Albin Eser

Changing Structures:
From the ICTY to the ICC

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I. Introduction

If one asked how the general procedural structure of the Ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and the permanent International Criminal Court (ICC) could be characterized and to what degree it may have changed, the common answer one might expect, is that the ICTY was primarily dominated by common law-adversarial features while the ICC was more influenced by civil law-inquisitorial elements. One must question, however, on what norms and facts this widespread opinion is based. Is it more or less the practical appearance in which the investigations and trials are performed? Or can this practice already be found in the underlying statutes and/or rules of procedure and evidence? And if so, to what degree are certain elements binding and programmatic for the whole procedural structure of these judicial institutions?

This question is all the more topical since in a recent publication, contrary to mainstream assumptions, an attempt was made to depict the procedure of the ICC as basically inquisitorial (with impacts on the pre-trial role and duties of the prosecutor, in particular with regards to disclosure) and, still more, to interpret, if not even overstretch, this scheme towards a policy-implementing type of proceeding in terms of

* Professor Dr. Dr. h. c. mult., Director Emeritus at the Max Planck Institute of Foreign and International Criminal Law Freiburg/Germany, former Judge at the International Criminal Tribunal for Former Yugoslavia The Hague/The Netherlands.


the "hierarchical ideal", as one of two faces of justice that were designed by Mirjan Damaška\(^3\) to whom this publication is dedicated.\(^4\)

Considering these contrary views, one in assuming adversariality as the original and still dominant structure of the international criminal justice system and the other in finding strong inquisitorial features, it appears appropriate to consider what provisions in the relevant statutes and rules may indeed be understood as indicators of one or the other procedural model – or perhaps even of a third one. For a closer look could reveal that provisions which would clearly and exclusively speak for one or the other model, though certainly existent could be much less frequent than superficial assumptions might expect. Such an outcome may be particularly disillusioning for those who are inclined to find the domestic procedure they have grown up with replicated in the international system they now have to work with; and since convinced of its superiority over other models, they would like to see it preserved, perhaps even by denoting it as not basically changeable.

In challenging assumptions – not to say prejudices – of this kind with regards to the ICTY and the ICC as exemplary institutions of international criminal justice, it seems necessary that, rather than merely be blinded by the surface of the practice in which these courts appear to operate, to instead scrutinize the norms the procedural system is – correctly or supposedly – based on. This examination which in this context cannot be more than a selective one shall be approached in two ways: one, by identifying elements in statutes and accompanying procedural rules which appear as typically adversarial, inquisitorial or of some other hybrid nature, and the other one, by focusing on truth, fairness and expediency as three structural features that are of particular significance for the character of a justice system. This scrutiny shall be performed both regarding the ICTY (II.) and the ICC (III.).

Before doing so, however, it must be clarified what is meant when speaking of "adversarial" and "inquisitorial". Similar to Damaška’s aforementioned procedural models which he does not pretend to exist as such in a specific country but to serve merely as "ideals" that may more or less be realized in different national systems\(^5\), there is neither one unique adversarial procedure nor an inquisitorial one in reality. For it is not only that the adversarial common law family has quite different members

\(^3\) **Damaška, Mirjan:** The Faces of Justice and State Authority. A Comparative Approach to the Legal Process, Yale University Press, New Haven/London 1986.

\(^4\) As to this and the other "coordinate ideal" of justice in terms of a conflict solving type of proceeding cf. the partly agreeing, partly critical review of **Swart, Bert:** Damaška and the Faces of International Criminal Justice, Journal of International Criminal Justice 6, 2008, pp. 87–114, and as to Heinze’s adaption (supra note 2) the critical book review of **Swoboda, Sabine:** Zeitschrift für Internationale Strafrechtsdogmatik, ZIS 5/2015, pp. 305–311, www.zis-online.com (29.09.2015).

\(^5\) Cf. **Damaška, Mirjan:** Structures of Authority and Comparative Criminal Procedure, Yale Law Journal 84, 1975, pp. 480–544 (482).
with divergent procedures, the inquisitorial civil law tradition, too, has evolved to various national diversities. So in order not to talk at cross purposes when using these ambivalent terms, it seems advisable to explain what is meant by each term in this context — without wanting to exclude, of course, that other descriptions may be equally appropriate, if not even better.

In my understanding it is characteristic of the "adversarial" model that the main responsibility for collecting evidence lies with the parties: the prosecutor on the one hand and the defence counsel (presenting the defendant) on the other hand, whereas the judges consider themselves primarily as arbiters or "referees". As, thus, it is considered the "parties' case" - rather than that of the judges - to establish the relevant facts, it is, at least in principle, left to the parties what evidence to present, what witnesses and exhibits to introduce, and in what manner and sequence to perform the examination. In contrast, in the "inquisitorial" model the judge has to play a much more active role. Even where, as it is nowadays the rule, the preliminary investigation is performed by the prosecutor, a judge may already be involved in controlling the pretrial phase. And as soon as it comes to the trial, it is the judge who has the ex officio responsibility to establish the truth: though not at any price but at least as far as not hindered by legal bars and performed in a fair manner. Accordingly, the examination of witnesses in the trial is primarily led by the judge who, beyond evidence produced by the parties, may proprio motu call further witnesses or ask the parties for presenting additional exhibits. Due to the different weight given to the actors of the parties and the bench, the more "party driven" adversarial model is considered primarily to secure the fairness of the proceedings whereas the "judge led" inquisitorial model seems more engaged in the search for truth. However, although this juxtaposition may be correct in so far as it is mirroring contrary procedural propositions, it is wrong in confusing the aims and manners of a procedure. So instead of opposing fairness and truth as antagonism, both must be combined: in aiming at truth as basis of justice to be performed in fair manner.

