International criminal trials: A normative theory

Vasiliev, S.

Citation for published version (APA):
CHAPTER 12.

TOWARDS A NORMATIVE THEORY OF INTERNATIONAL CRIMINAL TRIAL

1. Introduction

2. Reappraising normative parameters
   2.1 Usages and limitations of comparative method: Beyond ‘adversarial’ and ‘inquisitorial’ models
   2.2 Human rights and goals: Impactful but not decisive determinants
   2.3 Efficiency as a normative éminence grise
      2.3.1 Impact on procedural development
      2.3.2 Emancipation from domestic traditions: From familiar to pragmatic
      2.3.3 Result: Pragmatism and flexibility in procedure

3. Nature of international criminal trials
   3.1 Objectives, functions and effects of trials: Liberal legalist and socio-legal views
   3.2 Truth-finding: Primary function
   3.3 Trial stage as a truth-finding locus

4. Organization of international criminal trials: Translating flexibility and pragmatism
   4.1 Nature of the court: No jury and its implications
   4.2 Structure of trial proceedings
      4.2.1 Initial question: Structure of case at trial
      4.2.2 Trial preparation: Importance of robust case-management
      4.2.3 Opening statements and closing arguments: From advocacy to informative function
      4.2.4 Presentation of evidence: Variable model
      4.2.5 Sentencing: Need for separate hearing and deliberation
   4.3. Participants
      4.3.1 Role of judges: Active case-managers and truth-seekers
      4.3.2 Defendants’ role: Towards participatory model
   4.4 ‘Postmodern suspense’ in procedure: Reconciling variability with certainty

5. Concluding remarks: International trial adrift and prospects of coherent trial culture

1. INTRODUCTION

In the previous four chapters, the proceedings falling within, or closely related with, the trial stage in the nine historical and contemporary international and hybrid criminal courts, from the IMT and IMTFE to the STL, have been dissected into constituent phases from trial preparation to closing arguments.\(^1\) The essential differences and similarities between those courts have been outlined and appraised in light of the evaluative framework.\(^2\) This

---

\(^1\) Chapters 8-11.
\(^2\) For the explanation on the normative framework and the underlying parameters, see Chapters 2-3.
final Chapter turns to the overarching theme of the book – a normative theory of the international criminal trial. It synthesizes the critical insights gained from the theoretical and systematic exploration of the nature and organization of the trial proceedings undertaken in the previous parts of the study. The methodological, comparative, and analytical threads of the discussion can now be pulled together into the conclusion and key findings assembled into a purportedly coherent ‘normative theory’ that was promised at the onset.

The idea with offering a normative account of trial is to delineate what is (not yet) known about the ideal ‘trial paradigm’ in international criminal procedure and—even more importantly—what ‘ideal’ means in this context. Next to meta-theoretical insights into what amounts to such procedure, the account seeks to propose more specific solutions for the law of international criminal procedure that may help approximate it to that ideal. It also clarifies how that procedure should be applied in practice and what options should be available to the courts when fine-tuning the procedural regime in individual cases or sets of cases. Based on the analyses and critiques contained in the previous parts, the theory sums up the author’s vision on what international criminal trials are about and which phenomenological features make them akin to, or distinguish them from, their national counterparts. Further, the present account also discerns the conceptual and regulatory trends regarding the trial form and structure that are likely to shape the international trials of the future. It indicates directions for reform to be considered with a view to consolidating and refining the trial practice of the ICC, residual mechanisms, and any new ad hoc and special tribunals that may be established.

Despite broad similarities, the trial regimes across the various jurisdictions covered in this book remain rather diverse in technical detail. Upon a careful look, this diversity defies the seeming homogeneity ensured through use of generic models as blueprints when creating and amending procedural rules. Where the same regime formally applies, trial practice still may vary significantly from one case to another and among different Chambers within the same court. In case of the ICTY, ICTR, and the SCSL, this is a matter of discretion reserved to judges in applying (or misapplying) the rules – most notably in respect of pre-trial case management and the conduct of trial. At the ICC, this is, above all, a matter of statutory malleability of the trial model, as it can be adjusted on an ad hoc basis in each case. The objective diversity operates as a formidable obstacle to constructing a uniform and coherent trial theory that would, on the one hand, accommodate the best elements of existing models and, on the other hand, be sufficiently ‘dense’ to provide conclusive guidance for optimizing the trial practice and directing future reform. Since multiple trial regimes are practiced across and within courts, it is uncertain, even after two decades of modern international criminal adjudication, which of those regimes, if any, constitutes a recognizable ‘face of justice’ and a true ‘identity’ of a contemporary criminal trial before an international tribunal. This is a component of an overarching question about the normative identity of international criminal procedure, which was raised at the beginning of this book and a definitive answer to which can probably only be obtained in the future.

---

3 On the normative theory, see Chapter 1.
4 Chapter 1, section 4.
6 Chapter 10.
7 Chapter 1.
The second challenge to this endeavour to formulate a normative theory is the continuing absence of a universal and comprehensive evaluative framework that could serve as a procedure-vetting device to keep diversity in check and operate as an axis for consolidating and harmonizing procedural law and practice around a specific set of shared imperative standards. This invisible and arguably more severe obstacle further complicates the task of developing a single set of definite and systemically congruent choices that would amount to a ready-made procedural regime for international trials. The methodological framework consisting of ‘fairness’ and ‘effectiveness’ has proved instrumental in the assessment of the procedural standards and practices.\(^8\) Some questions as to whether a specific procedure is appropriate or ill-fitting could be answered and recommendations for improvement made. However, the application of the normative parameters in the analysis of trial arrangements has also amply demonstrated that those parameters remain under-determinative in respect of the many issues at the core of the organization of international criminal trials. In other words, the perspectives of ‘fairness’ and ‘teleology’ of international criminal justice are no ultimate gap-filling devices.

Still, a number of conclusions on the optimal ‘trial paradigm’ can be drawn at the close of this study and preference expressed for some of the solutions over the others, based on the accumulated procedural experience. Where the contours of a desirable trial model do not emerge clearly, the amorphousness is in itself also a valuable descriptor and a lesson. The indeterminacy and variability of trial arrangements may be acceptable and even desirable. The court should have the necessary flexibility to adapt the procedure to the circumstances in which trials are being conducted. The relevant factors include, for example, the epistemic capacities and needs of the parties, investigative challenges, the type and quality of evidence it receives, the nature, linguistic and cultural background of witnesses, accused, counsel, and so on. In the absence of cogent reasons to strive for absolute uniformity, procedural pluralism should not be dreaded and resisted if the normative limits—and, most importantly, the applicable human rights standards—are fully respected. The pluralism of trial practices and ‘faces’ of procedure is an unavoidable consequence of the multiplicity of law-enforcement fora, while adjustability endows the process of international justice with greater viability, effectiveness, and legitimacy.

But procedural pluralism can also be perceived as a euphemistic cover-up for the disorderly array of divergent procedural practices and solutions relating to the same issues. The difficulty of making choices in favour of either of them may be seen to undermine the uniformity and legal certainty of international criminal procedure, to deprive its development of a visible direction, and to threaten its future prospects as a workable set of principles and rules. Where there are convincing grounds to strive for uniformity, pluralist procedures are tantamount to a normative gap waiting to be filled by the elements of the single ‘best model’. Irrespective of how complete and dense the purported normative theory can be, the threefold objective pursued here is: (i) highlighting the most essential similarities and divergences between the jurisdictions surveyed with implications for the (non-)existence of shared standards of trial procedure; (ii) discerning the established features and ambiguities of the trial process, either of which may speak to its ‘normative identity’; and (iii) addressing how these findings should translate into any future institution-building efforts in international criminal justice.

The normative theory formulated in this Chapter stands on the three pillars developed in the previous chapters. The methodological and theoretical pillars were delineated in parts I and II. Part I defined the standards by which the procedural law and practice of the international criminal tribunals can be assessed, while part II focused on issues such as rationales, functions, and role of the trial phase in the procedural

\(^8\) Chapters 2 and 3.
The third pillar of the study (Part III) is landmarked by a descriptive, comparative, and analytical approach to trial procedure and practice in the nine jurisdictions surveyed. This combined approach allows ensuring that any findings and recommendations are both empirically and normatively grounded. It is warranted because no credible critical account of international trials can afford disregarding the considerable trial experience of a plethora of international and hybrid courts to date.

One could try reinventing international criminal procedure from scratch — independent of precedents and modelled solely or decisively on aprioristic ideas about the ideal procedure, for example with reference to the substantive criminal law it is meant to implement, the nature and goals of the tribunals, or other considerations that on their own are procedurally neutral. While such proposals may result in theoretical constructs that are intellectually entertaining, they are bound to have little practical value. But the viability and effectiveness of new theoretical models would have to be established experimentally; the unaffordability of such experiments points unequivocally to the need for drawing the empirical knowledge from the operation of actual trial systems. The normative trial theory should be grounded in experience and build upon institutions and procedures that proved workable, if not impeccable.

Conversely, the validity of any empirical lessons as a self-sufficient source of guidance for evaluation and reform may not simply be assumed. These are subject to varying interpretations and even fierce debates. Trying to discern a set of ‘best practices’ solely from experience of international criminal trials without clear normative guidance would have little credibility. Legitimizing something as ‘good practice’ can only be done by providing an explanation why one practice is deemed better than any other. This is why the elements of normative theory should not be extrapolated from extant practices in a pick-and-choose fashion and on unpronounced grounds. Conclusions derived from the tribunals’ procedural legacy should be reviewed. A solid, or at least transparent, theoretical and methodological basis is indispensable for transforming the empirical legacy of international criminal procedure into the notions about what parts of that legacy are worth taking further.

In drawing the contours of the trial theory, this Chapter starts by sharing insights gained from the application of the evaluative framework in the previous chapters. This allows for the meta-theoretical foundation of the present account of international trials to be laid down and to round its methodological contribution up. Given the continued prominence and complex function of the traditional (domestic) models of comparative criminal procedure, section 2 revisits and makes final observations on their relevance and the role they should play in the theory of international criminal procedure. Part III’s findings allow addressing the empirical validity of the initial methodological hypotheses outlined in Part I. This is done by reappraising the actual traction of the ‘fairness’ and ‘efficiency’ parameters as determinants of international criminal procedure.

Further, the Chapter proceeds to systematize, digest, and develop the findings of Part II on phenomenology of the trial phase through the prism of two broad perspectives. One perspective focuses on the ‘nature’ of international criminal trials as a socio-legal event and addresses its rationales, functions and the position in the context of international criminal proceedings (section 3). The second perspective, on the ‘organization of trials’, builds upon the previous findings to indicate which of the trial arrangements can be endorsed by the normative theory. Section 4 looks into how the trials should be structured and sequenced, in terms of the number of cases at trial, the order of presenting evidence and the modes of questioning to be employed. It also touches upon the role the procedural

---

9 Chapters 2-6.
10 Chapters 7-11.
participants should play, with the focus on judicial function at the pre-trial and trial stages, and on the defendant, whose actual role—rather than legal status—in international criminal trials has remained largely ignored until most recently.\footnote{12} This Chapter determines whether any specific procedural model should be adopted generally or on any specific issue of trial organization, what degree of flexibility should be afforded to the court, and how the variability of the trial models—where it is appropriate—can be reconciled with the compelling need for procedural certainty. The last section of the Chapter, section 5, is reserved for concluding observations on the implications of trial procedure pluralism, the normative need for harmonization, and the prospects of a coherent trial culture in international criminal tribunals.

Before proceedings further, one final remark concerning the scope of this Chapter is in order. As noted in Chapter 1, the trial theory that purports to be comprehensive (which is not the case here) would normally incorporate the detailed treatment of the law of evidence. The procedures for the collection and admission, party access, and evaluation of evidence exert a powerful influence on the nature and structure of trials and are consequential for their fairness and efficiency. The exclusion of most evidence-related issues, but for trial preparation and presentation and examination of proof at trial, sets respective limits on the scope and purport of this normative account. However, in order to ensure that it stands on as firm a ground as is possible in this respect, the Chapter touches upon the cornerstone matters of the law of evidence. Indeed, many of the normative choices in respect of the order and modes of presentation of evidence at trial cannot be made without expressing a position thereon. Accordingly, these developments are addressed briefly in the following as well, inasmuch as they inform the nature and organization of trials. But the discussion here does not pursue the objective of reimagining the law of evidence as it currently stands; it leaves this task to others.\footnote{13} Essentially and at risk of oversimplification, the ‘free proof’ tenor of the admission regime, unburdened of the developed exclusion rules which has been typical for international justice throughout its history, is here treated as a given.\footnote{14} This is not to say that the present state of international criminal evidence is satisfactory, nor that it has been static or will become so in the future.\footnote{15} On the contrary, it has always been a focal point for efforts to devise and refine evidentiary standards in order to make them a better fit for the nature of evidence that comes before the tribunals while ensuring fairness. The law of evidence continues to be a highly dynamic and contested domain in international criminal law.

2. REAPPRAISING NORMATIVE PARAMETERS

2.1 Usages and limitations of comparative method: Beyond ‘adversarial’ and ‘inquisitorial’ models

The book’s opening Chapter flagged some problems with reliance on comparative law data from domestic procedural traditions as the method for evaluating international criminal procedure arrangements. It was argued that the comparative method should not be used to form or corroborate normative views on what trial arrangements are suitable for

\footnote{13} See e.g. P. Murphy, ‘No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence Is a Serious Flaw in International Criminal Trials’, (2010) \textit{8 JICJ} 539, at 559 \textit{et seq.} (advocating the adoption of limited common-law evidentiary rules in the tribunals).
\footnote{14} Rule 89(C) ICTY, ICTR and SCSL RPE; Rule 63(2) ICC RPE.
\footnote{15} For example, see a recent amendment to Rule 68 ICC RPE: Resolution ICC-ASP/12/Res.7, Amendments to the Rules of Procedure and Evidence, ASP, adopted at the 12th plenary meeting, 27 November 2013.
international criminal tribunals, let alone to justify the status quo or to advocate reforms.\textsuperscript{16} In line with these premises, the chapters in Part III—devoted to the analysis of the tribunals’ trial arrangements—set out the domestic approaches to regulating various elements of trial process as background information. This reflects the idea of comparative criminal procedure as a basic grammar of the discipline of international criminal procedure, or as a vocabulary that is imperfect but necessary to comprehend the origins of rules and practices at the tribunals and to appreciate their rationales in that new context.\textsuperscript{17}

The character and evolution of trial regimes of the tribunals have for long been examined and debated in light of their semblance with, or deviation from, the ‘civil law’ and ‘common law’ traditions and the theoretical ‘adversarial’ and ‘inquisitorial’ models historically associated with them.\textsuperscript{18} It has become the norm to describe international criminal procedure as a ‘melting pot’ of procedural traditions, a hybrid system drawing from different cultures and torn apart by ‘clashes’ and ‘tensions’ arising between them. Those tensions had to be resolved before a fair and effective procedure could possibly emerge.\textsuperscript{19} The more recent literature has clearly moved beyond the ‘civil law v. common law’ discourse towards a more functional approach to the dichotomy. Now that the merger between the two procedural styles has been consummated into a body of international criminal procedure in its own right, calls are made to let go of the ‘outdated’ dichotomy as a procedural summa divisio and using ‘clever combinations’ of the best elements drawn from different models to construct both fair and effective international criminal procedure.\textsuperscript{20} Boas has argued strongly that ‘it is in fact time to abandon the preoccupation of international criminal courts with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.’\textsuperscript{21} Others have similarly sought to move the debate beyond the common law v. civil law divide.\textsuperscript{22} The tribunals were then placed in the vanguard of harmonization between the procedural and evidentiary rules originating in different domestic traditions.\textsuperscript{23}

There are cogent reasons to welcome the line of argument that seeks to re-modify the old debate between common law and civil law in the domain of international criminal procedure. The ability of the practicing world and academia to overcome this barrier and to effect a transition towards a methodology employing criteria that are more appropriate for the normative evaluation is a landmark of maturity of international criminal procedure as an autonomous system. Leaving the comparative taxonomies behind is a precondition for the more balanced and constructive discourse that opens up a prospect for the further

\textsuperscript{16} Chapter 1, section 4.3.4.C.
\textsuperscript{17} Chapters 8-11 (sections 2).
\textsuperscript{18} Chapter 4 (defining these categories and overviewsing domestic procedural arrangements from this perspective).
\textsuperscript{21} Boas, The Milošević Trial (n 20), at 287.
\textsuperscript{22} J. Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial-Inquisitorial Dichotomy’, (2009) 7 JICJ 17, at 18-19; J.D. Jackson and S.J. Summers, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions (Cambridge: Cambridge University Press, 2011) 28, 116, 143 (‘the boundaries between the various legal traditions are fragmenting, with the result that it is no longer accurate to think in terms of fully coherent “adversarial” and “inquisitorial” procedural traditions.’); Schuon, International Criminal Procedure (n 19), at 11.
\textsuperscript{23} P.R. Dubinsky, ‘Human Rights Law Meets private Law Harmonization: The Coming Conflict’, (2005) 30 Yale Journal of International Law 211, at 311 (establishment of an international criminal tribunal ‘fostered a useful hybridization of procedural law that is more difficult to create in national legal systems.’).
development of the system. The following recapitulates the reasons why comparative law is ill-fitting as a method for the evaluation and reform in international criminal procedure and addresses what these observations entail for optimal trial procedure of interest to the normative theory.

The process frameworks developed in individual legal systems and across the relatively cohesive domestic ‘traditions’, ‘families’ or ‘cultures’, mostly tend to be relied upon by their proponents as fail-proof sources of guidance on how criminal trials should be structured and conducted. The more self-reflexive members of the legal profession have noted ‘the tendency of each duly socialized lawyer to prefer his own criminal justice system’s values and institutions’. This warning appears to have been confirmed by the two decades of making and practicing procedure by modern international criminal tribunals. Although international criminal procedure is not nearly as ‘blank slate’ as it used to be, it is incomplete and open-ended in numerous essential respects. It lacks a coherent legal culture to serve as an ultimate fall-back and gap-filling device, in stark contrast with national systems which have taken centuries of refinement through trial-and-error and are believed to possess sufficient problem-solving capacity in the domain of procedural justice.

Hence, although international criminal procedure poses an unprecedented promise of convergence, the environments of international criminal courts are rich in temptation and opportunity to operate from strong value-ridden judgments on what constitutes a fair, effective, and otherwise virtuous process. Comparative law then comes in conveniently as a self-serving methodology for validating conclusions reached by other means, i.e. the conclusions controlled by a primordial set of values and unaffected by comparative data. The aprioristic notions, paths of reasoning, norms and their established interpretations are ‘smuggled’ from the national domain—the primary reference framework of a ‘socialised lawyer’—into the universe of the tribunals, only subject to limited and reluctant self-criticism.

The ‘overinvestment’ in the comparative dichotomies can partially be explained by the non-detachable semantic and normative baggage of perceptions about fairness and adequacy of the constitutive arrangements those models carry. Unfortunately, scholarship has not been immune to tempting albeit erroneous and sweeping assumptions that certain domestic procedural traditions are inherently ‘fairer’ than the others, even though assertions of one system’s superiority are not made in bad faith. Legal professionals alike

---

24 Boas, *The Milošević Trial* (n 20), at 287 (‘Freedom from preoccupation with the common and civil law approach to legal and procedural problem-solving in international criminal law will facilitate a more clear application of principle developed in the context of that legal system and encourage lawyers and judges to look at these issues in their context, rather than through the lens of their own domestic experience.’).

25 J. Crawford, ‘The ILC Adopts a Statute for the International Criminal Court’, (1995) 89 *American Journal of International Law* 404. See also Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London, 1945 (Washington, DC: U.S. Government Printing Office, 1949) x (‘Members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right. It has often been thought that because of these deep-seated differences of procedure the use of the judicial process by and among the community of nations is inherently limited.’).


27 Boas, *The Milošević Trial* (n 20), at 287 (‘there has been an overinvestment in the common law/civil law dichotomy and its perceived impact on the fair and expeditious conduct of international criminal proceedings. This dichotomy and its anatomical relationship with fairness and expeditiousness was critically important in the early years of developments of modern international criminal law’).

28 See e.g. G.S. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’, (2007) 45 *Columbia Journal of Transnational Law* 635, at 637 (seriously questioning ‘Why has it [international criminal procedure] failed to achieve the level of due process offered by the most rights-protective countries, such as the United States?’) and 638 n6 (‘The advanced protections in those systems,
naturally fall back on the familiar notions of what is fair whenever confronted with legal lacunae, options presented by vague compromises and statutory discretion, extraneous and counterintuitive arrangements and views opposite to theirs on how the proceedings should be organized. These circumstances arise on a daily basis in international criminal adjudication, enabling (and prodding) actors to revert to the modalities of trial practice they are most comfortable with, in incontrovertible confidence that they should look no further.

The propensity to revert to domestic models of criminal procedure has had a strong traction for the adoption, interpretation, and application of the rules of international criminal procedure, as it prodded lawmakers and practitioners to vouch for formulas and concepts that were not alien and ‘felt right’ to them. But the problem with this approach lies in the fact that many of the debates on what constitutes the ‘better’ international criminal procedure, especially in the formative stages, were overshadowed by the unconstructive advocacy in favour or against the adoption of ‘civil law’ or ‘common law’ procedures as a matter of principle. This controversy has for the most part been disconnected from the practical considerations of fair and effective process in its context. The adherence to a certain model tended to be seen as a stake in an almost ideological ‘global popularity contest’ between domestic legal traditions, reflecting the challenges of inter-state discussions about harmonized criminal procedure. The debate was at times conducted in acrimonious terms and without a genuine attempt to understand the other side, raising the spectre of ‘comparative chauvinism’. This made the supposedly neutral models devised by the comparatists susceptible to abuse as tools of rhetorical domination, albeit to no fault of their own.

Getting bogged down into the relative advantages of the domestic models in the field of international criminal justice had a detrimental effect of distracting lawmakers and practitioners from the primary purpose – the elaboration of standards and practices that are genuinely fair and workable in the exacting and unique setting of international criminal adjudication, regardless of the tradition which inspired them. The detachment of international criminal procedure from a cohesive socio-cultural environment and

particularly in the United States, will be the normative point of repair for this Article.’ Emphasis added.). Gordon repeatedly attributes the erosion of the rights of the accused to ‘civil law influences’ generally and in the IMT context in particular: *ibid.*, at 644, 645, and 680. This is not supported by the negotiation history of the Nuremberg Charter and the IMT’s practice (see Chapter 1). See also S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) 16 (‘it is generally recognized that the adversarial system is more suitable when it comes to offering protection to the rights of the accused.’).

29 F. Mégret, ‘The Sources of International Criminal Procedure’ (in L. Gradoni et al., ‘General Framework’), in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 70 (‘The extent to which such models can be relied on is subject to the need to adapt criminal procedure to the special demands of international justice. Domestic practices as sources of inspiration are in a sense in objective competition and often exert a stronger pull than actual sources of international law.’).


32 Jackson and Summers, *The Internationalisation* (n 22), at 6 (‘comparative scholarship in the field has tended to reinforce the nationalist tendency of states to differentiate themselves from others by classifying systems of evidence and procedure into two discrete categories.’).

of usages, as will be shown shortly, and it is not normative. Limited role in the genesis and evolution of international criminal procedure. Such usage of the comparative method and of its dichotomies persists. It is have often been employed to describe the realities and nature of international criminal proceedings. The categories referring to domestic legal traditions and comparative models can be relied on is subject to the need to adapt criminal procedure to the special demands of international justice. Hence, it is so a fortiori in respect of international criminal procedure. Any duly sophisticated endeavour to characterize the procedural systems of the tribunals along these lines would amount to a research exercise for its own sake. Besides

Therefore, (national) comparative law categories of common law and civil law are not an appropriate normative framework in international criminal procedure, which confirms the thesis advanced in Chapter 1. They neither guide the development nor assist in the normative evaluation of international procedural rules and practices. These purposes are better achieved with reference to that procedure’s fundamental values, needs, conditions, and other factors with a bearing on the appropriate trial arrangement. Whenever either the ‘adversarial’ perspective or the ‘inquisitorial’ perspective are used for the normative purpose of critiquing (international) criminal procedure, the conclusions can be drawn that said procedure falls short of being fair and effective. But such conclusions have no credibility in the absence of a justification as to why one perspective was chosen as the frame of reference over the other. The comparative method has other proper usages, as will be shown shortly, and it is not normative.

Secondly, it is incontrovertible that most of the elements of trial process resemble and/or can be traced back to their analogues and precursors in domestic criminal procedure. The categories referring to domestic legal traditions and comparative models have often been employed to describe the realities and nature of international criminal proceedings. Such usage of the comparative method and of its dichotomies persists. It is encountered even in studies where the ‘common law v. civil law’ dichotomy is reserved a limited role in the genesis and evolution of international criminal procedure. It is important to keep in mind though that the ‘adversarial v. inquisitorial’ dichotomy is inherently an imperfect descriptor of contemporaneous domestic procedural systems. Hence, it is so a fortiori in respect of international criminal procedure.

Arguably, the adage ‘the evidence scholarship.); M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International convergence’ and 9 (‘[t]he adversarial/inquisitorial dichotomy has had a particularly baneful effect on evidence scholarship.’); M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’, (2001) 50 International and Comparative Law Quarterly 26, at 28-9 (noting that ‘[s]ignificant derivations within each main style (and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate.’).

34 Schuon, International Criminal Procedure (n 19), at 251 (‘one should use this opportunity to endeavour to deliberate on which procedural devices suit the special needs of international criminal procedure in a more open manner, unfettered by one’s own legal tradition.’) and 308 (‘This circumstance permits freedom from unduly aligning oneself with the practices and procedures of one’s own legal system, so that they can be considered anew in light of the specific setting and tasks of international criminal trials.’).

35 In a similar vein, H. Friman et al., ‘Charges’, in Sluiter et al. (eds), International Criminal Procedure (n 30), at 460 (‘a normative assessment of a particular solution on comparative grounds would require a qualitative evaluation of the adversarial and the inquisitorial models as such against some chosen parameters.’); Mégret, ‘The Sources of International Criminal Procedure’ (n 29), at 70 (‘The extent to which such models can be relied on is subject to the need to adapt criminal procedure to the special demands of international justice.’ Footnote omitted.).

36 See also Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 19 (‘it is not immediately clear that either an “adversarial” or “inquisitorial” approach should be taken towards international criminal procedure as a matter of a priori principle.’). For an example of an aprioristic reasoning, see n 28.

37 E.g. Boas, The Milošević Trial (n 20), at 286 (‘It is apparent that international criminal law is infrastructurally adversarial but that it has many civil law overlays which can or do impact profoundly on the conduct of proceedings.’). The present study is no exception – it has occasionally used these notions as convenient ‘shortcuts’ to convey a general impression about the nature of procedural arrangements in individual courts. On the use of the models, see Chapter 4.

38 Jackson and Summers, The Internationalisation (n 22), at 8 (‘the dichotomy is increasingly unhelpful in describing actual systems of justice and as a heuristic tool for gauging whether or not systems are converging’) and 9 (‘[t]he adversarial/inquisitorial dichotomy has had a particularly baneful effect on evidence scholarship.’); M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’, (2001) 50 International and Comparative Law Quarterly 26, at 28-9 (noting that ‘[s]ignificant derivations within each main style (and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate.’).
sheding light on the provenance of some procedures and discerning major influences that shaped them, the use of comparative law terminology to describe their rationale and systemic functions is not apt to lead to particularly useful conclusions. For example, as Friman and co-authors point out,

a comparative study will primarily expose differences and allow conclusions as to whether the chosen solution for a particular international criminal institution is closer to one or the other legal tradition. The conclusion that the process of the SCSL is clearly influenced by adversarial (and common law) principles, and that the ECCC is more reflective of French law (and the civil law tradition) is self-evident and of limited interest.39

In this regard, the ‘inquisitorial’ and ‘adversarial’ models, when understood on a higher level of abstraction and not anchored to the historical provenance or cultural pertinence of a certain procedure presents a more serviceable prism. For example, they may serve as catchy labels referring to the judge-led and party-led process, respectively.

Thirdly, and in a quite different sense, the data on comparative criminal procedure have served the international judges at the ICTY, ICTR and elsewhere, as well as state delegations in the diplomatic negotiations leading to the adoption of the ICC Statute and Rules, as an indispensable construction material, source of inspiration, and a reference framework in their deliberations on procedure.40 Undoubtedly, this way of using comparative law knowledge will continue in any future efforts to devise procedure for prospective international and hybrid criminal tribunals. The project of creating international criminal procedure has been a prolonged and intermittent effort by various agents to construct a fair and workable system by way of combining, fusing, and amalgamating national rules and practices.41 Judge Cassese fittingly described the process that led to the emergence of international criminal procedure as “the gradual decanting of national criminal concepts and rules into the international receptacle”.42

The appropriateness of this methodology and the success of the effort are subject to different assessments. Numerous commentators—including negotiators,43 lawmakers and judges in their opinions,44 as well as extrajudicial writings45—have expressed the view that

39 Friman et al., ‘Charges’ (n 35), at 460.
40 Mégret, ‘The Sources of International Criminal Procedure’ (n 29), at 70 (‘The “source of inspiration” (rather than source stricto sensu) for international criminal procedure lies in several models of criminal procedure (common and civil law mostly).’ Footnotes omitted); M. Caianiello, ‘First Decisions on the Admission of Evidence at ICC Trials’, (2011) 9 JICJ 385, at 386 (‘source of various technical solutions for applying the political and ideological values at the basis of any system; values that, because of their intrinsic nature, need careful blending and balancing to achieve a harmonious outcome.’).
41 See Chapter 1.
43 Report of Robert H. Jackson (n 25), at x (‘The significance of the charter's procedural provisions is emphasized by the fact that they represent the first tried and successful effort by lawyers from nations having profoundly different legal systems, philosophies, and traditions to amalgamate their ideas of fair procedure so as to permit a joint inquiry of judicial character into criminal charges.’).
44 See also Erdemović dissent of Judge Cassese (n 42), para. 4 (‘international criminal proceedings … combine and fuse, in a fairly felicitous manner, the adversarial or accusatory system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition).’); Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC II quater, ICTY, 4 February 1998 (‘Delalić et al. defence disclosure decision’), para. 20 (‘The general philosophy of the criminal procedure of the International Tribunal aims at maintaining a balance between the accusatory procedure of the common law systems and the inquisitorial procedure of the civil law systems; whilst at the same time ensuring the doing of justice.’) and, in the same case, Judgement, TC, 16 November 1998 (‘Delalić et al. trial judgement’), para. 159 (‘a fusion and synthesis of two dominant legal traditions, these being the common law system … and the civil law system.’).
a functional and fair system of criminal procedure can be (and has been) cultivated as an artificial blend of the elements of different legal traditions. The ‘mild’ critics of this position do not fundamentally challenge the possibility of successful amalgamation, but point out that the sides to the dialogue are yet to engage in a meaningful exchange and joint effort to genuinely understand the legal concepts originating in other legal traditions, that is their ‘genotypes’ rather than ‘phenotypes’. The ‘ideological’ and philosophical differences underlying the various procedural styles mostly remain under-rationalized and unresolved. Despite the obvious need for the legal traditions to start ‘speaking with one language’ in the context of constructing international criminal procedure, one may wonder whether the cross-cultural dialogue has moved far beyond the state in which it was left at Nuremberg. As Justice Robert Jackson commented about the minutes of the London conference debates,

much of the exposition of rival legal systems is too cryptic and general to be satisfying to the student of comparative law. How much of the obvious difficulty in reaching a real meeting of minds was due to the barrier of language and how much to underlying differences in juristic principles and concepts was not always easy to estimate. But when difference was evident, from whatever source, we insisted with tedious perseverance that it be reconciled as far as possible in the closed conferences and not be glossed over only to flare up again in the public trials.

The other strand of criticism goes further in expressing pessimism about the very viability of a fair hybrid system in the international context. This echoes misgivings about hybrids and legal transplants registered in comparative law literature. Some
sacrificed on the altar of this artificial union.' Footnotes omitted.)

... the common law and the civil law. Certain due process rights are exceptionally, see Murphy, ‘No Free Lunch, No Free Proof’ (n 13) (suggesting that the tribunals should... the creation of Frankenstein’s monster.

What is equally apparent from these critiques, however, is that comparative data are instructive and indispensable in developing a synthesized or amalgamated sui generis system. Such data act, essentially, as building blocks, given the lack of a better construction material. With the synthesized and compromise-based procedural form having been the living reality in international criminal tribunals from the early days of the project, there is no going back towards comparative purism, asserting that either of the archetypal traditions of domestic process would have been a better option for the tribunals. As is recognized by the critics of the ‘Procrustean melding of the civil and

natural habitat, each set of practices is part of a larger procedural whole, with its own internal coherence.... Creating a successful mixture is not like shopping in a boutique of detachable procedural forms, in which one is free to purchase some and reject others.’).

55 Pizzi, ‘Overcoming Logistical and Structural Barriers’ (n 50), at 2
56 F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’, (2009) 14 UCLA Journal of International Law & Foreign Affairs 36, at 43 (‘in many crucial aspects the traditions are at loggerheads, making satisfying reconciliation difficult’); Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 705 (‘It would be tempting just to politically cherry-pick due process features in domestic jurisdictions ... and simply graft them onto the international mold. But that would not be realistic.’ Footnotes omitted.); Zappalà, Human Rights in International Criminal Proceedings (n 28), at 16 (regarding truth, pointing to ‘two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the “inquisitor” must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process.’).
59 M. Delmas-Marty, ‘Reflections on the “Hybridization” of Criminal Procedure’, in J.D. Jackson et al. (eds), Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damška (Oxford and Portland: Hart Publishing, 2008) 251 (‘only a comparative study makes it possible to develop truly “common” norms, that is, norms defined not by the unilateral transplantation of a dominant system, but a pluralist combination of the best of each national tradition, through synthesis or even “hybridization”…’).
60 See also Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 51 (‘Synthesis of institutional and procedural form is a reality in the international tribunals .... [It] seems that in trial practice the synthesis takes the form of compromise, and procedural difference (or claims back to comfort in either of the originating traditions) are arbitrated by the trial chamber. To this extent, synthesis is a necessary feature of trial practice but it operates within an overriding potential to claim and activate procedural (and interpretative) difference.’); Jackson and Summers, The Internationalisation (n 22), at 143 (‘The risk again ... is that by expressing a preference for one established model over the other, the protagonists involved are asked to think only in terms of established domestic procedures. The danger here is that the choice of criminal procedure becomes a kind of “global popularity contest” between domestic legal traditions where the most celebrated features of one tradition are transplanted into the international context in a “one-size-fits-all” paradigm.’). But, exceptionally, see Murphy, ‘No Free Lunch, No Free Proof’ (n 13) (suggesting that the tribunals should adopt essentially common law rules of evidence).
common law traditions’, the procedural product of such melding has, over time, taken root and thereby not realistically subject to reconsideration. No proposal advocating a wholesale return (rather than leaning) to a ‘pure’ system will be seriously taken, not least because it is not known what such a system amounts to in the context of globalized procedural legality, and much less why a specific ‘pure’ model among its possible alternatives is to be taken further as a blueprint.

The more promising—and indeed the only—avenue is to continue refining and optimizing the amalgamated system that is international criminal procedure. The national procedural traditions are, however, only points of departure in that process. Their influence on international criminal procedure should in principle not extend beyond providing a number of possible, i.e. not mandatory, starting positions. This is because whenever a procedural rule or practice is extrapolated onto the international context to form part of international criminal procedure, its rationale, functions, implications and, indeed, very nature will be informed and modified by a system in which it is set to work. Like with the borrowing of procedure in the domestic context, the process in most cases will amount to ‘legal translations’ rather than transplantation, or ‘reinterpretation’ rather than ‘plagiarism’. In other words, the rule or practice will acquire its own ‘genotype’ of which the ‘phenotype’ would only be an elusive and potentially misleading indicator.

At this juncture, another usage of the comparative method could be discerned – that of a heuristic tool and repository of empirical knowledge about the operation of domestic criminal processes. In teaching us about coherence and logic in a procedural system, the domestic models wield a significant explanatory power with regard to the rationales and functions of distinct components of procedure within a unified whole, and the associated advantages, risks, and checks that are attached to their use. By analogy, the insights about the internal logic and regularities in the working together of the wheels and cogs of actual procedural systems—for example, the link between the form of trial and the roles of the judges and parties—hint towards what might or might not work in international criminal procedure. As aptly noted by Frédéric Mégret,

There is no doubt the traditions provide a rich way of interrogating international procedure as it stands, testing its internal coherence, and determining its overall soundness from a doctrinal, practical, or principled point of view. … The role of different traditions is certainly an important factor in the genesis of international procedure, if only because they provide a number of more or less ready-made blueprints for what criminal procedure should be.

Under this heading, comparative law goes some way toward disproving some of the ontological uncertainties of international criminal procedure and, in particular, the impossibility of constructing mixed/hybrid procedural systems by cherry-picking and synthesizing elements that are typically associated with either of the major legal traditions. In particular, the existence and performance of experimental mixed systems of criminal

58 Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 707 (‘a Procrustean melding of the civil and common law traditions will not reverse the current trend. Instead, with due process as its policy lodestar, international criminal procedure must judiciously mix and match the best features that each system has to offer.’).


60 In a similar vein, see Caianiello, ‘First Decisions’ (n 40), at 386 (a procedural system is ‘a highly complex instrument, a multifaceted mechanism, in which each single act, in a broader or lesser way, connected to the others. To govern such a mechanism and to give it cohesion … theoretical models play a decisive role.’).

61 Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 32 (‘the internal consistency governing legal procedural styles needs to be recognised and worked within.’).

62 Mégret, ‘Beyond “Fairness”’ (n 53), at 43.
procedure attest that such models are not merely abstract theorizations but reflect functional, albeit by no means flawless, procedural regimes. The examples are Italy after the landmark 1988 reform of Criminal Procedure Code and Nordic countries whose trial systems incorporate both inquisitorial and adversarial features (e.g. Sweden and Norway).

