

**Memorandum Submitted to the Deputy Prosecutor of
the International Criminal Tribunal for Rwanda**

**Topic #4: Evidence of Good Character
and Reputation**

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- PP. Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345 (1997).
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Discussion

I. Introduction and Summary of Conclusions

This memorandum will address good reputation and character evidence with the aim of encouraging the development of sound evidentiary guidelines for the admission of such evidence in the International Criminal Tribunal of Rwanda. First, this memorandum will outline the current state of the admission of good reputation and character evidence in the International Criminal Tribunals of Yugoslavia and Rwanda. Next, it will discuss the use of good reputation and character evidence in common law jurisdictions such as the United States of America, Canada, England, Scotland, and South Africa. Then, the paper will provide an analysis of the admissibility of such evidence in the civil law jurisdictions of France and Belgium. Finally, this memorandum recommends that the International Criminal Tribunal of Rwanda establish rules to govern the admissibility of character and reputation evidence in order to clarify the tribunal's position on such evidence and give notice to the prosecution and defense.

II Factual Background

When a defendant attempts to prove that he or she is not the type of person who would commit the act of which he or she was accused, issues of good character and reputation evidence arise. This can occur when a defendant offers evidence of his or her good character through personal testimony, the testimony of character witnesses, or the cross-examination of prosecution witnesses. Defendants may attempt to offer this evidence through opinion, reputation, or evidence of specific acts.¹ Once such evidence

¹ See *infra* text accompanying notes 51-54.

is admitted, the prosecution may choose to enter evidence abutting the reputation or character of the defendant.²

III Legal Discussion

A. Current Use of Evidence of Good Character and Reputation in the International War Crimes Tribunals

1. Rules of Procedure

Article 14 of the Statute of the International Tribunal of Rwanda provides that the tribunal may establish rules of evidence.³ However, the tribunal has not established a rule specifically addressing character evidence. Therefore, the only formal principles governing the admission of such evidence are those set forth in Rule 89.⁴ Rule 89(B) provides that rules established should “favour a fair determination of the matter and [should be] consonant with the spirit of the Statute and the general principles of law.”⁵ Rule 89(C) provides that the tribunal may admit any evidence which it deems to have probative value.⁶

2. Use of Such Evidence in the International Criminal Tribunal of Yugoslavia

The Yugoslavian Tribunal has rarely addressed the issue of good character or reputation evidence.⁷ However, it did discuss the issue in the case of Prosecutor v.

² See *infra* text accompanying note 42-43.

³ See Statute of the International Tribunal for Rwanda, art 14 [reproduced at Tab G].

⁴ See Rules of Procedure and Evidence (1995), Rule 89 [reproduced at Tab F].

⁵ See *id.* at Rule 89(B) [reproduced at Tab F].

⁶ See *id.* Rule 89(C) [reproduced at Tab F].

⁷ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K]; see also Prosecutor v. Kupreskic, 1999 WL 33483190 (UN ICT (Trial) (Yug)), Decision of 26 February 1999 [reproduced at Tab L].

Kupreskic.⁸ In a ruling dated February 17, 1999, the tribunal made four primary points concerning the use of evidence of good reputation.⁹

First, the tribunal determined that evidence of the defendant's good character is not relevant if it relates to a time period prior to the beginning of the conflict during which the alleged acts occurred.¹⁰ The tribunal held that the unique nature of the emergency wartime atmosphere of Yugoslavia at the time the alleged acts were committed makes the defendant's good character prior to this period irrelevant.¹¹

Furthermore, the tribunal noted: "as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity with therewith."¹²

Second, the tribunal held that where the prosecution has conceded the good accused's good character prior to the events in issue, evidence of good character is not material.¹³ Third, it held that witnesses called to testify to facts would not be subjected to questions concerning character because of the time constraints of trial.¹⁴ Fourth, the tribunal noted that it would allow each defense counsel to call only one exemplary character witness and would request that any further good character evidence be

⁸ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K]; see also Prosecutor v. Kupreskic, 1999 WL 33483190 (UN ICT (Trial) (Yug)), Decision of 26 February 1999 [reproduced at Tab L].

⁹ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K].

¹⁰ See *id.* [reproduced at Tab K].

¹¹ See *id.* [reproduced at Tab K].

¹² See *id.* [reproduced at Tab K].

¹³ See *id.* [reproduced at Tab K].

¹⁴ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K].

submitted through affidavits.¹⁵ The tribunal also held, on a separate issue, that the *tu quoque* principle “does not apply to international humanitarian law.”¹⁶

In another ruling in the Kupreskic case, dated February 26, 1999, the tribunal further clarified its policy regarding good character or reputation evidence.¹⁷ This ruling was in response to a motion in limine submitted by the defense, in which the defendant requested that the prosecutor’s cross-examination of character witnesses be limited to the scope of the character questions on direct.¹⁸ The tribunal noted that Rule 90(H) allows for cross-examination to be limited to direct examination and to issues of credibility, but that additional matters may be addressed at the judge’s discretion.¹⁹ It held that such an explicit limitation as the defense sought would be “a departure from the express terms” of the rule, and so refused to limit its choice to hear a full cross-examination.²⁰

3. *Use of Such Evidence in the International Criminal Tribunal of Rwanda*

As is the case at the International Criminal Tribunal of Yugoslavia, the Rwandan Tribunal has not addressed evidence of good character or reputation in detail.²¹

However, on June 29, 1998 the tribunal issued a decision in the case of Prosecutor v.

¹⁵ *See id.* [reproduced at Tab K].

¹⁶ The defense counsel sought to submit evidence that tended to prove that Bosnian Muslims (the alleged victims in this case) had committed crimes against Bosnian Croats similar to those crimes with which the defendant was charged. The tribunal held that the legal obligations being addressed in the tribunal were not obligations “based on reciprocity,” but were instead obligations “designed to safeguard human values [which] therefore must be complied with regardless of the conduct of the other party or parties.” *Id.* [reproduced at Tab K].

¹⁷ *See* Prosecutor v. Kupreskic, 1999 WL 33483190 (UN ICT (Trial) (Yug)), Decision of 26 February 1999 [reproduced at Tab L].

¹⁸ *See id.* [reproduced at Tab L].

¹⁹ *See id.* [reproduced at Tab L]; *see also* Rules of Procedure and Evidence (1995), Rule 90(H) [reproduced at Tab F].

²⁰ *See* Prosecutor v. Kupreskic, 1999 WL 33483190 (UN ICT (Trial) (Yug)), Decision of 26 February 1999 [reproduced at Tab L].

²¹ *See* Prosecutor v. Kayishema, 1998 1770482 (UN ICT (Trial) (Rwa)), ICTR-95-1-T, Decision of 29 June 1998 [reproduced at Tab J].

Kayishema which is relevant to this discussion.²² The Tribunal denied a motion by the prosecution that would have precluded the admission by the defense of expert psychological evidence concerning the defendant's propensity for violence.²³

In its motion, the defense had argued that expert evidence was necessary to show:

(1) aggressiveness as an element of individual psychology, (2) violence, (3) psychology of crowds, (4) criminal crowds, (5) the fragility of testimony (notably eyewitness identification evidence), (6) evidence relating to the psychiatric examination of the accused and that ... these facts are important in determining the guilt or innocence of the accused by ostensibly proving that aggressiveness is an element of individual psychology and that, genocide was part of the psychology of crowds.²⁴

The prosecution had argued that the expert evidence was in fact character evidence of personality or disposition, clothed as scientific, fact and that it was not relevant to the facts at issue; therefore, the admission of the expert evidence on these issues would not be in keeping with the general principles of law and the "spirit of the Statute."²⁵

However, the tribunal did not choose to frame this issue in terms of the relevance or probative value of the evidence.²⁶ The tribunal dismissed the motion, claiming that it had no legal authority to determine admissibility of expert evidence before the expert had testified before the tribunal or officially submitted a report into evidence.²⁷ Whether expert testimony may be admitted to prove character is therefore still an open question.

B. Use of Evidence of Good Character and Reputation in Common Law Countries²⁸

²² See *id.* [reproduced at Tab J].

²³ See *id.* [reproduced at Tab J].

²⁴ *Id.* [reproduced at Tab J].

