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Procedural Rules Relating To The Admissibility Of Evidence Of A Consistent Pattern Of Conduct In Criminal Trials

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE ICTR

ISSUE: PROCEDURAL RULES RELATING TO THE ADMISSIBILITY OF EVIDENCE OF A CONSISTENT PATTERN OF CONDUCT IN CRIMINAL TRIALS

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I. Introduction and Summary of Conclusions[*]

A. Issues

This memorandum addresses evidentiary law surrounding the admissibility of a consistent pattern of conduct in criminal trials in the Anglo-American, Continental, and Tribunal legal systems. The first part of this memorandum lays out the basic rules of evidence for the admission of prior conduct in all three systems. The second part of this memorandum compares and contrasts the admission of evidence of past conduct in the Anglo-American and Continental systems. The third part of this memorandum compares and contrasts the admission of evidence of prior crimes in the Anglo-American and Continental systems. The fourth part of this memorandum looks at the Tribunal system and examines where among the evidentiary spectrum the system falls.

B. Summary of Conclusions

i. The American and Continental Legal Systems Differ Regarding the Admission of Past Misconduct

The American and Continental legal systems differ philosophically regarding the admission of past misconduct. While the American system forbids the use of past misconduct to prove character, the Continental system allows the admission of past misconduct evidence whenever it is relevant. The American system in practice, however, allows quite a bit of evidence to be admitted that the Continental system will not, such as evidence of a crime for which the defendant has been acquitted. Overall, the use of past misconduct evidence in the two systems is more similar than different.

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[*] ISSUE: Prepare a comparative legal paper on the procedural rules relating to the admissibility of evidence of a consistent pattern of conduct in criminal trials with regard to Anglo-American, Continental, and Tribunal systems of adjudication.

ii. The Systems Differ Much More Regarding the Admission of Prior Convictions

The American and Continental legal systems differ the most in their treatment of the admission of evidence of prior convictions. In the American system, the evidence may not be offered to show character, and may be used to impeach the defendant if he testifies.

In the Continental system, evidence of a prior conviction may be used to show the inclinations of the defendant and may not be used to impeach the defendant. The main reason for this disparity is that in the Continental system, while the defendant is usually heavily questioned in the course of a trial, he is prohibited from testifying under oath and is under no legal obligation to tell the truth. Since the defendant's testimony is already under suspicion, there is no need to impeach with evidence of prior crimes.[1]

iii. The Tribunal Combines Characteristics of Both Systems

The Tribunal system has characteristics of both the American adversarial system and the Continental inquisitorial system. In many structural ways, the Tribunals more closely resemble the adversarial system. The Tribunals' Rules of Procedure and Evidence were largely based on a draft submitted by the United States.[2] The procedure

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[1] Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55, 59-60 (1994). [Reproduced in the accompanying notebook at Tab 32]

[2] Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L L. & POL. 167, 171 (1998). [Reproduced in the accompanying notebook at Tab 30] (citing the U.S. proposal for the Tribunal's rules, reprinted in 2 Virginia Morris & Michael P. Scharf, An Insiders Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis 509-64 (1995). Following the adoption of the Tribunal's rules, the President of the Tribunal stated: "we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and

followed during trial more closely resemble an adversarial system, including the role of the lawyers and the placing under oath of all witnesses.[3]

In its mission of truth finding, however, the Tribunal system more closely resembles the Continental inquisitorial system. For the most part, this is reflected in the Tribunals' liberal policy on the admission of evidence in order to develop a complete record.[4]

II. Factual Background

The International Criminal Tribunal for Rwanda ("ICTR") was created by the United Nations in 1994.[5] Article 14 of the ICTR Charter adopted the Rules of Procedure and Evidence of the ICTY as its own Rules of Procedure and Evidence, with such changes as they deemed necessary.[6] Originally, Rule 93 under the ICTY Rules of Procedure and Evidence, which governs the admission into evidence of a consistent pattern of conduct, read as follows: "Evidence of a consistent pattern of conduct may be admissible in the interests of justice."[7] The ICTY modified Rule 93 in 1995. As a result,

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elsewhere." Statement by the President Made at a Briefing to Members of Diplomatic Missions, U.N. Doc. IT/29 (1994), reprinted in 2 Morris & Scharf 650.)

[3] Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV 1, 29 (2002). [Reproduced in the accompanying notebook at Tab 29]

[4] *Id.* at 29.

