

Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals

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Abstract

International criminal procedure (ICP) has fluctuated uncertainly between common- and civil-law procedural principles. Consensus on the principles underlying ICP is needed to ensure consistent standards of justice. The article begins by comparing criminal procedure in common- and civil-law systems, and describes the theories underlying the trial and judicial role in these systems. It then compares ICP to civil- and common-law criminal procedure. This comparison establishes the scope of judicial powers that can be exercised by international criminal judges. These powers differ from those exercised by both common- and civil-law judges. The article concludes by arguing that ICP is based on a new theory of the trial: the theory of ‘tempered adversariality’.

Key words

civil law; common law; ICTY/ICTR/ICC; international and comparative criminal procedure; judicial role and powers; trial

I. INTRODUCTION

International criminal procedure is in its infancy. The International Criminal Court (ICC) has yet to hear its first case. The Rules of Procedure applied in the ad hoc tribunals are barely a decade old, and these rules were fundamentally changed in 1999. Academic commentary and judicial discourse mirror the youth of this procedural law. While there is extensive commentary on specific areas of discontent, such as the rights of the defence or ICC prosecutorial independence, there has been little systematic analysis of two issues that are fundamental to analyzing and understanding international criminal procedure. The first is the extent to which international criminal procedure reflects common- and civil-law procedure. It is common to see the words, ‘the ad hoc tribunals’ procedures are primarily adversarial’, in both judgements and academic writing, without a discussion of the extent to which this is true. The second comprises

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the principles and theories underlying international criminal trials, which are directly linked to the principles and theories underlying the judicial role. Related to this second issue is the scope of procedural powers possessed by international criminal judges.¹

This article's aim is to describe the scope of judicial powers before the international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC), and to establish what theory underlies international criminal trials and the judicial role. To achieve this, the first part of the article compares common- and civil-law criminal procedures and describes the theories underlying the trial and the those underlying the judicial role in these systems. This is necessary because the procedures applied in international criminal tribunals (ICTs) are an amalgam of the procedures applied by the two legal systems. Understanding domestic criminal theory is a prerequisite to understanding international criminal theory.²

The second part of this article examines the procedures that apply in the international criminal tribunals (ICTs), describes the scope of powers exercisable by ICT judges, and delineates the limits of judicial power in areas where the judicial role is unclear. This description and delineation will be accomplished by describing the judicial role in the ad hoc tribunals, and in the ICC, and then examining the extent to which these roles reflect the judicial role in the civil- and common-law systems. This exercise is important because a 'fair and efficient criminal trial presupposes that the roles of the different actors are clearly identified'.³ Clarifying the scope of judicial powers will promote a more consistent standard of justice, because when powers are clearly understood, they will be more consistently applied.

The article concludes by using the analysis in the first two sections to establish that a new theory of the judicial role and of trial procedure underlies international criminal procedure. This theory is best described as 'tempered adversariality'.

2. COMPARATIVE CRIMINAL PROCEDURES

This section outlines and compares the procedures applied in common- and civil-law systems at the pre-trial and trial stages. It establishes the basic similarities and differences between the systems, which will provide a comparative basis for analyzing international criminal procedure. The fact that the common-law system was traditionally a jury system will be ignored, because common-law procedure is largely the same whether juries are used or not. This article focuses on trial procedures, so will not address the different approaches to appeals taken in the two systems.

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1. There is no evidence that the ad hoc tribunal judges, prosecutors and defence counsel are turning their minds to these issues. Existing academic writing on the topic is often merely descriptive, repeating what is obvious in the Statutes of the ICTY and the ICTR.
 2. See *Prosecutor v. Delalić*, Judgement, Case No. IT-96-21, T. Ch. II quater, 16 Nov. 1998, at 159, which suggests that in order to understand international criminal procedure it is necessary to understand the procedures applied in the common- and civil-law systems.
 3. D. W. Cassel, 'The Independence of the Judiciary Synthesis Report', (1992) 63 *Revue Internationale de Droit Pénale* 873.

2.1. Basic civil- and common-law procedure

I shall briefly outline civil-⁴ and common-law procedures before comparing them in more detail. The common-law criminal justice system (CJS) is engaged when a complaint is made to the police regarding an offence. The police investigate and have discretion to lay charges against the accused if there is sufficient evidence. Prosecutors review the charge, and have the discretion to drop it if the evidence seems weak or the offence is too minor to warrant prosecution. If the prosecution proceeds, a committal hearing will be held, at which some judicial body or figure⁵ will determine whether there is sufficient evidence to warrant a trial.⁶ During trial the prosecution calls witnesses and questions them in a manner designed to elicit all facts relevant to the prosecution's case. This questioning is known as the examination-in-chief, and only open-ended questions can be asked, except on uncontested or unimportant matters. The defence may cross-examine, which should be done using leading questions. After the prosecution has called all its witnesses, the defence can then call witnesses, who are examined-in-chief by the defence and cross-examined by the prosecutor. The accused may represent him- or herself in this process, but normally is only involved by instructing his or her lawyer. Once

4. It is well known that the procedure before the international criminal tribunals (ICTs) amalgamates civil- and common-law criminal procedures, but what this actually means is not so clearly understood. Some writers describe the civil-law criminal justice systems as 'inquisitorial' (D. D. N. Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', (1994) 5 *Criminal Law Forum* 507, at 508), a word which in common-law countries invokes 'visions of torture, secrecy, and dictatorial government' (M. E. Frankel, 'The Search for Truth: An Umpireal View', (1975) 123 *University of Pennsylvania Law Review* 1031, at 1053). Given the virulent, even hysterical, reaction that some writers have to systems which allow extensive judicial involvement (see, e.g., Greenspan's article, which attacks Judge Richard May for placing limitations on Milošević's questioning of a witness, despite the fact that the accused's questions were lengthy, argumentative, and often not even questions: E. L. Greenspan, 'Edward L. Greenspan Has Been Reading Transcripts of Slobodan Milosevic's War Crimes Trial. He's Come to One Conclusion: "This Is a Lynching"', *National Post*, 13 March 2002, at A20), and to the word 'inquisition', we must begin by debunking some of the myths about inquisitorial procedures.

In early inquisitorial systems, the functions of investigation and prosecution were performed by the same person, a prosecuting judge, who would frequently be a member of, or closely linked to, the executive (L. I. Stern, 'Inquisition Procedure and Crime in Early Fifteenth-Century Florence', (1990) 8 *Law and History Review* 297). These systems developed a terrible reputation because the accused was being judged by the prosecutor, who had complete, unchecked power over an accused, facilitating abuse. Prosecuting judges would use any means to get at what they believed or wanted to be the 'truth', including torture.

The myth that must be debunked is that modern civil-law systems are inquisitorial in the traditional sense. While the roots of civil-law systems are inquisitorial, the judicial and investigatory functions have been largely separated (see, e.g., the French Code de procédure pénal (hereafter CPP, available online at <http://www.legifrance.gouv.fr/WAspad/ListeCodes>, last visited 28 April 2003), Article préliminaire (I)). Defendants have important procedural rights, including the right to be presumed innocent, to be represented by counsel, and to present a defence (European Convention on Human Rights, Arts. 6(2), 6(3)(c), 6(3)(d)). It is no longer accurate to think of modern inquisitorial systems as systems of organized repression in which suspects have no rights and all power is concentrated in the hands of a single official who is quite prepared to abuse this power to secure a conviction. Since the word 'inquisition' conjures up unpleasant and inaccurate images, I shall describe the legal systems which have their roots in inquisitorial procedures as civil-law systems.

5. E.g. provincial court judges in Canada, magistrates in England, and grand juries in some US states.
6. Minor cases will proceed directly to trial once the charges are laid, without a committal hearing. The reason for this is that committal hearings take up a great deal of time and resources, and the accused is not regarded as being in sufficient jeopardy, in terms of the potential sentence, to warrant such a hearing. It should be noted that at least one common-law jurisdiction, Canada, has been moving steadily away from relying on and using committal hearings. See D. M. Paccioco, 'A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry', (2003) 48(2) *Criminal Law Quarterly* 151–85. The amendments referred to in that article have now come into force.

the defence rests, the prosecution and defence make closing arguments to the court (which may consist of a judge and a jury, or of a judge alone) as to whether the accused should be found guilty or innocent. The judge will then issue a decision on culpability, and will make a decision on sentence at a later date.

Civil-law procedure is quite different,⁷ and there are significant differences between different civil jurisdictions, unlike common-law systems, which are largely homogenous. Civil-law criminal justice systems can be divided between states where procedures are based on a prosecutorial model, where a public prosecutor conducts or supervises the investigation, and those where a *juge d'instruction* conducts or supervises the investigation.⁸ Accordingly, the following description is representative, but does not reflect any particular state's system.

When the police are informed of the charge, they conduct a preliminary investigation and advise the public prosecutor of the offence.⁹ The public prosecutor, or a figure known as a *juge d'instruction*, directs the subsequent investigation, although minor cases are delegated to the police. Witnesses and the accused will be questioned (although the accused has the right to remain silent), and the statements made will be added to a file known as the dossier. Once the investigation is complete, the prosecutor or judge decides whether to send the case to trial.

Before trial, the trial judges receive and review the dossier, which contains statements taken from witnesses and the accused, the accused's criminal record, and any psychological assessments of the accused. Traditionally, the information in the dossier was evidence against the accused. The strict common-law distinction between information and evidence (evidence being information adduced orally at trial), did not exist in civil-law systems. Today, the principle of orality applies in civil-law countries, so that the only evidence against the accused is that testified to or discussed in court. The trial judges use the dossier to prepare for trial, so will be familiar with the evidence before the hearing begins.

Trials are held before a panel of three judges, or judges and jury, depending on the system. The panel president controls the trial, including the order of witnesses and the questions asked.¹⁰ The president begins the hearing by questioning the accused, going over the accused's criminal past, if any, and the accused's denials,¹¹ although this is not a feature of all civil-law systems.¹² The accused can refuse to respond, although psychologically this must be difficult to do. The president then calls and questions witnesses. Traditionally, the prosecutor or defence (parties) would not directly question witnesses, but could suggest questions to the

7. The following description of civil-law procedure has been taken from a substantial number of sources, including C. Elliott, *French Criminal Law* (2001) and also C. Johnston, 'Trial by Dossier', (1992) 142 *New Law Journal* 249.

8. K. Ambos, 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports', (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 89.

9. France, CPP, *supra* note 4, Art. 19.

10. Germany, *Strafprozeßordnung*, German Criminal Procedure Code (hereafter StPo), s. 238(1). English translation available online at <http://www.iuscomp.org/gla/>, last visited April 28, 2003.

11. *Ibid.*, s. 243(4).

12. Belgium, Code d'instruction criminelle (hereafter CDIC), Arts. 315–17. Available online at http://www.staatsblad.be/index_fr.htm, last visited 28 April 2003.

president, who would choose whether to put them. The parties normally put forward few questions. Nowadays parties may have the right to ask questions directly and, under some civil systems, even to conduct the examinations.¹³ Traditionally, the trial was a confirmation of the evidence in the dossier, so that statements by witnesses not present constituted evidence. Today, the principle of orality may prevent this from occurring. Once all evidence has been heard, the parties make arguments to the panel.¹⁴ The judges then retire, before issuing a decision on both culpability and sentence.

2.2. Comparing pre-trial procedures

The role of prosecutors is important for my analysis of judicial powers, and will be considered here, because tasks performed by the prosecutor will not be performed by the judge. Common-law prosecutors do not direct the investigation but advise the police on legal matters, and may seek judicial authorization for particularly intrusive investigative techniques, such as phone-tapping. The police decide whether to commence an investigation. After charges are laid, prosecutors have extensive discretionary powers. They make quasi-judicial decisions as to whether the case should be prosecuted or dropped,¹⁵ and whether to plea-bargain.¹⁶ Such decisions can be reviewed, but the courts will generally refuse to intervene.¹⁷ Prosecutors do not seek a conviction at any cost. Their primary duty is to ensure that justice is done, and that a fair trial is conducted on the merits.¹⁸ Despite this, they are more akin to private attorneys than quasi-judicial figures. At trial they are partisan advocates who present all the evidence possible indicating guilt, leaving exculpatory evidence to the defence. Common-law police and prosecutors have no duty to seek out exculpatory evidence on behalf of an accused. The accused is expected to conduct this search. One difficulty with the common-law system is the accused often will not have resources to conduct an investigation, and the state is not obliged to investigate on the accused's behalf.¹⁹

Under civil-law systems, the prosecutor or *juge d'instruction* plays a different role. They direct criminal investigations,²⁰ although most cases are delegated to the police.²¹ Where *juges d'instruction* are involved, they conduct the investigation, and

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13. Germany, StPo, *supra* note 10, s. 240(1), (2); for Italy see A. Perrodet, 'The Italian System', rev. E. Ricci, in M. Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (2002), 348–412, at 368–70 and see also J. S. Lena and U. Mattei, 'Introduction to Italian Law', *ibid.*, ch. 8 (2002).
 14. Belgium, CDIC, *supra* note 12, Art. 335.
 15. *Krieger v. Law Society of Upper Canada* 217 DLR (4th) 513, (SCC), 168 CCC (3d) 97, paras. 23–32 (2002); *Imbler v. Pachtman*, 424 US 409, at 423–4 (including footnote) (1976).
 16. United Kingdom, Prosecution of Offences Act, s. 10, in *European Criminal Procedures*, at 441, (1985).
 17. *R v. DPP ex parte C*, 1 Cr. App. R. 136 (QB) (1995).
 18. Law Society of Upper Canada, Commentary to Rules of Professional Conduct, Rule 4.01(3); *Boucher v. The Queen*, SCR 16 (1955); *Berger v. United States*, 295 US 78, 85, 55 S Ct 629, 633 (1935) (USSC).
 19. For a general discussion of the issues raised by the indigence of defendants, see Canadian Bar Association, 'Making the Case: The Right to Publicly Funded Legal Representation in Canada', in *Report of the Canadian Bar Association* (2002). It is available online at http://www.cba.org/CBA/pdf/2002-02-15_case.pdf, last visited 8 April 2003.
 20. France, CPP, *supra* note 4, Art. 41.
 21. M. Delmas-Marty, 'Towards a European Model of the Criminal Trial', in M. Delmas-Marty (ed.), *The Criminal Process and Human Rights: Towards a European Consciousness* (1995), 193.

then refer the case to the prosecutor, who handles it at trial. The discretionary powers of the prosecutor or *juge* vary between civil systems. French and Belgian prosecutors may decide whether cases go to trial,²² but in Italy and Germany the principle of procedural legality applies,²³ obliging the prosecutor to prosecute. Dropping a case requires judicial authorization,²⁴ although the principle is not absolute.²⁵ Plea-bargaining is virtually unknown in the civil system, although similar arrangements are developing, as courts deal with an increasing number of cases.²⁶ A further key difference between civil- and common-law systems is that civil prosecutors and *juges d'instruction* are expected to be impartial and to search for both exculpatory and incriminatory evidence.²⁷ The reason for this is found in the civil-law theory of truth-finding, which the following paragraphs examine. Common-law truth-finding theory will be discussed in the section which addresses trial procedures.

The reason why I address civil-law truth-finding theory in this 'pre-trial' section, and common-law truth-finding theory in the 'trial procedures' section, is because civil theory believes that the best way to find the truth is through a pre-trial investigative process, whereas common-law theory argues that the best way to find out the truth is during the trial. Civil-law theory is rooted in pre-trial procedures, whereas common-law theory is rooted in the trial process.

