

Traditions in Conflict: The Internationalization of Confrontation

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This article considers international norms concerning the right to adversarial confrontation in positing a normative analytical standard of admissibility with respect to the “right to examine” guaranteed under Article 67(1)(e) of the Rome Statute of the International Criminal Court (ICC). It considers the notion of confrontation in the context of both the Continental European tradition, as well as the Anglo-American Common Law conception of the right, focusing on U.S. constitutional doctrine and relatively recent developments in English jurisprudence. It also surveys the scope of the right to examine as defined by the U.N. Human Rights Committee relative to the International Covenant on Civil and Political Rights (ICCPR), and by the European Court with regard to the European Convention. The article further evaluates the procedural regime concerning the admission of written evidence not subjected to cross-examination under the Rome Statute and the ICC’s Rules of Procedure and Evidence and argues that the broad judicial discretion it affords is insufficient to fully and predictably guarantee the core right to adversarial examination of witnesses intended under Article 67(1)(e). Ultimately, the article concludes that a bright-line rule of admissibility is not only a viable international standard, but also the one that best protects the hybridized right to examine as a core due process tenet of the Rome Statute.

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Introduction

The principle of confrontation is an ancient one, dating back to at least Roman times.¹ Today, it is a prevalent feature of the world's major

1. See *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988). For a fuller exposition, see generally Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994) (tracing the history of face-to-face confrontation). See also STEFANO MAFFEI, *THE EUROPEAN RIGHT TO CON-*

criminal justice systems and an integral component of international fair trial standards. Derived from national constitutionalism and international human rights, together with other long-established fair trial guarantees,² the right to examine one's accusers is universally reflected in regional and multilateral treaties the world over.³

While there are complex reasons for the proliferation and, importantly, the observation of fair trial rights as a whole within the international human rights legal framework, the fact that such rights generally lack an established hierarchy in terms of either their development or enforcement is contributive.⁴ Further, the "increased recognition that a number of nations share many fundamental legal values and expectations,"⁵—including both criminal trial and civil rights intimately connected

FRONTATION IN CRIMINAL PROCEEDINGS: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES 13 (2006) (observing that confrontation dates as far back as Hebrew writings).

2. See U.N. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session, The Administration of Justice and the Human Rights of Detainees*, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994), ¶ 85 (noting that fair trial rights have been an international human rights norm for over 40 years, giving rise to a substantial body of interpretation in its elaboration and construal), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.1994.24.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1994.24.En?Opendocument) (last visited Feb. 10, 2010); Charter of the International Military Tribunal, art. 16(e), annexed to Agreement Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter *Nuremberg Charter*] (providing that "[a] defendant shall have the right through himself or through his Counsel . . . to cross-examine any witness called by the Prosecution."). See generally UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. res. 217A (III), art. 11, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (stating that "[e]veryone charged with a penal offence has the right to . . . all the guarantees necessary for his defence.").

3. See International Covenant on Civil and Political Rights, art. 14(3)(e), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] (providing, "[i]n the determination of any criminal charge against him, [the accused] shall be entitled . . . in full equality . . . [t]o examine, or have examined, the witnesses against him."). For examples of statutes using terms nearly identical to the ICCPR see European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(3)(d), Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 221, 228, [hereinafter ECHR] (entered into force Sept. 3, 1953) (as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, respectively); see also Statute of the International Military Tribunal for the Former Yugoslavia art. 21(4)(e), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 20(4)(e), Nov. 8 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; African Commission on Human and Peoples' Rights, *Resolution on the Right to Recourse and Fair Trial* Res.4(XI) 92, ¶ 2(E)(iii) (Mar. 9, 1992) available at http://www.achpr.org/english/resolutions/resolution09_en.html [hereinafter ACHPR Resolution]; Rome Statute of the International Criminal Court, art. 67(1)(e), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force July 1, 2002). But see American Convention on Human Rights, art. 8(2)(f), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR] (providing for the "right of the defense to examine witnesses present in the court," distinguishing this provision from other international instruments which do not expressly provide for in-court confrontation) (emphasis added).

4. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 236-37 (1993).

5. *Id.* at 235.

with democracy⁶—may account for this phenomenon. However, even given the broad democratic consensus reflected in customary international law,⁷ the re-interpretation and refinement of fair trial rights standards as a whole, and particularly the right to examine, should remain a focal point of international criminal justice.

Modern fair trial rights are chiefly derived from elements drawn from two of the world's dominant legal traditions—the Common Law rooted in England (“Adversarial”) and the Civil Law of continental Europe (“Continental”).⁸ The procedural disparities in these traditions may have a potentially profound impact not only upon due process considerations, but also on the very conception of a fair trial.⁹ Although the transplantation and merging of discrete elements of these systems have greatly contributed to the expansion of rights-based criminal procedure and are intended to strengthen international fair trial standards,¹⁰ some commentators argue that the resultant hybrid system may be substantively impaired.¹¹ Others

6. *Id.* at 253 (recognizing that “[t]he link between individual human rights, which are most susceptible to abuse during the criminal process, and democracy is beyond question.”). See also David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1186 (1993) (observing that the ICCPR guarantees civil and political rights which “limit the power of the State to impose its will on the people under its jurisdiction.”); Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 606 (1996) (“[Close] examination of the rights listed in both the UDHR and the [ICCPR] leaves no doubt that both documents . . . are attempts to universalize civil and political rights accepted or aspired to in Western liberal democracies.”).

7. See generally ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* ch. 18 (Oxford University Press) (2d ed. 2008).

8. While Adversarial and Continental modalities predominate, the world's major legal traditions also include Marxist-Socialist and Islamic (Sharia). See Bassiouni, *supra* note 4, at 244.

9. See, e.g., Justice Robert H. Jackson, *Preface* to INTERNATIONAL CONFERENCE ON MILITARY TRIALS (U.S. Department of State 1945) (observing that “a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries.”); see also SALVATORE ZAPPALA, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 16 (Oxford University Press 2003) (“[T]hese models historically reflect different conceptions of ‘judicial truth’ . . . this differentiation reflects two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the ‘inquisitor’ must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process.”).

10. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 579 (2000) (observing the Continental/Adversarial hybrid evidentiary rules employed by the ICTY and their interaction with the need to maintain fair trials there).

11. See Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 851–52 (1997) (observing that the “transplantation of factfinding arrangements between common law and civil law systems would give rise to serious strains in the recipient justice system . . . a legal pastiche [can] produce far less satisfactory factfinding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.”); Henri Astier, *Rights of the Despised*, THE AMERICAN PROSPECT, Aug. 14, 2000, at 31 (observing that “the root of the problem is the hybrid nature of war crimes tribunals.”); see also Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 568 (1996) (noting that borrowing across

argue that this hybridization may considerably attenuate due process.¹² What, then, of an internationalized right to confrontation?

This article considers the “right to examine” within the Adversarial and Continental legal traditions, as well as in the context of the ICCPR and the European Convention on Human Rights (the “European Court”), and posits a normative analytical approach to Article 67(1)(e) of the Rome Statute.¹³ Part I reviews the right to confront within the broad context of the Continental mode of procedure. Part II considers the Anglo-American notion of confrontation, focusing on U.S. constitutional doctrine and recent developments in English law. Parts III and IV consider the right to examine, as interpreted by the U. N. Human Rights Committee (UNHRC) and by the European Court, respectively. Part V examines the ICC’s procedures regarding the admissibility of written evidence in view of the right to examine under the Rome Statute. In conclusion, this article proposes a bright-line analytical framework as a normative and viable alternative to the exceedingly broad judicial discretion the Rome Statute and the ICC’s Rules of Procedure and Evidence currently afford in determining the scope of admissibility of uncross-examined statements.

I. The Civil Law Paradigm

Although some commentators contend that the gap between the Adversarial and Continental modes of criminal procedure is wide,¹⁴ a focus on the operation of Continental procedure suggests otherwise.¹⁵ The view that the modern convergence of the two traditions has reduced their differences, leading to the relative dominance of certain characteristics of one over the other, seems more apt.¹⁶ No matter how the dichotomy

national and systemic lines risks importing stereotypes “without appreciating the distinctive relation of the borrowed practice to the premises of the system in which it has evolved and the living context in which it has taken its form. Indeed, it is commonly assumed that such borrowings are, at best, risky and, at worst, calamitous.”).

12. See Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 642–43 (2007) (observing that some have criticized the Nuremberg Charter as fundamentally unfair, and attributing this to the dilution of due process resulting from the “blending and balancing elements of the Continental European inquisitorial system and the Anglo-American adversarial system.”) (internal citations omitted); see also Lee A. Casey, *The Case Against The International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 868–69 (2002) (observing that the Adversarial and Continental systems “do not mix well together” and that “[i]n the ICTY, hearsay evidence is admitted virtually without limitation. . . . Neither the critical importance of vindicating the accused’s right to confront the witnesses against him, nor the basic human fallibility even of professional judges is acknowledged.”); Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny*, *Due Process Deficit*, 4 INT’L. CRIM. L. REV. 243, 265 (2004).

13. See Rome Statute, *supra* note 3.

14. See CHRISTOPH J. M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 1 (Oxford University Press) (2001) (noting the “the wide gap between the Anglo-American and the Continental traditions of criminal procedure.”).

15. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 549 (1973).

16. WAYNE R. LAFAYE ET AL., 1 CRIMINAL PROCEDURE, § 1.4(c), n.105, at 175 (2d ed. 1999) (“Just as Anglo-American procedure is not purely adversarial neither is European

is characterized, however, fundamental differences have clearly survived the intermixing of the two traditions,¹⁷ particularly those concerning the organization of the investigation phase and its correlative structures.¹⁸

A. Mode of Criminal Proceedings

Principally, three distinct but integrated stages define Continental criminal proceedings: the investigation stage, the examination stage, and the trial stage.¹⁹ Within this framework, the judiciary is responsible for controlling the conduct of trial and plays a very active role.²⁰ At trial, for example, judges decide which witnesses should be called and may directly conduct their examination on substantive matters.²¹ Such witnesses are traditionally questioned in contemplation of, and based upon, a *dossier* which documents evidence gathered during the investigative phase.²² The judiciary is thus chiefly responsible for eliciting the evidence to be relied upon to adjudicate the guilt of the accused.²³

During the early investigation stage, several formative operations are

procedure purely inquisitorial. Thus, commentators often prefer to describe the European process as providing a ‘mixed system’ in which the inquisitorial characteristics are dominant.”) (internal citations omitted).

17. See Gideon Boas, *A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 20* (Gideon Boas & William A. Schabas, eds., 2003) (observing that by adhering to the ECHR many Continental countries “have subjected themselves to general standards of procedural fairness” similar to those of the Adversarial system.).

18. See Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 *SUFFOLK TRANSNAT’L L. REV.* 1, 16–17 (2002) (discussing the general court structure and roles under the Continental system).

19. See JAMES G. APPLE & Robert P. Deyling, *A Primer on the Civil-Law System* 28 (Federal Judicial Center 1995); see also *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶¶ 59, 62, at 109 (appeal taken from Eng.) (describing, by means of examples from the French process, the stages of the Continental system, and contrasting the absence of judicial investigation in Common Law systems).

20. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *NOTRE DAME L. REV.* 403, 421–22 (1992) (noting that the French *juge d’instruction* supervises the investigation of serious cases, while the police conduct the actual investigation, including interviews and interrogations; in Italy, these responsibilities belong to the public magistrate); see also 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, 325 (1995) (noting that while the investigatory judge “still dominates pretrial procedure in many other continental systems,” in Germany, the office of the investigatory judge was terminated over thirty years ago and that prosecutors “are responsible for investigating and prosecuting criminal offense.”); Antonia Sherman, *Sympathy for the Devil: Examining a Defendant’s Right to Confront Before the International War Crimes Tribunal*, 10 *EMORY INT’L L. REV.* 833, 861–62 (1996) (comparing the roles of judges in Adversarial and Continental systems to those of “impartial referee” and “active inquisitor,” respectively).

21. See Damaska, *supra* note 15, at 525 (noting with regard to judicial control of the trial inquest that “whatever evidence [the judge] decides to examine becomes his—or, rather, the court’s—evidence.”).

22. See, e.g., Frase & Weigend, *supra* note 20, at 334 (“German professional judges usually are familiar with the complete file of the investigation before a trial begins.”).

23. See 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, 81 (1996) (observing that Continental judges are “proactive in

carried out under the direction and authority of an investigating judge²⁴ who is vested with considerable powers.²⁵ Amongst other formal devices at his control, he may seek out or identify suspects, have crime scenes processed, or have interrogations conducted.²⁶ Generally, it is during this stage that most evidence is acquired.²⁷ As mentioned above, the *dossier* records this evidence, including police reports, physical evidence, expert reports, and other important documents and materials.²⁸

A judicial or prosecutorial official normally compiles the *dossier*, which further includes information derived from the interrogation of relevant witnesses, among whom may be those proffered by the defense, as well as the accused.²⁹ Therefore, officials responsible for the preparation of the *dossier* are typically charged with collecting both incriminating and exculpatory evidence relevant to a given investigation.³⁰ As the theory goes, the direct and substantial involvement of the judiciary in the investigation phase “permits the court to dispense with many of the witnesses, and the procedural safeguards, required in an Anglo-American forum.”³¹

Although the development of the *dossier* marks the investigation phase, it also informs the examination phase and subsequent proceedings to varying degrees. In some cases, reliance upon the *dossier* is so profound that it may virtually obviate the need for trial testimony. However, in other cases its impact is less drastic.³² Nevertheless, the *dossier* forms an impor-

developing most, if not all, of the evidence during the trial.”) (internal citations omitted).

24. See Boas, *supra* note 17, at 21–22 (noting that “several continental European systems of criminal procedure. . . do not have the investigating judge as part of their investigation process,” referencing the German system where the prosecutor decides which cases to take to trial and the Danish system, where the police carry out investigations).

25. *Id.* at 20–22 (focusing on the French, Dutch and Belgian systems).

26. See generally, Felicity Nagorcka, Michael Stanton & Michael Wilson, *Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 456 (2005) (noting the broad authority provided to investigating judges under the French Code of Criminal Procedure to, *inter alia*, order searches and seizures, interrogate suspects and witnesses, and to manage the confrontation of witnesses with the accused).

27. BRON McKILLOP & SIMON STRETTON, *INQUISITORIAL SYSTEMS OF CRIMINAL JUSTICE AND THE ICAC: A COMPARISON* § 1.3, at 3 (New South Wales Parliamentary Joint Committee on the Independent Commission Against Corruption 1994).

28. See *id.* § 1.4, at 4.

29. See McClelland, *supra* note 18, at 14 (citing Rudolf B. Schlesinger, *Mitchell Lecture*, 26 BUFF. L. REV. 361, 365 (1977)); see also McKillop & Stretton, *supra* note 27, § 1.4, at 4 (noting, *inter alia*, that the accused’s personal background and criminal history form an integral part of the dossier).

30. See Thomas Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 12 (1981) (providing examples drawn from the German and French systems).

31. Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT’L L. 1, 60 (2006); see also Nagorcka et al., *supra* note 26, at 460 (observing that “[t]he lack of rules of evidence is a reflection of the fact that the duty to collect evidence and ‘search for the truth’ is given to a qualified and impartial judge.”).

32. See William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 434 (2004) (stating that “in some

tant and characteristic component of traditional Continental systems,³³ substantively influencing all phases of the trial process.³⁴

During the examination phase, judges actively continue gathering evidence in order to further elaborate the *dossier*.³⁵ Although during this phase an accused is afforded “[t]he opportunity to cast doubt on the credibility of witnesses, submit comments on evidence and request further investigations on [his own] behalf,”³⁶ adversarial cross-examination is functionally unavailable.³⁷ In practice, the questioning of witnesses typically proceeds substantially unchallenged.³⁸ Not unlike other witnesses, an accused too may be called upon to give information during the examination phase.³⁹ While he retains the right against self-incrimination in these circumstances,⁴⁰ an accused’s refusal to cooperate may be viewed as damaging to his credibility.⁴¹ Upon the conclusion of the examination phase, the record to be relied upon during the trial phase has generally been fully developed by the investigating judicial or prosecutorial official—at least with that evidence considered by them to be valid and relevant.⁴²

[C]ontinental countries . . . the trial usually consists of a discussion of the materials in the dossier in an attempt to determine the issue of guilt and the appropriate punishment.”) (internal citations omitted); see also McKILLOP & STRETTON, *supra* note 27, § 1.5, at 4 (remarking that “the traditional inquisitorial trial is essentially a process of public confirmation of the results of the investigation.”).

33. See McKILLOP & STRETTON, *supra* note 27, §1.2 at 3 (observing that the process of investigation “is the crucial phase as it establishes the dossier which is the basis for the subsequent progression, the backbone of the process.”). This ordinarily occurs upon the transmission of the dossier by the investigative judge to a panel of judges for a probable cause determination. See McClelland, *supra* note 18, at 15.

34. See McKILLOP & STRETTON, *supra* note 27, §1.4, at 4 (noting that “the dossier forms the basis for the progression of a criminal case . . . [and] shapes the trial and informs appellate review.”).

35. See *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 60, at 109 (appeal taken from Eng.).

36. HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL 11 (2005), available at <http://www.hrw.org/background/mena/iraq1005/iraq1005.pdf> (internal citations omitted).

37. See APPLE & DEYLING, *supra* note 19, at 28 (observing that the Continental examination phase provides “no counterpart to common-law cross-examination.”); see also *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 60, at 109 (appeal taken from Eng.) (observing that witnesses could be examined during this phase without the presence of the suspect and his lawyer “unless the examining judge chose to arrange a confrontation with the suspect.”).

38. See, e.g., Damaska, *supra* note 11, at 843–44 (noting that the Continental judge “retains the monopoly of witness’ examination.”).

39. See *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 60, at 109 (appeal taken from Eng.) (noting that suspects could be detained and repeatedly interrogated during the examination phase).

40. See Casey, *supra* note 12, at 868.

41. See McClelland, *supra* note 18, at 18 (noting that while a Continental defendant is placed in the position of having to respond to questions, he may refuse. However, this refusal “may be more damaging to his credibility than a common law defendant’s silent declination to participate.”); see also Nagorcka et al., *supra* note 26, at 455 (noting that “[t]he right to silence does exist in the French system; however its exercise can give rise to an unfavourable inference against the accused, as he or she is regarded as a necessary source of information in revealing the truth.”).

42. See Casey, *supra* note 12, at 868.

The trial, which is then carried out on the basis of the *dossier*, is substantially de-emphasized in Continental criminal proceedings. In contradistinction to the Adversarial model, which develops facts at the trial phase, the focus of the Continental trial is centered upon the investigation of the facts during the investigation phase. As such, in some cases the trial itself may solely be comprised of arguments advanced by the prosecution and the defense as to their respective interpretations of an essentially pre-established record.⁴³

B. Confrontation

Prior to the twentieth century, the principle of confrontation in Continental Europe was uncommon.⁴⁴ It had been greatly attenuated during medieval times, during which the procedures of the Inquisition took hold.⁴⁵ These were dependent upon secret and anonymous evidence in order to preserve social order and uproot dissidence.⁴⁶ Evidence in criminal cases was thus received “under a ‘veil of secrecy’ and the door was left ‘wide open to mendacity, falsehood, and partiality.’”⁴⁷ Suspects were not afforded an opportunity to confront such evidence.⁴⁸ Given these historical underpinnings, it is hardly surprising that the role of the parties in modern Continental trials is relatively reduced and subsidiary to that of the judge.⁴⁹

Indeed at trial, “[t]he involvement of the public prosecutor and defense attorney is generally limited to asking occasional follow-up questions or suggesting other lines of inquiry” to the presiding judge.⁵⁰ Concomitantly, cross-examination by counsel is relatively infrequent.⁵¹ Likewise, even though the participation of an accused is active,⁵² his role as far as exercising his rights in his own defense (such as the right to silence) tends to be lesser than that typically observed in Adversarial pro-

43. *Id.*

44. See MAFFEI, *supra* note 1, at 15–16.

45. See *R. v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128, ¶5, at 1137–38 (appeal taken from Eng.).

46. *Id.*

47. *Id.*

48. *Id.*

49. See APPLE & DEYLING, *supra* note 19, at 37 (noting that, as the principle inquisitors, the elevated status of judges in Continental systems “result[s] in a concomitant derogation of the role of lawyers during the trial.”); cf. Frase & Weigend, *supra* note 20, at 342 (observing that although the parties within the German system “may play a fairly active role,” the court controls the proceedings).

50. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L L. 1, 7 (1992).

51. Gordon, *supra* note 12, at 643, citing Michael P. Scharf, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 10 (Carolina Academic Press 1997).

52. See Pizzi & Marafioti, *supra* note 50, at 14 (noting that “[t]he defendant traditionally plays an active role in a civil law trial.”).

ceedings.⁵³ Indeed, an accused's involvement in Continental proceedings, even from the early stage of being a mere suspect, generally entails a continuing "dialogue with investigatory and judicial authorities throughout the pre-trial and trial phases."⁵⁴

The principle of the *procedure contradictoire*—a feature that provides that "all parties in a criminal proceeding must be allowed full opportunity to be informed of and to contest evidence, in order that a fair and just verdict ensues"⁵⁵—is integral to equality of arms—the notion that the prosecution and defense should have equal access to the court. However, it does not implicitly subsume the right to confrontation within the Continental tradition. Rather, it connotes that "the defence must be informed of all the evidence and arguments that are to be deployed against the defendant, and be given a chance to *answer* them."⁵⁶ It is thus fundamentally a question of fair notice. Nonetheless, until as recently as 2000, Austrian criminal procedure, for example, permitted the *ex parte* filing of Public Prosecutors' observations ("*croquis*") that could later be relied upon in rendering judgments at both the trial and appeal levels without any provision or notice to the defense.⁵⁷

As such, the principle of a *procedure contradictoire* is not a true confrontation right, but instead one fully steeped in Continental trial procedures, which are "notable for [their] lack of exclusionary rules"⁵⁸ and broad standards of admissibility. Because the Continental system "erects few evidentiary barriers that restrict the information the judge can consider in determining guilt,"⁵⁹ the practical implementation of an effective right to confront or to examine witnesses at trial has generally been

53. *Id.* at 8 (observing that the exercise of the right to refuse to answer questions is exceptional); McClelland, *supra* note 18, at 14; cf. Mark Findlay, *Synthesis in Trial Procedures? The Experience of International Criminal Tribunals*, 50 INT'L & COMP. L. Q. 26, 35 (2001) (noting that "while the presumption of innocence may be accepted, it is expected that the accused will be an initial witness in his/her defence and that his/her testimony will answer the inquisition."); Damaska, *supra* note 15, at 529 (noting that the Continental system regards an accused "as an evidentiary source before any other evidence has been examined at the trial.").

54. See McClelland, *supra* note 18, at 14.

55. Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L. J. 809, 838 (2000); see also Grundgesetz für die Bundesrepublik Deutschland [Constitution of the Federal Republic of Germany], § IX, art. 103(1), *English translation available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf> (providing that "[i]n the courts every person shall be entitled to a hearing in accordance with law.").

56. James R. Spencer, *Introduction to EUROPEAN CRIMINAL PROCEDURES* 45 (Mirielle Delmas-Marty & John R. Spencer eds., 2002) (emphasis added).

57. See *Brandstetter v. Austria*, 211 Eur. Ct. H.R. (ser. A) ¶¶ 67–69, at 27–28 (1993) (noting that a lower court's judgment "reproduced almost literally the text of [the *croquis*]" and stating that "[a]n indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgment can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution.") (internal quotations omitted).

58. McClelland, *supra* note 18, at 19 (stating further that "[r]elevancy and best evidence standards are the main tests of admissibility at civilian trials.") (internal citations omitted).