[5] U.N. SCOR Res. 955. [Reproduced in the accompanying notebook at Tab 28]

[6] Statute of the International Tribunal for Rwanda (hereinafter ICTR Statute) art. 14, *reprinted in* 33 I.L.M. 1598, 1607 [Reproduced in the accompanying notebook at Tab 27]

[7] International Criminal Tribunal for Yugoslavia, Rules of Procedure and Evidence, *reproduced in* 33 I.L.M. 484, 533 (1994) [Reproduced in the accompanying notebook at Tab 26]

Rule 93 now reads: "(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice. (B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defense pursuant to Rule 66."[8] This change, adding the requirement that the Prosecutor disclose evidence of a consistent pattern of conduct to the defense, was made in the interest of "broaden[ing] the rights of suspects and accused persons."[9] The ICTR adopted Rule 93 in its amended form. To this point, the Tribunals have not dealt with the question of admissibility of prior act evidence in their case law.

III. The Basic Rules Relating to the Admission of Evidence of Prior Conduct

A. The Anglo-American Legal System

i. The United States

1. The Federal Rules of Evidence

a. Rule 403

The basic rule of admissibility in the American system is that all relevant evidence is admissible.[10] However, this basic rule is modified by Federal Rule of Evidence 403, which states that even relevant evidence can be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

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[8] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *as amended on* 27 May 2003. [Reproduced in the accompanying notebook at Tab 25]

[9] *Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 50th Sess., at paragraph 26 (footnote 9), U.N. Doc. A/50/365 (1995). [Reproduced in the accompanying notebook at Tab 33]

[10] Fed. R. Evid. 402 [Reproduced in the accompanying notebook at Tab 37]

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[11] This in effect makes admissibility questions a balancing act between probative value and prejudicial effect. This rule affects all of the other American rules of evidence discussed in this memorandum.

There are six basic factors to consider in any Rule 403 balancing consideration. They are: (1) proximity in time to the charged conduct; (2) similarity to the charged conduct; (3) frequency of the prior acts; (4) surrounding circumstances; (5) relevant intervening events; and (6) other relevant similarities or differences.[12]

b. Rule 404

In the United States, the basic rule of evidence governing the admissibility of evidence pertaining to prior conduct is Federal Rule of Evidence 404. The first half of the rule, 404(a), states that character evidence is not admissible to show that an act conformed with a particular character trait, with certain exceptions.[13] The second half of the rule, 404(b), states generally that evidence of prior acts may not be used to show a character trait of the accused in order to prove that the defendant's conduct was consistent with that character trait.[14]

In this context, it is important to understand what the Rule means by "character of the accused." McCormack, in his treatise on evidence, describes character as "a generalized description of one's disposition, or of one's disposition in respect to a general

[11] Fed. R. Evid. 403 [Reproduced in the accompanying notebook at Tab 38]

[12] U.S. N.I.T.A. Fed. R. Evid. 413 [Reproduced in the accompanying notebook at Tab 35]

[13] Fed. R. Evid. 404 [Reproduced in the accompanying notebook at Tab 34]

[14] *Id.*

trait, such as honesty, temperance, or peacefulness….If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street."[15] In addition, courts have generally held that "character traits…need not constitute specific traits of character but may include general traits such as lawfulness and law-abidingness."[16]

Federal Rule of Evidence 404(a)(3) makes exceptions to the general prohibition on character evidence by allowing admission of character evidence of the defendant offered by the defendant, admission of character evidence of the defendant offered by the prosecution to rebut character evidence offered by the defendant, and the impeachment of a witness by evidence of conviction of a prior crime under Federal Rule of Evidence 609.[17] This obviously only applies for the purposes of this memorandum if the defendant takes the stand. Rule 609 states that evidence that a defendant has been convicted of a crime punishable by death or more than one year in prison shall be admitted for the purposes of attacking his credibility if the probative value of the evidence outweighs its prejudicial effect to the defendant.[18] A close reading reveals that this standard differs somewhat from the general standard of Rule 403 above. Under Rule 403, the prejudicial effect of a piece of evidence must "substantially outweigh[]" any probative value of that

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[15] McCormick §162, p. 340. [Reproduced in the accompanying notebook at Tab 43]

[16] *United States v. Diaz*, 961 F.2d 1417, 1419 (9th Cir. 1992). [Reproduced in the accompanying notebook at Tab 13]

[17] Fed. R. Evid. 404, *supra* note 13.

[18] Fed. R. Evid. 609 [Reproduced in the accompanying notebook at Tab 42]

evidence for it to be excluded.[19] By the plain language of Rule 609, however, if the prejudicial effect of the evidence is the same as or outweighs the probative value at all, the evidence will be excluded.[20] Further, evidence that the defendant witness was convicted of a crime involving dishonesty or false statement is automatically admissible regardless of punishment.[21]

Rule 609 does build in some exceptions to the admissibility of prior crimes evidence. Evidence of a conviction more than ten years old is not admissible unless the court determines in the interests of justice that the probative value of the conviction substantially outweighs its prejudicial effect.[22] In addition, a conviction subject to a pardon, annulment, certificate of rehabilitation, or other procedure based on a finding of rehabilitation is not admissible as long as the defendant has not been convicted of a subsequent felony, and a conviction subject to a pardon or annulment based on a finding of innocence is not admissible at all.[23] Finally, evidence of juvenile convictions is not generally admissible under Rule 609.[24]

FRE 404(b) states that evidence of prior "crimes, wrongs, or acts"[25] may not be used to prove the character of the accused, but rather may only be used to show proof of

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[19] Fed. R. Evid. 403, *supra* note 11.