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8 As those may in particular be found in various articles cited supra note 1; as informative cf. also the survey by Keen, Peter Carmichael: Tempered Adversariality: The Judicial Role and Trial Theory in International Criminal Tribunals, in: Leiden Journal of International Law 17, 2004, pp. 767–814 (769 ss.).
10 For more details to the all too much neglected distinction between, and the coordination of, aims, means and manners of international criminal justice cf. Eser, Albin: Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY, in: Swart, Bert/Zahar, Alexander/Sluiter, Göran (Eds.), The Legacy of the International Criminal Tri-
With these juxtapositions in mind, it has to be asked which provisions in the statutes and procedural rules of the ICTY and the ICC could be identified as indicating an adversarial, an inquisitorial or a somehow mixed structure. As far as feasible, this search will start with the investigation phase, progressing to the indictment and trial, ending with the judgment and any appeals and finally in particular summarizing aspects of truth, fairness and expediency.

II. Origins and Amendments at the ICTY

1. Basic Neutrality of the ICTY Statute

Starting with the Statute of the ICTY, there are only a few provisions which could serve as evidence of preference for one or the other procedural model. This is not surprising though since the ICTY statute is an unusually short court code, with altogether merely 34 articles of which – aside from organizational matters – not more than 10 are of a procedural nature anyhow.

(a) The two provisions that like to be named as main indicators of adversariality\(^{11}\) are dealing with rights and duties of the actors in the proceedings: Article 16 (1) according to which “the Prosecutor shall be responsible for the investigation and prosecution of persons responsible for [relevant] crimes”, and Article 21 (4) (e) according to which the accused is – as one of his minimum guarantees – entitled “to examine, or have examined, the witnesses against him”. As to both instances, however, it may be questioned whether they are indeed as peculiarly adversarial as commonly assumed.

Regarding the prosecutor’s – and not the judges’ – responsibility for the investigation and prosecution of suspects, to consider this as a uniquely adversarial seems to be based on the outdated assumption that in the inquisitorial model the judge does not only function as judicator but also as accusator and investigator. Whereas this may have been the inquisitorial practice for many centuries, at least since the fundamental procedural reforms of the 19th century when the prosecutor was introduced as a new procedural organ beside the judge, it is the prosecutor’s function to initiate a prosecution and to collect evidence. Since thus in the same way as the prosecutor is the accuser in the adversarial system he also is it nowadays in inquisitorial jurisdictions, it is at least misleading to identify accusatorial with adversarial and to juxtapose with inquisitorial.\(^{12}\)

\(^{11}\) Cf. Mundis, From 'Common Law' towards 'Civil Law', supra note 1, p. 368, fn. 4.

But even where by doing so the prosecutor may be supported or controlled by an
investigating judge (as in the case of the French juge d' instruction), it is primarily the
prosecutor's task to present evidence beyond a reasonable doubt. Thus, the only dif­
ference that in this respect may remain, is the ex officio duty of the inquisitorial judge to
establish the truth\footnote{Therefore it would be less misleading, instead of using the historically predisposed term of "inquisitorial" (cf. Keen, ibid.), rather to speak of "instructorial" in terms of the judges' duty to instruct themselves of the truth to the extent factually possible and legally permissible: cf. Eser, Albin: Reflexionen zum Prozesssystem und Verfahrensrecht internationaler Straf­gerichtsbarkeit, in: Sieber, Ulrich et al. (Eds.), Strafrecht und Wirtschaftsstrafrecht. Festschrift für Klaus Tiedemann, Carl Heymanns Verlag, Köln 2008, pp. 1453–1472 (1467 ss.), www.freidok.uni-freiburg.de/volltexte/6275 (29.09.2015); Eser (supra 12), p. 226.} while in the adversarial model the judge may leave this job to the
parties. Yet, even if the judge's duty to establish the truth is not explicitly addressed in
the ICTY Statute can this silence so easily be interpreted in adversarial terms? Or
wouldn't it be feasible to suggest that the prosecutor's primary responsibility for the
investigation in Article 16 (1) does not relieve the judge from basing his judgment
on the establishment of truth he is also obliged to search for?\footnote{Cf. Eser (supra note 10), p. 117 ss. with further references.}

Regarding the defendant's (or his counsel's) right of cross-examination in
Article. 21 (4) (e) this is no more a matchless feature of the adversary procedure either.
Though cross-examining witnesses is certainly more visible when the presentation of
evidence is principally performed by the parties, it is not unknown in primarily judge­
led trials either (as for instance in Germany) to let the prosecutor and the defence ques­
tion witnesses or even to leave the examination completely to them if so desired.\footnote{Cf. §§ 239, 240 (2) (German) Strafprozeßordnung (Criminal Procedure Code).}

(b) Provisions in the ICTY Statute which, on the other hand, could serve as inquis­
titorial indicators are equally few and scarcely stronger.

The one element cited as typically inquisitorial is that the trial and judgment are
entrusted to a bench of professional judges (Article 12), without requiring a jury.\footnote{As in particular emphasized by Meron, Theodor: Procedural Evolution in the ICTY. Journal of International Criminal Justice 2, 2004, pp. 520–525 (522, fn. 3).}

Yet, neither are lay judges foreign to inquisitorial procedures (as they do indeed
exist as assizes or even as true juries in many continental-European countries),
nor require adversarial procedures necessarily a jury of common law style (as it is
still lacking in Japan), thus disproving the absence of a jury as inquisitorial indicator.

The other provision highlighted as "the most striking civil-law element" in the
ICTY Statute considered as typically inquisitorial in the ICTY Statute is the right
of the prosecution for appeals even against a discharging judgment. However, although the prosecution’s right to appeal is certainly more common in civil-law jurisdictions, the question is whether its denial has essentially adversarial reasons. Or couldn’t it be that barring the prosecution from appealing an acquittal is rather rooted in the prohibition of double jeopardy and, thus, is neither included nor precluded by one or the other of the procedural models?

