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## Reasoned Judgments Requirement In International Criminal Law

Heather M. Kern

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CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES PROJECT

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MEMORANDUM FOR THE  
OFFICE OF THE ICTR PROSECUTOR

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ISSUE 13: REASONED JUDGMENTS REQUIREMENT IN  
INTERNATIONAL CRIMINAL LAW

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PREPARED BY HEATHER M. KERN  
SPRING 2003

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS\***

### **A. Issues**

This memorandum addresses whether an international criminal law principle exists requiring that reasoned judgments be rendered in international criminal law trials. Discussion Part A of this memorandum compares the decision-rendering practices of a cross-section of the international community. Part B discusses whether a duty to provide reasoned judgments exists with respect to international criminal law trials, examining the law governing international tribunals and international customary law. Part C evaluates the nature, extent, and limits of a duty to provide reasoned judgments by reference to general human rights principles and the goals of international war crimes tribunals.

### **B. Summary of Conclusions**

**(1) Most jurisdictions studied require that judges provide reasons for decisions. Juries are generally not required, or even allowed, to provide reasons for their decisions, but exceptions are increasingly common and many jurisdictions have terminated the use of juries altogether.**

Except for the United States, Canada, and Scotland, the jurisdictions studied require that trial judges give reasons for their opinions. In the United States, trial judges generally do not give reasons for their decisions. In Canada, they need not, but may be overturned on appeal for failure to do so where the evidence is strongly disputed. In Scotland, judges do not give reasons for their decisions as a matter of course, but must do so at the request of the defendant for appeals purposes. The remaining jurisdictions generally require that judges provide reasons for their opinions, generally in writing.

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\* ISSUE 13: Compare and contrast the ways in which decisions are rendered by adjudicators of fact (judges or juries) in the common law jurisdictions of USA, Canada, and Britain; the mixed jurisdictions of Israel, Scotland, and South Africa; and the civil code jurisdictions of France and Belgium. Consider whether an international criminal law principle exists requiring that reasoned judgments be rendered in international criminal law trials. Consider the nature, extent, and limit if such duty if it exists, or were to develop.

Where juries are used, they are generally not required to give reasons for their decision. This is especially true in the United States, England, and Canada, where courts may not inquire into the deliberations of the jury. In contrast, Belgium requires special verdicts, which involve a list of factual findings made by the jury. Some jurisdictions, such as Israel and South Africa, have abolished the use of the jury. Jurisdictions that retain it, especially in Europe where the European Convention on Human Rights may imply a reasons requirement, are considering alterations to the manner in which juries deliver verdicts.

**(2) An international criminal law principle that fact-finders must provide reasoned judgments exists, or is at least emerging. Statutes governing international criminal tribunals expressly require reasoned judgments and the custom of nations supports a finding that reasoned judgments are required.**

While the Statute of the International Court of Justice had no express provision requiring reasoned judgments, the statutes of all international criminal tribunals created since require that the accused be provided reasons for the court's decision in writing.

As indicated in the section comparing national laws, a custom exists, and is growing stronger, that reasons for decisions are provided in criminal cases. While not all countries require reasons, the trend is toward doing so. While a case can be made for preserving secrecy regarding jury deliberations and decisions, they are attributable to the unique role of the jury as a check on state power and do not apply generally where professional and independent judges preside.

**(3) The principle that fact-finders in international criminal proceedings must provide reasoned judgments is not only found in express provisions and customary law, but is supported by established human rights principles and by the goals of international criminal tribunals generally.**

The rights to a fair trial and to an effective appeal are broadly recognized and support a requirement that an accused be told the reasons for a court's decision.

Specifically, reasons provide an individual convicted of a crime a basis to argue that the trial court's decision was flawed or not supported by the evidence. They also ensure that procedural rules, particularly rules of evidence, are followed at trial. Reasons are the antithesis of arbitrary decisions prohibited by the principles of fairness in criminal trials.

Not only human rights doctrine, but the foundational underpinnings of the war crimes tribunals support recognition of a principle that reasoned judgments must be provided in criminal cases. The tribunals are particularly vulnerable to attacks of unprincipled decision-making and lack of independence. Fairness, and the perception by the world community that the trials are fair, is an important prerequisite to deterrence, which is arguably the principle purpose of the war crimes tribunals. Requiring reasons for judgments furthers not only fairness, but provides a means of demonstrating that fairness to outside observers.

## **II. FACTUAL BACKGROUND**

The International Criminal Tribunal for Rwanda was created in 1994 “to address the murder of almost 1 million Tutsis by Hutu paramilitary forces over three months during the civil war in Rwanda.”<sup>1</sup> The Tribunal has jurisdiction to prosecute the persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda in 1994 as well as Rwandan citizens suspected of such acts or violations in the territory of neighboring states.<sup>2</sup>

The system was created as one of concurrent jurisdiction: The tribunal was to try the leaders of the genocide and the Rwandan courts were to try all other responsible parties.<sup>3</sup> The Tribunal consists of three Trial Chambers, with three judges each, and an Appeals Chamber of five judges. The Appeals Chamber adjudicates appeals from both the Rwanda Tribunal and the International Criminal Tribunal for the former Yugoslavia.<sup>4</sup>

Particularly relevant to this discussion is Article 22 of the Statute of the International Tribunal for Rwanda,<sup>5</sup> regarding judgments. It reads:

- (1) The trial chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
- (2) The judgment shall be rendered by a majority of the Judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

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<sup>1</sup> HOWARD BALL, WAR CRIMES AND JUSTICE 25 (2002) [reproduced in the accompanying notebook at Tab 40].

<sup>2</sup> INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, HANDBOOK FOR JOURNALISTS (1998), *available at* <http://www.icttr.org/wwwroot/default.htm>.

<sup>3</sup> Madeline H. Morris, *The Trials Of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 249, 350 (1997) [reproduced in the accompanying notebook at Tab 73].

<sup>4</sup> INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, *supra* note 2.

<sup>5</sup> Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR. 48th Sess., U.N. Doc. S/RES/955 (1994) [reproduced in the accompanying notebook at Tab 6].

### **III. LEGAL DISCUSSION**

#### **A. Adjudication of Fact in Criminal Proceedings: A Comparative Study**

“Perhaps one of the most fundamental of all human rights should be the entitlement of the defendant to be told the reasons for his conviction and subsequent sentence.”<sup>6</sup> With this statement, John Andrews introduces his comparative study of human rights in criminal procedure.<sup>7</sup> He continues: “[i]f this is a fundamental right, then it is denied to defendants in most of the procedures studied.”<sup>8</sup> The law has evolved since Andrews published his study in 1982. While such a right is still not universally embraced, fact-finders in a variety of jurisdictions are increasingly required to provide reasons for their decisions.

The discussion that follows is organized according to the general rule of each jurisdiction discussed. Specifically, reasons are not generally required in the United States and Canada, but are generally required in Israel, South Africa, and Belgium. Procedures in England, Scotland, and France vary and are in a state of transition, due largely to the adoption by these nations of the European Convention on Human Rights, which may require reasoned judgments in all criminal cases.<sup>9</sup>

#### **1. Reasons Not Generally Required**

In many jurisdictions, neither the judge nor the jury is generally required to give reasons. Even if reasons are not generally required, most jurisdictions provide that the

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<sup>6</sup> John A. Andrews, *Introduction to HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY* 10-11 (John A. Andrews ed. 1982) [reproduced in the accompanying notebook at Tab 39].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See discussion *infra* Part III.A.3.

judge must or should give reasons in some instances, such as at the request of a party or where the evidence is convoluted.

**a. United States of America**

The United States is the strictest adherent to the principle that judges need not give reasons for their opinions. In the United States, most criminal trials take place in state courts, and each state has its own laws, so there is no national code of criminal procedure.<sup>10</sup> A state can grant criminal defendants more, but not less, rights than the Supreme Court, but often has little incentive to do so.<sup>11</sup> Criminal procedure law regarding defendants' rights is therefore largely comprised of the United States Supreme Court's interpretation of the Constitution.<sup>12</sup>

The Sixth Amendment to the Constitution provides that "[I]n all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." A jury trial is a matter of right in all but "petty" offenses.<sup>13</sup> A jury usually returns, in open court, a verdict of either guilty or not guilty.<sup>14</sup> The jury does not provide reasons and judges may not inquire into the rationale behind the jury's decision.<sup>15</sup>

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<sup>10</sup> Craig M. Bradley, *United States*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 414 (Craig M. Bradley ed. 1999) [reproduced in the accompanying notebook at Tab 42].

<sup>11</sup> *Id.* at 396.

<sup>12</sup> *Id.* at 395. Particularly, the Court's interpretation of the Fourth, Fifth, and Sixth Amendments govern criminal procedure. While these amendments facially apply only to the federal government, the Supreme Court has interpreted the Fourteenth amendment as extending the other amendments to states in the 1960's. *Id.*

<sup>13</sup> *Id.* at 418 (citing *Baldwin v. New York*, 399 U.S. 66 (1970), in which the Supreme Court defined as presumptively "petty" a crime for which a sentence of no more than six months is authorized by statute, regardless of whether the defendant is actually imprisoned or not). The defendant cannot waive this right without the prosecutor's consent, but a prosecutor typically prefers a non-jury trial. Bradley, *supra* note 10 at 418 [reproduced in the accompanying notebook at Tab 42].

<sup>14</sup> *Id.*

<sup>15</sup> See FED. R. EVID. 606(b) (judges are prohibited from inquiring into reasons underlying jury verdicts) [reproduced in the accompanying notebook at Tab 15]; see also *Gray v. U.S.* 174 F.2d 919, 924 (reversing

The Supreme Court has not decided whether the use of a special verdict, where the judge formulates succinct questions of fact necessary to the resolution of the matter, is permissible. No federal statute authorizes the use of the special verdict, and most courts find that such a practice infringes on the defendant's right to trial by jury.