[20] Fed. R. Evid. 609, *supra* note 18.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Fed. R. Evid. 404, *supra* note 13.

"motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[26] Further, when evidence of prior conduct will be used in a criminal case, the prosecutor must give notice to the defendant of the nature of the evidence to be used.[27] The evidence of a prior crime will be admitted pursuant to the rule upon a showing of evidence sufficient to convince a reasonable finder of fact that the prior act in fact happened.[28]

c. Rule 406

Evidence of the routine habit of a person may also be used to show that a person's conduct on a particular occasion was "in conformity with the habit."[29] Habit, however, is treated differently than general character evidence. McCormick described character and habit as "close akin. Character is a generalized description….'Habit,' in modern usage, both lay and psychological, is more specific….A habit…is the person's regular practice of meeting a particular kind of situation with a specific kind of conduct, such as the habit of going down a particular stairway two stairs at a time….The doing of the habitual acts may become semi-automatic."[30] If habit can be proved, it is highly persuasive as proof of conduct on a particular occasion.[31]

d. Rule 413

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[26] *Id.*

[27] *Id.*

[28] U.S. N.I.T.A. Fed. R. Evid. 404 [Reproduced in the accompanying notebook at Tab 34]

[29] Fed. R. Evid. 406 [Reproduced in the accompanying notebook at Tab 40]

[30] McCormick §162, *supra* note 15, at 340.

[31] *Id.* at 341.

Cases involving sexual assault present a special case with respect to the admission of prior acts. When a defendant is accused of an offense of sexual assault, evidence of the commission of any other offense of sexual assault is admissible for any relevant purpose as long as the Government gives the defendant fifteen days notice of the evidence it plans to use.[32]

It is important in this context to define "offense of sexual assault." According to Rule 413(d), an "offense of sexual assault" is "(1) any conduct proscribed by chapter 109A of Title 18, United States Code[33]; (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person; (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body; (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4)."[34]

The Government must meet a 'sufficient evidence' standard to admit the evidence of a prior sexual offense; that is, the court will admit when the Government offers sufficient evidence to persuade a reasonable fact-finder, by a preponderance of the evidence, that the defendant committed the earlier act of sexual assault or child

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[32] Fed. R. Evid. 413 [Reproduced in the accompanying notebook at Tab 41]

[33] Aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive sexual contact, sexual abuse resulting in death, and any repeat offenses. *See* 18 U.S.C. §§2241-2248 [Reproduced in the accompanying notebook at Tab 24]

[34] *Id.*

molestation. Unlike Rule 609, Rule 413 does not require that the similar act of sexual assault be excluded if the defendant was tried and acquitted of the similar act.[35]

2. Court Interpretations

a. *Huddleston v. United States*

In 1988, the United States Supreme Court announced a rationale for the admission of prior (similar) act evidence in their decision in *Huddleston v. United States.*[36] In *Huddleston*, a trailer containing 32,000 blank videotapes was stolen. Two days after the robbery, the defendant contacted another person about selling a large number of videotapes. The defendant proceeded to reach an agreement to sell 5,000 of the videotapes. Once the defendant was arrested, the only question for the court was whether or not the defendant knew that the videotapes were stolen.[37] At trial, the government was allowed over the defendant's objection to introduce two pieces of prior act evidence. First, a record store owner was allowed to testify that the defendant told him that he could procure thousands of black and white televisions to sell. Second, an undercover Federal Bureau of Investigation ("FBI") agent was allowed to testify that the defendant offered to sell him twenty-eight refrigerators, two ranges, and forty icemakers for $8,000. It was later determined that the appliances were worth $20,000 and were part of a shipment that had been stolen.[38]

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[35] U.S. N.I.T.A. Fed. R. Evid. 413, *supra* note 12.

[36] *Huddleston v. United States*, 485 U.S. 681 (1988). [Reproduced in the accompanying notebook at Tab 3]

[37] *Id.* at 682-83.

[38] *Id.* at 683.

In deciding that the prior act evidence was properly admitted, the Court both set the standard for admitting prior act evidence and described the sources of protection from unfair prejudice for a defendant. First, the Court held that similar act evidence "should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[39] Next, the court went on to outline four sources of protection from prejudice for defendants:

> …first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of rule 402 – as enforced through rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice…; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[40]

This decision created the modern test for the admission of prior or similar act evidence.

b. Post *Huddleston* Case Law

Taking their cue from the Supreme Court, U.S. Circuit Courts have interpreted the *Huddleston* decision in three main ways. The Tenth and parts of the Sixth and Seventh Circuits have developed a four-part test calling for the trial court to (1) determine whether the evidence is offered for a proper purpose; (2) decide whether it is relevant; (3) decide whether the probative value of the evidence is outweighed by the risk of unfair

[39] *Id.* at 685.