²⁵ *Id.* [reproduced at Tab J]; see also Rules of Procedure and Evidence (1995), Rule 89(B) [reproduced at Tab F]. To make this point, the prosecutor relied on Canadian law, which provides for limited expert testimony as to character in certain circumstances. See *Prosecutor v. Kayishema*, 1998 1770482 (UN ICT (Trial) (Rwa)), ICTR-95-1-T, Decision of 29 June 1998 [reproduced at Tab J]; see also *infra* Part IIIB(1).

²⁶ See *Prosecutor v. Kayishema*, 1998 1770482 (UN ICT (Trial) (Rwa)), ICTR-95-1-T, Decision of 29 June 1998 [reproduced at Tab J].

²⁷ See *id.* [reproduced at Tab J].

²⁸ Please note that evidence of prior bad acts is beyond the scale of this memorandum.

1. *United States*

In comparison to many other federal jurisdictions, the United States has developed a fairly regimented set of rules governing the use of character evidence.²⁹ The Federal Rules of Evidence strictly limit the admission of many types of evidence in the U.S., with the goal of achieving uniformity throughout the system.³⁰

Character evidence of criminal defendants and victims in the U.S. is governed by Federal Rules of Evidence (FRE) 404 and 405, and character evidence of witnesses is governed by FRE 608 and 609 in reference to the character of witnesses.³¹ FRE 404(a) addresses admissibility of general character evidence and FRE 404(b) addresses the admissibility of other crimes, wrongs, or acts.³² FRE 405 governs the means by which character may be proven, by opinion, reputation, or by testimony as to specific instances.³³ FRE 608 governs the means and scope by which a witness' credibility may be proven or attacked.³⁴ FRE 609 governs the impeachment of witnesses through evidence of prior convictions.³⁵

a. Character Evidence Under Rules 404 and 405

²⁹ See FED. R. EVID. 404, 405, 608, 609 [reproduced at Tab E].

³⁰ See Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. Rev. 1547, 1590 (1998) [reproduced at Tab OO].

³¹ See FED. R. EVID. 404, 405, 608, 609 [reproduced at Tab E].

³² See FED. R. EVID. 404 [reproduced at Tab E]. Under 404(b):

evidence of other crimes, wrongs, or acts is not admissible to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice....

FED. R. EVID. 404(b) [reproduced at Tab E]. Evidence of similar crimes in a sexual assault case or a child molestation case are governed by Rules 413 and 414 respectively. See FED. R. EVID. 413-414 [reproduced at Tab E]. These rules provide that in such cases, evidence of the commission of another such offense is admissible and may be "considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413-414 [reproduced at Tab E].

³³ See FED. R. EVID. 405 [reproduced at Tab E].

³⁴ See FED. R. EVID. 608 [reproduced at Tab E].

Under 404(a), evidence of character is generally not admissible to prove action in conformity with the trait.³⁶ Therefore, in its case in chief, the prosecution may not introduce character as an issue.³⁷ Several principles account for the limitation on the admission of character evidence: its relevance to the proceedings; the danger of the jury giving it too much weight; the danger of the jury seeking to punish past, rather than present, acts; the danger that unlimited admission will result in the defendant being surprised by allegations against which a defense could have been prepared; and the amount of time that could be wasted in an unregulated evaluation of the defendant's or a witness's character.³⁸ Basically, it is generally thought that the admission of such evidence would create confusion and undue prejudice against the defendant.³⁹ It is said to be the defendant's decision to make character an issue.⁴⁰

FRE 404(a) does, however, allow character evidence in order to show action in conformity in two circumstances.⁴¹ FRE 404(a)(1) governs the character of the accused. Evidence of the character of the accused is admissible by the accused to show a pertinent character trait or by the prosecution to rebut the same.⁴² Evidence of the accused's character by the prosecution is also admissible in order to rebut evidence of the same characteristic in the alleged victim under FRE 404(a)(2).⁴³

³⁵ See FED. R. EVID. 609 [reproduced at Tab E].

³⁶ See FED. R. EVID. 404(a) [reproduced at Tab E].

³⁷ See *Michelson v. U.S.*, 335 U.S. 469 (1948) [reproduced at Tab I].

³⁸ See *Milelli*, *supra* note 30, at 1591-92 [reproduced at Tab OO].

³⁹ See *id.* [reproduced at Tab OO].

⁴⁰ See *Greer v. U.S.*, 245 U.S. 559 (1918) [reproduced at Tab H].

⁴¹ See FED. R. EVID. 404(a) [reproduced at Tab E].

⁴² See FED. R. EVID. 404(a)(1) [reproduced at Tab E].

⁴³ See FED. R. EVID. 404(a)(1) [reproduced at Tab E].

FRE 404(a)(2) governs evidence of the alleged victim's character.⁴⁴ Such evidence is admissible by the accused and admissible by the prosecution if rebutting the same; such evidence is also admissible by the prosecution if it concerns the character trait of peacefulness of the alleged victim in a homicide case where the accused seeks to prove that the alleged victim was the aggressor.⁴⁵

In order for character or reputation evidence to be admissible under FRE 404(a), the evidence must be of a "pertinent" character trait.⁴⁶ That is, the trait must somehow be related to the likelihood that the accused would commit the offense in question.⁴⁷ The defendant may offer a "general estimate" of his or her character, which may include the defendant's propensity to commit crimes or that the defendant has been truthful on the stand.⁴⁸ The kind of character trait that may be shown is a matter of judgment as to relevancy.⁴⁹

FRE 405 addresses what methods may be used to prove character when evidence of character is admissible under FRE 404.⁵⁰ FRE 405(a) authorizes evidence of reputation or opinion in all cases where character evidence is admissible.⁵¹ This means that the defendant may not use specific instances in its case, but instead must rely on reputation or opinion.⁵² Evidence of specific instances of conduct is only admissible on direct in cases where the character trait is "an essential element of the charge, claim, or

⁴⁴ See FED. R. EVID. at 404(a)(2) [reproduced at Tab E].

⁴⁵ See FED. R. EVID. 404(a)(2) [reproduced at Tab E]. A victim's character in sexual offense cases is governed by Rule 412, which substantially limits inquiry into the victim's past sexual history. See FED. R. EVID. 412 [reproduced at Tab E].

⁴⁶ See FED. R. EVID. 404(a) [reproduced at Tab E].

⁴⁷ See SEC v. Towers Financial Corp., 966 F. Supp. 203 (S.D.N.Y., 1997) [reproduced at Tab Z].

⁴⁸ See U.S. v. Diaz, 961 F. 2d 1417 (Ore., 1992), *affirmed* 92 F. 3d 1194, *cert. denied* 519 U.S. 1078 [reproduced at Tab AA]; see also U.S. v. Pujana-Mena, 949 F. 2d 24 (N.Y., 1991) [reproduced at Tab CC].

⁴⁹ See Salgado v. U.S., 278 F. 2d 830 (Puerto Rico, 1960) [reproduced at Tab Y].

⁵⁰ See FED. R. EVID. 405 [reproduced at Tab E].

⁵¹ See FED. R. EVID. 405(a) [reproduced at Tab E].

defense” and on cross-examination.⁵³ In the criminal context, there are few, if any, modern crimes containing a character trait as an “essential element.”⁵⁴

Jurisdictions differ on the issue of whether expert psychological testimony is admissible as character evidence.⁵⁵ A defendant might offer expert evidence of character in order to prove that he or she did not have the predisposition to commit the crime charged.⁵⁶ Jurisdictions in Alaska and California have admitted such evidence, while jurisdictions in Indiana, Iowa, Michigan, Wisconsin, Kentucky, New Jersey, Pennsylvania, Oregon, Virginia, Idaho, Illinois, Connecticut, Minnesota, and Texas have not.⁵⁷

b. Evidence of Witnesses’ Character and Reputation

FRE 608 provides that evidence impeaching a witness must be limited to the impeachment of credibility and not character in general.⁵⁸ Evidence of untruthfulness may be offered by opinion or reputation in a direct examination, or by inquiry into specific instances on cross-examination of the witness herself.⁵⁹ Evidence of truthfulness may be admitted only after the witness’s truthfulness has been attacked.⁶⁰ FRE 609

⁵² See U.S. v. Talamante 981 F.2d 1153 (N.M., 1992), *cert. denied* 981 F.2d 1153 [reproduced at Tab EE].

⁵³ See FED. R. EVID. 405 [reproduced at Tab E].

⁵⁴ See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 475 (4th ed. 2000) [reproduced at Tab II].

