GUILTY UNTIL PROVEN GUILTY: RULE 61 OF THE ICTY

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ABSTRACT

The following article critiques the pre-trial procedure of the International Criminal Tribunal for the Former Yugoslavia, (ICTY) a topic of great significance at the moment, as the trial of Radovan Karadzic, one of the ICTY's most well-known fugitives, has recently commenced in the Hague. This article argues that the ICTY's Rule 61 procedure, which an absent Karadzic was subject to over ten years

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ago, severely degrades the defendant's right to a fair trial in two ways. First, it effectively functions as a trial in absentia, contravening the ICTY statute and depriving the defendant of the right to be present at trial. Secondly, Rule 61 procedure degrades the defendant's right to a public trial by limiting the public's ability to control judicial proceedings, a central purpose of a public trial.

Rule 61 procedure was the result of a compromise between the civil and common law countries that created the ICTY, the former advocating for the Tribunal's adoption of the trial in absentia, the latter urging to keep it out. An agreement was reached with Rule 61, which allowed for a functional equivalent of the trial in absentia when the defendant could not be apprehended. This procedure is different from the traditional trial in absentia, as it does not produce a final, binding verdict; instead, the defendant is re-tried upon extradition to the ICTY.

Rule 61 is a novel pre-trial procedure that is not utilized in any other court, either at the national or international level. Unfortunately, this unique procedure significantly infringes on the aforementioned due process rights of the defendant, mainly by acting like a trial in absentia without the necessary protections of such a trial. I propose that Rule 61 should either be changed to better accommodate the defendant's rights by allowing defense counsel participation, or should be eliminated from use in the ICTY. Furthermore, Rule 61 should not be used as a template for future international criminal tribunals. It should be noted that this topic is particularly significant because Radovan Karadzic is the first Rule 61 defendant to be apprehended and tried, and it is unclear how the findings and witness testimony of his Rule 61 hearing will be used at trial.

I. INTRODUCTION

Radovan Karadzic. To say that this name carries a negative connotation is to understate the monstrous reputation of this former Yugoslavian political leader. Nearly two years ago, as news of Karadzic's arrest saturated the media, this christened "Butcher of Bosnia," became well known even among those with minimal interest in international politics.[1] But for those familiar with world affairs, Karadzic's name has long been inseparable from discussions of the Yugoslav wars and the International Criminal Tribunal for the Former Yugoslavia (ICTY). The public's understanding of Karadzic has in large part been formed through Rule 61 of the ICTY Rules of Procedure and Evidence, which, in effect, allows the Court to conduct the equivalent of a trial in absentia when an arrest warrant does not yield the apprehension of the alleged war criminal.[2] Although this trial does not produce a final, binding verdict, it allows for the issuance of an international arrest warrant upon the determination that "there are reasonable grounds for believing that the accused has committed all or any of the crimes in the indictment."[3]

While the use of Rule 61 has allowed the Court to put greater pressure on countries to extradite alleged war criminals (thereby supposedly increasing the Court's efficiency and relevance in international law), it has significantly diminished the due process rights of those on trial at the ICTY.[4] It has done this mainly by heavily publicizing the findings[5] of the Rule 61

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[1] *Karadzic: Psychiatrist Turned 'Butcher of Bosnia*,' CNN.COM, *available at* http://www.cnn.com/2008/WORLD/europe/07/22/karadzic.profile/index.html [hereinafter *Butcher of Bosnia*].
[2] *See* Mark Thieroff & Edward A. Amley Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231, 259 (1998).
[3] *Id.* at 237.
[4] *See* Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 682-83 (2007).
[5] *See* Faiza Patel King, *Public Disclosure in Rule 61 Proceedings Before the International Criminal Tribunal for the Former Yugoslavia*, 29 N.Y.U. J. INT'L L. & POL. 523, 552 (1997).

hearing, which, though similar to a trial in absentia, lacks the important element of defense counsel participation.[6]

This Note will examine Rule 61 procedure and its effect on the following due process rights of an ICTY defendant: (1) the right to be tried in his presence, and (2) the right to a public trial. With regard to the first point I will argue that Rule 61 contravenes the ICTY statute by functioning as a prohibited trial in absentia. Moreover, by calling itself something other than a trial in absentia, Rule 61 appears less menacing than its traditional counterpart, and consequently provides its defendant with less protection. My second argument examines the Rule's effect on the defendant's right to a public trial. The Rule significantly diminishes the defendant's right to a public trial by limiting the public's ability to control judicial proceedings. Based on the aforementioned defects of Rule 61, this article concludes that a guilty verdict should not be enforced where Rule 61 has been utilized. Furthermore, this Note argues that Rule 61 should either be changed to allow for defense counsel participation, or abandoned entirely in the context of international criminal law.

In reaching its conclusion this Note will first discuss the ICTY's purpose and place in the international criminal system, with an emphasis on the Tribunal's ability to render impartial justice. Section III will examine trials in absentia and the hybrid nature of the ICTY. Section IV will consider Rule 61 of the ICTY Rules of Procedure and Evidence. Section V will provide background on the centuries old right to a public trial with an emphasis on the importance of judicial oversight through public scrutiny. Section VI will examine the limitations of Rule 61 on the defendant's right to a fair and public trial. Section VII will argue that defendant Radovan Karadzic cannot receive a fair trial at the ICTY because of the Tribunal's pre-trial use of Rule

[6] *Id.* at 543.

61. Section VIII will briefly discuss the Rule's effect on the ICTY and International Law. In conclusion, this Note will offer a solution whereby the ICTY would either completely eliminate Rule 61 hearings, or in the alternative, make the proposed changes necessary to better accommodate the rights of the defendant.

II. THE BIRTH OF AN INTERNATIONAL TRIBUNAL

A. The Yugoslav Conflict & the ICTY

The Yugoslav war drama unfolded in the early nineteen-nineties,[7] on the historically tumultuous Balkan peninsula. Its main characters, the members of rival ethnic and religious groups, fought a bloody war over the soon to be carcass of the Socialist Federal Republic of Yugoslavia (FRY).[8] The Republics of Slovenia and Croatia were the first to declare independence from the FRY, marking the war's beginning.[9] The conflict ultimately gave rise to six new states: Serbia, Montenegro, Croatia, Bosnia-Herzegovina, Slovenia, and Macedonia[10] *and* a heap of dead and displaced. All sides took part in various illegal acts under international law, including the "torture and relocation of civilians . . . ethnic cleansing . . . [and] illegal imprisonment . . . ."[11]

The ICTY was set up by the United Nations Security Council as an ad hoc tribunal adjudicating violations of international humanitarian law that occurred on the territory of the

[7] *See* Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 389-90 (1998).
[8] *Id*. at 387-90.
[9] *Id*. at 389.
[10] *Id*. at 387.
[11] *Id*. at 389-90.

former Yugoslavia since 1991.[12] It is the first international attempt, since World War II, to adjudicate violations of humanitarian law.[13] Its predecessors, the Nuremberg and Tokyo tribunals,[14] were criticized for failing to provide adequate due process rights and imparting a "victor's justice," on the losers of World War II.[15] Due to the lackluster legacy of the international tribunal, it is not surprising that the ICTY has taken pains to forge a different path, vehemently opposing allegations of a "victor's justice,"[16] and insisting on its commitment to the rights of the accused.[17]

