ACTA UNIVERSITATIS WRATISLAVIENSIS
No 3661
PRZEGLĄD PRAWA I ADMINISTRACJI C/2
WROCŁAW 2015

KAROLINA KREMENS
Uniwersytet Wrocławski

INQUISITORIAL AND ADVERSARIAL INFLUENCES ON THE EXAMINATION OF A WITNESS IN THE INTERNATIONAL CRIMINAL PROCEDURE

INTRODUCTION

International criminal law has been created by combining the two major Western legal systems of the contemporary world: Continental and Anglo-American traditions[1]. Although there is no strict dichotomy between these systems, they can be presented as containing certain features that allow for differentiating one from another. It has to be stated, however, that they certainly do not exist anymore in their original and ideal form, nevertheless it is still worth presenting them in opposition to reconstruct the fundamental presumptions made at the roots of the solutions adopted in a particular country and the awareness of these foundations allows for the evaluation of how the adopted regulations are to achieve the aims of criminal procedure[2]. Moreover, the use of terms "inquisitorial" and "adversarial" with which these two systems are usually described raises some questions[3].

[1] See A. Orie, "Accusatorial v. Inquisitorial Approach in International Criminal Proceedings", [in] A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford 2002, vol. 2, p. 1465; P.M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court", Wash. U. J.L. & Pol'y, 2001, no. 5, p. 90. See also P.L. Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia" EJIL, 2000, no. 11, p. 569 (arguing that the legal system established by the ICTY "is neither common law accusatorial nor civil law inquisitorial, nor even amalgam of both; it is *sui generis*").

[2] See W. Jasiński, "Model procesu karnego a efektywność dochodzenia do prawdy — uwagi na tle projektu nowelizacji Kodeksu postępowania karnego", [in] K. Kremens, J. Skorupka (eds.), *Pojęcie, miejsce i znaczenie prawdy w polskim procesie karnym*, Wrocław 2013, p. 48.

[3] In this paper the term "inquisitorial" is used to describe the Continental European system of law, i.e. the civil law system. To describe the system used within the Anglo-American parts of the world, the terms "adversary" or "accusatorial", i.e. the common law system are used. Obviously, the term "inquisitorial" is more apt to describe the criminal procedure that prevailed in Europe until the first half of

© for this edition by CNS

However, it must be clearly stated that for the purpose of this particular work, such terms as "inquisitorial", "civil" and "Continental" will be used synonymously, as well as "adversarial", "accusatorial", "common" and "Anglo-American" respectively, bearing in mind that there are objections to doing so.

Having said that, it is worth pointing out that the common law criminal trial is based on the adversarial model where both parties present evidence before a passive judge not engaged in the conflict, while in civil law the inquisitorial style is recognized where the court takes an active role in seeking the truth. Not surprisingly, those familiar with each system tend to be skeptical about the virtues of the other. More notably, those who use the adversarial model are suspicious of the neutrality of prosecutors and active judges in the inquisitorial system, while those who practice in the inquisitorial system are troubled by the secondary attention that the accusatorial system seems to give to uncovering the truth and the problem of equality of arms not being observed in some cases.

Some scholars believe that "the flaws of both systems, Anglo-American and Continental, could best be avoided in a structural combination of these two approaches. Such a combination would serve best the aims of criminal prosecution, which is to find the true offender and sentence him to the punishment he deserves in a system that can truly be called 'fair'"[4]. But combining these systems raises questions. As one might expect, both the adversarial and inquisitorial models have a network of rules that operate in tandem, according to basic unifying ideas. The challenge in creating an integrated practice from the two systems is to ensure that the end product is internally coherent, functional and fair. Achieving this is a challenge. Indeed, the challenges are so great that it is worth examining critically whether the blend of procedures is successful. Therefore the particular problem this paper will address is whether the examination of witnesses during proceedings of international criminal tribunals and courts should be undertaken using a combination of common and civil law concepts, or whether it should follow only one of these two paths.

This paper's aim is to describe the extent to which the examination of a witness in the criminal procedures of international criminal courts and tribunals reflects the

---

the nineteenth century and it references proceedings that once allowed secret preliminary investigations and torture (M. Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" U. Pa. L. Rev., 1973, no. 121, p. 556 [hereinafter: Damaska, Evidentiary Barriers]). The procedure that can be observed now within Continental Europe is sometimes called "mixed" or "reformed" (A good explanation on differences between these terms is provided from a historical perspective by A. Esmein, *A History of Continental Criminal Procedure*, New York 1968, p. 11). At the same time, some scholars believe that the terms "accusatorial" and "adversary" should not be used synonymously (A.S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure", Stan. L. Rev., 1974, no. 26, pp. 1016–1017, where the author explains that "'[a]dversary' refers to a method of resolving disputes and takes its contours from the contested trial" and "'accusatorial' […] is a classic procedural model that encompasses not only an adversary trial procedure but also other fundamental premises").

[4] Ch.J.M. Safferling, *Towards an International Criminal Procedure*, Oxford 2001, p. 4.

© for this edition by CNS

Continental and Anglo-American systems. To achieve this, it will provide an in-depth presentation of criminal procedures with regard to the examination of witnesses in the law of the *ad hoc* tribunals[5] as well as in that of the permanent International Criminal Court[6]. I will point out the elements of the law taken from the common and civil law systems and transposed to the international level[7]. I will critically examine procedural outcome of the mixture of Continental and Anglo-American elements. The focus will be on exploring whether the combination of those two systems endangers the rights of the accused and the fairness of the trial.

The paper starts with a discussion with regard to the establishment of the truth in international criminal proceedings. It will be argued that the approach towards the establishment of the truth might be the element that decides on the shape of criminal proceedings. The second part will be devoted to the investigation stage. The examination of a witness at this stage of international criminal proceedings will be presented as well as the disclosure of pre-trial findings to the judge (trial chamber). In the next chapter the paper will focus on the role of the judge and the parties during trial. The power to call and examine witnesses as exercised by the judge (trial chamber) and the parties will be discussed. In the fourth part more general questions regarding witness testimony will be presented, in particular the obligation of a witness to testify according to the truth as well as the right of the accused to remain silent, as understood in Continental and common law systems. Finally, the form of examination of a witness will be discussed. The paper will conclude with some question marks behind the fairness of international criminal proceedings as a result of the decision to combine inquisitorial and adversarial elements of criminal procedure.

---

[5] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia established in 1993 by the Security Council; S.C. Res. 827, 25 May 1993 [ICTY] and International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda established in 1994 by the Security Council; S.C. Res. 955, 8 November 1994 [ICTR].

[6] *Rome Statute of the International Criminal Court, adopted by the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/9, reprinted in ILM 1998, no. 37, p. 999, online: ICC <http://www.icc-cpi.int/library/about /officialjournal /Rome_Statute_120704-EN.pdf> [Rome Statute]. ICC operates also under the Rules of Procedure and Evidence. Addendum to the Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/INF/3/Add.1 (adopted on 12 July 2000), online: ICC <http://www.un.org/law/icc/asp/ 1stsession/report/english/part_ii_a_e.pdf> [ICC RPE].

[7] This paper cannot provide an exhaustive description of inquisitorial and adversarial systems, so explanations will be constrained and the focus will remain mostly on the examination of the witness with limited information regarding investigative and trial proceedings in reference to the examination of a witness. For a comprehensive explanation on these issues in both systems see for example M. Delmas-Marty, J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge 2005, comparing criminal procedures in England, Germany, France, Belgium and Italy.

© for this edition by CNS

1. THE ESTABLISHMENT OF THE TRUTH

The main difference between the criminal procedures of civil and common law systems lies in the approach taken to the establishment of the truth[8]. The Continental and Anglo-American systems differ tremendously when it comes to the establishment of the truth in criminal proceedings. In the former, the prosecutor (during the investigation) and the judge (during the trial) are responsible to seek for the truth. In the Anglo-American system it is believed that the truth is best established during the adversarial process when two parties present their case before a relatively passive judge, primarily through cross-examination. It is not that Anglo-American courts give low priority to the truth, but according to the Anglo-American theory of discovering the truth, "the truth is most likely to be established through an adversarial procedure, in which the parties present facts to a neutral adjudicator"[9]. Therefore under this proceduural model the obligation to establish the truth is never the task of the judge.

As Judge Richard May and Marieke Wierda argued with a view to the proceedings before the *ad hoc* tribunals, "the procedures adopted at trial have been aimed at determining the guilt or innocence of a particular accused without the express purpose of a wider seeking-truth function"[10]. This appears to be so when the adversarial structure of the trial proceedings before the ICTY and ICTR is observed[11]. The order of presentation of evidence[12] as well as the conduct of the

[8] M. Fairlie, "The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit" Int'l Crim. L.R., 2004, no. 4, p. 247 (The author claims, and I agree with her, that the establishment of the truth in the criminal proceedings is "not procedural in nature, but rather operates to shape the procedures").

[9] P. Carmichael Keen, "Tempered Adversality: The Judicial Role and Trial Theory in the International Criminal Tribunals" Leiden J. Int'l L., 2004, no. 17, p. 775.

[10] R. May, M. Wierda, *International Criminal Evidence*, New York 2002, p. 4.

[11] It is worth mentioning that the structure of the procedure which was chosen for the ICTY and ICTR, at least at the time of creation of those tribunals, is reminiscent of the proceedings used in the common law systems. One of the reasons for this choice is that the creators of the procedure depended on the historical tribunals' model, and; secondly, that they originated from the Anglo-American tradition and therefore naturally gravitated to this model. Both tribunals operate under separate Statutes and Rules of Procedure and Evidence: Statute of the International Criminal Tribunal for the Former Yugoslavia, SC, 3217th meeting, U.N. Doc. S/RES/827 (1993), online: ICTY <http://www.un.org/icty/legaldoc-e/index.htm> [ICTY Statute] and Statute of the International Criminal Tribunal for Rwanda, SC, 3453rd meeting, U.N. Doc. S/RES/955 (1994), online: ICTR <http://69.94.11.53/ENGLISH/basicdocs/statute.html> [ICTR Statute]; Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, IT/32/Rev. 38 (adopted on 11 February 1994, last amended on 13 June 2006), online: ICTY <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf> [ICTY RPE]; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, ITR/3/Rev.15 (adopted on 5 July 1995, last amended on 10 November 2006), online: ICTR <http://69.94.11.53/ENGLISH/rules/101106 /rop101106.pdf> [ICTR RPE].

