevertheless be a prerequisite to the statement being read at trial if the witness is unavailable for examination.[41] Moreover, witnesses who provide false information to investigating officials may be subject to prosecution,[42] irrespective of whether their pretrial statements are unsworn.[43] Furthermore, depending upon the jurisdiction, other supplementary measures may be available to ensure the integrity of this aspect of the investigatory process. For example, witnesses may be interviewed in the presence of defense counsel who can also examine the witness, an approach that enables the court to later "rely on the accuracy of the record of such interviews."[44] Fi-

40. In France, the formality of the process can begin even before a statement is taken, as the investigating judge may summon the witness by bailiff or police officer. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 101 (Fr.) (providing that the witness may also be summoned by letter). However beckoned, the witness is put on notice that, should she refuse to appear for questioning, she may be compelled to do so. *Id.* Once before the investigating judge, the witness is required to swear to tell the truth before her statement is taken in the presence of a clerk, and an official record is made of the questions and her answers. *Id.* arts. 102–03.

41. In Germany, for example, witnesses who are interviewed pretrial are generally not expected to take an oath unless the court deems it necessary because of the decisive importance of the statement. STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 59(1) (Ger.). However, an oath may be administered in preparatory proceedings if the witness will likely not be available for the main hearing. *Id.* § 62(2). This is so that the statement can be read at trial. *Id.* at § 254.

42. Under the French code, if a pretrial witness statement later appears to be false, the presiding judge may order that the witness be brought before law enforcement for the opening of a judicial investigation. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 342 (Fr.). Alternatively, the judge may order that the witness be brought before the district prosecutor for a judicial investigation into the perjury. *Id.* art. 457. In Germany, a witness who provides a false, sworn statement pretrial may be prosecuted for perjury. STRAFGESETZBUCH [StGB] [PENAL CODE], §154 (Ger.).

43. False, unsworn testimony is punishable in Germany as a lesser offense than perjury. STRAFGESETZBUCH [StGB] [PENAL CODE], §153 (Ger.) (providing that "whosoever as a witness or expert gives false unsworn testimony before a court or other authority competent to examine witnesses and experts under oath shall be liable to imprisonment from three months to five years") (translated by Prof. Dr. Michael Bohlander).

44. PAKES, *supra* note 36, at 124 (describing the investigatory process in the Netherlands).

nally, the trial that follows this neutral investigatory period is not one in which the parties bear responsibility for evidence production; instead, the trial is led by a judicial fact-finder who relies on the dossier in her development of the evidence.[45]

The Continental structure, however, contrasts sharply with the institutional frameworks of the seminal post-WWII proceedings, as well as that of most contemporary international criminal justice institutions that have followed them.[46] Indeed, both the Nuremberg and Tokyo Tribunals employed an adversarial model for their pretrial and trial proceedings.[47] As in common law systems,[48] evidence-gathering at the IMT and the IMTFE was a partisan process,[49] and the parties intro-

45. Fairlie, *supra* note 35, at 254 (describing the process and noting that the parties may be permitted to question witnesses, but only after judicial interrogation); *see also* Michele Caianiello, *First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?* 9 J. INT'L CRIM. JUST. 385, 393 (2011) (noting that the trial is "strongly conditioned on by the previous phases" and that witnesses called ordinarily confirm their prior statements, especially in jurisdiction where they face criminal sanctions for having given a false statement during the investigation).

46. Colleen M. Rohan, *Rules Governing the Presentation of Testimonial Evidence, in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 499, 524 (Karim A. A. Khan et al. eds., 2010) ("An important difference between procedures utilized in traditional civil law jurisdictions and the pre-trial investigation which results in the production of written statements in the international courts, is that in the international courts pre-trial investigation is party-driven.") *See also* Goran Sluiter, *Adversarial v. Inquisitorial Model, in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 230, 231 (Antonio Cassese ed., 2009) (discussing the dominance of the adversarial system in international criminal justice).

47. *See, e.g.*, Sluiter, *supra* note 46, at 231 (noting that both Nuremberg and Tokyo adhered to the adversarial model, and attributing this primarily to the influential role played by common law countries in the development of the institutions); *see also* CASSESE'S INTERNATIONAL CRIMINAL LAW 341–42 (Antonio Cassese et al. eds., 2013) (explaining why an adversarial model was adopted at Nuremberg).

48. *See, e.g.*, Fairlie, *supra* note 35, at 250–51.

49. Pursuant to each Charter, the chief prosecutors were responsible for the collection of evidence. Nuremberg Charter, *supra* note 9, art. 15(a); Tokyo Charter, *supra* note 23, art. 8(a). In reality, the Allied Powers conducted most of the investigation and evidence-gathering and provided the results to the prosecution for trial. *See, e.g.*, Salvatore Zappalà, *Comparative Models and the Enduring Relevance of the Accusatorial—Inquisitorial Dichotomy, in* INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES, *supra* note 35, at 44, 46–47 (discussing Nuremberg); SKIPPER STEELY, PEARL HARBOR COUNTDOWN 366 (2008) (discussing Tokyo). As for the defense, see Nuremberg Charter,

duced their respective evidence (or their "version of the facts") at trial.[50] This suggests a need for evidentiary gatekeeping that simply does not exist in judge-led Continental trials.[51] Similarly, unlike in Continental systems, the relevant witnesses at Nuremberg and Tokyo were not independent, but tied to a particular party, so that it is fair to expect that "the partisan nature of [the] trial[ ] tend[ed] to make partisans of the witnesses."[52] This, in turn, demonstrates why the use of untested affidavit evidence stains the memory of Nuremberg and calls into question the fairness of the proceedings at Tokyo. Simply put, party-driven evidence production creates "anxiety about potentially misleading information."[53] Accordingly, fairness requires "that each party have an immediate opportunity to challenge sources of information presented by the opponent."[54]

III. PRIOR RECORDED STATEMENTS AT THE ICTY

A. *The Initial Approach*

Part II's brief overview of the post-WWII proceedings and their critical reception helps to explain "the clouded legacy" created by the Nuremberg and Tokyo tribunals regarding "whether, and how much, live witness testimony can be legitimately dispensed with in a criminal trial."[55] The associated critique also provides insight into why the next phase of international criminal justice charted a different course and initially excluded unexamined written testimony from trials conducted

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supra note 9, art. 16(e) and Tokyo Charter, *supra* note 23, art. 9(e) (expressly addressing evidence-gathering by the defense and providing for the prospect of institutional support for obtaining it).

50. Zappalà, *supra* note 49, at 46 (describing the Nuremberg process as one in which the prosecution presented "its version of facts" and the defense was "allowed to rebut by pointing out any contradictions or inaccuracies"); *see also* Nuremberg Charter, *supra* note 9, art. 15(a), 16(e); Tokyo Charter, *supra* note 23, art. 8(a), 9(d).

51. Doran et al., *supra* note 39, at 20–21.

52. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1949).

53. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 79 (1997).

54. *Id.* (maintaining that it is not surprising that "anxiety about potentially misleading information reaches its highest point in Anglo–American justice"); *see also* Doran et al., *supra* note 39, at 20 (noting that evidentiary rules are necessary in the contest model in part because "they prevent parties from basing their cases on evidence that cannot be properly tested").

55. Wald, *supra* note 12, at 552.

at the first of the modern day courts. In fact, when the ICTY judges adopted the Tribunal's original Rules of Procedure and Evidence (RPE),[56] then-President Antonio Cassese expressly acknowledged the judges' intent to circumvent the blemishes that tarnished recollections of Nuremberg and Tokyo.[57] Accordingly, at the ICTY, where "the collection and presentation of evidence [likewise] follows the common law adversarial system,"[58] the earliest version of the judge-drafted rules established an express preference for in-person testimony,[59] despite an otherwise flexible approach of generally admitting relevant, probative evidence.[60] Under these initial rules, the one exception to the principle of orality was that depositions could be introduced, but only in "exceptional circumstances"[61] and only when the opposing party could cross-examine the depo-

56. The Tribunal's statute delegated the tasks of drafting, adopting and amending the RPE to its judges. ICTY Statute, *supra* note 7, art. 15.

57. According to Cassese, the judges' rulemaking process included "a conscious effort to make good the flaws of Nuremberg and Tokyo." 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, Int'l Crim. Trib. for the Former Yugoslavia [ICTY], U.N. 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 650 (1995) [hereinafter Statement by the ICTY President].

58. Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT'L CRIM. JUST. 1037, 1039 (2005) (noting that the ICTY employs "a party-driven system" as opposed to the "judge-driven" fact-finding and evidence presentation found in Continental systems); *see also* John Jackson, *Faces of Transitional Justice: Two Attempts to Build Common Standards Between National Boundaries*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 221, 240 (John Jackson et al. eds., 2008) (describing the ICTY as "fundamentally adversarial" because its "evidence is collected and presented by a prosecutor who has to prove guilt rather than an independent magistrate").

59. The Sub-rule provided: "Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that witness be heard by means of a deposition as provided for in Rule 71." Int'l Crim. Trib. for the Former Yugoslavia [ICTY], RULES OF PROCEDURE AND EVIDENCE, at Rule 90(A), U.N. Doc. IT/32 (Mar. 14, 1994). For the reader's convenience, "ICTY RPE" will be used to refer to the Rules of Procedure and Evidence of the ICTY, with specific versions of the rules noted accordingly.

60. *Id.* Rule 89(C) ("A Chamber may admit any relevant evidence that it deems to have probative value.").

61. *Id.* Rule 71(A).

nent,[62] thereby maintaining "the essence of [the ICTY's] party-driven process."[63]

Critically, this preference for in-person testimony essentially ensured that judges would be able to directly vet the credibility of party-affiliated witnesses. This assured an independent judicial assessment of witness trustworthiness, in particular through the observation of the witnesses' *unled* testimony.[64] Combined with cross-examination, famously dubbed by Wigmore as "the greatest legal engine ever invented for the discovery of truth,"[65] this early preference for live testimony contributed to the accuracy of judicial fact-finding. It follows that the ICTY's original assurance of witness presence and cross-examination helped contribute to the perceived fairness of the institution. In fact, then-contemporary assessments of the newly formed Tribunal lauded the approach as one that would not endanger the right of confrontation, as did the partisan presentation of untested written testimony at the IMT and IMTFE.[66] Instead, in a manner consistent with the development of the right to a fair trial as a human right in the post-WWII years,[67] the Tribunal appeared committed to safeguarding the statutory right of the accused to examine the witnesses

62. *Id.* Rule 71(C).

63. Robinson, *supra* note 58, at 1043 ("[T]he Tribunal system for the presentation of evidence is basically adversarial, and the essence of that party-driven process is cross-examination.").

64. *See, e.g.*, John Jackson, *The Best Epistemic Fit for International Criminal Trials: Beyond the Adversarial-Inquisitorial Dichotomy*, 7 J. INT'L CRIM. JUST. 17, 32 (2009) (observing that focus on cross-examination usually overshadows the importance of the fact-finder's ability to make a full evaluation of the witness's testimony).

65. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 29, § 1367 (3rd ed. 1940).

66. *See, e.g.*, Sherman, *supra* note 22, at 866 (citing IMT precedent as demonstrating the importance of adhering to the dictates of the adversarial model adopted).

67. Shortly after the creation of the IMTFE, the right to a fair trial was affirmatively recognized, both regionally and internationally, as a human right. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 9–12 (Dec. 10, 1948); Org. of Am. States [OAS], American Declaration on the Rights and Duties of Man, art. XVIII, May 2, 1948, O.A.S.T.S. No. 30. *See also* David Harris, *The Right to a Fair Trial as a Human Right*, 16 INT'L & COMP. L.Q. 352, 378 (1967). These post-WWII developments are considered in greater detail in Fairlie, *supra* note 35, at 266–67, describing the development of fair trial rights in the United States and abroad.

against him.[68] In fact, the approach provided even greater protection to the accused than was dictated by international human rights law at the time.[69]

B. *Early Experimentation with Written Witness Statements*

Before long, however, Tribunal judges became concerned about the length of ICTY trials, specifically citing the "great deal of reliance placed on the testimony of witnesses rather than on affidavits" as contributing to its overly long proceedings.[70] Under pressure from their United Nations funders,[71] the judges responded by implementing "a number of steps to reduce the length of trials"[72] that resulted in a shift away from

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68. ICTY Statute, *supra* note 7, art. 21(4)(e) ("In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . (e) to examine, or have examined, the witnesses against him . . . ."). Zappalà credits the decision to impose international human rights standards on the ICTY as "a move towards abandoning the victor's justice paradigm." SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 80 (2003). Notably, however, this robust right to cross-examination did not extend so far as to exclude hearsay evidence. *See, e.g.*, Prosecutor v. Aleksovski, Case No. IT-95-1/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence (Int'l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999) (expressly acknowledging that hearsay evidence may be admitted without the opportunity to cross-examine the declarant).

69. For example, the European Convention on Human Rights parallels ICTY Statute art. 21(4)(e), providing the accused the right "to examine or have examined witnesses against him." European Convention on Human Rights art. 6(3)(d), Nov. 11, 1950, 213 U.N.T.S. 221. However, the case law of the European Court makes clear that this is not an unqualified right. For a then-contemporary application of this principle, see, for example, Artner v. Austria, 203 Eur. Ct. H.R. (ser. A) 10, ¶¶ 22-24 (1992).

70. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Sixth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 13, U.N. Doc A/54/187-S/1999/846 (Aug. 25, 1999) [hereinafter Sixth Ann. ICTY Rep.]. *See also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 42 (2003) (identifying the time-consuming process of putting on live evidence as the primary culprit for the length of ICTY trials).

71. *See* ICTY Statute, *supra* note 7, art. 32 (providing that the Tribunal's expenses derive from the UN budget); *see also* G.A. Res 53/212, ¶¶ 5, 18 (Feb. 10, 1999) (calling on the Secretary-General to evaluate "the effective operation and functioning" of the ICTY and "take all necessary actions to ensure that the [ICTY] is administered with maximum efficiency and economy").

72. Sixth Ann. ICTY Rep., *supra* note 70, ¶ 14.

the Tribunal's heavy reliance on live witness testimony. These steps included lightening the restrictions on deposition evidence[73] and introducing a new rule (94 *ter*) to facilitate the use of written evidence,[74] albeit with "strict procedural protections."[75] All the while, the Tribunal continued to distinguish itself from its Nuremberg and Tokyo predecessors, emphasizing that "a great deal of reliance is placed upon the testimony of witnesses rather than on affidavits," and that the ICTY remained "committed to ensuring that the rights of the accused are fully respected in accordance with contemporary human rights norms."[76]

Even with these amendments in place, the ICTY Prosecutor continued to look for ways to increase the range of admissible written testimony. Part of this strategy included using Rule 89(C), a general evidentiary provision that authorizes Trial Chambers to admit relevant, probative evidence,[77] as a way around the "strict procedural protections" embodied in Rule 94 *ter*.[78] Like its ICC counterpart,[79] Rule 89(C) enables the

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73. *See, e.g.*, Wald, *supra* note 12, at 545–56 (discussing the amended rule governing deposition testimony).

74. ICTY RPE, Rule 92 *ter*, U.N. Doc. IT/32/Rev. 14 (Dec. 7, 1998) (enabling the parties to introduce untested affidavits for the purpose of corroborating live witness testimony). This provision was later removed during the Twenty-third Extraordinary Session held in December 2000 to revise the tribunal rules. ICTY RPE, U.N. Doc. IT/32/Rev. 19 (Jan. 19, 2001).

75. Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 21 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000). *See also* Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 18, 2000) (explaining that 94 *ter* "prescribes a precise and specific sequence of events" such that written evidence must be received before the live witness whose testimony it was meant to corroborate, so that the non-offering party is able to cross-examine the live witness on topics of dispute).

76. 6th Ann. ICTY Rep., *supra* note 70, ¶ 13.

77. ICTY RPE, R.89(C), UN Doc. IT/32 (1994).

78. *See, e.g.*, Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); *see also* Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, ¶¶ 2, 43 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 18, 2000) (noting that the prosecution used Rule 89(C) as a fallback provision before the Trial Chamber). For an in-depth discussion of these decisions, see Megan A. Fairlie, *Due Pro-*

parties to introduce, and Trial Chambers to consider, out-of-court statements for their truth.[80] As the *Kordic* Appeals Chamber made clear, however, this general principle that hearsay is admissible has its limits. Most commonly, the principle had been applied when a live witness repeated an out-of-court statement, something the Appeals Chamber described as "a very different matter, in terms of the preference for live testimony and the accused's right to examine the witnesses against him, from admitting complete statements of primary witnesses in lieu of calling them to court."[81]

Ironically, this rights-protective finding rendered the Tribunal's approach to written evidence unstable. In light of the continuing pressure to expedite ICTY proceedings, there remained a need for a more efficient way to consider time-consuming "crime-base" evidence.[82] Consequently, the aforementioned *Kordic* decision led to the replacement of Rule 94 *ter* with a new provision: Rule 92 *bis*.[83] Simultaneously, the Tribu-

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cess Erosion: The Diminution of Live Testimony at the ICTY, 34 CAL. WEST. INT'L L.J. 47, 65–70 (2003).

79. *See* Rome Statute, *supra* note 3, art. 69(4) (authorizing the Court to admit "any evidence" after considering it probative value and potential prejudice).

80. Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999).

81. Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, n.21 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

82. *See, e.g.*, Steven Kay, *The Move from Oral Evidence to Written Evidence*, 2 J. INT'L CRIM. JUST. 495, 497–98 (2004); *see also* GIDEON BOAS, THE MILOŠEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 135 (2007) (describing crime base evidence as involving "crimes committed, as opposed to any responsibility of the accused for them"). Such evidence could, for example, assist the prosecution in establishing the widespread or systematic contextual requirements for crimes against humanity. Because there was a great deal of overlap amongst ICTY cases, discerning a means by which to introduce crime base evidence in paper form was also an attractive option because it could "alleviate the need for witnesses to reappear multiple times to present essentially the same testimony before different panels of judges." Fergal Gaynor et. al., *Law of Evidence*, in INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES, *supra* note 35, at 1044, 1049.

83. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), ¶ 28 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002) (noting that "92 *bis* was introduced as a result

nal eliminated its preference for live testimony through its adoption of sub-rule 89(F),[84] which established a "no preference alternative."[85] These amendments marked a critical turning point for the ICTY. First, sub-rule 89(F) created a "dramatic change in the way evidence [was] to be received by the International Tribunal."[86] This change was "a 180 degree turn from the earlier emphasis on the 'principle' of live testimony,"[87] although this was scarcely acknowledged in the Tribunal's accompanying report, which no longer emphasized the distinction between the ICTY approach and that of the post-WWII tribunals.[88] For its part, Rule 92 *bis* would go on to become "the single most successful rule amendment of the [ICTY] if measured by durability, broad acceptance and frequency of use."[89] It would also later serve as the model for ICC revised Rule 68(2)(b).[90]

IV. THE EMERGENCE OF THE CONTEMPORARY TEMPLATE

A. *Reliability Issues*

As introduced, Rule 92 *bis* permitted the admission of written statements (declared and verified in a form prescribed by the rule), as well as written statements by unavailable de-

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of the Kordic and Cerkez Decision"). *See also* Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Eighth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 51, U.N. Doc. A/56/352-S/2001/865 (Sept. 17, 2001) [hereinafter Eighth Ann. ICTY Rep.] (noting that, of the new rules then-created, the most significant was Rule 92 *bis* and that the rule "provides a framework for the admission of formal written statements and transcripts . . . at the discretion of the Trial Chamber").

84. ICTY RPE, R.89 (F), UN Doc. IT/32/Rev.19 (2000) ("A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.").

85. Wald, *supra* note 12, at 548.

86. Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 48 (2001).

87. Wald, *supra* note 12, at 548 (noting that Rule 89(F) states a "counter-principle" to the Tribunal's "distinct preference for live witness testimony").