Civil-law truth-finding theory assumes that the best way to discover the truth is through an investigative process in which an investigator collects facts, reviews them, and draws conclusions about guilt or innocence. Civil theory suggests that the body best suited to carry out this task is the state, which is regarded as neutral and benevolent, interested in discovering the truth.²⁸ It is argued that the natural sciences support the notion that investigation is the best method of establishing the truth; scientific research is conducted through an investigative process in which hypotheses are tested against observable events, not through an adversarial procedure. One logical conclusion of the civil-law view is that an adversarial trial is not needed to discover the truth, because the facts are uncovered during the investigation. Trials, in civil theory, are for reviewing the facts and deciding on a sentence. The civil pre-trial process of investigation (or *instruction*, as it is known in French), is based on this theory. The facts discovered by the *juge d'instruction* or prosecutor are included in the dossier, which will be reviewed by a trial judge in a non-adversarial trial. Such a system can only find the truth if the prosecutor or *juge d'instruction* investigated both inculpatory and exculpatory evidence. A corollary is that the prosecutor or *juge* must be impartial and unbiased, otherwise evidence contradicting the bias might be left out of the dossier.

22. France, CPP, *supra* note 4, Art. 40; Belgium, CDIC, *supra* note 12, Art. 28(1).

23. Germany, StPo, *supra* note 10, Arts. 152(2), 153, 154. Italy, Italian Constitution, Arts. 25, 112; English translation available online at <http://www.oefre.unibe.ch/law/icl/itoot.html>, last visited 28 April 2003; Ambos, *supra* note 8, at 98.

24. Germany, StPo, *supra* note 10, s. 160; C. J. M. Safferling, *Towards an International Criminal Procedure* (2003), 76.

25. J. Fionda, *Public Prosecutors and Discretion: A Comparative Study* (1995), 167–9.

26. See, e.g., CPP, *supra* note 4, Arts. 41–2, 41–3, which allows French public prosecutors to divert some cases out of the criminal justice system; similar provisions are found in Germany, StPo, *supra* note 10, s. 153.

27. France, CPP, *supra* note 4, Art. 81; Germany, StPo, *supra* note 10, s. 160(2).

28. N. Jörg, S. Field, and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?', in P. Fellell *et al.* (eds.), *Criminal Justice in Europe: A Comparative Study* (1995), 41, at 46.

Unfortunately, civil-law theory ‘requires an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures.’²⁹ The system breaks down if the investigator is biased, develops a belief in the suspect’s guilt, or has an interest in a guilty verdict regardless of the facts. Modern civil-law theory, and most civil-law systems, address this problem by separating the functions of beginning a criminal case, investigating, and judging.³⁰ The investigator is more likely to be unbiased if he or she has not laid the initial complaint, but believing that investigators can remain completely impartial is probably unrealistic:

In the early hours of an investigation everyone is a suspect, and quite properly so . . . The police always say that they keep an open mind, which in a limited sense is true: their mind is open until, at one point, it closes. That point comes when the decision is made to charge a person with a crime – sometimes on the basis of sound and sufficient evidence, sometimes not.

That’s the point where the collective mind of the police snaps shut with an audible click. That’s where impartial investigation stops, and is replaced by an attempt to secure the conviction of the person charged. To talk about an ‘open mind’ from that point on is more than inaccurate. It is a joke.³¹

The functions of investigation and judgement should be separate for this reason. Abuses are possible, threatening individual liberty, if one person exercises both powers.³² Having an independent judge who has not conducted the investigation will help eliminate the problem of investigator bias.

The civil-law argument that the natural sciences support the notion that the best way to find the truth is through an investigative process is also flawed. While it is true that individual scientific discoveries are made through investigation, the process of advancing scientific knowledge actually possesses many of the characteristics of the adversarial process. When a scientist believes that he or she has made a discovery, the report of the discovery will be submitted to a jury of the scientist’s peers. In the academic world, the scientist will write a report of the discovery, which will be submitted for publication. Before publication, the report will be reviewed by other academics, to determine whether there are any flaws in the report, or in the scientific methods used. After publication, the report will be read and considered by other academics, who may spot flaws, and who may conduct their own investigations. Even in the non-academic world, where research is sponsored by corporations looking to turn a profit, new ideas will be analyzed by more people than just the scientist who made the initial discovery. Government watchdogs may review ideas to ensure that they are safe, and extensive testing will be done to ensure that the discovery operates as expected. Only after a new idea has been subject to peer review can the idea become generally accepted. Many ideas are discredited during this process.

29. *Ibid.*

30. V. Dervieux, ‘The French System’, in Delmas-Marty and Spencer, *supra* note 13, at 230–6.

31. While I would not go this far, having worked with numerous investigators who are extremely careful to maintain objectivity, the risk of investigators becoming partial is eloquently described in this quotation from E. L. Greenspan and G. Jonas, *The Case for the Defence* (1987), 129.

32. J. Larguier, *La Procédure Pénale* (1993), at 16–17; Elliott, *supra* note 7, at 12; J. Hodgson, ‘Codified Criminal Procedure and Human Rights: Some Observations on the French Experience’, (2003) *Criminal Law Review* 165, at 177.

Now that we have reviewed civil-law truth-finding theory, we can return to the pre-trial process applied in civil-law countries. Although the *juge d'instruction* is under an obligation to act impartially, and to search equally for exculpatory and inculpatory evidence, these duties would be meaningless if they could not be enforced. Accordingly, civil systems allow the defence to ask that further investigatory steps be taken, provided the evidence sought is considered important.³³ The *juge* or prosecutor can refuse the request if granting it is not necessary to establish the truth or granting it would, at that time, prejudice the ongoing investigation.³⁴ These refusals may be appealed.³⁵ This process differs from the common-law system, in which the accused has no right to require the police to take investigatory steps,³⁶ and means that exculpatory evidence is more likely to be discovered before trial in civil-law systems, which may lead to the case being dropped.

In the common-law system, judicial involvement in the investigation is limited to authorizing intrusive or coercive state activity, such as issuing arrest or search warrants.³⁷ Judges act as a check on state power, when the state wishes to adversely affect individual liberty. In civil-law systems, judicial involvement during the investigation varies. Where the investigatory powers have been placed in the hands of a *juge d'instruction*, there is considerable judicial involvement. The *juge* can carry out the investigation personally, will direct the police,³⁸ and may have powers to authorize intrusive investigatory measures, such as searching homes.³⁹ The *juge* often has a high degree of independence in deciding whom to investigate, not being subject to executive control.⁴⁰ The *juge* may also have powers of detention, but since allowing one person both to investigate and detain could threaten individual liberty, many civil-law systems separate these powers.⁴¹

In some civil-law jurisdictions, the *juge d'instruction* plays a role similar to that of common-law judges. In Italy, most investigative powers are vested in the public prosecutor, who directs the investigation. The *juge d'instruction* decides whether the prosecutor may use intrusive investigative methods, and whether there is sufficient evidence to detain and question the accused.⁴² This supervisory role has led

33. Germany, StPo, *supra* note 10, Arts. 136(1), 163a(2), 166(1).

34. Belgium, CDIC, *supra* note 12, Art. 61 quinquies, para. 1; France, CPP, *supra* note 4, Art. 82-1; Italy: Perrodet, *supra* note 13, at 364.

35. France, CPP, *supra* note 4, Arts. 81 (last para.), 82-1.

36. In common-law systems, the police will normally conduct further investigation when provided with information that suggests an accused is not guilty, or when information is provided indicating that the circumstances were different from those expected. Although the police cannot be required to conduct such further investigations, if a defendant provided inculpatory evidence which was ignored by the police, this would make a 'not guilty' verdict more likely. The defence would legitimately argue that a proper investigation was not undertaken and that as a result a reasonable doubt exists.

37. For the United Kingdom see Police and Criminal Evidence Act, s. 8, and Denning LJ's judgement in *Chic Fashions (West Wales) v. Jones*, [1968] 2 QB 299 (CA). For the United States, see US Constitution, Fourth Amendment; for Canada, see Canadian Charter of Rights and Freedoms, Constitution Act, 1982, s. 8, and *Hunter v. Southam*, [1984] 2 SCR 145.

38. France, CPP, *supra* note 4, Arts. 81, 151, 152; Belgium, CDIC, *supra* note 12, Arts. 55, 56.

39. Belgium, CDIC, *supra* note 12, Art. 89.

40. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Request for the Indication of Provisional Measures, Judgement of 8 Dec. 2000, [2000] ICJ Rep., at para. 25.

41. France, CPP, *supra* note 4, Art. 137-1; Elliott, *supra* note 7, at 14.

42. Perrodet, *supra* note 13, at 355; D. Salas, 'The Role of the Judge', in Delmas-Marty and Spencer, *supra* note 13, at 507-8.

commentators to suggest that such a figure is really a *juge de l'instruction*, rather than a *juge d'instruction* (the judge of the investigation, rather than the investigating judge).⁴³

2.3. Comparing trial procedures

The boundary between the investigative and adjudicative stages is porous in civil-law systems, since trial judges have the power to order further investigation.⁴⁴ It has been argued that common-law judges play a similar role, as they have the power to call witnesses.⁴⁵ However, while psychiatric or other professional assessments may be ordered by the court,⁴⁶ common-law judges never require the police to carry out further investigation, and rarely call witnesses.⁴⁷ The reason is common-law judges are required to play a passive role. I shall now discuss the common-law truth-finding theory, which is the theory underlying the common-law trial and judicial role.

The heart of the difference between the civil- and common-law traditions is a fundamentally different conception of the judicial role. Civil-law theory requires judges to be active, whereas common-law theory requires judges to be passive. Civil-law theory argues that the best way to find out the truth is through investigation, so judges must be active because they are the investigators.⁴⁸ Common-law theory distrusts the investigator, who is believed to be biased, and therefore unreliable when it comes to determining the truth. As such, common-law judges play a passive role, managing the trial to ensure that both parties are fully able to present their cases. The judge finds the truth after hearing all the information presented. The parties call all witnesses, examining and cross-examining them. Common-law theory believes that the truth is most likely to be established through an adversarial procedure, in which the parties present facts to a neutral adjudicator. This ensures that all relevant facts are brought forward, because the parties are highly motivated to find and present all the evidence supporting their view of the case. No 'neutral' investigator could be relied on to discover all evidence because he or she is not similarly motivated. The judge must be completely impartial because bias or preconceptions will influence his or her consideration of the facts. No judicial involvement in the investigation is permissible, because this would cause the judge to develop preconceptions.

During trial, the common-law judge may question or call witnesses, but questions should be rare, and it is almost unheard of for a judge to call witnesses. This passive role is rooted in a zealous concern for impartiality and a desire to protect the adversarial method. Extensive judicial involvement is fundamentally inconsistent with the notion that the best way to discover the truth is for highly motivated parties to elicit the evidence supporting their case.

43. F. Tulkens, 'Criminal Procedure: Main Comparable Features of the National Systems', in Delmas-Marty, *supra* note 21, at 12.

44. Belgium, CDIC, *supra* note 12, Art. 228; France, CPP, *supra* note 10, Art. 28; Germany, StPo, *supra* note 4, Art. 221.

45. J. R. Spencer, 'Introduction', in Delmas-Marty and Spencer, *supra* note 13, at 26–7.

46. See e.g., Criminal Code of Canada RSC, 1985, s. 672.11, c. C-46, as amended.

47. *The Queen v. Nicholas John Apostilides*, 154 CLR 563 (Aust. HC) (1984).

48. In civil-law systems judges were traditionally the investigators and, today, even trial judges have investigatory powers: *supra*, note 44.

Where judges do engage in extensive questioning or call witnesses, common-law theory suggests that this will have a negative impact on the truth-seeking process. First, if a judge effectively takes over the questioning, the parties may be prevented from eliciting all the facts relevant to their case, meaning that information may be missing when the judge decides the case. Second, where the judge is involved in extensive questioning the parties may be unable to present facts in their most favourable light. This means particular inferences that could be drawn from the facts might not be considered. Third, judges are human, and have certain unconscious preconceptions and biases. Where a judge does the bulk of questioning, the answers may reflect these biases. For example, a judge may believe that children are often unreliable witnesses. As a result, in cases involving children, that judge's questioning might primarily address the reliability of the child's testimony, focusing on flaws and inconsistencies, without addressing areas which suggest that the child's recollection is accurate. The evidence therefore reflects the judge's preconceptions. It could be argued that this is not a bad thing because the judge will have fewer biases than the parties. However, this argument ignores the fact that the parties are more familiar with the case than the judges, because they were the individuals involved. Accordingly, the judge may miss relevant facts which the parties would have elicited. This argument also does not recognize that the parties are in a good position to elicit evidence that contradicts the opposing party's biases. In a criminal case, while the defence may elicit facts that show a child's recollection to be inaccurate, the prosecution will elicit facts that show the child's recollection to be reliable.

This is why common-law appeal courts stop trial judges from taking the case out of the hands of the parties.⁴⁹ It is also why common-law judges who want to hear from a witness may suggest that one of the parties call that witness, but will not force a party to do so.⁵⁰

The consequence of adversarial theory is that common-law judges must be passive figures who ensure the parties present their evidence according to the rules of adversarial trials, which allow both parties an equal opportunity to present all relevant facts. Limitations on the parties' ability to present facts should only be imposed for the most cogent reasons, otherwise relevant evidence might remain hidden, making the truth less likely to be found.⁵¹

The first major criticism of common-law adversarial theory is that it only works if the litigants are equally strong. Such equality is rare, particularly in criminal cases, where the state generally has far greater resources than the individual. Where one party has greater resources, it has a correspondingly greater ability to investigate and present facts to the court. Since those accused of criminal offences often have few resources, they have little to no ability to seek out exculpatory evidence. A second criticism is that the parties are entitled to pursue their interests without regard to the harm that may be caused to third parties, such as witnesses, a feature

49. *R v. Valley*, 26 CCC (3d) 207 (Ont C.A.), at 230 (1986).

50. *Apostilides*, *supra* note 47.

51. R. C. C. Peck, 'The Adversarial System: A Qualified Search for the Truth', (2001) 80 *Canadian Bar Review* 456; D. M. Paccioco, 'Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof', (2001) 80 *Canadian Bar Review* 433, at 436–9.

of the system that many find repugnant.⁵² A third criticism is adversarial theory presupposes that the parties have an interest in getting to the truth. Some facts may point towards a version of the truth that neither party likes, so neither will adduce that fact. As an example, a person accused of murder might have an alibi that at the time of the murder he or she was engaged in a drug deal. The prosecutor may be aware of information suggesting the accused was involved in the drug deal, but may discount this, believing the accused committed the murder. Accordingly, the prosecutor will not present this evidence to the court, and will lead all evidence possible that indicates the accused committed the murder. The accused will not want to lead evidence of the alibi, because this will harm the accused's credibility, and could lead to charges of drug trafficking.

Common-law judges are forced to be passive for an additional practical reason: they know nothing about the case before it begins. As Judge Marvin Frankel puts it, the 'judge views the case from a peak of Olympian ignorance'. This prevents the judge from interjecting, because he or she has insufficient knowledge of the case to ask intelligent questions, so that judicial questioning may skew the process and waste time.⁵³

Civil-law judges, on the other hand, play an active role. This is possible because they are provided with the dossier or a summary of the evidence before the case goes to trial.⁵⁴ The judge conducts the initial examination of the accused, decides which witnesses to call, and questions those witnesses.⁵⁵ Unlike the common-law system, where the accused 'speaks' through a lawyer, the civil-law accused can respond at any time to the testimony of witnesses, and make comments to the judge.⁵⁶ In Belgium, for example, the public prosecutor and the accused, but not the defence counsel, must be given a chance to comment after each witness is heard.⁵⁷ The role of the parties during trial varies between different civil-law systems. In Belgium the prosecutor and defence may ask the judge to put questions to the witness, but they have no right directly to question witnesses, and the judge can refuse the request.⁵⁸ In other states, like Germany and France, the parties may put questions directly to the witnesses.⁵⁹ In Germany, if the prosecution and defence both agree, they can

52. See the comments of the French Justice Minister during the 2000 reforms to French Criminal Procedure, reproduced in Hodgson, *supra* note 32, at 175–6. Victims of sexual assault have been historically treated very badly by the criminal justice systems in common-law countries. It became a regular practice for defence counsel to cross-examine victims of sexual assault about their sexual history, for the purpose of impeaching the victim's credibility. The argument would be that a female who has sex with many partners is unworthy of belief, and would be more likely to have consented to the sexual activity leading to the charges before the court. The unfairness of this line of questioning led to amendments to the Canadian criminal code which were designed to prevent unfair questioning: Canadian Criminal Code, RSC 1985, c. C-46, as amended, s. 276(1); *R v. Seaboyer*, 2 SCR 577, 66 CCC (3d) 321 (1991).

