Paradise Postponed? – For a judge-led generic model of international criminal procedure and an end to "draft-as-you-go"

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Abstract

Since 1945, international criminal justice has been one continuous construction site, an expression of the attitude of international stakeholders and policy-makers that favours temporary solutions to contemporary problems. Even with the creation of the ICC that has not really changed. This chapter will set out a few fundamental and rather radical ideas that aim at initiating a thorough rethinking of the way criminal proceedings at the international level are regulated and run today. It sees itself very much as a call for a principled re-evaluation and for a move away from the attempts of the last two decades of arriving at a genuine amalgam of diverse systems by the method of judicial trial and error. The existing model(s) is/are an exemplary expression of the temporariness of international law, because it/they proceed(s) from a refusal by international law-makers to engage in drafting a permanent model that retains fairness standards while striving for maximum efficiency and that is meant to be applied across the board to any (new) tribunal – an approach that would lead to much greater certainty of law than is currently the case because of an increase in cross-institutional comparability. The chapter contends that while both adversarial and judge-led systems in their own national settings can achieve comparable levels of fairness, they differ in efficiency and that a judge-led model is better suited for the international arena and should be made the foundation for any future. permanent procedural framework. However, the temporary nature of the present system which mainly uses adversarial models is based to a large extent on an unprincipled reliance on supposedly "ready-made" and "tried and tested" solutions from as well as the experience of staff employed at previous tribunals. The use of the adversarial model is thus not based on a principled evaluation of its usefulness and effectiveness in the international context but on a default attitude of the lawyers creating and populating international tribunals, and possibly the diplomatic community in the wider sense.

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Paradise Postponed? – For a judge-led generic model of international criminal procedure and an end to "draft-as-you-go"

1. Introduction

Since 1945, international criminal justice has been one continuous construction site, an expression of the attitude of international stakeholders and policy-makers that favours temporary solutions to contemporary problems. Even with the creation of the ICC that has not really changed. This paper will try to set out a few fundamental and rather radical ideas that aim at initiating a thorough rethinking of the way criminal proceedings at the international level are regulated and run today. The author, prior to his ten years as an academic in a common law univesity in England, served in the German judiciary for 13 years, in an international tribunal for two, and has had first-hand experience of the English criminal justice system as a barrister's pupil; he thus hopes to have gained a deeper insight into the practical as well as theoretical framework of both civil and common law procedural models. The paper does not make any claim about being able to address all of the basic issues of all stages of the proceedings and will focus mainly on the trial phase in the wider sense, i.e. from the preparation of the indictment onwards,as the centrepiece of criminal proceedings; it sees itself very much as a call for a principled re-evaluation and for a move away from the attempts of the last two decades of arriving at a genuine amalgam of diverse systems by the method of judicial trial and error.[1] The history of international criminal procedure until the advent of the ICC has substantially been one of cobbling together building blocks from different traditions in order to create a new *sui generis* system based on extrapolations from Article 38(1) of the Statute of the ICJ and the history of Nuremberg, Tokyo and the other post-war military tribunals. This eclectic approach has unfortunately been combined with a plethora of regulatory lacunae left to the judges of the tribunals by the international (for want of a better word:) law-making bodies, a criticism that applies to the ICC as well, albeit clearly to a lesser degree. Yet, the recent spate of cases over the accused's duty to be present at the hearings in the context of the Kenya trial and the clear political overtones in the decisions, including the fact that the Assembly of States Parties (ASP) later caved in to the pressure from the African Union, should be sufficient evidence that even fairly basic and otherwise settled procedural concepts can acquire allergenic qualities in the system of international criminal law when they come into contact with the catalyst of international comity of states.[2] The 'sui generis' system seems nonetheless to have had mainly

[1] See on the issues of 'legacy' and the different 'goals' of international criminal justice the wide-ranging chapter by Eser, 2011 at 108 ff. Eser already identified many of the same issues referred to in this paper. Yet, he appeared to refrain from making similarly drastic demands.

[2] Only recently was this made plain again at the national level in *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] All ER (D) 112 (Jan), when the Court of Appeal stated that in the

adversarial overtones.[3] Even in cases where the statute of a tribunal, such as the Special Tribunal for Lebanon (STL), provides for the adaptation of a civil law model,[4] the court's judges in their rule-making power have, as will be shown below, blindsided the drafters of the Statute and introduced a way for the court to revert to what is in essence an adversarial model. The adversarial procedure is then infused with token civil law content, which creates unnecessary friction – for example, with the introduction of the use of written statements as evidence at the ICTY in the wake of its completion strategy, i.e. a measure meant solely to speed up the trials but which also had ramifications into the legitimacy of the rules of evidence and the fairness to the accused, as well as their right to confront witnesses in an otherwise adversarial setting, leading Judge David Hunt to remark famously in the *Milosevic* case that the interpretation of Rule 92*bis* by the Appeals Chamber majority left a "spreading stain" on the reputation of the ICTY[5]. Interesting as the developments in international criminal law may appear if viewed as a

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context of a murder trial against a British national who had provided intelligence to US forces who then used it for a deadly drone attack, a finding that the operator of the drone was guilty of murder would 'inevitably be understood by the US as a condemnation of them' – at paras 34-37, 44, 55, 56.

[3] See, for example, the admission by Judge O-Gon Kwon of the ICTY in a speech in 2011, in Sluiter 2013, at 1417.

[4] The Cambodian Court, the ECCC, has a judge-led trial model as far as questioning of witnesses is concerned that is similar to that of the Lebanese law – see Sluiter 2013, at 703 and the text below.

[5] *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003), 21 October 2003, paras. 19 – 22 (footnotes omitted). Judge Hunt was quite vociferous in his criticism and some excerpts from the dissent are warranted. He said, citing an English judge, Lord Atkin: I know of only one authority which might justify the suggested method of construction: "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all". Judge Hunt then went on: The Appeals Chamber […] has no power to alter the ordinary meaning of words used in the Rules. The tender of the written statement of a witness to take the place of his oral testimony on the matters with which that statement deals, and notwithstanding that the witness has attested to its truth orally, necessarily falls within the phrase "the evidence of a witness in the form of a written statement in lieu of oral testimony" in Rule *92bis*(A). Accordingly, it is admissible only insofar as it goes to proof of a matter other than the acts and conduct of the accused or (as a matter of discretion) the acts and conduct of those in close proximity to the accused. The Majority Appeals Chamber Decision drives a horse and cart through the previous interpretation of Rule *92bis*, and it seriously prejudices the accused[…]. I recently stated, in an appeal from the Rwanda Tribunal, that the very proper endorsement by the Security Council "in the strongest terms " of the Completion Strategy of the Yugoslav Tribunal should not be interpreted as an encouragement by the Security Council to the Tribunal to conduct its trials so that they would be other than fair trials. It is necessary to repeat that statement in the present case in order to apply it directly to the Majority Appeals Chamber Decision. That Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore its previously carefully considered interpretations of the law or of the procedural rules, with a consequential destruction of the rights of the accused enshrined in the Tribunal's Statute and in customary international law. The only reasonable explanation for these decisions appears to be a desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion. I have been unable to agree with those decisions because I do not believe that, in doing so, I would be performing my duties "honourably, faithfully, impartially and conscientiously " as the solemn declaration which I took when I became a judge of the Tribunal requires me to do. The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused to which reference is made in the previous paragraph. If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights. This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the

