2003

# The Role Of The Prosecutor And The Judge

Robert Tibbitts

**CASE WESTERN RESERVE UNIVERSITY**
**SCHOOL OF LAW**
**INTERNATIONAL WAR CRIMES PROJECT**

# MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

## ISSUE 11: THE ROLE OF THE PROSECUTOR AND THE JUDGE

**PREPARED BY ROBERT TIBBITTS**
**SPRING 2003**

## TABLE OF CONTENTS

INDEX TO SUPPLEMENTAL DOCUMENTS

STATUTES AND RULES



CASES

14. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Decision on Defense Motions for Judgment of Acquittal, 6 April 2000.

15. Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment, 14 January 2000.

16. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000.

17. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence: Separate Opinion of Judge Aspegren, 27 January 2000.

18. Prosecutor v. Tadic, Case No. IT-94-1-T, Transcript, 7 August 1996.

19. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997.

20. United States v. Bagley, 473 U.S. 667 (1985).

21. Woolmington v. DPP, A.C. 462 (1935).

BOOKS

22. A. V. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE: A COMPARATIVE STUDY, WITH PARTICULAR EMPHASIS ON THE ROLE OF THE PUBLIC PROSECUTOR (1975).

23. ANDREW SANDERS, *England and Wales (United Kingdom), in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 2000).

24. BARBARA HUBER, *Criminal Procedure in Germany, in* COMPARATIVE CRIMINAL PROCEDURE (John Hatchard et al. eds., 1996).

25. CHRISTOPH J. M. SAFFERLING, TOWARD AN INTERNATIONAL CRIMINAL PROCEDURE (2001).

26. DAVID BARNARD, THE CRIMINAL COURT IN ACTION (3d ed. 1988).

27. DENIS SALAS, REVISED BY ALEJANDRO ALVAREZ, THE ROLE OF THE JUDGE IN EUROPEAN CRIMINAL PROCEDURES (2002).

28. GEERT CORSTENS & JEAN PRADEL, EUROPEAN CRIMINAL LAW (2002).

29. GEORGE F. COLE & CHRISTOPHER E. SMITH, CRIMINAL JUSTICE (9th ed. 2001).

30. JASON S. WILLIAMS, CIVIL AND CRIMINAL PROCEDURE: THE CONDUCT OF LITIGATION IN THE COURTS OF ENGLAND AND WALES (1997).

31. JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: WITH SELECTED MATERIALS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2000).

32. JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2000).

33. SIR JOHN MAY, *The Responsibility of the Prosecutor to the Court, in* THE ROLE OF THE PROSECUTOR (J.E. Hall Williams ed., 1987).

34. JOHN MICHELICH, *United States of America, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 2000).

35. KENNETH MANN, *Israel, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 1998).

36. LEONARD H. LEIGH & LUCIA ZEDNER, THE ROYAL COMMISSION ON CRIMINAL JUSTICE: A REPORT ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY (1992).

37. MICHAEL C. MESTON, *Scots Law Today, in* THE SCOTTISH LEGAL TRADITION (Meston et al. eds., 1991).

38. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (1997).

39. MORTEN BERGSMO, CATHERINE CISSE, & CHRISTOPHER STAKER, *The Prosecutors of the international Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 1998).

40. NICO JORG, STEWART FIELD, & CHRISJE BRANTS, *Are Inquisitorial and Adversarial Systems Converging?, in* CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Phil Fennel et al. eds., 1995).

41. PAUL SIEGHART, *A View from Justice, in* THE ROLE OF THE PROSECUTOR (J.E. Hall Williams ed., 1987).

42. PETER MORRE, *Germany, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 1998).

43. RICHARD VOGLER, *Criminal Procedure in France, in* COMPARATIVE CRIMINAL PROCEDURE (John Hatchard et al eds., 1996).

44. ROBIN M. WHITE & IAN D. WILLOCK, THE SCOTTISH LEGAL SYSTEM (2d ed. 1999).

45. SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAEL JUDICIARY (1994).

46. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY (5th ed. 1996).

47. STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH (2002).

48. LORD THOMAS MACKAY COOPER, *The Scottish Legal Tradition, in* THE SCOTTISH LEGAL TRADITION (Meston et al. eds., 1991).

LAW REVIEWS

49. Abraham Abramovsky, *Partners Against Crime: Joint Prosecutions of Israeli Organized Crime Figures by U.S. and Israeli Authorites,* 19 FORDHAM INT'L L.J. 1903 (1996).

50. Alistair Bonnington, *Scots Criminal Procedure and the Lockerbie Trial,* 11 INT'L LEGAL PERSP. 11 (1999).

51. Amnon Straschnov, *The Judicial System in Israel,* 34 TULSA L.J. 527 (1999).

52. Bennett L. Gershman, *The New Prosecutors,* 53 U. PITT. L. REV. 393 (1992).

53. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics,* 55 VAND. L. REV. 381 (2002).

54. Daryl A. Mundis, *The Election of Ad Litem Judges and Other Recent Developments at the International Criminal Tribunals,* 14 LEIDEN J. INT'L L. 851 (2001).

55. 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 (2001).

56. Edward A. Tomlinson, *Nonadversarial Justice: The French Experience,* 42 MD. L. REV. 131 (1983).

57. Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared,* 22 INT'L REV. L. & ECON. 193 (2002).

58. Fraser Davidson, *Lockerbie and Scots Law,* 14 LEIDEN J. INT'L L. 171 (2001).

59. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45 (1991).

60. Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary,* 13 TEMP. INT'L & COMP. L.J. 87 (1999).

61. Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV. 1 (2002).

62. Hans-Jorg Albrecht, *Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 245 (2000).

63. J. R. Spencer, *The Case for a Code of Criminal Procedure*, CRIM. L. REV. 519 (2000).

64. Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 127 (1996).

65. John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477 (2002).

66. Kai Ambos, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 105 (2000).

67. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002).

68. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453 (2000).

69. Kuk Cho, *"Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality*, 15 TEMP. INT'L & COMP. L.J. 1 (2001).

70. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001).

71. Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS TO JUST. 207 (1999).

72. Mark D. Cohen, *New York v. Kirman/Israel v. Kirman: A Prosecutional In Tel Aviv Under Israel Law for a Narcotics Offense Committed in New York*, 4 CRIM. L.F. 597 (1993).

73. Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L L. & POL. 167 (1997-98).

74. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

75. Mirjan Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343 (1995).

76. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002).

77. Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57 (1994).

78. Nina Zaltzman & Eli Lederman, *The Gradual Erosion of the Defendant's Status in Israeli Law*, 62 TEMP. L. REV. 1175 (1989).

79. Patricia M. Wald, *Judging War Crimes*, 1 CHICAGO J. INT'L L. 189 (2000).

80. Paul Hardin, III, *Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland*, 113 U. PA. L. REV. 165 (1964).

81. Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173 (1999).

82. Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643 (2002).

83. R. C. Pruitt, *Guilt by Majority in the International Criminal Tribunal for the Former Yugoslavia: Does this Meet the Standard of Proof 'Beyond Reasonable Doubt'?*, 10 LEIDEN J. INT'L L. 557 (1997).

84. Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63 (1996).

85. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, And Why Should We Care?*, 78 CAL. L. REV. 539 (1990).

86. Richard S. Frase, *Review Essay: The Search for the Whole Truth about American and European Criminal Justice: Trials Without Truth: Why Our System of Criminal Trials has become an Expensive Failure and What we Need to Do to Rebuild it. By William T. Pizzi*, 3 BUFF. CRIM. L. REV. 785 (2000).

87. Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995).

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

89. Robert Black, *The Lockerbie Criminal Trial: The Scottish Rules of Evidence*, 11 INT'L LEGAL PERSP. 31 (1999).

90. Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include The Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996).

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

92. Sean Doran, John D. Jackson, & Michael L. Seigel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM J. CRIM. L. 1 (1995).

93. Susanne Walther, *The Position and Structure of the Prosecutor's Office in the United States*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 283 (2000).

94. Sylvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 LEIDEN J. INT'L L. 409 (2002).

95. Terence J. Galligan, *The Prosecutor's Duty to Disclose Exculpatory Evidence After United States v. Bagley*, 1 GEO. J. LEGAL ETHICS 213 (1987).

96. Vladimir Tochilovsky, *Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience*, 10 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 268 (2002).

97. William T. Pizzi, *The American "Adversary System"?*, 100 W. VA. L. REV. 847 (1998).

98. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993).

MISCELLANEOUS

99. Human Rights Committee, cmt 13, art. 14 (1994), *available at* http://www.1.umn.edu.humanrts/gencomm/hrcom13.htm.

100. Susanne Stemmler, *Incentive Structures and Organizational Equivalents of Plea Bargaining in German Criminal Courts* (1994) (Ph.D. thesis, The Pennsylvania State University.

## I. Introduction and Summary of Conclusions[1]

### A. Issues

This memorandum addresses the role of the prosecutor and judges in proceedings in front of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY] and the International Criminal Tribunal for Rwanda [hereinafter ICTR]. Part II of this memorandum identifies the general differences between the role of the prosecutor and judge in common law and civil code jurisdictions.[2] Then, Part III of this memorandum discusses the role of the prosecutor and judge in the specific common law jurisdictions of England and the United States.[3] Next, the Part IV of this memorandum discusses the role of the prosecutor and judge in the civil code jurisdictions of France and Germany,[4] while Part V of this memorandum discusses the role of the prosecutor and judge in the mixed jurisdictions of Israel and Scotland.[5] Finally, Part VI of this memorandum discusses the role of the prosecutor and judge in the ICTY and the ICTR, specifically addressing: (1) whether or not the burden of proof is on the prosecutor; (2) whether or not the mixing of common law and civil code roles of the prosecutor and judge is tenable; (3) and whether or not the mixing of roles provides the prosecutor with grounds for appeal.[6]

---

[1] Issue 11: Compare and contrast the role of the Prosecutor and Judges in the common law jurisdictions of the United States and England, the mixed jurisdictions of Israel and Scotland, and the civil code jurisdictions of France and Germany. Assess and evaluate current ICTR and ICTY cases, holding, and dicta, concerning the role of the Prosecutor and of the Judiciary in proceedings before the Tribunals. Specifically: (1) whether or not there is in fact a requirement that the Prosecutor prove his or her case, and if so, how this fits with a trial chamber adopting a more inquisitorial than common law approach; (2) whether or not this mixing is tenable; and (3) whether or not this mixing of roles provides grounds of appeal for the Prosecutor.

[2] *See infra* notes 12-57 and accompanying text.

[3] *See infra* notes 58-137 and accompanying text.

[4] *See infra* notes 138-259 and accompanying text.

[5] *See infra* notes 260-327 and accompanying text.

[6] *See infra* notes 328-422 and accompanying text.

## B. Summary of Conclusions

### (1) The Burden of Proof is on the Prosecutor To Prove the Guilt of the Accused Beyond a Reasonable Doubt

Under the Statutes of the Tribunals, the accused is presumed to be innocent of all charges.[7] The Rules of Evidence and Procedure for the Tribunals implicitly place the burden of proof on the prosecutor. From the first case to be tried in front of the ICTY, the burden of proof has been stated to be upon the prosecutor,[8] and this interpretation has continued to be followed, even though the ICTY and ICTR are moving towards a more inquisitorial style of proceeding.[9]

### (2) The Mixing of Common Law and Civil Code Roles of the Prosecutor and Judge is Tenable, Although Care Should be Taken to Ensure that Each Role Retains Its Independence and Distinctive Functions in the System

---

[7] Statute of the International Criminal Tribunal for Yugoslavia [hereinafter ICTY], art. 21(3) *reprinted in* JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: WITH SELECTED MATERIALS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2000) [Reproduced at the accompanying notebook at Tab 32], *also available at* http://www.un.org/icty/basic/statut/stat2000.htm. [Reproduced in the accompanying notebook at Tab 4]; Statute of the International Criminal Tribunal for Rwanda [hereinafter ICTR], art. 20(3), *reprinted in* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2000). [Reproduced in the accompanying notebook at Tab 3]. The presumption of innocence is an ideal common to all of the systems discussed in this memorandum. In five of the national systems addressed in this memorandum, the burden of proof is on the prosecutor. The only exception is in Germany, where the burden of proof is not solely on the prosecutor but on the "public authorities". *See* CHRISTOPH J. M. SAFFERLING, TOWARD AN INTERNATIONAL CRIMINAL PROCEDURE 257 (2001). [Reproduced in the accompanying notebook at Tab 25]. Regardless, the burden of proof is never on the defense. The Human Rights Committee, European Court of Human Rights, and Article 66 Rome Statute all place the burden of proof on the prosecutor. *See* Human Rights Committee, cmt 13, art. 14, ¶ 7 (1994), *available at* http://www.1.umn.edu.humanrts/gencomm/ hrcom13.htm. [Reproduced in the accompanying notebook at Tab 99]; Barbera, Messeque and Jabardo v. Spain, 146 Eur. Ct. H.R. ¶ 77 (ser. A) (1988). [Reproduced in the accompanying notebook at Tab 5]; Rome Statute of the International Criminal Court, art. 66, *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT (2000). [Reproduced in the accompanying notebook at Tab 1].

[8] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, ¶ 534. [Reproduced in the accompanying notebook at Tab 19]

[9] Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment, 14 January 2000, ¶ 339(a). [Reproduced in the accompanying notebook at Tab 15]. *See* Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,* 37 COLUM. J. TRANSNAT'L L. 725, 754 (1999). [Reproduced in the accompanying notebook at Tab 88]; *See also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998. [Reproduced in the accompanying notebook at Tab 6]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, ¶ 108. [Reproduced in the accompanying notebook at Tab 16]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, 21 May 1999, ¶ 234. [Reproduced in the accompanying notebook at Tab 13].

The mixing of common law and civil code concepts is not only tenable, it is the general rule. None of the jurisdictions studied in this memorandum have a "purely" adversarial or inquisitorial system.[10] However, in contrast to the ICTY/ICTR, each of the systems also have years of tradition, history, precedent, statutes, and/or constitutions which help define the roles that their judges and prosecutors fulfill. The ICTY/ICTR is a new system, devoid of many of the constraints and safeguards in place in traditional national systems. When this is combined with the fact that the judges have the power to make, modify and enforce the rules of procedure, they should take care to not distort their roles or that of the prosecutor to the point that either becomes too blurred to function effectively.

**(3) The Prosecutor May Have Grounds to Appeal an Acquittal if the Trial Chamber, Under Rule 98, Orders More Evidence to be Produced by the Defense for the Purpose of Proving an Element on Which the Defense Bears the Burden of Proof After the Close of the Defense's Case**

If, at the close of its case, either party has failed to present sufficient evidence of an element necessary for an offense or an affirmative defense, the Trial Chamber should not introduce evidence in support of that element. Thus, if the prosecution fails to present sufficient evidence to prove an element of an offense, the Trial Chamber should not use its power to summon witnesses and introduce evidence in support of the element that the prosecutor has failed to prove. Moreover, the Trial Chamber should not use its power to summon witnesses and introduce evidence in support of an insufficiently supported element of an affirmative defense that the defense has a duty to prove.[11]

[10] William T. Pizzi, *The American "Adversary System"?*, 100 W. VA. L. REV. 847, 847-49 (1998). [Reproduced in the accompanying notebook at Tab 97].

[11] For example, the Defense bears the burden of proving the Defense of Alibi. *See* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, ¶ 25. [Reproduced in the accompanying notebook at Tab 7].

## II. Factual Background

### A. General Characteristics of Civil Code and Common Law Criminal Systems

At the opening speech for the prosecution at Nuremberg, Robert H. Jackson stated: "Despite the fact that public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission."[12] One of the universal principals of criminal procedure is that the prosecution bears the burden of proof.

Criminal systems are often categorized as adversarial, inquisitive, or mixed systems of procedure.[13] The trial systems of the United States and England are labeled common law or adversarial systems.[14] Trials in these countries are party-driven, with the prosecution and the defense offering competing theories, and the judge acting in an independent and supervisory role.[15] In contrast, the trial systems of France and Germany are labeled civil code or inquisitorial systems.[16] These trials are characterized as judge-driven, with the prosecution and the defense taking a subsidiary and monitoring role.[17] Additionally, several jurisdictions, such as Israel and

---

[12] Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg (Nov. 21, 1945) *in* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 111 (1997). [Reproduced in the accompanying notebook at Tab 38].

[13] Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 193-94 (2002). [Reproduced in the accompanying notebook at Tab 57].

[14] McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1461 (2000). [Reproduced in the accompanying notebook at Tab 68] The system arose in past when each party in a dispute would choose a champion to support its cause. The two champions would then fight, with the winner being seen as representing the side that was right. Thus, might made right. Words commonly used to describe adversarial procedures are: "combat", "accusatorial", "contest", "dispute", "advocate", "ritualized aggression", etc.

[15] Joachim Herrmann, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 127, 129 (1996). [Reproduced in the accompanying notebook at Tab 64].

[16] McMunigal, *supra* note 14, at 1461. [Reproduced in the accompanying notebook at Tab 68]. Inquisitorial systems should not be confused with the Holy Inquisition; the was an ecclesiastical court designed to prosecute heresy. *Id.* *See* J. R. Spencer, *The Case for a Code of Criminal Procedure*, CRIM. L. REV. 519, 528 (2000). [Reproduced in the accompanying notebook at Tab 63]. The civil code came about in 1804, when it was promulgated by Napoleon. Hence, it is sometimes referred to as the Code Napoleon. The German code of criminal procedure (StrafprozeSSordnung)-mixes French ideas with notions from the common law. *Id.*

[17] Herrmann, *supra* note 15, at 128 [Reproduced in the accompanying notebook at Tab 64]; *see* DENIS SALAS, REVISED BY ALEJANDRO ALVAREZ, THE ROLE OF THE JUDGE IN EUROPEAN CRIMINAL PROCEDURES 489 (2002).

Scotland, are considered to be a mix of the inquisitorial and adversarial systems. In these jurisdictions, the judge's role tends to be more directive than in traditional adversarial systems, while the prosecutor and defense take a correspondingly less active role.

While these systems were once viewed as being at opposite ends of the procedural spectrum, today these distinctions are blurring as each blends and borrows characteristics from the others.[18] Examples of this blending of traditions are the ICTY and ICTR. This section will highlight some of the commonly accepted differences between the common law and civil code systems. More specific details of the different countries will be addressed in the following sections.[19]

## B. Role of the Parties in the Process

### (1) Common Law

#### *(a) Role of the Prosecutor*

Unlike civil code jurisdictions, criminal investigations are almost exclusively in the hands of the police, not the prosecutor, in common law jurisdictions.[20] The prosecutor's job is not to initiate investigations, but to represent the case before the court.[21] The police turn over the investigation to the prosecutor only after enough evidence has been gathered to charge the accused.[22]

---

[Reproduced in the accompanying notebook at Tab 27]. The French system is basically inquisitorial during the pre-trial stage, yet provides for some adversarial elements associated with common law systems. In contrast, the German system may be seen as following adversarial procedures during the pre-trial stage, but becomes inquisitorial during the trial itself.

[18] McMunigal, *supra* note 14, at 1461. [Reproduced in the accompanying notebook at Tab 68].

[19] See *infra* notes 58-327 and accompanying text.

[20] STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 32 (2002). [Reproduced in the accompanying notebook at Tab 47].

[21] SAFFERLING, *supra* note 7, at 64. [Reproduced in the accompanying notebook at Tab 25].

