International criminal procedure: “adversarial”, “inquisitorial” or mixed? *

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Abstract. The article analyses whether international criminal procedure is “adversarial”, “inquisitorial” or mixed. It examines the law of the ICTY and the ICC, including the relevant case law. This law has developed from an adversarial to a truly mixed procedure by way of various amendments of the ICTY’s Rules of Procedure and Evidence (RPE) and the drafting of the Rome Statute merging civil and common law elements in one international procedure. It is no longer important whether a rule is either “adversarial” or “inquisitorial” but whether it assists the Tribunals in accomplishing their tasks and whether it complies with fundamental fair trial standards. As to an efficient trial management an UN Expert Group called for a more active role of the judges, in particular with regard to the direction of the trial and the collection of evidence. In this context, it is submitted that a civil law like judge-led procedure may better avoid delays produced by the free interplay of the parties. Ultimately, however, the smooth functioning of a judicial system depends on its actors, procedural rules provide only a general framework in this regard. A truly mixed procedure requires Prosecutors, Defence Counsel and Judges who have knowledge of both common and civil law and are able to look beyond their own legal systems.

Preliminary remarks

While the ICTY’s – as well as the ICTR’s – Statute consists only of a few rather general provisions of procedural law and its “procedural code” is laid down in the judge made “Rules of Procedure and Evidence” (hereinafter: “Rules”),1 the ICC’s “Code” is contained in the international treaty adopted

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at Rome in 1998 (hereinafter: “Rome or ICC Statute”).

greatly influenced by the law and practice of the Ad Hoc Tribunals. The ICC-Rules, finally agreed on in the Preparatory Commission in November 2000 and formally adopted by the first Assembly of State Parties in September 2002 (Art. 112 ICC Statute) serve both as a clarification and as a complement to the procedural framework laid down in the ICC Statute (Art. 51 ICC Statute). Later there will be a third instrument, namely Regulations to be adopted by the Court itself (Art. 52 ICC Statute). Needless to say, it was difficult to disentangle these three sets of norms in the negotiations leading to the Rome Statute. Thus, the main difference between the ICTY and ICC lies in the fact that only the former has, so far, applied its Rules in practice and can, therefore, provide us with more concrete and precise guidance as to which, if any, model is to be preferred at the international level.

Before turning to an analysis of the ICTY and ICC rules in response to the question set out above a terminological point must be made. The term “inquisitorial” as commonly applied by common lawyers to describe the continental “civil” law systems is quite unfortunate since it reminds us of the darkest times of the middle ages when the prosecution and adjudication of a case was concentrated in one institution – the actively investigating judge (inquisitio = enquiry, inquest) –, the procedure exclusively written and secret and torture a legitimate means to obtain confessions. From the legal historian’s perspective, the term “inquisitorial procedure” is usually reserved for the type of disciplinary as well as criminal procedure instituted by Pope Innocent III in the 13th century which then evolved both in Canon law and secular

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6 This point also came up during the discussion in the above mentioned colloquium, see Eser/Rabenstein (eds.), Strafjustiz im Spannungsfeld von Fairness und Efizienz. Konvergenz und divergente Entwicklungen im Strafprozessrecht, Internationales Kolloquium auf Schloss Ringberg vom 8–11 Mai 2002 (forthcoming 2003).

laws and persisted well into the 19th century.\(^8\) The derogatory connotation of “inquisitorial” stems less from later abuses and extremes of the regular inquisitorial procedure, but rather from its terminological likeness to the summary and irregular type of procedure used for the persecution of heretics (\textit{inquisitio haereticae pravitatis}) on the Continent, especially in the heyday of the “Office of the Holy Inquisition”, while common lawyers tend to think of the infamous political proceedings of the Star Chamber.\(^9\) In fact, however, the inquisitorial procedure in the sense of the “\textit{inquisitio}”, was already abandoned with the French Revolution (1789) and the German Reformed Criminal Process (\textit{Reformiertes Strafverfahren}) established after the German “revolution” of 1848.\(^10\) As a consequence, current “inquisitorial” proceedings are characterized by separate responsibilities for the investigation or pre-trial phase, conducted by the Prosecution and/or the \textit{juge d’instruction} (examining judge), and the actual trial, conducted by a trial judge or court. In this sense, one can even say that both the adversarial and the “inquisitorial” system are inquisitorial in that the process is initiated and directed in the pre-trial phase by the state, i.e., the police and prosecution.\(^11\) Equally, both systems are “accusatorial” in that the prosecution and “accusation” lies in the hands of an institution different from the pre-trial judge (the Prosecution or the \textit{juge d’instruction}).\(^12\) The original meaning of the \textit{processus per accusationem} as a process initiated by a private citizen\(^13\) is no longer valid. Thus, it is misleading to call \textit{only} the adversarial system “accusatorial”\(^14\) since this implies that the modern civil law process does not operate in an accusatorial way by means of a Prosecution authority. In sum, the inquisitorial-accusatorial divide has only,

\(^8\) Although its true origin remains unclear, cf. \textit{L. Schulz}, Normiertes Misstrauen, 2001, 49 et seq. For a historic account see also \textit{Damaška}, Two Faces of Justice and State Authority, 1986, 3.


\(^10\) Cf. \textit{Safferling}, supra note 7, at 8–9; \textit{M. Böse}, supra note 9, at 113 et seq.


\(^12\) Indeed, with the German Reformed Criminal Process the accusatorial procedure (\textit{Anklageprozess}) was introduced (Art. X § 179 of the Frankfurt Constitution of the Reich of 1848), see \textit{Böse}, supra note 9, at 113 et seq. (115); for a correct differentiation see also \textit{Kreß}, Witnesses in Proceedings before the ICC etc., in: \textit{Fischer/Kreß/Lüder} (eds.), International and national prosecution of crimes under International Law, 2001, 309–383, at 309 fn 1.

\(^13\) \textit{Damaška}, supra note 8, at 3.

if at all, a meaning in historic, pre-revolutionary terms. Nowadays, modern criminal procedure is governed by the principles of orality and immediacy. In other words, the only element which could explain the term “inquisitorial” for this kind of procedure is its truth-seeking nature: While in the adversarial system this search for the (procedural) truth lies, if at all, in the hand of the parties and therefore their conflict is at the center of the proceedings (‘two cases approach’), in an “inquisitorial” system it is the responsibility of the State agencies in charge of criminal prosecution (‘one case approach’). In this sense, the civil law model can be more accurately described as “judge led” (instruktorisch) or – following Damaška’s more structural approach – “hierarchical”, while the common law model is adversarial – prosecution and defences being “adversaries” - or “coordinated”. Another misnomer is “Anglo-American” procedure if it is meant to imply that there is such a thing as a common criminal procedure of Great Britain and the U.S.A. while, in fact, the “British” (English, Scottish and Irish) procedures differ among themselves and equally with regard to the U.S. procedures which are, in turn, different in the various States. In any case, still worse than the misleading use of terminology is to attribute an incorrect or inadequate meaning. Unfortunately, this occurs too often with common lawyers who sometimes write about civil law exclusively relying on common law sources and taking the French model of an examining judge as the only civil law model although one should at least distinguish between this and the prosecutorial model (of German origin). If one takes a closer look at the diversity of the criminal justice systems within the Europe of the European Union and – even more so – of the Council of Europe, harmonisation or convergence can by no

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16 See for a good explanation of the main features Orie, supra note 14, at 1443 et seq.

17 Damaška, supra note 8, at 16 et seq.

18 A recent example is May/Wierda, supra note 5, at 727 using not only the classical dichotomy “adversarial” and “inquisitorial” but also, for example, wrongly asserting that in the civil law system the scope of the evidence is not restricted invoking as a reference an article from the Am. J. Crim. L.; but see, for example, § 245 para. 2 German StPO according to which evidentiary motions can be rejected by the presiding judge for various reasons.

19 As an example see Robinson, supra note 14, at 575 who seems only to know the French system if he writes that “in the inquisitorial system there is an investigating judge”. Exceptions like Richard Vogler confirm the rule, see his excellent study of the French procedure in Hatchard/Huber/Vogler (eds.), Comparative Criminal Procedure, 1996.

means automatically be taken for granted.\textsuperscript{21} With all these reservations the terms “adversarial”/“inquisitorial” will here only be used in the general sense described to reflect the still existing common-civil law divide.\textsuperscript{22} After all, it remains true that “typology becomes cumbersome and difficult to employ as an instrument of analysis”\textsuperscript{23} when we are talking about concrete procedural issues and specific rules.

Returning to our question, today there is general agreement that the procedure before the ICTY and ICC is a mixed one in that it contains structural elements or building blocks of both the “adversarial” and the “inquisitorial” system.\textsuperscript{24} It must not be overlooked, however, that it is only recent developments which have strengthened the civil law elements in international criminal procedure. Originally, the law of the \textit{Ad Hoc} Tribunals was drafted by common lawyers and the Draft Statute of the International Law Commission for an ICC\textsuperscript{25} provided for an adversarial procedure.\textsuperscript{26} Although a Chamber of the ICTY stated in 1996 that the procedure before the ICTY developed a “unique amalgam of common and civil law features” and “does not

\textsuperscript{21} This impression, however, is created by Amann, supra note 15, at 810, 825 et seq. speaking of “European integration at the vanguard of convergence”.

\textsuperscript{22} In a similar vein apparently Orie, supra note 14, at 1440 et seq. with various references.

\textsuperscript{23} Damaška, supra note 8, at 5.


strictly follow the procedure of civil law or common law . . . ”.27 At that stage the practice of the Tribunals still adopted a largely adversarial approach.28 Accordingly, the 1999 Expert Report found the adversarial system “largely reflected in the Statutes . . . ”.29 Only with the various amendments of the ICTY Rules – the last revision (No. 25) dates from 10 October 2002 – the procedure, not least because of the Expert Group Report just mentioned,30 developed towards a mixed procedure and so currently one can fairly speak of a sui generis model.31 As to the ICC, the beginning of the Preparatory Committee discussions in 1995 was common law dominated to such a degree that the French delegate Gilbert Bitti decided “to warn” his government “that a strong reaction was necessary in order to avoid a pure common law system”.32 Although some may qualify this as a (typical) French overstatement

28 See Prosecutor v. Tadic, Decision on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996 (IT-94-1-T), Separate opinion of Judge Stephen (“procedure of the International Tribunal is essentially adversarial in character . . . ”), Judge Vohra concurring. See also Cassese, First Annual Report of the ICTY, Yb 1994, at 99; May/Wierda, supra note 5, at 737: “essentially adversarial and common law principles apply” (with regard to the presentation of evidence), also at 739; Vohrah, supra note 24, at 526: “largely adversarial in nature”; Boas, Admissibility of Evidence under the RPE of the ICTY: Development of the “flexibility principle”, in: May et al. (eds.), Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, 2001, 263–274, at 266; Guariglia, The Rules of Procedure and Evidence for the ICC, in: Cassese et al. (eds.), supra note 14, 1111–1133, at 1112 referring to the initial version of the RPE; Orie, supra note 14, at 1463–1464; Terrier, supra note 24, at 1267; Bohlander, Anspruch und Wirklichkeit etc., in Haedrich/Eichenhofer (eds.), Staatsschussenschaften im Dialog – Schillerhausgespräche 2000/2001, Berlin 2002, demonstrating that common law sources are more than twice as often quoted in the case law than civil law sources. – On Nuremberg and Tokyo which were even more adversarial see Orie, supra note 14, at 1456 et seq., 1492.  
29 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and the ICTR, 22 November 1999, UN Doc. A/54/634, para. 67; see also para. 82: “reflective of the common law adversarial system . . . ”.  
30 Calling for a “more interventionist role” of the Judges, supra note 29, para. 75–78 and recommendation 9. In the “Report on the Operation of the ICTY”, presented by Judge Jorda on behalf of all the Judges, 12 May 2000, it is stated that “the Tribunal demonstrated its determination to make use of all the recommendations . . . ” (Introduction, Background).  
31 Similarly Robinson, supra note 14, at 569, 588 and Prosecutor v. Delalic et al., supra note 27.  
32 Bitti, supra note 26, at 274. For the drafting history see Fernández de Gurmendi, supra note 4 at 217 et seq.
and indeed have accused the French of delaying the negotiations, the fact of the matter is that the so called “French Draft” presented in 1996 was crucial in bringing about real discussions between common and civil law which finally led to the convergence of both systems in the ICC Statute and the Rules.