For example, in *U.S. v. Spock*,<sup>16</sup> a federal appeals court found error in the trial court's use of a special verdict procedure because of its potential to manipulate the jury's decision. "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. . . . By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant jury may be led to vote for a conviction which, in the large, he would have resisted."<sup>17</sup> Presumably, when jurors discuss the case, they often go through the elements of the crime one at a time in just such a manner to narrow down areas of disagreement and come to the required unanimous verdict. The court noted that it was the judge's participation in this forcing of a decision by use of the special verdict that was objectionable.<sup>18</sup>

Like juries, judges do not generally give reasons for their decisions in bench trials, where they serve as finders of fact.<sup>19</sup> Federal Rule of Criminal Procedure 23(c) provides that, "[i]f a party requests before the finding of guilty or not guilty, the court

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a conviction in which the jury "was erroneously required to render verdicts in the nature of special verdicts in answer to particulars of the information") [reproduced in the accompanying notebook at Tab 30]. The jury was provided with one verdict form for each criminal count, but each form had several paraphrases, each with a corresponding blank line on which the jury was to indicate a finding of guilty or not guilty. *Id.*<sup>16</sup> 416 F.2d 165, 182 (1969) [reproduced in the accompanying notebook at Tab 32]. The Court distinguishes cases in which the use of a special verdict in a criminal case has been upheld as cases where the procedure benefited the defendant and the defendant did not object. "It is elementary that defendant, properly advised, may waive even fundamental rights." *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Sean Doran et. al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 44 (1995) ("reasoned judgments in criminal bench trials appear to be the exception rather than the rule in the United States") [reproduced in the accompanying notebook at Tab 62].



must state its specific findings of fact in open court or in a written decision or opinion.”<sup>20</sup>

This is a distinct contrast from the rule in federal civil cases that a trial court, in all actions tried without a jury, “find the facts specifically and state separately its conclusions of law thereon.”<sup>21</sup>

The rule that a judge need not give reasons absent a request by the parties is interpreted quite strictly. For example, one court held that no findings were needed absent a request even though the court had admitted evidence subject to a condition and never ruled on whether that condition was ever satisfied.<sup>22</sup> Another court indicated that, where no request is made, “on appeal, findings will be implied in support of the judgment if the evidence, viewed in the light most favorable to the government, warrants them.”<sup>23</sup> Thus, in federal non-jury cases, reasons are only required if requested before the verdict is returned. When a request for findings is made, “the Court’s reasoning, finding, and conclusions must be adequate to enable intelligent appellate review of the basis for that decision.”<sup>24</sup>

Going one step further than federal law, many state laws do not require that judges give reasons for their opinions in nonjury criminal trials under any circumstances.<sup>25</sup> For example, Ohio law provides that, “[i]n a case tried without a jury,

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<sup>20</sup> FED. R. CRIM. P. 23(c) [reproduced in the accompanying notebook at Tab 13].

<sup>21</sup> FED. R. CIV. P. 52(a) [reproduced in the accompanying notebook at Tab 12].

<sup>22</sup> U.S. v. Bolles, 528 F.2d 1190, 1191 (4th Cir. 1975) [reproduced in the accompanying notebook at Tab 29].

<sup>23</sup> U. S. v. Ochoa, 526 F.2d 1278, 1282 n.6 (5th Cir. 1976) [reproduced in the accompanying notebook at Tab 33].

<sup>24</sup> U.S. v. Silberman, 464 F. Supp. 866, 869 (M.D. Fla. 1979) [reproduced in the accompanying notebook at Tab 31].

<sup>25</sup> Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L. J. 477, 518 n. 172 (1998) (rebutting an argument that hearsay evidence need not be excluded in bench trials because judges are required to write opinions, which prevents them from improperly using evidence in reaching a decision) [reproduced in the accompanying notebook at Tab 84].

the court shall make a general finding.”<sup>26</sup> An Ohio appeals court confirmed that a trial court is not required to state specific findings in its verdict.<sup>27</sup> The Texas Code of Criminal Procedure does not provide for a judge to give reasons for his opinion, an appeals court stated, holding that it was not error for a trial court to ignore the defendants’ request to make factual findings.<sup>28</sup> A study of Philadelphia bench trials revealed that judges “sometimes” give reasons for their decisions.<sup>29</sup>

In many jurisdictions, a written opinion is considered a prerequisite to a defendant’s ability to appeal.<sup>30</sup> This is not so in the United States where, as a general rule, questions of fact are not reviewable on appeal.<sup>31</sup> The appellate court may, however, reverse convictions for lack of evidence, which implies a finding that the facts were not decided correctly.<sup>32</sup>

Thus, in the United States, neither a judge nor a jury gives written reasons for their opinions, although a judge must do so at the defendant’s request. On appeal, the findings of fact are unreviewable, but a reversal for lack of evidence implies a reversal of the factual findings.

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<sup>26</sup> See OHIO R. CRIM. P. 23(c) [reproduced in accompanying notebook at Tab 10]. See also ARIZ R. CRIM. P. 26(1)(a) (“[T]he term judgment means the adjudication of the court based upon . . . its own finding following a non-jury trial, that the defendant is guilty or not guilty”) [reproduced in the accompanying notebook at Tab 11].

<sup>27</sup> State v. D’Ambrosio, No. 57448, 1990 Ohio App. LEXIS 3781, at \*42 (Ohio Ct. App. Aug. 30, 1990) (holding that the trial record and transcripts are sufficient for an effective appeal) [reproduced in the accompanying notebook at Tab 28].

<sup>28</sup> Hernandez v. Texas, 420 S.W. 2d 949, 952 (Tex. Crim. App. 1967) [reproduced in accompanying notebook at Tab 27]. The appeals court did not discuss the issue, but succinctly rejected the allegation of error in only two sentences: “The failure of the trial court to make findings of fact and conclusions of law as the appellants requested was not an error. Such procedure is not provided for in the Texas Code of Criminal Procedure.” *Id*

<sup>29</sup> Stephen J. Scholhofer, *Is Plea-Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1065 (1984) [reproduced in accompanying notebook at Tab 78].

<sup>30</sup> See discussion *infra* Part III.C.1.b.

<sup>31</sup> Christopher Osakwe, The Bill of Rights for the Criminal Defendant in American Law: A Case Study of Judicial Law-Making in the United States, *in* HUMAN RIGHTS IN CRIMINAL PROCEDURE, *supra* note 6, at 292 [reproduced in accompanying notebook at Tab 51].

<sup>32</sup> Bradley, *supra* note 10, at 422 [reproduced in the accompanying notebook at Tab 42].

### **b. Canada**

Like the United States, Canada does not mandate that judges give reasons for their opinions. Canada differs from the United States, however, in that failure to give reasons is more likely to result in a reversal on appeal.

Canadian criminal trials are usually heard by a judge sitting without a jury, although an accused can generally elect to have a trial by jury.<sup>33</sup> The Criminal Code governs criminal procedure.<sup>34</sup> The Code is not comprehensive, but is supplemented by judicial decisions interpreting the Canadian Charter of Rights and Freedoms and the common law.<sup>35</sup> While the Code does not explicitly require the fact-finder in a criminal trial to provide a reasoned opinion supporting its decision, case law indicates that judges must provide reasoned opinions in certain circumstances.

The Code is silent on whether trial judges must give reasons for their opinions. A requirement that judges give reasons may, however, be implicit in the defendant's right to appeal. In the words of the Supreme Court of Canada, "it would be wise for trial judges to write reasons setting out the legal principles upon which the conviction is imposed so that an error may be more easily identified if there be error."<sup>36</sup> Appeals are allowed on the grounds that the conviction is unreasonable or not supported by the evidence, entails a miscarriage of justice, or is based on an error of law.<sup>37</sup>

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<sup>33</sup> Kent W. Roach, *Canada*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 10, at 74 [reproduced in accompanying notebook at Tab 53].

<sup>34</sup> R.S.C., ch. 46 (1985) (Can.) [reproduced in the accompanying notebook at Tab 17].

<sup>35</sup> Part I of the Constitution Act, 1982 [reproduced in accompanying notebook at Tab 16].

<sup>36</sup> *R. v. McMaster*, 1 S.C.R. 740 (1996) [reproduced in accompanying notebook at Tab 36].

<sup>37</sup> Section 686(1)(a) of the Criminal Code, R.S.C., c. C-46 (1985) (Can.), [reproduced in accompanying notebook at Tab 17], provides for an appeal where the appeals court finds that: "(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or (iii) on any ground there was a miscarriage of justice."

In *R. v. Burns*, the Supreme Court unanimously decided that a judge need not give reasons for his or her decision.<sup>38</sup> The defendant in *Burns* was convicted of sexual assault following a trial in which conflicting evidence was presented. The trial judge gave brief oral reasons for the conviction, essentially stating that he believed the complainant.<sup>39</sup> On appeal, the court, finding the statement of reasons insufficient “to determine whether the learned trial judge properly directed himself to all the evidence,” set aside the conviction and directed a new trial.<sup>40</sup>

The Supreme Court restored the convictions, citing a “general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or another on problematic points.”<sup>41</sup> It endorsed this rule on the basis of efficiency. The court noted that the appellate court focused neither on a lack of evidence to support the verdicts of guilty, nor on a finding that those verdicts were unreasonable, but on the trial judge’s failure to “indicate that he had considered certain frailties in the complainant’s evidence.”<sup>42</sup> A judge, the Court held, “is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused’s guilt.”

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<sup>38</sup> 1 S.C.R. 656 (1994) [reproduced in the accompanying notebook at Tab 35].

<sup>39</sup> The judge’s entire statement of reasons was as follows: “I had the opportunity to hear the evidence of [the minor complainant] and to observe her demeanor on the witness stand. Although she was not sure of the exact dates of the specific acts and was confused as to some of the continuing events, she did present her evidence in an honest and straightforward manner, without equivocation. She was in my opinion a credible and believable witness. I accept her evidence as to the alleged indecent assaults from 1980 to 1983, and I also accept her evidence as to the sexual assault that occurred in January of 1987. Based upon that evidence, I am satisfied beyond a reasonable doubt that the accused is guilty on both counts.” *Id.*

<sup>40</sup> *R. v. Burns*, 74 C.C.C. (3d) 124 (1992) [reproduced in the accompanying notebook at Tab 34].

<sup>41</sup> *Burns*, 1 S.C.R. 656 (citing *Harper v. The Queen*, 1 S.C.R. 2 (1982)) [reproduced in the accompanying notebook at Tab 35].

<sup>42</sup> *Id.*

The Court further distinguished insufficient reasons from bad reasons. The appeals court had relied on a statement in *Harper*<sup>43</sup> that an appeal must be allowed, “where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence.” That statement referred to cases where the trial judge’s reasons demonstrate a failure to grasp an important point or a choice to disregard it, such that the verdict was unreasonable.

Revisiting the issue, the Supreme Court later held in *R. v. R. (D.)*,<sup>44</sup> that where there is “confused and contradictory evidence,” the trial judge should give reasons for his or her conclusions.<sup>45</sup> The Court reaffirmed *Burns*, maintaining that the appellate court will not intervene, “where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the records clearly reveals the trial judge’s reasons, or where the evidence is such that no reasons are necessary.”<sup>46</sup> In a dissenting opinion, one justice argued that this case falls squarely within *Burns*, such that no reasons were required and that the judge did give reasons in this case, albeit orally.