[40] *Id.* at 691.

prejudices; and (4) give a limiting instruction to the jury upon request of one of the parties.[41]

A second four-part test was developed in the Third, Eighth, Ninth and part of the Seventh Circuits. This test directs the trial courts to decide whether other crimes evidence (1) relates to a matter in issue other than general propensity; (2) proves an act that is similar enough and close enough in time to be relevant; (3) suffices to support a jury finding that the act happened and that defendant committed it; and (4) possesses probative value that is not outweighed by the risk of unfair prejudice.[42]

The First, Fifth, and part of the Sixth Circuits have enunciated a third test. This test, a two-part test, calls for trial courts to determine whether (1) the other act evidence is relevant for some purpose other than general propensity; and (2) prejudicial impact of the evidence substantially outweighs its probative value.[43]

Courts in the United States have admitted a wide variety of activity into evidence under Rule 404(b)'s "other purposes" language. Testimony that a defendant had

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[41] *See, e.g., United States v. Bakke*, 942 F.2d 977 (6th Cir. 1991) [Reproduced in the accompanying notebook at Tab 9]; *United States v. Murphy*, 935 F.2d 899 (7th Cir. 1991) [Reproduced in the accompanying notebook at Tab 19]; *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991). [Reproduced in the accompanying notebook at Tab 18]

[42] *See, e.g., Government of Virgin Islands v. Edwards*, 903 F.2d 267 (3rd Cir. 1990) [Reproduced in the accompanying notebook at Tab 2] ; *United States v. Wright*, 943 F.2d 748 (7th Cir. 1991) [Reproduced in the accompanying notebook at Tab 23]; *United States v. Brown*, 948 F.2d 1076 (8th Cir. 1991) [Reproduced in the accompanying notebook at Tab 10]; *United States v. Rubio-Villareal*, 927 F.2d 1495 (9th Cir. 1991). [Reproduced in the accompanying notebook at Tab 22]

[43] *See, e.g., United States v. DesMarais*, 938 F.2d 347 (1st Cir. 1991) [Reproduced in the accompanying notebook at Tab 12]; *United States v. Gonzalez-Lira*, 936 F.2d 281 (5th Cir. 1991) [Reproduced in the accompanying notebook at Tab 15]; *United States v. Feinman*, 930 F.2d 495 (6th Cir. 1991). [Reproduced in the accompanying notebook at Tab 14]

threatened and plotted to harm witnesses against him, evidence depicting the defendant's car thefts, the defendant's plans for robbery, the defendant's plans to escape from prison, and the defendant's drug activity have all been admitted as prior act evidence as probative of the defendant's criminal plan and motive and intent to kill a witness against him at his trial.[44] Evidence of participation in similar drug transactions, evidence of a prior conviction for nearly identical counterfeiting activity, and evidence of a previous attempt to import large quantities of narcotics were all admissible to show knowledge.[45]

Six robberies for which the defendant was not indicted were admitted into evidence to show the identity of the defendant in the robbery for which he was indicted.[46] In a trial for sexual abuse, the testimony of six women who were employees of the defendant and who alleged that the defendant sexually abused them during their employment was admissible and relevant to show a common scheme of sexually abusive behavior.[47] Finally, the death by gunshot wound of the defendant's previous wife was admitted into evidence to show lack of accident and intent in the defendant's trial for the murder of his current wife.[48]

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[44] *United States v. Clark*, 988 F. 2d 1459, 1465 (6th Cir. 1993). [Reproduced in the accompanying notebook at Tab 11]

[45] *United States v. Gordon*, 987 F. 2d 902, 908-9 (2nd Cir. 1993). [Reproduced in the accompanying notebook at Tab 16]

[46] *United States v. Mack*, 258 F. 3d 548, 554 (6th Cir. 2001). [Reproduced in the accompanying notebook at Tab 17]

[47] *United States v. Roberts*, 185 F. 3d 1125, 1142 (10th Cir. 1999). [Reproduced in the accompanying notebook at Tab 20]

[48] *State v. Murillo*, 509 S.E. 2d 752, 764 (N.C. 1998). [Reproduced in the accompanying notebook at Tab 8]

ii. Canada

1. R. v. Handy

The Canadian Supreme Court laid out the rationale and the test for the admission of similar act evidence in *R. v. Handy*.[49] In *Handy*, the defendant stood accused of sexual assault causing bodily harm. The Crown attempted to enter into evidence seven similar incidents that had previously occurred between the defendant and the victim where the defendant had the propensity to inflict painful sex when aroused and would not take no for an answer.[50] The trial judge in the case admitted the evidence,[51] but the Court of Appeal overruled, holding that the evidence should have been excluded.[52] The Supreme Court of Canada took up the case and examined the rationale behind the inclusion of similar act evidence.

