Defence counsel in international criminal law

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IV
INTERNATIONAL CRIMINAL PROCEDURE IN PERSPECTIVE

4.1 INTRODUCTION

Chapter II portrayed the different ways in which the position of defence counsel developed in the civil law systems of Continental Europe and in the Anglo-American common law context.[1] The nature of proceedings may have substantial impact on the position and role of defence counsel in criminal proceedings. For instance, the principle of equality of arms in a common law system as opposed to a civil law system involves different implications. In common law criminal proceedings, this principle is not just an aspiration. Procedurally, the prosecution and the defence are virtually on a par. In a civil law system, the procedural roles of the prosecution and the defence are further apart.[2] Another example is the right of an accused to self-representation instead of representation through defence counsel. The accused has more freedom to invoke this right in a common law system than in a civil law system.[3] As a result of defence counsel's differing role in common law and civil law systems, different professional standards will apply. In a party-driven, common law system, counsel is generally considered more active and autonomous than counsel in a civil law system, in the investigative stage as well as when presenting evidence in court and cross-examining witnesses. Before an international criminal court, professional standards of defence counsel's conduct may not be entirely clear from the outset and may deviate from the professional standards in counsel's domestic jurisdiction.[4]

A proper evaluation of the position of the defence in international criminal proceedings requires determination of the nature of those proceedings. A significant problem in this respect is that criminal justice systems of the International Criminal Court and the International Criminal Tribunals of the Former Yugoslavia and Rwanda lack a clear philosophy. The initial set of the ICTY's Rules of Procedure and Evidence, the main source of its criminal procedural law, was drafted in only four months by the ICTY's judges, with the help of members of the Office of Legal Affairs of the United Nations and proposals from states and several non-governmental organizations (NGOs).[5] The first set of the ICTR's RPE were, to a large extent, based on the RPE

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[1] See *supra,* Chapter II, paragraph 2.2.
[2] The interpretation of the principle of equality of arms in international criminal law will be further elaborated upon in Chapter V.
[3] See Chapter VII, paragraph 2.
[4] Chapter VI will elaborate on the issue of professional standards of defence counsel further.
[5] See ICTY First Annual Report (1994), § 55.

of the ICTY.[6] As a result, the procedural law of both Tribunals comprises elements of different existing legal systems.

This Chapter explores whether or not the nature of international criminal proceedings may provide an overall theoretical explanation for difficulties defence counsel encounter whilst practising at international criminal courts. An effective evaluation requires a frame of reference. It has been argued that the international criminal justice system is a system *sui generis*. In *Delalić et al*, the ICTY Trial Chamber considered:

> '[T]he Judges adopted a largely adversarial, instead of the inquisitorial, approach in the Rules. However, in formulating the rules, elements of both the civil and the common law systems capable of promoting justice were considered and adopted. Hence, it is more appropriate in the interpretation of the provisions of a rule to rely essentially on the words of the rule as promulgated, rather than to assume an *a priori* position as to the origin of the rule. A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it *sui generis*'.[7]

It has been similarly argued that each concept – whether or not it is derived from a national legal context – should be 'discussed from scratch again [….] and acquire its own meaning and its own consistent place in the new system'.[8] Whether or not this is accurate, it does not explain why a certain approach with regard to the right to legal assistance, to counsel of the accused's choice, to the applicability of the principle of equality of arms, to the mechanisms regulating the conduct of defence counsel or to the right of an accused to represent himself would be legitimate.

Procedural approaches in international criminal justice are often being justified through reference to existing procedural systems, belonging to two main legal families: the adversarial procedure of the common law system and the inquisitorial procedure of the civil law system.[9] Initially, the legal procedure of the *ad hoc* Tribunals was dominated by adversarial elements.[10] However, while they developed a substantive body of case law, and while their Statutes gave their judges the power to adopt and amend the Tribunals' Rules of Procedure and Evidence, [11] numerous new characteristics were introduced into the Rules. Many of these amendments have been characterized as being of an inquisitorial nature.[12] Langer deems that the procedural

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[6] According to Article 14 of the ICTR Statute, the ICTR Judges were to adopt the ICTY's Rules of Procedure and Evidence 'with such changes as they deem necessary'.

[7] See ICTY Tr. Ch., Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, *Delalić et al.* (Case no. IT-96-21), 1 May 1997, § 15.

[8] Haveman, R., et al. (ed), *Supranational Criminal Law: A System Sui Generis* (Antwerp, Oxford, New York: Intersentia, 2003), p. 5.

[9] It is not contested that other legal families exist.

[10] This was acknowledged, for instance, in the ICTY First Annual Report (1994), par. 71 *et seq*.

[11] See Article 15 ICTY Statute, in conjunction with Rule 6 ICTY RPE; Article 14 ICTR Statute in conjunction with Rule 6 ICTR RPE. Rule 6(A) provides that *proposals* for amendments can also be made by the Prosecutor or the Registrar.

[12] See, for instance, Mundis, Daryl A., 'From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence', 14 *LJIL* (2001), pp. 367-382; Ambos, Kai, 'International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?' 3 *International Criminal Law*

system of the *ad hoc* Tribunals has evolved into a system that closely resembles the so-called 'managerial judging model' of USA civil proceedings.[13] To unravel a procedural system, it can be helpful to identify its constituent distinctive elements from existing legal systems. However, it may prove difficult to establish exactly what elements originate from which procedural system.

Legal theorist Damaška is not satisfied with the most often-used dichotomy of common law (or accusatorial) and civil law (or inquisitorial) systems, since these terms depict a variety of meanings and implications. To conduct successful research on comparative legal procedure 'a suitable typology' is essential.[14] Damaška produced a typology for legal procedural systems of his own. One of his extensive comparative law works, *The Faces of Justice and State Authority*,[15] explores the existence of a correlation between procedural systems and the organisation, legitimacy and objectives of a state's government or authorities. One of Damaška's assumptions as to the basis of his ideal types is that a government's perception of its role is decisive for its perception of the purpose of its justice system. The purpose of justice will to a large extent determine the structure and features of a state's legal procedure.[16]

Damaška constructed two distinctive sets of basic models of legal procedure. The first set consists of the policy-implementing and conflict-solving procedure. These two models each match the objectives of an archetype of government, the 'activist government' and the 'liberal' or 'laissez-faire' type of government which Damaška calls the 'reactive state'.[17] Each model represents 'a particular conception of the objectives of justice'.[18] In an activist state, where state interests prevail over individual interests,[19] the justice system is considered an instrument to implement policies.[20] This objective is most likely to be achieved through a state-official-controlled inquest.[21] The reactive state's objective is to remain neutral. The only goal of its justice system is to help its citizens resolve their disputes in a fair manner, even where the state is a party, as in criminal proceedings.[22] A reactive state would only intervene in a conflict which cannot be resolved by the parties themselves. Its conflict-solving objective may be most successfully achieved by organizing proceedings as a contest in which two adversaries will each present their case to a passive judge who allows them plenty of

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Review (2003), pp. 1-37; Orie, Alphons, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC', in Cassese, Gaeta and Jones (ed), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, 2002).

[13] See Máximo Langer, 'The Rise of Managerial Judging in International Criminal Law', *The American Journal of Comparative Law*, Vol. 53, 2005, pp. 835-909, available at SSRN: http://ssrn.com/abstract=765744.

[14] Cf. Damaška, Mirjan R., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), p. 241.

[15] *Ibid.*

[16] Cf. *ibid.*, p. 11.

[17] Cf. *ibid.*, for instance, p. 72.

[18] See *ibid.*, p. 182.

[19] See *ibid.*, p. 86.

[20] See *ibid.*, for instance, p. 82 and 84.

[21] See *ibid.*, p. 87.

[22] See *ibid.*, p. 73-75.

room.[23] Paragraph 4.2 examines which role the participants in each of these two procedural models have, most particularly defence counsel.

The second set of Damaška's procedural models is based on the structure of authority: the hierarchical ideal and the coordinate ideal. These two models embody distinctive ideals of officialdom.[24] The hierarchical ideal is derived from a classic bureaucracy,[25] where proceedings consist of several stages and decisions are subject to superior review.[26] Procedural functions solely belong to officials. As defence counsel is not a state official, he may not interfere with the procedures run by the officials, for instance, by conducting his own investigations.[27] Were counsel to interview a witness in the hierarchical ideal, 'his testimony is viewed with great suspicion'.[28]

In the coordinate ideal, lay individuals perform official duties, mostly on a temporary basis. Authorities operate on one level as they belong to a 'single echelon of authority'.[29] This also applies to judicial authorities.[30] Superior or appellate review is sporadic.[31] There being no specialised officials to produce, preserve and retrieve documents, live testimony is preferred over written testimony.[32] Absent official investigators, it is perfectly normal, even necessary, in the coordinate system for private parties to prepare the evidence material for trial and to present and confront one another with it before the passive and unprepared trial judges.[33]

Whereas the "coordinate" style of authority that operates at one level is most suitable for a reactive government, the "hierarchical", bureaucratic style of authority is most likely to be embraced by an activist government.[34]

According to Judge Shahabuddeen: 'Judicial traditions vary and the Tribunal must seek to benefit from all of them.'[35] It would be beyond the scope of this study to work out the ideal procedural system for international criminal courts to adopt. Any such determination for a state is also beyond the scope of *The Faces of Justice*.[36] Damaška's theories in *The Faces of Justice* merely demonstrate whether procedural arrangements may work more smoothly when they are in line with the goals of justice that are pursued and with the division of authority amongst officials and private parties.[37] Damaška's models have a prominent place in this Chapter because their characteristics may assist in disentangling and analyzing the different components that

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[23] See *ibid.*, p. 80.
[24] See *ibid.*, for instance, p. 16 and 182.
[25] Cf. *ibid.*, p. 17.
[26] Cf. *ibid.*, p. 48.
[27] Cf. *ibid.*, p. 54.
[28] *Ibid.*, p. 53.
[29] Cf. *ibid.*, p. 16.
[30] Cf. *ibid.*, p. 57.
[31] Cf. *ibid.*, p. 59 and 60.
[32] Cf. *ibid.*, p. 61.
[33] Cf. *ibid.*, p. 63.
[34] Cf. *infra*, note 91.
[35] ICTR App. Ch., Decision (Prosecutor's Request for Review or Reconsideration). Separate Opinion of Judge Shahabuddeen, *Barayagwiza* (Case No: ICTR-97-19-AR72), 31 March 2000, § 68.
[36] Cf. Damaška (1986), *supra* note 14, p. 12.
[37] Cf. *ibid.*, pp. 13, 14.

coexist in legal procedural systems.[38] His theories provide a more neutral referential framework to discuss procedural issues at international criminal courts than the one provided by the common law/ civil law dichotomy. His procedural ideals are independent of this dichotomy.[39] Nevertheless, it cannot be denied that the features of the conflict-solving and coordinate models resemble those of the common law system of the United States, while many features of the policy-implementing and hierarchical models can be recognised in the civil law systems of continental European countries. That international criminal procedure does not equal one of Damaška's models is unimportant, as no existing legal system is purely policy-implementing, or conflict-solving, nor any state answers one hundred percent to the coordinate or hierarchical ideal.

Damaška's most important assumption in the light of this chapter is that views on the purpose of justice influence the choice of procedural arrangements.[40] It will be determined what goals of justice the *ad hoc* Tribunals and the ICC have pursued and to what extent these goals match these courts' procedural arrangements. In addition, it is determined whether the way authority is structured at these courts matches the organisation of its proceedings and the role of the participants in these proceedings. Therefore, the objectives that underlie the justice system of the *ad hoc* Tribunals and the ICC and how authority is structured at these courts will be analyzed in paragraphs 4.3.2 and 4.3.3. Paragraph 4.3.4 analyzes how the proceedings of the *ad hoc* Tribunals and the ICC are organized and discuss the nature of its constituent elements in light of Damaška's theories. Before going into these substantive issues, paragraph 4.3.1 will examine the degree to which Damaška's theoretical models that are inspired by national legal systems can be successfully applied to the context of international criminal justice.

The main purpose of Part II of this study is to determine whether Damaška's theories from *The Faces of Justice* may shed some light on the understanding of specific issues concerning the position of the defence in the context of international criminal justice. It should determine as to whether there is a discrepancy between the procedural system of the *ad hoc* Tribunals and the ICC and both the goals they strive to attain and their structure of authority. Concluding this Chapter, paragraph 4.4 examines the degree to which tensions are likely to result from any such discrepancies. International criminal courts are still in the process of developing their *sui generis* approach to the procedural issues before them. The central question to be addressed in the remaining part III of this study is to what extent and how possible tensions may affect the position of the defence. Or, more generally, to what extent the clashes between procedural arrangements of an inquest or contest model and its accompanying expectations of the defence may have an impact on the functioning of defence counsel at international criminal courts.

Damaška's conflict-solving and policy-implementing models require more explanation than his coordinate and hierarchical ideals. To refresh our memory and to ensure that the remainder of this study will be comprehensible, also for readers

[38] Cf. *ibid.*, p. 12. Damaška's models apply both to criminal and civil procedure. This study will focus on his views on the former.
[39] Cf. *ibid.*, p. 69.
[40] *Ibid.*, p. 11.

unfamiliar with *The Faces of Justice*, the most important features of the former models in light of this study will first be rehearsed.

4.2 DAMAŠKA'S POLICY-IMPLEMENTING AND CONFLICT-SOLVING MODELS

4.2.1 The Conflict-Solving Model

In Damaška's neutral reactive state, common interests or state interests are non-existent.[41] Autonomy is a core value. Individuals pursuing their own interests, may indirectly benefit all others.[42] Legal proceedings of a reactive state purport to intervene as little as possible in the private interests of individuals.[43] State interference in a dispute is a solution of last resort. A neutral state is unable to mediate and suggest a middle ground to litigants. As a result, proceedings are likely to take the form of a two-sided party contest with a neutral judge. Therefore, the proceedings of a reactive state are called conflict-solving or contest proceedings. As individual autonomy prevails, out-of-court settlements that will make proceedings redundant are encouraged.[44] Citizens can waive their rights, and use these as 'bargaining chips' to negotiate a solution.[45]

Because personal autonomy is vital, all parties, including criminal defendants, have substantive leeway to influence the form of their proceedings. For instance, in the contemporary American system, which resembles the reactive system, by entering his plea of guilty or not guilty, the criminal defendant chooses his form of proceedings: a sentencing hearing, without a trial, or a fully fledged jury or bench trial.[46] The personal autonomy of the criminal defendant is also reflected in his right to represent himself.[47]

Where proceedings take the shape of a contest, a judge or jury is likely to decide in favour of the "winning" party. Even though the best performer may not always represent the most accurate outcome according to substantive law,[48] the procedural objective of dispute resolution is more important than the outcome of the solution itself.[49] According to Damaška, '[t]he possibility that extreme forms of laissez-faire rest on conceptions of the truth as more a product of debate than as a mirror of

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[41] See *ibid.*, p. 74.
[42] Cf. *ibid.*, p. 75.
[43] See *ibid.*, p. 78.
[44] See *ibid.*, p.79. Cf. Justice White in *Brady v. United States*, 397 U.S. 742 (1970): 'The State to some degree encourages pleas of guilty at every important step in the criminal process.'
[45] *Ibid.*, p. 99.
[46] *Ibid.*, p. 100. Cf. *Brady v. United States*, *supra* note 44, in which Justice White stated that 'the [guilty] plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge.'
[47] *Ibid.*, p. 94. The application of this right to international criminal proceedings will be extensively discussed in Chapter VII of this study.
[48] See *ibid.*, p. 101.
[49] Cf. *ibid.*, p. 103.

reality need not be conjectured.'[50] Without a doubt, prioritising individual autonomy will hamper "the quest for truth".[51]

Since decisions need to be procedurally legitimated, procedural rules must be fair and give each party an equal chance to win the contest. Both parties are therefore procedurally equal in a reactive state.[52] However, complete procedural symmetry is unlikely, especially in criminal cases. For instance, the prosecutor will not risk any punishment if the defendant is not convicted. Although there may be professional consequences. In addition, the prosecutor will never testify as a witness in his own trial and will have more control over the proceedings.[53] The reactive system aspires to provide procedural equality rather than actual equality of the parties. Actual differences do not require compensation.[54] If a judge intervened to compensate the actual inequality between parties, it would render him partial. Furthermore, it would weaken the contest model and the incentives that are naturally implied in it.[55] Having defence counsel will not enhance "procedural equality", as it will not change the procedural rights afforded to an accused, such as his right to call witnesses and to present evidence. Legal assistance will rather strengthen the "actual" equality of the accused vis-à-vis the prosecutor.[56] However, especially when an accused is incarcerated and has no legal training as a lawyer, having legal assistance may be the only way for the accused to stand an equal procedural chance to win the contest.