'legal laboratory", the fact remains that courts, which deal with putting people away for many years for horrendous crimes, must first of all strive for legal certainty. This chapter will argue that the current unprincipled state of affairs is unsatisfactory, that mostly adversarially-based mixed systems make little sense in the international forum,[6] are responsible for delays and disadvantaging the defence, and that a move to a judge-led system is necessary, which protects the defence and keeps the prosecution in check by, among other things, ensuring sanctions for premature assurances[7] of trial-readiness – an issue brought into sharp relief again at the STL in the controversy about joining the case of a fifth accused at the eleventh hour to that of the four fist accused when the trial was weeks away, when their case had been developing for far over a year and the identity of the fifth accused had been known all along as well.

With the rise of the major role for victims' groups in pre-trial and trial proceedings, the defence in a party-driven model is now facing a second adversary who is a purely interest-driven player in the game, one whom the judges will be reluctant to control because of the rising global criminal justice policy emphasis on victims' rights – an emphasis that tends to forget asking itself the question *whose* victims they are before a final conviction is entered. In the case of mass atrocities based on factually complex and drawn-out armed conflicts with a vast number of affected people, linking the fate of any *one* of the victims to the person in the dock is highly problematic and runs the risk of politicising the trial as well as demonising the defence. A model based in principle on judicial non-interference in the process may not be fit for purpose to counter these concerns, which have been recognised even by seasoned common law? lawyers.[8]

The existing model(s) is/are an exemplary expression of the temporariness of international law, because it/they proceed(s) from a refusal by international law-makers to engage in drafting a model that retains fairness standards while striving for maximum efficiency and that is applied across the board to any (new) tribunal – an approach that would lead to much greater certainty of law than is currently the case because of an increase in cross-institutional comparability.[9] The

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Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation.

[6] The author is aware that this attitude is bucking the current trend in international criminal law which still attempts to arrive at a proper and reliable amalgamation or even celebrates diversity; see for reference only the recent special section of the 2013 volume of the Leiden Journal of International Law: Nerlich 2013, at 777; Doherty 2013, at 937; Jackson and M'Boge 2013, at 947; and Byrne 2013, at 991.

[7] There may, however, also be different understandings of what the function of an indictment is. In the ICTY it seemed that it had almost the effect that an authorisation by the ICC Pre-Trial Chamber for the initiation of an investigation has; in civil law countries such as Germany, for example, the indictment is the final product of the investigations.

[8] Simons 2006. 'Steven Kay, a British court-appointed lawyer for Mr. Milosevic, said the adversarial system "utterly fails to deal with trials of the Milosevic type.'

[9] One must praise the Herculean effort of the contributors to the immensely useful book edited by Sluiter, 2013, at a synthesis of the existing law and practice of international criminal procedure, and the recommendations offered for future policy directions. Proceeding in their research and recommendations as they did from the existing and historical international tribunals and courts as a basis for their extrapolations, a really drastic departure from the current framework did not, indeed could not emerge, especially in an environment where the judges are in possession of the case file in advance of the trial. In the loose context of the trial stage this reluctance can be seen at the examples of an aversion to legal re-characterisation of facts based on the defining function of the indictment (at 487 f.), separate sentencing hearings (at 543), the order of the presentation of evidence and the role of the judges – where express reference is made to the "common law concern about excessive judicial interference in the

chapter contends that while both adversarial and judge-led[10] systems[11] in their own national settings can achieve comparable levels of fairness, they differ in efficiency and that a judge-led model is better suited for the international arena. It is useful to provide the conceptual setting against the background of which all the following arguments should be read, and these words could be repeated as an introduction under each and every subheading. The temporary nature of the present system which mainly uses adversarial models is based to a large extent on an unprincipled reliance on supposedly "ready-made" and "tried and tested" solutions from, as well as the experience of staff employed at previous tribunals. The use of the adversarial model is thus not based on a principled evaluation of its usefulness and effectiveness in the international context but on a default attitude of the lawyers creating and populating international tribunals, and possibly the diplomatic community in the wider sense. In other words, the chapter argues that the current approach is *de facto* using the adversarial model as a drafting template for almost any new tribunal without engaging in a thorough and needs-based investigation of the demands of efficiency underlying international criminal justice. As will be shown at the example of the Lebanon Tribunal, sometimes the opposing intentions of the drafters of a Statute are undermined by adversarially-minded judges. The author does not advance the suggestion that the adversarial model as such lacks capacity for permanence, and if the international justice system had used the inquisitorial approach in the same manner as it has the adversarial one, the same comments would apply *mutatis mutandis*. Yet, as things stand at the moment, the temporary quality is *factually* tied to the adversarial model. If we want to advance to a permanent and coherent procedural paradigm, we must now undertake such a principled study and a needs-based analysis; this chapter will argue that the outcome of such an examination should lead to the adoption of a judge-led procedure.

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This new paradigm will also require a new kind of international judge, namely persons with massive trial experience and the capacity to run a trial pro-actively – a radical departure from the (alleged) ideal of the impartial and more or less passive umpire that still pervades much of the thinking in international criminal justice and allows for the recruitment of candidates who do not have that experience – although gratifyingly this particular concern seems to be on the decline.

The author is under no illusion that anything like this will happen anytime soon, yet the debate should be had and the aim should be to arrive at a coherent and monolithic concept of international criminal procedure that rises above the petty and often still preciously guarded idiosyncracies of each system, as well as the lack of trans-systemic understanding among the judges and practitioners. It is no secret that the legitimacy of international criminal courts, and of international criminal law in general, is still hotly contested in many parts of the world for political and legal reasons, and the *ad hoc* manner of establishing them with the often ensuing

examination by counsel" (at 654), judicial powers to question, subpoena and control the examination of witnesses and control over the sequence of case presentation – recommendations: none – (at 706, 720, 733, 743).

[10] This expression seems preferrable to the historically charged "inquisitorial", although the latter is still the more common usage.

[11] Although the author has previously bemoaned the fact that other procedural traditions originating outside the common law-civil law dichotomy have been persistently kept out of the picture in international criminal law, one must realise the practical necessities and accept that for the purposes of advancing towards an international unified model, the discussion will mainly take place between the adversarial and the judge-led paradigms as spawned by the common and civil law traditions. It is also unclear from the existing published materials to which extent other systems are willing or able to contribute meaningfully to the debate.

non-chalant disregard exhibited by the international players for the legal system of the respective target country serves as an additional irritant. If there was a permanent system that applied to all international trials and which everyone was apprised of in advance, no-one could legitimately complain about – at least – this facet of the picture anymore.