B. An Independent Court?

Despite the Tribunal's insistence on distinguishing itself from Nuremberg and Tokyo, it has fallen prey to many of the same criticisms, such as failure to provide the due process protections of a fair trial.[18] Although its advocates consider it a "breakthrough in humanitarian law,"[19] its opponents argue that this hastily conceived tribunal, opened "less than a year from its inception,"[20] suffers from institutional and other defects that limit its ability to be truly impartial and independent.[21]

i. Structural Defects in the Creation of the ICTY

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[12] *See* Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111, 135 (1998).
[13] Thieroff & Amley, *supra* note 2, at 232.
[14] *See* Note, *Fair Trials and the Role of International Criminal Defense*, 114 HARV.L. REV. 1982, 1982-83 (2001) [hereinafter *Fair Trials*]. Antonio Cassese, the first President of the Tribunal, stated that "[t]he statute and the rules [indicate] a conscious effort to avoid some of the oft-mentioned flaws of Nuremburg and Tokyo." Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L. J. 47, 51-52 (2003).
[15] *See Fair Trials*, *supra* note 14, at 1982.
[16] *See* Anne L. Quintal, *Rule 61: The "Voice of the Victims,"* 36 COLUM. J. TRANSNAT'L L. 724, 724 (1998).
[17] *See Fair Trials*, *supra* note 14, at 1982-83.
[18] *Id.* at 1983
[19] Henri Astier, *Rights of the Despised*, THE AM. PROSPECT, (Aug. 14, 2000), *available at* http://www.prospect.org/cs/articles?article=rights_of_the_despised.

[20] Johnson, *supra* note 12, at 116. There was a great deal of pressure on the "major powers… to 'do something' about the wars in the former Yugoslavia." *See* Astier, *supra* note 19.
[21] Johnson, *supra* note 12, at 115.

The ICTY's lack of independence from the forces that gave it life is a limitation on its ability to fairly adjudicate.[22] This lack of independence becomes evident when considering the basic framework of the international system and the Tribunal's place within it. The ICTY is a creation of the U.N, which has been compared to a world government, within which the "General Assembly, Security Council and Secretariat [are the] superficial counterparts to the legislative and executive branches" in domestic governments.[23]

Unfortunately, in the world government system, both the legislative and executive branches have too much influence on the judiciary, here the ICTY. First, the ICTY is dependent on the Security Council for funding,[24] and the members of its judiciary are selected with significant input from the Security Council, whose President supplies the General Assembly of the United Nations with a list of judges from which to make its selection.[25] This relationship with the Security Council has led scholars to criticize the control that organ wields over the ICTY, thereby questioning its potential for independence.[26]

ii. Political & Other Pressures Limiting the ICTY's Impartiality

The ICTY has been criticized both for its dependence on funding and its susceptibility to political pressures."[27] Scholars note that the Tribunal has been under intense political pressure from its very formation.[28] Even its supporters "argue[ ] that the main drawback of ad hoc

[22] *Id*. at 192.
[23] *Id*. at 113.
[24] *The International Criminal Court: American Concerns About an International Prosecutor,* CANADIAN LIBRARY OF PARLIAMENT, http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0211-e.pdf.
[25] Fairlie, *supra* note 14, at 57.
[26] *See* Daniel J. Brown, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763, 770 (1999).
[27] Fairlie, *supra* note 14, at 57-59 (citing Bruce Zagaris, *U.S. Congress Has Oversight Hearing on International War Crimes Tribunals*, 18 INT'L ENFORCEMENT L. REP. 169, (2002).
[28] Johnson, *supra* note 12, at 113.

tribunals is that they are inherently political and selective by virtue of their method of establishment . . . ."[29]

It is noted that these political pressures stem from expectations resulting from the Security Council's initial inability to resolve the conflict in the former Yugoslavia.[30] These early failures have led to heightened expectations of getting it right the second time around,[31] by rendering justice to the victims of a war it had been unsuccessful in mediating.[32] Interestingly, some scholars claim that in the eyes of the Security Council, "justice" at the ICTY is conviction, as it produces "visible success."[33]

Considering the financial and other control that the Security Council exerts over the Tribunal, it is reasonable that the ICTY would not be indifferent to the desires of that UN organ, including pursuing the Security Council's conception of "success." One scholar has noted:

> [I]t is difficult to maintain that outside wishes and interests, be they attributed to the form of a U.N. organ, an individual state, or even the international community at large, fail to influence the activities of the Tribunal….[S]uch entities are capable of wielding their power in the realm of judicial decision making….[34]

Consequently, the Security Council is only one of the many forces that exert an influence on the Tribunal.

The ICTY itself has admitted to being affected by "outside entities,"[35] many of which fall under the broad umbrella of the international community.[36] They include the General

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[29] RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 175 (2004).
[30] Johnson, *supra* note 12, at 113.
[31] *Id.*
[32] *Id.* at 191-92.
[33] *Id.* at 191, 114.
[34] Fairlie, *supra* note 14, at 59.
[35] *Id.*
[36] *Id.* at 60.

Assembly of the United Nations and the "court of public opinion."[37] Also, the media play a role in this international drama, by both influencing and being influenced by the perceptions of the public.[38] Interestingly, scholars note the ICTY's seeming "preoccupation" with its image and the way in which it is portrayed by the world media,[39] a potential problem for the rendering of a "blind" justice. These myriad influences over the Tribunal are especially problematic considering what some believe is the international community's "potential for indifference to the fair trial rights of the accused."[40]

C. Witness Reliability

A number of problems have been associated with witness testimony at the ICTY.[41] Examples include "several witnesses contradicting each other; several witnesses ha[ving] poor recollection," and a particularly significant lying incident involved the now infamous "Witness L."[42] Witness L was an anonymous witness for the prosecution of Tadic, an early ICTY indictee.[43] After relaying particularly damaging testimony[44] under the veil of anonymity, the witness confessed to lying, ultimately claiming that he was "forced by the Muslims, while [ ] in their custody, to agree to lie against Tadic[,] and [was] then trained by them in the testimony he was to give in the ICTY."[45] Witness L is not the only witness that has been forced to falsely testify at the ICTY.[46] Such witness misconduct is particularly troubling in light of the Tribunal's

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[37] *Id.*
[38] *Id.*
[39] Thieroff & Amley, *supra* note 2, at 245.
[40] Fairlie, *supra* note 14, at 60.
[41] Quintal, *supra* note 16, at 752.
[42] Robert M. Hayden, *Biased "Justice:" Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 561-62 (1999).
[43] *Id.*
[44] Paul Hoffman, *The Dusan Tadic Trial and Due Process Issues*, 19 WHITTIER L. REV. 313, 315 (1997).

[45] Hayden, *supra* note 42, at 561-62.
[46] *See* Christin B. Coan, Comment, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183, 218 (2000).

use of "protective orders," to shield witnesses' identity, sometimes even from the defendant,[47] as it may be difficult to expose untruthfulness under a veil of secrecy.