In a reactive administration of justice, a party is *dominus litis*.[57] Parties are driven by self-interest and can take proper care of proof taking.[58] As to disclosure, only information that is necessary for a fair contest must be disclosed. A disclosure obligation as to all the evidence would weaken the incentives of the contest system. To preserve the principle of party equality, disclosure obligations should be mutual. Consequently, where the defendant is not obliged to disclose, the prosecution can also keep information to itself.[59]

The role of the judge is to be unbiased and encourage the parties to vigorously defend their own arguments.[60] Only in exceptional cases will a judge intervene in the presentation of the evidence by the parties, to prevent that a party's meticulously prepared trial strategy will be ruined.[61] A judge's impartiality is highly

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[50] *Ibid.*, p. 123.
[51] *Idem.*
[52] Damaška (1986), *supra* note 14, p. 103.
[53] Cf. *ibid.*, p. 104. This was different in the Middle Ages, where the unsuccessful private prosecutor could be punished instead of the defendant (*Ibid.,* footnote 10).
[54] *Ibid.*, pp. 106, 107.
[55] See *ibid.*, p. 107.
[56] See *ibid.*, p. 109. This is the case for instance in the American system where a criminal defendant has a constitutional right to legal assistance by defence counsel based on the Sixth Amendment of the US Constitution. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Cf. *supra,* Chapter II, paragraph 2.2.1.
[57] *Ibid.*, p. 104.
[58] Cf. *ibid.*, p. 122.
[59] See *ibid.*, p. 132.
[60] See *ibid.*, p. 139.
[61] *Ibid.*, p. 125.

valued, even higher than the correctness of the resulting judgment.[62] In addition, judges need not be 'a repository of legal learning', but should simply absorb the parties' arguments with an open mindset.[63]

As mentioned, at the end of a party contest, the verdict does not necessarily accurately depict the truth. When dispute resolution is a priority, seeking the maximization of accurate fact-finding at the same time is forlorn.[64] To provide the contestants with 'a fair forum' with equal procedural chances is considered more important than an accurate outcome of proceedings.[65] Therefore, in a reactive environment, fairness prevails over justice.[66] One could also argue that fairness *is* justice.[67] As proceedings are not about accurate outcomes, an appeal opportunity is not self-evident in conflict-solving proceedings. Where a contest was conducted fairly, there will be no need to change the outcome, even if legal or factual errors were made.[68] A party that did not fully exploit a procedural rule, should bear the consequences thereof.[69]

That conflict-solving prevails over truth-finding in the reactive system is also reflected in its criminal proceedings. For instance, an accused cannot be forced to testify. To turn him into an object of his proceedings would make him lose control over his tactical interest as a party.[70] A defendant taking the stand will be treated as an ordinary witness. Nevertheless, as defendants may be more likely to protect their interest by lying than ordinary witnesses,[71] party misinformation is tolerated to a certain extent.[72] The same is true of pleas of guilty or not guilty. After an unsuccessful plea bargain, a defendant can still enter a plea of not guilty and subsequently have a regular trial.[73]

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[62] *Ibid.*, p. 136. As Damaška further clarifies almost 20 years later: fairness is 'pre-eminently a quality of procedure', whereas justice is 'pre-eminently a predicate ascribed to results'. Damaška, Mirjan, 'Negotiated Justice in International Criminal Courts', *JICJ* (2004), pp. 1018-1039, p. 1035 in footnote 28.

[63] Damaška (1986), *supra* note 14, p. 139.

[64] See *ibid.*, p. 123.

[65] See *ibid.*, p. 134.

[66] *Ibid.*, p. 136.

[67] For an extensive study as to the degree to which fairness amounts to justice, see Rawls, John and Kelly, Erin, *Justice as Fairness: a Restatement*, (Cambridge, Mass.: Belknap Press of Harvard University Press, 2001).

[68] Erroneous decisions will only lead to the right of appeal where they resulted from unfair or fraudulent proceedings. See Damaška (1986), *supra* note 14, p. 145.

[69] In the United States this goes as far as to consider the assistance of a defence counsel who has been sleeping during the trial of the defendant still 'effective assistance', as long as counsel was not unconscious for too long at moments that the interests of his client were at stake. See *Tippins v. Walker*, 77 F. 3d 682, 687 (2nd Cir. 1996).

[70] See Damaška (1986), *supra* note 14, pp. 126-127.

[71] *Ibid.*, p. 129.

[72] *Ibid.*, p. 130.

[73] *Ibid.*, p. 126, 127.

4.2.2 Defence Counsel in Conflict-Solving Proceedings

The role of defence counsel is important in contest proceedings because these proceedings are party driven. In a complex society, to ensure a winning legal case the assistance of a competent lawyer who can adequately present a case is a necessity. For this reason, skill and competence are important features for counsel in conflict-solving proceedings. In addition, legal assistance may help to settle a conflict out of court. Counsel's important role in the conflict-solving process makes it unheard of to refuse a party the right to counsel – even as to part of the proceedings.[74] On the other hand, as mentioned above, the principle of autonomy requires that legal assistance will not be imposed on parties, not even on a criminal defendant. The right to counsel of the accused's choice is vital.[75]

The role of counsel in the conflict-solving system is first and foremost to be an "*assistant to his client*". Within the limits of a fair contest, a lawyer may do anything to further his client's interests. As *dominus litis*, it is for the client to determine what these interests comprise, not for his lawyer. In terms of fact-finding, counsel must undertake anything that procedural rules permit. At trial, every "intellectually respectable" argument should be advanced. Even if it does not amount to the best legal interpretation, complicates the lawsuit or produces delay. Zealous advocacy is a must.[76] According to Luban, in the adversary system of the USA, zealous advocacy is 'the best way of impeding justice in the name of […] keeping the government's hands off people.' The defence counsel protecting the accused from the state is more important than obtaining accurate outcomes.[77] Nevertheless, in contest proceedings, a lawyer should not consider himself his client's alter ego. A lawyer who over-identifies with his client is considered worse than a lawyer identifying with the interests of the government. Therefore, in terms of ethical professional standards, apart from being his client's assistant, counsel is also considered an 'officer of the court'.[78] Counsel in a reactive state is likely to have more responsibilities, for instance, with regard to fact-finding and the presentation of (witness) evidence than his counterpart in an activist state where officials bear most fact-finding and evidence-preserving responsibilities.[79]

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[74] See *ibid.*, p. 141.

[75] See *ibid.*, p. 141. Damaška continues: "[P]arties must be free to hire and fire their lawyers, no matter how important the issues involved in the case or how skewed the proceedings become when a party chooses to manage his case personally." See pp. 141, 142. As to the scope of this right in international criminal proceedings, see *supra* Chapter II, paragraph 2.5. Cf. also Chapter VII on self-representation.

[76] See *ibid.*, p. 142. Nevertheless, some authors have contradicted the notion of an obligation of zealous advocacy in an adversarial setting. See, for instance, Luban, David, *Lawyers and Justice. An Ethical Study,* (Princeton, New Jersey: Princeton University Press, 1988) and Simon, William H., *The Practice of Justice. A Theory of Lawyers' Ethics* (Cambridge, Massachusetts, London, England: Harvard University Press, 1998). As to the issue of delaying the proceedings, Damaška has also advanced that for conflict resolution to be successful, delay, for instance, because of tactical inaction of parties, should be avoided. See Damaška (1986), *supra* note 14, p. 134

[77] See, Luban (1988), *supra* note 76, p. 63.

[78] See also on this issue, Chapter VI, for instance, paragraph VI.1.

[79] This is especially true where an activist state model is combined with Damaška's hierarchical style of authority, having at its disposal a machinery of officials.

Because of counsel's broader responsibilities, he is subject to ethical standards that prevent the abuse of his powers.[80]

In a reactive state's conflict-solving proceedings, even though counsel still needs the consent of his client for important decisions, in practice, the complexity of cases forces clients to rely more and more on their counsel. Damaška reasons that 'the lawyerization of party-controlled proceedings contributes to greater party equality'.[81] However, the extent to which a party can afford legal assistance will determine the quality of his legal assistance.[82] States that try to compensate the poor by assigning legal assistance will always set limits on the amount to be spent on a case.[83]

4.2.3 The Policy-Implementing Model

Damaška's other model state, the activist state, is optimistic and actively engages in 'material and moral betterment of its citizens.'[84] State policy can involve all spheres of social life.[85] Unlike the sceptic reactive state, it genuinely believes in its capacity to formulate the right goals and attain them through policies.[86] Activist law expresses a state's policies as an instrument of control of the acts and behaviour of citizens. The law is not fixed, so that where a goal cannot be accomplished, the law can be changed accordingly. For instance, where a harmful act does not match the description of a certain crime, provisions will be stretched until the description meets the act.[87]

The administration of justice in an activist state aims at implementing state policies through conducting trials. To this purpose, proceedings may better be structured as an "officially controlled *inquest*" than as a "privately controlled contest".[88] Therefore, the activist state's instrumentalist procedure is called "*the policy-implementing process*".[89]

The potential success of Damaška's policy-implementing scheme, as he admits, is largely dependent on the structure of authority that accompanies it. Ideally, it involves a substantial amount of officialdom, such as for instance a hierarchical bureaucracy. Because of the official control implied in its functioning, running a policy-implementing scheme is difficult in a coordinate ideal of officialdom. Since law

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[80] See Damaška (1986), *supra* note 14, p. 143. This is even more likely where a reactive state model is combined with Damaška's coordinate ideal of authority. Where no strong supervision mechanisms apply, the more evenly authority is being distributed, the more each person possessing power is responsible for living up to the limits of his power.

[81] *Ibid.*, p. 144.

[82] See *ibid.*, p. 144.

[83] *Ibid.*, p. 145. The inadequate funding of the defence of indigent accused is still a serious problem in criminal proceedings in the USA. Cf., for instance, Gershowitz, Adam M., "Raising the Burden of Proof: A Default Rule for Remedying the Under-Funding of Indigent Defense" (September 15, 2006). Available at SSRN: http://ssrn.com/abstract=930710, p. 2; Dennis E. Curtis and Judith Resnik, Grieving Criminal Defense Lawyers, 70 *Fordham Law Review*, April 2002, pp. 1615-1628, p. 1618.

[84] Damaška (1986), *supra* note 14, p. 80.

[85] See *ibid.*, p. 80.

[86] See *ibid.*, p. 81.

[87] See *ibid.*, p. 82.

[88] See *ibid.*, p. 87.

[89] See *ibid.*, p. 88.

is considered to be an instrument to realize state policy, the legal process is independent of dispute resolution.[90] The activist state's justice apparatus is likely to function best in a hierarchically structured environment.[91] Where a dispute between two individuals is considered to be a symptom of a broader problem, its resolvement could set an example for others.[92] In a dispute between an individual and a state representative, the two parties would not be on an equal footing and the adjudicator would never be neutral.[93]

The procedural law of an activist state reflects the assumption that the state's interest outweighs private interests. Even if it could be more efficient than conducting a trial, "bargaining" between private individuals and state representatives is unacceptable because it would pollute the system.[94] Citizens may not autonomously decide whether or not to have a trial. Officials make that decision.[95]

Official inquiry and implementation of state policy play a central role in policy-implementing proceedings.[96] To uncover the truth, obtaining an accurate outcome prevails over the notion of fairness or the protection of 'some collateral substantive value.'[97] Because truth-seeking is a prior goal of justice, violating procedural norms to obtain information may be justifiable.[98]

In a policy-implementing model the addressees of regulation will not be private parties, but the officials that have control over proceedings.[99] '[C]itizens are not necessarily the best representatives of their own interests, properly understood – that is, their interests as they appear in the light of state values.'[100] Therefore, they are denied the position of *dominus litis* in lawsuits. However, 'parties'[101] will be given a chance to present their views or to present evidence. Not to protect their individual interests, but mainly to serve as a "source of information" to assist the officials in reaching the accurate outcome and in developing 'the best policy response to the problem'.[102]

Officials are in control of all stages of proceedings.[103] Instead of pursuing private interests, citizens of an activist state are mobilized to pursue governmental goals. Ideally, "citizen involvement with the administration of justice"[104] is encouraged.

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[90] See *ibid.*, p. 84.
[91] *Ibid.*, p. 104. Cf. *ibid.*, pp. 147, 148.
[92] See *ibid.*, p. 85.
[93] See *ibid.*, p. 86.
[94] See *ibid.*, p. 94.
[95] *Ibid.*, p. 95.
[96] See *ibid.*, p. 147.
[97] However, not just any procedure producing an accurate outcome will be employed. Some rules of procedure are meant to uphold the 'internal procedural order' as well as 'substantive policy'. See *ibid.*, p. 148.
[98] See *ibid.*, p. 151.
[99] See *ibid.*, p. 152.
[100] *Ibid.*, p. 153.
[101] Since parties in a policy-implementing justice system are accorded so little autonomy in proceedings, Damaška proposes to refer to them as "main procedural participants" rather than parties, as the proceedings will most directly affect them even though they may not be *domini litis*.
[102] *Ibid.*, p. 153.
[103] See *ibid*, p. 154.
[104] *Ibid.*, p. 153.

For instance, citizens may ventilate their opinion as *amicus curiae*,[105] or call for state intervention. Officials can use such information to determine whether or not to institute or terminate proceedings.[106]

In the context of criminal procedure, the accused and the prosecutor do not have equal rights. Their interests are too far apart. The prosecutor is 'a powerful watchdog of state policy'. Only his distinctive function sets him apart from the adjudicator. He will always be superior to the accused and could even have 'coercive powers' over the latter.[107] To render an accurate decision that is in line with state policy, the adjudicator may examine all facets of the case that he considers important.[108] In pure inquisitorial proceedings, the judge will be an active fact-finder who is in charge of eliciting testimony, by examining witnesses.[109]

Where bringing out the truth is a pivotal goal, fact-finding is of central importance. All cases may turn into trials. There is no emphasis on out of court settlement of uncomplicated cases, such as in the reactive system.[110] But the truth will not be pursued at all cost. Even if facts remain uncertain, judgements will be delivered. In addition, state policy could dictate that one hypothesis as to the facts is adhered to even though another would do more justice to what has in fact occured.[111]

4.2.4 Defence Counsel in Policy-Implementing Proceedings

The view on the role of counsel in the policy-implementing model is somewhat ambiguous. Zealous advocacy is not appreciated to the same extent as in the reactive state. A lawyer should not lend himself to bring about an inaccurate verdict even if it would be in his client's interest.[112] Counsel should not just pursue the self-interest of his client and obstruct the fulfilment of state policy.[113] Where the state's interests and his client's interests clash, counsel should take a passive stance.[114] For instance, he should not stimulate a conceivably perjurous witness to testify, even if it would enhance his client's chances to an acquittal. But, in the interest of his client, he should not reveal the perjury either. As a final solution, counsel could request his own withdrawal. [115] The proceedings being centralised around policy-implementation, counsel can be most effective by raising those arguments that are 'both favorable to his client and acceptable from the state's point of view'.[116] Ultimately, a state may benefit from the loyalty of a lawyer toward his client. Rather than bringing out an

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[105] *Ibid.*, p. 153.
[106] *Ibid.*, p. 155.
[107] See *ibid.*, p. 157.
[108] See *ibid.*, p. 159.
[109] This could involve that the judge will be biased. According to Damaška, an effective interrogation of witnesses requires a previously formulated "tentative hypothesis" of the outcome. See *Ibid.*, p. 162.
[110] See *ibid.*, p. 160.
[111] See *ibid.*, p. 161.
[112] See *ibid.*, p. 175.
[113] See *ibid.*, p. 175.
[114] See *ibid.*, p. 176.
[115] See *ibid.*, p. 176.
[116] *Ibid.*, p. 178.

accurate result in a particular case, it may advance more remote state objectives, such as the overall accuracy of outcomes.[117]

Overall, lawyers from civil law systems have a narrower scope of activity than their common law confreres.[118] Their activities are especially limited in the investigative stage. They conduct few if any independent investigations. Investigative tasks will exclusively be entrusted to officials, as counsel's activity in this stage may hinder fact-finding.[119] Additionally, at the trial stage in an inquest model of proceedings counsel are less active than in contest proceedings. Counsel should certainly refrain from spreading confusion or from delaying proceedings.[120] His adversary in criminal proceedings is a state official involved in the investigations. Therefore, if counsel were to challenge the evidence that incriminates his client too vehemently, this could be mistaken for obstructing the fulfilment of state policies.[121] As state officials' are primarily responsible for attaining accurate outcomes, counsel's talent or skills need not play a crucial role in proceedings.[122]

An important role of defence counsel in activist criminal proceedings is to check whether state officials have properly performed their duties. This should diminish improper behaviour of officials and assist in producing an accurate outcome.[123] In addition, counsel may provide psychological support to his client, and give his client reassurance that someone is looking after his interests.[124] Without counsel's representation, the accused's legitimate interests may be overlooked or ineffectively defended. If legal representation is considered useful, counsel's assistance may therefore be imposed.[125]

To perform his duties effectively, counsel depends on reliable information, especially from his client. If counsel must disclose this information to authorities, presumably, the accused will keep the most sensitive facts to himself, which could impair "the larger interests of justice". Therefore, unless the state's interest in an accurate determination of the facts requires otherwise, the privilege of free communication and the attorney-client privilege are protected.[126]

Activist states do not appreciate independent associations. If allowed at all, Bar associations should operate as 'quasi-official agencies' that service the justice system. Compensating members of these associations for their services according to

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[117] See *ibid.*, p. 175.

[118] See *ibid.*, p. 143, footnote 79.

[119] See *ibid.*, p. 177. The same applies to the hierarchical ideal, where investigations are only entrusted to officials. See *ibid.*, p. 54. Various contemporary European Continental systems, such as the Dutch system, do not entitle the accused to legal assistance during police interrogations. See, for instance, Röttgering, A.E.M. and Franken, A.A., Counsel in Pre-Trial Investigations (De raadsman in het vooronderzoek), in Prakken and Spronken (ed), *Handboek verdediging* (Deventer: Kluwer, 2003), pp. 199-279.

[120] See Damaška (1986), *supra* note 14, p. 177.

[121] See *ibid.*, p. 178.

[122] See *ibid.*, p. 177. This may also apply to the hierarchical ideal. See *ibid.*, p. 54.

[123] See *ibid.*, p. 174.

[124] See *ibid.*, p. 178.

[125] For instance, if individuals may not pursue their self-interest, it makes sense not to have them represent themselves. See *ibid.*, p. 174. Cf. Chapter VII of this study.

