

TO: Deputy Prosecutor of the International Criminal Tribunal for Rwanda
FROM: Matthew N. McConnell, Second Year Law Student, Two Credit Course, New
England School of Law
DATE: December 19, 2003
RE: Issue Number 10. Comparative Study of the Weight to be Attached to the
Evidence of Accused Who Testify in Their Own Defense in Civil, Common Law,
and International Criminal Law System

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This memo addresses the subtle but important differences between various countries' criminal court systems and the way they treat evidence presented by a defendant when he takes the stand in his own defense. The court systems analyzed and presented in this memo are from common law countries, civil (code) law countries, the International Court System, and from other jurisdictions and countries like the United States Military Courts and Courts from the Philippines.

In general, there are many similarities in the criminal laws, the customs, and the procedures, adopted by these countries in order to find the truth at trial. For example, the French institution of the jury was adopted from the British model¹ and has been altered over the years to what is now a unique French System. Another example is the similarities between the American and German systems and the defendant's right to remain silent.² Both Germany and the United States forbid the fact finder at a trial to draw adverse inferences when a defendant takes advantage of that right and refuses to speak.³ Another example is similarities between the Canadian and English Systems concerning the admissibility of statements made by the accused

¹ *Comparative Criminal Procedure* 74-75 (John Hatchard, Barbara Huber and Richard Vogler eds. BIICL 1996) – The original concept of the jury was adopted from the British model in 1791 and molded over the years to its current form where the lay jurors work with the professional judges in the assize court to determine culpability and sentence. [Tab 30]

² John H. Langbein, *Comparative Criminal Procedure: Germany* 73 (West 1977) – Both countries recognize the right to remain silent when questioned, but in Germany the defendant almost never does. [Tab 33]

³ *Id* at 73. – As noted above, as compared to American defendants, those in Germany rarely invoke that right. [Tab 33]

at pre-trial hearings.⁴ Still another example is the similarities between the International Criminal Court and the American system which do not allow for the fact finders at a trial to draw any adverse inferences from the accused's silence.⁵ The common theme that has developed, however, is that despite all the similarities between these systems, each one has developed its own take on the rights of a defendant, the job of the fact finder, and the value to be given the defendant's testimony at a trial.

Since each system was developed from common roots and evolved from the individualism of the countries or circumstances that created them, what needs to be decided is which system should be used for the new court systems or international tribunals that are being developed today. One system is presumably not "better" or "worse" than the next, just different philosophically. Since each system has developed a unique way of evaluating the value or weight of a defendant's testimony when he takes the stand, each system's way of evaluation is presented throughout the memo equally. Overall, however, the weight the common law gives to a defendant's testimony on the witness stand is greater than the weight that the civil law systems give to the same testimony. This is due to several different factors; first is the difference in the fact-finding bodies and judiciary in civil law systems, which are predominantly made-up of more dominant judges⁶ and trained juries,⁷ and the fact finding bodies and judiciary in common law

⁴ John Sopinka, Sidney N. Lederman, & Alan W. Bryant, *The Law of Evidence in Canada* 375 (Butterworths 1992) Both English and Canadian systems may allow a defendant's statement to be used at trial depending on whether or not it was voluntarily given. [Tab 39]

⁵ John R. W. D. Jones & Steven Powles, *International Criminal Practice* § 8.5.95 (Oxford University Press 2003) – This rule is similar to the rule in both the United States and in Germany. [Tab 32]

⁶ John Henry Merryman, *How Others Do It: The French and German Judiciaries* 61 S. Cal L. Rev. 1865,1875 – A German Judge for example is very active during the trial who actually directs the evidence-taking phases of a trial. [Tab 22]

⁷ *Supra*, note 1, at 74 – A French jury deliberates in cooperation with the judges to find a verdict. The jury can ask questions and participate in the trial. The jury also sits for an entire term and the jurors are briefed in detail before the trial. [Tab 30]

systems, which are made up of lay juries⁸ and a more passively involved judiciary.⁹ Next is the difference in the oath that a witness is required to take before giving testimony in the code law systems¹⁰ and the oath that a witness is required to take in the common law systems.¹¹ Then there are differences in the impeachment process and tests used for evaluating a witness' testimony based on the past criminal record of a witness.¹² Finally, there are differences between the code system of allowing the fact finders to draw a negative inference from the silence of a defendant¹³ and that of the common law system which expressly prohibits that practice.¹⁴

II. FACTUAL BACKGROUND OF ISSUE DISCUSSED

The specific issue this memo addresses is the weight to be attached to the evidence of accused who testify in their own defense in civil law, common law, and international criminal law systems. This issue is addressed in the form of a comparative analysis of the different

⁸ *Supra*, note 1, at 212 – An English jury (much like an American jury) is summoned anew before each trial. The deliberations of the jury are confidential and judges are not involved. The Jury in the English system is passive and does not participate in questioning during a trial. [Tab 30]

⁹ *Supra*, note 1, at 209 – An English judge or Magistrate instructs the jury but does not collaborate with them. The English Judge or Magistrate may only ask very limited questions of a witness but may call witnesses in some situations at their discretion. [Tab 30]

¹⁰ Gerald L. Kock, *The French Code of Criminal Procedure* 51 (Sweet & Maxwell 1964) – A witness' oath in the French Code says that he will tell the whole truth but does not require him to invoke God (therefore not an "oath.") [Tab 35]

¹¹ Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 Cal. L. Rev. 539, 679 (1990) – The American system, unlike the French system, requires witness' to swear an oath to God, therefore making them subject to perjury under law and a moral obligation to God to tell the truth. [Tab 19]

¹² *Id* at 679 – A French defendant does not have to fear impeachment when he testifies because his prior criminal record will be admitted anyway, as opposed to an American defendant who can only be impeached by his criminal past, so if he doesn't bring it up, it might not be admitted. [Tab 19]

¹³ *Id* at 679 – French law does not prohibit a the fact finders from drawing negative inferences if a defendant does not answer questions on the witness stand, in fact silence to certain questions is thought to be worse than a flat out refusal to testify. [Tab 19]

¹⁴ *Procedural Protections of the Criminal Defendant -- A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 Harv. L. Rev. 426, 427 (1964) – The American system provides that judges must give juries the instruction that they are not allowed to draw any adverse inference from the silence or refusal to testify by the defendant. [Tab 15]

systems in order to provide the prosecution in the International Criminal Tribunal for Rwanda an objective viewpoint as to which system provides the most favorable options.