One is then well advised to turn to the experience of those systems when faced with existential anxieties of trying to combine elements that may appear incongruent in the domain of international criminal procedure. The combination of the ‘adversarial’ trial format, based on the two-case approach to case presentation and witness questioning order, and the characteristically relaxed ‘inquisitorial’ admissibility regime has been deemed a striking and distinctive feature of the tribunal process. The same has emerged as a key source of anxiety. As a conceptual matter, the existence of the ideally mixed—by nature or by design—domestic criminal procedure systems detracts from the claimed impossibility of constructing a credible and workable system of a similar nature for international criminal tribunals. The perceived incoherence may be presented as a creative solution resulting from cross-fertilization and learning among the judges from different backgrounds who are faced with the challenging task of conducting fair and effective trials. That said, the conceptual comfort gained in abstract contemplation of mixed domestic procedural models may be deceptive. First, mixed domestic systems ought not to be romanticized, as the experience of transplanting the foreign procedural philosophies and blending them with traditional features has not always led to a credible and coherent framework only subject to unreservedly positive assessments. It is necessary to look into the international hybrids’ operation in practice as it may well be that the fact-finding impediments and other infelicitous features of the tribunals’ legal and cultural environment pose special problems in terms of fairness and truth-seeking which are virtually unfamiliar to the mixed domestic systems.

---

63 In more detail, see Chapter 4. See also W.T. Pizzi and M. Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’, (2004) 25 Michigan Journal of International Law 429; Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 20), at 437 n3.

64 For instance, while Norway employs an ‘adversarial style’ of trial process in that the parties are responsible for presenting their cases, it is also characterized by a liberal regime for the admission of evidence, a preference for a narrative style of witness testimony, the judicial power to intervene in and even take over questioning from the parties, and the arrangement that the defendant should respond to the charges before witnesses are called. See further W. Pizzi, “The American ‘Adversary System’?” (n 21), at 140 (arguing that ‘the adversarial system of party control to be mixed with flexible rules of admissibility.’); N.A. Combs, ‘Evidence’, in W.A. Schabas and N. Bernaz (eds), The Routledge Handbook of International Criminal Law (London and New York: Routledge, 2011) 329.

65 Jackson and Summers, The Internationalisation (n 22), at 119 (‘One of the most striking is the tendency for adversarial features of party control to be mixed with flexible rules of admissibility.’); N.A. Combs, ‘Evidence’, in W.A. Schabas and N. Bernaz (eds), The Routledge Handbook of International Criminal Law (London and New York: Routledge, 2011) 329.

66 Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 33 (‘the adversarial system of party presentation combined with the ever increasing admission of written statements taken by the prosecution ... has restricted ... its [defence’s] ability to challenge evidence.’); Caianiello, ‘First Decisions’ (n 40), at 402-3 (‘the ICC system appears flawed’ because ‘notwithstanding its general accusatorial framework, the rules governing admissibility are more proximate to the inquisitorial model.’); Murphy, ‘No Free Lunch’ (n 13), at 540 (‘In the context of adversarial trial proceedings, “free proof” is an euphemism for a systemic failure of judicial discrimination in admitting evidence without inquiring its apparent provenance or reliability’).

67 See e.g. O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, (2007) 5 JICJ 360, at 364 (‘This infusion of civil-law evidentiary principles into an essentially common-law framework is, in my view, a testament to the judges’ willingness to cooperate, to learn from one another and to recognize the utility and effectiveness of approaches taken in national legal systems other than their own.’)

68 The Italian procedural reform exemplifies a scenario in which the innovations were met with significant resistance and the deviations from the law in practice: see n 63 and Chapter 4.

69 Jackson and Summers, The Internationalisation (n 22), at 140 (arguing that ‘the adversarial system of party presentation combined with the ever-increasing admission of written statements taken by the prosecution within a context in which it is difficult for the defence to make their own investigations has restricted defence access to information and its ability to challenge evidence.’) and 146 (‘the hybrid of adversarial presentation
Further, despite being unhelpful evaluative parameters and less than optimal descriptors, the ‘adversarial’ and ‘inquisitorial’ models developed by the comparative law discipline still operate as useful heuristic tools and analytical lens for identifying the origins, rationales and basic features of the various elements of procedure.\textsuperscript{70} They allow for the understanding of how the national process is organized and what factors are at work that could make it run more or less smoothly or make it less fair and expeditious. If and when a comparison or analogy with the arrangements under international criminal procedure is justified, the national criminal procedure experience may be used to discern and anticipate the potential advantages, risks, and problems in the tribunals’ framework and practice.\textsuperscript{71} Furthermore, the logic of path-dependence in developing criminal procedure equally informs the evolution of international criminal procedure as it informs national criminal process.\textsuperscript{72} This may be even more so at the tribunals, given the specifics of procedural law-making by the judges who are least likely to be radical law-reformists.\textsuperscript{73} Making a certain legislative choice from the outset entails the need for a number of procedural elements associated with it to be incorporated almost—and the word ‘almost’ is key here—by definition if the objective is a workable procedure.

Along these lines, the identification of potentially harmful gaps and the assessment of deficiencies and advantages of international trial arrangements on comparative grounds may come close to a quasi-normative task. However, for such an analysis to remain methodologically persuasive, any inferences across legal orders may only be made after careful attention has been paid to the unique context of the international procedural system which results in a different procedural philosophy.\textsuperscript{74} The tribunals, in creating and applying their \textit{sui generis} procedure, have essentially had not only to ‘reinvent the wheel’ but, on a wide range of issues, devise a whole new way of conducting the process. What may be seen as workable at the national level might be otherwise in an international system: the comparative law research shows that the transplanted institutions, rules and practices acquire a life of their own, governed by the different logic and dynamics at the receiving end.\textsuperscript{75}

\textsuperscript{70}To the same effect, N. Jörg \textit{et al.}, ‘Are Inquisitorial and Adversarial Systems Converging?’ in P. Fennell \textit{et al.} (eds), \textit{Criminal Justice in Europe: A Comparative Study} (Oxford: Oxford University Press, 1995) 41; Jackson and Summers, \textit{The Internationalisation} (n 22), at 6.


\textsuperscript{73}Erdemović dissent of Judge Cassese (n 42), paras 2 (‘legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings’) and 4 (‘This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems… [I]t would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say, common-law or civil-law systems.’).

\textsuperscript{74}Jackson and Summers, \textit{The Internationalisation} (n 22), at 7 (‘Institutional and cultural resistance within the receiving system sometimes proves too strong to achieve the impact intended, with the result that the character of the imported practice or procedure is altered in the new procedural environment.’); Damaška, ‘The Uncertain Faith of Evidentiary Transplants’ (n 51), at 840 (‘the music of the law changes … when the musical instruments and the players are no longer the same’).
Chapter 12: Towards a Normative Theory of International Criminal Trial

While demonstrating what this means in specific terms is reserved for subsequent discussion, one limited example for now is the lack of jury in international criminal trials and its implications for the advocacy dimension of trial.\textsuperscript{76} International trials are conducted by professional judges and not laymen. It could be argued that their legal minds need not be ‘conquered’ by partisan advocacy through interventions made before and after hearing evidence. However, this consideration does not \textit{per se} rule out the great value and pragmatic relevance of opening statements and closing arguments. As previous chapters have shown, those steps acquire a unique meaning and function in international criminal trials.\textsuperscript{77}

At any rate, it bears emphasizing that comparative law falls short of prescribing how the empirical and experimental knowledge about the logic and regularities of national criminal procedure is to be applied in building an international procedural system out of the domestic context. While some commonalities between different legal systems and families can be discerned, they lend no ready-made \textit{normative} basis for developing and/or reforming international criminal process. Any overlaps may be accidental or a consequence of the normative impact of the more imperative factors, most notably, human rights law, which, as has been shown, has a strong, albeit mediated, effect on international criminal procedure.\textsuperscript{78} The latter may thus bear semblance to or replicate the commonly shared rules reflecting convergence on the domestic level, but this is not necessarily \textit{because} national criminal procedure has a direct impact on its international counterpart.\textsuperscript{79} The practice of constructing criminal procedure for the international tribunals has shown that, despite the important role comparative method has played in that process, it has not been a strong normative determinant that is ‘strictly causal in making international criminal procedure what it is’.\textsuperscript{80}

To sum up, the foregoing observations indicate that the data and insights offered by comparative research into the national criminal procedure provide one with potentially useful heuristic and analytical aids. The comparative law discipline is also a repository of procedural standards and practices that may be—and have actually been—experimented with and transplanted into international criminal procedure. However, while the building blocks of the tribunal process can be sourced from that repository, it offers no guidance or instruction as to which building blocks are to be used and how they are to be employed in designing the architecture of international criminal procedure. For these reasons, this study has operated on the premise that comparative criminal procedure is of no avail as a source of normative guidance in the evaluation of procedural law and the performance of international courts. At the conclusion of this study of the tribunals’ trial arrangements, this premise is apt to be confirmed.

\subsection*{2.2 Human rights and goals: Impactful but not decisive determinants}

As opposed to the ‘non-parameter’ of comparative criminal procedure, a tentative choice of evaluative perspectives was made and explained in the initial chapters, along with important caveats attaching to their use in view of anticipated limitations on their ability to provide normative guidance.\textsuperscript{81} The application of the methodological framework to various

\textsuperscript{76} The structure of the court and syncretism of decision-making has, of course, broader implications affecting various aspects of the trial process, not least the liberal regime for the admission of evidence. For discussion of some consequences, see section 3.1.

\textsuperscript{77} On the opening and closing stages of trial, see Chapters 9 and 11 respectively.

\textsuperscript{78} Chapter 2.

\textsuperscript{79} See also Friman \textit{et al.}, ‘Charges’ (n 35), at 460 (‘when many domestic systems apply similar rules or principles with respect to a particular issue, regardless of the legal tradition and the adversarial or inquisitorial nature of the procedures, normative conclusions may be allowed without a preference for a certain model being a pre-requisite.’).

\textsuperscript{80} Mégret, ‘Beyond “Fairness”’ (n 53), at 43.

\textsuperscript{81} Chapters 2-3.
components of trial process in the tribunals presents an opportunity for reassessing the methodological choice and hypotheses, to the possible benefit for any future comparable analyses.

For one, IHRL has had a material and profound impact on every aspect of tribunal trial proceedings including, but not limited to, the structure and format of such. As Chapter 2 pointed out, not only is it grafted into the tribunals’ internal law (Statutes and Rules of Procedure and Evidence), but it also exerts powerful normative effects on the procedural law and practice as binding norms of general international law. Furthermore, human rights have emerged as an overarching interpretive methodology and general consistency rule. The latter must, as is the case with the ICC, be relied upon by the judges when interpreting and applying all procedural law. This elevates human rights standards to the status of lex superior.

Despite compelling legal effects on procedure, the import of ‘external’ human rights standards in the normative theory of international criminal trials is not that much of a procedural gap-filler. In the context of domestic criminal procedure, the sufficiency of ‘fairness’ as an adequate foundation for a theory of criminal process has been questioned. As for international trials, it has proven to be inconclusive as a source of specific normative guidance in relation to key issues of trial organization. The human rights law standards do not amount to a dense and exhaustive regulatory regime capable of prescribing international criminal procedure in much detail. As Mégret put it, IHRL ‘lacks the “thickness” of domestic traditions’ and its concepts of fair trial ‘await concretization in actual forms’.

There is also difficulty in identifying the exact content of the IHRL treaty and customary law norms that would be formally binding upon the tribunals. The tribunals enjoy a broad leeway in formulating and interpreting the relevant norms before applying them. The absence of any external human rights supervision or court hierarchy in the international legal order allows the tribunals to be the sole masters of their human rights regimes. This may result in what appears as an expansive or overly narrow interpretation of various human rights—e.g. the broad interpretation of the notion of fairness as benefitting not only the accused but also other trial participants—or the emergence of new areas of practice that are under-regulated by IHRL outside of the tribunal regime. Thus, given the fixation of fair trial provisions under IHRL on the protection of the accused person, there are gaps in the normative guidance relating to the status at trial of other participants, in particular, victims. The tribunals are functioning legal systems, not abstract models that hinge on ‘minimum standards’ alone. As any other actual criminal justice systems, they have had to make definite choices in filling these gaps and to ensure that the interests of actors other than the accused are made part of the procedural equation—for example, by allowing or disallowing victims to participate in their own right.

The case law of regional human rights courts (ECtHR and IACtHR) and monitoring bodies (HRC) provides instructive and authoritative guidance to international criminal tribunals in establishing the contents of the human rights treaty provisions on which their Statutes and Rules are modelled. However, it is not binding as far as the interpretation of the tribunals’ applicable law is concerned. Those human rights courts adjudicate cases

82 A. Duff et al., The Trial on Trial, Vol. 3: Towards a Normative Theory of the Criminal Trial (Oxford: Hart, 2007) 108 (‘Perhaps it is a mistake to focus so much on the idea of fairness, as if this was the only, or the only non-truth-related, value relevant to the trial and its procedures, so that the question is always whether a given procedure or provision is fair.’).
83 Mégret, ‘Beyond “Fairness”’ (n 53), at 53 (IHRL ‘lacks the “thickness” of domestic traditions .... Fundamental intuitions about the need or right to a fair trial await concretization in actual forms.’).
84 Ibid., at 56 (IHRL offers no “straightforward mediation between the interests involved because they are quite dependent on the actor claiming rights’ and cast victims’ procedural rights as ‘fundamentally alien to the requirements of a liberal trial geared towards the need to avoid condemning innocents.’).
85 See Chapter 2.
under their own jurisdicational arrangements, in their proper legal environment, and for the specific purposes stemming from their mandates. Hence the legal tests they develop by induction from their own cases are shaped by the different nature of cases and distinct purposes and form of adjudication. They do not have a binding effect on international criminal tribunals who build up their own human-rights casuistry. As a matter of judicial independence and decision-making authority, the tribunals are competent and under the duty to resolve human rights issues based on their own legal rationales as well as to autonomously interpret and apply the law in light of the circumstances of each individual case and in their socio-political and legal context. They are essentially neutral in terms of the choice between ‘inquisitorial’ and ‘adversarial’ procedures and express no unequivocal or even subtle preference for the adoption of either one or the other. Although human rights law standards are a backbone of international criminal procedures and the mandatory playing field within which it can be developed and practiced, the ‘external’ human rights regime leaves many key questions about the optimal and desirable way of organizing and structuring international trials unanswered, however desirable closer human-rights guidance on those issues would be. A few examples emerging from the foregoing Chapters clearly demonstrate this point.

Take the issue of the ‘managerial judging’ model introduced by the ad hoc tribunals (and subsequently employed by all other courts, including the ICC). The model enables the Trial Chamber judges to expedite the trial process, counteract the dilatory tactics by the parties, and to reduce the size of the (prosecution) case. No clear and meaningful normative position on the appropriateness of the model follows from the texts of human rights conventions or jurisprudence of respective courts. IHRL essentially is silent on whether the practice of granting trial judge(s) pre-trial access to information about the parties’ cases with a view to enabling them to effectively manage the presentation, is consistent with human rights law and, if so, how this procedure is to be administered to remain so. Nor has the notion come under review by the ECtHR, IACtHR, or HRC. The

86 Ibid., at 76 (‘Due process in international criminal procedure is less a matter of imposing a ready-made model on international trials than it is one of re-interrogating the tradition of due process in light of the particular exigencies of international criminal justice.’).
87 Ibid., at 51 (‘despite all the rhetoric, international human rights will in most cases be under-determinative of the issues at stake’) and 75-6 (‘In terms of human rights protections, international criminal procedure is testimony to the relative flexibility of international human rights law, and its legally plural tolerance of a diversity of models.’). See also Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 23 (‘The [human rights] norms, however, give little guidance in themselves as to how procedures should be constructed’).
88 See in detail Chapter 8.
Chapter 12: Towards a Normative Theory of International Criminal Trial

managerial judging model originated in the US civil process that, accordingly, has been outside the supervisory jurisdiction of the ECtHR. Cues emerging from the Strasbourg jurisprudence are too insufficient and ambiguous to rely on as a self-sufficient source of guidance, whether for the purpose of organizing case management at the tribunals or assessing its fairness.

This is not to say that IHRL is completely beside the point on this issue: one could discern a tension between the idea of an impartial tribunal and the pre-trial access by adjudicators to partisan and prejudicial materials. It is normally the prosecution who is expected to deliver, as part of its pre-trial brief, the detailed information relating to its projected case to the pre-trial judge or the Trial Chamber (the list of witnesses and exhibits with accompanying information and summaries of statements). In turn, the defence will normally limit its notification to matters to be contested (and, more reluctantly, uncontested matters), alibi, and special defences (such as diminished responsibility). The defence brief will tend to withhold the detailed information on its prospective evidence until the prosecution rests its case, whether for the practical reason of its case not being fully known due to ongoing investigations, as a matter of principle (right to remain silent), or as a matter of a chosen defence strategy. This entails that before trial the pre-trial judge and the Trial Chamber will acquire an insight into a one-sided, prosecution version of the case, rather than a ‘dossier’-style compilation of materials resulting from impartial investigative action. This has led to a claim that the evidence at trial will be seen by the judges in light of the prejudicial information they have obtained from the prosecution in the pre-trial.

However, the tribunals have navigated around the challenge of compromised judicial impartiality in view of the judges’ managerial role by ruling out the improper impact of the potentially prejudicial information on decision-making. It was emphasized that the pre-trial brief and the summary partisan materials are not ‘evidence’ but ‘mere information’ before they are properly presented in court and admitted as evidence, and that the Chamber is perfectly capable of appreciating this essential difference. Its delivery to the Chamber solely assists it in reducing the volume of the case and to effectively manage the case presentation – rather than to conduct fact-finding and to form a judicial opinion on the merits of the evidence prior to its examination in court. One might take issue with this justification and insist on the risk of bias, supporting the challenge by reference to the IHRL framework. But the truth is that it is only one of the possible and reasonable interpretations of those inconclusive sources, which hark back to the deeply-seated instincts about what fairness means and standards found in the domestic procedural culture. The existence of the alternative interpretation of judicial impartiality as a principle of human rights in this context espoused by the tribunals attests, yet again, to the importance of IHRL as the overarching philosophy and language of procedure and its inconclusive nature as regards the specific procedural form.

By a similar token, human rights law is an organizing framework but is not a dense regulator and determinant of the trial arrangements in respect of the structure of case, order

89 See infra section 4.2. and Chapter 8.
90 Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 20), at 445 (‘The presentation of pre-trial briefs and witness and exhibit lists is not comparable to the creation of the dossier typical to the civil law tradition. The briefs give general information on the cases of the parties, but the exact content of the evidentiary materials is only presented in lists and summaries for the pre-trial judge and it thereby remains unavailable to the pre-trial Chamber. In this way, the clear-cut distinction between mere “information” and proper “evidence” is preserved.’). It must be noted that the information contained in the second sentence in the quotation just cited is not fully accurate: (i) such information is in fact available to the Trial Chamber; and (ii) the witness and exhibits list contain only summary information. The principal distinction between the pre-trial briefs with the related materials (‘information’) and proper ‘evidence’ lies in their treatment by the Chamber; the former are not regarded as evidence before the presentation and admission at trial.
and modes of presenting evidence and questioning witnesses. As noted, the established principle of the equality of arms or the principle that ‘all evidence must in principle be produced in the presence of the accused at a public hearing with a view to an adversarial argument’ does not rule out the fairness of a typical civil-law scheme with its judge-orchestrated rather than party-led proceedings. The ‘adversarial argument’ requirement can be met in an ‘inquisitorial’ setting if confrontation takes place at the pre-trial phase or during trial, and it is therefore not tied strictly to ‘adversarial’ trials conducted at common law.\footnote{Jackson and Summers, *The Internationalisation* (n 22), at 78 (‘Although the bodies charged with interpreting and applying the various fair trial provisions commonly refer to “adversarial” rights and principles, these conceptions do not match existing practices within the adversarial tradition and it is misleading to consider that these are leading to a convergence in the direction of traditional adversarial processes.’). See also Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 24.}

Human rights law does not prescribe states to organize their evidentiary process in any specific manner in terms of the number and sequence of cases at trial, the order and modes of witness questioning, and the role of judges in calling and examining evidence, subject only to the requirements flowing from the right to an impartial and independent tribunal.\footnote{Chapter 10.}

With the benefit of hindsight, these indeterminacies are important to appreciate for the purpose of developing a normative theory of international trials.

The second normative perspective on international criminal procedure chosen in this study is effectiveness. Here trial arrangements are scrutinized from two different angles: one being the special goals of international criminal justice, the other – operational efficiency. Since the practical utility of the two elements (goals and efficiency) and their import as normative determinants and evaluative tools varies, it was deemed apposite to consider them separately.\footnote{Chapters 3 and 8-11 (sections 4.2 and 4.3).}

To begin with the goals of international criminal justice, Chapter 3 took upon the task of identifying the ‘special goals’ of the tribunals and distinguishing them from other teleological categories widely used in the international criminal justice discourse (in particular, the purposes of punishment and sentencing as well as procedural objectives). In addressing the normative relation between the special goals of the international criminal justice project and procedural arrangements, it was shown that the mix-up between the different layers of teleology of international criminal justice results in the attribution to the trial proceedings of broader socio-political goals or functions which they are neither fit for nor supposed to achieve. The consequence of this conceptual leap is the erroneous assumption of over-determinism of special goals vis-à-vis procedure.

The consideration of the ultimate objectives trials serve in the long run informs (or should inform) the trial structure and procedural regime, in the sense that the latter may not be such as to fundamentally contradict and undermine the professed goals. But the normative effect of the institutional goals on the procedure is subtler and weaker than that of simple causality and determinism. Unlike with the ‘human rights’ parameter, the perceived incongruence between a specific procedural element and any of the socio-political goals of the enterprise does not necessarily entail that the former should be dropped or reformed. Retaining it may still be justified by another goal, which it is meant to promote, or by the need to ensure fairness and expeditiousness of the process. As a perspective on international criminal procedure, goals of international criminal justice have little normative traction: a finding of inconsistency does not automatically result in a disqualification of the ‘problematic’ procedure or practice and in the need for reform.

Furthermore, the rationales for establishing the tribunals and the mandates of assisting in the restoration of piece and security, reconciliation, compilation of the historical record of atrocities and the like, neither require nor pre-determine that international criminal trials should be fashioned in a way resembling or replicating any
specific model of criminal process. The interests of achieving reconciliation, redress of the harm and suffering inflicted by the crimes, or historical truth *per se* does not inexorably point in the direction of ‘adversarial’ (party-driven) or ‘non-adversarial’ (judge-led) process. The institutional goals refer to the broad socio-political outcomes, and the direct contribution to their realization, which can be delivered by the trial system in general or by individual case proceedings, is difficult, if not impossible, to measure. Taken individually or severally, goals are under-determinative of the procedure and give limited guidance on the optimal institutional and procedural arrangements.

One contemplates the tendency to read too much specific procedural content into the procedurally neutral institutional goals of the tribunals. For example, one scholar has argued that the purpose of eliminating impunity of the highest civilian and military leaders ‘suggests a need to engage in active trial management to ensure that all cases are dealt with expeditiously.’ However, one fails to see how a normative distance between the ultimate purposes of the tribunals and the niceties of procedural organization can be overcome without a giant leap in reasoning. Links between the goals of the institutions and the procedural means are tenuous and not strictly causal. The need for an effective case-management cannot be inferred directly from the goal, which can be served by a variety of procedural arrangements. As shown previously, it rather flows from the determinant of efficiency that is a more directive regulatory parameter. Attempts to draw the efficiency-friendly procedure from socio-political goals may reflect the unwillingness to openly recognize the normative importance of purely pragmatic considerations on international criminal procedure while bringing them through the back door.

Besides, as rhetorical devices and tools for mandate-interpretation, the goals may be seen talking past each other, pulling in different directions, and emitting contradictory signals as to what trial arrangements conform better with or more effectively promote. Therefore, the consideration of international criminal procedure in light of goals of justice sometimes gives rise to radically opposed normative arguments. For one, the previous Chapters have commented on the position, espoused by various scholars, that the special goals of international criminal justice should push the trial paradigm away from the ‘adversarial’ model. According to these views, the adversary process in international criminal trials is responsible for the polarization of witness accounts along the partisan lines and the incompleteness of the historical record emerging, given that the parties lack incentives to conduct historically impartial investigations and judges have a largely passive role. The model also entails the subjection of testifying victims to the ordeal of cross-examination—not always conducted and overseen properly given the different backgrounds of counsel and judges—and provides the accused with a platform for grandstanding and political propaganda, arguably pushing away, rather than approximating, the prospects of victim satisfaction, reconciliation and lasting peace in the target community. The judge-led investigations and judge-dominated trials of the ‘inquisitorial’ model, it is argued, are more harmonious with the ultimate objectives of international criminal justice, including its pedagogical goal.

On the other hand, an argument has also been made in support of the opposite position, by way of a normative *ex post facto* justification of the procedures actually employed by international courts. It can be claimed that the adversarial process, with its predilection for public proceedings, transparency, elements of theatre, and reliance of oral rather than written evidence, better corresponds to the unique goals and needs of

---

94 Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 20.
95 Chapter 3 and *infra* section 2.3.3.
96 See chapters 3, 5 and 10.
international justice.\textsuperscript{97} Findlay explained the prevalence of the rules of Anglo-American origin in the domain of trial organization thus:

In the international criminal trial it is essential (for the symbolic significance of the event at least) that as much of the process as possible be public. For the purpose of the spectacle, and that the interest of the observer should be retained, witnesses rather than documents reveal the evidence in question. With the predominance of oral testimony as the source of evidence, the rules for its delivery and admissibility are more likely to link back to a procedural style which shares the significance of the witness (the common law).\textsuperscript{98}

In a similar vein, Zappalà justified the choice for the ‘adversarial’ trial structure at the IMT by the model’s higher didactic capacity than that of its ‘inquisitorial’ counterpart, given that ‘the adversarial style provides the most effective way of presenting a narrative to the public and reconstructing the course of events in a credible and transparent manner’.\textsuperscript{99}

With regard to the ICTY’s choice for the adversarial system, Combs has argued that its early liberal rules for the selection and firing of counsel by defendants stemmed from the recognized need to vest procedural control in the parties.\textsuperscript{100} At the dawn of the ICTY, this was the way to enhance the perceptions of the fairness and legitimacy of the tribunal, while non-adversarial process would arguably ‘create the appearance of muzzling defendants’.\textsuperscript{101} In a fledgling, vulnerable and profoundly mistrusted justice system, the adversarial system was arguably the only fitting ideological choice that could help the Tribunal win the time necessary to mature into a credible institution and to overcome the initial legitimacy deficit.\textsuperscript{102}

Plausible as these explanations are, they are attempts at a post facto rationalization. One may question to what extent the drafters of the Nuremberg Charter were driven in their amalgamation exercise and in their predilection for the adversarial structure of evidence presentation by the explicit consideration of those goals. The ‘package deal’ of ‘fair and workable procedure’ developed at the London Conference was rather a result of substantial US influence, premised on the instinctive notions as to how trials should conducted and not resisted in that regard by the French and the Soviets. The same could be asked about the determinism underpinning the ICTY judges’ fundamental decision to opt

\textsuperscript{97} Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 21 (goals of victim story-telling, achieving reconciliation, constructing a historical record ‘might seem to argue for the more transparent and oral modes of truth-finding associated with adversarial procedure’).

\textsuperscript{98} Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 52.

\textsuperscript{99} S. Zappalà, ‘Comparative Models and the Enduring Relevance of the Accusatorial—Inquisitorial Dichotomy’ (L. Gradoni et al., ‘General Framework of International Criminal Procedure’), in Sluiter et al. (eds), \textit{International Criminal Procedure} (n 30), at 46 (‘The dialectic structure of adversarial criminal process (alluding to the ‘good v. evil’ dichotomy) matched very well with the ostensible pedagogical and historiographic role of international criminal justice in the World War II’s aftermath.’). See also ibid., at 47 (‘The adversarial process appeared to contribute to this goal [transparency and ability to raise public awareness as to the crimes] more effectively than its inquisitorial counterpart which traditionally bears the distinctive features of secrecy, \textit{ex officio} inquiry, an emphasis on written documents rather than live testimonies, and the questioning of witnesses conducted only or mainly by or through the judges.’).

\textsuperscript{100} N. Combs, ‘Legitimizing International Criminal Justice: The Importance of Process Control’, (2011-12) 33 \textit{Michigan Journal of International Law} 321, at 325 (‘as a consequence of the ICTY’s initial, highly vulnerable status, the tribunal had no other choice but to adopt adversarial procedures and to grant defendants virtually free rein in selecting the lawyers’).

\textsuperscript{101} Ibid., at 377.

\textsuperscript{102} Ibid., at 327 (the trust towards officials which landmarks non-adversarial procedures ‘shows just how ill fitting and discordant nonadversarial procedures would have been for the early ICTY given the distrust that pervaded its proceedings. Adversarial procedures not only proved to be a far better ideological fit for the ICTY in its early years as it sought to gain credibility and legitimacy, but they also helped the tribunal to gain credibility and legitimacy.’). See also ibid., at 366, 369-80. After this initial stage of building up credibility, the defendant process control, in particular in representation matters, could be curtailed by the judges without substantial legitimacy costs.
for the party-driven process. Most of the legitimacy challenges lay ahead of the Tribunal when the Rules were being adopted in 1994. Importantly, in cases of both the IMT and ICTY, the choice for ‘adversarial’ trial procedures was shaped by a combination of coincidental factors and considerations of convenience; in none of them was it the only theoretical possibility. Arguably, a one-case approach to investigations and judge-driven trial process could have equally been justified ex post facto by the didactic, restorative, and historical objectives of international criminal justice. One could also emphasize in this context the compelling need to build up the court legitimacy through avoiding polarization of the proceedings and injection of partisan biases.

Without asserting the exclusive validity of these assessments rather than of their opposites, this discussion demonstrates that equally plausible normative positions may be formed as regards the fitness of various models of procedure in light of broader institutional goals. This confirms the earlier thesis on the indeterminacy of the goals perspective in terms of procedural arrangements. It may be instructive as to the nature, needs, and the expected longer-term outcomes of international criminal proceedings, and it has traditionally been used (and will continue to be used) in the critique of procedures. However, unlike the ‘fairness’ perspective, which provides for mandatory requirements towards international justice that do not tolerate inconsistencies where such are identified, the teleological perspective is not a particularly compelling normative vehicle for the evaluation of international criminal procedure generally and the organization of the trials in particular.

Thus, neither the ‘fairness’ perspective nor the ‘goals’ perspective are capable of providing conclusive guidance as to what trial arrangements are ideal or even optimal for international criminal tribunals. Despite their significant impact the two normative perspectives exerted on the initial configuration and the gradual evolution of the tribunals’ procedural regimes, they have not been the only or even decisive determinants to define the current form and nature of their trial regime.

To complete the normative picture, it appears that the additional determinant—functional and operational efficiency—has been at least equally if not more impactful in the actual evolution of the international trial process: that of functional and operational efficiency. Furthermore, it appears to have been the true source of much of the substantive content of the standards and practices acquired by the tribunals, and the reservoir from which most specific procedural solutions were drawn. The following section will briefly revisit the previous findings regarding the weight and implications of this third perspective, as these are important to appreciate in delineating the contours and nature of the normative theory of international criminal trials.

2.3 Efficiency as a normative éminence grise

2.3.1 Impact on procedural development

Chapter 1 has shown that in the majority of the modern international criminal jurisdictions (ICTY, ICTR, SCSL, ECCC, and STL), procedure was essentially the product of judicial

---

103 For recognition to that effect, see Combs, ‘Legitimizing International Criminal Justice’ (n 100), at 370 (‘although the judges had the theoretical ability to craft nonadversarial trial proceedings in which the judges took the lead in deciding which witnesses to call and what questions to ask, … they would have had no ideological grounding in the early ICTY.’).
104 Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 22 (‘it is by no means clear that an adversarial mode of procedure is suited to these wider goals. … Nor, however, is it clear that inquisitorial procedures are the answer.’).
105 Chapter 3.
106 See ibid., section 5.
law-making. The pragmatic, problem-based, and efficiency-driven legislative method—generally characteristic of judicial ways—has coloured the genesis and nature of the emerging international criminal procedure. From its inception, the judge-made procedure evolved as a flexible and dynamic system tailored and adjustable to the legal and institutional circumstances and the practical and operational constraints of the context in which it was set to run. The system was tirelessly propelled forward by means of creative solutions and fixes that the judges devised for it to meet the demands of fair and expeditious trials, with full respect for the rights of the accused and with due regard to the interests of other actors, such as victims and witnesses.

The concerns that distinguish academic inquiries and political legislative activity—respectively, the quest for doctrinal purism and systemic coherence, or the implementation of a specific model or a political compromise—took a back seat in that process. Arguably, those extra-judicial factors may have exerted a subterranean influence on the drafting, application, and amendment of the rules. Overt experimentation and search for a compromise between the procedural traditions were not a primary regulatory force in the judicial law-making, and certainly less so than is the case with the diplomatic efforts to agree upon international criminal procedure. Judges neither attempted to accommodate the conflicting comparative positions at any cost nor engaged in abstract normative theorizing. Rather, they searched hastily and gropingly for the ‘whatever works’ way out. The resulting international criminal procedure was therefore ‘expedient rather than experimental, rationalised rather than rational.’

By contrast, another significant segment of international criminal procedure has surged as a fruit of a political compromise between states (IMT, IMTFE, and ICC) or of the unilateral legislative acts performed by the UN transitional administrations (SPSC). For negotiating states and for the transitional administrators alike, making the applicable procedure not only fair but also workable was an important concern. However, as is well known, the diplomatic method of law-making follows its own logic and has its unique limitations. One is that, when employed for creating a uniform and dense procedural regime, it does not easily lend itself to systemic coherence. The premium on diplomatic—as opposed to judicial—pragmatism rests on a consensus and compromise. These necessitate resort to ‘constructive ambiguities’ in formulating the legal standards and delegating to the judges the task of carving out the further detail. In contrast with judicial law-making, the political legislative process allows room for bolder experiments, a progressive agenda, and idealism. The broad participatory and reparatory rights of the victims guaranteed under the ICC Statute are the prime example of a progressive move whose rationale, systemic functions and practical implementation were not thought through

---

107 Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 35 (‘The essential place of judicial discretion in all trial procedures necessitates that judicial efficiency will prevail as a source of authority for trial decision-making.’).
108 Mettraux, ‘Of the Need for Procedural Fairness and Certainty’ (n 31) (‘courts and tribunals have adopted rules and practices that fit their own needs without much regard for abstract theoretical preferences for one model over the other.’).
110 See e.g. Report of Robert H. Jackson (n 25), at x (‘That these paper provisions [in the IMT Charter] could be made to work in actual practice demonstrated that we had not achieved theoretical reconciliations in disregard of practical considerations.’).
comprehensively.\textsuperscript{112} But to the extent relevant, the previous experiences of creating, applying, and reforming the judge-made procedure at the ad hoc tribunals and the lessons learnt have been a source of guidance for state delegations in defining the ICC procedure and amending it subsequently in the Assembly of States Parties.\textsuperscript{113} This holds both for situations where a deliberate choice was made to depart from the ad hoc tribunals’ procedures and where their solutions were deemed fitting for the ICC.

The practical efficiency and pragmatism in procedure have been the core concerns for the ICTY, ICTR, SCSL, ECCC and STL judges when making the myriad of initial choices on the exact configuration of the process and even increasingly so when incrementally adjusting it in view of the changing perceptions of the institutional needs and challenges. The interest to ensure that the process is workable and effective was a powerful vehicle for gap-filling in relation to the procedural edifice, whereas the requirements of human rights law and the considerations flowing from the institutional goals operated as backbone principles and general aspirations of the system, respectively.\textsuperscript{114} In the ad hoc tribunals in particular, the ceaseless drive for efficiency has been responsible for the current nature and shape of the trial arrangements. But the need for streamlined process is no less imperative in other institutions, including the ICC. The judicial legislators in the ‘postmodern’ third-wave tribunals (ECCC and STL) have also greatly benefitted from the procedural legacy of their antecedents, the important part of which revolved around the issue of how trials are to be organized and conducted for them not be excessively long-drawn-out while remaining fair to the accused and other actors.

Despite its obvious importance in practice, the parameter of efficiency has for long gone unnoticed or underappreciated as a methodological matter.\textsuperscript{115} As a normative perspective on the process, international criminal law theory and discourse tended to see it as too mundane, unworthy, and suspect – unless it were anchored to a more ‘noble’ and virtuous concern with the expeditious process as a part of the right of the accused to be tried without undue delay. The conventional view is that the pragmatic and efficiency-oriented leanings of the process are a potential source of compromises on fairness. This view is short-sighted and efficiency does not necessarily conflict with fairness: on many instances is a precondition for it. Furthermore, efficiency has played an independent ideational role in determining the directions for the development of international criminal procedure. Its normative impact is as compelling as that of ‘fairness’: procedures that appear inefficient may still be justified by the need to preserve fairness or to implement certain of the special objectives of international criminal justice. However, in the context of the predominantly judge-driven legislative process, it has arguably been a primary moving force. Its gap-filling capacity in fleshing out the wheels and cogs of the procedural system is difficult to overestimate.\textsuperscript{116} Accordingly, when ‘efficiency’ was proposed as a part of the methodological framework of this book, it was explored under the umbrella

\textsuperscript{112} On the ‘participation’ aspect, see S. Vasiliev, ‘Article 68(3) and the Personal Interests of Victims in the Emerging Practice of the ICC’, in C. Stahn and G. Sluiter (eds), The Emerging Practice of the International Criminal Court (Leiden/Boston: Brill, 2009) 635-91.

\textsuperscript{113} See in particular the 2012 and 2013 amendments to Rules 68 and 134bis ICC RPE (on prior recorded testimony and the designation of a judge for the preparation of the trial, respectively).

\textsuperscript{114} This is true not only of trial arrangement but of other aspects of procedure as well. For example, while the positive developments towards higher standards of specificity of indictments in the ad hoc tribunals were ‘driven by pragmatic considerations relating to case management and efficiency considerations’, they obviously resulted in the enhancement of the rights of the accused. W. Jordash and J. Coughlan, “The Right to Be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy”, in S. Darcy and J. Powderly (eds), Judicial Creativity at the International Criminal Tribunals (Oxford: Oxford University Press, 2010) 305-6.

\textsuperscript{115} See also Zappalà, ‘Comparative Models’ (n 99), at 45 (‘a number of other elements did not even come into the picture until more recent times. In particular, concerns of efficiency … were not thoroughly examined.’). The author thanks Håkan Friman for this point.

\textsuperscript{116} See further Chapter 3.
notion of ‘effectiveness’, as a shadow side of the ‘teleology’ parameter. But subsequently, in the descriptive and analytical parts evaluating the adequacy of trial arrangements, this parameter was employed as a normative perspective in its own right.\footnote{Chapters 8-11.}

The invisible prominence of efficiency as a normative perspective on the process and its major determinant has far-reaching consequences for the configuration of the trial model contemplated by the normative theory. Its implications go beyond the mere stated need for a streamlined trial process. In fact, pragmatism in procedure defines the relationship between the trial arrangements adopted by the tribunals and the domestic models. It helps situate the trial structure, order of pleadings, and case presentations, and defines the roles of judges and other participants throughout the trial-preparatory and trial stages in relation to domestic reference points.