In general, a judge that provides reasons can ensure that his or her verdict will not be overturned as unreasonable, especially where the evidence is controverted. The reasons must be thorough and logical, or the decision will be overturned as unreasonable or unsupported by the evidence.

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<sup>43</sup> *Id.*

<sup>44</sup> 2 S.C.R. 291 (1996) [reproduced in accompanying notebook at Tab 38].

<sup>45</sup> The Supreme Court offered the following example of confused and convoluted evidence: “when [the victim] testified that her father had cut her on her back, she claimed first that she had to get stitches and stay overnight in a hospital. Then she testified that her hospital stay lasted three weeks. However, there were no records of any such hospital stay.” *Id.* at 54.

<sup>46</sup> *Id.*

In contrast to judges, juries do not give reasons for their verdicts under any circumstances.<sup>47</sup> Where they are used, juries deliberate in secret,<sup>48</sup> and courts “are prohibited from speculating about the reasoning process of a jury in reaching a verdict.”<sup>49</sup> Like a judge’s decision, a jury decision can be appealed if unsupported by the evidence.<sup>50</sup>

In sum, judges need not, and juries may not, give reasons for their decisions in all cases. A logical decision that can be supported by the evidence is required by both, however, because the decisions of either can be overturned if unreasonable.

## **2. Reasons Generally Required**

In the two systems studied where no jury system exists, reasons for decisions are generally required. In the third jurisdiction where reasons are generally required, the use of the jury has been largely curtailed. This raises the possibility that the preference for reasons led to the demise of the jury system. Proponents of the non-jury systems employed by Israel and South Africa suggest that criminal decisions are more principled due to the requirement that reasons be given to justify decisions.<sup>51</sup>

### **a. Israel**

The first system that does not use juries is Israel, where only bench trials exist. The defendant has no right to a jury trial, but is tried by a single judge, a panel of three

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<sup>47</sup> *Id.*; R. v. Noble, 1 S.C.R. 874 (1997) [reproduced in the accompanying notebook at Tab 37].

<sup>48</sup> Roach, *supra* note 33, at 74 [reproduced in the accompanying notebook at Tab 53].

<sup>49</sup> *Noble*, 1 S.C.R. 874 [reproduced in the accompanying notebook at Tab 37].

<sup>50</sup> See Roach, *supra* note 33, at 75 [reproduced in the accompanying notebook at Tab 53].

<sup>51</sup> Kenneth Mann, *Civil Procedure*, in INTRODUCTION TO THE LAW OF ISRAEL 282 (Amos Shapira & Karen C. DeWitt-Arar eds., 1995) (noting that the reasons requirement has led to “a large body of case law describing how judges do and should assess facts and arrive at decisions on factual issues in the trial” and that such case law is largely absent in systems that rely heavily on the jury trial) [reproduced in accompanying notebook at Tab 50].

judges, or in a Magistrate Court depending on the severity of the offense.<sup>52</sup> Israel's rules of criminal procedure are grounded in statute and common law principles developed by the courts.<sup>53</sup>

At the end of the bench trial, the judge or magistrate presents his or her decision on factual matters along with a written assessment of the evidence and a reasoned justification of the factual finding.<sup>54</sup> Where three judges hear the case,<sup>55</sup> one serves as the presiding judge.<sup>56</sup> When the decision is not unanimous, the majority view prevails, but if each of the three judges has a different opinion, the presiding judge's view prevails.<sup>57</sup>

Israel's procedure serves as a check on the judiciary by ensuring that the evidentiary rules are followed. The judge rules on admissibility and must disregard evidence deemed inadmissible.<sup>58</sup> If the reasons indicate that the judge relied on inadmissible evidence in reaching a verdict, the verdict may be overturned on appeal.<sup>59</sup>

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<sup>52</sup> Eliahu Harnon & Alex Stein, Israel in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 10, at 239 [reproduced in the accompanying notebook at Tab 47].

<sup>53</sup> *Id.* at 217. Israel has no written constitution. In 1992, it enacted Basic Law: Human Dignity and Liberty, setting out some generally accepted constitutional human rights. Eliahu Harnon, *The Impact of the Basic Law: Human Dignity and Liberty on the Law of Criminal Procedure and Evidence*, 33 ISR. L. REV. 678, 679 (1999) [reproduced in the accompanying notebook at Tab 67]. "The list of human rights is fairly short and manifestly not exhaustive." *Id.* at 682. For example, it does not mention the right of an accused to a fair trial. *Id.*

<sup>54</sup> Harnon & Stein, *supra* note 52, at 282 [reproduced in the accompanying notebook at Tab 47].

<sup>55</sup> Three judges are required for criminal cases where the offense is punishable by imprisonment of ten years or more or by death. Although the laws of Israel permit capital punishment in special circumstances, it almost never applied. Hon. Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L. J. 527, 528 (1999) [reproduced in the accompanying notebook at Tab 82]. "Israel's one and only execution came in 1962 when it hanged Nazi war criminal Adolf Eichmann for his role in killing 6 million Jews." Susan Taylor Martin, *Death Penalty Foes Gain Ground*, ST. PETERSBURG TIMES, Jan. 9, 1998, at 2A [reproduced in the accompanying notebook at Tab 72].

<sup>56</sup> Straschnov, *supra* note 55, at 528 [reproduced in the accompanying notebook at Tab 82].

<sup>57</sup> Drora Karotkin, *Effect of the Size of the Bench on the Correctness of Court Judgments*, 14 INT'L REV. L. & ECON. 371, 372 (1994) [reproduced in the accompanying notebook at Tab 70].

<sup>58</sup> Harnon & Stein, *supra* note 52, at 240 (citing Israeli Evidence Ordinance, Section 56) [reproduced in the accompanying notebook at Tab 47].

<sup>59</sup> *Id.* at 239 (citing Ploni v. State of Israel, 50(3) P.D. 225 (1993)) [reproduced in the accompanying notebook at Tab 47].

**b. South Africa**

South Africa, which also does not use juries, is unique among the systems discussed thus far in its use of assessors. Assessors are like jurors in that they are called for a specific case and decide questions of fact, but unlike jurors because they give reasons for their decisions.<sup>60</sup> The use of assessors emerged as the use of the jury declined in South Africa from 1920 until 1969, when the jury system was abolished.<sup>61</sup> At present, a jury system is widely viewed as unworkable in South Africa, partly due to “a history of all-white juries rendering unjust verdicts against non-white defendants and the problems of devising a jury system for a complex multi-racial society.”<sup>62</sup>

In South Africa’s non-jury system, a judge or magistrate is at all times either the sole fact-finder or a co-finder of fact.<sup>63</sup> Magistrates preside in District and Regional Magistrates’ Courts, which are collectively referred to as “lower courts,” and have limited jurisdiction based on the seriousness of the offense.<sup>64</sup> A judge presides in the High Court, which has jurisdiction over all cases, but deals in practice only with “the most serious offenses.”<sup>65</sup>

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<sup>60</sup> Neil Vidmar, *The Jury Elsewhere in the World*, in WORLD JURY SYSTEMS, 425 (Neil Vidmar ed., 2000) [reproduced in the accompanying notebook at Tab 57].

<sup>61</sup> P.R. Spiller, *The Jury System in Early Natal*, 8 J. LEGAL HIST. 129 (1987) [reproduced in the accompanying notebook at Tab 81]. The jury system had been introduced by English colonists around 1928. *Id.*

<sup>62</sup> Vidmar, *The Jury Elsewhere in the World*, *supra* note 60, at 425 [reproduced in the accompanying notebook at Tab 57].

<sup>63</sup> P.J. Schwikkard & S.E. van der Merwe, *South Africa*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 10, at 351 [reproduced in the accompanying notebook at Tab 54].

<sup>64</sup> *Id.* at 344. The jurisdiction of District Magistrates’ Courts is limited to twelve months imprisonment and fines not exceeding R20 000-00. They have no jurisdiction over cases of murder, rape, or high treason. The jurisdiction of Regional Magistrates’ Courts is limited to ten years imprisonment and fines not in excess of R200 000-00. They may try all cases, except high treason. *Id.*

<sup>65</sup> *Id.* at 345.



The judge in the High Court,<sup>66</sup> or magistrate in a lower court,<sup>67</sup> may decide to appoint assessors, two for each case, to assist with the fact-finding function.<sup>68</sup> Assessors deliberate with the judge or magistrate in chambers, deciding only factual questions.<sup>69</sup> They must give reasons for their decisions, which become part of the record and are available to any appeals court.<sup>70</sup>

Judges and magistrates also give reasons for their decisions, including factual decisions.<sup>71</sup> Where assessors are used, the decision of the majority, not necessarily that of the judge, is the verdict of the court.<sup>72</sup>

### **c. Belgium**

In Belgium, a jury trial is available for all criminal cases, but is actually used only for the most serious offenses, such as murder.<sup>73</sup> The jury verdict is a special verdict that includes questions about the elements charged in the crime and, where appropriate, about the aggravating and mitigating factors relative to sentencing. The twelve-member jury

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<sup>66</sup> (South Africa) Criminal Procedure Act of 1977, § 145 [reproduced in the accompanying notebook at Tab 18]. “Persons appointed as assessors in the High Court must be experienced in the administration of justice (such as legal practitioners or law lecturers) or must have skill in any matter which may be considered at the trial (such as accountants or pathologists).” Schwikkard & van der Merwe, *supra* note 63, at 351 [reproduced in the accompanying notebook at Tab 54].

<sup>67</sup> (South Africa) Magistrates’ Courts Act 32 of 1944, § 93ter (1) [reproduced in the accompanying notebook at Tab 19]. The experience requirements for assessors in the High Court, *see supra* note 68, do not apply in the lower courts, although such experience may be considered. Schwikkard & van der Merwe, *supra* note 63, at 351 [reproduced in the accompanying notebook at Tab 54]. “The appointment of assessors by magistrates in the lower courts is – unlike the appointment of assessors by judges in the High Court – essentially aimed at promoting the notion of lay participation in the adjudication of facts in a criminal trial.” *Id.*

<sup>68</sup> *Id.* at 350. The judge has discretion over whether to use assessors, although the accused may request their use. One exception is murder trials, in which a judge must appoint two assessors unless the accused requests that they not be used; even then, the judge has discretion not to appoint them. *Id.*

<sup>69</sup> *Id.* at 351.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Vidmar, *The Jury Elsewhere in the World*, *supra* note 60, at 445 [reproduced in the accompanying notebook at Tab 57].

votes by secret ballot. Eight out of four jurors must vote in favor of a conviction.<sup>74</sup> If the jury decides seven to five in favor of guilt on a material fact, the panel of judges who preside at trial express their opinion on the question of guilt; failure to agree with the majority results in acquittal.<sup>75</sup>

Belgium has different courts for different types of offenses, but all have similar procedures with regard to the delivery of judgment.<sup>76</sup> The judgment must be given with reasons and is pronounced in public.<sup>77</sup>

### **3. Evolving Systems: Reasons Sometimes Required**

Great Britain, Scotland, and France are categorized as “evolving” systems because the European Convention on Human Rights is leading, or is likely to lead, to changes in the criminal procedure laws of these countries.<sup>78</sup> Specifically, these jurisdictions did not formerly mandate that judges give reasons for their decisions, while the convention may be interpreted as requiring such reasons.<sup>79</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Marc Chatel, *Human Rights and Belgian Criminal Procedure at Pre-Trial and Trial Level*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE, *supra* note 6, at 190 [reproduced in the accompanying notebook at Tab 43].