First, the Court explained the historical rationale behind the general exclusion of disposition evidence. The court held that "it is undoubtedly not competent for the prosecution to adduce evidence tending to [show] that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the [offense] for which he is being tried."[53]

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[49] *R. v. Handy*, [2002] 2 S.C.R. 908 [Reproduced in the accompanying notebook at Tab 6]

[50] *Id.* at para. 2.

[51] *Id.* at para. 17.

[52] *Id.* at para. 19.

[53] *Id.* at para. 33 (quoting *Makin v. Attorney General for New South Wales* [1894] A.C. 57).

Next, the Court explained the reasons for making an exception to a general exclusionary rule. The Court "recognized that an issue may arise…to which evidence of previous misconduct may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse… [if] the similarities were such that absent collaboration, it would be an affront to common sense to suggest that the similarities were due to coincidence."[54]

Finally, the Court determined the basic test for the admissibility of similar act evidence and established the burden of proof. The Court found that "in considering the admissibility of similar fact evidence, the basic rule is that the trial judge must first determine whether the probative value of the evidence outweighs its prejudicial effect."[55] Lastly, the "onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the contest of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception."[56]

2. R. v. Shearing

After *Handy*, the issue in Canadian law becomes the procedure used to balance prejudicial effect against probative value. In *R. v. Shearing*,[57] the Canadian Supreme Court applied the principles of *Handy* to another sexual assault case.

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[54] *Id.* at para. 41. (quoting *R. v. B. (C.R.)* [1990] 1 S.C.R. 717) [Reproduced in the accompanying notebook at Tab 5]

[55] *Id.* at para. 54.
[56] *Id.* at para. 55.

[57] *R. v. Shearing* [2002] 3 S.C.R. 33. [Reproduced in the accompanying notebook at Tab 7]

The Court first examined the probative value of the similar act evidence. The first issue of probative value the Court discusses is the strength of the evidence including the potential for collusion. This issue "turns largely on the improbability of coincidence."[58] Further, if the court decides that "the evidence is not a product of concoction,"[59] the jury must then "determine for itself what weight, if any, to assign to the similar fact evidence."[60] The second issue of probative value discussed by the Court is the identification of the issues in question. Examples given by the court include whether the act in question actually occurred[61] and whether spiritual authority can prevent the formation of consent for sex.[62] Finally with respect to the probative value of similar act evidence, the Court considered similarities and dissimilarities between the facts charged and the similar fact evidence. The court considered six factors when discussing similarities and dissimilarities. They were: (1) the proximity in time of the similar acts to the charged conduct[63]; (2) the extent to which the other acts are similar in detail to the charged conduct[64]; (3) the number of occurrences of the similar acts[65]; (4) the

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[58] *Id.* at para. 40.

[59] *Id.* at para. 41.

[60] *Id.* at para. 42.

[61] *Id.* at para. 46.

[62] *Id.* at para. 47.

[63] *Id.* at para. 51. (Conduct spread over 25 years demonstrated a degree of extended consistency in behavior.)

[64] *Id*. at para. 52. (Similarity can lie in the physical act of sex itself or in the *modus operandi* used to create sexual opportunities.)

circumstances surrounding or relating to the similar acts[66]; (5) any distinctive features unifying the incidents of the similar acts[67]; and (6) any intervening events.[68]

The Court then examined the issue of potential prejudice to the defendant. The Court considered two kinds of prejudice: moral prejudice and reasoning prejudice. The moral prejudice is "the risk of an [unfocused] trial and a wrongful conviction."[69] The factors the Court felt would contribute to the moral prejudice included the inflammatory nature of the combination of sex and religion and the "sheer cumulative number of alleged incidents." [70] The Court described the reasoning prejudice as the "danger…that the jury may become confused by the multiplicity of incidents."[71] The Court worried that the jury "might mix up matters of consideration (the similar acts) with matters of decision (the charge)."[72] The Court concluded that when the probative value of the similar act evidence outweighs the prejudicial effect, the similar act evidence should be admitted.[73]

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[65] *Id*. at para. 53. (Hundreds of instances were clearly enough to establish situation specific behavior.)

[66] *Id.* at paras. 54-58. (The more similar the circumstances surrounding the behaviors, the more probative value the similar act evidence is likely to have.)

[67] *Id.* at paras. 59-61. (Distinctive similarities *and* differences should be considered by the trial judge.)

[68] *Id.* at para. 62. (No analysis of intervening events given.)

[69] *Id.* at para. 65.

[70] *Id.* at para. 65.

[71] *Id.* at para. 68.

[72] *Id.* at para. 69.

[73] *Id*. at para. 74.