D. Prosecutorial Bias

The Tribunal's oft mentioned "prosecutorial bias," is both a consequence of its nature as an ad hoc tribunal,[48] as well as its too hasty conception. [49] First, scholars note that the "mission-oriented" nature of ad hoc tribunals naturally results in the exclusion of defense counsel from the community of judges, administrators, and prosecutors that comprise the Tribunal.[50] Adding to the defense counsel's isolation is the fact that an attorney often represents a single defendant, performing his defense by commuting back and forth to the Netherlands from his respective home country.[51]

Additionally, it has been argued that the ICTY's defense counsel are "ill-equipped, incompetent, [and] conflicted . . . ."[52] Scholars refer to the ICTY defense system as the institution's "Achilles heel."[53] At the outset, the pre-requisites for acting as counsel for an ICTY defendant are minimal, in fact, one need only "be admitted to the practice of law in a State, or be a University professor of law."[54] Furthermore, commentators have noted that ICTY defense counsel is ill-equipped with regard to both experience and skill.[55] An assessment of defense counsel by the Expert Group, a United Nations creation aimed at reviewing the ICTY, was "very

[47] *Id*. at 218-19.
[48] *See Fair Trials*, *supra* note 14, at 1995.
[49] *See* Astier, *supra* note 19.
[50] *Fair Trials*, *supra* note 14, at 1995.
[51] *Id*.
[52] *Id*.
[53] David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 New Eng. L. Rev. 975, 975 (2003).

[54] *Fair Trials*, *supra* note 14, at 1996.
[55] *Id*. at 2000.

poor," most significantly in the area of witness examination.[56] These facts are especially troubling in light of the challenges posed by the substantive law of the Court. As the crimes at issue were poorly defined and rarely adjudicated before the Tribunal's creation,[57] these lawyers must struggle over the often murky precedent.[58]

In contrast to the defense counsel's troubled reputation, the ICTY's prosecution team has received high acclaim.[59] This may partly be a consequence of unequal resources, as both the ICTY and its sister court, the International Criminal Tribunal for Rwanda were fashioned in a way that allowed the prosecution "the lion's share of the international resources . . . ."[60]

E. An Unsupportive Citizenry

Adding to the ICTY's aforementioned problems is distrust of the institution by some of the people of the Former Yugoslavia. One of the Serbian government's primary objections is that the Tribunal is a political instrument that discriminatorily prosecutes and adjudicates . . . to the

[56] Tolbert, *supra* note 53, at 977.
[57] *Fair Trials*, *supra* note 14, at 1998.
[58] *Id*.
[59] *See* Thieroff & Amley, *supra* note 2, at 244. United States lawyer and head of the U.N. Commission, M. Cherif Bassiouni, described the ICTY's prosecution team as "great." *Id*.
[60] Astier, *supra* note 19. Not only does the prosecution "receive the lion's share of the resources," but it also appears to receive the majority of United States law students. An internet search for internship positions at the ICTY yielded a significantly disproportionate number of opportunities with the Office of the Prosecutor than with the Defense. *See* Seattle University Law School International Externship Programs, *available at* http://www.law.seattleu.edu/Academics/Externship_Program/International_Externships.xml (indicating that students may only apply for an internship with the Office of the Prosecutor or the Judicial Chambers; no mention is made of Defense work). Also, a University of Virginia Law School bulletin highlights the internship and clerkship positions occupied by its students; once again, not one of the mentioned students worked for the ICTY Defense team. *Students, Alumna Earn Key International, Human Rights Jobs*, UNIVERSITY OF VIRGINIA LAW SCHOOL, (April 18 2007), *available at* http://www.law.virginia.edu/html/news/2007_spr/hrfellows.htm. *See also News and Developments in International Legal Education*, PENN STATE UNIVERSITY, DICKINSON SCHOOL OF LAW BULLETIN, (Summer 2008), *available at* http://www.asil.org/ab/summer2008/pennstate.html (highlighting a student's wonderful experience with the Office of the Prosecutor).

It is curious that there has been such little effort by U.S. law schools to market the ICTY Defense internship, *see* ICTY Internships, http://www.icty.org/sid/113 (last visited July 5, 2009) to students.

detriment of the Serbs,[61] "lead[ing] to . . . lasting stigmatization and isolation."[62] In a 2003 survey of Serbian "Attitudes Toward the Hague Tribunal," 69% of the country's population "distrust[ed] that the trials of the accused Serbs in the Hague [ ] w[ould] be impartial."[63] In fact, many Serbs consider the ICTY to have been imposed upon them by the West as a tool of imperialism.[64] The citizenry of Croatia has also not welcomed the ICTY with open arms.[65] About 52% of Croatians believe that the ICTY "wants to criminalize the Homeland War,"[66] and an astounding 78% disagree with the extradition of Croatians to the Hague.[67] Furthermore, Bosnian Muslim opponents allege that the indictments of Muslims have been pursued solely to counteract allegations of bias by the Serbs.[68]

III. SOMEWHERE BETWEEN THE CIVIL AND COMMON LAW

Another factor limiting the ICTY's ability to adequately render justice is the tribunal's hybrid nature, which brings together elements of both the "adversarial" and "inquisitorial" systems of law.[69]

Scholars note that the adversarial and inquisitorial systems "reflect different conceptions of judicial truth."[70] The inquisitorial system's rules of procedure are geared toward the search for

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[61] ALEKSANDAR FATIC, RECONCILIATION VIA THE WAR CRIMES TRIBUNAL?, 46-47 (2000). Yugoslavia (now the Republic of Serbia) has explicitly questioned the legitimacy of the Tribunal. Thieroff, *supra* note 2, at 240.
[62] Thieroff & Amley, *supra* note 2, at 46.
[63] Igor Bandovic, *Remarks by Igor Bandovic*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 90, 96 (Steven R. Ratner & James L. Bischoff eds., 2004).
[64] Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 423 (2006).
[65] *Id*. at 424.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 423.
[69] Astier, *supra* note 19.
[70] Gordon, *supra* note 4, at 643.

truth, as its primary, overarching objective.[71] "The rules must enable the 'inquisitor' to extract the truth from the suspect."[72] This is contrasted with the adversarial approach's attention to *process*.[73] Although truth is, without doubt, also sought, proponents of the adversarial system urge that truth will be elucidated more clearly when greater emphasis is placed on process.[74] Although this is a rather subtle difference, it should be kept in mind that the adversarial system has more confidence in the ability of a well designed procedural system to keep the courtroom's sparring advocates in check.

