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Procedural Structure and Features of International Criminal Justice

Lessons from the ICTY

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Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY

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1. Preliminary question: ICTY, success or failure?

Talking of the 'legacy' of an institution, as it is pronounced in the title of this volume with regard to the International Criminal Tribunal for the Former Yugoslavia (ICTY), evokes the question of whether it was a success. The answer depends on what one expected. And this, in turn, depends on what goals international criminal justice, and the ICTY in particular, has been designed to achieve.

This statement appears so obvious that it may be called a commonplace. Yet is this correlation, in fact, so clearly realized in practice? When people speak of the international criminal tribunals as a success, or, perhaps more likely, as a failure, this may be judged from a very special, narrow, one-sided, or over-broad perspective and, not so rarely, nurtured by expectations that are not truly those which the founders of the Tribunal had in mind—not least when the focus is on the procedural structure and features of international criminal justice, as it is in the present chapter.

Thus in order to get a fair picture of what may be learned from the ICTY, it is necessary first to clarify what goals it is supposed to aim at, and, if these goals are somehow conflicting with each other, in what way inconsistencies may be solved. This clarification will hopefully prevent us, on the one hand, from identifying as failures of the ICTY and equivalent international tribunals the deficiencies caused by general political obstacles, instead of by genuine procedural shortcomings. At the same time, it will save us from praising the successes of international criminal justice which have been achieved despite a procedural system that may be in need of basic improvements. So instead of immediately and, inevitably, superficially listing merits to be maintained and defects to be corrected, more will be gained by first identifying and structuring the aims and means to be pursued and adopted, and

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then exploring the procedural devices that are the most appropriate and least obstructive to achieving the goals of international criminal justice.

It goes without saying that, within this framework, the aforementioned search can only be performed in an illustrative manner. This will be done by starting with some of the procedural fundamentals and by continuing with features which, in view of frequent demands for reform, as well as due to my own experiences as a judge at the ICTY, are of crucial importance for the ongoing success of international criminal justice.

2. To be distinguished and co-ordinated: aims, means, and modes of international criminal justice

2.1 Listings of goals

Even though this chapter is focused on the procedural legacy of the ICTY, if it is to produce more than just an arbitrary selection of procedural features, one must inquire first about the substantive ends that international criminal justice, and the ICTY in particular, is supposed to aspire to. When looking through the relevant literature on the procedural merits of the ICTY, however, these are—with a few exceptions to be dealt with in due course—rarely evaluated in view of the purposes international criminal justice has to pursue. If explicitly stated at all, reference can merely be found to fairness of the trial,¹ its expediency,² or both together,³ whether calling for proceedings that are expeditious enough to be fair,⁴ or by suspecting a trial of unfairness if it is too speedy.⁵ Even where fairness and expediency of the proceedings

¹ As expressed by the first Chief Prosecutor of the ICTY Richard Goldstone in an Address Before the Supreme Court of the United States (2 October 1996): 'Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings' (cited in Mark S Ellis, 'Achieving Justice Before the International War Crimes Tribunal' (2000) 7 *Duke J of Comparative and International Crim L* 519, 526. In the same terms 'judged by the fairness of their proceedings' are the international and hybrid criminal tribunals seen by Nina HB Jørgensen, 'The Proprio Motu and Interventionist Powers of Judges at International Criminal Tribunals', in Göran Sluiter and Sergej Vasiliev (eds), *International Criminal Procedure Towards a Coherent Body of Law* (Cameron May, 2009) 121, 146.

² As implied in the complaint of the excessive length of trials as the most important difficulty by Stéphane Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice' (2004) *J of Intl Crim Just* 526, 532.

³ As eg postulated by the present President of the ICTY Patrick L Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *European J of Intl Law* 569, 579, 580. The same position had already been expressed by the ICTY Appeals Chamber in *Prosecutor v Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No IT-95-14/1-T, 16 January 1999, para 19, when holding that 'the purpose of the rules is to promote a fair and expeditious trial'. The same criteria could be meant by Göran Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser, 2010) 585, 596, when he calls it as most important that the procedures must be 'fair and effective'.

⁴ See Robinson (*supra* note 3) 569.

⁵ As it was worried about the measures for shortening the trials required by the 'Completion Strategy'. For an appraisal of the controversial discussions see, in particular, Dominic Raab, 'Evaluating the ICTY and its Completion Strategy' (2005) 3 *J of Intl Crim Just* 82, 95 ff.

will not be considered goals for their own sake but merely as procedural modes to other substantive ends, such as providing justice by ascertaining the truth,⁶ those goals are not presented in detail. Instead, fairness or expediency appear to be the main yardstick, or the most important criteria, for evaluating the proceedings.

How one-sided this fixation on procedural fairness and expediency can be becomes even more apparent when contrasted with long lists of goals described by other authors with regard to the ICTY, the ICC, and other similar tribunals. As collected by Minna Schrag,⁷ and quoted below (except for the addition of numbers), the most commonly named goals include:

- (1) to bring a sense of justice to war-torn places;
- (2) to re-establish the rule of law;
- (3) to provide a sound foundation for lasting peace;
- (4) to enforce international law, and
- (5) end impunity for violations, especially for senior political and military leaders;
- (6) to bring repose to victims and
- (7) to provide an outlet to end cycles of violence and revenge;
- (8) to demonstrate that culpability is individual, and not the responsibility of entire groups;
- (9) to provide a safe forum for victims to tell their stories;
- (10) to demonstrate fairness and the highest standards of due process;
- (11) to provide exemplary procedures to serve as a model for rebuilding a legal system devastated by war crimes and human rights violations;
- (12) to create an accurate historical record, and
- (13) to forestall those who might later try to deny that wide-scale violations of international law occurred;
- (14) public education in general;
- (15) in a didactic mode, to illuminate explanations about what caused the violations, and illustrate particular patterns of violations;
- (16) to develop and expand the application and interpretation of international law and norms;
- (17) to function with maximum transparency and public scrutiny;
- (18) to provide a forum for considering restitution and reparations.

Before bringing this evidently mixed bag of goals to some meaningful order, it might be worthwhile to see which items in this list the institutions of international criminal justice would themselves proclaim as their goals. This is not easy to determine, especially with regard to the ICTY. For as its Statute does not provide a preamble in which the reasons for establishing an institution are usually pro-

⁶ As eg perhaps silently supposed by Wolfgang Schomburg, 'Common Law versus Civil Law' (September 2009) *Betrifft Justiz* Nr. 99, 108 ff with regard to the ICTY, or Reinhold Gallmetzer, 'The Trial Chamber's Discretionary Power to Devise the Proceedings Before It', in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 501 f with regard to the ICC respectively.

⁷ Minna Schrag, 'Lessons Learned from ICTY Experience' (2004) 2 *J of Intl Crim Just* 427, 429.

nounced,⁸ the only article in the ICTY Statute giving expression to its mission is Article 1, which grants the ICTY the power to 'prosecute persons responsible for serious violations of international humanitarian law'.

This to a certain degree corresponds with item (5) in Schrag's list, in terms of ending impunity for violations of international law, and thus in enforcing it according to item (4). A further provision in the ICTY Statute worth mentioning in this context may be Article 21, which guarantees the accused a fair hearing and similar procedural rights. Whether this allows us to call fairness an 'aim' of the proceeding,⁹ or to see 'the fundamental object and purpose' of the tribunal as being to ensure that the trials are fair and expeditious,¹⁰ this is conceptually questionable—just as questionable as Schrag's goal (10) to 'demonstrate fairness and the highest standards of due process'. For whereas ending impunity of international crimes by prosecuting them is certainly a substantive aim of international criminal justice, it would be difficult to conceive that the 'purpose' of establishing the ICTY was to demonstrate fairness: certainly the court has to proceed in this manner, but this does not mean that it was established for the sake of performing fairness—unless the fair performance of international criminal justice is thought to serve as an exemplary model of administration of criminal justice, in terms of Schrag's goal (11). Yet this, again, may be a welcome by-product rather than the purpose of establishing an institution of international justice.

As the Statute of the ICTY does therefore not expressly reveal much about its goals, more information may be gained from its Rules of Procedure and Evidence.¹¹ Here the requirement of a fair trial finds expression in the guarantees of certain procedural rights of the accused,¹² and the demand of expediency can be seen in various proscriptions for filing motions and for scheduling conferences;¹³ but it is

⁸ As is the case with the ICC in the Preamble to the Rome Statute. To be sure, however, not letting international crimes go unpunished and putting an end to impunity are the only goals from Schrag's list (3) and (5) that are explicitly proclaimed in the Preamble of the Rome Statute. For further information on the mission of the ICC cf Antonio Cassese, 'The Rationale of International Criminal Justice', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 123 ff.

⁹ As described by Patrick L Robinson, 'Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY' (2005) 3 *J of Intl Crim Just* 1037, 1058.

¹⁰ Robinson (*supra* note 3) 580.

¹¹ Adopted pursuant to Art 15 of the ICTY Statute on 11 February 1994, after numerous amendments as of 24 July 2009—IT/32/Rev 43. For further details on the development of these rules cf Gideon Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY', in Gideon Boas and William A Schabas, *International Criminal Law. Developments in the Case Law of the ICTY* (Nijhoff, 2003), 1 ff; Jérôme de Hemptinne, 'Amendments to the RPE (ICTY and ICTR)', in Cassese (*supra* note 8) 241–3.

¹² Cf, in particular, the rights of a suspect during investigation (rules 42, 43) and his initial appearance as accused (rules 62, 63), his right to assistance of counsel (rules 44–45*ter*), his right to have evidence collected by the Prosecutor to be disclosed (rules 66–68) as well as the basic provisions for a fair presentation of evidence (rule 89(B), (D)).

¹³ Aside from time prescriptions to be found at various places in the RPE, see in particular the requirement of regular status and pre-trial conferences (rules 73*bis*, *ter*) which, at the same time, also provide for a fair proceeding. An explicit demand of expediency can be seen in the Trial Chamber's power and duty to exercise control over the presentation of evidence so as to 'avoid needless consumption of time' (rule 90(F)(ii)). Guided by the same intention is the—continuously broadened—admission of written statements and transcripts in lieu of oral testimony (rule 92*bis*).

also the ascertainment of truth which the ICTY is supposed to pursue.¹⁴ In addition to these 'classical' procedural maxims of fairness, expediency, and ascertainment of truth, even the aims of restorative justice find expression in the Rules of Procedure and Evidence (RPE), by requiring the ICTY to take care of the restitution of property¹⁵ and to promote compensation to victims.¹⁶

As both the truth-related and the restorative provisions in the judge-made RPE have no explicit basis in the ICTY Statute, the question is where they might obtain their authority from. A partial answer can be found in Resolutions 808 and 827 (1993) of the United Nations Security Council, by which the ICTY was established, and which can be understood as a quasi-preamble to its Statute.¹⁷ The same holds for Resolution 955 (1994) in the case of the International Criminal Tribunal for Rwanda (ICTR).

In principle, both tribunals are tasked with a multi-faceted mandate.¹⁸ Led by the common aim of prosecuting the most serious violations of international humanitarian law, they are supposed to:

- (a) put an end to impunity for such crimes;
- (b) bring persons responsible for them to justice and, by doing so,
- (c) contribute to the restoration and maintenance of peace, and
- (d) ensure that such violations are halted and
- (e) effectively redressed.

There is one remarkable difference to be observed, though: what had not been addressed in the ICTY Resolution, but later was proclaimed in the ICTR Resolution, is

- (f) the conviction that the prosecution of those crimes would contribute to the process of national reconciliation.¹⁹

¹⁴ Astonishingly even more clearly than in Schrag's list, this aim finds expression in requiring the witness solemnly 'to speak the truth, the whole truth and nothing but the truth' (rules 90(A), 91(A)), as well as in expecting the Trial Chamber to make the interrogation of witnesses and the presentation of evidence effective 'for the ascertainment of the truth' (rule 90(F)(i)). Although not explicitly mentioning search for truth, the judges' right at any stage to put any question to the witness (rule 85(B)) as well as their right to permit enquiry into additional matters (rule 90(H)(iii)) and to order a party to produce additional evidence or *proprio motu* to summon witnesses and order their attendance (rule 98) can be employed for ascertaining the truth. Cf also Jørgensen (*supra* note 1) 122 ff.

¹⁵ Rule 105, corresponding to Schrag's list (18).

¹⁶ Rule 106, to a certain degree corresponding to Schrag's list (6).

¹⁷ Cf, in particular, the reasoning in the Resolutions of the UN Security Council and the Report of the Secretary General of 3 May 1993 (S/25704) as well as the regular Reports of the President of the ICTY to the UN Security Council. Cf also Daniel D Ntanda Nsereko, 'The Role of the International Criminal Tribunals in the Promotion of Peace and Justice' (2008) 19 *Crim L Forum* 373 ff.

¹⁸ Cf Lilian A Barria and Stephen D Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9 *The Intl J of Human Rights* 349, 357 f. Though this analysis is performed primarily with respect to ICTR Resolution 955, in substance it also applies to the ICTY Resolutions 808 and 827.

¹⁹ Thus the ICTR can claim to have been the first international tribunal to be established for the purpose of national reconciliation, as noted by Hideaki Shinoda, 'Peace-building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals' (2002) 7 *Intl J of Peace Studies* 41–58 (cited in Barria and Roper (*supra* note 18) 357).

Although this UN Security Council mandate covers more objectives than are expressed in the ICTY Statute and its RPE, it is still a much shorter list of goals than that commonly attributed to the ICTY, according to Schrag.²⁰

In the ICTY's own understanding of its mission, neither the UN Security Council Resolutions nor the ICTY Statute and RPE seem to give a full account. For as pronounced in a web page of the ICTY,²¹ its main goals are to:

- (i) bring to justice persons allegedly responsible for serious violations of international humanitarian law;
- (ii) render justice to victims;
- (iii) deter further crimes;
- (iv) contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.

Whereas in this list the aim (i) of bringing persons responsible for the international crimes to justice corresponds to (b) of the ICTY Resolution of the UN Security Council, and that of rendering justice to the victims (ii) corresponds to Resolution (e), and while the aim of bringing violations to a halt (d) may be understood as deterrence of further crimes (iii), the peace goal (iv) is phrased differently both in the ICTY and the ICTR Resolutions: while the ICTY Resolution did not yet speak of reconciliation at all, and whereas the ICTR Resolution named international reconciliation (f) and the restoration and maintenance of peace (c) as separate objectives, the self-description of the ICTY is one of promoting reconciliation as means to the restoration of peace (iv).

This tendency towards modifying, or even transcending, the original mission for which the international tribunals have been established can also be observed in other semi-official pronouncements, such as the expectations which, as stated by a former judge, have been recognized by the ICTY: beyond contributing to the maintenance of peace and to reconciliation, the court is expected also to give victims a voice and to compile a complete historical record of the war.²²

That the ICTY is not the only institution to see its mission extended beyond the original Resolutions is also illustrated by the ICC: while the Preamble of the Rome Statute, as already noted, did not proclaim more than that the international crimes concerned must not go unpunished and impunity for the perpetrators should be reversed,²³ the Assembly of States Parties in its 'Strategic Plan of the International Criminal Court' of 2006 described the 'mission' of the ICC in broader terms: after first stating that the ICC has 'fairly, effectively and impartially' to investigate,

²⁰ In fact, it is not even so easy to bring the objectives of the ICTY Resolution and the Schrag list of goals together: while putting an end to impunity (a) clearly corresponds to (5), bringing suspects to justice (b) resembles (1) and (2), and international reconciliation (f) seems to be addressed in (7) and (15), it is not quite clear whether effective redress (e) has to be understood in terms of restitution and reparations (18) and whether ensuring the halt of crimes (d) is covered in Schrag's list at all.