53. Frankel, *supra* note 4, at 1042.

54. V. Tochilovsky, 'Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals', (1999) *Netherlands International Law Review* 343, at 345–6.

55. Germany, StPo, *supra* note 10, Art. 238(1); France, see Larguier, *supra* note 32, at 113.

56. C. Jorda and J. De Hemptinne, 'Un Nouveau Statut pour l'Accusé dans la Procédure du Tribunal Pénal International pour l'ex-Yougoslavie', in Richard May *et al.* (eds.), *Essays on ICTY Procedure and Evidence*, in Honour of Gabrielle Kirk McDonald (2001), 215, at 224.

57. Belgium, CDIC, *supra* note 12, Art. 319.

58. *Ibid.*

59. Germany, StPo, *supra* note 10, Arts. 239(1), 240(2); France, CPP, *supra* note 4, Art. 442–1, 454.

conduct the direct and cross-examinations. When this occurs, the judge's role in questioning is limited to clarifying testimony.⁶⁰

It is not possible to compare civil- and common-law trial procedures without addressing the principle of orality. This principle will be particularly important to an analysis of the scope of powers possessed by international criminal judges. Orality means that the only information which can be used against an accused is that presented orally by a witness in court, where the witness can be cross-examined.⁶¹ The common-law tradition strongly protects orality, distinguishing between information gathered during the investigation, and evidence that can be used against the accused. Information only becomes evidence when testified to in court, so if a witness is unavailable their facts are lost. Orality is enforced by the rule against hearsay, which prevents out-of-court statements from being used against an accused. This prevents, for example, a police officer being called as a witness to recount everything that other witnesses have said. Although orality is strongly protected by the common law, this protection is not absolute.⁶²

Traditional civil-law trials did not respect orality, because the trial merely reviewed the written materials. No distinction was made between information gathered during the investigation and evidence. Witnesses might be called to confirm information in the dossier, or to resolve factual disputes, but the written statements of absent witnesses could still be used against the accused. In modern civil-law systems the principle of orality plays a significant role, although it is not respected to the same degree as in common-law systems. This protection of orality is due, at least in part, to Article 6 of the European Convention on Human Rights (ECHR), which provides for the right of the accused to a 'fair and public trial'⁶³ and to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.⁶⁴ These rights 'can only be fulfilled via oral confrontation with the witnesses'.⁶⁵ Today, when factual matters are at issue before a first-instance tribunal, the right to an oral hearing applies.⁶⁶ The 'right to examine or have examined witnesses' means that the accused must be able to question witnesses, either at the trial or pre-trial stages of the proceedings.⁶⁷ As such, civil systems which allow the accused to question a witness when evidence is being taken by a *juge d'instruction* would respect Article 6. Since many witnesses may be questioned before the accused is named, and it would

60. Germany, StPo, *supra* note 10, Art. 239(1).

61. This is my definition, extracted from the materials discussed in this article.

62. Canadian courts have relaxed the hearsay rule, allowing such evidence to be admitted when it is necessary to do so and the evidence appears to be sufficiently reliable: *R v. Starr*, 2 SCR 144 (2000); *R v. Khan* 2 SCR 531 (1990); *R v. Smith*, 2 SCR 915 (1992); *R v. B. (KG)*, 1 SCR 740 (1993).

63. See Art. 6(1) European Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov. 1950), Eur. TS 5, 213 UNTS 221 (ECHR).

64. See ECHR, Art. 6(3)(d); International Covenant on Civil and Political Rights (16 Dec. 1966), Arts. 14(1), 14(3)(e), UNTS Vo. 999, 171.

65. See Safferling, *supra* note 24, at 240. See also *Barberà, Messegué and Jabardo v. Spain*, Eur.Ct.H.R. App No. 00010590/83, Decision of 6 Dec. 1988, paras. 78, 84 and 89.

66. *Fredin v. Sweden* (No. 2), Eur.Ct.H.R. App No. 00018928/91, Decision of 23 Feb. 1994, paras. 21–22.

67. *Unterpertinger v. Austria*, Eur.Ct.H.R. App. No. 00009120/80, Decision of 24 Nov. 1986, 13 EHRR 175, paras. 31–33; *Kostovski v. The Netherlands*, Eur.Ct.H.R. App. No. 00011454/85, Decision of 20 Nov. 1989, 12 EHRR 434, at para. 41; *Saidi v. France*, Eur.Ct.H.R. App. No. 00014647/89, Decision of 20 Sept. 1993, 17 EHRR 251.

be cumbersome to allow the accused to question witnesses during the investigation, such decisions have 'led to a greater degree of orality at trial in those countries where, like France and Belgium, trial proceedings have traditionally made heavy use of written evidence'.⁶⁸

Civil-law codes of criminal procedure establish that the principle of orality is respected, at least to a degree. In Germany, the general rule is that, at trial, witnesses must testify in person. Their written statements cannot be used,⁶⁹ although there are exceptions to this rule. If the witness has died, is mentally ill, his or her location is unknown, or, given the relative unimportance of the evidence, the witness lives too far from the court, their statements can be admitted as evidence.⁷⁰ Italian law strongly respects the principle of orality, making a distinction, similar to that in common-law procedure, between information gathered during the pre-trial investigation and evidence, which comes into existence during an adversarial debate at trial.⁷¹ The principle of orality is weaker in French and Belgian criminal law, but it is still respected to a degree. In these countries the judge must base his or her decision on evidence submitted and adversarially discussed during the course of the hearing.⁷²

The common- and civil-law systems have different concepts of impartiality. Impartiality has a *subjective* aspect, which refers to the judge's personal conviction, and an *objective* or *institutional* aspect, which refers to whether institutional arrangements provide a sufficient assurance of impartiality. Where, for example, a judge conducts the entire investigation and issues the judgement, there would be no institutional impartiality.⁷³ Both aspects are relevant. There is general agreement on the broad outlines of what will make a judge partial: 'The fundamental principle is that a [person] may not be a judge in [his or her] own cause'.⁷⁴ Judges are considered partial in all legal systems when they (1) are a party to the case; (2) have a material interest in the outcome of the case; (3) are related to, or have had relations with, the accused; (4) have been involved in the case as a party or witness; or (5) have been a legal advisor to one of the parties. Judges are expected to recuse themselves in these circumstances or if biased in any other manner.⁷⁵ It is also common in both civil- and common-law countries to find rules specifying that judicial involvement at one stage of the case precludes involvement at a later stage.⁷⁶

68. Dervieux, *supra* note 30, at 247.

69. Germany, StPo, *supra* note 10, Art. 245(1), 250.

70. *Ibid.*, Art. 251.

71. Perrodet, *supra* note 13, at 357; Salas, *supra* note 42, at 512.

72. France, CPP, *supra* note 4, Art. 427; Belgium, B. Pesquié, 'The Belgian System', in Delmas-Marty and Spencer, *supra* note 13, at 123.

73. *Thorgeir Thorgeirson v. Iceland*, Eur.Ct.H.R. App. No. 00013778/88, Decision of 25 June 1992, para. 49. This view has been adopted by the ICTY Appeals Chamber: *Prosecutor v. Furundzija*, Judgement, Case No. IT-95-17/1, ICTY Appeals Chamber, 21 July 2000, at 189.

74. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 2)*, 1 AC 119, at 132 (2000).

75. Germany, StPo, *supra* note 10, ss. 22(1)(1), 22(1)(2), 22(1)(4); France, CPP, *supra* note 4, Art. 66; England and Wales, *Pinochet*, *supra* note 74, at 132–3; Belgium, Code Judiciaire, Arts. 292, 293, 304, 828. See also E. Gordon, 'The Independence and Impartiality of International Judges', (1989) 83 *ASIL Proceedings* 508, at 509.

76. France, CPP, *supra* note 4, Article préliminaire (1); Germany, StPo, *supra* note 10, Art. 24; England and Wales, Supreme Court Act 1981, s. 56.

There are two key differences in the way in which the civil- and common-law systems treat impartiality. First, in the common-law system, prior knowledge of the case or the accused's character is a sufficient reason to disqualify the judge.⁷⁷ The common-law system presumes that the court should know nothing except that which is presented in court, by the parties.⁷⁸ In the United States jurors are extensively questioned about their knowledge of the case and may be excluded if familiar with it.⁷⁹ The reason for this is that those with prior knowledge may reach a decision on the case based on this knowledge, rather than on the facts adduced at trial.⁸⁰ Second, the common-law system is more likely to hold that a judge is impartial on the basis of his or her conduct during trial. When common-law judges extensively question witnesses in a one-sided manner, or display any hostility towards the accused, a reasonable apprehension of bias may arise.⁸¹ Consequently, common-law judges are loath to intervene. Civil-law practice is entirely different. The lack of distinction between evidence and information, and the practice of providing the dossier to trial judges mean that pre-knowledge of the case is automatic. Judges could not be impartial for that reason alone. While the body that decides whether a case should be sent to trial is separate from the trial court in some civil systems,⁸² others allow trial judges to make preliminary determinations about the case, although the principle of orality places limitations on the use of such knowledge. Germany requires trial court presidents to decide whether there is sufficient evidence to warrant a trial.⁸³ Accordingly, while both common- and civil-law judges must be impartial, the practical application of this rule, and the limitations it imposes on judges, differ in the two systems.

2.4. Summary of similarities and differences between civil- and common-law systems

The review of civil- and common-law criminal procedures reveals six points of comparison which can be used to evaluate the scope of judicial powers before the international criminal tribunals: (1) the common-law prosecutor is an essentially partisan figure, whereas the civil-law prosecutor or *juge d'instruction* must be impartial and has an obligation to seek out information favourable to the accused; (2) in common-law systems, judges play only a supervisory role during the investigation, while in some civil-law systems a *juge d'instruction* directs the investigation; (3) both common- and civil-law systems separate the investigatory and adjudicatory functions, although the division is more porous in civil-law systems because trial judges can order additional investigation; (4) during trial, common-law judges must be passive, while civil-law judges can be active, owing to the differing theoretical views about the truth-finding process and the role of the judge; (5) the civil- and

77. England, Magistrates' Courts Act 1980, s. 42; Canada, *R. v. Sherratt*, 1 SCR 509 (1991).

78. *R v. Liverpool City Justices ex parte Topping*, 76 Cr. App. R. 170 (at 177-179) (1983); *R v. Khan*, 3 SCR 823 (2001).

79. Federal Rules of Criminal Procedure, Rule 24.

80. *Public Utilities Commission of District of Columbia v. Pollack*, 343 US 451, pp. 466-7 (1952).

81. *Valley*, *supra* note 49, at 230.

82. In Belgium, the Chambre du conseil or Chambre des mises en accusation decides whether there is sufficient evidence to warrant a trial. CDIC, *supra* note 12, Art. 221; *European Criminal Procedures*, 109-11.

83. Germany, StPo, *supra* note 10, ss. 200-203.

common-law systems have different conceptions of evidence, and respect orality to different degrees; and (6) while the broad outlines of impartiality are the same in both systems, common-law appeal courts are more likely to find a reasonable apprehension of bias based on pre-knowledge of the case or judicial activity during trial.

3. THE SCOPE OF JUDICIAL POWERS IN THE INTERNATIONAL CRIMINAL TRIBUNALS

I shall now describe the pre-trial and trial procedures applied in the international criminal tribunals and examine these procedures in the light of the comparison of the common- and civil-law systems. The ad hoc tribunals have developed side by side, and have similar procedures. Their Statutes are virtually identical, and most of the ICTY and ICTR's Rules of Procedure and Evidence are the same. The ICC is structured differently from the ad hoc tribunals, and the ICC's procedures are also substantially different. Accordingly, the ad hoc tribunals will be analyzed together, while the ICC will be considered separately. The broad outlines of the judicial role in the ad hoc tribunals and the ICC will be described, and areas where the scope of judicial powers are unclear will be highlighted. These areas will be compared with the powers of common- and civil-law judges, and analyzed in the light of the relevant international tribunal's statute, which will establish the limits of power in these unclear areas. The article will conclude by using this analysis to set out the new theory of the trial and judicial role that applies in the international criminal tribunals.

3.1. Ad hoc tribunals

3.1.1. Pre-trial procedures

Before analyzing the scope of judicial powers in the ad hoc tribunals' pre-trial stage, the pre-trial procedures will be outlined. The Prosecutor initiates investigations and gathers evidence, and is not supervised by the judiciary unless an arrest warrant or other order supporting the investigation is needed.⁸⁴ If there is 'sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal', the Prosecutor prepares an indictment.⁸⁵ The indictment and supporting material (a summary of the evidence against the suspect)⁸⁶ must be submitted to a 'reviewing Judge',⁸⁷ who reviews the indictment. The judge has the power to confirm or dismiss each count in the indictment, to adjourn the review, giving the Prosecutor an opportunity to amend the indictment, or to request further information.⁸⁸ If a count in the indictment is dismissed but

84. See ICTY Statute (hereafter ICTYS), Art. 16(1), (2); ICTR Statute (hereafter ICTRS), Art. 15(1), (2).

85. Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, IT/32/Rev.26 (30 Dec. 2002), as amended, and Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, as amended to 6 July 2002, R. 47(A), (B), (C) (hereafter sections common to both the ICTY and ICTR Rules will be referred to as Rules).

86. *Prosecutor v. Milošević*, Decision on Review of Indictment, Case No. IT-02-54, 22 Nov. 2001, para; and see also Rule 47(I).

87. Rules, R. 28.

88. Rules, R. 47(F).

additional evidence is found, the Prosecutor may bring an amended indictment.⁸⁹ If the indictment is confirmed, the judge may issue an arrest warrant, and the suspect is now considered an accused.⁹⁰ This article will refer to the person who is being investigated or prosecuted as either the 'subject', the 'suspect', or the 'accused'.⁹¹ Once subjects are in the ad hoc tribunal's hands, they must be brought before the trial chamber or one of its judges to be formally charged. The judge or trial chamber must ensure that the accused's rights are being respected, and the subject will enter a plea in respect of each count of the indictment. Once the accused has pleaded, a date will be set for trial.⁹²

The Prosecutor's role in the pre-trial process cannot be neatly categorized as either common- or civil-law. As in some civil-law systems, the Prosecutor is solely responsible for directing both the investigation⁹³ and prosecution, and may personally investigate and prosecute, although these tasks will usually be delegated. The Prosecutor does not resemble those *juges d'instruction* who direct the pre-trial investigation but do not prosecute the case at trial.

A number of procedures are similar to those of the common-law system. The Prosecutor may plea bargain.⁹⁴ Although he or she has obligations towards the defence, such as to disclose exculpatory evidence,⁹⁵ the Prosecutor is an essentially partisan figure, under no obligation to act impartially or to seek out exculpatory evidence.⁹⁶ This means that if the Prosecutor is required to provide his or her file to the court,⁹⁷ or to provide a summary of evidence to the court,⁹⁸ this information will not contain the same guarantees of impartiality and objectivity as can be expected in a civil-law dossier.⁹⁹

Judicial involvement in the pre-trial proceedings also cannot be neatly categorized, although it is fair to say that judges are more extensively involved than in common-law countries. The ad hoc tribunals' statutes created tribunals with trial and appeal chambers but with no pre-trial chamber.¹⁰⁰ The division between chambers is porous, as judges rotate between them, depending on the needs of the court.¹⁰¹

89. Rules, R. 47(I).

90. Rules, R. 47(H).

91. Technically, a 'suspect' is someone who is being investigated by the Prosecutor but has not yet been charged. Suspects have certain rights, such as a right to counsel and a right to silence. A person becomes an 'accused' when the indictment, which is prepared by the Prosecutor, is confirmed: see Rules, R. 47(H)(i). Certain consequences flow from categorizing a person as a subject, but the differences between a suspect and accused will not be canvassed further in this article.