B. The Continental Legal System

"Anyone expecting to find elaborate doctrines in continental European evidence law regarding information about a person's character, predilections, or incidents from past life, is bound to be disappointed."[74] According to Mirjan R. Damaska, there seem to be two reasons for this phenomenon: (1) distaste for rules that "call for an advance assessment of the probative effect of evidence,"[75] and (2) the fact that professional and lay finders of fact work together intimately to decide all issues.[76]

The Continental system is mostly concerned with whether or not a particular piece of evidence has any probative value. This, combined with two other factors, makes it particularly difficult to discard evidence of a defendant's past conduct. First, Continental trials are not divided into separate 'guilt-determining' and sentencing phases. As a result, before a court retires to deliberate on the issue of guilt, it has heard evidence relevant to sentencing, including information on the accused character, propensities, and prior conduct.[77] Second, the court conducts witness interrogation in a narrative fashion. This style allows witnesses "considerable freedom" in their testimony as compared to the questioning style in American courts. [78]

C. The Tribunal System

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[74] Damaska, *supra* note 1, at 55. This applies to statutory provisions as well as rules of evidence. *Id.*

[75] *Id.*

[76] *Id.* at 56.

[77] *Id.* at 56.

[78] *Id.* at 57.

i. Rule 89(C) and (D)

The basic rule governing the admissibility of evidence in the ICTY and the ICTR is Rule 89. Rule 89(C) states that any relevant evidence deemed to have probative value may be admitted.[79] Rule 89(D) states that relevant evidence may be excluded if "its probative value is substantially outweighed by the need to ensure a fair trial."[80]

ii. Rule 93

Rule 93 takes the general admissibility of relevant evidence espoused by Rule 89 and applies it specifically to evidence of a specific pattern of conduct. The Rule states: "A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice. (B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defense pursuant to Rule 66."[81]

IV. Admission of Past Misconduct

A. The Anglo-American Legal System

i. Uncharged Past Misconduct

Past misconduct is not always admissible when offered to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[82] The Supreme Court has stated that the decision to admit evidence under Rule 404(b) also depends on "whether the danger of unfair prejudice [substantially]

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[79] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *as amended on* 27 May 2003, *supra* note 8.

[80] *Id.*

[81] *Id.* at 535.

[82] Fed. R. Evid. 404(b), *supra* note 12.

outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."[83] As such, the basic rule of admitting past misconduct is that if the probative value of the prior misconduct is not substantially outweighed by any prejudice to the defendant, the evidence may be admitted if not offered to show character.

ii. Prior Acquittals

In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court made an end run around rule 404(b) to assert that prior bad acts are not necessarily excluded merely because the defendant has been acquitted. While the Rule 404(b) question was never raised in court, the Court theorized that since *Huddleston* the prosecution only needed to prove by a preponderance of the evidence that the defendant had committed the prior act. Using this theory, an acquittal is not necessarily a bar to admission because the standard of proof is much lower under *Huddleston* than in a criminal proceeding.[84]

iii. Prior Arrests

Since a prior act can be admitted even if the defendant had been acquitted, it stands to reason that a prior arrest would also be admissible. This is the case, but only under certain circumstances. Evidence of an arrest alone is not enough for admission, but

[83] *Huddleston, supra* note 36, at 688. (Holding that if similar act evidence is submitted for a proper purpose it is subject only to general strictures on admissibility such as relevance and probative value / prejudicial effect balancing.)[Reproduced in the accompanying notebook at Tab 3]

[84] *Dowling v. United States*, 493 U.S. 342 (1990). [Reproduced in the accompanying notebook at Tab 1]

if evidence of the specific activities of the defendant and the circumstances leading to his arrest were provided, that would be enough for admission.[85]

B. The Continental Legal System

"Observed from the common law's vantage point, continental law is strangely silent on evidence of collateral misconduct that does not contravene the criminal law and on evidence of collateral crime that has not resulted in a conviction."[86] As stated above, Continental courts seem to be interested exclusively in the probative value of prior misconduct. For this reason, instances of conduct such as prior sexual misconduct, training in pick pocketing, and mere fraternization with known criminals can be used as evidence of guilt.[87] Evidence of prior misconduct alone, however is not enough to convict. This evidence can only be used to corroborate other evidence.[88]

There are, however, some instances in which a Continental court will not allow the admission of evidence of prior misconduct. Prior criminal proceedings that did not result in a conviction provide one example. In a German case, the defendant was tried for the arson of his mill, the site of two previous suspicious fires that resulted in criminal proceedings against the defendant. These proceedings, however, never reached the trial stage. The trial court used the two previous prosecutions to support conviction for the third. On appeal, the appellate court reversed, finding that the two prior prosecutions

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[85] U.S.C.S. Fed. R. Evid. 404 [Reproduced in the accompanying notebook at Tab 36] (citing *United States v. Robinson*, 978 F.2d 1554 (10th Cir. 1992).) [Reproduced in the accompanying notebook at Tab 21]

[86] Damaska, *supra* note 1, at 60.