At any rate, more inquisitorial influx may be found in the requirement that the judgement delivered in public shall be accompanied by a reasoned opinion in writing (Article 23 (1)), while the additional possibility of appending a separate or dissenting opinion is probably more common in adversarial appeal procedures.

(c) Since the rest of the provisions of the ICTY Statute does not indicate a preference for the one or the other procedural model, it appears basically neutral. As therefore a sort of open book it offers itself to be filled by judge made law and practice. This is even expressly made possible by the ICTY Statute mandating the judges of the International Tribunal to “adopt rules of procedure and evidence” for the conduct of the proceedings (Article 15).

2. Adversarial Complements and Inquisitorial Supplements in the ICTY Rules of Procedure and Evidence (RPE)

The refraining of the ICTY Statute from explicitly favoring a certain procedural model was, on the one hand, readily used by common law proponents to install rules of procedure and evidence in primarily adversarial terms (a). On the other hand, however, the openness of the ICTY Statute also left room for inquisitorial features and amendments (b). Furthermore taking into account that not few rules as over time developed appear somewhat ambivalent, at least on paper the ICTY procedure shows a mixed picture (c).

(a) The key provision that gave the ICTY proceeding its adversarial appearance from the very beginning concerns the Presentation of Evidence (Rule 85). By entitling the parties to present the evidence and by ordering the sequence in the typical adversarial manner with the prosecutor to begin, the defence to follow and eventually to be continued with a rebuttal and rejoinder (A) and accordingly allowing examination-in-
Changing Structures: From the ICTY to the ICC

chief, cross-examination and re-examination (B), it is the parties the main responsibility for establishing the relevant facts is assigned to. Although "the judge may at any stage put any question to the witness", at first place "it shall be for the party calling the witness to examine such witness in chief" (B, sentence 2). In thereby giving weight to which party had called the witness, the adversarial distinguishing between a "witness of the prosecution" and "witness of the defence" seems to underlie.

In a similar way, though not yet expressly speaking of "prosecution case" and "defence case", the aforementioned sequence in Rule 85 (A) as well as the order of opening statements (Rule 84) are obviously based on this separation of the trial into two phases (i)–(iv), eventually continued (v) with evidence ordered by the chamber pursuant to Rule 98. Later on, in making use of the Tribunal’s power to amend the RPE (Rule 6), this dichotomy was formally introduced (Rules 65bis(G) and 73bis(E)) and termed in the adversarial manner. As a consequence thereof, at the close of the prosecutor’s case the Trial Chamber is enabled to enter a judgment of acquittal if there is no evidence supporting a conviction (Rule 98bis).

Further adversarial elements can be seen in the accused’s right to appear as a witness in his own defence (Rule 85 (C)) and in the – over time introduced – guilty pleas and plea agreement procedures (Rules 62bis, 62ter and 100).

(b) Regarding provisions that point in the inquisitorial direction, the first ones to be mentioned as already concerning the investigation stage are the disclosure obligations of the prosecutor Rule 66), in particular of exculpatory material (Rule 68). Although these duties had already been provided for in the original version of the RPE, it seems to have been difficult for parties with an adversarial background to comply with them. In reaction thereto it became later on necessary to introduce sanctions for not complying with disclosure obligations (Rule 68bis).

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19 Cf. infra to note 39.
21 Although the „defence case“ is certainly a specialty of the adversarial procedure not existent in most civil law jurisdictions, as stressed by Mundis (supra note 1), p. 377, fn. 75, this difference can hardly be explained with his argument that in inquisitorial trials the defence would not have sufficient possibility to raise exculpatory issues. Although in that system the judge’s duty to establish the truth, of course, also extends to discharging evidence and mitigating circumstances, this does not discharge the defence counsel from his own responsibility and possibility to put forward exonerating material.
23 As to describing the defendant having to enter a plea as “the most evident indication of the Anglo-American adversarial influence” see Zappala (supra note 12), p. 48; cf. also Tocchilovsky, Vladimir: Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia, in: Fischer, Horst/Kreß, Claus/Lüder, Sacha Rolf (Eds.), International and National Prosecution of Crimes under International Law, Berlin Verlag, Berlin 2001, pp. 627–644 (638 s.).
A certainly still more fundamental move into the inquisitorial direction was the introduction of the pre-trial judge (Rule 65er) in 1998 which, as particularly supported by France, was even considered as "the embryo of a true Investigative Chamber". In combination with Rule 107 also applicable in pre-appeal procedures, both as pre-trial or as pre-appeal judge he or she can exert considerable influence on the parties: by performing status conferences (Rules 65er (C) and 73bis), by establishing a work plan for the parties (Rule 65er (D), by determining the number of witnesses the parties may call and the time available for presenting evidence (Rules 73bis (B), (C), 73rer (B)-(E)), or by inviting the prosecutor to reduce the number of counts charged in the indictment (73bis (D)).

Further steps with inquisitorial indications can be seen in the admission of written statements and transcripts in lieu of oral testimony (Rules 89 (F), 92bis) and in the Trial Chamber's discretion to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings (Rule 94 (B)).

Besides those rather few rules regarding the admissibility of evidence, worthy of note is the absence of any specific rules by which the admission and weighing of evidence would be restrained. Consequently, by neither be bound by national rules of evidence (Rule 89 (A)), the chamber may admit all relevant proof unless its probative value is substantially outweighed by the need to ensure a fair trial (Rules 89 (C) and (D)).