⁵⁵ See Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 386-87 (1997) [reproduced at Tab PP].

⁵⁶ See U.S. v. Staggs, 553 F.2d 1073, 1076 (7th Cir. 1997) [reproduced at Tab DD]; U.S. v. McDonald, 688 F.2d 224, 227-28 (4th Cir. 1982) [reproduced at Tab BB].

⁵⁷ See Reed, *supra* note 55, at 386-87 (1997) [reproduced at Tab PP]. Reed explains the judicial reluctance to admit such evidence as “the product of general judicial skepticism regarding scientific evidence in general.” See *id.*

⁵⁸ See FED. R. EVID. 608 [reproduced at Tab E].

⁵⁹ See FED. R. EVID. 608 [reproduced at Tab E].

⁶⁰ See FED. R. EVID. 608 [reproduced at Tab E].

provides the conditions under which a witness's credibility may be attacked through evidence of prior convictions.⁶¹

2. *Canada*

Canadian evidence allows, under certain circumstances, the admission of bad or good character evidence in criminal trials, both when the parties' characters are facts in issue and when the character evidence is admitted to prove a fact in issue.⁶² As in the United States, however, character is rarely a fact in issue in criminal proceedings.⁶³

a. Evidence of the Defendant's Good Character and Reputation

The admission of character evidence in criminal trials arises more often in cases where the evidence is being used to prove that a defendant's characteristics made him or her more or less likely to have committed the crime in question.⁶⁴ When a defendant wishes to introduce good character evidence he or she may do so by calling witnesses to testify as his or her good reputation in the community or by cross-examining a witness familiar with his or her reputation.⁶⁵ The witness may not testify to his or her own opinion, but only the general reputation in the community of the defendant as relates to a particular characteristic.⁶⁶ The characteristic testified to must "relate to a relevant issue"

⁶¹ See FED. R. EVID. 609 [reproduced at Tab E].

⁶² See JOHN SOPINKA ET AL., *THE LAW OF EVIDENCE IN CANADA* 432 (1992) [reproduced at Tab MM].

⁶³ See *id.* at 440 [reproduced at Tab MM].

⁶⁴ See *id.* [reproduced at Tab MM].

⁶⁵ See *id.* [reproduced at Tab MM]; see also ROGER E. SALHANY, *EVIDENCE IN CRIMINAL CASES* 132 (6th ed. 2002) [reproduced at Tab KK]. Salhany states:

Evidence of a person's character is generally handled in the following manner. The witness will be asked whether he or she knows the accused's reputation for honesty (where the crime is one of dishonesty) or peacefulness (where the crime is one of violence), *etc.*, in the community. If the witness answers in the affirmative, he or she will then be asked, "What is that reputation?" and the witness will be allowed to give evidence of the community's view.

ROGER E. SALHANY, *EVIDENCE IN CRIMINAL CASES* 132 (6th ed. 2002) [reproduced at Tab KK].

⁶⁶ See SOPINKA, *supra* note 62, at 432 [reproduced at Tab MM].

and can include the trait of honesty, if the defendant's credibility is in question.⁶⁷ The jury may utilize character evidence in deciding guilt or innocence; a judge has a responsibility to inform the jury of this.⁶⁸ However, when a judge fails to inform the jury, the failure will not amount to a mis-direction unless the character trait was "relevant to the particular charge."⁶⁹ The weight attributed to evidence of reputation may vary, depending on the nature of the crime.⁷⁰

A defendant may also personally testify to specific acts of good conduct.⁷¹ Since the accused will usually not have a clear or accurate understanding of his or her reputation in the community, the Canadian view is that restricting him or her to reputation evidence cannot really result in the admission of probative evidence.⁷² The accused may testify to specific acts, limited to those such as any "project[ing] the image of a law-abiding citizen," including never having been arrested, working regularly, former incidents of honesty, and legal intent.⁷³

The accused may enter character evidence in his or her favor by expert evidence, but only in limited circumstances.⁷⁴ Where the characteristic at issue is normal in nature, such as a propensity for violence, psychiatric evidence will not be admissible.⁷⁵ Where there is evidence of a characteristic that indicates an "abnormal" characteristic, however,

⁶⁷ See SOPINKA, *supra* note 62, at 443 [reproduced at Tab MM].

⁶⁸ See *id.* at 453-454 [reproduced at Tab MM].

⁶⁹ See *id.* [reproduced at Tab MM].

⁷⁰ See SALHANY, *supra* note 65, at 131 [reproduced at Tab KK]. Salhany points out that the weight given to reputation in a "private" crime, such as sexual assault on a child may be less than if the crime were one having a more public effect on reputation. See *id.* [reproduced at Tab KK].

⁷¹ See SOPINKA, *supra* note 62, at 447 [reproduced at Tab MM].

⁷² See *id.* at 432 [reproduced at Tab MM]; see also *R. v. McNamara* (No. 1) (1981), 56 C.C.C. (2d) 193, at 348, *leave to appeal to S.C.C. refd.* 56 C.C.C. (2d) 576 (Can.) [reproduced at Tab R].

⁷³ See SOPINKA, *supra* note 62, at 448-49 [reproduced at Tab MM].

⁷⁴ See *id.* at 450 [reproduced at Tab MM].

⁷⁵ See *id.* at 451 [reproduced at Tab MM]; see also *R. v. Robertson* (1975), 21 C.C.C. (2d) 385; *leave to appeal to S.C.C. refd.* 21 C.C.C. (2d) 385n. (Can.) [reproduced at Tab U].

expert evidence may be permissible.⁷⁶ In 1994, it was clarified by the court in *R. v. Mohan* that there are “distinctive behavioural characteristics” in issue and that the expert’s opinion is based on a “behavioural profile ... in common use as a reliable indicator of membership in a distinctive group.”⁷⁷

b. Evidence of the Defendant’s Bad Character and Reputation

When the defendant has put character in issue or when there is evidence of similar acts, the prosecution may introduce evidence of the defendant’s bad character in cross-examination or rebuttal.⁷⁸ The accused has put character in issue whenever he or she has adduced evidence of good character;⁷⁹ however, character will not be put in issue when the prosecution has, through purposeful cross-examination, led a witness into testifying to the defendant’s character.⁸⁰ When character has been put in issue, cross-examination allows inquiry into the character of the accused.⁸¹ The evidence must be by reputation only and may not be used to find guilt or innocence, only to “neutralize” the evidence of good character.⁸² One exception to the general reputation rule is evidence of previous convictions, which may be freely used to rebut the defendant’s own testimony of good character.⁸³ In fact, evidence of previous convictions may be admitted to disprove credibility whenever the defendant testifies, regardless of the defendant’s assertion of

⁷⁶ See SOPINKA, *supra* note 62, at 450-453 [reproduced at Tab MM]; see also *R. v. Lupien* (1970) 2 C.C.C. 193 (Can.) (defendant accused of an act of gross indecency adduced psychiatric testimony revealing violent defense mechanisms concerning homosexuality) [reproduced at Tab Q].

⁷⁷ See SALHANY, *supra* note 65, at 168 [reproduced at Tab KK]; see also *R. v. Mohan*, (1994) 89 CCC (3d) 402 (Can.) [reproduced at Tab S].

⁷⁸ See SOPINKA, *supra* note 62, at 454-455 [reproduced at Tab MM].

⁷⁹ See SALHANY, *supra* note 65, at 132 [reproduced at Tab KK]; see also *R. v. Farrant*, (1983) 4 C.C.C. (3d) 354 (Can.) (defendant put character in issue by testifying: “It’s not my character to be violent, you know, use violence or a rifle, you know, to get my own way. That’s not my character.”) [reproduced at Tab P].

⁸⁰ See SALHANY, *supra* note 65, at 133 [reproduced at Tab KK].

⁸¹ See SOPINKA, *supra* note 62, at 457 [reproduced at Tab MM].

⁸² See *id.* at 460 [reproduced at Tab MM].