[12] Rule 85 (A) of the ICTY/R RPE.

© for this edition by CNS

examination of a witness employing the adversarial tool of cross-examination[13] resembles the common law model of trial proceedings and clearly indicates that the heart of the Anglo-American truth-finding theory has been adopted[14].

However, although the law of the *ad hoc* tribunals does not appear to require the prosecutor to search for the truth during the investigation[15], it should be noted that the case law of the ICTY seems to stress and emphasize such obligations[16]. At the same time, many of the powers granted to the judge and to the prosecutor of the ICTY and the ICTR seem similar to those that can be seen in the Continental system. The law of the *ad hoc* tribunals provides the judge with the competence to seek evidence and information that he or she believes should be revealed during the proceedings; including the power to call and question witnesses[17]. Moreover, the law of the ICTY and the ICTR provides for control over the mode and order of interrogating witnesses and presenting evidence to make those procedural steps as effective as possible for the "ascertainment of the truth"[18]. The Statutes of the *ad hoc* tribunals do not, however, explicitly require the judge to become familiar with the results of the pre-trial proceedings, and he or she is not under an obligation to play an active role during the trial. While this duty may be implied. It is, therefore, arguably, the choice of the judge to take steps in search for the truth. Most likely judges originating from the civil law tradition and familiar with the idea of Continental truth-seeking theory, are

[13] Rule 85 (B) of the ICTY/R RPE.

[14] It should be noted, however, that soon after making the general procedural choices for the international criminal tribunals, it was realized that the pure adversarial system may not work properly in trials where international crimes are to be dealt with. These trials are focused on crimes which are massive in nature and involve complicated factual scenarios. Hence, it was decided that to expedite proceedings it was necessary to introduce some inquisitorial elements. Currently the adversarial features can be seen in the structure of the trial as a whole and in particular in the course of the presentation of evidence with the famous cross-examination. Meanwhile, inquisitorial elements can be observed, especially with regard to the disclosure of pre-trial findings to judges, and their active role in calling and examining evidence during trial.

[15] See Article 16 and 18 of the ICTY Statute and Article 15 and 17 of the ICTR Statute.

[16] *Prosecutor v. Kupreskić et al.* (*Lasva Valley*), IT-95-16-T, Decision on Communications Between the Parties and their Witnesses (21 September 1998) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), ("It should be noted that the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice, whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting"). Similarly *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, Separate Opinion of Judge Shahabuddeen (31 March 2000) at para. 68 (International Criminal Tribunal for Rwanda, Appeals Chamber).

[17] See Rule 85 (A) (v) and Rule 98 of the ICTY/R RPE.

[18] Rule 90 (G) of the ICTY RPE and Rule 90 (F) of the ICTR RPE.

© for this edition by CNS

more eager to play an active truth-seeking role[19], while their common law counterparts remain passive[20].

The drafters of the ICC statute decided to be far more specific in this regard. The Trial Chambers of the ICC are obliged "to go beyond the dispute of the parties to seek a complete representation of the facts"[21]. The Rome Statute explicitly states that "[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth"[22]. The ICC procedure, therefore, comes closer to the Continental trial model. In Frank Terrier's words, "[p]lacing the truth at the center of judge's interests and concerns, and giving them powers to bring that truth to the fore, give the trial a quite new meaning, no longer just the organization of a competition between two adversaries"[23]. Moreover, a similar competence has been imposed on the ICC Prosecutor who shall "in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in so doing, investigate incriminating and exonerating circumstances equally"[24].

The adversarial approach to the establishment of the truth is less predominant in the law of the ICC. While the procedure is mainly adversarial in nature, however, notable civil law elements have been introduced and, therefore, the trials within ICC lean towards Continental tradition[25]. Perhaps it is the result of the fact that the French delegation put a very strong diplomatic effort to achieve this result[26], while

[19] For example, in *Stakić* case, the ICTY Trial Chamber called two expert witnesses *proprio motu* according to the provisions of Rule 98 ICTY RPE. See *Prosecutor v. Stakić* (*Prijedor*), IT-97-24-T, Order Pursuant to Rule 98 to Appoint a Forensic Document Examiner (28 June 2002) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) and *Prosecutor v. Stakić* (*Prijedor*), IT-97-24-T, Order Pursuant to Rule 98 to Appoint a Forensic Handwriting Expert (28 June 2002) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[20] It has been observed in cases before the *ad hoc* tribunals that the differences between the common and civil law systems may affect the way in which judges conduct the proceedings. See for example *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgment (26 May 2003) at para. 96 and 125 (International Criminal Tribunal for Rwanda, Appeals Chamber) (The Appeals Chamber stated that the attitude and behaviour of the Judge Kama presiding the Trial Chamber "should be interpreted within the context of the national legal system to which he belongs". Especially Judge Kama's remarks that he made about the Defendant's duty to tell the truth during the trial have not been the result of his alleged biases but "because the Judge comes from a legal system where a witness [accused] is not required to make a solemn declaration to tell the truth before he is examined").

[21] R. May, M. Wierda, op. cit., p. 49.

[22] Article 69 (3) *in fine* of the Rome Statute.

[23] F. Terrier, "Powers of the Trial Chamber", [in] A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), op. cit., p. 1273.

[24] Article 54 (1) (a) of the ICC Statute.

[25] S. Zappala, *Human Rights in International Criminal Proceedings*, Oxford 2003, p. 24, and R. May, M. Wierda, op. cit., p. 14.

[26] A. Cassese, *International Criminal Law*, Oxford 2003, p. 385.

© for this edition by CNS

the US remained in opposition to the establishment of the ICC and was not as significantly involved in the creation of the laws as it had been in the case of other international criminal tribunals. Therefore, it is provided that the parties will be able to submit evidence in accordance with the provisions of the Rome Statute[27] and ICC RPE[28]. None of these provisions, however, refer to the right of the parties to conduct cross-examination, which is a necessary element of the Anglo-American truth-finding theory[29].

The law of international criminal courts and tribunals fuses the common and civil law approaches to the establishment of the truth. At least in the law of the *ad hoc* tribunals the obligation to seek the truth is imposed both on the judge, as in the civil law systems, and on the parties, especially by allowing them to conduct cross-examination, as in the Anglo-American trials. In my opinion, the fact that the international criminal law entrusts to judges (and the prosecutor) the obligation to seek for the truth determines the shape of the procedure. The possibility to conduct the rigorously adversarial trial is ruled out. Only by encouraging judges to use such Continental law mechanisms as the extensive power to call and examine witnesses will they be able to fulfill the obligation to contribute to the establishment of the truth as they are expected[30]. On the other hand, in the Anglo-American tradition there is an expectation that judges will restrain themselves from interfering with the presentation of case by the parties. Judicial intervention, of the kind seen in civil law systems, is unbearable to the common law system and, in fact, destroys the very idea of the adversarial trial. Therefore, I believe that the decision to include the Continental approach to the truth-finding theory in the law of international criminal courts and tribunals should be followed by the introduction of tools and mechanisms from the civil law system accordingly. The common law mechanisms, especially the presentation of evidence in the Anglo-American manner and questioning of a witness, cannot work properly when judges are encouraged (ICTY and ICTR) or required

[27] Article 64 (8) (b) of the Rome Statute reads that "At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute".

[28] Rule 140 of the ICC RPE provides additional clarifications with regard to the manner of presenting evidence.

[29] Nevertheless the practice of the ICC shows that witnesses are being cross-examined by the opposing party. See for example transcripts from trial in case *Prosecutor v. Thomas Lubanga Dylio* (ICC-01/04-01/06).

[30] Obviously, the judge's power to call and question witnesses is not the civil law invention. However in the common law system judges are expected to make use of this power only for the clarification purposes. They also cannot seek additional information that may result in discovering new evidence; especially not the one that may result in incriminating the accused. In fact any other intervention would be considered in the Anglo-American system as a sign of partiality of the judge and switching the burden of proof from the prosecutor to the judge.

© for this edition by CNS

(ICC) to seek the truth independently, and equipped with the instruments that allow them to exercise these powers effectively.

2. PRELIMINARY INVESTIGATION — EXAMINATION OF A WITNESS AND DISCLOSURE OF PRE-TRIAL FINDINGS TO THE JUDGE

Preliminary investigation in the international criminal proceedings is conducted by the Prosecutor[31] who relies on the cooperation and judicial assistance of the States, while pursuing the inquiry[32]. The Prosecutor fulfills his or her duties by questioning suspects, victims and witnesses and by collecting non evidence[33]. Therefore it is the responsibility of the office of the Prosecutor both to carry out investigations and prosecute individuals before trial chambers. And in this manner international criminal proceedings differ from the common law system, where the prosecutor typically plays the role of a "lawyer of the police" and does not engage in the investigation. Although the reliance of the Prosecutor on cooperating States forces is tremendous, they will only be fulfilling orders of the Prosecutor and not conducting investigations themselves on their own initiative. However, even though this structure resembles Continental solutions, it seems that the reason for choosing such a structure resulted not from the desire to follow the inquisitorial system's standard, but from the obvious need to make the international criminal investigations operational. The International Prosecutor and moreover the international community simply cannot afford relying on the initiative and investigative actions of the criminal justice bodies from countries on which territory investigations are conducted also because they are not always eager to cooperate.

After completion of the preliminary investigation, the Continental practice demands that trial judge should get acquainted with the pre-trial findings gathered in the dossier, while in the common law system such disclosure is completely forbidden. It is believed that since the Continental judge has to fulfill his truth-seeking obligations, he or she has to be equipped with tools that will allow the judge to exercise that role. The knowledge of materials gathered during the investigation is looked upon as giving them a chance to do so. On the contrary, the common law judge, who is not bound by the same obligation is expected to resolve the issue be-

[31] Article 16 of the ICTY Statute; Article 17 of the ICTR Statute and Article 54 of the Rome Statute.