Let us now take a closer look at the law and practice of the ICTY and ICC with regard to the procedural stages of international procedure, i.e., the investigation, pre-trial and trial phase.

The investigation phase

In both Tribunals the Office of the Prosecutor, allegedly strong and independent, initiates and directs the investigation. The Prosecutor decides if there is a prima facie case that requires further investigation. She may carry out mere investigative measures, i.e., measures which do not infringe on individual rights, e.g., summon and question suspects, victims and witnesses as well as “collect” any other evidence (Art. 18 (2) ICTY, Rule 39 (i); Art. 54 (3) ICC-Statute). She needs judicial authorization, however, for coercive measures, e.g., the arrest of a suspect (Rules 54 et seq.; Art. 57 (3) ICC Statute). The first important difference between the ICTY and the ICC relates to the scope and time of the control and supervision of the prosecutor. While the prosecutor of the ICTY decides formally independent whether to file an indictment or to drop a case and is only subject to a subsequent “review” of the indictment (Art. 18 (4), 19 ICTYS, Rule 47), in the case of the ICC, the UN Security Council may suspend an investigation for a – renewable – period of 12 months (Art. 16 ICC Statute) and the Pre-trial chamber intervenes

33 Bitti, supra note 26, at 274; Fernández de Gurmendi, supra note 4, at 221, according to whom the existence of the alternative French Draft “made discussions extremely difficult”.

34 UN Doc A/AC.249/L.3 (1996).

35 Even Fernández de Gurmendi, Argentinean chairwoman of the working group on Procedural Matters and quite critical of the French Draft (supra note 33.) admits that only by the end of 1997, i.e., more than one year after the French draft was presented, delegates “had come to accept that the future Court’s procedures would not and could not reflect particular national views but had to be hybrid” (supra note 4, at 220). See also Kreß in: Grützner/Pötz/Kreß, Internationaler Rechtshilfeverkehr in Strafsachen, 2nd ed. Heidelberg, looseleaf, instalment 56, 2002, vol. 4, III 26, mn 95.

36 For the same (threefold) distinction Safferling, supra note 7, at 54, 172, 207; see also the structure of the Commentary edited by Cassese et al., supra note 14, at 1111 et seq. (section 6).

37 On this standard see the excellent comparative analysis of Hunt, The meaning of a “prima facie case” for the purposes of confirmation, in: May et al. (eds.), supra note 28, 137–149; also Vohrah, supra note 24, at 491–492; Turone, Powers and duties of the Prosecutor, in Cassese et al. (eds.), supra note 14, 1137–1180, at 1173.
where the prosecutor decides whether or not there is a “reasonable basis” to initiate proceedings, i.e., long before the indictment is drafted (Art. 15 (3), 53 ICC Statute). However, little, if anything, can be concluded from this difference as far as our question is concerned: Judicial interference before an indictment can possibly be drafted runs counter to both the adversarial and inquisitorial modes of procedure, since both models leave this decision to the prosecutor alone. It is plainly incorrect to consider the strong and independent ICTY and ICC prosecutor as an expression of the common law system since it was one of the great achievements of the “accusatorial” reform of the ancient inquisitorial system to create a prosecution authority responsible for the investigation. It may be argued, though, that the whole idea of pretrial judicial control or supervision of the prosecutor – by way of a kind of intermediate procedure and a pre-trial chamber – is a mixture of French and German influence and as such represents a “clear inquisitorial feature” of the pre-trial phase before the ICC. Indeed, during negotiations, common law delegates of the “like-minded” (ICC friendly) countries felt that any judicial intervention during the investigation, apart from the issuing of warrants of arrest etc., could jeopardize the independence of the Prosecutor, but they had to realize very soon that the alternative, proposed by countries hostile to the idea of an independent Prosecutor, was a political control by the UN-Security Council, i.e., by five States two of which are hostile (U.S.A. and China) and one which is, at best, neutral (Russia) to the idea of an ICC. Thus, in the


39 See from a comparative perspective Arbour et al., supra note 38; Ambos, supra note 20, 89 et seq.

40 See for the correct meaning of this term supra note 12 et seq. and text.


42 Cf. Guariglia, supra note 26, at 228.

43 The Security Council’s hostility towards the ICC was recently demonstrated by Resolution 1422 (2002) which, reinterpreting Art. 16 of the ICC Statute, grants renewable immunity for “former officials or personnel from a … State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation …” for a twelve-month period starting 1 July 2002. I have commented on this resolution in the German newspaper Süddeutsche Zeitung, 16 July 2002, at 13 (English version in www.germanlawjournal.com, issue October 2002). See also Kreß Blätter für deutsch und internationale Politiz 2002, at 1087 et seq.; Herbst, EUGRZ 2002, 581 et seq.
end, the like-minded group as a whole felt obliged to support an independent prosecutor subject to judicial control, leaving behind the civil-common law divide. It is interesting to note in this context that the U.S. decision to notify the UN-Secretary General that the U.S. does not feel any longer bound by the signature of the Clinton administration (to “unsign” the ICC treaty) was justified, among other things, by the Rome Statute’s “prosecutorial system that is an unchecked power”. 44 We have just seen that the contrary is true and it is depressing to see the extent to which the current US administration is prepared to obscure the truth in its attempts to discredit the ICC.

Returning to the functions of the Prosecutor, her impartiality, the obligation to establish the truth and present not only incriminating, but also exculpatory evidence – explicitly recognized by a Chamber of the ICTY45 and in Art. 54 (1) (a), 67 (2) ICC Statute – may be seen as a typical feature of the civil law procedure.46 Although the Prosecutor in the adversarial system is also required to adhere to the principles of truth and objectivity,47 the civil law system is structurally different in that it does not operate in terms of a prosecution and defense case and therefore the Prosecutor is considered an independent agent rather than a party.48 On the other hand, the Prosecutor has a wide discretion with regard to the decision to initiate an investigation which ultimately depends on “the interests of justice” (Art. 53 (1) (c), (2) (c) ICC Statute)49 and may even enter into agreements with States, intergovernmental organizations or private persons for the sake of their cooperation (Art. 54

44 Marc Grossman, Under Secretary for Political Affairs, “American Foreign Policy and the International Criminal Court”, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002: “The Rome Statute creates a prosecutorial system that is an unchecked power”. See also Statement of Secretary of Defense Donald H. Rumsfeld before the Senate Appropriations Committee Defense Subcommittee, 21 May 2002: “lack of adequate checks and balances on powers of the ICC prosecutor and (sic!) judges …”.

45 Prosecutor v. Kupreskic, Decision on Communications between the Parties and their Witnesses, 21 September 1998 (IT 95-16-T): “…the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only incriminatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting …”.


47 Safferling, supra note 7, at 221–222.

48 See also Friman, supra note 38, at 537; id., supra note 24, at 195; Tochilovsky, supra note 26, at 637; Safferling, supra note 7, at 79, 86.

49 Reference to “interests of justice” may also be found in other norms, e.g., ICTY Rules 71 and 5 (A). Crit. Turone, supra note 37, at 1173 et seq.; Fourmy, in: Cassese et al. (eds.), supra note 14, 1207–1230, at 1217–1218.
For civil lawyers these formulations display worrying similarities to plea bargaining, i.e., a classical common law feature.

The pre-trial phase

Although neither the ICTY nor the ICC procedure provide for a formal separation between investigation and pre-trial phase, a line can be drawn with the presentation of the indictment (ICTY) or the charges (ICC) by the Prosecutor. At this moment the investigation ends and the pre-trial phase starts. Here again we discover important differences between the two Tribunals. While the ICTY indictment is only subject to the already mentioned review procedure by a single judge (Art. 19 ICTY Statute, Rule 47), the ICC charges must be confirmed by the Pre-Trial Chamber in the so-called confirmation hearing (Art. 61 ICC Statute); whereas the “indictment” can be confirmed without the accused and she may even be subjected to the famous Rule 61 in absentia procedure, the “charges” may, as a rule, only be confirmed if the accused is present (Art. 61 (1) 2nd cl. ICC Statute). Be that as it may, the confirmation hearing has received general support from all sides and indeed it can be accommodated within both the adversarial and “inquisitorial”