²¹ Homepage of the ICTY (2008), General Information/Objectives <<http://www.icty.org/sid/324>>.

²² Ian Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 *J of Intl Crim Just* 348, 353.

²³ See *supra* note 8 and accompanying text.

prosecute, and conduct trials, and to act 'transparently and efficiently', we read that it shall also contribute '(α) to long lasting respect for and the enforcement of international criminal justice, (β) to the prevention of crime and (γ) to the fight against impunity'.²⁴

2.2 Coordinating aims, means, and modes

What may be learned from these findings with regard to the procedural evaluation of international criminal justice? Two questions need particular attention.

First, if the long list of goals which the ICTY—and in a similar way other international criminal courts—are expected to fulfil is contrasted with the rather sparse pronouncements on the mission of these institutions in official documents, the question is whether the long list should not be reduced to the goals that are quasi-officially proclaimed, or whether a less formal and more open policy should be preferred. Although the minimalist approach may please jurists of historical interpretation, and would more likely protect the justice system from becoming overstrained, I think the alternative is, at least in principle, the right one. Even at the national level it is not unusual to find the reasons for establishing a new institution left out of official documents; and even if aims are formally pronounced in a preamble, this is not necessarily a complete and definite description of the institution's mission. Still more important is the rational interest in construing an institution so as to make the best out of it. Therefore, unless explicitly excluded, institutions of international criminal justice should have the right, and even the duty, to pursue any aim within their basic mission of combatting serious international crimes, both by doing justice in respect of the past and by contributing to security and peace in view of the future.

However, the second point is that taking this approach is not to be understood in unlimited maximalist terms. Needless to say, international courts, by their very nature as judicial institutions, cannot solve all crime-related problems of the world. What they could and should do, though, is to exhaust all aims and means common to national and international criminal justice, and to support, or at any rate not to obstruct, goals typical of international criminal justice.

This general proposition apparently requires specification. Guidance for doing so can above all be found in Bert Swart's thorough analysis of the relation between the goals to be pursued by international criminal justice and the procedure to be chosen for achieving them.²⁵ Rightly not being content with the superficial manner of evaluating international criminal justice in terms of more or less isolated criteria, such as efficiency and fairness, he sees the need for two basic distinctions: one, between the aims any national justice system may pursue and the specific goals of

²⁴ ICC-ASP/5/6—4 August 2006 (5th session), Part III.

²⁵ Bert Swart, 'International Criminal Justice and Models of the Traditional Process', in Sluiter and Vasiliev (*supra* note 1) 93 ff; an earlier version of this review of the highly praised book of Mirjan R Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, 1986, is published in (2008) 6 *J of Intl Crim Just* 87 ff.

international criminal justice; and two, between the macro level of the criminal justice system as a whole, including its aims and objectives, and the micro level of the individual proceeding in which particular goals are to be achieved.²⁶ As it is furthermore true that the goals of criminal justice may have varied weight within the different stages of the proceedings, differentiated approaches to various procedural features are required.²⁷

Though I agree with these basic distinctions, as they allow us to bring long lists of scattered goals into a certain order, I think that a further step must be taken, by distinguishing between aims, means, and modes of international criminal justice. Whereas *aims* are the ends international criminal courts are established for, *means* are the measures and instruments by which these goals are to be reached, and *modes* are the ways in which it is to be done. If I may illustrate this distinction by an example used before, bringing suspects of international crimes to justice is the aim, which is to be achieved by means of ascertaining the truth, and is to be performed in a fair and efficient manner.

What does this mean for the co-ordination of the numerous goals supposed to be pursued by international criminal justice in the various lists mentioned before and which, in fact, are still to be complemented with the goals normally pursued by national criminal justice? Without sorting out yet at this point what finally may not be relevant for evaluating the procedural system of international criminal justice, it is not difficult to recognize that certain goals may be appropriate for being aspired to at the macro level of international criminal justice as an institution, whereas others have to be pursued on the micro level of the individual proceeding. As will be seen when taking a closer look at the various goals, however, what may be a direct aim of the individual trial, such as to punish an accused who has been found guilty, is an aim that can at the same time be a means of enforcing international law and paving the way for the reconciliation and lasting peace which the international tribunal is established for. Although, of course, not every case will have the capacity to make a positive contribution to the ultimate objective of international criminal justice, the individual proceedings should at least avoid detracting from that objective.

According to these relationships between ultimate ends of international criminal justice and the direct aims of the individual proceedings and their means and modes, the miscellaneous goals pronounced in various proclamations and in the listings mentioned before can be coordinated in the following way.

First, in regard to the goals, the ultimate ends of establishing a system of international criminal justice, independently from or complementary to the domestic judicial system, must be (A) the restoration and maintenance of peace, based (B) on the re-establishment of the rule of law, (C) the enforcement of international

²⁶ As to my own expectations in these respects, cf Albin Eser, 'The "Adversarial" Procedure: A Model Superior to Other Trial Systems in International Criminal Justice?', in Thomas Krüßmann (ed), *ICTY: Towards a Fair Trial?* (2008) 206, 210.

²⁷ Similar views on the relationship between the ends of international criminal justice and the means and modes of procedure to be employed are recognizable in Antonio Cassese, 'The ICTY: A Living and Vital Reality', (2004) 2 *J of Intl Crim Just* 585, Mirjan R Damaška, 'Problematic Features of International Criminal Procedure', in Cassese (*supra* note 8) 175 ff, Sluiter (*supra* note 3) 585, 598.

law, and (D) national reconciliation. This process can be enhanced (E) by employing the law and procedure of international tribunals as models for rebuilding the domestic legal system devastated by war crimes and human rights violations.

In order to render possible these (and any similar) ultimate objectives of international criminal justice, the individual proceedings must be aimed at bringing a sense of justice to crime-torn people and places by (F) putting an end to impunity for such crimes, (G) bringing persons responsible for them to justice, with the further aim (H) of deterring further crimes. This contribution to the restoration of peace and reconciliation will be more efficient the greater (I) is the satisfaction found by the victims.

No less important for maintaining a lasting peace will certainly be (J) the creation of a reliable historical record of what causes led to the crimes and who was responsible for them, (K) thus to forestall future denial of those events and responsibilities. Such far-reaching goals may appear doubtful, and therefore we must return to them; yet what already at this point can be stated is the expectation that international criminal proceedings shall at least not obstruct the finding and recording of historical truth. The same applies to expecting international criminal justice (L) to provide public education in general and (M) to develop the application of international law and norms.²⁸

While the aims considered so far are peculiar to international criminal justice, the purposes of punishment at the micro level of individual proceedings are common both to national and international prosecutions. In the same way, however, as most national courts would rarely explicitly and comprehensively pronounce on the purposes punishment in a given case shall serve, international courts as well are rather taciturn in this respect. Therefore it is mainly left to the judiciary—and thus finally to the judges—what purposes to take into consideration and what weight to give them in sentencing. So it cannot come as a surprise that the traditional goals of criminal justice govern the practice of sentencing:²⁹ though with varied weight, purposes of punishment are seen in (N) retribution and (O) reconfirmation by the law, (P) deterrence both of the perpetrator and the public at large, (Q) rehabilitation of the offender, and, to a certain degree, (R) satisfaction for the victim.³⁰

Secondly, in view of this long and manifold list of substantive aims of international criminal justice, the question is by what procedural means they may be accomplished. To state this as briefly as possible, as this requirement must be considered later in more detail: almost all of the aims of international criminal justice described above require (S) the search for the truth. No peace without justice, no justice without truth: if this commonplace is true, as I think it is, not

²⁸ As it is named in Schrag's list of goals (14) and (16), but not mentioned by others. As already remarked here, although good performance of international criminal justice will hopefully exert such positive side-effects, the courts may be overburdened when formally mandated to such far-reaching ends.

²⁹ As revealed in an analysis of the case-law of the ICTY by Swart (*supra* note 25) 105 ff.

³⁰ As to my own concept of punishment in which I try to integrate various purposes in a certain order rather than simply adding them, see Albin Eser, 'A Vision of a "Humane" Criminal Justice. Sketch of a Criminal Law and Procedure System Oriented Towards Man as an Individual and as a Social Being', University of Pretoria Prestige Lecture 1995 N° 1 <<http://www.freidok.uni-freiburg.de/volltexte/4067> (accessed 6 January 2010).

only the traditional function of criminal justice to convict the guilty and to exonerate the innocent but also the satisfaction of the victim by officially recognizing the harm done to him or her and to provide adequate reparation presupposes the ascertainment of the truth. Satisfaction of the victim, seen also as a step towards reconciliation, can also be supported (T) by giving the victim a voice.

Thirdly, regarding the modes in which the procedural means and measures for achieving these substantive aims of international criminal justice should be employed, certainly the most important—and often named—principles are those of (U) fairness, (V) efficiency, and, as an essential element of it, (W) the expediency of the proceedings. Further maxims occasionally mentioned in strategic plans or lists of goals are (X) impartiality, (Y) transparency, and (Z) public scrutiny.

Finally, when viewing these aims, means, and modes of international criminal justice together, it is obvious that their weight is different, and even that they may conflict with each other. This can happen, in particular, when the search for the truth would impair fairness or if reconciliation could be expected only by leaving certain events not fully investigated.

It seems that it will not be possible here to elaborate on all facets and tensions between the various aims and maxims of international criminal justice. What I wish to focus on, though, is the extent to which the procedural structure and features of the ICTY are devised and constructed in the best possible way to fulfil the mission of this judicial institution, and, to the extent that this is not the case, the improvements that would be required. Among the many challenges that deserve attention, only these can be addressed here: the need to adjust the basic structure of the procedure to the aims of international criminal justice (section 3, below), improvements to the search for the truth (section 4), adequate guarantees of fairness (section 5) and expediency of the proceedings (section 6), improved paths to reconciliation (section 7), and efforts to record historical findings (section 8).

3. To be adjusted to the aims: the basic structure of the procedure

If the Achilles' heel of international criminal justice is in the procedural law,³¹ the structure and maxims of that law are of fundamental significance. Although I think this is no less true with regard to the substantive requirements of criminal responsibility, I learnt from my experience as a judge that the outcome of a case can be quite different depending on the procedural model that is employed—in contrast to my original theoretical assumption, generated by long-standing comparative research, that criminal cases, as different as the procedures may be, if based on the same substantive law will finally come to the same result.³² If the kind of

³¹ As from the big trials of the ICTY concluded by Göran Sluiter, 'Karadžić on Trial' (2008) 6 *J of Intl Crim Just* 617.

³² Cf Eser (*supra* note 26) 207 f. Although this abandonment of earlier beliefs is so far only based on observations of the proceedings and decisions of the international criminal tribunals, I am convinced this revised hypothesis would be confirmed if the ICTY and ICTR proceedings and judgments were thoroughly scrutinized with regard to the question of whether the outcome of a case might be different

procedure chosen matters in this way, the question is what procedural features may account for the diverging results and what goals of international criminal justice may be affected thereby.

Traditionally, both the causes of divergence and the therapies to correct them have been attributed to the choice between two essentially different models: the 'adversarial' model of the Anglo-American common law and the 'inquisitorial' model of the European continental civil law.³³ Whereas the first is considered to be primarily interested in guaranteeing the fairness of the proceedings, the second appears more focused on the search for the truth and the expediency of the proceedings. Accordingly, it can be of momentous importance which model to follow when forming a procedure for international criminal justice. In regard to the ICTY, there is no question that its procedure, at least in origin and essence, was shaped on the adversarial model.³⁴ Although later it was changed, step by step, in the other direction,³⁵ insofar as the substantive goals of international criminal justice as points of reference are concerned, it seems important to know what weight these aims were given by the progenitors of the ICTY Statute and Rules of Procedure and Evidence when they decided in favour of one or the other set of procedural means and modes. Yet, to get right to it, there is not much about this to be found. It appears all the more advisable in view of the future to find out why the substantive aims of international criminal justice scarcely played a role in framing the procedure of its tribunals.

if, instead of the basically party-driven procedure as it is practised at these tribunals (see subsequently), a more judge-led approach were followed. Cf also Schomburg (*supra* note 6) 108.

³³ The reason is that there is neither a unique homogeneous 'adversarial' system nor is naming the counterpart as 'inquisitorial' still correct. Not only does the 'adversarial' common law family have quite different members (as described by John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003)), but when 'adversarial' is sometimes even equated with 'accusatorial' (as eg by Orie, *infra* note 34 or Zappalà, *infra* note 59, at 22), then it is apparently overlooked that the principle of 'accusation' (in terms of a prosecutor as 'accusator' distinct from the judge as 'judicator') is also common to modern continental systems. Therefore, if the essential criterion for distinguishing both models is the power and duty of the judge to search the truth '*ex officio*' rather than leaving its ascertainment to the good or bad will of the parties, the misleading denomination of 'inquisitorial' should be better substituted by 'instructorial'. For further details and references to this issue see Albin Eser, 'Reflexionen zum Prozesssystem und Verfahrensrecht internationaler Strafgerichtsbarkeit', in Ulrich Sieber et al (eds), *Strafrecht und Wirtschaftsstrafrecht* (2008) 1453, 1467 ff <<http://www.freidok.uni-freiburg.de/volltexte/6275> (accessed 6 January 2010); cf also Eser (*supra* note 26) 208, 216.

³⁴ Cf Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' in Albin Eser and Christiane Rabenstein (eds), *Strafjustiz im Spannungsfeld von Effizienz und Fairness. Convergence and Divergence in Criminal Procedural Systems* (Duncker & Humblot, 2004) 43 ff, in a revised version also published in (2003) 3 *International Criminal Law Review* 1–37; Maximo Langer, 'The Rise of Managerial Judging in International Criminal Law' (2005) 53 *The American Journal of Comparative Law* 835 ff, Alphons Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in Antonio Cassese, Paola Gaeta, and John Jones (eds), *The Rome Statute of the International Criminal Tribunal: A Commentary, Vol II* (Oxford University Press, 2002) 1439, 1463 ff; Göran Sluiter, 'Adversarial v. Inquisitorial Model', in Cassese (*supra* note 27) 230 ff.

³⁵ Cf Boas, *supra* note 11, at 4 ff, Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *J of Intl Crim Just* 585, 593 ff, Langer (*supra* note 34) 868 ff.

At first glance, this disregard seems surprising. Even though the Statute of the ICTY, with the obvious exception of Article 1 empowering the tribunal to prosecute international crimes, does not pronounce any other substantive aims, the underlying Resolutions 808 and 827 of the UN Security Council did provide some—such as to contribute to the restoration of peace and national reconciliation.³⁶ Instead, as it appears in reports on the development of the Rules of Procedure and Evidence, the main focus was on the manner in which to proceed.³⁷

This is understandable insofar as at the beginning of the ICTY's life one of the most urgent tasks was to develop a workable procedure. Yet, insofar as the principal choice in favour of the adversarial model³⁸ is concerned, this decision can hardly be explained by the assumption that this model might be the one best qualified to pursue the entire mission of international criminal justice: there must have been other reasons behind this choice. And those can, in fact, be easily identified. As a question of influence and power, it is an open secret that the founding years of the ICTY were under the considerable control of lawyers and judges from a common-law background.³⁹ Obviously, the most convenient solution for them was to adopt their own familiar adversarial model—easy to handle without major changes and, certainly as a welcome side effect, providing professional advantages over those not familiar with this system. So it is not surprising at all that the American Bar Association seized the opportunity to prepare a complete set of rules which was brought by ICTY President-to-be Gabrielle Kirk McDonald to the first meeting of the judges in charge of drafting the Tribunal's Rules of Procedure and Evidence. Nor was there any reason for ideological reservation, if the adversarial system, as typically assumed by adherents of the common law, is to be considered as the 'embodiment of procedural justice'.⁴⁰

³⁶ For details see *supra* at notes 17–19 with accompanying text.