This high degree of free evaluation of evidence, however, is on the other hand counterbalanced by the duty of the Trial Chamber, different from a common-law

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27 Meron (supra note 16), p. 522.
28 Both Rules – as also the following ones adopted – in the comprehensive reform package of 10 July 1998, partly with later amendments, as in particular of 17 November 1999.
29 Regarding the reasons that led to the rather substantial impact granted the judges on the indictment procedure cf. de Guzman, Margaret M./Schabas, William S.: Initiation of Investigations and Selection of Cases, in: Sluiter et al. (supra note 12), pp. 132–169 (138 s.); Tochilovsky (supra note 23), pp. 631 s., 635.
32 Described as one of the important deviations from some adversarial systems by Antonio Cassese in his First Annual Report of the ICTY to the UN General Assembly 29 August 1994; cf. Boas (supra note 18), p. 19.
jury trial, to give a reasoned judgment, both first pronounced orally in public and as soon as possible in writing (Rule 98(1)).

As to sentencing, the ICTY RPE are moving even further in an inquisitorial direction by expecting from the parties relevant information for determining an appropriate sentence already during the presentation of evidence (Rule 85 (A) (vi)) and by requesting the parties to address matters of sentencing already in the closing arguments (Rule 86 (C)), thus even prior to a guilty verdict. Another sentencing feature considered as inquisitorial, or at least different from adversarial jurisdictions, is the fact that, beside rather general references to the gravity of the offense and the individual circumstances of the convicted person in Article 24 (2) ICTY Statute, the Trial Chamber is not given any special sentencing rules. By having to render a reasoned opinion, however, there is at least an indirect way of controlling sentencing criteria and of securing equal treatment.

(c) Beside those Rules that can be interpreted as representing more adversarial or more inquisitorial features, there are quite a few provisions in the ICTY RPE which somehow stand on the borderline between both models as they may not be foreign to each of them.

This already concerns the preparation of the indictment by the prosecutor and its review and confirmation by a judge as the relevant Articles 18 (4) and 19 ICTY Statute are given concrete form in the RPE Rules 47 and 50. Although in an adversarial proceeding the judge may have less influence on the indictment and requests for additional material than he is in inquisitorial manner granted in Rule 47 (F), both systems require some involvement of a judge in the admission of an indictment.

In a similar vein, the power of the trial chamber to exercise control over the mode and order of interrogating witnesses and presenting evidence (Rule 90 (F)) and the right of a judge at any stage to put any questions to the witness (Rule 85 (B)), are, at least in principle, not unique for the one or the other procedural model. But there are certainly differences in degree: whereas in an inquisitorial trial the presiding judge will be the dominant figure, in an adversarial trial he will restrict his role to merely controlling the parties as the main actors in the presentation of evidence. And whereas the inquisitorial judge, if not requested otherwise, will be the principal examiner, questions of the adversarial judge will be exceptions, if in practice asked at all.


34 Introduced 10 July 1998.

35 Also introduced 10 July 1998.

36 Meron (supra note 16), p. 523 s.

37 Cf. supra II. 1 to Article 23 (1) ICTY Statute.

38 Cf. supra to note 15.
The same applies to the right of the trial chamber to order either party to produce additional evidence and to summon witnesses (Rule 98). And as if to make clear that the judges, especially when practiced in adversarial reluctance in this respect, should not hesitate to make use of this right, its independence from the parties was stressed by changing the original version of Rule 98: instead of merely conceding the chamber “itself” to summon witnesses, it may more strongly do so “proprio motu”.39

Before summing up what conclusions could be drawn form the Statute and the RPE of the ICTY to the character of its procedure, it appears appropriate to find out to what degree the various provisions may have an effect on three crucial elements of the procedure: ascertaining the truth (3.), guaranteeing fairness (4.) and pursuing expediency (5.).

3. Ascertaining the Truth

Different from fairness, as will be seen, ascertaining the truth as a precondition of a truly truthful judgment seems not to have been in mind when the Statute of the ICTY was drafted; for if not overlooked, neither the term of truth nor any indication thereto is identifiable in this basic document.

Fortunately, this lack is made up by the ICTY RPE in two respects: by obliging every witness solemnly to declare that he “will speak the truth, the whole truth and nothing but the truth” (Rule 90 (A)) and that the trial chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as “to make the interrogation and presentation effective for the ascertainment of the truth” (Rule 90 (F) (i)). Interestingly though, whereas witnesses are duty bound to tell the truth, the trial chamber is merely requested to organize the presentation of evidence in a truth supporting manner – without itself being obliged to search for the truth. Neither is the prosecutor under such a duty, particularly not with regard to exonerating facts; for even as far as the prosecutor has a duty of disclosure to the defence of any material which may suggest the innocence or mitigate the guilt of the accused (Rule 68 (i)40, he is not obliged to present it in the trial. Thus not really obligated to ascertain the truth, his task does not go further than to prove guilt to the satisfaction of the trial chamber “beyond a reasonable doubt” (Rule 87 (A), irrespective of what the truth may really be.41

4. Guaranteeing Fairness

Unlike truth, fairness is already taken notice of in the ICTY Statute. This is done in two respects: firstly, by requesting the trial chamber to ensure a fair and expeditious

40 As originally there was a disclosure duty only when the existence of evidence known to the prosecutor “tends to suggest” exculpatory material, since the amendment of 28 July 2004 / the duty to disclose already starts when “any material […] may suggest” the innocence etc.
41 But cf. also supra note 33. As to farther going commitments to establish the truth at the ICC cf. infra III.3.
trial (Article 20 (1)) and secondly, by entitling the accused to a fair and public hearing (Article 21 (2)). Whereas in the second respect the beneficiary of fairness obviously shall be the accused, in the first respect fairness can be understood in broader terms: so by covering, if not even the prosecution, at least the victims and witnesses, particularly so as due regard shall also be given their protection (Article 20 (1), last sentence).

These guarantees are substantiated in the ICTY RPE in various stages:

In the pre-trial stage, "in the interest of a fair and expeditious trial", the chamber may invite the prosecutor to reduce the number of counts charged in the indictment and may fix the number of sites or incidents comprised in one or more of the charges (Rule 73bis (D)) and may direct the prosecutor to select the counts in the indictment on which to proceed (Rule 73bis (E)).