[126] See *ibid.*, p. 175. This privilege allows counsel not to disclose any information falling under his duty of confidentiality. See *infra*, Chapter VI, paragraph 6.3.4,

some remunerative scheme at a level that is compatible with salaries of legal officials should prevent counsel from excessively identifying with their clients' interests.[127]

As the scope of activity of defence counsel in policy-implementing proceedings is narrower than in conflict-solving proceedings, counsel need not regard himself as an officer of the court, such as is customary in the reactive environment. Rather, in Damaška's view, counsel's professional ethics should counterbalance the notion that state interests will always outweigh individual interests. Counsel's role of representing an "individual enmeshed in the machinery of justice" may well be idealized in an activist state.[128]

4.3 Context of International Criminal Tribunals and ICC

4.3.1 Applicability of Damaška's Models to International Criminal Justice

Applying this theory to actual states and their legal systems is relatively straightforward. According to Damaška, Continental and Anglo-American states have different justice systems because of the different structure of their judicial apparatus and their different perceptions of the government's function and its role in legal proceedings.[129] Whereas European Continental governments continuously expanded their agenda, the English and American governments let social needs be fulfilled outside their power by private action.[130] Not surprisingly, the Continental procedure has developed in a more or less policy-implementing manner while the Anglo-American procedure has many conflict-solving traits. However, in its purest form, the policy-implementing model differs much more from the reality of the civil law system of modern Continental European countries than the conflict-solving model differs from the Anglo-American common law system. In addition, proceedings organized as an inquest may also subsist in a reactive state and a contest model of proceedings may also exist in an activist state.[131] Damaška did not pretend that either one archetype would be perfect,[132] but illustrated why certain combinations could be either a "stressful mismatch" or would 'successfully dovetail procedural functions and procedural authority'. [133] Roughly twenty years later, however, it is still unclear 'whether rules culled from two disparate procedural cultures can in their practical application establish a virtuous equilibrium or usable consonance.'[134]

It is important to determine whether or not, or to what extent, Damaška's theory of the *Faces of Justice* can actually be applied to international criminal justice. The main difficulty of applying Damaška's theories to the justice system of courts operating in an international context may be that the justice systems of the *ad hoc* Tribunals and the ICC are not connected to the framework of a particular nation state.

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[127] See *ibid.*, p. 176.
[128] See *ibid.*, p. 143, 144.
[129] *Ibid.*, p. 90.
[130] See *ibid.*, p. 90.
[131] Clear examples of the latter are civil proceedings on the European Continent. See *ibid.*, p. 206 *et seq.*
[132] See *ibid.*, p. 12.
[133] See *ibid.*, p. 14.
[134] Damaška (2004), *supra* note 62, p. 1019.

Why Damaška's models are relevant for a better understanding of the proceedings of international criminal courts, is that these proceedings are composed of elements that may generally also be found in a domestic context.[135] According to Cassese, 'international criminal law is essentially a hybrid branch of law: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law'.[136] Domestic and international criminal courts have in common that they establish individual responsibility for crimes and that they punish individuals upon a finding of guilt. A fair and efficient administration of justice requires a system of procedural rules. Applying Damaška's theoretical models to the justice system of international criminal courts may explain why some procedural arrangements may better match the goals these courts aspire and their accompanying structure of authority than other arrangements. The following paragraphs analyze the justice system of the ICTY, the ICTR and the ICC in light of Damaška's theories as far as possible. Paragraph 4.3.2 examines the objectives of justice that international criminal courts pursue and establishes whether these resemble Damaška's policy-implementing or his conflict-solving objectives. Paragraph 4.3.3 analyzes the structure of authority in which these courts operate and determine whether this bears more resemblance to Damaška's hierarchical ideal or to his coordinate ideal. Paragraph 4.3.4 will determine the nature of the actual proceedings of the *ad hoc* Tribunals and the ICC. Taking their main features into account, it will be examined whether proceedings are structured more as a contest, or as an inquest and whether they contain more hierarchical or coordinate elements. Paragraph 4.3.5 will discuss whether Damaška's theories divulge notable discrepancies between the goals of justice that international criminal courts pursue and the main features of their proceedings. Swart successfully applied Damaška's theories to international criminal justice and concluded that it is apparent that international criminal courts struggle with conflicts between their goals of justice and the procedural means to achieve them.[137] Whether suchconflicts influence the interpretation of the duties and role of the defence is the main issue in this study. Therefore, this chapter's conclusion will endeavour to shed light on how the outcome of this analysis can help to better understand the role and the position of the defence in international criminal proceedings.

4.3.2 Goals of Justice of International Criminal Courts

In *Nikolić*, the ICTY Trial Chamber emphasized that the ICTY's 'very *raison d'être* is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal

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[135] However, it should be noted that the procedural law of international criminal courts deals with more and different complex issues than national rules of procedure. For instance, these rules have to deal with the fact that there is no police force to arrest indicted persons. See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal [sic] for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (UN Doc. A/54/634), 22 November 1999 (hereinafter: Expert Report), par. 23 *et seq*.

[136] Cassese, Antonio, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 19.

[137] See Bert Swart, Damaška and the Faces of International Criminal Justice, 6 *JICJ* (2008), pp. 87-114, p. 105.

conduct'.[138] According to the President of the ICTY, this Tribunal was created to avert revenge and "self-help" solutions.[139] In *Deronjić* it was argued that the ICTY 'is not only mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia, but also to bring justice to both victims and their relatives and to perpetrators. Truth and justice should also foster a sense of reconciliation between different ethnic groups within the countries […] of the former Yugoslavia.'[140] These examples illustrate that international criminal courts pursue a broad range of objectives, such as truth-finding, reconciliation and fairness. This paragraph examines whether the goals of justice which the *ad hoc* Tribunals and the ICC pursue qualify as policy-implementing or conflict-solving goals and whether one of these categories prevails. It will not evaluate the goals of international criminal justice in terms of their value, attainability or credibility.[141]

One of the purposes for the UN Security Council in establishing the *ad hoc* Tribunals[142] was to bring peace and security to the Rwandan and the Balkan regions.[143] Restorative justice is a theory of justice that aims to restore social stability through justice. Pursuant to this theory, doing justice should result in reparation or reconciliation in a community.[144] The Resolution establishing the Rwanda Tribunal indicated that bringing the individuals responsible for genocide and crimes against humanity to justice 'would contribute to the process of national reconciliation'.[145] The ICC allows victims to participate actively in proceedings, rather then merely allowing them to act as witnesses.[146] The ICTY's fourth annual report stated that unless the perpetrators of the crimes committed in the Former Yugoslavia were brought before the Tribunal, they could 'continue to dominate and uphold nationalism and ethnic

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[138] ICTY Tr. Ch. I Section A, Sentencing Judgement, *Momir Nikolić* (Case No. IT-02-60/1-S), 2 December 2003, § 67.

[139] ICTY Fourth Annual Report (1997), par. 175.

[140] ICTY Tr. Ch., Sentencing Judgement, *Deronjić* (Case No. IT-02-61), 30 March 2004, § 133.

[141] This has been sufficiently addressed by others. For instance, it has been argued that the ICTR's goals are partly conflicting. Especially the goal of retribution was deemed unfit for international justice, and in conflict with bringing peace and reconciliation to a society. See Howland, Todd and Calathes, William, 'The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation', 39 *Virginia Journal of International Law* (1998), Fall 1998, pp. 135-167, p. 152. See also Schrag, Minna, 'The Yugoslav War Crimes Tribunal: An Interim Assessment', 7 *Transnational Law and Contemporary Problems* (1997), Spring 1997, pp. 15-22. Findlay and Henham argue that restorative goals of justice should become more prominent in international criminal justice. Cf., Findlay, Mark and Henham, Ralph J., *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Cullompton, UK; Portland, Or.: Willan, 2005).

[142] The UN SC relied on its powers under Chapter Seven of the Charter of the United Nations, in particular under Article 39.

[143] The *ad hoc* Tribunals were to 'contribute to the restoration and maintenance of peace'. See the Preamble of the UN SC Resolution 827 (UN Doc. S/RES/827 (1993)), 25 May 1993 and UN SC Resolution 955 (UN Doc. S/RES/955 (1994)), 8 November 1994. Cf. UN SC Resolution 808 (UN Doc. S/RES/808 (1993)), 22 February 1993.

[144] See Findlay and Henham (2005), *supra* note 141, p. 353; and, Henham, Ralph, 'The Philosophical Foundations of International Sentencing', 1 *JICJ* (2003), pp. 64-85, pp. 80, 81. Henham argues passionately for international criminal courts to take a more unambiguous approach towards restorative justice.

[145] See UN SC Resolution 955 (1994).

[146] Cf. for instance, Articles 15(3), 19(3), 68(3), and 75(3) ICC Statute.

division'. [147] If indictees were to retain powerful positions, 'this creates a general atmosphere of lawlessness and impunity, and perpetuates the mentality of conflict and division.'[148] These examples and the case law of the *ad hoc* Tribunals suggest that international criminal courts aspire to restorative justice. In *Furundžija* the prosecution contended that were the ICTY to impose lower sentences than domestic courts, this 'would undermine the Tribunal's aim of contributing to the restoration of peace and security in the former Yugoslavia.'[149] In *Erdemović*, the ICTY Trial Chamber argued that any effort to end impunity 'would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.'[150] In *Serushago*, the Chamber reiterated that the ICTR was established 'to prosecute and punish the perpetrators of the atrocities in Rwanda […] to put an end to impunity *and thereby*[151] to promote national reconciliation and the restoration of peace.'[152]

The Outreach programs of international criminal courts may support any restorative aspirations. The ICTY came to realize that its location in The Hague increased the gap between the justice done by this Tribunal and the supposed beneficiaries: the victims of the conflict.[153] Therefore, it created its Outreach Program 'dedicated to explaining its work and addressing the effects of misperceptions and misinformation.'[154] Administering justice in The Hague was clearly not enough to establish peace and reconciliation in a war torn region. The Rwanda Tribunal followed this example and so do other international criminal courts.[155] Rather than simply establishing an individual's guilt as to the crimes committed, the Tribunals deem it important to reach out to the local communities where these crimes took place and to increase the public awareness of these courts' achievements. The ICTY broadcasts most of its trials live on the internet. In most national jurisdictions, audio-visual recordings of court proceedings are generally prohibited, unless permission is received in advance. The goal of educating the public as to what happened in the war in the Former Yugoslavia[156] and in Rwanda has been delineated as the 'pedagogical'[157] mission of the Tribunals.[158] According to the President of the ICC, '[o]ne of the most

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147 ICTY Fourth Annual Report (1997), par. 179.
148 *Idem.*
149 ICTY App. Ch., Judgement, *Furundžija* (Case No. IT-95-17/1-A), 21 July 2000, § 226.
150 ICTY Tr. Ch., Sentencing Judgement, *Erdemović* (Case No. IT- 96-22-T), 29 November 1996, § 65.
151 Emphasis added, JTT.
152 ICTR Tr. Ch. I, Sentence, *Serushago* (Case no. ICTR 98-39-S), 5 February 1999, § 19.
153 See ICTY Sixth Annual Report, (UN Doc. A/54/187), 25 August 1999, par. 147.
154 *Ibid.*, par. 150.
155 See ICTR Fourth Annual Report (UN Doc A/54/315), 7 September 1999, par. 108; ICC Outreach Action Plan for Uganda: January – March 2007, available from www.icc-cpi.int.
156 Cf. Schrag (1997), *supra* note 141, pp. 15-22.
157 In *Aleksovski,* Judge Rodrigues also noted that the Trial Chamber has a 'pedagogical role'. Transcript, Status Conference, *Aleksovski* (Case No. IT-95-14/1), 9 December 1997, pp. 3-4. This instance was cited by Arbour, Louise, 'The Development of a Coherent System of Rules of International Criminal Procedure and Evidence before the *ad hoc* International Tribunals for the Former Yugoslavia and Rwanda', in 17 *Nouvelles Etudes Penales* 1998, pp. 371-387, p. 377. Unfortunately, as this was a closed session, the transcript cannot be checked.
158 Zappalà, Salvatore, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), p. 254.

important of the Court's field activities is outreach to local populations. An integral part of justice is that it is seen to be done. The ICC, its role and its activities must be understood.'[159]

Restorative justice aims to achieve more than establishing the guilt of the accused or to resolve a conflict between the alleged offender and the prosecutor. It aims at reaching out to every citizen rather than the individuals directly implicated in the conflict alone. In its opening statement in *Tadić*, the prosecutor argued that the ICTY has a more onerous burden than other criminal courts, because of the "expectation" that through its administering of justice in respect of individual accused, the Tribunal would contribute to peace in the former Yugoslavia.[160] Overall therefore, the aim of restorative justice of international criminal courts is policy-implementing rather than conflict-solving.[161]

In *Serushago*, the ICTR Chamber argued that the punishment of an accused who is found guilty 'must be directed […] at retribution'.[162] According to Hart, the theory of retributive justice entails that if a person has committed an offence that inflicted harm, he must receive punishment in proportion to the harm done. The punishment reflects society's (moral) condemnation of the offender. [163] In its barest form, retribution stands for: '[t]he criminal is to be punished simply because he has committed a crime.'[164] The purpose of retributive justice was first expressed in the founding resolutions of the *ad hoc* Tribunals that were established to bring the persons responsible for the 'flagrant violations of international humanitarian law' to justice.[165] The Preambles of the Statutes of the *ad hoc* Tribunals confirm the goal that the perpetrators of the crimes committed will not go unpunished. The ICC similarly aims 'to put an end to impunity' for the persons responsible for crimes that 'threaten the peace, security and well-being of the world'.[166] In the case law of the *ad hoc* Tribunals, not surprisingly, retribution as a goal of justice particularly surfaces where sentencing is concerned. In *Aleksovski*, the ICTY Appeals Chamber argued that retribution is widely recognised by the *ad hoc* Tribunals and should be understood as 'duly expressing the outrage of the international community at these crimes.'[167] The sentence should reflect that.[168] Similarly in *Erdemović*, retribution in this sense was deemed essential: 'the

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[159] See Address to the United Nations General Assembly, 9 October 2006, available from www.icc-cpi.int/library/organs/presidency/PK_20061009_en.pdf, lastly visited 18 May 2008, p. 3.
[160] See Transcript, *Tadić* (Case No. IT-94-1), 7 May 1996, p. 11.
[161] Swart deems that reconciliation is not a goal in itself, but a potential effect of punishment. See Swart, *supra* note 137, p. 104.
[162] Sentence, *Serushago*, *supra* note 152, § 20.
[163] Cf. Hart, H. L. A., *Punishment and Responsibility. Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), pp. 231-235.
[164] Cf. Packer, Herbert L., *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford University Press, 1968), pp. 37, 38. Packer labels the retributive goals of punishing 'just deserts'. In addition, Packer notes that retribution as a justification of punishment may also include the notion that punishment gives the offender the opportunity to expiate his sins.
[165] See UN SC Resolution 827 (1993) and UN SC Resolution 955 (1994). Cf. Resolution 808 (1993).
[166] See the ICC Statute's Preamble. The crimes under the ICC's jurisdiction are further referred to in this Preamble as: 'unimaginable atrocities that deeply shock the conscience of humanity' and 'the most serious crimes of concern to the international community as a whole'.
[167] ICTY App. Ch., Judgement, *Aleksovski* (Case No. IT-95-14/1-A), 24 March 2000, § 185.
[168] See *idem*. Cf. Sentencing Judgement, *Erdemović, supra* note 150, §§ 64-65.

International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.'[169] However, retribution is one goal that cannot be solely related either to conflict-solving goals or policy-implementing goals. This is a goal of all criminal legal systems and, if desired, may either be attained through a contest model or inquest model.

Deterrence has been a purpose of justice of international criminal courts from the moment they came into existence. By establishing the *ad hoc* Tribunals, the Security Council aimed to ensure that the violations of international humanitarian law would be 'halted and effectively redressed.' [170] Deterrence as a justification of punishment implies that where a person is punished for his crimes in an appropriate manner, this will deter him from doing it again (special deterrence) and may deter others from committing the same crime (general deterrence).[171] In the Fourth Annual Report of the ICTY, it is argued that '[t]he Tribunal cannot perform its deterrent function […] unless it holds trials of those responsible for massacres and genocide.'[172] According to the Preamble of its Statute, the ICC seeks 'to contribute to the prevention of […] crimes'.[173] Its Chief Prosecutor has emphasized the importance of the goal of deterrence.[174]

The goal of general deterrence, as it is further-reaching than a determination of the facts and the guilt of the person involved, should be considered policy-implementing. In *Serushago*, the ICTR contended that general deterrence would be the most important goal of sentencing offenders at the ICTR.[175] It should 'dissuade for good others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights'.[176] In *Tadić*, the ICTY argued the opposite: deterrence is a factor to be taken into consideration as a justification for sentencing, but should not be given undue prominence.[177]

Another aim of the *ad hoc* Tribunals is the creation of an historical record. According to the ICTR Appeals Chamber in *Karemera et al*, 'to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence' was helpful 'for the purpose of the historical record'.[178] One of

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169 Sentencing Judgement, *Erdemović, supra* note 150, § 65.

170 See the Preamble of the UN SC Resolution 827 (1993) and UN SC Resolution 955 (1994). Cf. UN SC Resolution 808 (1993).

171 Cf. Packer (1968), *supra* note 164, p. 39 *et seq*.

172 ICTY Fourth Annual Report (1997), par. 176.

173 See the ICC Statute's Preamble.

174 This was held by ICC Chief Prosecutor Mr. Luis Moreno-Ocampo on the conference 'Justice in the Mirror. Law, Culture, and the Making of History', Yale University, 8 December 2006. Notes are on file with the author.

175 See Sentence, *Serushago*, *supra* note 152, § 20.

176 *Idem*. Cf. ICTR Tr. Ch., Judgement and Sentence, *Kambanda* (Case no. ICTR 97-23-S), 4 September 1998, § 28.

177 ICTY App. Ch., Judgement in Sentencing Appeals, *Tadić* (Case No. IT-94-1-A and IT-94-1-A*bis*), 26 January 2000, § 48.