³⁷ Cf eg M Cherif Bassiouni and Peter Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (Transnational Publ., 1996) 863, Vladimir Tochilovsky, 'Proceedings in the International Criminal Court: Some Lessons to Learn from ICTY Experience' (2002) 10(4) *European J of Crime, Crim Law and Crim Just* 268. For more details on the development of the RPE cf Cassese (*supra* note 34) 593 f, Theodor Meron, 'Procedural Evolution in the ICTY' (2004) 2 *J of Intl Crim Just* 520 ff and the references *supra* note 11.

³⁸ As most prominently pronounced by the first President of the ICTY Antonio Cassese in his 'Statement by the President Made at a Briefing to Members of Diplomatic Missions' (IT/29, 11 February 1994): '[W]e have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and elsewhere' (cited in Virginia Morris and Michael P Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Vol 2* (Transnational Publ., 1995) 649, 650).

³⁹ Cf Bassiouni and Manikas (*supra* note 37) 863 f, Vladimir Tochilovsky, 'International Criminal Justice: "Strangers in the Foreign System"' (2004) 15 *Crim Law Forum* 319, 321 ff.

⁴⁰ As recently recalled by Sabine Gless, 'The Criminal Trial' (2005) 16 *Crim Law Forum* 373, 374, in her review of a comparison of procedural systems edited by Antony Duff et al, *The Trial on Trial, Vol 1: Truth and Due Process* (Hart, 2004). This sense of superiority could hardly be better expressed than by Kirk McDonald's own description of how she walked into the first meeting and slapped down the rules she had drafted in the United States: 'I was like "You want the rules, here they are", adding with a laugh: "I guess I was playing the typical American role: we know it all, we control it all"' (cited in Tochilovsky (*supra* note 39) 322).

To be sure, however, what is to be criticized in this genesis of the ICTY procedure is not so much the choice of the adversarial model⁴¹—because it would not have been any better if another model had been preferred in the same short-sighted way. What rather must be criticized is the constricted focus, when making the choice, on the usual objectives of domestic proceedings, without consideration of the additional goals of international criminal justice. All that mattered seems to have been: to convict or to discharge, as is the duty of any criminal tribunal, by trying the case in a fair and efficient manner. This is the narrow, self-restricted ground on which the battle between the adversarial insistence on a fair trial and the inquisitorial search for the truth was carried out, and where the former won out.

In other words, irrespective of the particular advantages and disadvantages the adversarial model entails,⁴² as a matter of principle it was like a birth defect in the development of the ICTY procedure that, beyond the intrinsic procedural goal of bringing the case to an end, paid no due attention to the more far-reaching aims of international criminal justice. This is not to ignore the fact that quite a number of substantive goals listed above from (A) to (R) have their proper place on the macro level in terms of the existence of an international criminal tribunal as such; this applies in particular to the re-establishment of the rule of law and the enforcement of international law. Even achievements on the macro level, however, can hardly be expected if the procedures on the micro level of individual prosecutions are not shaped in a way that would give the pursuit of these aims a real chance. So, even if not every individual trial can be expected to render victim satisfaction or contribute to the restoration of peace, the pursuit of such aims should be kept alive by the procedure or, at least, not obstructed by it. This is what is meant when we consider the adjustment of the procedural structure to the aims of national criminal justice. And this is likely to be missed if a new procedure is shaped on a traditional domestic model, conceding modifications only here and there, instead of developing the procedure from the outset in view of the aims and means required for the special mission of international criminal justice.

This applies, of course, to all procedural models. Therefore, as is increasingly admitted,⁴³ the degree to which the present ICTY procedure is more adversarial or more inquisitorial is indeed irrelevant. What finally matters is the availability of a procedure by which the aims of international criminal justice are achievable in the best possible way. This, however, can hardly be achieved in the course of an almost chauvinistic competition of preferring one's own national model over others. The motto and mechanism for future attempts must therefore be: instead of developing a procedure from a particular domestic model and merely adjusting it in response to certain international needs, and in this way remaining within the

⁴¹ Though the unmistakable missionary ambition with which the adversarial model is worldwide offered as the best possible system of criminal procedure is as not been welcomed without scepticism in all countries concerned; for references cf Eser (*supra* note 26) 208.

⁴² As shall be shown subsequently in more detail.

⁴³ As eg by Robinson (*supra* note 3) 879.

tight perspective of a national corset, it would be necessary, first, to identify the aims that international criminal justice must pursue, and then to construct the procedure in view of these aims, hopefully thus making them achievable, or, at least, not obstructing them.

Now, since this was not the way in which the ICTY procedure was constructed, the question is in what respects the present law and practice suffers from considerable deficiencies and how they could be corrected. As this can not be performed here in more than an illustrative manner, the focus shall be on aims, means, and modes which, in my view, are the most crucial ones. These are, as already indicated, the search for the truth, fairness and expediency, reconciliation, and the question of the historical record.

4. To be improved: the search for the truth

4.1 Truth as means to further ends—inherent limitations

Contrary to what is perhaps a widespread belief, the search for the truth is not an ultimate end of international criminal justice per se, but rather a means for rendering justice, reconfirming the rule of law, or contributing to reconciliation and the restoration of peace. Even where victims cry out for the truth, their final aim is satisfaction, or, less conciliatorily, retribution.⁴⁴

Nevertheless even as mere means to other ends, the search for the truth as a 'cornerstone of the rule of law'⁴⁵ is a key element of criminal justice, both national and international. This is obvious with regard to the main aim of rendering justice, commonly considered not to be attainable without truth. What justice, however? Is it in terms of retribution, as stated in some judgments of the ICTY?⁴⁶ Or, less retributionally, is it in terms of re-establishing the rule of law by bringing grave violations of humanitarian law as international crimes to the public light and not leaving them unpunished? Howsoever these and similar aspects of rendering justice may be weighted and ranked, neither an accurate verdict nor a truly just punishment can be rendered without having searched for the truth.

But perhaps even more important is the view to the future. Reconciliation both between individual offenders and victims and between the formerly warring groups presupposes ascertainment of what crimes have been committed, who was responsible for them, and what causes may have assisted the outbreak of violence. In the same vein, restoration and maintenance of peace can hardly be expected without forestalling later denial of responsibility through the establishment of a reliable

⁴⁴ Accordingly, as suitably observed by Heike Jung, 'Nothing but the Truth? Some Facts, Questions and Confessions about Truth in Criminal Procedure', in Duff et al (*supra* note 40) 147, 149 with regard to the ascertainment of truth, its role and weight may turn out quite differently depending on the more or less far-reaching goal of a criminal proceeding.

⁴⁵ As phrased by US Representative Madeleine Albright in the 48th Session of the UN Security Council, UN Doc S/PV.3217, 25 May 1993.

⁴⁶ Cf eg ICTY Appeals Chamber in *Prosecutor v Aleksovski*, Case No IT-95-14/1-A, 24 March 2000, paras 182–5; Swart (*supra* note 25) 105 f.

historical record. Thus, as long as forgetfulness and forgiveness are not mutual, a sustainable individual and social healing process can neither get started nor last without satisfying the victims' legitimate interest in establishing the truth.

In principle, I think, and except for certain conflicts among goals later to be addressed, the key role of truth is not contested by any serious contemporary procedure, neither by the inquisitorial nor by the adversarial model.⁴⁷ There are certain differences between both, however, at least to some degree. Whereas, as I have mentioned, the search for the truth is considered to be the hallmark of the inquisitorial model, the adversarial model is supposedly more fairness-oriented.⁴⁸ Due to its adversarial matrix, it will come as no surprise that the ICTY's procedure is less keen about the search for the truth than civil-law procedures would be.⁴⁹ This is not to say, however, that absolute truth has to be produced at any price. Rather, there are quite a few impediments, three of which are to be mentioned here, by which the searching for and the finding of the truth are hindered irrespective of the underlying procedural model.

The first one is a corollary of human nature. Courts established and operated by human beings—and not by an omniscient God—will realistically never reach more than 'procedural truth'.⁵⁰ Not being able to find absolute truth, however, can not excuse us from striving for the best possible truth. Despite all the scepticism, truth and justice are 'intimately intertwined' to such a degree that a judgment can be accepted as 'just' only if it is at least based on an honest effort to find the truth.⁵¹ While recognizing these qualifications, ascertainment of the truth still remains a precondition of—equally genuine and literally true—justice.

The second kind of impediment to the search for the truth is more legal in character and an achievement of modern humanitarian law. Human dignity and the right to life and physical integrity, as well as other human rights, are barriers to the search for the truth, irrespective of the underlying procedural model.⁵² This is a point at which the principle of fairness also comes into play.⁵³

⁴⁷ Cf Christoph JM Safferling, *Towards an International Criminal Procedure* (2001) 18 f.

⁴⁸ For more details on these different approaches cf Megan Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit' (2004) 4 *Intl Crim Law Rev* 243, 247 f with further references.

⁴⁹ Cf Schomburg (*supra* note 6) 110 f.

⁵⁰ Cf Ambos (*supra* note 34) 21. This inherent impossibility of gaining 'absolute truth' would even be true with the most obnoxious kind of inquisitorial system of old times. For even if a confession or testimony was gained by means of torture, one cannot be sure that it is true.

⁵¹ As has been concluded by Thomas Weigend, 'Is the Criminal Process about Truth?' in (2003) 26 *Harvard J of Law and Public Policy* 157–73 in his comparative analysis of differently far-reaching truth-strategies of the 'adversarial' and 'inquisitorial' models; along the same lines see Jung (*supra* note 44) 147 ff.

⁵² Accordingly, even judicial bodies with an 'inquisitorial' tradition such as the German Federal Supreme Court have with regard to fundamental human rights left no doubt that it is 'no principle of criminal procedure to explore the truth at any price' (Bundesgerichtshof in Strafsachen—BGHSt 14 (1960) 358, 365).

⁵³ See *infra* section 5.

A third impediment to the search for the truth may result from tensions with other aims of international criminal justice, and in particular with that of reconciliation.⁵⁴

Apart from these reservations, the search for the truth is an indispensable requirement of criminal justice. In a civil proceeding, directed as it is towards a mere balancing of interests, it may be appropriate to leave it to the parties to decide what evidence of truth they might present to, or withhold from, the judge. This, however, can hardly be the maxim of criminal proceedings designed to ascertain the guilt or innocence of a person and the damage done to victims.

This finally leaves us with impairments to truth that are attributable to the kind of procedure used, and thus may be conditioned by the underlying model. Three procedural features illustrate this point: the role of the participants involved, in particular that of the judges; witness proofing; and plea bargaining.

4.2 The role of the parties and the bench in the search for the truth

Leaving aside for a moment whether this fact is indeed presupposed by its Statute, the ICTY, in practice at any rate, proceeds basically along adversarial lines.⁵⁵ As 'party-driven' rather than 'judge-led',⁵⁶ this system implies that, on the one hand, it is at least in principle left to the parties to decide what evidence to present, what witnesses and exhibits to introduce, and in what manner and sequence to perform the examination. On the other hand, the judges should refrain from intervening, because of seeing themselves primarily as arbiters or referees, holding the 'scales of justice evenly' between the parties.⁵⁷

What does it mean for the search for the truth to leave the proceedings in this way largely in the hands of the parties?⁵⁸ As supporters of the party-driven model like to argue, the chance of ascertaining the truth will be greater if fought for by two adversaries both determined to win their own case.⁵⁹ However, this will lead to the full truth only if both sides are willing and able to perform their job properly, neither by neglecting relevant evidence nor by intentionally withholding it from the notice of the judges—as may be the case where both parties, for different reasons, are concerned that a witness might make statements detrimental to their case. If in such a situation party incapacity or obstructionism cannot be counteracted by the judge, truth will fall by the wayside.

Perhaps being aware of such adversarial shortcomings, the drafters of the ICTY Rules of Procedure and Evidence partly moved away from the traditional common-

⁵⁴ See *infra* section 7.

⁵⁵ Cf ICTY Judge Bonomy (*supra* note 22) 351 and *supra* note 34 with further references.

⁵⁶ As contrasted to each other by ICTY judge (and at present functioning as its President) Robinson, *supra* note 9, at 1039.

⁵⁷ As described by Robinson, *ibid.* To the same effect see the practice report by Tochilovsky, *supra* note 39, at 332 ff.

⁵⁸ As observed by former ICTY President Claude Jorda, 'The Major Hurdles and Accomplishments of the ICTY' (2004) 2 *J of Intl Crim Just* 572, 578.

⁵⁹ Cf Orie (*supra* note 35) 1443, Salvatore Zappalá, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) 16.

law model by giving the judges the right to question witnesses at any stage of the trial (rule 85(B)), to permit enquiry into additional matters (rule 90(H)(iii)), and to ask for additional evidence (rule 98).⁶⁰ These borrowings from the inquisitorial judge-led model, however, are still more words on paper than actions extensively practised. Not only is an ICTY judge at risk of having his or her impartiality impugned from asking too many questions,⁶¹ the instances of witnesses called at the behest of a Trial Chamber are still rare.⁶² Probably no less detrimental to the willingness to make use of these judicial powers is the adversarial understanding of the proceeding as being the 'parties' case', the success or failure of which is a responsibility of the parties.⁶³

This attitude of judges in the adversarial tradition to consider the case before them to be not theirs but the parties' case is perhaps the most crucial point with regard to truth in criminal justice. As this stance must be changed if the principle of 'no justice without truth' is to be taken seriously, some general remarks on the role of judges in international criminal justice appear appropriate.

Without wanting to question the virtue of 'judicial restraint' in principle, there is a fundamental difference between the indictment, with its various counts, and the evidence of the facts upon which the charge is based. The charge (including the alleged crimes and the facts supposedly underlying them) is one thing—it is the function of the prosecution. The judgment on the charges and facts is another thing—it is the function of the court. If a judge in reaching his or her verdict is restrained by the parties because they are withholding from the judge certain evidence relevant for proving the truth, he or she is expected to make a decision on a basis which is not real but prefabricated by the parties. This curtailment of judicial decision-making is fundamentally different from limitations and investigative gaps that result from legal exclusionary rules: limitations of that sort, required by the rule of law (*Rechtsstaatlichkeit*), must not be transgressed, not even for the sake of the truth. The question we are considering is different, however, if, beyond the limits required by the rule of law, the court in ascertaining the truth is limited to evidence produced by parties with one-sided incriminating or exonerating interests. Without having the chance to get the full picture of all legally obtainable evidence free of self-serving stratagems of the parties, the judge is literally 'degraded' to a decisional instrument, dependent on the parties for evidentiary input.⁶⁴ Thus the

⁶⁰ As to the exact wording and context of these Rules see *supra* note 14 and accompanying text.