III. LEGAL DISCUSSION

There are four sections to this legal discussion. The first section provides the analysis of the common law systems of criminal evidence law and outlines how they function in relation to the accused once he takes the stand, assuming of course that he does.¹⁵ The criminal justice systems analyzed in the first section are that of the United States of America, England, and Canada. The second section provides the analysis of the countries that use a code or civil law system and how those countries' criminal courts address the weight given the testimony of an accused when he takes the stand.¹⁶ The criminal justice systems analyzed in the second section are that of France and Germany. The third section provides the analysis of the international criminal court system and international statutes. Finally, the fourth section provides analysis of other jurisdictions including United States Military Courts and courts in the Philippines.

A. THE COMMON LAW COUNTRIES

This section provides the analysis of the court systems of the United States of America, England, and Canada. All three countries operate under a common law system, sometimes

¹⁵ Barbara Allen Babcock, *The American Criminal Justice System Approaching the Year 2000. Introduction: Taking the Stand*, 35 Wm. & Mary L. Rev. 1, 2 (1993) – In common law systems the criminal defendant can choose not to take the stand at all. [Tab 14]

¹⁶ *Supra*, note 1, at 72 – Unlike the common law systems, the civil law systems force the criminally accused to take the stand in their own defense. The accused can remain silent but cannot escape continuous interrogation so the accused usually ends up talking. [Tab 30]

known as the Anglo-American system,¹⁷ and have similar rules of evidence that apply during trial. The common law systems share an accusatorial process where the parties involved in the case produce and present the evidence.¹⁸ In the common law systems, the fact finder is an all-lay jury¹⁹ rather than a trained or semi-professional one. Also, common law systems more or less give an accused the same right to remain silent.²⁰ Furthermore, common law systems are regarded as meticulous in safeguarding the rights of the accused even at the expense of government authorities' ability to gather evidence.²¹ Even though all three systems are very similar they are not identical, however, and each gives a slightly different amount of weight to the testimony of an individual accused of a crime.

1. THE ACCUSED ON THE STAND IN THE UNITED STATES

Under the common law system in the United States, the jury must treat the testimony of an accused who takes the stand in his own defense no differently from that of the testimony of any other witness.²² In the United States criminal justice system, the jury is the fact finder and it is the jury that weighs the credibility of the evidence presented and the credibility of witness testimony.²³ The jury is, however, given instructions by the presiding judge as to what testimony it should consider when making decisions, what testimony it should disregard, and

¹⁷ *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763 (1961) – Use of term Anglo-American shows that the systems are very closely related. [Tab 16]

¹⁸ Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 Hastings L.J. 1, 7 (1986) – In civil law systems it is the judge who gathers and presents evidence. [Tab 17]

¹⁹ *Id.*, at 7 – In civil law systems the jury is better trained and works in concert with professional judges. [Tab 17]

²⁰ *Id.*, at 7 – The right to remain silent is different under common law systems than it is under civil law systems. [Tab 17]

²¹ *Id.*, at 7 & 8 – Common law systems are more apt to protect the rights of the accused than are civil law systems. [Tab 17]

²² Colleen R. Courtade & Robin C. Lerner, *American Jurisprudence, Second Edition, Witnesses*, 81 Am. Jur. 2d Witnesses § 156 (2003) – A defendant occupies the same status as any other witness. [Tab 42]

²³ Thomas Lundy, *Jury Instruction Corner*, 26-OCT Champion 56 (2002) – Jury is presumed to be best able to make decisions because of their “natural understanding of man” and the jury is used to afford the accused the protections guaranteed by the Sixth Amendment to the United States Constitution. [Tab 12]

what testimony it should give special attention to.²⁴ An example is the instructions given to a jury during a murder trial in the United States District Court for the Northern District of Illinois. During the trial the judge told the jury that they were the “sole judges of the credibility of and the weight which is to be given the testimony of the witnesses that have testified during the trial.”²⁵ As a further example, in the United States Fifth Circuit, judges instruct jurors that an important part of their decision making process will be to make judgments about the testimony of witnesses (including the defendant) who testified and that they should decide what part of that testimony to believe.²⁶

All the same rules applicable to all other witnesses are likewise applicable to a defendant who takes the stand.²⁷ Because in the United States the accused cannot be compelled to take the stand in his own defense²⁸ he may often times not testify because the treatment in the same manner as other witnesses may not be beneficial to his case. When the accused takes the stand and testifies, he waives the right to remain silent, at least in part, and is therefore open to vigorous cross-examination by the opposing side.²⁹ Once cross-examination of the accused on the witness stand has begun, he is, just like any other witness, open to impeachment of his character by introduction of his past criminal record and impeachment of his credibility by

²⁴ *Supra*, note 23 at 57 – There are any number of instructions that judges in the Federal System and State systems give to a jury with regard to witness testimony in general, some of which are codified. [Tab 12]

²⁵ Hon. William J. Campbell, *Charge to the Jury*, 4 F.R.D. 392 (1946) – The judge gave these instructions as part of a longer overall instruction. [Tab 44]

²⁶ Committee on Pattern Jury Instructions District Judges Association Fifth Circuit, *Pattern Jury Instructions (Criminal Cases) 2001 Ed.*, § 1.08 (West 2001) – The United States Fifth Circuit instructs juries to weigh the credibility of a defendant’s testimony the same as that of any other witness. [Tab 25]

²⁷ *Supra*, note 22 at § 156 – All the same rules apply to a defendant who testifies as they do to any other witness. [Tab 42]

²⁸ Paul C. Giannelli & Barbara Rook Snyder, *Baldwin’s Ohio Practice Evidence Manual Volume I*, § 611.10 (West 2001) – The States’ laws, including Ohio, contain rules of evidence that protect the accused in compliance with the United States Constitution and the accused cannot be forced to take the witness stand in his own defense. [Tab 41]

²⁹ *Id.* at § 611.10 – An Ohio State rule says, “A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives.” [Tab 41]

introduction of prior inconsistent statements.³⁰ Impeachment of a criminal defendant carries the risk that the defendant will seem to be a habitual offender or a bad person, hence the restrictive instructions given to the jury and the strict rules of evidence that protect the defendant.³¹ One such instruction is that given by the United States District Courts in the Eighth Circuit which directs the jury, after hearing that the accused has been convicted of a previous crime, only to use that evidence to help decide whether or not to believe the accused's testimony and how much weight to give it.³² As another example, some States direct judges to give special instructions to a jury when a defendant fails to deny certain alleged facts not directly related to a crime in order to protect the rights of the accused.³³ So, even when an accused takes the stand in his own defense, the jury is given detailed instructions to ensure protection of his rights.