178 ICTR App. Ch., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Karemera, Ngirumpatse, and Nzirorera* (Case No. ICTR-98-44-AR73(C)), 16 June 2006, § 35. The ICTR

the ICTY's annual reports states that 'through its judicial proceedings the Tribunal establishes a historical record which provides the basis for the long-term reconciliation and reconstruction of the region.'[179] Where this goal would be pursued beyond establishing the necessary facts for determining the degree of culpability and responsibility or the innocence of the accused, it could be characterized policy-implementing. Otherwise, it should be considered merely a welcome side-effect of conducting international criminal trials rather than a goal in itself. The importance attached to history was illustrated for instance in the *Tadić* Judgement, where the ICTY Trial Chamber dedicated several pages to the history of the Former Yugoslavia, dating back to the Ottoman Empire.[180] During the *Tadić* trial, the Chamber also insisted that a witness should elaborate upon the history of the Balkan region from the 14th century onwards, where he was supposed to testify on the military-political context of the events occurring from 1991 onwards.[181] It has been argued that the nature of the crimes prosecuted by international criminal courts as well as of the responsibility concepts involved, such as the concept of a criminal enterprise, requires that the broader context in which the crimes were committed is outlined.[182] However, the above examples of extensive historical accounts may go beyond the primary purpose of administering justice. In *Krstić*, the ICTY Trial Chamber acknowledged the limits of its responsibility in this respect. Even though the judgement deals at length with the context in which the crimes took place, it is recognized that *historians* should 'plumb the depths of this episode of the Balkan conflict'.[183] On the basis of the evidence which the parties presented, the judges should establish the criminal responsibility of each individual accused for the crimes that have occurred.[184] A substantial number of documents entered the public domain through the trials that the ICTY conducted. These documents uncover historical facts that might otherwise have remained secret.[185] Whether or not courts should aspire to create a historical record is a separate discussion.[186] In any event, international criminal courts do not appear to elicit historical facts for any other reason than to establish individual criminal responsibility. Considering the case of *Krstić,* it appears that they welcome it as a beneficial side-effect rather than even consider it as a goal in itself.

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has repeatedly confirmed that a genocide took place in Rwanda. For instance, in ICTR Tr. Ch. I, Judgement, *Akayesu* (Case No. ICTR-96-4-T), 2 September 1998, § 126; ICTR Tr. Ch., Judgement, *Kayishema and Ruzindana* (Case No. ICTR-95-1-T), 21 May 1999, § 291.

[179] See ICTY Fifth Annual Report (UN Doc A/53/219), 7 August 1998, par. 202.

[180] See ICTY Tr. Ch. II, Opinion and Judgment, *Tadić* (Case No. IT-94-1), 7 May 1997, § 55 *et seq*.

[181] See Transcript, *Tadić* (Case No. IT-94-1), 7 May 1996, pp. 123 *et seq*. Cf. also Wilson, Richard Ashby, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', 27 *Human Rights Quarterly* (2005), pp. 908–942, pp. 923, 924.

[182] See *ibid.*, pp. 940-941.

[183] ICTY Tr. Ch., Judgement, *Krstić* (Case No. IT-98-33-T), 2 August 2001, § 2.

[184] See *idem*.

[185] A journalist from the former Yugoslavia has assured the author that if proceedings would have been held in a domestic court, many of these documents would never have been made public.

[186] Zappalà, for instance, notes that the aim of creating a historical record through court proceedings complicates these and is unnecessary for establishing individual responsibility for crimes. See Zappalà, Salvatore, 'Symposium. How to Ameliorate International Criminal Proceedings: Some Constructive Suggestions. Foreword', 5 *Journal of International Criminal Justice (JICJ)* (2007), pp. 346-347. See also Wilson, R.A. (2005), *supra* note 181, pp. 908–942.

The aim of creating a historical record is related to the goal of substantive truth-finding, which is one of the priorities of Damaška's policy-implementing proceedings. The goal of truth-finding regularly surfaces in international criminal justice. Since each court aims to find out the truth in a case to some extent, this does not necessarily mean that truth-finding is a policy-implementing goal as such before international criminal courts. To determine whether or not international criminal courts aspire to truth-seeking sufficient to label this as a policy-implementing goal, it is vital to resolve whether and to what degree truth-finding might override the importance of conducting a fair contest. In *Akayesu*, the ICTR Trial Chamber refers to 'its pursuit of truth regarding the events which took place'.[187] The *ad hoc* Tribunals' Rules of Procedure and Evidence also mention truth-finding as an objective. Under Rule 90(F), the Trial Chamber controls the method of interrogating witnesses and of the presentation of evidence in order to make this 'effective for the ascertainment of the truth'.[188] The ICC Statute contains two direct references to truth-finding.[189] One of these provisions also leaves room for the judges to request more evidence than produced by the parties where this is deemed 'necessary for the determination of the truth'.[190] 'In seeking to establish the truth', the ICTR in *Akayesu* admitted to have relied on documents that 'were not specifically tendered in evidence by the parties during trial.'[191] This illustrates that judges of international criminal courts can become fairly active in order to bring out the truth of events, rather than to rely on the parties to solve their conflict. This is a policy-implementing feature. However, the *ad hoc* Tribunals and the ICC allow for plea agreements. It is acknowledged that these may result in a short and, maybe, to some extent distorted version of the truth. In *Deronjić*, it was argued that [n]either the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement.'[192] It was also agreed upon in this case that judges of an international tribunal should focus on the core criminal law issues of the cases brought before them 'within the ambit of the Indictment presented by the Prosecutor.' [193] Thus, truth-finding objectives are not deemed more important than the objective of a fair contest in every respect.

This begs the question as to what extent international criminal courts attach importance to the purpose of establishing fairness of proceedings. Whether adherence to fairness constitutes a conflict-solving inclination also depends on whether or not fairness prevails over the importance attached to policy-implementing goals. Examples of references to fairness are ample. The purpose of rendering fair trials is embedded in the Statutes of the ICC, the ICTY and the ICTR.[194] In addition, in *Akayesu*, the Chamber sought to apply 'the rules of evidence which in its view best favour a fair

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[187] See Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 144. Cf. also § 131 in which the Chamber held that it seeks 'to establish the truth in its judgment'.
[188] Rule 90(F) ICTR RPE and Rule 90(F) ICTY RPE.
[189] See Article 54(1)(a) and Article 69(3) ICC Statute.
[190] Article 69(3) ICC Statute.
[191] Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 131.
[192] Sentencing Judgement, *Deronjić*, *supra* note 140, § 135.
[193] *Idem*.
[194] See Article 19(1) ICTR Statute; Article 20(1) ICTY Statute; Articles 64, 67, 69(4), 81(1)(b)(iv) and 82(1)(d) ICC Statute.

determination of the matter before it.'[195] However, like truth-seeking, conducting fair proceedings is an aspiration of most legal systems.[196] It is not a unique feature of conflict-solving proceedings, just as substantive truth-finding is not exclusively a policy-implementing feature of proceedings. What constitutes a fair trial may vary among different legal systems, just as the meaning accorded to human rights in general.[197] The interpretation of the principle of equality of arms will be more limited in proceedings structured as an inquest, where the accused and the prosecution are on a different level, than in contest proceedings where two parties challenge each other's version of the facts on an equal basis. Whether international criminal courts pursue the goal of fairness to the degree that fairness *per se* should be labelled a conflict-solving goal is difficult to establish. It has been argued that fairness should at least prevail over efficiency. Judge Hunt pointed out that the ICTY will be judged by the fairness of its trials, not by the number of trials it concludes or by the speed within which it concludes those trials.[198] As this concerned a dissenting opinion, the view of the majority of judges before international criminal courts may be otherwise. Allowing plea agreements between the prosecution and the defence could evince a conflict-solving inclination. However, this is not necessarily so. For instance, at the ICC, if a plea agreement is concluded while 'a more complete presentation of the facts of the case is required in the interests of justice', judges may decide to conduct a trial instead of relying on the agreement.[199] It is deemed important that an extensive version of the facts is displayed.

Overall, this paragraph illustrated that the main categories of purposes of national criminal justice, such as retributive, deterrent or restorative purposes, can also be found in the context of international criminal justice. Even though a different approach for international criminal courts has been welcomed, [200] where goals of justice are considered, these courts do not deviate much from domestic courts. Whether international criminal courts primarily pursue conflict-solving or policy-implementing oriented goals is a different issue. Undeniably, these courts are ambitious and pursue policy-implementing goals. Overall however, these goals do not play a predominant role in proceedings. Retributive justice, which neither signals a conflict-solving nor a policy-implementing inclination, seems more important to

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[195] Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 131.

[196] According to Safferling, civil law as well as common law systems 'must be committed to ensuring fundamental human rights in a democratic society.' Both systems have the goal of upholding human rights and providing fair procedures. Safferling, Christoph Johannes Maria, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2003), p. 2. Cf. also Zappalà (2003), *supra* note 158, p. 246.

[197] See Bull, Hedley, Hobbes and the International Anarchy, in Finkelstein (ed), *Hobbes on law* (Ashgate: Aldershot, 2005), pp. 537-558, p. 556.

[198] See ICTY App. Ch., Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, *Milošević* (Case no. IT-02-54-AR73.4), 21 October 2003, § 22.

[199] See Article 65(4)(b) ICC Statute.

[200] See for instance, Mark A. Drumbl, Toward a Criminology of International Crime, Washington & Lee Public Law and Legal Theory Research Paper Series, May 2003, available from SSRN: http://ssrn.com/abstract_id=411780.

international criminal courts than restorative justice.[201] International criminal courts aspire to develop a proportionate response to the atrocious crimes they deal with that satisfies the international community. The restorative goals of bringing reconciliation and peace to the region that may qualify as policy-implementing is not an overarching purpose of justice, even though it was imperative for the UN SC to establish the *ad hoc* Tribunals. In addition, the goals of general deterrence and of creating a historical record do not seem to be given prominence over the goal of conducting trials fairly. The judges being provided with an active role in order to bring out the truth of events does illustrate a policy-implementing inclination.

What goals have been given most importance may best be determined in a later stage and deserves more than a single paragraph in a study. This is especially true for the ICC that has just started to conduct proceedings. As regards the *ad hoc* Tribunals, it would be interesting to settle this discussion after all the proceedings before these courts have finalized, perhaps not even possible until then.

To what extent the proceedings of international criminal courts display more contest features as in Damaška's conflict-solving model or more inquest features as in Damaška's policy-implementing model will be further examined in paragraph 4.3.4.

4.3.3 Structure of Authority in the Context of International Criminal Justice

This paragraph seeks to determine whether the context in which international criminal courts function matches Damaška's coordinate or his hierarchical ideal of officialdom. International criminal courts are *not* firmly embedded in the framework of a nation state led by a government, with a clear apparatus of civil servants, or a police force.[202] Therefore, at first sight, Damaška's models seem difficult to apply to international criminal justice. Even though it may be debated whether some structure of authority can be distilled out of the multi-layered "system" of international criminal justice at all and, although it may seem artificial, the following attempts to do so. First, the global order in which international criminal courts operate will be evaluated. Secondly, the organisational structure of international criminal courts will be examined.

Whether the world should be characterized as a coordinate or as a hierarchical society depends on how its structure of authority is branded. That international criminal justice has been envisioned as 'a force of global governance'[203] does not imply that a central authority on a global level exists according to which the world is "governed". But although there is no government of the world, there are indicators that an international community as such exists. These include a 'system of international […] law', 'a universal system of diplomacy', 'a world economy' and numerous international organisations.[204] Arguably, the United Nations – whose Security Council established the two *ad hoc* Tribunals – symbolizes "the existence of international society".[205] In addition, as many NGO's engaged in the negotiations of

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[201] Cf. for instance, Findlay and Henham (2005), *supra* note 141, p. 255; Henham (2003), *supra* note 144, *inter alia* at p. 66 and p. 81.
[202] Cf. also, for instance, ICTY Fourth Annual Report (1997), par. 181.
[203] Findlay and Henham (2005), *supra* note 141, p. xiv.
[204] Bull (2005), *supra* note 197, p. 556.
[205] *Idem.*

the Rome Statute of the ICC, one could speak of the existence of a "global civil society" of citizens of the world.[206] The ICC's Statute's Preamble's asserts that this court deals with 'the most serious crimes of concern to the international community as a whole'.[207] The *ad hoc* Tribunals' case law frequently refers to "the international community" as such, particularly in the context of sentencing goals.[208] In *Tadić*, the ICTY argued that, as a "truly international tribunal", it represents the whole world population rather than just part of it.[209] Whether or not it is a reality as such, the absence of a central government and the strong adherence of states to their sovereignty will always uphold the anarchic Hobbesian character of the international community.[210] By characterizing the international community as "nascent" in one of its early annual reports, the ICTY showed sensitivity to this reality.[211] According to Bull, on a global level, '[s]overeign states are still the principal actors' while '[i]nternational law and international organizations still command only tentative and uncertain allegiance.'[212] However, it has also been suggested that "the international system" acquires 'more hierarchical, and in many ways more complicated structures' and is no longer simply a collection of different sovereign and legally equal nation states.[213] States remain unequal in power, size, resources and vulnerability.[214]

The aim of capturing the structure of authority of the world order in any model founded on nation states may be unattainable. Therefore, neither a coordinate nor a hierarchical structure can be inferred from it. It is more sensible to analyze the degree to which the organisational structures of the *ad hoc* Tribunals and the ICC resemble a bureaucracy with a hierarchical structure or a coordinate environment with lay officials and shared responsibilities.

The *ad hoc* Tribunals, having been established by the UN Security Council, are connected to the bureaucratic framework of the UN. They are subject to UN

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[206] See Glasius, Marlies, *The International Criminal Court: a Global Civil Society Achievement* (London: Routledge, 2006). Glasius is well aware that this global civil society is not necessarily representative of all citizens of the world. See, for instance, *idem*, pp. 128-131.

[207] Cf. also the words of a former President of the ICTY, Judge Jorda, when discussing the efficiency of the Tribunal and the need for a 'Completion Strategy': 'Although we have first and foremost an obligation towards the accused, we also have one to the international community.' Statement by Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, ICTY Press Release, 27 January 2000, available from www.un.org/icty. Cf. *supra*, note 8.

[208] Cf., for instance, Sentencing Judgement, *Erdemović, supra* note 150, § 65; Judgement and Sentence, *Kambanda*, *supra* note 176, § 28; Judgement, *Aleksovski*, *supra* note 167, § 185.

[209] In this respect the *ad hoc* Tribunals distinguish themselves from the multinational military tribunals of Nuremberg and Tokyo, that represented only part of the world population. See Opinion and Judgment, *Tadić*, *supra* note 180, § 1.

[210] Cf. Bull (2005), *supra* note 197, p. 556. Cf. also Glasius (2006), *supra* note 206, pp. 128, 129.

[211] Cf. ICTY Fifth Annual Report (1998), par. 226.

[212] Bull (2005), *supra* note 197, p. 556, 557.

[213] According to van Crefeld, individual states may 'soon no longer be either willing or able to control and protect the political, military, economic, social and cultural lives of their citizens to the extent that they used to.' Van Creveld, Martin L., *The Rise and Decline of the State* (Cambridge, U.K.: Cambridge University Press (2nd Ed./ Reprint), 2000), p. vii.

[214] See Bull (2005), *supra* note 197, p. 554 and Glasius (2006), *supra* note 206, for instance, pp. 116, 117.

regulations and rules[215] and their expenses are borne by the UN.[216] The Judges, Prosecutors, Registrars and staff are all UN personnel appointed by the UN Secretary General or elected by the UN General Assembly.[217] The *ad hoc* Tribunals are each headed by a President who is selected by the permanent judges[218] and who reports to the UN SC and UN General-Secretary on a yearly basis.[219]

Each Chamber has a presiding judge.[220] Judges for the Tribunals should in their domestic jurisdictions qualify for "the highest judicial offices." For the composition of Chambers, experience in criminal law, international law, including international humanitarian law and human rights law will be taken into account.[221] Legal and geographical backgrounds of judges are taken into consideration to promote diversity.[222] The Tribunals demand no strict universal qualification requirements of judges, such as a number of years of experience in criminal law. Judges with little or no experience in criminal proceedings have an equal say as judges with broad experience in this field. Consequently, the degree of professionalization of judges can be low.[223] The Appeals Chamber, which the *ad hoc* Tribunals share, is not necessarily composed of judges with more extensive international criminal law experience. They are selected from the pool of permanent Trial Chamber judges.[224] All permanent judges rotate among the Trial and Appeals Chambers.[225] Thus, there is no noteworthy hierarchy among the judges.

The Prosecution is headed by the Prosecutor and the Deputy Prosecutor.[226] The Prosecutor is solely responsible for initiating investigations.[227] For years, the same individual was Prosecutor of both Tribunals.[228] Overall, the Prosecution has a hierarchical structure.[229] The Prosecutor is not required to have substantial working

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[215] See, for instance, ICTY Sixth Annual Report (1999), par. 139. Cf. also Tolbert, David, 'Reflections on the ICTY Registry', 2 *JICJ* (2004), pp. 480-485, p. 480.

[216] See Article 30 ICTR Statute; Article 32 ICTY Statute.

[217] See Article 13*bis,* 13*ter*, 16(5) and 17(4) ICTY Statute; Article 12*bis,* 12*ter*, 15(3) and 16(4) ICTR Statute.

[218] See Article 14 (1) ICTY Statute; Article 13(1) ICTR Statute.

[219] See Article 32 ICTR Statute; Article 34 ICTY Statute.

[220] See Article 13(7) ICTR Statute; Article 14(7) ICTY Statute.

[221] See Article 13 ICTY Statute; Article 12 ICTR Statute.

[222] Cf. Article 12(1) ICTY Statute; Article 11(1) ICTR Statute.

[223] Bohlander questions the professionalism of judges at international criminal tribunals. A number of them lack any previous judging experience in criminal proceedings. See Bohlander, Michael, The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics, in Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007), pp. 325-390.

[224] See Article 13(3) and 13(4) ICTR Statute; Article 14(3) and 14(4) ICTY Statute.

[225] See Rule 27(A) ICTY RPE; Rule 27(A) ICTR RPE.