⁶¹ Cf ICTY *Prosecutor v Hadžihasanović et al*, Case No IT-01-47-T, Decision on defence motion seeking clarification of the Trial Chamber's objective in its questions addressed to witnesses, 4 February 2005; Damaška (*supra* note 27) 177, Fairlie (*supra* note 48) 274, Jørgensen (*supra* note 1) 143 f, Sluiter (*supra* note 34) 233.

⁶² As to be drawn from the report by Robinson (*supra* note 9) 1049 f, there are, indeed, still rather few cases in the practice of the ICTY in which additional witnesses were summoned by order of the judges. As a further case in which calling of other witnesses was declined by the majority of the bench, cf *Prosecutor v Orić*, Case No IT-03-68-T, Judgment, 30 June 2006, para 800 (with reference to the Oral Decision in the Hearing of 1 March 2006, Transcript p 16041); cf also Bourgon (*supra* note 2) 530; Jørgensen (*supra* note 1) 132 f, Tochilovsky (*supra* note 39) 333.

⁶³ Even though statements of such frankness can hardly be found in writing, discussions with judges with a common law background are likely to boil down to this end.

⁶⁴ Cf Mirjan Damaška, *Evidence Law Adrift* (Yale University Press, 1997) 91.

court comes close to a kind of 'moot court' that has to decide on a quasi-hypothetical constellation of facts based on a presentation of evidence staged by the parties.

Whether these concerns are not as weighty when raised in relation to party-dominated proceedings on the domestic level is not a question to be explored here. At the level of international criminal justice, two peculiar features require attention. One is in regard to the fact that, in contrast with adversarial jury procedures in domestic systems, international criminal courts are composed of (professional) judges. In domestic jury systems the jurors are the only ones to function as 'fact-finders' in relation to the charges, while the judge's role is consequently limited to presiding at the trial, stating the law, serving as a mediator between the parties, and (as practised in certain jurisdictions) deciding the sentence. In international Trial Chambers, as at the ICTY and the ICC, the professional judges are not only responsible for keeping the trial in procedural order (principally through the presiding judge), but also for deciding on the facts, the application of the law, and the sentence.⁶⁵

Another reason for not allowing judges in international criminal justice to delegate the responsibility for ascertaining the truth to the parties is the comprehensive mandate of the court as a whole. The proposition that a bench of judges should be limited to a mere formal control of the proceedings, leaving the outcome of the case to the ability and discretion of the parties, is difficult to reconcile with the extraordinary responsibility resulting from the decision-making power over most serious international crimes. As the power and duty to prosecute international crimes are conferred upon the ICTY itself,⁶⁶ and not solely upon the parties, judges must blame not only the parties but themselves as well, if, due to an insufficient ascertainment of the truth, a defendant is wrongly found guilty or erroneously acquitted.

This plea for a pro-active role for the bench in ascertaining the truth could be realized without delay if, as a first step, the judges at international criminal courts were more willing to make use of the procedural rights they already have:⁶⁷ to question witnesses if the examination or cross-examination remains unclear on certain facts, or to ask for production of additional evidence if, for instance, available witnesses to relevant facts have not been called by the parties, and so on.

Still more important, however, would be a second step: the upgrading of the current interventional option available to the bench into a judicial duty to ascertain the truth. This would mean a change to the present system, which leaves to the discretion of the judges when and to what degree to make use of their right to further question witnesses and their power to ask for additional evidence. This

⁶⁵ On these essential differences between a jury trial and a proceeding tried by professional judges see also Safferling (*supra* note 47) 371. This difference has also been underlined by the then ICTY President Antonio Cassese in his Statement of 11 February 1994 (*supra* note 38) when arguing for the best possible free judicial evaluation of evidence: 'There will be no jury sitting at the Tribunal, needing to be shielded from irrelevances or given guidance as to the weight of the evidence they have heard. We, as judges, will be solely responsible for weighing the probative value of the evidence before us' (at 651).

⁶⁶ Cf Art 1 ICTY Statute and Art 1 ICC Statute, respectively.

⁶⁷ See *supra* note 63 and accompanying text.

would be true also with regard to the ICC, even though there the 'ex officio power'⁶⁸ of a Trial Chamber to order additional evidence is guaranteed in Article 64(6)(d) of the Statute (and not merely in the Rules of Procedure and Evidence). But in contrast with the prosecutor's express duty 'to establish the truth' (Article 54(1) (a) of the ICC Statute), no such duty is explicitly set out for the judges. For all international tribunals, then, there is a need to upgrade the ascertainment of the truth to a judicial duty. This would have positive effects for both sides: for the parties, by allowing them to challenge any neglect of this judicial duty on appeal;⁶⁹ and for the judges, by protecting them from challenges to their impartiality when they fulfil their duty to ascertain the truth by questioning a witness or by ordering the production of additional evidence.⁷⁰

To be sure, such strengthening of the active judicial role in assuring the ascertainment of the truth may deviate from adversarial traditions. Contrary to occasional apprehensions,⁷¹ however, it would still not go beyond the basic structure of international criminal justice. As I have written in more detail elsewhere,⁷² neither the Statute of the ICTY nor that of the ICC require an adversarial party-driven structure in which, among other procedural features, the judges are supposed to refrain from interventions aimed at the establishment of the truth. And even if the Rules of Procedure and Evidence appear more inclined towards adversarial customs, they would not be immutable.⁷³

Thus, provided that the search for the truth is performed in a fair manner and does not conflict with other aims of international criminal justice (such as efforts at reconciliation), there is no reason why the role of judges could not, or should not, assume a more pro-active role.⁷⁴ Even if improvements in this direction may come too late for the ICTY, they can still serve as a model for other international tribunals.

4.3 Witness proofing

If there was one phenomenon that particularly taxed my mind when I was serving as a judge at the ICTY, it was the custom of witness proofing. In general terms, this is 'the practice whereby a meeting is held between a party to the proceedings and the witness, before the witness is due to testify in Court, the purpose of which

⁶⁸ As characterized by Gilbert Bitti, Art 64 ICC Statute margin no 23, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Tribunal*, 2nd edn (CH Beck/Hart/Nomos, 2008) 1213.

⁶⁹ As submitted by Stefan Kirsch, 'Finding the Truth at International Criminal Tribunals', in Krussmann (*supra* note 26) 47 ff.

⁷⁰ Cf *supra* note 61 with accompanying text.

⁷¹ As, for instance, the assumption of Fairlie (*supra* note 48) 243, 245, that 'some adversarial procedural decisions were pre-ordained by the Statute'.

⁷² Cf Eser (*supra* note 26) 220 ff.

⁷³ Ibid.

⁷⁴ To a certain degree this activation of the bench may also be supported by the development of 'managerial judging', as described by Langer (*supra* note 34) 835–909, although this model is primarily a demand of judicial economy and expediency.

is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony'.⁷⁵ On a party-driven conception,⁷⁶ witnesses are distinguished as 'prosecution' or 'defence' witnesses depending on the calling party. This adversarial common-law product⁷⁷ was just as new to me as the many other procedural features. What alarmed me more in this case, though, was the increasing impression that, contrary to this model's promise of more accurate, complete, and efficient testimony, witnesses, after having been prepared and examined, if not rehearsed, by their party before the trial are no longer pure and unaffected. Witness proofing, rather than promoting the establishment of truth, may in fact counteract it.

One indication of the adverse effect of this practice on an unimpaired establishment of truth is the conspicuous quickness with which witnesses are ready to answer questions put to them by the party that had called them. This can hardly be explained other than by the witnesses having been alerted to expect this question and to answer it in the wanted way. This pre-programming may even go so far that questions on the same facts put to different witnesses are answered in a stereotyped manner. This may not stand out as long as the examination is performed in the cautious 'yes or no' manner, but it is a cause of concern when different witnesses use the same phrases, suggesting they have been pre-informed on what the answers should be. Related concerns arise when answers are given by witnesses even before they have been asked the question, pre-empting the question put to a previous witness by a judge and thus to be expected again. On the other hand, when afterwards cross-examined by the opposite party, a witness may be dominated by adverse feelings hindering him from freely and fully answering questions potentially detrimental to the original party's 'own' case. But even worse, if he turned over to the other side, thus somehow 'betraying' his original party, it would not be easy to challenge his credibility, since the rules on so-called 'hostile witnesses' allow the impeachment of a witness only under certain restrictions.⁷⁸

In the face of these impediments to a complete establishment of the truth, I was not at all happy to find the adversarial tradition of witness proofing practised at

⁷⁵ As phrased (and frequently referred to) in a submission of the ICC Office of the Prosecutor in *Prosecutor v Lubanga*, ICC-01/04-01/06-952, Prosecution Submissions Regarding the Subjects that Require Early Determination: Procedures to be Adopted for Instructing Expert Witnesses, Witness Familiarization and Witness Proofing, 12 September 2007, para 15.

⁷⁶ Cf Fairlie (*supra* note 48) 251.

⁷⁷ Though it must be noted that the practice of witness proofing may be different, as in particular between the United States and England and Wales; for a comparative survey cf Kai Ambos, "Witness proofing" Before the ICC: Neither Legally Admissible nor Necessary', in Stahn and Sluiter (*supra* note 6) 599, 605 ff.

⁷⁸ Cf Mike Newark, 'The Hostile Witness and the Adversarial System', in *The Criminal Law Review* (1986) 441 ff; as to the practice at the ICTY see *Prosecutor v Popović et al*, Decision on appeals against decision on impeachment of a party's own witness, Appeals Chamber, Case No IT-05-88-AR 73.3, 1 February 2008, para 28; Katrina Gustafson and Nicole Janisiewicz, 'Current Developments at the Ad Hoc International Criminal Tribunals' (2008) 6 *J of Intl Crim Just* 1091, 1109, Robinson (*supra* note 9) 1050 ff.

the ICTY.⁷⁹ Regardless of the legal question whether this custom has a base in the statutory documents of the international tribunals or whether it may even be necessitated by the adversarial structure of ICTY procedure,⁸⁰ from the teleological perspective of ensuring the uninfluenced presentation of facts by witnesses unbiased by the parties, witness proofing should not have a place in international criminal justice.

Thus I was relieved when the ICC decided to diverge from the ICTY route. The ICC, not considering itself bound by the jurisprudence of the ICTY, distinguishes between 'witness familiarization' and 'witness proofing'.⁸¹ As long as a witness is merely prepared by a party to enable him or her to give oral evidence at the trial in a satisfactory manner, this is held to be permissible,⁸² and perhaps even required to a certain extent for the protection of victims.⁸³ Any more extensive preparation of the witness with a focus on the prosecutor's case⁸⁴ and the concrete evidence to be presented at trial, is disallowed.⁸⁵

This restriction of traditional witness proofing to merely allowing the parties to familiarize a witness with the procedure is certainly a step in the right direction. Yet it has not been adopted by the ICTY⁸⁶ and it does not go far enough. As long as a

⁷⁹ See in particular ICTY, *Prosecutor v Limaj*, Case No IT-03-66-T, Decision on the defence motion on prosecution practice of proofing witnesses, 10 December 2004, para 2; *Prosecutor v Milutinović et al*, Case No IT-05-87-T, Decision on Ojdanić motion to prohibit witness proofing, 12 December 2006, ICTR-Appeals Chamber; *Prosecutor v Karemera et al*, ICTR-98-44-AR 73.8, Decision on interlocutory appeal regarding witness proofing, 11 May 2007, para 8. For further references cf Kai Ambos, 'International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty-Based Universal System', in Stahn and van den Herik (*supra* note 3) 161, 168. See also Ambos (*supra* note 77) 599 ff, Sluiter (*supra* note 3) 586 f.

⁸⁰ As to the pros and cons see in favour of witness proofing Ruben Karemaker, B Don Taylor III and Thomas Wayne Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Diversions' (2008) 21 *Leiden J of Intl Law* 683–98, criticized by Kai Ambos, '“Witness Proofing” before the International Criminal Court: A Reply to Karemaker, Taylor and Pittman', (2008) 21 *Leiden J of Intl Law* 911–16, with a response by Karemaker, Taylor, and Pittman in (2008) 21 *Leiden J of Intl Law* 917–23. For further criticism see Ambos (*supra* note 77) 602 ff.

⁸¹ See ICC Pre-Trial Chamber I, *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing, 8 November 2006, paras 18 ff; Trial Chamber I, *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, 30 November 2007, paras 28, 53, 57.

⁸² According to the *Lubanga* Trial Chamber (*supra* note 81, paras 29–30) witness familiarization shall serve these purposes: '(i) assisting the witness to fully understand the Court proceedings, its participants, and their respective roles; (ii) reassuring the witness about his or her role in proceedings before the Court; (iii) ensuring that the witness clearly understands that he or she is under a strict legal obligation to tell the truth when testifying; (iv) explaining to the witness the process of examination first by the Prosecution and subsequently by the defense; (v) discussing matters related to the witness' security and safety in order to determine the necessity of applications for protective measures before the Court; (vi) making arrangements with the Prosecution in order to provide the witness an opportunity to acquaint himself or herself with the Prosecution's trial lawyer and others who may examine the witness in Court'.

⁸³ See ICC Pre-Trial Chamber I (*supra* note 81) para 20, Ambos, *supra* note 77, at 600.

⁸⁴ Cited *supra* note 75.

⁸⁵ Further details cf Ambos (*supra* note 77) 599 ff, Gallmetzer (*supra* note 6) 520 f.

⁸⁶ See ICTY *Prosecutor v Milutinović et al*, Case No IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, ICTR Appeals Chamber, *Prosecutor v Karemera* (*supra* note 79) para 8; cf Fergal Gaynor and Barbara Goy, 'Current Developments at the Ad Hoc International Criminal Tribunals' (2007) 5 *J of Intl Crim Just* 544, 568, 1195.

witness is instructed by one party, he or she will still feel either as a witness of the prosecution or the defence: this can easily generate feelings of loyalty to the respective side. A normal witness—despite being admonished by the judge to impartiality—will not so easily be able to free himself or herself from the role already internalized by having been called by the prosecution or the defence.⁸⁷ Yet even if prosecution and defence counsel are willing to limit themselves to mere familiarizing the witness with the procedure to be expected, risks of transgression to hints regarding the concrete evidence remain. The risks are even greater in the case of a self-represented accused wanting to familiarize a witness with the procedure to come.

One must therefore take into account that the line between a purely formal ‘preparing’ and a substantive ‘coaching’ of a witness is so fluid that its observation cannot be left to one or the other party without any control. If familiarization is limited to a general preparation with regard to the procedure as such without dealing with the concrete evidence to be presented, a mutual way of control might be the joint preparation of witnesses by both parties should it be possible. If greater neutrality would be preferable, the preparation could be performed by an independent organ such as the Victims and Witnesses Unit of the international tribunal.⁸⁸

But if witness proofing is to be limited to making the witness familiar with the procedure without discussing the evidence to be presented, what better solution could there be than putting witness preparation in the hands of the judges? This would not only avoid a biased influence but would sever the witness’s connection to one party and upgrade him or her to a neutral ‘witness of the court’⁸⁹—in impartial search of the truth.

4.4 Guilty pleas and plea bargaining

At first glance, guilty pleas, which meanwhile are extensively practised in international criminal justice,⁹⁰ seem to be the best guarantee of truth. If the accused is accepting the charge, why should he do it if it were not true?