\section*{2.3.2 Emancipation from domestic traditions: From familiar to pragmatic}

First of all, procedural pragmatism inevitably prods procedural arrangements towards a decreasingly subtle emancipation from the shackles of the established domestic models of trial process. As the judges have struggled with the task of devising a fair and workable system in the tribunals, the normative impulses of the domestic models have gradually gone into decline. This paved the way for the functionalist (or, depending on one’s view, opportunistic) use of building blocks of those models in tailoring the process to the special needs, goals, and circumstances of international criminal proceedings.\footnote{Mégret, ‘The Sources of International Criminal Procedure’ (n 29), at 72 (‘a pragmatic exercise in cherry-picking elements of rules that are at any one point seen as most conducive to the goals of international criminal justice’); Pocar, ‘Common and Civil Law Traditions in the ICTY Procedure’ (n 20), at 459 (‘The flexibility shown by the ICTY in borrowing concepts from both the adversarial and inquisitorial legal traditions should be regarded as an attempt to strike a balance between these two needs [fairness and effectiveness] within a legal context that, for its novelty and complexity, presented challenges unknown to any domestic system in the world.’).}

This ‘pragmatic’ approach turned the ‘common law’ and ‘civil law’ frameworks into ‘reservoirs’ of adjustable template standards hinting to the possible solutions for challenges faced in practice.\footnote{Mégret, ‘The Sources of International Criminal Procedure’ (n 29), at 72 (‘international criminal tribunals will use domestic traditions as a vast reservoir of possible solutions that can be combined in more or less creative ways to accomplish international criminal justice’s goals. This is what can be described as the “pragmatic” approach to determining international criminal procedure.’).} However, such templates fall short of ready-made blueprints and require a divine effort at reimagining their features and combining them creatively into a new coherent whole.

On a more specific level, the pragmatic pull in international criminal procedure has left distinct traces on the current shape of the trial process. As will be discussed, the loosening of adversarial evidentiary principles has arguably been the most dramatic effect of that pull, but unavoidably, the rigid adherence to the ‘adversarial’ trial format also showed cracks. While the predominance of partisan investigations and the bipolar division into partisan cases continued to be the norm, the trial script has been showing a greater degree of variability in individual courts and in a broader historical outlook at different generations of international criminal justice institutions. The key stages—opening statements, evidentiary presentations including rebuttal and rejoinder, closing and further arguments—remained elements of trial practice, but not necessarily their rationales and technicalities. Further, the traditional common-law modes of questioning (examination-in-chief, cross-examination, re-examination) continued to be in use and to bear those names, but acquired distinct rationales and dynamics in the context of international trials. The changes in the evidentiary law and practice in the \textit{ad hoc} tribunals—and at the ICC in the
wake of the 2013 amendments to the ICC RPE\textsuperscript{120}—towards the use of witness statements in lieu of examination-in-chief speak eloquently to the dispensable nature of this traditional common law ‘link in the chain’ of witness examination. The addition and active recourse to modalities of examination by other actors (judges and at the ICC legal representatives of victims) could not be without consequences for the purpose and scope of the proof-taking process. The following observations illustrate how the determinants of pragmatism and efficiency have been driving the domestic reference points (‘common law’ and ‘civil law’) into normative irrelevancy in the area of trial arrangements.

The starting point is the view of procedures through a prism strongly associated with domestic landmarks – the view rooted in expediency, rather than rationality. At the historical IMTs and the ad hoc tribunals, the ‘adversarial’ trial scheme was adopted, subject to deviations some of which were more consequential than others (‘free proof’ being an important departure). At the ICTY and ICTR, the choice was due to interpretation by the judges of the statutory provisions as suggesting the application of adversarial logic (e.g. the prosecutor’s investigative powers and the opportunity for the accused to plead), even though this outcome was not preordained: the statutes leave room to other approaches.\textsuperscript{121} The judges did not miss the opportunity to immediately make innovations on that model, adjusting it to the special needs of the tribunal, as demonstrated by the more than symbolic departures from the adversarial script. Thus, the added judicial power to order the parties to submit additional evidence and to call witnesses \textit{proprio motu} was explained by the need for the Chamber ‘to ensure that it is fully satisfied with the evidence on which its final decisions are based’.\textsuperscript{122} The initial intuitive move towards the adversarial scheme can be rationalized by nebulous references to statutes, institutional goals, and the perceived needs of the historical moment in the formation and legitimation of the tribunal.\textsuperscript{123} But the impact of the comprehensive and timely provided US draft on the ICTY rules shows the decisive role coincidence and convenience played in framing the process, marking its source, and sketching (or essentially predetermining) the path for its evolution.

The importance of pragmatic considerations has not waned beyond these initial choices. On the contrary, the need for efficiency acquired a new dimension as the drive for streamlining the process continued to shape the development of the ICTY and ICTR procedure. In seeking ways to expedite the process and in reforming it accordingly, judges have been moving from the ‘more familiar’ to the ‘ever more pragmatic’. ‘What works’ has been the guiding principle in a ceaseless effort to improve the process and in assessing its performance. While judges have been seen as gravitating towards the judge-driven and—perhaps too easily presumed—civil-law process, in fact they were in a free fall in relation to the domestic models of criminal procedure, like ‘mariners on the ocean without compass, star or landmark’.\textsuperscript{124} This movement culminated in the adoption of the ‘managerial judging’ model and the persistent pursuit of the completion strategy.\textsuperscript{125} The default ‘adversarial’ scheme, which established itself on the strength of interpretive choices

\textsuperscript{120} See Rule 68(3) ICC RPE.

\textsuperscript{121} Chapter 1, section 3.2.3. See e.g. \textit{Delalić et al.} defence disclosure decision (n 44), para. 20 (‘There is little doubt about the predominating influence of the common law system and the impact of the accusatory procedure in the majority of the Articles of the Statute and the Rules.’); Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/49/342-S/1994/1007 (‘First ICTY Annual Report’), para. 80 (‘largely adversarial approach …, rather than the inquisitorial system prevailing in continental Europe and elsewhere’).

\textsuperscript{122} Rule 98 ICTY and ICTR RPE; First ICTY Annual Report (n 121), para. 73. On the use of this power, see Chapter 10.

\textsuperscript{123} See e.g. \textit{supra} n 102.


\textsuperscript{125} Chapters 3 and 8.
by the first cohort of judges, has been unchanged as a matter of form, although numerous variations in detail and flexible application were tolerated (e.g. defence’s rejoinder evidence is absent from the SCSL RPE but allowed in practice). In running ‘adversarial’ trials, the ad hoc tribunals have relied on domestic principles as adjustable regulatory models, not sealed package deals. The only real limits to adjustments were the compelling need to preserve fairness and to ensure the effective operation of the system.

That said, the phenomenon of path dependency, or systemic inertia, has been a further important factor: when it comes to a procedural system, one choice naturally comes with a set of others foreclosing significant departures. For one, the adoption of a two-case approach at trial logically entails the need to respect the principle that the prosecution must present all material evidence in its case-in-chief, before the defence starts with its own, in order to enable the accused to know the contents of the case against him or her and to effectively respond to the charges. In identifying the logic and regularities intrinsic in a procedural mechanism, the Trial Chambers have not shied away from drawing upon the legal principles and tests developed at common law and the legal literature from those jurisdictions as a practical matter of convenience and predictability. Where the evidence is presented in a dialectic fashion, the common law sources naturally appear as the most relevant starting points for determining the rules to be developed and followed, subject to necessary adjustments, the possible extent of which is inherently controversial. Insofar as it is a functional, not normatively inspired use of domestic sources, this approach is not objectionable. For example, civil law sources would be unavailable and irrelevant for the purposes of determining the admissibility of rebuttal evidence, the legitimate scope of cross-examination, or the legal test to be used in the determination of motions for the judgment of acquittal, for the simple reason that civil law jurisdictions are not familiar with such procedures.

The degree of ‘autonomization of international procedural rules’, i.e. the ‘process of interpreting the rules entirely independently from the legal-cultural setting and mental

---

126 In detail, see Chapter 10.
127 Judgement, Prosecutor v. Delalić et al., Case No. IT-96-21-A, AC, ICTY, 20 February 2001 (‘Delalić et al. appeal judgement’), para. 288 (‘Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case’); Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, ICTY, 19 August 1998, para. 20 (‘It can be said to be implicit in these Rules that there should be a point where accusation ends and answering the allegations begins. … It is, therefore, consistent with justice not to interfere with the Defendant answering the allegations made by continuing with further accusations.’); Decision on the Prosecution’s Alternative Request to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, TC, ICTY, 13 September 2004, para. 6. See in detail Chapter 10.
128 For example, the SCSL was criticized for not being sufficiently faithful to the principle on bifurcation of cases. The accused was impaired in the preparation of defence as the prosecution case was moulded throughout trial. See W. Jordash and S. Martin, ‘Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone’, (2010) 23(3) Leiden Journal of International Law 585, at 595-97.
129 Mettraux, ‘Of the Need for Procedural Fairness and Certainty’ (n 31) (‘while this or that aspect of their procedure might resemble the common law more than the civil law or vice-versa, it was rarely if ever adopted for that reason.’).
130 See, however, Bohlander, ‘Radbruch Redux’ (n 46), at 409 (in the context of the discussion of the ICTY Rule 98bis procedure, taking issue with Judge Shahabuddeen’s ‘attempt to use the English case-law references about the ‘reasonable trier of fact’ – language used by appellate courts vis-à-vis magistrates sitting without a jury’ and his ‘not us[ing] one single reference to civil-law sources, but only … common-law references from a very limited range of jurisdictions.’). One may wonder what value civil law sources would have in this context.
habits that shaped them’, has been taking place. This was not least due to the different backgrounds of judges manning the Trial Chambers and operational needs of the proceedings. However, a share of trial practice contradicts the claim that ‘[s]ubsequent interpretation of the rules of procedure is theoretically quite detached from the particular legal tradition that gave the procedure its shape’. The ideational usage of domestic principles often presented the most practically convenient solution because it could be drawn from a ready-made regulatory template that was assumed, rightly or wrongly, to be experimentally proven to deliver fairness. This borrowing has been a widely used method of constructing procedures, and it did not result from a normative belief about the binding nature of the domestic practices. Thus, by way of a general reflection about the status of adversarial system’s principles in the ICTY’s trial framework, the Delalić Trial Chamber held:

It has thus become necessary, and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions. It is conceded that a particular legal system’s approach to statutory interpretation is shaped essentially by the particular history and traditions of that jurisdiction. However, since the essence of interpretation is to discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same. It is, therefore, useful at the outset to discuss some of the rules which could be usefully applied in the interpretation of our enabling provisions.

In a similar vein, the Appeals Chamber made a following observation when discussing the applicability of common law principles regarding the possibility for a party to impeach and cross-examine its witness:

While the Tribunal is in no way bound by the rules of the common law and the Rules do not provide clear guidance on the question of impeachment a party’s own witness, Rules 85 and 90 are nonetheless largely reflective of the common law system. It is the parties who call and question “their” witnesses in turn and who are then cross-examined by the opposing side. Accordingly, recognizing that the procedure for the hearing of witnesses at the Tribunal is rooted in the adversarial process, it is important to be cautious in removing safeguards that belong to that process for reasons of fairness to the parties and for the purpose of ascertaining the truth; in this case, leaving the determination of adversity, and the green light to cross-examine, to the calling party rather than to the Trial Chamber.

The point about the non-binding character of the borrowed trial framework emerges clearly from the fact that, despite nominal adherence to ‘adversarial’ form and the continued constructive and functional reliance on domestic sources, the fundamental principles attaching to the domestic ‘adversarial’ trials have steadily been eroding. The principle of oral presentation of all evidence in court, including mandatory examination-in-chief and cross-examination of witnesses, came under attack as the factor

---


133 Pocar, ‘Common and Civil Law Traditions in the ICTY Procedure’ (n 20), at 442-43 (‘the variety of the backgrounds of ICTY judges has been instrumental in the creation of a truly international model of criminal adjudication that does not prefer one legal tradition over another.’).

134 Ibid.

135 Delalić et al. trial judgment (n 44), para. 159.

136 Decision on Appeals against Decision on Impeachment of a Party’s Own Witness, Prosecutor v. Popović et al., Case No. IT-05-88-AK73.3, AC, ICTY, 1 February 2008 (‘Popović et al. impeachment appeal decision’), para. 24 (footnotes omitted and emphases added).
detrimental to expeditious process.\textsuperscript{137} At the ICTY, the trend from 2000 onwards was the marked shift from oral to written evidence and relaxation of the discipline of admission of witness statements and transcripts of testimony from previous trials. The initial preference (in principle) for \textit{viva voce} testimony, subject to admission of depositions, was abandoned.\textsuperscript{138} Further rules were adopted and amended incrementally to codify the new framework in which oral testimony could be dispensed with altogether to the extent possible by admitting written statements relating solely to ‘crime base’ and not going to the proof of acts and conduct of the accused. This remained subject to the requirement that for evidence directly implicating the accused cross-examination should be allowed.\textsuperscript{139} Where the witness could still be cross-examined on her statement, examination-in-chief became dispensable even on sensitive matters directly implicating the accused.

The sole goal behind these measures was to decrease the volume of \textit{viva voce} evidence led in chief and cross-examined at trial because these proved to be the most time-consuming aspects of adversarial trial practice. The confrontational nature of the ‘adversarial’ mode and its insistence on the importance of examination of all evidence led in chief and cross-examined at trial because these proved to be the most time-consuming aspects of adversarial trial practice. The confrontational nature of the ‘adversarial’ mode and its insistence on the importance of examination of all evidence came to be perceived as a disadvantage in the tribunal context.\textsuperscript{140} The sheer volume of evidence adduced in ICTY trials made uncompromised adherence to the orality principle unsustainable. The critique of an adversarial system for its general tendency to prolong trials is not unknown in the domestic contexts.\textsuperscript{141} It became apparent already in the first

\begin{itemize}
\item \textsuperscript{137} Sixth Annual Report of the ICTY, UN Doc. A/54/187-S/1999/846, 25 August 1999, para. 13 (‘There are a number of causes for the length of trials and other proceedings. … [U]nlike the Nurnberg and Tokyo trials, a great deal of reliance is placed on the testimony of witnesses rather than on affidavits’). See also STL Rules of Procedure and Evidence (as of 12 April 2012) – Explanatory Memorandum by the STL’s President (‘STL RPE Explanatory Memorandum’), para. 3 (‘the inquisitorial model has the distinct advantage of being more expeditious during the trial phase. No one doubts that there is an increasing need for international criminal proceedings to be less lengthy, less cumbersome, and less costly.’).
\item \textsuperscript{138} Cf. Rule 89(F) ICTY RPE (IT/32/Rev. 19, 1 and 13 December 2000) (‘A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form’) and Rule 90(A) ICTY RPE (IT/32/Rev. 18, 2 August 2000) (‘Subject to Rules 71 and 71 \textit{bis}, witnesses shall, in principle, be heard directly by the Chambers.’).
\item \textsuperscript{139} In December 2000, Rule 90(A) ICTY RPE was replaced with Rule 89(F), removing the preference for the oral presentation of evidence, and Rule 92\textit{bis} was adopted to facilitate the admission, in lieu of oral evidence, of written statements not going to proof of acts and conduct of the accused, i.e. ‘peripheral or background evidence’ (Eighth Annual Report of the ICTY, UN Doc. A/56/352–S/2001/865, 17 September 2001, para. 51). In September 2006, Rules 92\textit{ter} and 92\textit{quater} were adopted. The former rule enables the TC to admit statements and transcripts going to proof of the accused’s conduct in lieu of examination-in-chief, subject to the witness’s availability for cross-examination and judicial questioning. The latter rule authorizes the admission of written evidence of ‘unavailable persons’ in lieu of oral testimony, provided that it appears reliable from the circumstances in which it was made and recorded. The material admissible under Rule 92\textit{quater} possibly includes statements going to proof of acts and conduct of the accused, although this may be a factor against the admission. Rule 92\textit{quinquies} ICTY RPE (adopted in December 2009) allows the admission of statements and transcripts of testimony given in the previous proceedings before the ICTY by persons who were prevented from testifying by improper influence.
\item \textsuperscript{140} O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, (2007) 5(2) \textit{JICJ} 360, at 364 (‘While in my years at the Tribunal I have come to appreciate that the common-law adversarial model has many strengths, perhaps its greatest weakness is its tendency to produce lengthy and often irrelevant exchanges between the examining party and the witness.’); Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 20), at 441 (‘This tendency results from the requirement that all evidence be scrutinised orally through examination and cross-examination. The problem of length is exacerbated in international criminal trials which deal with complex crimes, framed in complex historical and political fact patterns and involving hundreds of people between victims and perpetrators.’); Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 18 (pointing to doubts whether the adversarial process is ‘the best means of adding evidence within the tribunals’); Cassese, \textit{International Criminal Law} (n 45), at 385 and 442.
\item \textsuperscript{141} E.g. F. Strier, \textit{Reconstructing Justice: An Agenda for Trial Reform} (Westport, Connecticut: Quorum, 1994) 8 (‘Just as traffic congestion can be addressed in more than other way, so can court congestion. The
ICTY and ICTR cases that the unique challenges of international criminal trials are bound to exacerbate this problem. The relevant features of substantive ICL relate, for example, to the nature of the crimes under the jurisdiction and include the doctrines of liability that can be relied upon for attributing the crimes of subordinates and low-ranking perpetrators to senior civilian and military leaders who have not committed them personally (superior responsibility; (indirect) co-perpetration and joint criminal enterprise). These features create the need for the evidence establishing the contextual elements of the crimes and linking the conduct of file-and-rank perpetrators to the leaders. This may require proof of dozens of incidents in numerous locations spanning over lengthy periods of time and involving multiple victims and perpetrators – the challenge mostly unfamiliar to domestic systems, including those adhering to the adversary trial model. The model under which all of the crime-base-related evidence has to be examined-in-chief and cross-examined would protract the proceedings enormously to the point of endangering the prospect of completing them. Moreover, the overlapping facts in multiple cases posed a risk of having to hear the same crime-base-related evidence repeatedly from one trial to another, which could be afforded neither by the Tribunal nor by the witnesses.\(^{142}\)

The judges understandably took these circumstances as a cue for moving away from the rigid clinging to the \textit{viva voce} mode of evidentiary process.\(^{143}\) What, then, was an alternative solution? One would be to adopt more rigid exclusionary rules such as making hearsay or its specific forms inadmissible, as has been advocated by some practitioners.\(^{144}\) According to such assessments, unrestrained admission of evidence without proper regard to its reliability undermines rather than assists truth-finding.\(^{145}\) The result of enormous quantities of evidence of dubious quality being admitted in the trial record, even though it should in principle not serve as the basis for the decision, is that its credible evaluation becomes extremely difficult.\(^{146}\)

However, the proposed solution of formally adopting common law rules on admissibility is questionable, too. The sub-par epistemic conditions the tribunals find themselves in as fact-finders, as well as the notorious difficulties with obtaining evidence, the strength of path dependency, and the engrained legal-cultural pluralism of the tribunals’ environment are a mixed bag of practical and normative considerations that weigh heavily against it.\(^{147}\) The preferred solution that allows filtering unworthy evidence...
Chapter 12: Towards a Normative Theory of International Criminal Trial

at the admissibility stage and reducing inordinate volume of evidence on the record would be for Chambers to apply the existing rules in a more principled, consistent, and rigorous fashion. This may include placing a greater emphasis on reliability as a requirement to admission and the exclusion of untrustworthy evidence, e.g. ‘multiple hearsay’ and the like.\textsuperscript{148}

The implications of the ICTY’s shift away from the ‘adversarial’ approach of probing all evidence to the one under which only some evidence is to be subjected to cross-examination have proved controversial. The critique rests on two main grounds. First, the relaxed regime for the admission of documentary evidence ostensibly falls below the threshold of fairness guaranteed to the accused under human rights law and in national jurisdictions across the common and civil law divide.\textsuperscript{149} At common law, all evidence and not only evidence going to the acts and conduct of the accused should in principle be subject to examination. This arguably exceeds the minimum level of protection set by the Strasbourg jurisprudence, which does not require that the accused is able to examine all evidence but only that convictions do not rest to a decisive or substantial extent upon evidence that has not been cross-examined.\textsuperscript{150}

However, adherence to this minimum has been deemed by critics to be insufficient. This concerns in particular the admission of written statements of witnesses in lieu of examination-in-chief in relation to matters falling under ‘the acts and conduct of the accused’, provided that they are available for cross-examination, which was authorized by the Milošević Appeals Chamber and subsequently codified in ICTY Rule 92ter. Judge Hunt severely criticized it as nothing less than a capitulation to the demands of the Completion Strategy which ‘seriously prejudices the accused’.\textsuperscript{151} This conclusion may be not self-evident if one agrees that the standard provided in Strasbourg jurisprudence is adequate for international criminal proceedings. But its adequacy may indeed raise questions, given the significant amounts of hearsay adduced, the difficulty of appreciating whether or not a particular piece is decisive, and the cumulative effects of the limited probing of such evidence.

Be it as it may, nominally the ICTY regime still guarantees the accused a right to confront evidence that goes to proof of their own acts and conduct, as opposed to the evidence relating to crime-base, or the conduct of others. Where the accused is charged under the command responsibility and joint criminal enterprise doctrines, the distinction between the acts and conduct of the accused and the conduct of others may become blurred.\textsuperscript{152} In such cases, deciding whether to allow cross-examination of evidence that is

\textsuperscript{148}For further discussion, see ibid., at 403-404 (‘In such a context, it would be unreasonable to force the judges and the parties to fully respect, without exception, the orality principle and, above all, the ban on using statements unilaterally collected out of court as evidence.’).

\textsuperscript{149}See further Karnavas, ‘The ICTY Legacy’ (n 234), at 1084-5.


\textsuperscript{151}Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (majority decision given 30 September 2003), \textit{Prosecutor v. S. Milošević}, Case No. IT-02-54-AR73.4, AC, ICTY, 21 October 2003 (‘Milošević dissenting opinion of Judge Hunt’), paras 18-22.

\textsuperscript{152}Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 30 (pointing out the ‘difficulty with creating a fault line between evidence going to the acts and conduct of the accused and other evidence’ where ‘statements
sensitive or pivotal to the prosecution case in view of its proximity to the accused is a discretionary matter. But Trial Chambers have been directed to allow it and were generally scrupulous in this regard.\textsuperscript{153} Hence, at least formally, ICTY practice accords with the principle of a public hearing with view to an adversarial argument under international human rights law, as interpreted by the ECtHR.\textsuperscript{154}

The second critique of the flexible approach to admission of documentary evidence in the context of party-led trials hinges upon its adverse effects on truth-finding. It has been argued that in the context of international trials it may lead to sub-standard fact-finding.\textsuperscript{155} As noted, the general objection to indiscriminately admitting hearsay in ‘adversarial’ trials is the creation of evidentiary debris that are extremely difficult if not impossible for the judges to sort out and to effectively evaluate during deliberations.\textsuperscript{156} This is particularly so given the difficult epistemic context of international criminal cases which includes factors such as ethnic and partisan witness biases, translation errors, and high risks of fabrication. In the context of partisan trials with inherent and serious epistemic risks, it is problematic that the conviction-capable evidence is not fully and adequately tested.\textsuperscript{157}

Taking the Rule 92\textit{ter} admission regime as a specific example, it allows for the admission of a written statement or transcript in lieu of examination-in-chief where such evidence goes to the acts and conduct of the accused while still guaranteeing the right to cross-examine such evidence. Although famously regarded as the ‘greatest legal engine ever invented for the discovery of the truth’, cross-examination is an important—but neither only nor infallible—way of testing evidence.\textsuperscript{158} Despite the premium on this questioning mode, it may arguably not dispense with the need to first probe the witness by way of examination-in-chief and cannot really substitute for it.\textsuperscript{159} In the course of the examination by counsel for the calling party, open questions are posed to the witness, so judges are able to appreciate the responses and demeanour of the witness. The assessment of the credibility and probative value based on cross-examination and/or judicial examination upon a statement prepared as a substitute for oral testimony alone may be incomplete and deficient.\textsuperscript{160} In civil law, the neutral character of investigation and detailed

\textsuperscript{153} Rules 92\textit{bis}(C) and 92\textit{quater}(B) ICTY RPE; Decision on Interlocutory Appeal Concerning Rule 92\textit{bis}(C), \textit{Prosecutor v. Galić}, Case No. IT-98-29-A, AC, ICTY, 7 June 2002, paras 13-16. See e.g. Decision on Prosecution’s Rule 92\textit{bis} motion, \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-PT, TC III, ICTY, 4 July 2006, paras 7 and 18. See also Caianiello, ‘First Decisions’ (n 40), at 408 n62 (observing that the ICTY has been highly protective of the confrontation right, despite the demands of the Completion Strategy).

\textsuperscript{154} For the same conclusion, see Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 20 and 30-31 (‘it is hard to argue that the rules act unfairly upon the accused. So long as tribunals are sensitive to the requirement that convictions are not based substantially upon uncross-examined evidence, they are unlikely to fall foul of human rights law.’).

\textsuperscript{155} Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 19 (‘the present hybrid of adversarial gathering and presentation of evidence combined with its liberal admission … falls short of providing the optimal epistemic conditions for ensuring that verdicts are based upon a rigorous investigation and testing of the evidence.’); Murphy, ‘No Free Lunch’ (n 13), at 540, 552.

\textsuperscript{156} See n 145.

\textsuperscript{157} Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 31 and 33.

\textsuperscript{158} Roberts, ‘Comparative Law for International Criminal Justice’ (n 71), at 353 (‘Nor is JH Wigmore’s notorious boosterism for cross-examination … today unequivocally endorsed in the common law’s heartlands.’).

\textsuperscript{159} Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 32 (‘The debate over the assessment of hearsay evidence … tends to put too much emphasis upon the importance of cross-examination, as a means of testing evidence. What can be overlooked is that when written evidence are tendered as a substitute for the witness’s direct evidence, the court is denied the prospect of seeing the witness first relate the evidence in question on his or her words.’).

\textsuperscript{160} 

examination of evidence by judicial authorises during pre-trial and trial stages, are factors
deemed to remove prejudice caused by admission of written evidence and to neutralize the
truth-defeating effects of unreliable or false evidence. But unlike civil law judges, ICTY
judges are not availed of a complete investigative dossier that would enable them to
rigorously probe the partisan evidence – while its remote analogue in the tribunals, the
parties’ pre-trial briefs and case materials, falls short of enabling them to effectively test
the reliability and probity of evidence.\(^{161}\)

Finally, the presumed resource-saving effects of the admission of huge amounts of
documentary evidence have not been self-evident either. The practice may vary, as some
Chambers strive to decide admissibility as soon as evidence is tendered. But where free
admission policy predominates, it does not remove the need for the judges (and their staff)
eventually to examine and assess the reliability of such evidence in order to be able to
credit it with weight in the context of the trial record. It merely postpones these tasks until
the deliberation phase, when filtering out unreliable and fabricated evidence becomes
particularly difficult due to its repeated citation at trial and intertwining with other items on
the record.\(^{162}\) Besides making the evaluation task more cumbersome, indiscriminate
admission of broad quantities of documentary evidence has a side-effect of extending the
deliberation periods by the time needed for the perusal and evaluation of such evidence.
Therefore, the shift towards a more liberal approach for the admission of documentary
evidence can be questioned not only in light of its impact on truth-finding, but also in light
of its actual contribution to the more efficient, streamlined and pragmatic process. Yet,
even if one regards said reforms meant to scale down the adversarial character of the ICTY
proceedings objectionable and unsuccessful, it is beyond doubt that they pursued the
objectives of enhancing efficiency and reducing the length of trials in the first place.

At the ICC, the statutory indeterminacy of the trial scheme leaves room for
interpretation and variation in trial practice. As discussed previously, the way in which
evidence is to be presented is established by the Trial Chamber in each trial in consultation
with the parties; in the absence of an agreement between the parties, the directions are
handed down by the Presiding Judge, subject only to limited ‘model principles’ governing
the examination of witnesses.\(^{163}\) The ICC procedure in important respects reflects a clear
civil law influence – in particular, its prosecutor is placed under a duty ‘to investigate
incriminating and exonerating circumstances equally’ under Article 54(1)(a) of the ICC
Statute. However, this does not mean that the role of the prosecutor at trial consists in
submitting both types of evidence to the Trial Chamber. On the contrary, the fact that the
prosecutor has strict disclosure obligations vis-à-vis the defence points to the supposedly
‘adversary’ character of that role.\(^{164}\) Accordingly, the trial scheme adopted in the first cases
reflected the somewhat unexpected resurgence of the ‘adversarial’ style, or rather of what
can be seen as its significantly modified form.\(^{165}\) Next to accommodating the potentially
more active and assertive role of judges in the fact-finding process,\(^{166}\) the ICC trial
sequence adopted in practice radically deviates from the common law style by affording an

\(^{161}\) Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 32 (questioning if pre-trial briefs equip the judges to
conduct a full and effective examination of the witness).

\(^{162}\) Murphy, ‘No Free Lunch’ (n 13), at 552 (‘By the time the chamber comes to deliberate it is too late t o
detach any one part from the undifferentiated sum of the evidence.’).

\(^{163}\) Art. 64(3)(a) and (8)(b) ICC Statute; Rule 140 ICC RPE. See Chapters 8 and 10.

\(^{164}\) See further S. Vasiliev, ‘Trial’, in L. Reydams et al. (eds), International Prosecutors (Oxford: Oxford
University Press, 2012) 709; Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 35 (noting that in reality the
ICC Prosecutor ‘still brings the case to the court as an adversary’).

\(^{165}\) See in detail Chapter 10.

\(^{166}\) See Chapter 5.
opportunity to victims’ legal representatives to submit evidence on the guilt or innocence of the accused with leave of the Chamber.

This feature is not merely symbolic but consequential for the nature of the ICC trials. The latter effectively consist of multiple ‘cases’: besides the main cases for the prosecution and for the defence, there is a supplementary and limited ‘case of the truth’ consisting of evidence called by the judges *proprio motu*, as well as evidence called by legal representatives of victims. Although the parties remain primarily responsible for the presentation of evidence and their evidence constitutes the bulk of the record, the regular practice of hearing additional evidence fundamentally alters the procedural philosophy underlying the ICC trials. The institutional reasons for the ICC to adopt the ‘multiple-case’ principle as an organizing logic of case presentation, rather than a single ‘case of the court’ approach, call for reflection. As elsewhere, considerations of procedural efficiency and convenience have filled the normative gaps created by the open-ended legislation that granted broad discretion to procedural actors in shaping the procedural practice.

Thus, for one thing, the multiple-case approach has become entrenched at the ICC partly on the strength of habit. The established ICTY and ICTR precedents, the background and/or preferences of some of the key actors (judges and trial lawyers) in the ICC proceedings, as well as the fact that many of its staff members had worked at the *ad hoc* tribunals must have facilitated this choice. On another point of note, the essential structural factor that must have contributed to it has been the bifurcated structure of pre-trial investigations in the first cases, which necessitated the preparation and presentation of distinct cases by each party. Furthermore and most importantly, the ICC Statute and Rules contemplate the mandatory regime for *inter partes* disclosure. This effectively rules out the centralized dossier approach under which the Chamber would have advanced access to all partisan evidence enabling it to adopt a dominating role in the process of proof-taking at trial akin to judges in civil-law trials.

Such an approach would be unsustainable if the partisan investigations were to be retained, since it would require trial judges to take significant time to prepare for trial by gaining intimate knowledge of that evidence. This might have adverse consequences for the overall length of the proceedings and still be insufficient for the judges to acquire the true ‘ownership’ of evidence. The systemic coherence, pragmatism, and ultimately fairness are better heeded by the approach whereby the structure of presentation of evidence at trial mirrors the structure of investigations: evidence is most effectively led and examined at trial by actors/organisations who have conducted the investigation. These considerations go to the down-to-earth side of ‘efficiency’ and have served as a guiding light for ICC judges and parties in shaping the procedural practice within their discretion under the Statute’s flexible trial framework.

In the ICC, the strong traction of the ‘efficiency’ perspective on the practice is also discernible in the way in which some of the challenges posed by innovations of the legal framework were tackled. As noted earlier, the compromise-driven diplomatic drafting method and the partially succeeded idealistic agendas of some of the delegations resulted in the overtly experimental character of some aspects of the ICC process and the injection of elements not squarely according with the experience of national or international trials. The broad scheme for victim participation and reparations is a prime example of such a challenge. It would indeed be far-fetched to say that this endeavour to translate aspirations toward a more victim-friendly international criminal justice into procedural language was inspired by pragmatism. Not to mention the serious risks posed by extensive victim participation to the very concept of a fair trial in an ‘adversarial’ context, the operational efficiency concerns would likewise strongly militate against allowing victims to

---

167 See among others Arts 64(3)(c), 67(2), and 68(5) ICC Statute; Rules 76-84 ICC RPE.
participate, given the mass nature of victimization, limited court resources and the real risk of overflowing and clogging the system.

But it can be gathered from the regime for victim participation adopted in the first ICC trials that the efficiency concerns have played an essential role in operationalizing the provisions regarding victim participation in a way that would submit it to the more pragmatic purposes of the court. The conditional right of victims to lead evidence on the guilt or innocence of the accused and to challenge admissibility has been sourced from Article 69(3) which endows upon the Court ‘the authority to request the submission of all evidence that it considers necessary for the determination of the truth’.\(^{168}\) The evidentiary contributions by victims are essentially placed at the service of the truth-finding mandate of the Chamber, in line with considerations of procedural and functional efficiency. Other developments of the victim participation regime have included the increasing emphasis on the common legal representation, collective participation, and, more recently in the Kenya cases, dispensing with the need for the Chamber to examine and decide on numerous applications for participation where victims did not wish to present to the Chamber their views and concerns individually.\(^{169}\) These features clearly reflect the judicial attempts to further streamline the inefficient sides of the ambitious victim participation scheme as set out in the Statute and as practiced earlier in the life of the ICC.

### 2.3.3 Result: Pragmatism and flexibility in procedure

Many more examples can be adduced to demonstrate the profound impact of ‘efficiency’ considerations on the evolving nature and structure of international criminal trials across various international criminal jurisdictions.\(^{170}\) A full overview is superfluous to prove the self-evident point that the relevant parameter is an éminence grise among the determinants of procedure – like an underwater current it makes the procedural system drift along with the tide of fairness and institutional goal requirements. What does this premium on pragmatism in procedure entail for the relationship between the formal rules of procedure and the actual practice, in light of the domestic models? The answer to this question informs the framework for the normative theory of trial, as an attempt to capture the optimal trial arrangements. Is the normative theory constrained by a specific domestic model to be used by judges and parties as a mandatory interpretive tool in respect of the tribunal’s procedural principles and rules originating in that model? Or does pragmatism in procedure entail a complete emancipation from those models in turning the formal procedural standards into practice?

The nature and origins of international criminal procedure and the legal-cultural context in which it is developed and applied make it not very susceptible to formalism. The de-formalization of procedural law implies that it is not as much the ‘letter’ as the ‘spirit’ of the procedural provisions that informs specific ways in which they are operationalized in practice by the participants. Establishing the ‘spirit’ is the interpretive task for the procedural participants. In jurisdictions whereby judges are entrusted with procedural law-making powers (e.g. ICTY and ICTR), the lack of distance between those who legislate and apply law, and thus between law and practice, by definition reduces the weight attached to ‘legislative intent’. Its holders—judges—have an unchecked monopoly on the authoritative interpretation of the procedural rules. The interpretations are context-specific and fluctuate depending on the changing needs and circumstances, from one case to

\(^{168}\) See Chapter 10.


\(^{170}\) See e.g. Chapters 3, 8 and 10.
another. Although at the ICC the judges are ‘demoted’ from the position of law-makers to law-appliers, its trial scheme is neutral in comparative terms and open-ended by design: the judges and parties hold a broad discretion in shaping the trial proceedings. This cannot but lead to an intrinsic variability of the trial paradigm and its possible detachment from the principles, legal tests and practices developed in the national jurisdictions.

Despite differences between the courts and to varying degrees, they adopt what appears to be an informal and flexible attitude to procedural law. Procedural rule-formalism is mostly extraneous to international criminal justice institutions and is replaced by procedural pragmatism (which, of course, does not imply arbitrariness, given the duty to ensure fair and effective proceedings). The interpretations of statutory and judge-made procedural standards evince adjustability in light of compelling normative requirements. The technicalities and codes of procedure are secondary or, to use Judge Hunt’s candid expression, ‘the servants not the masters of the tribunal’s proceedings.’ At least formally then, the ‘masters’ are the imperative principles of fair and expeditious proceedings and the ‘interests of justice’ – the category invoked in tribunals’ legal discourse to justify the exercise of discretion. That said, the system is indeed not averse to seemingly excessive liberal—or rigid—interpretations of the formal rules by the judges-lawmakers, depending on the perceived needs of the situation – the method of interpretation which Judge Hunt himself criticized in a later opinion, citing Lewis Carroll’s character Humpty Dumpty, where he found himself in the minority.

The lack of a single legal culture at the tribunals and the pragmatic approach are inconsistent with the ethic of treating domestic terms of art, standards and practices as mandatory blueprints, especially on matters within discretion of the judges (such as, for example, determination of the applicable rules of evidence). Even where the culturally charged legal terms (e.g. examination-in-chief, cross-examination etc.) are used, their semantics are obscured and disburdened, at least in part, from the baggage of the established domestic discourse. While the forms (or phenotype) of trial procedures may

---

171 Separate Opinion of Judge David Hunt on Appeal by Dragan Papić against Ruling to Proceed by Deposition, Prosecutor v. Kupreškić et al., Case No. IT-95-16-A, AC, ICTY, 15 July 1999, para. 18 ('the Rules of Procedure and Evidence were intended to be the servants and not the masters of the Tribunal’s procedures. Rule 5 thus requires the Rules to be kept subordinate to the Tribunal’s obligation pursuant to Articles 20 and 21 to ensure a fair and expeditious trial. The object is to achieve justice, not to delay it, and not to permit mere technicalities to intrude where there has been no material prejudice caused by a non-compliance.’ Footnotes omitted). Judge Hunt cited Lord Penzance’s opinion in Kendall v Hamilton (1879) 4 App Cas 504 at 525 (House of Lords) (‘Procedure is but the machinery of the law after all – the channel and means whereby law is administered and justice reached.’) and 530-531 (‘the broad principle of making forms, rules and modes of procedure subordinate to the prime and paramount object of reaching the justice of the case’). See also Decision on Application by Dragoljub Ojdanić for Disclosure of Ex Parte Submissions, Prosecutor v. Milutinović et al., Case No. IT-99-37-I, Duty Judge, ICTY, 8 November 2002, para. 14 n32 (citing from Sir Henn-Collins MR In the Matter of an Arbitration between Coles and Ravenshear, [1907] 1 KB 1, at 4: ‘Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case.’); Decision Authorising Appellant’s Briefs to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions, Kordić and Ćerčer, Case No. IT-95-14/2-A, AC, ICTY, 8 August 2001, para. 6.