⁸³ See SALHANY, *supra* note 65, at 134 [reproduced at Tab KK].

good character, as long as admitting the previous convictions would make the trial “more, and not less fair.”⁸⁴

There are additional common law exceptions to the rule disallowing the prosecution from adducing character evidence.⁸⁵ These exceptions include similar fact evidence, admissible in the prosecution’s case in chief to prove such elements as motive or intent, know-how, or identity, among other things.⁸⁶ Another exception involves evidence of character adduced by one accused against a co-accused; in this case, the accused may freely offer character evidence against his or her co-accused, in order to prove that it was more likely that the co-accused was the person committing the crime.⁸⁷

c. Evidence of Witnesses’ Character and Reputation

The accused may put the victim or a third party’s character in issue only when relevant to the proceedings.⁸⁸ For instance, the victim’s reputation for violence may be probative if the defendant asserts self-defense; similarly, a third party’s reputation for violence may be important where the defendant claims a misidentification.⁸⁹ In such cases, the defendant may call witnesses attesting to general reputation or cross-examine prosecution witnesses to this effect.⁹⁰ In response, the prosecution may rebut this evidence by probing the accused’s character and by rebutting evidence of the victim or third party’s character.⁹¹ However, if the accused attacks the character of the prosecution’s (non-victim) witnesses, the prosecution will not be able to rebut with an

⁸⁴ See *id.* at 138-140 [reproduced at Tab KK]; see also *R. v. Brooks*, 129 C.C.C. (3d) 227 (1998) (Can.) [reproduced at Tab M].

⁸⁵ See SALHANY, *supra* note 65, at 130 [reproduced at Tab KK].

⁸⁶ See *id.* at 141-142 [reproduced at Tab KK].

⁸⁷ See *id.* at 131 [reproduced at Tab KK].

⁸⁸ See *id.* at 135 [reproduced at Tab KK].

⁸⁹ See *id.* [reproduced at Tab KK].

⁹⁰ See ROGER E. SALHANY, EVIDENCE IN CRIMINAL CASES 135 (6th ed. 2002) [reproduced at Tab KK].

⁹¹ See *id.* at 135-136 [reproduced at Tab KK].

attack on the accused's character.⁹² Evidence of a victim's peaceable nature is generally not allowed in the case-in-chief.⁹³

3. *England*

English common law allows a defendant in a criminal case to call witnesses to testify and to cross-examine the prosecution's witnesses as to his or her reputation in the community.⁹⁴ In return, when a defendant has put his or her character in issue, the prosecution may question witnesses in a similar vein in order to rebut this assertion of good character.⁹⁵ Examination as to incidents in which the defendant was involved that have similar facts to the crime charged or that establish background facts may be addressed by the prosecution and can be used to prove guilt.⁹⁶ Examination as to the existence of previous convictions, however, is usually admissible to bear on the issue of credibility⁹⁷ or, unofficially, to rebut evidence of good character.⁹⁸ Cross-examination of a defendant is governed by the Criminal Evidence Act of 1898, which will be further discussed below.⁹⁹

a. Evidence of the Defendant's Good Character or Reputation

As in Canada, defense witnesses may not be called upon to testify as to their opinions of the defendant or to testify to specific instances in which the defendant has

⁹² See *id.* at 137 [reproduced at Tab KK].

⁹³ See *id.* at 136 [reproduced at Tab KK].

⁹⁴ See COLIN TAPPER, CROSS AND WILKINS OUTLINE OF THE LAW OF EVIDENCE 242 (6th ed. 1986) [reproduced at Tab NN].

⁹⁵ See JOHN A. ANDREWS & MICHAEL HIRST, ANDREWS & HIRST ON CRIMINAL EVIDENCE, 449 (4th ed. 2001) [reproduced at Tab FF].

⁹⁶ See *id.* at 411-412 [reproduced at Tab FF].

⁹⁷ See *id.* at 454 [reproduced at Tab FF].

⁹⁸ See *id.* at 461 [reproduced at Tab FF]. "There might appear to be an exception where previous convictions are concerned, since there is no doubt that these may be proved where D has put his character in issue, but such convictions could perhaps be presumed to affect his general reputation, so there may in fact be no real conflict of principle involved." *Id.* [reproduced at Tab FF].

⁹⁹ See Criminal Evidence Act (1898) §§ 1(2)-1(3) (Eng.), reprinted in ANDREWS & HIRST, *supra* note 95, at 464 [reproduced at Tab B]; see also *infra* notes 112-119 and accompanying text.

acted with a particular characteristic, but only as to his reputation.¹⁰⁰ This was a rule established in the case of *R. v. Rowton*, in which the court upheld this common law principle, even though the court noted its apparent lack of logic.¹⁰¹ In practice, testimony of opinion and specific instance is often admitted regardless of the common law rule against this practice.¹⁰² However, official endorsement of the *Rowton* opinion remains; as recently as 1982, the court refused to overrule *Rowton* by labeling cases in which courts ignored the *Rowton* rule as “indulgences” which were not included in the defendant’s rights.¹⁰³ The official common law allows a defendant to testify to his own reputation, as impossible as that might appear to be, by allowing the defendant to make such statements as “he has led a good life, never been in trouble, and done a number of good acts.”¹⁰⁴

In order for these statements to be admissible, however, they must be relevant.¹⁰⁵ In the early 1990’s, the courts in England established new precedent in terms of what good character evidence is relevant, and the resulting jury instructions that are required.¹⁰⁶ The court in *R. v. Vye* established three main principles: (1) where the defendant’s credibility is in issue, the court must inform the jury that the defendant’s good character, as evidenced by pre-trial statements or testimony in court, is relevant to

¹⁰⁰ See ANDREWS & HIRST, *supra* note 95, at 463 [reproduced at Tab FF]; see also *R. v. Rowton* (1865) Le. & Ca. 520 (Eng.) (the court overturned a conviction because evidence of character was given in the form of opinion, not reputation, in indecent assault case) [reproduced at Tab V].

¹⁰¹ See ANDREWS & HIRST, *supra* note 95, at 450 [reproduced at Tab FF]; see also *R. v. Rowton*, (1865) Le. & Ca. 520 (Eng.) [reproduced at Tab V].

¹⁰² See ANDREWS & HIRST, *supra* note 95, at 450-451 [reproduced at Tab FF].

¹⁰³ See *id.* at 451 [reproduced at Tab FF]; see also *R. v. Redgrave*, (1982) 74 Cr. App. R. 10 (Eng.) [reproduced at Tab T].

¹⁰⁴ TAPPER, *supra* note 94, at 243 [reproduced at Tab NN].

¹⁰⁵ See ANDREWS & HIRST, *supra* note 95, at 451-452 [reproduced at Tab FF].

¹⁰⁶ See *id.* at 452-455 [reproduced at Tab FF]; see also *R. v. Vye*, (1993) 1 WLR 471 (Eng.) [reproduced at Tab X].

his credibility;¹⁰⁷ (2) even where the defendant has not testified or made pre-trial statements indicating good character, the judge must instruct the jury that good character can be an “indicator of a possible lack of criminal propensity;”¹⁰⁸ and (3) where two co-defendants are on trial and one has adduced evidence of good character, but the other has not been able to do so, the defendant of good character is still entitled to his or her instruction.¹⁰⁹

b. Evidence of the Defendant’s Bad Character or Reputation

As seems generally to be the case in common law jurisdictions, the prosecution may not directly examine witnesses on the issue of the defendant’s character.¹¹⁰ However, the prosecution may include evidence of previous convictions and of reputation in its rebuttal of character evidence adduced by the defense.¹¹¹ On cross-examining the defendant on character, the Criminal Evidence Act of 1898 is controlling.¹¹² This

¹⁰⁷ See ANDREWS & HIRST, *supra* note 95, at 453 [reproduced at Tab FF]; see also R. v. Vye (1993) 1 WLR 471 (Eng.) [reproduced at Tab X].

¹⁰⁸ See ANDREWS & HIRST, *supra* note 95, at 453 [reproduced at Tab FF]; see also R. v. Vye (1993) 1 WLR 471 (Eng.) [reproduced at Tab X].

¹⁰⁹ See ANDREWS & HIRST, *supra* note 95, at 454 [reproduced at Tab FF]; see also R. v. Vye (1993) 1 WLR 471 (Eng.); R. v. Shepherd, (1995) Crim. LR 153 (Eng.) [reproduced at Tab X].

¹¹⁰ See TAPPER, *supra* note 94, at 243 [reproduced at Tab NN].

¹¹¹ See *id.* [reproduced at Tab NN].