[22] Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 7 IND. INT'L & COMP. L. REV. 63, 75 (1996). [Reproduced in the accompanying notebook at Tab 84]. The prosecutor will be involved at the early stages of the investigation if the case is extremely complex. *Id.*

In common law jurisdictions, each party presents its own case, calls its own witnesses and experts and cross-examines the witnesses and experts of the other side.[23] The prosecutor's role is prove the case against the defendant beyond a reasonable doubt.[24] However, arguing the case at whatever cost is prohibited because the prosecutor occupies a dual role of an aggressive advocate seeking convictions and an officer of the court seeking justice.[25] On the other hand, the defense's role is to zealously represent the defendant and to ensure that the defendant's substantive and procedural rights are protected.[26]

*(b) Role of the Judge*

There is no investigative judge overseeing the investigation to ensure impartiality in common law jurisdictions like there is in civil code jurisdictions.[27] Under the common law systems, each party - the judge, the prosecutor, and the defense - has a distinct and independent role during trial.[28] The main function of the judge is to serve as a procedural watchdog.[29] The judge's role is as an impartial observer, ensuring that only evidence that is allowed by the rules is admitted. His or her role may be broken down into three elements: (1) procedural, (2)

---

[23] Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 525 (1973). [Reproduced in the accompanying notebook at Tab 74].
[24] NICO JORG, STEWART FIELD, & CHRISJE BRANTS, *Are Inquisitorial and Adversarial Systems Converging?, in* CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 51 (Phil Fennel et al. eds., 1995). [Reproduced in the accompanying notebook at Tab 40]. The prosecutor has a duty to disclose exculpatory evidence. However, just what constitutes exculpatory evidence is often debated. In the U.S., only exculpatory evidence that is likely to create a reasonable probability that its admission would change the outcome of the case is subject to mandatory disclosure to the defense. *See* McMunigal, supra note 14, at 1465. [Reproduced in the accompanying notebook at Tab 68].
[25] Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 455 (1992). [Reproduced in the accompanying notebook at Tab 52]. Hopefully, the two goals go hand in hand. However, the difficulty of zealously arguing a case in based on a good faith belief that the accused is guilty while still remaining open and objective throughout the proceeding is obvious. *Id.*
[26] Mack, *supra* note 22, at 76-77. [Reproduced in the accompanying notebook at Tab 84].
[27] Jorg, *supra* note 24, at 48. [Reproduced in the accompanying notebook at Tab 40].
[28] *Id.* at 51. The common law judge is often described as an umpire, ensuring that both sides follow the rules of the game being played out in front of the court. *Id.*
[29] *Id.*

adjudicative, and (3) sentencing.[30] He or she presides over the conduct of the trial and its process, thereby supervising the conduct of the parties and ensuring procedural fairness.[31]

Under the common law tradition, the fact-finder is either a lay jury or a professional judge.[32] If the fact-finder is a lay jury, the judge instructs the jury and clarifies questions of law.[33] If trial by jury is waived, the judge decides the facts of the case based on the evidence that each side presents.[34] At the end of the trial, the judge or jury must decide which side has presented the more convincing argument, with the prosecution bearing the burden of producing enough evidence to prove the defendant's guilt beyond a reasonable doubt.[35] The common law judge's influence on the jury is generally limited to instructions given to the jurors before they retire for deliberations.[36] If the accused is found guilty, the judge generally decides what sentence to impose.

**(2) Civil Code**

*(a) Role of the Prosecutor*

In contrast to common law jurisdictions, the position of prosecutor in civil code jurisdictions is generally a judicial post, and the roles of the prosecutor and the judge are less clearly differentiated.[37] The primary function of the prosecutor in a civil code system is to assist

[30] SAFFERLING, *supra* note 7, at 218. [Reproduced in the accompanying notebook at Tab 25]. In cases where there is no jury, the judge will also have the task of making findings of fact. The judge's role is procedural in the sense that it focuses on ensuring the rules are complied with by each side. *Id*. *See* GEORGE F. COLE & CHRISTOPHER E. SMITH, CRIMINAL JUSTICE 255-257 (9th ed, 2001). [Reproduced in the accompanying notebook at Tab 29].
[31] Herrmann, *supra* note 15, 129. [Reproduced in the accompanying notebook at Tab 64].
[32] *Evidentiary Barriers*, *supra* note 23, at 538. [Reproduced in the accompanying notebook at Tab 74]. Cases involving jury trials are relatively rare in common law systems, given that most cases are decided by pleas and that the defendant has the right to waive a trial by jury.
[33] SAFFERLING, *supra* note 7, at 210. [Reproduced in the accompanying notebook at Tab 25].
[34] *Id*. In some jurisdictions, a jury will also decide the sentence.
[35] *Evidentiary Barriers*, *supra* note 23, at 563-64. [Reproduced in the accompanying notebook at Tab 74].
[36] *Id*. at 538. This is not to say that the judge may indirectly influence the jury by the way of reactions to proceedings in front of the court.
[37] 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, 369 (2001). [Reproduced in the accompanying notebook at Tab 55].

the court in finding the truth; he or she represents the public interest.[38] The prosecutor controls the investigation of a reported crime, assembles a balanced dossier, and then files the appropriate charges if the evidence shows that a crime has been committed.[39] The dossier is consulted and used extensively by the judge during the trial. The bulk of the work of proving the guilt of the defendant is laid out by the prosecutor in the dossier before trial. These detailed pre-trial inquiries are meant to clearly define the issues at trial and ensure that all relevant facts are brought before the court.[40]

The prosecutor initiates the proceedings, and then moves into the background as the judge take over.[41] Although the role of the prosecutor is restricted to that of an assistant of the court, the prosecutor still bears the burden of proving the guilt of the accused. The counsel for the defense works in the interest of the accused and may use all means within the rules to secure an acquittal for his or her client.[42]

*(b) Role of the Judge*

An investigative judge or prosecutor oversees the investigation and ensures supervision and control of the measures used by the investigators in civil code jurisdictions.[43] Through the

---

[38] Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV. 1, 16 (2002). [Reproduced in the accompanying notebook at Tab 61]. Public interest also includes the interests of the victim, as well as the accused. *Id.*

[39] William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1332 (1993). [Reproduced in the accompanying notebook at Tab 98].

[40] A. V. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE: A COMPARATIVE STUDY, WITH PARTICULAR EMPHASIS ON THE ROLE OF THE PUBLIC PROSECUTOR 24 (1975). [Reproduced in the accompanying notebook at Tab 22]. These inquiries are not designed to pre-judge the accused, only to ensure that the full facts of the case are made available so that the trial court may interpret the evidence and decide the question of guilt and innocence. *Id*.

[41] Herrmann, *supra* note 14, at 129. [Reproduced in the accompanying notebook at Tab 64].

[42] SAFFERLING, *supra* note 7, at 224. [Reproduced in the accompanying notebook at Tab 25]. The defense counsel is still committed to serving truth and justice, but this role is curtailed by his duty to act in the interests of his client. For example, if the defense counsel is aware of the accused guilty, he may not disclose that knowledge but may also not deliberately mislead the court. In such cases, the defense counsel may ask to withdraw from the case. *Id.*

[43] Scott T. Johnson, Note, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L L. PERSP. 111, 144 (1998). [Reproduced in the accompanying notebook at Tab 91]. Some inquisitorial systems are reducing the role played by the investigation judge to that of merely authorizing the use of intrusive investigative techniques and transferring the responsibility for the collection

investigation, an investigative dossier is created containing both the findings of the judicial inquiry and the different steps performed by the investigators.[44] The investigation stage is crucial because the evidence in the dossier will be relied on almost exclusively by the judge in conducting the trial and reaching a decision.[45] This means the judge at trial will not be operating on a blank slate, but instead will have already been presented with knowledge of the case from the dossier.[46]

In the civil code systems, the parties are not necessarily independent actors; instead, they are all part of one proceeding meant to uncover the truth.[47] Trial procedures are considered to be simpler, less technical and less lawyer-dominated than adversarial proceedings.[48] The judge's task is to arrive at the truth through inquiry.[49] While the judge in the common law system has three main functions, the judge's functions in the civil code system can be divided into four elements at trial: (1) procedural, (2) adjudicative, (3) inquisitorial, and (3) sentencing.[50] The presiding judge is responsible for conducting the proceedings, making rulings on the law, and for

---

of evidence over to the prosecutor. THAMAN, *supra* note 20, at 31. [Reproduced in the accompanying notebook at Tab 47]. As the prosecutor's role becomes more involved with solving a crime, and less concerned with safeguarding the investigative process, the result may be the creation of an adversarial relationship between the prosecution and the defense. Jorg, *supra* note 24, at 47-48. [Reproduced in the accompanying notebook at Tab 40]. Defense lawyers in inquisitorial countries do not normally investigate their own cases; however, one result of the prosecutor's increased direction of the investigation is that the defense may be more reluctant to trust in the impartiality of the process and the investigations findings. This may lead more defense lawyers to engage in their own investigations. *Id.* To combat this trend, several inquisitorial countries created a new impartial judicial figure, called the judge of the investigation, to ensure that the investigation was conducted impartially and to help the prosecutor and the trial judge retain their neutral stance. THAMAN, *supra* note 20, at 31. [Reproduced in the accompanying notebook at Tab 47]. Thus, the judge is allowed to be independent of law enforcement and able to retain an impartial stance. *Id.*

[44] Jorg, *supra* note 24, at 47. [Reproduced in the accompanying notebook at Tab 40]. This file is available to the defense and the prosecution. The dossier reflects the questioning of witnesses, searches and seizures, interrogations, and other investigative techniques conducted by the investigating judge. *Id.*

[45] Mack, *supra* note 22, at 75. [Reproduced in the accompanying notebook at Tab 84].

[46] *Evidentiary Barriers*, *supra* note 23, at 545. [Reproduced in the accompanying notebook at Tab 74].

[47] *Id*. at 564.

[48] Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 134 (1983). [Reproduced in the accompanying notebook at Tab 56].

[49] SAFFERLING, *supra* note 7, at 217. [Reproduced in the accompanying notebook at Tab 25].

[50] *Id*.

eliciting the evidence.[51] It is the judge who takes the lead in questioning the accused and the witnesses, with the prosecutor relegated to asking follow-up questions and generally helping the tribunal to reach a just result.[52] The presiding judge is responsible for producing the evidence,[53] and the prosecutor and the defense ask questions only with the permission of the presiding judge.[54] The civil code judge has power to revise charges before and during the trial, and to raise arguments and defenses not initiated by either the defense or prosecution.[55] The judge also determines the facts of the case, along with the guilt or innocence of the accused.[56] Finally, the civil code judge decides hands down the sentence of a convicted defendant.[57]

## III. Role of the Prosecutor and Judge in Several Common Law Jurisdictions

### A. United States[58]

The United States' system of criminal justice is an adversarial system, which requires that each side in the conflict is zealously represented by an advocate.[59] The system developed out of a profound desire to protect the individual rights guaranteed under the U.S. Constitution, along

[51] Herrmann, *supra* note 14, at 129. [Reproduced in the accompanying notebook at Tab 64].
[52] Mack, *supra* note 22, at 75. [Reproduced in the accompanying notebook at Tab 84].
[53] *Evidentiary Barriers*, *supra* note 23, at 525. [Reproduced in the accompanying notebook at Tab 74]. The civil code judge may raise, and often has a duty to raise, defenses which are suggested by the facts of the case. McClelland, *supra* note 38, at 17. [Reproduced in the accompanying notebook at Tab 61].
[54] *Id*. at 16.
[55] *Id*. at 17.
[56] *Evidentiary Barriers*, *supra* note 23, at 539. [Reproduced in the accompanying notebook at Tab 74]. Different jurisdictions use a single professional judge or an entire bench of either professional or lay judges, or a mix of professional judges and a lay jury. SAFFERLING, *supra* note 7, at 217. [Reproduced in the accompanying notebook at Tab 25]. The perception that juries are not used in civil code countries is inaccurate. While most proceedings do proceed before judges, some jurisdictions, like France, have a mixed jury and professional judge system in the most serious cases. *Evidentiary Barriers*, *supra* note 23, at 539. [Reproduced in the accompanying notebook at Tab 74]. The lay judges participate in deliberations with and are presided over by professional judges.
[57] Cole, supra note 30, at 253. [Reproduced in the accompanying notebook at Tab 29].
[58] The Federal System of criminal procedure will be discussed. Each state has its own rules of criminal procedures, which often provide greater protection to individual rights than the Federal system. Including the federal system, there are 52 criminal procedures followed in the U.S.
[59] Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include The Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 927 (1996). [Reproduced in the accompanying notebook at Tab 90].

with a rejection of the inquisitorial tactics that were common on the European Continent.[60] The protection of individual rights is achieved by substantive and procedural due process, which serve to cloak the accused with constitutionally guaranteed safeguards.[61] The accused is presumed to be innocent, and the prosecutor must prove guilt beyond a reasonable doubt.[62] The United States places a substantial weight on minimizing erroneous convictions at trial, even at the risk that a guilt person may go free.[63]

More than any of the other jurisdictions discussed in this memorandum, the majority of cases in the United States are disposed of by plea bargaining. Only about 9% of felony cases go to trial, with roughly half of those being decided by a jury and half decided by a judge.[64] This is an important fact to keep in mind because the "average" trial in the United States occurs in only a minute number of cases. Implicitly, these cases are likely to be the ones in which guilt is not as clear cut as in cases disposed of by plea bargaining or the ones where several key issues are being vigorously disputed by the parties. Thus, the adversarial nature of criminal procedure in the United States is at its highest level in cases that actually go to trial.

---

[60] Mack, *supra* note 22, at 63-64. [Reproduced in the accompanying notebook at Tab 84]. During the 1960's, the Supreme Court under Chief Justice Warren significantly expanded the protections afforded to individuals under the U.S. Constitution. This expansion has been scaled back in recent years by the Rehnquist Court. On the Continent, the accused was commonly compelled to admit guilt after hours of interrogation in Star Chamber proceedings. The Star Chamber originated in the 14th century as a judicial branch of the King's Council. *Id.*

[61] *Id*. at 69-70. The rules are meant to level the playing field between the accused and the prosecution. *Id.*

[62] Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 56-57 (1991). [Reproduced in the accompanying notebook at Tab 59]. These protections are considered Court-enforced safeguards; however, in order to ensure that justice is done, the prosecutor has a duty to ensure that the basic elements of the adversarial systems exist at trial. *Id.*

[63] Richard S. Frase, *Review Essay: The Search for the Whole Truth about American and European Criminal Justice: Trials Without Truth: Why Our System of Criminal Trials has become an Expensive Failure and What we Need to Do to Rebuild it. By William T. Pizzi*, 3 BUFF. CRIM. L. REV. 785, 816 (2000). [Reproduced in the accompanying notebook at Tab 86].

[64] Cole, *supra* note 30, at 360. [Reproduced in the accompanying notebook at Tab 29]. The seriousness of the charge is probably the most important factor in deciding whether or not a plea agreement is reached. *Id*. *Contrast* Sean Doran, John D. Jackson, & Michael L. Seigel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM J. CRIM. L. 1, 9 (1995) (stating that these figures are inflated because "trials" is deemed to include hearings held by the judge on pre-trial motions. *Id*.). [Reproduced in the accompanying notebook at Tab 92].

### (1) Role of the Prosecutor

*(a) Investigation & Pre-Trial*

In the United States, the prosecutor serves the dual role of being a zealous advocate and a minister of justice, whose primary duty in any case is to see that justice is done.[65] In pursuing justice, the prosecutor represents numerous constituencies.[66] The prosecutor does not directly conduct the investigations of crimes; instead, he or she leaves these tasks up to the appropriate law enforcement agency.[67] However, the prosecutor is often consulted in cases of complex crimes which require the assistance of the prosecutor from the early stages of investigation.[68] When the investigation is complete or has produced sufficient evidence to file charges, the case is referred to the prosecutor for review.[69]

The prosecutor plays the central role in determining the criminal process of the accused.[70] He or she has broad and virtually unregulated discretion regarding whether or not to charge the accused and whether or not to proceed with the case to trial.[71] During the review of the investigation, the prosecutor's role is that of a neutral minister of justice.[72] In fulfilling this role,

---

[65] McMunigal, *supra* note 14, at 1454. [Reproduced in the accompanying notebook at Tab 68].
[66] Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 466 (2002). [Reproduced in the accompanying notebook at Tab 53]. For example, the prosecutor must take into account the crime victims, enforcement agencies, the office of the prosecutor, and truth and justice. *Id.*
[67] Susanne Walther, *The Position and Structure of the Prosecutor's Office in the United States*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 283, 288-89 (2000). [Reproduced in the accompanying notebook at Tab 93] However, investigations conducted by a federal grand jury are under the control of the prosecutor, and may or may not result in an indictment. *Id.*
[68] Flowers, *supra* note 59, at 935. [Reproduced in the accompanying notebook at Tab 90].
[69] JOHN MICHELICH, *United States of America*, *in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 481 (Louise Arbour et al. eds., 2000). [Reproduced in the accompanying notebook at Tab 34].
[70] Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 643 (2002). [Reproduced in the accompanying notebook at Tab 82].
[71] MICHELICH, *supra* note 69, at 481. [Reproduced in the accompanying notebook at Tab 34]. The standards followed by Federal prosecutors are the Principles of Federal Prosecution of the U.S. Department of Justice. Prosecutors generally consider whether or not there is sufficient evidence to prevail at trial or whether other cases are more worthy of resources. The prosecutor may also dismiss charges after an indictment is filed, and courts will usually defer to the prosecutor's discretion. The only judicial remedy for a decision to charge is dismissal of the prosecution, as the U.S. Supreme Court granted prosecutors absolute immunity in 1976 against civil suits brought for such matters. *Id.*
[72] Flowers, *supra* note 59, at 934-35. [Reproduced in the accompanying notebook at Tab 90].

the prosecutor acts as a judge and fact finder, and he or she should only proceed if he or she reasonably believes that the charges can be sustained by admissible evidence at trial.[73] At this stage of the process, the prosecutor occupies a non-adversarial role because there is no adversary yet identified.[74] If the prosecutor decides to proceed, either a federal grand jury is convened, an indictment is issued, or the suspect is arrested.[75] It is at this point in the proceedings in which the prosecutor in the United States begins to take on an adversarial role.[76]

*(b) Trial*

Trial in the United States is conducted as an adverse proceeding.[77] The prosecutor plays an active role and initiates the dispute by charging the defendant on behalf of the people.[78] The prosecution and the defense are responsible for producing their own cases, and both are expected to represent their positions zealously.[79] While each side is responsible for producing evidence that supports its position,[80] if the prosecutor is aware of exculpatory evidence that will materially effect the outcome of the case, he or she is required to disclose it to the defense.[81]

The prosecution presents its case first. As mentioned above, the prosecutor must prove the accused's guilt beyond a reasonable doubt.[82] At the close of the prosecution's case, the

---

[73] *Id*. at 938.
[74] *Id*. at 939. In fact, if the prosecutor assumes an adversarial role too soon, he would be far less likely to screen out case which were unsuitable for prosecution. *Id.*
[75] MICHELICH, *supra* note 69, at 481. [Reproduced in the accompanying notebook at Tab 34]. The prosecutor generally lacks compulsory powers, which are reserved for the judiciary. For example, a prosecutor must have a judge issue a warrant to arrest or search a suspect, and while a prosecutor may issue a subpoena for a person to testify, only a judge may order enforcement. *Id.*
[76] Flowers, *supra* note 59, at 940. [Reproduced in the accompanying notebook at Tab 90].
[77] *Id*. at 941.
[78] *Id.*
[79] Cole, *supra* note 30, at 366-72. [Reproduced in the accompanying notebook at Tab 29].
[80] *Id.*
[81] Terence J. Galligan, *The Prosecutor's Duty to Disclose Exculpatory Evidence After United States v. Bagley*, 1 GEO. J. LEGAL ETHICS 213, 214 (1987). [Reproduced in the accompanying notebook at Tab 95]. The defense is under no obligation to produce evidence of the defendant's guilt. *Id.* However, unlike defendants in Germany, if the defendant testifies, he must take an oath, and his attorney is not allowed to let the defendant perjure himself.
[82] Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251 (2002). [Reproduced in the accompanying notebook at Tab 67]. Basically, the reasonable doubt standard is proof to a virtual certainty. There are two other general levels of proof used in the United States: (1) preponderance of the

defense may ask the court to rule that the prosecutor has not established all the elements of its case and that the case should be dismissed.[83] This is similar to Rule 98 *bis* of the ICTY/ICTR, which operates along the same manner.