88. Fairlie, *supra* note 78, at 71 (noting that the Tribunal emphasized this distinction just two years earlier).

89. Christopher Gosnell, *Admissibility of Evidence, in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE, *supra* note 46, at 375, 396.

90. ICC RPE, Rule 68(2)(b), ICC-PIDS-LT-02-002/13_Eng (2013). Rules amended by ICC 2013 Amendments, *supra* note 4.

clarants (unsworn and in no specified form),[91] and transcripts from prior ICTY proceedings.[92] Notably, the rule required neither that the statements corroborate live testimony nor that they be accompanied by the right of cross-examination, techniques the Tribunal previously employed to provide a "guarantee of reliability."[93] Instead, the "cumulative nature" of a statement was a factor in favor of its admission, and cross-examination of its author a matter of judicial discretion.[94] Accordingly, the new rule further emphasized that the statutory right of an ICTY accused "to examine, or have examined, witnesses against him, is not an absolute one,"[95] while simultaneously remaining "silent as to the factors that should influence the exercise of the Chamber's discretion" regarding cross-examination.[96] At the same time, however, these reliability shortcomings were ostensibly tempered by the fact that the rule was limited to statements that go "to [the] proof of a matter other

91. For an unavailable witness, the rule provided that a Trial Chamber may "find[ ] from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability." ICTY RPE, Rule 92 *bis* (C)(ii), U.N. Doc. IT/32/Rev. 19 (Jan. 19, 2001). After a series of subsequent amendments, the provision on written statements of unavailable declarants was ultimately relocated to Rule 92 *quater*. ICTY RPE, Rule 92 *quarter*,U.N. Doc. IT/32/Rev. 49 (May 22, 2013). *See also infra* Part VII.

92. ICTY RPE, Rule 92 *bis* (D), U.N. Doc. IT/32/Rev. 19 (Jan. 19, 2001).

93. Wald, *supra* note 12, at 542 (applying this description to the requirements of corroboration and cross-examination).

94. ICTY RPE, Rule 92 *bis* (A)(i), (E), U.N. Doc. IT/32/Rev. 19 (Jan. 19, 2001). A later version of the rule moves the cross-examination language to 92 *bis* (C). ICTY RPE, Rule 92 *bis* (C), U.N. Doc. IT/32/Rev. 39 (Sept. 26, 2006) (adding that "if it does so decide, the provisions of Rule 92 *ter* shall apply"). For a discussion of the subsequently adopted 92 *ter*, see *infra* Part VI.

95. Prosecutor v. Miloševic, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (D)—Foca Transcripts, ¶ 24, (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2003) (citing to Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (Int'l Crim. Trib. for the Former Yugoslavia June. 7, 2002)). Notably, this right was never absolute, in light of the Tribunal's decision to admit hearsay. *See supra* note 68; *see also* Peter Murphy, *No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials*, 8 J. INT'L CRIM. JUST. 539, 560 (2010) (describing the decision to admit hearsay in international criminal proceedings as something that results in "[t]he inevitable derogation from the accused's fundamental right to cross-examine [that] has inescapable implications for the fairness of the trial").

96. Robinson, *supra* note 58, at 1042.

than the acts and conduct of the accused" as charged in the indictment.[97] Along these lines, when Rule 92 *bis* was first adopted, the Tribunal emphasized that the rule was designed to "facilitate the admission by way of written statement of *peripheral or background* evidence in order to expedite proceedings while protecting the rights of the accused."[98]

B. *Framework Considerations at the ICTY*

ICTY appellate jurisprudence explains that the decision to limit Rule 92 *bis* evidence to material unrelated to the acts of the accused "reflects a concern for the reliability of the material prepared by a party for the purposes of trial proceedings."[99] Specifically, the Appeals Chamber announced that the rule applies solely to documents created by the parties for the purpose of litigation,[100] material the common law recognizes as vulnerable to fabrication and liable to "contain[ ] only the most favourable version of the facts."[101] Thus, consistent with the ICTY's use of the contest model and associated concerns regarding party-generated evidence, the rule was designed "to ensure that the parties contest against each other fairly."[102] This aspect of Rule 92 *bis* serves as a critical reminder that the Tribunal's adversarial framework necessitates the protection it provides, even under a rule specifically devised for the prosecution.[103]

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97. *Id.* at 1043.

98. Eighth Ann. ICTY Rep., *supra* note 83, ¶ 51.

99. Eugene O'Sullivan & Deirdre Montgomery, *The Erosion of the Right to Confrontation Under the Cloak of Fairness at the ICTY*, 8 J. INT'L CRIM. JUST. 511, 517 (2010). *See also* Jackson, *supra* note 64, at 31 ("One of the reasons why common law adversarial systems have been traditionally suspicious of written statements is because there are well-founded doubts about the reliability of statements taken by parties for the purpose of litigation.").

100. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002) ("[R]ule 92 bis has no effect upon hearsay material which was not prepared for the purposes of legal proceedings.").

101. *Id.* ¶ 29.

102. Doran et al., *supra* note 39, at 20.

103. Indeed, even though Rule 92 *bis* and later provisions governing the admission of written statements may be used by the defense, these rules "are primarily designed to be employed by the Prosecution." Kay, *supra* note 82, at 496. This fact is reflected in practice, wherein the rules have been used more frequently by the prosecution than the defense. *See* Yvonne McDer-

This is particularly significant because Tribunal jurisprudence sometimes appears to redefine the role of the ICTY Prosecutor from that of an adversary to a more Continental-like figure who "represents the public interest of the international community and has to act with objectivity and fairness appropriate to that circumstance."[104] In fact, *dicta* from one decision goes so far as to claim that the ICTY prosecutor "is an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover truth in a judicial setting."[105] As 92 *bis* implicitly (and properly) recognizes, however, this sweeping language finds no support in the Tribunal's Statute or Rules,[106] nor, indeed, in the ICTY Prosecution's actual investigatory and trial practices.[107]

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mott, *The Admissibility and Weight of Written Testimony*, 26 LEIDEN J. INT'L L. 971, 976 (2013).

104. Prosecutor v. Miloševic, Case No. IT-02-54-AR.73.2, Decision on Admissibility of Prosecution Investigator's Evidence, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2002) (citing, as the basis for this assertion, representations made by representatives of the Office of the Prosecutor throughout the course of trial proceedings, along with a regulation issued by the Chief Prosecutor in 1999). For a discussion of the Continental prosecutor's (purportedly) impartial role, see, for example, Thomas Weigend, *A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor, in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 377, 381 (Luna & Wade eds., 2012).

105. Prosecutor v. Kupreškic, Case No. IT-95-16-T, Decision on Communications Between the Parties and Their Witnesses, ¶ ii (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 1998).

106. For example, Tribunal Rules only provide for prosecutorial disclosure of exculpatory materials known to the prosecution. ICTY RPE, Rule 68(A), U.N. Doc. IT/32/Rev. 19 (Jan. 19, 2001). Consequently, "no appropriate legal framework supported th[e aforementioned] aspiration." ZAPPALÀ, *supra* note 68, at 41 (remarking that the Tribunal might consider amending its Rules to provide that the Prosecutor search for exculpatory evidence).

107. As a then-legal officer with the ICTY OTP explained, "[T]he prosecution does not endeavour to provide the Trial Chamber with all the information relevant to the crime and the accused, but rather only that evidence which supports the prosecution's theory of the case. Thus, it remains for the defense to submit exculpatory evidence and to call witnesses for the accused." Daryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 381 n.75 (2001).

In fact, the concerns animating the limitations on the scope and nature of 92 *bis* evidence were not simply theoretical ones associated with the ICTY's adversarial framework. Rather, they had a basis in Tribunal experience. For instance, one Appeals Chamber decision expressly acknowledges that—pre-92 *bis*—questions concerning the reliability of "written statements given by prospective witnesses to OTP [Office of the Prosecution] investigators . . . ha[d] unfortunately arisen."[108] As the judge who authored that opinion later explained, the acts and conduct limitation was therefore designed both to "ensure the reliability of the evidence in relation to it, and to prevent the possibility of the statement placing the best gloss on the evidence which suits th[e offering] party."[109]

Because this provides just one example of the ways in which the combination of the prosecutor's adversarial role and the use of written evidence has the potential to affect the fairness of proceedings,[110] the ensuing analysis examines the rules governing written evidence and associated case law through the lens of the Tribunal's party-driven construct. In so doing, it identifies the fairness problems created by a prosecutorial pattern of introducing more (and more damning) written evidence against the accused, while simultaneously limiting the test of cross-examination as well as the judges' ability to assess witness demeanor. Before engaging fully in this discussion, however, it makes sense to first explain why the lessons drawn from the ICTY experience bear direct relevance for the ICC.

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108. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002). The Court later notes that the rule's purpose is to "restrict the admissibility of this very special type of hearsay to that which falls within its terms." *Id.* at ¶ 31.

109. Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Decisions on Interlocutory Appeal on the Admissibility of Evidence in Chief in the Form of Written Statements, Dissenting Opinion of Judge Hunt, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2003).

110. For example, the prosecutor could alternatively place "the best gloss" on the evidence by calling only the strongest witnesses while using the untested, written statements of weaker witnesses "to pile up the evidence . . . to reinforce its persuasive power." FRED GALVES, EDWARD J. IMWINKELREID & THOMAS LEACH, EVIDENCE SIMULATIONS 14–15 (2013) (explaining the benefits of cumulative evidence in an adversarial system).

C. *Framework Relevance at the ICC*

At first glance, one might assume that any fairness assessments regarding ICTY practice would have, at best, a more limited application at the ICC—at least insofar as they relate to the party-driven aspect of ICTY proceedings. This is because of the "principle of objectivity" that flows from the statutory mandate that the ICC Prosecutor "investigate incriminating and exonerating circumstances equally," a requirement designed "to establish the truth."[111] This Continental addition to the ICC statute has been lauded by scholars trained in that tradition, who have described it as "the most spectacular and innovative affirmation of prosecutorial impartiality"[112] and as something that constitutes a "major difference" to ICTY practice.[113] If so, this suggests that the aforementioned unease regarding untested, party-driven evidence (and related concerns) does not apply with the same force at the ICC, at least not with respect to prosecution-generated evidence. To this end, it has even been argued that the information collected by the ICC Prosecutor "can be seen as relatively reliable, as the prosecutor must be objective and investigate in favour too of the accused."[114] Thus far, however, the ICC experience belies these

111. Rome Statute, *supra* note 3, art. 54(1)(a). *See* Stefan Kirsch, *The Trial Proceedings Before the ICC*, 6 INT'L CRIM. L. REV. 275, 286 (2006) (interpreting the provision to create an affirmative obligation on the part of the judges "to intervene whenever [they] become aware that the Prosecution might not fulfil its obligation to investigate and to present all aspects of the case during the trial").

112. Luc Côté, *Independence and Impartiality, in* INTERNATIONAL PROSECUTORS 319, 359 (Luc Reydams et al. eds., 2012) (describing the provision as "unprecedented"). However, Côté later acknowledges that this "significant improvement in the law has been tempered in practice." *Id.* at 360.

113. Kirsch, *supra* note 111, at 286. *See also* Pocar & Carter, *supra* note 37, at 23 (describing the ICC Prosecutor as "more neutral" in comparison to the statutorily created "non-neutral prosecutor" at the ICTY); Jessica Peake, *A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals*, 26 PACE INT'L L. REV. 182, 215 (2014) (concluding that the role of the ICC prosecutor marks "a stark departure from a prosecutor in a pure adversarial system" and creates a figure "more akin to an official investigator in the inquisitorial system").

114. CHRISTOPH SAFFERLING, INTERNATIONAL CRIMINAL PROCEDURE 79 (2012).

views and raises real questions about the existence of the so-called "principle of objectivity."[115]

Consider, for example, Judge May's assessment of the principle, penned before the Court became operational, and defined in contrast to the practice at the ICTY: "the prosecutor of the ICC will have duties of 'truth-seeking' beyond the adversarial framework, and must conduct investigations to find both incriminating and exonerating evidence. (Whereas the prosecutor of the ad hoc tribunals has been under a duty to disclose, rather than seek such evidence)."[116] This is the distinction routinely maintained, as demonstrated in Côté's more recent assessment: "Beyond the usual disclosure obligations introduced originally [at the ICTY], the ICC Statute demands that the prosecutor actively and equally investigate exonerating circumstances turning him into 'an objective and impartial body of justice.'"[117] However, a member of the ICC OTP recently expressed a very different view, maintaining that the prosecution fulfills its ostensible objectivity requirement not by "check[ing] every single thing that could exonerate the accused," nor by affirmatively seeking out exonerating evidence, but merely by investigating such evidence as it comes across and disclosing it to the defense.[118] Under this view, the ICC Prosecutor indiscernibly resembles her adversarial counterpart

115. *See generally* Caroline Buisman, *The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?*, 27 LEIDEN J. INT'L L. 205 (2014) (providing a litany of examples and concluding, at page 226, that in every matter analyzed "the prosecution failed to investigate any of its cases with the thoroughness expected from a diligent prosecutor").

116. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 330 (2002) (citation omitted).

117. Côté, *supra* note 112, at 359–60 (citations omitted). *See also* Hans-Jörg Behrens, *Investigation, Trial and Appeal in the International Criminal Court Statute*, 6 EUR. J. CRIME CRIM. L. & CRIM. JUST. 429, 438 (1998) (discussing, *inter alia*, the prosecutor's investigative role in appeal proceedings).

118. John D. Jackson & Yassin M. Brunger, *Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals*, *in* Pluralism in International Criminal Law 159, 181 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) (quoting Respondent 10).

at the ICTY,[119] a conclusion reinforced by academic observation[120] and numerous examples in ICC practice to date.

For instance, in the Court's first prosecution, the OTP infamously employed a "secretive evidentiary regime,"[121] whereby it promised to keep the information it gathered from certain third parties confidential.[122] These agreements precluded the prosecution from fulfilling its disclosure obligations to the accused under the Statute.[123] Moreover, because the agreements were used extensively, the Trial Chamber found that the OTP's investigatory conduct involved the "wholesale and serious abuse" of a designedly exceptional provision in the Rome Statute.[124] This (mis)conduct even proved the temporary undoing of the trial because "a significant body of exculpatory evidence" was withheld from the accused,[125] a

119. *See id.* (describing OTP Respondent 10's interpretation of Article 54(1) as one that "does not vary considerably from what one would expect a common law prosecutor to do"); *see also* Robert Heinsch, *How to Achieve Fair and Expeditious Proceedings Before the ICC: Is It Time for a More Judge-Dominated Approach?*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 479, 485 (Carsten Stahn & Göran Sluiter eds., 2009) (noting that "one can get the feeling that ICC OTP is still behaving much more like an actor in a typical adversarial proceeding").

120. HANNA KUCZNSKA, THE ACCUSATION MODEL BEFORE THE INTERNATIONAL CRIMINAL COURT 52 (2015) ("[T]he prosecution has so far largely ignored its obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally.").

121. Sabine Swoboda, *The ICC Disclosure Regime—A Defense Perspective*, 19 CRIM. L.F. 449, 472 (2008) (deploring a scheme "to drape vital exculpatory evidence into [sic] a cloak of confidentiality").

122. Rome Statute, *supra* note 3, art. 54(3)(e) ("The Prosecutor may . . . agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.").

123. Article 67(2) requires that the prosecutor disclose "as soon as practicable" evidence that "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." Rome Statute, *supra* note 3.

124. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1486, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶ 73 (Jun. 13, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05884.PDF.

125. *Id.* ¶ 92 (noting that, because the prosecution's non-disclosure extended to the Trial Chamber, the Chamber was "unable to determine

shortcoming that, standing alone, suggests that the OTP was operating as a "mere party with a narrowly defined aim for the overall outcome of the proceedings," rather than as a Court organ with an obligation to establish the truth.[126] In addition, the confidentiality agreements were made with the United Nations and various non-governmental organizations,[127] entities that are not required to seek out exonerating or mitigating evidence.[128] Accordingly, there was an identifiable lack of objectivity in the OTP's investigation because none of the on-the-ground investigatory work was conducted in accordance with the Statute's 54(1)(a) requirements.[129] In addition, ongoing reliance on evidence provided by external entities continues to affect the "objectivity" of current investigations—if perhaps to a lesser extent.[130]

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whether or not the non-disclosure of this potentially exculpatory material constitutes a violation of the right to a fair trial").

126. *See, e.g.*, Behrens, *supra* note 117, at 438–39 (1998) (contending that it is the combination of the statutory requirement to seek out exonerating evidence equally, the prosecution's ability to launch an appeal on the accused's behalf, and the duty to disclose exonerating and mitigating evidence that contributes to the conclusion that the ICC Prosecutor "has the duty to establish, to the best of his powers, the truth" as an organ of the Court).

127. Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 409-417 (2008); *see also* Katy Glassborow, *ICC Investigative Strategy Under Fire*, INST. FOR WAR & PEACE REPORTING (Oct. 27, 2008), https://iwpr.net/global-voices/icc-investigative-strategy-under-fire.

128. HUMAN RIGHTS FIRST, THE ROLE OF HUMAN RIGHTS NGOS IN RELATION TO ICC INVESTIGATIONS 3 (2004) (noting that NGOs frequently "call for accountability of perpetrators as one way of addressing the violations" and, despite the focus of the paper, making no mention of the obligation to seek exonerating evidence). *See also* Caroline Buisman, *Delegating Investigations: Lessons to the Learned from the Lubanga Judgment*, 11 NW. J. INT'L HUM RTS. 30, 55 (2013) (noting that OTP has relied more on the work of NGOs and the United Nations than their own investigations and that these organizations are not required to seek out exonerating evidence).

129. Stuart, *supra* note 127, at 414 (noting that, by 2008, these types of investigations were "still a minor factor").

130. More recently, the ICC OTP has acknowledged that its "limited field presence" requires it to rely on so-called "first responders" to obtain evidence. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT [ICC], STRATEGIC PLAN JUNE 2012 –2015, ¶ 48 (2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf. While the OTP aims to enhance its field presence, it simultaneously intends "to explore how new forms of cooperation would allow the Office to directly access evidence that has been identified by these first responders." *Id. See also* Carsten Stahn & Dov Jacobs, *The Interaction Between Human Rights Fact-finding and International Criminal Proceedings:*

Moreover, patent objectivity shortcomings have arisen within OTP-led investigations conducted *in situ*. For example, in the *Mbarushimana* case, the Pre Trial Chamber identified behavior directly at odds with the prosecution's obligation to seek exonerating evidence. In fact, the Chamber derided OTP investigators for interview techniques that created "the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations."[131] The Chamber further described the techniques as "utterly inappropriate when viewed in light of the objective, set out in Article 54(1)(a), to establish the truth by 'investigating incriminating and exonerating circumstances equally.'"[132]

Other OTP-run investigations have similarly been criticized for their failure to adequately test the incriminating information gathered,[133] although this clearly ought to be an inherent aspect of the objectivity mandate. In fact, and of particular significance regarding the admissibility of recorded statements, the ICC Prosecution openly acknowledged in 2013 that "it is not always possible [for it] to investigate and find corroboration for witness accounts."[134] Notably, this statement

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Toward a (New) Typology, in THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING 255, 261 (Philip Alston & Sarah Knuckey eds., 2015) (noting the unresolved question of "to what extent the direct use of findings from various third parties can constitute an investigation within the meaning of Article 54").

131. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 51 (Dec. 16, 2011), https://www.icc-cpi.int/pages/record.aspx?uri=1286409.

132. *Id.*

133. *See, e.g.*, Buisman, *supra* note 115, at 215–16 (maintaining that the OTP has consistently failed to corroborate its witnesses and citing its failure to confirm the ages of so-called child soldiers in the *Lubanga and Katanga/Ngidjolo* cases as examples of this).