[87] *Id.* at 61.

[88] *Id.* at 62.

were based on unsubstantiated rumor. The appellate court suggested that had the sources of the rumors been available and had the rumors been of probative value in the arson case, they would have been admitted.[89]

In addition, some Continental courts will refuse to hear evidence of prior misconduct for which the defendant could have been prosecuted but was not. This reluctance is partly explained by the Continental practice of mandatory prosecution. In many Continental jurisdictions, the practice of prosecutorial discretion does not exist; when evidence of a crime exists, the prosecutor must prosecute.[90] Finally, some Continental jurisdictions refuse to admit evidence of a crime that the defendant was found not guilty of, although there is no consensus on this position.[91]

V. Admission of Prior Convictions

A. The Anglo-American Legal System

The American legal system's treatment of prior convictions evidence is simple compared with its treatment of prior misconduct. As stated Rule 404(b), evidence of a prior conviction may be used only to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[92] In addition, if the defendant is a witness, evidence of a prior conviction may be used to impeach his testimony subject to Rule 609, described above.[93]

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[89] *Id.* at 62-63.

[90] *Id.* at 63.

[91] *Id.* at 63-64.

[92] Fed. R. Evid. 404, *supra* note 13.

[93] Fed. R. Evid. 609, *supra* note 18.

B. The Continental Legal System

The Continental legal system provides a stark contrast to the American legal system in its treatment of the admission of evidence of prior convictions. While it is generally said that it is improper to assume that a person who has committed a crime is more likely to commit that crime again, the treatment of prior crimes in Continental courts belies that notion.[94]

The Continental system does have some similarities with the American system. Evidence of prior crimes may be used to establish elements of a crime or a particular modus operandi and evidence of prior crimes that have been expunged may not be used against a defendant.[95] The similarities end here, however.

Unlike in the American system, a criminal record can be used to establish a "particular inclination" of the defendant as long as the inclination can be inferred from the conduct that led to the prior conviction. In fact, the more unusual the inclination, the more likely it is that the evidence will be used.[96] For example, while homosexuality was a criminal offense in Germany, prior convictions for homosexual behavior were used as circumstantial evidence of guilt in subsequent proceedings.[97]

While the Continental system seems more likely overall to admit evidence of prior crimes than the American system, the real difference between the two arises over impeachment of witnesses. In the Continental legal system, the use of prior crimes

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[94] Damaska, *supra* note 1, at 58.

[95] *Id.* at 59-60.

[96] *Id.* at 58-59.

[97] *Id.*

evidence to impeach the defendant's testimony is prohibited.[98] This contrasting result can be explained by how the defendant is treated in the Continental legal system. First of all, while the defendant is usually heavily questioned in the course of a trial, he is prohibited from testifying under oath and is under no legal obligation to tell the truth. Since the defendant's testimony is already under suspicion, there is no need to impeach with evidence of prior crimes.[99] In addition, the above-mentioned lack of prosecutorial discretion results in a trial for all charged offenses, eliminating the problem of a defendant who has a criminal record merely as a result of plea-bargaining.[100]

VI. The Tribunal System

To this point, none of the tribunals has dealt with the question of prior act admissibility in their case law. To help answer the question of whether the tribunals should follow the American adversarial model or the Continental non-adversarial model, it would be helpful to analyze the similarities the tribunal has with each system.

As noted above, the ICTR adopted the Rules of Procedure and Evidence of the ICTY as its Rules of Procedure and Evidence in Article 14 of the Statute.[101] The ICTY's Rules of Procedure and Evidence, by turn, were "largely modeled upon a draft submitted by the United States, reflecting the American adversarial system rather than the inquisitorial system prevalent in civil law countries."[102] The Tribunals follow an

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[98] *Id.* at 59.

[99] *Id.* at 59-60.

[100] *Id.* at 60.

[101] ICTR Statute, *supra* note 6, art. 14.

[102] Scharf, *supra* note 2, at 171.

essentially adversarial approach to the presentation of evidence at trial, with each side presenting its case, and witnesses for each side subject to cross examination by the other. Other factors also point to the adversarial model. Each side is responsible for its own expert witnesses.[103] 'Guilt-finding' proceedings and sentencing proceedings are held separately where the defendant pleads guilty. All witnesses are placed under oath. There is no provision for a de novo review of trial proceedings on appeal.[104] Further, the current form of Rule 93, with its insistence on notice to the defendant, now more closely mirrors the wording of FRE 404(b).[105]

The Tribunals do share some characteristics with the Continental model. During the ICTY's first case, the Tadic trial, the defense counsel urged the Trial Chamber to follow American evidentiary rules and exclude hearsay statements in situations where there were no circumstantial guarantees of trustworthiness. The Trial Chamber refused, instead holding that Rule 89(C) allows in any evidence deemed to have probative value.[106] Gregory A. McClelland posits that the rationales for this decision are that it enhances the search for truth and that the ICTY's triers of fact are professional jurists,

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[103] McClelland, *supra* note 3, at 29.