A typical trial is marked by numerous evidentiary objections, motions for exclusion and objections to preserve issues for appeal.[84] As a result, criminal trials consume a lot of time and resources.[85] At the close of the defense's case, the prosecutor is given a chance to counteract the evidence presented by the defense.[86] In turn, the defense is allowed to counterattack the prosecutions rebuttal.[87] This exchange is allowed to continue as long as each side is presenting new evidence and highlights how the parties, not the judge, drive the criminal trial in the United States. After each side rests, closing arguments are presented and the case goes to the judge or the jury, who decide whether or not the prosecutor has proved his or her case beyond a reasonable doubt. While the defense is allowed to appeal a guilty verdict, the prosecutor is not allowed to appeal an acquittal.[88]

---

evidence, meaning more probable than not and used in civil litigation, and (2) clear and convincing, an intermediate level of proof and used in certain special instances of litigation. *Id.*

[83] Cole, *supra* note 30, at 369. [Reproduced in the accompanying notebook at Tab 29]. The case is rarely dismissed at this point in the trial. *Id*.

[84] Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 19 (2002). [Reproduced in the accompanying notebook at Tab 76].

[85] *Id*. For example, prosecutors commonly over charge defendants and offer better deals in cases where the evidence is relatively weak. As mentioned above, there is a huge reliance on guilty pleas in order to reduce the prosecutor's case load to a manageable level. This reliance is one of the hallmarks of the criminal system in the United States and effects virtually all significant decisions made in the system. *Id.*

[86] Cole, *supra* note 30, at 370. [Reproduced in the accompanying notebook at Tab 29].

[87] *Id*. at 366-72.

[88] STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1249-50 (5th ed. 1996). [Reproduced in the accompanying notebook at Tab 46].

**(2) Role of the Judge**

*(a) Investigation & Pre-Trial*

The judge in the United States is duty-bound to at all times to act as a neutral party.[89] Compared to involved role the judge plays in inquisitorial jurisdictions, the role of the judge in the United States is more supervisory during the pre-trial processes. It differs from civil code jurisdiction in that the judge does not play an active role in conducting the investigation or seeking out evidence for either side. The judge acts as an adjudicator and negotiator during the pre-trial process.[90] The judge hears and decides pre-trial motions on evidentiary issues that each side wishes to present. Moreover, the judge is responsible for ensuring that the accused is aware of his or her rights during the case.[91] Additionally, the judge disposes of the majority of criminal cases by taking a guilty plea from the defendant.[92] Finally, the judge performs an administrative function by scheduling cases and directing the staff of the court.[93]

*(b) Trial*

While the prosecutor functions as an advocate and is concerned with proving facts, the judge functions as a law-giver who sits above the fray in the courtroom and ensures the trial produces a just and fair result. Although the judge might have a basic knowledge of the facts of the case from pre-trial motions, he or she does not review an investigative file or have any independent knowledge of the facts.[94] To insure impartiality, the judge has no duty to investigate or present any evidence.[95] Instead, the judge plays the role of an umpire, keeping

[89] Mack, *supra* note 22, at 78. [Reproduced in the accompanying notebook at Tab 84].
[90] Cole, *supra* note 30, at 255-57. [Reproduced in the accompanying notebook at Tab 29].
[91] *Id*. at 256.
[92] *Id*. at 255.
[93] *Id*. at 257.
[94] Combs, *supra* note 84, at 17. [Reproduced in the accompanying notebook at Tab 76].
[95] Flowers, *supra* note 59, at 942. [Reproduced in the accompanying notebook at Tab 90].

both parties within the rules of the trial.[96] As such, the judge will decide if evidence violates the rules of procedure or if a question by either side falls outside its allowable scope. The judge's main task is to rule on the objections made by either party.[97]

Characterizations of the judge as being passive are only true in the sense that the judge does not actively direct the questioning of witness or the production of evidence. Judges in the United States are active in fulfilling their role of enforcing the rules and order of the trial. In fact, it is essential for the judge to actively enforce the rules for the adversarial system to function correctly and efficiently. A judge who is too passive in enforcing the rules could end up in a trial where the parties run rampant attempting to prove their individual theories of the case. A passive judge would appear like a referee in a boxing match that refused to enforce the rules of the bout, resulting in a match that gradually escalates into street fight. In order to be effective and see that justice is done, the judge must actively enforce the rules fairly to both parties.

In cases where the judge is also the finder of fact, he or she additionally weights the evidence, applies the law, and renders a decision.[98] If the finder of fact renders a decision of guilty, in most cases the judge is responsible for determining the sentence.[99]

**(3) Comparison to Other Systems**

In comparison to other jurisdictions, the United States is the most adversarial, especially in the terms of pre-trial discovery allowed by the defense. The role of the judge is similar to that of judges in Scotland and England, in that the judge remains nonaligned and allows the responsibility of presenting the case to fall to the prosecutor and the defense. Generally, the prosecutor has the least control over and contact with the investigating police compared with

[96] Mack, *supra* note 22, at 78. [Reproduced in the accompanying notebook at Tab 84].
[97] Doran, *supra* note 64, at 37. [Reproduced in the accompanying notebook at Tab 92].
[98] Mack, *supra* note 22, at 78. [Reproduced in the accompanying notebook at Tab 84].
[99] *Id*. at 80. Sentencing ranges for crimes are constrained by the Federal Sentencing Guidelines. Judges are allowed to depart from the standards in exceptional cases.

other jurisdictions. The burden of proof falls entirely on the shoulders of the prosecutor. Like France and Scotland, he or she is not allowed to appeal an acquittal.

## B. England[100]

### (1) Role of the Prosecutor

*(a) Investigation and Pre-Trial*

The main goal of a the prosecutor in England is not to secure a verdict against the accused, but to assist in the administration of justice.[101] The prosecutor has complete discretion in deciding whether or not to prosecute an offense.[102] If there is sufficient evidence to justify criminal proceedings, the prosecutor should then consider whether or not prosecution is in the best interest of the public.[103] If the prosecutor is unsure whether or not to proceed, the general rule is in favor of proceeding with prosecution and allowing the court to be the final arbiter.[104] The duty of the prosecutor is not to obtain convictions, but to ensure that all the evidence, both

[100] England refers to both England and Wales. Scotland has a separate system of procedure that will not be discussed in later this section. *See* Spencer, *supra* note 16, at 520. [Reproduced in the accompanying notebook at Tab 63]. English criminal procedure is widely dispersed among different statutes, some of which contradict themselves. "Indeed, it is no exaggeration to say that an English layman who can read foreign languages would find it simpler to discover the French or German or Italian rules of criminal procedure and evidence than he would his own." *Id.* at 521. JASON S. WILLIAMS, CIVIL AND CRIMINAL PROCEDURE: THE CONDUCT OF LITIGATION IN THE COURTS OF ENGLAND AND WALES 324 (1997). [Reproduced in the accompanying notebook at Tab 30]. Like other countries, criminal offenses are heard by courts of different levels depending on the seriousness of the offense, with the most serious offenses are tried by indictment in the Crown Court . The initial appearance of the accused takes place in the magistrate's court before the case is transferred to the crown court for trial. *Id*. at 326.

[101] SIR JOHN MAY, *The Responsibility of the Prosecutor to the Court, in* THE ROLE OF THE PROSECUTOR 90 (J.E. Hall Williams ed., 1987). [Reproduced in the accompanying notebook at Tab 33]. Prior to 1985, there was no nationwide, institutional prosecutor in England. Instead, private barristers were hired to represent the Crown in court while the police were responsible for the detection, investigation, and prosecution of crime. These private barristers served the police in a solicitor-client relationship, a relationship that allowed the police to override and overrule prosecutorial decisions. The Crown Prosecution Service (CPS) was created to attain a fairer balance in the way suspects and offenders were handled.

[102] ANDREW SANDERS, *England and Wales (United Kingdom), in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 298 (Louise Arbour et al. eds., 2000). [Reproduced in the accompanying notebook at Tab 23]. This is sometimes known as the "expediency" or "opportunity" system.

[103] MAY, *supra* note 101, at 91. [Reproduced in the accompanying notebook at Tab 33].

[104] *Id*.

inculpatory and exculpatory, is presented to the court.[105] The final decision of whether or not to prosecute remains with the prosecutor.[106] Once the prosecutor has decided to prosecute, charges should be kept to the minimum to achieve a just result and to ensure that the charge, if proved, will have a proportional punishment attached to the criminality of the accused.[107]

*(b) Trial*

Although some aspects of the investigation and pre-trial stages of the English system of criminal justice have acquired a somewhat inquisitorial flavor, the trial itself remains exclusively adversarial.[108] The prosecutor actively presents evidence and witnesses before the court in an effort to prove the case.[109] Similar to other jurisdictions, the English prosecutor is forced to fulfill the dual role of being an administer of justice, while at the same time attempting to prove the case beyond a reasonable doubt.[110] Moreover, the burden of proof rests solely on the prosecutor.[111]

---

[105] PAUL SIEGHART, *A View from Justice, in* THE ROLE OF THE PROSECUTOR 98 (J. E. Hall Williams ed., 1987). [Reproduced in the accompanying notebook at Tab 41].

[106] MAY, *supra* note 101, at 92. [Reproduced in the accompanying notebook at Tab 33]. The prosecutor may ask for the trial judge's opinion on what course to pursue. If he does, he must abide by the trial judge's decision. *Id.*

[107] MAY, *supra* note 101, at 92. [Reproduced in the accompanying notebook at Tab 33]. The prosecutor should charge those counts in the indictment that he has the strongest evidence for. Throwing the book at an accused when one or two charges is appropriate is considered to be a waste of the court time and money. Similarly, charging multiple offenses on weak evidence in the hope of the jury returning a conviction on one or two is considered improper. If the evidence is insufficient to convict on the strongest offenses, then the prosecution should not go forward. *Id. See* Spencer, *supra* note 16, at 527 (discussing the common resolution of cases by plea bargaining). [Reproduced in the accompanying notebook at Tab 63].

[108] Sieghart, *supra* note 105, at 100. [Reproduced in the accompanying notebook at Tab 41].

[109] DAVID BARNARD, THE CRIMINAL COURT IN ACTION 136 (3rd ed. 1988). [Reproduced in the accompanying notebook at Tab 26].

[110] Sieghart, *supra* note 105, at 101. [Reproduced in the accompanying notebook at Tab 41]. The prosecutor stands in a dual relationship where he is dependant on the police for much of his information, and is required by the court to perform a balancing act of proving his case beyond a reasonable doubt and remaining an impartial agent of justice. *Id.*

[111] Barnard, *supra* note 109, at 132. [Reproduced in the accompanying notebook at Tab 26].

Unlike a prosecutor for the ICTY/ICTR, if the trial ends with an acquittal in England, the prosecutor does not have an option to appeal any finding of fact.[112] Although the prosecutor may appeal a question of law, the accused will suffer no ill effects, even if the judge made an egregious error.[113] If the trial ends in a conviction, the prosecutor continues to have a duty to call to the attention of the defendant any exculpatory evidence that is discovered in the future.[114] In addition, the prosecutor may appeal the sentence given to a convicted person if he or she feels the sentence was too lenient.[115]

**(2) Role of the Judge**

*(a) Investigation & Pre-Trial*

Investigations in England are not conducted under any judicial control.[116] The accused comes before the court in a plea and direction hearing [hereinafter P & D hearing].[117] Prior to the P& D hearing, the prosecution and the defense complete a questionnaire for the judge that gives general information about the issues of the case, number of witnesses, exhibits, etc.[118] The judge uses this report to help decide the date of trial and to run the initial stages of the case more efficiently.[119]

After the P & D hearing, a preparatory hearing is often held on the motion of the judge or either party in order to expedite the trial and allow the judge to manage the proceedings

---

[112] *See* Spencer, *supra* note 16, at 524. [Reproduced in the accompanying notebook at Tab 63]. They may appeal from an acquittal resulting from a summary proceeding. *Id. See* Sieghart, *supra* note 105, at 101. [Reproduced in the accompanying notebook at Tab 41].
[113] Williams, *supra* note 100, at 505. [Reproduced in the accompanying notebook at Tab 30]. Thus, once an accused is acquitted, he or she cannot be re-tried on appeal. The prosecutor's appeal is only to correct mistakes of law from falling into common usage in the courts. *Id*.
[114] Sieghart, *supra* note 105, at 101-2. [Reproduced in the accompanying notebook at Tab 41]. For example, evidence might come to the attention of the prosecutor that someone other than the defendant later confesses to the crime or that police misconduct occurred during the investigation. *Id.*
[115] Williams, *supra* note 100, at 506. [Reproduced in the accompanying notebook at Tab 30].
[116] Sieghart, *supra* note 105, at 100. [Reproduced in the accompanying notebook at Tab 41].
[117] Williams, *supra* note 100, at 460. [Reproduced in the accompanying notebook at Tab 30].
[118] *Id*. at 462.
[119] *Id*.

efficiently.[120] During a preparatory hearing, the judge may rule on the admissibility of evidence or any other relevant question of law relating to the case.[121] The judge is also allowed to order both the prosecution and the defense to disclose aspects of their respective cases and to attempt to agree on the facts.[122] If the parties fail to reach agreements to the judge's satisfaction, the judge may order both to file reports explaining the reasons for their failure to agree.[123] Failure of either party to comply with orders during the preparatory hearing or departure from an agreed upon fact may be disclosed to the jury.[124]

*(b) Trial*

In England, it is the function of the jury to determine which side has the better case using the burden of proof beyond a reasonable doubt standard.[125] "[T]hroughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt."[126] The jury is viewed as being in the position to represent the views of the community, whereas the judge is bound by his institutional role to represent the law.[127] Also, like the judge in the United States, the English judge is confined to umpiring the trial and ensuring that both parties follow the rules.[128]

---

[120] Barnard, *supra* note 109, at 123. [Reproduced in the accompanying notebook at Tab 26].
[121] Williams, *supra* note 100, at 466. [Reproduced in the accompanying notebook at Tab 30].
[122] Barnard, *supra* note 109, at 147. [Reproduced in the accompanying notebook at Tab 26]. *See* Williams, *supra* note 100, at 466. [Reproduced in the accompanying notebook at Tab 30]. This includes ordering the prosecution to disclose the principal facts of its case, the legal propositions relied upon, and the consequences stemming from these matters. The defense may be ordered to give a general statement setting out the accused's defense and the legal propositions that are being relied upon. *Id.*
[123] *Id*. at 467.
[124] *Id*.
[125] Sieghart, *supra* note 105, at 100. [Reproduced in the accompanying notebook at Tab 41].
[126] Woolmington v. DPP, A.C. 462, 481 (1935). [Reproduced in the accompanying notebook at Tab 21].
[127] John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 517 (2002). [Reproduced in the accompanying notebook at Tab 65]. "Despite the demands for greater accountability the jury still derives its essential legitimacy from its independence from the legal system and from its ties to the community…." *Id.* at 527.
[128] Doran, *supra* note 64, at 18. [Reproduced in the accompanying notebook at Tab 92].

The judge is responsible for resolving questions of law, such as disputes over the admissibility of evidence.[129] Hearsay evidence is generally disallowed, although much like in the United States there are numerous exceptions to this rule and the rule is considered more relaxed than that employed in the United States.[130] At the close of the prosecutor's case, the judge may be called upon by the defense to decide whether the prosecution's evidence is sufficient to allow for the jury to convict.[131]

After the defense has presented its case and given its closing, the judge begins the process of "summing up."[132] The judge explains the burden of proof on each of the parties, summarizes the evidence, explains the relevant law the jury is to apply, and instructs that if it appears the judge has expressed a view about the evidence that they disagree with, they are to ignore the judge's apparent opinion and follow their own.[133] In addition, the jury will be asked to return a unanimous verdict.[134] If a verdict of guilty is returned, the judge is responsible for sentencing.[135]

**(3) Comparison to Other Systems**

England, Scotland, and the United States have criminal justice systems that are similar to a certain extent. All have adversarial criminal processes dependent on two relatively equal opponents squaring off to yield a reliable result.[136] The majority of cases in England are disposed of by a guilty plea; however, the number is not as great as found in the United States.[137] Additionally, England, similar to Scotland, allows for more pre-trial discovery between the

[129] Williams, *supra* note 100, at 366. [Reproduced in the accompanying notebook at Tab 30].
[130] Doran, *supra* note 64, at 4. [Reproduced in the accompanying notebook at Tab 92].
[131] Williams, *supra* note 100, at 475. [Reproduced in the accompanying notebook at Tab 30]. Due to the fact that judge's role is to decide only matters at law, the evidence is evaluated at its highest possible level of credibility. *Id*.
[132] Barnard, *supra* note 109, at 147. [Reproduced in the accompanying notebook at Tab 26]. The defense may appeal if the judge fails to perform the summing-up properly.
[133] Williams, *supra* note 100, at 479. [Reproduced in the accompanying notebook at Tab 30].
[134] *Id*. After a certain amount of time, the jury is allowed to reach a verdict by a majority of 10 out of 12 jurors. *Id*. at 480.
[135] *Id*. at 482.
[136] Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1258 (2001). [Reproduced in the accompanying notebook at Tab 70].
[137] Herrmann, *supra* note 15, at 148. [Reproduced in the accompanying notebook at Tab 64].

parties and has a more relaxed version of the prohibition on hearsay evidence than the United States.

Unlike France, Germany, and Israel, the English judge is discouraged from taking too much of an active role in developing the evidence of the case. The English judge is supposed to be a neutral arbitrator, ensuring equal application of the rules and allowing the jury to decide the facts and final result of the case. In fulfilling his or her pre-trial role, the judge is active in encouraging disclosure of evidence and getting the parities to agree to what facts they can. In this sense, the judge is plays more of a role as a facilitator between the parties than the director-type judge found in more inquisitorial systems like France and Germany.

Like the prosecutors in the United States, Scotland, and Israel, the prosecutor in England is responsible for developing his or her case to prove the defendant guilty beyond a reasonable doubt. Moreover, the prosecutor may not adversely affect the status of the accused if he or she successfully appeals a question of law. The fact that the accused may not be affected by an appeal by the prosecutor is similar to the rules in the United States, France, and Scotland.

## IV. Role of the Prosecutor and Judge in Several Civil Code Jurisdictions

### A. France[138]

France is a civil law jurisdiction where law is derived solely from legislative statutes or codes, and where the judiciary cannot make law through binding precedent.[139] The admission of evidence is unconstrained by exclusionary rules, and there are no strict bans on hearsay evidence like in many common law countries; instead, the focus of the court goes towards the weight of

[138] For the purposes of this note, only the procedure for grave offenses will be discussed. All sources concerning system of criminal procedure are in English, as this is the only language the author is able to read.
[139] Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57, 58 (1994). [Reproduced in the accompanying notebook at Tab 77].

the evidence.[140] In fact, French courts rely extensively on documentary evidence contained in the dossier.[141] The defendant is presumed to be innocent, and the prosecution bears the burden of proof.[142] Failure to establish any significant element of the offense must result in an acquittal.[143] The standard of proof that must be met is that of the inner belief (*intime conviction*).[144] This standard is viewed as a subjective standard compared to the more detached or objective standard of "reasonable doubt" that is used in common law systems.[145]

**(1) Role of the Prosecutor**

In contrast to common law countries, the office of the prosecutor in France is a judicial one.[146] The prosecutor serves the trial judge in a relationship that is analogous to the relationship between a client (trial judge) and a lawyer (the prosecutor).[147] The chief function of the prosecutor is to serve the interest of the public generally.[148]

---

[140] Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, And Why Should We Care?*, 78 CAL. L. REV. 539, 678 (1990). [Reproduced in the accompanying notebook at Tab 85].