172 Milošević dissenting opinion of Judge Hunt (n 151), para. 19 (citing L. Carroll: “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.”)

173 Decision on Prosecutor’s Appeal Admissibility of Evidence, Prosecutor v. Aleksovski, Case No. IT-AC, ICTY, 16 Feb. 1999, para. 19 (‘there is no reason to import such rules into the practice of the Tribunal, which is not bound by national rules of evidence. The purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal. The purpose of the Rules is to promote a fair and expeditious trial . . . and Trial Chambers must have the flexibility to achieve this goal.’ Footnotes omitted.)
resemble domestic models, their content remains indeterminate and malleable. The pragmatic approach to shaping process discards the autonomous normative value of domestic models and limits their function to that of the instrumental repository of elements from which international criminal practitioners are free to draw elements that they fit for international proceedings.

It is up to those who man the tribunals to imbue the open-ended procedural norms with specific content. This could reflect—and has indeed reflected, in the initial stages—the purported adherence to specific domestic models of procedure, or move beyond the ‘clash of the systems’ paradigm to give effect to the compelling normative need for efficiency and pragmatism. The testimonies of numerous insiders across various organs of different courts attest to the increasing detachment of lawyers from their legal-cultural roots and their growing ability to use the legal-cultural pluralism to the benefit of the rather pragmatic objective of devising procedure that ‘works’. As Mark Findlay predicted ten years ago, ‘the nature of broad generic offences as the jurisdiction for all internationalised courts, and the enforced blend of procedural traditions, professional preferences and practical experience will generate a common atmosphere of compromise and pragmatism.’

Thus, in terms of delineating the framework for the trial theory, there exist no convincing and principled reasons for preferring an ‘adversarial’ trial scheme over the ‘inquisitorial’ one and vice versa, and no compelling need to uncritically follow the standards and practices that have developed thereunder. The use of the elements drawn from the domestic models should be goal-driven, instrumental and pragmatic, and assist in devising the trial arrangements that would be fair and workable in the tribunals’ circumstances. The need to ensure fairness is the guiding light of the normative framework, and the drive for efficiency and pragmatism are its moving forces, or elements that cement the procedural system into viable mechanisms of international criminal adjudication.

The trial theory should accommodate flexibility and pragmatism regarding domestic legal traditions. Normative emancipation from domestic models should be effected in more than one sense. Firstly, there is no—and there arguably should be no—one single dominant model of trial in international criminal procedure, which, however, calls for additional efforts to ensure predictability and certainly in the procedural system. Second, the simultaneous practice within one institution of different approaches to structuring and organizing trials is also a manifestation of flexibility and pragmatism. Allowing room for variable trial arrangements within one court, depending on the circumstances, ensures that procedures best fitting the specific situation or case can be adopted, considering the nature of the crimes and victimization, the evidentiary needs and challenges faced by the court and the parties, and the cognitive needs of the judges. Thirdly, in relation to any specific trial model devised, procedural pragmatism militates against clinging rigidly, and in relation to every detail, to any pre-defined and pre-set (domestic) regulatory templates. Within the legal framework, judges and parties should possess powers and competence to creatively, and in consultation, to devise, adjust, and

---

174 Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 5), at 88 (‘In fact, a common experience among lawyers who have worked for some period of time at the ICTY, regardless of function, has been to let go of their prior commitments to a particular model—pre-existing allegiances based usually on domestic experience. As trials unfolded, common law lawyers at the ICTY found themselves admiring features of the civil law system, whose lawyers, in turn, saw merit in certain common law procedures.’); Boas, The Milošević Trial (n 20), at 279 (‘what is encouraging is the extent to which belief in the superiority of one’s own system or practice can give way to a de novo consideration of issues when faced with the necessity of achieving conformity with the common belief that international criminal trials must be fair and expeditious.’).

175 Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 52.
refine the procedural practices. This covers the structure of the case at trial, the trial sequence, the order of presenting evidence, the order and modes of questioning witnesses.

The rigidity in terms of the general trial style and framework for presenting evidence looks incoherent and might be meaningless in a system that adopts a flexible regime for the admission and evaluation of evidence. As noted, most scholars deem this inconsistency as the reason to advocate measures intended to tighten and formalize the law of evidence.176 But the solutions may also lie in embracing the openness of the trial framework and optimizing it further with a view to enhancing its truth-finding potential and efficiency.177 While not being a call for a shift in the ‘inquisitorial direction’, which is bound to be a misnomer, this entails the need for a more active approach to be taken by the judges to early comprehension of the case and to testing it at trial. The truth-finding objective demands ensuring an evidentiary base that consists of high-quality evidence and is as complete as possible. A straitjacket of presentation and questioning sequence underlain by a rigid approach as to which evidence and when can be examined may be problematic. This approach will either be not viable or subject to flexible application under the pretence of rigidity.

3. NATURE OF INTERNATIONAL CRIMINAL TRIALS

3.1 Objectives, functions and effects of trials: Liberal legalist and socio-legal views

Under the theme of the nature of international criminal trials, the theoretical part of this study (Part II) has looked into rationales, functions, and effects of international criminal trials, in comparison with those of national criminal trials.178 The unique socio-political dimension informs the pursuit of international criminal justice as it is expected to contribute to societal reconstruction, reconciliation, and peace-restoration.179 While teleology of international criminal justice typically hinges upon desired socio-political outcomes, such goals are shared with domestic trials in political transition and those adjudging on controversial historical events and a nation’s identity.

The inexorable links between international justice and international security and conflict resolution as its raisons d’être account for the common tendency to ascribe to the process of the tribunals the purposes reaching beyond the legalist mandate served by judicial proceedings. The latter is conceived in terms of traditional functions of any criminal court: establishing the incriminating and exonerating facts, deciding upon guilt or innocence, and issuing a sentence, if appropriate. It is essential for preserving legitimacy and credibility of international criminal tribunals that they remain judicial institutions in the proper sense because if they do not, not only will their judicial record be tarnished but also any of their purported contributions to reconciliation, historiography, and peace-building will be undermined.

Where the procedural framework is reformed for it to conform better to the professed objectives of the system (for example, by allowing victims to actively participate in order to make international criminal justice more victim-friendly), the newly introduced or reformed procedural devices translating the objectives should make sense. That is, they should acquire a specific meaning and be assigned procedural tasks to be operational. The institutional objectives behind the reform will need to be translated into procedural

176 See supra n 66.
177 Cf. Caianiello, ‘First Decisions’ (n 40), at 403 (lamenting the fact that the ICC Statute and Rules ‘give the judge the greatest discretion concerning which item of evidence can be admitted at trial, leaving no room whatsoever for technical formality in this area’ because this solution ‘risks undermining the equality of arms’).
178 Chapters 4-5.
179 Chapter 3.
functions and mechanisms. But attempts to expand the immediate goals of trial with institutional goals are misconceived. Such teleological manipulations are bound to undermine fairness and expeditiousness of the process and in the long run to reduce its role in bringing about the projected socio-political outcomes. The grand objectives of reconciliation, restoration of peace, and compiling the historical record of the conflict are possible long-term side-effects, not the proper functions of international criminal trials.

Legalist events by nature, trials as such are not meant to pursue any ulterior purposes and pedagogical objectives. Otherwise their restorative and reconciling potential with respect to target societies and beyond are likely to be subverted. Where ‘mission statements’ infiltrate the routine procedural operation and are used to bend and stretch the procedural law, the label of a show trial overshadows the process, and legitimacy costs are inevitable.\(^{180}\) This position is not irreconcilable with the recognition that the administration of procedural justice is meant to—and does in fact—exert certain calculated effects on the audiences at large through its corporeal features (structure of proceedings, appearance of the bench and the parties, and courtroom ritual and etiquette). It is apposite to draw an analogy with Durkheim’s concept of social rituals as the way for the community to define itself. As a medium through which the court conveys didactic messages of rule of law and fairness, international criminal procedure assists the disjointed international community on its quest for self-definition.

This is the meeting point between legalist and socio-legal accounts of international criminal trials. However, the effects of trials should be kept apart from their procedural functions. The court may not afford risks posed by the unabashed use of the process in didactic and other ‘ulterior purposes’. Other than accompanying messages of fairness and rule of law, the process should not be hijacked as a communicative medium, even if the semantics are ‘liberal’: fighting against impunity, establishing the historical truth, and redressing the harm suffered by the victims. Where the line is transgressed, the court drives itself into an awkward and self-defeating position of conducting a liberal discourse by illiberal means. This incoherence lies at the heart of the critique of the paradox of ‘liberal show trials’ in Chapter 5. The combination of ‘liberal’ and ‘show’ with reference to the phenomenon of a criminal trial is impossible: when the two adjectives are put together, they make an oxymoron. The mutually exclusive character of these typologies demands that a choice is made, and the principles of liberal criminal justice adhered to by all tribunals make it a false dilemma in fact.

### 3.2 Truth-finding: Primary function

Since international trials may not be expected to directly serve any far-reaching political goals, their core objectives are to be sought in the traditional functions of the criminal process. Much like under the standard accounts of the functions of trials in the domestic theory of criminal procedure,\(^ {181}\) one widely recognized core function is establishing the truth in accordance with the governing procedural framework of each tribunal.\(^ {182}\) Truth-finding can broadly be understood as the accuracy of fact-finding, the correctness of legal qualifications, and the just nature of the outcome (verdict and sentence, if any). As detailed in Chapter 5, the obligation of the Trial Chambers to establish the truth, and that of other participants to contribute to the successful discharge of this function, is enshrined in

---

\(^{180}\) See e.g. Duff *et al., The Trial on Trial, Vol. 3* (n 82), at 4-5.

numerous procedural rules, and forms an integral part of the procedural philosophy of international trials. Among others, Rule 85(A) of the ad hoc tribunals and of the SCSL envisages a step in the proof-taking process that is atypical for the adversarial procedure: the power of the Chamber to order the submission of evidence proprio motu and to call its ‘own’ witnesses. When explaining the rationale of this rule among the ‘three important deviations from some adversarial systems’, the ICTY judges emphasized the importance of ensuring that, in the best interests of international justice, the Tribunal is ‘fully satisfied with the evidence on which its final decisions are based’.183 This reference to the need to be fully satisfied of the evidentiary basis for the verdict is telling and indicates unequivocally the importance attributed to truth-finding among the other procedural priorities.

The theoretical chapters of this book paid particular attention to the fact-finding accuracy as an aspect of ‘truth-finding’ in a broad sense, given precedence of facts to legal findings and dispositions.184 The scope, configuration and methods of truth-finding by international criminal tribunals are informed by their special goals, and subject-matter jurisdiction, and institutional and procedural framework. In these respects, the fact-finding conducted by the tribunals has nuances distinguishing it from fact-finding in domestic criminal process.185 The broader context in which individual acts are committed forms part of crime definitions, resulting in an epistemic need to prove (or disprove) contextual elements and conduct in relation to multiple alleged crime sites or incidents. This feature of international trials serves to expand the scope of the truth that the tribunals are to establish.

Moreover, the institutional goal of establishing a credible historical record of atrocities may—less appropriately—result in pressures on the parties and the court to extend their factual inquiry beyond what is strictly required to effectively litigate and adjudicate the case. Pressures to write history through trials should be resisted insofar as such efforts exhaust the limited resources of the court invariably result in delays and vitiate the legalist nature of trials, thus casting a shadow on the very credibility of the judges’ ‘historiographic’ effort. International trials do incidentally contribute to historiography by providing a solid and rich record of micro-histories within the macro-history of controversial and large-scale events such as armed conflicts. However, this is more a possible side benefit arising from the specific functions of a procedural system because history is not for the courts to write. The due process, efficiency and legitimacy risks posed in giving expansive interpretations of trial truth as historical truth warrant the following approach: truth-finding through international trials should in all circumstances remain subject to demonstrated forensic demands of the case.

The different interpretations of the notion of ‘truth’ across domestic legal traditions provide reference points for identifying its content in the context of international criminal proceedings.186 A general distinction between the common law and civil law understandings of ‘truth’ can be drawn. It is bound to be a rough one, not least because in either system, the quest for truth and the legitimate scope of truth are subject to limitations and countervailing considerations recognized by procedural law, including a fair trial and other important rights (right to privacy), exclusionary rules, and communication and other privileges. But the general distinction runs between the common law epitome of ‘procedural truth’—a fact-finding outcome of an orderly adversarial process as a contest between two conflicting accounts—and the civilian emphasis on the search for ‘material

184 Chapters 4 and 5.
185 See e.g. Schuon, International Criminal Procedure (n 19), at 7 (asserting that ‘international criminal trials are essentially different from regular domestic criminal trials, as they are conducted in special circumstances ... and must also serve a special truth-establishing function’).
186 Chapter 4.
truth’, the factual outcome reflecting the reality as closely as possible. These contrasting interpretations are underpinned by fundamentally different procedural philosophies, and the parameters of ‘truth’ in international criminal trials should be grounded in its own nature.

As in other areas, the transposition of any domestic concepts may be appropriate only as long as the procedural philosophy and the available means of establishing the truth are the same, which is not the case. As Chapter 5 concludes, the parameters of the ‘truth’ sought and can be discovered by international criminal tribunals is not necessarily identical with the interpretations of this concept elsewhere. The special objectives of international criminal justice—historical record and justice for the victims—are sometimes deemed to favour the concept of truth that approximates the civil-law idea of an absolute or material truth. On the contrary, the limited ‘procedural truth’ as the truth arising from a dialectic clash of opposite accounts without judicial efforts is deemed less appropriate. It is more susceptible to influence of extra-epistemic factors such as the adherence to the rules of adversarial contest and relative freedom of the parties in determining and renegotiating the scope of the factual inquiry and evidence to be presented to the court. For instance, in both jurisprudence and scholarship, strong opinions have been expressed to the effect that the tribunals’ fact-finding inquiries should be conducted in a way that allows discovering as complete truth about the adjudicated events as is possible. The forms of plea bargaining resulting in the dropping of charges and in significant sentence reductions are deemed controversial and undesirable because they lead to the diminution of the scope of the truth the tribunals establish and/or to an epistemic myopia and veracity deficit.

It is important to be aware, however, that the nature of ‘truth’ which international criminal tribunals are normatively prepared and practically equipped to establish direly falls short of ‘material truth’. It arguably does so to a greater extent than in most domestic jurisdictions, which makes any claim to ‘absolute truth’ in this context look even more utopian. Firstly, there are normative reasons that set limits on the scope and methods of truth-finding before the tribunals, which they share with all modern national systems and which are often amplified in the context of international criminal proceedings. Besides the need to ensure a fair trial for the defendant, a number of other legitimate interests must be guaranteed, including the national security interests, testimonial privileges, and the interests of victims and witnesses who normally face high security risks.

Second, the tribunals face greater fact-finding impediments and objective factors that cannot but water down the ambition to establish a complete and absolute truth. The numerous practical problems and features of the international trial process, which downgrade the truth-finding capacity of the tribunals and are a good reason for modesty in this regard, are widely documented. Among others, this includes: the fallible memory of

\[187\] Turner and Weigend, ‘Negotiated Justice’ (n 182), at 1406 (‘Plea bargaining, at least in its common law variant, is not normally consistent with the goal of establishing the truth. When the defendant simply consents to accepting the charges, which may previously have been reduced as part of the bargain, what actually happened will never be brought out in open court, and the court’s verdict may not reflect the defendant’s true responsibility. In extreme cases, the sentence may be grossly out of proportion to the defendant’s actual culpability and thus deepen the conflict rather than resolve it.’). For discussion, see Chapter 5.

\[188\] Ibid.

heavily traumatized victim witnesses testifying years after the facts in an unfamiliar formal legal environment; rich incentives to fabricate evidence and not to testify truthfully on matters that remain politically charged and attract polarization along the lines of ethnic, national and political loyalty; linguistic barriers and misunderstandings resulting from translation errors; and cultural differences between trial participants and witnesses which complicate the effective factual inquiry, proof-taking, and comprehension of testimony. In a SPSC case, the Panel addressed at length the difficulties of establishing facts in view of unfamiliarity of witnesses with the procedural setup, inability to ‘narrate events in a congruent and exhaustive manner’ due to illiteracy.\(^{190}\) The ubiquitous challenges posed by cultural distance between international witnesses and key players at trial decrease the court’s ability to appreciate the probative value of testimonies and result in an inconsistent treatment of evidence, sometimes leading to the contradictions being explained away and to discarding testimony other times.\(^{191}\)

Third, the institutional factors and procedural systemic features—in particular, fact-finding powers of the Trial Chambers—further delimit the parameters of truth-finding in the tribunal context. While the Chambers in most courts and tribunals are authorized to actively search for the truth,\(^{192}\) unlike some national courts they are generally not placed under an unqualified duty \textit{ex officio} to strive for ‘material truth’ through extension of the fact-finding inquiry beyond the evidence made available to them.\(^{193}\) Except for the continental law-based ECCC,\(^{194}\) the parties to international criminal trials bear the primary burden of bringing the relevant evidence to the attention of the court. The court’s own truth-finding function in terms of calling its own witnesses, ordering additional evidence, and questioning witnesses remain subsidiary in law and/or in fact.

Ultimately, whether an individual trial chamber adopts a more or less active approach towards truth-finding is a discretionary matter. The specific modes will depend on the circumstances of the case and even more importantly, on the attitudes and style of individual members of the court as well as the collective bench dynamics. These are, of course, factors varied by tribunal but also by chamber.\(^{195}\) The paradigm of ‘truth’ in international criminal trials is not and arguably cannot be identical with that found in national jurisdictions, given their different institutional and legal context. Its normative content thus continues to oscillate in relation to domestic reference points and remains undetermined.

In sum, the current normative theory, on the one hand, recognizes the principled and more down-to-earth limitations of the tribunals’ capacity to establish a complete and absolute truth in relation to the facts on which their verdicts are based. For the reasons

\(^{190}\) See Judgement, \textit{Prosecutor v. Florencio Tacaqui}, Case No. 20/2001, SPSC, Dili District Court, 9 December 2004 (‘Tacaqui trial judgment’), at 4-5 (revealing frustration with witnesses’ reliance on their ‘paucity of culture’ as ‘a pattern of formulaic excuse’ and ‘an easy escape from the pressures of the examination’). For a more sensitive treatment, see Judgement, \textit{Prosecutor v. Akayesu}, Case No. ICTR-96-4-T, TC, ICTR, 2 September 1998, paras 155-56 (addressing cultural specificities of Rwandan witnesses).

\(^{191}\) Discussing these problems at the ICTY and ICTR, see Zahar, ‘Witness Memory’ (n 189), at 603-608 (characterizing the judicial treatment of testimonial deficiencies as ‘operationalization of eyewitness memory’); Combs, \textit{Fact-Finding without Facts} (n 189), at 189-223 (the Chambers’ ‘cavalier attitude toward testimonial deficiencies’ often results in their preparedness to ‘base their convictions on deeply flawed testimony’).

\(^{192}\) See e.g. Rule 98 ICTY and ICTR RPE; Art. 69(3) ICC Statute; Rule 87(4) and 91(2) ECCC IR.

\(^{193}\) E.g. Art. 244(2) Strafprozeßordnung, StPO (Germany).

\(^{194}\) Rules 55(5), 60(1), 90(1) ECCC IR.

\(^{195}\) See Chapter 10. Registering the influence of backgrounds of individual judges on the trial style, see e.g. F.J. Pakes, ‘Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia’, in P.J. Van Koppen and S.D. Penrod (eds), \textit{Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems} (New York: Plenum Press, 2003) 309–19. On the differences observed among individual ICTR Trial Chambers, see Byrne, ‘The New Public International Lawyer’ (n 5).
outlined above, the aspiration to dig out the material truth is not sustainable in the context of these courts, which drifts the tribunals’ truth away from the continental interpretation. On the other hand, the theory acknowledges that the limited version of negotiable and dispensable ‘procedural truth’ is not normatively satisfactory either. It argues in favour of a more active approach to be taken by the trial chambers to establishing the forensic facts relevant to establishing criminal responsibility. This entails the need for the judges to be prepared to look beyond the evidence presented and questions asked to witnesses by parties, in accordance with the governing procedural framework.

It is in this light that one is to interpret the ICC Trial Chambers’ practice of authorizing the participating victims’ legal representatives to present evidence as to the guilt or innocence and to challenge the admissibility of evidence, in accordance with Article 69(3) of the Statute. In the epistemic conditions in which the parties cannot wholeheartedly be relied upon as truth-seekers and in which the Trial Chamber itself has a limited truth-finding capacity due to unfamiliarity with the results of the investigation, the quest for the truth becomes a multilateral enterprise coordinated by the Chamber, in which victims have an autonomous role to play as generators of evidence.

The desirable judicial attitude to truth-finding is thus best described as an *ex officio* obligation to establish the truth within the reasonable limits demarcated by the evidentiary needs of the case and the applicable procedural rules. The tribunals are composed of professional judges who are ultimately responsible for establishing the facts and for rendering a verdict. The hands-off or light-touch judicial approach, which is not adequately inquisitive as to the reliability of evidence submitted by the parties and views the proof-taking merely as a partisan contest refereed by the judges, is unsatisfactory. On the contrary, the trial chambers are expected to use all means available to them to make sure that their judgments are based on the evidentiary record of which they are satisfied is as complete and reliable as possible in the circumstances.

Among others, the beneficial effects of pro-active judicial approach to truth-finding are best illustrated by the instrument such as on-site visits of judges. Such visits may be undertaken in order to verify the factual details regarding the topography of the geographic area, including the environment, distances, visibility of objects and conditions of infrastructure *in situ*. This instrument provides an important avenue for facilitating the assessment of evidence and enhancing the truth-finding capacity of the trial court in cases involving one specific or several crime incidents that allegedly occurred in a delimited area. It is relevant that in a number of cases where the Chambers undertook visits to the relevant locations, acquittals in the first instance on some or all charges were entered, presumably due to the ability of the judges to better verify the accuracy of facts presented to them. Indeed, a direct link in this regard may be difficult to establish, as detailed reasons for disbelieving evidence are not always provided in the judgments. Irrespective of the verdict, key evidence can be verified and its accuracy confirmed or, on the contrary, held unpersuasive and rejected as a result of the Chamber’s first-hand observations and

---

196 Chapter 10.


knowledge of localities obtained during on-site visits. The ICC Trial Chamber in Ngudjolo observed in its judgment of acquittal that a better knowledge of relevant geographic locations in the DRC, the view from one of them to the other, distances between them, and the conditions of the roads would have assisted the prosecution in clarifying and accurately assessing the various statements — the observation it would arguably not have been in a position to make without having been in situ itself. Recourse to site-visits should be had on a regular basis, whenever the accuracy and reliability of the relevant evidence raises doubts.

### 3.3 Trial stage as a truth-finding locus

As summarized above, the nature of international criminal trials has been defined, first, by distinguishing between the different tiers of teleology of international criminal justice and procedure and between functions and incidental effects of the proceedings; and, secondly, by identifying the task of establishing the truth as the primary function of the trial stage and of criminal process in general. The third perspective of the trial has been focused on the role and importance of this procedural stage in the overall context of international criminal proceedings. The theoretical concern with the position of trial in the procedural setup allows new light to be shone on it as a procedural stage and to approach it as an autonomous subject of study. But the explanatory value of this perspective, however, goes beyond merely theoretical interest. The role the trial is expected to play in the dimension of the proceedings necessarily speaks to its optimal organization in terms of structure, sequence and contents of steps, and methods of presenting and examining evidence — the issues relevant to the present normative theory.

The essential point made was that trial continues to be a centerpiece and the most important stage in international criminal proceedings. This is of course not a matter of any sort of absurd competition for primacy between the different procedural stages. But it is a question of which phase remains a real culmination of criminal proceedings and the focal point of the efforts of procedural participants; and where the most important activities take place that truly consummate the exercise of international criminal justice in a specific case. The characteristic of importance, when applied to procedural activities, is relative and perhaps even pointless because ultimately all elements and components of criminal process serve essential functions. But if the establishment of facts and truth-finding is to be regarded as an overarching purpose of the enterprise of criminal process, then trial can with reason be deemed a central stage, in view of the fact that it is — and should be — in a proper sense a truth-finding locus of international criminal proceedings.

For example, the investigative and pre-trial stages serve the essential functions of collecting the evidence, formulating the case against the defendant, confirming charges, effecting evidence disclosure, and effective preparation for trial, including the judges performing the necessary cutbacks on the excessive sides of the parties’ cases. In this sense, all pre-trial activities provide a basis for and contribute to an effective presentation of evidence and fact-finding by the court during the trial. But a series of procedural acts by the court towards the establishment of the truth is generally deferred until the trial

---


200 *Ngudjolo* trial judgment (n 198), para. 118.

201 See also Combs, ‘Fact-Finding Powers’ (n 197), at 721.

202 Chapter 3.

203 Chapters 4 and 5.

204 Chapter 6.
proceedings. Similarly, during the appeals, the trial judgment and the legal—and to a lesser extent, factual—findings are reviewed by the Appeals Chamber. However, the nature of the appellate process in the majority of international criminal courts is such that it is essentially a review of the trial courts’ findings rather than a truth-finding de novo.

In comparative terms, this is remarkable because, as noted by scholars, the trial is generally not representative of the bulk of the work of criminal justice across national legal traditions. In common law (accusatorial) systems, the trial stage is generally deemed the true climax of criminal process because this is the stage where the fact-finding truly takes place and which overshadows any preceding (partisan) inquiries and their results. Due to a strict separation between the parties’ investigation and trial inquiry, the results of investigation remain inaccessible to fact-finders (jury) prior to trial and the trial is thus the first and only forum of exposure of the triers of fact to the parties’ evidence. The trial is typically a one-day-in-court event conducted per adversarial script with stronger theatrical and trial advocacy elements calculated for jury consumption. That said, the absolute majority of criminal prosecutions do not end in contested trials because of the predominance of negotiated settlements (in the US the rate of guilty pleas being over 95%).

By contrast, in many continental law (inquisitorial) systems, fact-finding is essentially concentrated in the investigation stage whereby a dossier, containing results of the official inquest, is compiled to and made available to trial judges. At trial, the evidence contained in the dossier is examined and probed by the court with assistance of the parties and is entered into a trial record on which the decision is to be based. This remains a genuine, not merely pro forma, appraisal of the investigative record – particularly in jurisdictions placing a considerable emphasis on the principles of orality and immediacy at trial (e.g. in Italy and Germany, which are more ‘accusatorial’ systems). But the dossier still serves as a link of continuity between pre-trial and trial investigation that tends to be seen as, to a certain (yet not decisive) extent, redistributing the weight of fact-finding between the two phases. Furthermore, the importance of trials on the Continent have increasingly faced a metaphorical ‘attack’, especially in perhaps less serious cases, by accepting the legitimacy of diversionary and trial-avoidance arrangements – the tendency which has become entrenched even in jurisdictions which long resisted the institute of negotiated justice.

As argued in Chapter 6, in international criminal proceedings, the trial continues to retain its status as the central stage of the process wherein fact-finding genuinely takes

---

205 Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 28; Duff et al., The Trial on Trial, Vol. 3 (n 82), at 2 (‘Contested trials ... are not central to the criminal process, at least if centrality is understood quantitatively.’); T. Weigend, ‘Why have a Trial When You Can Have a Bargain?’, in A. Duff et al. (eds), The Trial on Trial, Vol. 2: Judgment and Calling to Account (Oxford and Portland, OR: Hart Publishing, 2006) 207-22 (concluding that ‘Although the criminal trial as we know it will not disappear from the system of criminal justice, it may lose its central position and become an infrequent exception to the rule of administrative or consensual disposing of criminal cases.’).

206 Damaška, ‘Epistemology’ (n 51), at 124 (‘Oral communication and live testimony compete with and may overshadow written evidence. Nor must proceedings in this setting assume an episodic character: they can be organized as a temporally continuous event.’).

207 See Chapter 6; Duff et al., The Trial on Trial, Vol. 3 (n 82), at 7 (‘Whilst the contested jury trial continues to dominate public perceptions of the criminal justice system, such trials are in fact comparatively rare.’).

208 Caianiello, ‘First Decisions’ (n 40), at 392.

209 Damaška, ‘Epistemology’ (n 51), at 124 (‘The legal process unfolds in temporally discrete installments, with the file of the case providing the necessary connection or lifeline between them.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 28 (‘the adversarial process in common law trial means that the visual theatre of the trial through the examination of witnesses in person may appear in stark contrast to the dossier-led trial in civil law, where most of the action has occurred beyond the court-room.’).

place and at which the course of justice is essentially completed. The finality of factual findings contained in the trial judgment as it relates to the scope and standard of appellate review on the issues of fact is one criterion of the meaning and importance of the trial phase, but it is not the only one. In Chapter 6, other relevant factors informing the position of trial have been addressed, including the resort to negotiated settlements and the growing sophistication of pre-trial activities and growth of pre-trial judicial competences, insofar as those might be seen to pose a ‘normative threat’ to the predominance of trial in the overall structure of the process.

To begin with the impact the sophistication of pre-trial process might exert on the significance of trial, it can be concluded that such effects are—or at least should be—minimal because the different pre-trial proceedings do not detract from the essential fact-finding function of the trial court. Neither the large-scale reforms at the ad hoc tribunals aimed at enhancing the judicial involvement in the pre-trial stage and strengthening their position as case-managers, nor the complex confirmation of charges procedure employed at the ICC serve to diminish the primary and exclusive responsibility of the Trial Chambers of the respective tribunals for the establishment of the truth.

At the ICTY, the role of pre-trial judge has been in facilitate consultation between the parties with a view to identifying genuinely contentious issues and to collect from the parties the information on their cases, including pre-trial briefs, witness and exhibit lists, and summaries of evidence. By nature and purport, these partisan materials contain only a preview of parties’ cases and may not be mistaken for a continental-style dossier containing the fruits of an official investigation. The rationale of such materials is to enable the Trial Chamber to effectively manage the projected case by reducing the number of witnesses and exhibits to be presented if it is deemed excessive as well as to focus the prosecution case on the most representative sites and incidents, given the tendency of prosecutors to ‘over-charge’. The exercise of those managerial powers does not come close to a fact-finding inquiry. The merely summary character of the pre-trial materials collected from the parties does not enable the Trial Chamber to take a lead in the examination of evidence at trial as would a continental court with access to an investigative dossier.

Another manifestation of a growing sophistication of pre-trial process, which could be taken as a sign of decline of trial as a principal procedural forum in international criminal proceedings, is the ICC confirmation hearing. The reason for that is the perceived risk that this procedure for weeding out trial-unworthy cases could overshadow factual findings to be made by the Trial Chamber. Such a sift procedure is analogous to common-law ‘committal’ but is organized as a full adversarial hearing at which evidence is presented by the parties in a summary form. The PTCs have assured that a confirmation procedure is not a trial before trial, nor a ‘mini-trial’ but has a mere ‘gatekeeping function’; they claim it serves a distinct purpose denoted by a lower evidentiary threshold than that necessary for the finding of guilt (‘sufficient evidence to establish substantial grounds to believe’). But the perception to the contrary has persisted. The Pre-Trial Chambers are occasionally criticized for applying an elevated standard of proof at the confirmation stage, requesting the prosecution to corroborate the charges by evidence that would be more fitting at trial, and to exceed the appropriate level of detail in their analysis of facts and evidence in the lengthy confirmation decisions. While it is subject to debate as to whether the trial courts have been unduly influenced by the Pre-

---

211 See Chapter 4.
212 See Chapter 6.
214 Art. 61(7) ICC Statute.
215 In detail, see Chapter 6, section 3.3.3.
Chapter 12: Towards a Normative Theory of International Criminal Trial

Trial Chambers’ deliberations on the evidence, the former are under an obligation to independently evaluate all the evidence and to limit their judgment strictly to that presented and examined at trial.216 This is sufficient, at least in theory, to secure the Trial Chambers’ exclusive status of a trier of fact in the ICC context.

As for negotiated justice, the number of cases disposed of through guilty pleas and plea-bargaining grew markedly in certain periods at the ad hoc tribunals, reaching a peak at the ICTY in 2002-2004.217 Generally, this tendency is to be seen in light of the Completion Strategy adopted by the Tribunals that created incentives for the prosecution to decrease the number of contested cases of mid-level accused in the docket. In cases of high-ranking defendants who pleaded guilty (Milan Babić and Biljana Plavšić), the expected benefits other than just efficiency—in terms of evidence-gathering (the prospects of insider testimony) and the great symbolic value of the expressions of remorse—must have played a role. Even so, the guilty-plea rates at the ICTY and ICTR have been far from such that might give rise to a claim that trial-avoidance is a normal rather than exceptional practice.218 Actually, given the gravity of crimes, this does not appear to deviate much from practice in common law countries in which plea bargaining is widely used: there, most cases involving grave offences or offences affixing a special stigma (e.g. sexual offences) still go on trial.219

At the ICC, no admissions of guilt have been received thus far and even if such admissions had been made, the trial proceeding would not have been foreclosed, even if in a shortened form. In accordance with Article 65(4) of the Statute, the Chamber may request the prosecution to present witness testimony or even order it to proceed under the ordinary trial procedures if the interests of justice so demand. The status of the Trial Chamber as the decision-maker on the merits of the case once it reaches trial is further confirmed by the lack of Pre-Trial Chamber competence to receive an admission of guilt.220 At the ECCC, the defendant in Case 001 (Duch) made confessionary statements to the Co-Investigating Judges and to the Trial Chamber. While this affected the scope and length of his trial, the confessions were treated as evidence and did not dispense with the need for holding a trial proper, in accordance with the civil-law scheme. While before the SPSC, the rate of defendants who admitted guilt was higher than in any other court, this was caused by unique factors, among which illiteracy of the defendants, the lower quality of defence representation, and very limited resources at the disposal of the Serious Crimes process.

The latter exceptional and isolated practice at one under-resourced hybrid court does not fundamentally affect the fact that most proceedings in international criminal justice have been and remain contested by nature and hence that trial has withstood the ‘attack’ by trial-avoidance mechanisms, where proceedings are initiated and reach the advanced stage. There are indeed strong reasons of a normative and practical character for the perseverance of trial against diversionary decisions. Given the extremely serious nature of these crimes and a heavy stigma attaching to them, neither defendants nor prosecutors are generally prepared and willing to enter in plea negotiations on the conditions acceptable to both parties – that is, unless the efficiency concerns exert inordinate pressure

216 Art. 74(2) ICC Statute (‘The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. … The Court may base its decision only on evidence submitted and discussed before it at the trial.’).
217 Chapter 6.
218 The SCSL has received no guilty pleas in core cases, but only in two contempt cases: see Sentencing Judgment in Contempt Proceedings, Independent Counsel v. Brima et al. and Independent Counsel v. Kamara, TC I, SCSL, 21 September 2005 (re Margaret Fomba Brima, Neneh Binta Bah and Ester Kamara); Judgement in Contempt Proceedings, Prosecutor v. Bangura et al., Case No. SCSL-2011-02-T, TC II, SCSL, 25 September 2012, para. 6 (re Samuel Kargbo).
219 Duff et al., The Trial on Trial, Vol. 3 (n 82), at 8.
on the prosecutors.\textsuperscript{221} For the same reason, judges have tended to demonstrate unease with guilty pleas followed by what they saw as a significant charge and sentence reduction as compared to the outcomes that may have transpired in the same cases if conducted under ordinary trial procedures.

Considering the special objectives of international criminal justice, the strong notion shared among many procedural participants and lawyers, target communities, and stakeholders, is that public and oral trial debates on evidence are crucial to the enterprise of adjudication of international crimes. In exercising their expressive role, the tribunals are already dealing with a limited and, ideally, carefully selected category of cases and accused. The rule-of-law impact and normative symbolism of such proceedings are arguments in favour of not dispensing with trials altogether, whenever the proceedings reach that stage. The prosecution’s evidentiary presentations—public, transparent and complete to the extent possible—are in the interests of international justice.\textsuperscript{222} For the victims it is important that the factual and legal truth not be sacrificed on the altar of expediency. Plea-bargaining may lead to significantly truncated charges and sentences disproportionate to the actual level of culpability of the defendant. That said, aside from efficiency gains, guilty pleas also present benefits in light of the goals of international justice, insofar as they occasionally promote truth-finding by unraveling the earlier unavailable evidence and they might contribute to reconciliation. However these incidental benefits are not strong enough to embrace the prospect of avoiding contested trials in international criminal law.

Therefore, it is appropriate to acknowledge the compelling need for a fuller presentation of facts and, where appropriate, evidentiary debates in international criminal proceedings. Where the defendant pleads guilty, admits guilt, or confesses incriminating facts, it may in specific circumstances still be desirable that the trial is not avoided altogether but is conducted in an abbreviated and narrower form, subject to the Trial Chamber’s discretion and in light of the circumstances of the case. In conformity with the model similar to that found in Article 65(4) of the ICC Statute, the Chamber should have an option of requesting the presentation and examination of key prosecution (and defence) evidence, in particular witness testimony orally or in writing so that it can be entered into the trial record. This should not result in protracted and irrelevant evidentiary debates, which would be not only anticlimactic but also objectionable for reasons of efficiency. This hybrid and creative approach—not readily comparable to any of the principal domestic models—could arguably strike the balance between efficiency, on the one hand, and the expressivist demand for a trial and the (more complete) truth, on the other.

In addition, it is apposite in this context to follow up on the practice which has been touched upon earlier – the increased reliance on written evidence submitted to the Chamber in whole or in part in lieu of \textit{viva voce} evidence.\textsuperscript{223} Insofar as predominance of written evidence detracts from the public and oral examination of evidence before the Trial Chamber, it could be said to replace the public and oral hearing by the trial by document or affidavit and thus \textit{de facto} to affect the role of trial. However, such presupposition would not be accurate. Thus, the admission of written evidence under Rules 92\textit{bis} through 92\textit{quinquies} does not shift fact-finding to outside the trial stage as a systemic principle; those Rules contain safeguards to the effect that incriminating evidence, as opposed to crime-base evidence, is subject to examination by the opposing party and the court.