In the trial stage, fairness is guaranteed in three respects: by generally requiring the chamber to apply rules of evidence which will "best favour a fair determination of the matter" (Rule 89 (B)), by allowing the chamber to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial" (Rules 70 (G) and 89 (D)), and by empowering the chamber, in order to guarantee the accused a "fair trial", to exclude a person from the courtroom (Rule 80 (A)).

Concerning both the pretrial and trial stage, the trial chamber may permit interlocutory appeals if the decision involves an issue that would significantly affect "the fair and expeditious conduct of the proceedings or the outcome of the trial" (Rule 73 (B)).

What – as already in the ICTY Statute – is left open, however, is the question what fairness means in concrete terms. When determining this is entrusted to the judiciary, the Tribunal may perhaps draw some guidance from the minimum guarantees of Article 21 (4).

Another question is: whom the fairness rules are designed to serve: only the accused or also other participants in a criminal case, in particular victims and witnesses? While Article 20 (1) ICTY Statute, as suggested before, offers a broad coverage, the RPE seems to distinguish between the accused and other persons, this at least in so far as the exclusion of a person from the courtroom is permitted only for guaranteeing the accused the right to a fair trial (Rule 80 (A)). But shouldn't victims and witnesses enjoy such fairness as well?

5. Pursuing Expediency

As can already be seen from the rules on fairness, these are very often combined with provisions concerning the expediency of the proceedings.

This already applies to (Article 20 (1)) ICTY Statute according to which the judges must ensure that the trial not only be fair but also expeditious. Although one might think that expediency is an element of fairness anyhow, by separately mentioning these two requirements it appears possible to conclude that a lengthy proceeding is not necessarily unfair. By both distinguishing and coupling these maxims, however, the message seems to be that each of them has its own value and that they should ideally be pursued together.

In these terms identically requiring fairness and expediency are the ICTY Rules 73bis (D) and (E) concerning the reduction of counts by the prosecutor, with the additional right of the chamber to determine the number of witnesses the prosecutor may call and the time available to him for presenting evidence (Rule 73bis(C)). In the same vein the prosecutor may be called upon by the chamber to shorten the estimated length of the examination-in-chief for some witnesses (Rule 73bis(B)).

Likewise referring both to fairness and expediency are possible restrictions on interlocutory appeals (Rule 73 (B)). This remedy, by the way, is also a remarkable example of RPE changes which had to be made in reaction to forensic experiences. In expecting that it would be both fair and less time consuming not to wait with motions until the conclusion of the trial, in the original Rule 73 (B) of 1997 interlocutory appeals had been admitted in a rather generous manner. Since this led to a flood of appeals, however, in respecting fairness and expediency certain restrictions had to be made.43

Different from these combinations with fairness, in one instance expediency also appears with truth, possibly even contravening it, though. For by empowering the trial chamber to exercise control over the mode and order of presenting evidence so as to "avoid needless consumption of time" (Rule 90 (F) (ii)), truth can run the risk of being sacrificed for expediency.

6. Preliminary Result

Perhaps it seems to be piecemeal to determine the character of the ICTY proceeding by trying to identify single provisions of its statute and procedural rules as more adversarial, inquisitorial or otherwise. But, if the basic instruments do not present the procedure explicitly as of this or that character, there is no other way. Having in these terms explored the ICTY Statute and its RPE, the following can be summarized:

43 After Rule 73 (B) had been adopted 12 November 1997, sections (B)-(D) were basically remodeled in amendments of 12 April 2001 and 8 December 2004. Cf. Meron (supra note 16), p. 521 s., Tochilovski (supra note 42), p. 1118 s.
Contrary to common assumption, the ICTY Statute did not design the tribunal’s procedure as adversarial but remained basically neutral. Thus being an open book that finally had to be filled by judge made law and practice, very much depended on how the RPE would be framed. Not in the least under substantial common law influence, the original version was certainly given a primarily adversarial face. The more the RPE developed further by supplements and innovations, however, the more the structure of the ICTY moved into an inquisitorial direction. This picture is also reflected in three major elements: Whereas the search for truth finds itself hardly expressed in the ICTY documents, guaranteeing fairness is of their concern right from the beginning. Although expediency of the proceedings was similarly aimed for, adversarial hurdles in this regard required corrections.

Thus it is not only that the ICTY Statute had refrained from onesided favoring of an adversarial scheme, even the RPE, though starting into this direction, later on became intermingled with inquisitorial features. If despite this at least mixed legal structure on paper the ICTY’s image is still that of an adversarial procedure, it is the forensic practice that marks the picture. Although the ICTY RPE would allow the chambers a more proactive role in controlling the proceedings, it seems to be difficult to relinquish perceptions and attitudes learned in domestic experience. Though no relevant empirical data can be offered, this prevalence of habits over norms may explain that, while some ICTY chambers would indeed make use of their right to ask questions, to request the parties to produce additional evidence or even to summon witnesses proprio motu, others will scarcely do so. It is no secret either that the one will have a more inquisitorial background whereas the others will rather come from common law jurisdictions.

III. Developments at the ICC

In comparison with the ICTY, regarding the sources of information on the structure of the procedure the provisions for the ICC defer in two respects: While the ICTY documents had been rather scarce with procedural indications, the ICC documents offer more information. And whereas the ICTY Statute left it to the RPE to give the procedure more concrete form, most of the ICC structure is already designed in the Statute, thus leaving the RPE not much to add. A further feature to mention is the learning factor of the ICC from the experiences of the ICTY.

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44 As described in more detail in Eser (supra note 10), p. 138 ss.; cf. also Mundis (supra note 1), p. 370 ss.
1. Further Shifts to a Mixed Structure in the ICC Statute

As already mentioned, different from the ICTY Statute’s silence with regard to the character of its procedure, the ICC Statute is both the main source of information and in leading its procedure to a hybrid position.