2. A case in point – the STL

To clarify the point made about the STL and temporariness, it bears remembering that this tribunal was not meant to address international offences such as war crimes, crimes against humanity or genocide, but a simple if major terrorist attack in Lebanon and that it should apply substantive Lebanese law. The international involvement was merely due to the inability of the Lebanese judicial system to deal with this kind of violence itself. That did not stop the STL Appeals Chamber with its former President Cassese as reporting judge from trying to internationalise the domestic law on terrorism in its (in)famous Rule 176*bis* decision[12] and from muddying the waters by introducing international concepts of participation and multiple charging when the need for that was not entirely clear from looking at the domestic law. The procedural part was left in a mixed state but especially on the conduct of the trial proceedings there was an interesting reference in the STL Statute, namely Article 20(2):

> Unless otherwise decided by the Trial Chamber *in the interests of justice*, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.[13]

This mode of questioning is clearly reminiscent of the judge-driven civil law model which applies in Lebanese law, unless the interests of justice require something else. The Rules of Procedure and Evidence (RPE) drafted by the judges provide for a means of avoiding the statutory approach, and it is the reasoning that is interesting.

> Rule 145 Questioning of Witnesses
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> (A) Where the Trial Chamber *considers that the file submitted by the Pre-Trial Judge enables it to adopt the mode of proceeding outlined in Article 20(2) of the Statute*, after the opening statements of the Parties and of any victim participating in the proceedings, each witness shall first be questioned by the Presiding Judge and any other member of the Chamber, then by the Party that has called the witness, and subsequently cross-examined by the other Party, if the other Party elects to exercise its right of cross-examination. The witness may also subsequently be re-examined by the calling Party.
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> (B) Where the Trial Chamber considers that the file submitted by the Pre-Trial Judge *is not such as to enable it to adopt the mode of proceeding envisaged in Article 20(2) of the Statute*, after the

[12] *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism. Conspiracy, Homicide, Perpetration, Cumulative Charging of 16 February 2011 – online at http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis – but see *Prosecutor v. Ayyash et al.*, Case No. STL-ll-01IPT/ACIR176bis, Decision on Defence Requests for Reconsideration of the Appeals Chamber's Decision of 16 February 2011, of 18 July 2012, para. 37, where the Appeals Chamber – this time without Judge Cassese – already adopted a more flexible approach.

[13] Emphasis added.

> opening statements of the Parties and of any victim participating in the proceedings, the witnesses called before the Trial Chamber shall first be examined by the Party that called them, then cross-examined by the other Party, if the other Party elects to exercise its right of cross-examination. The witness may also subsequently be re- examined by the calling Party. The Presiding Judge and other members of the Trial Chamber may at any time ask questions.
>
> (C) The Trial Chamber *may decide to depart from the modes of proceeding provided for in paragraphs (A) and (B) wherever it considers that this is required by the interests of justice*.[14]

Note that Article 20(2) talks about the interests of justice as the only criterion for deviating from the normal order of things. Rule 145(A) introduces a new concept, namely the question whether in effect the prosecution dossier submitted by the pre-trial judge as the 'case file' is sufficient for the trial chamber judges to run the trial themselves. It already deviates without any apparent justification from the clear order established in Article 20(2): Court – prosecution – defence; the Statute does not refer to who called the party. It is in substance identical with the rules under Lebanese criminal procedure, namely Articles 180 and 181 of the 2001 Code of Criminal Procedure (CCP) for proceedings before the single judge and Articles 255 – 260 CPP for trial before the full criminal court; Article 260 CPP even restricts the right of the parties to ask questions of witnesses in that they have to be made through the presiding judge. The CPP is available on the STL's website and, indeed, one of the Lebanese appellate judges was responsible for its publication at the time the CPP was passed.

Rule 145(B) then takes the bold step to say that if the case file is not sufficient for the judges to proceed as under Article 20(2), the chamber may revert to adversarial mode. In other words, if the file does not provide a sound basis to the standard required to follow the procedure as foreseen in the hiearchically superior Statute, another procedure can be followed which divests the trial chamber of the control of the presentation of the evidence and shifts control to the prosecution. This is in substance nothing else but allowing the prosecution – via the pre-trial judge – to declare trial readiness when it is in fact not ready, because if it were, then the file would contain all the material the trial chamber would need to proceed as ordered by Article 20(2). How this can be in the interests of justice is unclear, to say the least. It might in extreme cases also mean that even though the case file was as complete as possible at the time, the judges could revert to adversarial mode if none of them was comfortable with or experienced in running a pro-actively judge-led trial.[15] Given the systemic or professional provenance of many international judges in general that would not seem to be an unreasonable inference.

[14] Emphasis added?

[15] In this context, it is not uncommon to hear the question "How does this affect justice?". This question seems to proceed from an undefined and almost nebulously philosophical idea of justice that is distinct and uncoupled from any of its real-world incarnations within a particular procedural framework and is akin to asking whether the trial would not be "fair" otherwise. The answer to that is, firstly, that, as we have accepted, both adversarial and inquisitorial models can achieve comparable levels of fairness but as we shall argue, they do not reach the same degree of efficiency. Secondly, and more to the theoretical point, it is the procedural model as set out in a statute etc. that defines the ambit of the powers of the prosecution and the judges, as well as the rights of the defence and the victims. It is dangerous to tamper with a balanced system based on whims arising from perceived individual injustices, as this tends to upset the balance and lead to inroads into a party's legal positions, and more often than not those of the defence. Finally, although positivism does no longer have a very favourable press these days when the famous Radbruch Formula about unjust law is trotted out regularly, it bears reminding oneself that to rely on a notion as abstract as that of "natural justice" for use – in an individual case – as a substantive corrective criterion to procedural rules laid down by (a written) law is at the end of the day nothing short of allowing judges to discard

In the context of the STL there would have been enough experienced Lebanese judges who could have used the Lebanese system effortlessly. The presiding judge did not have to be an international one. No-one suggests that the Lebanese judges would be biased merely *qua* being Lebanese – otherwise they should not be on the bench under the criteria of Article 9(1) of the Statute. Yet, the Lebanese judges would have been uncomfortable with and lacked experience in the largely adversarial set-up brought about by the RPE. Why this was done when Article 28(2) of the Statute states that in drafting the RPE

> the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial

remains open to question. Why not simply adopt the relevant sections of the CPP and make sure they comply with the afore-mentioned standards? Maybe because that would have made the ubiquitous 'tribunal-hopping' of staff and prosecutors from other tribunals more difficult? Maybe because the first President in charge of the STL had already had the experience of drafting a set of RPE at another international tribunal and it seemed less burdensome to adapt these to the STL's environment – with the innovation of a separate pre-trial (but not investigating) judge already having been secured in the Statute? But then the one major controversial item in the STL and CPP arsenal of procedural tools from a human rights standards point of view, namely the trial *in absentia*, had also already been anchored in Article 22 of the Statute – for obvious reasons, because no-one at the time really anticipated that any of the suspects would ever attend trial, not least since Hezbollah had always made that clear. The Statute itself is thus somewhat contradictory with respect to what it regards as the 'highest standards of international criminal procedure', when all other international courts and tribunals, including the European Court of Human Rights, have always shied away from the procedure *in absentia* like, as it were, the Devil from holy water. Finally, what the exact content of Rule 145(C) RPE is, remains equally uncertain: neither judge-led nor adversarial but …? The judges of the STL's Trial Chamber in the case of *Ayyash et al.* predictably reverted to the adversarial mode when the trial began on 16 January 2014[16].