92. Rules, R. 62.

93. 'Investigation' is defined in the Rules as 'activities undertaken by the Prosecutor . . . for the collection of information and evidence'. R. 2, and see also Rules, R. 39.

94. ICTY Rules, Rule 62 ter; ICTR Rules, Rule 62 bis; see *Prosecutor v. Plasvić*, Sentencing Judgement, Case No. IT-00-39&40/1, 27 Feb. 2003, at 5. See also *Prosecutor v. Plasvić*, Plea Agreement, Case No. IT-00-39&40, 30 Sept. 2001.

95. Rules, R. 66–70.

96. W. A. Schabas, 'Common-law, 'civil-law' et droit pénal international: tango (le dernier?) à La Haye', (2000) 13.1 *Revue québécoise de droit international* 287, para. 15.

97. This happened in *Akayesu*, when President Kama ordered the Prosecutor to provide his or her entire file to the Tribunal. See *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 Sept. 1998, at 21.

98. ICTY Rules, Rule 65 ter(E); ICTR Rules, Rule 73 bis(B).

99. See Schabas, *supra* note 96, at para. 15.

100. See ICTYS, Art. 11; ICTRS, Art. 12.

101. Rules, R. 27.

This is dissimilar to civil-law countries, where trial judges are separate from and independent of the *juges d'instruction*, and also to common-law countries, which rigidly separate the different branches of the judiciary. The practice of rotating judges between divisions is *sui generis*, and it is argued that this is necessary because the ad hoc tribunals are so small in scale.¹⁰² The porosity between divisions of the ad hoc tribunals' judiciary may influence the interpretation here of judicial powers.

The rotation of judges helps us to determine what is meant by 'impartiality' in the ad hoc tribunals' statutes, a subject returned to throughout this article. Judges cannot preside over both the trial and the appeal,¹⁰³ which suggests that a judge who issues a final decision disposing of the case would not be considered impartial at a later stage (a belief reflected in both common and civil law). However, the willingness to rotate judges between chambers, the small number of judges, and the fact that they work together¹⁰⁴ mean that fraternization between chambers is inevitable. This suggests that the view taken of impartiality will not coincide with that taken by the almost hyper-sensitive common-law process. While trial chamber judges should not discuss the substance of their cases with those who might hear the appeal, discussion of procedural issues arising in the cases must occur, since the judges have the responsibility of designing international criminal procedure. These issues may be the subject of a later appeal. The fact that an accused reasonably believes that an appeal judge has had contact with the trial judge cannot be used to attack either judge's impartiality. A reasonable apprehension of bias, which is the test applied in the ad hoc tribunals to determine whether a judge can be removed for subjective bias,¹⁰⁵ will not be raised merely because a judge is not totally ignorant of the case.

The judges have no powers to direct the Prosecutor's investigation, although they play a supervisory role in ensuring that the accused is properly treated. Only judges can decide whether a suspect may be arrested,¹⁰⁶ whether detention can continue, and when the suspect or accused may be released.¹⁰⁷ As soon as the accused is detained, the trial chamber is expected to ensure that the accused has been given the right to counsel, that the indictment is read to the accused, and that the accused is given some basic information about the tribunal's procedure.¹⁰⁸ Similar protection for the accused is found in common-law countries and in those civil-law countries where judges play a supervisory role but do not direct the investigation. This similarity suggests that ad hoc tribunal judges should not become extensively involved in the investigation.

102. See Rules, R. 27(A), which indicates that rotation 'shall take into account the efficient disposal of cases'.

103. Rules, R. 15(D).

104. Rules, R. 24.

105. *Prosecutor v. Brđanin and Tadić*, Decision on Application by Momir Tadić for the Disqualification and Withdrawal of a Judge, Case No. IT-99-36, T.Ch. 18 May 2000; *Prosecutor v. Krajisnik*, Decision on the Defence Application for Withdrawal of a Judge from the Trial, Case No. IT-00-39, T.Ch., 22 Jan. 2003; *Prosecutor v. Furundzija*, *supra* note 73, at 189.

106. Rules, R. 55.

107. Rules, R. 40 bis, 65.

108. Rules, R. 62.

An additional supervisory function that reveals a great deal about the scope of judicial powers is the judges' gatekeeping function of reviewing the indictment. The reviewing judge confirms or dismisses each count, depending on whether a prima facie case exists.¹⁰⁹ 'The rationale at this stage is merely to prevent the prosecution from abusing the instrument of the trial'.¹¹⁰ A prima facie case is one where there is evidence which, if accepted by a trial chamber, would offer a sufficient basis for conviction;¹¹¹ this means there must be some evidence on the essential point of each charge. The task of review is similar to that 'performed by a grand jury or committing magistrate under the common-law or a *juge d'instruction* under some civil-law systems',¹¹² although it is a largely written process. In the ad hoc tribunals, Rule 15(C) allows the reviewing judge to sit on either the trial or appeal,¹¹³ reflecting the practice in some civil-law countries such as Germany, where trial judges may review the indictment. Common-law countries provide for a rigid separation of the gatekeeping and trial functions.

An analysis of whether Rule 15(C) is compatible with the right to a fair trial will shed light on how the concept of institutional impartiality will be treated before the ad hoc tribunals. Understanding this will help us understand the scope of judicial powers. As the reviewing judge must decide whether there is a prima facie case on paper, Rule 15(C) raises the concern that the trial judge may have prejudged the case. It might be argued that the decisions at the trial and review stages are different, so that prejudgement cannot have occurred,¹¹⁴ or that judges read so many summaries of fact, and issue so many orders, that by the time a case gets to trial (often months or years after an indictment is confirmed) the judge will not remember the review. While some European Court of Human Rights decisions support the notion that reviewing judges can sit on the trial,¹¹⁵ the case law is unclear,¹¹⁶ and other decisions suggest that such behaviour may not be permissible.¹¹⁷ In my view, Rule 15(C)

109. ICTYS, Art. 19; ICTRS, Art. 18.

110. Safferling, *supra* note 24, at 183.

111. *Prosecutor v. Milošević*, Decision on Review of Indictment, Case No. IT-02-54, ICTY T.Ch., 22 Nov. 2001, at 14.

112. *Ibid.*, at para. 2.

113. Judge Richard May reviewed one of the Milošević indictments, and is also sitting on the trial: *ibid.*

114. *Saraiva De Carvalho v. Portugal*, Eur.Ct.H.R. App. No. 00015651/89, Decision of 22 April 1994, at para. 37.

115. *Fey v. Austria*, Eur.Ct.H.R. App. No. 00014396/88, Decision of 24 Feb. 1993, at para. 30; *Saraiva*, *supra* note 114. In *Fey v. Austria*, the Court accepted that a trial judge's involvement in the investigation does not automatically undermine impartiality, but in that case, the trial judge was peripherally involved in the investigatory phase at the request of another judge, had not initiated the investigation, was not reviewing the strength of the charges, and had not attempted to come to any conclusion about the strength of the case. Given this, my view is *Fey* is weak support for the notion that a judge who is involved in one phase of the case can subsequently be involved at another.

116. *Bulut v. Austria*, Eur.Ct.H.R. App. No. 00017358/90, Decision of 22 Feb. 1996, paras. 1–18 (Judge De Meyer, Separate Opinion).

117. *Hauschildt v. Denmark*, Eur.Ct.H.R. App. No. 00010486/83, Decision of (24 May 1989); *Castillo Algar v. Spain*, Eur.Ct.H.R. App. No. 00028194/95, Decision of 28 Oct. 1998. The European Court of Human Rights has held that a judge's impartiality will not be undermined solely because the judge made pre-trial decisions. What is important is the scope and nature of the pre-trial decisions made (*Hauschildt*, at para. 50; *Saraiva De Carvalho v. Portugal*, *supra* note 114; *Fey v. Austria*, *supra* note 115, at para. 30. In the *Hauschildt* case, trial judges made pre-trial decisions requiring them to decide whether 'there was a very high degree of clarity' that the accused was guilty. The court upheld the accused's complaint that the tribunal was not objectively impartial (*Hauschildt*, at 52). However, in *Saraiva de Carvalho v. Portugal*, the presiding trial judge had reviewed the charges to determine whether there was sufficient evidence to warrant a trial. He dismissed a number of charges 'on the ground that the evidence gathered was not sufficient to enable a reliable assessment to be

violates the accused's right to an impartial tribunal. No accused could have faith in the impartiality of a judge who already believes that there is a *prima facie* case.¹¹⁸ This is particularly true when the accused intends to defend the case by suggesting that the prosecution has not met the burden of proof, which is an assertion that a *prima facie* case has not been made out. Institutional impartiality is undermined because a reasonable apprehension of bias is raised. Regardless of my opinion, Rule 15(C) expressly allows reviewing judges to sit on the trial or appeal and, given that the judges themselves made the rule, it will probably continue to be applied. Since the porous nature of the division between judicial functions resembles civil-law practices, and reviewing judges can sit on the trial or appeal, it will be far more difficult to establish a lack of institutional impartiality than it is under the common-law system. Again, the hyper-sensitive views found in common-law systems are not part of the concept of impartiality of the *ad hoc* tribunals.

In addition to confirming or dismissing the indictment, the judge has the power to 'request' additional information from the prosecution and to grant adjournments to allow the prosecution to gather more evidence.¹¹⁹ The power to request additional information has been exercised,¹²⁰ and its scope seems clear. The word 'request' indicates that the judges have no coercive powers if the prosecution refuses to provide more information, other than the power to confirm or dismiss. The ICTR Rules appear to grant more extensive powers in Rule 47(F)(i), which allows the reviewing judge to 'take any further measures which appear appropriate'. Similar wording was added to the ICTY Rules in 1998, but was removed in 2000.¹²¹ To date, there has been no discussion of the meaning of 'take any further measures which appear appropriate', and this power has not yet been explicitly relied on. This deficiency will be addressed here.

The ICTR Statute and Rules must be interpreted according to the ordinary meaning of the language used, in the context in which it occurs, in view of the objects and purposes of the Statute.¹²² The power division between the judiciary and procuracy and the specific powers that are conferred on the judges help us to determine what 'any further measures which appear appropriate' means. In my view, the judge is precluded from calling witnesses, ordering that witnesses be called, or engaging in

made of the probability of guilt', and the court held the judge was objectively impartial (*Saraiva, supra* note 114, at 12). This provides support for the *ad hoc* tribunals' practice of allowing the reviewing judge to hear the trial or appeal. Unfortunately, the European Court's case law is not entirely clear (see paras. 1–18 of Judge De Meyer's separate opinion in *Bulut v. Austria, supra* note 116, and *Saraiva* may not represent European law. In *Castillo Algar v. Spain*, some judges had interpreted an appeal judgement as indicating there was sufficient evidence to conclude a *prima facie* case existed. These judges then sat on the trial, and the European Court held that this undermined the trial court's objective impartiality (paras. 48–50).

118. See the arguments of the accused in *Hauschildt, supra* note 117, at para. 43.

119. Rules, R. 47(F).

120. See *Milošević, supra* note 111, at 15; *Prosecutor v. Milošević et al.*, Decision on Review of Indictment and Application for Consequential Orders, Case No. IT-02-54, 24 May 1999; *Prosecutor v. Bagilishema*, Case No. ICTR-1-I, 28 Nov. 1995; *Prosecutor v. Ntuyahaga*, Decision on the Review of the Indictment, Case No. ICTR-98-40-I, 29 Sept. 1998.

121. The rule was added in Revision 13, ICTY Rules of Procedure and Evidence (9/10 July 1998), and taken out in Revision 20 (13 Dec. 2000).

122. *Prosecutor v. Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App.Ch., 2 Oct. 1995, paras. 72–78; *Prosecutor v. Tadić*, Judgement, Case No. IT-94-A, App. Ch., 15 July 1999, paras. 282–285; Ilias Bantekas *et al.*, *International Criminal Law* (2001), 85.

acts tantamount to investigation, such as ordering further investigative measures. I hold this view for four reasons. First, the investigatory function has been conferred exclusively on the Prosecutor, and the judge's primary power under Rule 47(F)(i) is to 'request' the prosecution to present additional material. In common- and civil-law systems where the power to investigate is conferred primarily on the prosecution or police, judges do not direct the investigation and play only supervisory roles.¹²³ Since the division of powers in the ad hoc tribunals resembles these systems, this suggests that judges' pre-trial powers are limited. Second, where ad hoc tribunal judges do have the power to call witnesses or order additional evidence, as in Rule 98, this power is expressly conferred. As these powers are not explicitly conferred in Rule 47(F)(i), reviewing judges cannot call witnesses or order further investigation. Third, judges are required to be impartial,¹²⁴ and the reviewing judge may be a member of the trial chamber.¹²⁵ The trial judge could hardly be described as impartial if, as a reviewing judge, he or she had been involved in an investigation by ordering investigative steps. The European Court of Human Rights has held that where trial judges are involved in the investigation, this will breach the requirement of impartiality.¹²⁶ Fourth, in civil-law systems, when trial judges can call witnesses or order investigatory steps, this power is explicitly conferred.¹²⁷

If the power to take 'any further measures which appear appropriate' does not include the power to call witnesses or order investigative steps, what does it include? The express powers of Rule 47(F) include requesting information from the prosecutor, adjourning the review, and confirming or dismissing counts. These are blunt tools, and circumstances may require the exercise of different powers, such as making an in-court amendment to the indictment because of some clerical error. An example of the type of situation that might be covered is provided by ICTR jurisprudence. In *Prosecutor v. Serushago*, the ICTR reviewing judge asked the Prosecutor to amend a number of provisions in the indictment on the basis that they were vague, and the prosecutor complied.¹²⁸ In my view, the most reasonable interpretation of the power to 'take any further measures which appear appropriate' is to regard it as a catch-all clause, designed to confer powers to perform procedural acts of a non-substantive nature, which are not explicitly provided for by Rule 47.

Our review of the ad hoc tribunals' pre-trial process has shown that it cannot be neatly categorized as either purely common law or civil law. The prosecution is partisan, having no obligation to be impartial or to seek out exculpatory evidence, and trial judges play only a supervisory role during the investigation, reflecting common-law traditions. However, the prosecution is also responsible for the investigation, and while there is a relatively rigid division of judicial functions between the trial and appeals chambers, the reviewing judge's ability to sit on the trial or appeal means that this division is not absolute, reflecting civil-law traditions. This suggests

123. As in the Italian system.

124. ICTYS, Art. 13; ICTRS, Art. 12.

125. Rules, R. 15(C).

126. *De Cubber v. Belgium*, Eur.Ct.H.R. App. No. 00009186/80, Decision of 26 Oct. 1984, 7 EHRR 236.

127. Germany, StPo, *supra* note 10, s. 202; France, CPP, *supra* note 4, Art. 28.

128. *Prosecutor v. Serushago*, Decision on the Review of the Indictment, Case No. ICTR 98-39-1, 29 Sept. 1998.

that the concept of impartiality before the ad hoc tribunals will not be treated in as rigorous a fashion as in common-law systems. In terms of the active/passive distinction drawn between the civil- and common-law systems, the judiciary is clearly passive during the pre-trial investigation, which is driven by the prosecution.

3.1.2. *Trial procedures*

We now review the ad hoc tribunals' trial procedures. The broad outlines of judicial powers will also be described, areas where these powers are unclear highlighted, and the limits of those powers examined.