59. See Pizzi & Marafioti, *supra* note 50, at 7.

regarded as a somewhat secondary consideration in terms of the fairness of trials.⁶⁰ Indeed, although the right to examine exists in The Netherlands, for example, a judge has discretion to deny a request to examine a witness if his absence “cannot reasonably be considered prejudicial.”⁶¹

Traditional Continental systems are thus well-known to allow convictions on the basis of evidence from witnesses that an accused had not been afforded any prior opportunity to challenge. However, as discussed in Part IV, the influence of the European Convention has significantly affected these issues and spurred progressive changes in many national jurisdictions.⁶²

II. The Adversarial Framework

A. The Common Law Perspective

Adversarial systems generally regard the right of confrontation as an indispensable component of the fair administration of trials.⁶³ Within the Anglo-American tradition, the right to confront exists at common law⁶⁴ and is considered integral to the truth-finding function of the courts.⁶⁵ An accused is thus afforded a corresponding right to examine adverse witnesses,⁶⁶ which “ordinarily includes the accused’s right to have those wit-

60. See A. Beijer & A. M. van Hoorn, *Report on Anonymous Witnesses in the Netherlands*, in NETHERLANDS REPORT TO THE FIFTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 523, 524 (E. H. Hondius ed., 1998) (noting that “[t]he idea that a personal confrontation between the accused and the witness is an essential requirement to a fair trial traditionally plays a secondary role in the Dutch criminal justice system” and that “out-of-court statements can be used in evidence regardless of whether the witness is available to be called,” including the use of “written statements. . . even if they emanate from a person who could have been called.”).

61. *Id.* at 524.

62. See *R v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128, ¶ 24, at 1147 (appeal taken from Eng.) (noting that “much of the impact of article 6(3)(d) [which provides the right to examine under the ECHR] has been on the procedures of continental systems which previously allowed [convictions] on the basis of evidence from witnesses whom he had not had an opportunity to challenge.”) (internal citations omitted).

63. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The rights to confront and cross-examine witnesses. . . have long been recognized as essential to due process.”); *Kirby v. United States*, 174 U.S. 47, 55 (1899) (describing confrontation as a “fundamental [guarantee] of life and liberty”); see also *Sherman*, *supra* note 20, at 856 (noting “[t]hirty-three countries explicitly provide for . . . direct confrontation in their constitutions.”) (internal citations omitted).

64. See *R v. Hilton*, [1971] 1 Q.B. 421, 423 (C.A.) (observing that British common law provides that a defendant may cross-examine any witness, including a co-defendant).

65. See *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (noting that the purpose of confrontation is “to augment accuracy in the factfinding process.”).

66. See *Jones v. National Coal Board*, [1957] 2 Q.B. 55, 65 (C.A.) (stating that “[i]t is only by cross-examination that a witness’s evidence can be properly tested”); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (noting that cross-examination is “a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”) (internal citations omitted); see also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (noting that “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence . . . by subjecting it to rigorous testing in the context of an adversary proceeding.”).

nesses brought ‘face-to-face,’ in the time-honored phrase.”⁶⁷

Normatively, the “right to confront assumes the right to cross-examine . . . *by the respective parties*.”⁶⁸ Its substantive import therefore, is to require the appearance of an accuser at trial and in the presence of the accused.⁶⁹ This type of confrontation similarly provides the court with an opportunity to evaluate the credibility of testimonial evidence.⁷⁰ In this respect, the notion of Adversarial confrontation

means more than that an accused person know what witnesses are saying or have said about him [and] even more than that the accused be able to hear them saying it . . . There must be a confrontation: he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused . . . [Not doing so] amounts to a *per se* failure of justice⁷¹

At common law, the admissibility of statements against an accused *in lieu* of *viva voce* evidence was, and still is, principally dealt with within the framework of evidentiary rules. The common law has long-recognized limitations on the right to confrontation, typically grounded in exceptions to the rules against hearsay evidence.⁷² Ordinarily these rules impose certain predicate conditions on admissibility, including the (un)availability of the declarant or the demonstration of some indicia of reliability in balancing competing interests against the rights of the accused.⁷³

67. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1101-12 (1998) (analyzing the jurisprudence of the 6th Amendment to the United States Constitution as developed by the United States Supreme Court).

68. Sherman, *supra* note 20, at 857 (emphasis added). ICCPR art. 14(3)(e), however, implicitly permits the contravention of a defendant’s individual right to examine by providing the arguably lesser alternative that he “have [witnesses] examined” by someone other than his counsel, such as a judge or investigative magistrate. Some commentators subscribe to this thesis, particularly with respect to cases involving vulnerable witnesses or warranting witness anonymity. See, e.g., Sylvia Pieslak, Comment, *The International Criminal Court’s Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution*, 2 SANTA CLARA J. INT’L L. 138, 175 (2004) (arguing that the prejudice to the defense as a result of permitting accusatory witness to testify in full anonymity can be overcome by “employ[ing] the Judges of the Trial Chambers . . . as a substitute for the defense counsel by cross-examining the victim with the questions formulated by the defense council[sic] and then relay[ing] the answers back.”) (internal citations omitted).

69. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (noting that the Confrontation Clause contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination).

70. See generally *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

71. *S. v. Motlatla* 1975 (1) SA 814 (Transvaal Provincial Div.) at 815 (S. Afr.).

72. See *R v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128, ¶ 6, at 1138-39 (appeal taken from Eng.) (recalling exceptions to the right of confrontation in England, *inter alia*, dying declarations and *res gestae* statements); *Lilly v. Virginia*, 527 U.S. 116, 140 (1999) (Breyer, J., concurring) (noting “[t]he Court’s effort to tie the [Confrontation] Clause so directly to the hearsay rule.”); see also *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., concurring in part and concurring in the judgment) (noting that the *Roberts* line of cases “constitutionalize[d] the hearsay rule and its exceptions.”).

73. See, e.g., *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶¶ 27-82, at 59-74 (appeal taken from Eng.) (explaining the fundamental tenets of hearsay exceptions).

B. The Constitutional Confrontation Model of the United States

In the U.S., the right of confrontation is enshrined in the Sixth Amendment to the Federal Constitution, which provides that in all criminal cases the accused shall “enjoy the right . . . to be confronted with the witnesses against him”—the so-called Confrontation Clause.⁷⁴ In the U.S., confrontation is considered central to society’s “core notion of procedural fairness,”⁷⁵ and takes aim at Continental procedure and “particularly its use of *ex parte* examinations as evidence against the accused.”⁷⁶

Considering the importance of the Confrontation Clause and the analysis to be applied in determining constitutional limits of the right, the 1980 case of *Ohio v. Roberts*⁷⁷ effectively struck a balance that was recognized in U.S. courts for some twenty four years. In *Roberts*, the U.S. Supreme Court held that the admissibility of out-of-court statements made by a witness who failed to testify at trial did not violate the Confrontation Clause “if it [bore] adequate ‘indicia of reliability.’”⁷⁸ *Roberts* held that the requisite degree of reliability sufficient for the admissibility of evidence (without confrontation) was met where a given statement “[f]ell] within a firmly rooted hearsay exception” or “a showing of particularized guarantees of trustworthiness” had otherwise been made.⁷⁹ *Roberts* thus reduced the constitutional standard of admissibility of evidence not subjected to cross-examination to that contemplated by ordinary rules of evidence.⁸⁰

The fundamental nature of the right to confrontation has, as a procedural norm, remained consistent in U.S. jurisprudence. However, the limitations it imposes on the admissibility of evidence not subjected to cross-examination has decidedly not, either procedurally or substantively. Sharply abrogating *Roberts*’ doctrinal precedent, the 2004 Supreme Court case of *Crawford v. Washington* ushered in an entirely new analytical model, drawing for the first time a key distinction with respect to the constitutional admissibility of the statements of unavailable witnesses based upon their ‘testimonial’ quality.⁸¹

Crawford eschewed the nebulous analytical framework of *Roberts*,⁸²

74. U.S. CONST. amend. VI.

75. Raymond LaMagna, (Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony, 79 S. CAL. L. REV. 1499, 1503 (2006).

76. See *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

77. 448 U.S. 56 (1980).

78. *Id.* at 66.

79. *Id.*

80. See Timothy O’Toole & Catharine Easterly, *Davis v. Washington: Confrontation Wins the Day*, THE CHAMPION, March 2007, at 20 (noting that, under *Roberts*, “in-court confrontation was reduced from a bedrock, categorical constitutional guarantee to an often deemed unimportant matter of judicial discretion.”).

81. *Crawford v. Washington*, 541 U.S. 36 (2004).

82. See *id.* at 62 (criticizing *Roberts*’ reliability-based framework and noting that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”); see also Won Shin, *Crawford v. Washington: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity To Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 225 (2005).

centering instead on the nature of the out-of-court statement, which ultimately determined whether it could be fairly admitted in the absence of confrontation. Establishing a bright-line rule, *Crawford* held that the Confrontation Clause bars the “admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁸³

Crawford determined that ‘testimonial’ statements were those that either paradigmatically or at their core comprise, *inter alia*, the following: prior testimony at a preliminary hearing, before a grand jury, or at a former trial;⁸⁴ statements that are the result of structured police questioning;⁸⁵ an allocution, guilty plea, or other formal statement admitting guilt;⁸⁶ letters to the police or government accusing another of wrongdoing, or statements made under circumstances demonstrating “the declarant’s awareness or expectation that [they] may later be used at a trial.”⁸⁷ The Court reasoned that for these types of hearsay statements that “bear testimony”⁸⁸ in a way specifically contemplated by the original framers of the constitution, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the constitution actually prescribes: confrontation.”⁸⁹

In 2006, the Supreme Court revisited these issues in *Davis v. Washington* and its companion case, *Hammon v. Indiana*.⁹⁰ In *Davis*, the accused was convicted primarily based on an emergency call placed by a victim, who later did not testify at trial.⁹¹ The content of the call was admitted for the purpose of connecting the accused to the commission of the crime, and was principally relied upon to establish his identity as the perpetrator.⁹² On appeal, the accused argued that the conviction had been obtained in violation of his confrontation rights because he had not been afforded any opportunity to cross-examine the declarant at trial.⁹³ The Supreme Court disagreed, holding that a statement made to government officials concerning a continuing emergency that is not intended to be preserved as evidence at trial, is non-testimonial.⁹⁴ Conversely, a post-emergency statement that narrates past events relevant to later criminal prosecution is

83. *Crawford*, 541 U.S. at 53–54 (emphasis added). The 6th Amendment, like the common law, demands the presence of both conditions as a predicate to admissibility of testimonial hearsay evidence. *Id.* at 68.

84. *Id.*

85. *Id.* at 53 n.4.

86. *Id.* at 65.

87. *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (noting *Crawford*’s suggestion that a declarant’s awareness or expectation that their statement may be used at trial is “the determinative factor” of whether a statement bears testimony).

88. *Crawford*, 541 U.S. at 51.

89. *Id.* at 69.

90. *Davis v. Washington*, 547 U.S. 813 (2006) (consolidating both cases for appeal).

91. *Id.* at 819.

92. *See id.*

93. *Id.*

94. *Id.* at 822.

testimonial and therefore inadmissible.⁹⁵ In these circumstances, the Court concluded that the victim was not acting as a witness when she made the emergency call, nor was her call ‘testimony’ within the contemplation of the Sixth Amendment.⁹⁶

In drawing this distinction, *Davis* makes clear that the right of confrontation does not apply to non-testimonial statements at all,⁹⁷ leading one commentator to observe that while “the right of the accused to confront declarants of testimonial hearsay [becomes] clearer . . . the right to confront declarants of nontestimonial hearsay has perished entirely.”⁹⁸ Ultimately, this renders the question of the constitutional admissibility of evidence not subjected to cross-examination one that is principally fact-based, unfortunately providing the courts with “the flexibility to reach varying outcomes based on notions of expediency rather than doctrinal consistency.”⁹⁹ *Davis* thus underscores the unpredictability of constitutional confrontation analysis for which *Roberts* was roundly criticized—showing that that uncertainty of outcomes remains, if only having transposed the issues from one concerning the inherent problems in defining ‘reliability’ to one recast as a question of what it means to be ‘testimonial’.¹⁰⁰

In *Hammon*, the Court considered the nature of statements made to an investigating officer at the scene of a crime. Unlike *Davis*, which involved an emergency call, in *Hammon* the police went to the accused’s home in response to a domestic disturbance in which the accused’s wife reported that she had been beaten by her husband.¹⁰¹ Mrs. Hammon also filled out and signed a battery affidavit describing the assault.¹⁰² However, although subpoenaed, Mrs. Hammon did not testify at trial.¹⁰³ Instead, the police officer who took her pre-trial statements was nevertheless permitted to testify about what she told him at the scene pursuant to the excited utterance exception to the rule against hearsay.¹⁰⁴ The written affidavit was also introduced at trial as a present sense impression.¹⁰⁵

The Court found Mrs. Hammon’s oral statement to be testimonial under *Crawford*. The facts revealed that it had been made under sufficiently formal circumstances,¹⁰⁶ and concerned neither an emergency in

95. *Id.*

96. *Id.* at 829.

97. See Tom Lininger, *Davis and Hammon: A Step Forward or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), <http://www.michiganlawreview.org/assets/fi/105/lininger.pdf>.

98. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEXAS L. REV. 271, 280 (2006).

99. Lininger, *supra* note 97, at 28.

100. *Id.*

101. See *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005), rev’d sub nom., *Davis v. Washington*, 547 U.S. 813 (2006).

102. *Id.*

103. *Id.* at 450.

104. *Id.* at 447–48.

105. *Davis*, 547 U.S. at 813.

106. *Id.* at 830.

progress, nor an immediate physical threat to her person.¹⁰⁷ Accordingly, the Court concluded that the only purpose for which Mrs. Hammon was questioned by the police was as part of an investigation into past criminal conduct in order to investigate an alleged crime.¹⁰⁸ Hammon's confrontation rights therefore defeated the introduction of his wife's statement against him because he was never afforded a prior opportunity for cross-examination.¹⁰⁹

Crawford's bright-line analysis was developed, in part, to avoid uncertainty in the limitations imposed on the admissibility of out-of-court testimonial statements introduced against an accused—to effectively insulate constitutional analysis from “the vagaries of the rules of evidence, [and] amorphous notions of reliability.”¹¹⁰ However, while *Crawford* was intended to preserve those constitutional rights drafted by the framers in absolute terms, “through strict enforcement of categorical guarantees,”¹¹¹ *Davis* and *Hammon*—along with *Crawford's* progeny in the lower courts—show that this is far more easily achieved in theory than it will ever be in practice.

*Melendez-Diaz v. Massachusetts*¹¹² presents a recent application of the *Crawford* analysis. In *Melendez-Diaz* the accused was arrested for a street sale of cocaine.¹¹³ At his trial, bags allegedly possessed and sold by the accused were admitted into evidence, together with three ‘certificates of analysis’ prepared by a laboratory technician attesting to the fact that the substance identified was cocaine.¹¹⁴ Massachusetts law permitted the admission of such drug analysis certificates without requiring the cross-examination of the technician who actually conducted the scientific test.¹¹⁵ *Melendez-Diaz*, was convicted of distributing and trafficking cocaine, which he appealed without success to the Massachusetts Court of Appeal.¹¹⁶ On appeal, he argued, *inter alia*, that the admission of the drug analysis certificates violated his confrontation rights.¹¹⁷ However, the

107. *Id.* at 829–30.

108. *Id.*

109. See generally *Davis v. Washington*, 547 U.S. 813 (2006).

110. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (internal quotations omitted); see also *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) (noting, that confrontation rights are “no longer subsumed by the evidentiary rules governing the admission of hearsay statements.”).

111. Jeffrey L. Fisher, *A Blakely Primer: Drawing the Line in Crawford and Blakely*, THE CHAMPION, Aug. 2004, at 18, 19 (observing of *Crawford* that “the lesson is that bright-line rules are often the best way to achieve fairness and justice.”).

112. 129 S. Ct. 2527 (2009).

113. *Id.* at 2530.

114. *Id.* at 2530–31.

115. See David Mansfield, *Melendez-Diaz v. Massachusetts: Laboratory Testing and the Confrontation Clause*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 161, 164 (2009) (internal citations omitted), <http://www.law.duke.edu/journals/djclpp/index.php?action=downloadarticle&id=94>.

116. *Melendez-Diaz*, 129 S. Ct. at 2531.

117. *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct. July 31, 2007), *overruled by* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

Massachusetts Court of Appeal determined that their introduction did not violate the Confrontation Clause, relying on Massachusetts precedent holding that such certificates were non-testimonial business records.¹¹⁸

The U.S. Supreme Court disagreed, finding the certificates to be testimonial¹¹⁹ and their admission in the absence of an opportunity for cross-examination a clear violation of the Confrontation Clause.¹²⁰ Even this relatively straightforward application of *Crawford* however, drew strong criticism in a dissenting opinion, which described the Court's analysis as heralding "a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the [Confrontation] Clause."¹²¹

Although *Melendez-Diaz* was considered a welcomed application of *Crawford*'s confrontation analysis by the Supreme Court,¹²² it also underscored the fact that *Crawford*'s promise of finally clarifying the scope of the constitutional admissibility of evidence not subjected to cross-examination has fallen well shy of achieving the predictable analytical framework toward which it was expressly aimed. Instead, it has become mired in semantic complexities and fact-intensive *ad hoc* determinations¹²³ that have vexed prosecutors, defendants, and courts alike, and continue to do so.¹²⁴ Nevertheless, much of this uncertainty has far less to do with the viability of a bright-line standard of admissibility as such than it has to do

118. *Id.* (citing *Commonwealth v. Verde*, 827 N.E.2d 701, 705-06 (2005)).

119. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (noting the certificates were "quite plainly affidavits" and "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (internal citations omitted)).

120. *Id.* at 2531 (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

121. *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

122. See Steven N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, *THE CHAMPION*, Aug. 2009, at 28 (observing that *Melendez-Diaz*, in a straightforward application of *Crawford*, "further clarified the elusive definitional parameters of 'testimonial statement.'").

123. See Geetanjali Malhotra, *Resolving The Ambiguity Behind The Bright-Line Rule: The Effect of Crawford v. Washington on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 218 (noting three positions taken by courts and scholars: first, a narrow construction of 'testimonial' such that, admitting statements made in the course of emergency calls does not violate the Confrontation Clause; second, a broad construction of 'testimonial', such that emergency calls reporting crimes are *per se* testimonial; and third, advocating that a determination of the testimonial nature of such calls be made on an *ad hoc* basis); see also Neil R. Janulewicz, *Constitutional Law—Allowing Excited Utterances to Affect Characterizing Accusatory Statements as Testimonial Statements Contradicts Confrontation Clause Jurisprudence—United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), 40 SUFFOLK U. L. REV. 559, 562-63 (2007) (noting that courts have applied varying tests of 'testimonial': first, a test "characterizing only formalized statements to government authorities as testimonial," and second, "a reasonableness test, characterizing all statements a reasonable speaker would foresee that the government would use in a future investigation or prosecution as testimonial."). Furthermore, other courts handle the effect of hearsay exceptions concerning such statements disparately.

124. See Daniel B. Shanes, *Confronting Testimonial Hearsay: Understanding the New Confrontation Clause*, 40 LOY. U. CHI. L.J. 879, 879 (2009) (observing that even after *Davis v. Washington*, pressing questions remain "leaving some courts scratching their heads.").

with *Crawford* having simply failed to establish a sufficiently precise framework to do so effectively.¹²⁵

C. Confrontation in England

1. Hearsay Developments

While both U.S. courts and the European Court have increasingly tended towards narrowing the scope and substantive admissibility of hearsay not subjected to cross-examination, English courts seem to have gone the other way.¹²⁶ The Criminal Justice Act 2003 (“CJA 2003”)¹²⁷ expands the ability of English courts to receive precisely such evidence,¹²⁸ albeit on a regulated basis.¹²⁹ Although the right of confrontation is not absolute,¹³⁰ and may be curtailed in very limited circumstances—for example, where it is forfeited¹³¹—CJA 2003 § 114 is something quite apart, providing that an out-of-court statement “is admissible as evidence of any matter stated” under three specific conditions and a surprisingly broad catchall.¹³²

The first three conditions permitting the admission of evidence not subjected to cross-examination under section 114 comprise other statutory provisions of the CJA 2003, the common law, and the agreement of the

125. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (refusing to precisely define testimonial statements); see *id.* at 69 (Rehnquist, C.J., concurring) (remarking that the majority opinion leaves a “mantle of uncertainty.”).

126. LORRAINE WOLHUTER, ET AL., *VICTIMOLOGY, VICTIMISATION AND VICTIMS’ RIGHTS*, 134 (Routledge Cavendish 2008) (observing the recent tendency of English courts to “give weight to victims’ interests/rights in the proportionality element of the defendant’s right to a fair trial in article 6 ECHR”).

127. See Criminal Justice Act 2003 (c. 44) (Eng.) [hereinafter CJA 2003].

128. See *id.* § 116. For a few examples of cases applying CJA 2003, see *R. v Tahery (Alireza)* [2006] EWCA Crim 529, ¶¶ 20–26 (U.K.) (permitting the reading of statements at trial where the witness was unavailable due to fear of personal harm); *R. v Sellick*, [2005] EWCA (Crim) 651, [2005] 1 W.L.R. 3257, ¶¶ 61–68, at 3277–79 (U.K.) (same); *R. v. Al-Khawaja*, [2005] EWCA (Crim) 2697, [2006] 1 W.L.R. 1078 ¶¶26–28, at 1085–86 (U.K.) (finding that the admission of testimony by a deceased declarant did not render the trial unfair).

129. *R. v. T (D)*, [2009] EWCA (Crim) 1213, [2009] 173 J.P. 425 (U.K.), ¶ 34 (noting that “evidence was wrongly admitted [where there] was no evidence to establish that such steps as were reasonably practicable to find [the declarants] had been taken.”). The court also observed that “the right to confrontation is a longstanding requirement of the common law and recognized in Article 6(3)(d). It is only to be departed from in the limited circumstances and under the conditions set out in the CJA 2003. The witness must be given all possible support, but also made to understand the importance of the citizen’s duty.” *Id.* ¶ 25 (internal citation omitted).

130. See William E. O’Brian, *The Right of Confrontation: U.S. and European Perspectives*, 121 L.Q.R. 481, 494 (2005).

131. See *R. v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128, ¶ 68, at 1161 (noting that the judicial maxim that justice “will not permit a party to take advantage of his own wrong” applies to the right of confrontation) (internal citations omitted); see also *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878); *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (noting that “forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.”).

132. CJA 2003, *supra* note 127, § 114(1).

parties.¹³³ The fourth and most troubling, prescribes a residual “interests of justice” ground for admissibility.¹³⁴ These provisions fundamentally impact the common law rules, greatly expanding the potential for the erosion of traditional tenets of adversarial confrontation, which have been long-recognized in England.¹³⁵ In fairness, the CJA 2003 also provides compensatory measures designed to counter-balance the prejudicial effect of these newly expanded grounds of hearsay admissibility on the rights of an accused. These are set out in §§ 124, 125 and 126 of the Act.

§ 124 of the CJA 2003 allows the admission of evidence to discredit a non-testifying declarant to the same extent as if the witness had testified at trial.¹³⁶ Similarly, § 125 authorizes the court to direct an acquittal or to discharge a jury where a given case is based upon hearsay that would render a conviction unsafe.¹³⁷ As such, it is calculated to ensure the reliability of such evidence. Additionally, § 126 affords the court the discretion to exclude hearsay where, on balance, its exclusion substantially outweighs the factors supporting its admission.¹³⁸ § 126 further preserves the courts’ discretion to exclude unfair prosecution hearsay evidence under § 78 of the Police and Criminal Evidence Act 1984.¹³⁹

Despite a carefully undertaken legislative process prior to its enactment, as applied, the CJA 2003 may be at odds with the current jurisprudence of the European Court concerning the right to examine.¹⁴⁰

133. *Id.* § 114(1)(a)-(c) (providing for the admission of hearsay evidence “if, but only if— (a) any [statute] makes it admissible, (b) any [common law rule] makes it admissible, (c) all parties to the proceedings agree to it being admissible.”).

134. *Id.* § 114(1)(d) (providing for the admissibility of hearsay evidence where “the court is satisfied that it is in the interests of justice for it to be admissible.”).

135. *R. v. T* (D), [2009] EWCA (Crim) 1213, [2009] 173 J.P. 425 (U.K.), ¶ 25 (internal citations omitted).