50 Crit. Turone, supra note 37, at 1169–1170.
51 Friman, supra note 24, at 201.
52 According to Vohrah, supra note 24, at 485 the pre-trial phase only begins with the confirmation of the indictment by the judge (and ends with the presentation of the evidence by the Prosecution at trial). This would mean, however, that the period between the presentation of the indictment and the judicial confirmation would belong to the investigation phase although normally the Prosecution would only wait for the judicial decision in this period. In any case, this is only a formal question without material implications. On the pre-trial phase from a comparative perspective see Marchesiello, supra note 24, at 1231 et seq. who draws a line with the first appearance of the accused (at 1239).
53 Although it is “it is difficult to conclude that the rule 61 proceeding is equivalent to a trial in absentia” (Expert Group Report, supra note 29, para. 57; also Vohrah, supra note 24, at 504; McDonald, supra note 24, at 556; Terrier, supra note 24, at 1283), it still remains an in absentia procedure (similarly Orie, supra note 14, at 1467). In any case, also the Expert Group recognizes that it “could be abandoned without any significant diminution in Tribunal effectiveness…” (ibid., para. 60). See on this procedure also Safferling, supra note 7, at 243; Vohrah, supra note 24, 503 et seq.; McDonald, supra note 24, at 555 et seq.).
54 See the exceptions in Art. 61 (2) for a hearing in absentia.
55 Cf. Harhoff, supra note 24, at 648–649; Marchesiello, supra note 24, at 1243 et seq.; Terrier, supra note 24, at 1283. For presence during the trial see Art. 63.
56 See Fernández de Gurmendi, supra note 24, at 251; Brady, Disclosure of Evidence, in: Lee, supra note 24, 403–426, at 423 rejects the view that the confirmation hearing (Art. 61) resembles the juge d’instruction “under an inquisitorial system”; also id, Setting the Record Straight: A short Note on Disclosure and ‘the Record of the Proceedings’, in: Fischer/Kreß/Lüder, supra note 14, 261–272, at 265.
model: one may consider it – as common lawyers usually do – as a kind of filter to ensure that only the really significant cases go to trial\(^{57}\) or – as civil lawyers, especially the French (who “invented” it\(^{58}\)), do – as a rather lengthy pre-trial in order to “confirm” or check the charges and to avoid time-consuming disputes about disclosure of evidence in the trial stage.\(^{59}\) In this sense it may be compared to the French procedure in the case of “crimes” before the “Chambre d’accusation” or, as introduced by the recent reform of the Code de Procédure Pénale, the “Chambre de l’Instruction criminelle” (Art. 191–230 CPP).\(^{60}\) In any case, a similar “filter” procedure was introduced in December 1998 in the Ad Hoc Tribunals with the Pre-Trial and Pre-Defence Conferences (ICTY Rules 73bis and 73ter) and existed already before by means of the Status Conferences (ICTY Rule 65bis).\(^{61}\) The introduction of a Pre-Trial Judge (ICTY Rule 65ter) strengthens judicial intervention at the pre-trial stage following the civil law model although this judge has only coordinating, not investigating functions.\(^{62}\)

Another area of conflict between common and civil law refers to the presentation of the charges by the Prosecutor. While there is abundant case law from the Ad Hoc Tribunals on the form of the indictment (Art. 18 (4) ICTY Statute, Rule 47) requiring a precise statement of the facts and their legal classification imputed to the accused,\(^{63}\) it is less clear whether prosec-
utorial charges have binding effect on the subsequent proceedings. In general, it is clear that after confirmation of the charges an amendment requires judicial authorization; on the other hand, if such authorization is granted, the actual amendment is the task of the Prosecutor. In Kupreskic, a Trial Chamber allowed an amendment of the indictment only with regard to less serious offences or the rejection of offences; as to more serious or different offences, the Trial Chamber must call upon the Prosecutor to amend the Indictment. As for the ICC, according to Art. 74 (2) cl. 2 of the Statute, the Court must base its judgment “on the facts and circumstances described in the charges and any amendments to the charges”; however, it is not clear whether these charges are still the original ones as drafted by the Prosecutor or whether the Pre-Trial Chamber has the right to amend them proprio motu in the confirmation hearing. The former approach would be the one preferred by the common law, since in its tradition the Court is bound by the Prosecutor’s legal classification of the charges. The latter approach is more similar to the civil law where the Court can not only accept or dismiss but also – according to the principle iura novit curia – amend, in its own right, the charges. At first sight, the ICC Statute seems to follow the common law approach since

para. 16: As to responsibility on the basis of the common purpose as part of a joint criminal enterprise the indictment must indicate “the nature or purpose of the joint criminal enterprise” (its “essence”), the time over which the enterprise existed, the identity of those engaged in the enterprise at least by reference to their category as a group; the nature of the participation of the accused in the enterprise. For further requirements regarding the prosecution case, especially concerning the mental element see Prosecutor v. Brdjanin & Talic, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (IT-99-36-PT), para. 41–43, 46 et seq.; see also Prosecutor v. Kupreskic et al., Judgement, 23 October 2001 (IT-95-16-A), para. 79 et seq. and 306 et seq. taking up the mentioned case law and criticizing the (amended) indictments against Z. and M. Kupreskic and Josipovic as not sufficiently precise (para. 88: “enough detail to inform the defendant clearly of the charges . . .”); 114: “plead with sufficient detail the essential aspect of the Prosecution case.”). – A related question is the one of cumulative charging. According to the App. Ch. it “is to be allowed in light of the fact that, prior to the presentation of the evidence, it is not possible to determine to a certainty which charges . . . will be proven” (Prosecutor v. Delalic et al., Judgment 20 February 2001 (IT-96-21-A), para. 400; conc. Prosecutor v. Kunarac et al., Judgment 12 June 2002 (IT-96-23 & IT-96-23/1-A), para. 167; Prosecutor v. Krsitic, Judgment 2 August 2001 (IT-98-33-T), para. 559; see also Prosecutor v. Kunarac & Kovac, Decision on the Form of the Indictment, 4 November 1999 (IT-96-23-PT): accumulation of different offences for same facts is permissible; accumulation of charges only relevant for sentence). Cf. also Vohrah, supra note 24, at 490, 537 et seq.

64 See for the ICTY Vohrah, supra note 24, at 493.

65 Prosecutor v. Kupreskic et al., Judgement, 14 January 2000 (IT-95-16-T), para. 728 et seq. (744 et seq.).

66 See Friman supra note 38, at 208–209; Bitti, supra note 26, at 282. See also Prosecutor v. Kupreskic et al., supra note 65, para. 723, 733 et seq. (with reservations as to the applicability of the principle in international criminal proceedings).
the Chamber may only confirm or reject the charges (Art. 61 (7) (a), (b)) or adjourn the hearing and “request the Prosecutor to consider” (Art. 61 (7) (c)) either to provide further evidence (i) or amend a charge because of a different legal qualification (ii). On the other hand, given the broad powers of the Pre-Trial and the Trial Chamber, it may be argued that it has the inherent power to amend the charges as long as the rights of the defence are not violated, i.e., as long as the defence has enough time to react to such an amendment.\(^{67}\) In fact, the lack of clarity of the ICC Statute in this matter is due to the lack of agreement of common and civil lawyers during the negotiations. The question was, as many, conspicuously left open.\(^{68}\)

Further problems arise in relation to the disclosure rules.\(^{69}\) In both Tribunals the Prosecutor is obliged to disclose most (incriminating) evidence to the defence, either *proprio motu* or on request (ICTY Rules 66; Art. 61 (3) ICC Statute, Rules 76, 77, 121 (2)).\(^{70}\) As to the exculpatory evidence, it must be disclosed “as soon as practicable” (ICTY Rule 68; Art. 67 (2) ICC Statute, Rule 83).\(^{71}\) A representative of the Prosecution must certify that a full search of all relevant material has been conducted.\(^{72}\) Disclosure must be specific. With regard to witnesses, for example, date and place of birth, sex and place of residence (not address) must be disclosed since an adequate

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\(^{67}\) This “civil law” solution applies in Kosovo under Art. 337 Criminal Procedure Act of the SFRY. For the problems of the common law prosecutors, however, UNMIK has proposed an Art. 374 in its Draft Procedural Code for Kosovo (as of September 2001) which only allows the Prosecutor to amend the charges.

\(^{68}\) See *Friman* supra note 38, at 208–210; *Bitti*, supra note 26, at 280–281, 284–288.

\(^{69}\) For a more detailed analysis with regard to the ICTY, see *Pruitt*, Discovery: mutual disclosure, unilateral disclosure and non-disclosure etc., in: *May* et al. (eds.), supra note 28, at 305–314; *May/Wierda*, supra note 5, at 756 et seq.; generally and on the ICTY and ICC *Orie*, supra note 14, at 1449–1450, 1469–1470, 1483–1484.


\(^{71}\) See, for example, *Prosecutor v. Krajisnik & Plavsic*, Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65ter, 66 (B) and 67 (C), 1 August 2001 (IT-00-39 & 40 PT), para. 10: “Prosecution must disclose all the exhibits on which it intends to rely, at least, by the time it files its pre-trial brief” (emphasis added; the Prosecution submitted that it was not obliged to disclose 400 remaining documents of 800 in total). See also *Vohrah*, supra note 24, at 519–520; *Pruitt*, supra note 69, at 309 et seq. On the definition of “exculpatory material” and other unresolved issues in this context see *Harmon/Karagiannakis*, The disclosure of exculpatory material etc., in: *May* et al. (eds.), supra note 28, 315–328.

\(^{72}\) *Prosecutor v. Krnojelac*, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999 (IT-97-25-PT).
defence “envisages more than a blind confrontation in the courtroom”. Such a blind confrontation may, however, result from the need to protect certain witnesses and grant them anonymity (Art. 22 ICTY Statute, Rules 69, 75; Art. 68 ICC Statute, Rules 87, 88). Although this possibility affects, in principle, both prosecution and defence witnesses, it will more often restrain the accused’s right of confrontation and therefore a difficult balance between this right and the protection of witnesses must be struck. The defence has only specific disclosure obligations with regard to special defences, for example, an alibi (ICTY Rule 67, ICC Rules 78, 79). It cannot be obliged to disclose inculpatory evidence since this would violate the accused’s privilege against self-incrimination (Art. 67 (1) (g) ICC Statute) and as such, the general principle of equality of arms given the prosecution’s superior resources.

Prosecutor v. Delalic et al., Decision on the Defense Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997 (IT-96-21), para. 17, 19, 20.


The drafters of the ICC Statute were aware of this problem providing in Art. 68 (1) last clause that measures of victim protection “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. For a detailed discussion see Defrancia, Due Process in International Criminal Courts: Why Procedure Matters, 87 Virginia Law Review (2001), 1381–1439, at 1410 et seq. arguing for a “softened right of confrontation” (1417); Mumba, supra note 74, at 361 et seq.; see also Safferling, supra note 7, at 277 et seq., 374–375, arguing for “a combined system of judge and counsel working together in establishing the truth . . . ” (286) and a “combination of an adversarial, cross-examination based structure on the one hand, and an inquisitorial system with an active judge on the other . . . ” (288). See also McDonald, supra note 24, at 558, 562 et seq.; Zappalà, supra note 46, at 1330 et seq.; Jones, Protection of Victims and Witnesses, in: Cassese et al. (eds.), supra note 14, 1355–1370, at 1364 et seq.

See also Report Expert Group, supra note 29, para 89 with recommendation 12; Vohrah, supra note 24, at 516–517.

Brady, supra note 56, at 414. – On the difficult question of the witnesses’ right to non-self-incrimination see Ambos, 15 LJIL 155–177 (2002) demonstrating that ICC Rule 74 follows the common law (166 and passim).