This brief excursion into the law of just one tribunal has hopefully shown what effects the 'draft-as-you-go' approach as an expression of temporariness can entail. It opens the building of the administration of justice up to intruders with separate agendas and to political negotiations that would appear to fit and fix the temporary emergency and to fill the temporary gaps in the law needed for the fixing. A proper and detailed Code of International Criminal Procedure applicable to any and all international criminal courts and tribunals – and this chapter in the final analysis argues for nothing less – would mean a big step away from these constant uncertainties. After all, no-one would want to be faced with a justice system as it currently exists on the international level, were they to face trial at home even on lesser charges than genocide. In this context, the highest international justice standards must not fall below their highest national counterparts – and legal certainty is a fundamental one among their number.

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such laws if they deem them unfair or unwieldy, beyond the reach of the method of accepted teleological interpretation. Substance without form is arbitrariness.

[16] See *Prosecutor v. Ayyash et al*., Case No. STL-11-01/T/TC, Directions on the Conduct of the Proceedings, of 16 January 2014, online at www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/trial-chamber/f1326.

3. The conceptual framework – Purpose, fairness and efficiency

3.1. Characteristics of domestic procedures

Before a decision about the proper shape of what one might call a Code of International Criminal Procedure can be made, we need to examine the conceptual framework of international criminal proceedings. What are international trials meant to achieve? What can they achieve? One should guard against exaggerated expectations. It is helpful to start with the national framework and function of a trial. A trial at domestic level is meant to establish the criminal guilt of an individual accused. The offences are in most cases clearly circumscribed by the domestic laws on criminal offences. The general part on modes of liability, attempts, participation, *mens rea* etc. is also normally fairly settled. There is usually a long history of case law, which may be either legally binding if a system subscribes to *stare decisis*, or factually binding because no judge risks being overturned by going against the settled jurisprudence of the appellate courts. Depending on the procedural system, the court or the parties will be in charge of adducing the evidence and structuring the trial; in the first case, the parties often have a corresponding right to ask the court to hear additional evidence, in the latter it is mostly their own responsibility. Each system will be embedded in a wider cultural context, which will in turn decide whether a mode of trial is seen as fair or not. Some societies put a great emphasis on lay participation as a damper on state intrusion, and accept the attendant occasional incoherence in the system based on laymen's inclination to favour justice in the individual case over enforcing rules consistenly. Others prefer to make an effort for a principled approach, and thus value the role of professionally trained judges more. Some systems see their judges as neutral umpires, others ask them to descend into the arena. Some restrict the fact-finding to lay-persons and questions of law to professional judges, others allow a mixture or even do without any lay element at all. Mirjan Damaska set this basic picture out many years ago and his analysis is still worth reading.[17] However, especially in adversarial settings such as, for example, the United Kingdom, the rise of managerial judging[18] raises the question of whether the traditional picture of the disinterested umpire can still be upheld.[19] What can be said, however, is that each of the two systems in its own cultural environment is capable of achieving adequate levels of fairness accepted as sufficient by the host society, even though a different society might disagree.

3.2. Problems of international procedure – geo-politics, mass atrocities and creation of a historical record[20]

[17] Damaska,1986.
[18] Critically McEwan 2011.
[19] On managerial judging in international criminal courts see Langer 2005.
[20] See also Eser 2011.

When we shift to the international level we find, firstly, that (geo-)political factors enter into the picture, which do not tend to feature prominently in the everyday domestic trial environment: An international tribunal is always caught between the political interests of states and/or international organisations which often already surface in the negotiations about their establishment, their jurisdiction and their financing, staffing etc.. Secondly, atrocities of a scale common to most international tribunals do not normally occur in domestic settings and thus have a greater impact on human emotions and the need for understanding their origins as a first step in preventing their repetition. Thirdly, and most of all, however, we find that there is no common cultural milieu and agreement about what determines a fair trial, absent certain insular, but in nature generic, findings by human rights courts etc., the applicability of which to the international courts is, however, sometimes contested by reference to their unique nature or the complexity of the proceedings before them, most prominently in the context of remand in custody, as recently highlighted in the *Seselj* trial at the ICTY.[21]

The first two factors, namely geo-politics and the scale of the atrocities, have led some [22]to argue that an international trial is not merely meant to establish individual guilt, but also to create a historical record for the victimised region on which possibly reconciliation efforts at national level could be based. It is here that the difference between the adversarial and – to use the traditional expression – 'inquisitorial' system comes to light. An essentially party-driven system, as currently used in the international courts, cannot perform this function because apart from any information necessary for establishing the core offence elements and the so-called *chapeau elements*, such as 'armed conflict', 'widespread or systematic' etc., the party leading the evidence will not be interested in presenting any evidence that might confute its claim. The disclosure regime that is meant to remedy this imbalance is imperfect to say the least, because although the prosecution is under an obligation to disclose exculpatory material, no-one knows whether they actually are in possession of such material and the necessarily helpless blanket requests often made by the defence to disclose material are routinely turned down by the prosecution for lack of specificity, and that attitude is sanctioned by the judges who term such defence applications as impermissible 'fishing expeditions'. Similarly, the prosecution in most tribunals has taken to literally burying defence teams under millions of pages of documents 'disclosed' on CD-ROMs or by other electronic means, and the practice continues almost unchecked. This despite the fact that the defence is at a material disadvantage in all international criminal trials when it comes to accessing raw evidence, because of a lack of equality of arms based not infrequently on a refusal of the countries concerned to cooperate with the defence teams. An inquisitorial approach could alleviate such ambush or non-cooperation tactics to some extent, yet we must face up to the reality that even pro-active judges must at the end of the day work with the material the prosecution says it has unearthed and diclosed in the investigative and pre-trial phase of the proceedings – unless a real investigating judge was used, as, for example, in the Extraordinary Chambers in the Courts of Cambodia (ECCC), albeit there in a purely national context. After that the court has no real chance of doing its own digging on anything approaching a major and thorough scale. Lastly, in both systems judicial economy and scarcity of resources militate against any attempt at a thorough historical *Aufarbeitung* of the events. Thus even in a judge-led environment the control over the incriminating – and, absent an active

[21] See *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Decision on continuation of proceedings, 13 December 2013,at paras. 18 – 24; online at: www.icty.org/x/cases/seselj/tdec/en/131213.pdf.
[22] See, for example, the references and discussion in Sluiter, 2013,, at.60, 62 - 63.

pre-trial defence, also over much of the exculpatory – evidence ultimately rests with the prosecution.