The one provision among almost no other that may be claimed as a clear indication of adversariness is the parties’ right to submit evidence (Article 64 (8) (b)). But if this seemed to mean that the judges should – in adversarial manner – lean back and leave the presentation of the evidence entirely to the parties, one has to take notice of the context of this presentation and examination right of the parties. For not only that it is in the same article embedded in the power of the presiding judge to give directions for the conduct of proceedings and that the submission of evidence by the parties is subject to the directions of the presiding judge, the trial chamber has much more power than usual in the controlling of already the preparation and then of the performance of the trial: in particular to order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties (Article 64 (6) (d)), to request the prosecutor to present additional evidence in the case of a guilty plea of the accused (Article 65 (4)), and to take all necessary steps to maintain order in the course of a hearing (Article 64 (9) (b)).

A particularly important step in inquisitorial direction is the duty of the prosecutor, by extending the investigation on all facts relevant to an assessment of criminal responsibility, to investigate incriminating and exonerating circumstances equally (Article 54 (1) (a)). In the same vein levelling the adversarial antagonism of the parties, the prosecutor shall disclose to the defence evidence which he or she believes shows or tends to show the innocence of the accused, or to mitigate his guilt, or which may affect the credibility of prosecution evidence (Article 67 (2) sentence 1). And as if seeming afraid that the prosecutor might too readily assume exculpatory irrelevance, the decision is entrusted to the court (sentence 2).

Without wanting to repeat in detail what other inquisitorial elements that already had been installed in the ICTY procedure were preserved in the ICC Statute, indicative examples in particular be to mentioned are

– the further strengthening of the pre-trial chamber (Articles 57–61),

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the presentation of evidence relevant to the sentence during and prior to the close of the trial (Article 76),

- regarding the judgment and other judicial decisions the requirement of a written opinion in form of a full and reasoned statement of the trial chamber’s findings on the evidence and conclusions (Article 74 (5)), and

- the prosecutor’s right of appeal against an acquittal (Article 81).

2. Implementing Provisions in the ICC RPE

Thus, since the basic procedural lines had already been drawn by the ICC Statute, the RPE was not left more than to implement them in more concrete form – whereby the length and detail of some of these rules is not necessarily a sign of additional significance.

As far as the RPE provisions, dealing with the various stages of the proceedings (Chapter 4 Rules 63–103), the investigation and prosecution (Chapter 5, Rules 104–130) and the trial procedure (Chapter 6, Rules 131–144), render indications for the character of the procedure, these point in an inquisitorial direction.

This in particular applies to

- the duty of the prosecutor to provide the defence with the names of witnesses who are intended to be called to testify sufficiently in advance so as to enable an adequate preparation of the defence (Rule 76),

- the duty of the prosecutor to permit the defence to inspect any books, documents etc. which are material for its preparation (Rules 77 and 78),

- the equivalent disclosure duties by the defence (Rule 79),

- the duty of the defence to give notice to the prosecutor sufficiently in advance when intending to raise grounds for excluding criminal responsibility (Rule 80),

- the trial chamber’s power to make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence (Rule 84),

- the possibility of agreements between the prosecutor and the defence not to contest certain alleged facts etc, provided that the chamber is not of the opinion that a more complete presentation is required in the interest of justice, in particular the interests of the victims (Rule 69), thus both subjecting the parties’ discretion in the presentation of evidence to the chamber’s control and putting the victim as a sort of third party at their side,

49 As to different approaches to the separation of the verdict and sentencing cf. Safferling, Christoph: International Criminal Procedure, OUP, Oxford 2012, p. 436 ss.
— the trial chamber’s discretion to assess freely all evidence with regard to its relevance or admissibility (Rules 63 (2)), and
— the chamber’s duty to give reasons for any rulings on evidentiary matters (Rule 64 (2)).

Perhaps even more indicative for the ICC’s procedural character is not what the RPE had to supplement but what they do not address. This concerns the separation of the trial into “prosecution case” and “defence case”. Whereas the ICTY trial was right from the beginning designed in this manner and later on formerly separated in these two phases and explicitly termed in this manner50, neither the ICC Statute nor its RPE are providing such an adversarial structure of the trial.51 Consequently there is no room for an intermediate judgment of acquittal as it is available at the ICTY.52 Furthermore, not only that Rule 140 relevant for the conduct of the proceedings does not provide a scheme as it exists for the sequence of the presentation of evidence in the ICTY trial (Rule 85 (A)), in the ICC procedure it is the trial chamber that enjoys primary discretion to give directions for the conduct of proceedings, thus making the parties second in coming to an agreement on the order and manner in which the evidence should be submitted (ICC Statute Article 64 (8) (b), RPE 140 (1)).53 No less departing from adversarial customs, the trial chamber is even given the right to question a witness before he is questioned by the party that is to submit evidence by this witness (Rule 140 (2) (c)). Interestingly though, despite the normative disregard in the ICC provisions, speaking in terms of “prosecution case” and “defence case” still seems favoured in practice.54 This again may be explained by the difficulty to leave adversarial perceptions behind.55