[226] See Article 15 ICTR Statute; Article 16 ICTY Statute, Rule 38 ICTY RPE.

[227] See Article 17(1) ICTR Statute; Article 18(1) ICTY Statute.

[228] This was up until September 2003. Cf. Article 15(3) ICTR Statute.

[229] Arguably, there is more hierarchy involved in the Office of the Prosecutor of the *ad hoc* Tribunals than in the office of US district attorneys. See Combs, Nancy Amoury, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', 151 *University of Pennsylvania Law Review* (2002), November 2002, pp. 1-157, p. 102. Combs argues that where plea bargaining is concerned, the Prosecutor has final authority over all plea agreements and plea bargaining. Even Senior Trial Attorneys of the OTP have little authority over plea bargains.

experience as a prosecutor in international criminal justice, but should be an experienced national prosecutor.[230] Members of the Office of the Prosecutor 'are experienced police officers, crime experts, analysts, lawyers and trial attorneys.'[231]

The Registry consists of the Registrar, who heads the Registry, his Deputy, and staff members.[232] The Statutes and RPE of the Tribunals do not stipulate or mandate any qualification requirements for the Registrar or his Deputy. The Registrar fulfils a predominantly administrative function. Compensating the absence of an existing administrative framework, the Registry is an idiosyncratic organ of international criminal courts. 'It is an amalgam of judicial management responsibilities, combining features of a *Greffier* in the civil law system with some aspects of common-law clerk-of-court functions, and administrative duties imported from the UN system.'[233] The Registry's powers are broad. Apart from administering and servicing the Tribunal,[234] the Registrar also governs the victims and witnesses unit,[235] the Detention Unit,[236] the assignment of counsel[237] and monitors the behaviour of counsel.[238] It also maintains diplomatic contacts with States.[239]

The Registrar, whose rank equals that of a high UN Official, is appointed by the Secretary-General of the United Nations.[240] For practical purposes however, he functions under the authority of the President of the Tribunal.[241] It is uncertain whose instructions the Registrar should follow when those from the UN Secretary-General conflict with those of the President of the Tribunal.[242] Overall, the Registry is broadly involved in the courts administration, and has considerable powers. Having a single Registrar at its head, and there being one deputy registrar, the Registry is organized in

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[230] See Article 16(4) ICTY Statute: 'He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.'

[231] See website ICTY, www.un.org/icty/glance-e/index.htm, visited at 22 February 2006.

[232] See Article 17(2) ICTY Statute, Rules 30-33*bis* ICTY RPE; Article 16(2) ICTR Statute, Rules 30-33 ICTR RPE.

[233] Tolbert (2004), *supra* note 2155, p. 480.

[234] Article 16(1) ICTR Statute; Article 17(1) ICTY Statute.

[235] Cf. Rule 34 ICTY RPE; Rule 34 ICTR RPE.

[236] See Article 8(3)(c) Directive for the Registry of the International Criminal Tribunal for Rwanda, 31 May 2001; ICTY Rules of Detention (IT/38/REV.9), 21 July 2005, Rule 2.

[237] See Rules 44, 45 ICTY RPE; Rules 44-45 *quater* ICTR RPE.

[238] See Rule 46(C) ICTY RPE and Rule 46(D) ICTR RPE. Cf. also Tolbert (2004), *supra* note 2155, p. 480. Chapter VI on disciplinary regimes for defence counsel will elaborate on the latter function. See Chapter VI, paragraph 6.4.2. As to the responsibilities of the Registry over the defence, cf. also *supra*, Chapter III, paragraph 3.2.2.

[239] See ICTY Sixth Annual Report (1999), par. 138.

[240] *I.e.*, '[t]he terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.' Article 16(3) ICTR Statute; Article 17(3) ICTY Statute.

[241] See Rule 33(A) ICTY RPE; Rule 33(A) ICTR RPE.

[242] Cf. Tolbert (2004), *supra* note 2155, p. 481. Tolbert suggests that at the ICTY no difficulties have arisen in this respect, despite the existing risk, because of the 'outstanding leadership' of the people involved. (see *ibid.*, p. 482). However, this is no satisfactory conclusion, as no court should depend on the qualities of the leaders involved.

a hierarchical manner. Therefore, this organ alone makes the Tribunals more bureaucratic than coordinate. [243]

Obviously, for the *ad hoc* Tribunals it was nearly impossible to attract judges and prosecutors with previous experience in international criminal law or with the crimes that these Tribunals deal with. For the ICC, attracting personnel with international criminal law experience should already be easier. Therefore, this court could in principle attain a higher degree of professionalization.

The ICC is fully independent of the United Nations. It is headed by a President who is responsible for the court's "proper administration". However, the Office of the Prosecutor functions outside the scope of his responsibility.[244] Each Chambers division (Trial, Pre-Trial and Appeal) is headed by a President, each Chamber by a Presiding Judge.[245] The Judges of the ICC are elected by the Assembly of States Parties and should qualify for the highest judicial positions in their home jurisdictions.[246] Each Chamber should be allocated 'an appropriate combination of expertise in criminal law and procedure and in international law'. The Trial and Pre-Trial Chambers should mainly be comprised of judges with criminal trial experience.[247] In addition, legal and geographical diversity are taken into account.[248] Potentially, a less experienced judge could be preferred over one more experienced, but whose nationality is already represented. Although more expertise is required from judges at the ICC than from those at the ICTY, in terms of hierarchy, there are no significant differences.

The ICC's Office of the Prosecutor is headed by the Prosecutor, and his Deputy Prosecutors.[249] They are elected by the ASP[250] and do not need to be former prosecutors, but may also be judges or defence counsel, as long as they have criminal trial experience.[251] This at least accounts for a degree of professionalization. The Prosecutor may initiate investigations on his own initiative, but may also act on the request of a State Party or the Security Council.[252]

The Registry, headed by the Registrar, is in charge of the non-judicial aspects of the administration and servicing of the ICC.[253] The Registrar and his Deputy are elected by the judges,[254] function under the authority of the President[255] and have more limited powers than at the *ad hoc* Tribunals. For instance, the ICC Registrar has no control over the allocation of resources of the Prosecution, or over prosecutorial

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[243] It has on occasions unjustifiably allowed its bureaucratic purposes to prevail over defence rights. See Chapter III, paragraph 3.2.2.
[244] See Article 38 ICC Statute.
[245] See Regulations 13 and 14 ICC Regulations of the Court.
[246] See Article 36 ICC Statute.
[247] See Article 39(1) ICC Statute.
[248] Cf. Articles 36(8)(a) and 36(7) ICC Statute.
[249] See Article 42 ICC Statute.
[250] See Article 42(4) ICC Statute.
[251] Article 42(3) ICC Statute. See also Bergsmo, Morten and Harhoff, Frederik, 'Article 42', in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), pp. 627-636, p. 632.
[252] Cf. Articles 13-15 ICC Statute.
[253] See Article 43 ICC Statute.
[254] See Article 43(3) ICC Statute.
[255] See Article 38(3)(a) ICC Statute.

staff.[256] Because responsibilities are better divided over the organs of the ICC, its Registry generates less bureaucracy and hierarchy than its counterpart at the *ad hoc* Tribunals.

Thus, the organisational structure of the *ad hoc* Tribunals and the ICC involves hierarchical as well as bureaucratic elements. However, because the *ad hoc* Tribunals fall under the same umbrella of the UN,[257] these are regarded as more obviousy bureaucratic than the ICC. Inevitably, some bureaucracy is necessary for any court to function effectively, either in a coordinate or in a hierarchical system.[258] Accordingly, not too much attention should be given to this aspect.

Whether the structure of authority of international criminal courts is more hierarchical or coordinate also depends on the nature of the officials involved. The offices of the prosecution and the judiciary are largely occupied by legal professionals, even though the judges and the Prosecutor of the ICC may have had a different capacity in their domestic jurisdiction. Remarkably, the *ad hoc* Tribunals require no specific experience in criminal law in their potential judges. Furthermore, the main posts at international criminal courts are limited in duration.[259] Prosecutors and deputy prosecutors may serve the ICC for a maximum of nine years, judges for a maximum of six or nine years. The President and Vice Presidents may stay in their office no longer than three years, but may be re-elected once. The Registrar and his Deputies may stay in their office for five years, and may be subject to one re-election.[260] The ICTR Registrar serves a four-year term but can be reappointed without limits.[261] Before the ICTR, permanent Judges serve for a four-year term, but may be re-elected. [262] There will, therefore, always be a limitation on the degree of professionalism or specialization of the most important international criminal court officials,[263] except of course, where they go from one international criminal court to another. This movement could enhance the professionalism of ICC officials.

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[256] See Article 43(1) and 42(2) ICC Statute. Before the *ad hoc* Tribunals, the Registrar is delegated powers from the UN Secretary-General, and the Secretary General appoints prosecution staff. Thus, the Registrar is finally responsible for appointing prosecution staff. Cf. also Tolbert, David, 'Article 43', in Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* Baden-Baden: Nomos, 1999), pp. 637-646, p. 638, 640.

[257] However, the Registry has at times been able to evade the usual UN bureaucratic mechanisms, hereby saving a lot of time. Cf. Tolbert (2004), *supra* note 2155, p. 481.

[258] As van Crefeld put it: 'no ruler in charge of a political unit larger than family can operate without subordinates who look up to him and, in one way or another, are dependent on him.' Van Creveld (2000), *supra* note 213, p. 128. Who is the ruler in the context of international criminal law is not entirely clear, especially regarding the *ad hoc* Tribunals. It could either be their President, the UN Security Council or the UN Secretary-General to whom the President is obliged to report back on a yearly basis.

[259] Obviously, defence counsel fall outside the organisational framework of the ICC and the *ad hoc* Tribunals. Cf. *supra,* Chapter III.

[260] See Articles 42(4), 38(1), 36(9) and 43(5) ICC Statute.

[261] See Article 16(3) ICTR Statute.

[262] See Article 12*bis*(3) ICTR Statute. *Ad litem* judges serve the same maximum term, but may not be reelected. See Article 12*ter*(1)(e) ICTR Statute. The President and Vice-President serve a two-year term at most, but may be reelected once. See Rule 18(A) and 20 ICTR RPE; Rule 18(A) and 20 ICTY RPE.

[263] Nevertheless, for the purposes of continuity and expedition, judges will preferably remain appointed to a case until it finishes, even if they were originally appointed *ad litem* for a limited

The Prosecutor maintains a monopoly over initiating investigations. The Registrar has far-reaching powers. The Presidents of these courts also dominate, exercising authority over the administration of justice as a whole of the *ad hoc* Tribunals and the ICC. Much power being vested in a few individuals epitomizes a "pyramidical" hierarchy. However, this pyramid is low and has a broad base, consisting of senior legal officers, legal officers and supportive staff.[264]

One of the major impediments to the well-functioning of international criminal courts is the absence of an autonomous enforcement agency. Without the support and co-operation of states and international organizations, an international tribunal cannot function effectively.[265] Without an international police force to take responsibility for fact-finding or the arrests of indicted persons,[266] or, a facility to detain convicted persons and, instead, reliance upon "sentencing agreements" with states,[267] the support of states and international organisations is vital and essential.[268] Cooperation with national authorities may not always work out successfully. [269] Arguably, the absence of external supervisory bodies to the functioning of international criminal courts makes it easier for states to refuse cooperation.[270] The structural framework in which international criminal courts operate is to that extent incomplete.

Elements of the "hierarchical ideal" may prevail in terms of hierarchy and bureaucracy in the organizational structure of international courts. The lesser scope for professionalization in this context may mark an aspect of the coordinate ideal. Even so, it cannot be concluded that the structure of authority in international criminal courts is more connected to either Damaška's hierarchical or to his coordinate ideal of officialdom. Damaška has emphasized that although one "organization of authority" may be more suitable for a certain model of proceedings than the other, the relation

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duration. See, for instance, UN SC Resolution 1581 (UN Doc. S/RES/1581 (2005)), 18 January 2005. The UN SC expected 'that the extension of the terms of office of the ad litem judges concerned will enhance the effectiveness of trial proceedings and contribute towards ensuring the implementation of the Completion Strategy'. Cf. *supra*, note 8.

[264] In 2007, for instance, the ICTY counted 1144 staff members. See ICTY website, ICTY at a glance. For 2006/2007, the UN General Assembly authorized 1,042 posts for the ICTR. See ICTR website, General Information. In 2007, 465 staff members were working at the ICC. See Tenth Diplomatic Briefing, Information Package, 19 June 2007, available from the ICC website, p. 8.

[265] ICTY Sixth Annual Report (1999), par. 178.

[266] Cf. for instance, ICTY Fourth Annual Report (1997), par. 181 *et seq*. Cf. also ICTY App. Ch., Judgement, *Tadić* (Case No. IT-94-1-A), 15 July 1999, § 51.

[267] See Article 27 ICTY Statute; Article 26 ICTR Statute; Article 103 ICC Statute. Cf. also, Tolbert, David and Rydberg, Åsa, 'Enforcement of Sentences', in Richard May *et al.* (ed), *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp. 533-543. These bilateral agreements can be found on the ICTR website. As of 2004, after the Security Council had encouraged states to enter into such agreements, ten states had signed such agreements with the ICTY. See ICTY Eleventh Annual Report, (UN Doc A/ 59/215), 16 August 2004, par. 299. The twelfth report was silent on this number, but in 2006 the ICTY Registry concluded 10 more of such agreements. See ICTY Thirteenth Annual Report, (UN Doc. A/61/271), 15 August 2006, par. 92.

[268] Cf. ICTY Fifth Annual Report (1998), par. 226.

[269] For instance, until more than a decade after the ICTY was set up, two very important accused, Karadžić and Mladić, remained at large.

[270] Cf. Damaška (2004), *supra* note 62, p. 1031.

'between the organization of procedural authority and the object of proceedings' is not self-evident.[271] Therefore, the position of the defence can be more effectively evaluated according to the existing proceedings of international criminal courts. The following compares these with the theoretical models of Damaška.

4.3.4 Nature of Proceedings of the ICTY, the ICTR and the ICC

4.3.4.1 Introduction

As set out in the introduction, the procedural system of the *ad hoc* Tribunals as well as that of the ICC, like all existing legal systems, is hybrid.[272] Moreover, in *Akayesu*, the ICTR Trial Chamber emphasized that the Statute does not oblige it 'to apply any particular legal system'.[273] The identifiable common law and civil law features of international criminal proceedings have been comprehensively studied.[274] The First Annual Report of the ICTY labelled its proceedings as predominantly adversarial.[275] Notwithstanding, the proceedings of the *ad hoc* Tribunals also contain features of an inquest.[276] The ICC Statute neither promotes an adversarial nor an inquisitorial approach for its proceedings.[277] It refrains from mentioning any domestic legal system-related principles whenever this can be avoided. For example, instead of including the Anglo-American legal concept of "contempt of court", in the wording of the Statute, a similar concept is named "Offences against the administration of justice".[278] That makes it even more difficult to determine which element derives from which national legal system. Therefore, the following paragraph examines the different components of international criminal procedure along the lines of Damaška's models.

4.3.4.2 Conflict-Solving and Coordinate Features of International Criminal Procedure

To determine which features of the proceedings of the *ad hoc* Tribunals and the ICC are conflict-solving, the extent to which the prosecution and, more particularly, the

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[271] See Damaška (1986), *supra* note 14, p. 69.

[272] In *Tadić*, for instance, the Trial Chamber held: 'The International Tribunal, with its unique amalgam of civil law and common law features, does not strictly follow the procedure of civil law or common law jurisdictions.' See ICTY Tr. Ch., Decision on the Defence Motion on Hearsay, *Tadić* (Case No. IT-96-1-T), 5 August 1996, § 14.

[273] Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 131.

[274] See, for instance, Fairlie, Megan, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', 4 *International Criminal Law Review* (2004), pp. 243-319; Ambos (2003), *supra* note 12.

[275] Cf. ICTY First Annual Report (1994), par. 71.

[276] Cf. for instance, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, *Tadić* (Case No. IT-96-1-T), 27 November 1996 (hereinafter: Separate Opinion of Judge Stephen). Cf., also, Morris, Virginia and Scharf, Michael P., *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia: a documentary history and analysis* (Irvington-on-Hudson, N.Y: Transnational Publishers, 1995), p. 158 and 181; Fairlie (2004), *supra* note 274, pp. 243-245; Cassese (2003), *supra* note 136, p. 384 *et seq*.; Tochilovsky, Vladimir, 'International Criminal Justice: "Strangers in the Foreign System"', 15 *Criminal Law Forum* (2004), pp. 319–344, p. 321, 322.

[277] Cf., for instance, Tochilovsky, Vladimir, 'Rules of Procedure for the International Criminal Court: Problems to Address in the Light of the Experience of the *Ad Hoc* Tribunals', *Netherlands International Law Review* (1999), pp. 343-360, p. 344.

[278] See Article 70 ICC Statute. Cf. *infra,* Chapter VI, paragraph 6.4.4.

defence are autonomous and the extent to which they can influence the form of the proceedings is analysed. It is not intended to portray each and every conflict-solving aspect of international criminal proceedings.[279]

Each party has to present its own case to the judges during the trial. At the *ad hoc* Tribunals, the proceedings and the presentation of the evidence take place in a strict order.[280] After both parties' opening statements,[281] first, the prosecution will present its case. After it has finished the presentation of its case, the defence will have its turn.[282] Witnesses of each party will be examined in chief and subsequently be cross-examined by the other party. The trial ends with each party giving a closing argument, if they so wish.[283] Thus, the proceedings of the *ad hoc* Tribunals are unquestionably structured as a contest in which two opposing cases will be presented. How proceedings before the ICC will be conducted is not specifically outlined. Article 64(3)(a) of the ICC Statute provides that the Trial Chamber will '[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'.[284] There is no specific order of the presentation of evidence. When the presiding judge refrains from giving directions, Rule 140(1) of the ICC RPE leaves the manner and order of the presentation of the evidence to the parties.[285] Nevertheless, whatever the order of the presentation of the evidence, it is likely that the prosecution and the defence will each present their case separately at the ICC.