⁸⁷ This also applies in the reverse way to expectations on the part of the prosecutor and the defence although mere familiarization leaves the parties still less reason for assuming an ‘ownership of witnesses’, as the Appeal Chamber of the ICTY already had cause to disapprove. Though this was indeed done in ICTY *Prosecutor v Mrkšić*, Case No IT-905-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication With Potential Witnesses of the Opposite Party, 30 July 2003, it speaks for itself that ‘ownership’ propositions of this sort needed to be rejected at all; cf Toichilovsky (*supra* note 39) 329 ff. As to the difficulties of requiring one party’s witness to attend pre-trial interviews with the opposing party cf ICTY Appeals Chamber, *Prosecutor v Halilović*, Case No IT-01-48-AR 73, Decision on the Issuance of Subpoenas, 21 June 2004, Daryl A Mundis and Fergal Gaynor, ‘Current Developments at the Ad Hoc International Criminal Tribunals’ (2005) 3 *J of Intl Crim Just* 268, 287 f; (2006) 4 *J of Intl Crim Just* 623, 634.

⁸⁸ As, alternatively to a joint preparation by the parties, suggested by Ambos (*supra* note 77) 606.

⁸⁹ As is also supposed by ICC Pre-Trial Chamber I, *Prosecutor v Lubanga* (*supra* note 81) para 26, and confirmed by ICC Trial Chamber I (*supra* note 81) paras 33–4.

⁹⁰ And explicitly welcomed by former ICTY Judge Patricia M Wald, ‘ICTY Judicial Proceedings. An Appraisal from Within’ (2004) 2 *J of Intl Crim Just* 466, 471. For details of this development, its different forms, and its origin in Anglo-American criminal procedure cf Nancy Amoury Combs, ‘Copping a Plea to Genocide: The Plea Bargaining of International Crimes’ (2002) 151 *University of*

On second thoughts, however, one cannot be sure of having got at the truth when the accused pleads guilty. There are various reasons, both factual and legal ones, to be careful with identifying a guilty plea with truth. As is well known from domestic proceedings, a defendant might, for instance, plead guilty to a lesser crime in order to avoid disclosure and prosecution for a more serious one. Or he may have pleaded guilty under pressure or in order to protect another culprit from prosecution. And even if he pleads guilty to a charge without any diversionary tactic, a guilty plea may in legal terms not mean more than the acceptance of the charge without acknowledgement of the underlying facts as true.⁹¹

This shortcoming of truth is still more exacerbated when the guilty plea is the product of plea bargaining, a phenomenon also tolerated in international criminal justice.⁹² If it results in the confession of certain facts, this may, on the one hand, save the prosecutor a time-consuming trial with an uncertain outcome. On the other hand, this gain in time and expense may come at the cost of leaving the real causes—or the exacerbating circumstances—in the dark. And if the plea bargaining goes even further by dropping certain charges as a reward for assenting to others, this will not only leave potential criminal activities unpunished but also deprive victims of their desired satisfaction, especially as they are not involved in such deals.

If, in spite of such impairments to truth, 'negotiated justice'⁹³ is to be permitted, it must be legitimized by overriding interests. To be satisfied with the mere 'practical usefulness or necessity' as 'the only persuasive justification for negotiated justice'⁹⁴ is not entirely convincing. Even if some prosecution and elucidation are better than none at all, though partial justice may be dissatisfactory to both sides, practical exigencies are not a justification per se, but must be assessed against the aims to be pursued, or else be demoted to a secondary role. This need of balancing practical interests against substantive objectives of international criminal justice also applies to plea bargaining, as the case law of the ICTY fortunately recognizes.⁹⁵ Consequently, though truth may not simply be sacrificed for cost efficiency—for if this were the primary goal, one could forego prosecution from the very begin-

Pennsylvania Law Rev 1, 107 ff; Mirjan Damaška, 'Negotiated Justice in International Courts' (2004) 2 *J of Intl Crim Just* 1018ff; Anna Petrig, 'Negotiated Justice and the Goals of International Criminal Tribunals' (2008) 8 *Chicago-Kent J of Intl and Comparative Law* 1 ff; Swart (*supra* note 26) 107 ff.

⁹¹ As to this difference between the confession of facts and merely acknowledging a claim, its diverging developments in the Anglo-American and European continental law of civil and criminal procedure, and its underlying ideology cf Damaška (*supra* note 91) 1020 ff.

⁹² Cf Combs (*supra* note 91) 1 ff, 89 ff; Petrig (*supra* note 91) 7 ff.

⁹³ As guilty pleas and plea bargainings are liked to be described: cf for instance the titles of the articles of Damaška and Petrig, *supra* note 90.

⁹⁴ As was concluded in Damaška's thorough analysis of the pros and cons of negotiated justice (*supra* note 90) 1027 ff, 1030.

⁹⁵ As analysed and stressed by Swart (*supra* note 25) 105 f with reference to ICTY Sentencing Judgment, *Prosecutor v Plavšić*, Case No IT-00-39 and 40/1, 27 February 2003, paras 80, 83; ICTY Sentencing Judgment, *Prosecutor v Momir Nikolić*, Case No IT-02-60/1-S, 2 December 2003, para 78 and Annex B; ICTY Sentencing Judgment, *Prosecutor v Jokić*, Case No IT-01-42/1-S, 18 March 2004, paras 89–92; and ICTY Sentencing Judgment, *Prosecutor v Obrenović*, Case No IT-02-60/2-S, 10 December 2003, paras 111–16. As to the necessary evaluation of plea bargaining in the light of the goals of international criminal justice cf also Petrig (*supra* note 90) 11 ff.

ning—deficits in truth may be acceptable in given circumstances if negotiated justice were more promising for achieving other aims of international criminal justice.⁹⁶ This is true with regard to reconciliation, in particular, as we shall see later.⁹⁷

Although this is not the place to go into details, at least brief attention should be paid to the all-too-often neglected diversity of two different kinds of negotiated justice. If plea bargaining results in the dismissal of certain counts of the charge, this would concern the contents and extent of the indictment, and is clearly within the prosecutor's competence. Although such partial abandonment of the prosecution may counteract the fight against impunity and the victims' interest in satisfaction, the bench is left with neither the possibility nor the responsibility to ascertain the truth. However, as long as a charge is upheld, plea bargains and guilty pleas cannot entirely eliminate truth-finding if criminal guilt is to be more than a fiction fabricated by the parties. Therefore, in remembering what has already been said about the judicial responsibility in the establishment of truth in criminal cases,⁹⁸ the ICTY deserves full support when it refuses to be satisfied with admitted facts and, in case of doubt, requires further verification, perhaps even by calling witnesses *proprio motu*.⁹⁹

On the whole, even if negotiated justice is not to be entirely dispensed with, in the interest of truth it should remain the exception. With regard to the well-advised motto of Damaška, 'as many trials as possible, as much bargaining as necessary',¹⁰⁰ I would like to understand its second part to mean *not more bargaining than necessary*.

5. To be guaranteed: fairness

5.1 Fairness and expediency

Though the search for the truth is the most important instrument for accomplishing various substantive aims of international criminal justice, it must not be pursued at any price. Thus a price not to be paid for truth is fairness of the proceedings. For though truth is a prerequisite of justice, the search for the truth may fail to achieve sustainable justice if carried out with unfair means. The same is true, to a certain degree, of expediency: if the ascertainment of the truth completely disregarded the expectation of finalizing a proceeding within a reasonable time, the chances of rendering satisfaction and establishing reconciliation would vanish.

⁹⁶ Despite Damaška's highlighting of practical needs (*supra* note 90), he is, in fact, following the same line when finally discussing the deficits or merits of plea bargaining with regard to pedagogical goals of international justice, reconciliation of groups, or transparency of proceedings (at 1037 ff).

⁹⁷ See *infra* section 7.

⁹⁸ See *supra* at section 4.2, furthermore Schomburg (*supra* note 6) 110.

⁹⁹ As it did in the case of *Momir Nikolić* (*supra* note 95) para 25. For further details cf Swart (*supra* note 25) 109 f.

¹⁰⁰ Damaška (*supra* note 90) 1039.

On the other hand, fairness and expediency are merely the modes in which the proceedings are conducted and not their true aims. Trials are not performed for the sake of providing a public platform for the judicial demonstration of fairness and expeditiousness. If performed for other substantive aims, though, the trial must be performed in a fair and expedient manner. Therefore, it would be wrong to misconceive the adversarial emphasis on fairness as a procedural goal as being in opposition to the inquisitorial search for the truth. Instead of understanding the relationship between the two as 'one versus the other', they must be appreciated for their combined effect, in which the ascertainment of the truth—as the basis of a truly just judgment and procedural instrument for achieving the substantive aims of criminal justice—is the goal which must be pursued in a fair manner.¹⁰¹ In this sense, fairness is no less important as a guarantee of the rule of law than truth.

Unlike truth, which is less prominently indicated in the procedural instruments of the ICTY, fairness is more often and explicitly pronounced as a requirement of the proceedings in international criminal justice. Thus it is also more frequently invoked in judicial disputes.¹⁰² Traditionally, this has been a plea raised particularly by the defence, as if fairness were primarily, if not exclusively, the right of the defendant.¹⁰³ Rightly, however, fair treatment is owed not only to the defendant but to all parties, as well as to victims and witnesses.

Yet, what is meant and required by fairness? As a somewhat indistinct maxim, difficult to be defined in general terms, fairness can hardly be comprehended other than by working out the various sub-principles which it consists of. These are of such a number and variety,¹⁰⁴ however, that only those of crucial significance are considered here.

¹⁰¹ As to this relationship between aims, means, and modes of international criminal justice see *supra* section 2.2.

¹⁰² Cf Robinson (*supra* note 9) 1055.

¹⁰³ As appears, for instance, in the complaints of Fairlie (*supra* note 48) 295 ff, when she, though in principle rightly criticizing the pressure exerted by the 'completion strategy' (cf *supra* note 5) on the expediency of trials, seems only worried about the rights of the accused.

¹⁰⁴ An exemplary list of rights and maxims considered essential for ensuring a fair proceeding can be found in the ICTR Appeal Judgment in *Prosecutor v Rutaganda*, Case No ICTR-96-3-A, 26 May 2003, when dealing with errors affecting the defendants' right to cross-examination (paras 127–40) and to raise objections (paras 141–6), with the required burden of proof (paras 169–84), the handling of prior witness statements (paras 185–96) and the assessment of the credibility of witnesses (paras 197–213); cf. also Daryl A Mundis and Fergal Gaynor, 'Current Developments at the Ad Hoc International Criminal Tribunals' (2004) 2 *J of Intl Crim Just* 879–85 f; Karin N Calvo-Goller, *The Trial Proceedings of The International Criminal Court. ICTY and ICTR Precedents* (Nijhoff, 2006) 45 ff. On the requirements of fairness in comparison to other international instruments, as in particular in the International Covenant on Civil and Political Rights of 1996, cf Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 *Northwestern J of Intl Human Rights* 1–29; as to the recent Charter of Fundamental Rights of the European Union, cf Albin Eser and Justizielle Rechte, in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 3rd edn (Nomos, 2011) Art 47 margin no 34, at 583 f.

5.2 Equality of arms

The first to be considered, for it goes to 'the heart of the fair trial guarantee',¹⁰⁵ is the principle of equality of arms. Although it enjoys universal recognition,¹⁰⁶ it appears so closely connected to the adversarial procedure that it is often even equated with the adversarial principle.¹⁰⁷ One may doubt this, however, if such identification is also to mean that the adversarial procedure would guarantee a higher degree of fairness, as is supposed when the inquisitorial fact-finding method is described as being less attentive to equality between the parties.¹⁰⁸ Although the adversarial nature of the proceedings would indeed be distorted if the equality of the parties were diminished,¹⁰⁹ this would not justify the position that other procedural models do not guarantee the same degree of fairness, though perhaps by other means.

Quite apart from the aforementioned fact that fairness, including equality of arms as one of its essential elements, is universally recognized irrespective of the underlying procedural model, its practical enforcement finally depends on what the equality of arms requires and how it can be assured or adequately substituted. If the equality of arms in adversarial terms is to require, as its three key elements (i) the prohibition of trials *in absentia*, (ii) adequate representation by counsel, and (iii) adequate access to the judicial branch in support of fact-finding activities,¹¹⁰ then these requirements, far from being irreconcilable with other procedural models, are also practised in non-adversarial procedures,¹¹¹ and, even more so, in mixed procedural models, such as those of the international criminal courts.¹¹²

Nevertheless, it may be doubted that the defence is, in its factual status, equal to that of the prosecution. But if there are deficiencies in getting access to relevant evidence,¹¹³ such shortcomings in equality can hardly be eliminated by genuine adversarial means. On the contrary, the more privileges and advantages of the prosecution in gathering evidence, particularly from states, have to be compensated for by disclosure obligations towards the defence, as is increasingly the practice at

¹⁰⁵ As stated by the ICTY Appeals Chamber in *Prosecutor v Tadić*, Case No IT-94-1-A, Judgment, 15 July 1999, para 44.

¹⁰⁶ And thus was already relied upon by the Appeals Chamber in *Tadić* (*supra* note 105) paras 30 f, 44. Cf also Richard J Wilson, 'Procedural Safeguards for the Defense in International Human Rights Law', in Michael Bohlander et al (eds), *Defense in International Criminal Proceedings* (2006) 15.

¹⁰⁷ As observed in her thorough analysis of this principle by Jarinde Temminck Tuinstra, *Defense Counsel in International Criminal Law* (2009) 153 ff, 155, 190, 191. Cf also Zappalá, *supra* note 59, at 16.

¹⁰⁸ Cf Sluiter (*supra* note 34) 233.

¹⁰⁹ As assumed by Temminck Tuinstra (*supra* note 107) 155.

¹¹⁰ As stated by Sluiter (*supra* note 34) 233, for the predominantly adversarial international proceedings.

¹¹¹ As, for instance, in Germany where (i) trials *in absentia* are principally excluded (section 285 Criminal Procedure Code, with the minor exception that section 232 permits the performance of a trial if no penalty beyond 180 day rates is to be expected and the accused has been summoned in due form and warned of the consequences of not appearing in court), (ii) assistance of counsel as well as self-representation is guaranteed (see *infra* section 5.4 with note 136), and (iii) access of the defence to the dossier of the prosecution is, though with certain caveats, permitted (s 147).

¹¹² Cf Schomburg (*supra* note 104) 6 f, 12 f, 15 ff.

¹¹³ As often rightly complained; for details see Temminck Tuinstra (*supra* note 107) 159 ff.

the ICTY,¹¹⁴ the more the adversarial character of the procedure will increasingly be substituted by elements of a procedure that finds fairness more in the impartial disclosure of facts than in a one-sided adversarial exploitation of better factual cards. This destruction of adversariality by disclosure duties becomes still more apparent if the prosecutor has not only to disclose exonerating facts discovered accidentally, but, in order to establish the truth, is from the very beginning obliged 'to investigate incriminating and exonerating circumstances equally', as provided for in the ICC Statute.¹¹⁵ From here, though, it is only a short step to granting the defence full access to the prosecutor's dossier, as is the practice in inquisitorial systems.¹¹⁶

This is not the only instance, though, in which fairness to the defendant is less achievable by insisting on adversarial equality of the parties than by relying on judicial intervention. When the equality of arms as a superior characteristic of the adversarial procedure is emphasized, what seems to be overlooked is that the equal status of the parties does not per se guarantee fair effects.¹¹⁷ Even if both sides have equal access to the evidence they consider relevant and effective, the defendant will hardly enjoy fair treatment if his counsel is not able to make proper use of his or her powers.¹¹⁸ If, in such a case of evident factual inequality, the judge refrains from intervening, on the basis that it is not the judge's but the party's case, the defendant can easily suffer unfairness. When the judge intervenes, however, perhaps by ordering available evidence the defence counsel neglected to present, he or she is transgressing classical adversarial lines. So what has then to be preferred: to stay with adversariality or to ensure fairness?