<sup>76</sup> *Id.*

<sup>77</sup> Belgian Constitution, Articles 96-97, *translated in* THE CONSTITUTION OF BELGIUM AND THE BELGIAN CIVIL CODE 40 (John H. Crabb trans. 1982) [reproduced in the accompanying notebook at Tab 20]. The text of the constitution is also available in English at [http://www.oefre.unibe.ch/law/icl/be00000\\_.html](http://www.oefre.unibe.ch/law/icl/be00000_.html).

<sup>78</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms [reproduced in the accompanying notebook at Tab 3] was drawn up in 1950 and entered into force in 1953. The Convention lists a set of civil and political rights and freedoms and sets up a mechanism for their enforcement. The Convention provides for a European Court of Human Rights in Protocol No. 11 (added by amendment and effective November 1, 1998). Any State or individual may bring a suit as a victim of a violation of the Convention. THE REGISTRAR OF THE EUROPEAN COURT OF HUMAN RIGHTS, THE EUROPEAN COURT OF HUMAN RIGHTS: HISTORICAL BACKGROUND, ORGANISATION, AND PROCEDURE (2003) *available at* [http://www.echr.coe.int/Eng/Edocs/Historical\\_Background.htm](http://www.echr.coe.int/Eng/Edocs/Historical_Background.htm) [reproduced in the accompanying notebook at Tab 77].

<sup>79</sup> Note that Belgium is also subject to the convention, but required reasons for decisions of both judges and juries even before the convention took effect. *See* discussion, *supra* Part III.A.2.c for a complete discussion of Belgian procedure regarding delivery of judgments.

Article 6 of the Convention provides that in all criminal trials, a defendant is entitled to “a fair and public hearing” and that “[j]udgment shall be pronounced publicly,”<sup>80</sup> but does not explain what makes a hearing “fair” or what must be included in the “judgment.”<sup>81</sup> Human rights lawyers argue that “verdicts are not in themselves reasoned judgments and that defendants are being denied justice if they are not told the reasons for their convictions.”<sup>82</sup> The European Court of Human Rights, which enforces the Convention, “takes the line that a reasoned decision is an essential component of a ‘fair trial.’”<sup>83</sup>

#### **a. Great Britain**

Criminal offenses in Great Britain are divided into three categories with a different procedure for each. The offenses are categorized by severity of impact on the community. The least serious are summary offenses, tried in a magistrate’s court without a jury; the most serious are indictable offenses, which are tried at the Crown Court before a judge and jury. A number of offenses fall in between and are triable either way.<sup>84</sup>

The jury acts as fact-finder in the Crown Court.<sup>85</sup> The judge may decide that the facts are not in dispute, such that there is no case to go to a jury, and direct or order a

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<sup>80</sup> European Convention on Human Rights and Fundamental Rights, Art. 6 [reproduced in the accompanying notebook at Tab 3].

<sup>81</sup> See Andrews, *supra* note 6, at 11 (noting that “it does not say that judgment shall be given with reasons for the decision reached”) [reproduced in the accompanying notebook at Tab 39].

<sup>82</sup> Robert Verkaik, *New Law Will Force Juries to Give Reasons for Their Verdicts*, THE INDEPENDENT, August 25, 2000 at 1 [reproduced in the accompanying notebook at Tab 85].

<sup>83</sup> J.R. Spencer, *English Criminal Procedure and the Human Rights Act 1998*, 33 ISR. L. REV. 664, 675 (1999) (citing P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 437-438 (3rd ed., 1998)) [reproduced in the accompanying notebook at Tab 80].

<sup>84</sup> David J. Feldman, *England and Wales*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 10, at 114 [reproduced in the accompanying notebook at Tab 44].

<sup>85</sup> For a discussion of the declining use and increasingly limited role of juries in England, see K.W. Lidstone, *Human Rights in the English Criminal Trial*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY, *supra* note 6, at 105 [reproduced in the accompanying notebook at Tab 48].

verdict. The jury is generally neither required nor allowed to give reasons for its verdicts.<sup>86</sup>

It has long been recognized that the English jury, because it need not give reasons for its verdict, has the power to nullify, or return a verdict that is not in accordance with the law.<sup>87</sup> A defendant can, however, appeal on the ground “that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory.”<sup>88</sup> The appeals court rarely overturns on that ground, preferring to defer to the trial court on issues of fact.<sup>89</sup>

Until recently, judges typically gave reasons for their judgments, but magistrates did not.<sup>90</sup> In the magistrates' courts, guilt or innocence was usually decided without giving reasons, but either side could require the court to give its reasons by instituting an appeal and requesting a stated case.<sup>91</sup>

In anticipation of the Human Rights Act of 1998, the Lord Chancellor's Department advised magistrates that in criminal cases they would be required to give reasons automatically; this has become the general practice since October 2000.<sup>92</sup> The Human Rights Act took effect on October 2, 2000, and incorporates into English law

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<sup>86</sup> Spencer, *English Criminal Procedure and the Human Rights Act 1998*, *supra* note 83, at 675 [reproduced in the accompanying notebook at Tab 79]. It is a contempt of court to obtain, disclose or solicit any particulars of any statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations. See Contempt of Court Act 1981, § 8(1) [reproduced in the accompanying notebook at Tab 21].

<sup>87</sup> See e.g., John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477 (2002) (arguing that the ability of juries to render decisions inconsistent with settled law amounts to a lack of accountability that is no longer acceptable) [reproduced in the accompanying notebook at Tab 69].

<sup>88</sup> Criminal Appeals Act § 2(1) (1968) [reproduced in the accompanying notebook at Tab 22].

<sup>89</sup> Lidstone, *supra* note 85, at 105 [reproduced in the accompanying notebook at Tab 48].

<sup>90</sup> See Ian Francis, *Will it All End in Middle Tiers?*, 151 NEW L. J. 7008 (2001) [reproduced in the accompanying notebook at Tab 65].

<sup>91</sup> Magistrates' Courts Act, 1980, § 111 [reproduced in the accompanying notebook at Tab 24]. See *infra* Part A.3.b for a discussion of the stated case procedure in the context of criminal appeals in Scotland.

<sup>92</sup> J.R. Spencer, *Inscrutable Verdicts, the Duty to Give Reasons and Article 6 of the European Convention on Human Rights*, ARCHBOLD NEWS, February 14, 2001, at 5-6 [reproduced in the accompanying notebook at Tab 80].

certain rights and freedoms set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 of the Act incorporates the convention by reference; it thus requires a “fair trial” and “public” pronouncement of a “judgment.”<sup>93</sup>

It is not clear what effect the Human Rights Act will ultimately have on jury trials. “Although three respected English commentators tell us reassuringly that ‘the requirement to give reasons must be limited so as to take account of the way that jury trials operate,’ it is far from clear that the [European Court of Human Rights] would accept this view.”<sup>94</sup> In the case of bench trials, the court has “stressed the importance of a reasoned judgment, particularly in the context of suspect evidence or evidence that cannot solely justify a conviction.”<sup>95</sup> At least one English judge has suggested that the regular use of the special verdict, in which the jury decides discrete factual questions rather than returning a general verdict, be implemented in order to ensure a fair trial.<sup>96</sup> The judge cited ensuring an effective right of appeal as the basis for his proposal.<sup>97</sup>

### **b. Scotland**

In Scotland, the Lord Advocate is ultimately responsible in most cases for deciding whether to prosecute, in what court, and under which procedure.<sup>98</sup> Two types of

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<sup>93</sup> See Human Rights Act of 1998 Ch. 42, § 6 [reproduced in the accompanying notebook at Tab 23] and European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 [reproduced in the accompanying notebook at Tab 3].

<sup>94</sup> Spencer, *English Criminal Procedure and the Human Rights Act 1998*, *supra* note 83, at 675 (citing D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 215 (1995)) [reproduced in the accompanying notebook at Tab 79].

<sup>95</sup> Jackson, *supra* note 90, at 511 (citing *Murray v. U.K.*, 22 E.H.R.R. 29 (1996)) [reproduced in the accompanying notebook at Tab 69].

<sup>96</sup> See Rona Epstein, *In the News: The Human Rights Act – Will the Law Ever be the Same Again*, 151 NEW L. J. 7005 (2001) [reproduced in the accompanying notebook at Tab 64].

<sup>97</sup> See *id.*

<sup>98</sup> David M. Walker, THE SCOTTISH LEGAL SYSTEM 531 (6th ed, 1992) [reproduced in the accompanying notebook at Tab 58].

jurisdiction, solemn and summary, are available and the choice between the two depends on gravity of the offense.<sup>99</sup> Scotland differs from many systems in that the defendant has no say in whether a jury hears his or her case.<sup>100</sup> Procedure depends on jurisdiction. Trial for a solemn offense is before a jury and either a judge of the High Court of Justiciary or a sheriff.<sup>101</sup> Summary procedure consists of trial on complaint without a jury before a sheriff, magistrate, or one or more justices of the peace.<sup>102</sup> Whichever procedure is used, reasons are not routinely offered for criminal verdicts.<sup>103</sup>

Solemn procedure is used for relatively serious crimes and always involves a fifteen-member jury.<sup>104</sup> At the close of evidence, the judge charges the jury, instructing them on the law and on the points in issue;<sup>105</sup> the judge does not summarize the evidence.<sup>106</sup> The jury may give a verdict at once or retire to the jury room to consider it.<sup>107</sup> A simple majority is required. The possible verdicts are guilty, not guilty, and not proven.<sup>108</sup> The jury states only the verdict and whether the jury was unanimous; if not unanimous, the jury does not state the number of the majority.<sup>109</sup> No reasons are

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<sup>99</sup> *Id.*

<sup>100</sup> Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROB. 173 (1999) [reproduced in the accompanying notebook at Tab 63].