Against such a background, it is futile to speak of record creation as an aim of international trials and it should consequently be ruled out from our considerations as to what constitutes legitimate purposes of international criminal proceedings. The purpose of an international trial, like its domestic counterpart, can and should only be the decision on the individual guilt of the accused. From what we have said above, it is also evident that while there may be an incremental advantage of the judge-led approach of making sure that all relevant evidence is presented, this advantage may be seen as negligible if the prosecution is determined not to 'play ball', as it were. This particular aspect of fairness cannot be solved satisfactorily by either system. We must thus look for other mechansims, which will be described below.

3.3. Sources of international criminal procedure – the limited role of human rights law

Some have argued that an amalgamated international procedure could be based to a large extent on distilling human rights standards. While national proceedings are run by actors on often minutely choreographed tracks set out by detailed procedural codes and case law embedded in and originating from a more or less monolithic and homogenous legal and moral culture of the host society, the picture on the international level is entirely different. There is no homogenous attitude to which *kind* of procedure is fair and just, if we leave a few of the fundamental truths from provisions such as, for example, Article 6 of the European Convention on Human Rights (ECHR), aside. The role of human rights regulation is restricting the reach of the state *vis-à-vis* the citizens' private sphere, and even without Strasbourg's time-honoured margin-of-appreciation doctrine the human rights framework is much too crude a tool to be useful in shaping the nuts-and-bolts functions of a country's or of an international criminal procedure. Human rights law tells us nothing about whether we should have an adversarial or judge-led procedure, lay judges, a jury (and if so what kind of jury), a single judge or a panel of judges and for which offences, a *juge d'instruction* or an independent prosecutor, a *chambre d'accusation*, a grand jury or admission of the indictment to trial by the trial court or the investigating judge, whether and to what extent cross-examination and re-examination of witnesses should take place etc. All human rights law tells us is that if we use a certain model, it must in its operation comply with the basic rules of fairness emanating from the *generic* human rights standards, and as we said above each of these models can achieve human rights compliance within their own frameworks – yet problems may arise when we mix them. One should also be on guard against perhaps unwittingly transposing certain domestic ideosyncracies about fairness into the interpretation of international-level human rights from one's own domestic background, i.e. reading something into them which one then 'reads out' again in the process of analysis.

While human rights law has a relatively straightforward ambit of application since its main purpose is to be used to regulate behaviour of states with respect to individuals affected by their actions, this becomes much more difficult in an environment consisting of international criminal courts tasked with adjudicating upon ill-defined crimes using even less well-defined general principles committed in a target country whose legal order may be entirely different from the

prevailing views of the international community. International comity of states can then also create massive problems in finding common ground.[23] In principle, international criminal courts are not addressees of existing human rights instruments but have bound themselves either via their case law or have been bound by references to human rights law in their constituent documents . Yet, even human rights standards can vary from region to region. Would an Arab be able to rely on the specificities of the 2004 Arab Charter on Human Rights or a Muslim to rely on the 1990 Cairo Declaration of Human Rights in Islam, if and to the extent that they might diverge from the Universal Declaration of Human Rights or the ICCPR, and where such a diversion could have an impact on that person's case before an international criminal court? These are but a few points but it seems questionable that the answer to the appropriate model for international criminal proceedings can be gleaned from human rights law alone.

3.4. International criminal procedure and general sources of international law

Article 38 of the Statute of the International Court of Justice contains for all practical purposes a (possibly non-exhaustive) list of the sources of international law. As far as international criminal procedure is concerned, most of the work has to be done under the headings of customary law and general principles of law recognised by all nations. Customary law in this context takes us back mainly to the field of human rights standards and the reference to general principlestake us back to square one: what to do when you have massively conflicting approaches to procedural models arising out of centuries of geo-political influence of a few colonising cultural systems across the globe? As we saw earlier, even in a *prima facie* closed system, such as the ICC, there will be lacunae and need for interpretation because the law is anything but settled, Elements of Crimes, RPE and Regulations of the Court notwithstanding. This frustration may have led to a *de facto* uncoupling of the method of argument on the international level from its domestic roots in that the system has by now become self-referencing, i.e. using its own precedents beginning with Nuremberg, Tokyo and the post-war military tribunals and stretching to the ICTY, ICTR as well as the tribunals and courts for Sierra Leone, Cambodia, Lebanon, Bosnia etc. as a basis for future extrapolations rather than returning to the coalface of national principles. If this trend to self-referencing could be verified, it would in the present context mean a perpetuation of mostly adversarial and in essence common law approaches. And yet, there would still remain a variety of interpretations denying an adequate level of certainty and homogeneity. However, even if the courts were to go back to the national principles proper and engaged in grass-roots research, the picture would not look much better, because as the author has shown elsewhere[24] the research exercise is always massively selective and depending on the linguistic commands of the people doing the research. The creation of a separate and dedicated legal research advisory section staffed by people from a wide range of legal systems and with a broad spectrum of language command has apparently not been considered worth following up. In sum, the diagnosis must be

[23] A good example would be the question of wheter the national criminalisation of LGBT persons can be a crime against humanity, namely persecution, and the less than progressive response of the drafters of the ICC Statute to the concerns of a number of conservative states, both from Islamic and Christian backgrounds, about acknowledging 'sexual orientation' as a category of the term 'gender' in its Article 7(3). See on this Bohlander 2014 b.

[24] Bohlander 2011,with references to previous studies.

that reliance on the usual process of finding international law is not fit for purpose if we want to reach a stage of necessary certainty of law.

3.5. Efficiency in fairness – the path forward

If we accept that both the adversarial and judge-led systems can achieve the required level of procedural fairness if they are applied in their pure form, then efficiency becomes the deciding factor. International criminal courts are enormously expensive affairs and making sure that their budgets are guaranteed year on year is one of the major concerns of their operation. The same applies to the accused's right to a speedy trial. While this principle has actually been used in various instances to justify the *restriction* of defence rights, the international tribunals have from the beginning struggled with maintaining an acceptable length of detention before a decision at trial level is made and have constantly referred to the 'unique' circumstances in and the massive difficulties under which they have to operate as justification, especially as far as collecting evidence[25] *in situ* is concerned. Yet, this argument, if it is sound at all, would be acceptable only to the extent that the system does all it can to make sure delays are not caused by avoidable organisational slack. There is cause to doubt that this is currently happening.