This may follow from the fact that where fact-finding is concerned, not only the prosecution or other officials are responsible for investigations. The defence is supposed to conduct its own investigations and is assigned one or more investigators to this purpose. As both parties are responsible for gathering the evidence for their respective cases, it is more than likely, and arguably inevitable, that they will each get a chance to present their case. Pursuant to Rule 20(1)(b) ICC RPE, the Registrar must provide defence counsel with 'support for professional investigators necessary for the efficient and effective conduct of the defence.' Providing defence counsel with the means to conduct their own investigations enhances the autonomous position of the defence and is therefore a conflict-solving feature of international criminal proceedings. Additionally, this may appear to be in line with the coordinate model of proceedings. However, the ICC requires that the investigators should be 'professionals' with over ten years of relevant investigating experience. This somewhat diminishes the autonomy of the defence in terms of choice.[286] At the *ad hoc* Tribunals,

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[279] Some aspects are given more particular attention in other chapters. For example, the extent to which the prosecution and the defence are procedural equals is examined in Chapter V.

[280] See Rules 84-86, especially Rule 85(A) ICTY RPE; Rules 84-86, especially Rule 85(A) ICTR RPE.

[281] The Defence can choose to have its opening statement after the Prosecution's opening statement, or after the prosecution's presentation of the evidence, at the start of the Defence case. See Rule 84 ICTY RPE; Rule 84 ICTR RPE.

[282] See Rule 85(A) ICTY RPE; Rule 85(A) ICTR RPE.

[283] Rule 86 ICTY RPE; Rule 86 ICTR RPE.

[284] Cf. also Article 64(8) ICC Statute. Pursuant to Rule 122(1) of the ICC RPE the presiding judge determines the order and conditions of the presentation of evidence for the confirmation hearing.

[285] The presiding judge will interfere however, if the parties are unable to reach an agreement.

[286] See Regulations of Registry of the ICC (ICC-BD/03-01-06-Rev. 1), Regulation 137.

there are few and less significant requirements as to investigators for the defence.[287] Therefore, the fact that the ICC assigns *professional* investigators to defence counsel could be an element of the hierarchical ideal that favours professional officials to be in charge of the investigations.[288]

The judges before the Tribunals have little knowledge of the case beforehand. As they have no dossier to rely on, they largely depend on the two parties bringing out contesting views while presenting their version of the facts during trial. This is also a conflict-solving feature. The trial is the most important stage of proceedings, where most of the evidence is presented. Nonetheless, judges are provided with some materials (the parties' briefs, summarized witness statements, et cetera) before the trial starts.[289] Affording judges some information has been deemed necessary in the context of international criminal law. International criminal cases are generally too voluminous to process without any prior knowledge of what the parties will present and focus on. Nonetheless, the information is still far from that which judges in civil law countries would have at the start of a trial. Therefore, the presentation of the facts along the lines of a contest is still a paramount feature.

There remains room for judges to intervene with the adversaries. Judges may pose questions to witnesses at any stage.[290] This intervention, especially under cross-examination, may impair a specific sequence of questioning that may have been tactically prepared by a party. However, the degree to which it impinges upon the contest between the parties depends on how this power is used. For instance, when judges intervene as a last resort where parties fail to present their evidence effectively, it may leave the core nature of the contest intact.[291] Even so, in *Hadžihasanović and Kubura*, defence counsel criticized a number of questions the ICTY Trial Chamber had posed to witnesses, such as questions 'with the apparent purpose of depriving answers provided to the Parties of their weight or relevance', and argued that these questions did not meet the interests of justice.[292] The Chamber reasoned that it had no other option because of its truth-finding duty than to question witnesses the way it did.[293] At the ICC, judicial interference in the line of questioning of parties is largely avoided through Rule 140(2)(c) of the ICC RPE stipulating that the judges will only put questions to a witness before or after a party questions him.[294] Nevertheless, questions whenever posed may still interfere with the goals the parties were pursuing through questioning a witness. Therefore, the ICC Rule does not eliminate all interference with the party contest.

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[287] On requirements for defence investigators see *supra,* Chapter II, paragraph 2.4.3.

[288] Cf. Damaška (1986), *supra* note 14, p. 53, 54. Notwithstanding, the fact that the ICC assigns investigators to the defence is clearly an element favouring contest proceedings.

[289] See, for instance, Rules 66(A) and 73*bis* (B) ICTR RPE; Rules 65*ter*(E), (G) and (L), 73*bis*(B) and (C) ICTY RPE.

[290] Rule 85(B) ICTY RPE; Rule 85(B) ICTR RPE.

[291] Cf. Damaška (1986), *supra* note 14, p. 124.

[292] See ICTY Tr. Ch. II, Decision on Defence Motion Seeking Clarification of the Trial Chamber's Objective in its Questions Addressed to Witnesses, *Hadžihasanović and Kubura* (Case No. IT-01-47), 4 February 2005.

[293] See *idem.*

[294] See Rule 140(2)(c) ICC RPE.

Evidence will be exchanged between the parties before trial, on the basis of disclosure obligations.[295] In *Tadić*, Judge Stephen argued that the distinctive disclosure obligations of the prosecution and the defence that the ICTY initially employed were in line with adversarial common law systems. A trial is considered fair on the condition that the prosecution informs the accused of the allegations and evidence against him before his trial starts. The accused is not under any obligation to assist the prosecution in making out its case.[296] Generally in common law proceedings, the prosecution has broader disclosure obligations towards the defence than vice versa, even though this difference may be contrary to the idea of a fully equal contest. However, at the *ad hoc* Tribunals the disclosure obligations of the prosecution and defence have become more equal since the first trials started, for the very reason of enhancing the contest features in terms of procedural equality of the parties. According to Damaška, some features of the Anglo-American legal system may divert from a forensic contest, because Anglo-American governments have not been as keen on 'adjusting procedural form to its animating purposes' as European Continental governments.[297] This explains, for instance, why civil proceedings in Continental European states may contain purer contest elements than civil proceedings in the US.[298] The reason why the Tribunals sought to equalize the disclosure obligations between the defence and the prosecution rather than keeping them asymmetric, could be that, like Continental European states, they favour an instrumentalist approach to procedural law. Chapter V further explores whether upholding equal disclosure obligations is desirable in international criminal justice.[299] But, whatever answer will be provided, without doubt, having equal disclosure obligations is a conflict-solving trait of the proceedings of the *ad hoc* Tribunals.

At the *ad hoc* Tribunals, the accused may voluntarily appear as a witness in his own defence.[300] In addition, after the opening statement(s), the ICTY allows him to make an unsworn statement upon which contents he may not be cross-examined.[301] According to Damaška, a voluntary appearance of an accused as a witness in his proceedings will not be likely to distort contest proceedings, especially where his judges are experienced professionals. They should realize that an accused is more tempted to misinform them than a regular witness.[302] Where an accused is forced to testify in his own proceedings, he becomes "a means of proof", which diminishes his control over his tactical interest.[303] Therefore, the voluntariness for accused in international criminal proceedings to testify is a conflict-solving trait that enhances his

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[295] See Rules 66-70 ICTY RPE; Rules 66-70 ICTR RPE.

[296] See Separate Opinion of Judge Stephen, *Tadić*, *supra* note 276. See also Chapter V Equality of Arms, paragraph 5.6.

[297] See Damaška (1986), *supra* note 14, pp. 91 and 92.

[298] For instance, in American civil proceedings, 'a litigant can call his adversary to the stand to establish his own case.' Thus, in Anglo-American jurisdictions, 'civil procedure is more "inquisitorial" and criminal procedure more "adversarial".' On the Continent, the same applies *vice versa*. See *ibid.*, p. 127.

[299] See *infra,* Chapter V, paragraph 5.6.

[300] Rule 85(C) ICTR RPE; Rule 85 (C) ICTY RPE.

[301] See Rule 84*bis* ICTY RPE, which was adopted on 2 July 1999. Cf. also ICTY Sixth Annual Report (1999), par. 119. The ICTR RPE lack a similar provision.

[302] See Damaška (1986), *supra* note 14, pp. 128, 129.

[303] *Ibid.*, p. 126.

autonomy. It could however be argued that the "unsworn statement" as allowed at the ICTY undermines the contest. The accused is afforded an opportunity to speak without the prosecution being able to cross-examine him on the merits of his statement.

What may also signal the accused's control over proceedings is that under the RPE of the *ad hoc* Tribunals, where the accused pleads not guilty, he will have a full trial.[304] Conversely, if he pleads guilty, the trial phase is avoided and the sentencing phase initiated.[305] Where the initiation of a trial depends on the plea of the accused, this is generally indicative of a conflict-solving attitude.[306] The incentives for the Tribunals to promote guilty pleas are obvious. It will spare victims 'the trauma and emotions of trial'.[307] If the perpetrator admits his crimes, this may help to give victims and their relatives closure.[308] Additionally, it saves the Tribunals the time, resources and effort of a long trial. This was acknowledged in *Erdemović* when the ICTY was confronted with a plea agreement for the first time.[309] In consequence, accused have been encouraged to admit their guilt.[310] However, the *ad hoc* Tribunals will not allow the saving of resources to prevail over the quality of justice.[311] Guilty pleas are deemed particularly important in confirming the truth of the charges. As touched upon in paragraph 4.3.2, this, in addition to the accused taking responsibility for his actions, may further reconciliation.[312] However, the ICTY in *Deronjić* stressed that a disadvantage of a plea agreement is that the revelation of the truth is limited to the contents of the plea agreement.[313] Similarly, in *Nikolić*, it was advanced that 'the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised.'[314] In the US, however, it is deemed that a guilty plea is more likely to render a truthful outcome than a (jury) trial to the extent that it may prevent a wrong verdict and therefore enhances the legitimacy of the legal system.[315] On the other hand, it is also acknowledged that plea bargains block the adversary system's 'noble

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[304] CF. Rule 62(A)(v) ICTY RPE; Rule 62(A)(iv) ICTR RPE.

[305] See Rule 62*bis* ICTY RPE; Rule 62(B) ICTR RPE.

[306] Cf. Damaška (1986), *supra* note 14, p. 100. Cf. also ICTY App. Ch., Judgement - Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* (Case No. IT-96-22), 7 October 1997, § 6. Judges McDonald and Vohrah argue here that Rule 62 ICTY RPE 'explicitly incorporates the common-law adversarial trial procedure'.

[307] See Judgement and Sentence, *Kambanda*, *supra* note 176, § 54.

[308] See Sentencing Judgement, *Momir Nikolić*, *supra* note 138, § 145.

[309] See ICTY Tr. Ch., Sentencing Judgement, *Erdemović* (Case No. IT-96-22-T*bis*), 5 March 1998, § 19.

[310] See, for instance, *ibid.*, § 16. See also Sentencing Judgement, *Deronjić*, *supra* note 140, § 134.

[311] According to the ICTY Trial Chamber in *Nikolić*, 'in cases of this magnitude, where the Tribunal has been entrusted by the United Nations Security Council – and by extension, the international community as a whole – to bring justice to the former Yugoslavia through criminal proceedings that are fair, in accordance with international human rights standards, and accord due regard to the rights of the accused and the interests of victims, the saving of resources cannot be given undue consideration or importance.' Sentencing Judgement, *Momir Nikolić*, *supra* note 138, § 67.

[312] See Sentencing Judgement, *Deronjić*, *supra* note 140, § 134.

[313] See *ibid.*, § 135.

[314] Sentencing Judgement, *Momir Nikolić*, *supra* note 138, § 67.

[315] See Fisher, George, 'Plea Bargaining's Triumph', 109 *Yale Law Journal* (2000), pp. 857-1086, p. 1042.

clash for truth'.[316] International criminal courts encounter other challenges than national courts. They foster high aspirations. They are not only expected to do justice, but also to bring peace and reconciliation to victims and communities that suffered severely from war crimes, crimes against humanity or genocide.[317] Therefore, international criminal courts are cautious about having the parties, an organ of the Tribunal itself and a self-proclaimed perpetrator of atrocities, strike a deal without scrutinizing the contents of this 'deal' considerably. Not surprisingly therefore, for instance, in *Nikolić*, the ICTY advanced that where a plea agreement does not comprise 'the totality of an individuals [*sic*] criminal conduct' or does not reflect the seriousness of the crimes, 'questions may arise as to whether justice is in fact being done.'[318] Perpetrators of international humanitarian law violations should not be held accountable for only a portion of the crimes they have actually committed.[319] This attitude toward plea agreements also surfaces in the Statute of the ICC. Before the ICC, a plea of guilty or not guilty may also be made at the start of proceedings.[320] However, where an accused admits his guilt, the judges may request the prosecutor to produce more evidence or even order a regular trial if the interests of justice, and of victims in particular, require 'a more complete presentation of the facts of the case'.[321] Thus, a considerate amount of judicial control, especially over sentencing, and awareness of how plea agreements may reflect on victims of international humanitarian crimes, is incorporated in the plea system of international criminal courts. Judges spend considerable time to assess the facts asserted in the plea agreement, and the punishment proposed by the parties. The guilty plea is not considered to be merely a quick party solution to alleviate pressure on the system. Rather, it should produce the truth and construct a historical record of proceedings.[322] This limits the conflict-solving character of plea-bargaining at international criminal courts.

This may also account for why, whereas in the adversarial system of the United States, a guilty plea generally offers the accused the advantage of a more lenient sentence or may even diminish charges,[323] the judges of the *ad hoc* Tribunals have been hesitant to compensate accused for their admission of guilt and cooperation with the prosecution. In the first cases before the *ad hoc* Tribunals, no mitigated sentences in return for guilty pleas and cooperation were provided.[324] In *Kambanda*, rather than compensating the accused for his plea of guilty and his substantive cooperation with the prosecution,[325] the ICTR imposed the highest possible sentence, life

316 See *ibid.*, p. 859.
317 See *supra,* paragraph 4.3.2.
318 Sentencing Judgement, *Momir Nikolić*, *supra* note 138, footnote 117.
319 See *ibid.*, § 67.
320 See Article 64(8)(a) ICC Statute.
321 See Article 65(4) ICC Statute.
322 Cf. Swart (2008), *supra*, note 137, p. 106.
323 Cf. for instance, Damaška (2004), *supra* note 62, p. 1026.
324 ICTY First Annual Report (1994), par. 74. See *infra* footnote 338. This soon changed.
325 The plea agreement did not contain any agreement as to the sentence as this would be at the discretion of the Chamber. However, the prosecution had recommended a life sentence; the defence a prison sentence of two years. Judgement and Sentence, *Kambanda*, *supra* note 176, §§ 48 and 60.

imprisonment,[326] on the accused.[327] If Kambanda's guilty plea had resulted in a substantive mitigation of his sentence, it is likely that more accused would have pleaded guilty at the ICTR. In *Jelisić*, the ICTY issued a 40-year prison sentence.[328] Considering the age of the accused, this equalled a life sentence.[329] His guilty plea was considered of too little weight to mitigate his sentence. The Chamber could not perceive remorse and seemed to suspect that the sole motivation to make the plea had been to obtain a more lenient sentence. The plea was made after it became clear that there were photographs in evidence which showed the accused while committing the crimes he was accused of.[330] Damaška argued that the *ad hoc* Tribunals and the ICC tend to regard a plea of guilty from the accused as his confession. This is somewhat similar to an inquisitorial approach.[331] Pursuant to US Federal law, a defendant may withdraw his guilty plea if the judge rejects the plea agreement between the parties.[332] Plea agreements are dealt with as quasi-contracts in the Anglo-American context.[333] The approach in international criminal proceedings is different. Bargaining, imposing a lesser sentence for cooperating with the prosecution, was only hesitantly introduced in international criminal justice. In *Todorović*, the accused received substantial mitigation of his sentence. His timely plea of guilt and his substantial cooperation with the Prosecutor were most important as mitigating factors. His expression of remorse, as it was considered to be sincere, was also a mitigating circumstance.[334] But sentencing recommendations by the parties have not always been followed.[335] In *Plavšić*, given her leadership position, her admittance of guilt was expected to substantially contribute to reconciliation.[336] It led the Trial Chamber to impose a more lenient sentence than the proposal of the prosecution.[337] In *Nikolić*, the Trial Chamber imposed a sentence that exceeded the range the parties had proposed.[338] Because of the gravity of the offences

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[326] Rule 101(A) ICTR RPE.

[327] See Judgement and Sentence, *Kambanda*, *supra* note 176, IV. Verdict; ICTR App. Ch., Judgement, *Kambanda* (Case No. ICTR 97-23-A), 19 October 2000, § 126.

[328] ICTY Tr. Ch., Judgement, *Jelisić* (Case No. IT-95-10), 14 December 1999, § 139; ICTY App. Ch., Judgement, *Jelisić* (Case No. IT-95-10), 5 July 2001.

[329] Cf. App. Ch. Judgement, *Jelisić*, *supra* note 328, Partial Dissenting Opinion of Judge Wald, § 2.

[330] See Tr. Ch. Judgement, *Jelisić*, *supra* note 328, § 127.

[331] Cf. Damaška (2004), *supra* note 62, p. 1038.

[332] See Rules 11(c)(5) and 11(d) of the US Federal Rules of Criminal Procedure, 31 December 2004.

[333] Cf. Damaška (2004), *supra* note 62, p. 1027.

[334] See ICTY Tr. Ch., Sentencing Judgement, *Todorović* (Case No. IT-95-9/1), 31 July 2001, § 14.

[335] In the US, judges seldom oppose plea agreements. See, for instance, Fisher (2000), *supra* note 315, p. 1073.

[336] See ICTY Tr. Ch. I, Sentencing Judgement, *Plavšić* (Case No. IT-00-39&40/1), 27 February 2003, §§ 66-81.