134. Simon Jennings, *ICC Under Fire Over Investigations*, INST. FOR WAR & PEACE REPORTING (Mar. 22, 2013), https://iwpr.net/global-voices/icc-under-fire-over-investigations (quoting OTP). *See also* Karim A.A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Court*, 27 LAW & CONTEMP. PROBS. 191, 221 (2014) (maintaining that OTP failed to contact those named by its witnesses as having attended three meetings central to the Prosecution's case, despite the accessibility of these persons).

was made *after* the OTP had examined the relevant witnesses at trial, and in response to criticism from the designated Trial Chamber that the witnesses' "remarks were too contradictory or too hazy, too imprecise" for the Trial Chamber to base its decision on their testimony.[135]

In light of these examples and observations, it is little surprise that one member of the defense bar has described the requirement that the prosecution investigate incriminating and exonerating circumstances equally as a "nice provision" that is nevertheless "meaningless in practice."[136] In fact, ICC Judge Ozaki's observations regarding the witness statements obtained in ICC investigations endorse this view, while drawing a distinct parallel to the taking of ICTY witness statements.[137] Specifically, Judge Ozaki notes, "[W]itness statements at the ICC are not taken in neutral, impartial circumstances."[138] Rather, "[t]hey are taken by a party (often by an investigator) mainly in order to gather evidence to mount a case against an accused, and without the supervision of any impartial arbiter."[139]

Finally, although the principle of objectivity seemingly ought to temper the prosecutor's adversarial role at trial, here again the ICC Prosecutor is aligned completely (and, indeed, openly) with her ICTY analogue. One might expect otherwise, because the current Prosecutor interprets Article 54(1)(a) to mean that "the prosecution is not merely a party to the proceedings, but an organ of the administration of justice."[140] If this role, as noted elsewhere, imposes "an obligation to assist

135. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Transcript of Hearing to Deliver the Decision Pursuant to Article 74, 7 (Dec. 18, 2012). In fact, in its hearing on compensation for Ngudjolo, his counsel maintained that the prosecution "sidelined" those witnesses whose accounts were exculpatory for the accused. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Transcript of Compensation Hearing, 6 (Nov. 23, 2015).

136. Jackson & Brunger, *supra* note 118, at 181 (quoting Respondent 4).

137. *See supra* notes 108–09 and accompanying text.

138. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence, ¶ 11 (Nov. 23, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_10732.pdf.

139. *Id.*

140. Fatou Bensouda, *The ICC Statute—An Insider's Perspective on a* Sui Generis *System for Global Justice*, 36 N.C. J. INT'L L. & COMM. REG. 277, 280 (2011).

the court in discovering the truth,"[141] it appears to follow that "the Prosecutor is not only to investigate but also to present exonerating circumstances during trial."[142] Importantly, however, the ICC Prosecution has emphatically refuted this interpretation, maintaining that it "conflates the Prosecution's duty to investigate 'incriminating and exonerating circumstances equally' under article 54(1)(a) with the Prosecution's discretion and indeed, obligation, to present its *best possible case.*"[143] With regard to written witness statements, then, one should expect the ICC Prosecutor, like her ICTY counterpart, to use the available rules in a way that puts the best gloss on the prosecution's evidence.

In sum, despite claims of neutrality and purportedly nonpartisan evidence-gathering, the ICC OTP has established its likeness to its adversarial predecessor in every way that matters, in particular with respect to the use of untested witness testimony. Just as the ICTY Appeals Chamber concluded that "considerable emphasis" must be placed upon the need to ensure the reliability of written statements given to ICTY investigators by prospective witnesses "as questions concerning the reliability of such statements have unfortunately arisen,"[144] so too have ICC investigations produced comparable concerns. In effect, virtually all the available evidence supports the finding that ICC investigations and trials are as adversarial as their ICTY analogues. As a result, the due-process oriented criticisms stemming from party-generated evidence that follow apply with equal effect at the ICC, and run the same risks of undermining both the fairness of ICC proceedings and their perceived legitimacy.

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141. Côté, *supra* note 112, at 326 (internal citation omitted).

142. Kirsch, *supra* note 111, at 286 (internal citation omitted). This would be consistent with the professed role of a Continental prosecutor, who is charged with the mandate "to present the case to the court in a neutral manner." Weigend, *supra* note 104, at 381. Weigend later notes that this rosy view differs from reality, in which the Continental prosecutor assumes the role of partisan advocate by the time of trial. *Id.* at 382.

143. Prosecutor v. Chui, Case No. ICC-01/04-02/12-292, Prosecution's Response to Mathieu Ngudjolo Chui's Request for Compensation, ¶ 42 (Sept. 18, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_17750.pdf.

144. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002) (citations omitted) (attributing this to "the manner in which those written statements are compiled").

V. ICTY RULE 92 *BIS*/ICC RULE 68(2)(B)

A. *Fairness Concerns*

The first important lesson for the ICC regarding the decision to import Rule 92 *bis* into its RPE (as Rule 68(2)(b)), is that the rule's acts and conduct restriction—placed in the provision to temper the potential unfairness of admitting party-generated witness statements[145]—has at best afforded incomplete protection in practice. This is because the limiting language, on its terms, does not capture written testimony that addresses the conduct of others. Consequently, this latter type of written evidence may be fully admissible under the rule, even though it could prove central to establishing the guilt of the accused. As Judge Wald explained, the restriction can provide "an ephemeral distinction since a big chunk of Tribunal jurisprudence uses a command responsibility or joint criminal enterprise theory to convict accuseds under which they are held responsible for the acts of subordinates, or those with whom they collaborate."[146] Zahar echoes this concern, describing the protection afforded by the rule as "illusory" for joint criminal enterprise cases. In his view, "to enable admission of the bulk of the necessary evidence within the trial's time constraints and mostly without cross-examination—an invented distinction must be maintained between evidence 'directly' speaking to the actions of the accused, and evidence going to the conduct of a person other than the accused."[147]

These criticisms have merit, as the ICTY has adopted a literal interpretation of the Rule 92 *bis* limitation. Under this construction, untested witness statements can be used to demonstrate the guilt of the accused by, for example, establishing the conduct of another for which the accused is alleged responsible based on shared membership in a joint criminal enterprise (JCE).[148] As the *Milošević* Chamber explained:

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145. *See supra* note 99 and accompanying text.

146. Patricia M. Wald, *Rules of Evidence in the Yugoslav War Tribunal,* 21 QUINNIPIAC L. REV 761, 769 (2003) (concluding that "almost all the evidence could be said to go to the conduct or role of the accused").

147. Alexander Zahar, *Pluralism and the Rights of the Accused in International Criminal Proceedings, in* PLURALISM IN INTERNATIONAL CRIMINAL LAW, *supra* note 118, at 225, 242–43.

148. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) ¶ 10 (Int'l Crim. Trib. for the For-

> The phrase "acts and conduct of the accused" in Rule 92 *bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of the alleged co-perpetrators or subordinates it would have said so.[149]

This interpretation was later affirmed by the Appeals Chamber in a decision that elaborates on the observations in *Milošević* and illustrates how narrow the acts and conduct restriction can be in application. According to the majority decision, because a broad interpretation of the limiting language would "effectively denude [the rule] of any real utility,"[150] the term "acts and conduct of the accused" applies *only* to evidence that goes directly to the *actus reus* or *mens rea* of the accused or to showing "that [the accused] was a superior to those who actually did commit the crimes."[151] Consequently, the rule places no restriction on what 92 *bis* evidence establishes indirectly. In fact, the decision notes that the prosecution may use 92 *bis* statements that address the acts and conducts of others to establish the *mens rea* required to convict the accused.[152] Although the decision noted "the short step," in superior responsibility cases, between the acts constituting the crime charged and a finding that the accused knew or had reason to know of those acts, the decision suggested that this might con-

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mer Yugoslavia June 7, 2002) (noting that 92 *bis*'acts and conduct limitation applies in cases of JCE to written evidence that indicates the accused participated in the JCE or that he "shared with the person who actually did commit the crimes charged the requisite intent for those crimes").

149. Prosecutor v. Milošević, Case No. IT-02-54, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2002).

150. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002).

151. *Id.* ¶ 10.

152. *Id.* ¶ 11 (explaining that, to establish the accused's *mens rea*, "the prosecution may rely on the acts and conduct of *others* which have been proved by Rule 92 *bis* statements"). *See also* Daryl A. Mundis, *Current Developments at the* ad hoc *International Criminal Tribunals*, 1 J. INT'L CRIM. JUST. 197, 218 (commenting on the decision).

stitute an appropriate use of Rule 92 *bis*, even in cases where the declarant is unavailable for in-person examination.[153]

Despite this concession that important Rule 92 *bis* evidence might be admitted untested, cross-examination was, at least initially, permitted whenever the contents of a 92 *bis* statement addressed a disputed issue.[154] In addition, some Tribunal case law even suggested that cross-examination was *required* whenever 92 *bis* evidence was "pivotal" to the case against the accused.[155] For example, according to the *Limaj* Trial Chamber, "[W]hen a written statement touches upon the very essence of the prosecution case against the accused, the witness should be available for cross-examination."[156] This seemingly rights-protective assertion merits several important observations.

First, it shows how far the application of Rule 92 *bis* strayed from its avowed goal of facilitating admission of background or peripheral evidence.[157] If anything, evidence that "touches upon the very essence of the prosecution's case" seems the antithesis of that which is background or peripheral. Rather, the fact that Rule 92 *bis* evidence can have this core

153. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002). In such cases, the Appeals Chamber notes that "it may well be" that the evidence should not be admitted in written form or that an absence of the opportunity to cross should preclude admission of such statements. *Id.* ¶ 15.

154. Robinson, *supra* note 58, at 1041–42. *See also* Jackson, *supra* note 64, at 30 ("At first the chambers were cautious in applying this rule but over time they have been prepared to admit written statements without cross-examination over the objection of the defense and the rule has been used to admit large amounts of evidence that would otherwise have had to be led in chief.").

155. Indeed, this was Judge Robinson's avowed preference: "[I]n my view . . . [when] statements expose the accused to liability in relation to a critical element of the Prosecution's case, cross-examination is not at the discretion of the Trial Chamber." Prosecutor v. Milošević, Case No. IT-02-54, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, Separate Opinion of Judge Patrick Robinson, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2002).

156. Prosecutor v. Limaj, Case No. IT-03-66-T, Decision on Prosecutor's Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 9, 2005).

157. *See supra* note 98 and accompanying text (discussing the Tribunal's avowed rationale for adopting the rule).

quality demonstrates that a statement not directed at an accused can nevertheless "contribute strongly to the impression that he is guilty."[158] Second, it demonstrates the Tribunal's recognition that cross-examination and the truth-seeking benefits that derive from the sheer presence of a live witness[159] are important in ensuring the integrity of its trials. As was true of the limitations adopted for the rule,[160] this awareness is tied both to Tribunal experience and to theoretical concerns stemming from the Tribunal's adversarial framework. Judge Wald, for example, admitted she "gr[ew] suspicious" of out-of-court witness statements involving multiple translations, noting the "margin for error in such a system" and that "in the courtroom years later, many witnesses say they were misunderstood or misquoted in the earlier statement."[161]

The *Milutinovic* trial provides an illustrative example of the important connection between witness presence and cross-examination and the Tribunal's truth-seeking function. In that matter, the prosecution unsuccessfully attempted to submit "80 or 90" Rule 92 *bis* statements authored by witnesses with whom the prosecution's lawyers had not met, and all without the prospect of in-person examination.[162] After some of the

158. Wald, *supra* note 12, at 551.

159. *See* Patricia M. Wald, *ICTY Judicial Proceedings—An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 466, 473 (2004) ("Donning a robe does not enshroud its occupant with a seventh sense of whether something written on a piece of paper is true.").

160. *See supra* note 108 and accompanying text (noting reliability problems with some of the prosecution's written witness statements).

161. Wald, *supra* note 12, at 551. Similarly, witness preparation has frequently unearthed mistakes and omissions in statements obtained with the help of translators and then summarized by prosecution investigators. Colleen M. Rohan, *Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?*, *in* THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 289, 300 (William A. Schabas et al. eds., 2013). Notably, the ICC Prosecutor has argued for witness proofing on these very grounds. *See* Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Prosecution's Request for Authorisation to Conduct Witness Preparation, ¶ 11 (June 17, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04399.PDF (maintaining that witness proofing can facilitate the use of written evidence because it provides a pretrial opportunity to correct inaccuracies and inconsistencies in the proposed Rule 68 statements).

162. In response to judicial questioning as to why lawyers had not been sent to meet with the associated witnesses in the field, OTP responded by saying their initial plan was to tender the witnesses' written statements pursu-

related witnesses had been called, Judge Bonomy noted in open court that "there could have been the greatest miscarriage of justice if the[ ] witnesses had not been available for cross-examination."[163]

This observation buttresses Judge Wald's position that, if untested out-of-court statements are to be admitted, they must "truly be limited to non-incriminating evidence."[164] Indeed, while the cross-examination authorized in *Milutinovic* enhanced the fairness of *that* trial, not all ICTY Trial Chambers have been equally sensitive to the potential for injustice created by admitting untested, incriminatory written evidence. In fact, the prosecution's representative in *Milutinovic* noted that a different Trial Chamber had been much more lenient in permitting its use of comparable, untested Rule 92 *bis* evidence.[165] This inconsistency among Chambers is hardly surprising. Even those Trial Chambers that agree with the *Limaj* Trial Chamber's pronouncement above, an approach aligned with each chamber's obligation to ensure a fair trial,[166] might disagree as to whether a specific Rule 92 *bis* statement falls within the "very essence" category that requires cross-examination. Among other factors, the efficiency concerns that prompted the rule's creation might, consciously or otherwise, affect a chamber's discretionary assessment in this regard.[167]

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ant to 92 *bis*, without cross-examination, citing this fact as "one reason that those people weren't seen." *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Transcript, 2675 (Aug. 31, 2006), http://www.icty.org/x/cases/pavkovic/trans/en/060831IT.htm.

163. *Id.* at 2675–76.

164. Wald, *supra* note 12, at 551 (attributing this position to the unreliable nature in which out of court statements are obtained and the frequent subsequent denials and corrections of the statements' authors when called to testify).

165. In response to Judge Bonomy's assessment that the prosecution was naïve to believe that the *Milutinovic* Trial Chamber would admit the proposed, untested 92 *bis* evidence, the prosecutor responded by noting that "it's not naïve on my part based on the experience in the other case that I worked on in the tribunal"). *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Transcript, at 2676.

166. ICTY Statute, *supra* note 7, art. 20(1).

167. As Caianiello notes, there is "a constant temptation to consider items of evidence as not being crucial, just because they do not directly affect the acts and conduct of the accused." Caianiello, *supra* note 45, at 405. *See also* Rohan, *supra* note 161, at 298 (analogously describing "a relatively lenient assessment" regarding Rule *92 bis* admissibility as "a foreseeable event given

Moreover, even if the *Limaj* Trial Chamber's pronouncement constitutes the "best case law" on the topic,[168] it has no binding effect on the work of other trial chambers.[169] In fact, other chambers have at times approached the matter differently. For example, another trial decision maintains instead that "whether the evidence in question relates to a 'critical element of the Prosecution's case, or to a live and important issue between the parties'" is simply "an important consideration" in determining whether to require the witness to appear for cross-examination.[170]

In addition, and irrespective of the test imposed, Trial Chambers may erroneously deny cross-examination simply because their 92 *bis* rulings are based on party-provided information. In the *Martic* case, for example, the Trial Chamber acknowledged that cross-examination is a necessary counter-balance whenever Rule 92 *bis* statements include "evidence pivotal to the prosecution's case."[171] The decision then went on to consider the admissibility of multiple 92 *bis* statements,[172] including one that, according to the prosecution's submission, addressed only background information and was "largely cumulative with the evidence that will be presented

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the political pressures placed on the ad hoc tribunals to complete the cases before them within a specified period of time").

168. Caianiello, *supra* note 45, at 404 n.50 (maintaining that "most cases" have maintained this line of protection).

169. The finding of one trial chamber has no binding force on the decisions of other trial chambers. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (noting, however, that trial chambers are free to follow the decisions of one another).

170. Prosecutor v. Đorđević, Case No.IT- 05-87/1-T, Decision on Prosecutor's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 11, 2009).

171. Prosecutor v. Martic, Case No. IT-95-11-T, Decision on Prosecutor's Motion for the Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 16, 2006). *See also id.* ("[W]here the individual, whose acts and conduct are described in the statement, is so proximate to the accused and where the evidence is so pivotal to the Prosecution case, the Trial Chamber may decide (i) not to admit the statement at all, or (ii) to require the witness to appear for cross-examination.").

172. The Trial Chamber simultaneously considered the prosecution's motion to introduce eleven other witness statements and associated documents and seven transcripts. *Id.* ¶ 1.

during the trial through live witnesses."[173] Citing to this party-provided information, the *Martic* Trial Chamber admitted the statement without the benefit of cross-examination.[174] On appeal, however, and with the advantage of a full record, the Appeals Chamber fully rejected the prosecution's characterization of the statement, finding that its *ultimately uncorroborated* contents were so pivotal to establishing the accused's responsibility on multiple counts charged in the indictment[175] that its admission constituted a "miscarriage of justice."[176] In other words, the facts from *Martic* suggest that the Trial Chamber based its 92 *bis* ruling on party-provided (mis)information, a fact that reveals yet another shortcoming associated with the rule's implementation, and one that is specifically tied to the ICTY's adversarial structure. As Judge Robinson warned, because Tribunal judges do not have "an information-rich dossier, as is the case in civil-law jurisdictions, mistakes may be made by Trial Chambers in determining whether to allow cross-examination."[177]

B. *Rule 92* bis*: A Retrospective*

Considering the noted shortcomings of Rule 92 *bis*, it makes sense to examine the frequency with which the rule has been used, both to form an appreciation for its potential impact on the fairness of ICTY proceedings and to gauge its ef-

173. *Id.* ¶ 20.

174. *Id.*

175. Prosecutor v. Martic, Case No. IT-95-11-A, Judgement, ¶ 193 n.486 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (noting, in addition, that the statement of Antun Blažević—known earlier as "Witness MM-019"—was insufficiently corroborated by other evidence).

176. *Id.* (concluding that Martic's related JCE convictions were consequently reversible).

177. Robinson, *supra* note 58, at 1042 (internal citation omitted). Robinson goes on to note that the discretionary authority to allow for cross-examination "is more consistent with the civil-law system in which judges have a substantial role in questioning witnesses, [and that it therefore] has the potential to lead to unfairness to the accused, because the ICTY Judge, unlike his civil law counterpart, does not have a full knowledge of the facts of the case, and may err in the exercise of his discretion to allow cross-examination." *Id.* at 1043. *Cf.* Caianiello, *supra* note 45, at 408. Cainiello seems optimistic that ICC judges will not encounter comparable difficulties, but appears to overlook that the judges must depend upon party representations in making their determinations.

fect on efficiency. With respect to use, it was noted early on that Rule 92 *bis* "appears to have had a dramatic impact on the way in which parties, and in particular the Prosecution, are seeking to present their cases before the International Tribunal."[178] For example, by 2003, the number of witness statements admitted pursuant to Rule 92 *bis* in the *Krajisnik* case significantly outnumbered those witnesses who delivered in-person testimony.[179] Around the same time, the Prosecution began to undertake so-called "92 *bis* missions,"[180] employing multiple such undertakings in the *Hadzihasanovic & Kubura* matter with the aim of amassing "35 to 40 Rule 92 *bis* witnesses."[181] Ultimately, these missions merited inclusion in the Tribunal's Annual Reports to the Security Council and General Assembly,[182] which note that more than fifty such endeavors occurred between 2008 and 2015.[183] In addition to these

178. Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. L. F. 167, 176 (2001) (noting, in particular, the Prosecution's 92 *bis* application in the *Krajisnik* case, which identified approximately 170 witnesses). In its subsequent report, the Tribunal observed that the rule has become increasingly implemented. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Ninth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 82, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002). *Id.* ¶ 289 ("During the reporting period, rule 92 bis . . . has been increasingly implemented in several cases."). *See also* Robinson, *supra* note 58, at 1042 (noting that "[t]rials rely heavily on this Rule").