50 Cf. supra II. 2 (a) to note 20.
52 According to ICTY RPE Rule 98bis; but cf. Calvo-Goller (supra note 22), p. 287 ss.
53 Cf. Bitti (supra note 51), Article 64, margin no. 45.
55 Cf. supra II. 6 to note 45. As far as this dichotomy of the trial is considered to be required by the presumption of innocence, however, this assumption seems to be based on a widespread misunderstanding of this guarantee. For when literally understood as if a not finally convicted, though suspect, person would have to be treated as innocent, how could it then be possible to perform an investigation, not to speak of a trial, against such an “innocent” person at all? Therefore, while a non-convicted person may not be dealt with as guilty, that does not preclude, under relevant suspicions given, to treat this person as an accused who may be confronted with incriminating evidence he may defend himself against in a trial (as to such an inherently consistent understanding of the presumption of innocence cf. Eser, Albin: Justizialle Rechte, in: Meyer, Jürgen (Ed.), Charta der Grundrechte der Europäischen Union, 4th ed., Baden-Baden 2014, pp. 651–717 (674 ss), www.freidok.uni-freiburg.de/volltexte/9723 (29.09.2015). Thus another explanation for separating the trial might only be the prosecutor’s burden of proof, if interpreted in the extreme adversarial way that the defence is not supposed to do anything as long as the incriminating evidence does not appear sufficient. Even if this position may be feasible in cases with few charges to be tried within an accepted period of
Yet, even if the ICC procedure may still appear more adversarial in practice, on the paper of its Statute and RPE, its mixed structure is still more moving in an inquisitorial direction than that of the ICTY. 56 This ambivalent impression is also recognisable by the way in which the major elements of truth (3), fairness (4) and expediency (5) are dealt with.

3. Ascertaining the Truth

Different from the ICTY in whose Statute truth was not mentioned at all, 57 the ICC Statute takes notice of it in various respects:

- By obliging the prosecutor to investigate incriminating and exonerating circumstances equally "in order to establish the truth" (Article 54 (1) (a)), truth is – at least implicitly – proclaimed as a goal of the ICC.

- In thereby being lifted to a more neutral position, the prosecutor is turned from an one-sided adversary of the defendant to a non-partisan searcher of the truth, thus the adversarial parties antagonism is at least partially suspended. 58

- By giving the court the authority to request the submission of all evidence that it considers necessary for the "determination of the truth" (Article 69 (3)), truth must also be of concern for the court. Yet, since merely phrased as "authority" and not as a duty of the court to request the submission of evidence relevant for the truth, this provision – by not adopting a stronger proposal of the Preparatory Commission 59 – still falls behind the ex officio duty of an inquisitorial judge to establish the truth. 60

- By requiring the witnesses before testifying "to give an undertaking as to the truthfulness of the evidence" to be given (Article 69 (1)), the witness' duty to tell the truth is already pronounced in the ICC Statute rather than, as it is the case at the ICTY, to be left to the RPE.

56 Though the kind and degree of mixture may be evaluated differently: whereas, for instance, Kreß (supra note 33, at p. 603 ss) speaks of a "unique compromise structure" whose appropriate balance between the adversarial and inquisitorial elements has been left to the judges to decide, in Zappala’s more critical view (supra note 12, at p. 50) “the end results can again be roughly summarized as a mixed (perhaps chaotic?) procedural system with some adversarial and some inquisitorial traits”.

57 Cf. supra II. 3.


Regarding the RPE, however, different from those of the ICTY in which the relevant truth provisions are to be found, the ICC RPE do not prescribe more than the "solemn undertaking" by the witness "to speak the truth, the whole truth and nothing but the truth" (Rule 66 (1)). Thus other truth relevant matters seem to have been considered sufficiently dealt with in the ICC Statute.

4. Guaranteeing Fairness

Different from rather few fairness pronouncements in the Statute of the ICTY and instead more in its RPE, with the ICC it is just the other way around: whereas there most fairness provisions can already be found in the Statute, there are only few in the RPE.

Regarding the content the provisions of the ICC Statute are similar to that of the ICTY:

- in obliging the trial chamber to ensure a fair and expeditious trial (Article 64 (2)),
- in requesting the trial chamber to facilitate the fair and expeditious conduct of the proceedings by conferring with the parties (Article 64 (3) (a)),
- by authorizing the trial chamber, if necessary for its effective and fair functioning, to refer preliminary issues to the pre-trial chamber (Article 64 (4)),
- by empowering the presiding judge to give directions for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner (Article 64 (8) (b)),
- by entitling the accused to a fair hearing conducted impartially, substantiated by various minimum guarantees (Article 67 (1)),
- by requesting that measures taken for the protection of victims and witnesses shall not be prejudicial or insistent with the rights of the accused and the fair and impartial trial (Article 68 (1)), and
- by allowing an appeal to be based, beside errors of law or fact, on any other ground that affects the fairness or reliability of the proceedings or decision (Articles 81 (1) (b) (iv), 83 (2)).

This list of explicit references to fairness is supplemented by the ICC RPE, if not overlooked, merely with two provisions:

- by requesting the trial chamber, in order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, to make any necessary orders for the disclosure of documents or information not previously disclosed (Rule 84), and

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61 Cf. supra II. 3.
by authorizing the court to set time limits regarding the conduct of any proceed-
ings in order to facilitate fair and expeditious proceedings, bearing in mind in par-
ticular the rights of the defence and the victims (Rule 101 (1)).

A novel feature in these ICC provisions, worthy of mention, as not yet known in
the ICTY documents, is the unusual combination of fairness with impartiality instead
of expediency (Articles 64 (8) (b), 67 (1), 68 (1)). Whether this is a reaction to the lack
of impartiality already observed or simply accidental, is open for speculation. At any
rate it is hardly of structural significance.

5. Pursuing Expediency

As noticed before, requests of expediency like to be combined with fairness. This
applies to

- the general obligation of the trial chamber to ensure a fair and expeditious trial
  (ICC Statute Article 64 (2)),
- the general authorization of the presiding judge to give directions for the conduct
  of the proceedings (Article 64 (8) (b)),
- the more particular duty of the trial chamber to confer with the parties regarding
  the conduct of the proceedings (Article 64 (3) (a)),
- the referral of preliminary issues to the pre-trial chamber (Article 64 (4)),
- the orders for the disclosure of documents and information (ICC RPE Rule 84),
  and
- the right of the court to set time limits regarding the conduct of any proceedings
  (Rule 101 (1)).