<sup>101</sup> Walker, *supra* note 98, at 532 [reproduced in the accompanying notebook at Tab 58].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 537 (citing *Hamilton v. H.M.A.*, 1938 J.C. 134; *Rubin v. H.M.A.*, 1984 S.C.C.R. 96; *King v. H.M.A.*, 1985 S.C.C.R. 322).

<sup>106</sup> Duff, *supra* note 100, at 173 [reproduced in the accompanying notebook at Tab 63].

<sup>107</sup> Walker, *supra* note 98, at 538 [reproduced in the accompanying notebook at Tab 58].

<sup>108</sup> Charles N. Stoddart, *Human Rights in Criminal Procedure: The Scottish Experience*, in HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY, *supra* note 6, at 137-138 [reproduced in the accompanying notebook at Tab 55].

<sup>109</sup> See Criminal Procedure (Scotland) Act 1995 c. 46 § 100(1) [reproduced in the accompanying notebook at Tab 26]. A reform committee considered the possibility that the number of the majority be announced in open court to prevent mistakes, but rejected such a proposal in the interests of preserving the privacy of jury deliberations. Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, *supra* note 100, at 191 (citing the Thompson Committee, *Criminal Procedure in Scotland*, Second Report, Cmnd. 6218 Para. 51.51-56 (1975)) [reproduced in the accompanying notebook at Tab 63].

given.<sup>110</sup> Under the Contempt of Court Act of 1981, “it is contempt for anyone to obtain, disclose, or solicit any particulars of the deliberations in the jury room.”<sup>111</sup>

Whether a jury verdict may be overturned on the basis that it is unreasonable has been the subject of some debate in Scotland. There were originally three grounds for appeal in a solemn case, the most relevant here was that “the verdict of the jury . . . was unreasonable or cannot be supported having regard to the evidence.”<sup>112</sup> “Despite this wording, the Appeal Court never granted an appeal based solely on the perversity of the jury’s decision, allowing appeals under this heading only where the jury’s verdict was self-contradictory or illogical in some way.”<sup>113</sup>

In 1980, the three original grounds for appeal were replaced with the standard “miscarriage of justice.”<sup>114</sup> The courts still demonstrated reluctance to overturn a conviction merely because a jury verdict was unreasonable.<sup>115</sup> In his 1984 book on appeals, High Court Judge Lord McCluskey states that it “seems doubtful that the Appeal Court will ever ‘retreat from the notion . . . that the conclusions . . . of the jury . . . are sacrosanct and inviolable whatever the weight and coherence of the evidence.’”<sup>116</sup>

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<sup>110</sup> Walker, *supra* note 98, at 538 [reproduced in the accompanying notebook at Tab 58].

<sup>111</sup> Duff, *supra* note 100, at 173 (citing Contempt of Court Act 1981 § 8(c)(1)) [reproduced in the accompanying notebook at Tab 63].

<sup>112</sup> *Id.* (citing the Criminal Appeal (Scotland) Act 1926 § 2. The two other grounds were more general. They were “a wrong decision on any question of law” and “a miscarriage of justice.” *Id.*

<sup>113</sup> Duff, *supra* note 100, at 173 (citing *Salmond v. H.M. Advocate*, (1992) S.L.T. 156, 157-58 (H.C.J. Sept 9 1990), where appeal was allowed from a jury verdict of guilty of attempted murder with extreme provocation because provocation is not relevant to a charge of attempted murder) [reproduced in the accompanying notebook at Tab 63].

<sup>114</sup> Criminal Justice (Scotland) Act 1980 § 33 [reproduced in the accompanying notebook at Tab 25].

<sup>115</sup> Duff, *supra* note 100, at 173 (citing ROBERT WEMYSS RENTON & HENRY HILTON BROWN, CRIMINAL PROCEDURE (6<sup>th</sup> ed. 1996) Para. 29-07, which Duff describes as “the ‘bible’ for Scots criminal lawyers,” *id.* at n. 15.) [reproduced in the accompanying notebook at Tab 63].

<sup>116</sup> Duff, *supra* note 100, at 173, *quoting* LORD MCCLUSKEY, CRIMINAL APPEALS 188 (1992) [reproduced in the accompanying notebook at Tab 63].

The Sutherland Committee evaluated various aspects of the appeals process in 1996, including the question of overturning the jury's verdict.<sup>117</sup> The Committee generally agreed that the Appeal Court should be hesitant to overturn a jury verdict, but should do so in the exceptional case where the verdict is "unreasonable and has resulted in a miscarriage of justice."<sup>118</sup> The Crime and Punishment Act of 1997 incorporates the Committee's recommendations, retaining one ground for appeal, "miscarriage of justice," but including under that heading cases in which a jury "returned a verdict which no reasonable jury, properly directed, could have returned."<sup>119</sup>

Summary procedure involves no trial by jury. The judge decides issues of fact and usually pronounces a verdict immediately after the close of the evidence.<sup>120</sup> Reasons for a decision are only given when a party appeals, which either side may do in summary cases.<sup>121</sup>

As with jury verdict appeals, the appeals procedure in summary cases has also been problematic due to the lack of a requirement that the judge provide reasons for his or her opinion. Either party dissatisfied with the outcome may initiate an appeal by applying to the court to "state a case" for the appeals court, the High Court of Justiciary.<sup>122</sup> The stated case includes the court's reasoning. The procedure for drafting it has been a source of controversy.

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<sup>117</sup> *Id.* at 198 (citing the Sutherland Committee on Criminal Appeals and Miscarriages of Justice Procedures, Cmnd. 3245, ¶ 2.59-71 (1996)) [reproduced in the accompanying notebook at Tab 63].

<sup>118</sup> *Id.* (citing ¶ 2.69 of the Sutherland Committee Report).

<sup>119</sup> Stoddart, *supra* note 108, at 140-41 [reproduced in the accompanying notebook at Tab 55].

<sup>120</sup> Duff, *supra* note 100 at 173, Crime and Punishment (Scotland) Act 1997 § 17 [reproduced in the accompanying notebook at Tab 26].

<sup>121</sup> Walker, *supra* note 98, at 543 [reproduced in the accompanying notebook at Tab 578].

<sup>122</sup> Stoddart, *supra* note 108, at 140 [reproduced in the accompanying notebook at Tab 55].

<sup>123</sup> Walker, *supra* note 98, at 544-45 [reproduced in the accompanying notebook at Tab 58].



Until 1980, the judge prepared a draft stated case, which was to include the factual findings relevant to the decision and the judge's reasoning. The draft was sent to the parties, who then had one month to propose changes, which the judge was bound by statute to consider.<sup>123</sup> As the judge had the ability to reject the proposals altogether without a hearing and without giving reasons to justify the objection, this procedure sometimes led to injustice.<sup>124</sup> One example is the case of D.C. Anderson, a former Solicitor-General for Scotland convicted of breach of the peace. He employed his own note-taker to record the evidence submitted at the trial and used that record to propose lengthy adjustments to the draft Stated Case. The proposals were all refused by the sheriff, who provided no reason for the refusal. Anderson was therefore unable to argue about any omitted details during his appeal.<sup>125</sup>

The Anderson case was the subject of much debate centering on whether the defendant's rights were violated.<sup>126</sup> A committee reviewing criminal procedure law recommended mandatory hearings on adjustments proposed by the parties and a requirement that the judge state the rejected proposals and his reasons for not incorporating them into the stated case.<sup>127</sup> These proposals have been adopted.<sup>128</sup>

Scotland does not appear to have changed its procedures in response to indications by the European Court of Human Rights that the European Convention on

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<sup>123</sup> See *Duff*, *supra* note 100 at 174 (citing Criminal Procedure (Scotland) Act 1965 § 442-455) [reproduced in the accompanying notebook at Tab 63].

<sup>124</sup> Stoddart, *supra* note 108, at 141 [reproduced in the accompanying notebook at Tab 55].

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 140-141.

<sup>127</sup> *Id.* at 141 (citing the Third Report of the Thompson Committee, Ch. 8).

<sup>128</sup> *Id.* (citing the Criminal Justice (Scotland) Act 1980 § 3).

Human Rights requires reasoned judgments in all criminal cases.<sup>129</sup> It seems unlikely that the system will remain as it is, particularly as England and Wales have changed their procedures and continue to consider proposals for further reform.<sup>130</sup>

### *c. France*

In France, most procedural issues are governed by detailed provisions in the Code of Criminal Procedure.<sup>131</sup> France's constitution has few provisions relating to criminal procedure, but the European Convention for the protection of Human Rights and Fundamental Freedoms, binding on French courts, has an increasing effect on French procedural law.<sup>132</sup> Procedural rules depend on the nature of the offense; trials for more severe offenses are generally subject to more elaborate safeguards.<sup>133</sup>

The Assize court, which hears major felonies, consists of three professional judges and nine lay jurors who decide guilt and sentence together.<sup>134</sup> This is the only instance where lay participants are still used. The traditional jury system was abandoned in 1942 in favor of this mixed tribunal of lay persons and judges working together to decide facts.<sup>135</sup> The most minor offenses are tried in the Police Court before a single

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<sup>129</sup> The author's research has discovered no proposals similar to those made in England for changing procedures for rendering decisions in order to comply with the European Convention on Human Rights and the ruling of the European Court of Human Rights construing it as requiring reasons for criminal decisions.

<sup>130</sup> See *supra* Part III.A.3.a., for a discussion of the changes and proposed changes in England.

<sup>131</sup> Richard S. Frase, *France*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 10, at 147 [reproduced in the accompanying notebook at Tab 63]. Case law is not a significant source of French criminal procedure law. There is relatively little case law because procedural law is heavily codified, and the decisions that exist are not viewed as binding precedents, but as illustrations of the principles found in the text rather than in the prior decisions. *Id.* at 148.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 143.