136. *See R. v. Taylor*, [2006] All ER (D) 32, 32 (Jul) (noting that CJA 2003 § 124 permits a judge to strike a fair balance between the interests of the parties in cases where a key witness is not available to testify and submit to cross-examination as to his credibility). This principle is embraced by other national acts regulating the admissibility of anonymous statements. *See, e.g.,* Evidence Act 1843, § 31J(1)(b)–(c) (Jam.) (relevant portions amended 1995), available at <http://www.moj.gov.jm/laws/statutes/The%20Evidence%20Act.pdf>.

137. CJA 2003, *supra* note 127, § 125(1) (providing that “if. . . the court is satisfied. . . after the close of [the prosecution’s case] that— (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court *must* either direct the jury to acquit the defendant of the offence or [dismiss the jury and order a retrial].”) (emphasis added).

138. *Id.* § 126.

139. *See id.* § 126(2)(a). The latter act provides that a court may exclude prosecution evidence “if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.” Police and Criminal Evidence Act 1984 c. 60 § 78 (Eng.).

140. *See infra* Part IV.E; *see also* *Al-Khawaja v. United Kingdom*, App. No. 26766/05, 49 Eur. H.R. Rep. 1, ¶¶ 41–43, at 17 (2009) (finding the reading of depositions into the trial record under the CJA 2003, when there has been no opportunity for cross-examination, violates Article 6(3)(d) in the absence of sufficient counter-balancing measures).

However, recently, in *R. v. Horncastle*¹⁴¹ it was held that application of the CJA 2003 did not violate the ECHR in the circumstances of that case.

Horncastle involved joint appeals concerning the admission of statements of absent witnesses pursuant to the CJA 2003.¹⁴² In one instance, a statement was provided to the police by a declarant who subsequently died before trial. In the second, a statement was provided to the police by a declarant who later refused to testify out of fear for her life.

In dismissing the appeals, the Court held that insofar as the provisions of the CJA 2003 were concerned, Article 6(3)(d) of the ECHR is satisfied, even where a conviction rests solely or to a decisive degree on hearsay evidence.¹⁴³ The decision, which examined the CJA 2003 in view of the recently decided European Court case of *Al-Khawaja v. United Kingdom*,¹⁴⁴ effectively defended the legislative propriety of restricting confrontation rights in certain circumstances.

The Court in *Horncastle* found no justification in the jurisprudence of the European Court for limiting the scope of hearsay otherwise admissible under the CJA 2003.¹⁴⁵ Analyzing the European Court's jurisprudence, it concluded that "[w]here the hearsay evidence is demonstrably reliable, or its reliability can properly be tested and assessed, the rights of the defence are respected, there are in the language of the [European Court] sufficient counterbalancing measures, and the trial is fair."¹⁴⁶ The Court assessed Article 6 as requiring that a trial be fair but also noted that despite its content, "[Article] 6(3)(d) does not create any absolute right in an accused to have every witness against him present to be examined."¹⁴⁷ The Court thus found that the statements admitted pursuant to CJA 2003, as applied, were consistent with the rights provided for under the Convention.¹⁴⁸

Accordingly, the U.K. Supreme Court unanimously dismissed the appeals from the judgment of the Court of Appeals on December 9, 2009.¹⁴⁹ In particular, the Court noted that the provisions of the CJA 2003 "strike the right balance between the imperative that a trial must be fair and the interests of victims . . . and society . . . that a criminal should not

141. *R. v. Horncastle*, [2009] EWCA (Crim) 964, [2009] 2 Crim. App. 15, ¶ 79, at 42 (appeal taken from Eng.), *aff'd*, [2009] UKSC 14, [2010] 2 W.L.R. 47.

142. *Id.* ¶ 2, at 15.

143. *Id.* ¶ 79, at 42; *but see Al-Khawaja*, 49 Eur. H.R. Rep. 1, ¶¶ 41-43, at 17 (finding a breach of ECHR, art. 6(3)(d) in respect of statements admitted pursuant to CJA 2003).

144. App. No. 26766/05, 49 Eur. H.R. Rep. 1 (2009).

145. *See Horncastle*, [2009] EWCA (Crim) 964, [2009] 2 Crim. App. 15, ¶ 79, at 42.

146. *Id.*

147. *Id.* ¶ 80, at 42.

148. *Id.* ¶ 81, at 42.

149. *See generally R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 14, at 97 (appeal taken from Eng.) (noting, *inter alia*, that "[t]he regime enacted by Parliament [i.e., CJA 2003] contains safeguards that render the sole or decisive rule unnecessary . . . [the European Court's] jurisprudence lacks clarity . . . [and] was introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions . . . *Al-Khawaja* does not establish that it is necessary to apply the sole or decisive rule in this jurisdiction.").

be immune from conviction where a witness . . . dies or cannot be called to give evidence for some other reason.”¹⁵⁰

2. Witness Anonymity

The use of anonymous evidence at trial was squarely addressed by the House of Lords in *R. v. Davis*, a 2008 decision.¹⁵¹ The Court in *Davis* acknowledged long-standing exceptions to the right of confrontation and, importantly, reaffirmed the well-recognized historical underpinnings of confrontation at common law,¹⁵² which, in England, traditionally held that a conviction based upon the testimony of an anonymous witness is fundamentally unfair.¹⁵³

In *Davis*, the accused’s conviction for a double murder was overturned on appeal.¹⁵⁴ The trial evidence consisted of seven witnesses who expressed concerns for their physical safety.¹⁵⁵ They were each allowed to testify with protective measures that concealed information that might have revealed their identities from the accused and his attorneys. These measures included the use of pseudonyms; withholding from both counsel and the accused certain identifying particulars or pedigree information, including the witnesses’ names and addresses; restricting the scope of cross-examination such that questions on any matter which might bear on the witnesses’ identification were not permitted; the concealment of the witnesses’ physical appearance through the use of screens; and the use of mechanical voice distortion devices.¹⁵⁶

Of the seven witnesses against the accused, three identified him as the shooter.¹⁵⁷ The accused contended that compelling grounds existed to question the veracity of the identifying witnesses and that their credibility was in fact central to the case.¹⁵⁸ He further argued that the restrictions imposed by the trial court completely deprived him of the ability to challenge their evidence and, consequently, his right to a fair trial.¹⁵⁹ In agreeing with this position, Lord Justice Mance observed that “[i]n many cases, particularly cases where credibility is in issue, identification will be *essential to effective cross-examination*.”¹⁶⁰

Although the *Davis* Court noted that the jurisprudence of the European Court did not recognize an absolute rule prohibiting anonymous wit-

150. *Id.* ¶ 108, at 124.

151. *R v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128 (appeal taken from Eng.).

152. *See id.* ¶ 5, at 1137–38 (recognizing several authorities supporting the notion of the right to confrontation as of at least the 18th century).

153. *See id.* ¶ 25, at 1147.

154. *Id.* ¶ 35, at 1150.

155. *Id.* ¶ 3 at 1137.

156. *Id.*

157. *Id.*

158. *Id.* ¶ 4, at 1137.

159. *Id.* ¶ 32 at 1148–49 (appeal taken from Eng.) (noting the accused’s assertion that the protective measures gravely impeded him from pursuing the suggestion that certain evidence had been procured by a former girlfriend).

160. *Id.* ¶ 72, at 1162 (emphasis added).

nesses,¹⁶¹ it also observed that fair trial rights—specifically the right to examine—may be violated if there are no counterbalancing procedures, or if a conviction is based wholly or to a decisive extent on anonymous evidence.¹⁶² Similarly, the court found that in circumstances where the appellant could not have been convicted but for the anonymously received evidence, the trial is rendered unfair and, therefore, unlawful.¹⁶³ The court declined to expand the authority of English courts to allow the use of anonymous evidence in criminal trials beyond the extremely limited circumstances provided for at common law, particularly in the absence of a regulatory regime.¹⁶⁴ The Court thus deferred to Parliament to act to “devise an appropriate system which still ensures a fair trial.”¹⁶⁵

This invitation was met with almost instantaneous legislative reform “to put on a statutory footing a power for the courts to grant witnesses anonymity orders in criminal proceedings where this is consistent with the right of a defendant to a fair trial.”¹⁶⁶ The resultant Criminal Evidence (Witness Anonymity) Act of 2008¹⁶⁷—modeled on the New Zealand Evidence Act of 2006¹⁶⁸—now authorizes English courts to issue witness anonymity orders under relatively narrowly defined conditions, abolishing the common law limitations on the power of courts to do so.¹⁶⁹ Of course, to the extent that *Davis* did not altogether rule out the admissibility of anonymous testimony in English courts, the Witness Anonymity Act can be viewed as a mere codification of the case.

161. *Id.* ¶¶ 82–83, at 1166–67.

162. *Id.* ¶¶ 77–80, at 1164–66 (discussing *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 70, at 470 (providing that the accused’s interests are also to be balanced “against those of witnesses or victims called to testify.”)); see also *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 53, at 711 (quoting *Doorson*) (requiring the application of counter-balancing procedures).

163. *R. v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128 ¶ 96, at 1172 (appeal taken from Eng.).

164. *Id.* ¶ 98, at 1172–73 (stating that “any further relaxation of the basic common law rule, requiring witnesses on issues in dispute to be identified and cross-examined with knowledge of their identity and permitting the defence to know and put to witnesses otherwise admissible and relevant questions about their identity, is one for Parliament to endorse and delimit and not for the courts to create.”).

165. *Id.* ¶ 45, at 1153.

166. Press Release, United Kingdom Ministry of Justice, Criminal Evidence (Witness Anonymity) Act 2008 (July 2, 2008) (specifically referring to the *Davis* judgment), <http://www.justice.gov.uk/publications/witness-anonymity-bill.htm>; see also David Howarth, *The Criminal Evidence (Witness Anonymity) Act 2008*, ARCHBOLD NEWS Sept. 9, 2008, at 6–7.

167. See Criminal Evidence (Witness Anonymity) Act, 2008, c. 15 (Eng.) [hereinafter *Witness Anonymity Act*].

168. See Andrew Ashworth, *Witness: Trial Judge Granting Anonymity to Witnesses—Whether Lawful Under Common Law and Strasbourg Jurisprudence*, 11 CRIM. L.R. 915, 919 (2008) (observing that Sections 110–118 of the 2006 New Zealand Evidence Act abolishes the common law and instates discretionary court ordered anonymity in its place).

169. See *Witness Anonymity Act*, *supra* note 167, § 1(1)–(2); see also Press Circular, United Kingdom Ministry of Justice Circular, Criminal Evidence (Witness Anonymity) Act 2008 (July 21, 2008), <http://www.justice.gov.uk/docs/criminal-evidence-act.pdf>.

Nevertheless, the Act aspires to provide courts with a structured analytical and practical framework in which to determine the propriety and administration of anonymity orders. As mentioned above, § 1 of the Witness Anonymity Act supplants the common law limitations in respect of ordering witness anonymity.¹⁷⁰ § 2 authorizes the court to employ appropriate and “specified measures” against the disclosure of witnesses’ identities such as, withholding names and other details; the use of pseudonyms; interdicting the scope of examination so as to prohibit questions that might lead to the identification of a witness; using screens to obscure witness’ physical identification; and the use of voice modulation.¹⁷¹ § 3 addresses the implementation of the procedures to be followed upon application of either the prosecution or defense for an anonymity order.¹⁷² Further, § 4 establishes three predicate conditions for the issuance of these orders.¹⁷³ Finally, § 5 requires that the court take account of several non-exhaustive “relevant considerations,” principally concerning the administration of a fair trial, as follows:

- a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
- b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
- c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
- d) whether the witness’s evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
- e) whether there is any reason to believe that the witness—
 - i. has a tendency to be dishonest, or
 - ii. has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
- f) whether it would be reasonably practicable to protect the witness’s identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.¹⁷⁴

Similarly to the CJA 2003, these factors do not necessarily curtail the courts’ authority to issue anonymity orders even if the resulting conviction would rest on anonymous evidence to a ‘decisive’ extent.¹⁷⁵ Thus, it is

170. See Witness Anonymity Act, *supra* note 167, § 1(2).

171. *Id.* § 2(2)(a)–(e).

172. See *id.* § 3(1).

173. See *id.* § 4(1)–(5) (providing that (a) the measures specified in a witness anonymity order be necessary to protect the safety of the witness or another person or to prevent serious damage to property, or harm to the public interest; (b) that the court take into account the impact of such an order upon the fairness of the trial proceedings; and (c) that the court must find the order necessary to secure the testimony of the witness, which it must also find to be necessary to the proceedings).

174. *Id.* § 5(1)–(2).

175. See, e.g., *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 56, at 680 (appeal taken from Eng.) (noting that there is no mandatory rule against the use of

quite likely that a conflict with the EHCR will arise at some point concerning its application.

D. Diversity in the Common Law Approach to Confrontation

English law does not share the U.S. view that confrontation is a virtually categorical imperative and thus admits of no equivalent protection of the right.¹⁷⁶ The CJA 2003, Witness Anonymity Act, and most recently the *Horncastle* case underscore this divide in the Anglo-American tradition. Indeed, the principally deontological approach taken in the United States—one in which confrontation is intrinsically valued, even where a fair trial is otherwise obtainable—is arguably *sui generis*. Conversely, to the extent the current English statutory framework more directly defines the right of confrontation and cross-examination relative to other competing factors affecting the overarching fairness of trial proceedings (including those that do not necessarily involve the conduct of the accused) it is consonant with a broad-based teleological perspective, which has been adopted to varying degrees by other Adversarial jurisdictions and the European Court.

As mentioned above, New Zealand's 2006 Evidence Act informs current English legislation concerning witness anonymity.¹⁷⁷ Thus, although New Zealand considers the right to confrontation "basic to any civilized notion of a fair trial,"¹⁷⁸ that right has also been regularly limited in view of competing social interests and is not generally perceived of as unqualified, as it is in the U.S.¹⁷⁹

Canada's Charter of Rights and Freedoms,¹⁸⁰ which does not expressly provide for the right of confrontation, similarly qualifies it. Although § 7 of the Charter implicitly guarantees confrontation as part of

anonymous evidence to form the basis of a conviction, whether solely or to a decisive extent); see also J.R. Spencer, *Hearsay Reform: The Train Hits the Buffers at Strasbourg*, 68 CAMBRIDGE L.J. 258, 259 (2009) (observing that "the 2003 reform works on the premise that if a piece of hearsay evidence is admissible it has the same potential weight as a piece of oral evidence, and it is open to the court to convict on it, even if it stands alone.").

176. See, e.g., *Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 42, at 63-64; see also *R. v. Davis*, [2008] UKHL 36, [2008] 1 A.C. 1128, ¶¶ 68-71, at 1160-1162 (appeal taken from Eng.) (providing that "the right to confrontation recognised in the United States has . . . no exact counterpart in English common law.").

177. See *supra* note 168 and accompanying text.

178. *R. v. Hughes*, [1986] 2 N.Z.L.R. 129, 148 (C.A.); see also Bill of Rights Act 1990, 1990 S.N.Z. No. 109, §25(f) (providing for the right to examine in the language of the ICCPR and other international instruments) [hereinafter BORA].

179. Marie Dyhrberg, *Barriers to Defence Access to Witnesses for the Prosecution - An Antipodean Perspective* ¶¶ 6-7, at 3(2007), <http://mariedyhrberg.co.nz/showfile.php?downloadid=410>; see also *R. v. Hovell*, [1987] 1 N.Z.L.R. 610, 613 (C.A.) (admitting the statement of an unavailable elderly rape victim on the basis that "cross-examination would have been very unlikely to have made any difference" due to the extremely general nature of the witness's description of the assailant).

180. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter, Canadian Charter].

the overall fairness of trial proceedings,¹⁸¹ “the right to confront unavailable witnesses *at trial* is neither an established nor a basic principle of fundamental justice.”¹⁸² In this respect, Canadian jurisprudence recognizes the right to confrontation as one qualified “in the interests of justice.”¹⁸³ Thus, while Adversarial systems may hold certain positions fundamentally diverse from those espoused in the Continental tradition, the substantive application of the right of confrontation is not necessarily one of them.¹⁸⁴

Both the UNHRC and European Court take a similarly broad teleological approach to confrontation—that is, the relative right of the defense to participate in the examination of witnesses is balanced against the rights of witnesses and alleged victims, including their privacy rights.¹⁸⁵ However, this approach has drawn pointed criticism from some commentators who argue that it has “little predictive value.”¹⁸⁶ Nevertheless, the notional requirement of ‘corroboration,’ which is manifested in the prohibition of courts from giving “considerable weight” to or basing a decision to convict to a “decisive extent” on the out-of-court statements of unavailable witnesses¹⁸⁷—especially in the absence of an adequate opportunity for cross-examination¹⁸⁸—represents a critical step toward an international recogni-

181. See *R. v. Potvin*, [1989] 1 S.C.R. 525, 542. The Canadian Charter provides the right not to be deprived of life, liberty, or security of the person without the observance of the principles of fundamental justice. See Canadian Charter § 1(7).

182. *Potvin*, [1989] 1 S.C.R. at 542 (noting that “the right asserted by the appellant to confront an unavailable witness before the trier of fact *at trial* cannot be said to be a traditional or basic tenet of our justice system.”) (emphasis added); see also *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 459–60 (confirming that, “contemporaneous cross-examination [is] not protected by the Charter.”).

183. See *R. v. Levogiannis*, [1993] 4 S.C.R. 475, 491 (internal citations omitted); cf. *R. v. Tran*, [1994] 2 S.C.R. 951, 1003 (stating that “[i]t is axiomatic that an accused has the right to confront all witnesses and to be *meaningfully present* while evidence is being adduced, be it for or against the accused.”) (emphasis added).

184. See generally *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 41, at 104 (appeal taken from Eng.) (recognizing the teleological approach to confrontation taken by a number of Common Law States to confrontation and noting that “under the common law and statutory exceptions to the hearsay rule recognized in [Canada, Australia and New Zealand] there is no rigid rule excluding evidence if it is or would be either the ‘sole’ or ‘decisive’ evidence, however those words may be understood or applied. Instead, the common law and legislature in these countries have, on a principled basis, carefully developed and defined conditions under which hearsay evidence may be admitted, *in the interests of justice* and on a basis ensuring that defendants receive a fair trial.”) (emphasis added).

185. See generally *Grant v. The Queen*, [2006] UKPC 2, [2007] 1 A.C. 1, ¶ 17, at 13 (internal citations omitted) (observing that the European Court “has recognized the need for a fair balance between the general interest of the community and the personal rights of the individual, and has described the search for that balance as inherent in the whole Convention . . . [and that] the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must also be respected.”).

186. Andrew Choo, *Crawford v. Washington: A View from Across the Atlantic*, 2 INT’L COMMENT. EVIDENCE 4, 9 (2004).

187. *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 76, at 272 (noting that “a conviction should not be based either solely or to a decisive extent on anonymous statements.”); see also *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 55, at 712 (same).

188. *Dugin v. Russian Federation*, U.N. Human Rights Comm., Communication No. 815/1998, at ¶ 9.3, U.N. Doc. CCPR/C/81/D/815/1998 (2004).

tion of the intrinsic and independent value of the right to examine. As discussed below, however, international recognition of the right in substantive terms does not yet go far enough.

III. Confrontation under the ICCPR

A. Background

With near universal acceptance,¹⁸⁹ the ICCPR—one of the archetypal international instruments articulating fair trial standards—continues to influence the development of modern international criminal law and procedure as it has done for more than 30 years since its entry in to force.¹⁹⁰ Together with its two Optional Protocols, the ICCPR firmly establishes not only minimum procedural guarantees to which an accused is entitled as a matter of international human rights law, but also the binding, individually enforceable nature of those guarantees relative to member States.¹⁹¹

The ICCPR emerged as a product of the failure of United Nations member states to reach a consensus on making the Universal Declaration of Human Rights (UDHR) binding.¹⁹² The original text of the UDHR incorporated both first generation civil and political rights (supported predominantly by western and westernized states) as well as second-generation economic and social rights (favored by communist-bloc nations).¹⁹³ The complexities involved in reaching agreement on implementation and enforceability led to the creation of two covenants¹⁹⁴—the ICCPR on one

189. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 204, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E09.V.3 (2009) (indicating 164 parties and seventy-two signatories to the ICCPR).

190. The ICCPR was unanimously adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976. See S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. No. 23, at 2 (1992), *reprinted in* 31 I.L.M. 645 (1992) [hereinafter Senate ICCPR Report].

191. Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force March 23, 1976).

192. See THOMAS G. WEISS, WHAT'S WRONG WITH THE UNITED NATIONS (AND HOW TO FIX IT) 63, (Polity Press 2008); see Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, (Dec. 12, 1948). As a declaration, the UDHR is not legally binding. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 151 (2d ed. 2000). However, because many of the rights in the UDHR have become so widely observed as binding law, they have become a recognized part of customary international law.

193. See Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5-6 (1997) (noting that the segmentation of the UDHR into 'first' and 'second' generation rights "reflect[ed] the contrasting interests of the Cold War division between West and East.").

194. See Christian TOMUSCHAT, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (United Nations Audiovisual Library of International Law 2008), http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr_e.pdf (noting that "by resolution 543 (VI) of 4 February 1952, the General Assembly directed the Commission on Human Rights to prepare, instead of just one Covenant, two draft treaties; a Covenant setting forth civil and political rights and a parallel Covenant providing for economic, social and cultural rights."). For an excellent discussion of the reasons underpinning resolution 543 (VI), the so-called "separation" resolution see Craig Scott, *The Interdependence and Permeabil-*

hand, and on the other the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁹⁵ While the ICESCR attends, *inter alia*, to working conditions, adequate living standards (including shelter and food), health, and education,¹⁹⁶ the ICCPR “guarantees a broad spectrum of civil and political rights,”¹⁹⁷ including the right to self-determination, the right to life, freedom of religion and speech, and equal protection under the law.¹⁹⁸

B. Fair Trial Provisions

The ICCPR also broadly defines a number of customary and treaty-based rights, setting out core principles universally attendant to the fair administration of criminal proceedings.¹⁹⁹ Article 14 requires that in every phase of the trial process the parties should be considered procedurally equal and thus be placed in an equal position to advance their respective cases.²⁰⁰ The Covenant therefore recognizes the principle of ‘equality of arms’ as an essential tenet in the administration of fair trials.²⁰¹ In criminal cases, this denotes a state of procedural parity between the prosecution and the defense,²⁰² often loosely analogized to the common law notion of due process.²⁰³

ity of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights, 27 OSGOOD HALL L.J. 769, 779-98 (1989).

195. See International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter, ICESCR]; see also G.A. Res. 2200A (XXI), at 49, U.N. Doc. A/6316 (1966) (resolution adopting the ICESCR); WEISS, *supra* note 192, at 63-64; see also Fact Sheet, U.N. Office of the High Commissioner for Human Rights, The International Bill of Human Rights, No. 2 (Rev. 1) 2, (June 1996), <http://www.unhcr.org/refworld/docid/479477480.html> (noting that “the General Assembly requested the Commission “to draft two Covenants on Human Rights . . . one to contain civil and political rights and the other to contain economic, social and cultural rights.”).

196. ICESCR, *supra* note 195, arts. 7, 11-13.

197. Senate ICCPR Report, *supra* note 190.

198. ICCPR, *supra* note 3, arts. 1, 6, 18, and 26.

199. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 12 (2001); see also Anne E. Joynt, *The Semantics of the Guantanamo Bay Inmates: Enemy Combatants or Prisoners of the War on Terror?*, 10 BUFF. HUM. RTS. L. REV. 427, 437 (2004).

200. See *Ofner and Hopfinger v. Austria*, 1963 Y.B. Eur. Conv. H.R. 680, 696 (Eur. Comm’n on H.R.); see also *Bulut v. Austria*, 1996-II Eur. Ct. H.R. 346, ¶ 47, at 359 (explaining equality of arms as “one of the features of the wider concept of a fair trial” under which “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.”).