Trial management begins at the pre-trial stage. In the ICTY, within seven days of the accused's initial appearance the trial chamber president designates a judge who will be responsible for supervising the pre-trial proceedings; the ICTR Rules do not provide for such a designation. The judge will ensure that the case proceeds expeditiously, co-ordinating communication between the parties and requiring the prosecution to meet its disclosure requirements.¹²⁹ In both tribunals status conferences are held in a trial chamber or in front of a judge thereof. The conferences are also intended to ensure expeditious preparation for trial by organizing exchanges of information between the parties, and to allow the accused to raise issues in relation to his or her case.¹³⁰

In both tribunals the Prosecutor can be ordered to file a pre-trial brief. This is mandatory in the ICTY, but discretionary in the ICTR.¹³¹ The brief must include a summary of the evidence the Prosecutor intends to lead at trial, any admissions by the parties, and a statement of disputed and undisputed matters of fact and law.¹³² The Prosecutor will also be ordered to file: a list of witnesses the Prosecutor expects to call, which will include a will-say statement and a list of charges that each witness will testify on; the total number of witnesses to testify; whether each witness will testify in person or by written statement; the estimated time required for each witness; the total time required for presentation of the Prosecutor's case; and a list of exhibits.¹³³ The defence will be ordered to file a statement that specifies the nature of the accused's defence, and the matters the accused takes issue with in the Prosecutor's brief and why.¹³⁴ All this information will be reviewed by the trial chamber.¹³⁵ A pre-trial conference will be held in which the court may limit the estimated length of examination-in-chief for some of the witnesses, and limit the number of witnesses that the Prosecutor may call, although the Prosecutor may move for increases during trial.¹³⁶

Once the pre-trial proceedings are complete, the trial, which will be public,¹³⁷ will begin. The Prosecutor makes an opening statement, and the defence may also

129. ICTY Rules, R. 65 ter(A), (B).

130. ICTR Rules, R. 65 bis.

131. ICTY Rules, R. 65 ter(E); ICTR Rules, R. 73 bis(B).

132. ICTY Rules, R. 65 ter(E)(i); ICTR Rules, R. 73 bis(B)(i), (ii), (iii).

133. ICTY Rules, R. 65 ter(E)(ii), (iii); ICTR Rules, R. 73 bis(B)(iv), (v).

134. ICTY Rules, R. 65 ter(F); ICTR Rules, R. 73 bis(F).

135. ICTY Rules, R. 65 ter(L); ICTR Rules, R. 73 bis.

136. Rules, R. 73 bis(D), (E).

137. Rules, R. 78.

do so, but may reserve this right until the end of the prosecution case.¹³⁸ In an ICTY case the accused is entitled to make a statement to the court that is not under oath but may be used as evidence, reflecting civil-law procedure. Unlike civil-law procedure, the accused will not be examined, and cannot be questioned about the statement.¹³⁹ No such provisions exist in the ICTR Rules. Next, the prosecution will lead its witnesses,¹⁴⁰ who will testify under oath and who will be examined-in-chief by the prosecution, and cross-examined by the defence, followed by a re-examination and re-cross.¹⁴¹ While the prosecution and defence have the right to examine and cross-examine witnesses, the trial chamber has an overriding authority to ensure that the interrogation will be effective in ascertaining the truth and that time is not wasted.¹⁴² Judges have the right to question witnesses at any stage, but will normally save their questions until the end of their examination.¹⁴³ Once the prosecution has presented its case, the defence must file the same information filed by the Prosecutor before the pre-trial conference.¹⁴⁴ A pre-defence conference will be held, at which the trial chamber exercises the same powers as in the pre-trial conference.¹⁴⁵ The defence then opens its case, calling evidence under the same rules applied to prosecution witnesses. The prosecution may lead rebuttal evidence, followed by defence rejoinder evidence.¹⁴⁶ When this is complete, the trial chamber may either order the parties to adduce additional evidence or summon witnesses on its own motion.¹⁴⁷ Principles governing the power to call witnesses have not been considered or enunciated.¹⁴⁸ After this, if the accused is found guilty, the parties may lead evidence to assist the trial chamber in determining a sentence.¹⁴⁹ Not all evidence has to be presented through oral testimony. Rule 92 bis gives the ad hoc tribunals discretion to allow witness statements to be entered as evidence, although the witnesses may have to be called for cross-examination.

When the presentation of evidence is complete, the prosecution presents its closing arguments, followed by the defence. The Prosecutor may present a rebuttal argument, but if he or she does so, the defence has the right to the last word, and can make a rejoinder. The parties must address matters of sentencing in the closing arguments.¹⁵⁰ The trial chamber then retires and may decide both culpability and the sentence at the same time.¹⁵¹

138. Rules, R. 84.

139. ICTY Rules, R. 84 bis.

140. Rules, R. 85(A)(i).

141. Rules, R. 85(B).

142. Rules, R. 90(F).

143. R. 85. See also transcript from the *Tadić* trial, *Prosecutor v. Tadić*, Case No. IT-94-A, 19 and 23 July 1996, 3827–935; transcript from the *Krstić* trial, *Prosecutor v. Krstić*, Case No. IT-98-33A, Nov. 21 2003, at 100.

144. ICTY Rules, R. 65 ter(G); ICTR Rules, R. 73 ter.

145. ICTY Rules, R. 73 ter.

146. Rules, R. 85(A)(ii), (iii), (iv).

147. Rules, R. 85(A)(v).

148. As an example, the ICTY Appeals Chamber in the *Krstić* case ordered that a witness be called, without any consideration of what principles should guide this exercise of discretion. It appears that the prosecutor and defence were not consulted on the issue before the court made the ruling, although the order is unclear on this point: *Prosecutor v. Krstić*, Decision to Summons a Witness *Proprio Motu*, Case No. IT-98-33-A.

149. Rules, R. 85(A)(vi).

150. Rules, R. 86.

151. Rules, R. 87. See, e.g., *Prosecutor v. Simić et al.*, Judgement, Case No. IT-95-9 17 Oct. 2003.

Before addressing the scope of judicial powers during trial, we need to examine the principle of orality, since it affects those powers. The principle is strongly protected in the ad hoc tribunals, being mandated by their statutes, which provide that the accused has the right to call witnesses and to ‘examine, or have examined, the witnesses against’ him or her.¹⁵² All evidence directly implicating the accused must be presented by oral testimony. Written statements can be admitted only when they go to ‘proof of a matter other than the acts and conduct of the accused’¹⁵³ and they require an order, which the court has discretion to grant or refuse.¹⁵⁴ This discretion is limited. If a written statement addresses an important contested issue and the witness could be made available, the witness must be presented for cross-examination.¹⁵⁵ In exercising its discretion, the court must consider a number of factors, including whether the evidence is of a cumulative nature, relates to the historical or political background, and whether its source renders it unreliable.¹⁵⁶ Where evidence needs to be taken before trial as a matter of urgency, or the witness will probably be unavailable at trial, the rules provide for depositions to be taken.¹⁵⁷ The party seeking the deposition must notify the opposing party, which must be given an opportunity to cross-examine the witness. This strong protection of orality is close to that in the common-law system. This indicates that judges must not use information obtained out of court and that they cannot rely on the information contained in pre-trial briefs and will-say statements. Such information is not equivalent to a civil-law dossier, and cannot be used against the accused.

This initial description of ad hoc tribunal trial procedures raises a number of questions. (1) To what extent can the judges control the parties in their presentation of the case? How far can the court go in limiting the number of witnesses, and placing time limits on cross examination? (2) To what extent can judges be involved in the presentation of evidence? They can question witnesses, but can they take over the questioning as normally occurs in civil-law systems? (3) To what extent can judges exercise the power to call witnesses? If the judges believe that the prosecution or defence has not led sufficient evidence to support a claim, can they call witnesses to see whether the claim can be supported? (4) What is the meaning of impartiality before the tribunals?

(1) *To what extent can the judges control the parties’ presentation of the case?* The ad hoc tribunals’ trial procedure is strongly, although not exclusively, adversarial. The parties are expected to call, question, and cross-examine witnesses. The Prosecutor directs the pre-trial investigation, deciding when to submit indictments for review and whether to negotiate a plea, judges playing only a supervisory role. All this militates against the judges having an extensive role in controlling the parties’ presentations. Having said this, extensive information must be filed with the court

152. ICTYS, Art. 21(4)(e); ICTRS, Art. 20(1)(e).

153. Rules, R. 92 bis.

154. Rules, R. 71 and 92 bis.

155. *Prosecutor v. Milošević*, Decision on Prosecution’s Request To Have Written Statements Admitted under Rule 92Bis, Case No. IT-02-54, 21 March 2002, paras. 24–27.

156. Rules, R. 92 bis(A).

157. Rules, R. 71.

by the prosecution and defence, and judges have express powers to limit the number of witnesses and can question and call witnesses. This indicates that judges have significant powers during the case. Another important factor in interpreting the scope of judicial powers is the importance of expeditiousness. International criminal trials are extremely long, due to the vast volume of evidence required in each case. The Milošević trial, for example, is currently expected to last up to five years. Justice is not a goal that can be achieved regardless of time and expense. Lengthy trials require accused persons to put their lives on hold, and victims must wait for the outcome of a case.¹⁵⁸ The states involved may be attempting to build a fragile peace, and a long-lasting public review of their history may undermine these efforts. The need for expeditiousness indicates that the trial judges must have significant powers to control the parties.

There are two limits on judicial powers to control the parties' presentations. The first is that judges have only quantitative, rather than qualitative, powers of restriction.¹⁵⁹ They do not have the power to tell the parties how to present their case. They may limit the number of witnesses, and limit the time allowed for direct and cross-examination, but they are not given the power to decide how a party may question a witness, or on what issues the witness should testify (subject, of course, to the requirement that questions be relevant). Judges could suggest that a particular witness should address specific topics, but could not make this an order. The second limitation is imposed by the trial chamber's duty to ensure that the accused receives a fair trial, which means that the parties must be able to call sufficient evidence to establish their case. If a party is prevented by time or witness limitations from presenting relevant evidence, a fair trial becomes impossible. A party may certainly be barred from irrelevant questioning or from dwelling on non-contested or unimportant issues, but must be given the opportunity to adduce facts that they reasonably believe are essential to their case. Limitations would be best used to focus the minds of the parties on what is truly important, but must not result in a party being forced to leave out relevant evidence.¹⁶⁰ If a time limit is inappropriate, a party must bring this to the court's attention and demonstrate that without the time limit, a witness would address additional relevant matters. If the party can do this, the court must grant the extension.

(2) *To what extent can judges be involved in the presentation of evidence?* The procedure of questioning that has been adopted in the ad hoc tribunals is unlike both the common- and civil-law systems. While it seems primarily adversarial, with the parties conducting the examination-in-chief and cross-examination, judges have an

158. Safferling, *supra* note 24, at 251.

159. *Prosecutor v. Milošević*, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Case No. IT-02-54, App. Ch., 16 May 2002. In this case, the trial chamber imposed a 14-month limitation on the prosecution's presentation of its case. The trial chamber recognized that this would inevitably reduce the number of incidents that could be proved within this time. However, the trial chamber did not indicate which incidents should be proved, which witnesses should be selected, or how the prosecution should prosecute the case. These 'qualitative' issues were left entirely to the Prosecutor.

160. *Prosecutor v. Galić*, Decision on Application by Prosecutor for Leave to Appeal, Case No. IT-98-29, App. Ch., 14 Dec. 2001, para. 7.

express right to ask ‘any’ question of the witnesses.¹⁶¹ The use of the word ‘any’ indicates that the judges have broad rights to question witnesses and, in practice, some judges use this right extensively after the parties have completed their first chief and cross.¹⁶² Transcripts of ICTY trials reveal that substantially more information is produced by witnesses during judicial questioning than would otherwise have been adduced.¹⁶³ Such extensive involvement would be improper in common-law systems, where judges must remain passive, but is not as extensive as in civil-law trials. The active judicial role is made possible by the information provided to them in advance of trial.

In my view, for both legal and practical reasons the judges cannot take the primary role in questioning all witnesses. Such a role is legally impossible because the parties are primarily responsible for the case and the Prosecutor bears the burden of proof.¹⁶⁴ If a judge takes over the questioning completely, the judge effectively takes the case out of the parties’ hands, and removes the burden of proof from the Prosecutor. If the judge were provided with a civil-law dossier, it could be argued that the Prosecutor bears the burden because he or she presents all the evidence (the dossier) to the judge. However, such a procedure does not apply before the ad hoc tribunals, and would be inconsistent with the strong protection accorded to orality.

Practical reasons also prevent judges from taking the primary role in questioning witnesses. The pre-trial brief and summaries do not contain complete descriptions of everything witnesses say, so that the judges know less than the parties. While far from blindfolded, judges cannot hope to carry out so complete a task as the parties, which will have met with the witnesses, questioned them, and reviewed their statements thoroughly. Several ICTY prosecutors present each case, and during a trial different prosecutors enter and leave the courtroom to examine or cross-examine witnesses. The judges, who may be dealing with more than one case, cannot hope to duplicate such an effort. If the judge were to take the primary role, his or her relative ignorance would mean that less information would be adduced.

It has been argued that judges should be taking the primary role in questioning in order to expedite proceedings. To this end, it is suggested that the judges should be provided with a dossier, as in the civil-law system, as this would allow them to decide what evidence is important, and what can be left out.¹⁶⁵ One difficulty with this argument is that it fails to balance the need for expeditiousness with the benefits of the adversarial system, which allows the parties to adduce all the evidence they reasonably believe to be relevant. The parties may disagree with a judge’s assessment as to what evidence is important, and unless the parties are given the opportunity to lead evidence that the judge would have ignored, it would never be known whether the parties were correct. A second difficulty is this argument

161. Rules, R. 85(B).

162. See e.g. *Prosecutor v. Stakić*, Case No. IT-97-24, 27, 28, 29, 30 Jan., 11205–502. Witness Goran Dravojević, questioned at 11207–56, with judges questioning at 11252–6. Witness Cedimir Vila, questioned at 11261–502, with judges questioning at 11375–423 (and elsewhere).

163. *Ibid.*

164. Rules, R. 87(A); Safferling, *supra* note 24, at 257–63, esp. 262.

165. C. Jorda and J. de Hemptinne, ‘Le rôle du juge dans la procédure face aux enjeux de la répression internationale’, in Hervé Ascensio *et al.* (eds.), *Droit international pénal* (2001), 807, at 815.

fails to recognize the strong protection of orality which has been adopted by the ad hoc tribunals. It is a common experience in the common-law courts to discover that witness statements are incomplete or inaccurate.¹⁶⁶ The dossier approach might never uncover such inaccuracies, or fill in the blanks, if a judge refuses to hear certain witnesses.

In my view, since the parties are primarily responsible for presenting the case, the judges' role is primarily, but not exclusively, one of clarification. By this, I mean that judges' questions should generally be limited to ensuring that the court understands what the witness has said, and how this evidence relates to the case as a whole. I do not mean that the judges are limited solely to clarification and if witnesses give answers going beyond clarification, this undermines a fair trial. First, imposing such a limitation is impossible. Witnesses can and do say unexpected things, and may give new evidence in response to questions that have not previously been asked. Second, some witnesses may reasonably be expected to shed light on particular events, but have not been questioned regarding those events. Where this occurs, judges should be able to address that deficiency. It is common knowledge that at least some of the counsel before the ad hoc tribunals are unfamiliar with trial techniques. When watching parts of ICTY trials and reading the transcripts I have noticed that a number of counsel did not ask leading questions on cross-examination, asked questions that were frequently unclear, or asked questions that were clearly irrelevant.¹⁶⁷ Where counsel do not adduce all relevant evidence, judges must be able to address this by asking questions to ensure the accused receives a fair trial.

With respect to limitations on the manner of questioning, judges are bound to be impartial, which means that they must treat witnesses even-handedly. Judges must not conduct an examination-in-chief or cross-examination in the same manner as a party. Parties endeavour to establish a version of the facts that reflect their views in a fundamentally partial fashion. This does not mean that judges cannot ask leading questions or cannot challenge a witness who is being deliberately evasive. They are entitled to honest responses to their questions, just as the parties are, but they cannot attempt to systematically establish a particular view of the case. It is additionally important that the judges treat the witnesses presented by each side in an even-handed manner. As an example, if a judge were to be silent throughout the trial, but then extensively cross-examined the accused when he or she took the stand, that judge could hardly be regarded as impartial. A second limitation on questioning is that judges cannot question witnesses because they believe that a party has not proved its case and that additional questioning might achieve this goal. The rationale behind this limitation will be explained in the following paragraphs.