May/Wierda, supra note 5, at 760–761; Safferling, supra note 7, at 194, 202, 374.
ICTY Rule 73ter, however, provides for a Pre-Defence Conference, implying the disclosure of the defence witnesses (not their statements) in order to avoid lengthy interrogations at the trial stage. Disclosure is restricted with regard to reports, memoranda or other internal documents (ICTY Rule 70, ICC Rule 81). Otherwise it is up to the Trial Chamber to decide on disclosure (ICTY Rule 66 (C)), acting like a referee between the parties. Thus, disclosure is an ongoing process entailing a “continuing obligation” that extends to the post-trial stage, including appeals. From a conceptual perspective, such disclosure rules are a clear expression of the adversarial model since its “two cases approach” makes (mutual) disclosure necessary to ensure that both parties have the same level of information. In contrast, such rules are superfluous in the civil law system where, according to the “one case approach”, the investigation lies in the hands of the Prosecutor and she investigates both incriminating and exonerating evidence. It is sufficient in these circumstances to grant the defence access to the Prosecutor’s dossier at some point before the beginning of the trial. In a way, the dossier fulfills the function of the common law disclosure rules. In fact, ICC Rule 121 (2) (c) links the disclosure rules to the dossier requiring that all disclosed evidence shall be communicated to the Pre-Trial Chamber. Certainly, the conceptual difference between disclosure and dossier may be less valid in practice where we can detect a clear convergence of the systems in that the Prosecution in-

79 This would go against the lawyer-client privilege of professional secrecy recognized in the civil law model, see Prosecutor v. Tadic, supra note 28; also Orie, supra note 14, at 1470 with fn. 130.
80 May/Wierda, supra note 5, at 761; see also Vohrah, supra note 24, at 542.
81 On the exceptional character of Rule 70 (B) see Prosecutor v. Brdjanin & Talic, Decision on Joint Motion by Momcilo Krajišnik and Biljana Plavšic for Access to Trial Transcripts of Both Open and Closed Session and Documents and Things Filed under Seal, 13 March 2002 (IT-99-36-PT), para. 19.
82 See for a general overview of the drafting history Brady, supra note 56, 403–426; see also Lewis, supra note 57, at 226–227.
83 May/Wierda, supra note 5, at 758.
84 Cf. Brady, supra note 56, at 422; Pruitt, supra note 69, at 308.
85 Prosecutor v. Blaskic, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (IT-95-14-A), para. 29 et seq. (42).
86 Cf. Safferling, supra note 7, at 198; see also Orie, supra note 14, at 1469 noting the resemblance with the US Federal Rules of Criminal Procedure.
87 On this terminology see supra note 16 and text.
88 See also Friman, supra note 24, at 213; Tochilovsky, supra note 26, at 640–641; Orie, supra note 14, at 1450–1451.
89 Cf. Orie, supra note 14, at 1484.
90 See Orie, supra note 14, at 1484 considering that this provision alters the character of the disclosure.
vestigates basically its own case and tries to keep the evidence secret as long as possible. Even an active civil law judge may hardly be able to compensate for the Prosecution’s advantages arising from the investigation phase. From a human rights perspective, therefore, only broad disclosure rules adequately safeguard the right of the defence. This applies not only to an adversarial procedure. In this sense, the “all cards on the table” approach adopted by the ICC Rules (esp. Rules 77, 78) is to be welcomed.\textsuperscript{91}

As to potential national security interests one can formulate a threefold rule: ordinary information should be disclosed to the accused herself, confidential information only to her counsel and certain national security information need not be disclosed at all.\textsuperscript{92}

Much more indicative of the compromise character of the current ICTY and ICC rules is the development of the guilty plea or – as it is called in the ICC Statute (Art. 65) – the “admission of guilt” procedure.\textsuperscript{93} Originally, ICTY Rules 62 (iii)–(v) provided for a straightforward common law guilty plea procedure which brought the trial directly to the sentencing stage if the accused entered a plea.\textsuperscript{94} In this case, a separate sentencing hearing was conducted, i.e., the procedure to establish guilt or innocence of the accused and the decision on the sentence were separated.\textsuperscript{95} This system broke down very quickly with the Erdemovic trial where the inadequately defended accused “confessed” to having killed civilians under duress.\textsuperscript{96} His confession was first accepted as a valid guilty plea by a Trial Chamber\textsuperscript{97} but this decision was later overturned by the Appeals Chamber.\textsuperscript{98} It established four requirements of a

\textsuperscript{91} Guariglia, supra note 28, at 1127.
\textsuperscript{92} Safferling, supra note 7, 196. See for a general analysis Malanczuk, Protection of National Security Interests, in: Cassese et al. (eds.), supra note 14, 1371–1386.
\textsuperscript{93} See also Tochilovsky, supra note 26, at 638–640; Safferling, supra note 7, at 272 et seq.; Terrier, supra note 24, at 1286 et seq.; Orie, supra note 14, at 1480–1481; Bohlander, Plea-Bargaining before the ICTY, in May et al. (eds.), supra note 28, 151–163 (with a good explanation of the German position at 159 et seq.).
\textsuperscript{94} Cf. Vohrah, supra note 24, 511 et seq.
\textsuperscript{95} On this separation in general see infra note 155 and text.
\textsuperscript{96} ICTY-Trial Chamber I, Prosecutor v. Drazen Erdemovic Sentencing Judgment, 29.11.1996, Case No. IT-96-22-T, para. 10: “Your honour – I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: ‘If you are sorry for them, stand up, line up with them and we will kill you too’. I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because than they would have killed me”. This case was analysed various times, see for example McDonald, supra note 24, at 574 et seq.; Bohlander, supra note 93, at 153 et seq.
\textsuperscript{97} Prosecutor v. Erdemovic, supra note 96.
valid guilty plea which can now be found in Rule 62bis: the plea must be made voluntarily, it must be informed, not be equivocal and there must be a sufficient factual basis for the crime and the accused’s participation in it. Only if these conditions are fulfilled may the Trial Chamber enter a finding of guilt and set a date for the sentencing hearing (Rules 62bis, 100). Rule 62ter further provides for a plea agreement\textsuperscript{99} procedure between prosecutor and accused whose most important feature in our context is that it is not binding upon the Trial Chamber. Indeed, the Chamber is not confined to a consideration of the facts as agreed between Prosecution and Defence “because its fundamental obligation is to ensure that there is a sufficient factual basis for the crime and the accused’s participation in it”.\textsuperscript{100} Only if the Chamber enters a finding of guilt should it, as a rule, rely on the agreed facts for sentencing.\textsuperscript{101} Similarly, Art. 65 ICC Statute and Rule 139, greatly influenced by the Erdenovic disaster,\textsuperscript{102} leave it completely to the Trial Chamber to decide on the validity of the “admission of guilt”, taking into account the above mentioned criteria. It may either enter a conviction or order the continuation of the trial. In addition, any agreement or deal between prosecutor and accused – the ICC Statute refers to “discussions” – is not binding upon the Trial Chamber (ICTY Rule 62ter (C), Art. 65 (5) ICC Statute). Thus, although the need for discussions between the parties was recognized, this was not to prevent victims and witness from speaking about the “historical truth” in open court.\textsuperscript{103} The provision can hardly be called a “compromise”,\textsuperscript{104} it rather shows how strong the influence of the civil law, in this case its scepticism towards the whole idea of bargaining mechanisms in criminal trials, has become. In fact, it can be said that the “overregulation” of the guilty plea undermines its very purpose, namely to shorten proceedings;\textsuperscript{105} its effect is converted into that of a mere confession.\textsuperscript{106}

\textsuperscript{99} See, e.g., the plea agreements in \textit{Prosecutor v. Sikirica et al.}, Judgement 13 November 2001 (IT-95-8-S), para. 17 et seq.

\textsuperscript{100} Ibid., para. 48.


\textsuperscript{104} \textit{Fernández de Gurmendi}, supra note 4, at 223.

\textsuperscript{105} Cf. \textit{Creta}, supra note 74, at 407.

\textsuperscript{106} See \textit{Orie}, supra note 14, at 1481 who welcomes this, considering that the ICC Statute meets the requirements of justice better than the ICTY Statute.
This type of guilty plea can lead to great frustration among common lawyers. The present author witnessed a trial in East Timor under UNTAET regulation 15/2000 – which is essentially a copy of the ICC Statute – where an accused entered a guilty plea on the basis of a plea agreement with the (British) prosecutor – following the practice of the Ad Hoc Tribunals.\(^{107}\) He obviously desired the termination of his trial, but was so intensely questioned by a three judge panel of civil lawyers (two internationals from Italy and Benin and one from East Timor) that he finally gave up trying to convince the judges, especially the African one, that he indeed made the plea in a voluntary, informed and unequivocal way. The end of the story was that the plea was not accepted and the trial continued in the ordinary manner for quite a long time.

In sum, the current guilty plea provisions are a good example of excessive civil law reform of established common law institutions. This makes it easy for civil lawyers – see the East Timor example – to reject even “clean” guilty pleas while common lawyers are confronted with inoperable rules completely alien to their normal practice.

### The trial phase

#### Presentation of the case

It has rightly been asserted that the trial is the procedural stage in which common and civil law principles most strongly conflict with each other.\(^{108}\) Here again we can identify civil law reforms within a common law framework in various fields, first of all with regard to the presentation of the case (ICTY Rules 82 et seq.). At first sight, the ICTY Rules appear to resemble an adversarial procedure (“adversarial inclination”):\(^{109}\) Opening statements by Prosecution and Defence (rule 84), presentation of prosecution and defence evidence followed by rebuttal and rejoinder (rule 85 (A)), “examination-in-chief”, “cross-examination” and “re-examination” of witnesses (Rule 85 (B)). A closer look, however, reveals that the Trial Chamber may change the course of events “in the interests of justice” (rule 85 (A))\(^{110}\) and order additional evidence proprio motu (rules 85 (A) (v) in relation to 98). Further, Rule 84bis allows the accused to make an opening statement after the statements of the parties “under the control of the Trial Chamber”. Thus, at least conceptually,

\(^{107}\) See supra note 99.

\(^{108}\) Safferling, supra note 7, at 371.

\(^{109}\) Dixon, supra note 24, at 98; May/Wierda, supra note 103, at 249; Orie, supra note 14, at 1464, 1465, 1472.

\(^{110}\) For the meaning of the “interests of justice” clause in Rule 115 (B) see Prosecutor v. Kupreskic, supra note 63, para. 52–54, 61–69.
the accused is converted from a mere object of the trial, as known from the adversarial procedure, into an active party, familiar from civil law procedure.\textsuperscript{111} On the other hand, she may also appear as a witness in her own defence (rule 85 (C))\textsuperscript{112} and thus obtain the status which she would enjoy in the common law.\textsuperscript{113} The difference between these Rules lies in the fact that the opening statement does not possess the same probative value as the interrogation of the accused as a witness, since only then is the statement taken under oath and tested by cross-examination. In any case, civil law elements have “crept in” over time\textsuperscript{114} and in 1998 a Chamber of the ICTY even held that once the witness had made the solemn declaration, i.e., taken the oath, she becomes a “witness of truth” and ceases to be “a witness for either party”.\textsuperscript{115} This clearly implies that a pure adversarial trial no longer exists. In Blaskic, the Trial Chamber repeatedly summoned witnesses under Rule 98 and specified that they would first testify freely and only afterwards be interrogated by the parties.\textsuperscript{116} As to the fair trial principle, it is worth mentioning that it has been held that a further cross-examination of a witness by one party would violate the equality of arms principle embedded in Rule 85 (A).\textsuperscript{117}

In the ICC proceedings, the role of the Trial Chamber is even more dominant. The Chamber is “responsible” for the conduct of the proceedings (Art. 64 (6) (a) in relation to Art. 61 (11) ICC Statute), may require the production of evidence (Art. 64 (6) (b), (d)) and “rule on any other relevant matters” (Art.