[32] Article 18 (2) *in fine* and Article 29 of the ICTY Statute; Article 17 (2) *in fine* and Article 28 of the ICTR Statute; Article 54 (3) (c) and Article 86 of the Rome Statute.

[33] Article 18 (2) *in principio* of the ICTY Statute; Article 17 (2) *in principio* of the ICTR Statute and Article 54 (3) (a) of the Rome Statute.

© for this edition by CNS

tween the parties acquiring the so-called "tabula rasa" approach[34]. The judge is expected to be as neutral as possible[35]. I shall now discuss how far the international criminal procedure goes in disclosing the pre-trial findings to judges that actually sit on a trial with respect to the *ad hoc* tribunals' system and the law of the ICC.

Prior to the commencement of the trial, some steps, for the purpose of the preparation of the trial proceedings, are undertaken. The trial preparation and coordination of the communication between parties is managed in the ICTY by the pre-trial Judge[36] and in the ICTR by the Trial Chamber itself, or by the Judge designated from among the members of the Trial Chamber[37]. In case of the ICC, these functions are left in hands of the Pre-Trial Chamber[38].

The ICC Pre-Trial Chamber is responsible for preparing the trial and facilitating the communication between parties, confirming initiation of investigation by the Prosecutor and taking part in investigative actions[39]. The ICC is composed of four organs: the Presidency, the Office of the Prosecutor, the Registry and three Divisions[40], including the Appeals Division, the Trial Division and the Pre-Trial Division. Each division has separate functions. The members of the Trial and Pre-Trial Chambers may rotate, however it is explicitly stated that no judge who has participated in the pre-trial phase of one case may sit on the Trial Chamber of

[34] M. Fairlie, op. cit., p. 302. Although one must bear in mind that often even common law judges do engage in the so called "case management" that allow for quicker and more efficient conduct of the proceedings during trial. The procedure is focused on managing the sequence of events, numbers of witnesses and real evidence presented in open court and even though the aim of the management is not focused on familiarizing the judge with pre-trial findings, it is quite natural that he or she will gain knowledge about the commitment of a crime beyond the level that the "tabula rasa" approach would allow. See on the management of trial in common law system J. McEwan, "Truth, Efficiency and Cooperation in Modern Criminal Justice", *Current Legal Problems*, 2013, no. 66 (1), p. 203; and J. McEwan, "From Adversarialism to Managerialism: Criminal Justice in Transition", L Stud, 2011, no. 31, p. 519.

[35] The lack of knowledge of pre-trial findings is even more important when the accused is tried by a jury. See R. Lettow Lerner, "The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises", University of Illinois L. Rev., 2001, no. 791, p. 816 (the jury composed of lay people is more likely to be contaminated by the information included in the pre-trial findings and not screened by the test of admissibility during the court trial. In the civil law system it would not be an issue, since the pre-trial findings included in the dossier are already screened by the prosecutor gathering them according to the rules of admissibility and obliged to exclude those that the court would normally call inadmissible).

[36] Rule 65 *ter* of the ICTY RPE.

[37] Rule 73 *bis* of the ICTR RPE.

[38] Article 57 of the Rome Statute.

[39] See O. Fourmy, "Powers of the Pre-Trial Chamber", [in] A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), op. cit., p. 1215 (The author characterizes the three areas of involvement of the Pre-Trial Chamber with relation to investigation, person, and control and organization).

[40] Article 34 of the Rome Statute.

© for this edition by CNS

the same case[41]. Thus, while the Pre-Trial Chamber judges can gain an extensive knowledge of evidence gathered at that stage, and sometimes may even take part in the hearing of the accused[42] as well as witness hearings[43], they are forbidden from sitting on the bench during the subsequent trial.

It is different in case of the *ad hoc* tribunals. The ICTY "pre-trial Judge" is chosen from among the Trial Chamber's members[44], as is the "designated judge" operating in the name of the ICTR Trial Chamber[45]. They bring the knowledge gained through materials revealed for them before the commencement of the trial and during the pre-trial conferences directly to the bench in which they sit at the trial. In the ICTR this system is even more evident when the Trial Chamber, as a whole, performs the pre-trial functions[46]. The judges of the *ad hoc* Trial Chambers may therefore have factual knowledge of the events that happened before the beginning of the trial, similarly to what can be observed in the Continental law system and almost completely unlike in the Anglo-American trials.

The key issue, however, is the amount of information gathered during the preliminary investigation phase that is released to the members of the Trial Chambers who will actually be sitting on a trial. The current solutions adopted in the law of the ICTY and ICTR are not consistent. Some amendments to the procedure of the *ad hoc* tribunals have been adopted in the course of their work[47]. This was done because it was believed that the primarily adversarial procedure could be expedited by incorporating some inquisitorial elements. In particular, it could be done

[41] Article 39 (4) *in fine* of the Rome Statute ("under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing the case").

[42] Article 60 of the Rome Statute.

[43] Article 56 of the Rome Statute.

[44] Rule 65 *ter* (A) of the ICTY RPE.

[45] Rule 73 *bis* (B) of the ICTR RPE.

[46] Rule 73 *bis* (B) of the ICTR RPE.

[47] The law of the ICTY and ICTR before the adoption of amendments did not allow explicitly for the disclosure of pre-trial findings to judges. No position of the pre-trial judge or designated judge was available and pre-trial conferences were unknown. See D.A. Mundis, "From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence", Leiden J. Int'l L., 2001, no. 14, p. 367. But even before the changes were made, the case law of the *ad hoc* tribunals had implemented some inquisitorial features. See for example *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (2 September 1998) at para 22 (International Criminal Tribunal for Rwanda, Trial Chamber) (The ICTR Trial Chamber requested the Prosecutor, in view of the exceptional nature of the offences, to submit all written witness statements that already have been made available to the Defence. And, even though the Prosecutor objected that "the order […] represented an unjustified change in the established order for production of evidence" he had to comply). Similarly *Prosecutor v. Dokmanović* (*Vukovar Hospital*), IT-95-13a-T, Status Conference (27 November 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), cited in H. Brady, "Disclosure of Evidence", [in] R.S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Ardsley 2001, p. 425 (The ICTY Trial Chamber ordered production of witness statements, stipulating however that these materials will not be regarded as "evidence" but "to assist… comprehension and management of the trial").

© for this edition by CNS

by disclosing to the judges that sit on a trial the dossier. And one has to agree with that argument. If the judge knows some materials beforehand, they do not have to be revealed in detail during the trial and may be accepted as evidence even without presenting that particular piece of evidence during the trial, especially when the parties do not object to what is about to be proved by them.

After the amendments the pre-trial Judge in the ICTY system is obliged to record the points of agreement and disagreement on matters of law and fact[48] and keep the Trial Chamber regularly informed about the proceedings[49]. Prescribed rules stipulate in great detail what should be made available to the trial judges: a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused, admissions by the parties and a statement of matters which are not in dispute as well as statement of contested matters of fact and law[50]. The Prosecutor should also provide the list of witnesses including the summaries of the facts on which they will testify, points in the indictment to which each witness will testify, the total number of witnesses and estimated length of time required for each witness[51] and a list of exhibits the Prosecutor intends to offer[52]. The materials required to be submitted by the defence include the pre-trial brief addressing the factual and legal issues such as the nature of the accused's defence, the matters which the accused takes issue with in the Prosecutor's pre-trial brief and the reason why the accused takes issue with them[53], as well as a list of witnesses the defence intends to call[54] and the list of exhibits the defence intends to offer[55].

Therefore, information that is revealed to the trial judges in the dossier does not constitute the entire findings of preliminary investigation. The judges, therefore, cannot familiarize themselves with all materials gathered during preliminary investigation as it is usually done in the civil law system. Moreover, the statements of witnesses, recorded in writing during preliminary examination in the course of investigation held before the International Prosecutors, are not accorded the same value as those that result from the pre-trial questioning of the Continental prosecutor and the Police. The civil law procedure demands that the examination of witnesses conducted during the investigation be performed with precautions similar to those taken during the examination conducted at the trial stage, in terms of warnings to testify according to the truth, privileges, questioning official, etc.

[48] Rule 65 *ter* (H) of the ICTY RPE.
[49] Rule 65 *ter* (J) of the ICTY RPE.
[50] Rule 65 *ter* (E) (i) of the ICTY RPE. Similarly, Rule 73 *bis* (B) (i)–(iii) of the ICTR RPE.
[51] Rule 65 *ter* (E) (ii) of the ICTY RPE. Similarly, Rule 73 *bis* (B) (iv) of the ICTR RPE.
[52] Rule 65 *ter* (E) (iii) of the ICTY RPE. Similarly, Rule 73 *bis* (B) (v) of the ICTR RPE.
[53] Rule 65 *ter* (F) of the ICTY RPE. Similarly, Rule 73 *ter* (B) (i–ii) of the ICTR RPE.
[54] Rule 65 *ter* (G) (i) of the ICTY RPE. Similarly, Rule 73 *ter* (B) (iii) of the ICTR RPE.
[55] Rule 65 *ter* (G) (ii) of the ICTY RPE. Similarly, Rule 73 *ter* (B) (iv) of the ICTR RPE.

© for this edition by CNS

Usually the only difference is that the witness is not sworn at this point, just clearly and extensively informed of his or her obligation to testify according to the truth. Therefore, the documents included in the civil law dossier contain materials obtained formally in an effort to ensure their reliability, to be re-examined during the trial. Meanwhile, witness statements and information submitted to the judge in the international criminal procedure do not meet the same requirements. As a result, dossiers received by judges sitting on the international criminal trials differ from the civil law dossiers in the expected reliability of the information gathered throughout the investigative technique. However, it has to be admitted that this is still a far greater amount of information than what is made available to common law judges.