[337] It imposed 11 years of imprisonment whereas the prosecution had recommended 15 to 25 years. The defence did not make a recommendation. See *ibid.*, §§ 126-134.

[338] See Sentencing Judgement, *Momir Nikolić*, *supra* note 138, § 180. The Appeals Chamber reduced Nikolić's sentence to just within the range of the prosecution's sentencing recommendation, but only because of a re-evaluation of aggravating and mitigating circumstances, such as, for instance, an unfortunate mistranslation of the closing argument of the defence (§ 70; cf. § 122 Tr. Ch. Sentencing Judgement) and the Trial Chamber's misevaluation of the accused's cooperation with the prosecution (§ 114). The Appeals Chamber confirmed that the Rules of Procedure and Evidence do not bind the judges to accept the parties' plea agreement (§ 135). See ICTY App. Ch., Judgement on Sentencing Appeal, *Momir Nikolić* (Case No. IT-02-60/1-A), 8 March 2006. The subject of plea bargaining in

involved in international criminal proceedings and because international criminal courts aim to prosecute those individuals that allegedly bear the most responsibility for these crimes, and seek to deter others and promote national reconciliation,[339] mitigating a sentence purely because of an admission of guilt may seem unwarranted.[340]

Whereas in the adversarial system of the United States the vast majority of all prosecutions result in a plea agreement,[341] only a minority of accused pleaded guilty before the *ad hoc* Tribunals.[342] The inquest features of the guilty plea procedure at international criminal courts may be to blame.

In *Erdemović*, the ICTY Trial Chamber acknowledged that the procedures of the ICTY formally acknowledge the right of an accused 'to adopt his own defence strategy' which right is equally established in common law systems.[343] If an accused can await and prepare for his trial in freedom, this as well signifies his autonomy. Initially, provisional release could only be granted 'in exceptional circumstances'.[344] After this requirement was removed,[345] at the ICTY, provisional release was granted more often, on the condition that the accused would not pose any danger to others and would be likely to appear at his trial.[346] At the ICTR, which equally provides for

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international criminal justice has been extensively covered in legal literature. See, for instance, Damaška (2004), *supra* note 62; Combs, Nancy Amoury, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts', 59 *Vanderbilt Law Review* (2006), pp. 69-151; Tieger, Alan and Shin, Milbert, 'Plea Agreements in the ICTY: Purpose, Effects and Propriety', 3 *JICJ* (2005), pp. 666 - 679; Dixon, Rodney and Demirdjian, Alexis, 'Advising Defendants about Guilty Pleas before International Courts', 3 *JICJ* (2005), pp. 680 - 694; Salter, Michael and Eastwood, Maggi, 'Negotiating Nolle Prosequi at Nuremberg: The Case of Captain Zimmer', 3 *JICJ* (2005), pp. 649-665; Henham, Ralph and Drumbl, Mark, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia', 16 *Criminal Law Forum* (2005), March 2005, pp. 49-87; Scharf, Michael P., 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals', 2 *JICJ* (2004), pp. 1070-1081.

339 Cf. Judgement and Sentence, *Kambanda*, *supra* note 176, §§ 26-28.

340 It has also been argued that international criminal courts should render at least equally severe punishments as national courts for a similar crime. Otherwise their verdicts would not lack deterrent effect and would not contribute to the aim of retribution. See, for instance, Judgement, *Furundžija*, *supra* note 149, §§ 225-226.

341 Above 90 percent of all criminal cases and between 70 and 85 percent of all felony cases ends up in a plea agreement in the US. See, for instance, *Brady v. United States*, *supra* note 44, p. 752, footnote 10; and, Fisher (2000), *supra* note 315, pp. 1012-1013.

342 At the moment of writing, at the ICTR a total number of 8 accused have pleaded guilty. At the ICTY, 19 persons have pleaded guilty. At the ICTY, their sentences range from 3 to 20 years (this does not include Jelisić who pleaded guilty a month before the start of his trial and was tried nonetheless; because there was substantial evidence (pictures of him committing crimes) his plea was given only relative weight; he was sentenced to 40 years in prison; cf. App. Ch. Judgement, *Jelisić*, *supra* note 328, §§ 119-123).

343 See Sentencing Judgement, *Erdemović, supra* note 150, § 13.

344 Rule 65(B) ICTY RPE; Rule 65(B) ICTR RPE.

345 The exceptional circumstances clause was removed from Rule 65 ICTY RPE in Revision 17 in 1999; and from Rule 65 of the ICTR RPE in 2003. The same requirement was removed from Rule 40*bis* of the ICTY and ICTR RPE, dealing with the provisional detention of suspects.

346 Soon after the amendment, three accused were provisionally released in *Simić et al.* See ICTY, Tr. Ch. III, Decision on Milan Simić's Application for Provisional Release, *Simić* et al. (Case No. IT-95-9), 29 May 2000; ICTY, Tr. Ch. III, Decision on Miroslav Tadić's Application for provisional

it,[347] not a single accused has been provisionally released. The ICC's RPE do not require "exceptional circumstances" for providing "conditional" release.[348] . The ICC Pre-Trial Chamber can impose a number of conditions on an accused to be released, including travel limitations, restraints to visit certain people or places, to contact witnesses or victims, or to engage in particular professional activities. The Chamber can also demand the accused to post bond or provide another security.[349]

If an accused does not have to await his trial in custody, this could indicate that he is not merely regarded as an object of his proceedings, but as a serious participant in them. Since the ICTR has never granted provisional release to any accused, the Rule providing for it remains a dead letter. This reveals a policy-implementing attitude. The ICTY has a more conflict-solving attitude in this respect. Whether the ICC will in fact grant conditional release remains to be seen.

In addition to conflict-solving features, the proceedings of the *ad hoc* Tribunals and the ICC may also contain coordinate features. In the coordinate ideal, *amici curiae* are 'welcome assistants' to the unprepared-decision makers.[350] In international criminal proceedings, judges may request or allow states, organisations or private individuals to submit their observations as *amicus curiae.*[351] But, Damaška's policy-implementing model also allows citizens to voice opinions as *amici curiae* on specific issues, 'so that new channels of procedural input are carved out'.[352] Whether this feature in the international criminal context functions more in a coordinate way or in a policy-implementing manner, is not perhaps of great relevance to this study, but deserves more research.

In *Kayishema and Ruzindana*, the ICTR Appeals Chamber noted that 'both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.'[353] This could be attributed to the fact that 'the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind.'[354] In the coordinate ideal, live testimony is preferred over written witness statements, due to the absence of officials to preserve or retrieve documents and because lay persons are decision makers.[355] In international criminal justice, professional judges are adjudicators of fact and of law, and the Registry may preserve evidential material.[356] The same preference is therefore unnecessary. To some extent, written evidence *is* accepted in international criminal justice. The *ad hoc* Tribunals accept written witness statements regarding testimony on

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Release, *Simić* et al. (Case No. IT-95-9), 4 April 2000; ICTY, Tr. Ch. III, Decision on Simo Zaric's Application for provisional Release, *Simić* et al. (Case No. IT-95-9), 4 April 2000. Cf. ICTY Seventh Annual Report (UN Doc. A/55/273), 26 July 2000, par. 15.

347 See Rule 65 ICTR RPE.

348 See Rule 118 ICC RPE.

349 Rule 119 ICC RPE.

350 See Damaška (1986), *supra* note 14, p. 63.

351 See Rule 74 ICTR RPE; Rule 74 ICTY RPE; Rule 103(1) ICC RPE. The ICC also grants the parties the opportunity to respond to the *amicus curiae* briefs. See Rule 101(2) ICC RPE.

352 Damaška (1986), *supra* note 14, p. 153.

353 ICTR App. Ch., Judgement (Reasons), *Kayishema and Ruzindana* (Case No. ICTR-95-1-A), 1 June 2001, § 65.

354 *Idem*.

355 Cf. Damaška (1986), *supra* note 14, p. 61.

356 See Rule 138 ICC RPE; Rule 81 ICTR RPE; Rule 81 ICTY RPE.

relevant circumstances that do not directly relate to the specific criminal conduct the accused is charged with. For example, testimony on the political background of the conflict.[357] The Tribunals will not on such statements if there is 'an overriding public interest' in oral presentation of the evidence, if 'its nature and source renders it unreliable', or if other factors require that the witness attends for cross-examination.[358] The *ad hoc* Tribunals and the ICC generally prefer live testimony over written witness statement evidence.[359] An important reason for the *ad hoc* Tribunals to prefer oral testimony over written witness statements is their belief that *the parties'* cross-examination of witnesses at trial discloses the truth.[360] According to the ICTR Trial Chamber in *Akayesu*, the reliability and probative value of written witness statements taken down by prosecution investigators is far less than the reliability of 'direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.'[361] Cross-examination as a means of evidence examination is not incompatible with policy-implementing objectives, but it is more likely to advance conflict-solving objectives.[362] It may not be as important in ICC proceedings. The term "cross-examination" is absent in the RPE and Statute of the ICC.The parties and the judges will each have a separate opportunity to question witnesses.[363] Much will depend on the intensity with which judges will question witnesses at the ICC. The more intensely judges search for the truth *ex officio*, the more proceedings will become an inquest rather than a contest.[364]

The *ad hoc* Tribunals and the ICC have no investigative judge. The Prosecutor bears responsibility for gathering evidence and formulating an indictment.[365] In the absence of a jury, 'no technical rules for the admissibility of evidence' are necessary.[366] Unlike a jury, professional judges will be able to disregard evidence which after its presentation turns out to be unreliable.[367] Therefore, the law of evidence is relatively

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[357] See, for instance, Rules 71, 92*bis* and 92*quater* ICTY RPE; Rules 71 and 92*bis* ICTR RPE. Witness statements of deceased witnesses were strictly selected in ICTR Tr. Ch. I, Decision on Admission of Statements of Deceased Witnesses, *Bagosora et al.* (Case No. ICTR-98-41-T), 19 January 2005.

[358] See Rule 92*bis* (A)(ii) ICTY RPE; Rule 92*bis*(A)(ii) ICTR RPE.

[359] See Article 69(2) ICC Statute, Rules 67 and 68 ICC RPE; Rule 90(A) ICTR RPE; Rule 89(F) ICTY RPE. Cf. also Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 137.

[360] Cf. Rules 71(C), 85(B), 90(G) and 94*bis*(B)(iii) ICTR RPE; Rules 71(C), 85(B) and 94*bis* ICTY RPE.

[361] Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 137.

[362] See Damaška (1986), *supra* note 14, p. 96.

[363] See Rule 140 ICC RPE. It is stipulated that the prosecution and the defence may only question the witness about "relevant matters". See Rule 140(2)(b).

[364] Cf. Swart, *supra* note 137, p. 110.

[365] See Rules 39-43 ICTY RPE; Rules 39-43 ICTR RPE.

[366] No jury needs 'to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard.' See ICTY First Annual Report (1994), par. 72. For a different view on the non-technicality of evidentiary rules before the *ad hoc* Tribunals, see Zahar, Alexander and Sluiter, Göran, *International Criminal Law: a Critical Introduction* (Oxford UK; New York: Oxford University Press, 2008), par. 10.2.

[367] Cf. also Transcript, *Tadić* (Case No. IT-94-1), 26 June 1996, p. 3366, where the presiding judge further argued: 'We Judges intentionally and specifically in drafting the Rules of Evidence provide for the opportunity in 89(D) […] that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.'

uncomplicated.[368] Another consequence of the absence of a jury as a finder of fact in proceedings is that it diminishes the need for an expeditious and compact trial.[369] This may be a real disadvantage.

In the hierarchical ideal, judgements are a unanimous determination by an abstract institution comprised of individuals. In the coordinate ideal, they are individual pronouncements. This means that dissenting opinions are perfectly acceptable.[370] While requiring a majority verdict, international criminal courts allow judges to voice separate and dissenting opinions individually.[371] The Trial Chamber of the ICC should nonetheless *strive* for unanimous decisions.[372]

4.3.4.3 Policy-Implementing and Hierarchical Features of International Criminal Procedure

Initially, the procedure of the *ad hoc* Tribunals deviated from adversarial systems in important ways. There was no plea-bargaining at first.[373] After a few years, the slowness of proceedings, the length of detention of the accused and the costs involved, especially if the Tribunals would continue at this pace in fulfilling their mandates, became a major concern.[374] When changes were considered, it was emphasized that procedural rules should not just ensure 'the proper protection of the rights of the accused', but they should also fulfil 'the obligation of the Tribunal to the international community to conduct trials fairly and expeditiously.'[375] Judges of the Tribunals claimed that the protracted nature of the proceedings resulted from the little control that judges could exercise over proceedings.[376] It resulted in different measures to expedite proceedings, many of which could be indicative of a policy-implementing attitude.

There are several examples of judicial control over proceedings. The production of evidence is not left to the parties alone. At the *ad hoc* Tribunals and the ICC, judges may order the parties to produce additional evidence.[377] It was argued that this would serve the interests of justice on an international level, and would hardly diminish the parties' rights, if at all.[378] In addition, the Trial Chamber controls 'the

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[368] The evidence itself, however, is more complicated than in 'regular' domestic trials. 'Because this is a war crimes tribunal, since we will be hearing cases involving serious violations of international humanitarian law, there is more that has to be offered than in a typical murder trial […]. You have to put it in the context of an international or armed conflict […]. So, in order for the Prosecutor to establish guilt, it must do more than just place the accused at the scene or offer evidence that someone saw the accused commit an offence. They have to go further'. Transcript, *Tadić* (Case No. IT-94-1), 16 July 1996, p. 3391.

[369] No inconvenience is caused in terms of keeping citizens from their work or from influencing each other outside the courtroom.

[370] See Damaška (1986), *supra* note 14, p. 18 and 24.

[371] See, for instance, Article 23(2) ICTY Statute; Article 22(2) ICTR Statute; Articles 74 and 83(4) ICC Statute.

[372] See Article 74(3) ICC Statute.

[373] ICTY First Annual Report (1994), par. 74. See *supra* note 338.

[374] Expert Report, *supra* note 135, par. 35.

[375] See ICTY Sixth Annual Report (1999), par. 116.

[376] Cf. Expert Report, *supra* note 135, par. 77 *et seq.*

[377] See Rule 98 ICTY RPE; Rule 98 ICTR RPE; Article 64(6)(d) ICC Statute and Rule 84 ICC RPE. An exception to this Rule is incorporated in Rule 70(3) ICTY RPE, Rule 70(3) ICTR RPE and Rule 82(2) ICC RPE.

[378] See ICTY First Annual Report (1994), par. 73.

mode and order of interrogating witnesses and presenting evidence'.[379] They can also set time limits on cross-examination and examination-in-chief. The most policy-implementing characteristic in this respect is the fact that judges may summon witnesses on their own initiative.[380]

At the *ad hoc* Tribunals, status conferences are organized in the pre-trial phase to 'ensure expeditious preparation for trial' [381] and 'to ensure expeditious trial proceedings'. [382] In addition, pre-trial and pre-defence conferences have been introduced. At these conferences, the counts charged in the indictment are discussed and the parties submit the amount of evidence they propose to present 'in the interest of a fair and expeditious trial'.[383] At the ICTY, a "pre-trial Judge" should 'coordinate communication between the parties during the pre-trial phase' and 'ensure that the proceedings are not unduly delayed'. To this end, he 'shall take any measure necessary to prepare the case for a fair and expeditious trial.'[384] The ICC's Pre-Trial Chamber has various duties,[385] including examining requests of the Prosecutor to proceed with a particular investigation[386] and holding a confirmation hearing of the charges.[387] 'In order to facilitate the fair and expeditious conduct of the proceedings', the Trial Chamber may organize status conferences whenever necessary. [388] According to Damaška, pre-trial conferences may 'function as vehicles for the expansion of judicial control.' Parties may feel compelled to settle 'for the sake of larger interests, including bureaucratic concern with smooth case-flow management.' This is 'repugnant to the reactive state.'[389] Since the pre-trial meetings in international criminal justice mainly take place for efficiency reasons, it more resembles policy-implementing proceedings than contest proceedings. However, even though the institution of the pre-trial judge at the ICTY may increase judicial control, it is debatable whether this influences the strategy choices of the parties to such a degree that the contest becomes notably tainted. If merely facilitating a more efficient contest, these measures are not necessarily policy-implementing.

Written witness statements are allowed as evidence since the end of 2000 at the ICTY and since the second half of 2002 at the ICTR, albeit on the condition that they do not concern the specific acts and conduct of the accused. In addition, if an 'overriding public interest' would require this evidence to be presented orally, or if its nature and source would make it unreliable or if it would be prejudicial rather than of probative value, the written statement will not be accepted as evidence.[390] Between 1998 and 2000, a Rule was introduced to provide for the use of affidavit evidence as to

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379 Rule 90(F) ICTR RPE; Rule 90(F) ICTY RPE.
380 See Rule 98 ICTY RPE; Rule 98 ICTR RPE.
381 Rule 65*bis*(A)(i) ICTY RPE.
382 Rule 65*bis*(A) ICTR RPE.
383 Cf. Rules 73*bis* and 73*ter* ICTY RPE. Rules 73*bis* and 73*ter* ICTR RPE do not mention the interest of a fair trial but simply provide that judges may order the parties to shorten the length of examinations, to reduce the number of witnesses, *et cetera*.
384 See Rule 65*ter* ICTY RPE.
385 See Article 56 *et seq*. ICC Statute.
386 See Article 15 ICC Statute.
387 See Article 61 ICC Statute Rule 121 *et seq*. ICC RPE
388 See Rule 132 ICC RPE.
389 Damaška (1986), *supra* note 14, p. 134.
390 See Rule *92bis* ICTY RPE; Rule *92bis* ICTR RPE.

disputed facts in order to expedite proceedings.[391] For written witness statements to be accepted as evidence, declarations cannot simply be drawn up by the parties. Either a state official or a Tribunal official appointed by the Registrar should attend whilst the witness is making a statement.[392] This is a hierarchical element.