179. Rohan, *supra* note 161, at 298 (noting that the former outpaced the latter by 168 to 101).

180. *See, e.g.*, Prosecutor v. Galic, Case No. IT-98-29-T, Trial Transcript, 20967 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2003) (discussing a Rule 92 *bis* mission then being conducted in Sarajevo).

181. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-PT, Status Conference Transcript, 235 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 6, 2003).

182. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Fourteenth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 103, U.N. Doc. A/62/172-S/2007/469 (Aug. 4, 2007) [hereinafter Fourteenth Ann. ICTY Report]. These annual reports are statutorily required. *See* ICTY Statute, *supra* note 7, art. 34

183. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Fifteenth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 97, U.N. Doc. A/63/210-S/2008/515 (Aug. 4, 2008) (re-

developments, ICTY Trial Chambers adopted the unofficial practice of "partial bissing," by redacting more sensitive materials from written statements, such as information relating to the acts and conduct of the accused, and admitting the remaining portions in lieu of oral testimony.[184]

This hearty use of 92 *bis* suggests increased efficiency, consistent with the expectation that the provision "would have the effect of shortening trial duration by reducing the number of live witnesses at trial,"[185] which, of course, was the original rationale for adopting the rule.[186] Yet, even assuming that in-

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porting nine 92 *bis* missions); Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Seventeenth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 88, U.N. Doc. A/65/205-S/2010/413 (July 30, 2010) (reporting seven 92 *bis* missions); Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Eighteenth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 84, U.N. Doc. A/66/210-SS/2011/473 (July 31, 2011) (reporting nine 92 *bis* missions); Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Nineteenth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 96, U.N. Doc. A/67/214-S/2012/592 (Aug. 1, 2012) (reporting ten 92 *bis* missions); Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Twentieth Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 76, U.N. Doc. A/68/255-S/2013/463 (Aug. 2, 2013) (reporting eleven 92 *bis* missions); Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Twenty-First Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 63, U.N. Doc. A/69/225-S/2014/556 (Aug. 1, 2014) (reporting four 92 *bis* missions); *Twenty-Second Ann. Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991,* ¶ 67, U.N. Doc. A/70/226-S/2015/585 (July 31, 2015) (reporting three 92 *bis* missions).

184. O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench,* 5 J. INT'L CRIM. JUST. 360, 368 (2007).

185. Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, But Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms,* 36 YALE J. INT'L L. 241, 269 (2011).

186. *See* Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials,* 3 J. INT'L CRIM. JUST. 354 (2005) ("The rule was introduced to facilitate the introduction of written evidence in order to expedite trials, at a time when the Tribunal was beginning fully to realise the perils of even mid-level and low-level perpetrators' trials, which were lasting in excess

court time has been saved,[187] one must also factor in the time the rule requires both out of court and in the pretrial phase. Indeed, out-of-court time is likely to be significant for a number of reasons, including the fact that Rule 92 *bis* statements must be read twice: first for the purpose of admission and later as evidence.[188] The judges may also have to read any number of "associated documents"[189] in a "92 *bis* witness package,"[190] compounding the non-court time consumed by the rule and raising questions about the judges' ability to meaningfully consider an ever-increasing amount of material in their eventual decision-making.[191]

Moreover, the assumption that the rule has saved *in-court* time is open to question. Although the Tribunal appears not

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of one year, with the most complicated leadership cases still ahead."); *see also* BOAS, *supra* note 82, at 65.

187. Office of Internal Oversight Services [OIOS], Assignment No. AA2008/270/01–Audit of the ICTY Completion Strategy, ¶ 46 (Oct. 29, 2008) [hereinafter OIOS 2008 Audit] (describing the average testimony times for 92 *bis* witnesses as "significantly less" as compared to *viva voce* witnesses).

188. ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW 345, n.135 (2007).

189. *See, e.g.*, Prosecutor v. Rašic, Case No. IT-98-32/1-R77.2, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule *92* bis, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2011) (considering that the "documents associated with the [92 *bis*] statements form inseparable and indispensable parts thereof . . . and may therefore be admitted into evidence pursuant to Rule 92 *bis*").

190. Prosecutor v. Mladic, Case No. IT-09-92-T, Decision on Prosecution Motion to Admit Evidence Pursuant to Rule 92 *bis*, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 28, 2013) (considering "a Rule 92 *bis* witness package consisting of an amalgamated statement of Witness RM-159's prior testimonies and statements and eight associated exhibits").

191. *See* Zahar, *supra* note 147, at 246 ("It is not humanly possible for the judges to give individual attention to each piece of evidence."). Judge Ozaki raises a similar concern when contemplating a comparable move at the ICC, stating that "increasing the amount of documentation in the case record may create potential problems caused by the sheer volume and possible incompatibility of the material's content, thereby increasing the risk of confusion in the drafting of the judgment in the case." Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence, ¶ 28 (Nov. 23, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_10732.pdf.

to have studied the issue,[192] there is at least one empirical analysis that considers more than five years of ICTY activity with Rule 92 *bis* in place.[193] Even though there are limits to such an assessment,[194] the study demonstrates that, despite the introduction of Rule 92 *bis* and other efforts aimed at expediting Tribunal proceedings, ICTY pretrial and trial proceedings during the period actually lasted longer.[195] With respect to Rule 92 *bis* in particular, one OTP member interviewed in relation to the study complained that the rule "takes a lot of time in the pretrial phase."[196] In addition, the study found that, despite the increased use of written witness statements pursuant to the rule, the number of live witnesses did not decline.[197] This suggests that the parties used 92 *bis* to introduce *more* evidence. This approach, of course, is fully consistent with the tribunal's adversarial construct[198] and with the inference that much of the written evidence was likely unnecessary. In effect, the rule seems to have increased the admission of "evidential debris" that "complicates and prolongs trials unnecessarily."[199]

Because this indicates that the procedural reform was unsuccessfully implemented, one might propose that the answer lies in Tribunal judges exercising greater managerial authority

192. An audit of the ICTY's completion strategy notes that, at least up until March 2008, the Tribunal had not conducted an assessment regarding whether the use of written evidence either saved court time or reduced the overall length of cases. OIOS 2008 Audit, *supra* note 187, ¶ 45

193. The study considered data from April 26, 1995 until July 1, 2006. Langer & Doherty, *supra* note 185, at 252. Recall that Rule 92 *bis* was adopted in December 2000.

194. For example, the different nature of trials—in particular, "smaller fish" versus "big fish"—cannot be readily accounted for in such a study. The author is grateful to Fergal Gaynor for emphasizing this point.

195. Langer & Doherty, *supra* note 185, at 303. *Id.* at 267 ("[T]here are strong reasons to think that the reforms [including Rule 92 *bis*] made the trial longer.").

196. *Id.* at 269, n. 67.

197. *Id.* at 273.

198. GALVES ET AL., supra note 110, at 14 ("The presentation of cumulative evidence is a large part of what's supposed to happen at trial. We pile up the evidence on our side to reinforce its persuasive power."). As a result, the U.S. Federal Rules of Evidence grant judges the discretion to exclude needlessly cumulative evidence. *See* FED. R. EVID. 403.

199. H.H. Judge Peter Murphy & Lina Baddour, *Evidence and Selection of Judges in International Criminal Tribunals, in* PLURALISM IN INTERNATIONAL CRIMINAL LAW, *supra* note 118, at 368.

over the rule.[200] But, as the *Martic* example considered above demonstrates,[201] there are real risks when Chambers exercise these powers in an adversarial construct. By necessity, the judges depend upon party representations and operate without full knowledge of the case that will ultimately be presented.[202] Critically, a less than fully-informed Trial Chamber is the norm in ICTY proceedings[203] and is to be expected in a party-driven system (including that of the ICC). Consequently, some Trial Chambers may have understandably (and properly) erred on the side of fairness at the expense of efficiency.[204]

Finally, one cannot overlook the time that Rule 92 *bis*-associated litigation has added to Tribunal proceedings, as "the admission of each proposed non-*viva voce* witness is normally litigated between the parties."[205] These observations map on

200. Langer & Doherty, *supra* note 185, at 284.

201. *See supra* notes 171–77 and accompanying text.

202. Langer & Doherty, *supra* note 185, at 284 ("With limited information, the court risks making unfair or inefficient decisions—in other words, it risks making decisions that may expedite the process but generate higher costs in terms of accuracy, fairness, or any of the other goals of the legal process . . . .").

203. In *Milutinovic,* for example, Judge Bonomy described the trial's progression as one where "we're going to limp from witness to witness, unsure of what that witness's evidence will be until they come to court." *Prosecutor v. Milutinovic,* Case No. IT-05-87-T, Transcript, 2675 (Aug. 31, 2006), http://www.icty.org/x/cases/pavkovic/trans/en/060831IT.htm. While Bonomy's criticism was directed at the prosecution's failure in that case to narrow down its witnesses' proposed testimony in a timely fashion, the Tribunal's adversarial framework in general presents an impediment to its Trial Chambers' ability to exercise managerial authority, even with measures in place designed to keep them better informed than their counterparts in a pure adversarial system. As Damaška explains, when judges are only "partially informed" about the case that is set to unfold, consequent managerial efforts may be akin to those of a "blind and blundering intruder." Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments,* 45 AM. J. COMP. L. 839, 850 (1997) (borrowing the latter phrase from Frankel).

204. Langer & Doherty, *supra* note 185, at 285 (positing that judges who "may not have all the relevant information to make an efficient and fair decision . . . may refrain from using their managerial powers over the parties").

205. ZAHAR & SLUITER, *supra* note 188, at 345 n.135 (further describing this as a "time-consuming process"). *See also* McDermott, *supra* note 103, at 986–87 ("Many of the admissibility rules on written witness testimony in lieu of *viva voce* evidence were introduced with a view to aiding expedience, but have ironically on occasion added an extra layer of complexity in calling for

to related practitioner interviews that identify party resistance to the reform (and consequent strategic behavior designed to neutralize its effect) as one of the two main reasons for its failure.[206] This information, in turn, aligns with other research that suggests international criminal defense counsel place a high value on cross-examination, and view the increased use of written witness statements without the prospect of cross-examination as "a major source of unfairness in trials before the ICTY."[207]

C. *Relevant ICC Practice*

Although the ICC's application of revised Rule 68 is not yet extensive, some noteworthy parallels can already be drawn between the ICTY's Rule 92 *bis* experience and the Court's Rule 68(2)(b) practice. First, the ICC Prosecution has consistently advocated for the Court to adopt the Tribunal's narrow interpretation of the "acts and conduct" limitation.[208] Although rulings on the issue appear to be scarce,[209] at least one

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submissions on whether a statement goes to the acts and conduct of the accused, whether cross-examination would be in the interests of justice, and so forth, to such an extent that at times, it would have been more expedient to call the witness to testify in person.").

206. Langer & Doherty, *supra* note 185, at 275. The authors also point to judicial failure to implement the reforms effectively. *Id.* In this respect, see Nice & Vallières-Roland, *supra* note 186, at 368 (describing the "largely unfavourable rulings of the Trial Chamber" in response to the prosecution's attempt to use 92 *bis* in the *Milošević* case).

207. Jenia Iontcheva Turner, *Defense Perspectives on International Trials*, 48 VA. J INT'L L. 529, 559 (2008) (noting that this view applies irrespective of the type of system from which the attorney hails).

208. *E.g.*, Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶ 14 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF (noting that "[i]mportantly, acts and conduct of the Accused must be distinguished from acts and conduct of others who commit crimes for which the Accused is alleged responsible" and contending that "proof of the latter is admissible under rule 68(2)(b)").

209. Regarding the *Gbagbo* matter in the preceding note, for example, only one statement was admitted under Rule 68(2)(b), and its content did not go to the acts and conduct of the accused. Accordingly, the statement was admissible "regardless of whether a narrower or broader interpretation is given to the expression 'acts and conduct of the accused.'" Prosecutor v. Gbagbo, ICC-02/11-01/15, Decision on the Prosecutor's Application to In-

Trial Chamber has already embraced the ICTY approach. In a ruling reminiscent of the aforementioned *Milošević* decision, the *Ongwen* Chamber recently announced that Rule 68(2)(b)'s acts and conduct language "must be interpreted in its plain natural meaning, referring to the personal actions and omissions of the accused, rather than a broader normative meaning, extended to the actions and omissions of others which are attributable to the accused under the modes of liability charged by the Prosecution."[210] In other words, the prosecution can now introduce unexamined witness statements to prove the conduct of others, for which the accused is alleged responsible, without the opportunity to examine the relevant witness. While other Chambers need not follow the *Ongwen* Chamber's lead, given the narrow interpretation's universal acceptance at the ICTY and the position that a broad reading of the limitation would "denude the rule of any real utility,"[211] it seems likely that the prosecution will prevail in its call for a similar interpretation in other cases.[212]

This creates cause for concern, as ICC case law to date demonstrates the prosecution's keen interest in utilizing the sub-rule[213] to preclude the prospect of cross-examination.[214]

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troduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3), ¶ 19 n.33 (Jun. 9, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04177.PDF.

210. Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ¶ 11 (Nov. 18, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_25256.PDF.

211. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002).

212. *See, e.g*, Prosecutor v. Ntaganda, ICC-01/04-02/06, Public Redacted Version of "Prosecution's Application Under Rule 68(2)(b) to Admit the Prior Recorded Testimony of Witness P-0773," ¶ 14 (Dec. 20, 2016).

213. *E.g.*, Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15-465-Corr-Red2, Public Lesser Redacted Version of "Corrected Version of 'Prosecution's Request for Introduction of Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules,' 16 June 2016, ICC-02/04-01/15-465-Conf-Corr," ¶ 1 (Dec. 5 2016), https://www.icc-cpi.int/CourtRecords/CR2016_25600.PDF (proposing that the Court conditionally admit, under rule 68(2)(b), 38 prior recorded statements and their related documents).

214. This distinguishes ICC Rule 68(2)(b) from its ICTY forerunner, which provides that "[t]he Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it

In the *Gbagbo* case, for example, the prosecution attempted to use Rule 68(2)(b) to admit the written statements of three witnesses and multiple associated documents,[215] informing the Chamber that the examination of the three proposed witnesses was "unnecessary."[216] The prosecutor's application also downplayed the importance of the sub-rule's listed factors in favor of admission—such as the cumulative nature of the statement and that its contents are not in dispute[217]—maintaining that these are simply designed to guide the Court in the exercise of its discretion and "are not prerequisites for admission under the rule."[218] Simultaneously, however, the prosecution argued that the Court should exercise its discretion in admitting all three statements, because the statements did "not relate to disputed issues at the core of [the] case"[219] and were "of a cumulative and corroborative nature."[220]

Remarkably, the *Gbagbo* Chamber roundly disagreed with virtually all of the prosecution's characterizations. First, it ex-

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does so decide, the provisions of Rule 92 *ter* shall apply." ICTY RPE, Rule 92 *bis* (C), U.N. Doc. IT/32/Rev.50 (July 8, 2015).

215. Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶¶ 1–2 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF (seeking to introduce the written statements and associated documents of an additional eight witness pursuant to Rule 68(3)). ICC Rule 68(3) is discussed *infra* Part VI.

216. Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶ 6 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF (asserting that "the Parties and participants will benefit from an expedited presentation of the Prosecution's case-in-chief").

217. ICC RPE, *supra* note 6, Rule 68(2)(b)(i) (noting other factors, including whether the statement relates to background information).

218. Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶ 15 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF.

219. *Id.* ¶ 32.

220. *Id.* ¶¶ 24, 28, 32.

pressly found that two of the statements addressed "one of the core and disputed issues" in the case and that the proposed evidence could "reasonably assist the Chamber in [its] resolution" of the matter.[221] Moreover, the Chamber rejected the prosecution's claims that the statements were cumulative and corroborated by other evidence. Instead, the Trial Chamber observed that one of the proposed statements appeared to contain a distinct, firsthand perspective,[222] while another included decidedly unique information from the only eyewitness to a contested matter.[223] In fact, while assessing the latter, the Chamber refuted the prosecution's claim that another witness had provided similar evidence, remarking that this ostensibly corroborating witness was actually located "several kilometers away" from the first's "crucial location."[224] In other words, reminiscent of the *Martic* example at the ICTY, the prosecution mischaracterized its proposed written evidence in a way that enhanced the likelihood of its admission.

Of course, from a fairness perspective, unlike the ICTY Trial Chamber in *Martic,* the *Gbabgo* Chamber caught these mischaracterizations before admitting the evidence, untested, to the detriment of the accused.[225] Yet, a complete compari-

221. Prosecutor v. Gbagbo, ICC-02/11-01/15, Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3), ¶ 15 (Jun. 9, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04177.PDF. Accordingly, the Chamber concluded that the evidence was "significant for the determination of core issues materially in dispute" *Id.* ¶ 19. As noted, this is one of the listed factors a Chamber is meant to consider when deciding upon the admissibility of a 68(2)(b) statement. *See* ICC RPE, *supra* note 6, at Rule 68(2)(b)(i).

222. Prosecutor v. Gbagbo, ICC-02/11-01/15, Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3), ¶ 17 (Jun. 9, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_04177.PDF.

223. *Id.* ¶ 16 ("There is no other witness on the Prosecutor's list who was present at the relevant time in this area.").

224. *Id.*

225. Ultimately, the statements were admitted under ICC Rule 68(3). Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15 OA 8, Judgment on the Appeals of Mr. Laurent Gbagbo and Mr. Charles Blé Goudé Against the Decision of Trial Chamber I of 9 June 2016 Entitled "Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3)," ¶ 6 (Nov. 1, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_24756.PDF. As discussed infra, Part VI, ICC Rule 68(3) requires that the author of the written statement be present for examination.

son ought also to consider that the *Martic* Chamber had to assess the fairness of admitting twelve written statements without the benefit of cross-examination, four times the number at issue in *Gbagbo*. Accordingly, an increased volume of Rule 68(2)(b) submissions, such as the recent application to admit thirty-eight statements in the *Ongwen* case,[226] could well render a Trial Chamber more dependent upon the (partisan) prosecution's representations. Indeed, the *Gbagbo* decision demonstrates how the amount of out-of-court time required by the use of 68(2)(b) may be substantial, particularly if Trial Chambers are truly committed to ensuring that admitting the unexamined statements will not interfere with the rights of the accused.[227]

D. *Summary*

As the review of ICTY precedent makes clear, the acts and conduct limitation in Rule 92 *bis* was initially designed to protect the fair trial rights of the accused. Nevertheless, Tribunal practice quickly undermined the restriction's intended effect by construing its limiting language literally rather than purposively. As a result, the prosecution could submit party-generated evidence both to prove the acts of others for which the accused was alleged responsible, and even to (indirectly) establish the accused's *mens rea* for the crimes charged. Consequently, even with its general commitment to ensuring that Rule 92 *bis* evidence be corroborated, it is little wonder that the acts and conduct limitation—and the protection it affords—has been criticized by both bench and bar as "ephem-

226. Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ¶ 1 (Nov. 18, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_25256.PDF.

227. Notably, the *Gbagbo* Chamber's consideration of just *two* such statements required it to review not only the parties' submissions, but also the purportedly similar evidence (a separate witness statement), the opening statement of one of the accused, and prior defense questioning of one of the prosecution's live witnesses. *See* Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED]. Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶ 17 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF.

eral" and "illusory."[228] Nevertheless, rather than learn from this history, at least one ICC Trial Chamber has embraced the ICTY's approach to the acts and conduct limitation when applying Rule 68(2)(b), rendering the Court vulnerable to similar critiques regarding its use.[229] Should the ICC continue to proceed in this direction, it ought to learn from Tribunal precedent in other ways. For example, Trial Chambers should make clear that whenever the proposed witness statement addresses a critical element of the Prosecution's case or a live and important issue, these are not simply "important consideration[s]" regarding the question of cross-examination, as some of the existing Tribunal case-law provides.[230] Instead, such factors—which ought not to be determined based solely on party representations—should render the opportunity for witness examination a prerequisite to admission.