[141] Kublicki, *supra* note 139, at 85. [Reproduced in the accompanying notebook at Tab 77]. In part, this is due to the fact that the judge does not arrive "cold" at the evidence in the dossier but has a working knowledge of the investigation and the case. S*ee* Doran, *supra* note 64, at 21. [Reproduced in the accompanying notebook at Tab 92].

[142] RICHARD VOGLER, *Criminal Procedure in France, in* COMPARATIVE CRIMINAL PROCEDURE 28 (John Hatchard et al eds., 1996). [Reproduced in the accompanying notebook at Tab 43].

[143] *Id*.

[144] *Id*. at 29-30. The standard is stated as the following: "The law does not demand of Judges and Jurors that you take account of the means by which you were convinced; the law does not prescribe rules according to which the completeness or the sufficiency of evidence can be determined, it only requires that you reflect in silence and with careful thought in order to determine, in the sincerity of your consciences, what impression has been made upon your reasoning by the evidence adduced against the defendant and the way he/she had defended him/herself. The law asks only one question which sums up your entire duty. Do you have an 'inner belief'." *Id.*

[145] Mirjan Damaska, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 346 (1995). [Reproduced in the accompanying notebook at Tab 75].

[146] Vogler, *supra* note 142, at 62. [Reproduced in the accompanying notebook at Tab 43]. The judiciary is divided into two branches: (1) the sitting judiciary-composed of examining magistrates and trial judges, and (2) the standing judiciary-composed of the prosecutors. Both judges and prosecutors receive the same training and it is not uncommon for people to switch back and forth between the two during their careers. *Id.*

[147] *Id*. This puts the prosecutor in the dual role of civil servant and independent judge. Failure of the prosecutor to comply with instructions from a magistrate can result in removal or other disciplinary proceedings. However, the prosecutor does retain prosecutorial discretion from the trial judge. *Id.*

[148] *Id*. at 64. This responsibility of serving the public interest may be broken down into four categories: (1) investigate all criminal offences with the assistance of the judicial police, (2) initiate criminal proceedings, (3) ensure the proper operation of the law, and (4) ensure the final sentence is carried out and fully implemented. *Id*.

*(a) Investigation & Pre-Trial*

During the investigation, or *instruction,* stage, [149] the prosecutor is responsible for authorizing specific acts of investigation, as well as protecting the public from over-zealous policing.[150] In comparison to common law jurisdictions, the French prosecutor's supervision of the police is theoretically quite intensive.[151] In reality, however, the prosecutor generally leaves investigating to the police.[152]

Once the investigation of the judicial police is considered complete, the dossier is forwarded to the prosecutor.[153] The prosecutor then reviews the dossier to ensure that an offense has been made out and to determine whether or not it is in the public's interest to proceed.[154] If the prosecutor decides to go forward, the case is remitted to an examining magistrate (*juge d'instruction*) for an inquiry into the sufficiency of the evidence.[155] At this point, the prosecutor ceases to be involved in the case until the examining magistrate's investigation is complete and the dossier is returned to him or her.[156] If the prosecutor decides the evidence is sufficient, the completed dossier is sent to the *Chambre d'Accusation* to be reviewed.[157] The case will go forward to trial in the *Cours d'assises* if the *Chambre d'Accusation* considers it to be well

---

[149] *Instruction* is the French term for the pre-trial investigation. *Id.* at 29.
[150] SHEEHAN, *supra* note 40, at 7. [Reproduced in the accompanying notebook at Tab 22]; *see* LEONARD H. LEIGH & LUCIA ZEDNER, THE ROYAL COMMISSION ON CRIMINAL JUSTICE: A REPORT ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY 3-9 (1992). [Reproduced in the accompanying notebook at Tab 36]. The French police force is divided into several different divisions. The prosecutor directs the judicial police in the investigation once an instruction has been opened. Theoretically, the judicial police are required to report the discovery of any violations of the criminal law to the prosecutor. *Id*.
[151] Tomlinson, *supra* note 48, at 146. [Reproduced in the accompanying notebook at Tab 56].
[152] LEIGH, *supra* note 150, at 13. [Reproduced in the accompanying notebook at Tab 36].
[153] Vogler, *supra* note 142, at 40. [Reproduced in the accompanying notebook at Tab 43]. The prosecutor, who will have been informed of the inquiry from the outset of the investigation, is then able to call for further investigations if necessary. *Id.*
[154] Vogler, *supra* note 142, at 40. [Reproduced in the accompanying notebook at Tab 43].
[155] *Id*. This inquiry is referred to as an *instruction.* The purpose of the inquiry is two fold: (1) to ensure that weak case are weeded out before the commencement of a trial and (2) to ensure the evidence is sufficient to allow the trial court to make a decision on guilt and sentencing, if appropriate. *Id.*
[156] LEIGH, *supra* note 150, at 14. [Reproduced in the accompanying notebook at Tab 36].
[157] *Id*. at 20. The *chamber d'Accusation* is similar to a court of appeal and is comprised of a president and two counselors. The entire dossier is reviewed and all parties are able to be presence and submit arguments to the court. It serves as an important check in the system against unwarranted prosecutions. *Id*.

founded.[158] The multiple judicial reviews on the investigation during the pre-trial stage is a hallmark of inquisitorial systems of criminal justice. One of the main reasons that the dossier is relied upon so much during the trial is that it has already been reviewed several times.

Both the prosecutor and the examining magistrate have functions that would be associated with the police in common law systems.[159] Often, the cumulative roles of the prosecutor and the examining magistrate result in pre-trial delays of three years or more.[160] The length of time it takes for a case to move through the French system is a frequent source of criticism.[161] This has also been a frequent criticism of the ICTY/ICTR, where pre-trial detentions of the accused are frequently for significant periods of time.

*(b) Trial*

The dossier is the starting point of the criminal trial in France.[162] The trial is designed to serve as a check on the quality of the investigation.[163] As mentioned above, the burden of proof at trial is on the prosecutor.[164] At trial, the prosecution and the defense are responsible for calling witnesses.[165] Theoretically, the prosecutor does not directly question witnesses.[166] Instead the prosecutor must ask questions through the presiding judge.[167] However, in practice, the presiding judge will often allow the prosecutor to directly question the witness after the judge

[158] Cole, *supra* note 30, at 375. [Reproduced in the accompanying notebook at Tab 29]; *see also* Vogler, *supra* note 142, at 50. [Reproduced in the accompanying notebook at Tab 43]. At this time, the defendant's status is changed to that of an "accused person" and all right of appeal against procedural decisions that arouse during the instruction process are terminated. The assises court is reserved for felonies punishable by "infamous" punishment offenses. Less serious crimes are tried by the correctional court. *Id.*
[159] LEIGH, *supra* note 150, at 22. [Reproduced in the accompanying notebook at Tab 36].
[160] *Id.*
[161] *Id.*
[162] *Id.* at 23.
[163] Cole, *supra* note 30, at 375. [Reproduced in the accompanying notebook at Tab 29].
[164] Vogler, *supra* note 142, at 28. [Reproduced in the accompanying notebook at Tab 43].
[165] *Id.* at 76. A list of the witnesses each side plans to call must be exchanged the day before the hearing. *Id.*
[166] Herrmann, *supra* note 15, at 134. [Reproduced in the accompanying notebook at Tab 64].
[167] *Id.*

has finished his or her examination.[168] The prosecution finishes the trial by presenting its closing argument.[169]

**(2) Role of the Judge**

*(a) Investigation & Pre-Trial*

In contrast to common law countries, judges take a more active role in the proceedings.[170] In France, the decision to prosecute on felony charges is strictly regulated by the examining magistrate.[171] Examining magistrates must be involved in the investigation of major offenses.[172] As mentioned above, the examining magistrate retains sole responsibility for the investigation and controls the dossier during this phase.[173] The examining magistrate's inquiry is conducted in secret and is perhaps the most inquisitorial feature of the French criminal justice system.[174] The examining magistrate does not actually investigate. Instead, he or she reviews the dossier and commissions investigations into areas of inquiry relating to both guilt and innocence.[175] Thus, the examining magistrate's role is to independently examine the investigation and examine neutrally any areas that warrant further inquiry.[176]

---

[168] *Id*.
[169] Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43].
[170] Cole, *supra* note 30, at 253. [Reproduced in the accompanying notebook at Tab 29].
[171] *Comparative Criminal Justice*, *supra* note 140, at 625. [Reproduced in the accompanying notebook at Tab 85].
[172] Tomlinson, *supra* note 48, at 153. [Reproduced in the accompanying notebook at Tab 56].
[173] Kai Ambos, *The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 105 (2000). [Reproduced in the accompanying notebook at Tab 66].
[174] Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L.J. 87, 89 (1999). [Reproduced in the accompanying notebook at Tab 60]. *See* Vogler, *supra* note 142, at 42. [Reproduced in the accompanying notebook at Tab 43]. In Europe, only Spain, Holland, and Belgium still retain the *instruction*. The examining magistrate is required to look for both exculpatory and inculpatory evidence. *Id.*
[175] LEIGH, *supra* note 150, at 14. [Reproduced in the accompanying notebook at Tab 36].
[176] *Comparing the Investigating Grand Jury*, *supra* note 174, at 94. [Reproduced in the accompanying notebook at Tab 60]. The examining magistrate is given a great deal of power in who and what may be investigated, the only general constraint being that the investigation must be done in relation to the case. *Id* at 96.

There is a virtual absence of pre-trial motions in comparison to common law jurisdictions.[177] Although the process is non-adversarial, both the prosecution and the defense may request certain investigations to be carried out.[178] At this stage, only the examining magistrate has the power to obtain expert evidence.[179]

*(b) Trial*

The trial has more adversarial features than the pre-trial investigation, in part because it is designed as a check on the *instruction*.[180] At trial, the court is composed of three judges (with one designated as the president) joined by nine lay jurors.[181] The *Cours d'assises* are the only courts in France that incorporate the jury process.[182] The dossier forms the starting point of the trial.[183] The trial begins with the president reading the procedural history of the case to the court.[184] The president then questions the defendant, and then other witnesses, in order to establish the facts of the case.[185] The prosecution, the defense, the two other judges and the lay jurors are all allowed to ask questions of the defendant.[186]

---

[177] Kublicki, *supra* note 139, at 58. [Reproduced in the accompanying notebook at Tab 77].
[178] LEIGH, *supra* note 150, at 20. [Reproduced in the accompanying notebook at Tab 36]. Some of the examining magistrates powers are to interrogate the defendant and any witnesses, examine all material evidence, and hire experts. *Id.*
[179] Vogler, *supra* note 142, at 76. [Reproduced in the accompanying notebook at Tab 43]. There is an official list of experts from which one may be selected. *Id.*
[180] Cole, *supra* note 30, at 375. [Reproduced in the accompanying notebook at Tab 29]; *see* Vogler, *supra* note 142, at 29. [Reproduced in the accompanying notebook at Tab 43].
[181] Cole, *supra* note 30, at 253. [Reproduced in the accompanying notebook at Tab 29]; *see* Vogler, *supra* note 142, at 52. [Reproduced in the accompanying notebook at Tab 43]. The jurors are chosen at random from a list of eligible people. Jurors are allowed to ask questions and state opinions in court. The defense is allowed five challenges, the prosecution four. *Id.*
[182] Kublicki, *supra* note 139, at 61-62. [Reproduced in the accompanying notebook at Tab 77].
[183] LEIGH, *supra* note 150, at 22. [Reproduced in the accompanying notebook at Tab 36].
[184] Tomlinson, *supra* note 48, at 143. [Reproduced in the accompanying notebook at Tab 56].
[185] *Comparative Criminal Justice*, *supra* note 140, at 680. [Reproduced in the accompanying notebook at Tab 85]. Interestingly, the Rule 84 *bis*(A) of the ICTY and ICTR allows for the proceedings to follow this order of presentation. This amendment is one of the indications that the Tribunals are moving towards a more inquisitorial stance than they started with originally. *From 'Common Law'*, *supra* note 37, at 373. [Reproduced in the accompanying notebook at Tab 55].
[186] SHEEHAN, *supra* note 40, at 82-83. [Reproduced in the accompanying notebook at Tab 22]; Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43]. This is different than procedures used for less

The president is obligated to take all steps necessary to discover the truth, including calling witnesses not listed by the prosecution or the defense.[187] During questioning, the president is allowed to comment on the testimony, provided that he does not express an opinion on culpability.[188] On the other hand, the other two judges on the panel, called *assessors*, are allowed to express their opinion as to the defendant's culpability.[189] The president makes a closing statement to the court at the conclusion of the evidentiary phase of the trial.[190]

The judges and the jury then retire in private and vote on the issues using secret ballots, although jurors are free to ask questions and openly discuss the case.[191] At least eight out of the twelve must vote guilty on each question separately in order to convict.[192] If the answers to the questions, taken collectively, constitute a guilty verdict, the panel then moves on to sentencing.[193] If the defendant is acquitted, he is free and cannot be charged again, even if the decision is quashed in the Supreme Court of Appeal.[194]

**(3) Comparison to Other Systems**

The examining magistrate in France has been compared to the grand jury process in the United States, in the sense that both are carried out in secret and are used as a check on the

---

serious charges in France. In those proceedings, only the president of the trial court is allowed to directly ask questions of the defendant, although parties may submit questions for the president to ask. *Id.*

[187] Herrmann, *supra* note 15, at 134. [Reproduced in the accompanying notebook at Tab 64].

[188] Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43]. For example, the president is allowed to express an opinion that a witness is not telling the truth. *Id.*

[189] *Id*.

[190] *Id*. The president distills the issues of the trial into a series of yes and no questions of fact. *Id.*

[191] SHEEHAN, *supra* note 40, at 7. [Reproduced in the accompanying notebook at Tab 22]; *see* Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43]. The dossier stays with the clerk during this proceeding. *Id.*

[192] Tomlinson, *supra* note 48, at 144. [Reproduced in the accompanying notebook at Tab 56].

[193] Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43]. The sentence that is imposed must be decided upon by the majority of the panel. *Id.*

[194] SHEEHAN, *supra* note 40, at 85. [Reproduced in the accompanying notebook at Tab 22]; *see* Vogler, *supra* note 142, at 53. [Reproduced in the accompanying notebook at Tab 43]. This is due to the fact that a decision by this court represents the popular will and the case was already reviewed before the trial commenced by the *Chambre d'Accusation*. On less serious charges, an appeal can be made by any party. *Id.*

prosecutor.[195] Further, the examining magistrate is thought to provide better protection to the accused from overzealous government agents than the pre-trial procedures in England and the United States.[196] In essence, the accused is protected by a series of institutional checks in the French system, instead of a highly regulated trial contested by opposing parties.

The French prosecutor tends to play a less active role at trial than any of the other jurisdictions discussed. Although the prosecutor initiates the case and decides whether the evidence is sufficient to charge, he or she then falls into the shadows while the examining magistrate double checks the investigation, only to emerge again at trial in the role of an assistant to the president of the trial court.

## B. Germany

### (1) Role of the Prosecutor

The legal status of the German prosecutor is that of an independent officer of justice, belonging neither to the executive nor the judiciary branches of government.[197] Even so, the prosecutor possess some quasi-judicial powers during the pre-trial phase, such as deciding to discontinue a case or drop the charges.[198] In addition, the prosecutor compiles a dossier to be used throughout the case and at trial, similar to the French system of procedure.[199]

---

[195] *Comparing the Investigating Grand Jury*, *supra* note 103-5, at 94. [Reproduced in the accompanying notebook at Tab 60].
[196] *Id*.
[197] BARBARA HUBER, *Criminal Procedure in Germany*, *in* COMPARATIVE CRIMINAL PROCEDURE 138 (John Hatchard et al. eds., 1996). [Reproduced in the accompanying notebook at Tab 24].
[198] *Id*.
[199] Herrmann, *supra* note 15, at 138-39. [Reproduced in the accompanying notebook at Tab 64]. However, at trial, the dossier is in the hands of the presiding judge, not the prosecutor.

*(a) Investigation & Pre-Trial*

In Germany, the prosecutor is considered to be the "master of investigations."[200] Under this theory, the prosecutor heads the investigation and directs the police, who have no specific powers of their own in the field.[201] In practice, however, the police investigate crimes independently, and the prosecutor is only informed after the final police report is completed;[202] this is similar to the French system. The more serious the offense, the more likely it is for the prosecutor to work in close contact with the police.[203] The prosecutor is not considered to be a party to the process, and therefore, must act impartially.[204] Accordingly, he or she has a duty to look for both exculpatory and inculpatory evidence.[205]

Except in exceptional circumstances, the prosecutor must have judicial approval to use coercive or invasive measures during the investigation.[206] Otherwise, the prosecutor has independent control of the scope of the investigation and the direction it takes.[207] The investigation is conducted in secret and the accused does not have a right to be present during the questioning of witnesses or the examination of evidence.[208]

At the conclusion of the investigation, the prosecutor must decided whether or not to proceed to trial.[209] Mandatory prosecution is the rule, and prosecutorial discretion is limited.[210]

---

[200] PETER MORRE, *Germany, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 345 (Louise Arbour et al. eds., 1998). [Reproduced in the accompanying notebook at Tab 42].
[201] *Id.* The legality principle in Germany requires that the police report every complaint to the prosecutor. However, many non-serious offenses are handled by the police without reporting. *Id.*
[202] Cole, *supra* note 30, at 286. [Reproduced in the accompanying notebook at Tab 29]; *see* HUBER, *supra* note 197, at 137. [Reproduced in the accompanying notebook at Tab 24]. This essentially regulates the prosecutor's role to ensuring that procedure rules were followed and the investigation was fair. *Id.*
[203] LEIGH, *supra* note 150, at 28. [Reproduced in the accompanying notebook at Tab 36].
[204] Cole, *supra* note 30, at 286. [Reproduced in the accompanying notebook at Tab 29].
[205] LEIGH, *supra* note 150, at 35. [Reproduced in the accompanying notebook at Tab 36].
[206] HUBER, *supra* note 197, at 139. [Reproduced in the accompanying notebook at Tab 24].
[207] LEIGH, *supra* note 150, at 37-38. [Reproduced in the accompanying notebook at Tab 36].
[208] HUBER, *supra* note 197, at 139. [Reproduced in the accompanying notebook at Tab 24].
[209] LEIGH, *supra* note 150, at 43-44. [Reproduced in the accompanying notebook at Tab 36].
[210] Susanne Stemmler, *Incentive Structures and Organizational Equivalents of Plea Bargaining in German Criminal Courts* (1994) (Ph.D. thesis, The Pennsylvania State University) 42-43. [Reproduced in the accompanying notebook

For felony cases, the court must give its consent if the prosecutor decides not to prosecute.[211] If the prosecutor finds sufficient evidence to proceed, a written indictment is filed with the intermediate court.[212] Thus, prosecutors in Germany are sometimes referred to as the "judges before the judges."[213]

Once an indictment has been filed, the intermediate court reviews the case and decides whether further investigation is appropriate.[214] This provides an important check and allows the defendant an opportunity to persuade the court not to proceed to trial by introducing motions for the taking of evidence and making of statements.[215] If the court decides that the case against the defendant is sufficiently strong, then it proceeds to trial.[216] Once the case is forwarded to the trial court, the prosecutor no longer has the discretion to discontinue the case.[217]

---

at Tab 100]. If a case is a close call, the prosecutor is encouraged to file. *See Understanding*, *supra* note 39, at 1332-33. [Reproduced in the accompanying notebook at Tab 98].