Furthermore, the two legal systems diverge in their conception of whom the system is primarily designed to protect.[75] While the inquisitorial system is focused on the protection of society, including "providing for expeditious hearings and preventing delays," its counterpart is most concerned about the accused, which naturally places the focus on "ensuring respect for the fundamentals of due process."[76]

The President of the International Criminal Defense Attorney's Association, Ms. Elise, has commented on the possibility that the mixture of the two systems at the ICTY works in favor of the prosecution.[77] Arguably, their amalgamation results in the "sacrifice" of the due process rights of the accused, [78] due to what has been called "cafeteria inquisitorialism."[79] While both systems of law offer unique protections to the defendant, this artificially created legal process, "endanger[s]" both sets of protections.[80] For example, the ICTY will adopt those inquisitorial

[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Gordon, *supra* note 4 at 643-44.
[76] *Id.*
[77] Astier, *supra* note 19.
[78] Gordon, *supra* note 4, at 639.
[79] Fairlie, *supra* note 14, at 82.
[80] Johnson, *supra* note 12, at 119-20.

procedures that save time, while failing to utilize procedural safeguards intended to accompany them.[81]

IV. RULE 61: "A PUBLIC CEREMONY OF UNCONTESTED ACCUSATION"[82]

A. Trial in Absentia?

Rule 61 of the ICTY Rules of Procedure and Evidence is an example of a devastating result of the Tribunal's hybrid approach. It was a compromise between common law countries that opposed the trial in absentia and its civil law supporters.[83]

Common law countries, such as the United States, Canada, and the United Kingdom, have historically steered away from the trial in absentia.[84] Although there is a trend toward relaxing restrictions against such trials in some instances, [85] most common law countries will not allow trials in absentia for serious offenses. For instance, the United Kingdom, while permitting misdemeanors to be adjudicated absent the defendant, has refused to hold trials in absentia for serious offenses such as felonies.[86] Additionally, an Australian court has held that while the presence of the accused is normally required at trial, that right may be waived at the discretion of the judge when the accused has "fail[ed] to appear *after* the trial has started, through his escape from lawful custody."[87] Furthermore, while the United States has a made some exceptions to its

[81] Fairlie, *supra* note 14, at 82.
[82] DIANA JOHNSTONE, FOOL'S CRUSADE: YUGOSLAVIA, NATO AND WESTERN DELUSIONS, 107 (2002).
[83] Johnson, *supra* note 12, at 185.
[84] Ryan Rabinovitch, Article, *Universal Jurisdiction in Absentia*, 28 FORDHAM INT'L L. J. 500, 526 (2005).
[85] *See* Thieroff & Amley, *supra* note 2, at 264 -65 (claiming that the presumption against the trial in absentia outside of the United States "either never existed or seems to be waning").

[86] *Id*. at 266-67.
[87] *Id*. at 267 (emphasis added).

restriction on trials in absentia,[88] it categorically opposed the ICTY's adoption of any such procedure, as it believed it would interfere with the Tribunal's ability to render justice and be "seen as fair."[89]

Civil law countries, on the other hand, generally permit trials in absentia.[90] The Netherlands, France, and Italy, allow for a trial in absentia when the defendant is "unlawfully absent,"[91] though he still has the right to representation.[92] Interestingly, while France lobbied for the inclusion of the trial in absentia in the ICTY's rule of evidence and procedure,[93] its proposal was not a traditional trial in absentia, as it called for the annulment of any judgment entered in the defendant's absence upon his appearance at the Hague.[94]

Although the original International Tribunal at Nuremberg explicitly allowed for trials in absentia,[95] international law today is not in agreement with regard to its use. The International Covenant on Civil and Political Rights "provides for the right of the accused to be present during his or her trial."[96] Moreover, a number of human rights groups, such as the Lawyer's Committee for Human Rights, oppose the trial in absentia even where a host country explicitly refuses to extradite the alleged criminal.[97] In contrast to the above mentioned disapproval of the trial in absentia, a number of other international institutions do not call for an outright prohibition.[98] For example, the European Court of Human Rights has held that an accused's right to attend trial can be waived if "the State has attempted with due diligence to locate the accused and the accused is

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[88] *Id*. at 264
[89] *See* Quintal, *supra* note 16, at 744.
[90] Rabinovitch, *supra* note 84, at 526.
[91] Quintal, *supra* note 16, at 741. In France and Italy, it must also be shown that the defendant was adequately appraised of the proceedings. *Id*.
[92] *Id*. at 742.
[93] Rabinovitch, *supra* note 84, at 527 n. 126.
[94] Quintal, *supra* note 16, at 743.
[95] *Id*. at 739.
[96]Rabinovitch, *supra* note 84, at 527.
[97] Quintal, *supra* note 16, at 744.
[98] *Id*. at 744-45.

aware of the proceedings or the accused was trying to evade justice."[99] Nevertheless, although there is variance in how international bodies view the trial in absentia,[100] there is a consensus that significant precautions must be taken pursuant to such a trial.[101]

With regard to the ICTY, a compromise between the civil and common law approaches ultimately gave life to Rule 61, which allows for the "functional equivalent of [a] trial in absentia," without the controversial element of a binding judgment.[102] Interestingly, there is no equivalent to this Rule either at the national or international level.[103] Rule 61 is similar to a trial in absentia in that it allows for a quasi-trial in the absence of the defendant.[104] On the other hand, it deviates from the trial in absentia in that the accused has no right to a defense during such proceedings, unlike the defendant subject to the traditional trial in absentia.[105] Another critical difference between the trial in absentia and a Rule 61 proceeding is that no formal binding verdict is issued under Rule 61.[106]

B. Rule 61 Procedure

This novel procedure is utilized when an initial arrest warrant is not fruitful in producing an arrest.[107] It is thus appropriately titled the "Procedure in Case of Failure to Execute a Warrant

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[99] *Id*. at 745.
[100] *Id*. at 747.
[101] *See id*. at 745-46. For example, Article 37 of the Draft Statute for a Permanent International Court states that a trial in absentia "must be carefully regulated, with provisions for notification of the accused and for setting aside the judgment and sentence on subsequent appearance." Quintal, *supra* note 16, at 745. Also, the Human Right Committee has noted that particular attention must be paid to the defendant's rights pursuant a trial in absentia, including allowing representation. *See id*. at 746.
[102] Gordon, *supra* note 4, at 682.
[103] Thieroff & Amley, *supra* note 2, at 272.
[104] *See* Gordon, *supra* note 4, at 682.

[105] King, *supra* note 5, at 541.
[106] Gordon, *supra* note 4, at 682.
[107] *Id.* at 681.; Rule 61 reads as follows:

> Procedure in Case of Failure to Execute a Warrant
>
> (A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:

of Arrest."[108] If the Judge is satisfied that the accused is still at large notwithstanding appropriate measures by the prosecution to "effect personal service," Rule 61 provides for a hearing where a re-confirmation of the indictment can take place.[109] During this hearing the prosecution will present the initial indictment with supporting evidence as well as additional evidence.[110] Moreover, witnesses appear before the Tribunal, giving the Rule 61 hearing a "trial-like quality."[111] Upon conclusion of the proceedings:

> If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine . . . The Trial Chamber shall also issue an international arrest warrant in respect of the accused . . . .[112]

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a. The Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and
b. If the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain whose whereabouts, including by seeking publication of advertisements pursuant to Rule 60,

the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge.

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Subrule (A) above.

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt additional measures to freeze the assets of the accused, without prejudice to the rights of third parties.

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit.

Rule 61, Rules of Procedure and Evidence, U.N. International Tribunal for the Prosecution of Persons Responsible for the Territory of the Former Yugoslavia Since 1991, 11th Sess. [hereinafter "Rule 61"].