These few examples may already suffice to show that adversariality is not necessarily the best or only guarantor of fairness in criminal proceedings; rather, equality of arms can hardly be obtained without resorting to non-adversarial means.

It might be said that one of the advantages offered by the adversarial principle in ensuring equality of arms is to be found in the protection of the parties from unfair disparities in time and amount of evidence led when presenting their case at trial. This is a common challenge in international criminal cases, where the number of prosecution witnesses generally exceeds the number of defence witnesses.¹¹⁹ Although the easiest way to ensure equality of arms might be to allow the parties the same time and amount of evidence, particularly in relation to the number of witnesses and documents, this could easily go against another principle of proce-

¹¹⁴ Cf in particular rules 66–70 ICTY RPE, furthermore Orie (*supra* note 34) 1469 f, 1482 f, Salvatore Zappalá, 'The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE' (2004) 2 *J of Intl Crim Just* 620 ff.

¹¹⁵ Article 54(1)(a).

¹¹⁶ As, for instance, in Germany and The Netherlands; cf Barbara Huber to Germany and Marc Grunhuijsen and Joep Simmelink to The Netherlands, in Richard Vogler and Barbara Huber (eds), *Criminal Procedure in Europe* (Duncker & Humblot, 2008) 269, 328 ff, and 408 f respectively.

¹¹⁷ Cf, for instance, the critical observations of the former ICTY Judge Bonomy (*supra* note 22) 356 f; furthermore John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals' (2009) 7 *J of Intl Crim Just* 17, 24 ff.

¹¹⁸ As with regard to the ICTY, eg, criticized by Toma Fila, 'The ICTY from the Perspective of Defense Counsel from the Former Yugoslavia', in Richard May et al (eds), *Essays on ICTY Procedure and Evidence in Honor of Gabrielle Kirk McDonald* (Kluwer Law International, 2001) 187, 193; David Tolbert, 'The ICTY and Defense Counsel: A Troubled Relationship' (2003) 37 *New England Law Rev* 975, 977.

¹¹⁹ For details cf Temminck Tuinstra (*supra* note 107) 168 ff.

dure, namely expeditiousness, and it may thus also be detrimental to mutual fairness, in particular to victims. If this is to be avoided, we must certainly accept that equality of arms is not to be understood in terms of a 'strict principle of mathematical equality', but as a principle of 'basic proportionality', as said by the ICTY Appeals Chamber in the *Orić* case.¹²⁰ If this proportionality, however, is to be more than a formal comparison of adduced evidence and needed hours and days, it will be difficult to find an appropriate yardstick without enabling, if not obliging, the judges to induce the parties to reveal what they consider they need to prove, and by what evidence they wish to prove it, and on that basis decide what is relevant to the case and what time to allocate for it.¹²¹ Yet, as soon as ensuring fairness requires more than the bare enforcement of formalities, the judge will become involved in the case to a greater degree than the adversarial tradition allows for.

5.3 Impartiality of the judges

A second feature by which the adversarial setting appears superior to other procedural structures is the impartiality of the judges. As one more important 'component of the right to a fair trial'—repeatedly described so by the Appeals Chamber of the ad hoc tribunals¹²² and recognized in their statutes¹²³—it has generated a remarkable amount of case law.¹²⁴

As to its structural significance, it will not be, at first glance, surprising that a judge who is limiting herself to quietly following the proceedings, and intervenes only if an objection of a party has to be decided, is not running much of a risk of having her impartiality contested, compared with a judge who exposes himself by asking questions or admonishing witnesses to speak the truth.¹²⁵

¹²⁰ *Prosecutor v Orić*, Case No IT-03-68-AR73.2, Appeals Chamber, Interlocutory Decision on Length of Defence Case, 20 July 2005, para 7. As to this refinement of the less flexible approach of the ICTY Trial Chamber in *Prosecutor v Milošević*, Case No IT-02-54, Order Rescheduling and Setting the Time Available to Present the Defence Case, 25 February 2004, cf Temminck Tuinstra (*supra* note 107) 170 ff.

¹²¹ So, without wishing to question the aforementioned pronouncement of the Appeal Chamber in the *Orić* case in principle, I may be allowed to suppose that the Trial Chamber's decision in *Prosecutor v Orić*, Case No IT-03-68-T, Decision on First and Second Defence Filings Pursuant to Scheduling Order, 4 July 2005, could be understood as already pursuing a less formal than substantive proportionality line based on what relevant facts might require further—positive or negative—evidence. Who knows whether the reversal of the Trial Chamber's scheduling order would have been necessary if the Appeal Chamber had more relied on what in view of the Trial Chamber was already sufficiently proven or legally irrelevant and that in any case the Trial Chamber would have been open to hear additional evidence if its relevance had been properly indicated?

¹²² Cf Appeals Chamber in *Prosecutor v Rutaganda* (*supra* note 104) para 39 with further references.

¹²³ Article 13 ICTY Statute with rule 15 ICTY RPE, Art 12 ICTR Statute with rule 15 ICTR RPE, Arts 36(3)(a), 67 ICC Statute with rules 34, 35 RPE.

¹²⁴ Cf James Cockayne, 'Impartiality of Judges', in: Cassese (*supra* note 8) 370 f and the regular reports on 'Current Developments at the Ad Hoc International Criminal Tribunals' in Darryl A Mundis and Fergal Gaynor (2004) 2 *J of Intl Crim Just* 886, 1171; (2005) 3 *J of Intl Crim Just* 283, 1147; Fergal Gaynor and Barbara Goy (2007) 5 *J of Intl Crim Just* 1208; Katrina Gustafson and Nicole Janisiewicz (2008) 6 *J of Intl Crim Just* 116 f; Katharina Margets and Patrick Hayden 7 (2009) *J of Intl Crim Just* 1183 f.

¹²⁵ Cf *supra* note 61 with accompanying text.

On second thoughts, however, it is not so clear that a silent judge is necessarily unbiased and an intervening judge obviously partial. As a matter of fact, it all depends on the personality and consciousness of a judge. If a judge possesses an impartial sense of duty, as he or she solemnly promised to fulfil when taking office,¹²⁶ his or her questioning of a witness will be determined by a neutral pursuit of truth, irrespective of whether the answer satisfies or displeases one or the other of the parties. On the other hand, if a judge is biased, he or she may favour one party to the detriment of the other by remaining silent or by not intervening where fairness requires it.

If there remains one feature by which the adversarial self-restrained judge will seem superior, it could be public appearance: even if he is in fact not unbiased, he may seem so, and thus give less ground for requesting his recusal. But there again the question is about what should be preferred: appearance or reality?¹²⁷

There is another point, however, that I am much more worried about when considering the role of judges: it is the broad power and discretion of the president to assign judges to certain Chambers or even to specific cases, as it is practised in the administration of international criminal justice.¹²⁸ This is not to ignore the fact that the comparatively small number of international proceedings and their frequently excessive length require a high degree of flexibility that could hardly be managed by strict assignment rules—as are provided for—eg in guaranteeing the so-called ‘statutory judge’—in certain countries.¹²⁹ Nevertheless, should not the discretion of the president of the court in composing the Chambers, and accordingly the discretion of the presiding judge to assign members of his Chamber to specific cases, at least be exercised according to certain pre-determined criteria and guidelines? Otherwise, the administration of international criminal justice is opening a flank to political challenge of its impartiality or its lack of sensitivity, as for instance where a judge is assigned to a case which partly overlaps with another case in which he or she has adopted a certain position.¹³⁰

¹²⁶ Cf rule 14 ICTY RPE.

¹²⁷ This is, of course, not to exclude that even the mere appearance of bias can constitute a ground for recusal as it had been invoked, but was finally denied by the ICTR Bureau, in *Prosecutor v Seromba*, Case No ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006. What is rather questioned here is the difference between the ostensible appearance of impartiality as likely to be assumed of a silent judge and the assumption of bias of an active judge who in reality is impartial.

¹²⁸ As at the ICTY according to rules 19, 27(C) and 62(A) of its RPE. In defence of this practice cf Theodor Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’ (2005) 99 *American J of Intl Law* 359, 363 f.

¹²⁹ This principle, which in reaction to abusive ad hoc assignments of judges in the national socialist regime has even been constitutionally recognized as a basic right in Germany (Art 101(1) sentence 2 Basic Law), requires a regularly (usually for a year) predetermined *Geschäftsverteilungsplan* (in terms of an assignment of judge and case plan) pursuant to which, according to specified criteria, an incoming case will come under the jurisdiction of a certain judge or a Chamber. For a comparative survey on this guarantee of a ‘statutory judge’ see Albin Eser, ‘Der “gesetzliche Richter” und seine Bestimmung für den Einzelfall’, in Albin Eser et al (eds) *Straf- und Strafverfahrensrecht* (Heymann 1994) 247–71.

¹³⁰ As it was in particular criticized by Sluiter (*supra* note 31) 621 ff with regard to the *Krajišnik* and the *Karadžić* cases. Sceptical also regarding the international practice, Cockayne (*supra* note 125) 372.

5.4 Self-representation of the defendant

Regarding fairness, there are still other features by which the adversarial procedure is not necessarily superior to other models, and might even be worse. An extraordinarily topical example of this is self-representation by the defendant.¹³¹ Whereas the adversarial tradition leaves him, in principle, only the choice of being assisted by counsel or opting for self-representation,¹³² excluding any other form of assistance except perhaps that of 'standby counsel' or *amicus curiae*,¹³³ other procedural systems see no problem in allowing both self-representation and assistance by counsel at the same time.¹³⁴ Possibly except for the special problem of mandatory assignment of a counsel against the wishes of the defendant,¹³⁵ in principle the scope of fairness is certainly broader if the defendant, instead of being limited to the 'either/or' of self-representation or assistance by counsel, is allowed a cumulative 'as well as'.¹³⁶

5.5 Balancing adversarial versus other procedures

These examples may already suffice to show that fairness in international criminal justice is neither necessarily nor exclusively guaranteed by only one type of criminal

¹³¹ On the debate of this issue at the international criminal tribunals see, in particular, the insider reports of Gideon Boas, *The Milošević Trial* (2007) 53 ff, 205 ff; Bonomy (*supra* note 22) 355 ff and Alexander Zahar, 'Legal Aid, Self-Representation and the Crisis at the Hague Tribunal' (2008) 19 *Criminal Law Forum* 243–63; for details of the basic issues involved cf Robert Heinsch, 'How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge dominated approach?', in Stahn and Sluiter (*supra* note 7) 479, 492 ff, Nina HB Jørgensen, 'The Problem of Self-Representation at International Criminal Tribunals' (2006) 4 *J of Intl Crim Just* 64–77; Temminck Tuinstra (*supra* note 107) 245 ff with further references.

¹³² Cf Schomburg (*supra* note 6) 111. On the origin of this alternative in Anglo-American law where the defendant used to be required to waive his constitutional right to assistance of counsel if he preferred self-representation, cf Richard H Chused, 'Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics' (1977) 65 *California Law Rev* 636 f, 660; Joseph A Colquitt, 'Hybrid Representation: Standing the Two-Sided Coin on its Edge' (2003) 38 *Wake Forest Law Rev* 55, 64 ff, 145 f.

¹³³ Cf Jørgensen (*supra* note 131) 71 ff; Sarah Williams and Hannah Woolaver, 'The Role of the *Amicus curiae*-Before International Criminal Tribunals' (2006) 6 *Intl Criminal Law Rev* 151–89.

¹³⁴ As, in particular, in Germany; cf Albin Eser, 'Verteidigung in der internationalen Strafgerichtsbarkeit. Eine rechtsvergleichende Analyse', in Heinz Schöck et al (eds), *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften* (2008) 168 ff <http://www.freidok.uni-freiburg.de/volltexte/6276> (accessed 6 January 2011), Schomburg (*supra* note 104) 16 ff.

¹³⁵ Cf Mirjan Damaška, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 *J of Intl Crim Just* 3 ff; Michael P Scharf, 'Self-Representation versus Assignment of Defense Counsel Before International Tribunals' (2006) 4 *J of Intl Crim Just* 12–30, Sluiter (*supra* note 31) 618 ff.

¹³⁶ Not least would the latter way also be in better accordance with the international guarantees of the defendant's right to 'defend himself in person or through legal assistance', as it is, eg, phrased in Art 21(4)(d) ICTY Statute; for instead of interpreting the 'or' in exclusive terms of 'either—or' as it is wrongly done by disregarding that there is no 'either' prefixed in the phrase, it is in favour of a right of freedom of choice much more persuasive to understand the 'or' in terms of allowing self-representation and assistance of counsel beside each other, at least if the defendant so wishes, cf Eser (*supra* note 134) 174. In principle support of this cumulative approach see also Judge Schomburg in his Fundamentally Dissenting Opinion, in *Prosecutor v Krajišnik*, Case No IT-00-39-A, Appeals Chamber Decision on Momcilo Krajišnik's Request for Self-Representation, 11 May 2007, para 83.

procedure, but that a variety of ways is available. Though this was mainly illustrated by exposing flaws in the predominantly adversarial character of international criminal justice as currently practised, it is not to be understood as a principal rejection of this model. The point, rather, is that, despite the widespread mistrust among common law practitioners of any inquisitorial elements,¹³⁷ in certain respects fairness can be even better served in non-adversarial ways. Here we must also acknowledge that in many so-called civil law jurisdictions, as a result of fundamental procedural reforms affecting all but the judges' duty to ascertain the truth *ex officio*, there is not much left of the infamous forms of 'inquisition'.¹³⁸ Even if there remain national differences with regard to the scope and degree to which the rights of the accused are recognized, to my knowledge one will nowadays be hard pressed to find a European continental jurisdiction in which these rights are substantially less secure than in an adversarial system.

Thus it seems to be less the ensuring of fairness that would render one of the competing models superior to the other. All the more crucial, then, to scrutinize the achievement of other goals of international criminal justice now.

6. To be enhanced: expediency

6.1 Length of the proceedings—causes

Expediency, just as fairness, is another 'mode' in which the proceedings are to be performed. Even though they are occasionally dealt with together,¹³⁹ one must be aware that fairness and expediency, rather than necessarily aiming at the same end, may even come into conflict with each other¹⁴⁰—as in the case of granting a defendant unlimited time to prepare his self-representation without any assistance by counsel.¹⁴¹ A similar tension can arise with the search for the truth, when its total ascertainment would require more time than is realistically available. Nevertheless there can be no doubt that expediency of the proceedings is also part of their fairness,¹⁴² and thus an undisputed maxim of international criminal justice.¹⁴³

The question to be considered here will be a pragmatic one: can the present procedure ensure expeditiousness while respecting the other goals of international criminal justice? This is all the more important given the amount of complaints

¹³⁷ As to the persistence of such prejudices, though perhaps not herself sharing them, cf Fairlie (*supra* note 48) 247.

¹³⁸ As in particular with regard to the far-reaching reforms of the German Criminal Procedure Code cf Peter Riess, 'Das Ende einer Epoche? Gedanken zum 125. Jahrestag des Inkrafttretens der StPO', in Jörg Arnold et al (eds), *Menschengerechte Strafjustiz. Festschrift für Albin Eser* (CH Beck, 2005) 443–59. Therefore the term 'inquisitorial' is indeed not correct any more; cf *supra* note 33.