The ICC's Prosecutor has the duty to look for exculpatory as well as incriminating circumstances when investigating a case.[393] This duty to look for exculpatory evidence is not embodied in the RPE[394] or the Statutes of the *ad hoc* Tribunals, but has been established in their case law. It has even been described as "one of the most onerous responsibilities of the Prosecution".[395] In *Kupreškić et al.* the ICTY Trial Chamber stressed that 'the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting'.[396] This diminishes the chances for the prosecution to 'win' the contest. It therefore derogates from contest proceedings and amounts to a policy-implementing feature.

At the ICTR, Judge Shahabuddeen argued that the Prosecutor's role in international criminal proceedings is 'founded on the adversarial model'[397] and as a party, he 'is not required to be neutral in a case'. Nonetheless, he is not considered to be "a partisan" either.[398] His obligation to disclose all exculpatory material to the defence implies 'that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice"'.[399]

The fact that the ICC permits participation of victims in its proceedings may interfere with the two-party contest.[400] Particularly when victims support the

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[391] Rule 94*ter* ICTY RPE. See ICTY Sixth Annual Report (1999), par. 116.

[392] See Rule 92*bis* (B) ICTY; Rule 92*bis* ICTR RPE. Cf. also ICTR Tr. Ch. I, Decision on Bagosora Defence Request for Court to Direct ICTR Registrar to Attend Kigali on Mission to Witness Signing of Defence Witness Statement(s), *Bagosora et al* (Case No. ICTR-98-41-T), 20 February 2007.

[393] See Article 54(1)(a) ICC Statute.

[394] Only the prosecutor's duty to disclose exculpatory evidence to the defence has been incorporated in the RPE of the *ad hoc* Tribunals. See Rule 68 ICTY RPE; Rule 68 ICTR RPE. On disclosure obligations of the prosecutor as against those of the defence, cf. *infra* Chapter V, paragraph 5.6.

[395] See, for instance, ICTY Tr. Ch. II, Decision on "Motion for relief from rule 68 violations by the prosecutor and for sanctions to be imposed pursuant to rule 68*bis* and motion for adjournment while matters affecting justice and a fair trial can be resolved", *Brdanin and Župljanin* (Case No. IT-99-36), 30 October 2002, § 23; ICTY Tr. Ch., Decision on the Production of Discovery Materials, *Blaškić* (Case No. IT-95-14-PT), 27 January 1997, § 50.

[396] ICTY Tr. Ch., Decision on Communication between the Parties and their Witnesses, *Kupreškić et al.* (Case No. IT-95-16), 21 September 1998, p. 3, § ii. The Chamber noted in this decision that during court session breaks, parties may not without permission of the Chamber talk to 'their' witness, as this may influence the witness and distort the truth.

[397] ICTR App. Ch., Decision (Prosecutor's Request for Review or Reconsideration). Separate Opinion of Judge Shahabuddeen, *Barayagwiza*, *supra* note 35, § 67.

[398] *Ibid.*, § 68.

[399] *Idem*.

[400] See, for instance, Articles 15(3) and 19(3) ICC Statute and Rules 89-93 ICC RPE. Victims before the ICC have a right to legal assistance and will in most cases be legally represented.

prosecution case, their participation could affect the procedural balance to the detriment of the defence. Plainly, a policy-implementing element.

An influential amendment to the proceedings of the *ad hoc* Tribunals is the amalgamation of the sentencing and guilt establishment stages. As a result, an accused who remains silent throughout his trial also forfeits the opportunity to submit for a lenient sentence.[401] The ICTY used to provide for a separate sentencing stage,[402]giving the parties an opportunity to comment on mitigating or aggravating circumstances after a finding of guilt.[403] Since the 13th Revision of the Rules of Procedure and Evidence, solely cases in which the accused has entered a plea of guilty involve a separate sentencing stage.[404] The trial phase contains both the fact-finding phase as well as the sentencing phase. In *Brđanin*,[405] the defence felt that they were given insufficient opportunity to point out such mitigating circumstances. Strategically, it is against the interests of the accused to anticipate a finding of guilt before the court actually establishes his guilt.[406] In the USA and the UK, after the jury has established the guilt or innocence of the accused, the judge will deliberate on an appropriate sentence. In civil law systems, trials do not have a separate stage for the establishment of guilt and sentencing. Because judges are adjudicators of fact and law, separate stages are unnecessary and would needlessly prolong proceedings. In international criminal proceedings that are organized as a contest, removing the separate stages substantially diminishes the tactical advantages of the defence. Therefore, this should be deemed a policy-implementing feature.

The proceedings of international criminal courts could also contain features of Damaška's hierarchical ideal. Under the Rules of Procedure and Evidence of the *ad hoc* Tribunals, judges are exclusively responsible for assessing the probative value of evidence.[407] When the Chamber deems it has probative value, any relevant evidence may be admitted unless its value is substantially outweighed by the need to ensure a

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[401] See Damaška (1986), *supra* note 14, p. 128, Footnote 56.

[402] See Rule 100 ICTY RPE. Until the 10th revision of the ICTY RPE, Rule 100 read: 'If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.' After the 10th Revision, the words 'If the accused pleads guilty or' were added (IT/32/REV.10, 1996).

[403] See, for instance, ICTR Tr. Ch., Sentence, *Akayesu* (Case No. ICTR-96-4–T), 2 October 1998; ICTY Tr. Ch. II, Sentencing Judgement, *Tadić* (Case No. IT-94-1-T*bis*-R117), 11 November 1999.

[404] The relevant part of this provision now reads: '(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.' (IT/32/REV.13, 1998).

[405] ICTY Case No. IT-99-36.

[406] This problem was conveyed to the author at 8 March 2004 by Ms. Cynthia Dresden, legal assistant of defence counsel in *Brđanin*: 'the court's finding and sentencing activities happen simultaneously. Therefore, the accused is forced into the untenable position of both holding the prosecution to its burden of proof on the indictments AND bringing to light mitigating factors--including remorse--as required for appropriate sentencing. Does the accused waive his right to remain silent on his own behalf, thereby risking inappropriate punishment, or does he speak on his own behalf and implicitly relieve the prosecution of its burden? In the ICTY statute, culpability standards and objectives of sentencing are separate. However, they become blurred and inconsistent without the kind of bifurcated process that would address each set of requirements fairly and on its own terms. At least, this is one opinion.'

[407] ICTY First Annual Report (1994), par. 72.

fair trial.[408] Evidence is inadmissible if the methods for obtaining it 'cast substantial doubt on its reliability or if its admission […] would seriously damage, the integrity of proceedings', for instance as a result of a serious human rights violation.[409] In *Hadžihasanović and Kubura* it was emphasized that '[t]here is no reason to make the general rules on exclusion of evidence applied in common law systems authoritative precisely because the Judges of the Chamber are professionals capable of evaluating the probative value of testimony and documents.'[410] At the ICC too, judges may freely assess all the evidence submitted as to its relevance and admissibility.[411] Reliance on the parties may be limited. A 'verdict should be based upon the consideration of proven facts rather than the 'technicalities of pleading."[412] In addition, hearsay evidence is admissible. Or, at least, 'not inadmissible *per se*'[413] at the *ad hoc* Tribunals.

The fact that both the accused and the prosecution can appeal a conviction or an acquittal could be predicated on both the hierarchical ideal and the policy-implementing system. In a reactive state, appeal possibilities are limited. Appeal is primarily reserved for instances in which judges have manifestly failed to deliver a proper judgement.[414] At the *ad hoc* Tribunals, appellate judges will not be restricted to determining whether or not the Trial Chamber judges manifestly failed to take a proper decision, given the factual evidence presented to them. To a limited degree, they may also consider whether the factual basis of the judgment concerned is accurate. They can even hear new evidence for this purpose.[415] However, hierarchy in the appellate context is relaxed, because the same judges tend to rotate between the trial and appellate chambers.[416]

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[408] See Rule 89 ICTR; Rule 89 ICTY RPE. The wording of these provisions slightly differs.

[409] See Rule 95 ICTY RPE; Rule 95 ICTR RPE.

[410] ICTY Tr. Ch. II, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, *Hadžihasanović and Kubura* (Case No. IT-01-47), 22 July 2005, § 14. Cf. also, ICTY Tr. Ch. II, Order on the Standards Governing the Admission of Evidence, *Brđanin and Talić* (Case No. IT-99-36-T), 15 February 2002, §§ 5-26; ICTY Tr. Ch., Decision on the Motion of the Prosecution for Admissibility of Evidence*, Delalić et al* (Case No. IT-96-21-T), 19 January 1998, § 20.

[411] See Rule 63(2) ICC RPE. See also Article 64(9)(a) ICC Statute.

[412] Tr. Ch. Judgement, *Kayishema and Ruzindana*, *supra* note 178, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan regarding the Verdicts under the Charges of Crimes against Humanity/Murder and Crimes against Humanity/Extermination, § 32. See similarly, ICTY Tr. Ch., Decision on the Defence Motion on the Form of the Indictment, *Tadić* (Case No. IT-94-1-T), 14 November 1995, at p. 6.

[413] See Tr. Ch. Judgement, *Akayesu*, *supra* note 178, § 136. See also ICTR Tr. Ch. II, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness "TN", *Ntahobali et al.* (Case No. ICTR-98-42-T), 1 July 2002, § 11; Decision on the Defence Motion on Hearsay, *Tadić*, *supra* note 272, §§ 17-19. Cf. also Transcript, *Tadić* (Case No. IT-94-1), 26 June 1996, p. 3378. The presiding judge Kirk McDonald further remarked that if she would have had her American way, hearsay evidence would not be accepted. However, as there were three judges on the Chamber, and hearsay evidence is accepted in civil law systems, it would be accepted before an international tribunal.

[414] See also Articles 24 and 25 ICTR Statute; Articles 25 and 26 ICTY Statute.

[415] See Rules 115 and 117 ICTY RPE; Rules 115 and 118 ICTR RPE. Cf. Cassese (2003), *supra* note 136, p. 433.

[416] See *supra,* paragraph 4.3.3. I am grateful to Professor Damaška, who commented on an earlier version of this Chapter, for stressing this point to me.

According to Damaška in "*The Faces of Justice*", procedural models are connected to a certain view on the purpose of justice.[417]

The analysis of the goals of international criminal courts illustrated that the *ad hoc* Tribunals and the ICC pursue conflict-solving goals as well as policy-implementing goals. Although none of these goals clearly prevailed over any other, the scales appear to tilt somewhat more toward the policy-implementing side than the conflict-solving side. These international courts foster the aim to bring peace and reconciliation to war torn areas and to record a truthful version of the facts that occurred in internal and international armed conflicts. In addition, their duty to "the international community" regularly surfaces where sentencing is concerned, but also where certain procedural changes of a policy-implementing nature are being introduced, such as to expedite proceedings or to make them more efficient.

In respect of the degree of hierarchy and officialdom, on the one hand, the international criminal justice system lacks important features of a structure of authority, such as an enforcement mechanism. On the other, the structures of the courts themselves contain hierarchical and bureaucratic features. For instance, the prosecution and the registries are pyramid shaped organs of the Tribunals and the ICC, a lot of responsibilities being concentrated in the highest official. As to Chambers, hierarchy is relaxed, especially considering the absence of a difference in experience between Trial Chamber and Appeals Chamber judges. Given the relatively low level qualification requirements for judges, particularly at the *ad hoc* Tribunals, this important echelon is predominantly organized along the lines of a coordinate structure of authority. Nonetheless, lay judges in the form of a jury are absent in international criminal justice. The parties themselves rather than a machinery of officials are mainly responsible for gathering evidence. Overall, therefore, the structure of authority within the *ad hoc* Tribunals and the ICC is ambiguous.

Proceedings of the *ad hoc* Tribunals are basically shaped as a party-driven contest with a passive arbiter as a judge.[418] As the prosecution and the defence are procedurally roughly equal in such proceedings, defence counsel is more than a mere watchdog of the prosecution. With its own investigative resources, presenting its own case and its own evidence, including its own witnesses, the defence is a largely autonomous party in proceedings. The course that the ICC's proceedings will take is not wholly clear at the moment of finishing the research for this study. However, there are indications in the ICC Statute that seem to leave more room for policy-implementing proceedings than the *ad hoc* Tribunals. For instance, it will be up to the judge to decide how proceedings will be structured unless he delegates this choice to the parties. As opposed to the *ad hoc* Tribunals, the Prosecutor's duty to investigate both exculpatory and incriminating evidence is incorporated in the ICC Statute. Nevertheless, the ICC's defence teams are also expected to undertake their own investigations as they are entitled to have their own professional investigator. Therefore, it appears likely that the defence will have substantial autonomy in ICC

[417] Damaška (1986), *supra* note 14, p. 11.

[418] Although conflict-solving features dominate, the procedural systems of the *ad hoc* Tribunals also have policy-implementing features. See *supra*, paragraph 4.3.4.

proceedings as well. But, overall, the proceedings of the ICC are likely to involve stronger policy-implementing elements than the *ad hoc* Tribunals' proceedings where conflict-solving contest elements clearly prevail.

If international criminal courts attach substantial importance to purposes of justice that do not match the basic ideas behind their procedural framework, either the basic structure of proceedings should be altered or these courts should shift the focus of their purposes of justice. The *ad hoc* Tribunals pursue slightly more policy-implementing than conflict-solving goals, whilst their proceedings are structured as conflict-solving proceedings. Drawing the ultimate conclusion from Damaška's theories would mean that the Tribunals should change their proceedings into policy-implementing proceedings to make their proceedings function more harmoniously. Drastic changes to proceedings or goals are not likely to be established by the *ad hoc* Tribunals anymore. It will therefore simply be examined as to what extent the position of the parties, the defence in particular, may have been influenced by any tensions resulting from a mismatch in goals, hierarchical structure of authority and shape of proceedings.

For the defence, one of the most important advantages of the conflict-solving procedural model is that it should allow the defence to present its case on an equal footing as the prosecution. In international criminal proceedings, an accused being prosecuted on behalf of the entire international community including an often high number of victims, procedural balance and a degree of autonomy is important. The presumption of innocence becomes a delicate issue where a person is accused of genocide, war crimes or crimes against humanity. It is also less likely in adversarial conflict-solving proceedings that evidence will be withheld and kept secret from the accused to protect any general interests than in policy-implementing proceedings.

There are obvious disadvantages in conducting international criminal trials along the lines of conflict-solving proceedings. Given that international criminal proceedings generally involve crimes that were committed on a large scale and in a complex setting, proceedings are extremely time-consuming. It is common knowledge that adversarial proceedings are intrinsically time consuming, because parties in these proceedings predominantly rely on live witness testimony, and are allowed to examine and cross-examine each of the witnesses presented in court. According to Eser, as the judges will remain passive, the contest system grants parties considerable freedom and could encourage them to be comprehensive, by presenting as many witnesses and documentary evidence as possible. This may prolong international criminal proceedings even more.[419]

The Completion Strategy puts pressure on the *ad hoc* Tribunals to shorten their proceedings, and was designed to do so. Relinquishing the goal of expediting proceedings creates risks for the efficient functioning of international criminal courts. A clear example is the *Milošević* case which took so long that the accused died in the course of proceedings, hereby preventing the ICTY from establishing his guilt. Proceedings were expedited through the introduction of policy-implementing features. In the course of the *ad hoc* Tribunals' existence, more court control over the

[419] Cf. Eser, Albin, 'Vorzugswürdigkeit des adversatorischen Prozessystems in der internationalen Strafjustiz?', in Müller-Dietz, Heinz *et al.* (ed), *Festschrift für Heike Jung* (Baden-Baden: Nomos Verlagsgesellschaft, 2007), pp. 167-187, p. 176, 177.

presentation of evidence and more reliance on written evidence was introduced, even though oral evidence is still preferred over written testimony by the *ad hoc* Tribunals and the ICC.

As the structure of the *ad hoc* Tribunals did not include a jury as an adjudicator of fact, there were no strong arguments against expediting proceedings through the amalgamation of sentencing and guilt establishment stages. This had a strategic impact on the defence at the *ad hoc* Tribunals, in the sense of a negative impact. It forced the defence to fixate its position as to the responsibility of the accused for the crimes concerned from the earliest stage of proceedings onwards until the end. Conversely, were these two stages separated, the defence could change strategy after the guilt establishment stage and bring up any mitigating circumstances in the sentencing stage once guilt has been pronounced on any count on the indictment. This renders international criminal proceedings more policy-implementing.

But the *ad hoc* Tribunals have also adopted amendments that better preserve the autonomy of the parties. The clearest example hereof being the introduction of plea agreements. In terms of achieving expedition, the effect may have been limited. Few accused waived a full trial by entering a plea of guilt.

The Faces of Justice demonstrated that a given structure of proceedings accompanies certain roles of the parties to the proceedings.[420] Hence, a goal of justice that is being pursued through a change of proceedings may also bring about a change of perspective as to the proper role of the parties. Where policy-implementing goals are pursued in an overall contest model of proceedings, such as of the *ad hoc* Tribunals, a clash of legal cultures is likely to result. A policy-implementing mindset in respect of defence counsel's role may accompany that pursuit. This may put pressure on the defence. If parties are constrained in their presentation of evidence in an adversarial system, this may prevent them from presenting their case effectively.

Thus, Damaška's models provide important and inspiring insights in the nature of international criminal proceedings. However, in order not to get lost in an abstract academic debate, rather than constructing a new ideal procedural model for international criminal courts based on Damaška's insights, I have chosen for the pragmatic approach to focus on the existing procedural system of international criminal courts. The special context of the administration of justice of an international criminal court calls for different solutions from those appropriate in domestic criminal proceedings. Part III uses Damaška's insights to confront and examine the current legal system of international criminal courts. But it also considers problems of defence counsel that may occur irrespective of the character of the proceedings that international criminal courts employ.

[420] See, *supra*, paragraphs 4.2.3 and 4.2.5.