\textsuperscript{111} See Orie, supra note 14, at 1468. – The same can be said of the position of the victim before the ICC: although she is not a party to the proceedings in the formal sense (as a \textit{partie civile} or \textit{Nebenkläger}), she may be actively involved in the trial (see Art. 68 (3), 82 (4), Rules 89 et seq.; see also Guariglia, supra note 28, at 1127–1128: “victim-oriented tribunal”; Orie, supra note 14, at 1478, 1487, 1491; generally Jordalde Hemptinne, The Status and Role of the Victim, in Cassese et al. (eds.), supra note 14, 1387–1420, at 1399: “potential subject matter”).

\textsuperscript{112} See May/Wierda, supra note 5, at 742; Terrier, supra note 24, at 1307–1308.

\textsuperscript{113} Cf. Kreß, supra note 12, at 321–222; Terrier, supra note 24, at 1308; Orie, supra note 14, at 1468. See generally on the position of the defendant in the two systems Orie, supra note 14, at 1448–1449.


\textsuperscript{115} Prosecutor v. Kupreskic, supra note 45, consideration 3 (iii), “a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90(B) of the Rules of Procedure and Evidence, is a witness of truth before the Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either party”; See also Tochilovsky, supra note 26, at 631.

\textsuperscript{116} John R.W.D. Jones, The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 2nd ed. 2000, at 431; see also Kreß, supra note 14, at 351.

\textsuperscript{117} Prosecutor v. Delalic et al., supra note 27, para. 28, 29. See also May/Wierda, supra note 5, at 739–740.
The presiding judge directs the proceedings (Art. 64 (8)); only if she declines to do so can the Prosecutor and Defence “agree on the order and manner in which the evidence shall be submitted” (ICC Rule 140 (1)). This dominant role for the Chamber and the Presiding Judge has given rise to bitter disputes between common and civil lawyers not only in Rome but also later in New York in the Preparatory Commission when the Rules were negotiated. Observers spoke of a “clash of cultures between the civil law and the common Law”,¹¹⁸ the former in favour of a strong judge directing the trial, the latter in favour of a neutral judge leaving the conduct of the trial basically to the parties and in particular allowing them to cross-examine witnesses freely.¹¹⁹ The final compromise can be found in Rule 140 (2) according to which a witness may be questioned by Prosecution and Defence without the intervention of the Chamber which may question the witness only before or after the parties. Thus, the possibility of a cross-examination has been recognized implicitly and it will finally depend on the protagonists of the procedure whether and how this possibility will be used.¹²⁰ Interestingly enough, terms like cross-examination and other typical terms of art (“catch words”) for either common or civil law are conspicuously absent from the Statute and the Rules. The Drafters wanted to make clear that what is sought is really a mixed procedure.¹²¹

Rules of evidence

General

Still more power is given to the Chambers of both ICTY and ICC by the rules of evidence. In general, it is up to the Chamber to decide on the “admissibility”, “relevance” and “probative value” of the evidence (ICTY Rule 89 (C); Art. 64 (9), 69 (4) ICC Statute, Rule 63 (2)).¹²² The Trial Chamber has “broad discretion” – to use the words of the Appeals Chamber in Aleksovski¹²³ – tak-

¹¹⁸ Lewis, supra note 208, at 547–550; Fernández de Gurmendi, supra note 24, at 252; Kreß, supra note 12, at 352.
¹¹⁹ On the importance of cross examination for the adversarial model see also Kreß supra note 12, at 347; for criticism from within the common law id, at 349–350.
¹²⁰ This may be the reason that Lewis, supra note 57, at 231–233 still speaks in an adversarial tone of prosecution and defence case almost ignoring the dominant role of the Chamber. See also Guariglia, supra note 28, at 1133 who sees practical difficulties in the application of Rule 140.
¹²¹ Cf. Kreß, supra note 12, at 352; Orie, supra note 14, at 1480 with fn. 161, 1488 with fn. 175.
¹²² For the negotiation history of Art. 69 ICC Statute, see Behrens, supra note 102, at 242 et seq.
¹²³ Prosecutor v. Aleksovski, Decision on the Prosecutor’s Appeal on the Admission of Evidence, 16 February 1999 (IT-95-14/1-AR73), para. 15; confirmed in Prosecutor v. Kordic and
ing into account “a fair determination of the matter before it”, “the spirit of the Statute and the general principles of law” (ICTY Rule 89 (B)) and “the need to ensure a fair trial” (ICTY Rule 89 (D)). However, evidence obtained by violation of human rights is, *a limine*, excluded (ex ICTY Rule 95; Art. 69 (7) ICC Statute).

The Chamber may also request the submission of additional evidence that it considers necessary for the “ascertainment” or “determination of the truth” (ICTY Rule 90 (G) (i), Art. 69 (3) ICC Statute). Although this indicates civil law influence, it is a widespread misconception among civil lawyers that the adversarial procedure does not pursue the truth. In fact, the search for truth is a common feature of both systems, and only the method of arriving at the truth is different. One may argue that common law follows a more liberal concept of the truth – a kind of procedural rather than material truth.

In any case, the search for the truth is not incompatible with a common law system as long as it consists only of a right (Art. 69 (3) ICC Statute: “have the authority”) and not - as originally proposed by Germany – of a duty.

The Trial Chamber controls the mode and order of interrogating witnesses (ICTY Rule 90 (F); Art. 69 (2) ICC Statute). It must not, however, as we have seen above, interrupt the questioning of the witness by the parties but may only question her before or after the parties (ICC Rule 140 (2) (c)). While the latter Rule contains only an implicit reference to the possibility of

*Cerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 (IT-95-14/2-AR73.5), para. 20. See also *Prosecutor v. Aleksovski*, Judgement 24 March 2000 (IT-95-14/1-A), para. 63: “margin of deference to the Trial Chamber’s evaluation of the evidence …”; App. Ch. may overturn the T. Ch.’s findings only when evidence “could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous”.

Reference to fairness can also be found in ICTY Rule 5 (C).


*Safferling*, supra note 7, at 18–19; *Behrens/Piragoff*, in: Triffterer supra note 125, Art. 69 nn 5.

On this concept see *Volk*, Wahrheit und materielles Recht im Strafprozeß, Konstanz 1980, at 15–18; on the distinction between material and procedural truth see also recently *Gusy*, Verfassungsfragen des Strafprozessrechts, Strafverteidiger 2002, 153, at 155.

See *Behrens*, supra note 102, at 244; Kreß, supra note 12, at 351–352.
cross examination (see also ICC Rules 67 (1), 68), this possibility is explicitly mentioned in ICTY Rule 90 (H). Cross examination shall be limited, however, “to the subject matter of the evidence-in-chief and matters affecting the credibility of the witness and ... to the subject-matter of the case”. Thus, the ICTY follows the Tokyo precedent and the US Federal Rules. In addition, the Trial Chamber may “take judicial notice of adjudicated facts and documentary evidence from other proceedings of the Tribunal in relation to matters at issue in current proceedings” (Rule 94 (B)). In other words, such facts need not be proven twice. While this may be tolerated in light of the similarity of proceedings arising from a specific political or military context – the same applies to evidence with regard to a consistent pattern of conduct (rule 93) –, it is highly problematic that the rules put oral and written witness evidence on an equal footing. We shall return to this point later. Finally, there are specific rules with regard to evidence in cases of sexual violence (Rule 96); in particular, a corroboration of the victim’s testimony is not required (96 (i), see also ICC Rules 70–72).

In general, these provisions tend towards a flexible civil law approach – in the sense of a “flexibility Principle” – with a wide discretion of the Court instead of the rather strict common law approach of a system of exclusionary rules. In particular ICTY Rule 89 (B) has been interpreted as inviting “common sense” and “reasonable” approaches, permitting the “golden opportunity to craft a workable and just procedural and evidentiary regime that will foster the interests of international justice”.

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130 May/Wierda, supra note 5, at 739. On the common law origin of Rule 90 (H) see Prosecutor v. Brdanin and Talic, Decision on “Motion to Declare Rule 90 (H)(ii) Void to the Extent it is in Violation of Art. 21 of the Statute of the International Tribunal” by the Accused R. Brdanin and on “Rule 90(H)(ii) submissions” by the Accused M. Talic, 22 March 2002 (IT-99-36-T), para. 12; summarized in Judicial Supplement No. 31bis, at 9.


132 For more details Piragoff, Procedural Justice related to Crimes of Sexual Violence, in: Fischer/Kreß/Lüder, supra note 14, 385–421 (389 et seq.); Viseur Sellers, supra note 125, at 279 et seq. (on ICTY Rule 96). The corroboration requirement does not extend to other crimes, see Terrier, supra note 24, at 1298.

133 Boas, supra note 28, at 264.


135 Cf. Dixon, supra note 24, at 100.

Admissibility of different forms of evidence

One important consequence of the “flexibility principle” is that hearsay evidence, i.e., “evidence by any witness of what another person stated (whether verbally, in writing or otherwise)”, is, in general, admitted. This has been the settled practice of the Trial Chambers of the ICTY since the hearsay decision in Tadić and was confirmed by the Appeals Chamber in 1999. It appears particularly important in the light of the fact that in the common law hearsay evidence is allowed only exceptionally. It must not be overlooked, however, that the admission of hearsay – and other forms of evidence – is not unlimited but depends on the relevance and “probative value” of this evidence (ICTY Rule 89 (C)). The probative value, in turn, depends on the reliability of the evidence which, above all, is determined by cross-examination. In the case of hearsay, the probative value or weight is, in general, lower than that of direct evidence. Last but not least, evidence of any kind, as suggested before, must be excluded “if its probative value is substantially outweighed


138 Cf. Dixon, supra note 24, at 91–92; Harhoff, supra note 24, at 654; Terrier, supra note 24, at 1297–1298; Rodrigues/Tournaye, supra note 103, at 297 et seq.; Guariglia, The Admission of Documentary Evidence and of Alternative Means to Witness Testimony etc., in: Fischer/Kreß/Lüder, supra note 14, 665–680, at 666–671; May/Wierda, supra note 5, at 745 et seq.; id., supra note 103, at 258, 261; Safferling, supra note 7, at 308; Boas, supra note 28, at 270; Robinson, supra note 14, at 577–578; for a more critical view Wladimiroff, supra note 24, at 8–9. – Equally, hearsay is not excluded by the theoretical concept of witness testimony, see Kreß, supra note 12, at 317.

139 Prosecutor v. Tadić, supra note 27, para. 7, 13 et seq. (Judge Stephen dissenting); Prosecutor v. Blaskić, Decision on the Defence Motion to Compel the Disclosure of Rule 66 and 68 Material to Statements Made by a Person Known as “X”, 15 July 1998 (IT-95-14-T), para. 10–12.