Along these lines, at least one ICC Trial Chamber has demonstrated an important and particular sensitivity to the partisan nature of evidence presentation at the ICC and the consequent need for (time-consuming) caution in assessing the admissibility of written statements under the rule.[231] This might be seen as evidence that the Court has learned from ICTY experience that it cannot simply rely on the prosecution's characterization of its evidence before dispensing with critical reliability safeguards, such as the test of cross-examination. While this would certainly constitute a positive fair trial development, the true test of the Court's commitment to this

228. *See supra* notes 146–47 and accompanying text.

229. Wald, *supra* note 159, at 473 (contending that the admission of "critical material without the ability to view and question the witness goes to the heart of the process"). *See also* Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 908 n.370 (2005) (concluding that "the use of written evidence has probably worsened the truth-determination ability of ICTY trials").

230. Prosecutor v. Đorđević, Case No. IT-05-87/1-T, Decision on Prosecutor's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 11, 2009).

231. Prosecutor v. Gbagbo, ICC-02/11-01/15, Public Redacted Version of "Prosecution Application to Conditionally Admit the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(2)(b) and the Prior Recorded Statements and Related Documents of [REDACTED] Under Rule 68(3)," ¶ 14 (Apr. 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03092.PDF.

approach will only come in time and, notably, at the expense of more efficient proceedings. Stated another way, this aspect of the ICC's early 68(2)(b) jurisprudence highlights a critical tension between the effort needed to make sure that the sub-rule is fairly applied and its intended aim of expediting proceedings.[232] When coupled with the empirical work of Langer and Doherty on its sister provision at the ICTY[233] and the comparably limited usefulness of 68(2)(b) evidence at the ICC,[234] the sub-rule's ability to expedite Court proceedings is, at best, an open question.

VI. ICTY RULE 92 TER/ICC RULE 68(3)

A. *The ICTY Experience*

Another overlap between the Tribunal and the Court lies in the parallel provisions of ICTY Rule 92 *ter* and ICC Rule 68(3), although the latter predates the former's adoption at the ICTY.[235] Both rules specifically sanction the introduction of written witness statements that go directly to the acts or conduct with which the accused is charged, provided the declarant appears at trial for examination.[236] The ICTY rule codified a practice first employed in the *Slobodan Milošević* trial[237] and,

232. Int'l Criminal Court [ICC], *Study Group on Governance: Working Group on Lessons Learnt: Second Rep. of the Court to the Assembly of States Parties*, ICC-ASP/12/37Add.1, ¶ 18 (Oct. 31, 2013), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf [hereinafter Study Group on Governance, Second Rep.].

233. *See supra* note 195 and accompanying text.

234. Int'l Bar Ass'n, *Rule 68 Amendment Proposal* (Nov. 12, 2013) (noting that when an institution, like the ICTY, is prosecuting multiple cases arising out of the same or related conflicts there can be a distinct benefit to a rule like ICTY Rule 92 *bis* or ICC Rule 68(2)(b) but that "the usefulness of this provision from one case to another before the ICC is likely to be more limited").

235. Under the ICC's original rules, Rule 68(b) permitted the use of previously recorded, unexamined testimony, provided that the witness agreed and was available for examination at trial. ICC RPE, Rule 68 (b), ICC-ASP/1/3 (2002). Under the revised rules, this provision now appears in Rule 68(3). ICC RPE, Rule 68(3), ICC-PIDS-LT-02-002/13_Eng (2013).

236. ICTY RPE, Rule 92 *ter* (A)–(B), U.N. Doc. IT/32/Rev. 39 (Sept. 26, 2006).

237. Prosecutor v. Miloševic, Case No. IT-02-54-AR73.4, Decisions on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, ¶ 21 (Sept. 30, 2003) (endorsing the practice in gen-

while that decision was controversial,[238] the use of Rule 92 *ter* has been less so. In this respect, it is first worth noting that the rule might be described as more rights-protective than 92 *bis*. Specifically, when one considers the narrow reach of 92 *bis*' acts and conduct limitation,[239] 92 *ter* offers greater protection to the accused because it provides for cross-examination as a matter of right.[240] Nevertheless, the provision has been criticized for undermining the accused's right to a public trial,[241] as well as for the fact that its use precludes the judges from making credibility determinations as to the prosecution's evidence in chief.[242]

Rule 92 *ter* has also helped push the Tribunal towards what might be described as an unwelcome reliance on written evidence. This effect was most recently—and markedly—illustrated in the *Karadžić* trial. In that matter, a total of 195 prosecution witnesses were called, with only nineteen contributing purely to the prosecution's case-in-chief by way of live testimony.[243] The remainder were admitted pursuant to 92 *ter*,[244] with a less extensive examination-in-chief.[245] In addition, more

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eral, but leaving it to the Trial Chamber to perform an interests of justice analysis with respect to the admissibility of each statement).

238. *See, e.g.*, Prosecutor v. Miloševic, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ¶¶ 6–7 (Oct. 21, 2003.) Hunt, the author of the *Galic* opinion, reminded of the dangers of party-created evidence and noted that concerns about fabrication and misrepresentation prompted the decision to limit 92 *bis* to written evidence to statements that did not address the acts and conduct of the accused charged in the indictment. *Id.*

239. *See supra* notes 146–53 and accompanying text.

240. Early versions of Rule 92 *bis* incorporated this discretionary aspect entirely within the body of that rule. *See, e.g.*, ICTY RPE, Rule 92 *bis* (E), U.N. Doc. IT/32/Rev.19 (Jan. 19, 2001). The provisions later provided that, when cross-examination is deemed required, 92 *ter* applies. ICTY RPE, Rule 92 *bis* (C), U.N. Doc. IT/32/Rev. 50 (July 8, 2015).

241. *See, e.g.*, Rohan, *supra* note 161, at 301–02 (noting that *92 ter* statements are "never revealed in open court" and can be accompanied by exhibits that "may or may not ever be mentioned, discussed, or be the subject of examination in open court").

242. Kay, *supra* note 82, at 500.

243. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Verdict of Judgment on 24 March 2016, ¶ 6136 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

244. *Id.*

245. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Order on the Procedure for the Conduct of Trial, ¶¶ M–N, (Int'l Crim. Trib. for the Former

than one hundred submissions were admitted under 92 *bis*.[246] Predictably, this dependence on written evidence features prominently in Karadžić's recently launched appeal.[247] It has also been part of his legal adviser's public commentary on the trial, which unabashedly questions the legitimacy of one of the ICTY's most important prosecutions by highlighting the Tribunal's pre-trial decision "that Karadžić would not be allowed to question 148 prosecution witnesses whose statements or prior testimony were admitted into evidence against him."[248]

It follows that this extensive use of written evidence has the tendency to negatively affect not only the fair trial rights of the accused and the perceived fairness of the proceedings but also the "symbolic significance" of international criminal prosecutions.[249] This is particularly true because a vast amount of associated exhibits, "unseen by the general public," tend to be introduced in conjunction with the statements, a process that "negatively impacts on the public character of the trial"[250] and consequently hinders the public's access to evidence.[251] In fact, the public is left unaware of the substance of both these

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Yugoslavia Oct. 8, 2009) (providing that the parties may submit amalgamated 92 *ter* statements and that the presenting party may conduct either a limited examination-in-chief for the purposes of "clarifying or highlighting particular aspects of the witness's evidence" or a broader examination-in-chief of "partial" 92 *ter* witnesses—witnesses whose evidence was submitted partly in writing and partly elicited orally through direct examination).

246. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Verdict of Judgment on 24 March 2016, ¶ 6137 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).

247. Prosecutor v. Karadžić, Case No. MICT-13-55-A, Radovan Karadžić's Notice of Appeal, ¶ 2 (Mechanism for Int'l Crim. Tribs. July 22, 2016) (asserting that "admitting untested written evidence of huge swaths of the prosecution's case before the trial even began" violated the presumption of innocence and gave rise to four separate grounds of appeal).

248. Peter Robinson, *The Karadžić Case: Fair Trial or Show Trial?*, E-INT'L REL. (Mar. 1, 2012), http://www.e-ir.info/2012/03/01/the-Karadžić-case-fair-trial-or-show-trial (noting that, before the first witness was called, a mountain of evidence had already been admitted against the accused).

249. Mark Findlay, *Synthesis in Trial Procedures? The Experience of International Criminal Tribunals*, 50 INT'L & COMP. L.Q. 26, 52 (2001) (averring that international criminal trials ought to be as public as possible and a process in which "the interest of the observer should be retained").

250. Fergal Gaynor et al., *Admissibility of Documentary Evidence, in* INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES, *supra* note 35, at 1044, 1057.

251. Rohan, *supra* note 161, at 301–02.

associated exhibits and the contents of the admitted statement, "which is the witness's case in chief—[because this] is never revealed in open court."[252] These factors, in turn, create a noticeable conflict between the ICTY Prosecution's evident interest in increasing the amount of written testimony introduced at trial[253] and its acknowledgment that "the production of large quantities of written evidence can render trials sterile, reduce the impact of prosecution evidence, and may make the criminal process very difficult for the public to follow."[254] In addition, the greater the amount of written evidence, the greater the likelihood that its use will "preclude the transparency needed in order to engage interested communities,"[255] thereby undermining the institution's "reconciliatory function."[256]

B. *ICC Parallels*

By comparison, one might be tempted to conclude that the ICC is unlikely to face similar problems in its combined use of 68(2)(b) and 68(3) primarily because of the Court's avowed statutory preference for in-person testimony.[257] However, recent developments at the ICC suggest otherwise. De-

252. *Id.* at 296–97 (noting that the offering party simply reads a summary of the statement into the record).

253. Wald, *supra* note 12, at 541 ("The Prosecutor has stated on several occasions, her belief that, for expedition's sake, more evidence should be introduced in the civil-Continental form, as opposed to live witnesses.").

254. U.N. Secretary-General, *Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶ 54, U.N. Doc. A/54/850 (Apr. 27, 2000) (noting further that written evidence may undermine the credibility of the tribunals in the eyes of victims and the international community).

255. Jackson, *supra* note 64, at 22.

256. Sluiter, *supra* note 46, at 233.

257. Rome Statute, *supra* note 3, art. 69(2) ("The testimony of a witness at trial *shall* be given in person, *except* to the extent provided by the measures set forth in Article 68 or in the RPE.") (emphasis added). "This sentence makes in-court personal testimony the rule, giving effect to the principle of orality." Prosecutor v. Bemba, Case No. ICC-01/05-01/08-1386 OA5 OA6, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor Against the Decision of Trial Chamber III Entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence," ¶ 76 (May 3, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05528.PDF.

spite early optimism that the Court would be immune from the efficiency pressures placed on the ICTY due to the Tribunal's temporary status,[258] the ICC's permanency has not shielded it from this type of external compulsion. Instead, just as the Tribunal was made to answer for its slow progress to the entity that created and financed its operation, the same has been the case at the ICC since at least 2010. That year, the ICC's Assembly of States Parties (ASP) adopted a resolution that expressly identified improving "the efficiency and effectiveness" of the Court as "a common interest" of the ASP and the ICC.[259] This started a process that resulted in revised Rule 68, a provision adopted on the recommendation of a group of ICC judges,[260] in consultation with major stakeholders, to "reduce the length of Court proceedings and streamline evidence presentation."[261]

Accordingly, Trial Chambers have begun to move towards using the rule for its avowed purpose. For example, the *Nta-*

258. *See* Caianiello, *supra* note 45, at 408 (contending that the pressures placed on the Tribunal, intimately tied to the goal of bringing the institution to a close, "should not have any implications for the ICC, which is not subject to any completion strategy").

259. Int'l Criminal Court [ICC], Resolution ICC-ASP/9/Res.2: Establishment of a Study Group on Governance, ICC-ASP/9/20 (Dec. 10, 2010).

260. The proposal came from the Working Group on Lessons Learnt, a group created in 2012 to determine the necessary amendments to the ICC's Rules of Procedure and Evidence. All interested judges could contribute to the group. Int'l Criminal Court [ICC], *Study Group on Governance: Lessons Learnt: First Rep. of the Court to the Assembly of States Parties*, ICC-ASP/11/31/Add.1, ¶ 13 (Oct. 23, 2012), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-31-Add1-ENG.pdf [hereinafter Study Group on Governance, First Rep.]

261. Int'l Criminal Court [ICC], *Report on the Working Group on Amendments*, ICC-ASP/12/44, ¶ 8 (Oct. 24, 2013), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-44-ENG.pdf. *But see* YVONNE MCDERMOTT, FAIRNESS IN INTERNATIONAL CRIMINAL TRIALS 90–91 (2016) (maintaining that the "efficiency argument" does not stand up to scrutiny, in part because the length of the Court's first prosecution, which lasted over eight years, was not attributable to in-court testimony). In fact, fewer than seventy witnesses were called in the Lubanga trial. Håkan Friman, *Trial Procedures—With a Particular Focus on the Relationship Between the Proceedings of the Pre-Trial and Trial Chambers*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 909, 910 (Carsten Stahn ed., 2015). At the same time, however, Friman notes that the Prosecutor's revised policies, announced prior to the amendments, "may result in more witnesses and greater reliance on 'live testimony,' which could extend the length of proceedings." *Id.* at 913.

ganda Chamber recently directed the prosecution to "consider the use of Rule 68(2)(b) in appropriate cases and increase the use of Rule 68(3)" to expedite trial proceedings,[262] a demand that prompted the prosecution to add more than a dozen witnesses under the provision in addition to those whose testimony it had already submitted in paper form.[263] The *Gbagbo* Chamber also appears to have recently embraced the rule's efficiency potential. First, in a manner reminiscent of the changes noted in the Tribunal's Annual Reports,[264] the Chamber went from highlighting the importance of live witness testimony and full respect for the rights of the accused to silence on both topics. Specifically, in September 2015, the Chamber's Directions on the Conduct of Proceedings expressly noted "the primacy of orality and the right of the accused to examine or have examined the witnesses against him."[265] Yet, just eight months later, the Chamber issued a revised set of directions that makes no reference to the principle of orality, nor to the right of the accused to confront his accusers. Instead, the revised directions note simply that "the parties may make use of prior recorded testimonies with a view to maximizing the efficiency of the time spent in the courtroom."[266] This marked an apparent turning point in the case, opening the door to a development that demonstrates the limited effect of the Court's ostensible preference for in person testimony, despite its noted virtues in ICC appellate jurisprudence.[267]

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262. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Supplemental Decision on Matters Related to the Conduct of Proceedings, ¶ 15, (May 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03798.PDF.

263. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Prosecution's Revised Time Estimates for the List of Witnesses (July 29, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_05470.PDF.

264. *See supra* note 88 and accompanying text.

265. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Directions on the Conduct of the Proceedings, ¶ 54 (Sept. 3 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15523.PDF. The remaining two paragraphs under the heading of recorded testimony discuss only the designated time requirements for Rule 68 filings. *Id.* ¶¶ 55, 56.

266. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Decision Adopting Amended and Supplemented Directions on the Conduct of the Proceedings, Annex A, ¶ 48 (May 4, 2016), https://www.icc-cpi.int/RelatedRecords/CR2016_03214.PDF.

267. *See, e.g.*, Prosecutor v. Bemba, Case No. ICC-01/05-01/08-1386 OA5 OA6, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor Against the Decision of Trial Chamber III Entitled "Decision on

By mid-2016, the prosecution announced its plan to tender at least seventy-eight further applications pursuant to revised Rule 68 in the *Gbagbo* trial, meaning "that well over half of the prosecution witnesses in [the] case would never provide their evidence orally."[268] Gbagbo objected and contrasted this fact with the Court's unmodified, *statutory preference* for live testimony.[269] Despite acknowledging these arguments, however, the ICC Appeals Chamber did not effectively engage with them. Instead, its November 2016 decision simply maintained that "respect for the principle of orality cannot be reduced to a purely mathematical calculation of the percentage of witnesses providing their entire evidence orally."[270] In other words, even when the majority of witness testimony is in the form of out-of-court statements, an ICC trial may nevertheless comply with a statutory provision that "makes in-court per-

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the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence," ¶ 76 (May 3, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05528.PDF ("The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.").

268. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3), Annex Red, Partially Dissenting Opinion of Judge Henderson, ¶ 3 (June 13, 2016), https://www.icc-cpi.int/RelatedRecords/CR2016_04267.PDF.

269. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Document in Support of the Appeal Against the "Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3)," ¶¶ 9–11 (July 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_05426.PDF.

270. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15 OA 8, Judgment on the Appeals of Mr. Laurent Gbagbo and Mr. Charles Blé Goudé Against the Decision of Trial Chamber I of 9 June 2016 Entitled "Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony Under Rules 68(2)(b) and 68(3)," ¶ 78 (Nov. 1, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_24756.PDF. The Trial Chamber has since emphasized the need to expedite the proceedings, emphasizing that the then-predicted use of live witness testimony was unsustainable. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/15, Order Requesting the Parties and Participants to Submit Information for the Purposes of the Conduct of the Proceedings Pursuant to Article 64(2) of the Statute and Rule 140 of the Rules of Procedure and Evidence (Jan. 23, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_00317.PDF.

sonal testimony the rule."[271] Admittedly, this approach might make sense under the right set of facts—if, for example, written statements (though numerous) are extremely limited in content, while the testimony of fewer, well-placed witnesses delivers most of the evidence against the accused. Yet, this more nuanced approach muddies the waters regarding what statutory compliance requires, resulting in an ambiguity that is unlikely to play out in the accused's favor. Indeed, the Appeals Chamber's pronouncement may ultimately mean that the Court's in-principle preference for live testimony is imperceptible in practice and, perhaps, indiscernible from that of the ICTY.

VII. ICTY RULE 92 *QUATER*/ICC RULE 68(2)(C)

A. *The History Behind 92* quater's *"Reliability" Requirement*

In 2006, the ICTY adopted Rule 92 *quater*,[272] which addresses the admissibility of written statements made by unavailable persons (individuals now deceased, untraceable, or too impaired to testify in court).[273] The provision was later imported (almost verbatim) into the ICC RPE as Rule 68(2)(c),[274] although 92 *quater's* history raises legitimate questions about this decision. Prior to the rule's adoption at the ICTY, written statements of unavailable witnesses were ad-

271. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-1386 OA5 OA6, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor Against the Decision of Trial Chamber III Entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence," ¶ 76 (May 3, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_05528.PDF. *See also supra* note 257 and accompanying text.

272. Like the amendments noted above, the rule resulted from a rights-protective case that prohibited the admission of a written statement by a deceased witness that went to the acts and conduct of the accused. *See* McDermott, *supra* note 103, at 972–73. Ostensibly the rule was adopted to "save court time and expense." OIOS 2008 Audit, *supra* note 187, ¶ 45.