<sup>134</sup> Gerald S. Frase, *Introduction*, in THE AMERICAN SERIES OF FOREIGN PENAL CODES No. 29, FRANCE 23-25 (1988) (Edward M. Wise ed., Gerald L. Kock & Richard S. Frase trans. 1988) [reproduced in the accompanying notebook at Tab 64]

<sup>135</sup> Vidmar, *Jury Systems Elsewhere in the World*, *supra* note 60, at 429 [reproduced in the accompanying notebook at Tab 36].

professional judge.<sup>136</sup> Offenses that fall in between are tried in Correctional Court before one or three professional judges.<sup>137</sup>

The procedure in all three courts is similar regarding the delivery of judgments. After closing arguments, the court deliberates on issues of both guilt and sentence.<sup>138</sup> In Correctional and Police Courts, the court must render a written judgment order citing the reasons for the decision, including the principal facts supporting guilt as well as the law violated. In the Assize Court, the judgment order is simply the mixed court's verdict of guilty or not guilty as to each offense, findings of aggravating or mitigating circumstances, and the sentence imposed.<sup>139</sup>

Most countries that employ juries require only a general verdict of guilty or not guilty with no explanation from the jurors.<sup>140</sup> One justification for the jury is that it is better at finding the facts than the judge acting alone and, consequently, it is difficult to justify any judicial interference with the verdict of the jury.<sup>141</sup> The general rule that the judiciary cannot inquire into the reasons for a jury's decision also allows the possibility of jury nullification, acquitting a defendant who is factually guilty.<sup>142</sup> The power to nullify enhances the jury's role as a "check on the power of the state."<sup>143</sup> Since judicial

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Richard S. Frase, *supra* note 131, at 171 [reproduced in the accompanying notebook at Tab 46].

<sup>139</sup> *Id.* (citing Code of Criminal Procedure Arts. 348-366, 485-543.). There is currently no English translation of the new code, which became effective March 1, 1994. Frase relies on his own translation of the French version. Richard S. Frase, *supra* note 131, at 143 n. 1 [reproduced in the accompanying notebook at Tab 46]. For an English translation of the Code as of January 1987, see THE FRENCH CODE OF CRIMINAL PROCEDURE (Rev. Ed., Gerald L. Kock & Richard S. Frase trans., 1987).

<sup>140</sup> Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in WORLD JURY SYSTEMS, *supra* note 60 at 42 [reproduced in the accompanying notebook at Tab 56].

<sup>141</sup> Duff, *supra* note 100, at 173 [reproduced in the accompanying notebook at Tab 63].

<sup>142</sup> Mann, *supra* note 51, at 282 [reproduced in the accompanying notebook at Tab 50].

<sup>143</sup> *Id.* (citing Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 617, 618-19 (1963) (stating that "one of the ancient, fundamental reasons for having general jury verdicts was to preserve the right of trial by jury as an indispensable part of free government"))).

inquiry would likely erode the power to nullify, it should not be allowed if the jury is to retain its role as a check on the state.

Requiring the finder of fact to give reasons for decisions is more common with respect to professional judges than lay juries. Judges are expected in all cases to apply the law accurately and fairly; many view a reasons requirement as a means to ensure judicial accountability in this respect.<sup>144</sup> The procedure is more varied when a judge acts as fact-finder with procedures ranging from requiring that reasons be given in all cases to not requiring reasons in any cases.

## **B. Duty to Provide Reasoned Judgments: Sources in International Criminal Law**

At issue is whether a principle exists in international law that the finder of fact in a criminal trial must provide a reasoned judgment. There are two basic types of international criminal law: international agreements and customary international law.<sup>145</sup> A principle that reasoned judgments are required of the finder of fact in criminal trials is found in both sources of law.

### **1. Express Statutory Provisions**

International agreements are technically binding only upon the signatories to such agreements and their nationals.<sup>146</sup> They may also be a source of international law, although some scholars would limit the authority of treaties to filling in gaps where international law is unclear.<sup>147</sup> A duty to provide reasoned judgments is expressly created

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<sup>144</sup> Jackson, *supra* note 87, at 487 (noting the increase in jurisdictions requiring that judges at all levels give reasons for decisions and linking the trend to an increased demand for judicial accountability) [reproduced in the accompanying notebook at Tab 69].

<sup>145</sup> JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 4 (2000) [reproduced in the accompanying notebook at Tab 52].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

by the governing documents of most international criminal law tribunals, suggesting that such a requirement is a norm of international criminal law.

As early as 1973, the Bangladesh International Crimes (Tribunals) Act provided that “the Judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based[, but] each member of the tribunal shall be competent to deliver a judgment of his own.”<sup>148</sup> The statutes governing the International Criminal Tribunals for the former Yugoslavia and Rwanda similarly provide for “a reasoned opinion in writing, to which separate or dissenting opinions may be appended.”<sup>149</sup>

A reasons requirement is also included in the Rome Statute of the International Criminal Court.<sup>150</sup> It differs from the earlier statutes in that it does not seem to provide for separate opinions: “The Trial Chamber shall issue one decision. Where there is no unanimity, the Trial Court’s decision shall contain the view of the majority and the minority.”<sup>151</sup> This provision is not entirely clear, but it suggests that each member of the chamber would have to agree on the wording of a single opinion embracing the views of all. This differs both from the International Criminal Tribunals for Yugoslavia and Rwanda, which allow each judge to write his or her own opinion, uncensored by the others, and from some jurisdictions that allow only the majority to express its an opinion.

As these statutes demonstrate, international criminal tribunals almost always expressly provide that judges deliver reasons for their opinions. This may be due to the

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<sup>148</sup> Bangladesh International Crimes Tribunals Act of July 19, 1973, Art. 20(1) (July 20, 1973) [reproduced in the accompanying notebook at Tab 2].

<sup>149</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Sec. Res 827, art. 23 (1993) [reproduced in the accompanying notebook at Tab 7]; Statute of the International Tribunal for Rwanda, U.N. Sec. Res. 955, art. 22 (Nov. 8, 1994) [reproduced in the accompanying notebook at Tab 6].

<sup>150</sup> Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference, zrt. 74 July 17, 1998 [reproduced in the accompanying notebook at Tab 5].

<sup>151</sup> *Id.*

increased needs of such tribunals to demonstrate legitimacy and independence.<sup>152</sup> When judges must explain the analysis they employed in reaching a decision, that decision is less open to criticism that the outcome was predetermined and the trial was just for show.

## 2. **Customary Law**

International criminal law is not limited to express provisions in sources of international law, but also in customary international law. Customary international law “is of a universally obligatory nature.”<sup>153</sup> To prove that a certain rule is customary one has to show that it is reflected in state practice and that there exists a conviction in the international community that such practice is required as a matter of law.”<sup>154</sup>

As illustrated in Part A, requirements that judges give reasons for their decisions in criminal cases is increasingly common in national jurisdictions the world over. Juries are not typically required to give reasons for their decisions, but the declining use of juries and the trend toward requiring juries that are used to provide reasons for their judgments confirms an emerging trend of reasons requirements. Where a traditional jury is preserved, it may be viewed as a narrow exception to a general rule of requiring reasoned judgments, because the jury occupies in those legal systems the dual role of arbiter of justice and check on state power.

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<sup>152</sup> See discussion *infra* Part C.

<sup>153</sup> PAUST, *supra* note 145, at 4 [reproduced in the accompanying notebook at Tab 52].

<sup>154</sup> International Committee of the Red Cross, ICRC Study on Customary Rules of International Humanitarian Law, *available at* <http://www.icrc.org/> (Providing an overview of INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (forthcoming 2003) [reproduced in the accompanying notebook at Tab 68]. “In this context, ‘practice’ relates to official state practice and therefore includes formal statements by states. A contrary practice by some states is possible because if this contrary practice is condemned by other states or denied by the government itself the original rule is actually confirmed. State practice in this context does not mean age-old practice. In general, we have focused on state practice during the last twenty years. Customary international law can emerge in an even shorter period of time.” *Id.*

It is quickly becoming the state practice in nearly all jurisdictions that judges provide reasons for their decisions. In some countries, particularly those without a jury system, judges have long been required to explain their decisions. Judges at all levels are now required by statute to give reasons for their decisions in England.<sup>155</sup> Even in Canada, which has no statutory requirement that judges give reasons for decisions in criminal cases, the Supreme Court has suggested that a failure to give reasons is reversible error on appeal.<sup>156</sup>

The trend toward requiring reasons for criminal verdicts is perhaps more evident in reforms in the jury system. Jury verdicts were historically inscrutable; the jury was even seen as having wide latitude to disregard the law altogether and decide on the basis of conscience without being overturned on appeal.<sup>157</sup> Many systems have stopped using juries in criminal trials. Those that retain juries are beginning to allow special verdicts, where a jury gives specific factual findings.<sup>158</sup> Significantly, Spain and Russia have recently reintroduced juries but a general verdict is not used. In those systems, the jury is presented with a set of questions, which may be very detailed, and they must give a rationale for the verdict.<sup>159</sup>

In Israel, South Africa, and Belgium, juries are not typically used in the traditional sense. Israel and South Africa do not use juries at all; South Africa has replaced juries with lay assessors who work with judges and magistrates to make factual findings. Belgium retains the jury system, but requires special verdicts, or detailed findings of fact,

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<sup>155</sup> See discussion *supra* Part III.A.3.a.

<sup>156</sup> See discussion *supra* Part III.A.1.a.

<sup>157</sup> See Jackson, *supra* note 87, at 483-505 (providing an overview of criminal jury practice and discussing jury nullification in detail) [reproduced in the accompanying notebook at Tab 69].

<sup>158</sup> Belgium is an example of such a system. See discussion *supra* Part III.A.2.c.

<sup>159</sup> Neil Vidmar, *Historical and Comparative Perspective*, *supra* note 60 at 43 [reproduced in the accompanying notebook at Tab 56]

rather than a general verdict of guilty or not guilty. In all of these systems, a judge is required to give reasons for his or her decisions.<sup>160</sup>

In Canada and the United States, juries do not give reasons for their opinions and judges are not generally required to. A caveat is that the Canadian Supreme Court has demonstrated a willingness to overturn convictions not clearly supported by the evidence absent some explanation from the judge.<sup>161</sup>

England has recently implemented changes in their criminal procedure in order to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The convention requires the public pronouncement of “judgments” in criminal cases, which has been interpreted as a reasons requirement, at least in cases heard by a judge.<sup>162</sup> Scotland and France will likely follow suit. The future of jury trials in these systems is unclear, but it seems likely that more specific findings of fact will replace the traditional jury verdict of guilty or not guilty without reasons.

Despite these changes, juries are still generally not required, or even permitted, to give reasons for their verdicts. This may be due to the unique role of a lay jury as a check on the state.<sup>163</sup> It is viewed as a “means whereby ordinary people’s common-sense can inform decisions and contain the powers of government.”<sup>164</sup> Some suggest that, because of this role, the jury “must be permitted to look at more than logic.”<sup>165</sup> Delivering reasoned opinions is not seen as a priority where a jury is used, so a jury

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<sup>160</sup> Israel’s system is detailed in *supra* Part III.A.2.a. South Africa’s in *supra* Part III.A.2.b.

<sup>161</sup> See discussion of *R v. R(D)*, *supra* page 12.

<sup>162</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 [reproduced in the accompanying notebook at Tab 3].