¹¹² See Criminal Evidence Act of 1898, §§1(2)-(3) [hereinafter Criminal Evidence Act of 1898], reprinted in ANDREWS & HIRST, *supra* note 95, at 464 [reproduced at Tab B]. Section 1(2) provides:

A person charged in criminal proceedings who is called as a witness in the proceedings may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to any offence with which he is charged in the proceedings

Criminal Evidence Act of 1898, § 1(2), at 464 [reproduced at Tab B]. Section 1(3) provides:

A person charged in criminal proceedings who is called as a witness in the proceedings shall not be asked ... any question tending to show that he has committed or been convicted of or been charged with any offence other than one with which he is then charged, or is of bad character, unless-

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of an offence with which he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature of the conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses

memorandum will discuss cross-examination regarding character evidence primarily in terms of Section 1(3)(ii), which allows cross-examination addressing specific instances of bad character and previous convictions when the defendant has made his character an issue.¹¹³ A defendant has, generally speaking, put his character in issue when the good character evidence “appears to be the aim, rather than a mere incidental effect of the evidence.”¹¹⁴ Therefore, evidence comprising a “general examination as to the surrounding circumstances” that happens to create a favorable picture of the defendant’s character does not put character in issue.¹¹⁵ When the defendant casts aspersions on the conduct or character of the prosecution, its witnesses, or the deceased victim of the alleged crime under the second “limb” of Section 1(3)(ii), the prosecution is also allowed to cross-examine on specific instances of bad character.¹¹⁶ However, the prosecution may not adduce separate evidence indicating bad character on the part of the defendant on rebuttal just because the defendant has attacked the character of the prosecution’s witnesses.¹¹⁷ It is largely a matter of the judge’s discretion whether the defendant has case such aspersions on the prosecution when prodded into doing so by the prosecution in its cross.¹¹⁸ In conclusion, it is important to remind the reader that Section 1 (3) only

for the prosecution or the deceased victim of the alleged crime; or
(iii) he has given evidence against any other person charged in the same proceedings.

Criminal Evidence Act 1898, § 1(3) [reproduced at Tab B].

¹¹³ See Criminal Evidence Act, *supra* note 112 at § 1(3)(ii) [reproduced at Tab B].

¹¹⁴ ANDREWS & HIRST, *supra* note 95, at 460 [reproduced at Tab FF].

¹¹⁵ See *id.* at 459 [reproduced at Tab FF], quoting *R. v. Ellis*, (1910) 2 KB 746 (Eng.) [reproduced at Tab O]; see also *R. v. Stronach*, (1988) Crim. LR 48 (Eng.) [reproduced at Tab W].

¹¹⁶ See ANDREWS & HIRST, *supra* note 95, at 471 [reproduced at Tab FF]; see also Criminal Evidence Act 1898, *supra* note 112 at § 1(3)(ii) [reproduced at Tab B].

¹¹⁷ See P.J. SCHWIKKARD ET AL., PRINCIPLES OF EVIDENCE 56 (1997) [reproduced at Tab LL]; see also *R. v. Butterwasser* (1948) 1 KB 4 (Eng.) [reproduced at Tab N].

¹¹⁸ See ANDREWS & HIRST, *supra* note 95, at 472 [reproduced at Tab FF].

applies when the defendant has put his or her character in issue by personally testifying.¹¹⁹

c. Evidence of the Witnesses' Character and Reputation

Evidence of the victim's bad character is generally inadmissible.¹²⁰ However, when relevant to a claim of self-defense in a violent crime, the victim or a third party's reputation for violence may be admitted to the court.¹²¹ These attacks may be rebutted by the prosecutor.¹²² The defendant is entitled to attack the credibility of victim and any witness testifying.¹²³

4. *Scotland*

a. Evidence of the Defendant's Character and Reputation

In Scotland, character evidence is considered "collateral" evidence whenever the characteristic is not a fact in issue.¹²⁴ Therefore, in all other criminal and civil cases, character evidence is generally held to be inadmissible, unless there are "exceptional circumstances where it is felt [the evidence] has a material bearing on at least one of the main issues."¹²⁵

It is generally accepted, however, that the defendant may seek to testify or call witnesses to testify to his or her good reputation.¹²⁶ If a defendant simply calls other witnesses to testify to his or her character, then the cross-examination of the witnesses

¹¹⁹ See *id.* at 460 [reproduced at Tab FF].

¹²⁰ See TAPPER, *supra* note 94, at 245 [reproduced at Tab NN].

¹²¹ See *id.* [reproduced at Tab NN].

¹²² See *id.* [reproduced at Tab NN].

¹²³ See *id.* [reproduced at Tab NN].

¹²⁴ See FIONA E. RAITT, GREEN'S CONCISE SCOTS LAW: EVIDENCE 279 (3rd ed. 2001) [reproduced at Tab JJ].

¹²⁵ *Id.* at 280 [reproduced at Tab JJ].

¹²⁶ See *id.* at 292 [reproduced at Tab JJ].

may include no evidence that the prosecution has of the defendant's character.¹²⁷ When a defendant testifies as to his or her own good character, however, the prosecution may cross-examine on that issue under Section 266 (4) (b).¹²⁸

Under Scottish law, Section 266 of the Criminal Law Act of 1995 addresses the prosecution's ability to use character evidence when the accused testifies.¹²⁹ The provisions of Section 266 are virtually identical to the provisions of the English Criminal Evidence Act of 1898.¹³⁰ Under Section 266 (4) (b), previous convictions are also allowable under the same circumstances as evidence pertaining to bad character. However, previous convictions have sometimes been admitted by accident and have not been held to cause substantial prejudice.¹³¹ Scotland also provides for similar fact evidence to be admitted to prove intent, lack of accident, etc., as long as there is a "nexus" between the two incidents.¹³² Section 266 (4) also provides cross-examination of

¹²⁷ See *id.* [reproduced at Tab JJ].

¹²⁸ See Criminal Law Act of 1995, [hereinafter Criminal Law Act of 1995] § 266(4) (1995) (Scot.) [reproduced at Tab C], *reprinted in* ALASTAIR N. BROWN, CRIMINAL EVIDENCE AND PROCEDURE: AN INTRODUCTION 132 (1996) [reproduced at Tab GG].

¹²⁹ See Criminal Law Act of 1995, *supra* note 128, at § 266 (4) (1995) [reproduced at Tab C]. The defendant will not be asked questions tending to prove the committal of any criminal act or that he or she is of bad character unless:

- (a) the proof that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence with which he is then charged; or
- (b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character, ... or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution ...; or
- (c) the accused has given evidence against any other person charged in the same proceedings.

Id. [reproduced at Tab C].

¹³⁰ See *id.* at § 266 (4) [reproduced at Tab C]; see also Criminal Evidence Act of 1898, *supra* note 112, at § 1(3) [reproduced at Tab B].

¹³¹ See RAITT, *supra* note 124, at 293 [reproduced at Tab JJ].

¹³² See *id.* at 282 [reproduced at Tab JJ].

the defendant's character when the defendant has given character evidence against a co-accused or when a previous conviction or characteristic is a prerequisite for the crime.¹³³

b. Evidence of the Witnesses' Character and Reputation

The character of the victim and witnesses are examinable in terms of credibility, but generally not on other grounds.¹³⁴ The exception to this rule is the admissibility of characteristics of the victim, which tend to prove he or she has a reputation for violence in a case where there is a self-defense issue.¹³⁵

5. *South Africa*

a. Evidence of the Defendant's Character and Reputation

As in most common law jurisdictions, when a defendant seeks to adduce evidence of character, the form of this evidence must be by reputation.¹³⁶ When the evidence is through the defendant's testimony, it must be by the assertion that his or her conduct has been generally good.¹³⁷ The Criminal Procedure Act Section 227(1) provides that character evidence is admissible in accordance with English law in force on May 30, 1961.¹³⁸ The accused may enter evidence of his or her good character through calling witnesses, testifying him or herself, or by cross-examining the prosecution's witnesses.¹³⁹

South Africa's Criminal Procedure Act, Section 197 largely follows the English Criminal Evidence Act of 1898, Section 1(3) and the Scottish Criminal Law Act of 1995,

¹³³ See Criminal Law Act of 1995, *supra* note 128, at § 266 (4) [reproduced at Tab C].

¹³⁴ See BROWN, *supra* note 128, at 128-132 [reproduced at Tab GG].

¹³⁵ See *id.* at 128-129 [reproduced at Tab GG].

¹³⁶ See SCHWIKKARD, *supra* note 117, at 54 [reproduced at Tab LL].