In American law, as mentioned before, a defendant does not have to take the stand in his own defense and his failure to do so cannot be used against him.³⁴ In fact, instructions to the jury direct that they make no consideration whatsoever of the fact that the defendant refused to testify³⁵ or refused to answer certain questions asked of him when giving testimony in his own

³⁰ F. Lee Bailey & Henry Rothblatt, *Successful Techniques for Criminal Trials*, § 244 (Lawyers Co-operative Publishing Co. 1971) – The defense team in the United States needs to weigh the risks of having the accused testify if there is a possibility of his testimony being discredited due to impeachment. [Tab 23]

³¹ John MacArthur Maguire, *Evidence of Guilt, Restrictions Upon its Discovery or Compulsory Disclosure*, 94 (Little Brown, and Co. 1959) – Even though the defendant is subject to the same treatment as that of other witnesses, judges sometimes give more exclusionary discretion to protect a defendant testifying on his own behalf. [Tab 29]

³² Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 2003 Ed.*, § 2.16 (Thomson-West 2003) – There are also other more specific instructions given by the Eighth Circuit dependent on what the past crimes are being introduced to show. [Tab 24]

³³ California Center for Judicial Education and Research San Francisco, CA, *2000 CJER Mandatory Criminal Jury Instruction Handbook*, § 3.2 (West 2000) – The State of California uses instructions to lend some protection to a defendant who testifies on his own behalf. [Tab 27]

³⁴ *Supra*, note 28, at § 611.10 – In the State of Ohio jury instructions say that a defendant's failure to take the stand is and testify cannot be the subject of comment. [Tab 41]

³⁵ Committee on Pattern Jury Instructions of the Judicial Council of the Eleventh Circuit, *Pattern Jury Instructions (Criminal Cases) 2003 Ed.*, § 2.2 (Thomson-West 2003) – Many jurisdictions including the United States 11th Circuit give instructions to a jury to ensure that the jury does not hold against the defendant the fact that he did not testify or remained silent. [Tab 26]

defense.³⁶ On a similar note to this point is the fact that a defendant who chooses to take the stand in his own defense cannot be denied the opportunity to do so pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.³⁷ The case that firmly establishes this rule, *Rock v. Arkansas*, further states that the State Constitution of Arkansas guarantees an accused the right to be heard by himself and his counsel and also states that “every person is competent to be a witness except as otherwise provided.”³⁸ In old American common law, a defendant was thought not to be competent to take the stand in every case, especially if he had been convicted of a felony because “from such a moral nature it was useless to expect the truth.”³⁹ Under modern American common law, since a Supreme Court decision in 1918, it is now thought that the best way to get to the truth is to hear testimony from everyone involved, including the defendant, and leave it up to the jury to decide what weight to give to the testimony.⁴⁰

The right of a defendant’s testimony to be heard in totality does not guarantee that it will be heard completely without bias however. If a defendant testifies last for example, after hearing all the prior testimony from the previous witnesses, it is proper for the prosecution to tell the jury to weigh the defendant’s testimony differently from that of other witnesses.⁴¹ This is consistent

³⁶ Stanford Young, *Trial Handbook for Mississippi Lawyers Third Edition*, § 14:18 (West 2003) – In the State of Mississippi a defendant can invoke the rule against self-incrimination when on the stand and asked an incriminating question. [Tab 43]

³⁷ *Rock v. Arkansas*, 483 U.S. 44 (Supreme Court, 1987) – This case establishes the right of a defendant’s testimony to be heard when taking the stand. [Tab 1]

³⁸ *Id.*, at 50 – Arkansas State court in *Rock v. Arkansas* did not allow defendant’s testimony based on theory that the defendant was at least somewhat incompetent due to lack of recollection of incident. The Supreme Court reversed the decision of the Arkansas State Court. [Tab 1]

³⁹ Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill. L. Rev. 1, 21 (1997) – The old American common law was based on old Roman and Germanic law that justified on ground of moral turpitude that a felon could not be believed anyway so his testimony would have no weight, so he therefore would be denied the right to testify at all. [Tab 13]

⁴⁰ *Id.*, at 21 – The Supreme Court decision was in *Rosen v. U.S.*, 245 U.S. 467 (1918). [Tab 13]

⁴¹ *Portuondo v. Agard*, 529 U.S. 61 (Supreme Court 2000) – The United States Supreme Court held that it is natural for the jury to have in mind and weight the fact that the defendant testified last and heard all the prior testimony and that it is proper for the prosecution to point that out to the jury. [Tab 2]

with the fact that when a defendant chooses to take the stand in his own defense, he waives his rights (at least in part) to remain silent and is subject to the full assault of the prosecutor's questioning and to the prosecutor's closing argument the same as other witnesses.⁴² There is no distinction between a prosecutor impeaching a defendant's testimony on cross-examination or waiting until the closing argument.⁴³ A defendant's testimony is also subject to intense scrutiny by the judge and the jury. A criminal defendant in the United States has no right to commit perjury.⁴⁴ As a practical matter the only opportunity the accused has to address the court and the jury is by testifying and therefore must deny his guilt to them.⁴⁵ The serious risk is that should the jury not believe the defendant then there is a great probability that he will be convicted and if the judge should not believe him, he will get a harsher sentence.⁴⁶ The issue of perjury is present in the American system because all witnesses, including the defendant, must swear an oath before giving testimony.⁴⁷ "The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat."⁴⁸

In the American system, the jury decides who to believe and when. They are the fact-finder and can weight the testimony of the defendant accordingly to reach a decision. The court presents limits to the jury in the form of instructions meant to protect the rights of the accused. These instructions include ensuring that the jury does not draw a negative inference from a defendant's choice to remain silent on any point. When the defendant takes the stand in the

⁴² John Owens, *Portuondo v. Agard: Distinguishing Impeachment of Credibility From the Act of Burdening a Defendant's Constitutional Rights*, 78 Denv. U. L. Rev. 173, 185 (2000) – Owens further discusses the fact that when a defendant takes the stand he is subject to the same treatment as that of other witnesses. [Tab 10]

⁴³ *Id.*, at 191 – Further states that the prosecutor can remind the jury that the defendant testified last and remind them that they can therefore weight the defendant's testimony accordingly. [Tab 10]

⁴⁴ *Supra*, note 15, at 7 – Because the accused has the choice of whether to remain silent or not, if he speaks, he swears an oath to God that he will tell the truth, and if he doesn't, that is a crime in itself. [Tab 14]