[108] Gordon, *supra* note 4, at 681.

[109] *Id.*

[110] King, *supra* note 5, at 524-25.

[111] Rabinovitch, *supra* note 84, at 527.

[112] Rule 61, *supra* note 107.

At this point, the Tribunal "may order a State to provisionally freeze the accused's assets."[113] Furthermore, if it is determined that a state's lack of cooperation affected the Tribunal's inability to gain custody of the accused, the Security Council shall be notified,[114] and economic sanctions may be imposed.[115] Also, the international arrest warrant requires the international community to partake in locating and arresting the "international fugitive,"[116] whereas the initial indictment was only "operative [ ] in the jurisdiction where the confirmee [was] thought to reside."[117]

C. The Purpose of Rule 61

The key to Rule 61 is in the "deliberately public nature of [its] proceedings…."[118] The indictment is broadcast throughout the world, with the intent of creating greater urgency for the apprehension of the accused.[119] More specifically, it is intended to deal with the problem of uncooperative Balkan political players and countries unsupportive of the ICTY.[120] In a number of Rule 61 proceedings, the prosecutor and Trial Chamber have "emphasized the importance of publicly airing the evidence against the accused."[121] Intense publicizing of "emotionally charged [witness and victim] testimony" will arguably also put pressure on the Security Council to take action pursuant the indictment.[122] Furthermore, scholars have noted that these proceedings "address the potential risk of a proper trial never taking place because the subject may never be

[113] King, *supra* note 5, at 526.
[114] *Id*. at 525-26.
[115] *Id*. at 548.
[116] JOHN R. W. D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 572 (3d ed. 2003).
[117] Thieroff & Amley, *supra* note 2, at 238-39.
[118] King, *supra* note 5, at 552.
[119] *Id.* at 523. As the ICTY does not have a police force, Rule 61 has been justified as a way of putting greater pressure on the host countries of alleged war criminals and the international community. *See* Thieroff & Amley, *supra* note 2, at 240.
[120] Thieroff & Amley, *supra* note 2, at 239.
[121] King, *supra* note 5, at 526.
[122] Thieroff & Amley, *supra* note 2, at 241-42

surrendered to the [T]ribunal."[123] ICTY Judge Sidhwa has explicitly recognized this purpose of Rule 61 proceedings in a separate opinion to a Rule 61 decision:

> Rule 61 is basically an apology for this Tribunal's helplessness in not being able to effectively carry out its duties, because of the attitude of certain states that do not want to arrest or surrender accused persons, or even to recognize or cooperate with the Tribunal. . . [This is] the next effective procedure to inform the world . . . of the terrible crimes with which the accused is charged and the evidence against the accused that would support his conviction at trial.[124]

In this regard, the nature of Rule 61 is an attempt, both to allow the victims stories to be heard,[125] as well as to sanction the accused.[126]

i. The Creation of a Public Record

Court Justice Goldstone has stated that the evidence presented at a Rule 61 hearing "will constitute a permanent judicial record for all time of the horrendous war crimes that have been committed in the former Yugoslavia.[127] "That public record will assist in attributing guilt to individuals . . . ."[128] Furthermore, nearly every one of the ICTY's Rule 61 decisions to date has highlighted the opportunity for the victims' stories to thereby "become a part of history," and "create a historical record."[129]

It is irresponsible to label Rule 61 decisions a "historical record," as doing so gives the uncontested allegations in the indictment more credit than they deserve. The problem with this "record" is that it is created without input from the defense.[130] Furthermore, as no Rule 61 defendant has yet been subject to a real trial, there is no precedent,[131] nor does the ICTY statute

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[123] CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 244 (Oxford 2003).
[124] Jones, *supra* note 116, at 569.
[125] Safferling, *supra* note 123, at 244. Rule 61 is "sometimes referred to as the voice of the victims." *Id.*
[126] Thieroff & Amley, *supra* note 2, at 274.
[127] *Id.*
[128] *Id.*
[129] King, *supra* note 5, at 527, n.15.
[130] Quintal, *supra* note 16, at 752.
[131] Safferling, *supra* note 123, at 244-45.

or Rules of Procedure consider how this "record" will ultimately be used.[132] Many commentators have noted the possibility that parts of this "record," such as un-contradicted witness testimony, could be used at the actual trial.[133] This is a serious problem, as it would take away the defendant's right to cross-examine his witness.[134] This is especially problematic in light of the above mentioned problems with coerced witness testimony at the ICTY.[135] While allegations of manipulation may not be surprising due to the political nature of the Tribunal, they are particularly worrisome in the context of Rule 61, considering the ICTY's emphasis on creating a public record and the possibility of imposing sanctions on the accused through the use of such un-contradicted testimony.[136]

Furthermore, even if Rule 61 findings are not used at a later trial, there is a conceptual flaw in the idea that a "historical record" can be created without significantly degrading the defendant's legal position,[137] and thereby affecting future proceedings. Though it may not be a formal judgment, the Tribunal's finding that "there are reasonable grounds to believe the accused committed the acts charged in the indictment" is nevertheless a "determination of guilt," on some level,[138] particularly when such a finding is aggressively disseminated across the globe.

ii. Victim Healing

Both the ICTY and a plethora of scholars have noted the potential "cathartic" effect of testifying at a Rule 61 proceeding.[139] ICTY Justice Goldstone emphasized the importance of allowing victims to share their stories so as to "begin their own healing process and that of many

[132] Quintal, *supra* note 16, at 752.
[133] *Id*.
[134] Safferling, *supra* note 123, at 244-45.
[135] Quintal, *supra* note 16, at 752.
[136] *Id*. at 752-53.
[137] Thieroff & Amley, *supra* note 2, at 250.
[138] Quintal, *supra* note 16, at 753.
[139] Thieroff & Amley, *supra* note 2, at 249.

tens of thousands of victims who identity with them."[140] Some have gone as far as to say that participation in such formal hearings is so liberating for the victims that it may be "an end in itself."[141] Though testifying at a Rule 61 hearing may have significant therapeutic effects for the victims of war, such considerations should not eclipse the inquiry of whether the disputed procedure satisfies the requirements of a fair trial.

iii. Pedagogical Role

Scholars have also highlighted the pedagogical role of Rule 61 hearings, whereby the crimes of those still at large are made known to the world.[142] Again, it cannot be overstated that there is no significant educational benefit from the presentation of a one-sided narrative. Interestingly, some authors oppose the heavy publicizing of the Rule 61 indictment, believing that it might actually decrease the international community's motive in ultimately bringing the alleged criminals to trial.[143]

V. RIGHT TO A PUBLIC TRIAL

It has been noted that the right to a fair trial encompasses the right to a public trial,[144] a centuries old "common-law tradition"[145] eloquently described as "the handmaiden of effective judicial administration."[146] Public access to judicial proceedings is said to serve both the interests of the accused,[147] and the public itself.[148]

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[140] *Id*. at 247.
[141] *Id*. at 249.
[142] Jones, *supra* note 116, at 568-69.
[143] Quintal, *supra* note 16, at 726.
[144] *Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979) (*quoting Estes v. Texas*, 381 U.S. 532, 583 (1965)).
[145] *Id.* at 394 (Burger, J., concurring).
[146] *Id.* at 413 (Blackmun, J., concurring in part and dissenting in part).
[147] *Id.* at 380.