¹³⁷ See *id.* [reproduced at Tab LL].

¹³⁸ See *id.* at 55 [reproduced at Tab LL].

¹³⁹ See *id.* [reproduced at Tab LL].

Section 266 (4).¹⁴⁰ Otherwise, if character evidence has been offered only through third party witnesses, the prosecution may rebut it with bad character evidence concerning reputation.¹⁴¹

When a defendant testifies, and has put his or her character in issue through his or her own testimony, or the testimony of a witness, the prosecution may cross-examine the defendant on his character.¹⁴² Unlike in England, however, South African courts have not yet determined whether this cross-examination should be permissible when the defendant's imputation of witnesses is a necessary element to his or her affirmative defense.¹⁴³

b. Evidence of the Witnesses' Character and Reputation

In South Africa, a witness's credibility may be attacked and this attack rebutted, but the prosecutor may not adduce evidence relating to the witness's good character or credibility in his or her case-in-chief.¹⁴⁴ The general character of the complainant is not considered relevant to the proceedings.¹⁴⁵

6. *Comparing Common Law Jurisdictions*

In evaluating good character and reputation in common law jurisdictions, it is obvious that a strong thread of uniformity runs through the general principles of admissibility. However, there are notable differences in the substantive details. In the

¹⁴⁰ See Criminal Procedure Act, § 197, (S. Afr.) reprinted in SCHWIKKARD, *supra* note 117 at 36 [reproduced at Tab D]; see Criminal Law Act of 1995, *supra* note 128 at § 266 [reproduced at Tab C]; Criminal Evidence Act of 1898, *supra* note 112, at § 1(3) [reproduced at Tab B].

¹⁴¹ See SCHWIKKARD, *supra* note 117, at 36 [reproduced at Tab LL].

¹⁴² See *id.* at 55-56 [reproduced at Tab LL]; see also R. v. Butterwasser (1948) 1 KB 4 (Eng.) [reproduced at Tab N].

¹⁴³ See SCHWIKKARD, *supra* note 117, at 58 [reproduced at Tab LL].

¹⁴⁴ See *id.* at 59-60 [reproduced at Tab LL].

¹⁴⁵ See *id.* at 60 [reproduced at Tab LL].

International Criminal Tribunal of Rwanda, such details should be clarified through a careful balancing of the interests served by each approach.

Among common law jurisdictions, evidence of good character or reputation for relevant traits, such as honesty, the tendency to abide by the law, and peacefulness, is universally admissible by the defendant.¹⁴⁶ Generally speaking, the defense can adduce this evidence through the defendant's testimony, through a witness called by the defense for that specific purpose, or through cross-examination of prosecution witnesses.¹⁴⁷ The permissible form of good character evidence, however, varies. In the U.S., for example, witnesses may testify to their opinion of the defendant or to his or her reputation in the community for a relevant characteristic.¹⁴⁸ In the other common law jurisdictions surveyed, however, witnesses may not testify to their opinion of the defendant, only to his or her reputation.¹⁴⁹ The most practical route for the tribunal to take on this issue would be recognizing that opinion is necessarily a part of reputation and that witnesses should be allowed to testify to both.

The defendant's own testimony as to character presents a difficult problem in this context, which national jurisdictions have dealt with in varying ways. When character evidence is by reputation only, it seems impossible for the defendant to offer such evidence, since reputation is "essentially what people say about him when he isn't there."¹⁵⁰ In the U.S., it is permissible for a defendant to testify to his or her opinion of his or her own character.¹⁵¹ Therefore, there is no conflict as to the logical form of a

¹⁴⁶ See *supra* text accompanying notes 36-45, 64-66, 100-04, 126-28, 136-39.

¹⁴⁷ See *id.*

¹⁴⁸ See *supra* text accompanying notes 36-45.

¹⁴⁹ See *supra* text accompanying notes 64-66, 100-04, 126-28, 136-37.

¹⁵⁰ COLIN TAPPER, CROSS AND WILKINS OUTLINE OF THE LAW OF EVIDENCE 243 (6th ed. 1986) [reproduced at Tab NN].

¹⁵¹ See FED. RULE EVID. 404 [reproduced at Tab E].

defendant's testimony. In Canada, however, opinion evidence of character is not admissible.¹⁵² Canadian courts have addressed this problem by allowing the defendant to testify to specific acts that show he or she has led a responsible, honest life.¹⁵³ England has not taken this route. Instead, it formally upholds the rule that the defendant must somehow find a way to testify to his or her own reputation, while sometimes allowing evidence of specific acts into evidence as "indulgences" of the court.¹⁵⁴ South Africa, in contrast, merely permits the defendant to testify to the general quality of his or her past behavior.¹⁵⁵ The tribunal should take a straight-forward approach to this issue and allow defendants to testify to their opinion of their own character, since allowing defendants to testify to specific act when other witnesses are not allowed to do so creates a substantive disadvantage for defendants who choose not to testify.

Although the general rule across jurisdictions is that only the defense may adduce character evidence in its case in chief, there are broad exceptions concerning previous convictions, acts with similar fact patterns, crimes where a particular characteristic is an element of the crime, and evidence offered by a co-accused. When these exceptions do not apply, the next issue that arises in considering evidence of good character or reputation is the degree to which it may be rebutted.

Once the defense has put character in issue, the prosecution is allowed to rebut character evidence in various ways, depending on the federal jurisdiction. In the U.S., the prosecution may use specific acts to rebut testimony of good opinion or reputation.¹⁵⁶ The prosecution may also use evidence of bad character to rebut evidence of the same

¹⁵² See *supra* text accompanying notes 71-72 .

¹⁵³ See *supra* text accompanying notes 71-72.

¹⁵⁴ See *supra* text accompanying note 103.

¹⁵⁵ See *supra* text accompanying notes 137.

characteristic offered by the defense against the victim under 404(a)(2).¹⁵⁷ In Canada, the rebuttal may only be by reputation, in order to “neutralize” the evidence offered by the defense.¹⁵⁸ In England, Scotland, and South Africa, much depends on whether the defendant testifies. When a defendant does not testify, the law only allows rebuttal as to general reputation.¹⁵⁹ When the defendant does testify and the defendant’s character has been put in issue or the defense has impugned the character of a prosecution witness, the prosecution may rebut with questions as to specific instances.¹⁶⁰ The tribunal should not differentiate between occasions when the defendant testifies and when he or she chooses not to do so. The tribunal could simplify this issue by allowing the same form of rebuttal evidence in all cases.

Federal jurisdictions also differ on the use of expert evidence to prove a relevant mental characteristic, where the characteristic is not an element of a crime or defense. In Canada, for example, the general policy is that such evidence will be admissible where there is a relevant, reliable, and limited scientific class of persons possessing this characteristic.¹⁶¹ This includes characteristics traditionally classified as deviant, such as pedophilia or homosexuality.¹⁶² In the U.S., the law varies from state to state as to whether such evidence is admissible.¹⁶³

Also relevant is a comparison of common law jurisdictions’ attitudes towards the character evidence of witnesses. In the U.S., Rule 404(a)(2) authorizes the defense to adduce evidence of the victim’s character for violence only when asserting self-defense

¹⁵⁶ See FED. R. EVID. 404 [reproduced at Tab E].

¹⁵⁷ See FED. R. EVID. 404(a)(1) [reproduced at Tab E].

¹⁵⁸ See *supra* text accompanying note 82.

¹⁵⁹ See *supra* text accompanying notes 119, 129, 141.

¹⁶⁰ See *supra* text accompanying notes 116-18, 129, 140.

¹⁶¹ See *supra* text accompanying notes 74-77.

¹⁶² See *supra* text accompanying notes 74-77.

in a homicide charge.¹⁶⁴ FRE 608 provides that evidence impeaching a witness must be limited to the impeachment of credibility, not character in general, and that evidence of truthfulness may only be offered to rebut an attack on credibility.¹⁶⁵ In Canada, a victim's character is questionable whenever there is a claim of self-defense.¹⁶⁶ However, the prosecution must generally wait for a witness's character to be attacked before attempting to show a peaceful character.¹⁶⁷ In England, Scotland, and South Africa, the law is largely similar.¹⁶⁸

C. Use of Evidence of Good Character and Reputation in France and Belgium

France and Belgium, like other countries utilizing an inquisitorial judicial system, do not formally regulate the use of character evidence (or many other types of evidence) at a criminal trial.¹⁶⁹ The basis of an inquisitorial system is the “combination of the prosecutorial and adjudicative functions” of the government into a proceeding dominated by a judge.¹⁷⁰ Although rights of the defendant that are commonly are enforced in adversarial systems, such as the right against self-incrimination, the right to due process, and the presumption of innocence, are also generally present in modern inquisitorial systems, they generally have a different and less formal role.¹⁷¹ In France, for instance, a defendant will be questioned by the president of the court, by jurors, and by his or her

¹⁶³ See *supra* text accompanying notes 55-57.