273. ICTY RPE, Rule 92 *quater* (B), U.N. Doc. IT/32/Rev. 39 (Sept. 26, 2006).

274. The only significant difference in the ICC Rule is that it requires Trial Chambers to consider whether the prosecution should have anticipated the witness's unavailability, such that it should have availed of the Statute's "unique investigative opportunity" option. ICC RPE, Rule 68(c)(i), ICC-PIDS-LT-02-002/13_Eng (2013). This statutory provision allows for evidence taking with defense representation. *See* Rome Statute, *supra* note 3, art. 56(1), (2)(d).

dressed under 92 *bis* (C) and, as such, the statements could only be admitted if their content did not address the acts and conduct of the accused.[275] At the same time, statements of unavailable witnesses under 92 *bis* enjoyed a special status as compared to those of available persons under the same rule. While the latter had to meet specific technical requirements, including a witnessed affirmation of truth under penalty of perjury,[276] all that was required for admissibility in the case of unavailable witnesses—as remains true under Rule 92 *quater* and, now, ICC Rule68(2)(c))—was a finding of "reliability."[277]

Shortly after 92 *bis* was adopted, this reliability requirement was criticized, not for being too lenient but for creating an unnecessary impediment to admission. According to Judge May, conditioning the admissibility of untested statements of unavailable witnesses on the basis of reliability is problematic, primarily because subsequently admitted evidence may establish that the excluded statements were actually trustworthy.[278] Under this view, the statements should be admitted and, if insufficiently bolstered throughout the trial, disregarded by the judges when formulating their judgment.[279] The fairness of this approach, then, depends upon the judges' ability to "'un-

275. *See, e.g.*, Prosecutor v. Naletilic, Case No. IT-98-34-T, Decision on the Prosecutor's Request for a Public Version of Trial Chamber's "Decision on the Motion to Admit the Statements of Deceased Witnesses [. . .]" of 22 January 2002," Annex A (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2002) (maintaining that a "teleological interpretation of Rule 92 *bis* requires Rule 92 *bis* (C) to be read in the light of the material restriction laid down in Rule 92 *bis* (A)").

276. ICTY RPE, Rule 92 *bis* (B), U.N. Doc. IT/32/Rev. 39 (Sept. 26, 2006) (requiring that the witness acknowledge that she could be prosecuted for providing false testimony).

277. ICTY RPE, Rule 92 *bis* (C)(ii), U.N. Doc. IT/32/Rev. 38 (June 13, 2006) (requiring only that the Chamber "finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of reliability"). The ICC rule drops the language addressing how the statement was taken and uses the phrase "sufficient indicia of reliability." ICC RPE, Rule 68(2)(c)(i), ICC-PIDS-LT-02-002/13_Eng (2013).

278. MAY & WIERDA, *supra* note 116, at 226–27.

279. *Id.* at 227 (concluding that excluding evidence at the admissibility stage is "contrary to the presumption that professional judges are able to exclude unreliable evidence from the minds when formulating their judgment").

bite' the apple of knowledge."[280] Moreover, even assuming professional judges possess this cognitive super power,[281] removing the indicia of reliability requirement would arguably have been inefficient. First, it would have invited the parties to tender an unlimited number of unreliable, untested, and possibly untestable statements whenever the statements placed the best gloss on the evidence for their side. In turn—and in particular when the non-moving party is the defense—failing to counter the statements would be a risky manoeuver. In effect, if an accused is unsure of whether admitted statements will factor into the final analysis, the prudent course of action is to respond to all such admitted statements—even those lacking in apparent value—as failing to do so could ultimately place the accused in peril.[282]

In addition, requiring some element of reliability before admitting the written statement of an unavailable witness was consistent with the Tribunal's unique approach to this type of party-generated evidence. Under 92 *bis,* the written statements of *available* witnesses are admissible only after meeting a host of technical requirements, including that the statement be witnessed,[283] sworn,[284] and provided under penalty of perjury.[285]

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280. Mirjan R. Damaška, *Free Proof and Its Detractors,* 43 AM. J. COMP. L. 343, 352 (1995) (contending that it is difficult "for any person—lay or professional—to 'unbite' the apple of knowledge").

281. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding,* 153 U. PA. L. REV. 1251, 1330–31. Wistrich et al. conclude, after a series of experiments, that judges generally lack the capacity to ignore relevant, inadmissible evidence. *See also* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation,* 12 BEHAV. SCI. & L. 113, 125 (1994) (reporting on a study in which the decision-making of judges and jurors alike was affected by previously excluded evidence, although the judges seemed unaware of their biases).

282. In fact, there is striking international precedent for this, although it has been rightly criticized as potentially "imposing a positive burden on accused persons to counter the evidence against them." McDermott, *supra* note 103, at 984 (discussing an ICTY case in which the Trial Chamber appears to have given added weight to a 92 *bis* statement because the defense did not attempt to rebut it).

283. The statement must be accompanied by a declaration witnessed by "a person authorised to witness such a declaration in accordance with the law and procedure of a State" or by a "Presiding Officer appointed by the Registrar of the Tribunal for that purpose." ICTY RPE, Rule 92 *bis* (B)(i)(a)–(b), U.N. Doc. IT/32/Rev.50 (July 8, 2015).

284. *Id.* Rule 92 *bis* (B)(ii)(b).

Rather clearly, these technical requirements governing the admission of statements from available witnesses are designed to enhance the accuracy and, consequently, the reliability of this "very special type of hearsay."[286] Accordingly, it made sense to condition the admission of statements from unavailable witnesses on some type of assurance as to their reliability, particularly given the informal and confusing manner in which such statements are often taken,[287] as well as the witnesses' complete unavailability for cross-examination. Indeed, these factors suggest that the threshold for admissibility ought to be at least as rigorous, if not greater, when a party proffers a document it created from its interview of a now unavailable witness. Nevertheless, the rule adopted and retained this (much) less rigorous standard for almost six years, until it was moved into (then-new) Rule 92 *quater*.[288]

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285. *Id.* Rule 92 *bis* (B)(ii)(c).

286. Prosecutor v. Galic, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia June 7, 2002).

287. For example, the *Naletilic* Chamber noted its "various concerns with regard to the general reliability of witness statements given to investigators of the Prosecution . . . namely the fact that such statements are not given under oath, that they never have been subject to cross-examination, that they are given by a witness not contemporaneously with the events in question but only some years afterwards, and, that, in particular, the taking of these statements regularly involves the process of multiple translations whose reliability as such already appears to be at least questionable." Prosecutor v. Naletilic, Case No. IT-98-34-T, Decision on the Prosecutor's Request for a Public Version of Trial Chamber's "Decision on the Motion to Admit the Statements of Deceased Witnesses [. . .]" of 22 January 2002," Annex A (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2002). By contrast, as the Appeals Chamber noted in the Kordic case, a statement "made under formal circumstances . . . might increase its reliability." Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

288. ICTY RPE, Rule 92 *quater* (A)(i)–(ii), U.N. Doc. IT/32/Rev.50 (July 8, 2015). This rule essentially replicates, with minor stylistic refinements, former Rule 92 *bis* (C)(i) and (ii). For example, while 92 *bis* (C)(ii) required the Chamber to "find from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability," ICTY RPE, Rule 92 *bis* (C)(iii), U.N. Doc. IT/32/Rev. 39 (Sept. 26, 2006), Rule 92 *quater* rephrases this to require that the Chamber "find[ ] from the circumstances in which the statement was made and recorded that it is reliable." ICTY RPE, Rule 92 *quater* (A)(ii), U.N. Doc. IT/32/Rev.50 (July 8, 2015). The new rule likewise refines the language describing unavailability and the

The decision to transfer this more relaxed standard into the new rule becomes even more remarkable when one considers that, unlike 92 *bis*, 92 *quater* expressly permits the admission of statements that address the acts and conduct of the accused as charged in the indictment.[289] Critically, this aspect of 92 *quater* lies in significant tension with the Tribunal's earlier worries about the reliability of party-generated witness statements that notably curbed the reach of 92 *bis*.[290] By contrast, 92 *quater* essentially ignores this concern, even though it arguably ought to apply with even greater force to statements that cannot be tested by cross-examination.[291] Moreover, the Tribunal's piecemeal approach to rule adoption and amendment resulted in an even further lopsided and illogical state of affairs within its revised set of rules that, inexplicably, was later imported into the ICC framework.[292] At the ICTY (and now at the ICC) written statements of *available* witnesses that do *not* go to the acts and conduct of the accused are subjected to more onerous admissibility requirements, while a much less exacting hurdle of "reliability"[293] applies to statements of *un-*

Chamber's finding thereof, but keeps the common meaning of the provisions wholly intact. *Id.*

289. ICTY RPE, Rule 92 *ter* (B), U.N. Doc. IT/32/Rev.50 (July 8, 2015).

290. *See supra* note 101 and accompanying text.

291. The sub-rule implicitly acknowledges that admitting written evidence that goes to proof of acts and conduct of an accused as charged in the indictment can be problematic by making this characteristic a factor that *may* go against the admission of such evidence. ICTY RPE, Rule 92 *quarter* (B), U.N. Doc. IT/32/Rev.50 (July 8, 2015). There is, however, no official, substantive discussion about 92 *quater*, not even in the annual report issued immediately after its adoption. Fourteenth Ann. ICTY Report, *supra* note 182, ¶ 29 (noting only the addition of the rule by name).

292. *See* ICC RPE, Rule 68(2)(b), ICC-PIDS-LT-02-002/13_Eng (2013) (replicating the acts and conduct limitation from 92 *bis*); ICC RPE, Rule 68(2)(b)(ii)–(iii), ICC-PIDS-LT-02-002/13_Eng (2013) (requiring that testimony submitted pursuant to Rule 68(2)(b) be sworn and comply with additional technical requirements, including that the author was advised of perjury liability); ICC RPE, Rule 68(2)(c), ICC-PIDS-LT-02-002/13_Eng (2013) (providing that an unsworn statement from an unavailable witness may be admitted if sufficiently reliable and that the statement may go to the acts and conduct charged, although this *may* be a factor against admission).

293. Gosnell, *supra* note 89, at 398 ("In practice, a signed witness statement elicited by a party, even without attestation before a judicial officer, will generally suffice.").

available witnesses that *may* address the substance of the prosecution's charges.[294]

B. *Rule 92* quater, *as applied*

In the main, ICTY Trial Chambers appear to have been cautious in their admission of 92 *quater* evidence, particularly when the proposed statements address the acts and conduct of the accused. In at least three instances, two separate chambers rejected the prosecution's attempt to admit such statements under the rule because admission without the opportunity for cross-examination would have "constitute[d] an unfair prejudice.[295] Moreover, in the limited instances in which 92 *quater* statements that directly implicated the accused were admitted, the associated decisions appeared to require something more than the rule's "indicia of reliability" threshold.[296] Specifically, Trial Chambers sought additional "guarantees of reliability" before exercising the discretion to admit this type of Rule 92 *quater* evidence, such as the cumulative nature of the statements, corroboration from other witnesses, and the defense's ability to cross-examine other prosecution witnesses who provided similar evidence.[297] Indeed, even when pro-

294. Rohan, *supra* note 161, at 299 (describing the disparity as "ironic").

295. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazic Pursuant to Rule 92 *Quarter* and for Leave to Add Exhibits to Rule 65 *Ter* Exhibit List, ¶ 22, (Int'l Crim. Trib. for the Former Yugoslavia Jan. 9, 2012); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 *Quater*, ¶¶ 41–42 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 13, 2010); *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Redacted Version of the "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (F), 92 *Bis*, 92 *Ter* and 92 *Quarter* of the Rules of Procedure and Evidence" Filed Confidentially on 7 January 2008, ¶¶ 41–42 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 21, 2008) (rejecting, in the "interests of justice," the written testimony of deceased witnesses whose statements directly allege responsibility of the accused who would be denied the right of cross-examination).

296. *See, e.g.*, Prosecutor v. Milutinovic, Case No. IT-05-87-T, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, ¶ 7 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 2007) (concluding that there was a satisfactory indicia of reliability regarding a prior statement because the witness later affirmed it was true).

297. *See, e.g.*, *id.* at ¶ 9 (describing the 92 *quater* statement as relating to and "generally consistent with" the evidence of two live witnesses whom the defense cross-examined). *See also* Prosecutor v. Popovic, Case No. IT-05-88-T,

posed Rule 92 *quater* statements did *not* address the acts and conduct of the accused, whether the statement was corroborative in nature generally played an important role in determining if admission would prejudice the accused.[298]

Nevertheless, and consistent with the analysis above, most academic commentary on the rule is suitably critical, as Rule 92 *quater's* ability to implicate fair trial concerns has the makings of a perfect storm. Subject to an undemanding reliability requirement, the rule permits the introduction of party-generated witness statements that go directly to establishing the charges against the accused, despite a longstanding (and reasonable) suspicion of this type of evidence in adversarial proceedings,[299] and all without the benefit of cross-examination. As a result, 92 *quater* "risks leading a trial chamber to draw impermissibly incriminating conclusions upon evidence that is not sufficiently reliable for that purpose,"[300] thereby posing a serious threat to the institution's normative and sociological legitimacy.

C. *Relevant ICC Practice*

Thus far, the Court's case law includes at least one ruling that replicates the Tribunal's emphasis on corroboration in its 68(2)(c) assessment.[301] However, a separate decision in the

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Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, ¶¶ 45, 48, 57, 64 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 21, 2008) (considering the cumulative nature of the evidence, the corroboration of other witnesses, and the fact that, in each case, the testimony was elicited during prior judicial proceedings).

298. *See e.g.*, Prosecutor v. Mladic, Case No. IT-09-92-T, Decision of Prosecution Rule 92 *Quater* Motion (Witness RM-012), ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 13, 2013) (determining that the accused was not prejudiced by the lack of cross-examination with respect to a statement admitted pursuant to 92 *quater* because the statement was cumulative and did not go to the acts and conduct charged in the indictment).

299. Jackson, *supra* note 64, at 33 ("Strict rules such as regarding hearsay in an adversarial setting reflect suspicions about the way in which evidence is gathered and collected by the parties. Relaxing the standards for admissibility of such evidence without the possibility of a full and effective examination of the original source runs the risk of error.").

300. Gosnell, *supra* note 89, at 420.

301. *See, e.g.*, Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Decision on "Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence," ¶ 22 (Nov. 12, 2015), https://www.icc-cpi.int/CourtRecords/CR2017_00929.PDF (exercising its discretion to ad-

Ntaganda case applied the provision quite differently. In that matter, the Prosecution used Rule 68(2)(c) to introduce the out-of-court statements and transcripts of three (then-deceased) witnesses and more than sixty associated exhibits.[302] Contrary to comparable ICTY case law, however, the *Ntaganda* Chamber's admissibility assessment included no consideration of whether the proposed written testimony was cumulative, corroborated by other evidence, or capable of being tested in other ways

In fact, the decision omits any reference to these prominent ICTY safeguards. It likewise neglects to consider how the statements' admission might impact the fairness of the trial, even though the written testimony of one of the witnesses pertained directly—and quite damningly—to the charges against Ntaganda.[303] Instead, the decision merely states that because of its reliability[304]—noted as an undemanding *prerequisite* to admission multiple times over—"the Chamber considers that the testimony's *prima facie* probative value outweighs any prejudicial effect caused to the accused by its introduction."[305] Accordingly, the evidence was admitted without any discernible consideration of its effect on the fairness of the trial,[306] nor any mention of the negative impact that the absence of cross-examination might have upon the proceedings.

D. *International Human Rights Law and Efficiency*

In addition to the fair trial concerns created by 92 *quater*/68(2)(c), the fact that cross-examination is impossible runs the

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mit a Rule 68(2)(c) statement introduced "solely to corroborate" other prosecution evidence).

302. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on Prosecution Application Under Rule 68(2)(c) of the Rules for Admission of Prior Recorded Testimony of P-0022, P-0041 and P-0103 (Nov. 20, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_22692.PDF.

303. The proposed written evidence included allegations of Ntaganda's personal "involvement in the training of child soldiers in Mandro, the murder of a priest in Mongwalu and acts of pillaging." *Id.* ¶ 37.

304. *Id.* ¶ 32. This conclusion was based on the fact that the witness's out of court statement was "internally coherent and consistent with [the witness's] in-court testimony [in a separate case]," was signed by the witness and indicated that it was voluntarily given).

305. *Id.* ¶ 27.

306. The Trial Chamber acknowledged this statutory responsibility at the outset of the opinion, but made no subsequent reference to it. *Id.* ¶ 6.

risk of (ironically) undermining the efficiency of trial proceedings. For example, at the ICTY, convictions could not be "based solely, or in a decisive manner" on evidence that had not been subjected to cross-examination.[307] This standard, based on then-existing international human rights law rendered the utility of unexamined, directly incriminating written evidence entirely dependent upon corroborating, independent evidence.[308] Nevertheless, the existence of the latter at the ICTY was not a prerequisite to the admission of the former.[309] Consequently, nothing prevented the admission of uncorroborated, unexamined, directly incriminating written statements although, by definition, these submissions were simply not useful.[310] Moreover, the introduction of such evidence was also arguably inefficient in cases where it was supported by independent, corroborating evidence. Pursuant to the "sole or decisive" limitation on unexamined evidence, the independent, properly tested evidence must be capable of supporting a conviction on its own,[311] a fact that seemingly renders related, untested written evidence superfluous. By contrast, if the untested written evidence is needed to support the independent, tested evidence, this would render it decisive

307. *See, e.g.*, Prosecutor v. Prlic, Case No. IT-O4-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 23, 2007) (noting Tribunal compliance with then existing ECtHR case-law).

308. Gosnell, *supra* note 89, at 419.

309. *Id.* at 420. *See, e.g.*, Prosecutor v. Popovic, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, ¶¶ 62–63 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 21, 2008) (maintaining that corroboration is "simply a factor to take into consideration" when applying 92 *quarter* and deciding to admit a directly incriminating, unexamined, and partly uncorroborated statement pursuant to the rule).

310. Adding to this inefficiency, 92 *quater* statements may be accompanied by associated documents and exhibits. *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on the Admission of Statements of Two Witnesses and Associated Documents Pursuant to Rule 92 *Quater* (Int'l Crim. Trib. for the Former Yugoslavia Jan. 16, 2009).

311. Gosnell, *supra* note 89, at 420 ("If the corroborated information is strong enough to ensure that the statement is not given 'decisive' weight, then it must logically also be weighty enough to sustain a conviction on its own.").

and, if so used, "the uncross-examined statement would be accorded more weight than it can be given."[312]

Whether this latter efficiency problem will extend to the ICC will depend upon whether the Court adopts the stricter "sole or decisive" test employed at the ICTY or the more flexible approach recently announced by the European Court of Human Rights (ECHR). According to the latter, a trial may be deemed fair even when untested evidence is decisive—that is, "of such significance or importance as to be likely to determine the outcome of the case"[313]—so long as there are "sufficient counterbalancing factors,"[314] such as corroboration.[315] Questions regarding the effect of such an approach on the Court's sociological legitimacy aside,[316] it would appear to be normatively legitimate for the Court to adopt this rule.[317] Even if the Court applied this more flexible test, however, the first noted efficiency problem remains: unless the necessary "counterbalancing factors" are made a prerequisite to admission, unexamined written statements (and their associated exhibits) submitted pursuant to 68(2)(c)—however voluminous and time-consuming to consider—may ultimately prove useless.

312. *Id.*

313. Horncastle v. United Kingdom, 2014-IV 1394 Eur. Ct. H.R. 1331, 1333 (citing Al-Khawaja v. United Kingdom, 54 Eur. Ct. H.R. 23 (2012)).

314. *Id.* at 1332 (maintaining that these can "compensate for any difficulties caused to the defence by the admission of the statement").

315. *Id.* at 1361 (concluding that an untested, presumed decisive statement was consistent with the right of the accused to a fair trial and to examine the witnesses against him because of "the strength of the other prosecution evidence in the case").

316. ICC convictions based decisively on untested, party-generated written statements could hardly do other than cause the institution reputational harm. *See, e.g.*, Al-Khawaja v. United Kingdom, 54 Eur. Ct. H.R. 23, ¶¶ 61, 70 (2012) (Sajó, J., and Karakas, J., partly dissenting and partly concurring) (expressing doubt over the modification of the sole or decisive test and contending that, even when counterbalancing measures are in place to protect the right to a fair trial, "it will remain a questionable achievement, as it comes at the price of sacrificing an expressly granted Convention right").

317. *See* Rome Statute, *supra* note 3, art. 21(3) (requiring compliance with internationally recognized human rights law). Nevertheless, it is possible to argue that this approach violates the accused's right to "to examine, or have examined, the witnesses against him or her," as this statutory provision includes no limiting language. *Id.* art. 67(1)(e).