\textsuperscript{221} Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 261 (‘the prosecution has incentives to go to trial instead of bargaining because [of] the goals of international criminal tribunals’). See also Duff \textit{et al.}, \textit{The Trial on Trial}, \textit{Vol. 3} (n 82), at 8 (‘Even if trials do not dominate the whole criminal justice landscape, they can still be very important when it comes to offences with the greatest stigma and the greatest practical consequences for the defendant.’).

\textsuperscript{222} Damaška, ‘Negotiated Justice’ (n 124), at 1031.

\textsuperscript{223} See \textit{supra} section 2.3.2.
Chapter 12: Towards a Normative Theory of International Criminal Trial

Whether or not prepared by the parties for the purpose of legal proceedings, any evidence relating to acts and conduct of the accused on which a conviction can be based generally remains subject to cross-examination. The unavailability of witnesses either makes evidence relating to such sensitive matters inadmissible (Rule 92ter) or operates as a strong consideration against admission (Rule 92quater). Objectively the *viva voce* presentation of all critical evidence has been the absolute norm.\(^{224}\)

It would thus be far-fetched to consider that the *ad hoc* tribunals’ increased reliance on documentary evidence, attended by no to limited oral examination, threatened the overarching importance of the trial process as a truth-finding locus. Some scholars have advocated that the ICC ought to reserve a greater fact-finding role for the PTC, provided that equality of arms is guaranteed in examining witnesses at the pre-trial stage.\(^{225}\) According to them, it would be more conducive to accurate fact-finding – the earlier the witnesses are examined, the more accurate their recollections are likely to be, while the passage of time before the trial might negatively affect witness memory. The PTCs may exceptionally gather evidence as a matter of ‘unique investigative opportunity’ (Article 56), and the proposal may be tied to this statutory ground. However, as the authors recognize, it would require a substantial reform of the pre-trial process towards a dossier approach.\(^{226}\) This is based on a generalized and potentially flawed premise that witnesses, if examined earlier rather than later, are more likely to be more truthful or have fuller or more accurate recollections.\(^{227}\)

Hence, the normative theory recognizes the special normative significance of the trial phase as compared to other steps in the procedural chronology.\(^{228}\) The trial enjoys both objective and ideational centrality in all historical and contemporary procedural systems. Indeed, the emphasis on trial is a distinctive feature of international criminal procedure and the one that is more likely to remain in any future experiments with creating *ad hoc* and hybrid courts.

---

\(^{224}\) With respect to the ICTY, see Pocar, ‘Common and Civil Law Traditions in the ICTY Procedure’ (n 20), at 450 (‘written evidence only supplements *viva voce* evidence, and did not become the main thrust of the Prosecution’s evidence.’).

\(^{225}\) Cf. Jackson and Summers, *The Internationalisation* (n 22), at 140, 146 (‘The trial could then be reserved for those witnesses who had not been previously examined properly. With greater equality of arms guaranteed at the pre-trial phase and an “adversarial procedure” provided for taking the testimony of all significant witnesses either at the pre-trial or trial phase, the ICC would be in a stronger position to win legitimacy for international criminal justice.’).

\(^{226}\) Ibid., at 140 (‘this cannot be done under a system which is essentially party driven, with the investigation of crimes and the collection of evidence solely in the hands of the prosecutor and the defence.’); Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 38.

\(^{227}\) Jackson and Summers, *The Internationalisation* (n 22), at 140 (‘the epistemic conditions for examining and cross-examining witnesses are better before trial than at trial because witnesses will have a fuller recollection of events at this earlier stage.’). One should not lose sight of the fact that most ICC witnesses will have spoken to numerous interlocutors (families, members of the community, domestic authorities, NGOs, media, and humanitarian agencies) before they get in touch with the ICC. This will already exert some effects on their authentic recollection and, from this point of view, it does not matter as much if they give statements to the parties’ or the court’s investigators in the pre-trial phase or at trial. On this issue, see Zahar, ‘Witness Memory’ (n 189), at 603-4.

\(^{228}\) Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 28 (pointing out ‘the paramount place of the trial in the institutionalisation of international criminal justice’).
4. ORGANIZATION OF INTERNATIONAL CRIMINAL TRIALS: TRANSLATING FLEXIBILITY AND PRAGMATISM

4.1 Nature of the court: No jury and its implications

The structure and composition of the court goes beyond the scope of the normative theory of the trial. The fact that international tribunal benches are composed exclusively of professional judges and do not include lay jurors is currently part of the DNA of international trials. This circumstance is by definition consequential for the various aspects of trial process. Before outlining the positions the current theory of the trial takes on specific matters of trial organization further in this section, it is worth pausing upon the real and imaginary implications of, and the reasons for, the absence of jury in the context of international criminal procedure. This will help clarify why the normative theory does not propose to revisit the absence of jury in international trials and what effect, if any, it should have for the trial arrangements.

One well-known consequence of no jury is a flexible regime for the admission of evidence and no rule against hearsay. The fact that laymen sitting as jurors have no special expertise and skills in evidence evaluation is a commonly accepted historical rationale for an elaborate net of exclusionary rules at common law.\(^\text{229}\) The jury can too easily be impressed by irrelevant information and does not deliver reasons for its verdict that would allow effective review of their finding. It therefore needs to be shielded from inadmissible and prejudicial information by exclusionary rules. By contrast, professional judges manning international benches should be able to distinguish reliable and probative evidence from the evidence of poor quality on which no conviction may rest. This rationale was endorsed among others by the drafters of the IMT Charter\(^\text{230}\) and by the ICTY judges.\(^\text{231}\)

When employed to justify the admission of large quantities of documentary evidence, this argument has met with strong objections. Thus, the existence of a jury is neither the only nor the primary reason for the development of exclusionary rules at common law. Such rules were historically meant to ensure that decisions in adversarial trials are based on reliable evidence.\(^\text{232}\) Hearsay on which effective examination is not

---


\(^\text{230}\) Report of Robert H. Jackson (n 25), at xi ('We saw no occasion at the London Conference to insist upon jury rules for a trial where no jury would be used.'). See also ibid., at 80 and 83.

\(^\text{231}\) First ICTY Annual Report (n 121), para. 72 ('This Tribunal does not need to shackle itself to restrictive rules that have developed out of the ancient trial-by-jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. The judges will be solely responsible for weighing the probative value of the evidence before them.'). See also Decision on the Defence Motion on Hearsay, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 5 August 1996, paras 10-11; Decision on the Motion of the Prosecution for the Admissibility of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, ICTY, 19 January 1998, para. 20 ('While the importance of the rules of admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the [ICTY] are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight.'); Order on the Standards Governing the Admission of Evidence, Prosecutor v. Brdanin and Talić, Case No. IT-99-36-T, TC II, ICTY, 15 February 2002 ('Brdanin'), para. 14 ('In a jury trial there is the absolute need to keep away from the lay jurors prejudicial material of little or no probative value that may be difficult for them to remove from their mind.').

\(^\text{232}\) For discussion, see Murphy, ‘No Free Lunch’ (n 13), at 545-47. See also J.H. Langbein, ‘The Criminal Trial Before the Lawyers’, (1978) 45(2) The University of Chicago Law Review 263, at 306 (‘the true historical function of the law of evidence may not have been so much jury control as lawyer control.’); R.D. Friedman, ‘The Confrontation Right Across the Systemic Divide’, in Jackson et al. (eds), Crime, Procedure and Evidence (n 56), at 261 (arguing that a common law hearsay rule ‘was entirely independent of the jury
possible is inherently unreliable and poses a risk of error. Moreover, the self-indulgent assumption about the superior cognitive capacities of professional judges as compared to those of lay adjudicators has been brought into question. Leaving to one side the fact that far from all international judges possess a previous experience of serving in a judicial capacity, let alone of conducting criminal trials, the miraculous ability of professional judges to disabuse their minds from the legally irrelevant and unreliable information can be doubted from a cognitive psychology perspective. This is so especially considering the unavoidable professional distortions and biases at work, the extraordinary lengthy and complex character of the proceedings, and the massive amounts of evidence of potentially sub-standard quality and little reliability. In this respect, a strong emphasis placed in tribunal discourse and jurisprudence on the absence of jury is less convincing – an imaginary implication of an over-appreciated factor.

In terms of the link between the lack of jury and the structure of trial proceedings, it has been rather tenuous. In the tribunals by law or in practice following the adversarial script, the trials have been conducted largely in the same fashion as if they would if they had been jury rather than bench trials, subject to greater judicial control. The components of trial process which were traditionally associated with the parties’ advocacy for the purpose of persuading the jury of the merits of their cases—opening statements and closing arguments—have been retained in all courts. However, as a result of the composition of the court and the reduced value of advocacy in professional bench trials, those procedures have lost in theatrics and were put by the judge at service of more pragmatic procedural ends. Their functionality shifted, respectively, to introducing the judges into the cases in order to facilitate their comprehension of the complex and voluminous evidence to come and assisting them in its evaluation.

Insofar as the order of presentation of evidence and modes of examination of evidence are concerned, the ad hoc tribunals rarely justified any departures from the principles of common-law origin by the absence of jury. In Popović et al., the Trial Chamber held the rigid (common law) rules on impeachment of witnesses irrelevant in the system.

---

233 Jackson and Summers, The Internationalisation (n 22), at 140 (‘Relaxing the standards for the admissibility of such evidence without the possibility of a full and effective examination of the original source runs the risk of error.’).  
235 See P.M. Wald, ‘ICTY Judicial Proceedings: An Appraisal from Within’, (2004) 2 JICJ 466, at 473 (‘Donning a robe does not enshroud its occupant with a seventh sense of whether something written on paper is true or false. In that sense, the judge is on a par with the juror, who must rely on his or her human instinct in evaluating the person doing the testifying. To permit critical material to be admitted without the ability to directly view and question the witness goes to the heart of the process and threatens to squander the ICTY’s most precious asset – its reputation for fairness and truth-seeking.’); Murphy, ‘No Free Lunch’ (n 13), at 551 (disbelieving that ‘the mystical powers said to be bestowed on a man or woman at the first moment of assuming the judicial robe are necessarily up to the task of sifting through thousands of potentially fabricated hearsay statements and, if necessary, putting them out of one’s mind when forming a judgment about the facts.’).  
236 Cf. Brdanin and Talić evidence order (n 231), para. 14 (‘Proceedings before this Tribunal are instead conducted by professional judges. This Trial Chamber attaches great importance to this characteristic.’ Emphasis added.)

237 See chapters 9 and 11; infra section 4.2.3.
Chapter 12: Towards a Normative Theory of International Criminal Trial

ICTY context due to the lack of jury.\textsuperscript{238} It ruled, by majority, that it was up to each party ‘to determine to what extent and in what the credibility of a witness is to be challenged’ and that the Chamber would be capable of making a credibility assessment ‘in whole or in part based on the examinations conducted’.\textsuperscript{239} This approach was reversed to the extent that it put the determination on whether to impeach a witness in the calling party’s hands, whereas it must be for the Trial Chamber to allow the party to cross-examine its witness and to limit the scope of the questioning per objections to impeachment.\textsuperscript{240}

The component of the trial process that has arguably most felt the absence of jury is the deliberation and judgment-drafting stage. Obviously, the law and practice on verdict deliberations on, voting rules, and the format of trial judgments in international criminal law are very different from the relevant procedures employed in jury benches. Most importantly, in domestic criminal trials across legal traditions a jury verdict does not need be reasoned because the institute of jury, as a trial by one’s peers, is in itself meant to imbue the operation of criminal justice with legitimacy within the local community. However, the professional character of international criminal benches, the compelling need for the tribunals to earn their legitimacy by providing a solid reasoning, and the requirements to be met at appellate review necessitates a considerable deviation from domestic practices. This reflects, among others, on the scope of deliberation (separate deliberation on a verdict and on a sentence or a merged deliberation); how judges arrive at their collective decision; how dissenting views are accommodated and published and what consequences they have for the decision-making authority of the Trial Chamber; how the judgments are drafted; and the admissible judicial style, length, and reasoning.

Finally, to turn briefly to the reasons for resisting the institute of jury in international criminal tribunals, it must be noted that at no stage in the development of procedural systems on the international level has a jury system seriously been considered as an option. This has to do primarily with the extraordinary gravity of the crimes and complexity of the cases, the novel character of the adjudication framework, and the seemingly insuperable difficulties of implementing this institute on the international level. At the IMT and IMTFE, the fear of unjustified acquittals may have made the jury unthinkable.\textsuperscript{241} Subsequently, when creating ICTY and ICTR procedure, this victors’ justice consideration gave way to more principled and practical concerns pointing to the same conclusion.\textsuperscript{242}

Firstly, the enormity and complexity of the task of international criminal adjudication made bench trials appear more appropriate. This is understandable in view of the high risk of emotion-based and biased verdicts, nullification and error either way;\textsuperscript{243} the recognized need for special knowledge and expertise;\textsuperscript{244} difficulties of agreeing on the

\textsuperscript{238} See e.g. Transcript (oral decision), Prosecutor v. Popović et al., Case No. IT-05-88-T, TC, ICTY, 17 September 2007, at 15457-15458 (‘in a Tribunal of this nature, where professional judges decide on matters of fact and law, the old-fashioned or maybe archaic rules prohibiting or restricting the impeachment of one’s own witness, applicable in some common law jurisdictions, have no application here’).

\textsuperscript{239} Ibid., at 15458.

\textsuperscript{240} Popović et al. impeachment appeal decision (n 136), paras 26-8.

\textsuperscript{241} J.A. Bush, ‘Lex Americana: Constitutional Due Process and the Nuremberg Defendants’, (2001) 45 Saint Louis University Law Journal 515, at 530 (‘Jury trials would have been laughable, allowing a single “twelfth angry Nazi” juror to acquit even the worst perpetrator.’).

\textsuperscript{242} A. Orie, ‘Accusatorial v. Inquisitorial Approach’, in Cassese/Gaeta/Jones (eds), The Rome Statute 1473 (‘the practical differences and the factual and legal complexity of the cases would be an obstacle to anything but a bench trial.’).

\textsuperscript{243} Ibid.; A. Powell, ‘Three Angry Men: Juries in International Criminal Adjudication’, (2003) 79 New York University Law Review 2341, at 2355-57; Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 700 (‘jurors will be more likely to vote according to their personal biases and popular sentiment than as trained professionals’).

\textsuperscript{244} D.J. Scheffer, ‘Advancing U.S. Interests with the International Criminal Court’, (2003) 36 Vanderbilt Journal of Transnational Law 1567, at 1572 (‘in this court for these types of crimes …[y]ou want very expert
Chapter 12: Towards a Normative Theory of International Criminal Trial

(national, ethnic, geographic) criteria for selecting and vetting jurors; as well as costliness, linguistic and cultural barriers, and logistical obstacles to having the same jury bench sit during several years of trial. Second, underneath these practical objections lie conceptual issues that militate against a jury system, at least in international as opposed to hybrid tribunals. The idea of a ‘trial by peers’ epitomized in the jury will remain fictitious until a more cohesive and integrated international community—at the level of states, groups, and persons—become more than mere rhetoric. Otherwise, it would look like a foreign and illegitimate imposition. In international trials, the jury may be less necessary as a check against governmental abuse since international judges are not appointed by any specific government. Moreover, it may well be antithetical to the current system of recruiting judges underpinned by the idea of a bench detached from a local community.

Several scholars—some of which in strong terms—advocated the need to consider lay participation in international trials because that would better safeguarding of the rights of defendants, make the system more legitimate and democratically accountable, and to enhance communal ownership of the verdicts. But this is not convincing against the backdrop of foregoing observations. With benefit of hindsight, such experiments would have been undesirable, unnecessary and, at present, they seem effectively foreclosed for the purpose of future efforts towards establishing international (but not hybrid) courts. Procedural systems of the tribunals are already under considerable strain due to an excessive number of reasons, and adding these elements would exacerbate drastically the tribunals’ efficiency, without expected considerable benefits in terms of authority, credibility and legitimacy. A more rational and preferred approach is to continue placing emphasis on the professionalism and integrity of international criminal judges and investing in a better quality of international judiciary, rather than popular participation.

4.2 Structure of trial proceedings

4.2.1 Initial question: Structure of case at trial

The normative preference for a certain organization of trials and for specific sequence and modes of evidentiary presentations and questioning witnesses depends on the position to be judges who know the law, and who can understand the complexities of atrocity law, to be the judges of your innocence or guilt’); Powell, ‘Three Angry Men’ (n 243), at 2355; Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 700 (‘Right or wrong, there has been an international perception that jurors are unqualified to sit as finders of fact given the complexities of modern international criminal law and the expertise required for forensic fact-finding.’)

244 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 242), at 1489; Pocar, ‘Common Law and Civil Law Traditions in the ICTY Criminal Procedure’ (n 20), at 440 n7; Mégret, ‘Beyond “Fairness”’ (n 53), at 65. 245 Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 702; Mégret, ‘Beyond “Fairness”’ (n 53), at 66. 246 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 242), at 1489 (‘The idea of being tried by one’s peers becomes somewhat hypothetical unless the accused would accept the fact that jurors are fellow human beings as important.’); Mégret, ‘Beyond “Fairness”’ (n 53), at 65 (‘could a random selection of human beings from the entire world (or, in the case of the ICC, state parties) credibly be seen as an emanation of the international community?’).

247 Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 702 (‘an international jury of the defendant’s “peers” would create the appearance of justice imposed from the outside, consisting of “world citizens” with no understanding of the relevant community experience or ethos.’); Powell, ‘Three Angry Men’ (n 243), at 2367. 248 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 242), at 1489 (‘the protection against arbitrary judgments by government-appointed judges is of lesser importance if the judges are not appointed by a national government but by the world community and in accordance with strict criteria as to their legal background nationality, expertise, and gender.’).

249 Powell, ‘Three Angry Men’ (n 243), at 2378; Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 707 (proposing the use of mixed panels).
adopted concerning the essential issue which extends beyond the trial phase. This question is: should the proceedings generally and investigations in particular revolve around a single case, formulated, investigated, and prepared by an impartial fact-finder, assisted or directed by the parties only to a limited extent? Or should they rather hinge upon two distinct cases orchestrated by the parties and/or participants only with rights-supervisory and managerial touch by the judges? The choice with regard to the structure of investigations is not neutral as regards the arrangements to be adopted in the following stages of the process because it creates an inclination in favour of either bipolar (multipolar) or singular trial proceedings.  

In particular, the unity or bifurcation of the case during the pre-trial investigation creates a systemic expectation, respectively, either for a one-case (‘case of the court’, ‘case of the truth’) and dossier-based approach or for a two-case party-led and ‘adversarial’ approach at trial. This primary choice in respect of the investigative structure is essential to defining the procedural form of both pre-trial and trial proceedings. The uniform one-case investigation entails a structural need to organize the trials roughly along the lines of the continental style, which means, among others, unrestricted access by the parties to the materials contained in the dossier, the decisive role of judges in determining the contours of the case and the evidence to be heard, their pro-active and predominant role in eliciting evidence at trial, the thematic rather than party-based structure of case presentation at trial and undifferentiated modes of questioning. The broad judicial discretion and elementary regulatory regime are conducive to the climate of unilateral judicial decisions on the evidence to be examined, the calling order of witnesses as well as indiscriminate inquiries and unrestrained interventions by the judges in the interrogation with view to establishing the truth.

The other option naturally prods the trial process in the ‘common law’ direction by replicating, at least in general lines, the ‘adversarial’ logic of the proceedings. The bifurcate investigations provide parties with a significant autonomy in defining their cases and entail the need for the evidentiary communication between the parties by means of pre-trial disclosure. At trial, it mandates them to take the lead role in the process of adducing evidence while the adjudicators, who hold no dossier and are unfamiliar with the details of parties’ investigations, are naturally limited to the role of referees. The ultimate responsibility for the case presentation entails the need for each party to thoroughly prepare their evidence, by proofing ‘their’ witnesses before trial and by deciding which witnesses will be called and in what order. The dialectic evidentiary contest between the two parties is subject to paraphernalia of rules governing the order, nature, and form of partisan interventions as well as the rationales and sequence of steps and turns in examining and cross-examining the evidence.

In international criminal procedure, the model based on the parallel partisan investigations and the corresponding ‘adversarial’ trial structure has been predominant, with the ECCC being the only exception, although even there the judge-led paradigm of trial process has proved not sustainable to the full extent. The scholarly debate has addressed the question of whether the one-case or multiple-case approach is better suited to the unique circumstances and challenges of international criminal justice.

In addressing this issue from the perspective of the goals of international criminal justice, Swart observed that giving ‘a simple and clear-cut answer to that fundamental question’ to this ‘fundamental question’ might be impossible. But at the same time, he suggested that ‘the peculiar goals of international criminal justice have a strong policy implementing character and are, therefore, better served by a choice in favour of an inquest

---

251 See also B. Swart, ‘Damaška and the Faces of International Criminal Justice’, (2008) 6 JICJ 87, at 107 (referring to the choices of ‘structure of investigations, pre-trial proceedings and the trial itself’ as obviously ‘the most important procedural choices in setting up international criminal courts’).

252 See Chapter 10.
Chapter 12: Towards a Normative Theory of International Criminal Trial

model rather than a contest model’. 253 The grounds for this conclusion are not obvious, even if one accepts the premise on which this line of argument rests, namely that ‘the relationship between the ends of international criminal justice and the shape of proceedings is of the utmost importance’. 254 As emphasized on several occasions before, the present normative theory rejects the idea of goal-determinism in international criminal procedure.

Other authors went further in their argument and advocated an overhaul of the current paradigm in favour of the process whereby not the parties but ‘an investigating judge is responsible for the investigation of the case, the preparation of an indictment and the collection and presentation of a dossier upon which the court proceeds with the case’, i.e. the process subject to tight judicial control at all stages that is ‘fundamentally civilian in structure, and not adversarial’. 255 In view of logistical, procedural and epistemic difficulties associated with parallel investigations in international crimes cases, *inter partes* disclosure and bipolar presentations at trial, there should be, it is argued, ‘a single, neutral investigation that is as full and complete as possible, and the investigators should be obligated to pursue all relevant evidence, whether it favors the prosecution or the defense’. 256

However, the virtues of the dossier approach in international criminal law are neither to be assumed nor overstated. One objection made against it in the domestic context relates to the excessive trust put in the person of investigating judge, despite serious risk of premature judgment on his part as a result of advance knowledge of the case. 257 It is telling that the faith in the institute of investigating judge has been in decline even in European lands seen as its strongholds. It has been abolished, or his status downsized, in Germany, France, and, most recently, in the Netherlands. 258 Given the nature of the grave nature of the crimes and notoriety of the suspects in international criminal justice, the doubts about the idea of an impartial official investigator collecting all relevant evidence regardless of whether it goes to the proof of guilt or innocence of the accused are amplified in international criminal justice context. In a mixed procedural and politically charged context, the ideal of a completely detached truth-seeking is unattainable or at least will be an article of less than universal faith, especially among defendants and their counsel. 259 If so, the legitimacy of one-track investigations will constantly be subject to serious challenges from the parties on the ground of incomplete and slanted investigations. This is likely to result in a ceaseless flow of investigative requests from the parties, motions for appellate review of investigative acts, and unavoidable attempts to conduct informal parallel inquiries behind the investigating officer’s backs in order to be able to meaningfully participate in the official investigation. These challenges are manifest in the

---

253 Swart, ‘Damaška’ (n 251), at 707.
254 Ibid.
G. Boas and W.A. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY*
256 Pizzi, ‘Overcoming Logistical and Structural Barriers’ (n 50), at 2-3.
257 See Damaška, ‘Epistemology’ (n 51), at 121 (‘from the epistemic perspective the decision-makers’ advance knowledge is a serious shortcoming. It leads them early on to form hypotheses about what happened, and makes them more receptive to information conforming to their tentative hypotheses than to information departing from them.’); *id., Evidence Law Adrift* (n 229), at 92; Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 35 (‘Such a judge can all too easily become captivated by a “crime control” ideology or by a construction of events that has already been set up by on-site investigators, raising questions about the concept of “neutral investigation”.’).
258 Damaška, ‘Epistemology’ (n 51), at 121 (‘a serious challenge to officially dominated systems is the development of adequate institutional incentives against the powerful drive of partisan self-interest to unearth and develop evidence.’).
259 To a similar effect, see Combs, *Fact-Finding without Facts* (n 189), at 310 (It is impossible to imagine that such faith and trust could be placed in an official of the international tribunal given the political considerations that surround the operations of international tribunals.’).
experience of conducting investigations in the ECCC context, a single contemporary court relying on a civil law dossier model.

From an epistemic perspective, it is not certain that the inquest model ensures a more robust investigation and a more complete and accurate truth-finding than the two-track inquiries. Unlike partisan actors, an investigating judge (or a prosecutor with similar functions, such as in the ICC context) may be lacking powerful incentives to developing the lines of inquiry that contradict the initial hypotheses. One-track investigations will generally be lackadaisical, aiming at collecting evidence corroborating the early prejudgment rather than paying equal attention to all forensic versions. Arguably, in view of the highly contested nature of international criminal cases and serious epistemic constraints faced by a court investigator, entrusting investigative competence to the parties as the actors genuinely interested in and better capable of unearthing the relevant evidence, is more fitting.

Thus, the relative advantages of either approach in the context of international criminal justice are far from obvious. In addition, proposals have been made for a hypothetical ‘third way’ combining the two models. Under this approach, the investigation would be structured around one dossier but still be conducted by each of the party, with judges (or pre-trial chamber) keeping the dossier and exercising supervision over investigation. While the idea is a promising one and needs to be explored, this is another proposal at experimental hybridization and, given that none of the courts currently adopts this approach, how it would work in practice remains to be seen.

For the current purpose of delineating a normative theory for international criminal trials, it is unnecessary to definitely solve the dispute between the inquest and contest approaches to investigation or to explore the benefits of the models whose viability is yet to be tested empirically. To be sustainable, such theory should remain sufficiently open-ended as to accommodate the different approaches to structuring investigations without foreclosing either of them. Retaining flexibility in this respect is advisable given that the conditions of different conflict and post-conflict environments in which international criminal investigations are conducted vary from one situation to another.

For example, consider the situation characterized by a volatile security situation, party-unfriendly political climate in the target country in the wake of regime change, refusal of cooperation and obstruction of investigations by the national government, intimidation of (potential) witnesses, forbidding entry to investigative teams and so on. In different times, all or some of these challenges have been faced by the ICTY prosecution, the ICTR defence investigators in Rwanda, and the ICC defence teams in Libya. In such contexts, the parties and, in particular the defence, may face serious challenges in collecting evidence, and the model of unified investigation by judicial officers and/or the parties jointly might be more suitable. By contrast, the settings where the defence is not substantially disadvantaged in terms of access to evidence could be better suited for the partisan investigation practice. In such situations attending the ICTY and ECCC operations, two-track investigations may be a workable solution.

260 Jackson and Summers, The Internationalisation (n 23), at 10; Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 707.
261 See e.g. Jackson and Summers, The Internationalisation (n 23), at 146 (‘Within the context of international criminal trials, where epistemic conditions are difficult and witnesses may be highly partisan, it is arguably better to structure investigations around one dossier created by both prosecution and defence under the supervision of a pre-trial chamber than to sustain parallel party investigations.’); Gordon, ‘Toward an International Criminal Procedure’ (n 28), at 707 (‘A hybrid procedure might employ a specially designated pre-trial judge to participate in or oversee the collection of evidence.’).
262 Jackson, ‘Finding the Best Epistemic Fit’ (n 22), at 28 (arguing that equality of arms requires a ‘greater responsibility placed upon the court for the gathering of evidence.’).
Chapter 12: Towards a Normative Theory of International Criminal Trial

Therefore, the starting point for the organization of trials is that there is and should be no one-size-fits-all approach to structuring international criminal investigations. On the contrary, it may arguably be preferable to provide international criminal justice institutions with an adjustable multiple-choice framework enabling the court and the parties to opt for different investigative approaches depending on the expected or actual epistemic needs and practical challenges unique to a specific context. The emphasis on the pragmatism and flexibility in international criminal procedure mandate that closer attention is paid to the operational conditions and challenges in choosing the suitable procedure, instead of clinging to a pre-set scheme of either partisan or judge-led investigation. The normative indeterminacy in respect of the optimal structure of investigations entails that the trial theory ought to accommodate the eventualities of both one-case and multiple-case approaches to case presentation at trial.

4.2.2 Trial preparation: Importance of robust case-management

In the foregoing chapters, the procedural reforms at the ad hoc tribunals aimed to activate trial judges in the pre-trial stage and to enable them to perform managerial measures on the parties’ cases have been addressed, along with their impact on the procedure in the more recently created courts. The need to empower and encourage judges to adopt a robust and pro-active approach in coordinating trial-preparation activities of the parties has often been viewed as one of the principal lessons to be drawn from the procedural evolution of the ad hoc tribunals.

Already in the early years of the tribunals, the judicial involvement in pre-trial process came to be seen as the suitable remedy against the excruciatingly slow pace of trials which generated widespread concern within and outside of the tribunals. Among other factors, this problem tended to be attributed to the party-driven nature of the proceedings in which judges had no active role to play and no way to counteract dilatory tactics of the parties who had initiative. It became clear that as partisan advocates, parties were inclined to call a great number of witnesses and to adduce excessive evidence—its bulk tending to be corroborative—and could not be relied upon for voluntarily reducing the size and scope of their respective cases in the context of party-led trials. As part of acquittal risk-averse strategy, the prosecution tends to ‘overcharge’ by including in the indictments multiple forms of liability, counts and crime sites or incidents and seeking to adduce as much evidence as possible to support each allegation, causing an explosion in

---

263 For a similar conclusion, see Jackson and Summers, The Internationalisation (n 23), at 146. Cf. Combs, Fact-Finding without Facts (n 189), at 310, 314 (assuming the adversarial approach to investigations).

264 See Chapters 3, 6, and 8.

265 C. Jorda, ‘The Major Hurdles and Accomplishments of the ICTY’, (2004) 2 JICJ 572, at 578 (‘the theme of [reforms at the ICTY] has always been to give greater powers of initiative to the trial Judge.’); G. Kirk McDonald, ‘Problems, Obstacles and Achievements of the ICTY’, (2004) 2 JICJ 558, at 367 (arguing that ‘a structure established by its [ICTY’s] Statute … may not be best suited for trials of complex international crimes’ and advocating the need to ‘provide for the early, active involvement of Judges to shape the presentation of evidence.’); W. Schomburg, ‘The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights’, (2009) 8 Northwestern Journal of International Human Rights 1, at 15 (‘The common law structure of the proceedings ... contributes to the detention times because a chamber is generally dependent on the parties’ submissions, so the schedule is therefore in their hands.’).


267 The initial preference for viva voce evidence was another important factor: see supra section 2.3.2.

268 Report of the Expert Group (n 266), para. 76 (recommending judges to exclude testimony if it is cumulative or of no material assistance with respect to contested issues).
Chapter 12: Towards a Normative Theory of International Criminal Trial

the volume of the case at the cost of clarity of accusations. In turn, the defence’s strategy lies in contesting everything and in requiring proof of every element of every single crime charged. Even where the accused eventually does not challenge at trial that crimes have in fact took place and does not adduce contradicting evidence, the defence is unlikely to make early concessions that a specific issue is not in dispute. The ‘contest-everything’ strategy helps divert the adversary’s resources from core issues and linkage evidence to investigating and presenting crime-base evidence. The defence has no apparent incentives to expedite the process, as opposed to delaying it.

In order to contain the expansive dynamics and partisan excesses intrinsic in party-driven proceedings, a number of case-management devices were added and refined in 1997-2003. In the following period, the Completion Strategy provided further reasons and momentum for optimizing, strengthening and active resort to these mechanisms. These have included the duty of the parties to deliver pre-trial briefs and related summary materials regarding the case to the Trial Chamber; the formal function of a pre-trial judge (at the ICTY only) charged with the coordination of trial-preparatory activities, establishing the work plan, facilitating communication between the parties concerning the preparation of the case, and the flow of information and materials between them and the Chamber; and status, Rule 65ter, pre-trial, and pre-defence conferences which the Trial Chamber could use to review the status of trial preparation and exercise the moderating activities on the projected case.

These measures were widely regarded as a move from the adversarial system to the inquisitorial process, in light of the common perception that the former was to be blamed for the lack of expedition. But, as noted, the label of ‘managerial judging’ is clearly a more fitting description of the new role of the Trial Chambers in the pre-trial process. The reforms neither changed the two-case structure of process nor gave judges a role in investigations and fact-finding; they merely granted them greater controlling powers over partisan cases. The main leitmotif of these reforms was to give Trial Chambers advance access to the information about the case. The knowledge obtained through preview of the proposed (summary) evidence would enable the judges to identify issues genuinely in dispute between the parties, to moderate the volume of evidence to be presented with view to concluding the trial within a reasonable period of time, and to exercise tighter control over the presentation of evidence at trial.

270 Report of the Expert Group (n 266), para. 67.
271 See also Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 261.
272 See Chapters 6 and 8. For a description and chronological summary of managerial reforms, see Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 247-49 and 251.
274 Rules 65bis, 73bis, 73ter ICTY, ICTR, SCSL RPE; Rule 65ter ICTY RPE. See e.g. Sixth Annual Report of the ICTY (n 137), para. 14.
275 See inter alia sources cited in n 265.
276 Langer, ‘The Rise of Managerial Judging in International Criminal Law’ (n 72), at 836; Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 247. See also Chapters 1, 6, and 8.
277 Jackson and Summers, The Internationalisation (n 22), at 126 (the reforms were ‘motivated by a managerial need to speed up proceedings rather than by any concerted desire to move the structure of the proceedings away from party competition towards a more truth-finding court. … The effect was to make judges more activist, but activist in the sense of encouraging the parties to expedite the proceedings rather than in the sense of taking over the fact-finding process.’).
Chapter 12: Towards a Normative Theory of International Criminal Trial

Unsurprisingly in light of the Completion Strategy, the managerial judicial practices became regular elements of the procedural landscape at the ICTY. The ICTY judges have actively employed their powers to call upon the parties to shorten the estimated length of the examination-in-chief; to determine the number of witnesses to be called and to impose time-limits on the presentation; to invite the prosecution to reduce the number of counts charged and to fix the underlying incidents and crime sites ‘most representative of the crimes charged’ (with the possibility of directing the prosecution to select counts). The ICTR and SCSL incorporated most but not all of the devices introduced at the ICTY and, in respect of some judicial powers, preferred to introduce their watered-down analogues, with few exceptions. Moreover, they were not prepared to utilize them as actively as the ICTY judges, evincing a more conservative attitude in this regard. However, the principal idea behind managerial judging model, including its mainstream and essential elements, proved to have a lasting value in the family of international and hybrid courts. This is illustrated by the fact that the Trial Chambers in all posterior courts whose process involves significant party control (and therewith the risks of partisan excesses), including the ICC and STL are availed of pre-trial case-management powers.

Insofar as managerial judging reforms detracted from the party control and generated tensions with the adversarial principles of party autonomy in formulating and presenting their cases, the measures aimed at tightening judicial control over the proceedings proved controversial with the parties and even with some judges. The orders determining the number of witnesses to be called and reducing the time available for the presentation of parties’ cases, often through arbitrary calculation regardless of the case (‘by one-third’), were understandably resisted by the parties. In numerous cases, the parties claimed that the Chamber’s cutbacks in the number of witnesses and hours allotted for the presentation of evidence encroached upon their right to present their case, which resulted in additional litigation.

Besides the shared objection to the loss of party control, the defence’s reasons for resisting the reforms included the implied unrealistic expectation that the accused would be interested in contributing to the success the managerial court by helping it to move the case forward, whereas many accused would have every reason to slow down the process. The pre-trial judges’ efforts to persuade the defence to agree to certain facts tended furthermore to be seen as inviting them to help the prosecution with discharging its burden of proof without any pay-offs. Furthermore the defence’s acceptance of the reductions in the time for the presentation of its case and in the number of witnesses it were to lead at trial would
Chapter 12: Towards a Normative Theory of International Criminal Trial

amount to a waiver of the right to a reasonable opportunity to present its case, and the defence had nothing to gain from such concessions.\footnote{Ibid., at 287.} Secondly, the defence complained that the Trial Chamber’s pre-trial exposure to biased partisan information contained in the prosecution materials might compromise judicial impartiality. In Blagojević et al., the ICTY Trial Chamber requested copies of witness statements, as opposed to mere witness summaries, and the defence applied for reconsideration of this decision.\footnote{For discussion, see Chapter 6.} Among others, it claimed that this request confused the judicial and prosecutorial function (the function to investigate) and exposed the Chamber to the prejudicial material that was not evidence in a proper sense, in violation of the presumption of innocence and the right to cross-examination.\footnote{Blagojević et al. prosecution materials decision (n 280), at 3.} In turning down the request for reconsideration, the Chamber held that the requested materials were necessary for it to be able to manage the trial more effectively under Rules 65\textit{ter} and 73\textit{bis} and that it would not regard the witness statements as ‘evidence’ before they are submitted and admitted at trial.\footnote{Ibid., at 4-5. On the distinction between information and evidence, see n 90.}

Besides displeasure of the prosecution with its loss of exclusive control over the format of its case and the time available for presenting it,\footnote{Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 286-287.} the power to request the prosecutor to reduce the number of counts charged and to fix the number of crime sites and incidents on which the prosecution may lead evidence—and especially to \textit{direct} the prosecution to select the counts—was the major rubbing point between the judges and the OTP.\footnote{See Chapter 8.} But the challenges to this power on the ground that it compromised the prosecutorial independence and judicial impartiality, as long as the identification by the judges of the counts ‘most representative’ of the charges might be perceived as prejudging the merits of the case, were rejected. The courts maintained that the previous involvement of the judges in the pre-trial process and their function of keeping the parties’ cases within the reasonable limits neither violated the OTP’s independence nor prejudiced judicial impartiality. This is because pre-trial case-management meant neither that judges would look into the merits of the prosecution case nor that they would interfere with the prosecution function.

The major challenge to the managerial judging reforms came from outside the ICTY and related to the actual contribution of the new case-management judicial tools to speeding up the proceedings. In their important study, Langer and Doherty concluded on the basis of statistical analysis and interviews that such reforms did not expedite the ICTY process as was expected but, paradoxically enough, slowed it down.\footnote{Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 286-87.} As they explain, this has to do with several reasons of a procedural and institutional nature. The managerial reforms lengthened the proceedings because new functions, steps, and activities were incrementally added to the procedural edifice, without bringing the expected efficiency benefits.\footnote{Ibid., at 269.} One may add that due to the contested character of most judicial management tools in the context of adversarial proceedings, procedural debates and litigation must have diverted the court resources to the resolution of controversies.