¹⁶⁴ See FED. R. EVID. 404(a)(2) [reproduced at Tab E].

¹⁶⁵ See FED. R. EVID. 608 [reproduced at Tab E].

¹⁶⁶ See *supra* text accompanying notes 88-93.

¹⁶⁷ See *id.*

¹⁶⁸ See *supra* text accompanying notes 120-23, 134-35, 144-45.

¹⁶⁹ See Gordon Von Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 417 (1992) [reproduced at Tab QQ].

¹⁷⁰ Melilli, *supra* note 30, 1617 [reproduced at Tab OO].

¹⁷¹ See Von Kessel, *supra* note 169, at 417 [reproduced at Tab QQ].

own representative.¹⁷² There is no official trial transcript.¹⁷³ The decision will be decided by secret ballots, which will be cast in answer to specific fact-related questions posed to the jury.¹⁷⁴ If the jury's answers to the questions make up a guilty verdict, jurors are invited to propose and agree upon an "appropriate" sentence in accordance with the law.¹⁷⁵

The judge in an inquisitorial trial has an "activist" role, presenting evidence, calling and questioning witnesses, and directing the course of the trial.¹⁷⁶ The judge in such a system, or panel of lay and professional judges, is not subject to a formal set of rules governing the admission of evidence.¹⁷⁷ There is an assumption that a judge will be able to discover a "broader or more reliable picture of the facts" if not subject to such rules.¹⁷⁸ During a trial, for instance, a French court president may express any opinion or ask questions in any way, as long as he or she does not express an opinion regarding the defendant's ultimate guilt.¹⁷⁹ In fact, the parties' lawyers in an inquisitorial system will make few objections to the judge's questions.¹⁸⁰ Jurors may remark on credibility or culpability issues without limit; judges may also comment on credibility and are free to call any witnesses they feel necessary, even those not listed by the parties.¹⁸¹

¹⁷² See COMPARATIVE CRIMINAL PROCEDURE 53 (John Hatchard et al. eds., 1996) [hereinafter Hatchard] [reproduced at Tab HH].

¹⁷³ See *id.* [reproduced at Tab HH].

¹⁷⁴ See *id.* [reproduced at Tab HH].

¹⁷⁵ See *id.* [reproduced at Tab HH].

¹⁷⁶ See Von Kessel, *supra* note 169, at 417 [reproduced at Tab QQ]; see also Hatchard, *supra* note 172, at 69 [reproduced at Tab HH].

¹⁷⁷ See Von Kessel, *supra* note 169, at 417 [reproduced at Tab QQ].

¹⁷⁸ *Id.* at 419 [reproduced at Tab QQ].

¹⁷⁹ See Hatchard, *supra* note 172, at 53 [reproduced at Tab HH].

¹⁸⁰ See Von Kessel, *supra* note 169, at 424 [reproduced at Tab QQ].

¹⁸¹ See Hatchard, *supra* note 172, at 53 [reproduced at Tab HH].

The French system is governed by the Criminal Procedural Code, issued in 1959 and last revised in 1993.¹⁸² Limits on admissibility in the French system are rare, since “courts are concerned more with the ‘weight’ or ‘value’ of evidence than its admissibility.”¹⁸³ This amounts to a “complete rejection of the strict rules of evidence,”¹⁸⁴ since judges and jurors may base the guilt of a defendant on any fact presented, regardless of the weight of the evidence.¹⁸⁵ In the investigation of a case, the examining magistrate may delve into any issues he or she feels are relevant, including “the facts of the alleged offence and the character and background of the defendant, including educational, family, sexual and employment history and previous offending.”¹⁸⁶ Even the witnesses are allowed by law to make “whatever declaration” they feel necessary.¹⁸⁷ In the end, the free scrutiny system of admissibility permits “even the changing breathing patterns of the defendant under interrogation to be considered as an element in proof.”¹⁸⁸

¹⁸² See *id.* at 18 [reproduced at Tab HH]; see also CRIMINAL CODE OF PROCEDURE (Fr.) [hereinafter C. CRIM. PROC.], reprinted in *COMPARATIVE CRIMINAL PROCEDURE* 30 (John Hatchard et al. eds., 1996) [reproduced at Tab A].

¹⁸³ Hatchard, *supra* note 172, at 29 [reproduced at Tab HH].

¹⁸⁴ See *id.* [reproduced at Tab HH].

¹⁸⁵ See *id.* [reproduced at Tab HH]. The “free scrutiny” method of evaluation is presented as follows:

The law does not demand of Judges and Jurors that you take account of the means by which you were convinced; the law does not prescribe rules according to which the completeness or the sufficiency of evidence can be determined, it only requires that you reflect in silence and with careful thought in order to determine, in the sincerity of your consciences, what impression has been made upon your reasoning by the evidence adduced against the defendant and the way he/she has defended him/herself. The law asks only one question which sums up your entire duty. Do you have an “inner belief.”

Article 353, C. CRIM. PROC., *supra* note 182, at art. 353 (Fr.) [reproduced at Tab a].

¹⁸⁶ See Hatchard, *supra* note 172, at 43 [reproduced at Tab HH].

¹⁸⁷ See *id.* at 46 [reproduced at Tab HH]. The editors of *Comparative Criminal Procedure* phrase this point in an interesting way, stating that witnesses “theoretically” have this right. This phrasing seems to imply that there is some unstated practical limitation to the right’s usage. See *id.* [reproduced at Tab HH]. A witness gives an uninterrupted version of events and is subsequently questioned by the judges, jurors, and attorneys. See *id.* at 76 [reproduced at Tab HH].

¹⁸⁸ See *id.* at 72 [reproduced at Tab HH].

In Americans, the free scrutiny method of admitting evidence may conjure up nightmarish visions of the hero of Albert Camus' The Stranger, who was convicted of murdering a man because he was the type of man who would smoke a cigarette at his mother's wake.¹⁸⁹ However, there are principles behind the inquisitorial system, which form a solid foundation for its methods of analyzing evidence. The general principle behind requiring evidentiary rules in adversarial systems is the need for an impartial decision maker, usually a jury of laypeople.¹⁹⁰ However, nations with inquisitorial systems often use a panel of professional judges and rarely use a jury that does not include lay judges.¹⁹¹ Under these circumstances, inquisitorial systems seek to provide a neutral fact-finder not through the use of a lay jury, but through the use of judges that have been subject to rigorous standards of selection and training, and who are not subject to the political pressures of appointment or reelection.¹⁹² Another safeguard of the French system is found in the division of the functions among different levels of the judiciary and the commonality of appeals.¹⁹³ As with almost any criminal system in place, there are valid criticisms to be made of the French dependence on the judiciary, since the process can leave questions of true impartiality on the part of judges.

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¹⁹⁰ See Von Kessel, *supra* note 169, at 463 [reproduced at Tab QQ]. (“[U.S.] rules against hearsay and character evidence provide ample opportunity for objections to relevant evidence which might be misused by the lay jury.”). *Id.* [reproduced at Tab QQ].

¹⁹¹ See *id.* at 433 [reproduced at Tab QQ].

¹⁹² See *id.* at 517-518 [reproduced at Tab QQ].

¹⁹³ See Hatchard, *supra* note 182, at 30 [reproduced at Tab HH]. Different judicial authorities handle the case at different levels; for instance, judges conducting the initial investigation (the *parquet*) are separate from those conducting the second level of inquiry required for more serious crimes (the *instruction*) and are separate from those conducting the final trial on the merits. See *id.* [reproduced at Tab HH].