⁴⁵ *Supra*, note 15, at 6. [Tab 14]

⁴⁶ *Supra*, note 15, at 7. – This high price for taking the stand unsuccessfully is because there is no right to lie on the stand. [Tab 14]

⁴⁷ *Supra*, note 11, at 679. [Tab 19]

⁴⁸ *Supra*, note 15, at 9. [Tab 14]

American system he faces several perils however. First is the fact that the jury may not believe his testimony or the defendant's testimony may be impeached due to his inconsistent statements or prior criminal convictions. Second is the judge may impose a harsher sentence on the accused if he does not believe the testimony. Finally, a defendant faces the possibility of more criminal charges if he breaches his oath and commits perjury on the stand. The key to the weight given to a defendant's testimony when testifying on his own behalf in the American system is exemplified in the following jury instructions; "When a Defendant elects to take the witness stand and testify, then you have no right to disregard his testimony merely because he is accused of a crime. When he does testify he at once becomes the same as any other witness and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness."⁴⁹

2. THE ACCUSED ON THE STAND IN ENGLAND

In the common law system of England, all sane persons (with some minor limitations) are competent to give testimony as a witness in a criminal trial.⁵⁰ This includes testimony of the accused who is always competent to take the stand, although he cannot be compelled to do so.⁵¹ The Criminal Evidence Act of 1898 states that every person charged with a crime shall be a competent witness at any stage of the proceeding and shall only be called as a witness upon his own application.⁵² England preserves the right of a criminal defendant not to testify in his own

⁴⁹ *Supra*, note 25, at 7. – This jury instruction is from the United States District Court for the Northern District of Illinois. [Tab 44]

⁵⁰ *Supra*, note 1, at Chapt. 4, § 8.1 – A witness is competent if he may lawfully be called to give evidence and a witness is compellable if he can lawfully be obliged to give evidence[Tab 30]

⁵¹ *Supra*, note 1, at Chapt. 4, § 8.1 – This is the same as in American law where a defendant cannot be forced to testify but always has the right to do so if he wishes. [Tab 30]

⁵² John A. Andrews & Michael Hirst, *Andrews & Hirst on Criminal Evidence Third Edition*, § 8-020 (Sweet & Maxwell 1997) – This law is similar to American law where the defendant's right to be heard cannot be compromised. [Tab 36]

defense or to remain silent on a certain point while on the stand, but unlike in the American system there are rules that allow the prosecution to make adverse inference from his failure to do so.⁵³ Such inferences are only acceptable however, when the court or jury considers it to be appropriate, then the adverse inference for a failure to testify is allowed.⁵⁴

All witnesses, with the exception of those under the age of 14, are required to swear an oath prior to giving testimony and since generally speaking a defendant is treated as any other witness in England, the defendant's testimony must be sworn.⁵⁵ The oath is sworn "To the Almighty God that the evidence shall be the truth."⁵⁶ Once the defendant has been sworn in, he is obligated to answer questions asked of him just as any other witness would be required to do or else face contempt punishment.⁵⁷ In this way, English law is similar to American law in that there is an oath each witness must take and therefore each witness is subject to punishment if he commits perjury.⁵⁸ Like in the United States, if the jury catches an accused in a lie while he is under oath there is a natural tendency to think that he is guilty and since the jury is the fact finder, the chances are that the accused will be convicted.⁵⁹

As in the American criminal justice system, the jury is the fact finder in the English system and it is the jury that weighs the evidence presented and makes the decisions regarding

⁵³ *Supra*, note 52, at § 8-021 – The general rule still remains that no comment shall be made about a defendant's failure to testify. [Tab 36]

⁵⁴ *Supra*, note 52, at § 8-021 – This rule also extends to police questioning and the failure to answer certain questions. [Tab 36]

⁵⁵ *Supra*, note 52, at § 6-048 – General rule in England is that any testimony given not under oath is a nullity unless the witness is merely presenting documents not in dispute. [Tab 36]

⁵⁶ *Supra*, note 52, at § 6-049 – If the witness is not a Christian or Jew, then the court has the ability to alter the oath so as to make it relevant and acceptable for the witness. [Tab 36]

⁵⁷ *Supra*, note 52, at § 8-002 – Judge should give the defendant instructions to this fact prior to his taking the stand. [Tab 36]

⁵⁸ *Supra*, note 1, at Chapt. 4, § 8.1 – This is also the same as if the judge considers the witness "hostile" meaning that he shows no desire to tell the truth. [Tab 30]

⁵⁹ *Supra*, note 52, at § 9-034 – Lying on the stand will bias the jury against the defendant even if the lie is not related to the offense charged. [Tab 36]

whether or not the testimony of witnesses is believable.⁶⁰ In England, as in the United States, the jury is considered to be very susceptible to prejudice.⁶¹ It is for this reason that English law has “The General Rule” for excluding evidence that could unfairly bias the jury against the accused.⁶² The General Rule is similar to the jury instructions given out by the American courts notifying the jury that they are not to hold certain past convictions or issues of character against the defendant. There are exceptions to the General Rule, however, that are similar to the rules in American law which allow certain evidence of prior offenses, prior inconsistent statements, and other character evidence to be admitted into evidence against the defendant when he testifies.⁶³ With these exceptions, the testimony of the accused can be impeached and the jury can weigh the evidence of his testimony accordingly.⁶⁴ In English law, the defendant is given further protection by forcing him to take the stand first, before any other defense witnesses, if he is going to take the stand at all.⁶⁵ This rule hopefully eliminates the possibility of bias where the jury knows that the defendant has heard all the evidence presented and can tailor his story to fit the prior testimony.

Under English law, the jury is the fact finder and uses its discretion when deciding what weight to give a defendant’s testimony when he takes the stand in his own defense. With guidance from the court on issues such as impeachment of the defendant’s testimony, the jury must decide whether or not they believe the defendant. As in American law, the defendant faces many perils when he decides to take the stand in his own defense. In fact, under English law, the

⁶⁰ *Supra*, note 1, at Chapt. 4, § 7.3 – Juries play no part in the sentencing as they do in the United States. [Tab 30]

⁶¹ *Supra*, note 52, at § 15-002 – The main reason to attempt the exclusion of certain evidence is because of the susceptibility of jurors to prejudice. [Tab 36]

⁶² *Supra*, note 52, at § 15-002 – General rule to avoid prejudice is similar to jury instruction given in the United States instructing jurors to not consider past convictions when deciding on the guilt of the defendant. [Tab 36]

⁶³ *Supra*, note 52, at § 15-008 – These exceptions are the rules that allow impeachment of the defendant’s testimony for various reasons. [Tab 36]

⁶⁴ *Supra*, note 52, at § 15-008. [Tab 36]

⁶⁵ *Supra*, note 52, at § 15-002. [Tab 36]

rule goes further than it does in the United States because failure to testify can in some instances result in a negative inference to the jury. If the defendant decides to testify anyway, he must take an oath before giving testimony where he then becomes subject to the crime of perjury if he tells an untruth. Once he takes that oath and takes the stand, he is treated just as any other witness would be treated. A defendant can have his testimony impeached based on several factors including prior inconsistencies in his statements, prior convictions for crimes, and for flaws in his character. Overall, the weight to be given the testimony of an accused testifying in his own defense under English law is very similar to that of the United States.