<sup>163</sup> See *U.S. v. Spock*, 416 F.2d 165, 182 (1969), discussed in *supra* notes 16-18 and accompanying text [reproduced in the accompanying notebook at Tab 32].

<sup>164</sup> Sally Lloyd-Boystock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS*, *supra* note 62, at 53 [reproduced in the accompanying notebook at Tab 49].

<sup>165</sup> *Spock*, 416 F.2d at 182 [reproduced in the accompanying notebook at Tab 32].



generally need not explain its decision. The use of a jury may therefore be seen as a unique feature of some domestic legal systems. That juries need not provide reasoned decisions appears to be an exception to a general principle that reasons be given in all criminal decisions.

That the fact-finder must provide reasoned judgments is a principle of international criminal law. This is evidenced both by the inclusion of such a requirement in the statutes of international criminal law and the widespread state practice of requiring reasoned judgments. This reasons requirement is grounded in general human rights principles relative to criminal defendants, but is not absolute, as demonstrated in the section that follows.

### **C. Nature, Extent, and Limits of the Duty to Provide Reasons**

The express requirement by international criminal tribunals and the custom of nations indicate an international standard that reasoned judgments be provided in criminal cases. Such a standard is also implied in human rights law generally and, in the context of international criminal tribunals, by the foundational principles of those tribunals. Human rights law and the principles guiding the operation of international criminal tribunals also limit the extent of such a duty.

#### **1. Human Rights Law Implications**

Because international tribunals and domestic systems are increasingly requiring reasons for the decisions of both judges and juries, a reasons requirement is emerging as customary international law. The requirement is both bolstered by, and must be tempered

with other protections provided by, existing human rights law. Two such protections relevant to criminal defendants are the right to appeal and the right to a fair trial.

**(b) The Right to an Effective Appeal**

Perhaps one of the most compelling reasons for requiring reasons for criminal verdicts is to allow the defendant to appeal. “The more clearly articulated the grounds for a decision, the greater the opportunity to challenge that decision, by reference to the record, on appeal.”<sup>166</sup> A defendant’s right to appeal is widely recognized in many nations and by many human rights conventions. For example, the International Covenant on Civil and Political Rights provides that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”<sup>167</sup>

Some argue that delays will occur due to an increased volume of appeals when judges give reasons for their opinions on which defendant may base an appeal. This argument is unfounded for two reasons. First, findings of fact are still relatively final even in a bench trial where reasons are given, due to the general reluctance of appeals courts to overturn findings of fact made at trial where the judge was able to see and hear the witnesses and other evidence, and, presumably, better judge credibility.<sup>168</sup> Second, a reasons requirement may streamline the appeals system, as a party can better assess his or her chances at a successful appeal when the reasons for the decision are clearly

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<sup>166</sup> Doran, et.al., *supra* note 19, at 44 [reproduced in the accompanying notebook at Tab 62; *see also* Van Kessel, *supra* note 25, at 519 (“[s]ince Anglo-American criminal trial verdicts are given without reason, appellate review is difficult”)[reproduced in the accompanying notebook at Tab 84].

<sup>167</sup> International Covenant on Civil and Political Rights, art. 14 (5), 999 U.N.T.S. 171 (Dec. 9, 1996) [reproduced in the accompanying notebook at Tab 4]. *See also* American Convention on Human Rights, 1969, art. 8(2)(h)1144 U.N.T.S. 123 (“[d]uring [criminal] proceedings, every person is entitled, with full equality, to the following minimum guarantees: . . . the right to appeal the judgment to a higher court”) [reproduced in the accompanying notebook at Tab 1].

<sup>168</sup> Richard Nobles et. al., *The Inevitability of Crisis in Criminal Appeals*, 21 INT’L J. SOC. L. 1, 2 (1993) (“[The American appeals courts’] primary concern is its reluctance to substitute its own judgment for that of the jury, when assessing matters of fact”) [reproduced in the accompanying notebook at Tab 75].

explained.<sup>169</sup> “[W]ithout reasons the losing party will not know whether the court misdirected itself and thus whether he may have an available appeal on the substance of the case.”<sup>170</sup> This would result in less frivolous appeals and may actually enhance efficiency in the long run.

The tradeoff for increased appealability is a decrease in finality of judgments, which implicates such policy concerns as efficiency and validity. As stated by Sean Doran, “the requirement that the judge give a reasoned judgment is an implicit recognition that the sense of finality that attaches to the jury’s verdict is of less force in the nonjury contest.”<sup>171</sup>

***a. The Right to a Fair Trial***

The right to a fair trial is acknowledged in most, if not all, international documents.<sup>172</sup> There is, however, no universal agreement as to what constitutes a fair trial. Some common concepts are that decisions not be arbitrary,<sup>173</sup> that defendants not

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<sup>169</sup> See Michael Asimow, *Toward a South African Administrative Justice Act*, 3 MICH. J. RACE & L. 1, 11 (1997) (advocating for a reasons requirement for administrative decisions in South Africa where a party’s rights have been adversely affected, such as a deportation proceeding) [reproduced in the accompanying notebook at Tab 59].

<sup>170</sup> *Id.* (quoting *Flannery v. Halifax Estate Agencies* 1 All. E.R. 373, 377-378 (2000)).

<sup>171</sup> Doran et.al., *supra* note 19, at 44 [reproduced in the accompanying notebook at Tab 62].

<sup>172</sup> See M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS* 132-90 (1994) (compiling United Nations documents asserting the importance of the right to a fair trial) [reproduced in the accompanying notebook at Tab 41]; Universal Declaration of Human Rights, art. 10, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 at 71 (1948) (“[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”) [reproduced in the accompanying notebook at Tab 8]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 213 U.N.T.S.221, Eur. T.S. No. 5 (1950) (In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”) [reproduced in the accompanying notebook at Tab 3]; *but see supra* note 55 (noting that Israel’s Bill of Rights does not include the right to a fair trial, but explaining that the list of rights it does contain is by no means exhaustive).

<sup>173</sup> See e.g., Universal Declaration of Human Rights, art. 9 (“no one shall be subjected to arbitrary arrest, detention, or exile”) [reproduced in the accompanying notebook at Tab 8].

be convicted of laws not in force at the time of the action,<sup>174</sup> and that trials not be subject to unreasonable delays.<sup>175</sup>

One commentator suggests that a professional judge who must give reasons for his or her decisions renders more logical or rule-bound results than does a jury not required to offer reasons.<sup>176</sup> It is difficult to attack a judgment clearly and logically reasoned from existing rules as arbitrary. It follows that if the notion that a reasons requirement leads to more logical or rule-bound decisions is valid, a duty to provide reasoned judgments protects defendants from arbitrary decisions. Logical and rule-bound decisions may also ensure that a defendant is not convicted of *ex post facto* laws, since the judge is required to articulate the rule applied and its source.

Increased appealability may, however, adversely affect a defendant's right to a speedy trial. Voluminous appeals may lead to serious delays before matters are finally resolved. If more decisions are overturned as a result of a reasons requirement, courts might become clogged as cases are remanded for a new trial. Efficiency is a significant concern for the Rwandan tribunal, as it has been criticized as fraught with unnecessary delays due to bureaucracy.<sup>177</sup> Some are resigned to the notion that "the best form of

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<sup>174</sup> See International Covenant on Civil and Political Rights, Art. 15, 999 U.N.T.S. 171 (Dec. 9, 1996) ("[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed") [reproduced in the accompanying notebook at Tab 4].

<sup>175</sup> See *id.* at Art. 14 (3)(c) (mandating a minimum guarantee for criminal defendants "to be tried without undue delay").

<sup>176</sup> Mann, *supra* note 51, at 282 (noting that the reasons requirement has led to "a large body of case law describing how judges do and should assess facts and arrive at decisions on factual issues in the trial" and that such case law is largely absent in systems that rely heavily on the jury trial) [reproduced in the accompanying notebook at Tab 50]. For a discussion of how requiring juries to provide reasons for their decision in the form of special verdicts will lead to more logical conclusions, see Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process*, 59 U. CIN. L. REV. 15, 58 (1990) [reproduced in the accompanying notebook at Tab 60].

<sup>177</sup> Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases?*, 33 GEO. WASH. INT'L L. REV. 363, 376 (2001) [reproduced in the accompanying notebook at Tab 76].

justice that the ICTR or the national courts will be able to render will be justice delayed.”<sup>178</sup> Of course, if unjust decisions are the only other option, delay may be the better of two evils. Still, delays might become so serious as to unreasonably infringe on the defendants’ human rights.

While it may lead to delays, the enhanced ability to appeal that arises from reasoned judgments also contributes to ensuring that trials are fair. For example, appeals may be the only way to ensure that procedural rules were followed at trial. Reasoned opinions are especially useful in ensuring that evidence rules are adhered to. This offers an additional basis for the general rule that juries need not give reasons for their opinions. In a jury trial, a judge determines issues of admissibility; the jury is only exposed to evidence after it is deemed admissible. There is thus no risk that the jury will consider inadmissible evidence in reaching its decision.<sup>179</sup>

In contrast, a judge “is routinely exposed to inadmissible and prejudicial evidence, with the attendant risk that any decision on guilt will be tainted thereby.”<sup>180</sup> Many argue that requiring a judge to write a reasoned opinion is the best method of ensuring that inadmissible evidence is not used in reaching a decision.<sup>181</sup> In the words of one commentator, a reasoned judgment requirement “converts evidentiary barriers from input controls to output controls. Their failure to serve as a barrier to the flow of

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<sup>178</sup> Morris, *supra* note 3, at 374 [reproduced in the accompanying notebook at Tab 73].

<sup>179</sup> Of course, some evidence is admissible for one purpose but not another. In the United States, Federal Rule of Evidence 105, provides that such evidence should be admitted and the jury given a limiting instruction. In such a circumstance, the distinction made between a judge and a jury with regard to viewing inadmissible evidence does not apply, so it fails as a rationale for requiring the judge, but not the jury, to give reasons for decisions [reproduced in the accompanying notebook at Tab 14].

<sup>180</sup> Doran et.al., *supra* note 19, at 186 [reproduced in the accompanying notebook at Tab 62]

<sup>181</sup> *See id.*

information to the fact-finder is made up by requiring the fact-finder to use them to shape the contours of his or her final decision.”<sup>182</sup>

It can be argued that a judge will not decide differently than he or she would absent a reasons requirement, but instead be careful to write an opinion so that it demonstrates only use of admissible evidence. Trials would therefore be less efficient, due to the time it would take judges to craft such opinions, and the decisions no more rooted in evidence than before. Even if some judges disregarded procedural rules, the reasons requirement would be useful. In the extreme cases, where a verdict necessarily rests on inadmissible evidence, a judge would be faced with the choice of crafting an illogical opinion or returning the correct verdict based on admissible evidence. If the judge returned such an unsupported verdict, it would almost certainly be overturned on appeal.