Therefore, in French and Belgian criminal trials, evidence of the defendant's good character will be discovered and presented at the discretion of the judge, largely depending on its perceived relevance to the case.¹⁹⁴

E. Analysis and Recommendation

The differences between a common law system of evidentiary rules and the inquisitorial style of criminal procedure are manifest. There are substantial advantages and disadvantages to both systems, but both have a basis in logic and an entrenched history. Common law rules limiting the admission of character evidence are prophylactic in nature; they seek to prevent the fact finder from making a decision on an impermissible basis.¹⁹⁵ The principle behind this theory is that a person's disposition cannot ultimately prove that that person committed the specific crime in question.¹⁹⁶ In the common law view, giving the fact-finders, generally a group of lay people, access to information about the defendant's bad characteristics, will lead them to make a decision based on prejudices against people with those characteristics.¹⁹⁷ However, there are flaws in this system as well.

Rules limiting the admission and use of character evidence are certainly open to wholesale attack. Kenneth J. Melilli argued that the rules of evidence regarding character should be completely abolished.¹⁹⁸ He argues that the defining principles behind the rules are flawed and poorly applied by the judiciary.¹⁹⁹ First, he posits that character

¹⁹⁴ See *supra* text accompanying notes 182-188.

¹⁹⁵ See SALHANY, *supra* note 65, at 129-130 [reproduced at Tab KK].

¹⁹⁶ See *id.* at 129 [reproduced at Tab KK].

¹⁹⁷ See *id.* at 130 [reproduced at Tab KK].

¹⁹⁸ See Melilli, *supra* note 30, at 1621 [reproduced at Tab OO]. Melilli proposes the replacement of rules 404, 405, 413, 414, 415, 608, and 609 with rules that broadly allow the admission of character evidence whenever relevant, with the precaution of a judicial instruction. See *id.* at 1622-1623 [reproduced at Tab OO].

¹⁹⁹ See Melilli, *supra* note 30, at 1591-1611 [reproduced at Tab OO].

evidence and evidence of past crimes are relevant in most cases, as a matter of “common sense,” and that evidence that the judiciary admits is often no more relevant, and sometimes less so, than the excluded evidence.²⁰⁰ Melilli addresses responses to the theory that the jury overvalues such evidence with the following statement: “to state that jurors are persuaded by character evidence, without more, is merely to state that such evidence is relevant ... [E]vidence is not unfairly prejudicial simply because it tends to improve the government’s chances of obtaining a conviction.”²⁰¹ A more convincing argument, also proposed by Melilli is that there is no real proof to show that judges and lawyers are any better equipped to assess the true value of evidence than laypeople, and that such a presumption shows an inherent mistrust of juries.²⁰²

While Melilli certainly does not propose a conversion to the inquisitorial principles utilized by countries such as France and Belgium, he does raise some problems with the common law system that the inquisitorial system has addressed. There is no limit, in these systems, to the admissibility or evidentiary value of evidence concerning character.²⁰³ Salhany points out the merit of this view, stating: “[a]s a matter of common sense, people usually take into account the history and character of someone with whom they are dealing.”²⁰⁴

²⁰⁰ See *id.* at 1592-93 [reproduced at Tab OO].

²⁰¹ *Id.* at 1597 [reproduced at Tab OO]. Melilli goes on to make the argument that where there is consensus among laypeople (jurors) that evidence is relevant, then (since “a consensus of opinion is a valid proxy for accuracy”) there is no way the evidence could be overvalued. *Id.* at 1598 [reproduced at Tab OO].

²⁰² See *id.* at 1605 [reproduced at Tab OO].

The claim that the judge has superior experience or insight is usually simply gratuitous and unsupported. How does sitting in a courtroom, as opposed to working in a factory or reading novels or raising a family or anything else confer such superior experience and insight? Might one not say with equal force that courtroom “experience” or legal practice or training distorts insights into human motivation and character?

Id. at 1600 [reproduced at Tab OO].

²⁰³ See *supra* Part IV.

²⁰⁴ SALHANY, *supra* note 65, at 129 [reproduced at Tab KK].

However, the practical reality is that the common law system, with its strict rules and procedure, often affords a sense of security to defendants and a real foundation of legitimacy for a public uncomfortable with such a strong government power as prosecution. In the context of the International Criminal Tribunal of Rwanda, these considerations cannot be overestimated. The tribunal has already adopted a set of procedural rules and has amassed a small amount of case law on character evidence.²⁰⁵ The tribunal's identity as a common law entity, therefore, seems established.

Within the context of this identity, however, the tribunal could still adopt the open questioning as to character and personal history that prevails in inquisitorial jurisdictions.²⁰⁶ Since a panel of judges, instead of a lay jury, issues tribunal verdicts, the fears associated with a common law jury would not necessarily apply.²⁰⁷ However, the adoption of such a policy does not appear to be in conformity with the current tribunal holding of Kupreskic, which indicates that evidence of good reputation prior to the events that sparked the crimes is not relevant, since many persons of formerly good character acted in the genocide.²⁰⁸

The most practical route for the tribunal to follow is a careful evaluation of which elements of the admission of character evidence used in common law jurisdictions are the most easily utilized for their needs. For instance, the provisions used in England, Scotland and South Africa to govern the use of cross-examination of defendants seem

²⁰⁵ See Rules of Procedure and Evidence (1995) [reproduced at Tab F]; see also Prosecutor v. Kayishema, 1998 1770482 (UN ICT (Trial) (Rwa)), ICTR-95-1-T, Decision of 29 June 1998 [reproduced at Tab J]; Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K]; Prosecutor v. Kupreskic, 1999 WL 33483190 (UN ICT (Trial) (Yug)), Decision of 26 February 1999 [reproduced at Tab L].

²⁰⁶ See *supra* Part IV.

²⁰⁷ See *supra* text accompanying notes 190-93.

²⁰⁸ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K].

unnecessarily complex. These rules allow the defendant's decision to testify or not to completely dominate the prosecution's ability to bring up serious "specific instance" evidence in rebuttal of testimony of good character.

Another such question arises when evidence of reputation, opinion, or specific incidents may be adduced. Officially allowing defendants to testify to their own reputation, while systematically granting "indulgences" for specific instance evidence to be adduced in the defendant's case in chief,²⁰⁹ seems like a ludicrous way to manage the admission of evidence. A far more conscientious method would be to openly and uniformly allow whatever the court genuinely thinks should be permissible.

Furthermore, the American method of allowing witnesses to testify as to opinion seems far more straightforward than limiting witnesses to reputation testimony. After all, it is unlikely that a witness would testify to the good reputation of a defendant if that witness did not agree with that reputation in the first place.

The most important element of a tribunal policy on character evidence will be its clarity and uniformity. An attempt should be made to create a policy on character and reputation evidence that does not deal in loopholes and apparent contradictions. Instead, the focus of the tribunal should fall in line with Rule 89(C), which permits the admission of "any relevant evidence which [the tribunal] deems to have probative value."²¹⁰ This rule makes no limitation on the admissibility of evidence because of its prejudicial value. With the absence of a lay jury, there are fewer potential problems with prejudicial

²⁰⁹ See *supra* text accompanying note 103.

²¹⁰ See Rules of Procedure and Evidence (1995), Rule 89(C) [reproduced at Tab F].

information being admitted. Therefore, there is very little reason to overly limit the admission of character evidence in the tribunal, except where it is cumulative.²¹¹

IV. Conclusion

Among common law jurisdictions, there are several differences in the admission of character evidence. However, certain basic provisions, such as the defense's freedom to admit character evidence and the prosecution's obligation to refrain from doing so in its case-in-chief, are uniform throughout systems. The French and Belgian inquisitorial approaches to criminal evidence shed valuable light on the inequities of the common law system and provide living proof that the well-loved adversarial system is not the only way that a modern democracy can manage its judicial affairs.

While the admission of character evidence to the International Criminal Tribunal of Rwanda is only a very small part of the functions of that body, its groundbreaking mission and unique identity make it imperative that all of the tribunal's rules and policies be crafted with care and prudence. Rules governing the admission of character evidence should be taken seriously and drafted in a uniform fashion that strives to be "consonant with the spirit of the statute and the general principles of the law."²¹²

²¹¹ See Prosecutor v. Kupreskic, 1999 WL 33483188 (UN ICT (Trial) (Yug)), Decision of 17 February, 1999 [reproduced at Tab K]; see also Rules of Procedure and Evidence (1995), Rule 90(F)(ii) [reproduced at Tab F].

²¹² Rules of Procedure and Evidence (1995), Rule 89(B) [reproduced at Tab F].