[211] HUBER, *supra* note 197, at 127. [Reproduced in the accompanying notebook at Tab 24]. The prosecutor takes into account the sufficiency of the evidence, obstacles to convictions, and any possible deterrent affects when making a decision not to prosecute. In addition to receiving the consent of the court, the victim who originally reported the crime must be notified of a decision not to prosecute and has a right to appeal. *Id.* *See* Morre, *supra* note 200, at 344. [Reproduced in the accompanying notebook at Tab 42].

[212] HUBER, *supra* note 197, at 127. [Reproduced in the accompanying notebook at Tab 24]. Minor offenses may be disposed of by an expedited procedure or penal order. *Id.*

[213] Hans-Jorg Albrecht, *Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 245, 255 (2000). [Reproduced in the accompanying notebook at Tab 62]. In fact, during a prosecutor's first three years of his or her career, he or she is referred to as "Richter auf Probe" or "judge in preparation". *See* Stemmler, *supra* note 210, at 100. [Reproduced in the accompanying notebook at Tab 100].

[214] HUBER, *supra* note 197, at 128-29. [Reproduced in the accompanying notebook at Tab 24].

[215] *Id*. at 129.

[216] LEIGH, *supra* note 150, at 43-45. [Reproduced in the accompanying notebook at Tab 36]. Critics of the intermediate review by the independent court have said that it is unfair for the court to decide whether or not the accused is probably guilty before a trial has taken place. However, it appears that this additional review (as opposed to not having an intermediate review) of the case would provide the defendant with a chance to develop exculpatory evidence and have the case dismissed. *Id*.

[217] HUBER, *supra* note 197, at 100. [Reproduced in the accompanying notebook at Tab 24]. The prosecutor's power to discontinue the case is shifted to the court at this point. *Id*.

*(b) Trial*

At trial, the prosecutor has the right to question and cross-examine witnesses.[218] The prosecutor takes an active role in the proceedings, and can formally demand that the court introduce evidence.[219] These actions by the prosecutor are more commonly associated with adversarial systems. At the close of the evidence, the prosecutor presents a closing argument and recommends a specific penalty to be imposed.[220] In the German system, it is the duty of the public authorities to establish guilt.[221] Thus, the burden does not rest entirely on the prosecution, but on the judges as well.[222] This shared responsibility for producing evidence to prove the guilt of the accused by the prosecutor and judge is unique among the jurisdictions discussed in this memorandum. An acquittal or inadequate sentence may be appealed by the prosecution.[223]

**(2) Role of the Judge**

*(a) Investigation & Pre-Trial*

While judges and prosecutors belong to separate and independent agencies, most judges start out their careers by serving as prosecutors.[224] As mentioned above, a judge must approve the use of coercive or invasive measures during the investigation.[225] Although Germany used to employ the office of the investigative judge, that office was abolished in 1975.[226] Germany now places the responsibility of investigation on the prosecutor, with an intermediate court reviewing

---

[218] Herrmann, *supra* note 15, at 135. [Reproduced in the accompanying notebook at Tab 64].
[219] HUBER, *supra* note 197, at 131. [Reproduced in the accompanying notebook at Tab 24].
[220] Stemmler, *supra* note 210, at 32. [Reproduced in the accompanying notebook at Tab 100]. *See* HUBER, *supra* note 197, at 130. [Reproduced in the accompanying notebook at Tab 24]. The prosecutor's recommendation is generally towards the upper-limit of possible sentences. *Id.*
[221] SAFFERLING, *supra* note 7, at 257. [Reproduced in the accompanying notebook at Tab 25].
[222] *Id.*
[223] Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 344. (1995). [Reproduced in the accompanying notebook at Tab 87].
[224] HUBER, *supra* note 197, at 138. [Reproduced in the accompanying notebook at Tab 24]. Both receive the same education and salaries. In general, the students who perform the best on their Second State Examination are selected for posts in the judiciary. However, even these students usually serve some time as a prosecutor. *Id.*
[225] *Id*. at 139.
[226] *German Criminal Justice*, *supra* note 223, at 325. [Reproduced in the accompanying notebook at Tab 87].

indictments to serve as check against unfounded or improper prosecution.[227] The court must give its consent if the prosecutor decides not to prosecute a felony case.[228]

Once an indictment has been filed, an independent court reviews the case and decides whether further investigation is required.[229] As mentioned above, if the court decides that the case against the defendant is sufficiently strong, then it proceeds to trial.[230] Even if the defendant gives a confession and admits guilt, the court will nevertheless hold a trial under the theory that the court must still adjudicate the facts necessary to convict the accused.[231]

*(b) Trial*

The judge in the German criminal trial occupies the most powerful and influential position in the criminal trial.[232] The most serious offenses are dealt with by the supreme court of each state in Germany.[233] Each supreme court is composed of five professional judges.[234] Because the judges make the ultimate determination of guilt in the case, only one judge, the presiding judge, will have studied the dossier in advance of trial.[235] This is done to minimize the chances that judges will prejudge the case.[236] However, some judges use the dossier as a script to guide witnesses through their testimony, and some question whether studying the dossier

[227] HUBER, *supra* note 197, at 129. [Reproduced in the accompanying notebook at Tab 24].
[228] *Id*. at 127.
[229] *Id*. at 128-29.
[230] *Id*. at 129. Critics of the intermediate review by the independent court have said that it is unfair for the court to decide whether or not the accused is probably guilty before a trial has taken place. However, it appears that this additional review (as opposed to not having an intermediate review) of the case would provide the defendant with a chance to develop exculpatory evidence and have the case dismissed. *Id.*
[231] Combs, *supra* note 84, at 42. [Reproduced in the accompanying notebook at Tab 76].
[232] Stemmler, *supra* note 210, at 37. [Reproduced in the accompanying notebook at Tab 100].
[233] HUBER, *supra* note 197, at 102. [Reproduced in the accompanying notebook at Tab 24]. Serious offenses are those against the State, murder, etc. Each superior court is comprised of five professional judges. This is in contrast to the local and district courts, which are comprised of a mix of professional and lay judges. *Id.*
[234] *Id*. The German system does not employ juries. For lesser offenses, a mix panel of professional and lay judges are used. *Id.*
[235] *See Understanding*, *supra* note 39, at 1334. [Reproduced in the accompanying notebook at Tab 98].
[236] *Id*.

increases the chances that the presiding judge will pre-judge the case.[237] The presiding judge is responsible for the direction and control of the trials, and he or she is obligated to extend the taking of evidence to all facts that are important in the decision.[238]

After the presiding judge has questioned the defendant, the other judges have the right to ask questions of the defendant.[239] Unlike judges in England and the United States, the German presiding judge bears the primary responsibility for examining witnesses;[240] he or she actively asks questions based in part on the dossier compiled by the prosecutor.[241]

After the defendant has testified, other witnesses are heard and evidence is taken.[242] The judges have a duty to search for the truth.[243] The court is bound to examine all available evidence and has the discretion to introduce evidence and call its own witnesses.[244] The principle of "free evaluation of evidence" allows the German judges wide discretion in evaluating the persuasiveness of each item of evidence.[245] If evidence is excluded, the judges still learn about it, they just choose to disregard it and it cannot be used to support the court's final judgment.[246] Although there is a preference for oral testimony, the judges have the discretion to use documentary evidence in its place in certain circumstances.[247]

---

[237] Herrmann, *supra* note 15, 138-39. [Reproduced in the accompanying notebook at Tab 64].
[238] *Id*. at 134.
[239] HUBER, *supra* note 197, at 131. [Reproduced in the accompanying notebook at Tab 24]. The defendant has the right to silence and a privilege against self-incrimination. *Id*. at 130.
[240] Herrmann, *supra* note 15, at 140. [Reproduced in the accompanying notebook at Tab 64].
[241] Cole, *supra* note 30, at 286. [Reproduced in the accompanying notebook at Tab 29].
[242] HUBER, *supra* note 197, at 130. [Reproduced in the accompanying notebook at Tab 24]. Witnesses cannot decline to give evidence, but can decline to answer certain questions if the answer would incriminate them. Inferences may be drawn from the witnesses refusal to answer. *Id.*
[243] SAFFERLING, *supra* note 7, at 257. [Reproduced in the accompanying notebook at Tab 25].
[244] Herrmann, *supra* note 15, at 134. [Reproduced in the accompanying notebook at Tab 64].
[245] Kuk Cho, *"Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality,* 15 TEMP. INT'L & COMP. L.J. 1, 8 (2001). [Reproduced in the accompanying notebook at Tab 69].
[246] *Id*.
[247] Herrmann, *supra* note 15, at 134. [Reproduced in the accompanying notebook at Tab 64].

After the closings of the prosecution and the defense, the judges then retire and decide on the verdict and, if necessary, what sentence is to be imposed.[248] Two-thirds of the judges are required for any finding of guilt.[249] The court can only convict the defendant if it sure of guilt based on its free conviction derived from the totality of the trial.[250] The court's conviction must leave no room for reasonable doubt, and the court must issue a written judgment with an explanation of why it reached the verdict it did.[251]

**(3) Comparison to Other Systems**

The German system has been classified as inquisitorial; however, it does contain some features of an adversarial process.[252] For example, the prosecutor may pose questions to the witnesses directly, and the judge must allow the prosecutor to play a role in the trial. Moreover, the German system will exclude evidence in order to protect individual rights at the expense of truth, a characteristic that is considered to be more indicative of an adversarial system.[253] However, following an inquisitorial vein, the prosecutor is seen as more of an assistant to the court and has a duty to remain objective during the proceedings.[254]

Like all other systems of criminal procedure, the German system is aimed at discovering the truth and serving the public interest.[255] However, the way German judges and prosecutors achieve these goals are somewhat different than the rest. Unlike France, the German office of

---

[248] HUBER, *supra* note 197, at 130. [Reproduced in the accompanying notebook at Tab 24].
[249] *German Criminal Justice*, *supra* note 223, at 344. [Reproduced in the accompanying notebook at Tab 87].
[250] HUBER, *supra* note 197, at 112. [Reproduced in the accompanying notebook at Tab 24]. This standard is stated as: "nach seiner freien, aus dem Inbegriff der Verhandlung geschopften Uberzeugung" and does not literally mean "beyond a reasonable doubt," but in effect it is substantially the same. *See German Criminal Justice*, *supra* note 223, at 344. [Reproduced in the accompanying notebook at Tab 87].
[251] *Id*. *See See Understanding*, *supra* note 39, at 1334. [Reproduced in the accompanying notebook at Tab 98]. The written decision must be issued within several weeks of the judgment. *Id.*
[252] HUBER, *supra* note 197, at 100. [Reproduced in the accompanying notebook at Tab 24].
[253] *Review Essay*, *supra* note 63, at 821. [Reproduced in the accompanying notebook at Tab 86].
[254] Cole, *supra* note 30, at 286. [Reproduced in the accompanying notebook at Tab 29].
[255] HUBER, *supra* note 197, at 99. [Reproduced in the accompanying notebook at Tab 24]. The main sources of German criminal procedure are the Imperial Code of Criminal Procedure (*Reichs-StrafprozeBordnung*) and the Courts Act (*Gerichtsverfassungsgesetz/GVG*). In addition, the European Convention on Human Rights (ECHR) is a part of German-Federal law and contains sections that are directly applicable to German courts. *Id.*

the investigative judge has been abolished;[256] however, much like the French, the German system has been criticized for the length of time it takes to bring the accused to trial.[257] In contrast to prosecutors in the other jurisdictions studied, the German prosecutor is bound by the principle of mandatory prosecution to bring proceedings in all cases where there are sufficient facts to indicate that a prosecutable offense has been committed.[258] Thus, the law does not permit prosecutors in Germany the same latitude in filtering out cases that, for example, prosecutors in the United States enjoy.

The prosecutor in the German system is more active at trial than prosecutors in the French system, but less active than prosecutors in the United States or England. Interestingly, the prosecutor in Germany is allowed to appeal a conviction, a power shared with only the prosecutors in Israel and the ICTY/ICTR. However, unlike those jurisdictions, the prosecutor does not shoulder the entire burden of proof, so allowing an appeal may be more justifiable given the increased role of the judge during the trial.

While judges from adversarial systems are compared to neutral referees, the German judge is more accurately describe as the "leader of the game."[259] The judge in Germany takes the lead in developing the evidence at trial, unlike judges in the United States, England, and Scotland. At the same time, the German judge relies less on the investigative dossier than French judges do; only France appears to have a more active judge in these respects than Germany. However, both France and Germany employ intermediate checks on the decision to prosecute by the using independent intermediate judges to review the prosecutor's case.

---

[256] *German Criminal Justice*, *supra* note 223, at 325. [Reproduced in the accompanying notebook at Tab 87].
[257] LEIGH, *supra* note 150, at 44. [Reproduced in the accompanying notebook at Tab 36].
[258] Morre, *supra* note 200, at 341. [Reproduced in the accompanying notebook at Tab 42].
[259] Stemmler, *supra* note 210, at 27. [Reproduced in the accompanying notebook at Tab 100].

## V. Role of the Prosecutor and Judge in Several Mixed Jurisdictions

### A. Scotland

#### (1) Role of the Prosecutor

*(a) Investigation & Pre-Trial*

In Scotland, the prosecutor's primary duty is to ensure that justice is done.[260] During the initial stages of an investigation, the Scottish police take the main role of questioning people until they focus on a suspect.[261] At this point, the case is turned over to the prosecutor.[262]

The prosecutor has exclusive discretion regarding the decision of whether or not to prosecute a particular offense.[263] The prosecutor (Crown counsel) commences an action in serious cases by indictment in a solemn criminal procedure in the High Court of Justiciary.[264] The indictment must be specify the precise accusation against the accused.[265] Once the accused is arrested, the first appearance in court is in private.[266] At this appearance, the prosecutor is allowed to question the accused.[267] Although the accused may refuse to answer, the prosecutor is allowed to comment on any refusals during the trial.[268] The defense is not allowed to ask any

[260] Paul Hardin, III, *Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland*, 113 U. PA. L. REV. 165, 167 (1964). [Reproduced in the accompanying notebook at Tab 80].
[261] *Id*. at 172. Theoretically, after a suspect is the main focus of an investigation, police questioning should stop, but in reality this is not often the case. *Id*.
[262] *Id*. at 173.
[263] MICHAEL C. MESTON, *Scots Law Today, in* THE SCOTTISH LEGAL TRADITION 26 (Meston et al. eds., 1991). [Reproduced in the accompanying notebook at Tab 37].
[264] Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 174-75 (1999). [Reproduced in the accompanying notebook at Tab 81]. For example, all murders would be held in solemn criminal procedure before the High Court of the Justiciary. *Id.*
[265] ROBIN M. WHITE & IAN D. WILLOCK, THE SCOTTISH LEGAL SYSTEM 77 (2d ed. 1999). [Reproduced in the accompanying notebook at Tab 44].
[266] Alistair Bonnington, *Scots Criminal Procedure and the Lockerbie Trial*, 11 INT'L LEGAL PERSP. 11, 13 (1999). [Reproduced in the accompanying notebook at Tab 50].
[267] Bonnington, *supra* note 266, at 13. [Reproduced in the accompanying notebook at Tab 50].
[268] White, *supra* note 265, at 77. [Reproduced in the accompanying notebook at Tab 44].

questions except those that are needed to clear up any ambiguities in the answers of the accused.[269]

The next step in the procedure is preparation for trial. In Scotland, the prosecutor must give the defense a list of witness that the prosecutor is going to call and what those witnesses are going to say.[270] This list is a courtesy list, and there is no legal remedy if a witness departs from his or her prior statement.[271] In general, bilateral discovery in criminal proceedings is the rule, and both sides are given access to each other's witnesses and evidence.[272] There is also a duty on both sides to attempt to reach an agreement on the facts before trial.[273] In line with the adversarial nature of the system, the pre-trial stage is seen as less critical than the trial stage, where the evidence will be seen to be fully examined.[274]

*(b) Trial*

At trial, the prosecutor presents his or her case first, followed by the defense.[275] Witnesses are crossed and reexamined by the prosecution and the defense.[276] At the close of the prosecutor's case, the defense may submit that there is no case to answer.[277] If the judge finds that the prosecution's evidence, if accepted as true, is sufficient for the jury to convict, then the defense proceeds with presenting its case.[278]

---

[269] Bonnington, *supra* note 266, at 14. [Reproduced in the accompanying notebook at Tab 50].
[270] Fraser Davidson, *Lockerbie and Scots Law*, 14 LEIDEN J. INT'L L. 171, 175 (2001). [Reproduced in the accompanying notebook at Tab 58]. The Scots call the witnesses statement a "precognoscing." *Id.* at 176.
[271] Bonnington, *supra* note 266, at 15. [Reproduced in the accompanying notebook at Tab 50]. On cross-examination, the witness can persist with the inconsistent statement and the cross-examiner will be stuck with the answer without any recourse. *Id.*
[272] Hardin, *supra* note 260, at 175. [Reproduced in the accompanying notebook at Tab 80].
[273] Robert Black, *The Lockerbie Criminal Trial: The Scottish Rules of Evidence*, 11 INT'L LEGAL PERSP. 31, 32 (1999). [Reproduced in the accompanying notebook at Tab 89].
[274] SHEEHAN, *supra* note 40, at 117. [Reproduced in the accompanying notebook at Tab 22].
[275] Bonnington, *supra* note, 266 at 21. [Reproduced in the accompanying notebook at Tab 50].
[276] *Id*. at 22.
[277] Duff, *supra* note 264, at 189. [Reproduced in the accompanying notebook at Tab 81].
[278] *Id*.

During the trial, the burden of proof is on the prosecution to prove each element of an offense beyond a reasonable doubt.[279] The jury then reaches a verdict by a majority decision of: "guilty", "not guilty", or "not proven."[280] If a "guilty" verdict is returned, the prosecution is allowed to appeal a sentence that it feels is too lenient.[281] Both the "not guilty" and the "not proven" verdict result in an acquittal of the accused, and cannot be appealed by the prosecutor.[282]

**(2) Role of the Judge**

*(a) Investigation & Pre-trial*

The role of the judge in the Scottish system is not to discover whether or not a crime has been committed.[283] Instead, the judge's role is similar to that of an American or English judge - acting as a referee throughout the procedure and rarely intervening between the parties.[284] As such, the judge hears pre-trial motions and generally helps to ensure the trial runs as efficiently as possible.