3. THE ACCUSED ON THE STAND IN CANADA

The Canadian common law system is very similar to the common law systems of England and the United States with some exceptions. The accused is a competent witness in Canada and is entitled, should he desire, to testify on his own behalf.⁶⁶ The accused in the Canadian system cannot be compelled to take the stand.⁶⁷ The accused also has the right to remain silent in that he does not have to take the stand, but there are a few differences in the Canadian system from this right in the United States or in England.

These differences stem mostly from trials before a jury, the primary fact finder like in England and the United States, versus trials before a judge alone, who can also be a primary fact finder.⁶⁸ Under the Canadian Evidence Act, a judge is not required to tell a jury that they cannot draw their own conclusions regarding a criminal defendant's failure to testify.⁶⁹ Also, in a trial

⁶⁶ *Supra*, note 4, at 600. – Canada Evidence Act of 1893 made the accused a competent witness. [Tab 39]

⁶⁷ *Supra*, note 4, at 600. [Tab 39]

⁶⁸ *Crankshaw's Criminal Code of Canada*, (Gary P. Rodrigues ed., Carswell 19993) S.4§4 – This section of the criminal code discusses in detail with case examples the differences between what a judge alone can weigh vs. what the jury is allowed to weigh. The judge must give instructions to the jury, just like in the United States, that they cannot consider the defendant's failure to testify. [Tab 40]

⁶⁹ *Id.*, at S.4§4. [Tab 40]

before a judge alone, the prohibition against making comments on a defendant's failure to testify or to answer questions is not applicable.⁷⁰ The judge alone in certain situations is forced to reconcile and mentally block out, the prior testimony of a defendant that he may have heard prior to the trial, no matter how incriminating the testimony may have been.⁷¹ The general rule in Canada is more or less the same as that in the United States and England, however, where the judge should normally give the jury instruction to disregard the fact that a defendant refused to testify or answer certain questions.⁷²

As in the United States and England, in Canada there is a rule against forcing a defendant to incriminate himself on the stand but it is limited to the fact that the defendant does not have to enter the witness box at all.⁷³ If the defendant decides to testify then he is subject to answering all questions asked of him and is not generally excused from answering questions that will incriminate him.⁷⁴ In Canada, similar to that in the United States, there is no particular order in which the defense must call witnesses.⁷⁵ The weight to be given the testimony of the accused who testifies after other defense witnesses have already gone cannot be diminished.⁷⁶ The defendant in the Canadian system also takes an oath to God and is subject to perjury if he lies on the witness stand.⁷⁷ A defendant who chooses not to testify on his own behalf cannot make an unsworn statement.⁷⁸ However, at the close of trial in Canada, a defendant is allowed to address

⁷⁰ *Supra*, note 68, at S.4§4 [Tab 40]

⁷¹ Alan W. Mewett & Shaun Nakatsura, *An Introduction to the Criminal Process in Canada, Fourth Edition*, 174 (Carswell 2000) – A judge who is the fact finder and has heard all the pre-trial evidence must use his judgment to block out all the prior testimony he may have heard to give the defendant a fair trial. [Tab 37]

⁷² *Supra*, note 68, at S.4§4 [Tab 40]

⁷³ *Supra*, note 68, at S.5§3 – If the defendant wishes to completely preserve his right not to incriminate himself then he doesn't have to take the stand. [Tab 40]

⁷⁴ *Supra*, note 68, at S.5 [Tab 40]

⁷⁵ R. E. Salhany, *Canadian Criminal Procedure, Fourth Edition*, 320 (Canada Law Book Inc. 1984) – Canada does reference the English rule to this point however and may apply it. [Tab 38]

⁷⁶ *Id.*, at 320 – If a judge decides ahead of time that he will not consider evidence of this nature too strongly, then a miscarriage of justice can be declared. [Tab 38]

⁷⁷ *Supra*, note 68 at S.5§3 [Tab 40]

⁷⁸ *Supra*, note 75, at 321 [Tab 38]

the fact finding body (either the jury or judge alone) regardless of whether or not he testified on his own behalf.⁷⁹ Finally, regarding self incrimination in the Canadian common law system, a defendant's rights are somewhat protected if he testifies with a prior criminal record.⁸⁰ A defendant's credibility can be impeached but the judge must give instructions to the jury that most prior incidents of criminal activity cannot be considered as evidence of guilt, but only for the purposes of assessing the defendant's overall credibility.⁸¹

4. SUMMARY OF COMMON LAW COUNTRIES

Generally speaking, the common law systems of the United States, England, and Canada are very similar. The basis fact finding body is the lay jury which can use its discretion, after taking in judicial instructions, to decide what testimony to believe and how to weigh the evidence presented. Each system has in place laws that prevent (or at least make an attempt to prevent through an oath to God) lying on the witness stand through perjury laws. Each system also allows for the maximum protection of the defendant's right to remain silent. The defendant cannot be compelled to testify in any of the common law systems and when the defendant does choose to testify he still maintains some protections. Juries are not permitted as a general rule to take into account, or to draw any negative inferences from, the defendant's failure to testify in his own defense. If the defendant does testify under the common law systems he is generally treated as any other witness is treated and is subject to vigorous cross-examination and possible impeachment of his testimony. The credibility of a defendant's testimony is also protected under the common law by instructions to the jury that they cannot hold past criminal records or

⁷⁹ *Supra*, note 75, at 321. [Tab 38]

⁸⁰ *Supra*, note 75, at 323. [Tab 38]

⁸¹ *Supra*, note 75, at 323 – This rule is the same as in England and the United States that impeachment is allowed and jury can consider it, but only to the credibility of the testimony, not as a measure of guilt. [Tab 38]

incidents against the accused except where such incidents can be seen to directly affect the defendant's credibility.