(3) *To what extent can the judges exercise the power to call witnesses or order additional evidence?* Judges' powers to call witnesses or order the parties to produce additional evidence is *sui generis*. The trial chambers have the power to require the parties to

166. Paccioco, *supra* note 6, at 160.

167. For an example of irrelevant questioning, see *Prosecutor v. Gagović*, Case No. IT-96-23, Transcript, 28 March 2000.

produce additional evidence and can call witnesses on their own motion.¹⁶⁸ With respect to the common-law system, such powers either do not exist or are extremely limited because judges must guard against taking over a party's case. In civil-law systems, judges' powers are much broader in that, in addition to their power to call witnesses, they can order additional investigative steps before trial.¹⁶⁹

Given that the powers of investigation and adjudication have been separated, with the Prosecutor having sole responsibility for the investigation, the judges' right to call witnesses or order further evidence cannot breach this separation of powers. Since the parties have the primary role in presenting the evidence, the power to call witnesses is intended to allow judges to clarify the case before them; it could not be used to call witnesses who might implicate the accused on matters that have not yet been covered. If the judges believed, for example, that the Prosecutor had not proved its case, they could not call, or order to be called, a list of witnesses in an effort to see whether the case could be proved. Such an order would be tantamount to ordering an in-court investigation of the facts, which would relieve the Prosecutor of the burden of proof. The accused would be faced not only with a powerful and well-funded prosecution service, but with an even more powerful panel of judges, a situation incompatible with equality of arms. It might be argued that calling witnesses to see whether a party's case can be proved is part of the judge's truth-seeking function, but this argument ignores the parties' role, and the fact that they bear the burden of proof. If the parties have not called witnesses on an essential point then evidence supporting this point probably does not exist. However, if a judge calls a witness who provides evidence supporting an essential element of the case, this does not mean that the accused has been denied a fair trial. Witnesses' testimony may be unexpected. This is the nature of trials. The issue is not what the witness says, but the purpose for which the witness is called.

(4) *What is the meaning of impartiality before the tribunals?* We saw in the first part of this article that there is broad agreement on the meaning of impartiality between the civil- and common-law systems. With regard to subjective impartiality, the main area of difference is the hyper-sensitivity of the common-law system with respect to prior involvement, and the conduct of the judge during the trial. One-sided questioning of witnesses would certainly result in a verdict being overturned in the common-law system, whereas such questioning in the civil-law system is routine. My view is that the *sui generis* nature of ad hoc tribunal trials requires a *sui generis* interpretation of impartiality.

The extensive rights to ask questions of witnesses and to place limitations on the parties when they present their cases, and the right to information about the case (such as the pre-trial brief and witness summaries) mean that judges do not have to be as passive as their common-law counterparts. The process of asking questions is bound to adduce facts which can have one of three effects: they can be neutral, in the sense that they help neither party, they can help the prosecution, or they can

168. Rules, R. 98; see also Krstić, *supra* note 148.

169. Germany, StPo, *supra* note 10, Art. 221; Belgium, CDIC, *supra* note 12, Art. 298.

help the accused. It would not be possible to challenge a judge's impartiality solely on the ground that the judge had questioned a witness about matters adverse to the prosecution or accused. More would be required. However, subjective impartiality is stronger than in the civil-law system. Judges cannot engage in one-sided questioning with the purpose of eliciting evidence solely of guilt or of innocence, and cannot question witnesses with the objective of extracting evidence that supports a particular view of the case.

With regard to objective impartiality, the judiciary has little to no investigatory power, but reviewing judges may sit on the trial or appeal. This indicates that objective impartiality is more weakly protected than in the common-law system, but is stronger than in the civil-law system, where trial judges do have some investigatory powers. It is difficult to see how an accused could successfully challenge the objective impartiality of the judges, since the rules establishing the division of functions are not subject to constitutional safeguards.

The conclusion that the ad hoc tribunals' approach to impartiality is more robust than in the common-law system is supported by the recent ICTY appeal decision in *Prosecutor v. Brđanin*.¹⁷⁰ In that case a trial chamber had begun contempt proceedings, and appointed an *amicus curiae* prosecutor to deal with a contempt allegation against a defence counsel. The defence counsel challenged the impartiality of a panel of judges (the original panel) on a number of grounds, and a disqualification panel was convened to hear the disqualification application. The *amicus* agreed with two of the defence counsel's submissions, with the result that the court was presented with a joint argument that the original panel should be disqualified. The disqualification panel disagreed, and held that the original panel's impartiality had not been impugned. The panel held that

The jurisprudence of the Tribunal establishes a presumption of impartiality in relation to the functioning of any Judge of the Tribunal. To rebut the presumption of impartiality, the reasonable apprehension of bias must be 'firmly established'. At the basis of this threshold is the notion that it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as the real appearance of bias itself.¹⁷¹

The rejection of the joint submission suggests that a high standard applies in disqualification applications. This is supported by the Appeal Chamber's rulings in *Furundžija* and *Delalić*, which indicate that the applicant must meet a high threshold to rebut the presumption of impartiality.¹⁷²

We can see that the ad hoc tribunals' trial procedures fall somewhere in between the common- and civil-law systems. The parties' role in presenting evidence reflects adversarial traditions, but it would be incorrect to suggest that the ad hoc tribunals use an adversarial system. The extensive information that must be provided to the

170. *Prosecutor v. Brđanin*, Decision on Application for Disqualification, Case No. IT-99-36-R77, 11 June 2004.

171. *Ibid.*, at 8 (footnotes omitted).

172. *Prosecutor v. Furundžija*, *supra* note 73, at 199; *Prosecutor v. Delalić et al.*, Judgement, App. Ch., Case No. IT-96-21, 20 Feb. 2001, at 707.

court in advance and the judges' more active role in questioning witnesses reflect civil-law procedures, conflicting with the common-law requirement that judges be passive. It is fairest to say that the ad hoc tribunals have a genuinely *sui generis* system that reflects aspects of both civil- and common-law systems, suggesting that a new theory underlies ad hoc tribunal trials and the judicial role.

3.2. The International Criminal Court

3.2.1. Pre-trial procedures

I shall summarize the ICC pre-trial procedures before analyzing them in the light of the seven points of comparison established in the first section of this article. The ICC has separate pre-trial, trial, and appeals chambers,¹⁷³ which, in comparison with the ad hoc tribunals' chambers, are rigidly separated. Appellate judges serve in that division for their entire term of office,¹⁷⁴ with the non-appellate judges being assigned to either the pre-trial or trial chambers for a period of up to three years, although pre-trial judges can be temporarily attached to the trial chamber, and vice versa.¹⁷⁵ A rigid division of functions is maintained because a judge who has participated at one stage of the case cannot sit on any other.¹⁷⁶ This means that judicial impartiality is better protected in the ICC than in the ad hoc tribunals, where pre-trial judges can sit on the trial. Judicial supervision of the investigation is performed entirely by the pre-trial chamber, although the trial chamber and appeal chamber can exercise the pre-trial chamber's powers where necessary.¹⁷⁷

The Office of the Prosecutor is an organ of the ICC, consisting of the Prosecutor and Deputy Prosecutors; I shall use the term 'Prosecutor' to refer to the Prosecutor, the Deputy Prosecutors, and their delegates.¹⁷⁸ The Prosecutor commences pre-trial proceedings by deciding to investigate, and is solely responsible for the investigation and prosecution.¹⁷⁹ This decision may be taken *proprio motu*, or on the request of a state or the UN Security Council.¹⁸⁰ The pre-trial chamber may review this decision, although the source of a chamber's jurisdiction to review, and the scope of powers in the review, depend on how the prosecution was begun.¹⁸¹ If the case continues, the Prosecutor may ask the pre-trial chamber to issue an arrest warrant if there are reasonable grounds to believe the suspect has committed an offence within the jurisdiction of the ICC.¹⁸² Next, the pre-trial chamber holds a confirmation hearing, at which the accused will normally be present, unless he or she has waived this right or has fled or cannot be found. The Prosecutor presents a list of charges to the court, supporting each one with sufficient evidence, which may be documentary, to establish substantial grounds for belief that the suspect

173. Rome Statute of the International Criminal Court (hereafter ICCS), Art. 34(b).

174. *Ibid.*, Art. 39(3)(b), 39(4).

175. *Ibid.*, Art. 39(3)(a), 39(4).

176. *Ibid.*, Art. 39(4), 41(2)(a).

177. *Ibid.*, Art. 64(6)(a), Art. 83(1).

178. *Ibid.*, Art. 42(2).

179. *Ibid.*, Art. 42(1).

180. *Ibid.*, Art. 14, 15, 53.

181. *Ibid.*, Art. 53.

182. *Ibid.*, Art. 58.

committed the crime charged. The suspect may object to the charges, challenge the Prosecutor's evidence, and present evidence.¹⁸³ Once this process is complete, the pre-trial chamber may confirm the charges, decline to confirm them, or adjourn the hearing and request the Prosecutor to consider providing further evidence, conduct further investigations, or amend a charge. When the charges are confirmed, the case proceeds to trial.

Neither the judiciary nor any third party can direct how the Prosecutor may carry out his or her duties. The Prosecutor has a considerable degree of independence, from the chambers, the Assembly of States Parties, the Security Council, and individual states. This independence is expressly recognized by the Rome Statute of the International Criminal Court (ICCS). The Prosecutor is not to seek instructions from an external source,¹⁸⁴ and can only be removed for cause,¹⁸⁵ which means that the sole guide for the conduct of the Prosecutor is the law. The independence of the Prosecutor is also bolstered by the discretion to investigate. Investigations can be begun on the request of a state party,¹⁸⁶ by referral from the Security Council,¹⁸⁷ or by the Prosecutor *proprio motu*.¹⁸⁸ When a state requests or the Security Council refers, the Prosecutor must 'initiate an investigation, unless he or she determines that there is no reasonable basis to proceed under this Statute'. In making this decision, the Prosecutor must consider whether the Court has jurisdiction, and whether the case would be admissible.¹⁸⁹ Although a state referral seems to mandate an investigation, this is tempered by Article 53(1)(c), which allows the Prosecutor to terminate the investigation when,

Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

This would allow the Prosecutor to terminate an investigation almost immediately,¹⁹⁰ indicating that under normal circumstances the Prosecutor has the discretion to decide whether to investigate, at least when the information is provided by a state party or third party. It is unclear whether the Security Council can order an

183. *Ibid.*, Art. 61.

184. *Ibid.*, Art. 42(1).

185. *Ibid.*, Art. 46(1), (2); Rules, R. 24(1) IC. The Prosecutor can only be removed from office if he or she has committed an act of serious misconduct or a serious breach of duties, or is unable to exercise the functions required by the Statute (Art. 46(1)). Such misconduct would include activities incompatible with official functions, abuse of office, or concealing information which would have precluded the Prosecutor from taking office (ICC Rules, R. 24(1)). Removal requires the affirmative vote of a majority of the states parties, not the Assembly of States Parties, which means that at least half of those states which have ratified the statute must approve the Prosecutor's removal (ICCS, Art. 46(2)). This suggests a high threshold for removal for cause, but the decision to remove the Prosecutor is a political one which is not subject to appeal. This process could significantly erode the Prosecutor's independence if states are willing to exercise improperly the power to vote for removal. In Canada, judges can be removed by an affirmative vote in parliament, a process similar to that which would occur in the ICC. However, judicial independence is so strongly respected in Canada that this has never occurred. Only time will tell whether the Prosecutor's independence is to be truly respected.

186. ICCS, Arts. 13(a), 14(1).

187. *Ibid.*, Art. 13(b).

188. *Ibid.*, Arts. 13(c), 15.

189. *Ibid.*, Art. 53(1)(a), (b).

190. W. A. Schabas, *An Introduction to the International Criminal Court* (2001), 100.

investigation using its Chapter VII powers.¹⁹¹ Once an investigation has begun, the Prosecutor can refuse to prosecute if there is not a sufficient factual or legal basis to believe that the suspect has committed a crime within the jurisdiction of the court (inadequate grounds), the case is inadmissible, or prosecution is not in the interests of justice.¹⁹²

The discretion to investigate and prosecute is subject to the pre-trial chamber's supervision. This introduces a watered-down version of the presumption of procedural legality found in civil-law systems. Where the Prosecutor decides not to investigate or prosecute on the basis of inadmissibility or inadequate grounds, a referring state or the Security Council can ask the pre-trial chamber to review this decision, but the chamber cannot review on its own initiative. In this review the chamber can only 'request the Prosecutor to reconsider that decision',¹⁹³ indicating that the chamber's powers are limited at best. The pre-trial chamber can review on its own initiative or on the request of a state when the Prosecutor's decision is based on a belief that the investigation or prosecution is not in the interests of justice. When this review occurs, the Prosecutor's decision will only be effective if confirmed by the pre-trial chamber.¹⁹⁴ Accordingly, the pre-trial chamber exercises more extensive powers of review than in common-law systems.

The strongest pillar supporting prosecutorial independence is the power to initiate an investigation *proprio motu*.¹⁹⁵ Whether this power should have been conferred was hotly debated. Some argued that the Prosecutor had to be independent and free from political manipulation, otherwise there would be no guarantee of impartial justice.¹⁹⁶ Others feared that the Prosecutor might engage in politically motivated prosecutions,¹⁹⁷ or undermine peace-building efforts.¹⁹⁸ These concerns have been addressed to a degree by the requirement that when the Prosecutor initiates an

191. R. B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', (1999) 10 *Criminal Law Forum* 61, at 72–3.

192. ICCS, Art. 53(2).

193. *Ibid.*, Art. 53(3)(a).

194. *Ibid.*, Art. 53(3)(b).

195. *Ibid.*, Art. 15(1).

196. L. Arbour, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court', (1999) 17 *Windsor Yearbook of Access to Justice* 207; 'Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 301–3.

197. N. Rostow, General Counsel, US Mission to the United Nations, at the Fifty-seventh session of the United Nations General Assembly, in the Sixth Committee, on the International Criminal Court, Oct. 14, 2002, copy available online from the US Department of State website, at <http://usinfo.state.gov/topical/pol/usandun/02101615.htm>, and from the US Mission to the United Nations website, at http://www.un.int/usa/02_153.htm, last visited 26 March 2003. Such concerns are not surprising, given the US experience with its own Independent Counsel (a series of individuals, including Kenneth Starr), who was able to set his or her own budget, and engage in extensive and expensive investigations that many regarded as abusive. See A. J. Davis, 'The American Prosecutor: Independence, Power, and the Threat of Tyranny', (2001) 86 *Iowa Law Review* 393.

198. R. J. Goldstone and N. Fritz, 'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers', (2000) 13 *LJIL* 655, at 655. In my view, the concern that peace-building efforts will be undermined by international criminal justice is overstated. First, there is little evidence that prosecutions undermine peace processes. Second, where significant conflict has occurred, a failure to achieve justice may result in violent counter-reactions from those groups that have been repressed. The name of the NGO 'No Peace Without Justice', says it all. Third, it is possible that the Security Council could prevent a prosecution by using its Chapter VII powers.

investigation *proprio motu*, he or she must ask the pre-trial chamber to authorize the investigation,¹⁹⁹ which the chamber will do if there is a 'reasonable basis to proceed'.²⁰⁰ If authorization is refused, the Prosecutor may submit a subsequent request if new facts or evidence are discovered.²⁰¹ The pre-trial chamber supervises the initiation of *proprio motu* investigations through this gatekeeping role. No such gatekeeping role applies when the Prosecutor investigates on the request of a state or the Security Council. This indicates that the pre-trial chamber's powers of review are primarily intended to protect the interests of states, although these powers will also protect subjects, since a frivolous prosecution would not satisfy the requirement of 'a reasonable basis to proceed'.

This review of prosecutorial independence and discretion reveals a procedure that largely reflects civil-law practices. Common-law prosecutors are not independent from the executive, and their decisions as to whether to prosecute are not generally subject to judicial review. Civilian *juges d'instruction* or prosecutors are often independent from the executive,²⁰² but are subject to the requirement of procedural legality. We should now consider the pre-trial chamber's supervision of the investigation itself.