*(b) Trial*

In accord with adversarial systems, Scotland places a greater emphasis on the trial than on any pre-trial inquiries.[285] Similar to trials in England and the United States, the Scottish

[279] Black, supra note 273, at 39. [Reproduced in the accompanying notebook at Tab 89]. *See also* White, *supra* note 265, at 76. [Reproduced in the accompanying notebook at Tab 44]. *See* SHEEHAN, *supra* note 40, at 118. [Reproduced in the accompanying notebook at Tab 22].
[280] Bonnington, *supra* note 266, at 22. [Reproduced in the accompanying notebook at Tab 50]. The Scottish jury is composed of fifteen lay people. Therefore, eight out the fifteen will is enough for a verdict. The "not proven" verdict is simply a finding by the jury that the prosecutor filed to prove the charges. Scotland used to have two verdicts: "guilty" and "not proven". However, once there was a trial of someone so clearly innocent that the jury returned a verdict of "not guilty." For some apparently unknown reason, the "not proven" verdict survived and is still used to this day. One idea is that it is a Scottish form of jury nullification in cases where they feel the law should be tempered. *Id.* Some question whether a system with the presumption of innocence should allow for a "second class" acquittal. *See* Duff, *supra* note 264, at 195. [Reproduced in the accompanying notebook at Tab 81].
[281] Bonnington, *supra* note 266, at 14. [Reproduced in the accompanying notebook at Tab 50].
[282] White, *supra* note 265, at 79. [Reproduced in the accompanying notebook at Tab 44].
[283] White, *supra* note 265, at 76. [Reproduced in the accompanying notebook at Tab 44].
[284] *Id*.
[285] SHEEHAN, *supra* note 40, at 117. [Reproduced in the accompanying notebook at Tab 22].

system employs a lay jury as the fact-finder.[286] Each juror is given a copy of the indictment, which contains a narrative of the case against the accused.[287] The judge's job is to control the admission of evidence and guarantee that each side is treated fairly before the law.[288] Additionally, every essential fact of the charge must be corroborated by more than one source.[289] The judge is free to comment upon the evidence and upon the credibility of the witnesses.[290]

After the closing statements of the prosecutor and the defense, the judge instructs the jury and reminds them of the main evidence presented and the applicable law.[291] The job of drawing conclusions from the evidence and deciding whether or not the prosecution has proved its case is left entirely in the hands of the jury.[292] As mentioned above every trial produces a verdict in Scotland due to the fact that the verdict is reach by a bare majority.[293]

**(3) Comparison to Other Systems**

The Scottish system is considered to be an example of a mixed inquisitorial and adversarial system.[294] One difference between Scottish criminal procedure and that of common law countries is that the Scots have a codified system.[295] However, the proceedings themselves

[286] Bonnington, *supra* note 266, at 23. [Reproduced in the accompanying notebook at Tab 50]. The jury is comprised of fifteen people. Each side used to be allowed five preemptory challenges, although the prosecutor rarely used them. In 1995, preemptory challenges were done away with all together. There is no voir dire procedure in Scotland, based on the idea that there is no process that will eliminate the prejudices that exist among men. *Id.*
[287] Duff, *supra* note 264, at 189. [Reproduced in the accompanying notebook at Tab 81].
[288] White, *supra* note 265, at 77. [Reproduced in the accompanying notebook at Tab 44].
[289] SHEEHAN, *supra* note 40, at 120-21. [Reproduced in the accompanying notebook at Tab 22]. Therefore, even a confession by the accused would not be consider enough to convict if it was standing alone. *Id.*
[290] Hardin, *supra* note 260, at 185. [Reproduced in the accompanying notebook at Tab 80].
[291] White, *supra* note 265, at 77. [Reproduced in the accompanying notebook at Tab 44].
[292] White, *supra* note 265, at 77. [Reproduced in the accompanying notebook at Tab 44].
[293] Duff, *supra* note 264, at 190. [Reproduced in the accompanying notebook at Tab 81]. Upon returning from deliberations, the jury is asked whether the verdict was unanimous or by majority, but the size of the majority is not disclosed. *Id.*
[294] Bonnington, *supra* note 266, at 11. [Reproduced in the accompanying notebook at Tab 50].
[295] *See* Spencer, *supra* note 16, at 521. [Reproduced in the accompanying notebook at Tab 63].

are basically adversarial in nature.[296] Thus, the evidence is placed before the judge by the prosecutor and the defense and tested by rigorous examination by both parties.[297]

In addition, pre-trial discovery is greater in Scotland than in the United States. Otherwise, the Scottish system is very similar to the systems in the United States and England, with the judge acting as an umpire between the prosecutor and the defense. However, the prosecutor is not allowed to give an opening statement, so it could be said that the prosecutor's role is somewhat less adversarial than that of prosecutors in the United States or England.[298] Moreover, hearsay evidence is generally disallowed along the same line of thought as that followed in England and the United States. A common characteristic that Scotland shares with France, the United States and England is the use of juries as the finder of fact. Additionally, the Scottish prosecutor is unable to appeal an acquittal of the accused. However, the requirement of corroborated of evidence is a unique characteristic among the jurisdictions discussed in this memorandum.

## B. Israel

### (1) Role of the Prosecutor

*(a) Investigation & Pre-Trial*

Investigations are typically initiated by the police, although the prosecutor has the legal control of the process.[299] At the close of the police inquiry, the prosecutor may have the police conduct additional investigations.[300] The prosecutor has discretion as to whether or not to

[296] White, *supra* note 265, at 76. [Reproduced in the accompanying notebook at Tab 44].
[297] SHEEHAN, *supra* note 40, at 117. [Reproduced in the accompanying notebook at Tab 22].
[298] LORD THOMAS MACKAY COOPER, *The Scottish Legal Tradition, in* THE SCOTTISH LEGAL TRADITION 26 (Meston et al, eds., 1991). [Reproduced in the accompanying notebook at Tab 48].
[299] KENNETH MANN, *Israel, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 363 (Louise Arbour et al. eds., 1998). [Reproduced in the accompanying notebook at Tab 35]. The police have the power to arrest and use coercive powers, such as search warrants. *Id.*
[300] *Id.*

prosecute a particular case.[301] Broad disclosure obligations operate on the prosecutor.[302] For example, all witnesses for the prosecution must be listed on the indictment and the prosecutor may introduce evidence that was not subject to discovery.[303] While the prosecution must receive the permission of the court to examine the evidence of the defense, the defense has an automatic right to examine the prosecution's evidence.[304]

*(b) Trial*

Comparable to common law systems, conducting the trial falls to the parties in the dispute. Each side is responsible for presenting its own legal arguments and producing its own evidence. At trial, the prosecutor must prove the state's case beyond a reasonable doubt.[305] If the accused is acquitted, the prosecutor may appeal.[306]

**(2) Role of the Judge**

*(a) Investigation & Pre-Trial*

During the pre-trial stage, the judge oversees the "pleadings" where the prosecution and the defense disclose their evidence to each other.[307] This appears to be similar to that found

[301] *Id*. The prosecutor's decision may be reviewed by the court. The High Court may also compel prosecution or prevent it. The prosecutor's decision is generally based on the sufficiency of the evidence and the public interest. *Id.*
[302] Combs, *supra* note 84, at 48. [Reproduced in the accompanying notebook at Tab 76].
[303] Mark D. Cohen, *New York v. Kirman/Israel v. Kirman: A Prosecutional In Tel Aviv Under Israel Law for a Narcotics Offense Committed in New York*, 4 CRIM. L.F. 597, 605 (1993). [Reproduced in the accompanying notebook at Tab 72]. Once a witness is listed as a prosecution or a defense witness, the other side is not allowed to interview that person prior to trial. *Id*.
[304] Nina Zaltzman & Eli Lederman, *The Gradual Erosion of the Defendant's Status in Israeli Law*, 62 TEMP. L. REV. 1175, 1178 (1989). [Reproduced in the accompanying notebook at Tab 78]. In contrast, the Tribunals take an approach that allows the defense to examine the prosecution's evidence but at the cost of opening up its own evidence to discovery.
[305] Abraham Abramovsky, *Partners Against Crime: Joint Prosecutions of Israeli Organized Crime Figures by U.S. and Israeli Authorites*, 19 FORDHAM INT'L L.J. 1903, 1913 (1996). [Reproduced in the accompanying notebook at Tab 49].
[306] Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L.J. 527, 531 (1999). [Reproduced in the accompanying notebook at Tab 51].
[307] Zaltzman, *supra* note 304, at 1178. [Reproduced in the accompanying notebook at Tab 78].

under the English system of procedure. Although Israeli courts make use of plea bargaining, it is not to the same extent as that found in England and the United States.[308]

*(b) Trial*

Israel criminal trials are bench trials.[309] Professional judges act as fact-finders and make the decisions on legal issues.[310] In serious criminal cases, a panel of three judges is used.[311] In Israeli procedure, the judge is involved in the fact finding process and is allowed to deviate from the technical rules of evidence to discover truth and avoid injustice.[312] The judges are allowed to ask the witnesses questions; however, this may be done only after the prosecution and the defense have concluded their examinations.[313]

In the past, Israel had followed a more common law approach to the rules of evidence, which were technical and limited hearsay.[314] Today, evidence is considered more along the lines of the inquisitorial mode of admissions of relevant evidence, with reliability going toward the weight that the evidence is given by the judge.[315] To some extent, the move toward the more inquisitorial allowance of evidence has been in response to the threat of terrorism.[316] The judges

[308] Combs, *supra* note 84, at 48. [Reproduced in the accompanying notebook at Tab 76]. Approximately 35% of criminal case go to trial in Israel. *Id*.
[309] Combs, *supra* note 84, at 48. [Reproduced in the accompanying notebook at Tab 76].
[310] Straschnov, *supra* note 306, at 528. [Reproduced in the accompanying notebook at Tab 51].
[311] *Id*. This appeal can be for both factual and legal issues. The American version of "double jeopardy" does not exist in Israel. *Id.*
[312] Zaltzman, *supra* note 304, at 1177. [Reproduced in the accompanying notebook at Tab 78].
[313] SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAEL JUDICIARY 495 (1994). [Reproduced in the accompanying notebook at Tab 45].
[314] Zaltzman, *supra* note 304, at 1182. [Reproduced in the accompanying notebook at Tab 78].
[315] *Id*.
[316] *Id*. Apparently, many witnesses would make statements, only to retract them at trial due to fear of retaliation. *Id.* This is a similar situation to the one facing the Tribunals, with witnesses being afraid to testify out of fear of reprisals being made against them.

are allowed to use their professional skills to evaluate evidence, some of which would not meet the requirements of admissibility in the United States or England.[317]

In addition to more open rules of evidence than many adversarial systems, Israeli judges are allowed to summon witnesses and introduce evidence of their own initiatives.[318] This power reflects the more inquisitorial nature of judges in the Israeli systems, where increasingly the adversarial system is viewed more as a general framework that may be departed from as justice requires.[319] The judges deliver the sentence of the court and, similar to the system employed for the ICTY/ICTR, both the prosecution and the defense may appeal a verdict in a case.[320]

**(3) Comparison to Other Systems**

Israeli criminal procedure is a mixed system based upon the adversary model of the common law, but is conducted without a jury and has special modifications to allow for the judge to assume an active leadership role at trial.[321] Instead of a jury, a panel of judges acts as both the finder of fact and as the enforcer of the rules of evidence and procedure.[322] Like other adversarial systems, the Israeli system views the criminal trial as a match between the prosecutor and the defense, with the judge enforcing the rules and deciding the winner of the contest.[323] Israeli law does not operate under a written constitution; however, the Israeli Supreme Court has equitable powers to grant relief based on the sake of justice.[324]

---

[317] Combs, *supra* note 84, at 48. [Reproduced in the accompanying notebook at Tab 76]. *See* Zaltzman, *supra* note 304, at 1188-1189. [Reproduced in the accompanying notebook at Tab 78]. The broad admissions of evidence extends the inclusion of illegally obtained evidence, as there is no general exclusionary rule in Israeli law. Id.
[318] Shetreet, *supra* note 313, at 493. [Reproduced in the accompanying notebook at Tab 45].
[319] Zaltzman, *supra* note 304, at 1194-95. [Reproduced in the accompanying notebook at Tab 78].
[320] Straschnov, *supra* note 306, at 531. [Reproduced in the accompanying notebook at Tab 51].
[321] Shetreet, *supra* note 313, at 493. [Reproduced in the accompanying notebook at Tab 45].
[322] Zaltzman, *supra* note 304, at 1176. [Reproduced in the accompanying notebook at Tab 78].
[323] *Id*.
[324] Straschnov, *supra* note 306, at 531. [Reproduced in the accompanying notebook at Tab 51]. For example, if the rights of an accused were blatantly trampled when a confession was extracted, the court could exclude the evidence, although it does not always do so. *Id.*

The adversarial foundation of Israeli criminal procedure has become increasingly more inquisitorial, partly as a response to the pressures of terrorism and organized crime.[325] Uncovering truth is the primary purpose of the process, and injustice is viewed as both convicting the innocent and acquitting the guilty.[326] Therefore, Israeli judges do not stay above the fray in the courtroom to the same extent that judges in the United States or England do, and they are allowed to introduce evidence and examine witnesses. However, the judges' power in directing the trial must be exercised with restraint, so as not to exceed the traditional boundaries of the adversary system, as liberally understood.[327]

Of the jurisdictions examined in this memorandum, Israel's appears to be the most similar to the ICTY/ICTR. Similar to the ICTY/ICTR, the court is comprised of three professional judges who decide questions of law and findings of fact. Moreover, the increased dangers of terrorism have applied pressure to the adversarial foundations of Israel's system, causing a shift towards judges with more inquisitorial powers. In comparison to the United States, where the philosophy is to skew the system to protect against a wrongful conviction at the cost of allowing the guilty to go free, the Israeli system leans towards a more balanced ratio, seeing either result as possessing the same level of injustice. This tendency is reflected in allowing the prosecutor to appeal an acquittal, a characteristic shared with Germany and the ICTY/ICTR. Allowing the prosecutor to appeal at the ICTY/ICTR implies a similar belief that injustice would result from an accused who is guilty of war crimes going free due to error, just as it would from an innocent person being convicted.

---

[325] Zaltzman, *supra* note 304, at 1208. [Reproduced in the accompanying notebook at Tab 78].
[326] *Id*. at 1176-77.
[327] Shetreet, *supra* note 313, at 495. [Reproduced in the accompanying notebook at Tab 45]. The judge is always supposed to bear in mind the nature of the adversary system and the need to maintain a balanced attitude toward the parties. *Id*.

## VI. Role of the Prosecutor and Judge in the ICTY & ICTR

### A. General

#### (1) Role of the Prosecutor

The role of the prosecutor in the Tribunals is both as an advocate for the international community and as a minister of justice who is responsible for presenting both inculpatory and exculpatory evidence in order to assist the judges in determining the truth.[328] The prosecutor represents the interests of the international community, including the victims of the offenses and the fundamental rights of those accused.[329]

*(a) Investigation & Pre-Trial*

During the investigation stage of procedure, the prosecutor functions in the model of the inquisitorial system. The prosecutor is responsible for initiating investigations.[330] In addition, the prosecutor may seek the assistance of State authorities in conducting the investigations.[331] The prosecutor has the power to question suspects and witnesses, gather evidence and conduct on-site investigations.[332] If the prosecutor determines that a *prima facie* case exists, an

[328] JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 165 (2000). [Reproduced in the accompanying notebook at Tab 32].
[329] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, ¶ 100, 104. [Reproduced in the accompanying notebook at Tab 7].
[330] ICTY art. 16, 18(1). [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 15, 17 (1). [Reproduced in the accompanying notebook at Tab 3].
[331] ICTR art. 17(2). [Reproduced in the accompanying notebook at Tab 3] If the State fails to cooperate with the prosecutor, the prosecutor is allowed to report that State to the United Nations Security Council. *See* MORTEN BERGSMO, CATHERINE CISSE, & CHRISTOPHER STAKER, *The Prosecutors of the international Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in* THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 121, 148 (Louise Arbour et al. eds., 1998). [Reproduced in the accompanying notebook at Tab 39].
[332] ICTR art. 17(2). [Reproduced in the accompanying notebook at Tab 3].

indictment is prepared and forwarded to the judge of the Trial Chamber.[333] The prosecutor is allowed to continue to investigate, even after an indictment has been issued.[334]

There is no mandatory prosecution rule in the Tribunals in cases where there is sufficient evidence.[335] The prosecutor's decision not to bring charges in a specific case is not subject to review.[336] In contrast, a decision to prosecute is subject to judicial review in the form of a confirmation hearing, at which it must be established that a *prima facie* case exists against the accused.[337] The accused is not present at indictment hearings and is normally unaware that an indictment is being sought.[338] If the indictment is confirmed, the accused is taken into custody and the case moves on to the pre-trial stage.[339]

---

[333] *Id*. at art. 17(4). *See* JONES, *supra* note 328, at 172 (stating that the meaning of *prima facie* case is a sufficient basis to convict if the evidence is not contradicted by the defense). [Reproduced in the accompanying notebook at Tab 32].

[334] Bergsmo, *supra* note 331, at 121, 141. [Reproduced in the accompanying notebook at Tab 39].

[335] Bergsmo, *supra* note 331, at 121, 135. [Reproduced in the accompanying notebook at Tab 39]. This is due partly to the fact that national courts have concurrent jurisdiction over crimes within the jurisdiction of the Tribunals and partly because the prosecutor does not possess enough resources to prosecute every crime falling within the jurisdiction; therefore, only the most important crimes are brought before the Tribunals. Factors that enter into the prosecutor's decision of whether or not to bring charges in a particular case include: the nature of the offense, the status of the alleged perpetrator, the nature of the legal issues involved, and the prospects of apprehending the alleged perpetrator. Article 18(4) uses the term "shall" in describing the obligation of the prosecutor to prepare an indictment upon a determination of sufficient evidence. "Shall" may be used to express something that is mandatory or permissive. It appears that Article 18(4) has not been interpreted as obligating mandatory prosecution. However, "shall" is used again in Article 18(4), concerning the forwarding of the indictment to the Trial Chamber. In this instance, "shall" appears to be interpret as mandatory. The difference in the interpretation of the word may turn on the fact that while there is judicial review of an indictment, there is no such a review for a decision not to indict. ICTY art. 18(4) [Reproduced in the accompanying notebook at Tab 4].

[336] Bergsmo, *supra* note 331, at 121, 135. [Reproduced in the accompanying notebook at Tab 39].

[337] *Id*. *See* ICTY art. 18, 19. [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 17, 18. [Reproduced in the accompanying notebook at Tab 3].

[338] Bergsmo, *supra* note 331, at 121, 136. [Reproduced in the accompanying notebook at Tab 39]. Many of the Tribunals indictments are issued in secret due to fear that the accused would go into hiding. *Id.* In comparison, the statute of the ICC requires that an accused be present or represented for the indictment hearing. *See* Rome Statute of the International Criminal Court [hereinafter ICC], art. 61, *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT (2000). [Reproduced in the accompanying notebook at Tab 1].

[339] ICTY art. 18, 19. [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 19, 20. [Reproduced in the accompanying notebook at Tab 3].

At the Tribunals, the principle of "equality of arms" is supposed to function as a safeguard for the accused.[340] During the pre-trial phase, the prosecutor must: (1) provide copies to the defense of the supporting materials that accompanied the indictment and all prior statements obtained by the accused, (2) provide the defense copies of statements of all the witnesses the prosecutor intends to call at trial, and (3) allow the defense to examine the evidence the prosecutor intends to use at trial.[341] This type of pre-trial disclosure would be unheard of in the United States. If the defense requests to examine any of the prosecutor's tangible evidence pursuant to Rule 66(B) of the ICTY and ICTR, the prosecutor is entitled to examine any tangible evidence which the defense intends to use under the theory of balanced reciprocal disclosure.[342]

Under Rule 68, the prosecutor is required to disclose to the defense the existence of exculpatory evidence.[343] All of the jurisdictions discussed above place similar duties on the prosecutor. In *Prosecution v. Delalic*, exculpatory evidence was defined as "material known by the prosecutor that suggests the innocence or mitigates the guilt of the accused or the affects the

[340] ICTY art. 21. [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 20. [Reproduced in the accompanying notebook at Tab 3]. *See also* May, *supra* note 9, at 757 [Reproduced in the accompanying notebook at Tab 88].
[341] Rules of Procedure and Evidence, International Criminal Tribunal for Yugoslavia, UN Doc. IT/32/Rev. 26 (2002) [hereinafter RPE], 66(A)(B)(C), *available at* http://www.un.org/icty/basic/rpe/IT32_rev26.htm. [Reproduced in the accompanying notebook at Tab 2]. Rule 66(D) allows the prosecutor to apply to the Trial Chamber to be relieved of his obligation to disclose in the disclosure would prejudice ongoing investigations or is against the public interest. *Id*. *See id.* at 67(A)(ii)(a)(b). However, the defense is required to disclose its intent to enter a defense of alibi or any special defense, along with its witnesses and any other evidence which it intends to rely on to establish the defense. *Id*. Rule 73 *ter* of the ICTY and ICTR, which allows the Trial Chamber to order the defense to disclose the witnesses it intends to call after the close of the prosecutions case. *Id.* at 73*ter*.
[342] RPE 67(C). [Reproduced in the accompanying notebook at Tab 2].
[343] *Id.* at 68.

credibility of the prosecution's evidence."[344] This is a more generous rule to the defense than the *Bagely* rule that is followed in the United States.[345]

*(b) Trial*

While the investigative phase has an inquisitorial flavor, the trial phase is more adversarial in nature.[346] At trial, the procedure is essentially adversarial, while the evidentiary rules take on a more inquisitorial flavor.[347] The presentation of evidence is mainly performed by the parties, with each side being allowed to make opening and closing statements, present evidence, and conduct direct and cross-examinations.[348] This is very similar to the United States system, although witnesses are given greater latitude in their answers on cross-examination.[349] Additionally, evidence does not have to be corroborated, unlike the rule from Scottish procedure.[350] Overall, it would still be fair to characterize the trials as adversarial in that each party presents "their" evidence and "their" witnesses before the court in an effort to prove "their" case.[351]

---

[344] JONES, *supra* note 328, at 344. [Reproduced in the accompanying notebook at Tab 32] (citing Prosecution v. Delalic, *Decision on the Request of the Accused Pursuant to Rule 68 for Exculpatory Information* rendered on 24 June 1997) at ¶ 14. [Reproduced in the accompanying notebook at Tab 11]

[345] McMunigal, *supra* note 14, n. 63 [Reproduced in the accompanying notebook at Tab 68] (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). [Reproduced in the accompanying notebook at Tab 20].