[104] *Id.*, at 30-31.

[105] Rule 93(B) of the Tribunal now reads "[a]cts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defense pursuant to Rule 66." Rule 404(b) of the Federal Rules of Evidence reads, in part, "the prosecution in a criminal case shall provide reasonable notice in advance of trial…of the general nature of any such evidence it intends to introduce at trial."

[106] *Prosecutor v. Tadic*, No. IT-94-1-T, paras. 555-56. [Reproduced in the accompanying notebook at Tab 4]

both factors which point to the Continental legal model.[107] Another factor which points to the Continental model is that findings of guilt do not need to be unanimous, rather only two of the three judges on an ICTY panel must find the defendant guilty.[108]

The majority of factors point to the Tribunal system following the adversarial model. As an extension of this model, the Tribunal could follow the adversarial model for admitting evidence of prior conduct. There are several arguments, however, that the Tribunal system would be better served following more of a Continental model.

The Tribunal system has four basic justifications: creating an accurate historical record; advancing international jurisprudence and the international rule of law; individualizing guilt; and doing justice.[109] Possibly the most important and fundamental function of the international criminal tribunals is creating an accurate historical record.[110] Continental legal systems have an ability to create a full record lying partly in the judicially controlled fact collection and partly in the absence of rules prohibiting the use of prior act evidence. In fact, Continental law does not "contain rules excluding relevant evidence on the ground that factfinders might erroneously assess its credibility and thus endanger factfinding precision."[111] Continental lawyers are much more pragmatic, believing that relying on a case-by-case approach is better than framing general rules.[112]

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[107] McClelland, *supra* note 3, at 30.

[108] *Id.*

[109] *Id.* at 2-5.

[110] *Id.* at 37.

[111] Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 514 (1973). [Reproduced in the accompanying notebook at Tab 31]

One possible way to improve the Tribunal system's search for truth may be to entrust the evidence gathering process to neutral agencies, make the results of investigations available to both parties, give the Presiding Judge control over the witness list and maintain the Presiding Judge's primary responsibility for presenting evidence and questioning witnesses, subject the defendant to questioning at any time, and subject the Tribunal's decisions to de novo review on appeal.[113] These suggestions would obviously shift the balance of the Tribunal's nature to the Continental system, which may better suit the four major justifications of the Tribunal system. This may be a better fit for the Tribunal, for while the language of Rule 93 may look like the language of Rule 404(b), the *Tadic* decision shows an interpretation of the rule more appropriate to the Continental system.

VII. Conclusion

The American and Continental legal systems differ philosophically regarding the admission of past misconduct. While the American system forbids the use of past misconduct to prove character, the Continental system allows the admission of past misconduct evidence whenever it is relevant. The American system in practice, however, allows quite a bit of evidence to be admitted that the Continental system will not, such as evidence of a crime for which the defendant has been acquitted. Overall, the use of past misconduct evidence in the two systems is more similar than different.

The American and Continental legal systems differ the most in their treatment of the admission of evidence of prior convictions. In the American system, the evidence

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[112] *Id.*

[113] McClelland, *supra* note 3, at 37-38.

may not be offered to show character, and may be used to impeach the defendant if he testifies.

In the Continental system, evidence of a prior conviction may be used to show the inclinations of the defendant and may not be used to impeach the defendant. The main reason for this disparity is that in the Continental system, while the defendant is usually heavily questioned in the course of a trial, he is prohibited from testifying under oath and is under no legal obligation to tell the truth. Since the defendant's testimony is already under suspicion, there is no need to impeach with evidence of prior crimes.[114]

The Tribunal system has characteristics of both the American adversarial system and the Continental inquisitorial system. In body, the Tribunals more closely resemble the adversarial system. The Tribunals' Rules of Procedure and Evidence were largely based on a draft submitted by the United States.[115] The procedure followed during trial more closely resemble an adversarial system, including the role of the lawyers and the placing under oath of all witnesses.[116]

In spirit, however, the Tribunal system more closely resembles the Continental inquisitorial system due to it's primary mission of truth finding. For the most part, this is reflected in the Tribunals' liberal policy on the admission of evidence in order to develop a complete record.[117] For this reason, it may be advantageous to argue for a continuing

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[114] Damaska, *supra* note 1, at 59-60.

[115] Scharf, *supra* note 2, at 171.

[116] McClelland, *supra* note 3, at 29.

[117] *Id.* at 29.

interpretation of the Tribunal's Rules of Evidence that is more consistent with the Continental model of evidence.