Moreover, Langer and Doherty provide some impressionistic evidence for the claim that despite the relevant rule amendments and the nominally extensive powers at their disposal, the judges used them insufficiently or inefficiently.\footnote{Ibid., at 269.} They point out an important objective factor: even when judges were willing to exercise managerial powers, they invariably had less information about the case than the parties. As a result, the judges

\footnote{Ibid., at 271.}
were not always in a position to make the right decisions, and the parties have been able to neutralize judicial efforts to speed up the process. But other—subjective factors—may have played a role. Not all of the judges sufficiently understood the rationales of the new rules, knew how they should work, or were truly convinced of the propriety, fairness, and expediency of applying case-management measures generally or in specific situations. It would seem, moreover, that the competence level and the willingness to assume control and responsibility over the conduct of the proceedings and to take decisive steps have been a problem. Arguably, in the same category of root causes for sabotaging the reforms is the limited ability to let go of the strong pre-existing (domestic) notions about the appropriate configuration of the judicial role. The expectation that the judges would do so was not fully justified.

Against this backdrop, one is left to wonder whether the lesson posed by the experience of implementing the managerial judging concept in the ICTY is a positive or negative one. For the purpose of the normative theory of the trial in particular, the question is whether this model is to be recommended for the future courts and, if so, what ought to be done to maximize its benefits. It is submitted that the managerial judging reforms by the ad hoc tribunals were steps in the right direction given the challenges posed by the increased dockets, highly complex and voluminous cases, and the compelling need to complete their mandates within a reasonable time. In the context of party-driven process for the prosecution and adjudication of international crimes cases, the approach has its obvious merits and should be built upon and further perfected in the subsequent courts. Any deficiencies in the implementation do not fundamentally compromise the idea of managerial court in international criminal trials, but should rather be taken as invaluable lessons.

In similar conditions—which may replicate themselves before the courts other than ad hoc tribunals—the judges should be able, subject to the necessary safeguards, to moderate the volume of evidence sought to be presented by the parties and, even more crucially, the scope of the prosecutor’s case. As correctly argued by Boas, ‘judicial timidity and prosecutorial bullishness is exactly the area in which international criminal courts and tribunals must mature’. This ought to include the availability of—and judges’ preparedness to exercise, whenever appropriate—the powers to determine the maximum number of witnesses to be heard, to set time-limits on the examination-in-chief and the overall presentation of the case, and to request the prosecution to concentrate on the most important and representative crime incidents comprised within the charges.

Langer and Doherty conclude that the managerial judging reforms at the ICTY have essentially failed or at least, using somewhat euphemistic language, failed to deliver on the promise of expediting the process. If this assessment is accurate, it is clear that one important reason for that has certain been the latent judicial and—more overt—partisan resistance. In essence, those reforms sought to fundamentally redefine the judicial role from passive umpires to active case-managers in the context of party-driven process. For such a tectonic shift to bear fruit, time needs to be reserved for the changes to be fully

---

293 Ibid., at 243-44 (‘the managerial court is likely to have less information about the case than the parties. This limited information may lead the court to refrain from using its managerial powers in order to avoid making inefficient, or unfair decisions. The court’s limited information also facilitates parties’ attempts to neutralize the court’s managerial powers.’). See also ibid., at 271-73 (on categories of managerial failures), 283 (on the limited access to information).

294 E.g. ibid., at 295 (voicing the expectation that ‘given that the ICTY is a sui generis multicultural international court system, ... judges would be more ready to put aside their domestic preconceptions about the proper role of the judge and to adapt more easily to the changes the managerial judging required.’ Footnote omitted.)

295 Boas, The Milošević Trial (n 20), at 201.
Chapter 12: Towards a Normative Theory of International Criminal Trial

consummated and for the novel elements to take root in the procedural system. Mere rule-amendments are insufficient and should have been followed up by concerted efforts on the part of the leadership of the tribunals in enforcing them. But a coherent implementation programme was altogether non-existent at the ICTY. The shared understanding and endorsement of the reforms by all court organs and procedural actors is needed. This is difficult to achieve in a short-term perspective and without additional efforts to consolidate the key players around the ideas behind the reforms. The participants must have been given an opportunity to get accustomed to, learn, and rehearse their new roles before the procedures could be hoped to become part of the institutional routine and culture and to counteract institutional inertia.

In the context of the ad hoc tribunals, incremental and successive reforms introduced one after another tended to dilute procedural certainty and to confuse parties and judges about the exact contents of their professional roles. In the ICTY, ICTR, and SCSL context, it is important to appreciate that the new requirements departed from the prevalent perceptions of such roles and the entrenched notions of ‘good practice’. This challenged the practitioners to ‘learn on the job’ and to be undertaking additional efforts for reaching the managerial objectives. Unavoidably, the new measures tended to be perceived as extraneous, imposed—and unfair or detrimental—innovations. As a result, they lacked in support and generated resistance on the part of repeat players, even where the need for such measures was formally recognized. Since the judges have a significant leeway in applying the rules, they could choose not to do so and were falling back on their traditional comfortable roles. Given that parties had even more reasons to resist the reforms, this had a domino effect because judges did not incentivize the parties sufficiently for collaboration in the managerial experiment.

What appears to have been the general problem with this experiment is the initial lack of these procedures and the tension they caused with the adversarial framework. If so, it goes long way to the point that with the critical mass of experience of practice and reform of international criminal procedure, the procedural design should not be an afterthought and is a serious matter to invest in from the beginning, lest even a good idea would fail. In order to avoid unnecessary litigation and minimize tensions engendered by step-by-step reforms, it is recommended to ensure that managerial powers are grafted in the procedural frameworks of the tribunals from the outset. If the parties and judges know the rules of the game from the beginning, such rules are less likely to generate inertia and opposition and are more likely to deliver the expected increase in procedural efficiency.

Even provided that managerial judging functions as it should, its expected efficiency gains in international criminal proceedings should not be overestimated. The particular complexity of international criminal proceedings creates significant room for

---

296 Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 243 (‘any time gains reforms provide have to offset the extra time that the reform requirements take to implement and execute.’). See also ibid., at 272 and 297 (suggesting, on the basis of interviews with the ICTY staff, that the implementation of the managerial judging system and judicial resort to respective powers has considerably improved after 2006, the period not covered in their article).

297 Ibid., at 285-86 (noting, among others, the lack of training for judges on the use of managerial powers, monitoring and evaluations of the use of such powers, and respective incentives for the judges).

298 Schuon, International Criminal Procedure (n 19), at 176 (pointing out the ‘difficulties for a chamber to make decisions pursuant to Rule 73bis(D) and (E) of the Rules wisely’ as this ‘requires great effort for a chamber to familiarise itself at this early stage with a case to which it has just been assigned and of which it has only limited information at its disposal’). For judges views to that effect, see I. Bonomy, ‘The Reality of Conducting a War Crimes Trial’, (2007) 5(2) JICJ 348, at 352, 354; O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, (2007) 5(2) JICJ 360, at 375.

299 Jackson and Summers, The Internationalisation (n 22), at 126-27 (noting ‘considerable scope within the rules for individual judges influenced not or by the parties in individual cases, to slide back to their traditional and more comfortable roles.’).
party resistance to managerialism. Moreover, given the high stakes involved in criminal trials, there is only limited extent to which defence may be expected to cooperate with the managerial court. The defence may not be pressed into waiving fundamental rights by conceding to facts, giving up the lines of defence it may consider viable or by being precluded from leading evidence it deems material. It should be free to proceed undeterred in accordance with its strategy. The Chamber has a difficult responsibility to strike the balance between the absolute duty to ensure a fair trial and the need to streamline the process. While it would be going too far to say that the promise of managerial judging in international criminal procedure is ‘chimerical’, one should be realistic about its possible benefits. Its primary function is to equip the judges with some tools, limited as they are, for keeping the parties’ cases within reasonable limits and the adversarial excesses of party-driven process in check. The particularly important contribution of this model in international criminal tribunals is in moderating the prosecutorial tendency to put forth too many counts and to seek to adduce excessive evidence.

4.2.3 Opening statements and closing arguments: From advocacy to informative function

Chapters 9 and 11 have addressed the law and practice of the tribunals concerning the purpose and organization of the opening and closing stage of the trial proceedings, respectively. Given the non-evidentiary and advocacy-based nature of these stages, their place in the normative theory of the trial and recommendations may be discussed jointly, albeit that their procedural purposes are substantively different. As noted above, the non-jury character of international criminal trials impacted on the rationales and format of opening statements and closing arguments. Their original (common law) rationales as procedures with a strong advocacy function—that of impressing the finders of fact (lay jurors) with the merits of the parties’ cases and slanting them in the relevant party’s favour—are redefined in the international context. Before the tribunals, they bear a more pragmatic informative function of assisting professional judges to comprehend the case and to systematize evidence for deliberation.

Even though international trials are held before a professional bench, both the introductory statements previewing the evidence and the concluding submissions that summarize the important pieces of evidence proposed as the bases for the decision and the respective debates are not only apposite but also necessary in international trials. The latter are characterized by the unparalleled complexity of cases as well as factual and legal issues involved (including but not limited to the relevant historical, political and military context of the crimes); the significant length of the proceedings; and the enormous volume of testimony and documentary evidence adduced in the course of the proceedings, running to hundreds of thousands transcript pages.

In this light, the effective roadmap into the case provided by the parties before evidentiary phase and the concluding analyses and debates on the issues litigated at trial at the end have the significant potential of assisting judges in their adjudicative task. They promote the judicial understanding the relevance of and the relationship between different items; assessment of the probity and reliability; and crediting evidence with weight. In the

---

300 Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 295.
301 Ibid., at 296 (due to ‘the right of the defendant to keep his evidence close to the vest’, ‘a party-driven criminal process is less predictable and harder to manage that a party-driven civil process.’).
302 T. Weigend, ‘Should We Search for the Truth, and Who Should Do It?’, (2010-11) 36 North Carolina International Law and Commercial Regulation 389, at 408 (‘The defense must retain the option of abstaining or withdrawing from the cooperative effort, and the system must not turn the defendant’s refusal to play along against him by inferring guilt from his lack of cooperation in the common search for the truth.’).
303 See supra section 4.1.
majority of the tribunals, parties remain primarily responsible for the collection and presentation of evidence. The need to allow them to introduce evidence and to draw conclusions on it is self-evident as this enables them to complete presentations and makes sure that the judges can appreciate the implications of the evidence and related debates.

But even where the judges are supposed to take the lead role in examining witnesses and other sources of evidence (e.g. at the ECCC), the opening and closing phases nonetheless remain indispensable. Before the evidence is heard, opening statements enable parties and participants to gain the sense of ownership of the case despite their previously marginal role in the investigation. This ownership is necessary to ensure their meaningful participation and burden-sharing with the Trial Chamber with respect to truth-finding. The trial hearing is still adversarial and the Co-Prosecutors bear the onus of proof in relation to the guilt of the accused. Other parties and participants may partake in the questioning of the accused, Civil Parties, experts and witnesses, propose the hearing of additional witnesses, and experts, and even be delegated the responsibility of leading the examination of certain sources. Similarly, allowing them to sum up the evidence they examined and to address to the crucial elements of proof in closing elements the judge-led proceedings is a logical consequence of their evidentiary participation. Hence in international criminal trials, the practical relevance of the opening and closing stages transcends the party-driven process. These elements are worth retaining regardless of which of the currently existing models is adopted.

Next to the general reaffirmation of the continuing practical value and validity of these procedural elements as part of international criminal procedure, a number of limited recommendations have been offered that the present normative theory of trial is to incorporate. Concerning the organization of the opening stage, Chapter 9 has pointed out that where the two-case structure is adopted for trial, it may be worth providing the defence with a choice whether it wishes to make its opening statement after the prosecution’s statement or at the beginning of its case. It may make more sense for the defence to do so after the prosecution evidence as at that stage it is in a better position to know the contents of its own case, and this appears to have been a preferred option for the judges at the ad hoc tribunals. However, this matter is better left to the defence to decide and there are no compelling reasons for limiting its autonomy in this regard.

Secondly, it was recommended providing the accused with a possibility of addressing the court with a personal statement, including at, but not limited to, the opening stage. Although there is a risk that such statements will be used to pursue political and otherwise irrelevant arguments, allowing them may offer a number of benefits, and the risks are manageable provided that the Chamber oversees the process of its delivery. Subject to leave and under control of the Chamber, a statement could be delivered after the prosecution statement and irrespective of whether and when the defence counsel decides to deliver an opening statement. The rationales are to enable the accused to clarify relevant matters in case this may assist the Chamber in comprehending the evidence and to accommodate the defendant’s wish to be involved in the trial by state a personal position on the case and the charges, before the prosecution starts presenting its evidence. Next to the possibility for the accused to appear as a defence witness, the form of his or her personal contribution by evidence and information is an area of practice where the influence of pragmatism and flexibility of the trial arrangements and their detachment from specific domestic models should be allowed. In line with the multiple-choice model embodied in the STL Rules, such considerations would favour allowing the judges to ask the accused questions on such a statement, provided that the right to remain silent is

304 Rules 21(1)(a) and 87(1) ECCC IR.
305 Chapter 10.
306 Rule 84bis ICTY RP; Art. 67(1)(h) ICC Statute; Rule 144 STL RPE.
307 See e.g. Rule 85(C) ICTY, ICTR, and SCSL RPE; Rule 144(D) STL RPE.
preserved and that no adverse inferences are drawn from the exercise of this right. In order to enhance the possible probative value of the statement and/or answers, it is worth providing the accused with a faculty of preceding them with a solemn declaration, without compelling him or her to do so.

Third, actors other than parties (e.g. the legal representatives of participating victims or civil parties) may be allowed by the procedural framework or judicial decisions to contribute by evidence on the guilt or innocence of the defendant and to participate in the examination of evidence (e.g. ICC, ECCC, and STL). Where such contributions amount to a ‘third case’, it is advisable not to foreclose the possibility for them to make opening interventions in order to introduce the evidence. The Trial Chamber is to exercise control over the delivery of such statements and to ensure that they are relevant and of a reasonable length. This recommendation is of a general nature and applies equally to all opening statements, irrespective of who delivers them. The pragmatic emphasis on the informative rather than advocacy objectives of opening statements entails, first and foremost, that such statements are relevant to the evidence and do not compromise the efficiency of the process. The trial management devices such as establishing time limits, requiring the advance delivery of statement outlines, and management of the submissions at the opening hearing itself may be used by the Chamber for that end.

In respect of the closing stage, all parties and participants (e.g. victim representatives) who contribute by evidence and are allowed to participate in its examination at trial should be allowed the opportunity to deliver closing arguments in which the strength and weaknesses of the evidence can be addressed along with each others’ arguments. In order to facilitate the Chamber’s deliberations on the evidence, it is advisable to allow structured debates on the evidence admitted at trial. This means that after oral arguments, rebuttal and rejoinder arguments should be allowed to make sure that all statements regarding evidence can be addressed. As argued in Chapter 11, the last word of the accused provides a potentially useful opportunity to state his or her personal position concerning the issues discussed at trial, the evidence and the proceedings generally. Finally, the submission of written final briefs prior to the oral arguments, containing the summaries of important evidence and analyses of its probative value and reliability, is good practice. Besides being potentially indispensable aids that the Chamber may use in evaluating the evidence at deliberations, the briefs enable the parties to focus on the most contested and crucial elements in their oral arguments and provide for more constructive and structured debate on evidence.

4.2.4 Presentation of evidence: ‘Postmodern suspense’ and variable model

It is well-known that the organization and conduct of the core activity at the trial proceedings—the presentation of evidence and its examination by trial court—vary significantly among domestic procedural traditions. The procedure for proof-taking goes to the heart of philosophy and fundamentals of criminal process – the notions of truth, justice, and equity which are embedded in a coherent legal culture in turn informed by an array of historical, socio-economic, cultural and political or ideological factors specific to a given community. In the context of international criminal justice, the procedural semantics cannot simply be assumed, due to the existence of neither a prevalent and shared understanding of the fundamental concepts nor a coherent legal-cultural context which might predetermine the choice of a specific trial model among several options. In trying to identify the real ‘face’ of the international criminal trial, Chapter 10 has instead revealed
what appears as a haphazard diversity of arrangements adopted by international and hybrid jurisdictions at hand. That Chapter looked into whether and to what extent the order of evidence and modes of examination employed by the tribunals track the principal domestic trial models. While the initial influence was strong, it was not compelling from a normative point of view and did not preclude the adjustability of the trial arrangements in view of the pragmatic considerations and operational realities of the tribunals.

The trial is a principal stage and a truth-finding locus of international criminal process, and its proof-taking phase is the true centerpiece of trial because this is where the fact-finding actually occurs. The choice of a framework for the development of evidence at trial is therefore a principal and even the only most important question for the purpose of the present effort of formulating a coherent normative theory of the international criminal trial. The choice would then be between, on the one hand, the essentially ‘adversarial’ party-driven proof-taking based on a common-law script and, on the other hand, the judge-driven ‘inquisitorial’ proof-taking modelled per civil-law scheme, either of those representing in fact a certain hybrid between the two. It is this author’s conclusion that the question of choice is a wrong question in itself, insofar as it assumes that this choice must necessarily be made for each tribunal.

However, there are no convincing normative grounds in the first place for preferring a specific set of trial arrangements and for advocating a definite move of the trial procedure in international criminal tribunals in a specific direction. On the contrary, there are compelling reasons for preserving the diversity of epistemic arrangements and enabling the tribunals and their trials chambers to opt for the most suitable trial framework in each specific situation or case from among several ready-made but adjustable templates. Like in domestic contexts, no one-size-fits-all and uniform style of fact-finding should be adopted in all international criminal tribunals. Subject to the applicable human rights including the fair trial requirements (equality of arms and adversarial hearing), the institutional or situation-specific choices for a certain model of presenting and examining evidence should be tailored to epistemic needs and anticipated challenges related to conducting an international criminal trial in the context of the target society. Given the wide reach of international criminal justice and the diversity of contexts with which it has had and is likely to be dealing in the future, imposing a single proof-taking scheme on all tribunals would be normatively unjustified and counterproductive in epistemic terms. It arguably undermines the claim of the project to universality and could ultimately be detrimental to its efficiency and legitimacy.

Much has been said about the (absence of) rationales for the adoption of the ‘adversarial’ proof-taking framework in the post-WW II tribunals and by the UN ad hoc tribunals and the SCSL. This influential but fateful initial choice had far-reaching consequences not only for the subsequent evolution of international criminal procedure, but also for the overall performance and track record of international criminal justice. But it must be recalled that at the bottom this initial move was instinctive, arbitrary and not well-thought-through (without necessarily meaning erroneous). It stemmed from unchecked beliefs of policy-makers and/or judges and prosaic or accidental factors, rather than from a principled thinking about the procedure optimal in light of the trial objectives and operational realities of the tribunals. In principle, such a procedure would need to be

---

311 See Chapter 10.
312 Damaška, ‘Epistemology’ (n 51), at 122 (‘it seems unlikely that a single fact-finding style can be optimal in all legal proceedings.’); Combs, Fact-Finding without Facts (n 189), at 285 (‘Because the optimal set of criminal procedures depends on a complex set of socio-political, cultural, and structural factors, it is unrealistic to expect that any one set of criminal procedures will well serve different sets of populations.’)
313 Jackson and Summers, The Internationalisation (n 22), at 146 (rejecting the idea of imposing ‘a one-size-fits-all hybrid’ on all types of tribunals).
314 See Chapters 1 and 10; see also section 2.3.2.
tailored or at least adjustable to societal contexts in which it was to fare and to the nature of criminal cases with which it was to deal. But considerations regarding to the constituencies and beneficiaries of international criminal justice (including the important issue of witness capacity) had no impact on the process of defining the trial framework.\footnote{Combs, \textit{Fact-Finding without Facts} (n 189), at 290 (‘the international tribunals seemingly selected their initial procedures with little or no appreciation for the way in which those procedures were apt to function in the actual contexts in which they would operate. ...[N]one of the tribunals appeared to take account of specific circumstances that might render one set of procedures more efficacious than another in eliciting clear and accurate testimony from international witnesses.’).}

Making the latter accessible and understandable for accused, witnesses and the public at large, in light of their cultural background, would be important not only to guarantee it acceptance and legitimacy locally, but also to ensure its effective operation.\footnote{E.g. Mégret, ‘Beyond “Fairness”’ (n 53), at 74 (‘the highly technical and ritualized aspects of the adversarial process ... may make it quite remote from some of the societies for whose primary benefits the trials are supposedly conducted. ... Not all victims and witnesses emerging from transitional environment inhabit the sort of atomized world that has given rise, for example, to aggressive adversarial legalism.’).} As noted by critics of the ICTY and ICTR process, the perspective of clients and actors (accused, witnesses and victims, and counsel) were under-appreciated in defining the procedural design, and the latter was at variance with the procedural tradition in the target countries.\footnote{Schomburg, ‘The Role of International Criminal Tribunals’, at 15 (‘It is extremely difficult to comprehend why there is a preponderance of common law rules in the proceedings of the International Tribunals when the accused come from countries governed by civil law systems. Very often, neither the accused, nor the counsel, nor the witnesses (all coming from former Yugoslavia or Rwanda) are acquainted with the adversarial procedure that the International Tribunals follow.’); Combs, \textit{Fact-Finding without Facts} (n 189), at 292.} The result not only appears incoherent and is difficult to justify without reference to situational factors, but it also proved to complicate the functioning of the tribunals practically and in terms of truth-finding efficacy.

For background, it is important to consider that linguistic and cultural differences between most (crime-base) witnesses and procedural players (judges and counsel) constitute a formidable obstacle to the smooth communication in the trial context, and that the lack of shared cultural notions and background already seriously complicates the establishment of the truth. As extensively documented by Combs in respect of the ICTR, SCSL, and SPSC proceedings, judges face serious difficulties in assessing the credibility of witnesses and truthfulness of testimonial accounts.\footnote{Combs, \textit{Fact-Finding without Facts} (n 189), at 21-166.} The witnesses’ and accused’s cultural notions of time, distance, moral values, traditions of narration, and views on what can be said about certain things and how, are different from those of counsel; hence, establishing rapport with witnesses and ensuring an effective testimony are highly challenging tasks.\footnote{D. Cohen, ‘Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor’, East-West Special Reports, no. 9, East-West Center, Honolulu, July 2006, at 61 (‘Dealing with the problems caused by witnesses whose cultural sense of time, of narration, or of communal knowledge may be very different than that of judges, or who may have been traumatised by the events they experienced, is indeed a challenge.’).}

Against this backdrop, the choice for the adversarial framework may have been suboptimal because certain of its trial forms—in particular, cross-examination—are ill-suited to enable the ascertainment of the truth. Cross-examination may work relatively well as the master truth-finding device in some Western societies or societies in which cultural barriers do not complicate trial communication to a great extent.\footnote{Combs, \textit{Fact-Finding without Facts} (n 189), at 309.} But it may be unsuitable in other settings in which communitarian values and social harmony are cherished far more than individualism, competitiveness, or legalism, and where proceedings aim to restore the harmony rather than to establish culpability in respect of
misconduct. In many cases the tribunals are dealing with, cross-examination is apt to lead to secondary traumatization of testifying victims, and ultimately to subvert, rather than promote, the discovery of the truth. As attested by the experience of trials before the ICTY and ICTR, these risks increase in a multicultural setting of an international courtroom. There, the delicate art of cross-examination could be entrusted to unskilful cross-examiners, while judges, due to their non-interventionist attitude or inexperience in trial management, might not sufficiently keep the process under control.

In this connection, a number of scholars have advocated the need for greater contextualization of the trial process in the tribunals for it to reflect the local legal culture. In establishing the trial format and proof-taking framework, it is important to ensure their correspondence with the procedures familiar in the relevant societal contexts, as well as their adequacy in light of human-rights requirements. The contextualization would help the tribunals avoid an impression of unfair imposition of foreign process on the accused and witnesses. It would also defuse the tensions arising out of interaction between the international legal enterprise and the local culture and thereby enhance the fact-finding capacity of the tribunals. But complete and uncritical mimicry is, of course, no panacea—especially where the domestic culture of criminal procedure is inaccessible, under-developed, or falls below the recognized human right standards. In that case, the attempt of contextual borrowing of creative solutions, originating in other jurisdictions that have

321 Damaška, ‘Epistemology’ (n 51), at 126-7 (‘Confrontational and aggressive methods of developing testimonial evidence, for example, appear less desirable in societies in which social harmony is highly prized, than in those in which the virtues of harmony are less elevated on the totem pole of values. …[I]solated conduct [is] only a triggering event for proceedings whose main purpose [is] to re-establish social harmony disrupted by the event.’); Roberts, ‘Comparative Law for International Criminal Justice’ (n 71), at 353-54 (‘it would be foolhardy to assume that it [cross-examination] can be replicated with equal success in the multi-lingual, culturally diverse international courtrooms of The Hague or Arusha.’).
322 Mégret, ‘Beyond “Fairness”’ (n 53), at 74 (‘Institutions, such as cross-examination, which can already be particularly harsh to witnesses in domestic contexts (but where this is at least internalized as a socio-legal norm), may seem even more so when the witnesses have testified to acts of considerable violence and come from widely different cultural backgrounds.’).
323 Tacaqui trial judgment (n 190), at 5 (‘this exposure of some witnesses to the cross-examination and to the rules and customs of inquiry by the Parties (a distinct and positive feature of adversarial trial in many jurisdictions) has brought confusion and contradiction, instead of clarity, with witnesses unable to come out from the bundle of contradictions created from their own words. In many cases the original version of a fact or of a detail regardless of relevance was modified during the course of testimony and the attempt to clarify the facts lead to renewed sources of confusion. As a result, the transcripts of the hearing can be used by the Parties at their east in a sort of careful cherry-picking of truths available, as it is made evident by the consideration that most of the witnesses for each count are referred to (and their version is used) by each Party, in support of the respective, contrasting version.’).
324 Damaška, ‘Epistemology’ (n 51), at 126 (‘The lesser desirability of contentious methods in the former is attributable, at least in part, to epistemic arguments,’ and n24 (‘a witness who is subject to hostile cross-examination may become less credible—out of spite, frustration, or some other reason.’).
325 Jackson and Summers, The Internationalisation (n 22), at 146 (‘In order to ensure that decisions are accepted locally in the societies from which the accused originate, it makes sense to devise procedures that are as little as possible from local norms. At the same time, these procedural need to measure up to the fair trial norms contained within the international instruments.’); M. Damaška, ‘Problematic Features of International Criminal Procedure’, in A. Cassese et al. (eds), The Oxford Companion to International Criminal Justice (Oxford: Oxford University Press, 2008) 185.
326 Jackson and Summers, The Internationalisation (n 22), at 115-16 (‘in order to offset the claim by the accused persons that they are being tried by “alien” procedures, international tribunals should place a high priority on devising procedural forms and practices that open lines of communication with local audiences.’); Mégret, ‘Beyond “Fairness”’ (n 53), at 75 (noting ‘the ultimate goal of safeguarding the integrity of the international trial process by not submitting the accused and witnesses to unduly alien legal rituals’).
faced similar testimonial problems may be considered where they might effectively tackle the epistemic challenges.\textsuperscript{328}

Combs has argued that the choice of a specific trial model should primarily proceed from the anticipation of fact-finding impediments the tribunal is likely to confront in a relevant societal context.\textsuperscript{329} Such impediments will vary by tribunal, given differences in the level of literacy, and familiarity with the Western legal form in witnesses.\textsuperscript{330} She argues that while some impediments plaguing international tribunals (unwillingness to give non-evasive answers, mendacity, and perjury) are better dealt with through adversarial questioning mode, others—relating to objective incapacity of witnesses to convey facts in a clear and accurate fashion—through non-adversarial ones. To the extent that prevalent challenges can be foreseen as a systemic matter, the choice should be made accordingly.

In the latter situations, witnesses should be allowed to narrate their story in their own words and without interruptions, followed by informal questioning by judges and non-hostile interrogation by the parties falling short of a rigid Q&A format used for examination-in-chief and cross-examination at common law. This informal and conversational way of proceeding is more likely to help fragile witnesses overcome nervousness caused by the unfamiliar setting of formal court process and avoid the truth-defeating confusion that is likely to be generated by the rigidly structured questioning.\textsuperscript{331} By contrast, the formal and more probing questioning, with cross-examination as the jewel in the crown of the party-led process, is more efficacious when it comes to exposing untruths and countering reluctance to provide clear and accurate testimony. Preceded by strenuous efforts to identify impeachment evidence, vigorous and penetrating partisan questioning is better suited for poking the witness’s credibility-related weaknesses, demonstrating the evasiveness of the answers, or for unravelling perjury than a more neutral and open-ended judicial questioning.\textsuperscript{332}

The fundamental logic underlying these considerations is persuasive, given the diversity of societal contexts relevant to the tribunals’ work, the heterogeneity of fact-finding challenges, and the lack of an intrinsic legal culture (and political ideology). These factors point to the need to embrace pluralism of forms and techniques of witness examination in international criminal procedure, not as an inevitable evil but as an asset. Pluralism already exists at the level of the system, and in principle, each court should be allowed reasonable flexibility and discretion in devising trial proceedings in accordance with situational factors. What is more, this dovetails into the more recent trend in international criminal procedure—the variable model of trial—allowing the court leeway to flesh out the specific trial forms in consultation with the parties and/or in light of the circumstances.

\textsuperscript{328} Roberts, ‘Comparative Law for International Criminal Justice’ (n 71), at 353-54 (‘Microscopic examination of proof-taking and evidence-testing at the domestic level is required to identify the comparative strengths and weaknesses of procedural mechanisms, and to assess their capacity for extrapolation to the international context.’); Combs, \textit{Fact-Finding without Facts} (n 189), at 297-302 (proposing the importation of the institute of intermediaries at trial and other techniques of handling vulnerable witnesses from domestic jurisdictions).\textsuperscript{329} Combs, \textit{Fact-Finding without Facts} (n 189), at 285, 303 (‘it is only through an understanding of the particular evidentiary problems that an international tribunal is likely to confront that we can craft optimal procedures for that institution.’).

\textsuperscript{330} \textit{Ibid.}, at 296-97, 303.

\textsuperscript{331} For detailed discussion, see \textit{ibid.}, at 304-8.

\textsuperscript{332} \textit{Ibid.}, at 312-16 (arguing, among others, that the vigorous and penetrating partisan questioning, preceded by frantic investigation into any credibility damaging evidence is better equipped to unravel perjury than judicial questioning). See also R. Park, ‘Adversarial Influences on the Interrogation of Trial Witnesses’, in Van Koppen and Penrod (eds), \textit{Adversarial Versus Inquisitorial Justice} (n 195), at 132, 145-49; M. Damaska, ‘Presentation of Evidence and Factfinding Precision’, (1975) 123 \textit{University of Pennsylvania Law Review} 1083, at 1092.
Chapter 12: Towards a Normative Theory of International Criminal Trial

The advent of the so-called ‘variable model’ of trial is attested by the more flexible and indeterminate framing of trial process before the more recent tribunals, such as the ICC and STL. The legislative approach there is characterized, respectively, by the absence of a detailed default scheme and by the indication of several avenues that the Trial Chamber is authorized to take in regard to questioning. By contrast, the ad hoc tribunals’ and the SCSL judge availed themselves of no opportunity to opt for different questioning techniques other than those provided; and only with a limited opportunity to adjust the order of presentation of evidence, which was employed in a sparing and non-revolutionary fashion.

As a consequence of the inability of the drafters of the Statute to agree on any specific evidentiary sequence, the ICC Trial Chambers are charged with the responsibility of giving directions for the conduct of the proceedings in each individual case, to be prepared in consultation with the parties and subject to limited general principles regarding questioning. In the ICC cases so far, the trial procedure adopted was party-driven rather than court-driven and hinged upon distinct cases, including the evidence of victims authorized by the Chamber under Article 69(3). At the STL, the Trial Chamber may choose to depart from the default order of examining witnesses at trial—implying the primary role of judges in questioning, followed by examination by the calling party and cross-examination—in case the investigative file received from the Pre-Trial Judge does not enable it to do so.

In this author’s view, this remarkable trend reflects what may be called a ‘postmodern suspense’ in the trial format. It results not only from the diplomatic difficulties—like with the ICC—of negotiating a politically acceptable, yet ‘dense’ trial scheme. The more fundamental reason is the growing uncertainty as to which of specific trial models is epistemologically and normatively more optimal for international criminal tribunals. The suspense—now formally acknowledged as a matter of law—reflects the gradual shift from the convenience-driven initial choices to a more principled and thorough reflection. The question is whether it must be seen as an opportunity to improve the relevant courts’ procedural operation and fact-finding processes, or whether it is poses a threat of continuous disintegration and multi-tracking of the trial system on the international level. When it comes to procedural law, the flexibility of the legal framework, open-endedness, and broad discretion of actors have engendered unease and tend to be perceived as menacing procedural certainty, legality, and eventually fairness. These perceptions, in turn, lead to arguments advocating the need to identify a ‘uniform core’ of that law with view to greater harmonization.

It is worth pausing upon the position of Combs, who offers a nuanced argument in this respect. Initially she does not position herself as a proponent of one-size-fits-all solutions for framing trial arrangements and, on the contrary, recognizes the benefits of the more contextual approach carries in terms of ameliorating the truth-finding processes at the

---

333 In detail, see Chapter 10. Proposing the term ‘variable model’ and discussing the ICC model along these lines, see Vasiliev, ‘Trial’ (n 164), at 753, 761 et seq.
334 Rule 85(B)-(C) ICTY, ICTR and SCSL RPE. The predominant interpretation of Rule 85(B) ICTY RPE precludes the possibility for judicial questions to precede examination-in-chief (‘It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.’).
336 Art. 64(8)(b) ICC Statute; Rule 140 ICC RPE.
337 For detailed discussion of the law and practice, see Chapter 10.
338 Art. 20(2) STL Statute and Rule 145 STL RPE.
340 Ibid., at 597.
At the same time, she points out that a uniform and clear rather than undefined and flexible framework offers efficiency gains in terms of the adoption of the RPE and for the accumulation of experience in the ‘community of practice’. While convinced of the theoretical merits of the variable model, she is pessimistic about its political and practical viability as well as about the possibility for any tribunal to foresee the nature of witness and epistemic problems it will face before the trials begin. In this light, she makes a proposal towards constructing a uniform and sui generis framework in line with the trial model adopted in the Scandinavian countries, which combines the ‘best of the two worlds’: the judicial questioning at the start of testimony followed by partisan cross-examination.

This combination of non-adversarial and adversarial techniques of questioning falls nothing short of a promising avenue that the courts with the variable model may consider relying upon as a pre-set mode of examination. But the systemic implications and workability of this hybrid technique need first to be considered. Beyond providing the sequence of examination (starting with judicial interrogation), it will essentially lead to further de-formalization of examination modalities. One indiscriminate form of questioning, like in civil law trials, would be adopted as the principal mode and made available to all questioners depending of the epistemic needs of the moment. It would gravitate towards the more neutral style or to its opposite at different times.

While this sequence reserves the function of initial or primary questioning to the judges, the bench may still be insufficiently familiar with the case for the proper exercise of this role while the party calling the witness might be in a better position to examine the witness in chief. The judicial questioning that is not as directed as examination-in-chief might be inadequate in eliciting the information the party had in mind and provide a more limited basis for cross-examination regarding the matters of credibility and relevant to the cross-examining party’s case. Secondly, the hybrid proposal leaves the tension between the uniform questioning sequence/style and the diverse fact-finding challenges of individual witnesses unresolved. Either of the components—be it the ‘non-adversarial’ judicial interrogation or the ‘adversarial’ cross-examination—may, again, fail at obtaining the accurate and lucid testimony from different kinds of witnesses, as the price to be paid for uniformity. In the worst case, evasive or lying witnesses will be allowed to ramble in the benign view of judges, while vulnerable witnesses will still feel threatened and give incoherent and confused testimony under cross-examination.

Finally, beside the theoretical strengths of the proposal, the proposed sui generis framework can arguably face an even more fierce resistance than the advocacy of either of the familiar modes. In terms of practicability, the prospects of its formal adoption by the courts with the variable scheme may be reduced: the pluralism in practice is not that easily eradicated. Hence this leads one to wonder if the viability—and perhaps necessity—of the pluralistic legal framework and practice has not been discarded too soon. While the disadvantages and risks of the model have been readily recognized above, it is submitted that pluralism is likely to continue reign the day. If so, this would warrant investing some thinking and effort in devising ways of managing its risks and maximizing the benefits the contextualism may bring in terms of fairness, effectiveness, and fact-finding precision. These matters will be turned to at the end of this section.

---

341 Combs, *Fact-Finding without Facts* (n 189), at 285, 316 and 318 (suggesting that ‘the flexible system created in the Rome Statute could be enlisted to help improve fact-finding accuracy at the ICC’ in accordance with the expected witness-related problems).
342 Ibid., at 316 (discussing the efficiency of borrowing rules from antecedent tribunals and knowledge-transfer).
343 Ibid., at 318.
344 Ibid., at 319-20 (describing how this would work and providing references to the legislation and practice in Sweden, Norway, and Finland).
345 See infra section 4.4.
4.2.5 Sentencing: Need for separate hearing and deliberation

The approach to be taken to organizing submissions and deciding on sentencing is an important matter of the structure of trial, as it has ramifications for the nature, volume and form of evidence to be presented to the court during trial hearings as well as the scope of judicial deliberations. The question is whether deliberations in the aftermath of trial should represent a unique decision site in respect of both issues of guilt or innocence and sentence (in case the accused is found guilty) and result in a single judgment dispensing of both matters, or rather a bifurcate process whereby the appropriate sentence can be pleaded and deliberated separately, with two distinct decisions dedicated to the determination of guilt and of the appropriate sentence, where appropriate. The status of the law across international criminal courts has been varied and evolved in different ways over time. The ICTY and ICTR abolished a separate sentencing stage save for guilty-plea cases in 1998, but the more recent SCSL, ICC and STL restored the possibility of a separate sentencing procedure to be held following the verdict of guilt. While both approaches have proved to be workable and fair in practice, subject to relevant guarantees, the relative value of each of them can be defended and criticized from the positions of the better protection of the rights of the accused, procedural efficiency, and goals of international criminal justice.