During the investigation, the Prosecutor is under more onerous obligations than the ad hoc tribunal's Prosecutor, who is not obliged to be impartial or to look for both inculpatory and exculpatory evidence. The ad hoc tribunals' Rules have been criticized, as this means that pre-trial protection for the accused is weaker than in civil-law systems. Information received by an ad hoc trial chamber from the Prosecutor does not contain the same guarantee of impartiality as that possessed by the civil-law dossier.²⁰³ These concerns have been addressed in the ICC. The Prosecutor is required to remain impartial when investigating and cannot 'participate in any matter in which [his or her] impartiality *might reasonably be doubted* on any ground'.²⁰⁴ The grounds for disqualifying prosecutors are the same as those for disqualifying a judge: personal interest in the case; previous involvement in the case; performing functions prior to taking office in which he or she could be expected to have formed an opinion about the case; or the expression of opinions that could objectively adversely affect the required impartiality.²⁰⁵ The Prosecutor can be removed by the appeals chamber at the request of the suspect if this duty is breached.²⁰⁶ These rules impose a surprisingly high standard of impartiality on the Prosecutor. The subject does not have to demonstrate actual bias, only a reasonable doubt that the Prosecutor is not impartial,²⁰⁷ which suggests that the standard will be that applied to ICC and common-law judges: a reasonable apprehension of bias. This standard will have to be interpreted in the light of the Prosecutor's role. As an example, the Prosecutor is

199. ICCS, Art. 15(3).

200. *Ibid.*, Art. 15(4).

201. *Ibid.*, Art. 15(5).

202. Perrodet, *supra* note 13, at 416–41.

203. Tochilovsky, *supra* note 54, at 355–7.

204. ICCS, Art. 42(7) (emphasis added).

205. Rules of Procedure and Evidence, International Criminal Court (hereafter ICCR), R. 34(1).

206. ICCS, Art. 42(7), (8).

207. *Supra* note 200.

expected to develop opinions about a subject's guilt, so that belief in an accused's culpability could not be a sufficient basis for removal. We can see that the appeal chamber plays a supervisory role over the prosecutors, in the sense that it is the ultimate guardian of prosecutorial impartiality.

Concerns about the ad hoc tribunal Prosecutor's role were also addressed in the ICC by including an obligation found in many civil-law systems, that the Prosecutor must investigate incriminating and exonerating circumstances equally.²⁰⁸ Neither the statute nor the rules expressly go so far as those civil-law systems which enforce the subject's right to ask or require investigation of particular matters. In my view, however, ICC subjects do have such powers, because they are necessarily implicit in the duties and mechanisms of control imposed on the Prosecutor. During the investigation the Prosecutor may question subjects,²⁰⁹ who can waive their right to silence,²¹⁰ and provide information about exculpatory facts which require investigation to confirm. If the Prosecutor were to fail, without any reasonable excuse, to investigate the alleged exculpatory evidence, this would be a violation of the duty to seek out equally exculpatory and inculpatory evidence. This would also be a violation of the duty of impartiality, allowing the accused to seek the Prosecutor's removal.

Article 42 of the ICC's Statute and Rule 34(3) of its Rules of Procedure and Evidence state that the appeals chamber has the power to decide 'any question' relating to disqualifying the Prosecutor, but do not specify what rulings the appeals chamber may make. In my view, the chamber is able to do more than remove or decline to remove the Prosecutor. We know that the Prosecutor is solely responsible for the investigation. Accordingly, the pre-trial chamber cannot tell the Prosecutor how to do his or her job, and cannot require the Prosecutor to investigate particular facts. Situations may arise when the Prosecutor's failure to investigate exculpatory evidence is not so severe as to undermine prosecutorial impartiality. Let us assume that a subject advised the Prosecutor of exculpatory evidence, but that the Prosecutor's staff mislaid this information so it was not investigated within a reasonable time. This failure breaches the duty to investigate equally exculpatory and inculpatory evidence, but does not suggest partiality. In such cases, where the breach is minor and removal is not warranted, the power to decide 'any question' means that the appeals chamber could issue an order stating that the Prosecutor has violated the duty to investigate equally exculpatory and inculpatory evidence, but that at this time the Prosecutor has not violated the duty of impartiality. This would, as a practical matter, oblige the Prosecutor to investigate the exculpatory evidence. Failure to do so would provide evidence of partiality, allowing the accused to bring a new claim to remove the Prosecutor. It could be argued that such a declaratory order is really an attempt to usurp the Prosecutor's sole responsibility for the investigation. I would counter this by pointing out that a declaratory order signals that investigation must occur, but does not lay down its form or content. This is not an order to investigate

208. ICCS, Art. 54(1)(a).

209. *Ibid.*, Art. 54(3)(b).

210. *Ibid.*, Arts. 55(1)(a), 55(2)(b).

but an order signalling that the Prosecutor's behaviour runs the risk of violating the duty of impartiality.

The pre-trial chamber plays a supervisory role during the investigation, although it has only negative powers.²¹¹ The chamber has the power to decide whether certain coercive measures may be taken against a suspect, to issue orders to assist the investigation, and to protect the suspect's rights. With regard to coercive measures, the Prosecutor can only request that suspects submit to questioning,²¹² and must ask the pre-trial chamber to issue a summons to appear or an arrest warrant.²¹³ When a warrant of arrest is issued, the Court can request a state to provisionally arrest the suspect in urgent cases, but the ICC Statute contemplates that a provisional arrest will be quickly followed by the suspect's surrender to the ICC.²¹⁴ It is unclear whether provisional detention for investigative purposes is permissible.²¹⁵ Court authorization for such coercive measures reflects the practice in common-law countries and those civil-law countries where the *juge d'instruction* is really a *juge de l'instruction*. It is vital to realize that the Prosecutor is the driving force behind these orders. The pre-trial chamber has no power, on its own motion, to order an arrest or issue orders assisting the investigation, except in the narrow circumstances where the Prosecutor is unreasonably failing to take action with respect to a unique investigatory opportunity.²¹⁶ Accordingly, once an investigation has begun, the pre-trial chamber's powers are almost exclusively negative, in the sense that it can refuse prosecutorial requests.

Once a suspect is in the ICC's hands, the pre-trial chamber becomes more heavily involved, but, again, its powers are best characterized as negative. The accused must be brought before the chamber, which must ensure that the suspect's rights are being respected.²¹⁷ Judicial oversight should ensure that the Prosecutor complies with his or her statutory duties. The pre-trial chamber has a limited monitoring power over the prosecution's subsequent preparation for trial, as it can release the accused if the trial is inexcusably delayed.²¹⁸ Again, this is a negative power.

As with the ad hoc tribunals' reviewing judges, the pre-trial chamber plays a gatekeeping role in deciding whether there is sufficient evidence to warrant a trial. The pre-trial chamber must hold a confirmation hearing at which the Prosecutor presents the court with a list of charges, supporting each charge 'with sufficient evidence to establish substantial grounds to believe that the suspect committed each of the crimes charged'. Evidence can be documentary or summary, and witnesses need

211. By negative powers, I refer to those powers which operate by negation, e.g. the power to stop the Prosecutor from proceeding with an investigation, or the power to prevent the Prosecutor from engaging in particular investigative activities (such as detaining and questioning an accused). Examples of positive powers would be powers to require the Prosecutor to investigate, or to investigate in a particular way, or to require the Prosecutor to arrest a subject.

212. ICCS, Art. 54(3)(b).

213. *Ibid.*, Art. 58(1).

214. *Ibid.*, Arts. 91, 92(1), (3); ICCR, R. 188.

215. O. Fourmy, 'Powers of the Pre-trial Chambers', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1221.

216. ICCS, Art. 56(3).

217. *Ibid.*, Arts. 55(2), 59(3), 60(1), (2).

218. *Ibid.*, Art. 60(4).

not be called.²¹⁹ The accused must be provided in advance with a list of the charges and must be informed about the supporting evidence. He or she can be represented in the confirmation hearing, and can challenge the Prosecutor's evidence. To ensure that the accused has the ability to exercise these rights the pre-trial chamber can order disclosure.²²⁰ This is a change from the ad hoc tribunals, which provide for an *ex parte* review of the indictment,²²¹ and represents an adoption of the common-law tradition of contested gatekeeping proceedings. The confirmation hearing can only be held in the absence of the subject if he or she has waived the right to be present, or has fled and cannot be found, in which case the pre-trial chamber may appoint counsel to represent the subject's interests.²²² The pre-trial chamber's powers in the confirmation hearing are limited. It may confirm or decline to confirm the charges, or may adjourn the hearing and 'request' that the Prosecutor consider providing further evidence, conduct further investigations, or amend a charge.²²³ The pre-trial chamber has been denied the power to call witnesses or to order additional investigative steps, reflecting the common-law tradition of a neutral, dispassionate adjudicator, although the ability to request further evidence resembles civil-law practices.

An important question regarding the confirmation hearing is the way in which it will be structured. William Schabas has suggested that the 'confirmation hearing seems to resemble preliminary hearings held under common-law procedure'.²²⁴ The ability of the subject to present evidence supports this notion, as does the ability to challenge the prosecution evidence. However, the common-law system relies largely on oral gatekeeping proceedings, in which the crown calls witnesses to establish that there is sufficient evidence which, if believed by a trial court, could result in a conviction. In addition, common-law gatekeeping proceedings have a dual function. The primary function is to confirm that there is sufficient evidence to warrant a trial, but an important secondary function is to provide the defence with disclosure. The defence can cross-examine the prosecution witnesses, extracting evidence helpful to the defence's case as well as learning about the quality of the witnesses.

In my view, while the ICC confirmation hearing could resemble the common-law process, it never will. An oral hearing is not required, because Rule 61(5) states that the 'Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial'. This indicates that the procedure can be primarily written, and practical considerations suggest that it must be. Ad hoc tribunal trials are extremely lengthy, and calling oral evidence to establish substantial grounds on the essential elements of all charges would be an extraordinarily lengthy procedure. Such proceedings would delay the trial, and use up valuable resources. Accordingly, ICC confirmation hearings are *sui generis*. While they may be contested as in common-law systems, the fact that the hearing will be largely

219. *Ibid.*, Art. 61(1), (3), (5).

220. *Ibid.*, Art. 61(3), (6).

221. Rules, R. 47.

222. Implied by Art. 61(2) ICCS.

223. ICCS, Art. 61(7).

224. Schabas, *supra* note 190, at 115.

written and that pre-trial chamber judges may request further information reflects civil-law practices.

In conclusion, the pre-trial chamber plays a supervisory role, but its powers are almost entirely negative, in the sense that it acts as a check on prosecutorial activity. It cannot direct the investigation or order the Prosecutor to engage in specific investigatory steps. However, it would be a mistake to assume that the ICC's pre-trial procedures adopt the common-law model. The Prosecutor must be impartial and must investigate equally exonerating and inculpatory evidence, obligations which can be enforced through the appeals chamber. Prosecutorial powers to decide whether to investigate and prosecute are more extensively reviewable than in common-law systems. To this extent, the Prosecutor resembles civil-law prosecutors who both investigate and prosecute. It would be best to describe the ICC's pre-trial procedures as *sui generis*, which suggests that the theory underlying the ICC, as in the case of the ad hoc tribunals, differs from both common-law and civil-law theory.

3.2.2. *Trial procedures*

This section describes the trial process and raises a number of issues about the scope of judicial powers.

After the charges have been confirmed, the President constitutes a trial chamber, which is responsible for the conduct of subsequent proceedings. The pre-trial chamber retains jurisdiction over any amendments to the charges and the confirmation of new charges.²²⁵ The experience of the ad hoc tribunals reveals that pre-trial matters are likely to arise after the confirmation of the charges. There may be issues concerning disclosure, orders may have to be granted to help the parties collect evidence, and so on. The ICC Statute addresses this issue by providing that before or during trial, the trial chamber can refer preliminary matters back to the pre-trial chamber, or 'may, as necessary . . . [e]xercise any functions of the Pre-Trial Chamber' that are 'relevant and capable of application' in the circumstances.²²⁶

Trials are held in public in the presence of the accused, and the trial chamber is expected to ensure that trials are fair and expeditious, respecting the rights of accused persons, victims and witnesses.²²⁷ Once the chamber is constituted, it must hold a status conference to set the date of the trial, and may hold additional status conferences as time goes on. The purpose of these conferences is to facilitate the fair and expeditious preparation for trial.²²⁸ According to Article 64(3), the first task of the trial chamber is to

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

...

225. ICCS, Art. 61(9), (11).

226. *Ibid.*, Arts. 61(9), (11), 64(4), (6)(a).

227. *Ibid.*, Art. 63, 64(2), (7).

228. ICCR, R. 132.

- (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

This will presumably be done at the first status conference. Before and during trial, the trial chamber can require the attendance of witnesses, order the production of documents or other evidence, and order the production of evidence in addition to that already collected or presented by the parties.²²⁹ The chamber has the power to rule on all relevant matters, and to take all necessary steps to maintain order in the course of a proceeding.²³⁰

The trial begins with the charges being read to the accused, followed by the accused's plea. On a plea of guilty, the chamber must ensure that the plea is free and voluntary, and that it is supported by the facts. It may accept the plea based on the information provided by the Prosecutor and agreed to by the accused, may require additional evidence, or may order the case to trial.²³¹

With regard to the presentation of evidence, Article 64(8)(b) of the ICC Statute states:

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.

Articles 64(9) and 69(4) indicate that the trial chamber has the power to rule on the admissibility of evidence and take all necessary steps to maintain order in the course of a hearing. Rule 88(5) requires the chamber to ensure that witnesses are not abused during the cross-examination process. Rule 140(1) states that if the presiding judge does not give directions on what procedures are to be used, the Prosecutor and defence shall agree on the order and manner in which evidence shall be submitted to the trial chamber. Rule 140(2) states:

In all cases, subject to article 64, paragraphs 8(b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows:

- (a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, 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 the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2(a) or (b);
- (d) The defence shall have the right to be the last to examine a witness.

229. ICCS, Art. 64(6)(d).

230. *Ibid.*, Art. 64(6)(f), 64(8)(b).

231. *Ibid.*, Art. 64(8)(a), 65.

Once the evidence from both parties has been heard, the parties may make closing arguments, with the defence having the right to the last word.²³² The judges, who must have been present throughout the entire trial, will then deliberate together in secret and decide the case. The decisions on culpability and on sentence are separate, as in the common-law system, rejecting the ad hoc tribunals' approach.²³³

The above description of trial procedures, as they are expressly described in the ICC Statute and Rules, raise a number of issues. (1) What limitations are there, if any, on the presiding judge's ability to issue directions concerning the procedure to be applied at trial? Could a judge with a civil-law background, for example, order a purely inquisitorial procedure? (2) How extensive are the trial chamber's powers to order the production of evidence? Does it have unlimited powers to call its own witnesses or to order additional investigation? (3) To what extent can the parties be required to provide information about their cases to the court in advance of trial? Does the trial chamber have the power to require the Prosecutor to provide a copy of its file to the court? (4) To what extent can the judges control the parties in their presentation of the case? (5) The trial chamber is able to exercise any pre-trial function (other than confirming charges), that are 'relevant and capable of application'. What principles will guide the court in deciding when to exercise these powers? When should the trial chamber refer a matter back to the pre-trial chamber? (6) Given that the pre-trial chamber has the sole power to amend charges, does this mean that the Prosecutor is precluded from amending a charge after the trial has begun? (7) What is the meaning of impartiality before the ICC, and does this have an impact on the extent to which judges can be involved in questioning witnesses?