If we stop arguing about alleged model-inherent deficiencies in fairness, then the financial and operational strictures of international criminal justice and the right to a speedy trial demand that we choose the most efficient model of the two, all things being equal with regard to fairness, and stick to that. In the event of unforeseeable and unavoidable gaps in the law, a modified application of the principles of Article 38 of the ICJ Statute should ensue in that only jurisdictions that use a system of sufficient similarity should be used to provide comparative material, obviating the deleterious effects of transsystemic transplants. The use of only one model that would apply across the board to all international criminal tribunals and courts would also ensure that the potential for continous professional education for practitioners and judges would be massively enhanced and that the training of new candidates for a pool of international practitioners could be better organised and streamlined. The reasons why and how a judge-led model appears better suited for international criminal proceedings will be set out in the next section.

4. Preferring the judge-led model – reasons and parameters

4.1. Romantic views of the role of the judge in the adversarial trial

[25] There may (still) be an unspoken consensus among those populating the international criminal institutions, the 'no-impunity'-driven NGOs, parts of academia and, of course, the politicians that the prosecution should always be given more time to look for evidence to ensure a conviction of those one already knows are guilty and to ensure satisfaction for 'the victims' – with the latter's increasing procedural visibility and participation in international proceedings before conviction contributing a particularly destabilising element; yet, to say so is profoundly politically incorrect these days. Needless to say that this attitude may have a lot to do with the one displayed by the proponents of the record-creating function addressed above, and that it has no place in a balanced view of the administration of criminal justice.

For many people, the adversarial model has an aura of perfect fairness,[26] because its paradigm is the disinterested judge who makes sure the parties play by the rules but does not become entangled in the actual sparring between them herself. However, every seasoned adversarial practitioner knows that the judge has a huge potential for influencing the outcome of the case by her decisions on which evidence to admit and other incidental orders, but most seriously through her summing-up to the jury. There are prosecution-minded and defence-minded judges, and probably more of the former, not least because of the selection process in some common law tradition countries which still would seem to put a lot of weight on matters such as whether the candidate has in the past represented government branches or the prosecution service in court. It needs to be borne in mind that in those jurisdictions where the jury do not give reasons for their verdict, the attack on the safety of the verdict is based on the summing-up of the judge and any other decisions that may have crucially impacted on the course of the trial – but not on the jury's verdict. The romantic view of the adversarial approach has also begun to suffer severe corrosion from the managerial judging campaign – while managerialism is an irritant artefact in an adversarial setting, it causes much less friction in a judge-led one. The adversarial judge has the case file but he is at the same time not allowed to structure the trial himself because he knows at least the prosecution's case and under modern managerial rules also quite a lot of the defence case in advance. Since he is part of the state he cannot be allowed to 'present the state's case against the accused' – a choice of words that does not properly translate into the judge-led model where 'finding the material truth' about a certain chain of events is the paramount goal, not 'proving a case'. Judge-led systems, to be fair, face similar concerns about judges who tend to favour the prosecution's side of the case, not least in those countries such as Germany, where in some of the states a career shift between bench and prosecution service and back to the bench is anything but unusual and, as some say, indeed required in order to move up the ranks. However, at least in cases of serious crime, the system has provided for its own checks on that particular problem, among others by using collegiate panels and by requiring the panel to give reasons for conviction/acquittal and sentence, which are subject to full appellate scrutiny.

4.2. Absence of the dichotomy between spheres of professional and lay adjudication

Another reason that speaks against the adversarial model in an international setting is that the trials are without exception professional-judge-only affairs. There is no jury, there are no lay judges. The adversarial paradigm is in part historically and traditionally – if not necessarily conceptually – connected to the distinction between finding facts and law in a judge-and-jury system. The jury is not meant to know anything of the dossier or case file and to base its findings solely on what they are presented with at trial. Contamination of the jury by material extrinsic to the trial is to be avoided. Similarly, even in cases of lay judges sitting with the professionals in a judge-led scenario and where the lay assessors have almost full judicial stature, human rights law

[26] Sluiter 2013, at 480, even goes as far as saying that 'international human rights are based on an underlying assumption that criminal proceedings shall be of an adversarial character'. In the context of the citation of bringing charges what is meant there is probably that they shall follow an *accusatory* model and not the historical 'inquisitorial' model where prosecutor, judge and enforcer were the same person.

imposes restrictions on what material they can have access to and how, as explained for the German context by the Strasbourg Court in *Elezi*.[27] This concern about lay contamination is conceptually[28] invalid in a system that allows the professional judges to have the case file in advance and to engage in structuring the ambit and progress of the case from an early stage through pre-trial conferences and decisions.

Nor should one argue for the inclusion of a lay element in international courts. The domestic problems of lay involvement increase exponentially on the international level, both conceptually and logistically. The horrific nature of the events and most importantly the graphic nature of some of the evidence in international trials routinely transcend even the worst cases on a domestic level and are sufficient to try the resilience of any hardened professional, much more so that of a lay person. On the practical side, lay participants usually have a job and their employers will be very reluctant to let them go for the periods normally envisaged for these trials, not to speak of possible sequestration necessary to avoid media contamination etc. Finally, as far as infusing and tempering the professional process with a lay person's unspoilt common sense and experience is concerned, in the context of international trials that would also mean ensuring cultural understanding of the target country – yet, lay assessors or jurors from the conflict regions would almost by definition have to be excluded for obvious fear of bias. For good reason therefore, international courts use only professionals, which means that the typical mechanisms for avoiding lay bias are irrelevant and prior knowledge of the case file has to be checked by other controls. If one gives the judges advance knowledge of the prosecution case file, they should be allowed to use it. Equally, once the case file goes to the court, full procedural control should shift to the judges and the prosecution in particular would have to be held to have produced all the material it needs to prove its case, with attendant sanctions for late or additional evidence.

4.3. Efficiency aspects – adversarial vs. judge-led model

In the following section we shall look at a number of pressure points in practice – some of them will be of a rather nuts-and-bolts character, but looking at practice without looking into the moving parts of the engine, as it were, will ultimately be of little help.

4.3.1. Preparedness for trial and controlling the prosecution

A judge-led model based on possession of the case file by the trial court with the ensuing control over the structuring of the proceedings by the panel would appear to have distinct advantages over a party-driven adversarial model, even if one takes into account efforts at managerial judging and restricting adversarial excesses in the international context, especially when one looks at the practical side and less at the theoretical underpinnings. The efficiency of the adversarial setting depends very much on the preparedness of the parties for trial and as almost

[27] *Elezi v. Germany*, Application no. 26771/03, Judgment of 12 June 2008.
[28] Naturally, the sociological question of whether professional judges can be contaminated by prior knowledge of the case file – they can, of course – is an entirely different matter and must be countered by other mechanisms, as explained above.