A. Right of the Accused

An open proceeding ensures that the accused will not be tried in a vacuum,[149] where the state can impose its will without check. The Supreme Court of the United States has held that:

> the right to a public trial . . . has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is *subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power*.[150]

Utilitarian Jeremy Bentham claimed that other checks on judicial power would serve little purpose without the right to publicize court proceedings.[151] Bentham further elaborated that "[r]ecordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance," without the right to publicity.[152] Additionally, the right to a public trial not only guards against abuse by judges, but all actors of the system.[153]

This protection against abuse naturally flows from the public's "contemporaneous review [of the trial] in the forum of public opinion."[154] "Oversight of judicial proceedings [through] public scrutiny,"[155] is the critical purpose behind the right to a public trial, and its proper application requires the "active cooperation of an enlightened public."[156]

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[148] *Id.* at 383.
[149] King, *supra* note 5, at 546.
[150] *Gannett*, 443 U.S. at 380 (quoting *In re Oliver*, 33 U.S. 257, 270 (1948) (emphasis added)).
[151] *Id.* at 422 (Blackmun, J., dissenting)
[152] *In re Oliver*, 33 U.S. at 271.
[153] *Gannett*, 443 U.S. at 412 (Blackmun, J., dissenting).
[154] *In re Oliver*, 33 U.S. at 270.
[155] King, *supra* note 5, at 544. The importance of public scrutiny of judicial proceedings has also been noted by the Supreme Court of the United States, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (noting that a public nature of a trial "serves to guarantee the fairness of trials and to bring the beneficial effects of public scrutiny on the administration of justice"), as well as the European Court of Human Rights. Joanna Pozen, *Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials*, 38 N.Y.U. J. INT'L L. & POL. 281, 292-92 (2006) (emphasizing that the most important aspect of a public trial is that it allows for public scrutiny).
[156] *Gannett*, 443 U.S. at 413 (Blackmun, J., concurring in part and dissenting in part) (*quoting Wood v. Georgia*, 370 U.S. 375, 391 (1962)).

B. Public Interest

As well as helping to ensure a fair trial for the defendant in question, the public trial also serves more general societal interests,[157] such as improving the "integrity of the trial process."[158] In addition to curtailing intentional abuse by the judiciary, openness of court proceedings unquestionably enhances "the quality of testimony, induce[s] unknown witnesses to come forward with relevant testimony, [and] cause[s] all trial participants to perform their duties more conscientiously."[159] Public scrutiny of sensitive trials, like those of political figures, is particularly important, as there is often a greater incentive to veil them.[160] Although these benefits no doubt protect the individual defendant, they also add to the overall fairness of the justice system and well being of society,[161] and help increase public confidence in the courts.[162]

VI. ANALYSIS: RULE 61- A DEGRADATION OF THE DEFENDANT'S RIGHT TO A FAIR AND PUBLIC TRIAL

A. Harmful Mutation of the Trial in Absentia

Rule 61 is a novel form of the controversial trial in absentia. Although it does not provide the defendant with the customary protections of a trial in absentia, most importantly, a

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[157] Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1901 (1978) [hereinafter *Trial Secrecy*].
[158] *Gannett*, 443 U.S. at 423 (Blackmun, J., concurring in part and dissenting in part).
[159] *Id.* at 383.
[160] *Trial Secrecy*, *supra* note 157, at 1906.
[161] Interestingly, the Supreme Court of the United States has noted that the "adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants of the litigation." *Gannett*, 443 U.S. at 369. This begs the question of who is protecting the public interest in Rule 61 proceedings, as the defendant's representative is absent.
[162] King, *supra* note 5, at 544. *See also* Note, *Closure of Pretrial Proceedings*, 93 HARV. L. REV. 62, 66 (1979).

defense,[163] it also does not produce a binding verdict.[164] Thus, it could be argued that the protections that are added and those that are taken away balance one another so as not to ultimately harm the defendant's right to a fair trial. This view of the Rule is superficial, as it does not consider the purpose and effect of Rule 61.

As noted above, the purpose of Rule 61 is to expedite the apprehension of the accused by "publicly airing the evidence" against him.[165] This is done by heavily publicizing the re-confirmed indictment.[166] Some have even argued that this hearing is intended to take the place of an actual trial that may never occur.[167]

Considering that the Rule 61 proceeding has been charged with aiming to "create a record," and taking the place of a trial, it comes inappropriately close to a trial in absentia.[168] Tellingly, ICTY Judge Jorda claims that Rule 61 has "taken the French concept of trial in absentia to its limits."[169] Consequently, as it appears that Rule 61 functions as a trial in absentia under a different name,[170] the defendant's right to a fair trial is compromised by the withholding of the standard protections of a trial in absentia.

B. Unreleased Evidence

In addition to the aforementioned lack of protections is the limitation on public disclosure of some evidence presented by the prosecutor during the Rule 61 hearing.[171] In certain cases the Tribunal has ruled that various materials presented during Rule 61 proceedings were not

[163] King, *supra* note 5, at 540. Furthermore, the European Court of Human Rights has held that the accused should be represented at a trial in absentia. *Id.*
[164] Safferling, *supra* note 123, at 244.
[165] King, *supra* note 5, at 526.
[166] *Id.* at 553.
[167] Safferling, *supra* note 123, at 244.
[168] Thieroff & Amley, *supra* note 2, at 259-60.
[169] *Id*. at 259.
[170] *Id*. at 259.
[171] King, *supra* note 5, at 528.

public.[172] This denies the public and others an opportunity to critically analyze the basis for the indictment.[173] Such a critique of the indictment is especially important here, as the defense cannot challenge the prosecutor's case.[174] This seriously infringes on the "public's role in controlling judicial proceedings," by "publicly airing" only a part of the evidence upon which the indictment is based.[175]

C. The Right to a Fair and Public Trial

In light of the Tribunal's defects, such as its questionable independence and vulnerability to political pressures,[176] Rule 61 presents an insurmountable obstacle to the defendant's ability to receive a fair trial.