The ICC system is not entirely compatible with the approach presented above. Certainly, the Preparatory Commission of the ICC was influenced by the practices of the *ad hoc* tribunals and in particular, by the amendments made with regard to the status conferences and the pre-trial judge[56]. Yet the ICC adopted a resolution that can be described as ambiguous[57]. According to Rule 121 (2) (c) of the ICC RPE, all evidence disclosed between the Prosecutor and the person (subject to a warrant of arrest or a summons) for the purpose of confirmation of charges hearing is communicated to the Pre-Trial Chamber. Subsequently, the evidence is recorded by the Registry[58] and after constituting the Trial Chamber transmitted to it[59]. However, it is not certain, at least not stipulated in the law of the ICC, whether the evidence disclosed after the confirmation hearing should also be communicated to any of the Chambers, and moreover if the Trial Chamber may view the files (and to what extent) prior to the trial[60]. It seems that the ambiguity of the text in case of the ICC is "quite intentional" and it will be for the Court to decide which approach, Continental or Anglo-American, should be adopted[61]. It is likely that since the provisions of the law of the ICC are so open, the judges originating from the civil law system will be tempted to familiarize themselves with the whole file, as they would do during their own national trials, while the common law judges will be more reluctant to look at the pre-trial findings due to the natural tendency to withhold this information. Notwithstanding the advantages and shortcomings of these two approaches, the accused certainly should not be exposed to such un-

[56] D.A. Mundis, op. cit., p. 370.

[57] H. Brady, op. cit., p. 425.

[58] Rule 121 (10) of the ICC RPE.

[59] Rule 130 of the ICC RPE.

[60] H. Brady, op. cit., p. 425 (In the author's opinion there is no particular reason why the Trial Chamber should not have a right to access the evidence submitted after the hearing, especially given that the provisions of the ICC RPE give the Trial Chambers broad powers. However, the fact that this situation is not clearly prescribed either in the ICC RPE or in the Rome Statute and left for the Trial Chamber to decide, cannot be evaluated positively).

[61] Ibid., p. 426.

© for this edition by CNS

certainty. The accused and their lawyers should be confident with what they will experience during the trial regardless of habits and nationality of the judge.

Thus, the mixture of civil and common law systems can be observed. Yet none of the systems is properly represented. If judges are to be able to familiarize themselves with the pre-trial findings, it should be done in the widest possible way, so they can see the whole picture of preliminary investigation and, subsequently, conduct the trial with a deep understanding of the case, as it is done in the civil law system. When it is not done in such a way, the rights of the accused are indeed threatened and the objections of the common law lawyers are absolutely appropriate. As aptly commented by Megan A. Fairlie, basing her view on the proceedings before the ICTY, that "the Tribunal's pre-trial approach […] is not only incompatible with an adversarial understanding of the impartiality, but also runs counter to the continental concept of fairness"[62].

3. THE ROLE OF THE JUDGE AND THE PARTIES DURING TRIAL. POWER TO CALL AND EXAMINE WITNESSES AND THE ORDER OF PRESENTATION OF EVIDENCE

The order of presentation of evidence before the *ad hoc* tribunals at first sight follows the adversarial model according to the provisions of Rule 85 (A) of the ICTY/R RPE. Each party is entitled to call witnesses and present evidence. Usually this will be done by presenting the evidence in two separate cases, first by the Prosecutor, who bears the burden of proof, and then by the Defence. Subsequently, this might be followed by prosecution evidence in rebuttal and defence evidence in rejoinder[63].

In any case, the civil law elements, especially those that make it possible for the judges to be more active, are easily visible throughout the law of the *ad hoc* tribunals. First of all, the judge is allowed to order evidence, pursuant to Rule 98 of the ICTY/R RPE[64] which reads that a Trial Chamber may *proprio motu* order either party to produce additional evidence and to summon witnesses and order their attendance. There is nothing in the law of either ICTY or ICTR imposing an

[62] M. Fairlie, op. cit., p. 310.

[63] Consistently with the common law tradition it has been decided that rebuttal evidence should be limited to matters emerging from the evidence of the defence. See Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, *Delalić* (*Celebici*) (ICTY-96-21), Trial Chamber, 19 August 1998, §§ 23–24 ("The essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence". However, "if new points are brought out by the Prosecution's evidence in rebuttal, the accused may respond by presenting evidence in rejoinder").

[64] Rule 85 (A) (v) of the ICTY/R RPE.

© for this edition by CNS

obligation on the Trial Chamber to obtain the acceptance of the parties for such decision[65]. Moreover, the ICTY in one of its judgements confirmed that every witness from the moment of taking a solemn declaration is a "witness of truth […] not strictly a witness for either party"[66]. This remains in compliance with the continental approach.

The *ad hoc* Trial Chambers are also entitled to alter the sequence of presentation of evidence, when the interest of justice is at stake[67] and shall exercise control over the mode and order of interrogating witnesses and presenting evidence for the effectiveness and acceleration of the trial[68]. Additionally, even more active role of the judge can be seen in their right to question witnesses at any time they wish[69] and in the power to reduce the number of witnesses and to shorten their examination conducted by both the Prosecution and the Defence[70]. However, the Trial Chamber has no power to decide on the scope, way and subjects on which the witness, called by the party, should testify[71]. As it was aptly argued by Christopher Safferling, these elements prove that "[the judge's] intervention in the presentation of evidence is not governed by party interests but considered truly independent aimed solely at seeking of the truth"[72]. Therefore, even though some of these regulations are also known in the common law system[73], it is fair to admit that all together they resemble powers that are granted to civil law judges, inevitable to fulfill the obligation to seek the truth laid upon them.

Even though the general Rule 85 of the ICTY/R RPE provides for the adversarial order of presentation of evidence which separates Prosecutor and Defence cases, there are so many exceptions to that rule in favour of the civil law system that it is impossible to admit that the common law system prevails in that area[74]. It is perhaps more accurate to claim that the role of the parties and the judge in the *ad hoc* trials, with regard to the presentation of evidence at the trial, are rath-

[65] P. Carmichael Keen, op. cit., p. 788 footnote 148 and accompanying text.

[66] Decision on Communications between the Parties and their Witnesses, *Kupreškić and others* (ICTY-95-16), Trial Chamber II, 21 September 1998.

[67] Rule 85 (A) of the ICTY/R RPE.

[68] Rule 90 (G) of the ICTY RPE and Rule 90 (F) of the ICTR RPE.

[69] Rule 85 (B) *in fine* of the ICTY/R RPE.

[70] Rule 73 *bis* (B) (C) and 73 *ter* (B) (C) of the ICTY RPE and Rule 73 *bis* (C) (D) and Rule 73 *ter* (C) (D) of the ICTR RPE.

[71] P. Carmichael Keen, op. cit., p. 790.

[72] Ch.J.M. Safferling, op. cit., p. 219.

[73] See for example *R. v. Felderhof* [2003] O.J. No. 4819 at para. 35–36 ("In my view, a trial judge does have and must have a power to manage the trial and whether that in exceptional circumstances that can even include a power to require the prosecution to call its evidence in a particular order").

[74] See Ch.J.M. Safferling, op. cit., p. 218; G.-J.A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, The Hague 2005, p. 244, and P.L. Robinson, op. cit., p. 576. Similarly, K. Ambos, "International Criminal Procedure, 'Adversarial', 'Inquisitorial' or Mixed?", Int'l Crim. L. Rev., 2003, no. 3, p. 18.

© for this edition by CNS

er Continental with some distinctive Anglo-American elements. Undoubtedly, it is up to the judge to use the tools he or she is equipped with and, therefore, it is understandable that common law judges were, are and will be far more reluctant to make use of these. However, the opportunity to use them, brings the law of the *ad hoc* tribunals much closer to the civil law system.

On the other hand, the law of the ICC, with regard to the powers of the judge and parties during the trial, is constructed in a far more complicated manner than the law of the *ad hoc* tribunals. The provisions are scattered among the Rome Statute and ICC RPE, yet are less explicit than the law of the ICTY and ICTR[75]. The law of the ICC does not provide a strict order for the presentation of evidence during the trial. The conflict between common and civil law lawyers on that issue, involving the rights of the accused and the notion of fair trial, created the tension that resulted in the adoption of Article 64 (8) (b) of the Rome Statute, which stated in very broad terms that "[a]t the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute"[76]. Subsequently, one of the most controversial rules was adopted[77], stating, that "[i]f the Presiding Judge does not give directions under Article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions"[78]. Surprisingly, the order of presentation of evidence in such case will be left for the parties to decide. That freedom is, however, limited, with regard to the conduct of examination of witnesses, by the provisions of the subsequent Rule 140 (2) of the ICC RPE[79].

At the same time judges of the ICC are considered more as actors than simple arbiters[80]. Their role is thought to be more active than that of the judges of ICTY

[75] But see H.-J. Behrens, "Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V,VI,VIII)", Eur. J. Crime, Crim. L. & Crim. J., 1998, no. 6, p. 125 ("They [the provisions of the Rome Statute and the ICC RPE] may not be the most elegantly phrased set of international law. But they certainly are an approach to a global understanding of a fair trial before an international Court").

[76] See S.A. Fernandez de Gurmendi, "Elaboration of the Rules of Procedure and Evidence", [in] R.S. Lee (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Ardsley 2001, p. 252 ("This debate stood between some civil law lawyers, who considered that the judges should be sole arbiters of the procedure with no further guidance from the Rules, and others, mainly coming from a common law tradition, who insisted that a predictable procedural scheme was essential to ensure fair trial and protect the rights of accused [footnotes omitted]").

[77] See P. Lewis, "Trial Procedure", [in] R.S. Lee (ed.), op. cit., p. 547; and K. Ambos, op. cit., p. 20.

[78] Rule 140 (1) of the ICC RPE.

[79] The order of examination of witnesses is discussed in detail in part 5 of this paper.

[80] F. Terrier, op. cit., p. 1272; and Ch.J.M. Safferling, op. cit., p. 219.

© for this edition by CNS

and ICTR. According to the provisions of Article 64 (6) (a) in relation to Article 61 (11) of the ICC Statute, the Trial Chamber is "responsible for the conduct of proceedings". Article 64 (6) (d) of the Rome Statute allows the Trial Chamber to "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties". Additionally, the Trial Chambers "have the authority to request the submission of all evidence that it considers necessary for the determination of the truth"[81]. Once again, this approach raises the question of how it can be interpreted by the judges originating in different law systems. The common law judges "would view this as a power to be exercised only rarely", while civil law judges "could interpret the provision as a license for major judicial involvement in the production of evidence"[82]. As argued before, the coherent law system should not give a chance for such choices depending on the origin of the judge.