¹³⁹ Cf *supra* note 3.

¹⁴⁰ In these terms, expediency is even defined as 'the use of or inclination towards methods that are advantageous rather than fair or just', in *Collins English Dictionary and Thesaurus* (2000) 413 on 'expediency' (2). Cf Boas (*supra* note 131) 68 f, 283 f.

¹⁴¹ Cf, in particular, Boas (*supra* note 132) 133 ff.

¹⁴² Robinson (*supra* note 3) 569; cf also Barria and Roper (*supra* note 18) 361 ff.

¹⁴³ Cf *supra* notes 2, 3 and (with accompanying text) 12, 15, 26, furthermore section 2.2 at (W).

being made about the excessive length of international criminal proceedings.¹⁴⁴ If expediency must be improved, the causes of delay must be examined. Quite a number of them may be found in external conditions, in particular the lack of co-operation of states when asked to deliver evidence.¹⁴⁵ My main focus, however, will be on internal hurdles, put up by failings in the structure and practice of the courts.

In this procedural respect, as already analysed in more detail elsewhere,¹⁴⁶ one of the main problems in securing expediency in international criminal justice by way of shortening the length of trials seems to lie in the very broad scope of indictments and in the long lists of witnesses and documents offered up by the parties.¹⁴⁷ Although various measures have been taken to narrow the indictments and to cut down on witnesses and documents,¹⁴⁸ the question remains whether the difficulty of coping with these problems may be attributable to flaws in the present procedural structure and practices at the ICTY and other predominantly adversarial international tribunals.

Features not to be underestimated as possible causes of expansive indictments and lengthy trials are in particular the following. First, the more the prosecution fears that, should a count fail or evidence turn out to be insufficient, modifying an indictment or bringing additional evidence is precluded, the more the prosecution will be inclined to frame the indictment as broadly and comprehensively as possible and to present as many witnesses and exhibits as are available. Conversely, the defence will feel impelled to counteract with a correspondingly long list of witnesses and documents.¹⁴⁹

Secondly, although these dynamics of expansion might be brought under control by a stringent relevance regime, the filtering out of irrelevant evidence will succeed only if the Chamber, as early as practicable, takes control of what evidence to admit as relevant, or, at least, gives the parties guidance as to what it deems to be relevant; and, to be sure, this should cover relevance of both legal and factual matters.¹⁵⁰ Otherwise, even well-intentioned prosecution and defence counsel will feel obliged to define the relevance of evidence as broadly as possible to avoid the risk of not presenting evidence which might have been considered relevant in the eyes of the judges.

Thirdly, an uncertainty capable of inducing the broadest possible presentation of evidence may also result from unresolved differences in the conception of substan-

¹⁴⁴ As it is, rather than ignored, particularly stressed by insiders of the ICTY, cf Bonomy, *supra* note 22, at 352; Bourgon (*supra* note 2) 532; Jørgensen (*supra* note 1) 125 f; Fausto Pocar, 'Criminal Proceedings Before the International Criminal Tribunals for the Former Yugoslavia and Ruanda' (2006) 5 *The Law and Practice of Intl Courts and Tribunals* 83, 94.

¹⁴⁵ Cf Pocar, *ibid.*

¹⁴⁶ Cf Eser (*supra* note 26) 212 ff.

¹⁴⁷ Cf O-Gon Kwon, 'The Challenge of an International Criminal Tribunal as Seen from the Bench' (2007) 5 *J of Intl Crim Just* 360, 372 ff.

¹⁴⁸ Cf in particular the power of the judge to review the indictment (rule 47 ICTY RPE), status conferences (rule 65bis ICTY RPE), directive orders of the Trial Chamber to the Prosecutor to reduce a number of counts or to cut down the list of witnesses and documents (rule 73bis ICTY RPE). For case examples cf Gaynor and Goy (*supra* note 86) 1199.

¹⁴⁹ Cf Stefan Kirsch, 'The Trial Proceedings Before the ICC' in (2006) 6 *Intl Crim Law Rev* 275, 289.

¹⁵⁰ As also pointed out by Kirsch, *ibid.*

tive law. Although so far scarcely discussed, this is a particularly crucial point for procedural systems which are primarily party-driven and not judge-led. In a primarily judge-led trial, the bench is, as a rule, from the very beginning supposed to be familiar with the elements of the substantive law to be applied to the charges, and, if there are uncertainties in the interpretation of the law, to make up its mind with regard to the requirements for coming to a verdict of guilty or not guilty; accordingly, the presiding judge will be in a position to direct the presentation of evidence to the facts which might finally become relevant for the verdict, thereby avoiding time-consuming presentations of legally irrelevant circumstances. If differences in the conception of the substantive law to be applied to the charges occur in a trial primarily driven by the parties, they will, as a rule, not be in a position to foresee which alternative interpretation of the law the judge may finally follow. If in such a case the prosecution in its pre-trial brief interprets an element of the crime in broader terms than the defence is willing to accede to in its brief,¹⁵¹ and if the Chamber reserves its understanding of the law to be applied until its final judgment, or if it refrains from even disclosing a prior indication as to what line of interpretation it will ultimately follow, then the parties, if they do not want to take risks, have no choice but to support their interpretation of the law with what they believe to be relevant evidence.¹⁵²

Fourthly, the aforementioned factors leading to lengthy proceedings are exacerbated by the separation of the trial into a prosecution and defence case.¹⁵³ If, as is typical of international trials, the indictment contains a large number of different counts, each covering numerous events, the presentation of evidence with regard to the same count and event by the prosecution on the one side and the defence on the other may be separated by months or years.¹⁵⁴ In these situations, it is all the more difficult to keep the presentation or exclusion of evidence with regard to its relevance under control.

Fifthly, the disadvantages of such distinctly separate trial phases become even more evident when, after the conclusion of the defence's case, a 'rebuttal' is called for by the prosecution, which might be followed by a 'rejoinder' by the defence.¹⁵⁵ If rebuttal is allowed in too lax a manner, it can lengthen the trial by the presentation of cumulative evidence. This may occur where the Chamber refrains from indicating that it does not need further supporting evidence as to the event

¹⁵¹ For the purpose and scope of these pre-trial briefs of the parties cf rule 65ter ICTY RPE.

¹⁵² If, for instance, the Defence in its pre-trial brief contends that a superior-subordinate relationship in terms of Art 7(3) ICTY Statute requires the existence of certain ranks and the bearing of certain insignia, while the prosecution considers both to be irrelevant, then the parties, as long as they do not know which interpretation the Trial Chamber will follow, will be forced to present evidence either (as the prosecution) to prove that ranks and insignia existed (although that is, in the prosecution's own view, wrongly required by the defence) or to prove (as the defence) that the fighters in question were not organized by ranks or insignia (as is, in the defence's own view, wrongly considered irrelevant by the prosecution). If the Trial Chamber in such a situation indicated as early as possible to the parties whether or not it considered ranks and insignia material to establishing a superior-subordinate relationship, a lot of irrelevant evidence could be avoided and time saved.

¹⁵³ Cf Damaška (*supra* note 64) 91 f.

¹⁵⁴ Cf Swart (*supra* note 25) 116 n 79.

¹⁵⁵ For details on these possible trial phases cf rule 85(A) ICTY RPE.

concerned. On the other hand, a rigid rebuttal practice can turn out to be even more counterproductive. If, for example, the prosecution must take into account that, due to a very strict and narrow rebuttal regime, the later introduction of evidence will be extremely difficult, if not impossible, it will already at the pre-trial stage resort to precautions which may increase the number of proposed witnesses and exhibits and thus lengthen the trial.¹⁵⁶ Further, the less judges are inclined to allow substitution of evidence that turns out to be weak, either during or before the end of the trial, the more a party will, in order to be on the safe side, feel compelled at the pre-trial stage to seek to have an overabundance of evidence admitted.

Sixthly, it is necessary to attend to the vagueness or lack of clarity from which indictments suffer. It is bad enough that justice may fail where clearly proven facts cannot be subsumed under the indictment because it was fixed on one alternative of the criminal provision, missing another one which could have been fulfilled, or because the facts of the charge are described in such a way that they cannot be subsumed under alternative elements of criminal responsibility. In addition, if such ambiguities in the indictment are not clarified in the pre-trial stage,¹⁵⁷ they may not later be cured by a 'judicial warning' (as is possible in some jurisdictions);¹⁵⁸ and thus a lot of time can be wasted on the presentation of useless evidence. Furthermore, this does not only concern the trial, but the appellate stage as well. For the more the indictment is tainted by deficiencies, the greater the risk that the Appeals Chamber will have to deal with submissions concerning the correct interpretation or even invalidity of the indictment.

Seventhly, although at first glance it might appear as if the prosecution is primarily to blame for flaws in the indictment and presentation of excessive evidence, such an impression would be only partly true. For in a similar way that the prosecution feels compelled as a precautionary measure to offer more evidence than necessary to convince the Chamber of a certain incriminating fact, the defence, also being unaware of what the Chamber will find relevant or is possibly already convinced of, will, in order not to be foreclosed later on in rejoinder, from the very beginning present an overly abundant witness and exhibit list. This may perhaps even include evidence with respect to non-indicted issues, aimed more at public image considerations. Even an indictment flawed by vagueness or lack of clarity can be viewed as useful, and thus left unchallenged by the defence, in order to be later invoked as grounds for error at the appeal stage.

When looking for the roots of the aforementioned flaws in expediency, two characteristic features of the adversarial system come to mind: first, the proceeding is party-driven rather than judge-led, with the consequence that the length of the trial substantially depends on what each party considers to be relevant for its case; and secondly, the division of the proceedings into 'prosecution case' and 'defence case'.

¹⁵⁶ As to difficulties which may arise for the Trial Chamber due to a too narrowly minded rebuttal regime cf *Prosecutor v Orić*, Case No IT-03-68-T, Decision on the Motion to Present Rebuttal Evidence, 8 February 2006.

¹⁵⁷ As was, not without objections by the defence, done in *Prosecutor v Boškoski*, Case No IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment, 26 May 2006.

¹⁵⁸ As, for instance, according to section 265 German Criminal Procedure Code.

The adversarial trial typically starts with the prosecution presenting its charges and evidence, followed—after a possible ‘intermediate acquittal’ by the court on counts lacking evidence capable of supporting a conviction¹⁵⁹—by the defence presenting its discharging evidence. This adversarial setting of consecutive prosecution and defence cases is even further prolonged by the fact that each phase begins with the examination-in-chief by the calling party, followed by cross-examination by the opposing party, and is potentially continued with re-examination by the original party.

It is no surprise that this adversarial setting can produce undesirable side effects. The inherent antagonism which exists in the adversarial setting of opposing parties leads to a corresponding differentiation between ‘prosecution witnesses’ and ‘defence witnesses’.¹⁶⁰ Furthermore, the criminal proceeding from the very beginning is considered a battle which each side desperately wants to win. Consequently, in order to guarantee an ‘equality of arms’ in this struggle, the various prosecution and defence stages into which the trial is divided are supported by ‘combat rules’ regarding the manner in which the chief-, cross-, re-, and any further examinations may be performed. Even in a simple murder case, it may be difficult to avoid time-consuming repetition where evidence on the same elements is being presented in fragments. The situation is exacerbated in typically complex international criminal proceedings, where one side has to present its evidence long before the other side. Without being able to foresee what the later counter-evidence may be, a party could feel forced to come forward with evidence covering as broad a scope as possible. Thus, as well-meant as this network of rules is for guaranteeing ‘equality of arms’, it certainly lengthens the proceedings.

This complexity is made worse by certain examination rules, in particular those regarding ‘leading questions’ which in the chief-, cross-, or re-examination may be differently admissible for the defence and—mostly not—for the prosecution, as well as the rules regarding so-called ‘hostile witnesses’.¹⁶¹ Not only are these and similar rules difficult to master,¹⁶² they are prone to prolong the trial.¹⁶³

In view of these findings, even committed supporters of the adversarial tradition meanwhile concede that this procedural system, however well-suited it may be to domestic proceedings, is not—or at least not without significant modifications—apposite for the complex challenges of international criminal justice.¹⁶⁴

¹⁵⁹ As presently provided for in rule 98*bis* ICTY RPE; cf Andrew T Cayley and Alexis Orenstein, ‘Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals’ (2010) 82 *J of Intl Crim Just* 575 ff, Robinson (*supra* note 9) 1046 ff.

¹⁶⁰ Cf *supra* note 76 with accompanying text.

¹⁶¹ Cf *supra* note 78 with accompanying text.

¹⁶² Cf Tochilovsky (*supra* note 37) 329 ff.

¹⁶³ In addition, these rules can also have a detrimental effect upon the search for truth. If an essential witness is not called by either party because each of them is afraid of not receiving exclusively favourable answers and does not want to run the risk of a perhaps counter-productive ‘hostile witness’ requiring impeachment, then the result may be the mutual ‘blocking’ of a key witness that might only be ‘de-blocked’ by the judges, provided that they do not feel hindered by the need to preserve the adversarial image of a ‘non-interventionist’ judge.

¹⁶⁴ Cf in particular Boas (*supra* note 11) 18 ff, 31, and (*supra* note 131) 286 ff; Bonomy (*supra* note 22, at 349, Cassese (*supra* note 27) 596, Jørgensen (*supra* note 1) 140 ff, Geoffrey Nice and Philippe Vallières-Roland, ‘Procedural Innovations in War Crime Trials’ (2005) 3 *J of Intl Crim Just* 354 f, 377 f; cf also Zappalá, *supra* note 59, at 114 ff.

6.2 Measures for enhancing expeditiousness of proceedings

In spite of some scepticism, improvements to the procedure to enhance its expediency would be neither blocked by the ICTY Statute and its Rules of Procedure and Evidence¹⁶⁵ nor by the seemingly indispensable adversarial structure of its procedure.¹⁶⁶ Thus the following measures to enhance its expediency may be suggested:

- (1) As early as possible, ideally in the course of confirming the indictment,¹⁶⁷ the judge should be empowered and obliged not only to examine whether the charges are sufficiently based on supporting material, but also to make sure that the legal elements and modes of individual criminal responsibility are stated as clearly as possible. This is to enable both the parties and the Chamber to recognize from the very beginning what is legally relevant and what is to be factually proven, and to reduce the witness and exhibit lists as well as to control the presentation of evidence in the trial accordingly.
- (2) As to the legal submissions in the parties' pre-trial briefs, if they take substantially different positions with regard to essential elements, the Chamber should indicate which approach it is going to follow, in order to again make the parties aware of what is legally relevant, so that they may present their evidence accordingly. This kind of 'warning' could be made in a way that is already practised by certain ICTY Chambers, by issuing guidelines on evidence to be observed during the trial.¹⁶⁸
- (3) In order to make the parties refrain from submitting an overabundance of witnesses and exhibits at the start of the trial, the parties should in a more flexible way be allowed to present additional evidence later on, if the need should arise. The same should apply to a more flexible and broader admission of rebuttal and rejoinder evidence.
- (4) Even within one comprehensive indictment with different counts and incidents, a saving in time and effort would be achieved if the traditional division between presenting, first, the whole prosecution case and, afterwards, the whole defence case were to be segmented, with each segment dealing with a count or incident immediately from both sides, provided of course that the various charges allow for such separation and presentation. Intermediate acquittals by the Chamber might even be allowed.¹⁶⁹

¹⁶⁵ As is not even denied by an advocate of the adversarial system as strong as Fairlie, *supra* note 48, at 294, though she is obviously only one-sidedly pointing at the improvement of the rights of the accused (at 306).