Interestingly though, in comparison with the expediency provisions of the ICTY there are some differences to be noted: a more formal one in that at the ICTY the
relevant provisions are mainly regulated in the RPE whereas at the ICC they are
mainly placed in the Statute, and more substantial ones in that the items that are
dealt with are partly common to both courts whereas others differ.

Both jurisdictions have in common the general principle of expediency (ICTY Statute Article 20 (1) and ICC Statute Article 64 (2) respectively), and the power
of the court to set time limits regarding the conduct of the proceedings (ICC Rule
101 (1)) or in particular for presenting evidence (ICTY Rules 73bis(B), (C), 90 (F)
(ii)).

Where they differ, it seems to be due to a different focus: While the ICTY wants to
further expediency by requesting the prosecutor to reduce the counts of the indict-
ment (RPE Rules 73bis (D) and (E)) and to keep interlocutory appeals under control

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62 Supra II. 5.
(Rule 73 (B)), the ICC expects more expediency especially by referral of preliminary issues to the pre-trial chamber (Statute Article 64 (4)) and by disclosure orders (RPE Rule 84).

In practice, however, attempts to streamline the procedure so far have not been significantly successful.63

**IV. Conclusions**

If this survey on the development of the ICTY and ICC procedures has given the impression that it was prejudicial in favoring one over an other procedural model, then the purpose of this presentation would be misunderstood. Rather, by exploring flux and variety of different influences it mainly was to show two features: the openness of the written provisions for different developments and the need, by leaving domestic archetypes behind, to find appropriate international criminal procedures of its own.

As to the first concerning the past, when trying to identify adversarial, inquisitorial or other procedural elements in the statutes and rules of the ICTY and the ICC, this was not done for demonstrating superiority of one over the other but to refute the widespread belief that these international criminal procedures have, right from the being and even across various changes, been and remained basically adversarial. That may look so in the way they are practiced. If reading though what is in the written documents, the picture is a quite different one. This is especially true of the ICTY Statute which hardly gave any structural guidance for the procedure of this tribunal. Thus left to be complemented by judge made rules of procedure and evidence prominently influenced from common law traditions, the procedure received its adversarial appearance. But when more and more troubled by practical problems, in particular with the excessive length of trials not the least due to the predominant role of the parties,64 amendments in terms of a more proactive role of the judges by introducing pre-trial chambers and by strengthening their power of control already led the ICTY proceedings in inquisitorial direction. And as if to prevent that newly to be established international courts fall back behind already reached positions, the founders of the ICC, rather than leaving it to the RPE, already designed major features of its proceedings in its Statute, as in particular with comparatively strong powers of the judges both in the pre-trial and in the trial, in promoting the prosecutor to a more neutral role by obliging him to investigate incriminating and exonerating circumstances equally, and thus in furthering the ascertainment of truth.

Of the lessons that can be drawn from this development and experience, only these may be mentioned: On the one hand it is welcome if the statute of an international criminal tribunal, rather than prescribing its procedural structure in a rigid form, leaves room for adapting it to its special needs by way of non-statutory rules that

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63 Cf. Zappala (supra note 12), p. 50 s.

can more easily be amended. In these terms, to the same degree and in the same way as such rules can be established they may also be changed. Thus they are less “eternal” and more easily correctible when turning out as not functioning well enough, as well as more quickly adaptable to new needs. On the other hand, however, if the statute leaves too much room to be filled by judge made law and practice as it was the case with the ICTY, very much depends on the ability and willingness of the rule makers, instead of simply implementing the own domestic model, to be oriented entirely towards the special conditions and needs of international criminal justice, regardless which national models or procedural traditions they may come from – an expectation of disregarding own domestic practices that was hardly present when the ICTY RPE were originally generated. Against this background it is understandable that major elements of the ICC procedure were already laid down in this Statute instead of being left to its RPE.

As secondly with regard to the future, though lessons of the past were mostly to be learned from adversarial deficiencies, this is not to be understood as a call for simply replacing the procedure with some kind of an inquisitorial one. On the contrary, one of the messages hopefully emanating from these procedural observations is the proposition that international criminal justice can neither be organized by plainly adopting and then adjusting a domestic model, be it adversarial or otherwise, nor by simply blending different models. What rather is necessary, first, is to identify the special aims international criminal justice is being established for, and, secondly, to develop procedural means and modes best suited to achieve those goals. Thus, instead of choosing a model of domestic criminal justice of this or that provenience and trying here and there to make it fit to the special needs of international criminal justice, one should – without feeling bound to a certain traditional system – be keen enough to construct a procedure top-down: from the aims international criminal justice has to pursue towards the best appropriate means to reach them.65

It is also in these terms, I think, when Mirjan Damaška with regard to fairness in international criminal justice states that it “need not be identical with that of national criminal law and enforcement”. And in referring to a concept according to which fairness should be expanded beyond its traditional domestic confines and “not be focused on the position of defendants, but extend to other procedural participants as well”, he continues that according to this view “fairness to defendants should be balanced with fairness to victims and other procedural protagonists – including prosecutors – taking into account the peculiar problems they encounter in the administration of interna-

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tional criminal justice". In the same vein and an even more general form he suggests "that international criminal justice should be evaluated by sui generis standards, and that these standards need not be identical with the most demanding ones found in national justice systems".67

As it was found in this survey on procedural developments at the ICTY and ICC, the present state of international criminal justice is not more than a mixture of competing models: certainly not entirely bad but still not good enough since in particular suffering from structural inconsistences not the least due to divergent legal-political objectives. In order to gain international criminal justice its own character and standing, its substantive aims and procedural requirements must be perceived and constructed from a truly transnational angle.

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67 Damaška, Mirjan: Should national and international justice be subjected to the same evaluative framework?, in: Sluiter et al. (supra note 12), pp. 1418–1422 (1422).