An important point has been raised on that issue by Hans-Jörg Behrens, in his article on the procedure of the ICC[83]. He suggested that since the role of the judges in the ICC trials (which is also true in case of the *ad hoc* tribunals) is not limited to ruling on the questions of law but has been expanded to seeking the truth by calling additional evidence and questioning witnesses, "it is necessary to make sure that the judges for the Trial and Pre-Trial Chambers have experience in criminal trial"[84]. In fact, the law of the ICC contains such a provision[85], while the laws of the *ad hoc* tribunals are not as explicit[86]. It has to be evaluated positively that the trials in the ICC will be conducted by people experienced in criminal litigation and not only in international, humanitarian or human rights law. It is not to say that the expertise in those fields is not important or unuseful, on the contrary, it is essential to bring this distinct perspective to international criminal trials. However, ruling on criminal trials cries for even deeper knowledge in criminal litigation. Moreover, the complexity of the laws governing the criminal procedure before international courts and tribunals demands a general understanding of the criminal procedure in both Continental and Anglo-American systems.

In conclusion, it can be seen that the law of international criminal courts and tribunals mixed the idea of an active judge taken from the civil law tradition with the adversarial approach in which two parties bring the evidence before the court.

---

[81] Article 69 (3) of the Rome Statute.

[82] W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge 2001, p. 118.

[83] H.-J. Behrens, op. cit., p. 140.

[84] Ibid., p. 123.

[85] Article 39 (1) *in fine* of the Rome Statute reads as follows: "The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience".

[86] Article 13 of the ICTY Statute and Article 12 of the ICTR Statue read as follows: "The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and selections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law".

© for this edition by CNS

This combination is less upsetting for the civil law idea of criminal proceedings. Judges of the ICTY, ICTR and ICC are equipped with such an extensive power that enable them to actively seek for the truth and it is not that relevant if adversarial mechanism of the presentation of evidence is prescribed for the parties. They will be still capable of performing their duty. Meanwhile, for the common law lawyers this structure seems unbearable. Judge's interventions prevent the parties from accomplishing their goal of establishment of the truth through the adversarial process.

Particularly disturbing for the common law lawyers is the power of the judge to call witnesses and to order additional evidence and its relation to the burden of proof. As some believe, in the civil law system the burden of proof is shared between the prosecutor and the judge, since the latter has extensive powers to introduce new evidence[87]. The same point may be made with regard to the powers granted to the judge in international criminal proceedings. Such suggestions are misplaced and result from the narrow view of the Continental proceedings. The role of the civil law judge, as well as the role of the Trial Chambers in the international criminal laws, is to reveal the truth. The purpose for calling additional witnesses and questioning them is simply to extend the search for the truth and it may be done both in favour and against the accused. The Prosecutor still bears the burden of proof and is obliged to provide the evidence proving that the accused is guilty beyond reasonable doubt. The role of the judge is to verify the versions provided by the prosecutor and the defence and, in cases where it is necessary, to order additional inquiry in certain matters for the clarification purposes, by inviting new evidence that could either incriminate or exonerate the accused. Contrary to the Anglo-American tradition, the engagement of the judge in finding additional evidence against the accused is not considered in the civil law system as either intercepting competences of the prosecutor in establishing guilt, or proving judge's partiality[88]. However, it must be understood that the presented structure is unacceptable for the common law lawyers wrecking the idea of an adversarial trial.

4. PRELIMINARIES TO GIVING TESTIMONY

One of the principles recognized by both civil and common law systems is the obligation of a witness to testify truthfully[89]. International criminal courts and

[87] P. Carmichael Keen, op. cit., p. 793.

[88] The concept of the burden of proof and approach adopted towards the impartiality of the judge in civil and common law systems goes far beyond the scope of this paper. The understanding of those issues is deeply rooted in the Continental and Anglo-American cultures, especially in the idea of what purposes the criminal proceedings serve. Therefore, it is impossible to engage in such discussion here.

[89] But see C. Kreß, "Witnesses in Proceedings before the International Criminal Court", [in] H. Fischer, C. Kreß, S.R. Lüder (eds.), *International and National Prosecution of Crimes under*

© for this edition by CNS

tribunals require that before giving evidence every witness shall make a solemn declaration[90]. The *ad hoc* tribunals and the ICC provide that children (and in case of the ICC also "a person whose judgment has been impaired") who do not understand the nature of the solemn declaration, may be allowed to testify without it[91]. Additionally, the witness may, or in case of the ICC shall, be warned of the duty to tell the truth and the consequences that may result from a failure to do so[92].

The international criminal laws recognize the right of the accused to testify during the trial[93]. Since the accused is taking a role of a witness while testifying, he or she is also subject to making a solemn declaration. The accused may also choose to remain silent[94], and, as the ICTY Trial Chamber noted, no negative inference may be drawn from the silence of the accused[95]. However, once again international criminal procedures modified the common law tradition by introducing the civil law practice. According to Rule 84 *bis* of the ICTY RPE (note that the ICTR RPE did not establish a similar provision), the accused is allowed to make a statement under control of the Trial Chamber, without taking an oath or making a solemn declaration[96]. The Rome Statute adopted a similar provision[97]. In the view of Salvatore Zappala, the rationale behind the introduction of this rule is a belief that the knowledge of the position of the accused on particular

International Law. Current Developments, Berlin 2001, pp. 323–333 (The author discusses the obligation of a witness to appear voluntarily before tribunals and exceptions from the duty to testify).

[90] See Rule 90 (A) of the ICTY RPE, Rule 90 (B) of the ICTR RPE and Rule 66 (1) of the ICC RPE. In any case the words of the solemn declaration read as follows: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

[91] Rule 90 (B) of the ICTY RPE; Rule 90 (C) of the ICTR RPE and Rule 66 (2) of the ICC RPE. Note, however, that in case of the *ad hoc* tribunals, a judgment cannot be based on such testimony alone.

[92] Rule 91 of the ICTY/R RPE and Rule 66 (3) of the ICC RPE.

[93] Rule 85 (C) of the ICTY/R RPE and Article 67 (1) (g) of the Rome Statute.

[94] Article 21 (4) (g) of the ICTY Statute, Article 20 (4) (g) of the ICTR Statute and Article 67 (1) (g) and (i) of the Rome Statute. On the expanded protection of the accused with regard to the right to remain silent in the law of the ICC see W.A. Schabas, op. cit., pp. 151–152; and S. Zappala, op. cit., p. 118.

[95] See *Prosecutor v. Kupreskić et al.*, IT-95-16-T, Judgment (14 January 2000) at para. 339 (d) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) ("It is the right of the accused not to give evidence at trial and no adverse inference can be drawn from the fact he did not testify. The Trial Chamber refers to Article 21 (3) that guarantees the right to presumption of innocence and Article 21 (4) (g) which provides that the accused cannot be compelled to testify against himself"). See also *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgment and Sentence (16 May 2003) at para. 46 (International Criminal Tribunal for Rwanda).

[96] Before the adoption of Rule 84*bis* the practice was inconsistent. See J.R.W.D. Jones, S. Powles, *International Criminal Practice*, 3rd ed., Ardsley 2003, p. 713 (The authors claim that "Rule 84 *bis* is, to a certain extent, the codification of an existing practice"). But see G. Turone, "The Denial of the Accused's Right to Make Unsworn Statements in Delalić", J. Int'l Crim. Just., 2004, no. 2, p. 456 (The author discusses the *Delalić* case, where the motion of the defence to allow an unsworn statement was rejected, even contradictory to the opinion of the Prosecution).

[97] Article 67 (1) (h) of the Rome Statute.

© for this edition by CNS

issues helps judges and the Prosecutor to avoid the production of unnecessary evidence[98]. This approach remains in accordance with the civil law theory of discovering the truth. Continental lawyers believe that the accused, not bounded by oath and obligation to testify truthfully might reveal some useful information that might help in developing the investigation and establishing the truth during the trial, even if she would try to delude the judge and the Prosecutor[99]. The accused in the Continental system never takes either an oath or a solemn declaration and the privilege against self incrimination allows for making a statement in open court without a necessity to be subjected to questions asked by the prosecution or even the judge.

This combination of civil and common law systems in the mechanism of questioning the accused is particularly disturbing and does not satisfy the expectations of either of these two systems. It seems as though the adopted resolutions are to please lawyers from both systems by introducing this peculiar compromise and do not enhance the quality of the trial. Anglo-American lawyers rejecting unsworn statements cannot feel comfortable with this idea of approaching the truth since, from their perspective, it jeopardizes the rights of the accused. On the other hand, from the Continental perspective, the idea of the sworn testimony of the accused is "astonishing"[100] and at least unnecessary, since the accused is able to share his or her views on the case in an unsworn statement. At the same time, the civil law system expects that the accused will be questioned about the contents of the statement, which is forbidden under international criminal law[101]. Moreover, the probative value of the unsworn statements of the accused is decided in the civil law system in light of all collected materials. From the common law perspective such statements are worth less and this practice was abandoned for the sake of the fairness of trial. The law of the ICTY, accepting both modes of obtaining information from the accused, does not explain how each piece of evidence should be evaluated. It is only provided that "[t]he Trial Chamber shall decide on the probative value, if any, of the statement"[102]. The ICC does not provide any guidance in this matter either. There are some that argue that the unsworn statement of the accused should be considered evidence and its probative value should be based on the evaluation of evidence of the entire proceedings,

[98] S. Zappala, op. cit., p. 141.

[99] For the common law lawyers this rationale seem like an essential departure from the principle of presumption of innocence. The Continental lawyers certainly do not share this opinion. Unfortunately, due to the capacity limitation this paper does not aim at explaining in detail the differences between the Continental and Anglo-American understanding of all problematic procedural issues. Therefore, this distinct approach to the presumption of innocence will just remain signalled and not discussed in detail.

[100] J. Pradel, *Droit pénal comparé*, Paris 1995, p. 449, n. 1, cited in W.A. Schabas, op. cit., *supra* note 146, p. 128.

[101] It is prohibited at least in the law of the ICTY. See Rule 84 *bis* (1) *in fine* of the ICTY RPE.