140 Prosecutor v. Aleksovski, supra note 123, para. 15.

141 See Prosecutor v. Tadić, supra note 27, para. 8 et seq.; and the dissenting opinion of Judge Stephen. See also May/Wierda, supra note 5, at 745 referring to the dissenting opinion of Judge Pal in the Tokyo Judgment and the Nuremberg Judgment; also Safferling, supra note 7, at 292, 306; Boas, supra note 28, at 269. For the civil law view see the decision of the German Constitutional Court in Strafverteidiger 1997, 1, at 2–3. Rodrigues/Tournaye, supra note 35, at 292 et seq. identify a merger of the two systems on the basis of a comparative analysis.

142 On the importance of the relevance in particular May/Wierda, supra note 103, at 252. On the importance of the weight (or probative value) of the evidence see Boas, supra note 28, at 271 et seq.

143 Prosecutor v. Aleksovski, supra note 123, para. 15: “weight or probative value to be afforded to that evidence … usually be less than that given to the testimony of a witness …”. See also Boas, supra note 28, at 271.
by the need to ensure a fair trial” (ICTY Rule 89 (D)) or if it is obtained by methods which cast “substantial doubt on its reliability” (ICTY Rule 95, Art. 69 (7) (a) ICC Statute). As to the integrity of the proceedings as a whole, ICTY Rule 95 must be read together with Rule 42 concerning the rights of the suspect during investigation. It has been characterised by a Chamber as a “residual exclusionary provision” and complements the general exclusionary rule 89 (D) requiring a specific “source reliability”. Since the probative value and its effect of fair trial in the sense of Rule 89 (D) can often only be assessed after the examination of the evidence, it is also possible to first admit certain evidence and later exclude it.

In the Tadic hearsay decision, a Trial Chamber recognized that reliability is “a component of admissibility” and developed certain “indicia of reliability”. In Kordic and Cerkez, a Trial Chamber rejected the admission of witness statements into Prosecution testimony since this “would amount to the wholesale admission of hearsay untested by cross-examination . . . and would be of no probative value”. Phrased in positive terms, cross-examination is the most efficient remedy against unreliable evidence. Similarly, the Appeals Chamber excluded the statement of a deceased witness because of its unreliability: “A piece of evidence may be so lacking in terms of the indicia of reliability that it is not ‘probative’ and is therefore inadmissible”. The Chamber based the unreliability test, inter alia, on the lack of cross examination of the witness and the poor quality of the hearsay, not being “first hand”, but only “more removed” hearsay and, in addition,
diluted by various translations. Although the Chamber did not want to be understood its decision as “upsetting” the general principle of admission of hearsay evidence, it considerably limits the use of hearsay evidence and the decision was even interpreted as invoking the classical common law exceptions to the hearsay rule. Finally, the Kupreskic Appeals Chamber called for “extreme caution when assessing a witness identification of the accused made under difficult circumstances”.

As to documentary evidence, a Trial Chamber decided on the admissibility of certain documents on the basis of their probative value and reliability. While, for example, military reports and a war diary carry their “own authenticity” and “speak for themselves” and therefore are ordinarily admissible, documents, such as intelligence reports, based “on anonymous sources or hearsay statements . . . incapable of now being tested by cross-examination”, cannot be admitted since their probative value was so reduced to the point where it was “substantially outweighed by the need to ensure a fair trial” in the sense of Rule 89 (D).

To be sure, the Chamber concluded that the possibility of cross-examination by the defence, i.e., in this case to cross-examine any witness on the documents, was a fundamental requirement to ensure a fair trial. This does not mean, however, that documents may only be introduced through a witness for the purpose of their authentication – as common law would require but it does confirm the general human right of the accused to “examine or have examined the witnesses against him”, as recognized in Art. 14 (3) (e) CCPR, Art. 6 (3) (d) ECHR and adopted by Art. 21 (4) (e) ICTY Statute.

152 Prosecutor v. Kordic and Cerkez, supra note 123, para. 27: “... multiple translations in an informal setting create a much greater potential for inaccuracy than is the case when both the declarant and the witness speak the same language or when the original statement is given in court with professional, double checked simultaneous translation”.

153 Ibid., para 23 with fn 21.

154 Guariglia, supra note 138, at 670. See also Prosecutor v. Milosevic, Decision on Admissibility of Prosecution’s Investigator Evidence (IT-02-54-AR73.2), 30 September 2002, para. 21: basic issue whether summarised evidence would itself be admissible under Rule 89 (C).


157 Prosecutor v. Kordic and Cerkez, supra note 156, para. 43–44.

158 Ibid., para. 43–44.

159 Ibid., para. 40–41.

160 Cf. May/Wierda, supra note 103, at 257; Terrier, supra note 24, at 1308.

161 See, e.g., Prosecutor v. Kordic and Cerkez, supra note 123, para. 23. See also Prosecutor v. Delalic et al., Decision on Motion of Prosecution for Admissibility of Evidence, 19 January
Fair trial standards also govern the ICTY’s position with regard to the admission of transcripts and ‘affidavits’.\(^\text{162}\) While Rule 94\textit{ter}, relating to the latter issue,\(^\text{163}\) was deleted in the course of the December 2000 amendment of the Rules (see below), the question of the admission of transcripts from other proceedings remains relevant. Also, the use of deposition evidence according to Rule 71 can have a similar effect in replacing the immediate hearing of witness testimony at trial.\(^\text{164}\) The Appeals Chamber admitted the transcript of a testimony of Admiral Domazet in the Blaskic case as “hearsay” in the subsequent Aleksovski proceedings, since the possibility of cross-examination of the witness already existed in the Blaskic proceedings and there was no “particular line of cross-examination which would have been both relevant and significant to the Aleksovski trial but which would not also have been both relevant and significant to the Blaskic Trial”.\(^\text{165}\) This practice has been followed by the Kordic Trial Chamber which admitted a number of transcripts of witness testimonies from the Blaskic proceedings since the witnesses were cross-examined by the Blaskic Defence which had a “common interest” with the Defence in Kordic.\(^\text{166}\) On the other hand, in Delalic \textit{et al.}, it was decided that an Austrian police interview of one of the accused could not be admitted into evidence since the Austrian procedural rules of the time stood in “direct contradiction” to Art. 18 of the ICTY Statute and Rule 42 as regards the right to counsel.\(^\text{167}\) By way of Rule 5 this interview must be considered null in proceedings before the ICTY.\(^\text{168}\) This decision ultimately reflects the strong fair trial stand of the ICTY and can be directly linked to Rule 95 mentioned above.\(^\text{169}\)

**The increasing importance of written evidence**

While all the decisions quoted so far had as a starting point the principle of \textit{live testimony} as laid down in the former Rule 90 (A),\(^\text{170}\) this Rule was deleted

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\(^{163}\) See \textit{Prosecutor v. Vasiljević}, supra note 123, para. 46 et seq. (46).


\(^{165}\) See \textit{Prosecutor v. Delalić et al.}, supra note 144, para. 46 et seq. (50).

\(^{166}\) See supra note 7, at 283 et seq.; \textit{Terrier}, supra note 24, at 1300, 1303; also \textit{infra} note 206 and text.
with the 19th amendment to the Rules in December 2000. As a consequence, the rule on testimony by video-link has been relaxed and – more importantly – Rule 89 (F) introduced, which allows the Trial Chamber to “receive the evidence of a witness orally or, where the interests of justice allow, in written form”. This rule is complemented by Rule 92bis (A) according to which a “written statement” can be admitted “in lieu of oral testimony” if it “goes to proof of a matter other than the acts and conduct of the accused . . .”. The Rule goes on to provide a non-conclusive list of factors favouring the admission of written evidence and establishes a systematic set of rules on the admission of written evidence which basically rely on the previously quoted case law of the ICTY (see, for example, Rule 92bis (D) with regard to transcripts). Nevertheless, these amendments have been severely criticized, especially by common lawyers. Thus the former U.S. ICTY Judge Patricia M. Wald qualified them as a “180 degree turn from earlier emphasis on the ‘principle’ of live testimony”. She further considered that even before these amendments “the ICTY Rules represented a departure from common law rules of evidence”. What occurred in December 2000 she describes as “the emerging dominance of written testimony”.

Although it cannot be denied that the deletion of the principle of live testimony (Rule 90 (A)) and the admission of written testimony in the interests of justice (Rule 89 (F)) implies a significant normative change, the situation is much less dramatic than painted by our common law colleagues. It is true, for example, that the border line between evidence with regard to general matters and the acts and conduct of the accused may be blurred in specific cases, especially with regard to the responsibility of the superior. However, it also

19: “It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal . . .”; reprinted in Klip/Sluiter (eds.), supra note 27, at 217 (221) with a comment by Klip.

171 While former Rule 90 (A) allowed testimony by video-link only “in exceptional circumstances”, Rule 71bis makes its use exclusively dependent on a request by the parties and “the interests of justice”. Thus, the strict criteria established by Tadic (supra note 170) for the use of such evidence and the less weight attached to it can no longer be considered valid (see for these criteria infra note 136 and text; also May/Wierda, supra note 103, at 255–256).

172 Emphasis added.


174 Ibid, at 545.

175 Ibid, 545. Concurring Defrancia, supra note 75, at 1424 et seq. calling for “more advocacy” in favour of the adversarial model (1425).

176 Wald, supra note, 173, 550.

177 See Prosecutor v. Brdjanin & Talic, Decision on ‘Objection and/or Consent to Rule 92bis Admission of Witness Statements Number One’ Filed by Brdjanin on 16 January 2002 etc., 30
clearly follows from the wording of Rule 92bis (A) that a written statement cannot be admitted to prove the individual responsibility of the accused with regard to the specific charges in the indictment (“proof of a matter other than the acts and conduct of the accused . . . ”). In short, live testimony remains indispensable to prove the individual guilt of the accused. This view has been confirmed in a recent decision of a Trial Chamber in Naletilic & Martinovic. The Chamber further held that the chapeau requirement of Rule 92bis (A) must be extended, by means of teleological interpretation, to Rule 92bis (C) which allows, as recognized in comparative law, for written testimony in the case of death or other inability of the witness to attend the trial. As a consequence, written testimony under these circumstances can only be admitted if it does not refer to the acts and conduct of the accused. This applies generally to all forms of written testimony under Rule 92bis; in fact, para. (D) of this Rule contains the same formula. In addition, the ICTY case law, based on Art. 21 (4) (e) of the Statute and Rule 89 (B)–(D), has developed, as we have seen above, strict standards to ensure a fair trial for the accused, especially by testing the reliability of the evidence. These standards also restrict the use of written testimony. They are not supplanted or modified by Rule 92bis. In the Milosevic proceedings, the admission of the written statements of 23 prosecution witnesses was limited in number and those witnesses admitted were required to attend for cross examination; if a witness fails to appear, her written statement will not be admitted. Although the Chamber was of the view that the statements fall within the chapeau of Rule 92bis (A), i.e., they go to proof of matters other than the acts of the accused, they “relate to a critical element of the Prosecution’s
and, therefore, “the requirements of fair trial demand the accused be given the right” to cross-examination. In any case, if written evidence is admitted at all it will not possess the “same per se probative value” as live testimony. If there is a contradiction between the written and oral statements of a witness, the parties may ask the witness “to explain the discrepancy, inconsistency or contradictions” to the Tribunal which will later determine the probative value of the alleged contradiction.