In the ad hoc tribunals, the procedural pragmatism, systemic coherence, and operational efficiency served as the main considerations for adopting and retaining a unified approach. The separation between submissions and deliberations speaking to the determination of an appropriate sentence, typical for domestic jurisdictions in which the guilt or innocence are determined by the jury and the sentence by the judge, was deemed superfluous in the context where both matters are decided by the same professional judges. Despite the mere speculative and assumptive character of the popular claims about the superior cognitive and analytical abilities of professional adjudicators as compared to lay jurors, the professional nature of international criminal justice has mostly been deemed a sufficient guarantee that no information irrelevant for the determination of guilt would be taken into account when considering the verdict. Moreau, insofar as many witnesses in international trials testify both on matters relevant to the determination of criminal responsibility and on sentencing matters (for example, the character of the accused or the impact of crimes on the victims and scope of their suffering), hearing such witnesses on all issues at once precluded the need to recall them, resulting in greater efficiency.

However, the recognized downside of this approach is that the defence is expected to present and examine witnesses who are able to provide information in mitigation of the possible sentence before the guilt of the accused has been established. It cannot do so without making a self-defeating concession, even if hypothetically, that the defendant may be guilty, while its principal strategy is to refute guilt. The defence is understandably reluctant to plead matters of sentencing in midst of a concerted effort to contest the charges, in which it is already seriously constrained by time limits imposed by the Chamber. Furthermore, the defence may simply not be in a position to make sufficiently specific and effective sentencing submissions without knowing exactly on what factual basis the possible conviction rests.

The ICTY and ICTR procedure has tried to accommodate these concerns by envisaging a separate stage for the submission of the information relevant to sentencing as

---

346 E.g. Pocar, ‘Common and Civil Law Traditions in the ICTY Procedure’ (n 20), at 444 (‘As the ICTY benches are composed of professional judges, there is no reason to keep fact witnesses and character witnesses separate; professional judges are by definition are, by definition, able to discern between the different factors relevant to the different findings.’).

347 See ibid., at 445 (‘the unified proceedings have saved a significant amount of time and resources’).

348 STL RPE Explanatory Memorandum (n 137), para. 45 (‘the accused and his counsel are often put in a difficult position in that they have to argue as to the accused’s lack of responsibility for the crime, while at the same time putting forward evidence and arguments relevant to any sentence which may be imposed.’).
a distinct phase in the trial sequence, by directing the parties to address the matters of sentencing in their closing arguments and final briefs, and by favouring the admission of such evidence in the written form.\textsuperscript{349} These measures guaranteed the defence’s ability to put forward an argument with regard to sentencing. But they may be insufficient to neutralize the prejudice for the accused the merged structure of trial poses in terms of the ability to put on an effective defence and to level the playing field with the prosecution – which by contrast is not strategically prevented from examining its own witnesses on both matters. One may also question the significant courtroom time-saving effects of the unified procedure, given the risk of spending considerable resources on hearing the sentence-related information which might prove irrelevant if the accused is eventually acquitted.\textsuperscript{350}

Furthermore, the enmeshment of sentencing-related matters into the trial fabric primarily oriented at establishing the guilt or innocence of the defendant in those rejurisdictions rendered the sentencing more of an afterthought and marginal issue rather than a symbolic act of penalizing the perpetrators of the crimes as culmination of the trial proceedings. The lack of oral and public hearings specifically devoted to sentencing matters at which the relevant information could be examined and the limited attention to the rationales for imposing a specific sentence in merged trial judgments in non-guilty-plea cases arguably do not do justice the expressive importance of sentencing in light of the tribunals’ institutional and socio-political goals. It is in this light that the return to the bifurcated scheme in most post-ICTY and ICTR courts is to be seen.\textsuperscript{351}

In the SCSL, ICC and STL, the Trial Chambers will only proceed to the determination of the sentence upon the finding of guilt and may hold separate sentencing hearings to receive additional evidence or submissions relating to sentence.\textsuperscript{352} The consideration of efficiency do not militate against such approach insofar as the witnesses who are capable of providing both types of evidence/information at trial may do so, as this dispenses with the need to recall them at a sentencing stage. At the same time, this offers a number of benefits: it allows the parties to make specific sentencing submissions on the basis of the actual trial judgment, rather than second guess the factual findings to be entered by the Trial Chamber; it enables them to call additional witnesses to provide the information which may be useful in the sentence-determination which they (in particular, the defence) may be unwilling to call during the trial; it saves time and resources on examination of witnesses who can solely speak to the sentencing matters; and it maximizes the symbolic importance of the act of sentencing and provides the Chamber and the parties with a platform to engage in meaningful discussion of the relevant aggravating and exonerating factors and with an opportunity for the judges to explain their rationales for a specific sentence calculus more thoroughly than in a single combined judgment.

On the balance of arguments and in light of the experience and evolution of international criminal adjudication—rather than as a tribute to the recent trend alone, the normative theory of international criminal trials embraces the bifurcate approach in structuring trial. The future international and hybrid courts are advised to split deliberations on the guilt and the determination of an appropriate sentence. The latter are to be held only if and when the accused has been found guilty and are to be preceded by a separate sentencing procedure and/or hearing whereby the parties may make oral and/or written sentencing submissions and present evidence relevant for the determination of the sentence. The considerations of pragmatism, however, mandate that the separate

\textsuperscript{349} Rules 85(A)(vi), 86(C), 92bis(A)(i)(d)-(f) ICTY and ICTR RPE.

\textsuperscript{350} STL RPE Explanatory Memorandum (n 137), para. 45 (‘hearing character witnesses at a stage where the Court has not yet formally decided whether to acquit or convict the defendant may prove to be a waste of time.’)

\textsuperscript{351} Ibid., paras 46-47 (the abolition of separate sentencing procedure in contested cases at the ICTY ‘proved to be a mistake’).

\textsuperscript{352} Rule 100(B) SCSL RPE; Art. 76(2) ICC Statute; Rule 171(A) STL RPE.
sentencing hearings remain optional rather than obligatory. Since recalling witnesses able to provide evidence in relation to both verdict and sentence at the sentencing stage is to be avoided, the parties should be able to examine them in relation to both matters during the trial.

4.3. Participants

4.3.1 Role of judges: Active case-managers and truth-seekers

The previous chapters show that in various areas of the trial practice, the optimal configuration of the judicial role and the readiness of the judges to exercise it meaningfully and resourcefully are factors that to a large extent predetermine whether the tribunals will succeed in their endeavour of conducting trials fairly and expeditiously.\(^{353}\)

To turn to pre-trial process first, one of the most important lessons to be learnt from the experience of managerial judging in the ad hoc tribunals is that the judges should actively employ their competences to obtain an early understanding of the nature of the parties’ cases (or the materials contained in the case file). The enhanced comprehension of the contested facts and key legal issues will enable to effectively manage the case in the lead-up to trial and to control the proceedings before them on a real-time basis during trial.\(^{354}\) The circumstance that the judges by definition have less information about the case than the parties where the latter are responsible for investigations has been responsible for the limited and timid use of the managerial powers by the judges. The judges did not feel they were equipped to take decisive steps for the fear of making inefficient or unfair decisions.\(^{355}\)

There are no reasons—other than non-pragmatic adherence to domestic conceptions of fairness and judicial impartiality that are not so relevant in the international context—to require that the judges’ pre-trial access to information about the case is more limited than that of the parties as a result of inter partes pre-trial disclosure. In this sense, the Trial Chamber’s access to statements of witnesses the parties intend to call (rather than summaries) is good practice. If the Chamber is truly expected to effectively moderate the volume of evidence and to manage the proceedings before it by precluding disserviceable questioning, it should not be left in the dark as regards the parties’ plans about specific evidentiary items, being more ignorant about the evidence to be presented than anyone in the courtroom. Access to the copies of statements and any other materials disclosed inter partes enhances the judges’ ability to manage the case at both pre-trial and trial stages. It goes without saying that such information is to be used for this limited purpose and may not be treated as evidence proper before it is duly presented and admitted at trial.

Over and above mere access to information, the Trial Chambers should be prepared to act upon it and to actively exercise their managerial powers, such as determining and enforcing the limits regarding the time to be used for the presentation of evidence and the examination-in-chief of some witnesses; limiting the number of witnesses the parties may call; and moderating the proof-taking with view to avoiding the waste of time in ineffective and irrelevant witness questioning. In doing so, the judges are advised to adhere to a meaningful rather than mechanistic approach to calculating time limits and the reduction of hours for presentation and/or examination. The managerial measures taken in the lead-up should firmly be based on the understanding of the nature of the parties’ case and any

\(^{353}\) On the role in truth-finding, see chapters 5 and 10; on control over proceedings chapters 9-11; on case-management, see chapter 8.

\(^{354}\) See also Boas and McCormack, ‘Learning the Lessons’ (n 269), at 78 (‘courts must take an active part in the pre-trial process and in the regulation of the scope and conduct of a case during trial. These provisions are complementary because the better-managed the case is in pre-trial, the more focused it is likely to be at trial.’ Footnotes omitted.)

\(^{355}\) For discussion, see Langer and Doherty, ‘Managerial Judging Goes International’ (n 5), at 283-85.
limits ought to be calculated with due regard to the parties’ epistemic needs and objectives. They should not unnecessarily interfere with the parties’ chosen strategies in relation to their cases, which they should be reasonably free to determine in the context of the party-driven process.

To ensure that each party enjoys a reasonable opportunity to present the case, judges ought not to shirk their responsibilities through imposition of arbitrarily determined or formalistic limits on the time allocated for the presentation and on the number of witnesses. Judicial orders for the reduction of said estimates by a traditional ‘one-third’ irrespective of the circumstances of the crimes, may evince unwillingness to get into detail and are likely to be based on a limited understanding and knowledge of the case. As such, they are insufficient to guarantee the parties’ efficient use of the time and call of witnesses not exceeding the number necessary to make their case.  

This means that next to global, or macro-management measures— the imposition of overall time-limits for the case presentation, determining the number of witnesses—the judges should be prepared and able to do the ‘micro-management’.  

This requires them to look into the particulars of the parties’ projected cases. Similarly, rather than policing the effectiveness of developing proof at trial through a formal ‘stopwatch’ method, the judges should do so based on utility of particular lines of examination pursued by the parties and the participants. This applies equally to party-driven and judge-driven proceedings. In the party-driven context in particular, the micro-management might interfere with the party autonomy to formulate the case and to present the best evidence. The risks posed by a hands-on approach will be reduced if the judges: (i) invest adequate time and efforts in the pre-trial stage in preparing for trial (including familiarizing themselves with the parties’ cases and acquiring early insight into the projected role of each witness or exhibit on the party’s list); and (ii) are prepared to take the necessary and consistent steps to manage the parties’ cases equally in both pre-trial and trial stage by assuming ultimate responsibility for the efficient conduct of the proceedings. It must be recognized that this is a question of willingness, skill, and experience, not that of formal powers.

When it comes to the optimal judicial role at trial, the judges’ role as truth-seekers becomes relevant, next to the role as case-managers. In the framework of a party-driven process organized around several partisan cases rather than a single case of the court, managerial powers as such are insufficient for the judges to take a leading position in developing evidence over from the parties. Nor should the judges be expected to overreach their roles as predetermined by the procedural framework of a specific tribunal or through any preliminary consultations with the parties. Without additionally enhanced truth-finding competences, managerial judging is not meant to turn judges into primary truth-seekers akin to continental judges who are equipped to conduct official inquest at

---

356 Ibid., at 275 (based on ICTY interviews, describing a partisan tactics aimed to neutralize managerial efforts by inflating the requested number of witnesses in the anticipation judicial cutbacks of that number by one-third).

357 Boas and McCormack, ‘Learning the Lessons’ (n 269), at 78-79.

358 For critiques of the ECCC and ICTY trial management practice along these lines, see respectively K. Gibson and D. Rudy, ‘A New Model of International Criminal Procedure? The Progress of the Duch Trial at the ECCC’, (2009) 7 JICJ 1005, at 1018-20; Karnavas, ‘The ICTY Legacy’ (n 234), at 1084.

359 Boas and McCormack, ‘Learning the Lessons’ (n 269), at 79.

360 See e.g. Karnavas, ‘The ICTY Legacy’ (n 234), at 1061 (‘the art and skill of judging, e.g., managing the court proceedings, dealing with procedural issues, and ruling on evidentiary matters, requires skills that can only be acquired by courtroom experience.’)

361 Jackson and Summers, The Internationalisation (n 22), at 139 (‘although this [pre-trial brief] gives judges advanced knowledge of some of the evidence, it is far from being a complete account of all previous investigative activity as would be available to judges in a civil law jurisdiction and this raises the question of whether they are as fully equipped to conduct a full and effective examination of the witness.’).
trial by the prior access to the dossier. In most contemporary tribunals (save for the ECCC), the organizing framework of the proceedings remains party-driven.\(^{362}\)

In such contexts, attempts to surpass the managerial role will cast judges in an awkward position of ‘blundering intruders’ in the domain where parties should be left to develop their case, within the limits set by the Chamber.\(^{363}\) There has been a lack of clarity and consensus about the proper nature of the judicial role in the \textit{ad hoc} tribunals.\(^{364}\) This not least because wide-scale and ceaseless reforms aiming at giving judges more powers tended to blur the established (domestic) notions about their proper professional roles and because the judicial styles adopted by different Chambers have varied widely. It is in the public domain that boundaries have occasionally been trespassed, leading to tensions between the parties and the court and, reportedly, even among the members of the bench.\(^{365}\)

It is important that such tensions are avoided to the extent possible in the future. Finding the ‘virtuous equilibrium’ between the party-driven and judge-driven fact-finding is in principle a daunting challenge.\(^{366}\) The problem is still awaiting a satisfactory resolution in the tribunals’ context as it is in the context of national criminal procedure reforms.\(^{367}\) The solution is to be sought in a clearer definition of the judicial role in questioning witnesses called upon the initiative of the parties and rationales for calling evidence \textit{proprio motu}. The transparency on the part of the judges through consultation with the parties concerning any projected fact-finding initiatives will go even further towards preventing and extinguishing tensions caused by the confusing flexibility and legal culture shock.\(^{368}\)

The proper balance should necessarily be found. Even in party-driven proceedings, the competences vested in the judges by the rules should not be set aside but put to the service of the truth-finding function to the extent possible.\(^{369}\) Be it as it may, the judges are

\(^{362}\) B. Swart, ‘Damaška and Faces of International Criminal Justice’, (2008) \textit{6 JICJ} 87, at 110 fn84 (‘a process does not necessarily stop being party-driven because of measures aiming to expedite proceedings at various stages.’); Jackson and Summers, \textit{The Internationalisation} (n 22), at 127 (‘whatever the movement towards managerialism, the trials continue to be adversarial in the sense that they remain dominated by party collection and presentation of evidence.’).


\(^{364}\) Swart, ‘Damaška’ (n 362), at 113 (noting ‘insufficient clarity about the frequency and the intensity with which judges make use of their powers to become active in the pursuit of truth as well as about their motives for doing so.’).

\(^{365}\) E.g. Decision Regarding Questions Asked by the Judges during the Examination of a Witness in Court, \textit{Prosecutor v. Prlić et al.}, Case No. IT-04-74-T, TC III, ICTY, 5 June 2008, at 2-3. See Karnavas, ‘The ICTY Legacy’ (n 234), at 1062-3 (reporting the parties’ frustration ‘at having spent an enormous amount of time and effort in preparing a meticulous case only to find itself in trials conducted by what appears to be improvisation, or worse yet, experimentation.’) and citing Transcript, \textit{Prosecutor v. Prlić et al.}, Case No. IT-04-74-T, TC III, ICTY, 19 March 2007, at 15852 (OTP: ‘I was so embarrassed for this institution… I was even embarrassed for the Judges. … We are very, very concerned … for a number of reasons, including the time limits placed on the case, …repeated statements and comments by the Chamber and the President, and the way certain things have been handled.’).

\(^{366}\) Damaška, ‘Epistemology’ (n 51), at 121 (‘as demonstrated by the experience with amalgams created so far, it is difficult to find a virtuous equilibrium between officially and party-dominated fact-finding practices’).

\(^{367}\) Chapter 4. But see Weigend, ‘Should We Search for the Truth’ (n 302), at 414 (who seems to believe in ‘a convergence of the two models towards shared responsibility, with judges becoming more active in adversarial systems and parties obtaining greater participation rights in inquisitorial systems.’).

\(^{368}\) Swart, ‘Damaška’ (n 362), at 113 (among safeguards against judicial prejudice mentioning ‘the willingness of judges to explain to the parties why they take initiatives coupled with their willingness to take into account the views of the parties with regard to the desirability of such initiatives, and, more than anything else, a reasoned judgment’).

\(^{369}\) Chapter 5 and \textit{supra} section 3.2.
under the duty to exercise control over the mode and order of presenting evidence, may call additional evidence and to ask questions to witnesses whenever appropriate; and may undertake on-site visits. These powers must not remain dormant but shall be exercised with view to facilitating and meaningfully complementing the truth-finding efforts undertaken by the parties, without overshadowing those efforts. Trial judges are ultimately responsible for rectifying excesses and deficiencies of the party-led process. It is up to them to intervene whenever parties fail to present material evidence, to adequately verify it, to ask witnesses important questions or to receive the clarifications necessary for the comprehension of evidence, and to conduct effective and non-abusive examination.

Irrespective of the nature of the process as party-led or judge-driven, the judicial power to exercise control over the conduct of questioning remains an integral component of the judicial competence. As repeat players in international criminal justice, judges are uniquely placed to know where fact-finding impediments lie and to assist the parties and witnesses to minimize their impact. In the party-driven proceedings, the judges must be able and make sure to ask all questions that need to be asked; but save for clarifying questions they are advised to refrain to do so until the end of the parties’ examination at which point they may feel free to turn from ‘umpires’ into active ‘truth-seekers’. The need for the judges to go beyond the evidence presented and questions asked by the parties, where those are deemed insufficient to ascertain the truth, follows from their status as fact-finders ex officio, which is autonomous from the parties. It is warranted in a more direct sense by their responsibility for delivery of properly reasoned and factually accurate judgments than by nebulous goals of international criminal justice.

International criminal trials are highly complex adjudicative enterprises in which the procedural role of judges has been growing increasingly indeterminate from a comparative perspective. This contrasts with domestic context whereby the parameters of the model judicial conduct are defined with sufficient clarity and form part of an established judicial culture. In the absence thereof, the task of judging in the tribunals inevitably entails the need to discharge greater responsibilities. The unique challenge of ensuring fair and expeditious proceedings in international trials requires the judges to interpret their role with a degree of flexibility and creativity while being keenly aware and protective of the non-negotiable limits set by the legal framework.

More generally international judges have multiple roles to juggle. The openness of the procedural framework, as a consequence of distancing by primary law-makers from issues of procedure, left a lot of gaps for judges to fill through adoption of procedural law

370 Rule 90(F) ICTY, ICTR, and SCSL RPE; Regulation 43 ICC Regulations of the Court.
371 Rule 98 ICTY and ICTR RPE; Rule 85(B) ICTY, ICTR and SCSL RPE; Art. 69(3) ICC Statute; Art. 20(3) STL Statute.
372 See supra section 3.2.
373 Combs, Fact-Finding without Facts (n 189), at 310 (rightly noting that ‘both party-driven and court-driven investigations are consistent with judicial control over questioning.’); Weigend, ‘Should We Search for the Truth’ (n 302), at 403 (‘control of the trial process is an essential feature of judicial authority in all procedural systems’).
374 Combs, Fact-Finding without Facts (n 189), at 307 (‘Judges who have sat through numerous trials in a given tribunal … should be especially familiar with the sorts of cultural divergences that can distort communication and with methods of questioning that might reduce the distortion.’).
375 Mégret, ‘Beyond “Fairness”’ (n 53), at 71 (speaking ‘in favour of judges not leaving any stone unturned when it comes to fully understanding testimony presented to them, and thus intervening in court to have elements explained to them. Otherwise, they risk adopting judgments that are poorly informed, historically and socially, something that could have considerable incidence on transitional justice processes.’).
376 See Chapter 3. Cf. V. Tochilovsky, ‘Trial in International Criminal Jurisdictions: Battle or Scrutiny?’, (1998) 6/1 European Journal of Crime, Criminal Law and Criminal Justice 55, at 56-57 (given the historical-record function, ‘the judges should be able to participate effectively in examination of evidence’); Swart, ‘Damaška’ (n 362), at 114 (admonishing against ‘mismatches, such as the one where policy implementing goals are being pursued without a forceful affirmation of the legitimacy of judicial activism’).
and the construction of the body of practice. Besides traditional requirements to qualifications, experience and personal integrity, this has demanded of them remarkable creativity in devising workable and fair procedures without substantial precedent, sensitivity to prejudice risks faced by parties in the tribunal context, and responsiveness to challenges, ability to reflect critically on their own and their colleagues’ performance with view to correcting the course, and a solid knowledge of the comparative criminal procedure ‘bricks’, without aprioristic leaning to any of them. The superb quality of judges is a crucial prerequisite for the success of international criminal proceedings. The elevated demands warrant reconsideration of some of the actual recruitment policies so that only the most qualified and experienced criminal law judges can sit on international benches.

4.3.2 Defendants’ role: Towards participatory model

As already observed in relation to the opening and closing stages of trial, the increase in the procedural opportunities for defendants to participate in their own trial constitutes a firm trend in the development of trial procedure before international criminal tribunals.\(^{377}\) This concerns the accused’s personal contribution by information and evidence at trial – in particular, the possibilities for the accused to make (opening) statements (whether or not being sworn in and subject to examination), to give testimony, and to participate by delivering a last word at the close of trial. The shift towards a ‘participatory model’\(^{378}\) in respect of the defendants’ status is also discernible from allowance made for their personal involvement in the evidentiary phase, namely the opportunity for represented accused to put questions to witnesses.

From the first experiment of defining procedure in the IMT, the comparative richness of options for defendants wishing to participate in their trial more actively as suppliers of information has been a distinctive trait of international criminal procedure.\(^{379}\) By allowing the accused both to testify in their own defence and to deliver a personal statement not subject to examination, the IMT process went beyond what either of the common law and civil law traditions deem permissible. The trend continued at the ICTY whose Rules allowed defendants to appear as witnesses;\(^{380}\) and, regardless of whether his counsel decided to make an opening statement after the prosecution’s opening address, to make a personal unsworn statement not followed by examination.\(^{381}\) Occasionally, the Chambers gave the latter right a more liberal interpretation by allowing for such statements to be made not only at an opening stage, but also at the start of defence case,\(^{382}\) at the very end of trial (qua last words),\(^{383}\) and even throughout the trial.\(^{384}\) The latter ‘right to be heard’ throughout the proceedings mirrored the latest trend at the time established by the ICC Statute, which similarly conferred upon the defendant the right ‘to make an unsworn statement oral or written statement in his or her defence’.\(^{385}\) The STL RPE embody maximum flexibility in this regard by providing the accused with the two—established in international criminal procedure—options of testifying and making statements at any

\(^{377}\) See supra section 4.2.3.

\(^{378}\) For a theoretical discussion, see Jackson and Summers, The Internationalisation (n 22), at 25-7.

\(^{379}\) See Chapter 1; Bush, ‘Lex Americana’ (n 241), at 526-7.

\(^{380}\) Rule 85(C) ICTY RPE.

\(^{381}\) Rule 84bis ICTY RPE. See Chapter 9.

\(^{382}\) Transcript, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, TC, ICTY, 26 March 2001, at 9448-40, 9453-74; Transcript, Prosecutor v. Limaj et al., Case No. IT-03-66, TC II, ICTY, 7 June 2005, at 6892, 6904-15.

\(^{383}\) Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39, TC I, ICTY, 31 August 2006, at 27500.


\(^{385}\) Art. 67(1)(h) ICC Statute.
stage, including the final statement at the end of trial. The Rules further expand the range of avenues open to him with an opportunity to submit himself to questioning by the judges, subject to relevant guarantees and with the choice of making a solemn declaration before any statements and/or answers to the judges’ questions. This option in principle makes such statements or answers equivalent in value with testimony.

Granting the represented defendants an opportunity to examine witnesses in person dovetails into the flexible and pragmatic approach the Chambers have taken in allowing the direct participation by the accused in the trial alongside the counsel. At the ad hoc tribunals, the general principle has been that where the accused is represented, questioning should primarily be conducted by counsel, but its application has not been overly strict. In some cases, forms of participation falling short of personal examination of witnesses by the accused were allowed. Thus, in Nahimana et al. the accused Ngeze was allowed to write down his questions that would be put to witness Serushago by the judges. In other cases, the Chamber allowed for an even more direct involvement by the accused in examining witnesses. The Krajišnik Trial Chamber experimented with authorized the accused, who had expressed a wish to represent himself but formally continued to be represented, to put supplementary questions to a witness after cross-examination by counsel, as a way to test his capability to conduct his own defence. In the defence part of the case, the Chamber extended the ‘experimental phase’ by allowing him ‘a limited participation to complement examination-in-chief by his counsel’ in respect of defence witnesses. The Chamber warned that in case the accused failed to demonstrate his capacity of ‘putting his questions in a procedurally proper manner’, it would intervene to cut short any questioning that was disruptive or in violation of the RPE.

More recently, the Trial Chamber in Prlić et al. allowed (represented) accused ‘in exceptional circumstances and after authorization of the Chamber, ...[to] directly address a witness and put questions’. The way in which this right was actually exercised led the Chamber to narrow the relevant circumstances down, in particular, to the ‘examination of events in which he personally took part or to the examination of issues about which he has specific expertise’. In line with previous jurisprudence, the Appeals Chamber endorsed the Trial Chamber’s exercise of a stricter control over the cross-examination by the accused with view to preventing the waste of time and confirmed its authority to impose ‘reasonable restrictions’ upon the ‘right to participate directly in the proceedings alongside his counsel’. However, it curbed the Trial Chamber’s move to further restrict

---

386 Rule 144(A) and (D) STL RPE.
387 Rule 147(C) STL RPE.
388 Rule 144(B) STL RPE.
389 STL RPE Explanatory Memorandum (n 137), para. 28 (‘It may be assumed that the accused’s answers have the same evidentiary value as the evidence of other witnesses – that is, they are not to be considered as having lesser value than if he goes into the witness box and gives sworn evidence.’).
392 Ibid., at 17206.
393 Revised version of the decision adopting guidelines on conduct of trial proceedings, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, TC III, ICTY, 28 April 2006, para. 9.c.
394 Decision on the Modes of Interrogating Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, TC III, ICTY, 10 June 2007, paras 10-12; Decision Adopting Guidelines for the Presentation of Defence Evidence, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 24 April 2008, para. 3.
396 Decision on Praljak’s Appeal of the Trial Chamber’s 10 May 2007 Decision on the Mode of Interrogating Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.5, AC, ICTY, 24 August 2007, paras 9 and 11.
that right in a later decision by quashing the overly restrictive interpretation of ‘special expertise’ as an abuse of discretion.

In a similar vein, the ICTY and ICTR practice regarding testimony of the accused has combined flexibility of the pragmatic approach with the stringency of trial control by the judges. Unlike the SCSL, the ad hoc tribunals have generally accorded the defence latitude in determining the timing of the accused’s testimony, as a matter of the right of the parties to determine the structure of their cases autonomously. In numerous cases, the accused chose to testify towards the end of their case, while in at least one case part of the defendant testimony (examination-in-chief) took place during the prosecution case and cross-examination upon its conclusion. The autonomy of parties to determine the internal order of their cases invites special caution on the part of the Chamber whenever imposing fetters on the defence’s choice of the timing for the accused’s testimony, but it does not rule out its discretion to be exercised under Rule 90(F) completely. In the ICC trial practice, defendants have so far been allowed to decide as to when to testify and chose to do so towards the end of their respective cases.

These examples demonstrate a degree of reasonable flexibility in the application of the initial framework of ‘lawyer’s trials’ in the tribunals in which the exclusive prerogative to address the court on behalf of the accused belonged to counsel. The current regime provides the Chambers with leeway in accommodating the direct involvement by the accused who choose to testify to determine when to do so.

---

398 Decision on Motion for Reconsideration Presented by the Praljak Defence, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 26 June 2008, at 5.
399 Decision on Slobodan Praljak’s Appeal of the Trial Chamber’s Decision on the Direct Examination of Witnesses Dated 26 June 2008, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.11, AC, ICTY, 11 September 2008, paras 21-22 (‘the Trial Chamber should have allowed more flexibility for its assessment of the notion of specific expertise and perform such assessment on a case-by-case basis when faced with a specific request. The approach taken by the Trial Chamber could potentially lead to violation of the Appellant’s rights under Article 21 and thus constitute an abuse of discretion. … [‘Exceptional circumstances’] should … not be read as restricting those circumstances to two scenarios. Indeed, various other circumstances may still arise during the proceedings which may justify the Appellant’s participation in the examination.’).
400 For an overview of the case law, see Elberling, The Defendant (n 12), at 141; N. Combs, ‘Power to Control (and Intervene in) the Examination of Witnesses’, in Acquaviva et al., ‘Trial Process’ (n 197), at 723-4. E.g. Judgement, Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, AC, ICTR, 26 May 2003, para. 99 (‘in his successive remarks concerning the duration and method of examination, actually applied both stringency and flexibility, and the choice of Appellant’s Counsel to conduct the examination as she thought fit was not affected in substance. The Appellant in fact had considerable latitude to say what he had to say.’). See Rule 85(C) SCSL RPE (uniquely requiring that defendant must testify prior to other defence witnesses).
401 Decision on Prosecutor’s Motion on Trial Procedure, Prosecutor v. Kordić and Ćerkez, Case No. IT-95-14/2, TC, ICTY, 19 March 1999 (‘it has been the practice of the International Tribunal to allow those accused who choose to testify to determine when to do so’).
402 Transcript, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, TC, ICTY, 6 March 2000, at 675 et seq. and 1019 et seq.; 28 November 2000 at 6705 et seq.
403 See e.g. Transcript, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 25-29 October 1996 (Tadić testified among the last witnesses in his case); Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39-T, TC I, ICTY, 25 April 2006 – 22 June 2006 (testimony of Krajišnik as the last witness in his case).
404 In Galić, the accused chose not to testify because the TC had held that he would have been expected to do so before the testimony of expert witnesses and possibly resume his testimony afterwards; Judgement, Prosecutor v. Galić, Case No. IT-98-29-T, TC I, ICTY, 5 December 2003, para. 791. The TC’s exercise of discretion was upheld on appeal: Judgement, Prosecutor v. Galić, Case No. IT-98-29-A, AC, ICTY, 30 November 2006, para. 20 (‘Trial Chambers have discretion pursuant to Rule 90(F) of the Rules to determine when an accused may testify in his own defence, but this power must nevertheless be exercised with caution, as it is, in principle, for both parties to structure their cases themselves, and to ensure that the rights of the accused are respected, in particular his or her right to a fair trial.’). See also Judgement, Prosecutor v. Seromba, Case No. ICTR-01-66-A, AC, ICTR, 12 March 2008, paras 19-20.
accused in witness examination. Importantly, it comes with the need for an ever-tighter control by the Chamber over the mode and order of interrogating witnesses and presenting evidence with view to ascertaining the truth and avoiding the waste of time. It is submitted that the expansion of procedural opportunities for the represented defendants, subject to tight control by the Chamber, is not accidental, but is a defining feature of international criminal procedure. It goes some way to supporting the thesis that international criminal procedure has moved away from the established models associated with domestic procedural traditions, towards what is a genuinely sui generis trial regime.\(^{407}\)

The interposition by lawyers is a norm in adversarial common law systems.\(^{408}\) In international criminal trials, the removal of rigid and tradition-specific barriers to a more direct communication between the accused and the Chambers and/or witnesses is quite remarkable. The tendency of envisaging multiple and hybrid procedural avenues for defendants to contribute to evidentiary process is consistent with the emancipation of international trials from the shackles of traditional common law and civil law trial forms and reflects the quest by international criminal procedure for a distinct identity. Provided that the rights of the accused are fully respected (including the rights against self-incrimination and to be presumed innocent) and that the Chamber is vigilant in managing the trial, the personal participation is compatible with assistance by counsel.\(^{409}\) This flexibility is a welcome development that is endorsed as the part of the normative theory of the trial.

First, it maximizes pragmatism and flexibility in trial procedure and translates these values into arrangements that are tailored to the institutional circumstances and fact-finding need of these trials. While one is invited to recall qualifications regarding the cognitive superiority of professional judges over lay jurors,\(^{410}\) there are fewer reasons in international criminal trials to require a constant intermediation of counsel than in domestic jury trials, whereby defence counsel speaks on behalf of the defendant as a way to shield the juror from prejudicial information that might be gathered from his utterances and demeanour.\(^{411}\) But in international trials, the adverse impact of such information that is not part of evidence is less likely and personal interventions by the defendant are subject to procedural guarantees. Besides, there are good epistemic reasons for allowing the defendant to make personal statements at the opening or closing stages, as this may be the optimal format in which he can clarify his personal position on the charges and evidence matters for the court. Where the accused observed or participated in the events covered in testimony or where he possesses personal knowledge of relevant matters, his participation in the questioning of the witness may assist with truth-finding and enhance the fact-finding accuracy.\(^{412}\) The creative and flexible use of different avenues should remain available. This may include hybrid forms of submitting information by way of personal statements preceded by a solemn declaration and not followed by examination\(^{413}\) as well as testimony

\(^{407}\) Cf. Elberling, *The Defendant* (n 12), at 149 (concluding that ‘the difference between the civil law and common law traditions is largely reproduced in international criminal procedure’).

\(^{408}\) However, this has not always been the case. See Langbein, ‘The Criminal Trial Before the Lawyers’ (n 232), at 314-16 (the ‘lawyerization’ of trials in England started in the second half of the 18th century).


\(^{410}\) *Supra* section 4.1.

\(^{411}\) The other obvious rationale is avoiding disparity in ‘bites at a cherry’ between the parties.

\(^{412}\) See also Trechsel, ‘Rights in Criminal Proceedings’ (n 409), at 174 (‘the personal participation of an accused in the examination or cross-examination of a witness may be important if the accused was present on the event on which the witness testifies. He or she may be the only person capable of asking the pertinent questions as only he or she may have direct knowledge of, or better, memories of the events.’).

Chapter 12: Towards a Normative Theory of International Criminal Trial

starting with the defendant’s narrative unprompted by his counsel’s questions. 414 An overly rigid and formalistic framework for addressing the court will have a freezing effect on the defendant’s participation and deprive the court of his testimonial or testimony-like contributions. The tribunals are advised to eschew an inflexible regime under which the respect for the accused’s right to silence would result in the accused being effectively silenced despite his willingness to provide the court with the information.

Secondly, allowing the accused to participate more directly in the trial, alongside his counsel, enhances the legitimacy of the process and the acceptance of its outcomes, not least in the eyes of the defendant. As has consistently been argued in relation to both the opening and closing stages, 415 the personal participation in his defence enables the accused to move from the position of a side-lined figure in his own trial, as the ‘object’ of legal process, to that of their ‘subject’. 416 Subject to reasonable restrictions following from the need to ensure fair and expeditious proceedings, a similar argument can be made with regard to the involvement by the accused in the examination of witnesses. Where the accused is capable of asking a witness pertinent questions, let alone where he is uniquely placed to do so, there is no reason to deny him this opportunity. Such restriction would not only be counterproductive in terms of truth-finding but would also unnecessarily alienate the accused and undermine the perceptions of fairness in the context where the authority of the court tends to be a highly contested matter. 417

The psychological research into the operation of criminal justice at the domestic level shows that the perceptions of fairness of legal process and acceptance of its outcome are related to the level of control over the process by litigants. According to Lind and Tyler, ‘procedures that vest process control in those affected by the outcome of the procedure are viewed as more fair than are procedures that vest process control in the decision maker’. 418 The reason is not that process control necessarily secures more favourable outcomes for a party, but that it allows litigants to express their views and be heard on matters they deem important. 419 The subjective effect of empowerment—a perception that their procedural action may make a difference in the outcome—positively impacts a litigant’s judgement concerning procedural fairness. On the contrary, arrangements that create obstacles for litigants’ agency and do not accommodate reasonable autonomy in pursuing their interests within the existing framework tend to be experienced as deprivation of rights and unfairness. 420

If these conclusions are true, the link between agency of defendants and perceptions of fairness can be extrapolated onto international criminal proceedings. Personal participation by the accused in the trial and the exercise of his autonomy as a party ought to be accommodated to the extent possible inasmuch as it may both assist in

414 Cf. Judgement, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, AC, ICTY, 9 May 2007, para. 28 (not finding error in the TC’s refusal to authorize such format of testimony). But see also Partially Dissenting Opinion of Judge Shahabuddeen, paras 1, 6, and 9 (opining that Blagojević’s right to a fair trial was violated because the Chamber refused to permit him to testify directly by way of a continuous statement under oath and subject to cross-examination, thereby preventing him from ‘telling his story’).
415 Chapters 9 and 11.
416 Trechsel, ‘Rights in Criminal Proceedings’ (n 409), at 174 (‘On a more fundamental level it is by active participation in the defence that the accused can assert his or her position as a subject in the proceedings as compared to the position of a mere object.’).
417 See also J. Jackson, ‘Autonomy and Accuracy in the Development of Fair Trial Rights’, research paper No. 09/2009, UCD Working Papers in Law, Criminology & Socio-Legal Studies, SSRN, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407968>, at 18 (‘Particularly in the international domain, where international justice is being tested by the international community it is important to give accused persons a voice to off-set any perception of “victor’s justice”.’).
419 Ibid., at 101.
420 Ibid., at 95.
the ascertainment of the truth and endow the accused with a sense of participation. That said, the autonomy does not mean hegemony and its exercise should be policed by the Trial Chamber in order to ensure that it serves the objectives of the process. Obviously, the risks that opportunities to intervene will be misused for political arguments, witness intimidation, and disserviceable questioning increase when the accused is allowed to address the court in a capacity other than witness and to have his voice heard throughout the trial. But it is ultimately the Trial Chamber’s responsibility to ensure that the time is not unnecessarily wasted and that extra-testimonial contributions of the accused are aligned with the truth-finding mandate of the court and with the need to ensure fair and expeditious proceedings.

4.4 ‘Postmodern suspense’ in procedure: Reconciling variability with certainty

The previous sections have outlined the contours of the normative theory of international criminal trials and fleshed out its contents in some detail. The critical review of the experience of adjudication and reform in various courts and what appear as steady trends in the development of their procedural law have served as the principal bases for the normative insights. So far the Chapter has attempted to offer a trial paradigm—a set of interrelated and hopefully internally coherent institutional and procedural solutions—which could serve as a reference point in the future efforts of devising and developing international criminal procedure in part of the organization of the trial phase. This is subject to the caveat that said paradigm comes pierced by a substantial number of gaps that remain to be patched.