201. See *Campbell v. Jamaica*, U.N. Human Rights Comm., Communication No. 307/1988, at ¶ 6.4, U.N. Doc. CCPR/C/47/D/307/1988 (1993) (observing that “an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence.”); *Moraël v. France*, U.N. Human Rights Comm., Communication No. 207/1986, ¶ 9.3, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989) (noting that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms); see also *Robinson v. Jamaica*, U.N. Human Rights Comm., Communication No. 223/1987, ¶ 10.4, U.N. Doc. Supp. No. 40 (A/44/40) at 241 (1989).

202. See *B. d. B. et al. v. Netherlands*, U.N. Human Rights Comm., Communication No. 273/1989, ¶ 6.4, U.N. Doc. Supp. No. 40 (A/44/40) at 286 (1989) (observing that Article 14 “guarantees procedural equality.”).

203. Bassiouni, *supra* note 4, at 278.

This widely accepted principle²⁰⁴ informs Article 14's fair trial provisions,²⁰⁵ which include the right to equality before the courts as well as the right to a fair and public hearing,²⁰⁶ the presumption of innocence, the right to be informed of charges, the right to have adequate time to prepare a defense and to communicate with counsel, the right to be tried without undue delay, the right to counsel, and free legal assistance if necessary,²⁰⁷ the right to the assistance of an interpreter, the right not to be compelled to testify against oneself or to confess guilt,²⁰⁸ and of course, the right to examine the witnesses.²⁰⁹

As international human rights instruments have increasingly tended towards a preference for adversarial criminal procedures,²¹⁰ the right to equality of arms within the framework of the common law due process model has gained correlative favor and importance, in particular within Continental systems.²¹¹ The result is an increasing convergence of the pro-

204. *Id.* at 277 (noting "the right to equality of arms is guaranteed in . . . the ICCPR, the A|JCHR, and the Fundamental Freedoms."). It is also substantively protected in the ACHR and the ACHPR Resolution; see *Avocats Sans Frontières* (on behalf of Bwampamye) v. Burundi, African Commission on Human and Peoples' Rights, Communication No. 231/99 (2000), ¶¶ 26-27, available at <http://www1.umn.edu/humanrts/africa/comcases/231-99.html>.

205. Bassiouni, *supra* note 4, at 277.

206. ICCPR, *supra* note 3, art. 14(1); see also G.A. Res. 2200A (XXI), at 49, U.N. Doc. A/6316 (1966) (U.N. resolution adopting the ICCPR).

207. ICCPR, *supra* note 3, art. 14(1).

208. *Id.* art. 14(2), 14(3), 14(b)-(d), 14(f)-(g).

209. *Id.* art. 14(3)(e).

210. See generally Bassiouni, *supra* note 4, at 277; see also Jarinde Temminck Tuinstra, *Assisting an Accused to Represent Himself: Appointment of Amici Curiae as the Most Appropriate Option*, 4 J. INT'L CRIM. JUST. 47, 49 (2006) (observing that "[i]nternational criminal procedure can be perceived as a mixture of common law and civil law concepts, in which common law elements prevail").

211. For example, in 1989 and 2001 Italy underwent a near total reform of its criminal procedure, and substantially adopted several adversarial features. See Pizzi & Marafioti, *supra* note 50, at 5-6 (observing that Italy's decision to adopt an adversarial trial system reflects in part "a way to 'open up' its criminal justice system, both to reflect its status as a modern democratic society and to make a dramatic break with past reliance on closed pretrial hearings."); see also Pizzi & Montagna, *supra* note 32, at 431 (noting that the 2001 reformation of the Italian code of criminal procedure extends greater adversarial rights to defendants, pursuant to a 1999 Parliamentary reform of the Italian Constitution, "to mandate an adversarial trial system by strengthening the rights of defendants, especially the rights that guarantee defendants the right to confront and cross-examine witnesses against them," which itself followed several judicial decisions undercutting basic principles ushered in with the 1989 transformation). Although not nearly as radical a reform of continental procedure as the Italian initiative, French criminal procedure underwent similar changes in 2000, strengthening the defense right to request a *juge d'instruction* to examine witnesses and to seek additional evidence. These reforms allowed a right of appeal where the refusal of the judge to carry out such requests was unjustified. See generally Stewart Field & Andrew West, *Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process*, 14 CRIM. L. F. 261 (2003). German criminal procedure provides for the right of the defense to "make oral requests of proof which generally oblige the court to hear additional evidence as suggested by the party. The court can refuse a request of proof only for one of several fairly limited reasons." See Frase & Weigend, *supra* note 20, at 342 (internal citations omitted).

cedural and substantive conceptions of a fair trial across the two systems.

C. The Right to Examine Adverse Witnesses

The UNHRC is responsible for monitoring and interpreting the ICCPR.²¹² It is authorized to consider allegations from individuals in member States with regard to violations of their civil and political rights under the first of its two Optional Protocols.²¹³ Although it has not definitively interpreted the right to examine witnesses as being inclusive of the right to direct confrontation,²¹⁴ the UNHRC has observed that Article 14(3)(e) was “designed to guarantee the accused the same legal powers of . . . examining or cross-examining any witnesses as are available to the prosecution.”²¹⁵ Although the right of direct confrontation is not expressly provided for under the ICCPR, the characterization of the principle of equality of arms internationally could in theory support such a view.²¹⁶

The fact that Article 14 confers only a general right to examine rather than a more explicit right to adversarial confrontation likely owes to its universalistic underpinnings in taking into consideration broadly divergent national legal systems.²¹⁷ As a minimum guarantee however, a general

212. See Fact Sheet, U.N. Office of the High Commissioner for Human Rights, No. 15 (Rev. 1) 14, Civil and Political Rights: The Human Rights Committee, <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

213. The first of two optional protocols to the ICCPR sets forth the terms and procedure under which the UNHRC receives and considers ‘communications’ (submitted complaints). See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force March 23, 1976). The second optional protocol to the ICCPR is directed at abolishing the imposition of capital punishment. See Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 29 I.L.M. 1464 (entered into force July 11, 1991).

214. See generally Sherman, *supra* note 20, at 855 (arguing that one of the reasons the ICCPR is silent on the issue of direct confrontation is its intended establishment of minimum core rights to applied to a broad spectrum of legal systems).

215. U.N. HUMAN RIGHTS COMM., *General Comment 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, ¶ 12 reprinted in UN Doc. HRI/GEN/1/Rev.6 at 135 (Apr. 13, 1984) [hereinafter General Comment 13]; see also *Compass v. Jamaica*, U.N. Human Rights Comm., Communication No. 375/1989, ¶ 10.3, UN Doc. CCPR/C/49/D/375/1989 (1993) (noting that “article 14, paragraph 3(e), protects the equality of arms between the prosecution and the defence in the examination of witnesses.”).

216. See, e.g., *Mitrevski v. The Former Yugoslav Republic of Macedonia*, App. No. 33046/02, ¶ 28, June 21, 2007 (recognizing that in civil trials each party must be provided with an opportunity to defend its interests “under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent.”) (emphasis added), <http://www.bailii.org/eu/cases/ECHR/2007/515.html>; *Kaufman v. Belgium*, 50 Eur. Comm’n H.R. Dec. & Rep. 98, 115 (1986); cf. *Foucher v. France*, 1997-II Eur. Ct. H.R. 452, ¶ 34, at 465 (lacking the substantiality requirement).

217. See AMNESTY INTERNATIONAL, *FAIR TRIALS MANUAL*, 129 (Amnesty International 1998) (noting that “[t]he wording of international standards, which use the phrase ‘to examine or have examined’, takes into account different legal systems, including systems based on adversarial trials and systems where the judicial authorities examine witnesses.”) (internal citation omitted), available at http://www.amnestyusa.org/international-justice/fair_trials/manual/22.html.

right to examine may not preserve the fairness of the proceedings.²¹⁸ Thus, where it is necessary to achieve the overarching substantive fairness contemplated under the ICCPR, it seems obvious that the Covenant's text may, indeed should, be construed to require additional procedural safeguards and guarantees. While member states may not deviate from the minimal protections provided under the ICCPR, they are always free to exceed them. As such, the absence of a textual reference to a right of adversarial confrontation *per se* cannot be read to deny the extension of such a right as necessary to secure a fair trial.²¹⁹ Indeed, respect for the principle of adversarial proceedings is central to the notion of a fair trial, as interpreted by the UNHRC.²²⁰

D. The Jurisprudence (Views) of the UN Human Rights Committee

Notwithstanding the definition of 'examine' as might be required under Article 14(3)(e), it is clear that it at least requires "that the parties participate . . . in an adversarial procedure and that . . . defence counsel ha[s] the opportunity to interrogate [adverse witnesses]."²²¹ The UNHRC has observed that, to preserve the rights conferred by Article 14(3)(e), criminal proceedings "must provide the person charged with the criminal offence the right to an oral hearing, at which he or she may appear in person or be represented by counsel, and may bring evidence and examine the witnesses."²²² Moreover, this right may encompass preliminary proceedings at which witness testimony is received where the witness is subsequently unavailable at trial.²²³

Perhaps the most transparent violations of the right to examine have been found in the context of proceedings before so-called faceless courts.²²⁴ These proceedings are marked by the concealment of the iden-

218. See General Comment 13, *supra* note 215, ¶ 5 (noting that "the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.").

219. See Sherman, *supra* note 20, at 856 (noting that the ICCPR's silence on the question of a right to confront "cannot be the basis for any argument that defendants need not, or should not, be accorded [such a] right.").

220. *Morael v. France*, U.N. Human Rights Comm., Communication No. 207/1986, ¶ 9.3, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989) (observing that "the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings. . . .").

221. *Semey v. Spain*, U.N. Human Rights Comm., Communication No. 986/2001, ¶ 8.7, U.N. Doc. CCPR/C/78/D/986/2001 (2003).

222. *Rodríguez Orejuela v. Colombia*, U.N. Human Rights Comm., Communication No. 848/1999, ¶ 7.3, U.N. Doc. Supp. 40 (A/57/40) at 172 (2002) (holding that because of the absence of an adversarial hearing, affording the accused an opportunity to examine witnesses, "the proceedings. . . culminated in. . . conviction and sentencing [that violated] the right of the [accused] to a fair trial in accordance with article 14 of the Covenant.").

223. See *generally* *Compass v. Jamaica*, U.N. Human Rights Comm., Communication No. 375/1989, ¶ 10.3, U.N. Doc. CCPR/C/49/D/375/1989 (1993).

224. See, e.g., *Vargas Más v. Peru*, U.N. Human Rights Comm., Communication No. 1058/2002, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1058/2002 (2005); *Quispe Roque v. Peru*, U.N. Human Rights Comm., Communication No. 1125/2002, ¶ 7.3, U.N. Doc. CCPR/

tivity of the judges and the inability of the defense to challenge them.²²⁵ They are typically conducted in a manner that systematically deprives the defense of any ability to examine adversarial witnesses,²²⁶ and in some instances of the right to be present at the proceedings or the right to a public trial.²²⁷ Similarly, the UNHRC has determined that in the absence of due notice, trials *in absentia* also violate the right of the accused not only to be present but also of the right to examine witnesses altogether.²²⁸

1. Fairness in the Examination of Witnesses

UNHRC jurisprudence suggests that the right to examine arguably requires a component of effectiveness. For example, in *Peart v. Jamaica*,²²⁹ a murder trial, it became known during the cross-examination of the principal eye-witness that he had made a prior written statement to the police on the night of the incident. The accused requested a copy of the prior statement, which was refused by the prosecution and denied by the trial

C/85/D/1125/2002 (2005); *Carranza Alegre v. Peru*, U.N. Human Rights Comm., Communication No. 1126/2002, ¶ 7.5, U.N. Doc. CCPR/C/85/D/1126/2002 (2005).

225. See *Carranza Alegre*, Communication No. 1126/2002, ¶ 3.5, U.N. Doc. CCPR/C/85/D/1126/2002; see also Inter-Am. Commission on Human Rights, *Annual Report 1996*, at 736, OEA/Ser.L/V/II.95 Doc. 7 rev., (Mar. 14, 1997) (observing that “[k]eeping secret the identity of the ‘faceless’ judges and prosecutors prevents them from guaranteeing the independence and impartiality of the courts. The anonymity of the judges deprives the defendant of the basic guarantees of justice.”).

226. See, e.g., *Vargas Mas*, Communication No. 1058/2002, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1058/2002 (noting that Article 14 is violated in the absence of an opportunity to question witnesses, where the attorney for the accused received threats and the proceedings were conducted by faceless judges); *Quispe Roque*, Communication No. 1125/2002, ¶ 7.3, U.N. Doc. CCPR/C/85/D/1125/2002 (finding an Article 14 violation where the “court [was] composed of faceless judges[,] the interrogation of witnesses was not permitted and [defense attorney] had only 30 minutes to examine the case file.”); *Carranza Alegre*, Communication No. 1126/2002, ¶ 7.5, U.N. Doc. CCPR/C/85/D/1126/2002, para. 7.5 (determining that defense counsel’s inability “to challenge witnesses who had made statements during the police investigation” contributed to the denial of a fair trial as a whole).

227. See U.N. HUMAN RIGHTS COMM., *General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 23, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007) (noting that trials involving anonymous judges, such as those involving measures taken to fight terrorist activities, suffer from other basic irregularities); *Becerra Barney v. Colombia*, U.N. Human Rights Comm., Communication No. 1298/2004, ¶ 7.2, U.N. Doc. CCPR/C/87/D/1298/2004 (2006) (excluding the accused from the proceedings); *Vivanco v. Peru*, U.N. Human Rights Comm., Communication No. 678/1996, ¶ 7.1, U.N. Doc. CCPR/C/74/D/678/1996 (2002) (denying the right to communicate with chosen lawyer); *Quispe Roque*, Communication No. 1125/2002, ¶ 7.3, U.N. Doc. CCPR/C/85/D/1125/2002 (imposing severe restrictions on the accused’s right to examine or even cross-examine certain classes of witnesses, e.g., police officers responsible for the arrest and interrogation of the defendant).

228. See *Mbenge v. Zaire*, U.N. Human Rights Comm., Communication No. 16/1977, ¶ 14.1, U.N. Doc. CCPR/C/OP/2 at 76 (1990) (noting that without due notification, judgements *in absentia* violate Article 14(3)(e)); see also *Antonaccio v. Uruguay*, U.N. Human Rights Comm., Communication No. R.14/63, ¶ 20, U.N. Doc. Supp. No. 40 (A/37/40) at 114 (1982) (same).

229. U.N. Human Rights Comm., Communications Nos. 464/1991 & 482/1991, U.N. Docs. CCPR/C/54/D/464/1991 & 482/1991 (1995).

judge.²³⁰ As it turned out, however, the accused finally received a copy of the statement following their conviction and appeal.²³¹ The statement named another individual as having shot the decedent. In holding that Article 14(3)(e) had been violated, the UNHRC determined that the “failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendant.”²³² The decision is significant in this respect because it is not limited to the mere provision of an ‘opportunity’ to cross-examine as a means to achieve procedural fairness, but seems to require that the opportunity so afforded be fundamentally fair.²³³

2. *Absence of Counsel*

In *Brown v. Jamaica*,²³⁴ the UNHRC determined that an accused must be provided an opportunity to “ensure the presence of his lawyer” at a preliminary hearing involving the deposition of witnesses.²³⁵ At issue was the propriety of allowing a preliminary hearing involving the deposition of two prosecution witnesses to continue in the absence of the accused’s attorney.²³⁶ Initially, when the accused indicated that he preferred not to cross-examine the witnesses himself, the magistrate adjourned the matter for cross-examination.²³⁷ Following a second adjournment due to the absence of counsel, new counsel was appointed for the accused who, having never been present for the direct testimony, declined to cross-examine the witnesses.²³⁸ While the UNHRC concluded that the proceedings violated Article 14(3)(d) in this instance, the absence of counsel at preliminary proceedings has been separately determined to be violative of Article 14(3)(e).²³⁹ Not surprisingly, the absence of an accusatory witness from the proceedings altogether may yield precisely the same result.

230. *Id.* ¶ 11.4.

231. *Id.* ¶ 3.1.

232. *Id.* ¶ 11.5.

233. See *Yasseen and Thomas v. Guyana*, U.N. Human Rights Comm., Communication No. 676/1996, ¶ 7.10, U.N. Doc. CCPR/C/62/D/676/1996 (1998) (noting that the failure to produce documents which may have contained evidence favorable evidence to the accused at trial violates Article 14(3)(e)).

234. U.N. Human Rights Comm., Communication No. 775/1997, U.N. Doc. CCPR/C/65/D/775/1997 (1999). Here, the UNHRC found that the magistrate judge’s conduct in proceeding with preliminary depositions “aware of the absence of the author’s defence counsel” violated the rights of the accused, under Article 14(3)(d), “to defend himself in person or through legal assistance.” *Id.* ¶ 6.6. The UNHRC’s view, however, has manifest implications concerning the conferral of rights under Article 14(e) in these circumstances.

235. *Id.* ¶ 6.6.

236. *Id.*

237. *Id.*

238. *Id.*

239. See *Hendricks v. Guyana*, U.N. Human Rights Comm., Communication No. 838/1998, ¶ 6.4, U.N. Doc. CCPR/C/75/D/838/1998 (2002) (finding a violation of both Article 14(3)(d) and (e) where defense counsel was absent from a stage of the preliminary hearing); cf. *Semey v. Spain*, U.N. Human Rights Comm., Communication No. 986/2001, ¶ 8.7, U.N. Doc. CCPR/C/78/D/986/2001 (2003) (remarking that Article

3. Absence of Accusatory Witness

In *Dugin v. Russian Federation*²⁴⁰ the accused and his accomplice were charged with murder in a beating death. The decedent and his companion confronted the accused and his accomplice, resulting in a fight.²⁴¹ Based upon the testimony of several eyewitnesses and that of the surviving victim, the accused was convicted of premeditated murder.²⁴² The surviving victim, however, never appeared during trial and his absence thus precluded cross-examination.²⁴³ Nonetheless, the trial court considered the pretrial statements made by the surviving victim during the course of the initial investigation.²⁴⁴ Concluding that the rights of the accused under Article 14 had been violated, the UNHRC questioned the circumstances concerning the victim's unavailability, noting that the reasons for his absence at trial had not been adequately explained; moreover, the UNHRC observed that the trial court had given "very considerable weight. . .to his statement, although the author was unable to cross-examine this witness."²⁴⁵

Similarly, in *Rouse v. The Philippines*,²⁴⁶ the basis of the witness's unavailability was stressed in determining whether there was a violation of the right to examine witnesses. In *Rouse*, having been charged with violating a child abuse statute, the accused asserted that he had been framed by the police.²⁴⁷ His trial and subsequent conviction were primarily based upon the signed and sworn statement of the 15-year-old victim, which was witnessed by his parents.²⁴⁸ The statement alleged that the accused had prompted the victim to engage in sexual acts.²⁴⁹ On the facts of the case, the UNHRC found a violation of Article 14(3)(e).²⁵⁰ First, although the alleged victim had been subpoenaed to testify, neither he nor his parents could be located.²⁵¹ Secondly, "considerable weight was given to that witness' out of court statement" as the sole eyewitness to the alleged crime which the accused had not been able to cross-examine.²⁵²

Determining the fairness of trial proceedings in the face of statements not subjected to cross-examination, in terms of the degree of reliance placed upon such evidence in sustaining a conviction, has gained favor in

14(3)(e) is satisfied where the parties participated in an adversarial procedure and defense counsel had an opportunity to interrogate the declarant).

240. U.N. Human Rights Comm., Communication No. 815/1998, UN Doc. CCPR/C/81/D/815/1998 (2004).

241. *Id.* ¶ 2.1.

242. *Id.* ¶ 2.2.

243. *Id.* ¶ 3.1.

244. *Id.*

245. *Id.* ¶ 9.3 (emphasis added). A "considerable weight" standard affords broader protection of the right to examine than the "decisive extent" standard, applied under the ECHR. See *infra*, Part IV.

246. U.N. Human Rights Comm., Communication No. 1089/2002, U.N. Doc. CCPR/C/84/D/1089/2002 (2005).

247. *Id.* ¶ 2.2.

248. *Id.* ¶ 2.4

249. *Id.*

250. *Id.* ¶ 7.5.

251. *Id.*

252. *Id.* (emphasis added).

international criminal procedure.²⁵³ As can be seen in the development of the jurisprudence of the European Court discussed below, it has become a threshold consideration to adjudicating the safety of trial proceedings and in securing the right of examination and/or confrontation.

IV. The European Convention on Human Rights of 1950

A. Background

Based on the Universal Declaration of Human Rights, the ECHR was drawn up in 1949 by the Council of Europe.²⁵⁴ It was opened for signature on November 4, 1950, and entered into force on September 3, 1953.²⁵⁵ Like the ICCPR, the European Convention provides several fundamental civil and political rights and freedoms including, *inter alia*, the right to a fair trial.²⁵⁶

As a regional treaty, the ECHR created international human rights enforcement mechanisms in its member states, permitting both the adjudication of alleged violations as well the acceptance and implementation of

253. See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92*quater* of the Rules (Hasa Rizvić), ¶ 22 (Jan. 14, 2008) (noting that under ICTY jurisprudence “a Chamber cannot base a conviction solely or to a decisive extent on evidence which has not been subject to examination by both parties.”) (citing *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babic, ¶ 20 (Sept. 14 2006)); *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on the Appeals Against the Decision to Admit the Trial Transcript of the Examination of Jadranko Prlić, ¶ 53 (Nov. 23, 2007) [hereinafter *Prlić Appeal*]; see generally *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Decision On Prosecution’s Motion to Add One Exhibit to its Rule 65ter List and for Admission of Evidence of Witness Matija Bosković Pursuant to Rule 92*quater*, ¶ 19, (Mar. 9, 2009); see also Special Tribunal for Lebanon, Rules of Procedure and Evidence, U.N. Doc. No. STL/BD/2009/01/Rev. 1, Rule 159 (June 10, 2009) [hereinafter STL RPE] (expressly providing, “[a] conviction may not be based solely, or to a decisive extent, on the statement of a witness made pursuant to Rule 93.”).

254. EUROPEAN COURT OF HUMAN RIGHTS, INFORMATION DOCUMENT ON THE COURT ¶ 1 (2006), http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf [hereinafter Information Document] (noting that “[t]he Convention represented the first steps for the collective enforcement of certain of the rights set out in the Universal Declaration.”).

255. *Id.*

256. See ECHR, *supra* note 3, art. 6 (providing that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”). Moreover, since its entry into force, the Convention’s Protocols have expanded the rights originally set out. See Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Apr. 28, 1985, Eur. T.S. 114 (abolishing the death penalty); Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Eur. T.S. 117, arts. 2–4 (providing for the right of appeal in criminal cases; compensation of victims of miscarriages of justice; and protection against double jeopardy); Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, Nov. 4, 2000, Eur. T.S. 177; Protocol 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances, May 3, 2002, Eur. T.S. 187.

the decisions rendered.²⁵⁷ Although the Convention has always allowed individuals to bring complaints directly against member states, a private right of enforcement was originally recognized only at a State's option and acceptance.²⁵⁸ However, as of 1998 the recognition of a private right of enforcement has been compulsory among member states.²⁵⁹ As such, "individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention."²⁶⁰

Over the years, responsibility for enforcing the European Convention has fallen to three institutions—the European Commission of Human Rights; the Committee of Ministers of the Council of Europe, which supervises the enforcement of decisions;²⁶¹ and the European Court.²⁶² The Convention's role among national jurisdictions has been to harmonize rights protection by establishing a *minimum* standard—"a floor below which a national legal protection may not fall."²⁶³ While this clearly implies a differing impact upon diverse national systems, the Convention, in essence, constitutes an obligatory norm derived from an "emerging consensus among the Contracting States."²⁶⁴ In this sense, the jurisprudence of the European Court has been markedly influential in developing rights-based norms and particularly, in fostering basic consistency among the criminal procedures of its diverse members.

257. See generally Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777 (2003).

258. See Information Document, *supra* note 254, ¶¶ 10–11; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 25, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter *Old European Convention*] (providing that "[t]he Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person . . . provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions.") (emphasis added).

259. Information Document, *supra* note 254, ¶ 4; see also Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, Eur. T.S. 155 (replacing Article 25 of the Old Convention with Article 34 and providing that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.").