[346] May, *supra* note 9, at 735 [Reproduced in the accompanying notebook at Tab 88].

[347] *Id.* at 737-38. [Reproduced in the accompanying notebook at Tab 88]. *See* JONES, *supra* note 328, at 163-64. [Reproduced in the accompanying notebook at Tab 32].

[348] May, *supra* note 9, at 738 [Reproduced in the accompanying notebook at Tab 88]. *See* ICTY art. 21 [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 20 [Reproduced in the accompanying notebook at Tab 3].

[349] MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 123 (1997) (discussing the cross-examination of witnesses under the hybrid system of the Tribunals that does not restrict witnesses to yes or no answers.) [Reproduced in the accompanying notebook at Tab 38].

[350] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998, ¶ 135. [Reproduced in the accompanying notebook at Tab 6].

[351] Vladimir Tochilovsky, *Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience*, 10 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 268, 270 (2002). [Reproduced in the accompanying notebook at Tab 96].

Under the Statutes of the Tribunals, the accused is presumed to be innocent of all charges.[352] The presumption of innocence was a universal theme among all of the systems discussed above. The Rules of Procedure and Evidence hold that in order to found guilty, the guilt of the accused must be proven beyond a reasonable doubt to the majority of the Trial Chamber.[353] Thus, the Tribunals adopted the common law standard of proof beyond a reasonable doubt. At least in one case, the difference in the French "inner belief" and the common law "beyond a reasonable doubt" standards has been commented on, where the French judge possessed an "inner belief" yet the other two judges failed to find guilty "beyond a reasonable doubt".[354] It is clearly not on the defendant to disprove his guilt due to the presumption of innocence in favor of the accused; the accused may only be convicted if one of the two other parties of the Tribunal proves his guilt. Although it is not explicitly stated in the Rules, the burden of proof has been held to be upon the prosecutor in the case law of the ICTY and the ICTR.[355]

[352] ICTY art. 21(3). [Reproduced in the accompanying notebook at Tab 4]; ICTR art. 20(3). [Reproduced in the accompanying notebook at Tab 3].
[353] RPE 87. [Reproduced in the accompanying notebook at Tab 2]. No definition of reasonable doubt was accepted by the creators of the Tribunals. *See* R. C. Pruitt, *Guilt by Majority in the International Criminal Tribunal for the Former Yugoslavia: Does this Meet the Standard of Proof 'Beyond Reasonable Doubt'?*, 10 LEIDEN J. INT'L L. 557, 559 (1997). [Reproduced in the accompanying notebook at Tab 83].
[354] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment: Separate and Dissenting Opinion of Judge Guney, 7 June 2001, ¶ 155. [Reproduced in the accompanying notebook at Tab 10].
[355] Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment, 14 January 2000, ¶ 339(a). [Reproduced in the accompanying notebook at Tab 15]. *See* May, *supra* note 9, at 754 [Reproduced in the accompanying notebook at Tab 88]. *See also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998 [Reproduced in the accompanying notebook at Tab 6]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, ¶ 108 [Reproduced in the accompanying notebook at Tab 16]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, 21 May 1999), ¶ 234. [Reproduced in the accompanying notebook at Tab 13].

### (2) Role of the Judge

*(a) Investigation & Pre-Trial*

In order to expedite trials, the judge plays an active role in pre-trial proceedings.[356] The specific actions taken by the pre-trial judge depends on the judge's judicial philosophy, caseload and experience.[357] Pre-trial management requires the judge to set up a work schedule and set forth the obligations of each of the parties.[358] Additionally, the judge hears pre-trial motions by either party.[359] After the motions are decided, the prosecutor is required to file pre-trial documents, followed by the defense.[360] Further, the pre-trial judge is allowed to set the number of witnesses called and the length of each party has to present it case.[361]

One proposal that has been made to the Tribunals, and that has the support of the prosecutor, is the use of a dossier that would be prepared by the prosecutor and would contain witness statements, with comments by the defense, that could be used as evidence at trial.[362] As a result of the suggestion, prosecutors now present a dossier-like investigative file to the trial chamber and the defense at the initial appearance of the accused.[363] Use of the dossier-like file allows the judges to be informed in advance about the case; however, it risks impairing the judges' impartial stance toward the case because, unlike the dossier used in many civil code countries, the investigative file presented to the judges of the ICTY/ICTR is the product of a one-

---

[356] Tochilovsky, *supra* note 351, at, 271. [Reproduced in the accompanying notebook at Tab 96].
[357] *From 'Common Law'*, *supra* note 37, at 374. [Reproduced in the accompanying notebook at Tab 55]. "In several cases, the pre-trial judge has directed the parties to intensify their efforts to agree to matters of fact and law in an effort to reduce the number of contested issues that must be dealt with at trial." *Id* at 375.
[358] Daryl A. Mundis, *The Election of Ad Litem Judges and Other Recent Developments at the International Criminal Tribunals*, 14 LEIDEN J. INT'L L. 851, 856 (2001). [Reproduced in the accompanying notebook at Tab 54]. Pre-trial disclosure includes witness lists, pre-trial briefs, objections to evidence, etc. *Id*. *See* RPE Rule 65*ter*. [Reproduced in the accompanying notebook at Tab 2].
[359] *The Election*, *supra* note 358, at 857. [Reproduced in the accompanying notebook at Tab 54].
[360] *Id*. at 856-857.
[361] *Id*. at 851, 858. *See* RPE 73*bis*, 73*ter*. [Reproduced in the accompanying notebook at Tab 2].
[362] *From 'Common Law'*, *supra* note 37, at 378-79. [Reproduced in the accompanying notebook at Tab 55].
[363] *Id*. at 379.

side adversarial investigation.[364] In fact, dossiers submitted in recent cases have tended to focus on inculpatory evidence and have failed to highlight exculpatory evidence.[365] The use of a dossier system that does not incorporate the same protections found in other jurisdictions, like France and Germany, creates the possibility that the judges' perception of the case will be unfairly skewed towards the prosecutor's position.[366]

*(b) Trial*

At trial, the judges of the ICTY/ICTR could be said to play an adversarial role when it comes to the proceedings and an inquisitorial role in terms of the rules of evidence. The judges listen to the evidence and arguments of the parties with an impartial stance and enforce the rules of the trial in order to preserve equality among the parties, comparable to judges in an adversarial jurisdiction.[367] However, similar to an inquisitorial jurisdiction, the rules of evidence are broadly defined, allowing for hearsay evidence to be admitted. For example, the judges are allowed to admit the evidence of a witness in the form of a statement in lieu of testimony.[368]

Under the Rules of the Tribunals, the judges are allowed to summon their own witnesses and have evidence presented after the parties have presented their cases.[369] This is similar to role of a judge in an inquisitorial jurisdiction, like Germany or France. Moreover, the judges are the finders of fact and must evaluate the evidence presented in order to reach a majority verdict on the charges.

---

[364] Tochilovsky, *supra* note 351, at, 272. [Reproduced in the accompanying notebook at Tab 96].
[365] *From 'Common Law'*, *supra* note 37, at 380. [Reproduced in the accompanying notebook at Tab 55]. This is not to suggest that the prosecutor has been unethical or failed in his or her duty to disclose exculpatory evidence to the defense. Each party is still responsible for the presentation of its own case. *Id.* It is merely meant to highlight some of the possible dangers that the *dossier* systems, especially in an unregulated form, could pose to the impartiality of judges.
[366] Tochilovsky, *supra* note 351, at, 272. [Reproduced in the accompanying notebook at Tab 96].
[367] JONES, *supra* note 328, at 163-64. [Reproduced in the accompanying notebook at Tab 32].
[368] *The Election*, *supra* note 358, at 851, 856. [Reproduced in the accompanying notebook at Tab 54].
[369] RPE 85, 98. [Reproduced in the accompanying notebook at Tab 2]. For an example of how judge introduced evidence affect the rights of the accused in Israel, *see* Zaltzman, *supra* note 304, at 1196. [Reproduced in the accompanying notebook at Tab 78].

These rules have an interesting effect when examining the burden of proof placed on the prosecutor. If, after the close of the prosecution's case, the Trial Chamber has doubts about the guilt of the accused, then the typical rule under an adversarial system would dictate that the accused be acquitted. Judicial intervention to relieve some doubt of the guilt of the accused could only mean that the prosecution has failed to meet its burden.

Logically, if the entire burden of proof is placed on the prosecutor, the Trial Chamber should be unable to call witnesses or introduce evidence in order to dispel uncertainties of the guilt of the accused. To hold otherwise goes against the presumption of innocence of the accused and that the burden of proof is on the prosecutor. If the burden of proof is on the prosecutor, the Trial Chamber should only be allowed to introduce evidence and call witnesses if it: (1) believes the prosecutor has presented enough evidence to prove guilt beyond a reasonable doubt and is seeking exculpatory evidence and/or (2) believes the defense has produced enough evidence to prove an affirmative defense in which the burden of production is on the accused. Therefore, the Trial Chamber should only introduce evidence in an attempt to call into question an element or defense where sufficient evidence has been introduced to meet the parties' burden of production.

**(3) Comparison to Other Systems**

The role of the prosecutor at the ICTY/ICTR is inquisitorial in many investigative and pre-trial respects, yet adversarial at trial. Like prosecutors in Germany, France, and Israel, he or she is responsible for overseeing the investigation, except to a much greater extent due to the logistical and political problems that are unique to the Tribunals. Pre-trial discovery tends to be more like that found in mixed or inquisitorial systems. Moreover, the increasing practice of compiling a dossier is a hallmark of inquisitorial systems. This practice highlights one of the

dangers of borrowing a procedure from one system without incorporating the safeguards for the accused that are present in that system. Unlike France and Germany, institutional protections are not set up to regulate the contents of the dossier in order to ensure that all the evidence is presented to the judge.[370]

At trial, the prosecutor must play an adversarial role similar to prosecutors in the United States and England. Further, the prosecutor still bears the burden of collecting evidence and presenting that evidence to prove its case. The fact that the prosecutor may appeal an acquittal is comparable to the prosecutors in Israel and Germany.

The judges at the ICTY/ICTR function much like the judges in Israel. All of the trials are to benches comprised of three professional judges. In addition, the inquisitorial powers of judges in both systems are similar, and the majority verdict is the same. The reasoned judgment requirement is comparable to the judgments handed down by civil code courts. Unlike the examining magistrate in France, the judges are not involved in the investigation of the cases, nor do the judges have access to a regulated dossier of the investigation to familiarize themselves with the case. Both of the parties in the dispute bear the ultimate responsibility in presenting their respective cases, so the judges must retain the role of a detached referee when enforcing the procedural rules and ruling on objections, like the judges in England, the United States, and Scotland.

[370] Tochilovsky, *supra* note 351, at, 272. [Reproduced in the accompanying notebook at Tab 96]. The neutral character of the dossier is one of the reasons that many civil code systems do not have the equivalent pre-trail disclosures rules that are found in common law countries. *Id.*

## B. Specific Case Examples

### (1) Tadic Case

The first trial before the ICTY was of Dusko Tadic, and it is useful in examining the initial system of procedure.[371] Tadic's trial dealt with allegations that Tadic was in command of a group that summarily executed non-Serbs, brutally beat and tortured prisoners, and was involved in acts of rape.[372] The prosecutor charged Tadic with thirty-one counts of persecution, murder and other offenses.[373] The presiding judge of the trial chamber opened the trial by making a statement that the accused was entitled to a fair trial and mentioned that, despite the fact that the members of the parties came from different legal traditions, fairness to the accused was a principle they each shared.[374] The prosecutor, followed by the defense, then made opening statements of their own.[375] This presented traditional adversarial procedure, with both the prosecutor and the defense zealously representing their opposing positions in the case.

After the opening statement, the prosecution proceeded to present its case, calling over seventy witnesses during the course of the trial.[376] The examination of witnesses also had an adversarial flavor, with the parties conducting the direct and cross-examinations; however, the witnesses were given greater latitude in answering questions on cross-examination than would have been allowed in some adversarial systems, like the United States, and the judges were

---

[371] Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L L. & POL. 167, 167 (1997-98). [Reproduced in the accompanying notebook at Tab 73].
[372] *Balkan Justice*, *supra* note 349, at 99. [Reproduced in the accompanying notebook at Tab 38]. Interestingly, Tadic was apprehended in Germany yet waived any objection to his transfer to the ICTY because he felt he could get a better deal at the Hague. The charges of rape were dropped at the beginning of the trial, due to the fact that the alleged victim was too frightened to testify. *Id.*
[373] JOHN E. ACKERMAN & EUGENE O'SULLIVAN, PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: WITH SELECTED MATERIALS FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 4 (2000). [Reproduced in the accompanying notebook at Tab 31].
[374] *Balkan Justice*, *supra* note 349, at 115. [Reproduced in the accompanying notebook at Tab 38].
[375] *Id.*at 115-19.
[376] *Id*. at 120.

allowed to ask the witnesses their own questions.[377] In addition, the prosecutor was allowed to introduce hearsay evidence.[378] The allowance of any relevant evidence that has probative value is an inquisitorial characteristic of the proceedings, as inquisitorial proceedings tend to allow judges broad discretion in determining what evidence to hear.

At the close of the prosecution's case, which lasted for about four months, the defense motioned for a dismissal of the charges that it felt the prosecution had failed to prove.[379] In its argument, the defense pointed out that many of the Rules of the ICTY were counterparts of the rules followed in common law countries, and that in common law countries, the defense is allowed to make a motion at the close of the prosecution's case that the prosecution has failed to carry its burden of proof.[380] The Trial Chamber allowed the motion by the defense, but the motion did not succeed because the court felt the prosecution had presented sufficient evidence to support the charges.[381]

One of the rationales the Trial Chamber gave for not granting the motion was because many of the common law rules were designed because a lay jury decides questions of fact.[382] At the ICTY, the three professional judges of the Trial Chamber play the role of the fact-finder, and thus, there is no need to protect the defendant from an erroneous jury ruling.[383] Therefore, there was no need for the judges to weigh the evidence at the close of the prosecution's case, and the

---

[377] *Id.* at 123, 184.
[378] Prosecutor v. Tadic, Case No. IT-94-1-T, Transcript, 7 August 1996, 4861-62. [Reproduced in the accompanying notebook at Tab 18]. The court stated that the reliability of the hearsay evidence would go toward weight and that under Rule 89(C), the court may admit any relevant evidence that it considers has probative value. *Id*. *See* RPE 89(C). [Reproduced in the accompanying notebook at Tab 2].
[379] *Balkan Justice*, *supra* note 349, at 173. [Reproduced in the accompanying notebook at Tab 38].
[380] *Id*.
[381] JONES, *supra* note 328, at 403. [Reproduced in the accompanying notebook at Tab 32] *See* RPE 85. [Reproduced in the accompanying notebook at Tab 2].
[382] *Balkan Justice*, *supra* note 349, at 177. [Reproduced in the accompanying notebook at Tab 38].
[383] *Id*.

court would wait until the end of trial to determine whether or not the prosecution had carried its burden of proof beyond a reasonable doubt.[384]

In terms of viewing the burden of proof as resting with the prosecution, this rational by the court creates several points for discussion. If the accused is presumed to be innocent of charges in front of the Trial Chamber, and the prosecution fails to meet its burden of proof at the close of its case, then the defense's motion should be heard and granted, and the accused should be acquitted on the charges that have not been proven beyond a reasonable doubt. One would think an interest in court efficiency should prompt the court to allow for a motion at this stage, as it could dispose of any charges where the burden of proof has not been met. This would prevent the defense from needlessly presenting evidence combating a charge that the prosecution has failed to prove.

Theoretically, in a system where the burden of proof rests on the prosecution, this would not only be an appropriate time to weight the evidence, it would be ideal. However, under the Rules of the ICTY, both the defense and the prosecutor are allowed to appeal a verdict. Thus, if the Trial Chamber ruled in favor to dismiss some of the charges on a defense motion at the close of the prosecutions case, the prosecutor would be allowed to appeal that decision after a final verdict is delivered. If the Appeals Chamber found in favor of the prosecution's appeal, another trial would have to be held on those issues so that the defense would be able to present evidence and witnesses to rebut the prosecution's case. The decision to not dispose of charges that the Trial Chamber feels have not been proved, which at first glance appears to call into question the

[384] *Id.*

notion that the burden of proof rests exclusively with the prosecutor, makes sense after accounting for the prosecution's right to appeal an acquittal.[385]

Interestingly, in 1998, the Rules were amended to specifically address this issue; Rule 98 *bis* was created stating: "If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more offenses charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal on that or those charges."[386] This rule makes no direct reference to the burden of proof being on the prosecution. However, it is fair to infer that if, after the prosecution has presented its evidence, the defense may move for acquittal, then it is at this point in the trial where sufficient evidence must have been offered; thus, if the prosecution is the only party who can now no longer present evidence, the burden must rest solely on the prosecutor to prove the case beyond a reasonable doubt.

At the ICTY/ICTR, the Trial Chamber may order either party to produce additional evidence or summon its own witnesses throughout the case.[387] If part of the burden of proof fell onto the Trial Chamber to prove the guilt of the defendant, then presumably the Trial Chamber could wait until after both sides had presented their case and then call its own witnesses to fill in any of the holes.[388] Rule 98 *bis* implicitly does not provide for this because, at the motion of the defense or on its own initiative, the Trial Chamber shall order acquittal on charges that are not supported by sufficient evidence to sustain a conviction.[389]

---

[385] In fact, an appeal by the prosecutor was filed in this case and Tadic was convicted of nine of the charges that he had been acquitted on. *See* JONES, *supra* note 328, at 5. [Reproduced in the accompanying notebook at Tab 32].
[386] RPE 98*bis*. [Reproduced in the accompanying notebook at Tab 2]. *See* JONES, *supra* note 328, at 431. [Reproduced in the accompanying notebook at Tab 32].
[387] RPE 98. [Reproduced in the accompanying notebook at Tab 2].
[388] *Id*. at 85.
[389] *Id*. at 98*bis*. *See* Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Decision on Defense Motions for Judgment of Acquittal, 6 April 2000, ¶¶ 26-28 [Reproduced in the accompanying notebook at Tab 14].