[102] Rule 84 *bis* (B) of the ICTY RPE.

© for this edition by CNS

according to the provisions of Article 74 (2) of the Rome Statute[103]. However, it is once again just an unsettled presumption that might be interpreted otherwise by the Trial Chambers of the ICC.

5. THE FORM OF EXAMINATION OF A WITNESS

The law of international criminal courts and tribunals recognizes a well established principle that the accused has a right to confront witnesses called by the Prosecution and to examine witnesses called on his or her own initiative[104]. The law of the *ad hoc* tribunals and the Rome Statute state clearly that the accused is entitled "to examine, or have examined, the witness against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"[105]. This provision is not understood in the same way in the common and civil law systems. In the adversarial system the focus remains on cross-examination, while the Continental law accepts the examination of witnesses in other forms forbidding the use of cross-examination[106]. Moreover, in the civil law system the judge, imposed with an obligation to seek the truth, is empowered to take part in the examination of witnesses not only for clarification purposes, as they may in the common law system, but also to elicit the truth.

The general mode of interrogation of witnesses before the *ad hoc* tribunals is reminiscent of the order known from the common law system. As it is prescribed in Rule 85 (B) of the ICTY/R RPE, "[e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness". It is clear that the examination of each witness will take place within the presentation of evidence by each party separately (first by the prosecutor and followed by the defence) as well as during the time for the evidence called by the Trial Chamber[107]. In *Delalić* case the ICTY Trial Chamber took the time to explain what should be understood by the terms used within the quoted rule: "Examination-in-chief is the process whereby a party who has called a witness to give evi-

[103] A. Orie, op. cit., p. 1482.

[104] See for example Article 13 (3) (e) of the International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, Arts. 9–14, 6 ILM 368 (entered into force 23 March 1976) [ICCPR].

[105] Article 21 (4) (e) of the ICTY Statute, Article 20 (4) (3) of the ICTR Statute and similarly Article 67 (1) (e) of the Rome Statute.

[106] See P.L. Robinson, op. cit., p. 575. See also R. May, M. Wierda, op. cit., p. 285 (The authors point out that the credibility of evidence may be established in other ways, not only by conducting cross-examination).

[107] See Rule 85 (A) of the ICTY/R RPE.

© for this edition by CNS

dence in support of his case elicits from such witness through questions evidence relevant to the issues favourable to his case. In other words, examination-in-chief is always conducted by the party calling a witness to testify. Cross-examination, on the other hand, is the examination of a witness by questions by the adversary against whom the witness has testified. The object of cross-examination is two-fold, first to elicit information concerning facts in issue, or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed to put questions to correct matters or new facts arising out of cross-examination[108]".

But such a basic structure can be changed. The order of examination of a witness as provided in Rule 85 of the ICTY/R RPE was revised by the ICTY Trial Chamber in the *Kupreskić* case[109]. According to the view of the Trial Chamber, who summoned a witness *proprio motu* pursuant to Rule 98 of the ICTY RPE, the proper order for examination of a witness would be examination by Judges, followed by examination by the Prosecution and then examination by the defence counsel[110]. Also in the *Blaškić* case, the ICTY Trial Chamber, ordering the appearance of General Enver Hadzihasanovic (according to Rule 98 of the ICTY RPE)[111], decided that the mode of interrogation will be to have "the Witness […] testify freely about the matters of which he had knowledge that occurred within the scope of his then mission and that relate to the acts with which the accused has been charged as they appear in the indictment"[112]. The testimony in the narrative form was designed to be followed by the questioning made first by the Judge, then by the Prosecutor and then the Defence.

The law of the ICTY and ICTR regulates extensively the scope of cross-examination, stating that it should be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of a witness and, where a witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of the case[113]. But at the same time the Trial Chamber is in any case al-

[108] *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) at para. 22 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[109] J.R.W.D. Jones, S. Powles, op. cit., p. 758.

[110] Ibid., p. 759.

[111] *Prosecutor v. Blaškić* (*Lasva Valley*), IT-95-14-T, Decision in respect of the Appearance of General Enver Hadzihasanovic (25 March 1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[112] *Prosecutor v. Blaškić* (*Lasva Valley*), IT-95-14-T, Decision in respect of the Appearance of General Enver Hadzihasanovic (25 March 1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[113] Rule 90 (H) (i) of the ICTY RPE and Rule 90 (G) (i) of the ICTR RPE.

© for this edition by CNS

lowed to permit inquiry into additional matters[114]. It is also provided that during cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, a counsel shall put to that witness the nature of the case of the party for whom the counsel appears which is in contradiction with the evidence given by the witness[115].

After cross-examination, the party that called a witness has a right to re-examination[116], however there is nothing in the law of the ICTY and ICTR about the right to re-cross examination[117]. Moreover, in one case, the ICTY Trial Chamber denied the defence the right to cross-examine the prosecution witness for the second time after the re-examination by prosecution[118]. This rule is, as the Trial Chamber stated itself, nothing new and it is well established in US and English law, that "a party has the last word with his own witness"[119]. It is, nevertheless, not an ultimate regulation. If during re-examination new materials are introduced, it seems that the opposing party should be allowed to conduct further cross-examination on such new material[120].

A particularly crucial issue during the examination of witnesses is a matter of leading (suggestive) questions. In the civil law system, such questions are never allowed. The common law system provides for the use of them during cross-examination, considering them an "essential tool in the cross-examiner's

---

[114] Rule 90 (H) (iii) of the ICTY RPE and Rule 90 (G) (iii) of the ICTR RPE.

[115] Rule 90 (H) (ii) of the ICTY RPE and Rule 90 (G) (ii) of the ICTR RPE. It is worth noticing that existing Rule 90 is a result of amendment (1999 in ICTY and 2003 in ICTR). Before correction this regulation stated that "[c]ross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness. The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters as if on direct examination". Therefore with the amendments the rule has moved from the "American rule" or "closed system" with some exceptions to the truth seeking function of the Trial Chamber (permitting inquiry into additional matters) to what is accepted in Canadian and English legal traditions, meaning the cross-examination not limited by the subject matter of examination-in-chief. See on the old regulations J.R.W.D. Jones, S. Powles, op. cit., pp. 718–719; and R. May, M. Wierda, op. cit., pp. 148–149. On Canadian law see D.M. Paciocco, L. Stuesser, *The Law of Evidence*, 5th ed., Toronto 2005, p. 387.

[116] Rule 85 (B) *in principio* of the ICTY/R RPE.

[117] But see *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) at para. 20 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) (Note that the Trial Chamber opposed using the term "re-cross examination" since this expression does not reflect the language of the ICTY Statute).

[118] *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[119] *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 30.

[120] *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 30.

© for this edition by CNS

trade"[121]. In the international criminal procedure leading questions are not tolerated during examination-in-chief[122]. But, in accordance with the common law tradition, they are allowed during the cross-examination[123]. However, their allowance does not result from the rules of law but has been interpreted by Chambers, which is again troublesome[124]. Judges originating from different law systems may have distinct opinions with regard to permission of leading questions[125]. The unclear position on that matter effects the course of a trial. Leading questions are an indispensable element of Anglo-American cross-examination. And if leading is not to be permitted in international criminal law, then there is no cross-examination at all.

Finally, in the law of the *ad hoc* tribunals, the double role of the Trial Chamber has been recognized: the power to control the mode of the interrogation of witness by parties[126] and to examine witnesses[127]. Both common and civil law systems recognize such judicial powers. However, in the Anglo-Ameri-can system judicial questioning is acceptable only for clarification purposes and should not be "interpreted as a license for judges to descend pell-mell into the arena of trial combat and conduct the questioning of witnesses unrestrained"[128]. In fact,

---

[121] R. May, M. Wierda, op. cit., *supra* note 18, p. 148.

[122] See for example *Prosecutor v. Kordić and Čerkez* (*Lasva Valley*), IT-95-14/2-T, Decision on the Prosecutor's Motion on trial Procedure (19 March 1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) (In the *Kordić and Čerkez* case, the ICTY Trial Chamber ruled with regard to the examination-in-chief that "it is the practice of the International Tribunal not to allow leading questions on matters in dispute). But see F. Terrier, op. cit., p. 1303 (The author aptly argues that in cases where parties agree on the issue and leading questions may save the time or accelerate testimony on background matters).

[123] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (1 June 2001) at para 320-323 (International Criminal Tribunal for Rwanda, Appeals Chamber) (The Appeals Chamber ruled that even though "[i]nterpretation of the provisions thereof [on the allowance of leading questions during the cross-examination] may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it" and "that the Rules of the Tribunal have never contained any specific provision on the issue of leading questions" it is incorrect to prohibit the accused from asking leading questions during cross-examination as has been done by Judge Kama during the Trial).

[124] See P.M. Wald, op. cit., p. 91 (The author discusses that a "lack of a common legal culture" on the issue of leading question that, among other issues, creates a confusion for the judges and participants in the proceedings).

[125] This is exactly what happened in *Akayesu* case, where Judge Kama originating from Senegal (civil law system) did not allow the leading questions in cross-examination while the Appeals Chamber implied that this is incorrect, nevertheless deciding that the prohibition as to asking leading questions did not cause any prejudice. See *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (1 June 2001) at para 325 (International Criminal Tribunal for Rwanda, Appeals Chamber).

[126] Rule 90 (F) of the ICTY/R RPE and Article 64 (8) (b) and 69 (2) of the Rome Statute.

[127] Rule 85 (B) *in fine* of the ICTY/R RPE, Article 64 (9) (b) of the Rome Statute and Rule 140 (2) (c) of the ICC RPE.

[128] D.D. Ntanda Nsereko, "Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia", Crim. L. F., 1994, no. 5, p. 538 (The author, originating from the common

© for this edition by CNS

the adversarial order of examination of witnesses in the *ad hoc* tribunals' system has been shaken tremendously by allowing the Judge to put any questions to the witness at any stage. Even though it has been argued that judges should use their powers only "to clarify issues which remain unclear"[129], as it is done in the common law system, and that "most [judges] are quite restrained and respect the adversarial nature of the proceedings"[130], it depends once again on the nationality of the judge. Judges originating from the Continental tradition, practicing extensive examination of witnesses on a daily basis, are undoubtedly more eager to make use of powers granted them by the law. Peter Carmichael Keen gives several examples of the extensive questioning by the judges reporting even that "more information is produced by witnesses during judicial questioning that would otherwise have been adduced"[131]. For the lawyer originating from the Continental system, such an outcome is not surprising. No doubt, however, common law lawyers would feel uneasy while experiencing the broad competences of the judges being eagerly exercised.