260. *Mamatkulov and Askarov v. Turkey*, 2005-I Eur. Ct. H.R. Rep. 293, ¶ 122, at 333.

261. See ECHR, *supra* note 3, art. 46(2) (providing that "[t]he final judgment of the court shall be transmitted to the Committee of Ministers which shall supervise its execution.").

262. See European Court of Human Rights, *Annual Report 2008* (Council of Europe 2008), ¶ 2, at 9, available at http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf.

263. Alec Stone Sweet & Helen Keller, *Assessing the Impact of the E.C.H.R. on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE E.C.H.R. ON NATIONAL LEGAL SYSTEMS* 702 (Alec Stone Sweet and Helen Keller eds., 2008).

264. *Id.*

B. Confrontation under the European Convention

The right of confrontation within the context of the principle of equality of arms was somewhat dubious in earlier traditional Continental systems; for example, as noted above, “in earlier inquisitorial systems, defense counsel often was not allowed to participate in the actual trial.”²⁶⁵

In stark contrast, Article 6 of the ECHR “is intended above all to secure the interests of the defence and those of the proper administration of justice.”²⁶⁶ Moreover, the European Court has recognized that “[t]he right to a fair trial holds so prominent a place in democratic society that there can be no justification for interpreting Article 6 of the Convention restrictively.”²⁶⁷ In this context, the ECHR has greatly expanded the conception of the right to examine as a fundamental tenet of procedural fairness in criminal proceedings across Europe and has had an appreciable impact upon the right, particularly as administered in Continental systems.²⁶⁸ Nevertheless, “there is little consensus as to whether the right to examine in fact constitutes a fundamental procedural norm that cannot be derogated from in any circumstances.”²⁶⁹

Although generally worded, the application of Article 6(3)’s right to examine has been substantially refined under the European Court’s case law in two principal areas—anonymous witnesses²⁷⁰ and absent witnesses,²⁷¹ including cases that have clearly involved both of these condi-

265. Bassiouni, *supra* note 4, at 277.

266. Acquaviva v. France, 333 Eur. Ct. H.R. (ser. A) 3, ¶ 66, at 17 (1995).

267. Moreira de Azevedo v. Portugal, 189 Eur. Ct. H.R. (ser. A) ¶ 66, at 16 (1990); see Windisch v. Austria, 186 Eur. Ct. H.R. (ser. A) ¶ 30, at 11 (1990); see also Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) ¶ 33, at 16 (1980); see generally Daud v. Portugal, 1998-II Eur. Ct. H.R. 739, ¶ 39, at 750 (applying the convention to the adequacy of state-assigned defense counsel).

268. See Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 376, 407 (1999) (noting the potential of the ECHR to move the judicial systems of traditionally inquisitorial member states closer to the common law adversarial practice, referring particularly to Barberà v. Spain, 146 Eur. Ct. H.R. (ser. A) (1988)).

269. Kelly Buchanan, *Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists*, 35 VICT. U. WELLINGTON L. REV. 609, 639 (2004); see also Grant v. The Queen, [2006] UKPC 2, [2007] 1 A.C. 1, ¶ 17, at 13 (observing that the European Court “has been astute to avoid treating the specific rights set out in article 6 as laying down rules from which no derogation or deviation is possible in any circumstances.”). For a full treatment of derogation under Article 15 and European Court jurisprudence, see RALPH BEDDARD, HUMAN RIGHTS AND EUROPE, 188–92 (3d ed. 1993).

270. See Krasniki v. The Czech Republic, App. No. 51277/99, Feb. 28, 2006, <http://www.bailii.org/eu/cases/ECHR/2006/176.html>.

271. See Craxi v. Italy (no. 1), App. No. 34896/97, Dec. 5 2002 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=703237&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; Ferrantelli v. Italy, 1996-III Eur. Ct. H.R. 937; Zentar v. France, App. No. 17902/02, Apr. 13, 2006 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=794312&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; S.N. v. Sweden, 2002-V Eur. Ct. H.R. 145.

tions.²⁷² While anonymous and absent witnesses are dealt with below, to the extent that vulnerable witnesses comprise a somewhat specialized class of cases involving unique public policy issues, they are, for comparative purposes, beyond the limited scope of this article.

1. *The Right to Examine Generally*

Although Article 6, like ICCPR Article 14, protects the right to a fair hearing, it does not provide for rules on the admissibility of evidence. Article 6(3) provides as follows:

- 3) Everyone charged with a criminal offence has the following minimum rights:
 - a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b) to have adequate time and the facilities for the preparation of his defence;
 - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

In applying Article 6(3)(d), the Court's primary focus is not upon the proper application of often idiosyncratic and divergent evidentiary rules among member states as a supranational court of review, but on the fundamental fairness of the trial proceedings overall.²⁷³ National proceedings are thus accorded a great deal of deference in respect of the regulation and application of evidentiary rules.²⁷⁴ Indeed, national courts have been accorded such great deference in determining whether or not to require the appearance of witnesses for trial that, in the view of some commentators, Article 6(3)(d) was of little practical impact.²⁷⁵ In this context, *Unterpertinger v. Austria*²⁷⁶ arose as one of the early hearsay confrontation-type cases, etching out the contours of the right to examine under the ECHR.

In *Unterpertinger*, the accused was convicted of domestic assault.²⁷⁷

272. See *Lüdi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A) (1992); *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691.

273. See *Schenk v. Switzerland*, 140 Eur. Ct. H.R. (ser. A), ¶ 46, at 29 (1988) (stating that rules of evidence are "primarily a matter for regulation under national law."); *Barberà v. Spain*, 146 Eur. Ct. H.R. (ser. A) ¶ 68, at 31 (1988) (stating that "as a general rule, it is for the national courts . . . to assess the evidence before them as well as the relevance of the evidence. . . . The Court must, however, determine . . . whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 § 1.").

274. See *Edwards v. The United Kingdom*, 247 Eur. Ct. H.R. 23, (ser. A) ¶ 34, at 34-35 (1992); see also *Helmers v. Sweden*, 212 Eur. Ct. H.R. (ser. A) 3, ¶ 31, at 15 (1991).

275. Craig Osborne, *Hearsay and the European Court of Human Rights*, CRIM. L.R. 255, 260 (Apr. 1993).

276. 110 Eur. Ct. H.R. (ser. A) (1986).

277. *Id.* ¶ 20, at 10.

The accused's wife and step-daughter, the alleged victims in the case, refused to testify against him at trial.²⁷⁸ Consequently, the prosecution introduced and relied on certain police reports containing their incriminatory accounts of the incidents.²⁷⁹ In reviewing the proceedings, the European Court determined that the convictions had been obtained in contravention of the accused's rights to the extent that he was deprived of any opportunity to cross-examine either witness concerning their statements to the police.²⁸⁰ Significantly, the Court noted that the statements had been used as "proof of the truth of the accusations made by the women at the time,"²⁸¹ and clearly formed the basis upon which the conviction principally rested.

In *Bricmont v. Belgium*²⁸² the European Court established limits on the standing policy of according deference towards the determinations of domestic courts in respect of requiring the hearing of witnesses. In *Bricmont*, the trial court excused the key witness from testifying due to his health and age.²⁸³ In review, the Court found that the accused's conviction for forgery and misappropriation violated Article 6.²⁸⁴ Considering the relationship of the principle evidence relied upon in support of a conviction to the question of trial fairness, the Court nonetheless recognized that "[t]here are *exceptional circumstances* which could prompt the Court to conclude that the failure to hear a person as a witness was incompatible with Article 6."²⁸⁵ The Court thus held that Article 6 is violated where the evidence upon which a conviction is predicated is adduced at trial "without [the accused] ever having had an opportunity, afforded by an examination or a confrontation, to have evidence taken from the complainant in his presence."²⁸⁶

Similarly, in *Barberà v. Spain*,²⁸⁷ a murder case that involved the prosecution's use of a confession by a former accomplice of the accused, the Court determined that the admission of a former accomplice's statements at trial violated the accused's fair trial rights. The accused were never afforded an opportunity to examine the absent declarant.²⁸⁸ The Court held that Article 6(3)'s guarantee of the right to examine "means that the hearing of witnesses must in general be adversarial."²⁸⁹ In principle therefore, all evidence must be produced in the presence of the accused with a

278. *Id.* ¶ 30, at 14.

279. *Id.* ¶ 31, at 14-15.

280. *Id.* ¶ 33, at 15.

281. *Id.*

282. 158 Eur. Ct. H.R. (ser. A) (1990).

283. *Id.* ¶ 46, at 46.

284. *Id.* ¶¶ 84-85, at 30-31.

285. *Id.* ¶ 89, at 31 (emphasis added). One might expect this fact to be virtually presumed. See also *Popov v. Russia*, App. No. 16853/04, ¶ 179, July 13, 2006, <http://www.bailii.org/eu/cases/ECHR/2006/771.html>.

286. *Bricmont*, 158 Eur. Ct. H.R. (ser. A) ¶ 8, at 30-31.

287. 146 Eur. Ct. H.R. (ser. A) (1988).

288. *Id.* ¶ 86, at 36-37.

289. *Id.* ¶ 78, at 33; see also *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 51, at 711.

view to adversarial argument, and the accused “is entitled to take part in the hearing and to have his case heard.”²⁹⁰ In noting that “the applicants never had an opportunity to examine a person whose evidence - which was vital, as is clear from the Supreme Court’s judgment,”²⁹¹ the Court determined that the requirements of a fair and public hearing had been infringed.

The assessment of the degree of centrality of statements not subjected to cross-examination to a given conviction has become a main pillar of the European Court’s analysis of the right to examine, and one that has gained considerable favor among other international institutions.²⁹²

2. Anonymity

The European Court has posited that the use of anonymous testimony may work unmitigated prejudice against the right of the accused to examine the witnesses against him.²⁹³ In *Kostovski v. The Netherlands*, the Court responded to the question of whether a conviction based upon the unexamined statements of anonymous witnesses stood in contravention an accused’s right to a fair trial under Article 6.²⁹⁴ In that case, the accused was convicted of armed robbery upon the use of statements given by two witnesses who failed to appear at trial.²⁹⁵ The statements were received in evidence in conformity with the established practice of The Netherlands at the time, which permitted their use at trial upon the condition that they had been recorded as part of the official investigative report and later read into the trial record.²⁹⁶ Though permitted to submit questions to the examining magistrate to pose to the witness during the pretrial examination,²⁹⁷ counsel for the defendant was nevertheless excluded from the proceeding. Further, of the questions submitted on behalf of the accused, only two were answered, as the remaining inquiries would allegedly have

290. *Barberà*, 146 Eur. Ct. H.R. (ser. A) ¶ 78, at 34 (internal citations omitted).

291. *Id.* ¶ 86, at 36-37.

292. See *Prliæ Appeal*, *supra* note 253, ¶ 53; see also *STL RPE*, *supra* note 253, Rule 159 (expressly providing that “a conviction may not be based solely or to a decisive extent on a statement [of an anonymous witness].”); *Dugin v. Russian Federation*, U.N. Human Rights Comm., Communication No. 815/1998, at ¶ 9.3, U.N. Doc. CCPR/C/81/D/815/1998 (2004) (applying a “considerable weight” standard); see also *Rouse v. Philippines*, U.N. Human Rights Comm., Communication No. 1089/2002, ¶ 7.5, U.N. Doc. CCPR/C/84/D/1089/2002 (2005) (same).

293. See *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) ¶ 44-45, at 21 (1989) (holding that a conviction based to a decisive extent on a statement in the absence of an opportunity to challenge violates Article 6(3)(d)); see also *Unterpertinger v. Austria*, 110 Eur. Ct. H.R. (ser. A) ¶ 33, at 15 (1986); *Lüdi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A) ¶ 47, at 21 (1992); *Saïdi v. France*, 261 Eur. Ct. H.R. ¶ 44, at 56 (1993); *Van Mechelen*, 1997-III Eur. Ct. H.R. 691, ¶ 63, at 713; *Delta v. France*, 191 Eur. Ct. H.R. 3 (ser. A) ¶ 36, at 16 (1993) (holding that the opportunity to examine and to protect his interests must be given to an accused either when a witness gives a statement to be introduced against him, or in a later proceeding).

294. 166 Eur. Ct. H.R. (ser. A) (1989).

295. *Id.* ¶ 18, at 12.

296. *Id.* ¶¶ 28-32, at 16-17.

297. *Id.* ¶ 30, at 16.

compromised the witnesses' identity.²⁹⁸

On these facts, the European Court found that the Convention was breached because there had been no prior opportunity to examine the witnesses' evidence and the conviction was based to a decisive extent on the anonymous statements.²⁹⁹ The Court reiterated that the Convention mandates that "all evidence should be produced in the presence of the accused at a public hearing with a view to adversarial argument."³⁰⁰ Accordingly, it held that Article 6(3)(d) requires that an accused "be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."³⁰¹ The process of withholding the identity of the witnesses violated the rights of the accused, under Article 6 insofar as it:

[deprived the defense] of the very particulars enabling it to demonstrate that [the witness] is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility.³⁰²

The Court thus determined that the accused had not received a fair trial. Not only had he had not been afforded an opportunity to examine the witnesses at any stage in the proceedings directly, but the anonymity procedures used in the pretrial and trial phases, rather than respecting defense rights,³⁰³ further prejudiced them by restricting even indirect examination of testimonial witnesses.

Similarly, in *Windisch v. Austria*,³⁰⁴ neither the trial court nor the defendant was ever provided with an opportunity to examine or hear from the two anonymous witnesses, upon whose statements the defendant was ultimately convicted of burglary.³⁰⁵ The witnesses both claimed to have seen the defendant near the scene of a burglary under a street lamp, with his face obscured in part by a handkerchief.³⁰⁶ At trial, the police officers who took these statements offered their assessment of the witnesses' reliability, as well as the content of statements in chief.³⁰⁷ In the absence of any eyewitness placing the defendant at the scene of the crime, it was clear that the main evidence relied upon by the trial court to sustain the conviction rested solely upon the out-of-court declarations of the anonymous wit-

298. *Id.* ¶ 16, at 11.

299. *Id.* ¶ 44, at 21.

300. *Id.* ¶ 41, at 20.

301. *Id.* (citing *Unterpretinger v. Austria*, 110 Eur. Ct. H.R. (ser. A) ¶ 31, at 14-15 (1986)).

302. *Id.* ¶ 42, at 20.

303. *Id.* ¶ 41, at 20 (conditioning the use of unexamined statements upon "the rights of the defence hav[ing] been respected.").

304. 186 Eur. Ct. H.R. (ser. A) (1990).

305. *Id.* ¶¶ 12-13, at 7.

306. *Id.* ¶ 10, at 6.

307. *Id.* ¶ 12, at 7.

nesses. As such, the Court determined that the accused had not received a fair trial,³⁰⁸ noting in particular that the witnesses' anonymity during the investigation and subsequent trial impermissibly restricted the defendant's Article 6 rights.³⁰⁹

3. Absence, Unavailability, and Hearsay

In *Delta v. France*,³¹⁰ the Court determined that the right to confront, to be present, and to examine adversarial witnesses requires the provision of an opportunity for an accused to challenge and question the witness against him, upon the making of the statement or later in the proceedings.³¹¹ Unlike *Kostovski*, *Delta* did not involve anonymous witnesses but rather witnesses whose identities were known and who failed to appear at the defendant's trial.³¹² Finding a breach of Article 6, the Court observed the fact that the accused had not been present during the investigatory phase of the proceedings when the two witnesses gave statements to the police.³¹³ Further, he was never afforded a subsequent opportunity to examine the witnesses.³¹⁴ To the extent that the statements constituted most of the material evidence against the accused, they essentially formed the basis of his conviction. The failure to afford the defendant an opportunity to question the witnesses under these circumstances impermissibly restricted his Article 6 rights.³¹⁵

In *Saïdi v. France*,³¹⁶ the Court found a violation of Article 6(3)(d) in similar circumstances. In that case, the accused was convicted of involuntary homicide in connection with two drug-related deaths without ever having been given the opportunity to confront the witnesses against him during either the course of the investigation or the trial itself.³¹⁷ In its decision, the Court reasoned that while the use of statements obtained at the stage of the police inquiry or the judicial investigation is not in itself inconsistent with Article 6(3)(d), since evidence must be produced with a view to adversarial argument, the "lack of any *confrontation*" deprived the

308. *Id.* ¶ 31, at 11.

309. *Id.* ¶¶ 27-28, at 11; see *Mayali v. France*, App. No. 69116/01, ¶¶ 36-38, June 14, 2005 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=776754&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (sexual offence case in which consent was at issue wherein the Court found a violation of a Article 6(3)(d) where an unavailable witness's statements to the police and report of an expert who had examined both the accused and the victim were decisive); see also *F. v. Finland*, App. No. 22508/02, ¶¶ 56-61, July 17, 2007, <http://www.bailii.org/eu/cases/ECHR/2007/620.html> (noting that the right to examine was violated where the accused's conviction rested on unpreserved statements given by his absent daughter to a psychologist).

310. 191 Eur. Ct. H.R. (ser. A) 3 (1993).

311. See *id.* ¶ 36, at 16.

312. *Id.* ¶ 37, at 16.

313. *Id.*

314. *Id.*

315. *Id.*

316. 261 Eur. Ct. H.R. (ser. A) 40 (1993).

317. *Id.* ¶ 44, at 57.

accused of a fair trial.³¹⁸ The Court again observed that these statements “constituted the sole basis for the applicant’s conviction.”³¹⁹

Distinguishing the holding in *Unterpertinger*, the case of *Asch v. Austria*³²⁰ demonstrated that the inability to examine a witness does not necessarily result in the violation of Article 6(3)(d). *Asch* involved a victim of domestic violence who refused to testify at a subsequent trial as she was entitled to under Austrian law.³²¹ However, much like *Hammon*, a prior statement that she gave the police about the incident was read into record at trial, despite her absence.³²² The accused complained that he had not been afforded an opportunity to examine the declarant.³²³ Conditioning the use of the out-of-court statements on “the rights of the defence [having] been respected,” the European Court held that under the peculiar circumstances of the case, the accused had not been deprived of a fair trial.³²⁴ Significantly, the Court noted that the statements at issue were not the only evidence upon which the conviction was predicated insofar as the trial court had before it corroborative evidence of the crime.³²⁵ This case thus makes clear that Article 6 does not confer an unqualified right of direct confrontation or examination, but instead comprises a mechanism permitting the introduction of testimonial hearsay under controlled conditions.³²⁶ As seen in some of the cases that follow, the parameters of these conditions are, at least according to some commentators, unpredictable.³²⁷

C. Refinements under the ECHR

1. Corroboration

In *Bracci v. Italy*,³²⁸ the defendant was convicted of several charges, including theft and sexual abuse against two prostitutes. At trial, the prosecution placed particular reliance upon the pretrial statements of the two

318. *Id.* ¶¶ 43–44, at 56–57 (emphasis added).

319. *Id.* ¶ 44, at 57.

320. 203 Eur. Ct. H.R. (ser. A) (1991).

321. *Id.* ¶ 16, at 8.

322. *Id.*

323. *Id.* ¶ 18, at 8.

324. *Id.* ¶¶ 28–30, at 10–11.

325. *Id.* ¶ 28, at 10; see also *Artner v. Austria*, 242 Eur. Ct. H.R. (ser. A) 3, ¶ 24, at 11 (1992) (finding no Article 6 violation even in the absence of an opportunity for cross-examination because the contested statements were not the only evidence on which the conviction was based).

326. See *Pello v. Estonia*, App. No. 11423/03, ¶ 26, Apr. 12, 2007, <http://www.bailii.org/eu/cases/ECHR/2007/294.html>, (observing that Article 6(3)(d) “does not require the attendance and examination of every witness on the accused’s behalf. Its essential aim, as is indicated by the words ‘under the same conditions’, is a full ‘equality of arms’ in the matter.”) (citing *Engel v. The Netherlands*, 22 Eur. Ct. H.R. ¶ 91, at 38–39 (1976)).

327. See Andrew Choo, *supra* note 186, at 9 (noting that the jurisprudence of the European Court on the question of confrontation is of “little predictive value.”).

328. App. No. 36822/02, ¶¶ 13, 19, Oct. 13, 2005 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787947&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

prostitutes given to police earlier in the investigation.³²⁹ The two women did not appear at trial.³³⁰ The accused appealed his conviction on the ground that he was denied a fair trial in two respects: first, that he was unable to examine either witness and second, that he was unable to obtain a DNA test of an article of clothing bearing trace evidence.³³¹ The European Court observed that although the pretrial statements were read aloud at trial in compliance with Italian criminal procedure, “at no stage in the proceedings was counsel for the defence able to examine or have examined the individuals who were accusing the applicant in connection with the two incidents in question.”³³² However, the Court found that to the extent one witness’s testimony was corroborated by other evidence, there was no breach of the convention, even in the absence of affording the accused a right of examination.³³³ With respect to the remaining witness, the Court did find a violation of Article 6(1) and 3(d) of the Convention because of the Italian court’s “exclusive” reliance upon the pretrial statements in the absence of corroboration and without having afforded the accused “an adequate and sufficient opportunity to contest the statements upon which his conviction [for crimes against that witness] was founded.”³³⁴

The European Court unanimously held in *Taal v. Estonia*,³³⁵ that Article 6(3)(d) had been violated where the trial court convicted the accused of threatening to detonate an explosive in a supermarket, relying primarily upon the testimony of witnesses identifying the defendant that had been obtained during the preliminary investigation. Despite the accused’s requests, none of the witnesses appeared at trial.³³⁶ The Court confirmed the grounds of the accused’s complaint—namely, the denial of any opportunity to examine or have examined the witnesses against him at any stage of the proceedings.³³⁷ Moreover, the Court pointed out the failure of the national courts to examine any of the witnesses.³³⁸

2. Basis of Unavailability

*Bocos-Cuesta v. The Netherlands*³³⁹ involved a conviction for sexual assault among other offenses committed against four children from which the accused subsequently appealed. In part, the conviction rested upon the children’s statements to the police.³⁴⁰ However, none testified at trial, as

329. *Id.* ¶¶ 17, 20.

330. *Id.* ¶ 56.

331. *Id.* ¶ 28.

332. *Id.* ¶56

333. *Id.* ¶¶ 57–58.

334. *Id.* ¶¶ 59–61.

335. See App. No. 12349/02, ¶¶ 29, 33–34, Nov. 22, 2005, <http://www.bailii.org/eu/cases/ECHR/2005/749.html>.

336. *Id.* ¶ 29.

337. *Id.* ¶ 35–36.

338. *Id.* ¶ 32.

339. App. No. 54789/00, ¶ 31, Nov. 10 2005, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=789034&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

340. *Id.* ¶ 39.

the trial court determined this might cause them undue trauma.³⁴¹ The European Court disagreed and found that the reason provided concerning the denial of the defendant's request to "hear the victims [was] insufficiently substantiated and, to a certain extent, speculative."³⁴² Accordingly, the trial was found to be in violation of the accused rights under Article 6.³⁴³ The Court noted for example, that no accommodation was provided to the accused to review the manner in which the children provided statements to the police, for example, by watching in another room via closed circuit video.³⁴⁴ Moreover, the accused had no opportunity to have questions put to these non-testifying witnesses at any time.³⁴⁵ To the extent that the police did not record the statements provided, neither the applicant nor the trial judges were able to observe the witnesses' demeanor and thereby assess the reliability of the testimony.³⁴⁶ As such, the Court found that the trial proceedings denied the accused a proper and adequate opportunity to challenge the witnesses' statements, as well as personally to observe their giving of oral evidence.³⁴⁷ *Bocos-Cuesta* is thus significant because it inherently recognizes an intrinsic broader confrontational right under Article 6(1), taken together with Article 6(3)(d).

*Zentar v. France*³⁴⁸ further confirms a broader confrontational view of the right to examine. In *Zentar*, the accused was convicted based "largely" on the out-of-court statements of witnesses who offered testimony against the accused at the investigative phase of the proceedings.³⁴⁹ While the witnesses implicating the accused were unavailable at trial, no effort had been made to secure their appearance.³⁵⁰ Based upon this failure, and considering the particular importance of safeguarding the rights of the accused, the Court determined that the opportunity for the accused to challenge the witness statements on which his conviction was based had not been sufficient.³⁵¹

Likewise, in *Vaturi v. France*,³⁵² where the accused alleged that he had

341. *Id.* ¶ 40.