On a more general policy level it must be recalled that the December 2000 amendments were a reaction to the criticism of the length of the proceedings at the Tribunal. This length – from 10 to 224 days (in the Milosevic case the Prosecution’s estimate for a joint trial of all three indictments was about 3 years) – is largely due to the high number of live witnesses – between 100 and 200 (in Milosevic an estimated 380-600) – the testimony of one witness on average taking one trial day. The reliance on witness testimony distinguishes the current trials from those of Nuremberg and Tokyo where the Prosecution case was largely built on documentary evidence. Although this may change in trials against military and political leaders who did not personally (“with their own hands”) perform any acts of violence, but acted behind the scenes and may therefore only be convicted through documentary and circumstantial evidence, witness testimony will remain crucial for the simple reason that modern dictators do not necessarily keep a detailed record of their atrocities for subsequent prosecutions. Thus, the Expert Group’s Report of 1999 recommended the use of other forms of evidence, in particular

186 Ibid., para. 24.
187 Ibid., para. 25.
188 Prosecutor v. Naletilic & Martinovic, Decision on the Admission of Witness Statements into Evidence, 14 November 2001 (IT-98-34-T), consideration 3. The “witness interview statements”, established without any judicial control, were not admitted into evidence.
190 See also Tochilovsky, supra note 26, at 632; Guariglia, supra note 138, at 677; McDonald, supra note 24, at 615 pointing out that the main goal of the December 1998 amendments was to expedite trials and improve the management of cases. In a similar vein May/Wierda, supra note 103, 259, 261 defending written evidence for the sake of accelerating proceedings; also Rodrigues/Tournaye, supra note 103, at 302.
192 See for other cases May/Wierda, supra note 103, at 250.
193 May/Wierda, supra note 5, at 743–744, 748; id, supra note 103, at 257; Orie, supra note 14, at 1460; Rodrigues/Tournaye, supra note 103, at 296.
194 See on the importance of documentary evidence Terrier, supra note 24, at 1308; on circumstantial (or indirect) evidence see May/Wierda, supra note 103, at 256.
written “prepared testimony”. Such flexibility is also justified in the light of the nature of the crimes to be prosecuted before International Criminal Tribunals. These are not ordinary national crimes but international ones which take place in a certain historical and political context. This context must first be understood and investigated to adequately impute individual responsibility to the various suspects involved in the criminal enterprise. To prove this context, different and more flexible methods must be allowed, as, for example, is expressed in ICTY Rule 93 with regard to evidence of a consistent pattern of conduct and in Rule 94 with regard to judicial notice. Finally, fears of common lawyers vis-à-vis the “inquisitorial” tendency of a judge-led procedure may be countered with the argument that these fears are much more justified in a trial before lay participants such as the jury. At the international level, it is expected to have a bench of professional judges with sufficient experience to weigh the evidence, taking into account the necessary considerations of justice and in particular the rights of the accused.

The Expert Group Report further stated that the Judges “expressed the belief that the prolonged nature of Tribunal proceedings was attributable . . . to not enough control . . . over the proceedings by the judges”. In other words, the length of the proceedings is taken as an argument for a more “inquisitorial” procedure which relies more on judicial direction than the free interplay of the parties. However, demands for a faster trial must have a hollow ring in the ears of common lawyers when at the same time the common law’s classical method to achieve this result, the guilty plea, has been restricted to such a degree that it cannot longer exercise this function as it does in an adversarial trial. Be that as it may, the debate about the length of the international proceedings is not only about efficiency but also about human rights since the right to a speedy trial is recognized in all major human rights instruments; indeed, a speedy trial is in the interest of the accused as long as it does not restrict her right to an adequate defence.

Report Expert Group, supra note 29, para. 85 et seq., 88 with recommendation 12: “written testimony submitted in advance in question-and-answer form, with an opportunity given to the other party later to object to questions, and the witness being later made available for cross-examination”, “preparation of a dossier . . . containing witness statements . . . to enable the Trial Chamber to select relevant witnesses for oral testimony and to admit certain witness statements as documentary evidence . . .

See also McDonald, supra note 24, at 621; similarly May/Wierda, supra note 103, at 249–250.

Cf. Dixon, supra note 24, at 87 et seq.; Terrier, supra note 24, at 1293–1294.

See also Safferling, supra note 7, at 285–286, 308, 371, 375. – For a general analysis of the rights of the accused see Zappalà, supra note 46, at 1319 et seq.

Report Expert Group, supra note 29, para 77.

Cf. Safferling, supra note 7, at 250 et seq.
Turning to the ICC, the principle is that of live testimony “in person”. The Court may, however, permit oral or recorded testimony by video or audio technology and the introduction of documents or written transcripts (Art. 69 (2), Rules 67, 68). The parties may – in an adversarial manner! – agree on certain facts but – civil law influence! – such an agreement is not binding on the Chamber; it may nonetheless consider the fact not proven and hear more evidence on it (Rule 69). There are also specific rules with regard to evidence in cases of sexual violence (Rules 70–72). The use of audio or video technology, widely practised by the AdHoc Tribunals, implies the admission of previously recorded evidence and thus entails a deviation from the principle of immediacy; therefore, the ICTY has developed strict criteria to use such technology: the testimony must be sufficiently important, the witness must be unwilling or unable to attend and the right of confrontation of the accused must be preserved. The use of written transcripts is certainly more dangerous since it does not only affect the principle of immediacy but also the principle of orality. For this reason, it is to be welcomed that the ICC chooses a more restrictive approach than the ICTY requiring that the parties have the possibility to examine the witness at one point of the proceedings (Rule 68). This approach takes into account Art. 6 (3) (d) ECHR and the jurisprudence of the Strasbourg Court according to which an effective right of defence requires that the accused had, at least at one point during the proceedings, the possibility to question the witness.

Further, according to ICC Rule 121 (10), “a full and accurate record of all proceedings before the Pre-Trial Chamber” shall be maintained by the Registry (see also Rule 131 (1)), i.e., in essence the evidence presented to the Pre-Trial Chamber at the confirmation hearing (disclosure rules!) must be documented. This record will be sent to the Trial Chamber (Rule 130). Although the Rules leave conspicuously open (“constructively ambiguous”)...
whether the Trial Chamber shall or may inspect the record – Rule 131 only refers to the Prosecutor, Defence, State representatives and victims –, the mere existence of the record (although it may not be as complete as a French “dossier”) entails - from a common law perspective – the risk that the Trial Chamber will rely on this “record” instead of deciding on the basis of the evidence it receives in the actual trial. The right interpretation obviously also depends on the function and role of the presiding judge during trial: if she really wants to direct the trial, as Art. 64 (8) ICC-Statute allows her to do, she may need the knowledge from the record to do so effectively, if she leaves the conduct of the trial – in an adversarial manner – to the parties she does not need this knowledge. Ultimately, as shown by the practice of the Ad-Hoc Tribunals, the judges may well choose the option they know best from their national systems. The limit is clearly laid down in Art. 74 (2) ICC Statute according to which the judgement must be based “only on evidence submitted and discussed …at the trial”, i.e., the record may only play a supportive function at most. Such a function may, however, always be necessary given the factual and legal complexities involved in war crimes trials.

In sum, it is fair to say that the rules of evidence adopt, despite the broad powers of the Trial Chamber, a mixed approach combining civil and common law features. The practical application of these rules will ultimately depend on the legal background of the judges who are given sufficient discretion to conduct trials in accordance with their own preferences.

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Statements, 28 January 1997 (ICTR-96-4-T): “…all such statements shall be admitted as evidence and form part of the record”. See also Bitti, supra note 26, at 278.

Cf. Orie, supra note 14, at 1485; also on the ICTY dossier at 1470–1471.

See for the “civil law-common law divide” on this issue Brady, supra note 56, 424–426; id., supra note 56 (Setting), 269–271; also Lewis, Trial Procedure, in: Lee, supra note 24, 539–553, at 540; Tochilovsky, supra note 26, at 634 with note 26.

Prosecutor v. Dokmanovic, Order of 28 November 1997, IT-95-13a-PT: “…[P]erusal of such documents by the Trial Chamber is primarily for the purpose of promoting better comprehension of the issues and more effective management of the trial …”. See the examples by Harhoff, supra note 24, at 653–654.

Insofar even Brady supra note 56 (Setting), 272 and Bitti, supra note 26, at 279 agree. Safferling, supra note 7, at 188.

See for the same conclusion with regard to the record of the proceedings supra note 145; with regard to the witness regime and the search of the truth see Kreß, supra note 12, at 353, 382 (“open procedural framework”).
Other aspects

In both Tribunals the judgement must be accompanied by a reasoned opinion (Art. 23 (2) ICTY Statute, Rule 98ter (C); Art. 74 (5) ICC Statute), unknown in common law jury trials.\textsuperscript{216}

As to the appeals procedure,\textsuperscript{217} both ICTY and ICC allow for an appeal of the Prosecutor against acquittal (Art. 25 (1) ICTY Statute; Art. 81 (1) (a) ICC Statute). In common law systems such an automatic right of appeal against an acquittal does not exist\textsuperscript{218} since, for most common lawyers, it is a deeply troubling, if not utterly uncivilized concept to subject an accused to a criminal trial for a second time arising from the same act; it constitutes a violation of the rule against double jeopardy (\textit{ne bis in idem}).\textsuperscript{220} While the generous scope of the right to appeal resembles the civil law, the appeals procedure is based on the common law since it does not allow a trial \textit{de novo} but only a review of the decision on clearly identified points of fact and law with limited opportunities for new evidence.\textsuperscript{221}

The two act or stages approach of the adversarial system with regard to adjudication (finding of guilt) and the sentence\textsuperscript{222} was originally provided for in the ICTY but latter the two acts were merged – again for reasons of

\textsuperscript{216} This is overlooked by Robinson, supra note 14, at 575 if he considers a reasoned written opinion as a feature of both systems.


\textsuperscript{219} “Ne” not “non” according to the grammatical rule governing prohibitive commands, e.g., \textit{ne dubitaveris} (do not hesitate) (see Bayer-Lindhammer, Lateinische Grammatik, 2nd ed. 1990, at 200; see also www.facstaff.bucknell.edu/gretaham/Teaching/Latin102).