B. THE CIVIL LAW COUNTRIES

This section provides the analysis of the court systems of France and Germany. Both countries operate under a civil code system and have similar rules of evidence that apply during trial.⁸² In the civil code systems, the fact finding body is a mix of professional judges and semi-trained lay jurors as opposed to the common law systems where the fact finder is a true lay jury.⁸³ Civil code systems have similar rights to remain silent and similar rights regarding self incrimination when a defendant testifies.⁸⁴ Although the civil code systems are very similar overall, there are some differences.

1. THE ACCUSED ON THE STAND IN FRANCE

The French criminal procedure is an inquisitorial one unlike the accusatorial system used in the common law.⁸⁵ The first thing a French defendant faces in that inquisitorial system is when giving testimony on his own behalf at his trial, he knows that he is not facing a true lay jury.⁸⁶ The jury works in concert with the judiciary, very unlike the Anglo-American system,

⁸² *Supra*, note 11, at 637 – Frase compares several aspects that are similar between the French and German systems including rates of conviction. [Tab 19]

⁸³ *Supra*, note 1, at Chapt. 2, § 7.3 – French juries appoint lay jurors for a long term where they work in collaboration with professional judges to reach verdicts and sentences. [Tab 30]

⁸⁴ *Supra*, note 1, at Chapt. 2, § 7.1 – Although the French system forces a defendant to testify it allows defendant to lie when on the stand. Defendant can also remain silent on certain issues. [Tab 30]

⁸⁵ Joseph J. Darby, *Lessons of Comparative Criminal Procedure: France and the United States*, 19 S. D. L. Rev. 277, 278 (1982) – Darby argues for a movement more toward the French inquisitorial system rather than the accusatorial system in the United States.

⁸⁶ *Supra*, note 1, at Chapt. 2, § 7.3 – French courts appoint a jury for a long term where they gain valuable experience while working side by side with professional judges. [Tab 30]

and therefore the judges are far more involved in the decision making.⁸⁷ The French defendant then faces the fact that there will definitely be a trial to determine his guilt⁸⁸ and that he will be called as a witness.⁸⁹ The accused is always the first witness called at a criminal trial and must take the stand, although he can choose to remain quiet when asked questions.⁹⁰ Even though the accused has the right to remain silent, similar to the common law right, the accused on the stand in France rarely maintains his silence due to the constant questioning that he cannot escape.⁹¹ The perils for maintaining silence during questioning are high for the accused in France as well because, unlike in the common law systems, the prosecution can make any adverse inference it wants to the jury and judges regarding his silence.⁹²

In the French system, all witnesses who take the witness stand and deliver testimony must take an oath to tell the whole truth or face perjury charges for failing to do so.⁹³ The only exception to this practice is the defendant himself, unlike in the Anglo-American system, does not have to take the oath.⁹⁴ The fact that the defendant does not take an oath presents two major differences between the French system and the Anglo-American system. First, there is no risk of the defendant committing perjury while on the stand (which the French view as a form of double jeopardy).⁹⁵ Second, because there is no oath and no risk of perjury, the defendant has in effect,

⁸⁷ *Supra*, note 1, at Chapt. 2, § 7.3 – French jurors can outvote the judges but there is still a very strong influence. [Tab 30]

⁸⁸ *Supra*, note 1, at Chapt. 2, § 7.1 – There must always be a trial in French criminal practice. [Tab 30]

⁸⁹ *Supra*, note 11, at 679. [Tab 19]

⁹⁰ *Supra*, note 11, at 679. [Tab 19]

⁹¹ *Supra*, note 1, at Chapt. 2, § 7.1 – The French see the guarantee of a trial as better than the common law “right to silence.” [Tab 30]

⁹² *Supra*, note 1, at Chapt. 2, § 7.1 – When a defendant maintains silence, even a change in breathing patterns can be considered proof of guilt. [Tab 30]

⁹³ *The French Code of Criminal Procedure* (Gerald L. Koch trans., Sweet & Maxwell Limited 1964) at Section IV, Article 104 and Article 109. – All witnesses must appear before the court without exception or be subject to fines or perjury. [Tab 35]

⁹⁴ *Supra*, note 11, at 679. [Tab 19]

⁹⁵ *Supra*, note 1, at Chapt. 2, § 7.1 – Only laws regarding perjury are against other witnesses. [Tab 30]

a free pass to lie on the stand.⁹⁶ The French view untruthfulness as a natural aspect of self-preservation and the defendant is not penalized for telling lies.⁹⁷ Because of the defendant's ability to lie on the stand and the fact that a defendant cannot perjure himself, the defendant's testimony may be given less weight than that of a defendant's testimony in the Anglo-American system.⁹⁸ As a final major difference between the law in France and the common law, a defendant on the stand in France does not have to worry about rules of impeachment when giving his testimony.⁹⁹ All prior statements and prior criminal records of the defendant are admissible.¹⁰⁰

French law differs from the common law systems in several different ways that would affect the weight the fact finder would give to a defendant's testimony. The fact finder is more highly trained and makes decisions with judges who are more savvy than a common law lay jury. Rules of impeachment are far different in France since all of the defendant's past records are admissible. Even though the French law allows the right to remain silent, that is not very practical for the defendant since his failure to speak on the stand (which he is forced to take) can be used against him. Finally, the lack of an oath prior to giving testimony, which grants the right to lie on the stand, is far different from the common law system and will have an impact on the weight the fact finder will give to the defendant's testimony.

⁹⁶ *Supra*, note 1, at Chapt. 2, § 7.1 – The defendant can lie about anything they wish on the stand and face no repercussions for doing so. [Tab 30]

⁹⁷ *Supra*, note 1, at Chapt. 2, § 7.1 [Tab 30]

⁹⁸ *Supra*, note 1, at Chapt. 2, § 7.1 – This may not be the case if the defendant makes a confession of guilt on the stand because the confession is seen in French law as the “Queen of proofs.” [Tab 30]

⁹⁹ *Supra*, note 11, at 679. [Tab 19]

¹⁰⁰ *Supra*, note 11, at 679. [Tab 19]

2. THE ACCUSED ON THE STAND IN GERMANY

As is the rule in France, German criminal procedure is inquisitorial and has strongly resisted adversarial domination.¹⁰¹ Also as in France, the defendant does not face a lay jury as the fact finder when he takes the stand in his own defense.¹⁰² In a trial for serious charges in Germany, a fact finding body is made up of three professional judges and two lay judges, all of whom decide the weight to be given testimony.¹⁰³ These “mixed” courts allow for collaboration between professionals and lay persons when making decisions and speed the process up by doing away with the multitude of jury instructions that are prevalent in the United States.¹⁰⁴