342. *Id.* ¶ 72.

343. *Id.* ¶ 73-74.

344. *Id.* ¶ 71.

345. *Id.* ¶ 59.

346. *Id.* ¶ 71.

347. *Id.* ¶¶ 71-74.

348. App. No. 17902/02, Apr. 13, 2006 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=794312&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

349. *Id.* ¶ 29.

350. *Id.* ¶ 30; see also *Makeyev v. Russia*, App. No. 13769/04, ¶ 43, Feb. 5, 2009, <http://www.bailii.org/eu/cases/ECHR/2009/207.html> (finding a violation of Article 6 where, *inter alia*, "the authorities failed to make a reasonable effort to secure [the witnesses'] presence in court.").

351. *Zentar*, App. No. 17902/02, ¶ 31.

352. App. No. 75699/01, July 13, 2006 (available only in French), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=794314&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (recognizing the obligation of the state to safeguard the rights of the accused as inclusive of the right to examine and confront).

been given no opportunity to examine witnesses or to have them examined at any stage of the proceedings, the Court unanimously found a violation of Article 6.³⁵³ Significantly, the Court noted that the question of whether the examination of the witnesses might have proven fruitful was unnecessary to determine whether a breach of Article 6 had occurred, although such examination would have contributed to the equal balance needed to be struck throughout the proceedings between the prosecution and the defense.³⁵⁴

In *Ferrantelli v. Italy*,³⁵⁵ the accused were implicated by a co-accused who had been arrested in possession of the murder weapon.³⁵⁶ The accused later confessed to the crime, providing an account inconsistent with that of the co-accused. Subsequently, the co-accused recanted his earlier implication of the accused, and the accused also recanted their confessions.³⁵⁷ The co-accused was later found dead, before either the accused or his attorneys had a chance to question him.³⁵⁸

In 1991, the Italian Court of Cassation sentenced the accused based, *inter alia*, on the statements of the deceased co-accused, the accused's confessions, and other evidence.³⁵⁹ On review before the European Court, the accused contended that they had been convicted based on confessions obtained by investigators using physical and psychological pressure.³⁶⁰ They further argued the impossibility of examining or having examined the co-accused (as a prosecution witness) prior to his death.³⁶¹ Although the use of statements obtained at the pre-trial stage was not inconsistent with paragraphs (3)(d) and (1) of Article 6, the Court held that these provisions required that the accused be afforded an adequate and proper opportunity to challenge and question witnesses either when the statements were being made or at a later stage of the proceedings.³⁶² While a substantial period had elapsed prior to the death of the co-accused during which the authorities could have arranged for this opportunity, the Court found that the State could not be held responsible for the intervening death and as such Article 6(1) and (3)(d) had not been violated.³⁶³

In *Gossa v. Poland*,³⁶⁴ the Court similarly held that the fact that an

353. *Id.* ¶¶ 58–59; see also *Mild and Virtanen v. Finland*, App. Nos. 39481/98 and 40227/98, ¶¶ 47–48, July 26, 2005, <http://www.bailii.org/eu/cases/ECHR/2005/541.html> (finding a violation of Article 6(3)(d) where “every reasonable effort to obtain [witnesses’] attendance was not made and the fact that there was no provision of law on the basis of which they could have been brought to court made it impossible for the applicants to examine them.”).

354. *Vaturi*, App. No. 75699/01, ¶ 58.

355. 1996-III Eur. Ct. H.R. 937.

356. *Id.* ¶ 9, at 942.

357. See *id.* ¶¶ 10–14, at 942–43.

358. See *id.* ¶¶ 15–16, at 943.

359. See *id.* ¶ 52, at 950–51.

360. *Id.* ¶ 44, at 949.

361. *Ferrantelli*, 1996-III Eur. Ct. H.R. 937, ¶ 44, at 949.

362. *Id.* ¶ 51, at 950.

363. *Id.* ¶¶ 52–53, at 950–51.

364. App. No. 47986/99, Jan. 9, 2007, <http://www.bailii.org/eu/cases/ECHR/2007/2.html>.

accused may have been unable to examine a witness whose statements may have been involved in securing his conviction does not necessarily constitute a violation of Article 6(3)(d). In *Gossa*, the accused alleged that he had not been provided any opportunity to challenge the inculpatory statements of one of the witnesses against him and upon which his conviction was predicated.³⁶⁵ In determining that the lack of any opportunity to cross-examine the declarant did not abridge the accused's Article 6 rights,³⁶⁶ the Court found it significant that the authorities had made an appropriate effort to secure this witness' attendance.³⁶⁷ In addition, the Court determined that the conviction had not been based solely or to a decisive degree on that particular witness' statements.³⁶⁸

3. *Impact of Unexamined Statements*

The European Court has greatly circumscribed the use of anonymous testimony as well as hearsay evidence in contravention of an accused's Article 6 rights. However, the Court's jurisprudence has held with reasonable consistency that a fair trial can be achieved even where the accused has not been accorded a right to examine witnesses, as was the case in *Asch v. Austria*.³⁶⁹ Accordingly, there is no absolute procedural bar against the receipt of pretrial statements of adversarial witnesses against an accused in the absence of oral testimony.³⁷⁰ With respect to anonymous testimony however, the Court has taken a more conservative tack in limiting consideration of these types of statements to situations bearing substantial corroboration or in extenuating circumstances. Hence, a trial will be found fundamentally unfair where a conviction is based to a decisive extent upon the testimony of an anonymous witness in the absence of any appreciable opportunity of the defense to examine the witness at any stage of the proceedings.³⁷¹

Although the European Court does not consider the right to cross-examination absolute,³⁷² limitations imposed on the rights of an accused under Article 6 must nevertheless be considered restrictively. In *Doorson v. The Netherlands*³⁷³ for example, although the evidence against the accused

365. *Id.* ¶ 40.

366. *Id.* ¶ 64.

367. *See id.* ¶ 49 (internal citations omitted).

368. *Id.* ¶ 63.

369. 203 Eur. Ct. H.R. (ser. A) ¶¶ 28-30, at 10-11 (1991).

370. *See A.M. v. Italy*, 1999-IX Eur. Ct. H.R. 47, ¶ 25, at 55; *Lucà v. Italy*, 2001-II Eur. Ct. H.R. 167, ¶ 40, at 178; *see generally* *Mild and Virtanen v. Finland*, App. Nos. 39481/98 and 40227/98, July 26, 2005, <http://www.bailii.org/eu/cases/ECHR/2005/541.html>; *but see* *Rodriguez Orejuela v. Colombia*, U.N. Human Rights Comm., Communication No. 848/1999, U.N. Doc. Supp. 40 (A/57/40) at 172 (2002).

371. *See Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 76, at 472.

372. *See Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) ¶ 43, at 20-21 (1989); *see also* *Artner v. Austria*, 242 Eur. Ct. H.R. 3, ¶ 24, at 11 (1992); *Asch v. Austria*, 203 Eur. Ct. H.R. (ser. A) ¶ 31, at 11 (1991) (holding that "the fact that it was impossible to question [the complainant] at the hearing did not [, in the circumstances of the case, violate the rights of the defence; it did not deprive the accused of a fair trial.").

373. 1996-II Eur. Ct. H.R. 446.

included testimony from anonymous witnesses, the Court found that the opportunity provided to the accused's counsel to examine these witnesses outside the presence of the accused constituted an acceptable safeguard under the circumstances, even taking into account the limitation it imposed on the accused's right of examination.³⁷⁴ To the contrary, in *Visser v. The Netherlands*,³⁷⁵ the Court found that the trial court's attempt to accommodate the accused's right of examination by affording his counsel an opportunity to hear the anonymous witness' statement before an investigating judge and to submit written questions to be posed was unacceptable.³⁷⁶ Although the Court did not reach the question of the sufficiency of the protective procedures put in place, it appears that no justification for the limitations imposed upon the rights of the accused had ever been established; the Court thus concluded that the trial court failed to examine the seriousness and legitimacy of the reasons advanced for the anonymity of the witness whose statement was introduced against the accused.³⁷⁷ Importantly however, *Visser*, like *Doorson*, confirmed that a conviction based solely or to a decisive extent on anonymous statements violates Article 6.³⁷⁸

In *Krasniki v. the Czech Republic*³⁷⁹ the European Court also found that when the trial court had no reason to receive the testimony of witnesses outside the presence of the defendant and his counsel, and based the conviction to a *decisive* extent on anonymous testimony, Article 6(1) of the Convention had been violated.³⁸⁰ *Krasniki* involved a conviction for possessing and dealing in illicit substances. At trial, the accused was not permitted to examine a witness whose testimony was taken outside his presence by the trial judge.³⁸¹ A second witness could not be located and her pretrial statement was read out in court in her absence.³⁸² To make

374. *Id.* ¶¶ 69–73, at 470–71 (stating that while the “the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants, the subsequent use of their statements by the trial court to found a conviction . . . is not under all circumstances incompatible with the Convention.” And “Counsel was not only present, but he was put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity.”).

375. App. No. 26668/95, Feb. 14, 2002, <http://www.bailii.org/eu/cases/ECHR/2002/108.html>.

376. *Id.* ¶ 48 (holding that in the absence of an inquiry as to the seriousness and basis for the anonymity “the interest of the witness in remaining anonymous could [not] justify limiting the rights of the defence to the extent that they were limited”); cf. *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 74, at 471 (holding that “while it would clearly have been preferable for the applicant to have attended the questioning of the witnesses” on balance the domestic court was “entitled to consider that the interests of the applicant were outweighed in this respect by the need to ensure the safety of witnesses.”).

377. *Visser*, App. No. 26668/95, ¶ 47.

378. *Id.* ¶ 46.

379. App. No. 51277/99, Feb. 28, 2006, <http://www.bailii.org/eu/cases/ECHR/2006/176.html>.

380. *Id.* ¶¶ 78, 80–83.

381. *Id.* ¶ 22.

382. *See id.* ¶ 25.

matters worse, both witnesses testified against the accused anonymously.³⁸³ Under these circumstances, the Court unanimously determined that the proceedings had unfairly breached Krasniki's rights.³⁸⁴

4. *Statements of Co-Accused*

In *Isgrò v. Italy*,³⁸⁵ the Court determined that the admission at trial of an accomplice's hearsay statements against the accused was not unfair. Distinguishing this case from existing jurisprudence at the time, the European Court found first, that the statement in question was clearly not anonymous; second, that the accused was able to and did put questions to his accomplice at a hearing before the investigating judge and discussed the statements;³⁸⁶ and third, that the statements of the accomplice were not the sole evidence upon which the court relied.³⁸⁷ The Court acknowledged that the defense counsel had been excluded from the accused's confrontation of the witness; however, it also found that this did not affect fair trial rights because the public prosecutor had also been absent, and because the accused was allowed and able to put questions to the witness himself, thus mitigating the absence of defense counsel.³⁸⁸ As dubious an argument as these grounds present, the Court nevertheless went on to find that the restrictions placed on the accused did not contravene Article 6(3)(d).³⁸⁹

However, in *Lucà v. Italy*³⁹⁰ the European Court did find that reliance on the untested statements of a co-accused, unavailable through his assertion of his right against self-incrimination, violated Article 6. The court found the fact that the statement at issue was made by a co-accused immaterial (as a matter of reliability), and instead held a blanket proposition that "where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to

383. *Id.* ¶ 10-12.

384. *Id.* ¶ 86.

385. 194 Eur. Ct. H.R. (ser. A) 3 (1991).

386. *Id.* ¶ 35; *but see id.* ¶ 36 (noting the absence of a defense lawyer during the confrontation). Clearly, questioning by the accused without the assistance of counsel at this stage of the proceedings cannot be viewed as an appropriate substitute for a proper cross-examination, especially where it is unquestionable that the accused would have been otherwise entitled to the assistance of counsel at trial for the same purpose. Nonetheless, the Court determined that such limitations did not deprive the accused of a fair trial. *See id.* ¶ 37.

387. *Id.* ¶ 35.

388. *Id.* ¶ 36. Astonishingly, no apparent regard was taken of the likely difference in skill and experience between the accused and his counsel in conducting such examinations, in terms of assessing the adequacy of the opportunity provided to the accused in relation to the fairness of the proceedings.

389. *Id.* ¶ 37. The European Court also accepted the trial court's determination that the accomplice could not be found so as to testify at trial, although it acknowledged that the accomplice contacted the police during the trial, contacted the investigating judge on a separate day, and was reported to be living at his mother's house as the trial proceeded. *Id.* ¶¶ 16-18.

390. 2001-II Eur. Ct. H.R. 167.

which the guarantees provided by Article 6 §§ 1 and 3(d) of the Convention apply.”³⁹¹ Although the relevant law at the time permitted the domestic courts to admit the statement of a co-accused, the European Court held that this could not operate to the detriment of the accused in violation of the Convention.³⁹²

D. The Ground Rules

The foregoing cases establish that the Court will generally defer questions concerning the admissibility of statements or depositions used at trial to the primary consideration of national authorities as a matter of domestic law.³⁹³ However, all evidence must generally be produced in the presence of the accused at a public hearing with a view to adversarial argument. While there are exceptions, the rights of the defense must not be infringed.³⁹⁴ Witness anonymity must be based on sufficient reasons,³⁹⁵ and measures must be undertaken to counterbalance the resultant prejudice to the accused.³⁹⁶ Although the use of statements from an unavailable witness in the absence of an opportunity for the accused to question the witness at any stage of the proceedings does not automatically result in exclusion, where the rights of the defense cannot otherwise be secured, as normally prescribed under the Convention, such statements must be used with great care.³⁹⁷ Thus, a conviction based solely or to a decisive degree upon depositions in the absence of an opportunity to examine or to have a declarant examined at any phase of the proceedings is incompatible with Article 6.³⁹⁸

391. *Id.* ¶ 41, at 179.

392. *Id.* ¶ 42, at 179.

393. See *Rumyana Ivanova v. Bulgaria*, App. No. 36207/03, ¶ 39, Feb. 14, 2008, <http://www.bailii.org/eu/cases/ECHR/2008/150.html> (reiterating the view that the European Court considers it primarily for the national authorities and courts to interpret and apply domestic law) (internal citations omitted); *Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) ¶ 58, at 25 (1992); *Casado Coca v. Spain*, 258 Eur. Ct. H.R. (ser. A) 3, ¶ 43, at 18 (1994); *Perna v. Italy*, 2003-V Eur. Ct. H.R. 333, ¶ 29, at 351 (recognising that “the admissibility of evidence is primarily a matter for regulation by national law.”).

394. See, e.g., *Lucà v. Italy*, 2001-II Eur. Ct. H.R. 167, ¶ 39, at 178; *Solakov v. the Former Yugoslav Republic of Macedonia*, 2001-X Eur. Ct. H.R. 292, ¶ 57, at 307-08; *P.S. v. Germany*, App. No. 33900/96, ¶ 21, Dec. 20, 2001, <http://www.bailii.org/eu/cases/ECHR/2001/884.html>.

395. See *Doorson v. the Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 71, at 471; see also *Visser v. The Netherlands*, App. No. 26668/95, ¶ 47, Feb. 14, 2002, <http://www.bailii.org/eu/cases/ECHR/2002/108.html>.

396. See *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 54, at 712.

397. See *Visser*, App. No. 26668/95, ¶ 44; see *S.N. v. Sweden*, 2002-V Eur. Ct. H.R. 145, ¶ 53, at 162.

398. See, e.g., *Saïdi v. France*, 261 Eur. Ct. H.R. (ser. A) ¶ 44, at 56 (1993); *Barberà v. Spain*, 146 Eur. Ct. H.R. (ser. A) ¶ 78, at 33-34 (1988); *Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) ¶ 41-45, at 20-21 (1989); *Asch v. Austria*, 203 Eur. Ct. H.R. (ser. A) ¶¶ 26-31, at 11 (1991), at 10-11; *Lüdi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A) ¶¶ 43-50, at 20-21 (1992); *Lucà v. Italy*, 2001-II Eur. Ct. H.R. 167, ¶¶ 39-45, at 178-179.

E. A New Shift in the European Court's Confrontation Doctrine

On January 20, 2009, the European Court handed down its decision in *Al-Khawaja v. United Kingdom*.³⁹⁹ The case involved the national courts' admission of statements not subjected to cross-examination against the two accused under section 23 of the Criminal Justice Act of 1988 (since repealed) and section 116 of the CJA 2003, respectively.⁴⁰⁰

As mentioned above, the CJA 2003 sets out specific criteria for the admissibility of the statements of absent witnesses, and includes certain safeguards concerning the rights of the accused pursuant to sections 124 through 126.⁴⁰¹ Although these provisions ostensibly balance the interests of the defense,⁴⁰² the Law Commission of England and Wales recommended against the Act's incorporation of the European Court's requirement under the ECHR that core hearsay evidence be corroborated.⁴⁰³ Despite the obligation of the national courts to consider the judgments of the European Court, the Act does not require corroboration of hearsay statements relied upon to a decisive extent in securing a conviction.⁴⁰⁴ Thus, despite the finding of the Court of Appeal that the lower courts' admissibility determinations were proper and the convictions safe, the European Court held that Article 6(3)(d) of the Convention had been breached to the extent the respective convictions were based solely or decisively on statements which the accused had no opportunity to challenge.⁴⁰⁵

Al-Khawaja does not depart from prior European Court's decisions insofar as it maintains that convictions founded decisively or solely on

399. *Al-Khawaja v. United Kingdom*, App. No. 26766/05, 49 Eur. H.R. Rep. 1 (2009); see *supra* Part II.C.1.

400. *Al-Khawaja v. United Kingdom*, App. No. 26766/05, 49 Eur. H.R. Rep. 1 (2009); see *supra* Part II.C.1.

401. See *supra* notes 126–50, and accompanying text.

402. See *R. v. Horncastle*, [2009] EWCA (Crim) 964, [2009] 2 Crim. App. 15, ¶ 10, at 21 (appeal taken from Eng.), *aff'd* [2009] UKSC 14, [2010] 2 W.L.R. 47 (noting that “[the CJA 2003] was . . . informed by experience accumulated over generations and represents the product of concentrated consideration by experts of how the balance should be struck between the many competing interests affected. It also represents democratically enacted legislation substantially endorsing the conclusions of the expert consideration.”); see also CJA 2003, *supra* note 127, § 125(1)(a)–(b) (imposing upon courts a duty to direct an acquittal or retrial where it is satisfied that “the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.”).

403. See Law Comm'n for Eng. & Wales, *Evidence in Criminal Proceedings: Hearsay and Related Topic*, 1997, Law Com. No. 245, ¶ 1.50, at 13 (1997) (noting that “there is no need, under the Convention or otherwise, to introduce a rule that an essential element of an offence cannot be proved by uncorroborated hearsay.”); see also *R. v. Horncastle*, [2009] EWCA (Crim 964), [2009] 2 Crim. App. 15, ¶ 17, at 24.

404. Human Rights Act 1998, § 2(1), (c. 42) (U.K.) (providing that “[a] court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.”).

405. *Al-Khawaja v. United Kingdom*, App. No. 26766/05, 49 Eur. H.R. Rep. 1, ¶ 25, at 10 (2009).

depositions without cross-examination violate Article 6. In this respect, it will not likely have much impact on the general admissibility of un-confronted hearsay that is neither dispositive of guilt nor otherwise corroborated. However, the decision presages a significant reorientation in the Court's analytical doctrine, clearly shifting the emphasis of the extant teleological approach to the right to examine. In particular, the decision articulates a strengthened position in favor of defense rights, providing that even where Article 6(3) minimum guarantees have been met the court must nevertheless ascertain whether the trial as a whole has been fair.⁴⁰⁶ In this sense, the European Court emphasizes that the provisions of Article 6(3) do not simply comprise factors or illustrations of fair trial rights, but comprise tangible minimum guarantees, requiring extension to anyone charged with a criminal offense.⁴⁰⁷ In the event an accused is denied the right to examine, the trial court must undertake counterbalancing measures.⁴⁰⁸ The Court reiterated that "[e]ven when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements."⁴⁰⁹

Furthermore, the Court significantly observed that, absent special circumstances—for example, witness absence due to fear or unavailability attributable to the accused's conduct—"it] doubts whether *any* counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant."⁴¹⁰

Prior to *Al-Khawaja*, however, European Court jurisprudence had clearly accepted that in exceptional cases the failure to comply with Article 6(3)(d) does not *per se* invalidate the fairness of a trial.⁴¹¹ *Al-Khawaja* now challenges this conception and portends the closing of the door to the notion that trial courts may analyze the deprivation of the right to examine decisive evidence under what amounts to a harmless error analysis if proper counterbalancing measures are shown. The decision further makes clear that no distinction concerning the right to examine anonymous witnesses—rather than those merely absent—is required under the Court's analysis.⁴¹²

Because of the far-reaching implications for the English regulatory scheme under the CJA 2003, which relies on counterbalancing measures,

406. *Id.* ¶ 34, at 13–14.

407. *See id.*; cf. *R.v. Sellick*, [2005] EWCA (Crim) 651, [2005] 1 W.L.R. 3257, ¶ 50, at 3274 (U.K.).

408. *Al-Khawaja*, 49 Eur. H.R. Rep. 1, ¶ 37, at 15.

409. *Id.*

410. *Id.*

411. *See also* *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶¶ 73–74, at 113 (appeal taken from Eng.) (observing further that the European Court's case law shows that the fairness of trial is to be assessed on an *ad hoc* basis, "an inability on the part of a defendant to cross-examine the maker of a statement that is admitted in evidence will not necessarily render the trial unfair.").

412. *Al-Khawaja*, 49 Eur. H.R. Rep. 1, ¶ 36, at 14 (citing *Lucà v. Italy*, 2001-II Eur. Ct. H.R. 167, ¶ 40, at 178).

Al-Khawaja was appealed to the European Court's Grand Chamber, which heard argument on the case on May 19, 2010.⁴¹³ What remains to be seen is whether the Court will hold its ground in the face of this fierce contest. If it does, the impact of this decision will significantly strengthen the right of examination under the Convention and indeed, internationally. However, the debate is likely to be as highly spirited as hard fought.

V. The Case for a Bright-line Standard in ICC Proceedings

Although not absolute,⁴¹⁴ the right to examine embodies normative objectives that are intrinsically valuable to the truth-finding function of the trial process. In certain respects, this subsumes adversarial confrontation, which preserves an accused's opportunity not only to test a witness' recollection of the events at issue, but in essence, to challenge his conscience as well. A trier of fact is thus provided an opportunity to objectively evaluate the credibility of accusatory witnesses by observing their demeanor and the manner in which they present evidence.⁴¹⁵ The value of these elements of the trial process cannot be understated, and their impact cannot be properly evaluated solely by resorting, after the fact, to an uncertain record of the proceedings.

Given that "[a] teleological reading of the [Rome] Statute indicates that the trial . . . will be the centrepiece of the Court's proceedings in terms of acquiring evidence upon which to determine a person's criminal responsibility,"⁴¹⁶ the importance of securing a reliable and veritable right to examine trial evidence that is consistent with its core objectives is critical to the fairness of international criminal proceedings.

While there has been some encouraging movement in this direction by the European Court,⁴¹⁷ the standard of analysis employed internationally

413. Press Release, European Court of Human Rights, Grand Chamber Hearing *Al-Khawaja and Tagay v. The United Kingdom* (May 19, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868093&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

414. See O'Brian, *supra* note 130, at 494.

415. See *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (discussing the right of confrontation); see also *Bocos-Cuesta v. The Netherlands*, App. No. 54789/00, ¶¶ 71-74, Nov. 10 2005, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=789034&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (observing that while a trial court may undertake a careful examination of statements taken from witnesses, giving the accused ample opportunity to contest them, "this can scarcely be regarded as a proper substitute for a personal observation of a witness giving oral evidence.").