Furthermore, judges be more careful about their evaluation of evidence because they would have to explain, one step at a time, what led them to the decision. “The duty to give reasons concentrates the mind with the result that a reasoned decision is more likely to be soundly based on the evidence than one which is not reasoned.”<sup>183</sup>

In some jurisdictions, the right to trial by a jury of one’s peers is considered an element of a fair trial.<sup>184</sup> In those jurisdictions, a reasons requirement may detract from the right to a fair trial by limiting or eliminating the jury’s role as independent of the

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<sup>182</sup> *Id.*

<sup>183</sup> Jackson, *supra* note 97 at 487 [reproduced in the accompanying notebook at Tab 69].

<sup>184</sup> The Sixth Amendment to the United States Constitution [reproduced in the accompanying notebook at Tab 9] provides that, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” In the United States, the jury is seen as “an integral part of the criminal justice process.” Brodin, *supra* note 176, at 17 (1990) [reproduced in the accompanying notebook at Tab 60].

state.<sup>185</sup> Such a derogation of the jury's ability to judge independently is more difficult to justify because the benefits of reasoned judgments are diminished in the jury context. For example, concerns about the use of inadmissible evidence are less persuasive as a basis for requiring reasons with respect to juries compared to judges.<sup>186</sup> This is because the judge serves as a screen and a jury is often not exposed to inadmissible evidence. There is still the danger, however slight, of misuse of evidence stemming from the admission of evidence for one purpose but not another and the risk that a jury will give more weight to evidence than is justified by its credibility.<sup>187</sup>

## **2. Fulfilling the Purposes Behind the Creation of War Crimes Tribunals**

While the concerns discussed thus far are relevant to all criminal adjudications, some additional issues are of special importance with respect to international criminal law. The reasons for the creation and execution of international criminal law necessarily guide the procedures used to administer it.

Fairness is central to any system of justice, and international criminal tribunals are no exception. Perhaps as important as actual fairness, though, is the appearance of fairness. War crimes tribunals exist today in the shadow of the Nuremberg trials, which

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<sup>185</sup> See Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 535 (1995) (analyzing the United States Supreme Court's reluctance to allow the use of special verdicts in criminal jury trials) [reproduced in the accompanying notebook at Tab 66]; Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Trials*, 21 YALE L & POL'Y REV. 263, 269 (arguing that "because of the constitutional right to a determination by an independent jury, juries should not be subjected to questions that could lead or otherwise influence their thinking") [reproduced in the accompanying notebook at Tab 74].

<sup>186</sup> See Van Kessel, *supra* note 25, at 484 ("the independent factfinder (usually, but not necessarily, the jury), which operates largely free of procedural checks on verdict integrity, provides [a] buttress supporting exclusion of hearsay in criminal cases") [reproduced in the accompanying notebook at Tab 84].

<sup>187</sup> See *id.* at 498-500 ("when we expose jurors to inadmissible evidence, or evidence admissible only for a limited purpose, and tell them to disregard the evidence entirely or to disregard it for the most apparent and tempting purpose, we ask them to perform the near-impossible task of erasing a mental imprint of relevant and cogent fact").

are often criticized as imposing victors' justice, applying retroactive laws, and denying the procedural rights essential to a fair trial.<sup>188</sup> "If the rule of law is to gain acceptance throughout the world, it is not sufficient that trials of international criminals are just, but that they are widely recognized as just."<sup>189</sup> A system of international criminal justice is not likely to achieve its goals if observers dismiss the entire exercise as a puppet show or victor's justice.

One aspect of the appearance of justice is the independence of the tribunal.<sup>190</sup> Accountability is often viewed as limiting independence. Judges that are accountable to an outside authority are not completely free to decide cases in a manner adverse to that authority. For that reason, "[a]ccountability is often contrasted with independence with much debate as to where the balance between these should be struck."<sup>191</sup> Many argue in favor of requiring a fact-finder to offer reasons for its opinions on the ground that it increases its accountability.<sup>192</sup> It does not necessarily follow that judges who provide reasons are less independent than they would be if not required to give reasons.

First, the possibility that the tribunal's independence will be compromised arises whenever a tribunal makes a decision that is not what the authority to which it is accountable would prefer. This is so whether reasons are provided for a judgment or not.

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<sup>188</sup> *Developments in the Law – International Criminal Law III: Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1982 (2001) [reproduced in the accompanying notebook at Tab 61].

<sup>189</sup> Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT'L L. 1, 17 (1998) [reproduced in the accompanying notebook at Tab 71].

<sup>190</sup> Rwandans opposed the creation of the tribunal in part because "nations that took an active role in the civil war and genocide would be given a role in appointing the ICTR's judges. Popoff, *supra* note 177, at 374 [reproduced in the accompanying notebook at Tab 76]. In contrast, the author of that note later states that "many of the delegates [to the U.N. Security Council] felt that the ICTR would legitimize the trials and eliminate the specter of 'victors' justice' that hung over the Nuremberg and Tokyo Tribunals." *Id.* (citing Provisional Verbatim Record of the Security Council, U.N. SCOR. 49th Sess., 3453rd mtg. At 13-17, U.N. Doc. S/PV/3453 (1994)).

<sup>191</sup> Jackson, *supra* note 87 [reproduced in the accompanying notebook at Tab 69].

<sup>192</sup> See generally Jackson, *supra* note 87 [reproduced in the accompanying notebook at Tab 69].



It is not clear that a country would be less pleased with a judge finding one of its military heroes guilty of a war crime if the judge provided reasons for that decision than it would be if the judge did not. In some cases, the opposite may be true. A judge can justify a decision that it makes that conflicts with its authority's interests by providing a reasoned opinion explaining how it was logically and legally required to find in the manner it did.

Second, reasoned judgments may be evaluated as making the judge more accountable, not to his or her appointer, but to the defendants and to the public served by the tribunal.<sup>193</sup> Accountability may be defined as the duty of a public decision maker to explain, legitimate and justify a decision and to make amends where a decision causes injustice and harm.<sup>194</sup> Providing fully reasoned opinions in writing serves to make the tribunal accountable in this way as well.

It may be that an individual convicted by a war crimes tribunal will never concede that his or her actions were unlawful or that his case was tried fairly. It may, however, be important in such a context, that those not a party to the action view the trial as just and the actions as condemnable. Reasoned opinions are one way to ensure that the process be viewed as rational rather than arbitrary and the outcomes viewed as the legitimate result of real trials, rather than predetermined convictions.

Legitimacy is important not just for its own sake, but as a prerequisite to deterrence, a central goal of any system of criminal justice. One of the primary aims of any war crimes tribunal is to reliably document history, and one strong reason for

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<sup>193</sup> See *id.* at 484 (noting that an important issue in any discussion of accountability is to whom accountability is or should be owed).

<sup>194</sup> *Id.* at 483 (citing Dhavan, *Judges and Accountability*, in *JUDGES AND THE JUDICIAL POWER* 167 (R. Dhavan et al eds., 1985)).

recording such a history is to prevent the occurrence of future atrocities. In the words of Cherif Bassiouni:

The world needs to establish a historic record of major international crimes, if for no other reason than to establish the truth and to educate future generations. Maybe then we can deter potential criminals and avoid the repetition of those crimes. Otherwise, we are condemned to repeat the mistakes of the past.<sup>195</sup>

Absent a reasons requirement, “the judge has a strong incentive to leave the record vague.”<sup>196</sup> Writing a reasoned opinion takes time and thoughtfulness and carries with it the risk that an appellate court will view it as incorrect. Indeed, the more detailed the opinion, the more susceptible it is to challenge on appeal.<sup>197</sup>

A reasoned judgment raises issues about the validity and the appearance of fairness when employed in systems where a panel of judges hears a case. Requiring that a number of judges agree on the specific reasons for the opinion poses some practical difficulty, as even stylistic differences can be a bar to agreement. To the extent that a panel of judges cannot agree on a written opinion, the inclusion of dissents or concurrences may detract from the validity of the judgment.

Both the Rwanda statute and the Rome statute require written reasoned opinions. Interestingly, while the Rwanda statute provides for the inclusion of separate and dissenting opinions, the Rome Statute does not. “The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber’s decision shall contain the

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<sup>195</sup> HOWARD BELL, *Dedication, in* WAR CRIMES AND JUSTICE (2002).

<sup>196</sup> Doran et.al. *supra* note 19 at 193 [reproduced in the accompanying notebook at Tab 62].

<sup>197</sup> See *supra* pages 11-12 (illustrating that in Canada, no reasons may be better than flawed reasons because an appeals court will uphold a decision that the fact-finder could have reasonably come to, but not one that its opinion demonstrates it came to unreasonably).

views of the majority and the minority.”<sup>198</sup> A decision by a divided court may lead to doubt as to its soundness and rationality.<sup>199</sup> On the other hand, it may add to a general perception that the procedure is legitimate, as one would probably not expect dissents in a case where the outcome was predetermined. Different opinions may result where the tribunals act from emotion rather than rationality, but irrationality would presumably be clear from the text of the opinion.

In most jurisdictions studied, judges must give reasons for their decisions in criminal trials, at least when the defendant so requests. While juries generally do not give such reasons, this is due to the special position juries occupy as a check on state power, with the ability to nullify a law deemed unjust, and the need for juries willing to serve without fear that their deliberations will be scrutinized. In addition to this widespread state practice, the statutes of international criminal tribunals require that judges give reasons for their decisions. A reasons requirement is therefore a principle of international criminal law. This is a confirmation of the centrality of such a requirement to respect for the human rights of criminal defendants, particularly the right to a fair trial and to an effective appeal. The principle is also especially useful in the context of international criminal tribunals, where reasoned judgments meet a heightened need for independence and legitimacy to counter the criticism that such tribunals only mete out victor’s justice. Judges in international criminal tribunals must therefore give reasons for

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<sup>198</sup> Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference, zrt. 74 July 17, 1998 [reproduced in the accompanying notebook at Tab 5].

<sup>199</sup> United States Supreme Court Justice Earl Warren is often esteemed for eliciting a unanimous decision in the landmark case that held school segregation by race illegal based on a belief that unanimity would lead to less public controversy over the decision. See e.g., Mark Tushnet with Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991) [reproduced in the accompanying notebook at Tab 83].

their opinions in order to comply with international criminal law, respect the rights of the accused, and convey a sense of legitimacy.