The model of examination of witnesses before the ICC is even more confusing than the one exercised under the rules of the ICTY and ICTR. The mode of interrogation is not prescribed in terms of examination-in-chief and cross-examination. The Rome Statute provides, that "at the trial, the presiding judge may give directions for the conduct of proceedings, including ensuring that they are conducted in a fair and impartial manner"[132]. It should be noted, however, that the Trial Chamber should "confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings"[133]. This rule is a result of the general disagreement between common and civil law lawyers on the necessity to include the obligation to conduct the interrogation of the witness in a form of cross-examination, and over the necessity to provide the basic framework for the trial[134]. Consequently, Rule 140 (2) was adopted, prescribing the following order of examination of a witness:

---

law system, is horrified by the Continental idea of judges being allowed to ask questions at any time during the trial and not only to "resolve the ambiguities" during the trial).

[129] *Prosecutor v. Delalić* (*Celebici*), IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (1 May 1997) at para. 26 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

[130] W.A. Schabas, op. cit., p. 472.

[131] P. Carmichael Keen, op. cit., p. 791 footnote 162 and accompanying text.

[132] Article 64 (8) (b) of the Rome Statute.

[133] Article 64 (3) (a) of the Rome Statute. See P. Lewis, op. cit., p. 547 (This basic regulation is elaborated further in the rule that has been described as "one of the most controversial of all the Rules" and born in "a clash of cultures between the civil law and the common law". Note, however, that the author points out that some countries looked beyond their national law traditions for the sake of clear and coherent resolutions).

[134] P. Lewis, op. cit., pp. 548–550 (The author discusses the history of the adoption of this highly controversial rule).

© for this edition by CNS

a) A party that submits evidence has the right to question that witness.

b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters.

c) The Trial Chamber has a right to question a witness before or after a witness is questioned as prescribed in a) or b).

d) The defence shall have the right to be the last to examine a witness.

Such order applies "in all cases", however it is not an obligatory sequence of events and questioning is subject to the discretionary powers of the Trial Chamber to decide the order of calling and the mode of examining evidence[135].

During the ICC trials the parties are allowed to question the witness about all relevant matters and it is up to the Trial Chamber to control the manner of questioning[136], especially by ensuring that witnesses are not abused during the examination[137]. There are some who believe that even though the term "cross-examination" has not been used in the language of the Rome Statute nor in the ICC RPE, the right to cross-examine a witness has been recognized implicitly in the law of the ICC, since Rule 140 (2) (c) of the ICC RPE demands that the Trial Chamber has the right to question a witness before or after the parties[138]. However this interpretation seems too broad. The lack of interruptions made by the judge during the examination of a witness does not make this questioning a cross-examination. This is how any trial should be conducted, even the one before the Continental court. There is no harm to the truth being done if the judge waits with his questions until the examination by the party ends. Even in the civil law systems it is disturbing when the judge interrupts the questioning of the party. Perhaps this is just a habit of judges used to conduct the examination of witnesses individually; however it should be limited or even banned. The judge may clarify the issues he or she is not comfortable with or unravel some additional facts after the examination by the party has ended.

International criminal courts and tribunals adopted the general principle of oral evidence with some appeasements in favour of other ways of delivering testimonial evidence[139]. The acceptance of testimony being delivered in such

[135] Rule 140 (2) *in principio* of the ICC RPE.

[136] Article 64 (8) (b) and 69 (2) of the Rome Statute.

[137] Rule 88 (5) of the ICC RPE.

[138] See K. Ambos, op. cit., p. 20.

[139] Rule 90 (A) of the ICTR RPE reads that "witnesses shall, in principle, be heard directly by the Chambers". This regulation was primarily adopted also by the ICTY RPE however after amending the RPE with the Rule 92 *bis*, the Rule 90 (A) has been deleted and the Rule 89 (F) has been added, which states that "a Chamber may receive the evidence of a witness orally or, where interests of justice allow, in written form". In the ICC system, Article 69 (2) of the Rome Statute states clearly that "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 [protection of victims and witnesses] or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce

© for this edition by CNS

a way is argued to be a notable civil law element remaining in contradiction to the common law general principle of oral evidence[140]. This is perhaps a misunderstanding of that principle and its application in the Anglo-American tradition. It is possible that the Continental law system may be more open to witness statements in the written form. Nevertheless, the out-of-court statements that are offered to prove the truth of its concepts (commonly called hearsay evidence) are also admissible as a matter of exception in the common law systems[141]. The long list of those exceptions allows the claim that the testimony of a witness in a form other than oral evidence is no longer a distinguished and unique feature of the civil law system.

The law of the *ad hoc* tribunals provides for the proof of facts in ways other than by oral evidence in court[142]. It enlists circumstances that favour the admission of evidence in that form (e.g. relating to the character of the accused)[143] as well as circumstances which forbid that (e.g. any factors which make it appropriate for the witness to attend for cross-examination)[144]. Rule 92 *bis* additionally contains several safeguards, e.g. that a written statement will be admissible only when accompanied by the declaration of the witness making the written statement that its contents are true and correct to the best of the person's knowledge and belief[145].

The ICTY and ICTR provide for the admission of statements of a deceased person, persons who cannot be traced and persons whose bodily or mental condition makes them unable to testify orally (without the technical safeguards required for other statements)[146], as well as transcripts of evidence given by a witness in proceedings before the Tribunal[147]. Nevertheless, the rights of the accused cannot violate the fundamental right of the accused to confrontation and cross-examination guaranteed by the Statute and Rules. Thus in at least one of the cases before the ICTY the Trial Chamber confirmed that the admissibility of transcripts does not preclude the right of the Defence to cross-examine the witnesses[148].

(oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of accused".

[140] A. Orie, op. cit., p. 1472.

[141] See for example D.M. Paciocco, L. Stuesser, op. cit., p. 82.

[142] Rule 92 *bis* of the ICTY/R RPE reads that "a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment".

[143] Rule 92 *bis* (A) (i) of the ICTY/R RPE.

[144] Rule 92 *bis* (A) (ii) of the ICTY/R RPE.

[145] Rule 92 *bis* (B) of the ICTY/R RPE.

[146] Rule 92 *bis* (C) of the ICTY/R RPE.

[147] Rule 92 *bis* (D) of the ICTY/R RPE.

[148] *Prosecutor v. Kordić and Cerkez* (*Lasva Valley*), IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence (29 July 1999) at para. 28 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

© for this edition by CNS

The ICTY and ICTR also allow for the admission of depositions, the evidence taken out of court but under oath before a presiding officer where the opposing party was granted the opportunity to cross-examine[149]. Certainly the use of depositions raises some doubts, since, as Patricia Wald points out from her experience in the ICTY, some Trial Chambers let depositions freely in during the trial, while other Chambers were more restrictive[150].

The law of the ICC includes more detailed provisions on that issue. Article 69 (2) of the Rome Statute allows the use of documents and written transcripts. According to Rule 68 of the ICC RPE, the Trial Chamber may allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony. However, it may be admitted only if the witness is present before the Trial Chamber to be examined by the parties, or if the parties had an opportunity to conduct the examination during the recording[151].

The use of written out-of-court statements in international criminal trials raises some questions. First of all, the broad admissibility of pre-trial statements of witnesses in the civil law system is limited by the formal requirements that such statements have to meet. Incorporation of a bare rule without the restrictions that this system provides may be tricky and may threaten the rights of the accused. The examination of witnesses during the preliminary investigation in civil law system has to meet the same requirements as the examination during trial, with the exception that the Prosecutor (or criminal justice body) plays the sole role of the questioning authority and the witness, instead of taking an oath, is only informed on the obligation to testify according to the truth and possibility to be punished for false testimony. Most importantly, instructions on the requirement to testify according to the truth and other requirements, such as the right to refuse testimony and answer questions under certain circumstances have to be not only read to the witness but also signed by him or her. Secondly, it has to be kept in mind that the Prosecutor examining the witness in the civil tradition is obliged to seek the truth and gather evidence in favour and against the accused. Therefore, in the view of Continental lawyers the right of the accused to "examine or have examined the witness on his behalf" is not threatened even when the defence lawyer is not present during the interrogation at this stage[152]. The law of the *ad hoc* tribunals and the Rome Statute do not provide such safeguards. Provisions clarifying cir-

[149] Rule 71 of the ICTY/R RPE.

[150] P.M. Wald, op. cit., p. 111. See also W.A. Schabas, op. cit., pp. 476–477.

[151] Rule 68 (a) of the ICC RPE.

[152] Although it is worth pointing out that the accused, treated as a party to the proceedings at the investigative stage, has a right to participate during the interrogation themselves or to be represented by their defence lawyer. On the other hand, usually the victim is granted the same right in that matter.

© for this edition by CNS

cumstances under which deposition evidence should be admitted at trial should be available at least in the RPEs[153].

In conclusion, it seems that even in prescribing an order of the examination of witnesses, the drafters of the law of the *ad hoc* tribunals and of the Rome Statute once again could not agree on following one law tradition. The mode of the examination of witnesses may appear as Anglo-American, however, it is always subject to change if the judge decides so. In my opinion the fact that the mode of the examination of witnesses is subject to discretionary powers of the Trial Chambers, which is particularly visible in case of the ICC proceedings, is not acceptable. As mentioned before, the cultural diversity of judges sitting on trials and the practice of *ad hoc* tribunals show that the nationality of the judge shapes the conduct of a trial[154]. With rules prescribed in such a broad manner it is likely that judges will impose their habits with regard to the examination of witnesses. The coherent system of law cannot afford such differences in the form of a trial and, especially, in the presentation of evidence.