all cases in the adversarial procedures of the international criminal courts have shown and as was already mentioned above, the major issue is the *de facto* control by the prosecution over the evidence and its monopoly of access to domestic state cooperation, its not infrequent reticence to full and manageable disclosure to the defence and the reluctance or inability of the judges to interfere with the prosecution's conduct of a case. One particular example of this was the practice of the prosecution exhibited in some cases to use one set of materials to gain the confirmation of an indictment *ex parte* while dropping those materials, either in whole or in part, from the evidence they will use at trial – if they do not intend to use them at trial the defence may face difficulties in making submissions arising from the confirmation materials. Even though the judges may have the case file, as at the STL, for example, they may still leave control of the presentation of the evidence to the parties and in that context that means mainly the prosecution since more often than not the bulk of the evidence will come from their side. The judges thus have no proper control over the case flow and the time needed, which creates knock-on effects on case allocation and planning for other proceedings. The parties present their respective evidence in turn, not structured along evidential issues with direct confrontation of prosecution and defence evidence over identical issues. Thus, given the ususal timelines along which international trials develop, it may happen that the defence evidence[29] on a particular fact will be heard many months after that of the prosecution, a fact that will hardly serve to focus the court's deliberations on the probative value of the evidence or the credibility of witnesses. The prosecution will be exposed to the constant temptation to go to trial with less than a fully prepared case, especially if it can hope that the court will take a lenient view on amendments of the indictment and additional evidence, a hope that is not necessarily diminished by the current practice of more or less passive judicial attitude.

4.3.2. Control over the presentation of evidence and exclusion rules

The adversarial approach also means that, leaving aside some prior disclosure obligations, the defence will not need to show its hand until the prosecution has rested. The latter is in principle, to be fair, also the case in the judge-led model, yet if the court is using an event-structured trial schedule, a defence that wishes to engage rather than torpedo the trial will have every incentive to cooperate by naming its evidence in time so that the schedule can accommodate it – a non-cooperative defence naturally raises different questions of trial control which we cannot delve into here.[30] A lot will in this context also depend on involving the defence in a meaningful

[29] Simon Minks, who prosecuted the Somali piracy case of *Dhow* in the Netherlands, informed the author of an interesting twist in the Dutch proceedings, where defence counsel asked the court for an advance payment on costs of over € 16,000 in order to travel to Somalia and conduct their own investigations. The advance was granted, yet at the time of writing the parties were arguing whether and to what extent the evidence produced by that visit was admissible at trial. – Email from Simon Minks of 18 February 2014; on file with the author.

[30] Suffice it to say that in the complex environment of international proceedings, even under a judge-led model an early defence disclosure could be required with attendant sanctions for vexatious and frivolous violations as long as this does not lead to a model where the defence would be forced to assist towards a conviction – different models exist, such as the drawing of adverse inferences or the exclusion of late evidence etc., yet it needs to be remembered that they all carry a great potential for causing miscarriages of justice. If the defence has reliable evidence that is exculpatory, one would, however, assume that it is normally in the interests of the accused that this is presented at as early a stage as possible.

manner at as early a stage as possible, something which can admittedly be difficult given the often real concerns over witness intimidation and evidence tampering. At the end of the day, the procedure must also provide for sanctions against frivolous delaying tactics by both sides, and exclusion of late evidence the admission of which would lead to inexcusable and unacceptable delays may be one – although obviously ultimate – possibility. The courts and tribunals have mostly shied away so far from invoking the exclusionary rule for late additional evidence at trial; the appellate stage presents a slightly different picture, however. It may be questionable whether this leniency has always been a wise choice, especially insofar as creating a proper international trial culture is concerned and ensuring that the general suspicion under which the defence is often held is acknowledged and abolished. In particular, once the dossier is made the basis for structuring and organising the trial, the prosecution should move into the same position as the defence and have to show cause for any additional evidence not contained in the dossier. It bears reminding that the effect of not employing an exclusionary rule of some sort[31] more often than not disadvantages the defence and this is again in part the impact of an attitude mentioned above that allows a measure of latitude to the prosecution partly because of the seriousness of the charges involved and the still prevailing[32] 'no-impunity' attitude in much of the international community.

4.3.3. Admission of the indictment by the trial court

Inquisitorial or judge-led features that might help streamline the proceedings can begin at the stage of admitting an indictment when an indictment is understood as the *final result* of previous exhaustive investigations – as it should be – and not in the sense of an authorisation to investigate in the first place. Do we really need to separate the decision-making on admission of the indictment and at trial level? Would it not be in the best interests of the parties if they knew the views of the judges who are actually going to try the case about whether there is a *prima facie* case or whether the evidence might be insufficient and in need of supplementary investigations[33]? It is accepted at the international level that having been involved in confirming an indictment does not preclude a judge from sitting on the trial[34] afterwards. Indeed, some civil law systems, such as Germany, operate that model – with the particular emphasis on the defence normally being given full access to the dossier at that time and being able to make preliminary observations on fact and law before a decision on admission is taken. The author as a former criminal judge in the German courts has extensive experience with this kind of procedure and in the very few cases where the prosecution file did give rise to further questions, these could be addressed before the trial got under way and before delays could lead to disruptions and potential adjournments with prejudice, i.e. when after the lapse of certain time limits the trial would have to start afresh. This experience and that of other colleagues would also seem to militate against the general concern that knowledge of the case file and involvement in admitting an indictment per se causes bias and pre-established views of the case with the trial judges. It is a question of training and awareness and last, but not least, trial experience. A decision made on the basis of a

[31] On exclusion of evidence as a sanction see Sluiter 2013, at 812.
[32] See Bohlander 2014 a.
[33] This concern is recognised, for example, in Sluiter 2013, at 486 f.
[34] Sluiter 2013, at 816.

dossier is based on one side of the story and not infrequently quite different things can happen at trial. This should also serve as a caution against the excessive use of written material, the one aspect that is so often (mis-)characterised as a 'typical' civil law input.

4.3.4. No pre-trial briefs or opening statements

Since the proceedings are held before professional judges who ideally have the full case file, there is reason to question the need for lenghty pre-trial briefs and opening statements. A seasoned judge can match the material from the case file to the indictment, and in any event, an indictment can be drafted in such a way as to include exact references to the evidence in the file in relation to the individual facts pleaded in the indictment.[35] It might have been the case that in the early days the judges were not used to such criminal trial work and needed an executive summary in the form of a pre-trial brief, as it were, to know what the case was going to be about. In a model where it is the judges who decide the flow of the case, the need for such a stage becomes questionable. Opening statements make even less sense in a judge-only model. They are useful for jury trials to give the jurors a sense of the case of the prosecution. In a fully informed judge-driven environment the only purpose opening statements can have is either playing to the (global) gallery in the wider sense, or giving the media a run-down of the case for their easy consumption. Both would not be legitimate reasons for wasting court time and resources. The trial is run in open court and media can attend, but the trial is not run *for* the media. That kind of concern can be addressed by the public outreach unit of the prosecution.