416. Helen J. Brady, *Setting the Record Straight: A Short Note on Disclosure and the Record of the Proceedings*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW, RECENT DEVELOPMENTS*, 265 (Horst Fischer et al. eds., 2001).

417. See *Kaste v. Norway*, 48 Eur. H.R. Rep. 45, ¶ 53, at 58 (2009) (reiterating that "where a deposition may serve to a material degree as the basis for a conviction then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Articles 6(1) and (3)(d) of the Convention apply."); see also *Al-Khawaja v. United Kingdom* 49 Eur. H.R. Rep. 1, ¶ 34, at 13-14 (2009) (noting, "[a]s minimum rights, the provisions of Article 6(3) constitute express guarantees and cannot be read . . . as illustrations of

is neither definite enough nor sufficient to import wholesale to the ICC with respect to interpretation and application of Article 67(e). Indeed, “in an area of law so politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused.”⁴¹⁸

A. The Admissibility of Written Evidence in ICC Proceedings

The Rome Statute and the ICC’s Rules of Procedure and Evidence (ICC RPE) provide for the receipt of testimonial statements and written transcripts in lieu of *viva voce* testimony;⁴¹⁹ such testimony is similarly considered in the *ad hoc* tribunals.⁴²⁰ However, unlike its *ad hoc* counterparts, the ICC’s procedural framework presents a substantial improvement in terms of the protection expressly afforded the right to examine.

The general authority to receive documentary evidence and written documents is subject to the ordinary admissibility requirements provided under Article 69(4), affording the Court virtually unfettered discretion.⁴²¹ Although the Rome Statute fundamentally rejects the formalistic evidentiary constraints of common law procedure in favor of the more open

matters to be taken into account when considering whether a fair trial has been held.”). This perhaps portends an eventual departure from what has until now been a decidedly teleological approach to confrontation taken by the European Court.

418. G.J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* 1, 15 (T.L.H. McCormack & G.J. Simpson eds., 1997).

419. International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. No. PCNICC/2000/1/Add.1 (Nov 2, 2000) (entered into force Sept. 9, 2002) [hereinafter ICC RPE].

420. See International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7, Rule 92bis (Admission of Written Statements and Transcripts in Lieu of Oral Testimony), Rule 92ter (Other Admission of Written Statements and Transcripts), 92quater (Unavailable Persons) (Mar. 14, 1994) (last amended Dec. 10, 2008) [hereinafter ICTY RPE]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1, Rule 92bis (Proof of Facts Other than by Oral Evidence) (June 29, 1995) (amended Mar. 14, 2008) [hereinafter ICTR RPE]; see Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 92bis (Alternative Proof of Facts), Rule 92ter (Other Admission of Written Statements and Transcripts) and Rule 92 quater (Unavailable Persons) (Jan. 16, 2002) (amended May 27, 2008) [hereinafter SCSL RPE], available at <http://www.sc-sl.org/LinkClick.aspx? fileticket=zXPwoukovM%3d&tabid=176>; STL RPE, *supra* note 253, Rule 155 (Admission of Written Statements and Transcripts in Lieu of Oral Testimony), Rule 156 (Written Statements and Transcripts in Lieu of Examination in Chief), Rule 158 (Unavailable Persons).

421. See Rome Statute, *supra* note 3, art. 69(4) (providing, “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”). Other rules of admissibility are limited to rules prohibiting admissibility in particular circumstances. These include Rule 71, which concerns “the prior or subsequent sexual conduct of a victim or witness;” Rules 70 and 72, which limit the admissibility of evidence concerning to a victim’s consent in sexual offences; and Rules 74 and 75, which relate to privileged attorney-client communications and the right against self-incrimination and familial incrimination, respectively.

admissibility standards of Continental systems,⁴²² it is nevertheless clear that probativity and prejudice are at least relevant factors considered by the Court in assessing the admissibility of all evidence. However, unlike the *ad hoc* tribunals, Article 69(4) of the Rome Statute neither invites nor requires the exclusion of evidence where its prejudice exceeds its probative value.⁴²³ Thus, the ICC's Pre-Trial Chamber observed that

under article 69(4) of the Statute the Chamber may exercise its discretion when determining the relevance and/or admissibility of any item of evidence. According to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis.⁴²⁴

Article 69(2) further provides that

[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.⁴²⁵

Thus, unless the admission of documents and written transcripts would contravene the Rome Statute or the ICC RPE, the Court has broad discretion to admit them.⁴²⁶ Concomitantly, where no specific rule bars the admission of such evidence—or at least, where this functionally discretionary determination has been made in the absence of an express provision—a Chamber may admit any such written testimony in its general search for the truth.⁴²⁷

Rule 68 of the ICC RPE also regulates evidence of written testimony and transcripts as follows:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

422. D.K. Piragoff, *Evidence*, in *THE INTERNATIONAL CRIMINAL COURT - ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 349, 351 (Roy S. Lee ed., 2001).

423. ICTY RPE, *supra* note 420 Rule 89(D) (expressly permitting the Court to exclude evidence when its probative value is substantially outweighed by the need to ensure a fair trial).

424. *See* The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 77 (Sept. 30, 2008).

425. Rome Statute, *supra* note 3, art. 69(2).

426. *See id.*

427. *See id.* (providing that “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”).

- a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.⁴²⁸

The ICC's Trial Chamber has interpreted these provisions, observing that a Trial Chamber

has the discretion to order that written statements (viz. "the transcript or other documented evidence of[. . .] the testimony") are to replace "live" evidence if, but only if, one of the two following conditions are met: either that the defence and the prosecution have had the opportunity to question the witness if he or she is not present before the Court, or, for a witness before the Court, the witness—who gives consent to the introduction of the evidence—is available for examination by the prosecution and the defence.⁴²⁹

As mentioned above, this presents a marked improvement over the protections afforded pursuant to the *ad hoc* tribunals' rules of procedure, which limitedly acknowledge that the lack of a prior opportunity to cross-examine the declarant of a written statement proposed for admission may be one of many factors in determining admissibility, and not a necessary precondition thereto.⁴³⁰

While the safeguards provided under Rule 68 are consistent with international minimum requirements concerning the right to examine as established in the jurisprudence of the European Court and in agreement with the views of the UNHRC, in some respects its provisions go farther. Specifically, it is not limited to transcripts or other written evidence that may be relied upon to a decisive or considerable extent in sustaining a conviction. On the other hand, Rule 68 also raises significant issues of concern regarding the adequacy of the right to examine as it may be applied.

First, Rule 68 is indicated only where the Pre-Trial Chamber has not taken measures pursuant to Article 56 of the Rome Statute.⁴³¹ It does not require that the accused be accorded an opportunity to examine a witness in circumstances where the prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a wit-

428. ICC RPE, *supra* note 419, Rule 68.

429. See *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses, ¶ 19 (Jan. 15, 2009).

430. See, e.g., STL RPE, *supra* note 253, Rule 155(A)(i)(g) (providing that the ability to cross-examine upon the making of the statement is a factor favorable to its admissibility). Notably, neither the ICTR RPE nor the ICTY RPE contain equivalent provisions. However, in respect of the admission of written evidence pursuant to the ICTY RPE, Rule 92*quater*, the lack of cross-examination does not bar admissibility. Instead, it is a factor in deciding the weight of such evidence. See *Prosecutor v. Gotovina, et al.*, Case No. IT-06-90-T Decision on the Admission of Four Witnesses pursuant to Rule 92*quater*, ¶ 7 (July 24, 2008).

431. See ICC RPE, *supra* note 419, Rule 68.

ness.⁴³² Instead, Article 56 requires the prosecutor to advise the Pre-Trial Chamber which may “upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.”⁴³³ Alternatively, where the prosecutor fails to request such measures, the Trial Chamber may take appropriate measures upon its own initiative; these, however, are subject to a right of appeal by the prosecutor.⁴³⁴ Although Article 56 lays out specific measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defense, the right to examine is not expressly mentioned.⁴³⁵ As such, the extension of the right to examine in these circumstances rests solely within the discretion of the Chamber. Testimony and statements obtained pursuant to Article 56 may thus be admitted at trial without the defense ever having been afforded a right to examine, as long as the Pre-Trial Chamber did not consider it necessary at the time, the Prosecution successfully appealed the imposition of any such measure, or the Trial Chamber deemed its admission fully consistent with a fair trial or necessary for the determination of the truth.⁴³⁶

Second, Rule 68 concerns the admissibility of “previously recorded audio or video testimony of a witness, or the *transcript or other documented evidence of such testimony*.”⁴³⁷ Although this has been held to include written statements,⁴³⁸ there is some question as to whether this interpretation is supportable as a matter of statutory construction. For example, Article

432. See Rome Statute, *supra* note 3, art. 56; cf. ICTR RPE, *supra* note 420, Rule 71(C) (providing for a “right to attend the taking of the deposition and cross-examine the witness” where an application for taking a deposition for use at trial is granted); ICTY RPE, *supra* note 420, Rule 71(C) (same).

433. See Rome Statute, *supra* note 3, art. 56(1)(b).

434. *Id.* 56(3).

435. *Id.* 56(1)(c) (stating that “[t]he measures referred to in paragraph 1(b) may include: (a) Making recommendations or orders regarding procedures to be followed; (b) Directing that a record be made of the proceedings; (c) Appointing an expert to assist; (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defense; (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons; (f) Taking such other action as may be necessary to collect or preserve evidence.”).

436. Rome Statute, *supra* note 3, art. 69(3); see also ICC RPE, *supra* note 419, Rule 47(2) (providing that “[w]hen the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently, he or she may request the Pre-Trial Chamber to take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence. If the testimony is subsequently presented in the proceedings, its admissibility shall be governed by article 69, paragraph 4, and given such weight as determined by the relevant Chamber.”).

437. ICC RPE, *supra* note 419, Rule 68 (emphasis added).

438. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecution’s Application for the Admission of the Prior Recorded Statements of Two Witnesses, ¶ 18, (Jan. 15, 2009).

56—to which Rule 68 expressly refers—concerns the taking of “testimony or a statement” by the prosecution.⁴³⁹ These two terms are substantively distinct. Taken to its logical end, this might suggest that the admissibility of a *statement*, as distinct from *testimony*, is governed solely by the general discretionary criteria for admissibility under Article 69(4), which does not explicitly implicate the right of examination.⁴⁴⁰

On the other hand, accepting that Rule 68 encompasses ‘statements,’ as a broad interpretation of the term ‘testimony’ suggests, one could reasonably conclude that its text extends only to statements that have been formalized in some way.⁴⁴¹ Documents—including reports, analysis, or informal hearsay statements—would not fall under the requirements of Rule 68, but under the general admissibility provisions of Article 69(4). This is in part because of the sheer volume of material likely to come before the court in any given case and because, to the extent that the application of Rule 68 to such material effectively would create a hearsay rule, it would be contrary to the established procedural framework.⁴⁴² Functionally however, there is no intrinsic reason why informal statements, reports, or other hearsay evidence should not give rise to the same considerations which underlie the protections provided by Rule 68 concerning formal testimony or statements—that is, an opportunity to examine the declarant during the making of the statement, or during the trial proceedings.

Regardless of their form, these statements can nevertheless be ‘testimonial’ within the meaning of *Crawford*, particularly in the sense that they may provide evidence material to the culpability of the accused for the crimes with which he has been charged. However, as Article 67(e) is not a rule of admissibility *per se*, the only practical limitation on the admissibility of informal testimonial hearsay not subject to Rule 56, or otherwise subject to Rule 68, rests exclusively in the broad discretion of the Court under Article 69.⁴⁴³ A bright-line standard of admissibility would necessarily limit this discretion in a predictable and uniform way so as to strengthen the core guarantees embodied in Article 67(e). Of course, the question of where to draw the line will be a matter of considerable debate and, necessarily, one of policy. Nonetheless, this debate must also consider the procedural regime of the given institution, as more fully discussed below.

The ICTY and ICTR, for example, draw the line with respect to the admissibility of written evidence at statements going to the acts or conduct of an accused, as provided for under Rule 92*bis* of their respective rules of

439. See Rome Statute, *supra* note 3, art. 56(1)(a).

440. *Id.* art. 69(4).

441. ICC RPE, *supra* note 419, Rule 68 (allowing the introduction of “other documented evidence of [a witness] testimony.”).

442. See generally *Lubanga Dyilo*, ¶ 23 (noting the advantages of having evidence read into the record, as opposed to live testimony).

443. See, e.g., *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 77, (Sept. 30, 2008).

procedure.⁴⁴⁴ Given the length of trials and the amount and complexity of the evidence involved, the ICTY, for example, has been constrained to develop expeditious means of presenting evidence.⁴⁴⁵ As such, Rule 92bis is “designed to expedite the proceedings on matters that are not pivotal to the case, by avoiding the need to call and examine the witness and admitting his or her written statement as substantive evidence in lieu of his or her oral evidence.”⁴⁴⁶

In the United States, the question turns on the ‘testimonial’ character of the statement,⁴⁴⁷ while in England, like several other Common Law jurisdictions, the question is framed as one that is fundamentally evidentiary, and thus governed by statutory rules of admissibility aimed at achieving fairness.⁴⁴⁸ In this sense, the line will be determined by many interests, among which the interests of the defense must compete.⁴⁴⁹

As noted in Part IV, the ECHR and ICCPR do not define rules of admissibility.⁴⁵⁰ Thus, answers to evidentiary questions arising under these treaties depend primarily upon the degree to which evidence never subjected to cross-examination figures in support of a judgment of conviction; in essence, this is a retrospective standard of review, rather than a

444. See ICTR RPE, *supra* note 420, Rule 92bis; ICTY RPE, *supra* note 420, Rule 92bis; see generally *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), ¶ 10, June 7, 2002 (noting that Rule 92bis(A) excludes written statements which goes to prove that the accused: (a) personally perpetrated any of the charged crimes, (b) planned, instigated or ordered them, (c) aided and abetted those who committed the crimes in the planning, preparation or execution, (d) was a superior to those who committed the crimes, (e) knew or had reason to know such crimes were about to be or had been committed by his subordinates, and (f) failed to take reasonable steps to prevent or punish those acts) [hereinafter *Galić Interlocutory Appeal*]; see also *Prosecutor v. Basogora*, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule 92bis, ¶ 13, Mar. 9, 2004 (noting that “Rule 92bis was primarily intended for ‘crime-base’ evidence.”). The admissibility of written statements relevant only to sentencing and the character of an accused under the ICTR’s procedure however, are considered factors favorable their admission. See ICTR RPE, *supra* note 420, Rule 92bis (e)-(f).

445. See generally *Prosecutor v. Milosević*, Case No. IT-02-54-T (T. Ch.), Decision on Prosecution Motion for the Admission of Transcripts in lieu of *viva voce* Testimony Pursuant to 92bis(D) - Foca Transcripts, ¶ 25, June 30, 2003.

446. See *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on the Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, ¶ 15, Apr. 25, 2005; but see *Galić Interlocutory Appeal*, *supra* note 444, ¶¶ 14-15 (acknowledging that statements otherwise admissible under Rule 92bis may be so “proximate to the accused” that the Chamber may, in the exercise of its discretion, disallow it); see also *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Order Relating to Prosecution’s Applications to Admit Evidence Pursuant to Rule 92bis, ¶ 15, at 2, July, 19 2004 (noting that Rule 92bis is designed to expedite the presentation of evidence within the constraints of a fair trial).

447. See *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

448. See *R. v. Horncastle*, [2009] UKSC 14, [2010] 2 W.L.R. 47, ¶ 36, at 102 (appeal taken from Eng.) (observing that the “CJA 2003 contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be.”).

449. See *id.* ¶ 108, at 124 (remarking that the provisions of CJA 2003 permitting uncross-examined evidence “strike[s] the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general. . . .”).

450. See *supra* Part IV.

prospective one.⁴⁵¹

In this author's estimation, a reasonable position on the admissibility of testimonial hearsay in view of the ICC's procedural framework would be to require the strict application of Article 67(e) and the protections afforded under Rule 68(a) and (b) as a predicate condition of admissibility where any statement, whether formal or informal, comprises a material element of responsibility for the crimes charged, or where such a statement goes to the proof of the acts or conduct of the accused. This effectively would fill the lacunae left by ICTY/ICTR procedure,⁴⁵² address the core considerations of the right to examine—the receipt of inculpatory statements not subjected to cross-examination—and provide the accused with a meaningful ability to challenge crime-base evidence within a definite and predictable analytical framework. At the same time, this would allow for the receipt of relevant background evidence and evidence not materially in dispute, saving considerable time and resources in otherwise extremely lengthy and complex court proceedings.

The desirability of a clear bright-line standard of admissibility in international war crimes trials is further warranted when one considers several salient factors and their potential effect on the fairness of such trials. The most important of these factors are institutional inequality and the application of inapposite international standards.

1. Institutionalised Inequality

As set out in Part III, the principle of equality of arms frames the right to examine as conferred by virtually all modern regional and multilateral treaties subscribing to fair trial rights.⁴⁵³ Article 67 of the Rome Statute imports the language of these instruments wholesale, providing in relevant part that:

- 1) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair

451. See, e.g., *R. v. Horncastle*, [2009] EWCA (Crim) 964, [2009] 2 Crim. App. 15, ¶¶ 68–70, at 39 (appeal taken from Eng.) (aptly observing that “[n]o one can know what evidence is decisive until the decision-making process is over”); *but see Kaste v. Norway*, 48 Eur. H.R. Rep. 45, ¶¶ 53–54, at 58 (2009) (suggesting a prospective standard in stating that “where a deposition may serve to a material degree as the basis for a conviction then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3(d) of the Convention apply.”) (emphasis added).

452. See *Galíe Interlocutory Appeal*, *supra* note 444, ¶ 9 (noting that Rule 92bis differentiates “between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92bis(A) excludes. . . .”).

453. See ICCPR, *supra* note 3, art. 14(3); ECHR, *supra* note 3, art. (6)(3); ACHR, *supra* note 3, art. 8(2); ACHPR Resolution, *supra* note 3, art. 2(E); ICTY Statute, *supra* note 3, art. 21(4); ICTR Statute, *supra* note 3, art. 20(4); Statute of the Special Court for Sierra Leone, art. 17(4), 2178 U.N.T.S. 138, [hereinafter SCSL Statute]; Statute of the Special Tribunal for Lebanon, art. 16(4), S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter, STL Statute]; Rome Statute, *supra* note 3, art. 67(1).

hearing conducted impartially, and to the following minimum guarantees, in full equality . . .

- e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.⁴⁵⁴

Although this language is borrowed, the manner of its application under the procedural regime of the Rome Statute certainly need not be.

Practice, particularly at the *ad hoc* tribunals, has taught that the reality of international trials, like their domestic counterparts, do not always live up to normative notions of equality. In fact, great institutional disparity between an accused and the prosecution is inherent in the distribution of power contemplated by the respective organic statutes of international courts. For this reason, several of these institutions provide dedicated offices designed to safeguard defense rights during the course of criminal proceedings.⁴⁵⁵ Nevertheless, at least one commentator has observed, “the lack of strong defence institutions in the Rome Statute (following the texts of the Statutes of the *ad hoc* tribunals in this respect) makes the inequality of arms between prosecution and defense more striking.”⁴⁵⁶

The *ad hoc* tribunals’ interpretation and application of the principle of equality of arms as a procedural mechanism further underscores certain practical weaknesses that affect the fairness of trials.⁴⁵⁷ Indeed, little attention has been paid to the very real question of the *substantive* inequal-

454. See Rome Statute, *supra* note 3, art. 67(1)(e).

455. See SCSL RPE, *supra* note 420, Rule 45 (creating the Office of the Principal Defender); International Criminal Court, Regulations of the Court, Doc. ICC-BD/01-01-04, Reg. 77 (May 26, 2004) (providing for an “Office of Public Counsel for the Defence.”).

456. See Kenneth S. Gallant, *Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might Be Done About One of Them*, 14 CRIM. L.F. 317, 327 (2003); see also HUMAN RIGHTS WATCH, WORLD REPORT 2003 231-32 (2003) (observing that “[w]hile prosecutors included experienced international criminal lawyers from the [Serious Crimes Investigation Unit], the defense was provided by staff members from East Timor’s drastically under-resourced and inexperienced Public Defenders’ Office . . . [n]either the East Timorese nor the international defenders had any previous experience in crimes against humanity trials.”) (emphasis added).

457. See Masha Fedorova et al., *Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings* 15 (Institute for International Law Working Paper No. 27, 2009); see also Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶¶ 48-49, July 15, 1999 (noting that “there is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses.”). Although *Tadić* implied that the obligation of the Trial Chamber should be liberally construed, the true procedural underpinnings in the practical application of the principle of equality of arms were interpreted and followed in Prosecutor v. Nahimana, which noted that the defense “had ample opportunity and resources to defend the Accused under the same *procedural conditions* and with the same procedural rights as were accorded to the Prosecution.” Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, ¶ 16, June 5, 2003 (emphasis added); see also Prosecutor v. Clément Kayishema, Case No. ICTR-95-I-A, Judgment, ¶ 69, June 1, 2001 (observing that equality of arms does not require an equality of resources among the parties).

ity that exists between parties.⁴⁵⁸ As such, some commentators reasonably question whether it is ever possible to put the defense on equal footing with the prosecution in terms of means and resources.⁴⁵⁹ Unsurprisingly, the ICC's Pre-Trial Chamber "I" observed that it is "impossible to create a situation of absolute equality of arms."⁴⁶⁰ Thus, at least in a normative sense, it would seem clear that the procedural and substantive guarantees available to a given accused must not only be interpreted broadly, but applied as robustly as possible in international criminal tribunals since, after all, "[the right of an accused to a fair hearing in full equality] is a right specifically attributed to the defendant and not to any party to the proceedings."⁴⁶¹ Further, the ICC's Trial Chamber "I" has acknowledged that ICC cases will present

infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling—for credible reasons—to give evidence.⁴⁶²

Such cases will thus require a genuine right of confrontation.

Substantive disadvantages to an accused further obtain as the result of certain constraints concerning material aspects of trial preparation. The investigation and compulsion of evidence are particularly problematic areas, which require a vital compensatory right of examination. For instance, the prosecution may secure a substantial advantage over an accused in being able to obtain the cooperation of states and the use of sensitive material that a state would simply never make available to a given accused for any number of perfectly valid reasons.⁴⁶³ This may substantially compromise an accused's ability to materially rebut or refute inculpatory evidence. Clearly, therefore, the fact that the principle of equality in human rights law may have to be balanced against these types of competing interests means that the procedural mechanisms designed to protect an accused's substantive rights must also seriously take them into account.⁴⁶⁴

458. See Gabrielle McIntyre, *Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia*, 16 LEIDEN J. INT'L L. 269, 272 (2003).

459. See John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial-Inquisitorial Dichotomy*, 7 J. INT'L CRIM. JUST. 17, 26–27 (2009).

460. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Defence's Request to Obtain Simultaneous French Transcripts, ¶18 (Dec. 13, 2007) [hereinafter Lubanga Decision of Dec. 13].

461. ZAPPALA, *supra* note 9, at 113.

462. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, ¶ 24, (June 13, 2008).

463. See ICTY RPE, *supra* note 420, Rule 70; ICTR RPE, *supra* note 420, Rule 70; SCSL RPE, *supra* note 420, Rule 70; Rome Statute, *supra* note 3, art. 54; ICC RPE, *supra* note 419, Rule 82.

464. Fedorova et al., *supra* note 457, at 17 (observing that disclosure obligations may be "counterbalanced by fundamental competing individual or public interests.").

ICC judges have acknowledged that the principle of equality of arms requires that minimum guarantees “must be generously interpreted” in order to safeguard the right to a fair trial.⁴⁶⁵ However, built in to a procedural conception of the principle is the inherent danger that competing interests—even those bearing no relation to the accused’s conduct—can all too easily compromise the right to examine.⁴⁶⁶ The broad participatory right of victims in ICC proceedings is precisely such an area.⁴⁶⁷ Commentators have thus cautioned that the incorporation of the ICC victim’s bill of rights as a core procedural tenet “may adulterate, and ultimately dilute, basic structural due process protections of ICC defendants.”⁴⁶⁸ This may overstate the case somewhat; nonetheless, due process protections are necessarily put at risk where the rights of victims and accused are placed in competition.⁴⁶⁹ The question is whether, in light of the procedural guarantees provided for under Article 67, the right to examine will normatively be accorded priority in view of the nature and gravity of the crimes charged.