The right of the accused to a fair trial naturally extends to pre-trial, Rule 61 hearings.[177] Article 21 of the ICTY Statute enumerates the rights of the accused, one of which is "the right to a fair and public hearing."[178] The defendant's right to a public trial is of greater importance in the context of the ICTY, where its independence and ability to withstand political pressures has been questioned. Alarmingly, Rule 61 proceedings effectively deny the public a meaningful role in controlling judicial proceedings.[179] The purpose of Rule 61 is to flood the public with a sense of urgency for the apprehension of the alleged criminal.[180] Giving greater weight to this public indictment is the idea of the creation of a "record," that will allow victims to be heard. Although

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[172] *Id.*
[173] *Id.* at 553-54.
[174] *Id.* at 543.
[175] *Id.* at 548-49.
[176] Fairlie, *supra* note 14, at 59 (citing Bruce Zagaris, *U.S. Congress Has Oversight Hearing on International War Crimes Tribunals*, 18 INT'L ENFORCEMENT L. REP. 169, (2002)).
[177] King, *supra* note 5, at 538.
[178] *Id.* at 541.
[179] King notes the possibility that failure to disclose all evidence upon which a Rule 61 hearing relies would limit the public's right to perform judicial scrutiny. My note, on the other hand, argues that the nature of Rule 61, regardless of full disclosure, limits the public's ability to control judicial proceedings, thereby destroying the defendant's right to a public trial as well as the presumption of innocence. *Id.* at 544.
[180] *Id.* at 553. One author has even noted that Rule 61 serves as a kind of "exorcism," whereby the "evil [is] conjured by the public pronouncement of the crime." PIERRE HAZAN, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 74 (2004).

it is unclear how this "record" will be used during an actual trial,[181] the mere treatment of such evidence as a "record" heavily tips the presumption of innocence in the prosecution's favor. The result of the "mediatization" of such an indictment[182] deprives the public from being able to meaningfully scrutinize the defendant's case, and gives the ICTY greater leniency in choosing the means by which to pursue justice, as it has already set the stage for conviction.

Further adding to the public's inability to exercise oversight over ICTY hearings is the media's treatment of the indictment.[183] Some have asserted that the media, in contrast to its usual role of acting as a "powerful check on the accusatorial powers of the state," plays the part of the prosecution's lap dog,[184] reporting on the ICTY with a severe "prosecutorial bias."[185] Henri Astier, a senior producer for the BBC, states that the "media cover the proceedings in The Hague from the point of view of the prosecution."[186] Astier further notes that "in the court of public opinion, to be indicted by a UN tribunal is to be guilty."[187] He also attests to a "lack of journalistic interest in the tribunal's daily work and the "secrecy of many [of its] hearings."[188] These statements are a serious cause for alarm, as they point to an atmosphere in which the presumption of innocence cannot be maintained.

When the public receives a biased indictment through a biased medium it is unreasonable to expect it to meaningfully critique the judiciary. The trial is thus public only in name. The purpose of a public trial is to provide the people an opportunity to act as a check on the

[181] Safferling, *supra* note 123, at 244-45.
[182] Goran Sluiter, Editorial Comment: *Karadzic on Trial*, 6 J. INT'L CRIM. JUST. 617, 621-22 (2008).
[183] King, *supra* note 5, at 543. The author notes that the media and public's role in Rule 61 proceedings should be to "take the place of the defense counsel." *Id.*
[184] Astier, *supra* note 19.
[185] Fairlie, *supra* note 14, at 60-61.
[186] Astier, *supra* note 19.
[187] *Id.*
[188] *Id.*

judiciary.[189] Here, Rule 61 creates an illusion of a terrifically public trial, while allowing the prosecution to educate the public of its views with the acquiescence of the media.

In light of the various flaws of the ICTY,[190] there is a pressing need for public scrutiny over its proceedings. Unfortunately, Rule 61 works to eliminate meaningful public scrutiny, thereby effectively destroying the defendant's the right to a fair and *public* trial.

VII. THE CASE OF RADOVAN KARADZIC

As of today, only five Rule 61 hearings have been conducted,[191] with a total of only eight "re-confirmees."[192] Of these eight, only Radovan Karadzic has been apprehended, his trial commencing in October of 2009.[193]

In July of 1996, the ICTY issued a joint Rule 61 decision for,[194] arguably, the two most notorious ICTY fugitives, Radovan Karadzic and Ratko Mladic.[195] Both were prominent Bosnian Serb political players during the Bosnian war,[196] Karadzic, allegedly the mastermind, Mladic, a top military commander.[197] In addition to helping create the Serbian Democratic Party (SDS) in 1990,[198] Karadzic served as President of Republika Srpska, a breakaway republic of Bosnia &

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[189] King, *supra* note 5, at 544-45.
[190] Fairlie, *supra* note 14, at 59 (citing Bruce Zagaris, *U.S. Congress Has Oversight Hearing on International War Crimes Tribunals*, 18 INT'L ENFORCEMENT L. REP. 169, (2002)).
[191] Jones, *supra* note 116, at 568.
[192] Thieroff & Amley, *supra* note 2, at 255. Being "re-confirmed" means that the defendant was subject to a Rule 61 hearing.
[193] Marlise Simons, *Karadzic Trial Resumes Without Defendant*, N.Y. TIMES, Oct. 27, 2009, *available at* http://www.nytimes.com/2009/10/28/world/europe/28karadzic.html.
[194] Prosecutor v. Karadzic & Mladic, Case No. IT-95-5-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996).
[195] *See* Thieroff & Amley, *supra* note 2, at 252.
[196] *Id*.
[197] *Butcher of Bosnia*, supra note 1.
[198] *Id*.

Herzegovina from 1992-1995.[199] Prior to his summer 2008 capture, Karadzic evaded authorities for over ten years.[200] The United States even offered a generous five million dollar reward for "information leading to his capture."[201] Today, the former political leader stands trial for a myriad of ghastly charges, most significantly, for masterminding a genocide of the Bosnian war.[202] He claims that he is innocent of all charges.[203]

The use of Rule 61 in the Radovan Karadzic case elucidates the flaws in ICTY pre-trial procedure and its disastrous effect on the defendant's right to a fair trial. In reviewing Karadzic's indictment pursuant Rule 61, the Court stated, "[T]he victims may use this forum to have their voices heard and to live on in history. International criminal justice . . . must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility."[204] Here, the Court attempts to "reveal" the truth through an intense "mediatization"[205] of findings derived from a slanted Rule 61 hearing.

The following is an excerpt of charges from Karadzic's indictment:

> [C]rimes against humanity refer[ing] to persecution on political, racial and religious grounds . . . a sniping campaign against [a] civilian population . . .[G]enocide . . . for the internment of civilians in detention facilities and inhumane treatment therein . . . extensive destruction of property and the appropriation and plunder of property . . . shelling of civilian gatherings . . . destruction of sacred sites . . . [F]or taking United Nations Peacekeepers hostage and using them as human shields. . . ."[206]

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[199] *Karadzic war crimes trial set for late October*, CNN.COM, *available at* http://www.cnn.com/2009/WORLD/europe/07/01/karadzic.trial/index.html.
[200] *Butcher of Bosnia*, *supra* note 1.
[201] *Id*.
[202] *Radovan Karadzic War Crimes Trial to Begin in August*, GUARDIAN.CO.UK June 5, 2009, *available at* http://www.guardian.co.uk/world/2009/jun/05/radovan-karadzic-war-crimes-trial-august/.
[203] *Karadzic Judge Says Trial Won't Start Before Sept.*, ETAIWANNEWS.COM, *available at* http://www.etaiwannews.com/etn/news_content.php?id=991770&lang=eng_news.
[204] Prosecutor v. Karadzic & Mladic, *supra* note 194, at ¶ 3.
[205] Sluiter, *supra* note 182, 622.
[206] Prosecutor v. Karadzic & Mladic, *supra* note 194, at ¶ 6.