E. *Summary*

Without doubt, the most remarkable aspect of 92 *quater* is that the rule permits the admission of written witness statements that directly implicate the accused in the crimes charged without the test of cross-examination. This change marked an unexplained about-face from the Tribunal's earlier expressed concerns about the reliability of such party-generated evidence and its consequent effect on a fair trial. At the same time, the Tribunal's use of 92 *quater* might be described as cautious. Its decisions explicitly recognize the importance of alternate guarantees of reliability, such as corroboration, even for proposed statements that do not directly implicate the accused. As for statements that address the acts and conduct charged, relevant jurisprudence unfailingly acknowledges their potential for prejudice and includes multiple instances of exclusion. Indeed, the Tribunal's admission of 92 *quater* statements directly implicating the accused appears consistently dependent upon alternate guarantees, such as corroboration and the ability to test the statements' content through the examination of other witnesses.[318]

Whether the ICC will follow the Tribunal's lead in this respect remains unclear, as early case law is limited, mixed, and non-binding.[319] While at least one Trial Chamber decision emphasizes the importance of corroboration to 68(2)(c) determinations, at least one other evidences decidedly less concern (if any) regarding the use of the rule and its effect on the Court's obligation to provide a fair trial.[320] In fact, the latter

318. For examples of such cases, see *supra* notes 296–97 and accompanying text.

319. Rome Statute, *supra* note 3, art. 21(2) ("The Court *may* apply principles and rules of law as interpreted in its previous decisions.") (emphasis added). Despite this seemingly broad language, Schabas convincingly argues that the *ratio decidendi* of Appeals Chamber decisions should be followed by the Trial and Pre Trial Chambers and that, in practice, this has thus far been the case. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 395–96 (2010).

320. *Compare* Prosecutor v. Bemba, Case No. ICC-01/05-01/13, Decision on "Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence," ¶ 22 (Nov. 12, 2015), https://www.icc-cpi.int/CourtRecords/CR2017_00929.PDF (exercising its discretion to admit a 68(2)(c) statement introduced "solely to corroborate" other prosecution evidence) *with* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on Prosecution Application Under Rule 68(2)(c) of the Rules for Ad-

decision appears to overlook the absence of corroborating evidence or other guarantees, maintaining instead that directly incriminating, party-generated witness statements are "prima facie" admissible upon meeting the sub-rule's relatively undemanding "indicia of reliability" requirement. Notably, should future rulings embrace this approach, this will impact both fairness and efficiency. Indeed, if the only admissibility prerequisite is a low hurdle that can be met by such factors as "internal consistency" and a witness's acknowledgment when giving her statement that it is voluntarily made,[321] this will invite the parties to follow the lead of their ICTY counterparts, clogging ICC trials with what Murphy has excellently coined "evidential debris."[322] As a result, Trial Chambers will have the task of twice vetting a vast number of 68(2)(c) statements (and their "associated exhibits")[323] only to afford little or no weight to the material in the final analysis. This, in turn, would exacerbate the aforementioned efficiency problems likely to result from the Court's compliance with international human rights law.

VIII. RULE 92 *QUINQUIES*/ ICC RULE 68(2)(D)

A. *The Adoption of 92* quinquies

Virtually all the observations regarding 92 *quater* apply equally to the subsequently adopted Rule 92 *quinquies*,[324] the last of the rules imported into the ICC's procedural framework and the final topic of consideration.[325] Like 92 *quater*, and again at odds with the Tribunal's earlier concerns about the reliability of party-generated evidence, 92 *quinquies* permits the

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mission of Prior Recorded Testimony of P-0022, P-0041 and P-0103 (Nov. 20, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_22692.PDF (not considering whether written testimony was corroborated by other evidence).

321. *See supra* note 304 and accompanying text. *See, e.g.*, Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on Prosecution Application Under Rule 68(2)(c) of the Rules for Admission of Prior Recorded Testimony of P-0022, P-0041 and P-0103 (Nov. 20, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_22692.PDF.

322. Murphy & Baddour, *supra* note 199, at 369.

323. Such evidence will be read first for admission and later as evidence. ZAHAR & SLUITER, *supra* note 188, at 345 n.135.

324. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Amendments to the Rules of Procedure and Evidence*, U.N. Doc. IT/268 (Dec. 16, 2009).

325. ICC RPE, Rule 68(2)(d), ICC-PIDS-LT-02-002/13_Eng (2013).

admission of untested statements that go directly to the acts and conduct with which the accused is charged.[326] The provision governs prior statements given by persons who fail to attend trial, or who attend but fail to give evidence, due to "improper interference."[327] In such cases, the rule provides that the prior statements may be considered, even without the test of cross-examination, whenever "the interests of justice [would be] best served" by their admission.[328] As explained by the ICTY's then-President Patrick Robinson, the provision was a "procedural innovation," designed to "enable core proceedings to go forward even where there are attempts to interfere with the administration of justice."[329]

Therefore, 92 *quinquies* was not adopted with the purpose of expediting trial proceedings *per se*, but rather to "offset any potential obstacles for the expeditious progress of the cases."[330] As has been widely observed, the rule was added to the ICTY's procedural regime in response to particular difficulties the Tribunal then faced.[331] Specifically, the rule was adopted at a time when the *Seselj* trial had been delayed for nearly a year due to allegations of witness intimidation.[332] Simultaneously, the Appeals Chamber was also considering the appeal of two acquittals in the *Hardinaj* case that were allegedly obtained under "prevailing circumstances of witness in-

326. ICTY RPE, Rule 92 *quinquies* (A), (B)(iii), U.N. Doc. IT/32/Rev. 50 (July 8, 2015).

327. *Id.* Rule 92 *quinquies* (A)(ii).

328. *Id.* Rule 92 *quinquies* (A)(iv). *See also* ICC RPE, Rule68(2)(d)(i), ICC-PIDS-LT-02-002/13_Eng (2013) (omitting the factors to be considered in the interests of justice assessment).

329. Int'l Crim. Trib. for the Former Yugoslavia [ICTY], *Statement by Judge Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, to the Security Council on 18 June 2010*, (June 18, 2010).

330. Peter Robinson, President, ICTY, Presentation at Diplomatic Seminar (May 28, 2009) (explaining the decision to consider a provision admitting the written statements of intimidated witnesses).

331. *See, e.g.*, GIDEON BOAS ET AL., 3 INTERNATIONAL CRIMINAL LAW PRACTIONER LIBRARY: INTERNATIONAL CRIMINAL PROCEDURE 354 n.98 (2011) (opining that the new rule was "apparently motivated by difficulties in securing witnesses in the *Seselj* and *Haradinaj* cases").

332. Press Release, Int'l Crim. Trib. for the Former Yugoslavia [ICTY] (Jan. 13, 2010), http://www.icty.org/sid/10302 (noting that the trial "was adjourned on 11 February 2009 on the request of the Prosecution amid allegations of witness intimidation").

timidation and fear."[333] In fact, because Rule 92 *quinquies* was adopted in the midst of the *Haradinaj* appeal,[334] there was some speculation at the time that the new rule would be used in the subsequent retrial.[335]

Instead, as was only recently revealed, the sole attempt to utilize the sub-rule arose in the *Karadžić* case.[336] In that instance, however, the Trial Chamber refused to permit the evidence because the case against Karadžić was pending at the time 92 *quinquies* was adopted.[337] Consequently, the associated decision provides no direct precedent to inform the Court in its application of Rule 68(2)(d), the ICC equivalent of 92 *quinquies*.[338] This might be seen as unfortunate because the new sub-rule seems poised to play an important role at the ICC. As some of the Court's judges recently noted, "Witness interference is a live and ongoing issue in ICC cases, [and it] may be

333. Prosecutor v. Haradinaj, Case No. IT-04-84-A, Prosecution's Notice of Appeal, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia May 1, 2008). In the matter, it was alleged that "[t]he Trial Chamber denied the Prosecution a fair trial by not granting it the additional time necessary to exhaust all reasonable steps to obtain the testimony of [certain recalcitrant] witnesses"). *Id.*

334. David Re, *Appeal, in* INTERNATIONAL PROSECUTORS 797, 841–42 (Luc Reydams et al. eds., 2012). *See also* Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010).

335. *See, e.g.*, Gentian Zyberi, *The ICTY Appeals Judgment in the Haradinaj Case*, EJIL TALK! (Oct. 11, 2010) (contending that 92 *quinquies* is "surely an amendment detrimental [to Haradinaj]" and therefore "cannot be used at trial").

336. Prosecutor v. Karadžić, Case No. MICT-15-96-T, Decision on a Request to Provide Stanišic and Simatovic Access to a Confidential Decision on the *Karadžić* Case (Mechanism for Int'l Crim. Tribs. July 27, 2017).

337. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Admit Prior Evidence of Milan Tupajic Pursuant to Rule 92 *Quinquies*, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 2012). ICTY Rule 6(D) provides, in relevant part, that an amendment shall "not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case." ICTY RPE, Rule 6(D), U.N. Doc. IT/32/Rev. 50 (July 8, 2015).

338. Nevertheless, dicta from the recently revealed decision could well assist ICC judges in the future Rule 68(2)(d) decision-making. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Admit Prior Evidence of Milan Tupajic Pursuant to Rule 92 *Quinquies*, ¶¶ 16–18 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 2012) (emphasizing that the witness's fears must be genuine, a result of improper interference—such as intimidation or bribery—and the fears must have materially influenced the decision not to testify).

more of an issue at the ICC than the ICTY."[339] In fact, as discussed below, when 68(2)(d) was adopted, the Court faced its own witness intimidation problems and the prosecution later attempted to use the provision because of them.

Before considering these developments, however, it makes sense to briefly note the critical response to the ICTY's initial adoption of 92 *quinquies*. One commentator described the rule's addition to the Tribunal's Rules of Procedure and Evidence as "the latest and hopefully the last of the rules permitting written witness statements in evidence at the expense of the accused right to cross examination."[340] Another critic pointed to the rule as an important example of how the Tribunal was "shifting progressively (and worryingly in [his] opinion) toward the admission of any type of written evidence."[341] Remarkably, these observations speak not just to the merit of 92 *quinquies*, but also to the Tribunal's overall approach to written evidence. Moreover, they are consistent with the overwhelming majority of scholarship on the topic, as summarized in this blistering commentary:

> These rules and amendments to the rules are an affront to the right of the accused to have a fair trial, and often the decisions handed down in relation to these rules demonstrate questionable, if not poor legal reasoning. The judicial interpretation of a Rule or a series of Rules (i.e. Rules 92 bis, 89(C) and 89(F)) resulted in the ever-expanding admission of hearsay evidence at the expense of the statutorily guaranteed rights of the accused.[342]

Accordingly, this prompts questions about the decision to replicate the ICTY approach at the ICC in the first place, let alone the choice to import the controversial 92 *quinquies*.

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339. Study Group on Governance, Second Rep., *supra* note 232, ¶ 34. The report explains that this is so "because of the lack of a subpoena power and the differences in the nature of criminal investigations at each institution." *Id.*

340. Rohan, *supra* note 161, at 302.

341. Cainaniello, *supra* note 45, at 407–08.

342. O'Sullivan & Montgomery, *supra* note 99, at 535 (assessing the use of written statements just prior to the adoption of 92 *quinquies*).

B. *Fairness Concerns*

Like 92 *quater*, 92 *quinquies* and its ICC equivalent, Rule 68(2)(d), require neither a specific indicia of reliability in order for written witness statements to be admitted, nor that the prior statements have been given under oath. The rules also expressly provide that the unexamined evidence may go directly to the acts and conduct with which the accused is charged,[343] although, in a seemingly more rights-protective fashion, the ICC rule indicates that this may be a factor against the statement's introduction.[344] Neither the ICTY rule nor its ICC equivalent place an onus on the prosecution to provide the defense with an alternative opportunity to examine the witness in cases where it is aware in advance of the risk of non-appearance.[345] This is unfortunate, particularly because this requirement could certainly have been incorporated into the ICC version of the rule.[346]

Moreover, 68(2)(c) may be used even when the accused is in no way connected to the witness interference that prompted the failure to testify.[347] In fact, it was expressly decided to repli-

343. ICTY RPE, Rule 92 *quinquies* (B)(iii), U.N. Doc. IT/32/Rev. 50 (July 8, 2015) ("Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.").

344. ICC RPE, Rule 68(2)(d)(iv), ICC-PIDS-LT-02-002/13_Eng (2013).

345. James F. Flanagan, *We Have a "Purpose" Requirement If We Can Keep It*, 13 LEWIS & CLARK L. REV. 553, 569–570 (2009) (contending that when the prosecution is aware that there are risks that the witness might not appear at trial, it must respond with efforts to provide confrontation by other means").

346. To this end, one possibility in this regard is the requirement that the prosecution avail itself of the unique investigative opportunity provision. Rome Statute, *supra* note 3, art. 56. In fact, the relevance of this rule to ICC Rule 68(2)(c)—the Court's 92 *quater* equivalent—was expressly recognized. *See* ICC RPE, Rule 68(2)(c)(i), ICC-PIDS-LT-02-002/13_Eng (2013) (requiring that the Chamber be satisfied that "the necessity of measures under article 56 could not be anticipated). Even in the domestic realm the call for a comparable safeguard is "a recommendation with a long pedigree." Marny Requa, *Absent Witnesses and the UK Supreme Court: Judicial Deference as Judicial Dialogue?*, 14 INT'L J. EVIDENCE & PROOF 208, 211 (2010) (noting that the UK may need to reform its laws to allow for pretrial questioning of witnesses by the defense "to protect confrontation rights while respecting the interests of witnesses"); *see also id.* at 226–27 (considering pre-trial questioning in greater detail).

347. ICTY RPE, Rule 92 *quinquies* (B)(ii)(b), U.N. Doc. IT/32/Rev. 50 (July 8, 2015) (dictating that "the apparent role of a party or someone acting

cate this aspect of the ICTY rule at the ICC. According to the ICC's Working Group on Lessons Learnt (WGLL),[348] "[I]t would be unduly restrictive to limit the applicability of this provision only to situations where the party to the proceedings against whom the prior recorded testimony is offered, acted (or acted in concert with others), to improperly interfere with the witness."[349] In part, the WGLL defends this position by suggesting that this expansive approach will deter third parties from engaging in acts of interference.[350] This is a questionable premise, however. If deterrence is the real goal, it would be more logical to make use of existing tools that impose *personal* liability for such conduct, both by prosecuting witness interference as an offence against the administration of justice[351] and by actively publicizing related proceedings and their potential penalties.[352]

Additionally, from a due process perspective, it is unjust to saddle an accused with a trial that is less fair because of the conduct of others, particularly when (as at the ICC) the rationale for doing so is tied directly to institutional shortcom-

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on behalf of a party to the proceedings in the improper interference" should form part of the interests of justice assessment). *See also* ICC RPE, Rule 68(2)(d), ICC-PIDS-LT-02-002/13_Eng (2013).

348. The WGLL was created in 2012 to determine the necessary amendments to the ICC's Rules of Procedure and Evidence; all interested judges could contribute to the group. Study Group on Governance, First Rep., *supra* note 260, ¶ 13.

349. Study Group on Governance, Second Report, *supra* note 232, at ¶ 34.

350. *Id. See also* Fergal Gaynor, *Obstruction of Justice by Silencing Witnesses: Possible Remedies,* INT'L CRIM. JUST. TODAY (Apr. 17, 2014), https://www.international-criminal-justice-today.org/arguendo/obstruction-of-justice-by-silencing-witnesses-possible-remedies/ (contending that "[t]the new rule at the ICC should serve to reduce the incentive for interfering with witnesses").

351. Rome Statute, *supra* note 3 art.70 (1)(c).

352. The Court is authorized to impose a jail term of up to five years for acts of witness interference. *Id.* art. 70(3). Although some individuals have been charged accordingly, there has been virtually no coverage of this in the mainstream media. *See, e.g.*, Mayeul Hiéramente, Philipp Müller & Emma Ferguson, *Barasa, Bribery and Beyond: Offices Offences Against the Administration of Justice at the International Criminal Court,* 14 INT'L CRIM. L. REV. 1123, 1124 (2014) (noting that Barasa's arrest warrant for witness interference "fade[d] into the background"); Tom Maliti, *Who Are the Witnesses in the Second Kenya Bribery Case at the ICC—Part 1,* INT'L JUST. MONITOR (Sept. 21, 2015), https://www.ijmonitor.org/2015/09/who-are-the-witnesses-in-the-second-kenya-bribery-case-at-the-icc-part-1/.

ings.[353] In fact, the adversarial doctrine of moral forfeiture—which arose in matters involving written testimony obtained in more *neutral and formal* settings[354]—historically required proof that the defendant caused the witness's non-appearance before stripping him of his right of confrontation.[355] Consistent with, and possibly even more rights-protective than these ancient roots,[356] U.S. law requires "some degree of intent to thwart the judicial process [on the part of the accused] before thinking it reasonable to hold the confrontation right forfeited."[357] This heightened threshold is justified by the fact that "the prosecution gains in many cases when it admits absent witness testimony."[358] Accordingly, it highlights a shortcoming in the ICC rule, although, admittedly, not all common law jurisdictions are as decidedly rights-protective.[359]

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353. *See, e.g.*, Study Group on Governance, Second Report, *supra* note 232, at ¶ 34 (explaining that third party interference should suffice for Rule 68(2)(d) because the ICC lacks subpoena powers and has other unique evidence-gathering challenges).

354. Giles v. California, 554 U.S. 353, 357–61 (2008) (explaining that the exception fostered the admission of testimony given at a coroner's inquest and statements taken by justices of the peace before a magistrate).

355. *Id.*

356. Notably, Justice Scalia's analysis in *Giles* maintains that the doctrine historically required evidence that the accused acted with the purpose of making the witness absent. *Id. But see* Ellen Liang Yee, *Forfeiture of the Confrontation Right in* Giles*: Justice Scalia's Faint-Hearted Fidelity to the Common Law*, 100 J. CRIM. L. & CRIM'Y 1495, 1508–12 (2010) (contending that the available historical resources do not definitively establish this view and could equally be interpreted to have simply required proof that the defendant caused the witness's absence).

357. Giles, 554 U.S. at 380 (Souter, J., concurring). *See also* FED. R. EVID. 804(b)(6) (excluding from the rule against hearsay "statement[s] offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result").

358. Flanagan, *supra* note 345, at 565. Flanagan notes further that, in such cases, "the real witness, with all the inevitable warts, does not appear before the jury." *Id.*

359. *See, e.g.*, Requa, *supra* note 346, at 215 (noting that United Kingdom jurisprudence ultimately shifted its analysis to simply asking whether the statement's admission was consistent with a fair trial, "regardless of the reason why the witness cannot be called to testify").

1. *Domestic Precedent?*

This disparity amongst common law approaches to cases of alleged witness interference leads to the question of whether, in assessing the fairness of 68(2)(d), the provision might find support in comparable domestic practice. To this end, it might be pointed out that numerous common law jurisdictions permit the admission of prior inconsistent statements for their truth under certain circumstances.[360] However, these examples provide incomplete analogical value due to the comparably challenging circumstances in which ICC witness statements are likely to be obtained.[361] Moreover, nearly all of these domestic provisions are more rights protective and more narrowly tailored than the ICC sub-rule.[362]

Amongst adversarial systems, it seems only the United Kingdom has adopted legislation that, like 68(2)(d), admits prior statements of fearful witnesses even when the witness is completely unavailable for cross-examination and the accused played no role in the witness's unavailability to testify.[363] In

360. *See, e.g.*, R. v. B. (K.G.), [1993] 1 S.C.R. 740 (Can.) (addressing prior inconsistent statements of recanting witnesses available for cross-examination); Criminal Justice Act 2006 (Act No. 26/2006) (Ir.), http://www.irishstatutebook.ie/eli/2006/act/26/enacted/en/pdf; FED. R. EVID. 801(d)(1)(A) (addressing prior sworn statements of declarants who testify and are subject to cross-examination); *Adam v The Queen* [2001] 207 CLR 96 (Austl.) (addressing prior inconsistent statements of recanting witnesses available for cross-examination).