In Germany, all witnesses are required to take an oath prior to testifying just like in France and the common law systems.¹⁰⁵ However, unlike in the common law systems, when the defendant testifies on his own behalf he is exempt from taking the oath.¹⁰⁶ This does not give the defendant the absolute right to lie on the stand like in French law.¹⁰⁷ A defendant may receive a harsher sentence if he denies his guilt than if he confesses.¹⁰⁸ However there is also no liability for perjury if a defendant does not tell the truth on the stand.¹⁰⁹ On that note, a German defendant is compellable to take the stand and testify like in the French system and is given the

¹⁰¹ John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 Mich. L. Rev. 204, 206 (1979) – The German trial system has been kept uncomplicated and rapid. [Tab 20]

¹⁰² *Id.*, at 206. – German courts are divided between those used for serious charges and those that are used to try lesser charges. [Tab 20]

¹⁰³ *Id.*, at 206. Laymen can veto professional judges. [Tab 20]

¹⁰⁴ Richard S. Frase and Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B. C. Int’l & Comp. L. Rev. 317, 355 (1995) – This process also allows for shortened jury selections and no need for elaborate evidence-admissibility rules. [Tab 21]

¹⁰⁵ Dr. Eberhard Schmidt, *The German Code of Criminal Procedure* (Dr. Horst Niebler & Dr. Manfred A. Pfeiffer trans., Sweet & Maxwell Limited 1965) at § 59 – In Germany the oath is to “God the Almighty” just like in England and in the United States. [Tab 34]

¹⁰⁶ *Id.*, at § 60. [Tab 34]

¹⁰⁷ *Supra*, note 1, Chapt. 3 § 7.1 [Tab 30]

¹⁰⁸ *Supra*, note 1, Chapt. 3 § 7.1 [Tab 30]

¹⁰⁹ *Supra*, note 104, at 343 [Tab 21]

right against self-incrimination much like in the French system.¹¹⁰ The one major difference between the French and German civil code systems, however, is that should a German defendant decide to remain silent when asked a particular question, his silence cannot be used against him in any way and no negative inference can be drawn by the fact finders.¹¹¹ It is a rarity in the German system however for a defendant to remain silent as he is more of a participant in the trial than under the common law.¹¹² Finally, in the German system, like in the French system, a defendant does not have to worry that a prior record or prior statement will cause his testimony to be impeached or that the fact finders will be bias, because all the defendant's prior criminal records are usually admissible.¹¹³

In the German system the fact finding body is a "mixed" system of professional judges and lay judges. They are the decision making authority and weigh all the evidence given by witnesses and presented to the court. The judges are not to negatively take into consideration the fact that the accused chose to remain silent when asked a question. The defendant in Germany also must take the stand in his own defense but does not get sworn in like other witnesses. Consequently there is no threat that a defendant who testifies will perjure himself. There is also not a present threat of impeachment on the defendant's testimony because all his past records and statements are admissible against him. The German system feels that the system of judges are capable of weighing all these factors accordingly when hearing the defendant's testimony so as not to allow bias to influence their decision.

¹¹⁰ *Supra*, note 2, at 72 – A German defendant must always take the stand but can remain silent when questions are asked of him liked in the French system. [Tab 33]

¹¹¹ *Supra*, note 2, at 72 – That rule is a major restriction on the German court's freedom to evaluate the evidence as it sees fit. [Tab 33]

¹¹² *Supra*, note 1, Chapt. 3 § 7.1 [Tab 30]

¹¹³ *Supra*, note 2, at 77 – There are exceptions to that rule where a German court will exclude some prior records [Tab 33]

3. SUMMARY OF CIVIL LAW COUNTRIES

As opposed to the common law system the civil law system is less adversarial and more participatory from the find finder's point of view as well as the defendant's. The defendant is forced to participate in the process and cannot simply sit idle and the fact finders work together to come to a decision and weigh the evidence as appropriate. In the civil code system, although a defendant does have to take the stand, he does not have to answer every question asked of him. On this point the laws of Germany and France differ. In the French system, the evidence is weighed against the defendant when he chooses not to testify whereas in the German system, the fact finder can draw no inference regarding the defendant's failure to answer questions. The defendant in the civil code system does not take an oath on the stand. It is said that due to that rule, the defendant has the right to lie on the stand. With no oath to bind him, the defendant cannot commit perjury. The find finders must weigh testimony from a defendant accordingly. Finally in the code system, a defendant's criminal past and statements he may have made, are fully admissible during the trial which means that although he need not fear impeachment, the find finders know all about the previous incidents.

C. THE INTERNATIONAL CRIMINAL LAW

Much of the current international law is a mixture between the common law systems of the United States and Great Britain and the civil code systems of the European Union.¹¹⁴ The laws are drafted mainly by committee from within the United Nations.¹¹⁵ The International criminal law leans heavily in its statutes toward protecting the defendant and ensuring that he is

¹¹⁴ Bernard Boland, *In Search of a Trial: Exporting the Adversary System*, 60-NOV Bench & B. Minn. 29 (2003) – This article refers to the building of the new government of Bosnia and Herzegovina and how it was a collaboration effort between the U.S. and the E.U. [Tab 11]

¹¹⁵ Statute of the International Court of Justice (2003) – Drafted by the United Nations [Tab 47]

innocent until proven guilty.¹¹⁶ The international criminal law therefore maintains the rights of an accused to maintain his silence.¹¹⁷ The defendant in an international criminal trial cannot be compelled to take the stand in his own defense.¹¹⁸ If the defendant chooses not to take the stand in his own defense, or if he chooses to take the stand and fails to answer a question, then no adverse inference against him can be made by the trial chamber presiding over the trial.¹¹⁹ This rule is more similar to the Anglo-American rule than to the civil code rule.