Moreover, the indictment charges Karadzic with "serious violations of international humanitarian law allegedly committed . . . during the take-over of the "safe area" of Srebrenica,"[207] which included the execution of 7,000 Muslim men.[208] Examples of other un-contradicted evidence released through Karadzic's indictment includes charges of command responsibility for crimes such as forcing brothers or parents to engage in sexual acts,[209] "force[ing] a man to eat the liver of his grandson [and] 'specialized centers' for the rape of women . . . ."[210] The indictment "truly [describes] scenes from hell, written on the darkest pages of human history."[211]

Pursuant to Radovan Karadzic's Rule 61 proceeding, the Court ruled that some written materials tendered by the prosecution upon which the indictment relied were not public.[212] Examples of such written materials are "public documents, such as reports from United Nations and other monitoring organizations, witness statements, photographs, correspondence and reports from peace-keepers."[213] The only materials necessarily made known to the public was "oral testimony of witnesses in open court."[214]

Scholars note that the media has already pronounced a guilty verdict for Karadzic.[215] Considering Rule 61's focus on intensely publicizing such a sensational "record," that was neither contested by a defense nor seriously critiqued by the media, it is unlikely that the public will care enough to scrutinize these upcoming judicial proceedings. It should not be forgotten

[207] *Id*. at ¶ 7.
[208] *Butcher of Bosnia*, *supra* note 1.
[209] Prosecutor v. Karadzic & Mladic, *supra* note 194, at ¶ 13.
[210] *Id*.
[211] Quintal, *supra* note 16, at 738.
[212] King, *supra* note 5, at 527-28.
[213] *Id*. at 528.
[214] *Id*. at 527.
[215] Sluiter, *supra* note 182, at 625.

that Karadzic was a prominent political figure and that the necessity for a public trial is greater in such circumstances, as there is often more incentive for secrecy.[216]

Upon extradition to the ICTY in July of 2008, Radovan Karadzic presented this question to the Court: "What regularity can I expect when everything takes place in an atmosphere in which regardless of what truths may be demonstrated in this room, no one on *earth* believes in the possibility of an acquittal."[217]

VIII. EFFECTS ON THE ICTY & INTERNATIONAL LAW

In addition to degrading the defendant's right to a fair trial, it can be argued that Rule 61 also serves to diminish the most important goal of the Tribunal, reconciliation.[218] Considering the former Yugoslav government's objections to the ICTY,[219] and the distrust that some people of the region still harbor toward it, it is particularly important to take care that defendants receive a fair trial. Interestingly, Ivana Nizich of Human Rights Watch claims that "few in the former Yugoslavia believe that the ICTY is going to prosecute those that deserve prosecution, that it will establish the truth of what happened during the war, or that it will serve as a vehicle or impetus for reconciliation among the various peoples of the former Yugoslavia."[220] It is likely that the trial of Radovan Karadzic will only create a deeper chasm between the peoples of the Former Yugoslavia, as few of his fellow Serbs believe he will receive a fair trial. This fall, as people turn

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[216] *Trial Secrecy*, *supra* note 157, at 1906.
[217] Sluiter, *supra* note 182, at 625 (emphasis added).
[218] Fatic, *supra* note 61, at 1. Moreover, the Tribunal seeks to facilitate the "transition from war to a long-lasting peace" in the region. MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY, 42 (2008).
[219] Fatic, *supra* note 61, at 46.
[220] Higonnet, *supra* note 64, at 424.

on their televisions to view Karadzic defend himself, the lines will once again be drawn according to nationality, more than a decade after the end of the Bosnian war.

United States Supreme Court Justice Murphy's strong dissent pursuant *In re Yamushita* serves as a strong reminder that: "[t]o subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world."[221]

IX. CONCLUSION

There is certainly something rotten in the state of Holland.[222] Rule 61 degrades the defendant's right to a fair trial by both inappropriately subjecting him to the equivalent of a trial in absentia and by taking away the public's ability to control judicial proceedings. Instead of being a compromise between those who wanted a trial in absentia and those that did not,[223] Rule 61 has proven more fatal to the defendant than a traditional trial in absentia. In order to safeguard the defendant's right to a fair trial, Rule 61 should not be used in the international criminal setting without allowing for the participation of defense counsel. Although some scholars believe that increasing the Rule 61 standard from reasonable to clear and convincing would give greater credibility to the proceedings,[224] it is unlikely that this would meaningfully affect the fairness of the proceedings as long as the defense continues to be excluded from the process.

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[221] *Trial Secrecy*, *supra* note 157, at 1982 (quoting In re Yamashita, 327 U.S. 1, 28-29 (1946) (Murphy, J., dissenting)).
[222] WILLIAM SHAKESPEARE, HAMLET act 1, sc. 4. As is the case with many international courts, the ICTY is housed in Holland. One scholar alleges that the Rule 61 hearing is an "exception [to the Tribunal's] overall faithfulness to the rule of law." Thieroff & Amley, *supra* note 2, at 272.
[223] Johnson, *supra* note 12, at 185.
[224] *See* Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal law and the Ad Hoc Tribunal of the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 160 (1995).

Use of defense counsel would allow for a more balanced representation of the crimes committed. Furthermore, where a defendant is apprehended following a Rule 61 hearing, the Tribunal should conduct something similar to a Truth Commission, by pursuing fact-finding without imposing a sentence,[225] as such a sentence would be built upon grievous violations of the defendant's rights. Such a Truth Commission would yield a more accurate record, while the prejudicial effects of the Rule 61 proceedings would be minimized as the accused would not be stripped of his liberty.[226] Some authors have noted that the Rule 61 proceeding, as it currently exists, already functions as a truth commission, as few of its indictees are tried and sentenced. [227] Still, the possibility of punishment for the few that are eventually tried makes this style of justice inappropriate without the participation of defense counsel, as its one-sided "record of wrongdoings"[228] prejudices a potential trial.

Interestingly, the Tribunal has, on at least one occasion said "that the accused can claim little consideration," at the Rule 61 stage, in terms of pre-trial protections.[229] While it is understandable that the Tribunal does not want to reward the accused for failing to appear at trial,[230] the unique nature of this hearing, which effectively takes the place of a trial that will likely never occur, requires protections attributable to the trial in absentia, both to protect the reputation of an accused that will never be tried, and to safeguard the possibility of a fair future trial.

Finally, when considering what protections are due the ICTY defendant, it should not be forgotten that the crimes there adjudicated are the "most horrific, large-scale crimes a human

[225] Quintal, *supra* note 16, at 754. This author notes that Rule 61 procedure has been criticized for functioning as a Truth Commission, thereby reducing the "the political will" to apprehend alleged criminals. *Id*.
[226] Thierroff & Amley, *supra* note 2, at 250.
[227] Quintal, *supra* note 16, at 754.
[228] *Id*. at 755.
[229] King, *supra* note 5, at 539.
[230] *See id*. at 539.

being can commit."[231] Utmost vigilance ought to be exercised when assigning responsibility for the torture, death and displacement of hundreds of thousands of people.

[231] Gordon, *supra* note 4, at 689.