¹⁶⁶ As in more detail demonstrated in Eser (*supra* note 26) 220 ff.

¹⁶⁷ Cf rules 47, 50 ICTY RPE.

¹⁶⁸ Cf, for instance, *Prosecutor v Orić*, Case No IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, 21 October 2004; Jørgensen (*supra* note 1) 141 f. For further references cf Sabine Swoboda, 'Admitting Relevant and Reliable Evidence', in Kruessmann (*supra* note 26) 365, 367 ff.

¹⁶⁹ As, for instance, according to rule 98bis ICTY RPE; cf *supra* note 159 with accompanying text.

- (5) A more active role of the Chamber, and in particular its presiding judge,¹⁷⁰ is also called for with regard to the relevance of the evidence to be presented, as much as in the pre-trial stage¹⁷⁰ as in the various phases of the trial.¹⁷¹ By the same reasoning, when it comes to the final briefs and closing arguments, the Chamber should indicate to the parties which issues they should particularly focus on.
- (6) This plea for a more active judiciary does not necessarily mean that examination of witnesses should be put into the hands of the judges, as is the practice in the European continental tradition.¹⁷² Even if the primary examination stays with the parties, it should at least be more open to inquiry from the judges.¹⁷³ This would require the judges to be given more information about the background of the case and about what the parties are planning to present as evidence.¹⁷⁴

These recommendations are modest and ask only for the most urgent amendments. Whether and to what degree international criminal justice requires an essentially different procedure to accomplish its aims in a fair and expeditious manner is a question that needs more time and space than is available here.¹⁷⁵

7. To be promoted: reconciliation

Remembering that reconciliation is a fundamental prerequisite for the restoration and maintenance of sustainable peace as the ultimate end of international criminal justice,¹⁷⁶ the question is whether the present structure of the international criminal tribunals offers the best possible means and modes for achieving this aim. So far, scepticism seems to prevail.¹⁷⁷ Looked at more closely, though, and

¹⁷⁰ As particularly emphasized by Mark B Harmon, 'The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials', in (2007) 5 *J of Intl Crim Just* 377–93; Jackson (*supra* note 117) 33 ff; cf also Bonomy (*supra* note 22) 352 f, Kwon (*supra* note 147) 372 ff.

¹⁷¹ In order to enable the judge to give advice with regard to the relevance of evidence to be offered by the parties, however, it would be, first, each party's business to indicate not later than at the beginning of its examination to the judge what facts the party considers relevant to be presented. Improvements in this direction, however, can, as is also sounding through in the criticism of Jung (*supra* note 44) 151 f on the occasion of a visit to the ICTY, hardly be expected from strong adversarial attitudes.

¹⁷² In this respect I would not go as far as Kirsch (*supra* note 149) 287 who, astonishingly for a defence counsel, suggests leaving the examination-in-chief to the judge.

¹⁷³ Fortunately, as already mentioned, options along these lines can already be found in the ICTY Rules of Procedure and Evidence (cf *supra* note 14; Orić (*supra* note 34) 1464 ff). To make use of their investigative powers to intervene, the judges should in particular feel called upon when deadlocks between the parties which, for contrary reasons, restrict the presentation of evidence (cf *supra* note 164), should be 'de-blocked'.

¹⁷⁴ Cf Heinsch (*supra* note 131) 487 f, Tochilovsky (*supra* note 37) 271.

¹⁷⁵ For first reflections on structural reforms in international criminal justice cf Eser (*supra* note 33) 1467 ff. For further procedural proposals in particular of the 'managerial judging' of Langer (*supra* note 34) 874 ff.

¹⁷⁶ See furthermore Barria and Roper, *supra* note 18, at 362.

¹⁷⁷ Cf Cassese (*supra* note 27) 596; Bourgon (*supra* note 2) 532; Janine Natalya Clark, 'The Limits of Retributive Justice' (2009) 7 *J of Intl Crim Just* 463, 482 ff; Patricia M Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court' (2001) 5 *Washington Univ J of Law and Policy* 87, 116 f.

by distinguishing between the macro level of the international criminal justice system as a whole and the micro level of the individual proceeding.¹⁷⁸ I have no doubt that an enormous contribution to opening the doors for reconciliation and peace has already been made by the establishment of a functioning international justice system—as a signal that impunity for grievous international crimes will no longer be tolerated and as a reinforcement of the rule of law as a precondition of peace. To render more than general contentment, however, and to achieve the individual satisfaction particularly of the victims concerned, the individual proceedings must be performed in a manner appropriate to furthering reconciliation. This is not to say that any and every trial could be expected to render the victim satisfaction and to contribute to the restoration of social peace. But even if this realistically is not the primary objective,¹⁷⁹ reconciliation should at least not be obstructed by the way in which the proceedings are performed. In this respect, the current procedure has some features which appear more to impair than facilitate reconciliation.

This already applies to the characterization of the procedure as ‘adversarial’. Although this merely seems to imply terminology, it is sending out a message that is not without influence on the procedural atmosphere. ‘Adversarial’ has an inimical connotation of hostility, detrimental to reconciliation. This effect could be avoided if the procedural structure of international criminal justice were understood as ‘contradictorial’ rather than ‘adversarial’.¹⁸⁰ As ‘contradictorial’ merely expresses the mode of elucidating the truth by way of contradiction, including confrontation, the actors of a criminal proceeding could be understood as partners in a (controversial) dialogue: at best ‘in a spirit of co-operation’.¹⁸¹

In this conception, the prosecution would understand its role not as a one-sided ‘adversary’, determined to win by any means, and therefore primarily looking for incriminating facts and evidence. Instead it would consider itself as an ‘office’ (in the sense of the Roman duty-bound *officium*) which, though in a contradictorial manner, must search both for incriminating and exonerating factors.¹⁸² Furthermore, downgrading the ‘adversariality’ of the proceedings by treating witnesses as ‘witnesses of the court’, instead of ‘prosecution witnesses’ or ‘defence witnesses’,

¹⁷⁸ Cf *supra* notes 25 ff with accompanying text.

¹⁷⁹ Cf Swart (*supra* note 25) 107.

¹⁸⁰ In the same way as this change in terminology could have a de-escalating effect, furthermore the replacement of ‘inquisitorial’ by ‘instructorial’ would also come closer to the history of the law of criminal procedure: cf. Albin Eser, ‘Schlussbetrachtungen’, in Eser and Rabenstein (*supra* note 34) 63 f, 434 f as well as the corresponding models by Walter Perron, *Das Beweisanzugsrecht des Beschuldigten im deutschen Strafprozess (unter Berücksichtigung des adversatorischen Prozessmodells)* (Edition iuscrim, 1995) 6, 553. For further details on these terminological adjustments see also Eser (*supra* note 33).

¹⁸¹ Cf Heinsch (*supra* note 131) 496 f.

¹⁸² As, by the way, the OTP at the ICC is obliged, according to Art 54(1)(a) Rome Statute. A decision along the same lines was taken by the ICTY by requiring the prosecutor to present not only inculpatory, but also exculpatory evidence (*Prosecutor v Kupreskić*, Case No IT-95-16-T, Decision on Communications between the Parties and the Witnesses, 21 September 1998); cf also Ambos (*supra* note 34) 47, Sluiter (*supra* note 3) 590 f. For more details on the role of the prosecutor in international criminal justice see Albin Eser, ‘Zur Schlüsselrolle des Anklägers für die internationale Strafjustiz’, in Rainer Griesbaum et al (eds), *Strafrecht und Justizgewährung*, (BWV, 2006) 111–24 <<http://www.freidok.uni-freiburg.de/volltexte/3728> (accessed 6 January 2011).

would more easily avoid projecting the national/ethnic conflict behind the criminal events in the former Yugoslavia into the courtroom, from where discriminatory lessons may even be fortified in the mind of mistrustful home communities.¹⁸³ If witnesses, instead of being attached to one or the other adversary, and accordingly labelled, could be presented as being neutral 'court witnesses' in search of the truth,¹⁸⁴ this might also be a contribution to promoting reconciliation.

As for the manner in which the examination of witnesses is performed,¹⁸⁵ if they are, according to adversarial tradition, limited to answering questions put to them in a telegraphic manner with 'yes', 'no', or 'I don't know', and are interrupted whenever they attempt to add a sentence which might elucidate matters further but may be disadvantageous to the questioner, they must surely feel instrumentalized, as objects to be kept under control rather than treated and trusted as responsible human subjects. This is particularly counter-productive to reconciliation when a witness was hoping for relief by being given the chance to tell all that he knows about the criminal event in a coherent manner—and after having done so being prepared to make peace with the past.

With reconciliation as an aim, should plea bargaining be used by the international criminal courts?¹⁸⁶ On the one hand, plea bargaining could function as a door-opener for reconciliation if it is connected with a remorseful guilty plea which the victims are also satisfied with.¹⁸⁷ In such a case, even the search for the truth must give way, perhaps in terms of a conflict-solving type of proceeding.¹⁸⁸ On the other hand, if plea bargaining results in a deal that the victims are not satisfied with, particularly after not having been heard at all, both the exploration of the truth and a genuine and sustainable reconciliation will have been missed. Without wanting to ignore the fact that the involvement of victims in criminal trials can entail side-effects which may be detrimental to the interests of the defendant and to the expediency of the proceedings,¹⁸⁹ if reconciliation is to be taken seriously, it will not function without the victims being given an opportunity to have their case heard.¹⁹⁰

¹⁸³ Cf Bonomy (*supra* note 22) 350; Mirko Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' (2009) 7 *J of Intl Crim Just* 89 ff.

¹⁸⁴ Cf *supra* note 89 with accompanying text.

¹⁸⁵ Cf Bonomy (*supra* note 22) 350, Robert Cryer, 'Witness Evidence Before International Criminal Tribunals' (2003) 3 *The Law and Practice of Intl Courts and Tribunals* 411, 417 ff; Wald, *supra* note 177, at 109, 116 f.

¹⁸⁶ Cf *supra* section 5.4.

¹⁸⁷ Cf *Prosecutor v Nikolić*, Case No IT-02-60/1-S, Sentencing Judgment, 2 December 2008, paras 69 ff; Swart (*supra* note 24) 109, but see also Petrig (*supra* note 90) 28.

¹⁸⁸ As was elaborated and contrasted with a policing-implementing type of proceeding by Damaška (*supra* note 25) 97 ff, 123, 147 ff; cf also Swart (*supra* note 25) 108, where it is not clear, however, whether he would also include victims when speaking of 'negotiations between the parties'.

¹⁸⁹ As is already emerging from the novel participation of victims at the ICC; cf René Blattmann and Kirsten Bowman, 'Achievements and Problems of the International Criminal Court' (2008) 6 *J of Intl Crim Just* 711, 728 f. Cf also Damaška (*supra* note 27) 178, and (*supra* note 90) 1032, Heinsch (*supra* note 131) 494 f.

¹⁹⁰ Cf Michael Bohlander, 'Plea-Bargaining before the ICTY', in May (*supra* note 118) 151, 162; Petrig (*supra* note 90) 22 f, Sluiter (*supra* note 3) 598.

8. To be recorded: historical findings

Like reconciliation, recording of historical findings is an essential prerequisite of sustainable peace, and thus also an important aim of international criminal justice.¹⁹¹ If reconciliation between communities strained by historical-cultural tensions is to last and not be affected by new and untruthful legends, then ascertaining the truth to the best extent possible is not only essential to rendering justice in the individual case, but also to illuminating the basis of controversial historical events.¹⁹²

Yet, also like reconciliation, recording of historical findings can hardly be more than a by-product of criminal proceedings. Judges are not trained historians nor are court transcripts and exhibits historical documents. Nevertheless, even if witness testimonies or other evidentiary material is incomplete¹⁹³ or biased, after having been contested and verified in court and found reliable as the basis of a judgment, such findings will certainly have a higher degree of truthfulness than any untested statements or hearsay reports that self-proclaimed history books are often based upon.¹⁹⁴

Thus, although international criminal tribunals, if they are not to lose their very character as a judicial body, are primarily tasked with performing a trial on the guilt or innocence of accused individuals,¹⁹⁵ the judges, rather than preventing the exploration and documentation of historical facts, should be open to recording them as material for historiography.¹⁹⁶ In this respect, an international tribunal's obligation to establish the truth certainly goes well beyond that of an ordinary domestic court.

9. Concluding remarks

If these lessons from the ICTY seem quite critical, it does not mean that the procedure and practice of the tribunal should be considered a failure. Nor may the

¹⁹¹ See also Tzvetan Todorov, 'Memory as Remedy for Evil' (2009) 7 *J of Intl Crim Just* 447 ff.

¹⁹² All that has been stated by Weigend in this respect (*supra* note 51) 169 on the role of ascertaining the truth for settling individual conflicts is to an even greater degree valid for violent confrontations between ethnic groups; cf also Petrig (*supra* note 90) 11 ff. Along the same lines see ICTY Judge Christine van den Wyngaert in a (to my knowledge unpublished) lecture on 'International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies' at the Annual Meeting of the American Society of International Law on 30 March 2006 in Washington, DC. Cf also Károly Bárd, 'The Difficulties of Writing the Past Through Law—Historical Trials Revisited at the European Court of Human Rights' (2010) 81 *Revue Internationale de Droit Penal* 27 ff.

¹⁹³ As there is particular reason to fear in procedures not governed by a judicial duty to ascertain the truth: cf Jorda (*supra* note 58) 578; Wald (*supra* note 90) 116 f.

¹⁹⁴ It is therefore not surprising that so-called history books of the events in former Yugoslavia, presented as documentary evidence, quite frequently do not survive if contested in court.

¹⁹⁵ Cf Cryer (*supra* note 185) 418 ff, Damaška (*supra* note 25) 180, and (*supra* note 90) 1032.

¹⁹⁶ Cf Antonio Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European J of Interl Law* 2, 9, and *supra* note 35, at 597; Swart (*supra* note 25) 110 f; Richard Ashby Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia' (2005) 27 *Human Rights Quarterly* 908–42.

listing of deficiencies mainly attributable to the still predominantly adversarial ICTY system be understood as a call to replace it with some kind of inquisitorial procedure.

On the contrary, one of the messages hopefully emanating from these procedural observations is the proposition that international criminal justice cannot be organized by simply adopting and then adjusting a domestic model, be it adversarial or otherwise. What is necessary, first, is to identify the special aims international criminal justice is being established for, and, secondly, to develop procedural means and modes best suited to achieving those goals. Thus, instead of choosing a model of domestic criminal justice of this or that provenience and trying here and there to make it fit to the special needs of international criminal justice, one should, without feeling bound to a certain traditional system, be keen enough to construct a procedure top-down, from the aims international criminal justice has to pursue.

Without wanting to ignore the disappointments and hurdles international criminal tribunals still have to live with, their deficiencies are certainly outweighed by their merits, in particular by their sheer existence and ability to put an end to impunity of most serious international crimes. This is no reason, however, not to fight for further procedural improvements.

With this in mind, I would like to repeat what I have already stated on other occasions: if an international criminal court fails, history will not care whether it was due to rules and structures which left it up to the parties to decide what to present or to withhold. In the judgment of history, it will be the court as a whole—with its judges at the forefront—that will be held accountable for the failure or success of international criminal justice.

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Gesammelte Beiträge/Collected Publications

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