The fact finding body of the international criminal law is more similar to the civil code system than the common law system in that it is made up of a panel of trained judges.¹²⁰ These trained judges weigh the evidence presented by the defendant if he decides to take the stand in his own defense. The court also requires that any witness that testifies is required to take an oath that his testimony is truthful.¹²¹ This includes the defendant unless the measure will be prejudicial against the defendant.¹²² Similar to the common law system, there are rules regarding perjury and the defendant is not “free to lie” as he is in the code law systems.¹²³

The international criminal law is an amalgam of the common law systems and the civil code systems. The defendant cannot be forced to testify, he has the right to remain silent, he must take an oath prior to giving testimony, no adverse inferences can be inferred from his failure to answer a question or testify, and he can be punished further for committing perjury, all

¹¹⁶ Salvatore Zappala, *Human Rights in International Criminal Proceedings*, (Oxford University Press 2003) at 83 – Zappala discusses at great length the need to preserve the notion that the accused is innocent until proven guilty. [Tab 31]

¹¹⁷ *Id.*, at 85 – Zappala outlines the basic rights of a defendant in international law necessary to ensure that he is assumed innocent until proven guilty including the guilty plea procedure and the right of the accused to maintain silence. [Tab 31]

¹¹⁸ Rome Statute of the International Criminal Court (1998) at Article 67 [Tab 46]

¹¹⁹ *Supra*, Note 5, at § 8.5.94 – This section states “that equally the privilege against self incrimination bars the drawing of adverse inferences from an accused’s silence on any matter.” [Tab 32]

¹²⁰ *Supra*, Note 117, at Article 35 – This section through Article 52 cover the rules of the fact finding body of the international criminal court. [Tab 46]

¹²¹ *Supra*, Note 117, at Article 69 [Tab 46]

¹²² *Supra*, Note 117, at Article 69 [Tab 46]

¹²³ *Supra*, Note 117, at Article 70 [Tab 46]

which are similar procedurally to the common law systems. The fact finding body however, that weighs the testimony given by the accused, is made up of professional judges which is more similar to the civil code system.

D. OTHER JURISDICTIONS

The other two jurisdictions that will be quickly summarized in regards to weight given to the testimony of a defendant are the United States Military Courts and the Philippines. Both are based on the United States' version of the common law and will be briefly presented.

1. THE ACCUSED ON THE STAND IN THE UNITED STATES MILITARY COURT

The substance of what goes in the United States military courtroom is the same as in any other courtroom in the country.¹²⁴ There are separate military rules of evidence, however.¹²⁵ The fact finder in a military court is a lay jury in that they are not trained in the law but they are all members of the military and have knowledge of the workings of the military.¹²⁶ The military court gives limiting instructions to the jury like all the other courts in the United States but the instructions are a little different and may reflect the way the jury weighs the testimony of the accused.¹²⁷ The jury is told "In weighing the evidence a member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world."¹²⁸ They are further told (in different parts), "You should not disregard the testimony of any witness without

¹²⁴ Robert L. McBride, *The Art of Instructing the Jury* (W.H. Anderson Co. 1969) at § 13.05 – Since the basics of the military justice system is very similar to the United States Federal system, most of the laws overlap. There are, however a few differences that could effect the weight the fact finder could give to a defendants testimony. [Tab 28]

¹²⁵ *United States v. Duvall*, 47 M.J. 189, 192 (1997) – The separate military rules of evidence were developed in 1980. [Tab 7]

¹²⁶ *Supra*, note 124, at § 13.06 – A military jury is made up of members of the military and all have a rank structure to abide by. The court tells the members of the jury to disregard the rank structure while deciding on matters before the court. [Tab 28]

¹²⁷ *Supra*, note 124, at § 13.06 [Tab 28]

¹²⁸ *Supra*, note 124, at § 13.06 [Tab 28]

due consideration,” and “In judging the credibility of the witness in this proceeding, you should carefully weigh the testimony given, and in so doing consider all the circumstances under which any witness has testified: his demeanor and manner while on the stand; the acuteness of his powers of observation...”¹²⁹ In a case against a member of the United States Air Force, a judge was found not to have erred by issuing instructions to the jury that more or less allowed them to consider past record and character of the accused in weighing the evidence.¹³⁰

The slightly different rules of evidence in the military courts which allow more leeway for the jury to make decisions, combined with an arguable more astute jury, effect the weight a defendant’s testimony is given when compared with the normal American court system.

2. THE ACCUSED ON THE STAND IN THE PHILIPPINES

Although the court in the Philippines is based on the common law system and generally has rules regarding witness testimony and provides for protections of the accused, the court in the Philippines does not always give equal weight to a defendant’s testimony and does not adhere to the strict rules of jury instruction and limiting guidance given by the Anglo-American system.¹³¹ In a case against a defendant for rape, an appellate court said in its opinion that it agreed with the trial court when it said “that no evidentiary weight could be given to the self-serving declarations of the appellant. His testimony deserves scant consideration.”¹³² The court continues in saying, “Such weak and self-serving negative defense cannot claim more weight or worth than the testimonies of prosecution witnesses who present clear and positive evidence.”¹³³

¹²⁹ *Supra*, note 124, at § 13.06 [Tab 28] – The instructions are detailed but basically tell the jury to use their common sense. The instructions are not as limiting as in normal American courtrooms.

¹³⁰ *United States v. Bigelow*, 57 M.J. 64 (2002) – Judge gave instructions that would not have been allowed in a normal American courtroom. [Tab 6]

¹³¹ *People of the Philippines v. Pamilar y Revolito*, G. R. No. 130846 (Oct. 23 2001) [Tab 4]

¹³² *Id.*, at 4. – In this case it was evident to the court that the defendant was lying. [Tab 4]

¹³³ *Id.*, at 4. [Tab 4]

Generally in the Philippines, like in the other common law systems, a defendant who takes the stand in his own defense is treated like any other witness.¹³⁴ The Philippines' court system sees a defendant's testimony as strictly self-serving and must be given less weight.¹³⁵

IV. CONCLUSION

In general the civil code system gives more weight to the testimony of the accused than does the common law system. The code system forces the witness to take the stand and forces the fact finding body to deal with the defendant's testimony. The fact finding body in the civil code system is also more highly trained and therefore can better weed out what is fact from fiction, especially after the interaction that is allowed between the fact finders and the accused. Even though the accused can lie on the stand in the code system, the fact finder knows that he may do so and even expects it. Whereas the lay jury in the common law system is instructed more to protect the rights of the accused and the system goes to great lengths as to what information the jury should disregard to give more or less weight to. The common law system also treats the testimony of the defendant no differently from that of any other witness thereby making his testimony no more important. In fact, it may be that he is not heard by the fact finder at all under the common law. The civil code system of France and Germany give more importance to the testimony of the accused than does the Anglo-American system and even puts the accused in a special category worthy of special treatment. The protections for the accused may be more prevalent under the common law, but what the accused says on the stand matters more under a civil code system.

¹³⁴ *People of the Philippines v. Roberto S. De Vera*, G.R. No 112006 (July, 7 1997) [Tab 3]

¹³⁵ *Id.*, at 1 [Tab 3]