2. *Inapposite International Standards*

a. Victim participation

As mentioned above, the extent of victim participation raises genuine questions concerning the substantive equality afforded an accused in ICC proceedings. The Appeals Chamber has confirmed that Article 68(3) of the Rome Statute affords victims the right to participate, *inter alia*, in the trial phase of the proceedings.⁴⁷⁰ While the right of victims to introduce evidence during confirmation hearings is restricted,⁴⁷¹ the evidence that may be led and examined in relation to material aspects of the charges against an accused at trial is quite broad. For example, although the right to present substantive evidence primarily belongs to the defense and prosecution,⁴⁷² the Appeals Chamber has acknowledged that there is no provi-

465. See Lubanga Decision of Dec. 13, *supra* note 460, ¶ 18.

466. See generally Amendments to the Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 44 (Dec. 16, 2009) (amending ICTY RPE in order to provide for the admissibility of written statements of witnesses subject to interference). While this amendment covers culpable behavior by an accused resulting in the unavailability of evidence, it does not exclude from its ambit interference with witnesses caused by sources unrelated to the accused.

467. See Rome Statute, *supra* note 3, art. 68(3) (allowing victims whose “personal interests” are affected to present “their views and concerns”); see also Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT’L L. 777, 796 (2008) (observing that victims have “the same right as the Defence and Prosecution to introduce evidence in ICC proceedings.”).

468. Gordon, *supra* note 12, at 698–99 (citing Alison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 146 (2005)).

469. See Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1437 (2001).

470. Trumbull, *supra* note 467, at 796–97.

471. See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of a Case, ¶¶ 101–03, 110–12, May 13, 2008.

472. Rome Statute, *supra* note 3, art. 69(3).

sion in the Rome Statute or ICC RPE that “preclude[s] the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.”⁴⁷³ The Appeals Chamber has observed that “if victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.”⁴⁷⁴ The extension of such rights at trial thus provides victims with a meaningful right of participation as intended by Article 68(3).⁴⁷⁵

While the extension of victim participatory rights does not necessarily entail a correlative reduction in the protection afforded an accused, it clearly raises the possibility. Insofar as the guarantees provided under Article 67(e) emerge from an Adversarial modality, there is a serious question as to whether, as applied, it can adequately accommodate victims’ participatory interests without substantively undermining those of the defense. ICC Appeals Chamber Judge Pikis observes that the participation of victims envisioned under Article 68(3)

has no immediate parallel to or association with the participation of victims in either the common law system of justice as evolved in England and Wales, where no role is acknowledged to victims in criminal proceedings except for the right to initiate a private prosecution, or the Romano-Germanic system of justice, where victims in the role of civil parties or auxiliary prosecutors have a wide-ranging right to participate in criminal proceedings.⁴⁷⁶

In this sense, the right to examine does not contemplate the substantial participation of victims. Indeed, as a precursor of Article 67(e), Article 6 of the European Convention reflects this position as well, particularly insofar as it contains no explicit requirement that the interests of victims be taken into consideration.⁴⁷⁷ As such, the emergent rules are calculated to safeguard these interests within a procedural paradigm which subsumes an adversarial right to examine within the broader context of the burden of proof which limits confrontation to the evidence adduced by the prosecution.⁴⁷⁸ As an element of fundamental fairness, the principle of equality of arms in view of the burden of proof further requires that an accused cannot be compelled to confront more than one accuser— “[h]olding the scales

473. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-925 OA9 OA10, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶ 94 (July 11, 2008) [hereinafter *Appeals Judgment on Victims’ Participation*].

474. *Id.*

475. *Id.* ¶ 97.

476. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-925 OA8 (Appeals Chamber), Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, Separate Opinion of Judge Georgios M. Pikis, ¶ 11 (June 13, 2007) (internal citations omitted) [hereinafter *Pikis Separate Opinion*].

477. See *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 70, at 470.

478. *Pikis Separate Opinion*, *supra* note 476, ¶ 18.

even between the parties with the burden of proof cast upon the Prosecutor rules out a second accuser.”⁴⁷⁹

Given that the ICC’s procedural framework leaves both the substance and scope of a victim’s participation exclusively within the discretion of the Court,⁴⁸⁰ the adequacy of the protection afforded an accused’s right to examine is at best uncertain, as it is determined on a case-by-case basis. Further, requiring “[vigilance] in safeguarding the rights of the accused . . . [taking] into account, *inter alia*, whether the hearing of such evidence would be appropriate, timely or for other reasons should not be ordered,”⁴⁸¹ is hardly a concrete analytical mechanism by which core fair trial rights may be reliably safeguarded.

It is difficult to imagine how the broad participatory rights of victims—which will likely run contrary to the interests of an accused—can avoid having a significant impact on the balance of equities between the prosecution and defense, such that the extant due process mechanisms that support the ICC’s procedural framework can be applied, as they would be in the absence of any such third-party intervention.

b. Incongruity of the teleological approach

The two principle considerations that underlie the teleological approach taken by the UNHRC and European Court concerning the scope of the right to examine are dictated by necessity: first, the establishment of a flexible analytical framework capable of accommodating divergent cultural and legal systems and second, the establishment of an international consensus on minimal standards of fairness.⁴⁸² However, both of these considerations are extraneous to the fundamental objectives of the Rome Statute.

As set out above, the European Court (similarly to the UNHRC) considers that:

the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is *not to give a ruling as to whether statements of witnesses were properly admitted as evidence*, but rather to ascertain whether the proceedings as a whole, including the way in

479. *Id.* ¶ 19.

480. Appeals Judgment on Victims’ Participation, *supra* note 473, ¶ 86 (noting that “victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the determination of the truth, and if in this sense the Court has ‘requested’ the evidence.”) (quoting Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation, Jan. 18, 2008, ¶ 108); *see also id.* ¶ 95 (providing for the exercise of participatory right “at stages of the proceedings determined to be appropriate by the Court.”).

481. Appeals Judgment on Victims’ Participation, *supra* note 473, ¶ 100.

482. *See generally* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L. J.* 273 (1997) (discussing the problems involved in integrating diverse national legal systems into a supranational one); Kate Kerr, Note, *Fair Trials at International Criminal Tribunals: Examining the Parameters of the International Right to Counsel*, 36 *GEO. J. INT’L L.* 1227 (2005) (discussing problems in maintaining basic standards of fairness in international criminal tribunals).

which the evidence was taken, were fair.⁴⁸³

Unlike the European Court, the ICC is neither designed, nor bound, to defer to the evidentiary rules and standards of any other jurisdiction. Contrary to the ICCPR and ECHR, the ICC is expressly required to interpret and apply its own statute and procedural rules pursuant to a uniquely established hierarchy.⁴⁸⁴ Although in many respects these rules mirror those of other international jurisdictions, they are nevertheless distinct within the Court's homogenous framework. Moreover, they are at least presumably calculated to achieve the *highest* standards of procedural and substantive fairness—as opposed to the merely *minimum* consensus-led safeguards that are designed to embrace widely-divergent systems under the ICCPR and European Convention. Thus, although a broad-based teleological approach to the right to examine may be explainable, and indeed justifiable, in crafting a manageable approach to assess diverse legal traditions, the rationale for following this approach and its derivative rules in a unitary system does not hold.

Furthermore, the ICC's unique procedure supports the adoption of an admissibility analysis that focuses specifically on the values and standards expressed in the ICC RPE and the Rome Statute as normative deontological objectives. Article 21 of the Rome Statute establishes an arguably *sui generis* hierarchy concerning the law applied by the Court,⁴⁸⁵ providing amongst other things for the application of the "Statute, Elements of Crimes and its Rules of Procedure and Evidence" and requiring that "the application and interpretation of law . . . must be consistent with internationally recognized human rights."⁴⁸⁶ This, of course, does not mean that the implementation of these rights must be co-extensive with the minimum safeguards established under the ICCPR and European Convention. Rather, the Court's authority to interpret its own statute and procedure readily distinguishes its purpose from that of the UNHRC and European Court, and affords the Court the ability to depart from the dogma underlying these minimal protections and to more fully protect the adversarial examination of witnesses as a core right of its own importance.

483. *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446, ¶ 67, at 470 (emphasis added); *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 50, at 711; *P.S. v. Germany*, App. No. 33900/96, ¶ 19, Dec. 20, 2001, <http://www.bailii.org/eu/cases/ECHR/2001/884.html>; see also *Teixeira De Castro v. Portugal*, 1998-IV Eur. Ct. H.R. 1451, ¶ 34, at 1462; *Allan v. The United Kingdom*, 2002-IX Eur. Ct. H.R. 41, ¶ 42, at 55.

484. Rome Statute, *supra* note 3, art. 21.

485. See Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 286-87 (Carsten Stahn & Göran Sluiter eds., 2008).

486. Rome Statute, *supra* note 3, art. 21(1) (providing further that the court must apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.") (emphasis added).

c. The nebulous ‘decisive extent’/‘considerable weight’ standard

As set out above, the doctrine of the European Court regarding the right to examine permits a court to take full account of evidence subjected to neither confrontation nor cross-examination, provided a conviction is not based solely or to a decisive extent thereupon.⁴⁸⁷ Similarly, the UNHRC proscribes convictions in which statements not subjected to cross-examination are given “considerable weight.”⁴⁸⁸ As there has yet to be a conviction before the ICC, it remains unclear whether the Court will adopt either of these standards. Nevertheless, both present at least two fundamental problems. First, there is a definitional issue: how extensive must reliance be to qualify as a ‘decisive’? Or how much weight amounts to ‘considerable weight’?⁴⁸⁹ Second, these standards are necessarily retrospective and thus more suitable for a standard of review, rather than service as a standard of prospective admissibility at trial.

The European Court has captured the notion of decisive evidence in a variety of ways, such as, evidence having “decisive importance for the legal characterization of the offence;”⁴⁹⁰ evidence upon which a conviction is “based mainly;”⁴⁹¹ or evidence which has “played a part establishing the facts which led to the conviction.”⁴⁹² Still other cases have found violations of Article 6 where a conviction is “solely or to a decisive degree” based on statements not subjected to cross-examination.⁴⁹³ This shows that the Court’s jurisprudence does not establish any clear threshold beyond which a conviction becomes impermissibly based on testimony not subjected to cross-examination, excepting the rare situation where such evidence is indeed the sole evidence supporting a conviction. Relatedly, to this author’s knowledge, the Court has never found trial proceedings to be fair when the accused has been unable to test, however defined, the ‘sole’ or ‘decisive’ evidence underpinning a conviction. Nevertheless, while this ambiguity may reflect the Court’s need to further define minimum standards of fairness applicable across diverse procedural systems, the current standard plainly suffers from the same substantive shortcomings as those

487. See Law Comm’n for Eng. & Wales, Evidence in Criminal Proceedings: Hearsay and Related Topic, Law Com. No. 245, ¶ 5.24, at 64 (1997) (observing that “although Article 6(3)(d) puts limits on the extent to which the prosecution may make use of hearsay evidence, nothing in Article 6 restricts the use of hearsay evidence by the defence.”).

488. See ICCPR, *supra* note 3, art. 14(3)(e); *Makeyev v. Russia*, App. No. 13769/04, ¶¶ 34–36, Feb. 5, 2009.

489. For a similarly malleable standard in the American context, see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (articulating the famous “I know it when I see it” standard of review in respect of determining the scope of an obscenity statute).

490. *Makeyev*, App. No. 13769/04, ¶ 43.

491. *Unterpertinger v. Austria*, 110 Eur. Ct. H.R. (ser. A), ¶ 33, at 15 (1986).

492. *Lüdi v. Switzerland*, 238 Eur. Ct. H.R. (ser. A), ¶ 47, at 21 (1992); see also *Taxquet v. Belgium*, App. No. 926/05, ¶65, Jan. 13, 2009, (articulating Lüdi’s corroboration requirement, conversely as “whether the conviction is based to a significant extent on other evidence not derived from anonymous sources.”) (emphasis added).

493. *Sadak v. Turkey* (no. 1), 2001 Eur. Ct. H.R. 267, ¶ 65, at 285–86 (emphasis added).

recognized in *Crawford*'s criticism of *Ohio v. Roberts*; namely that a framework based upon amorphous criteria that is unpredictable fails to provide meaningful protection from even core confrontation violations.⁴⁹⁴

The fact that the European Court will not permit a conviction to stand where uncross-examined or untested hearsay is 'decisive' to a given conviction is of little assurance to an accused insofar as "the court will not find that a trial was unfair simply because hearsay evidence was *most likely a major factor* in the defendant's conviction."⁴⁹⁵ Indeed, it is not a stretch to conclude that the mere fact that a court may take account of testimony not subjected to cross-examination "will always be because the court considers it a 'decisive' part of that evidence."⁴⁹⁶ In this sense, the standard is at best extremely difficult and impractical to apply and assess. As a prospective standard of admissibility, it would imply that every piece of hearsay evidence would have to be evaluated to determine if it *could* be dispositive (whether decisively or solely)—a clearly difficult, impractical and unpredictable endeavor.⁴⁹⁷ On the other hand, as a standard of review, it may very well be impossible to determine whether a particular statement was truly decisive or given considerable weight in establishing a conviction in the face of a well-reasoned decision claiming precisely the opposite.

d. Devaluation of the impact of crime-base and background evidence

The decisive extent rule, like that of the *ad hoc* tribunals prohibiting acts or conduct evidence, undervalues the impact of crime-base evidence in international war crimes trials. While as a general proposition, the more crucial evidence is to the guilt of an accused, the more carefully a court must account for its reliability and its fair adduction at trial, crime-base or background evidence—even that necessary to establish liability—tends to be an exception. Hearsay is regularly admitted to establish fundamental elements of international crimes, while so-called linkage evidence establishing the responsibility of the accused tends to be more carefully scrutinized.⁴⁹⁸ However, inasmuch as considerable or decisive evidence may carry a risk of unreliability and thus require testing through confrontation, there is no particular reason why evidence that is not decisive or considera-

494. See *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

495. Conor Mulcahy, *Unfair Consequences: How the Reforms to the Rule Against Hearsay in the Criminal Justice Act 2003 Violate a Defendant's Right to a Fair Trial Under the European Convention on Human Rights*, 28 B.C. INT'L & COMP. L. REV. 405, 423 (2005) (citing Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPAC L. REV. 777, 791 (2003)).

496. *Van Mechelen v. The Netherlands*, 1997-III Eur. Ct. H.R. 691, ¶ 10, at 724 (Van Dijk, J., dissenting).

497. See *R. v. Horncastle*, [2009] EWCA (Crim) 964, [2009] 2 Crim. App. 15, ¶ 69, at 39 (observing that identifying which hearsay evidence is the sole evidence in a case in advance may not be initially clear, as proffered corroborative evidence may successfully be challenged, and that conversely, evidence that stands alone may come to be supported by evidence during trial).

498. See generally Jackson, *supra* note 459, at 28-33 (2009) (discussing the admissibility of evidence in international criminal tribunals, including the "crime base" and "conduct of the accused" evidence).

ble is any less risky, or why testing through confrontation is any less necessary. The importance that a statement not subjected to cross-examination has to a conviction is distinct from its reliability, and it is reliability to which the right of examination essentially attends.

e. The corroboration requirement

Although the decisive extent standard requires the corroboration of dispositive evidence that has not been subjected to cross-examination in order to sustain a conviction,⁴⁹⁹ this too is insufficiently defined. Similarly to the European Court, the ICTY holds that convictions cannot be based solely or in a “decisive manner” on witness depositions concerning the accused’s acts or conduct in the absence of an opportunity to examine or have examined such witnesses during the investigation or at trial, unless such depositions are otherwise corroborated.⁵⁰⁰

In the contempt case of *Haraqija and Morina*,⁵⁰¹ the accused and another were convicted of contempt of court for intimidating a witness in another case. Haraqija’s conviction was based upon the statements of his co-accused, who claimed, *inter alia*, that Haraqija had directed him to prevail upon a witness not to testify against Haraqija.⁵⁰² To the extent that Haraqija’s conduct was found to be an integral part of the conduct of his co-accused in intimidating the witness,⁵⁰³ the Trial Chamber found Haraqija guilty of contempt.⁵⁰⁴

On appeal, Haraqija argued that the dispositive evidence against him—a statement given by his co-accused to the office of the prosecutor implicating Haraqija in the conduct subject to the contempt proceeding—should not have been admitted.⁵⁰⁵ The statement was admitted at trial even though his co-accused refused to testify.⁵⁰⁶

In its judgment, the Trial Chamber found the co-accused’s statement to be sufficiently corroborated by an intercepted conversation involving the co-accused, in which the co-accused told the witness that he had been sent by Haraqija.⁵⁰⁷ The defense challenged this evidence, arguing that the corroboration relied upon by the Trial Chamber was in fact derived from the same source—a source not subjected to cross-examination—and thus could not legally support the conviction consistently with Haraqija’s right to

499. See Kirst, *supra* note 257, at 796–97.

500. See *Prlić Appeal*, *supra* note 253, ¶¶ 41, 53; see also *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, ¶ 12, Sept. 14, 2006; *Prosecutor v. Popović*, Case No. IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin’s Questioning, ¶ 48, Dec. 14, 2007.

501. See *Prosecutor v. Astrit Haraqija*, Case No. IT-04-84-R77.4, Judgement, Dec. 17, 2008 [hereinafter *Haraqija Trial Judgement*].

502. *Id.* ¶ 6.

503. *Id.* ¶¶ 60, 100, 102.

504. *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, Judgment, ¶ 5, July 23, 2009 [hereinafter *Haraqija Appeal Judgement*].

505. *Id.* ¶¶ 17–19.

506. *Id.*

507. *Haraqija Trial Judgement*, *supra* note 501, ¶ 13.

examine.⁵⁰⁸ Indeed, the Trial Chamber determined that corroborating evidence in this context “may include pieces of evidence that, although originating from the *same source*, arose under different circumstances, or at different times and for different purposes.”⁵⁰⁹

While the Appeals Chamber determined that the Trial Chamber erred in placing decisive weight on the testimony of Haraqija’s co-accused, it held so not because it considered that corroboration sufficient to sustain a conviction may not be derived from other evidence not subject to cross-examination; instead, it held as it did because of the Trial Chamber’s failure to ascribe the appropriate weight to certain ambiguities and deficiencies found in the account of the co-accused.⁵¹⁰

In the *Haraqija* case, the Appeals Chamber appears to have reached the right result. However, in applying the prescribed ICTY standard to ICC proceedings, the inherent danger to the right to examine is plain. Moreover, it speaks directly to the difficulties inherent in an essentially adopted international standard, in this case resulting in the suggestion that a declarant’s prior statements which had not been subjected to cross-examination can be used as corroboration of later statements that are similarly uncontested, even if such later statements substantially underlie or decisively determine a given conviction.

Even if uniformly applied, the requirement of corroboration as it stands is still deficient in as much as the presence of corroborating evidence does not necessarily mean that a conviction is not, or indeed could not be, based to a decisive extent on the untested evidence.⁵¹¹ In this sense, the scope of the right to examine ultimately turns upon an impractical and difficult fact-intensive *ad hoc* review of the evidence which, although arguably appropriate as a minimum standard of review of the fairness of trials among diverse legal systems, should have no plausible application to ICC trials.

Conclusion

Transplanted legal concepts such as the right to examine cannot be expected to carry the same import or to achieve the same goals as those contemplated within their original procedural framework. The character of a given legal culture manifests a blend of procedure and substance which, although not simple equivalents, are “ultimately . . . inseparable, and will be misunderstood if analyzed as distinct.”⁵¹²

508. *Id.* ¶¶ 21–22.

509. *Id.* ¶ 41 (emphasis added); cf. Spencer, *supra* note 175, at 259 (observing that Article 6 of the ECHR precludes dispositive hearsay evidence “unless it was corroborated by some other significant piece of evidence, to which the same objection cannot be made.”).

510. Haraqija Appeal Judgement, *supra* note 504, ¶¶ 65–68.

511. See Haraqija Trial Judgement, *supra* note 501, ¶ 24.

512. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 80 (2001).

Because the right to confront or examine generally proceeds from a matrix of complementary procedural and substantive considerations primarily within the Adversarial tradition, its hybridization into the procedures of the ICC warrants careful consideration of the constituent elements necessary to maintain its purpose and effectiveness. Safeguarding the right in such circumstances necessarily entails a reliable and consistent approach to the interpretation of relevant procedural rules. Nebulous analytical standards that circumscribe the right to examine render it all the more susceptible to the weaknesses which attend hybridization, particularly in the absence of an equivalent complement of procedural safeguards normally present in the original legal setting thereof.⁵¹³

As an institution, the ICC must share in the broad expectation that it “fully respect internationally recognized standards regarding the rights of an accused at all stages of its proceedings.”⁵¹⁴ It should command no less esteem than that hoped for in the creation of other international tribunals, namely to “establish itself as the preeminent defender of human rights and particularly the right of every accused to a fair trial according to the most exacting standards of due process required by contemporary international law.”⁵¹⁵ So far as “[t]he provisions of the Rome Statute and the practice of the international tribunals require [international] courts to aspire to the highest standards set by international human rights treaties, customary international law, and general principles of law,”⁵¹⁶ the rights of the accused to a fair trial should never be regarded as either ancillary or mediate.

Like the Rome Statute, the London Charter—which established the International Military Tribunal in Europe after World War II—also provided for a right of examination.⁵¹⁷ However, the International Military Tribunal’s application of this right was pointedly criticized because of the extensive use of *ex parte* affidavits in contravention of an accused’s ability to effectively confront witnesses and evidence.⁵¹⁸ In this context, and in

513. Examples of such nebulous standards include the American “sufficient indicia of reliability” test, *Ohio v. Roberts*, 448 U.S. 56, 68 (1980), and the European Court’s “decisive extent” test, *Doorson v. The Netherlands*, 1996-II Eur. Ct. H.R. 446 ¶ 76, at 272.

514. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993) (referring to the establishment of the ICTY).

515. Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT’L L. 235, 237 (1996).

516. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT’L L. 111, 117 (2002).

517. Charter of the International Military Tribunal, § IV, art. 16(e), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (providing that “[a] Defendant shall have the right through himself, or through his Counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.”); cf. International Military Tribunal for the Far East, § III, art. 9(d), Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (providing that the right to a fair trial is subject to “such reasonable restrictions as the Tribunal may determine.”).

518. See Amann, *supra* note 55, at 819–20 (2000) (noting that the London Charter’s protections were minimal and that contrary to Article IV, defendants did not receive fair

view of the fact that “[t]he Rome Statute does not contain any categorical prohibitions or restrictions on the introduction of affidavit testimony,”⁵¹⁹ it is extremely important that ICC proceedings infuse the right to examine with real substance. Indeed, its application must be more than a nod in the right direction wholly dependent upon the best intentions of international judges.

Because the use of affidavit and transcript evidence is, and will remain, a fundamental part of international criminal procedure, Article 67(1)(e) cannot merely aspire to the acceptable *minimal* international standards. Instead, it must reliably ensure a meaningful and predictable opportunity for an accused to adversarially examine trial witnesses. If we proceed upon the premise that the process of determining the guilt or innocence of an accused is no less important than its result, it is easy to see why a well-defined right to confrontation best approximates fairness within the context of the ICC’s hybridized procedure, and provides the most effective way to fulfill the normative objective of testing the reliability of evidence before the court. A bright-line standard of admissibility provides the clarity, predictability, and regularity needed for international proceedings to live up to the adage that “[a] vigorous, unintimidated, knowledgeable defense is the *sine qua non* of a fair trial.”⁵²⁰

trials). See generally M. CHERIF Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 408 (2003) (acknowledging that procedural rights afforded by the Nuremberg Tribunal were “quite limited”); ZAPPALA, *supra* note 9, at 18 (noting the heavy use of affidavits and depositions without confrontation).

519. DeFrancia, *supra* note 469, at 1430.

520. Patricia M. Wald, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 102 (2001).