The model of examination of witnesses as prescribed in the international criminal laws particularly fails when broad powers of the judge are blended with the right to cross-examination. If judges are obliged to establish the truth, they have to be allowed to take an active part in the questioning of witnesses. As argued before, it does not mean that they should be allowed to interrupt the examination at any time. However, if they feel that some important information has been left aside, they have to have the power to conduct additional inquiry either in a way of calling new evidence or examining evidence already admitted. On the other hand, the adversarial system cannot properly operate without cross-examination. But at the same time the necessity to conduct cross-examination brings confusion to the civil law lawyers: "Understandably, the bulk of defense counsel are Balkan-trained lawyers and are typically not experienced at cross-examination. Some are quick learners, but others are painfully awkward and unfocused on just what they are trying to accomplish. They sometimes argue with or even criticize the witnesses. They also go off on tangents that are not always relevant to their case […]. As an American judge, I frankly find many defence cross-examinations painfully unhelpful to my own judgment […]. In sum, I came away from the two lengthy trials in which I have participated thinking that the potential of cross-examination by defense counsel in the search for the truth has not been realized[155]".

[153] See also P.M. Wald, op. cit., pp. 111–112.

[154] See J. Meernik, Ch. Farris, "The Influence of Attorney Background on Judicial Decision Making at the International Criminal Tribunal for Rwanda", *Judicature*, 2006, no. 89, p. 326.

[155] P.M. Wald, op. cit., pp. 104–105. See also P. Carmichael Keen, op. cit., p. 792 (The author claims that even where in the international criminal trials leading questions are allowed, the lawyers unfamiliar with the adversarial system did not make use of them).

© for this edition by CNS

Indeed the ability to conduct cross-examination is part of the common law education and merely, if at all, touched upon during the training in the Continental law system. The ICTY holds short training courses for newly appointed defence lawyers[156]. Nevertheless, it is hard to believe that the experienced Anglo-American lawyers who have received extensive training in common law criminal litigation may be defeated in confrontation with their civil law colleagues while conducting cross-examination. Most importantly, the truth may not be revealed during the trial if the parties are not able to conduct cross-examination in an appropriate manner. This is probably where the truth-seeking judge could step in, spoiling entirely the concept of the adversarial trial.

CONCLUSION

The procedure of international criminal courts and tribunals has been created on the edge of two distinct law systems. Evan J. Wallach argues that "there must be a set of standardized rules adopted by the world as a common ground for procedures in war crime trials, whether conducted by international or military tribunals. It does not matter so much what those rules are as long as they are standardized, and fairly and predictably enforced"[157]. Indeed there is a great need for the set of standardized rules of procedure for the purpose of international criminal trials. Though not any rules will do. The rules should not be taken out of one pot and melted with other rules derived from an opposing system of law, even if it is supposed to be done in the name of expediting the proceedings and greater protection of the rights of the accused. In fact on the way the protection of the accused might be threatened. Combining the party driven adversarial system with its cross-examination and the active role and extensive truth-finding functions of a judge capable of calling evidence and questioning any witness has brought too much confusion. I certainly agree with the authors arguing that the combination of the civil and common law systems may be a huge mistake and may bring, at least, a less satisfactory result[158].

---

[156] P.M. Wald, op. cit., p. 104.

[157] E.J. Wallach, "The Procedural and Evidentiary Rules of the Post-War II War Crimes: Did They Provide an Outline for International Legal Procedure", *Columbia Journal of Transnational Law*, 1999, no. 37, p. 882.

[158] M. Damaska, op. cit., p. 852 ("In seeking inspiration for change, it is perhaps natural for lawyers to go browsing in a foreign law boutique. But it is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase — a legal pastiche — can produce a far less satisfactory fact finding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form").

© for this edition by CNS

The international criminal procedure combined the civil and common law approaches to the establishment of the truth, disregarding the fact that each of those approaches invokes particular procedural choices. If the Continental idea of judges seeking the truth is to work, there are several conditions that have to be met if the system is to work efficiently and according to its principles. Most of all, judges must be able to call and examine witnesses during the trial if they feel that some information has been overlooked. To be able to fulfill their obligations they cannot be restrained in their ability to become familiar with pre-trial findings. They also cannot operate in the strict set of evidentiary rules blocking them from evidence that might be helpful in establishing the truth. Obviously it is not a call for the admittance of any information. It should be prescribed that it is also the prosecutor's responsibility to evaluate materials collected during the preliminary investigation and they should be bound by evidentiary rules accordingly. The judges should be trained to evaluate such evidence appropriately and should not be beforehand accused of presumed partiality when they engage in the search for the truth during the trial.

On the other hand, if the examination of witnesses is to be carried out in an adversarial manner, according to the Anglo-American approach to the establishment of the truth, there are some elements that cannot be a part of the procedure. First of all, the parties should be allowed to conduct cross-examination with all its consequences. There are some uncontested elements of cross-examination, as for example the right to ask leading questions to challenge the witness's credibility, the lack of which destroys the concept of questioning itself and the whole idea of common law trial. Secondly, the judge should remain neutral and parties should be free from fear that the judge will intervene by asking questions while they still carry out the examination. Finally, if the judge's neutrality is not to remain a fiction, they should not become familiar with preliminary investigation findings or any inadmissible evidence that parties would like to present during the trial. To achieve that, the judge should not be introduced to a dossier of any kind and the set of strict evidentiary rules should be adopted.

It is true that there are some authors who argue that the system created for the purpose of international criminal trials is a system *sui generis*, at least in some of its features[159]. In my opinion this is a false assumption. It may seem that some mechanisms used in international criminal proceedings differ from both the common law and the civil law system, as for example the pre-trial procedure in the *ad hoc* tribunals and the ICC. However, mixing selected institutions from different systems does not create a new system of law[160]. The system of law that is to be called *sui generis* should work coherently according to the principles and theory

[159] See for example P. Carmichael Keen, op. cit., p. 802; and P.L. Robinson, op. cit., p. 569.

[160] P. Carmichael Keen, op. cit., p. 802 (for this author the international criminal law system even deserves the separate name of "tempered adversality").

© for this edition by CNS

prescribed clearly and moreover should protect the accused at least in a way one or the other system protects them. The international criminal procedure is not, in my opinion, there yet, although I hope it will be. Instead, international community experiences a cumbersome set of rules that do not fit together and are impossible to operate under one structure. It is just a group of procedural mechanisms derived from common and civil law systems built on a political compromise between those two Western traditions of law.

After undermining the rationale of the combination of common and civil law systems in the international criminal procedure, the question remains what kind of procedure should be chosen for international criminal trials. The answer to this problem can be found in the goals of international criminal trials. It is predominantly accepted that the atrocity and gravity of international crimes call for the thorough understanding of events that led to their commitment. The international community expects that the truth about the crime will be revealed together with the truth about the events accompanying the crime in the interest of justice. Moreover, it has been argued on several occasions that the common law trials are rather lengthy. At the same time factual scenarios of events that occur when genocide or crime against humanity is committed are usually quite complicated. This evidently prolongs the proceedings. But the international community and, above all, the accused persons, cannot afford the trials lasting eternally. Therefore, as discussed before, the tendency in the international criminal law is to shorten the proceedings as much as possible, obviously not endangering the rights of the accused at the same time.

If those are truly the goals of the international criminal law, there is really no other choice but the civil law system. This aim may be achieved only by accepting the fact that the truth seeking functions are added to the tasks of the judge[161]. With such an objective the judge may order additional evidence when it becomes necessary and, above all, actively participate in the examination of witnesses during the trial. However, it has to be kept in mind that such choice must have its consequences. Thus, it is necessary to allow the judge to become familiar with pre-trial findings as well as perform their duties in the system of rules of evidence less strict than the one known from the common law system. This resolution adds also to expediting the proceedings.

It is not to say, however, that the civil law system should be chosen because it is a better or superior system. On the contrary, it must be observed that Conti-

[161] ICTY, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN SCOR, 49th Sess., A/49/342, S/1994/1007 (1994) 1 at. 73 (the ICTY expressed a belief, that the powers of the judge to order evidence "will enable the Tribunal to ensure that it is fully satisfied with the evidence on which its final decisions are based" because "it was felt that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the parties' rights is minimal by comparison").

© for this edition by CNS

nental States have a tendency to lean towards the adversarial system that seems more appealing[162]. As a Continental lawyer I would be equally happy to see the adversarial system operating on the international criminal forum with all its principles, restrictions and effects. But since the international community focuses not only on deciding the guilt but also revealing all circumstances in which the crime occurred, at the same time demanding velocity in the proceedings, it seems that the civil law system would serve it better. In my opinion, if the procedure to be chosen is to be adversarial, the whole concept of international criminal proceedings should be changed.

WPŁYW INKWIZYCYJNEGO I KONTRADYKTORYJNEGO PROCESU KARNEGO NA PRZESŁUCHANIE ŚWIADKA W MIĘDZYNARODOWYM POSTĘPOWANIU KARNYM

Celem artykułu jest przedstawienie, w jakim stopniu przesłuchanie świadka w międzynarodowym postępowaniu karnym odzwierciedla założenia przyjęte w kontynentalnym oraz anglosaskim postępowaniu karnym. Aby to osiągnąć, zaprezentowana zostanie analiza rozwiązań przyjętych w odniesieniu do przesłuchania świadka w prawie trybunałów *ad hoc*, tj. Międzynarodowego Trybunału Karnego do spraw zbrodni popełnionych w byłej Jugosławii (MTKJ) oraz Międzynarodowego Trybunału Karnego do spraw zbrodni popełnionych w Rwandzie (MTKR), a także stałego Międzynarodowego Trybunału Karnego (MTK). Wskazane zostanie, które elementy kontradyktoryjnej i inkwizycyjnej procedury karnej zostały przyjęte w prawie każdego z wymienionych trybunałów. Krytycznej analizie poddany będzie pomysł połączenia rozwiązań zaczerpniętych z obu systemów w celu stworzenia nowej procedury karnej, a w szczególności zagrożenie, jakie dla prawa oskarżonego do rzetelnego procesu niesie z sobą ta idea.

[162] Refer for example to Italian reform of criminal procedure in 1988 and forthcoming changes to Polish criminal procedure in July 2015.

© for this edition by CNS