4.3.5. Judgments, decisions and orders – timing and styling of drafting

Another area in dire need of improvement is that of the delivery and drafting of judgments and substantial decisions,[36] an issue where a tighter judicial control and a changed judicial attitude could also deliver huge efficiency savings. As far as the timing is concerned, Mirjan Damaska has rightly criticised[37] the practice that in many cases the accused remain in custody during the invariably long periods between closing speeches and delivery of the judgment even if they are ultimately acquitted and the judges already have made up their mind to that effect long before the written judgment is delivered. Damaska correctly demands a move to delivery of the verdict in an oral summary judgment as soon as possible after the deliberations and the presentation of the written reasons after that – again something that is common, for example, in German procedure. Given that the time limits for justifying an appeal run from the date the accused or the prosecution obtain a copy of the written reasons, there must, however, be a corrective to the effect that this drafting period cannot last *ad libitum*. More decisions and orders on incidental matters should be made from the bench, giving succinct reasons, without any follow-up written versions.

[35] For an example, see a specimen indictment from German procedure in Bohlander 2012, at 282.
[36] Another issue that cannot be addressed here at length is the need for a repression of interlocutory appeals on issues that logically preced the final judgment. See for the German model Bohlander 2012, at 252 ff.
[37] Sluiter 2013, at 1421.

That takes us to another major factor causing delay: the style of the judgments. Even given the complexity of the cases before international courts, it is hard to see why a judgment needs to run to thousands of pages and footnotes in four volumes. The judgment style in the courts and tribunals, no doubt due to a lack of training and criminal judicial experience with quite a number of the judges[38] and the record-creating attitude of some, has so far been overly verbose and aimed at an almost complete reproduction of the evidence and the legal and factual arguments of the parties, despite the fact that unlike many civil law traditions, the international courts have verbatim transcripts on which any appeals argument relating to factual inaccuracy can be easily based. At trial level that is in the final analysis irrelevant, it makes more sense at the appellate level where the appellant normally has to attack a judgment with specific arguments, although again there are systems that do not require a fully-fledged argument as far as the application of the substantive law to otherwise undisputed facts is concerned. Judgments are often drafted – by inexperienced legal officers more than the judges[39] – as the case develops, especially the factual findings and the evidence, a practice which through human inertia inevitably leads to retention of much more information than is necessary in the final document, because it is already there and it would otherwise seem a wasted effort, or to massive duplication of work if a judge changes his mind after drafting has already gone on, as the author himself could experience at the ICTY. Drafting proper – as opposed to updating a skeleton judgment – should thus not start before the judges have made up their mind on the law and the facts, and it should strive at condensing the facts considered proven by the court and not reproducing the evidence and the legal arguments of the parties *in extenso*. Each party will find out from the court's own exposition of the law whether their legal opinion carried any weight with the judges.

5. Conclusion

[38] One should not overlook the fact that in many common law systems with a judge-and-jury model the trial judge will not write a reasoned judgment related to the verdict, since that is the jury's domain. He may express the reasons for sentencing into the record. Proper judgment drafting often begins only at the appellate level, and even then there are marked differences in style between the free-flowing judicial narratives of common law judges and the highly structured and formalised approaches of, for example, the German, Spanish and French judiciaries who on top of that often sit without juries and/or whose relationship to the jury is different from the common law environment. Many common law judges will thus not have had much experience in drafting judgments, let alone in complex cases.

[39] See the revealing Concurring Opinion of 13 November 2013 by Judge Antonetti in the *Seselj* case, where he said: 'The Trial Chamber was confronted with the successive departure of the Chamber's legal officers for personal reasons linked to the Tribunal's Completion Strategy which led them to opt for other jobs. Consequently, every departure of a person in charge entailed the induction of a new person in charge, which was one of the reasons for extending deadlines. During deliberations, three legal officers successively left the Chamber to take up other jobs. I believe that, had there been better management and recruitment that took into consideration the exigencies of this case, we could have had a person in charge of the legal team on a permanent basis until the reading of the judgement so that we would not be faced with this kind of difficulty. In my opinion, there has been a serious breakdown in management since, unfortunately, I do not have the legal power to recruit such a person myself and to issue him orders and directions in the exercise of his function. In a sense, the Judges are prisoners of a system where their only role is to wait for drafts from legal officers who fall under the Registrar's, not the Judges', administrative authority. If the current staff is not retained, there may be consequences for the work of the future Chamber.' – online at http://www.icty.org/x/cases/seselj/tdec/en/131113a.pdf. – The idea that the judges might want to do their own drafting did not seem to have occurred to him.

This contribution could only address some of the problem areas caused by the temporariness of international criminal justice, yet, it is hoped that it has impressed the need for more attention to be given to what can be realistically expected from a criminal trial, also and not least on the technical levels, to ensure compliance with one major aspect of the rule of law – certainty of law. Certainty of law as a pivotal facet of the idea of justice requires a sustained, coherent and principled engagement by the relevant stakeholders in the international community with the aim of reducing any margins of judicial appreciation that can impact on a defendant's rights, and in a criminal justice context almost any judicial action can. One cannot arrive at certainty of law by merely discussing different traditions and leaving it to judicial trial and error through trial and appellate judgments of any number of courts, which is regrettably the practice followed by today's international criminal courts and tribunals. It is also not acceptable merely to copycat existing procedural templates simply because they are considered "ready-made" or to have been "tried and tested" in previous international courts and tribunals. Much of that has to do with a protectionist attitude regarding one's own domestic legal system and a critical view of 'how the others do it'. One needs to realise – or from time to time remind oneself – that while in each domestic setting a homogenous legal culture has over time shaped society's views of what is a 'just' procedural model, and that indeed each of those is perfectly capable of achieving an adequate standard of fairness, no such joint legal culture and hence no joint view of fairness exist on the international level. We cannot leave it to the laborious process of case-by-case development to arrive at a common mould, because all the time we are putting people away and imposing the ultimate moral sanction – and it would seem on a very shaky foundation indeed. This process, which is hard enough in any national environment, is made much more difficult at the international level where the deleterious impact of (geo-)politics is felt with much greater immediacy, as the recent affair at the ICC and ASP over the duty of the accused to attend trial has shown. It is not good enough to say that this is how international law works – we have to try harder. After Nuremberg and Tokyo until 1993, the prospect of an international court for mass atrocities was seen by many as an illusion. The ICTY's substantive law was based on customary international law, its procedural law was not since it followed mainly one legal tradition. Only five years later, the Rome Statute was adopted which gave birth to the first properly treaty-based court, which, however, still had and has many areas of uncertainty that might benefit from a more systematic and analytical revision of its law and potentially even an amendment of its Statute and Rules, although that is admittedly not a very realistic option. Yet as long as new international(ised) courts such as, for example, the planned Kosovo Tribunal[40], keep popping up from the ground, there is a need for such an endeavour, Imagine what an honest, radical and concerted international effort aimed at drafting a detailed procedural law for all international courts and tribunals could yield in the next five years.

[40] See, for example, http://jurist.org/paperchase/2014/04/kosovo-lawmakers-vote-to-create-war-crimes-court.php or www.dw.de/neues-kriegsverbrechertribunal-im-kosovo/a-17590527. At the time of writing, no official information about the shape of the tribunal was available.

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