of admissibility.\textsuperscript{638} All of which occurs while the defendant is under arrest without conviction all through the trial, when he is brought against serious charges.\textsuperscript{639}

2. The Adopted System: A Combination Leading to a Sui Generis System

The recent history of international tribunals, starting with the Nuremberg and Tokyo Tribunals, going through the U.N. \textit{ad hoc} Tribunals for Yugoslavia, Rwanda until the establishment of the ICC, has witnessed an ongoing compromise between the legal systems and their criminal procedures.\textsuperscript{640} The international tribunals are somewhat bewildered between reliance on the investigations of third parties on the one hand, and diminishing the barrier of evidence on the other hand,\textsuperscript{641} due to the nature of the materials and offenses which are brought before the tribunals.

Such indecision between either legal system requires that the judges balance the weight of all evidence brought before them, in light of the inability to perform an acquitting investigation for the defence: either by themselves or by the defence in many cases.\textsuperscript{642} In light of the need to weigh evidence by the international tribunals, rather than rule them as admissible or inadmissible only, they are neither “passive” nor “active”. They are \textit{sui generis} types of courts, which have to balance between the rights of the defendants to a fair trial, and the need to deter and punish the crimes within their jurisdiction, while preserving the rights of victims, witnesses, states and international organizations at the same time.\textsuperscript{643}

The participation of victims in the ICC proceeding is an innovation when compared to any previously established international tribunal. Though the victim has not become a (private) party in criminal proceedings, as is the

\textsuperscript{638} Philip L. Reichel, \textit{COMPARATIVE CRIMINAL JUSTICE SYSTEMS}, above note 603, at 151.

\textsuperscript{639} Article 58 of the Rome Statute, revolves around a “Reasonable Time” with no exact limitation of the possible period of arrest.


\textsuperscript{641} Compare to Kristina D. Rutledge, \textit{Comment and Note: Spoiling Everything}, above note 602, at 171–172.

\textsuperscript{642} David Lusty, \textit{Anonymous Accusers}, above note 604, at 413.

\textsuperscript{643} An investigation and an indictment must always be “in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial” (Article 68(5)).
case in some civil law countries, under the Rome Statute victims are entitled to protection and to participate indirectly in the ICC proceedings. Consequently, an international model for the participation of victims was created which differs substantively from the common-law criminal systems.

Since the Nuremberg Tribunals, international criminal trials, including the ICC, have a prosecution, a defence, and professional justices. It is the duty of the justices to balance the weight of the evidence against the ability of the defence to bring forth evidence, in light of the right of the defendant to a fair and expeditious trial.644 A fair trial might very well include taking into consideration situations in which the defendant is unable to bring evidence to support his arguments. Such, for example, is the case of a change in regimes in a country which holds information that is vital for the defence, during which time evidence for the defence might be swiftly destroyed.645

On the other hand, it may be argued that the cases brought before international tribunals, have been of the most heinous crimes, such as genocide, and crimes against humanity. The perpetrators of such crimes would certainly not hesitate to bury evidence along with their victims, and to conceal or destroy evidence.646 It is also difficult to fully implement rules of admissibility in such circumstances, because the only remnant of a mass killing, for example, might be a video tape of an execution that survived the event, its camera man being long gone.

Thus, we are left with a constant need for a balance between a fair procedure and a difficult subject matter, where neither of the legal systems reigns in international criminal adjudication. On the one hand, rules of admissibility, as much as they are preferred, are difficult to implement. On the other hand, a total relinquishing of the barrier of evidence, without a proper substitute whereby the court makes the investigations itself, is difficult to accept in terms of defendant rights. However, as international criminal adjudication evolves, the criminal procedure develops in terms of defendant rights. The question is whether the criminal procedure adopted for the ICC can ensure a fair trial. The Rome Statute and the Rules of Procedure and Evidence are the Magna Carta of the accused. It is more than just a

645 Allison Marston Danner writes:
“Despite the increasing autonomy granted to the Prosecutor over the course of the negotiating history of the Rome Statute, the Court remains heavily dependent on state cooperation in order to investigate its cases, arrest its suspects, and imprison the individuals it convicts”
Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion, 97 AJIL (July 2003), at 527.
646 Patricia M. Wald, The ICTY Comes of Age, above note 601, at 108.