361. Recently in the *Gbagbo* case, for example, cross-examination revealed numerous contradictions between a witness's live testimony and his prior recorded statements seemingly due, in part, to interpretation difficulties. Ivoire Justice, *Vague and Contradictory, the Words of Witness P-106, an Abobo Trader, Cause a Stir in the Audience*, INT'L JUST. MONITOR (Feb. 7, 2017). *See also* Jackson, *supra* note 64, at 31 (noting that "the conditions for taking evidence are particularly poor in the case of international crimes"); *supra* note 159 and related text.

362. While all the domestic examples listed *supra* are limited to in-person recantation by witnesses who are available for cross-examination, the ICC rule applies equally to statements of persons who fail to attend trial. ICC RPE, Rule 68(2)(d)(i), ICC-PIDS-LT-02-002/13_Eng (2013).

363. *See* Criminal Justice Act 2003, c. 44, § 116(4) (Eng.) (permitting the admission of the written statements of fearful witnesses "if the court considers that the statement ought to be admitted in the interests of justice" and providing four factors the court should take into account in making such a ruling including "any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evi-

fact, when the ECHR's Grand Chamber recently considered this U.K. approach, its analysis included a comparative assessment of six other common law jurisdictions, none of which employed similar legislation.[364] Moreover, two of the jurisdictions surveyed considered and rejected the U.K. approach, with one concluding that it allows in "unreliable hearsay evidence"[365] and the other declaring the Act's main provisions on hearsay incompatible with the right of confrontation.[366] In addition, the U.K. law has been criticized as applied for placing undue weight on "the public interest in prosecuting cases when witnesses are absent,"[367] "a practical approach to the admission of unavailable witness evidence[ ] that complements the statutory regime but . . . risks fair trial rights."[368] In other words, the closest domestic parallel to 68(2)(d) is not only exceptional but controversial.

In addition, inasmuch as U.K. appellate decisions impose additional safeguards on the admission of statements taken from fearful witnesses, these measures are not required by 68(2)(d), nor does it seem likely that the ICC will introduce them. For example, U.K. courts oblige the prosecution to make "very full inquiries" regarding an unavailable witness's credibility as a prerequisite to admitting her written state-

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dence)"). Scottish Law has a similarly broad approach to hearsay and would likewise permit the admission of prior statements, although it makes no reference to fear or recantation. *See* Criminal Procedure (Scotland) Act 1995, § 259 (2)(e).

364. Al-Khawaja v. United Kingdom, 54 Eur. Ct. H.R. 23, ¶¶ 69–87 (2012) (comparing the United Kingdom approach to that of Ireland, Australia, Canada, Hong Kong, New Zealand and the United States).

365. *Id.* ¶ 81 (quoting a report from Hong Kong's Law Reform Commission).

366. *Id.* ¶ 71. Ireland's Law Reform Commission explained that it could not follow the United Kingdom approach because "to allow in untested evidence from frightened and unavailable witnesses would undermine [the right of confrontation]." LAW REFORM COMM'N, CONSULTATION PAPER: HEARSAY IN CIVIL AND CRIMINAL CASES 163 (2010) (describing section 114 as a reform that relaxes the hearsay rule to such an extent as "to potentially render [it] redundant").

367. Requa, *supra* note 346, at 220.

368. *Id.* at 226. *See also* Mark S. Brodin, *The British Experience with Hearsay Reform: A Cautionary Tale,* 84 FORDHAM L. REV. 1417, 1422–23 (2016) (critically assessing England's revised laws on documentary evidence of unavailable witnesses through an American lens).

ment,[369] something that the ICC Prosecution has acknowledged it often cannot do.[370] In addition, U.K. appellate case law dictates that witnesses should not be told that their statements may be read at trial, nor "given any indication whatsoever that this is likely,"[371] a prerequisite that, given the Court's increasing dependence on written testimony, seems ill-suited to ICC replication. Finally, appellate jurisprudence emphasizes the exceptional nature of the United Kingdom's provision governing the admission of statements by fearful witnesses, declaring that when the content of the statement can really only be assessed by in-person testimony, "*as will often be the case*, it may not be admitted."[372] While this article advocates for just such a comparably rigorous (and consequently narrow) approach to admitting statements pursuant to Rule 68(2)(d), one must anticipate resistance to this view, particularly because it would likely be equated with stripping the provision of its utility.[373]

C. *Relevant ICC Practice*

The only application of 68(2)(d) to date makes no reference to the exceptional nature of the provision, nor does it consider any other factors analogous to the safeguards imposed by U.K. courts. On the contrary, the Trial Chamber's ruling in *Ruto & Sang* rejected only one of the prosecution's requests to admit 68(2)(d) evidence,[374] while admitting four

369. Regina v. Riat [2012] EWCA (Crim) 1509, ¶ 18.

370. *See supra* note 134 and accompanying text.

371. Regina v. Horncastle [2010] 2 AC 373, ¶ 88.

372. *Id.*

373. For example, the *Ruto* Trial Chamber rejected the suggestion that Rule 68(2)(d) statements should be sworn because this requirement would "severely limit the practical application of the amended Rule 68" and "would thus be against the object and purpose of the amended Rule 68, which, in a manner which respects the fair and expeditious conduct of the proceedings, facilitates the introduction of prior recorded testimony in situations where oral in-court testimony cannot be given as anticipated." Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 32 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF. Similarly, the WGLL concluded that it would be "unduly restrictive to limit the applicability" of the sub-rule to instances wherein the accused was responsible for the interference. Study Group on Governance, Second Rep., *supra* note 232, ¶ 34.

374. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶¶ 96–97 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF (at-

other statements and associated documents under the rule.[375] Moreover, at least one of the admitted statements—all of which were tied to recanting witnesses—was given by a person who later stated under oath that he did not anticipate being called to testify when he provided the statement.[376] In sum, the ICC's first application of 68(2)(d) appears decidedly less rights-protective than that of its ostensible domestic counterpart, a point worth noting even though the statements were ultimately excluded on appeal.[377] Indeed, because this later reversal was based solely on the retroactive application of 68(2)(d) and because it did not consider any other aspect of the rule's application,[378] the Trial Chamber decision retains its value as potential (non-binding) precedent for future applications of the rule.

In this respect, one of the most striking aspects of the Trial Chamber decision lies in its selective consideration of

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tributing the rejection to insufficient evidence of witness interference, a prerequisite for admission).

375. *Id.* ¶¶ 67, 86, 117, 133.

376. *Id.* ¶ 63 (citing the submission of the Ruto defense).

377. Prosecutor v. Ruto, Case No. ICC-01/09-01/11-2024, Judgment on the Appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang Against the Decision of Trial Chamber V(A) of 19 August 2015 Entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony," (Feb. 12, 2016); *see also* Rome Statute, *supra* note 3, art. 51(4) (prohibiting rule amendments from applying retroactively "to the detriment of the person who is being investigated or prosecuted"). Accordingly, the lower court's analysis regarding other application matters remains relevant regarding the potential future application of the sub-rule.

378. Prosecutor v. Ruto, Case No. ICC-01/09-01/11-2024, Judgment on the Appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang Against the Decision of Trial Chamber V(A) of 19 August 2015 Entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony," ¶¶ 94–95 (Feb. 12, 2016) (acknowledging "the negative impact that depriving the accused of the opportunity to challenge evidence can have on the fairness of the proceedings" and concluding that the accused were disadvantaged in this regard by the application of the new rule). In fact, the appellate decision specifically eschews any discussion of the defense challenges to the lower court's reliability and interests of justice assessments. *Id.* ¶¶ 9(vi)–(vii), 97. This form of decision-making is what Cass Sunstein describes as "decisional minimalism." Cass Sunstein, *Leaving Things Undecided,* 110 HARV. L. REV. 6, 6–7 (1996).

ICTY precedent.[379] For example, the Chamber turned to the Tribunal's approach under 92 *quater*[380] (the closest analogue to Rule 68(2)(d)) to support its conclusion that the rule's reliability requirement can be met by a particularly modest showing.[381] Simultaneously, however, the Trial Chamber ignored an important point made by the same Tribunal source in conjunction with this low reliability threshold: that there is a need for "cautious scrutiny" before admitting the statement of an unavailable witness that directly implicates the accused.[382] Rather, and at marked odds with the 92 *quater* case law discussed above,[383] the ICC decision cites neither corroboration nor any other alternative guarantee of reliability in support of its decision to admit the statements—although *all four* addressed the acts and conduct charged.[384] In fact, the Trial Chamber's interest of justice assessment gives almost no consideration to the effect that the statements' admission may have on the rights of the accused.[385] Instead, the ruling fo-

379. Although 92 *quinuqies* was never applied, analogical value can be drawn from the Tribunal's consideration of its other provision governing the documentary evidence of unavailable witnesses, 92 *quater*.

380. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 65, n.100 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF (citing Prosecutor v. Lukic, Case No. IT-98-32/1-A, Appeals Judgement, ¶ 566 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012)).

381. *Id.* ¶ 65 (declaring that "the Chamber may consider the fact that a statement was signed and is accompanied by a declaration that it is true to the best of the witness's knowledge as an indicia of reliability").

382. Prosecutor v. Lukic, Case No. IT-98-32/1-A, Appeals Judgement, ¶ 565, (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012).

383. *See supra* notes 291–294 and accompanying text.

384. *See* ICC RPE, Rule 68(2)(d)(iv), ICC-PIDS-LT-02-002/13_Eng (2013) (expressly providing that this may be a factor against introduction).

385. The Chamber does (unconvincingly) contend that admitting the directly incriminating statements over the strident objections of both accused advances their right to be tried without undue delay. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 60 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF (maintaining that this is consistent with the rule's purpose of expediting proceedings). The decision also makes passing reference to the fact that both accused had the opportunity to "cross-examine" the witnesses. *Id.* In so doing, however, it omits the fact that the witnesses recanted their prior statements when called by the prosecution. As the Appeals Chamber later observed, in such cases "it cannot be expected that the accused would proceed by eliciting incriminating evidence from the

cuses primarily on the need to safeguard the trial from interruption due to the witness interference,[386] while dismissing the relevance of "the unproven link between the improper interference and the accused" to its interests of justice determination.[387] Simultaneously, the decision appears to downplay the importance of its (required) interests of justice assessment[388] by noting that, in the Chamber's ultimate assessment of guilt or innocence, "whether the prior recorded testimonies go to the acts and conduct of the accused, and whether the evidence contained therein is corroborated" can affect the weight the statements are ultimately given.[389]

D. *Summary*

By adopting 92 *quinquies*, the ICTY attempted to address the frustrating and significant problem of witness interference in international criminal trials. While a laudable and important goal, the new provision further entrenched the prospect of introducing critical, unexamined, party-generated statements into the Tribunal's decidedly adversarial proceedings. Additionally, the provision resulted solely in costs to the Tribunal, as it engendered strident criticism about the institution's

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witness in order to be able subsequently to challenge that evidence." *Id.* ¶ 93.

386. *Id.* ¶ 60 ("The Chamber will not allow such hindrance and will safeguard the integrity of the proceedings."). New Zealand case-law points out the dangers of this approach: "We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial." R v. Hughes [1986] 2 NZLR 129 (CA) at 148–49 (J. Richardson).

387. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 60 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF (maintaining that "the Chamber does not consider that [the statements'] admission is unduly detrimental to the accused").

388. A Rule 68(2)(d) statement "may only be introduced if the Chamber is satisfied that the interests of justice are best served" by its admission. ICC RPE, Rule 68(2)(d)(i), ICC-PIDS-LT-02-002/13_Eng (2013).

389. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 60 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF (maintaining that "the Chamber does not consider that [the statements'] admission is unduly detrimental to the accused").

commitment to truth-seeking and due process, all without ever having been put to effective use.

Now a part of the Court's framework as 68(2)(d), the imported rule will likely exact similar reputational costs if its sole application to date provides any benchmark. In this respect, one must hope that the Court's lone ruling is anomalous. At a minimum, future applications of the rule should draw comprehensively, and not selectively, from the ICTY's analogous 92 *quater* case law. This means recognizing that the non-exacting "indicia of reliability" assessment is a necessary but insufficient precondition to admission. It also means that any interest of justice assessment must meaningfully consider the effect of the statement's admission on the rights of the accused in all cases but most particularly when the proposed statement directly implicates the accused in the crimes charged. Indeed, in such cases, nothing short of cautious scrutiny will suffice if the Court is to be seen as fair and its verdicts as reliable.

IX. CONCLUSION

Ultimately, one of the more remarkable and frustrating aspects of the development of international criminal justice is its tendency to recreate past mistakes rather than fully learn from them. This is patently true of the use of witness statements in international criminal trials. While the use of affidavit evidence made the post-WWII proceedings more efficient, the practice nevertheless left a stain on the legacy of Nuremburg, and continues to contribute meaningfully to the widespread perception that the Tokyo proceedings were unfair. Armed with this information, the judges of the ICTY initially made an affirmative decision to chart a different course as part of a broader, acknowledged effort to "make good the flaws"[390] of Nuremberg and Tokyo.

The ICTY first considered the use of written evidence in a way that demonstrated a noticeable commitment to securing a rights-protective regime that took the ICTY's adversarial orientation into meaningful account. Eventually, however, the Tribunal succumbed to the seductive appeal of efficiency over fairness and ought to be remembered for having made that choice. Indeed, as this work illustrates, the final ICTY tem-

390. Statement by the ICTY President, *supra* note 57.

plate, now transplanted into the ICC, was not the product of a thoughtful and comprehensive plan. Instead, the now mimicked provisions were adopted in an *ad hoc* fashion, often in response to a then-pressing problem, always in conjunction with significant pressure to expedite ICTY proceedings, and with increasingly less attention paid to their effect on the Tribunal's obligation to secure a fair trial. These facts, coupled with the unresolved question of whether its piecemeal approach actually made ICTY proceedings more efficient, suggest that the Tribunal's written evidence experiment might better contribute to the development of international criminal practice from a "lessons learned" perspective than as an off-the-shelf tool for future proceedings.

This "lessons learned" analysis would have revealed what this article makes plain: the Tribunal's adversarial construct—mirrored in the ICC in every way that matters—is one of the primary reasons why the ICTY rules governing witness statements proved both unfair and inefficient. Within such a framework, it is to be expected that both parties, including the prosecution, will proffer evidence that puts the "best gloss" on their respective positions, and that they will take advantage of every opportunity to "pile up" this evidence to strengthen its persuasive power. The former fact explains why the right of confrontation is a "central and defining feature" of adversarial systems[391] and why it is critical that fact-finders be able to observe the credibility and demeanor of partisan witnesses. Yet, under the ICTY's eventual approach, both fundamental safeguards gave way to ostensibly more efficient written evidence.

Simultaneously, the ICTY rules gave the judges the power to manage the use of witness statements but without the necessary information to do so knowledgeably. Unlike their Continental counterparts, the Tribunal's judges did not have a comprehensive, objective dossier upon which to make well-informed decisions on key issues—such as whether a proposed statement was central to establishing the guilt of the accused or whether a statement directly implicating the accused in the crimes charged was cumulative evidence. As a result, Chambers were frequently confronted with a series of unhappy, varyingly inefficient alternatives in making their admissibility de-

391. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials,* 24 SYDNEY L. REV. 361, 375 (2002).

terminations: rely upon the representations of the partisan proponent (running the risk of reversal, as in *Martic*);[392] scour the available, party-proffered materials to formulate its own conclusions (a time-consuming endeavor based on likely incomplete information); tentatively admit the evidence after motions and arguments, with the possibility of excluding it later; or err on the side of caution and require the witness's presence for cross-examination. In other words, the Tribunal's adversarial construct hindered the judges' ability to efficiently implement rules specifically geared towards expedition.

Had this type of stocktaking of the ICTY rules occurred prior to the November 2013 amendments, perhaps the ICC judges and the major stakeholders with whom they consulted would not have proposed to replace the Court's more rights-protective, truth-enhancing approach with the Tribunal's dubious template. Instead, the judges could have explored ways to improve upon the ICTY approach, bearing in mind the partisan nature of evidence-gathering and presentation decidedly present in ICC practice. That the matter appears insufficiently examined, particularly in light of then-existing criticisms of the ICTY rules, raises serious questions about the process that brought the 2013 amendments about. Nevertheless, the fact remains that the rules have become a part of the Court's framework. As a result, the focus must now be on implementation, as the Court's "emerging body of trial practices must be regularly scrutinized to assure fundamental fairness."[393]

This Article marks the beginning of that undertaking and its assessment of the Court's first efforts to apply revised Rule 68 shows cause for concern. Indeed, only one of the ICC decisions surveyed includes any meaningful consideration regarding how the admission of the proposed statements might affect the rights of the accused. Moreover, while the Rule 68(2)(b) decision in *Gbagbo* demonstrates the need for judges to carefully vet an adversarial party's characterization of its own evidence—and the commitment of one Chamber to engage in this time-consuming exercise—there is no assurance that future Trial Chambers will follow suit. If anything, there is rea-

392. Case No. IT-95-11-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008). *Martic* is discussed *supra* Part V.

393. Wald, *supra* note 12, at 537 (discussing the need to vet the processes employed by international courts).

son to suspect that this type of laborious, rights-protective assessment may fall by the wayside as efficiency and budgetary pressures increase.

More troubling still is the nonchalant manner in which two separate ICC Trial Chambers recently admitted directly incriminating statements of unavailable witnesses without any apparent regard for safeguards well-entrenched in Tribunal precedent.[394] Unless closer attention is paid to this developing body of law, the absence of "bottom-line norms of reliability for judge-factfinders in international trials"[395] may become customary, to the detriment of both the accused and the Court. A standard-less approach would simultaneously incentivize the introduction of "evidential debris,"[396] while eliminating the impetus for seeking out fairness-enhancing alternatives, including the prospect of providing confrontation outside the trial context.

As a relatively young institution, the ICC finds itself in the delicate position of needing to establish its legitimacy.[397] Undoubtedly, the ability to complete its trials and produce convictions are a key part of this endeavor. Yet, convictions rendered under less than fair conditions are almost certain to raise questions about their reliability, undermining any positive perceptions engendered by apparent effectiveness. Moreover, at least part of the affected communities is likely to view the proceedings as rigged, weakening the Court's legitimacy in

394. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on Prosecution Application Under Rule 68(2)(c) of the Rules for Admission of Prior Recorded Testimony of P-0022, P-0041 and P-0103 (Nov. 20, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_22692.PDF; Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ¶ 94–95 (Aug. 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_15400.PDF.

395. Wald, *Rules of Evidence, supra* note 146, at 770.

396. Murphy & Baddour, *supra* note 199, at 369.

397. 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); *see also* Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT'L L.J. 1566, 1566 (2005) (observing that "the legal-political environment in which international and internationalized criminal courts function brings greater attention to the credibility of these institutions" and that they must work to maintain credibility and integrity).

certain regions and potentially engendering further hostility, rather than contributing to the peace and security critical to rebuilding post-conflict societies. Indeed, even those who support the convictions are liable to feel cheated by a process that renders document-based convictions and thereby subordinates the sharing of individual and collective harms.

Ultimately, any short-term gains associated with more efficient and more attainable convictions—assuming these goals can be achieved—must be assessed against longer term losses. Like the ICTY before it, the ICC is meant to provide enlightened justice,[398] setting an example worthy of imitation on the international and domestic level. Its leading role in the current constellation of contemporary international criminal justice institutions leaves the ICC uniquely poised to either solidify the human rights advancements hard-won over the last seven decades, or lead a retreat away from prioritizing the process accused persons are due. Perhaps if greater attention is paid to the Court's use of revised Rule 68—and with the encouragement of procedural watchdogs—it is not too late for the ICC to impose careful limits on the use of written testimony in its pursuit of justice.

398. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 516 (1997) (concluding that the ICTY was "mandated to provide a model of enlightened justice").