It is remarkable that only in few specific areas does the international criminal trial stand on relatively firm—not to mean uncontested—grounds. Arguably, the absence and undesirability of a lay jury and the flexible regime for the admission of evidence are the examples. Nearly anything else, including the cornerstone issues of the organization of trial—from the structure of case to the regulation of specific steps in the trial process—is overshadowed by flexibility and indeterminacy. The finding that recurrently emerged in the foregoing discussion is that the modern international criminal trial is bereft of a recognizable face, and that its traits have increasingly been becoming blurred in relation to domestic reference points.

Some may have hoped that trial procedure of the tribunals would consolidate and become more definite in the course of the two decades of modern international criminal adjudication. Such hopes have come alongside with expectations that the tribunals may serve as a crystal clear and uniform role model for domestic criminal justice systems willing to optimize their procedure in international crimes cases. But the tendency has rather been the opposite. The evolution of international criminal procedure has entered into an enduring era of ‘postmodern suspense’ and is still emerging from it. The question is whether it necessarily should and whether the flexibility, indeterminacy, and pluralism of the normative ‘suspense’ are such a bad thing. On the balance of arguments, this author’s answer is in the negative. These are logical and unavoidable consequences of realizing pragmatism in tailoring procedure to epistemic needs and operational challenges coloured by the uniqueness of the societal contexts which international criminal justice administered by the tribunals is to service. The pluralism of international criminal procedure does not derail its role as a source of guidance or inspiration for national criminal justice systems, as there still are seminal conclusions to be drawn from the diversity of the tribunals’ trial practice. The lesson to be learnt by states for the purpose of improving procedure in

421 See also Jackson, ‘Autonomy and Accuracy’ (n 417), at 18 (‘the right to be heard can be decoupled from the court’s responsibility to see that a fair trial is allowed to proceed. The risks associated with miscarriages of justice are too great to allow such a right to predominate over the presentation of an effective defence.’).

international crime cases is that they should neither orient themselves on a procedural blueprint of the tribunals (which is non-existent) nor uncritically adopt the ready-made solutions that have been developed in that context. Instead, the domestic procedures are to be optimized in light of the binding obligations under human rights law and in the context of the legal culture, procedural tradition, and other country-specific circumstances and challenges posed by international crime cases. The role of tribunals in this process may be that of trend-setters but not standard-setters in any direct sense.

No defence of variability and pluralism in international criminal procedure would be sustainable unless it takes into account the costs associated by the open-ended regulatory approach and offers avenues to minimize its risks and challenges. As noted earlier in respect of the advent of the ‘variable’ model of evidence presentation, the main challenges to it relate to the deficit of legal certainty and predictability, and its implications for fairness. The critiques along these lines abound, and they must be taken seriously. If anything, trials ‘by improvisation’ cannot be afforded. A number of commentators, including those with work experience in the tribunals, have noted the downsides of procedural pluralism within the same institution related to inconsistent interpretation and application of procedural rules. For example, in denouncing ‘the enormous variation in the in the application of the Rules from one Trial Chamber to another’ at the ICTY, Whiting describes a disarray of discordant practices as follows:

Some judges questioned witnesses at length, at times even taking over control of the proceedings, while others left all the questioning to the parties. Some benches allowed documents to be entered into evidence freely, through a summary witness, an expert, or even from the bar table, while others only allowed documents to be entered into evidence after being specifically authenticated by a witness. Some judges permitted all hearsay to be admitted, while others sought to restrict it. Some judges allowed the parties to determine the pace of the trial, while others imposed strict time constraints. Some judges allowed prosecution analysts to testify as experts while others did not.

Besides objective factors, such as the dimension and nature of the case, these differences tend to be explained by the ‘human factor’, namely the background and personal style of the judges and, in particular, of the president of the relevant Trial Chamber. This is broadly corroborated by the—as yet limited—empirical research into the trial practice before the ad hoc tribunals.

Next to ‘cross-chamber pluralism’ of trial practices, the related concern is the ‘extemporaneous’ pluralism, or inconsistent interpretation of the same rules over the time (possibly followed by rule-amendment). This may also take the form of significant and

---

423 In a similar vein, see R. Vogler, A World View of Criminal Justice (Aldershot: Ashgate, 2005) 285 (‘whilst the new international regimes of criminal justice are to be welcomed and whilst the underlying traditions of criminal justice are truly universal, it remains a matter for each nation to develop its own particular regime in accordance with local traditions and bearing in mind the guiding principles of procedure.’). 424 E.g. G.S. Reamey, ‘Innovation or Renovation in Criminal Procedure: Is the World Moving toward a New Model of Adjudication?’, (2010) 27 Arizona Journal of International and Comparative Law 693, at 734 (‘These differences threaten the goal of consistency within a multinational tribunal. Consequently, trials conducted in the same “legal language” will nevertheless have distinctive “accents” depending on the composition of the chamber.’). 425 Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 5), at 91 (‘it would be misleading to describe the ICTY as having had a procedural system as opposed to procedural systems. …[F]amiliar to any practitioner who has appeared before a multiplicity of ICTY benches, was the enormous variation in the application of the Rules from one Trial Chamber to another.’). 426 Ibid.; Karnavas, ‘The ICTY Legacy’ (n 365), at 1062-3. 427 See in particular works by F. Pakes (n 195) and R. Byrne (n 5). 428 Reamey, ‘Innovation or Renovation in Criminal Procedure’ (n 424), at 735 (‘This “law in the interstices” [interpretive rule-making] is even more likely to reflect the learned biases of the judges. At the extreme, this
at times radical changes in the applicable procedure by the same chamber in the same case over time, whether in response to the perceived need to fix unfortunate aspects of the early approaches including in view of the pressure of the Completion Strategy.\footnote{Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 5), at 91 (‘variation occurred not just from one courtroom to another, but also occurred across time within the same courtroom. Judges might begin a trial liberally, allowing evidence and documents to be easily admitted into evidence, only to clamp down partway through when they felt themselves to be overwhelmed and the proceedings to be languishing, while in other cases restrictive admissibility requirements gave way to more accommodating procedures in pursuit of efficiency and illumination of the many issues involved.’).} Unsurprisingly, turnaround in the way procedural rules are interpreted and applied has met with profound and widespread disapproval of trial participants. Shifts in judicial approach and rule amendments formalizing them were typically viewed as suspect and changing the ‘rules of the game’ in attempt to implement policies at the cost of fairness in specific cases.\footnote{E.g. Karnavas, ‘The ICTY Legacy’ (n 234), at 1056, 1064 (critical of ‘the constant tinkering with the rules of procedure for the sake of promoting efficiency and expeditiousness while eroding the fundamental rights of the Accused.’).}

These insecurities could easily be extrapolated on the ICC, only to be amplified in its context. The latter point is related to the statutory recognition of the ‘variable model’, as far as the procedure at trial is concerned.\footnote{See section 4.2.4; Chapter 10.} Its trial practice so far may not have confirmed the worst expectations, which is due to the visible endeavour by different Chambers to follow by and large the same procedure.\footnote{Note, however, the radical departure by ICC TC V from the practice established by different chambers in the cases in the DRC and CAR situations. Cf. The almost identical Decision on Witness Preparation, \textit{Prosecutor v. Ruto and Sang}, ICC-01/09-01/11-524, TC V, ICC, 2 January 2013 (‘\textit{Kenya I witness preparation decision }’), paras 50-1 (allowing for the substantive preparation of witnesses by the parties for giving testimony at trial) and Decision on Witness Preparation, \textit{Prosecutor v. Ruto and Sang}, ICC-01/09-02/11-588, TC V, ICC, 2 January 2013 (‘\textit{Kenya II witness preparation decision }’), paras 52-3, with: Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, \textit{Prosecutor v. Lubanga}, \textit{Situation in the DRC}, ICC-01/04-01/06-1049, TC I, ICC, 30 November 2007 9 (disallowing this practice; Decision on a number of procedural issues raised by the Registry, \textit{Prosecutor v. Katanga and Ngudjolo}, ICC-01/04-01/07-1134, TC II, ICC, 14 May 2009, para. 18; Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, \textit{Prosecutor v. Bemba}, \textit{Situation in the DRC}, ICC-01/05-01/08-1016, TC III, ICC, 18 November 2010.} Among the practical implications related to this ‘unpredictable system’, the difficulties the parties are likely to face in preparing for trial have been pointed out, including ‘the impossibility of ordering in advance the presentation of witness’ testimony and making the necessary arrangements to ensure the attendance of witnesses at trial.\footnote{F. Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility’, in Cassese/Gaeta/Jones (eds), \textit{The Rome Statute} 1132 (footnote omitted).} Taking the consequences of this fundamental uncertainty beyond the walls of the ICC, a related insecurity in this regard is what guidance, if any, can be drawn

\[\]
Chapter 12: Towards a Normative Theory of International Criminal Trial

from the ICC trial arrangements by national criminal justice systems, given the ICC’s informal status as a role model or standard-setter.\(^{435}\)

The preoccupation about the deficit of legal certainty and the unpredictability of procedures relation to the broad leeway given to the court in interpreting and applying the rules is ubiquitous. It is not limited to the modern international courts that are composed of multiple trial chambers and deal with multiple cases, but has also been voiced in respect of the historical IMT and IMTFE, which had one case each to deal with. Thus, Wallach’s critical review of their procedural performance led him to speak against unpredictability and in favour of standardization of rules to be applied across the board. He argued that it does not matter what the rules are as much as that they are uniform, consistent, and fairly enforced.\(^{436}\)

The deficit of legal certainty of trial practices also raises the question of the extent to which discrepancies in the judicial style underpinned by the cultural differences between trial benches of the same tribunal can and should be accommodated. As regards the tribunals evincing cross-chamber variation in the trial practice, this issue has given rise to varying assessments. One commentator has argued that the need for foreseeable and consistent trial practices leaves no room for such variation, which results from some judges’ reluctance or inability to apply the RPE as they stand and from their unacceptable reading into the Rules of their own domestic tradition.\(^{437}\) But, it is argued, judges should not be allowed leeway in this regard, but instead be urged to follow a single uniform trial model binding on all Chambers within the same tribunal.\(^{438}\) The more well-disposed position has been to acknowledge the inevitable cultural factor and accepting its impact within reasonable limits, provided that the judges act in the best interests of justice and genuinely endeavour to look beyond their personal preferences and habits.\(^{439}\)

Be it as it may, the importance of giving the parties as much certainty as possible about the way in which the trial will be conducted is uncontested. It is a precondition for their ability to determine their investigative approach and to prepare for trial accordingly. Advocating for an ‘international procedural model’, another experienced defence counsel addressed the adverse consequences of unpredictability in trial practices:

Parties—prosecutors or defence counsel—cannot function properly, nor can they perform their duties efficiently, unless they know in advance what the “rules of the game” are. An understanding of what procedural/evidential rules are applicable to the proceedings is relevant not just to the trial process where they might, for instance, decide on the admissibility or otherwise of a particular item of evidence. They also play a fundamental role upstream as a sort of preliminary professional filter: if the parties know what regime will be applicable to the trial, they will apply that standard to assessing the material which they consider using at trial.

\(^{435}\) E.g. Jackson and Summers, *The Internationalisation* (n 22), at 146 (‘As the one permanent international criminal court, however, it is behoven on it to build where possible on a consensus of best practice and to act as a standard bearer for international criminal justice.’).

\(^{436}\) E.J. Wallach, ‘The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Criminal Procedure?’, (1998-99) 37 *Columbia Journal of Transnational Law* 851, at 882 (‘there must be a set of standardized rules adopted by the world as a common ground for procedures in war crimes trials, whether conducted by international or military tribunal. It does not matter so much what those rules are as long as they are standardized, and fairly and predictably enforced. It is clear, from the comments of the court and counsel, as well as from varying trial rulings and results, that lack of predictability was a most troubling problem in the World War II tribunals.’).

\(^{437}\) Karnavas, ‘The ICTY Legacy’ (n 234), at 1063.

\(^{438}\) Ibid., at 1064 (arguing that judges should be provided with a ‘Bench Book that sets out in detail a step-by-step process on how judges should conduct the proceedings’ and that ‘a uniform procedure with clear guidelines could be made available to all judges, guiding them throughout the proceedings.’).

\(^{439}\) K. Ambos, ‘Structure of International Criminal Procedure’, in Bohlander (ed.), *International Criminal Justice* (n 234), at 493 (‘the practical application of these [ICC] rules will ultimately depend on the legal background of the judges who are given sufficient discretion to conduct trials in accordance with their own experiences and preferences.’).
Chapter 12: Towards a Normative Theory of International Criminal Trial

...and, should they do their work diligently, set aside all the material which on its face is incapable of meeting that standard. 440

This statement goes a long way to supporting the point by Wallach about the overbearing importance of procedural certainty, as compared to that of the character of procedural law as such.

Indeed, the advance knowledge the trial procedure by the parties and the judges is not only practically beneficial but also a basic precondition for an effective administration of criminal justice. Imagine a scenario in which it is known in advance that the trial is party-led and the parties rather than the court are primarily responsible for determining the scope and parameters of the case, the selection and order of appearance of witnesses, and for the direct and cross-examination of witnesses. In this case, the parties must ensure that they will have conducted full investigations, prepared their evidence, have obtained the necessary disclosures from the other party, and reserved time for further investigations in order to obtain impeachment evidence on which basis they can effectively cross-examine. However, the entire setup of investigation and trial preparation will need to be adjusted where the trial is programmed as a judge-dominated event in order for the parties to allocate their time and resources meaningfully at the pre-trial stage. Thus, it may be unnecessary for them to painstakingly prepare their cases by piecing together the mosaic of proof and polish the lines of examination of witnesses with view to ensuring that the case can be presented in the most efficient manner.

While there is much to be said about the importance of procedural certainty, the advantages of the ‘variable model’ for the presentation of evidence and witness examination has been adumbrated above. 441 Essentially, leaving to the court the leeway to define the procedural rules which are structurally suitable and epistemologically tailored to the unique features of the forensic situation of a case or a set of cases before it may enable it to ensure greater fairness and effectiveness of proceedings and superior fact-finding than if it were prescribed to follow a default non-adjustable trial algorithm. For example, the variance in the procedures adopted by different ICC Trial Chambers governing witness preparation has been justified, among others, by the ‘specific situation in Kenya’. 442 Without having to assess the merits of the argument, its actual impact on the outcome, or the implications, it is not difficult to see that providing the Trial Chambers with a margin of appreciation in devising the trial process may be justified by cogent arguments of a normative and practical nature.

The consolidation of the procedures around a single model has indisputable advantages in terms of procedural certainty and effective and smooth conduct of proceedings, as significant time and resources can be saved through the simple adoption of a ready-made algorithm instead of re-inventing trial procedure in every case. At the same time, there remains a risk of an erroneous first step prodding the evolution of trial practice in a wrong track and its harmonization around the model that has been chosen without adequate reflection and for wrong reasons, or has proven to be unworkable in a specific type of settings. While international criminal trials are by no means a laboratory for staging the quasi-academic experiments with view to arriving at a holy grail of an ideal procedure, the consequences of wrong choices are potentially far-reaching, particularly where adjustments the initial course are cumbersome or impossible to effect on a short-term basis due to inflexibility of procedural law, limited avenues for review, or a conservative institutional culture. The dilemma between fixation and innovation in procedure has been acknowledged by ICC Judge Fulford in similar terms:

440 Mettraux, ‘Of the Need for Procedural Fairness and Certainty’ (n 31).
441 Section 4.2.4.
442 Kenya I witness preparation decision (n 432), para. 37; Kenya II witness preparation decision, ibid., para. 41.
the harm is compounded in the way that procedures get fixed. Each time a case is conducted in a particular way, the more difficult it is to break free from the trend of established precedent; yet it is dangerous for first-instance judges to use a serious war crimes trial as a laboratory experiment, investigating whether radical new procedures have utility. They could endanger the entire process, which may have taken years, because an unfavourable appellate approach may result in a retrial.\footnote{A. Fulford, ‘Reflections of a Trial Judge’, (2011) 22 Criminal Law Forum 215, at 223. In similar terms, Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 5), at 107.}

Can the ‘variable model’ be reconciled with the need for procedural certainty and, of so, how this is to be achieved? It is submitted that these are not antithetical and that the variable framework can be made to work in ways predictable for the parties and the participants. The variability of procedures, as the faculty of the court to opt for the trial procedures deemed to be best suited to ensure fair and effective proceedings in a specific case, is not to be equated with procedural uncertainty and unpredictability. The indeterminacy and open-endedness of trial in a systemic dimension of the court should not rule out or cancel efforts to achieve the requisite and early certainty in the context of each specific case or situation. There are several ways in which the anarchy of procedural pluralism can be contained and the risks of legal uncertainty effectively managed.

First, in a variable trial framework, the general lines and niceties of the procedure should be subject to consultation between the Trial Chamber, the parties, and the participants, if appropriate. It is only where the adoption of the procedural rules for the conduct of the trial is preceded by a transparent and inclusive process of reflecting upon the advantages and weaknesses of various options, the epistemic needs and challenges, and concerns of the participants, will the best solutions likely be found. Given that the tribunals are not embedded in any established tradition of their own and sail in uncharted waters in many respects, considerations of procedural and organisational efficiency must be given an important role in the construction of procedure. The considerations and insights of the parties, who will most likely be better familiar with the situation on the ground than the court, can prove material. Allowing the parties and possibly other procedural participants whose status is affected (e.g. victims and their legal representatives) an opportunity to be heard as to the applicable procedure facilitates the acceptance of the rules eventually adopted than one-sided impositions, even where such rules are still not fully consensual. This would also help avoid the unnecessary litigation aimed at clarifying the rationales behind the procedures and the modalities through which those are to work. Ultimately, the elaboration of the trial procedure through, and as a result of, consultation involving the Trial Chamber, the parties and the participants is a proven antidote to the perceived deficit of legitimacy and democratic accountability associated with the procedural law-making by the judges.\footnote{On this issue, see Chapter 1.}

The importance of consultation in devising trial process is, of course, been grafted onto the ICC procedural regime, whereby the parties are expected to come up with proposals for the conduct of trial in case the Presiding Judge does not issue directions, and where the parties are in disagreement, the Presiding Judge shall issue such directions.\footnote{Art. 64(8) ICC Statute; Rule 140(1) ICC RPE.}

The idea of procedural rule-making as a consultative process was nothing new at that stage. Starting from the first trials, the Trial Chambers in the \textit{ad hoc} tribunals have requested the parties’ submissions on various procedural issues during status conferences and otherwise\footnote{Opinion and Judgement, \textit{Prosecutor v. Tadić}, Case No. IT-94-1-T, TC II, ICTY, 7 May 1997, para. 19 (‘This being the first full trial conducted by the International Tribunal, and in view of the fact that counsel came from a variety of national jurisdictions, the Trial Chamber sought to involve the parties in discussion of}
conduct of trial proceedings. These measures, helpful and necessary as they are, were not sufficient to shield the tribunal judges’ procedural lawmaking process from challenges based on the alleged lack of legitimacy. These challenges could have been avoided, at least in part, if the parties had had a greater role in the adoption and amendment of procedural rules by the judges and/or if the process has been more consensus-oriented and less of a unilateral imposition, especially on issues going to the nature of the process and key elements of the parties’ procedural status.

This has been different at the ICC where the consultation arrangement is formally recognized as part of the regime for procedure-creation. This appears to have worked relatively well so far—perhaps, better than may have been expected by the early commentators\(^{447}\)—not least because the judges eschewed the attitude of navigating around it and imposing procedures on the parties unilaterally. The elaboration of trial rules organized as a consultative and participatory process has arguably helped avoid tensions due to discrepant interpretations of rules or growing inconsistencies over time, without foreclosing departures by the same or other Chambers in the appropriate circumstances in the future. While it has required additional time to be invested in the devising of trial standards, the consultation method eventually worked to enhance the legitimacy of those rules and practices that were adopted and paid off by reducing the prospects of litigation seeking to contest the applicable procedure. If one is to compare the approaches taken by various Trial Chambers to devising the trial process, the approach consisting in the adoption of a comprehensive decision covering all principal issues of the organization of trial (the approach by Trial Chamber II in *Katanga and Ngudjolo*) is to be preferred to the method of incremental clarification of such issues as they arise through a series of written decisions and oral resolutions (such as was done by Trial Chamber I in *Lubanga*). The former approach is more conducive to legal certainty and helps avoiding confusion which may result from the regulation of the trial regime being fragmented over several decisions adopted at different stages, and from the trial hearings taking their course while some of the parameters of the trial regime remain *in limbo*.

The second possible measure to contain the ‘anarchical’ pluralism of the ‘variable model’ would be to foresee and to spell out, as a part of the procedural framework (in the RPE or in subordinate instruments and practice directives), several pre-defined avenues available to the Trial Chamber in determining the trial regime and, additionally, to indicate what conditions and circumstances are relevant for its exercise of discretion. In broad terms, this approach is embodied in the STL’s trial framework, which links the role to be adopted by the Trial Chamber in respect of witness examination to the state of the file it receives from the Pre-Trial Judge.\(^{448}\)

A non-exhaustive set of additional considerations potentially relevant to the determination of the optimal avenue could be envisaged, including those relating to the quality of evidence, category of witnesses, and the expected fact-finding impediments. Presenting a Trial Chamber with choice between several ready-made trial models, elaborated down to specifics while leaving room for reasonable flexibility, would ensure transparency of the exercise of determining the procedure to be applied. This would to some extent qualify judicial leeway in framing instructions for the conduct of trial while

---

447 Chapter 10. See e.g. *supra* n 434.
448 Art. 20(2) STL RPE; Rule 145 STL RPE. See further section 4.2.3 and Chapter 10.
providing judges with useful guidance and alleviating their quasi-legislative burden. By setting out criteria relevant to determining the preferred trial model, this approach would guarantee procedural certainty to the participants, whereas the matters that remain to be decided within the chosen framework could still be subject to consultation with the parties. Despite the more limited scope of matters to be set by consultation under this scenario, the advance notice to the parties about the rules to the presentation of evidence would go some way to preventing side litigation on procedure.

5. CONCLUDING REMARKS: INTERNATIONAL TRIAL ADRIFT AND PROSPECTS OF COHERENT TRIAL CULTURE

At the close of this Chapter, the objectives set at the outset of the book—the detailed examination of international criminal trials and making a step towards the normative theory of international trials—have to a large extent been completed. The Chapter reappraised the methodological framework for international criminal procedure offered in Part I and synthesized the insights gained from its application in Part III. The relevance of this ‘meta-theoretical’ account of international criminal procedure possibly transcends the topic of the trial phase. But the exercise of reappraising the evaluative criteria adopted early on (‘human rights law’; ‘goals of international criminal justice’; and ‘efficiency’) in light of their potency as determinants of international criminal procedure was meant solely to consolidate and clarify the normative foundations for the trial theory.

The exposition of the theory itself has focused on the nature and organization of the international criminal trial. Trial, as it emerges from that exposition, is viewed primarily as a legalist event embedded in the liberal system of international criminal justice. In addition, as a nod to the law-and-society perspective, the nature of trials as socio-legal events is recognized. In cases dealt with by the tribunals, trial even can be deemed a ‘ritual’ through which the disparate international community attempts to define its own self. The trial process before the tribunals unavoidably encompasses elements of ritual and theatre that are bound to exert far-reaching external effects on broader audiences outside of the courtroom. But the primacy of the legalist component entails that, while being what they are, trials must be run solely with view to discharging, in a fair and expeditious manner, their primary function: the establishment of forensic facts and truth-finding in accordance with the legal framework. For international trials to stay at a safe distance from their bad cousin, ‘show trials’ which loom in every atrocity trial, legal process should run its course unimpeded by ‘ulterior purposes’. Especially the judges should not have regard to the broader goals of the project and incidental sociological effects of trials, save for a clear and consistent—and yet incidental—‘didactic’ message of procedural fairness.

The book’s findings regarding the optimal organization and structure of trials, recapped in this Chapter, are somewhat less assertive and might appear unsatisfyingly agnostic. International criminal trials are ‘adrift’. The notions about the optimal trial model are in a state of flux in relation to domestic reference points. That model tends to be less defined by law in advance and over time has become increasingly amorphous, varied by tribunal and even by individual chamber, and context-specific. The effect of this ‘postmodern suspense’ in respect of trial arrangements fits into the general tendency in international criminal procedure towards indeterminacy and flexibility. More than anything, its evolution has been driven by pragmatism and oriented at arriving at fair and workable responses to unique situations in which international criminal justice finds itself.

In defining the procedural law, the institutional circumstances and forensic needs of trials have required the courts to break with—and occasionally to adhere to—notations drawn from national legal traditions, depending on convenience and in any event adjusting those notions to the relevant circumstances and the imperative need to guarantee fairness.
Chapter 12: Towards a Normative Theory of International Criminal Trial

Constructed by judges and/or international negotiators of the building blocks from national procedural traditions, international criminal procedure is akin to a new edifice built of bricks taken from elsewhere and yet looking dissimilar from the antecedents. With the ‘architectural plan’ of national criminal procedure not being followed, international trials may not be expected to replicate the logic and structure of domestic solutions in full. The premise for the theory is that the autonomous—sui generis—nature of international criminal procedure is a fact. However, this overused label is descriptive, vague and potentially misleading. It says little about what comes, much less what should come, under it in terms of specific solutions, and creates a wrong impression of a homogeneous type of procedure.

As it relates in fact to multiple entities endowed with pluralistic procedural laws, each being unique and sui generis in various ways, the question arises as to the causes and nature of pluralism, driving forces behind it, and the prospects of harmonization within the sui generis bag. Thus, the universalist pull of human rights law is imperative and superior in its normative force. But its traction as an external gap-filler and a source of conclusive guidance for compiling the optimal trial model has been rather tenuous because the tribunals bear the burden of forging their own human rights regime. Similarly, the goals of international criminal justice have not been meant to operate as a charismatic determinant and a strong axis for the consolidation of trial arrangements around a single model. There is neither a direct link nor deterministic relationship between the socio-political goals and the notion of the best procedure. One who expected straightforward procedural answers regarding the optimal trial paradigm will be disappointed to find that institutional goals give rise to multiple and often contradictory considerations. If at all, they provide only limited and ambiguous directions for procedural reform, including in matters such as the structure and chronology of the trial process.

By contrast, the pragmatic parameter of operational efficiency—less celebrated by the normative discourse in ICL—has had a strong traction as a determinant of international criminal procedure. It has exercised a powerful gap-filling function and pulled the development of that law in a specific direction. As a matter of ‘efficiency’, one might expect that the tribunals’ similar substantive law, similar fact-finding problems, and similar pressures and constraints would prod them gently to adopting an (almost) identical procedure. However, the concerns of efficiency and the tasks of devising a workable procedural law have fed the pluralism of trial arrangements, not their convergence into a single synthesized trial style. As the driving force in the evolution of procedural law and practice, pragmatism and efficiency are not to be counted on for sustainable and permanent harmonizing effects. On the contrary, save for opportunistic and temporary uniformity for the sake of convenience, these normative forces tend to operate against one-size-fits-all solutions. They militate against adherence to specific (domestic) models as a matter of principle and without strong practical reasons and instead favour flexibility and variability. Despite superficial similarities in the operational contexts of various courts, the consequential differences in institutional frameworks, operational contexts, and practical challenges effectively slant the idea of a fully converged trial system. Undeterred by the light touch of occasional and weak pulls towards harmonization, procedural pluralism continues to reign the day in the domain of international criminal justice. Whether one likes it or not, pragmatic framing of trial procedure, its confusing amorphousness in domestic terms, and the constructive variability—not be mistaken for unmanaged ad hocery—constitute the strongest trends for the future.

As a result, the trial model sketched in this Chapter, going through the structure of trial proceedings from preparatory (pre-trial) to deliberations and judgment, neither hinges upon the concept of a party-driven contest, nor upon that of a judge-driven inquest. This tracks openness in the structure of investigations as a unified effort or multiple parallel investigations conducted by parties and participants. Flexibility is beneficial to maintain
given that different contexts in which international crimes are investigated give rise to different challenges. Hence, the procedures for the collection and presentation of evidence should not be squeezed into a single mould. Instead, the argument is that they should be made more sensitive to operational and fact-finding challenges faced in different (post)conflict settings. Several options should pragmatically be accommodated so that one of them can be opted for by the court in consultation with the parties and depending on the circumstances. This provides the courts with tailored means for the execution of truth-finding mandates in a more efficient and fair way.

In line with this approach, the Chapter argued the case for a ‘variable model’ for presenting evidence and addressed both its advantages and risks. The conclusion is that the approach aimed at managing and ordering pluralism of trial arrangements by putting it to service of diverse epistemic needs posed by each case should be preferred to devising a uniform presentation model. Pluralism of trial practices in international criminal justice is not problematic per se, since any risks posed by the variable approach in terms of predictability and legal certainty can be neutralized in specific cases. This can be achieved through consultations between the court and the parties and/or through spelling out by law of several avenues the court may choose to follow when tailoring the applicable trial procedure.

In other areas, however, a number of definite and unequivocal approaches and solutions have been identified and recommended for the adoption as part of the normative theory of international trials. The sequence of phases of trial process may remain unchanged, but it is suggested that in contested cases, deliberations on sentencing should be held only after giving parties the opportunity to make relevant submissions where the guilty verdict has been rendered. In the trial preparation phase, the Chapter has advocated the imperative need for robust, consistent, and meaningful case-management by the judges both in the pre-trial phase and during trial. Judges ought to be granted as much as access to the results of partisan investigations as is required in light of the objective of effective management. Moreover, they are to be prepared to exercise managerial powers confidently and creatively whenever appropriate because this is the only realistic way of dealing counteracting partisan excess and their lack of procedural self-control. Despite the ambivalence of the managerial judging experiment in the ad hoc tribunals, its fate in international criminal law is far from sealed. It is expected to deliver better results if incorporated into the procedural frameworks from the outset, as opposed to piecemeal and frantic reforms that only lead to confused and half-hearted enforcement.

The status of judges at trial combines the roles of both effective and pro-active managers and responsible truth-finders. The latter role should be exercised in conformity with the overall procedural framework and the character of trial process as party-led or judge-driven. This by no means downgrades the importance of the autonomous truth-finding mandate of judges. The additional evidence must be called and additional questions must be put to witnesses whenever necessary for establishing the truth. However, the party-driven character of the process comes with some fetters relating to the way, not extent, to which this fundamental mandate is to be practiced. While fully pursuing the truth, judges should exercise care to perform truth-finding function in the manner which leaves the initiative to the parties. The parties should be given a reasonable and equal opportunity to present their respective cases and their truth-seeking efforts should not be subverted by ill-timed and ill-framed evidentiary interventions and interrogation from the bench. Unless there are compelling circumstances, the judges may—and shall, if appropriate—ask questions and call evidence after the take by the parties.

The position of a defendant throughout trial is another cross-cutting issue highlighted by the normative theory. It was argued that an overly rigid framework that substantially limits and effectively rules out the defendant’s personal participation, not much unlike with ‘trials by lawyers’ at common law, is an oddity in this context. It is
recommended to provide the accused with a broader range of procedural avenues for participation alongside counsel and for submission of information, beyond the traditional role as a witness in his own case and making an unsworn statement. In particular, there should in principle be a possibility of making relevant—and only relevant—statements throughout the process or at least at certain key moments (‘the right to be heard’) upon leave and under control of the Chamber. Such interventions may be followed by judicial follow-up questions and/or preceded by a solemn declaration, with the choice being left to the defendant in consultation with counsel. In certain circumstances (e.g. special expertise and personal participation in the events in issue), allowing a represented accused to partake in the questioning of witnesses, next to the questioning by counsel, is warranted given the potential contribution of such participation to the clarification of facts and testimony.

In this regard, vigilant control by the bench and the need to safeguard fair trial rights cannot be emphasized enough. The empowerment and autonomy of the accused are synonymous neither to uncontrolled and counterproductive nor to misinformed and involuntary participation. Subject to this caveat, a greater flexibility in this regard would help prevent the accused from being side-lined and muted in his own trial, which is particularly undesirable where he is both able and willing to meaningfully contribute to examining evidence and/or to clarifying the facts not as a witness but as a party. The risk that the trial might be used as a political platform or for other improper ends can be contained by able and timely judicial intervention. Benefits of the proposed approach include: dismantling of artificial barriers in the communication between the court and the accused; providing judges with the potentially relevant information on the matters discussed at trial and with additional insights about the person of the accused; compensating for the de-personalization of the trial run by lawyers by putting a ‘human face’ on it; and enhancing the perceptions of legitimacy of the proceedings and facilitating broader acceptance of the verdict.

Further to a limited range of issues on which a preference has been expressed, the general tone of the normative theory of the trial is in keeping options open, reconciling with the inevitable degree of indeterminacy, and recognizing the potential of pluralism as a method in international criminal procedure. Indeed, on some issues, indeterminacy may well prove temporary. Procedure governing international criminal trials is in the making and still evolving as courts are struggling to devise suitable solutions by trial and error. The ‘normative theory’ is but a snapshot. Like efforts to develop actual trial procedure, it ‘is more akin to an on-going project of construction, refinement and maintenance … than a one-off design challenge to produce a definitively timeless procedural classic’.

The persisting cognitive dissonance within the discipline of international criminal procedure should be employed as a springboard for the progressive development of the law.

Is such ‘progressive development’ bound to lead to the diminution of procedural pluralism in the domain of trial process and the consolidation of a single hybrid trial model? This relates more generally to the prospect and viability of a coherent legal culture whose emergence in the tribunals’ context has been precipitated by some scholars. The unique synthesized trial style, implicit part of a ‘truly mixed, sui generis procedure’ may be declared a fact of reality—if one looks at the ad hoc tribunals; or it might emerge soon, it is said, provided that the procedural actors (judges and counsel) are knowledgeable about both common law and civil law and are prepared to transcend the grand divide and to give up loyalties to their background.


450 Ambos, ‘The Structure of International Criminal Procedure’ (n 439), at 503 (‘national boundaries in criminal procedure may be overcome with increasing experience and practice in a system of international criminal justice which is heading towards a harmonic convergence of both, the ‘inquisitorial’ and ‘adversarial’ systems.’). See also sources in n 174.
Chapter 12: Towards a Normative Theory of International Criminal Trial

Perhaps the boundaries between the national traditions can indeed be transcended as the tribunals gain experience. But one should feel sceptical, on the experiential basis of the same institutions, that the ‘harmonic convergence’ can be effected in international criminal justice and that the holy grail of a coherent trial culture is ever to be found without a radical systemic change. According to Findlay,

synthesis at the international level is a matter of convenience, or at least compliance rather than any recognition or commitment to a new compatibility. The political imperatives fuelling the international tribunals ... are not tolerant of disparate procedural niceties standing in the way of trial outcomes. Therefore, what now seems to be a triumph for synthesis may be more reliant on the political moment of internationalisation rather than on any real and significant developments towards a new, fused procedural tradition.\(^{451}\)

It is incontestable nowadays that the mandatory terms of ‘socialization’ for international criminal practitioners—judges, lawyers, investigators, and court administrators—do not allow room for irrational suspicion about other legal cultures which was characteristic at the earlier stages of the formation of international criminal procedure. Back then, the oppositional mode of interaction between the proponents of different traditions tended to be perceived as an unavoidable and tolerable fact. Indeed, it catalysed the thinking and debate on the procedure and was the first necessary step in the collective quest for the coherent culture. Over time it was ousted by the ethic of ‘common civility’, which encourages a constructive dialogue, learning and exchange between different national traditions. This ethos is more pragmatic and amenable to flexibility and emancipation from established domestic frames. It is more pluralism-friendly and emphasizes the importance of the genuine mutual respect between conversing (and towards under-represented) traditions. But in terms of its objectives and prospects of success, it is still a question whether the dialogue governed by this ethic amounts to a true attempt at deconstructing and tackling the linguistic, epistemological, ideological, and cultural differences at the most basic level.\(^{452}\) Is its approach so elementary and molecular as to enable one to build a totally non-eclectic procedure, a fully coherent whole?

The idea of a fully coherent trial culture emerging is stimulating and invigorating (as many other utopian ideas). However, the comparative discourse that is at service of the procedure-amalgamating exercise at the tribunals is conducted on the terms and in the circumstances making the emergence of such a culture unlikely. The sides to the debate are now certainly listening to one another and are doing so with an unprecedented level of attention. But this does not guarantee that they are meaning and hearing the same thing – this is still a dialogue, not a monologue. If the coherent culture were to emerge, it would have already done so towards the end of the two decades of conducting a cross-cultural conversation in the context of the \textit{ad hoc} tribunals. Arguably, the forging of a completely homogeneous legal culture at the tribunals requires a whole new generation of international criminal lawyers who bear one single identity instead of being torn apart between the two; who have been brought up exclusively in the amalgamated legal culture capable of propagating itself; who know little to nothing and do not need to know about the watershed between common law and civil law; and who do not notice its hybrid nature but are convinced of its wholeness and self-sufficiency. Obviously, such conditions are impossible to replicate and the whole scenario is unthinkable and even inacceptable. Most

\(^{451}\) Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 52-3.
\(^{452}\) Bohlander, ‘Radbruch Redux’ (n 46), at 405 and 410 (questioning the accuracy of ‘the impression that everyone is \textit{already} taking to everybody in a fully equal and sophisticated comparative conversation.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 38), at 50 (‘for synthesis at the level of ideology, the challenge of fair trial requirements must be addressed. And this needs to be done being aware of, and resistant to, the common and civil law procedural practice to speak one language when it comes to principle and to tolerate contradiction without challenging that principle.’); Skilbeck, ‘Frankenstein’s Monster’ (n 55), at 462.
international criminal lawyers are still educated in national law, have practiced domestically, and are the fortunate holders of both primary and acquired professional identities.

What remains is the hope that in the continuity of amalgamation and construction of a coherent legal culture—whether it is achievable or not—the dialogue will continue to be conducted with genuine mutual respect. Only then can it result in the ever increasing approximation, understanding and appreciation of the differences and similarities, being the points of potential divergence and convergence. But, at present, it is clear that the procedural pluralism is here to remain – both as a matter of cross-jurisdictional diversity among the courts and at the level of the normative structure and nature of international criminal procedure. Instead of trying to shake it off and investing ourselves fully in the alluring grand project of a ‘coherent trial culture’, embracing the pluralist reality and trying to get a grip over it, to the extent necessary and feasible, is a more constructive solution. The operation of a continuum of flexible trial systems in international criminal justice requires us to learn how to harness the risks posed by pluralism, notably that of legal certainty, and how to enlist its advantages for maximizing the fairness and efficiency of procedure in every forensic context in which international criminal tribunals are called upon to intervene. The questions of how successfully these challenges will be tackled and whether the alternative avenue of striving for uniformity and convergence will eventually prevail are subjects for future observations and research.