Following the denial of the motion for dismissal in *Tadic*, the defense then proceeded to present its case and attempt to establish a defense of alibi for Tadic.[390] Toward the end of the defense's case, the prosecution informed the court by that one of its witnesses had falsified his testimony on the stand.[391] After the defense rested, the prosecutor presented its rebuttal.[392] The defense did not choose to offer any rebuttal witnesses of its own.[393] Both sides presented closing statements, and the case went to the judges for a verdict and sentencing, if applicable.[394]

The Trial Chamber in *Tadic* stated: "the Prosecution is bound to prove each element of the offense charged."[395] The Trial Chamber returned form deliberations with a mixed verdict.[396] Under Rule 87(A) of the ICTY, "[a] finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt."[397] Tadic was found guilt of eleven of the thirty-one counts.[398] In regards to eleven of the counts that the court held were applicable, but of which Tadic was found not guilty, the trial chamber wrote: "The Prosecutor has failed either to establish beyond a reasonable doubt the elements of the offences, or to present conclusive evidence linking the accused to the related acts or to satisfy the Judges beyond a reasonable doubt that victims named were murdered."[399] Of the charges on

---

[390] *Balkan Justice*, *supra* note 349, at 185. [Reproduced in the accompanying notebook at Tab 38].
[391] *Id*. at 199. This helps to highlight the dual role of the prosecutor of the ICTY as both advocate and minister of justice.
[392] *Id.* at 204.
[393] *Id*. at 205. "In all, the Trial Chamber had heard the testimony of 125 witnesses, amounting to more than 6,000 pages of transcripts." *Id.*
[394] *Id*. at 207.
[395] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, ¶ 534. [Reproduced in the accompanying notebook at Tab 19]. Tadic was the first accused to be convicted at trial by ICTY following a plea of not guilty. During the Tadic trial, Judge McDonald said the prosecution had to prove the charges against the accused beyond a reasonable doubt. *Id*. *See also Balkan Justice*, *supra* note 349, at 177 (providing account of Judge McDonald's statement and an in-depth look at the Tadic trial and the start of the ICTY) [Reproduced in the accompanying notebook at Tab 38].
[396] *Balkan Justice*, *supra* note 349, at 214. [Reproduced in the accompanying notebook at Tab 38].
[397] RPE 87(A). [Reproduced in the accompanying notebook at Tab 2].
[398] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, ¶ 534. [Reproduced in the accompanying notebook at Tab 19]
[399] *Balkan Justice*, *supra* note 349, at 273, app. D. [Reproduced in the accompanying notebook at Tab 38].

which the accused was found guilty, the trial chamber stated: "The Chamber . . . has been satisfied beyond a reasonable doubt by the Prosecution's evidence . . .."[400] It is clear from the Trial Chamber's statements throughout the case, and in its decision, that the burden of proof in relation to the charges against the accused rests upon the prosecutor.

**(2) <u>Delalic Case</u>**

The ICTY also followed the presumption that the burden of proof was on the prosecutor in the *Delalic* case. The *Delalic* case was the first joint trial to be brought before a Trial Chamber.[401] Zejnil Delalic, and his co-defendants Zdravko Mucic, Hazim Delic, and Esad Landzo, were indicted and charged with grave breaches of the Geneva Conventions and Violations of the Laws or Customs of War for their actions at the Celebici prison camp.[402] At the camp, detainees were beaten, tortured, sexually assaulted and killed.[403] In the *Delalic* case, the Trial Chamber held that it is a matter of common sense that the legal burden of proof rests on the prosecutor in criminal proceedings.[404] The court went on to state: ". . . the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offense has been proved."[405] If the defense raises an affirmative defense, such as alibi, it is must show that it is more likely than not that the defense is true.[406] The Trial Chamber stated: "Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the

---

[400] *Balkan Justice*, *supra* note 349, at 273, app. D. [Reproduced in the accompanying notebook at Tab 38].
[401] JONES, *supra* note 328, at 5. [Reproduced in the accompanying notebook at Tab 32]
[402] *Id*.
[403] *Id*.
[404] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, 16 November 1998, 16374-16418 [Reproduced in the accompanying notebook at Tab 12]. *See* Ackerman, *supra* note 373, at 419, 422. [Reproduced in the accompanying notebook at Tab 31].
[405] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, 16 November 1998, 16374-16418. [Reproduced in the accompanying notebook at Tab 12].
[406] JONES, *supra* note 328, at 180. [Reproduced in the accompanying notebook at Tab 32]

accused is required to prove any issues which he might raise on the balance of probabilities."[407] In the end, Delalic was acquitted, while the three other men were found guilty of various charges.[408]

**(3) <u>Musema Case</u>**

The ICTR has followed the presumption set out in *Tadic* and other ICTY cases that the burden of proof to prove the case beyond a reasonable doubt rests on the prosecutor. In 1996, the prosecutor indicted Alfred Musema for genocide and conspiracy to commit genocide.[409] Musema was accused of personally attacking and killing Tutsi refugees, as well as arming other individuals and directing them to attack.[410] Musema was convicted of genocide, crimes against humanity (extermination and rape), and was sentenced to life in prison.[411] In discussing the respective burdens of the parties, the Trial Chamber stated: "The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the accused."[412] Later on in the decision, the Trial Chamber made reference to certain defense admissions which allowed it to find that ". . . the prosecutor is discharged of the burden of proving these elements . . .."[413] In acquitting Musema on some of the charges, the Trial Chamber concluded that the burden rested on the prosecution to establish the elements of the offenses and that the prosecutor had failed to do so.[414] In Judge Aspegren's separate opinion, he stated: ". . . as in all cases, the burden being on the prosecutor

---

[407] Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, 16 November 1998, 16374-16418. [Reproduced in the accompanying notebook at Tab 12]. This is similar to the principle followed under Scottish law.
[408] *Id.*
[409] JONES, *supra* note 328, at 29. [Reproduced in the accompanying notebook at Tab 32].
[410] *Id*.
[411] Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, §§ 7, 8. [Reproduced in the accompanying notebook at Tab 16].
[412] *Id.* at ¶ 108.
[413] *Id.* at ¶¶ 943, 964.
[414] *Id.* at ¶¶ 940, 961, 964, 968, 974.

to prove the facts alleged . . .."[415] It is also clear from this case that the Trial Chamber firmly places the burden of proof on the prosecutor.

**(4) <u>Baglishema Case</u>**

In another trial before the ICTR, Ignace Bagilishema was charged with seven counts of genocide, complicity in genocide, and crimes against humanity (murder, extermination and other inhumane acts).[416] Bagilishema was acquitted on all counts of the indictment.[417] Judge Gunawardana's separate opinion stated: ". . . the Prosecution has failed to prove its case against the Accused beyond a reasonable doubt, and therefore the Accused is entitled to an acquittal . . .."[418] In discussing the common law perspective on the burden of proof resting on the prosecutor, Judge Gunawardana remarked: "In common law jurisdictions . . . it remains at all times for the Prosecution to prove its case beyond a reasonable doubt."[419] Judge Gunawardana went on to note that the burden is also on the prosecution in civil law jurisdiction.[420] Although the defense has the burden to prove the defense of alibi, the prosecution must refute the defense so that there is no reasonable doubt.[421] Judge Gunawardana held the conclusion ". . . is supported implicitly by the Statute and Rules of the Tribunal, whereby the Accused is presumed innocent until proven guilty (Article 20(3)), and where a finding of guilty may be reached 'only

[415] Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence: Separate Opinion of Judge Aspegren, 27 January 2000, ¶ 34. [Reproduced in the accompanying notebook at Tab 17].
[416] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, ¶ 9. [Reproduced in the accompanying notebook at Tab 8].
[417] *Id.* at VERDICT.
[418] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment: Separate Opinion of Judge Gunawardana, 7 June 2001, ¶ 1. [Reproduced in the accompanying notebook at Tab 9].
[419] *Id.* at ¶ 6.
[420] *Id.* at ¶ 6, n. 5. "For example, in French law the prosecutor must adduce sufficient evidence … to convince the court of the guilt of the accused. Under the German code…the burden of proving the case rests upon the prosecution…." *Id.*
[421] *Id.* at ¶ 7.

when the majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt' (Rule 87(A))'".[422]

## VII. Conclusion

### A. Burden of Proof On the Prosecutor

#### (1) Almost Universal

An almost universal principle of civil, common and mixed systems of criminal procedure is that the burden of proof is on the prosecutor. Although the standard of proof that is required is not always the same, it is the prosecutor who has the burden of meeting it. The lone exception is Germany, where the judge's duty to search for truth implies that he has a duty to look for and examine both inculpatory and exculpatory evidence.[423] Following these traditions, it is clear from studying the Statute, the Rules of Procedure and Evidence, and the cases of the ICTY and ICTR that the burden of proof rests squarely on the shoulders of the prosecutor. The standard the prosecutor must meet is "beyond a reasonable doubt."[424] This is consistent with the adversarial nature of the proceedings at the Tribunals, and consistent with both the common, civil, and mixed law traditions studied at the beginning of throughout this memorandum.

#### (2) Tenable

Although, the ICTY and ICTR appear to be moving toward a more inquisitorial system of procedure, the burden of proof remaining on the prosecutor is tenable. Other inquisitorial and mixed jurisdictions operate effectively with the burden of proof on the prosecutor. In addition, the European Convention on Human Rights is interpreted as placing the burden of the proof

[422] *Id.* at ¶ 7, n. 19. *See* Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, 21 May 1999, ¶ 234 [Reproduced in the accompanying notebook at Tab 13]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, ¶108. [Reproduced in the accompanying notebook at Tab 16].
[423] *See infra* notes 232-51 and accompanying text.
[424] *See infra* notes 328-422 and accompanying text.

exclusively on the prosecutor.[425] Interestingly, the creators of the International Criminal Court [hereinafter ICC] did not leave this question open to doubt: Article 66 of the Rome Statute of the International Criminal court explicitly states that the burden of proof is on the prosecutor.[426]

**(3) Possible Grounds for Appeal**

Both the prosecution and the defense should have grounds to appeal a case where the trial chamber has introduced evidence pursuant to Rule 98 in order to relieve a burden that the law places on the other party. If, at the close of its case, either party has failed to present sufficient evidence of an element necessary for an offense or an affirmative defense, the Trial Chamber should not examine evidence in support of the insufficient element. Thus, if the prosecution fails to present sufficient evidence to prove an element of an offense, the Trial Chamber should not use its power to summon witnesses and introduce evidence in support of the element the prosecutor has failed to prove. Moreover, the Trial Chamber should not use its power to summon witnesses and introduce evidence in support of an insufficiently supported element of an affirmative defense that the defense has a duty to prove. Either action would violate the principles of equity of arms and the guarantee of a fair trial, and place the other party at a disadvantage *vis-à-vis* his or her opponent.[427]

**B. <u>Trends & Recommendations</u>**

The procedures at the Tribunals started out primarily based upon an adversarial foundation.[428] However, recent amendments and greater use of powers than granted under the

[425] GEERT CORSTENS & JEAN PRADEL, EUROPEAN CRIMINAL LAW ¶¶ 350-353 (2002). [Reproduced in the accompanying notebook at Tab 28].
[426] ICC art. 66. [Reproduced in the accompanying notebook at Tab 1].
[427] Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, ¶¶ 24, 25. [Reproduced in the accompanying notebook at Tab 7]. This trend is supported by the case law of the European Court of Human Rights. *Id*. at ¶ 24. *See* Corstens, *supra* note 425, at ¶ 338. [Reproduced in the accompanying notebook at Tab 28]. Any party to a case has the right to adversarial proceedings before impartial judges. *Id*.
[428] *Trial and Error*, *supra* note 371, at 171. [Reproduced in the accompanying notebook at Tab 73].

original rules have caused the proceedings to take on a more inquisitorial spirit.[429] The judges' increased use of inquisitorial powers is meant to expedite trial proceedings that have been criticized for taking too much time to complete.[430] Theoretically, inquisitorial judges are empowered to control the proceedings of the court from start to finish.[431] Although this increased control could lead to expedited proceedings, inquisitorial jurisdictions often suffer from lengthy delays, and it could be naïve to suggest that increased judicial control alone will be enough to streamline the proceedings. A model for the judges to follow would be that of the Israeli judges, who have inquisitorial powers to direct and actively lead procedures, yet temper this power ". . . so as not to transcend the permissible lines drawn by the adversary system, as liberally understood."[432]

**(1) Need for Role Stabilization.**

The judges at the ICTY and ICTR have three tasks: (1) to flesh out the international law that they are to apply to the accused, (2) to apply the international law in deciding culpability and punishment for the accused, and (3) to discern the truth and chronicle some of the world's darkest deeds.[433] Discerning the body of relevant precedent to apply in these cases is a daunting task facing the judges of the ICTY/ICTR. The judges of the ICTY/ICTR are charged with creating the precedent that is to be applied in the proceedings from the myriad of treaties, conventions, practices, case law from other jurisdictions and learned commentaries that comprise international law.[434] Moreover, this body of law must comply with the principle that no individual may be convicted of a crime that was not defined as such at the time he or she

[429] Combs, *supra* note 84, at 75-76. [Reproduced in the accompanying notebook at Tab 76].
[430] Combs, *supra* note 84, at 73-76. [Reproduced in the accompanying notebook at Tab 76].
[431] SAFFERLING, *supra* note 7, at 217. [Reproduced in the accompanying notebook at Tab 25].
[432] Shetreet, *supra* note 313, at 495. [Reproduced in the accompanying notebook at Tab 45].
[433] Patricia M. Wald, *Judging War Crimes*, 1 CHICAGO J. INT'L L. 189, 191-92 (2000). [Reproduced in the accompanying notebook at Tab 79].
[434] *Id*. at 191.

acted.[435] Thus, the judges are often confronted with legal questions that have never before been addressed by any court.[436]

Flexibility is needed in order for the judges to fashion solutions to these complex legal issues. "Legal systems are in a constant state of flux and consequently the roles played by those who operate them must constantly be adjusted."[437] This statement has even greater relevance when applied to the hybrid procedural system of the ICTY/ICTR that forces judges to reorganize and adapt rules and procedures as problems are encountered. As novel issues are dealt with and precedent is established, the flexibility required by the judges will be reduced. Consequently, the system will become more stable and less dynamic, allowing all the parties involved to more accurately predict how a particular case is going to be handled. It is important to emphasize that judges will continue to need to possess the ability to correct problems in the system. As feedback and information about the court's performance is gathered, the judges will be able to alter and change the rules that are followed to allow the ICTT/ICTR to achieve its goals with maximum efficiency.

The judges at the ICTY/ICTR are placed in a unique role in comparison to the other systems studied in this memorandum in the sense that they have to decide what the law is, how the law should be applied, and whether the facts in each particular case have been proved to show a violation of the law. Unlike the other jurisdictions, which operate based on constitutions, statutes, and case precedent that has been interpreted and applied on numerous occasions, the judges at the ICTY/ICTR are deciding novel issues in every case before them. In essence, the judges are forced to mix and combine different rules and philosophies from jurisdictions throughout the world. Complicating matters is the fact that each judge comes from his or her

[435] *Id*.
[436] *Id*. at 191-92.
[437] Salas, *supra* note 17 at, 489. [Reproduced in the accompanying notebook at Tab 27].

own system's background, with priorities placed on different areas of the trial process and what their roles are within that process.[438]

Now that the judges have more experience with the exceptional system that they have created, it is time for the system to solidify its structure to facilitate cohesion. At this point, judges should identify with their roles as judges of the ICTY/ICTR, and not as an English or French judge serving for a time on the ICTY/ICTR. The rules of procedure and evidence should be consistently applied with the same standard throughout the trial chambers. Labeling the system as adversarial, inquisitorial or mixed, while helpful for convenience of discussion, rarely will accurately portray the system to outsiders given the wide variation between the systems that traditionally carry these labels.

As the judges of the ICTY/ICTR set their roles in a consistent manner, the prosecutor will be able to more fully realize and perform his or her role. Due to the broad discretion of the judges, the prosecutor's role is only defined in relation to the stance which each trial chamber takes on a particular case. Once the judges are consistent and sure of the roles they occupy in at the Tribunals, the prosecutor's role should become clear, and the two roles should become more distinct from each other. This will allow the prosecutor to know from the outset exactly what

[438] Tochilovsky, *supra* note 351, at, 274. [Reproduced in the accompanying notebook at Tab 96]. To illustrate with an analogy from sports, it is as if a soccer, football, and rugby referee were gathered together to umpire a match combining different elements of all three sports. The football referee is used to highly structured and technical rules and codes of conduct that are strictly enforced throughout the game, with the match stopping after each play for the teams to regroup. The soccer referee is used to a game that is more open and less formally regulated, with most of the players regulating themselves during the game. The referee is generally focused on the players involved in the playing of the ball at a particular time, leaving a large number of players unregulated until the action swings back in their direction. The rugby referee is used to a considerable less regulated match with few rules and with the players who, like those in a soccer match, need to be more or less regulated depending on their status at a particular point in the match. However, like players in football, the rugby players play the game in much closure proximity to each other and who line-up and face-off thought out the match. These three officials must get together, decide on the rules of the match, and then enforce those rules on the two teams, which are comprised of players from all three sports. Not surprisingly, the rules and procedures have been in a state of flux, with different judges and prosecutors placing different degrees of emphasis on different areas. Moreover, all of the parties involved are being told to speed the game up, which will likely cause each player to rely more and more on the system that he or she is more familiar with in an attempt to increase efficiency.

role he or she is expected to play throughout the case. This internal cohesion will help to increase the efficiency of the entire process, thus, speeding up the trials.

**(2) Decreased Independence of the Prosecutor**

The trend towards a more inquisitorial style of international justice, at least at the pre-trial stage, is also evident in the ICC, where a pre-trial chamber must give its approval before the prosecutor may initiate an investigation.[439] This is a more inquisitorial stance than followed by the ICTY/ICTR, where that power is exclusively within the province of the prosecutor.[440] Moreover in the ICC, the judges have the power to order the prosecutor to proceed with an investigation, even if he or she believes there is insufficient evidence for prosecution.[441]

Although different jurisdictions allow prosecutors varying levels of independence, most view prosecutorial independence as protecting basic freedoms and promoting efficiency through role specialization.[442] If the independence of the prosecutor continues to be infringed upon by the judges, a question arises as to whether the prosecutor will be able to function effectively or if the position will become that of an assistant, rather than that of autonomous and mostly self-regulating component of international justice.[443]

**(3) Office of the Defender**

Although this memorandum is focused on the role of the judge and the prosecutor in different criminal systems, it bears mentioning that a significant player in the systems, the defense, has been excluded. This mirrors the structural organization of the Tribunals and the ICC, which do not provide for an Office of the Defender. Systems based on a triadic scheme

[439] Sylvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 LEIDEN J. INT'L L. 409, 426-427 (2002). [Reproduced in the accompanying notebook at Tab 94].
[440] *Id*. at 426-427.
[441] *Id* at 419.
[442] Salas, *supra* note 17 at, 496-99. [Reproduced in the accompanying notebook at Tab 27].
[443] Louise Arbour, *The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court*, 17 WINDSOR Y.B. ACCESS TO JUST. 207, 217-220 (1999). [Reproduced in the accompanying notebook at Tab 71].

function poorly when one of the three roles is not represented. Even though the high profile nature of the Tribunals ensures that excellent defense counsel is present in each case, there is no continuing presence to ensure that the rights of the accused are represented when, for example, the judges amend the rules of procedure and evidence.

The mere presence of an Office of the Defender would likely have an effect on the day-to-day interactions at the ICTY/ICTR. For example, at The Hague and in Arusha, all the offices of the Tribunals work in the same building and share the same resources, resulting in a blurring or roles between the judges and the prosecutors.[444] While such everyday interaction may seem inconsequential in any one particular case, the cumulative effects on the system are likely tremendous in terms of role definition. Roles are defined in relation to the other parties in a system. The establishment of an Office of the Defender would help to protect the rights of the accused, and allow the judges and the prosecutors to further define their roles in relationship to all three parties involved in the criminal process.

[444] de Bertodano, *supra* note 439, at 419. [Reproduced in the accompanying notebook at Tab 94].