\textsuperscript{220} Cf. Thomas III, supra note 218, at 229 et seq.; Stuckenberg, supra note 218, at 15–16; Brady/Jennings, Appeal and Revision, in: Lee, supra note 4, 294–304, at 297; Roth/Henzelin, supra note 217, at 1543; Creta, supra note 74, at 411–412 calling for a change of the ICTY Statute and Rules in this respect. See also Safferling, supra note 7, at 332-333 arguing that an appeal against acquittal is not prohibited by human rights. According to Behrens, supra note 125, at 440 this (common law) prohibition does not apply to a non-jury trial (cf. Hatchard/Huber/Vogler, supra note 19, at 237).

\textsuperscript{221} Orie, supra note 14, at 1474, 1490. - As to the admission of additional evidence, according to ICTY Rule 115, different criteria have been developed in the case law which, in any case, leave a wide discretion to the Appeals Chamber (\textit{Prosecutor v. Kupreskic}, supra note 63, para. 42 et seq. (76) with reference to the civil and common law approach and the earlier case law). This Rule was amended in October 2002 (supra note 1) limiting the motion for additional evidence “to the specific finding of fact” of the Trial Chamber to which it is directed.

\textsuperscript{222} For more details see Safferling, supra note 7, at 269 et seq., 372 convincingly arguing – from a human rights perspective – in favour of the separation.
efficiency – by Rule 87(C). The ICC Statute leaves the decision on a separate sentencing hearing basically in the hands of the judges (Art. 76 (2); Rule 143).\(^{223}\)

As to the *binding effect* of the decisions of the Appeals Chamber on Trial Chambers – generally recognized in common law under the doctrine of binding precedent – the Appeals Chamber ruled in *Aleksovski* that the *ratio decidendi* of its decision is binding,\(^{224}\) thereby following the common law approach. A more flexible approach can be found in Art. 21 (2) ICC Statute according to which “the Court may apply principles and rules of law as interpreted in its previous decisions”,\(^{225}\) i.e., it is not obliged to follow these previous decisions but has a broad discretion whether or not to do so.\(^{226}\)

The possibility of sanctioning defence lawyers by way of *contempt* proceedings (ICTY Rule 77, Art. 70, 71 ICC Statute) is a traditional common law mechanism which is rather alien to the civil law.\(^{227}\) According to the Appeals Chamber, the contempt power is an “inherent jurisdiction of the Tribunal” and is intended to ensure that the exercise of jurisdiction is not frustrated and its basic judicial functions safeguarded.\(^{228}\) The adoption of rules to prosecute contempt falls within “other appropriate matters” within the meaning of Art. 15 of the ICTY Statute.\(^{229}\)

**Conclusions**

At the level of international criminal procedure, the traditional common-civil law divide has been overcome. Although most rules can be traced back to a common or civil law origin, they are rendered *sui generis* and unique in


\(^{225}\) Emphasis added.

\(^{226}\) Cf. *McAuliffe de Guzman*, in: Triffterer, supra note 125, art. 21 mn. 21–22.

\(^{227}\) See generally *Oosthuizen*, Of misconduct, contempt, false testimony, rule mutations etc., in: May et al. (eds.), 28, 387–402; *Kay/Swart*, supra note 46, at 1432 et seq.; on the specific offences, see *Terrier*, supra note 24, at 1309 et seq.


their application before the International Criminal Tribunals.\textsuperscript{230} Thus, it is not important whether a rule is either adversarial or “inquisitorial” but whether it assists “the Tribunals in accomplishing their tasks . . .”\textsuperscript{231} and whether it complies with fundamental fair trial standards.\textsuperscript{232} Given the widespread criticism in this respect,\textsuperscript{233} it is necessary to recall that the ECHR has recognized that the procedure before the ICTY offers all necessary due process guarantees, including the impartiality and independence of the Tribunal.\textsuperscript{234} Although it is true that “substantial problems of coherence and legal security” exist in international criminal procedure “because each system [common and civil law] represents a carefully structured balance between the rights of the parties to the trial”,\textsuperscript{235} it is no solution to these problems to establish common and civil law chambers as recently proposed by some common law colleagues.\textsuperscript{236} This would deepen the differences between the two systems instead of using the chance to develop a truly mixed international criminal procedure which deserves to be called \textit{sui generis}.\textsuperscript{237}

In assessing whether one system is better suited than the other to be applied in international criminal proceedings, one should, following an issue-oriented approach,\textsuperscript{238} distinguish between the \textit{pre-trial and trial phase} of the proceedings. As to the former, the civil law approach seems to be advantageous with regard to the \textit{equality of arms} between Prosecution and Defence. The experience of the \textit{Ad Hoc} Tribunals shows that the Defence – apart from the fact that it enters the case at a very late (pre-trial) stage – never

\textsuperscript{230} \textit{Prosecutor v. Delalic et al.}, supra note 27, para. 15: “A Rule may have a common law or civilian origin but the final product may be an amalgam of both . . ., so as to render it \textit{sui generis}”. Conc. \textit{Robinson}, supra note 14, at 580; also \textit{Defrancia}, supra note 75, at 1390, 1436.

\textsuperscript{231} \textit{Dixon}, supra note 24, at 98.

\textsuperscript{232} Cf. also \textit{May/Wierda}, supra note 5, at 753 et seq., 764. Similarly \textit{Robinson}, supra note 14, at 569 and passim; fairness as an “overarching requirement”. Also \textit{Safferling’s} human rights approach, supra note 7, at 2, 20–21 and passim.

\textsuperscript{233} See, for example, \textit{Defrancia}, supra note 75, at 1401 (“priority . . . to basic due process protections”) and passim; \textit{Katz}, infra note 240, at 116 et seq., arguing for stricter fair trial standards.


\textsuperscript{235} Cf. \textit{Harhoff}, supra note 24, at 650; in a similar vein \textit{Orie}, supra note 14, at 1453, 1494–1495 pointing out, \textit{inter alia}, that the rules of evidence “are closely linked to the procedural system in which they function”.

\textsuperscript{236} Crit. \textit{Bitti}, supra note 26, at 288.

\textsuperscript{237} See supra note 27.

\textsuperscript{238} Cf. \textit{Damaška}, supra note 8, at 5. The rationale of this approach is to look at the issues instead of the terminology or ideology, see the discussion on inquisitorial\textendash adversarial at the beginning of this paper.
has the same or even similar possibilities as the Prosecution to prepare its case.\(^{239}\) This is partly due to the lack of human resources which makes it impossible to dispatch persons to the crime scenes to actually “investigate” the case; more importantly, however, it is due to the dependence on State co-operation in the gathering of evidence. While it may be difficult for the Prosecution to enter the territory of a particular State for investigative purposes it is often completely impossible for the Defence if the State refuses to co-operate. There are various cases where defence counsel were denied permission to enter the territory of the Republika Srpska and Rwanda.\(^{240}\) In a case like Milosevic, where the prosecution heavily depends on intelligence information, would anyone seriously believe that the CIA or any other secret service would voluntarily co-operate with private defence lawyers? Thus, the only possibility for the Defence to obtain the necessary information for the preparation of its case is that the Prosecution investigates in both directions and discloses its information to the Defence. Indeed, this is the reason for the strict disclosure obligations of the Prosecution.\(^{241}\) It may be argued that, from a conceptual perspective, an impartial prosecutor, as provided for in the civil law system, guarantees at least a certain protection for the accused and may, if willing, ensure that the accused’s rights are respected. This point was also stressed during the Preparatory Committee negotiations before the Rome conference.\(^ {242}\)

Looking at the proceedings as a whole and the trial in particular, a more active or – to use the words of the Expert Group – “interventionist role” for the judges would appear to guarantee a more efficient management of the trial and thus contribute to shortening the proceedings. Although the Expert Group Report did not explicitly suggest “that case management improvements cannot be made in the common law adversarial system”,\(^ {243}\) its analysis and recommendations\(^ {244}\) clearly argue for a judge-led procedure in the sense


\(^{240}\) See *Harhoff*, supra note 24, at 656; *Kay/Swart*, supra note 46, at 1424. For a general discussion on the limitations of the defense with references to the ICTY case law, see *Katz*, International Criminal Courts and Fair Trials: Difficulties and Prospect, 27 Yale Journal of International Law (2002), 111–140, at 121 et seq.

\(^{241}\) In *Prosecutor v. Krajisnik & Plavsic*, supra note 71, the Chamber invoked the equality of arms principle in favour of disclosure. For a general discussion, see *Prosecutor v. Tadic*, Judgement, 15 July 1999 (IT-94-1-A), para. 43 et seq. For a similar argument see *Prosecutor v. Brdjanin & Talic*, supra note 81, para. 43 et seq. For a similar argument see *Prosecutor v. Brdjanin & Talic*, supra note 81, para. 43 et seq.

\(^{242}\) Cf. *Guariglia*, supra note 26, at 234.

\(^{243}\) Expert Group Report, supra note 29, para. 77.

\(^{244}\) Ibid., para. 75–77 and recommendations 7 to 9.
of the civil law tradition.\textsuperscript{245} Indeed, it cannot be denied that a trial directed and managed by an experienced judge can avoid delays produced by the free and uncontrolled interplay of the parties. The same applies to the pre-trial phase coordinated by a Pre-Trial judge (ICTY Rule 65\textit{ter}).\textsuperscript{246} On the other hand, agreements between Prosecution and Defence, reached under the supervision of a Judge should not be rejected \textit{a limine} by civil lawyers since they are an important element to shorten proceedings.\textsuperscript{247}

It must not be forgotten, however, that procedural rules only provide for a general framework, the smooth functioning of which depends, ultimately, on the procedural protagonists, especially the judges.\textsuperscript{248} A truly mixed, \textit{sui generis} procedure requires Prosecutors, Defence Counsel and Judges who have knowledge of both common and civil law and are able to look beyond their own legal systems.\textsuperscript{249} Although the existing procedural rules leave enough room for both common and civil lawyers to conduct proceedings in accordance with their national law, the practice of the Ad Hoc Tribunals, especially of the ICTY, shows that national boundaries in criminal procedure may be overcome with increasing experience and practice within the framework of a system of international criminal justice which is heading towards a harmonic convergence of both systems. In the future, a much greater problem may be to accommodate legal systems not based on western traditions as, for example, the Islamic law.\textsuperscript{250}

\textsuperscript{245} Even common lawyers recognize this, see for example \textit{McDonald}, supra note 24, at 616 arguing for a more active role of the judges to make trials more expeditious.

\textsuperscript{246} See already supra note 62 and text.

\textsuperscript{247} See already \textit{Prosecutor v. Erdemovic}, supra note 98 (joint separate opinion \textit{McDonald/Vohrah}), para. 2: “common law institution of the guilty plea should . . . find a ready place in an international criminal law forum . . . ”.

\textsuperscript{248} Similarly \textit{Orie}, supra note 14, at 1493, 1494.

\textsuperscript{249} See also \textit{Harhoff}, supra note 24, at 654.

\textsuperscript{250} Cf. \textit{Amann}, supra note 15, at 851 et seq. I have already earlier referred to China as a \textit{sui generis} system, see \textit{Ambos}, supra note 20, 90.