(1) *What limitations are there, if any, on the presiding judge's ability to issue directions concerning the procedure to be applied at trial?* Articles 64(3)(a) and 64(8)(b) and Rule 140(2) indicate that the presiding judge has the ultimate authority to decide how the trial should be run. This power is not absolute. The president is constrained in his or her choice of procedure, and must allow the parties to examine and cross-examine witnesses. The president's powers must be interpreted in the light of a number of other articles and the general structure of the ICC Statute and Rules. Article 67 gives the accused the right to 'conduct the defence in person or through legal assistance of the accused's choosing', and Article 67(1)(e) provides for the right to

examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.²³⁴

It might be argued that this phrase allows judges to take over the questioning of all witnesses, since this would mean that the accused's witnesses would be examined under the same conditions as the prosecution's. The words 'examine or have examined' must be given their ordinary meaning, in the context in which they occur,

232. ICCR, R. 141(2).

233. ICCS, Art. 74, 76.

234. *Ibid.*, Art. 67(1), (e).

in the light of the objects and purposes of the Statute.²³⁵ The ordinary meaning of these words is that the accused may choose to question witnesses personally, or may have his or her legal representative question witnesses. Other persons may not question witnesses on behalf of the accused. A judge, for example, could not question a witness and either refuse to allow the accused or accused's counsel to question the witness or only allow the accused or counsel to pose questions via the judge. Nor could judges appoint an *amicus curiae* to question witnesses in place of the accused when the accused is conducting his or her own defence.²³⁶ The words 'examine' and 'examined' are verbs. As this is the accused's right, it indicates that the accused must be doing some action. The accused must 'examine' the witness him- or herself or must have 'examined' the witness, requiring someone to do the questioning. If a judge took over the questioning, the accused would not be the actor, but would be the object of the judge's actions. Any uncertainty is resolved by the French text, which reads 'Interroger ou faire interroger'. 'Faire' is translated into English as 'to make' or 'to do', indicating that the accused is performing the action of having someone else question the witness. That part of Article 67(1)(e) given above at footnote 234 is identical to Article 6(3)(d) of the European Convention on Human Rights. Article 6(3)(d) has been interpreted by the European Court of Human Rights as meaning 'that the hearing of witnesses must in general be adversarial'.²³⁷ We can presume that the drafters of the ICC Statute were aware of this interpretation when they adopted Article 67(1)(e), which suggests they intended to incorporate adversariality by using it.

Support for the notion that the parties have the right to question witnesses is found in a number of other sections of the ICC Statute and Rules. Rule 88(5) indicates that the chamber must be vigilant in controlling the manner of questioning a witness or victim, which presupposes that someone other than the chamber is doing the questioning. Article 69(2) states that the testimony of a witness shall be given in person, 'except to the extent provided by the . . . Rules of Procedure and Evidence', and that prior recorded testimony may be admitted. The article finishes with the words, 'These measures shall not be prejudicial to or inconsistent with the rights of the accused'. Prior recorded testimony may be introduced provided that 'both the Prosecutor and the defence has the opportunity to examine the witness during the recording' or 'the Prosecutor, defence and Chamber have the opportunity to examine the witness during the hearing'.²³⁸ The defence right to be involved in this questioning suggests that preventing the accused from questioning witnesses is inconsistent with the accused's rights.

A further indication that the parties are expected to do most of the questioning is the lack of an express requirement that the Prosecutor provide a dossier to the

235. *Prosecutor v. Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-A, ICTY App. Ch., 2 Oct. 1995, paras. 72–78; *Prosecutor v. Tadić*, Judgement, Case No. IT-94-A, ICTY App. Chamber, 15 July 1999, paras. 282–285; Bantekas, *supra* note 122, at 85.

236. See *Prosecutor v. Milošević*, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, Case No. ICTY IT-02-54.

237. Case of *Barberà, Messegué and Jabardo v. Spain*, *supra* note 65, at para 78.

238. ICCR, R. 68.

trial chamber. Judicial access to a dossier is essential to inquisitorial procedure, since judges could not possibly prepare for a purely inquisitorial trial without such access.²³⁹ Article 64(2) requires the trial chamber to ensure that the trial ‘is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. The phrase ‘is conducted’ presupposes that the trial chamber is managing the parties involved in the trial, as in the common-law system. If the system were inquisitorial, Article 64(2) would require the Chamber to ‘conduct’ the trial in a fair and expeditious manner. The fact that the parties must question witnesses indicates that the proceedings, which must be public,²⁴⁰ will necessarily be oral.

The requirement of adversariality does not require common-law adversariality where the judge is passive, so the trial chamber can play a more active role during the proceedings. Rule 140(2) indicates that the judge can choose to question witnesses first. There is no formal reason why the judge could not do so, provided the parties are also given an opportunity to question and cross-examine the witnesses fully. However, as will be discussed later, judges run a risk of being considered biased if they question witnesses first.

The above discussion demonstrates that the president is not free in his or her choice of procedure, and must respect the basic principles of adversarial proceedings, namely the parties’ right to call, examine, and cross-examine witnesses in a public and oral hearing.

(2) *How extensive are the trial chamber’s powers to order the production of evidence?* The pre-trial and trial chambers’ powers to order the production of evidence are more extensive than those exercised in the common-law system, but are less extensive than in civil-law systems. Judges are expressly given the power to question witnesses, which means that a passive role is not required, and Article 64(6)(d) states that

In performing its functions prior to the trial or during the course of the trial, the Trial Chamber may, as necessary:

...

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

This indicates that trial chamber judges have the power to order that additional witnesses be produced, but they are not allowed to order additional investigation or to perform acts tantamount to investigation. Where civil-law judges are given the power to order additional investigation, this is expressly stated.²⁴¹ The power to order the production of evidence is limited to situations where the trial chamber is ‘performing its functions’, and where the additional production is ‘necessary’. The trial chamber’s functions are limited to the post-confirmation preparation for trial, and the trial itself. There is a rigid separation of functions between the trial chamber and pre-trial chamber, and the pre-trial chamber is explicitly made responsible for supervising the investigation. Investigative supervision is not a trial chamber

239. Jorda and de Hemptinne, *supra* note 165, at 815.

240. ICCS, Art. 64(7).

241. France, CPP, *supra* note 4, Art. 28.

function. Since the pre-trial chamber does not have the power to order additional investigation, it can hardly be the case that the trial chamber can. If the trial chamber ordered additional investigation, this would undermine the ICC's strict division of the investigative function (which is the Prosecutor's responsibility), and the adjudicative function.

This indicates that the power to order the production of additional evidence is limited to a clarification role, broadly understood. If no evidence has been collected or led by the parties in relation to an issue, ordering them to collect and present evidence in relation to that issue would be tantamount to ordering an investigation. Additional evidence can be ordered only when this will not constitute an investigation. This will be limited to circumstances in which evidence has been led in relation to an issue and it is clear that additional witnesses exist whose identity has been ascertained or is readily ascertainable and who could shed additional light on that issue. If the identity of the witness has not been ascertained, or is not readily ascertainable, the parties would have to be ordered to go out and find witnesses – a requirement that the parties investigate. In other words, additional evidence can be ordered when the investigation has already been performed.

(3) *To what extent can the parties be ordered to provide information about their cases to the trial chamber?* Although the ICC Statute and Rules do not explicitly give judges the power to order the parties to provide information to the court, these powers are implicit in the structure of their Statute and Rules. However, a dossier-like approach, in which the Prosecutor or defence is compelled to provide their entire case files to the court, is impermissible. The dossier approach requires the Prosecutor to keep a single file that contains a complete record of proceedings, and all evidence, both inculpatory and exculpatory, yet the Statute and Rules do not require the Prosecutor to keep such a record. If the drafters of the Statute or the Rules had wanted a dossier-like approach to be taken, they would have expressly indicated this in the Statute.

Further evidence that a dossier-like approach is not to be used is the strong protection provided for the principle of orality. Article 69(2) specifies that the 'testimony of a witness at trial shall be given in person', but the court 'may' permit witnesses to testify by other means. Where evidence is not led orally, the prosecution and defence must have had the opportunity to question the person who originally gave the evidence.²⁴² While this might seem to be an exception to the principle of orality, it actually protects one of the concerns underlying the principle: that parties should be able to test and challenge the evidence of adverse witnesses. The ICC's Statute and Rules do not expressly allow for evidence to be led in writing, as in Rule 92 bis of the ad hoc tribunals' Rules, suggesting that the international community does not regard written evidence to be consistent with the accused's rights, when this evidence has not been subject to cross-examination. Article 74(2) requires the ICC to base its decision only on the evidence submitted and discussed before it at trial. The dossier approach is not necessarily inconsistent with the principle of orality, as rules may provide that only information which has been discussed adversarially

242. ICCR, R. 68.

at trial can be used against the accused. However, the dossier approach is usually associated with weak protection for orality. Since orality is strongly protected in the ICC's Statute, in a system that also requires adversariality, a dossier-like approach is not permissible, and the parties cannot be ordered to produce their entire files.

An argument could be made that the trial chamber must adopt common-law procedure, with the parties providing little to no information to the chamber before trial. There are several difficulties with this argument. The 'presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner'. This statement seems wide enough to include the power to order the parties to summarize their cases for the court. The judges are expected to play a relatively active role in the proceedings, questioning witnesses and calling evidence. They would be unable to do this if they had no advance information about the case. They are also expected to be involved in ensuring there is disclosure, and that the case proceeds fairly and expeditiously. It is hard to see how they could perform these functions unless they know what the case is about. Accordingly, in my view, the ICC Statute and Rules allow the presiding judge to order the parties to provide information about their cases in advance. While judges cannot order them to produce their entire files, they must be able to order information similar to that required by the ad hoc tribunals: brief descriptions of their positions and arguments; summaries of what witnesses would testify to; and a detailed list of witnesses and the time expected that each witness would take.

(4) *To what extent can the judges control the parties in their presentation of the case?* Ad hoc tribunal trial chambers have substantial powers allowing them to control the parties' presentation of the case. No such powers are expressly provided for in the ICC Statute or Rules. Regardless of what powers the presiding judge may have under Article 64(8)(b), the same comments made regarding the ad hoc tribunals' powers to control the parties apply here. The parties cannot be prevented from adducing all relevant evidence that may support their case. To do so would undermine the accused's right to a fair trial. Of course, whether a given limitation on the prosecution or defence will have this effect is a difficult question to answer. It would take a book to discuss all the ways in which a judge could limit the parties' presentations, so I shall confine my discussion to time and witness limitations.

In my view, ICC judges have the ability to limit the number of witnesses a party can call, and the time that parties can take during cross-examination. The trial chamber must have the ability to control the length of proceedings. International criminal trials do not resemble domestic trials because of their length and complexity. Judges are required to ensure that the trial is 'expeditious',²⁴³ a duty which must be matched by corresponding powers. Limitations could be imposed in advance, as in the ad hoc tribunals, or during the course of the trial, in response to parties who are wasting time during the direct and cross-examinations. If, during the course of the trial, a party who has been questioning a witness on relevant matters

243. ICCS, Art. 64(2).

needs additional time to complete relevant questioning, he or she must be granted this time, otherwise the party will be denied the right to fully present his or her case.

(5) *What pre-trial functions can the trial chamber exercise?* In seeking to answer this question there is no relevant international practice that we can examine. The ICC is a *sui generis* system, and the trial chamber has a unique set of powers that is not identical to any domestic system. My answer must necessarily be limited to principle. The division of functions between pre-trial and trial chambers is rigid, and the trial chamber can only exercise those powers that are 'relevant and capable of application' in the circumstances.²⁴⁴ The pre-trial chamber's powers relate primarily to the investigation, while the trial chamber's powers relate primarily to the trial and preparation of the case for trial. Where an effort is being made to find information that has not previously been discovered, this is an investigatory function that should generally be supervised by the pre-trial chamber. It may be necessary for the trial chamber to exercise pre-trial functions in some circumstances, because pre-trial matters necessarily influence the timing of the trial. However, in deciding whether it should refer a matter back to the pre-trial chamber, the trial chamber must take into consideration the division of functions. Unless it is necessary for the trial chamber to exercise a pre-trial function, in order to prevent a delay or to ensure that the trial starts on schedule, pre-trial functions should always be referred back to the pre-trial chamber. Failing to do this will erode the division of investigatory and adjudicatory functions, which may raise doubts about the trial chamber's impartiality.

(6) *Is the Prosecutor or the Court precluded from amending a charge after the trial has begun?* My view is that the Prosecutor or the Court cannot substantially amend charges once the trial has begun. The reality of international criminal trials is that searching for and finding relevant evidence could continue for ever. When a community has been engulfed by mass violence, every person is affected, every person has participated, and every person is a witness, living or dead. Roads bear the marks of passing tanks. Cities, towns, and villages bear the scars of bullets and bombs. Fields bear the bodies of the dead. No investigation can gather a complete record of what happened during the years of horror that the community has borne, and no trial can paint a portrait of everything that has occurred. The truth established during a trial is necessarily a momentary snapshot of what has occurred, a picture that could always be made more complete if one could only include every event that occurred outside its frame. The truth is necessarily incomplete, imperfect, and human. The best that can be hoped for is that an investigation and trial establishes as much of the truth as possible as it relates to the accused, and clearly answers a single question, 'guilty or not guilty?', in relation to specific charges. The accused is entitled to a fair trial, and must be told what it is that he or she is charged with having done. The only thing that matters at trial is whether he or she has committed specific acts that amount to a specific crime. The accused is not on trial for his or her entire past life, or for being a good or bad

244. *Ibid.*, Art. 61(11).

person. No human being can judge another's life, and no human being could defend his or her life in the short time that a trial might last. A trial does not take the form of a target that the Prosecutor or court can move at will, and that the accused must try to strike, but is a specific event, about specific acts, which occurred at specific times. The fact that the pre-trial chamber is accorded the exclusive power to confirm charges means that the Prosecutor can never substantially amend charges once the trial has begun.²⁴⁵

(7) *What is the meaning of impartiality before the ICC, and does this have an impact on the extent to which the judges can be involved in questioning witnesses?* Judicial impartiality is protected much more strongly in the ICC than in the ad hoc tribunals, due to the rigid division of functions between pre-trial and trial judges. We know from the first part of this article that there is broad agreement between the civil- and common-law systems with regard to the outlines of impartiality. The ICC respects the basic rules: judges cannot be involved with any of the parties or with the case at an earlier stage; judges must withdraw if they have any interest in the case. Rule 34(1) provides additional protection. A judge may be disqualified on grounds of

- (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned.
- (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

These grounds go beyond those expressly included in Rule 15 of the ad hoc tribunals' Rules. The standard will presumably be whether there is a reasonable apprehension of bias. The fact that the judge may be considered partial as a result of opinions expressed in writing or in public actions, indicates that in-court statements made during the trial or in-court questioning could be used to impugn the judge's required impartiality. Questioning witnesses in a public trial is a public action, and can eloquently express the judge's opinion. As judges can be challenged on such grounds, they will have to be careful that when questioning witnesses they do not do so in a one-sided fashion. It is for this reason that I stated earlier that while judges can be the first to question a witness, they should be cautious in doing so. If a judge routinely brings out evidence of guilt when taking the primary role in questioning prosecution witnesses and fails to adduce exculpatory evidence, a reasonable apprehension of bias may arise. For this reason, while judges can take the primary role in questioning witnesses they should not do so routinely or for all witnesses. Judges would do better to allow the Prosecutor to bring out evidence of guilt and to engage in questioning where this may accelerate proceedings, rather than try to take control of the case. The ability of ICC judges to ask questions indicates that ICC impartiality does not suffer from the hyper-sensitivity found within the

245. I do not suggest that minor amendments could not occur when such an amendment would not prejudice the defence.

common law, but since the judges can be challenged more easily than in the ad hoc tribunals, they are under heavier constraints.

4. CONCLUSION: TEMPERED ADVERSARIALITY

We are now ready to conclude by examining the theory underlying ad hoc tribunal and ICC trials and the judicial role.

The scope of judicial powers before the ICTs is *sui generis*. This means that the theories underlying the common- and civil-law systems of criminal justice and the judicial role cannot be directly applied to the international criminal tribunals. A new theory of the trial, and of the judicial role, is required.

In the first part of this article I reviewed the theories underlying common-law and civil-law trials, and pointed out the flaws within those theories. Common-law theory fails to take account of the problem that the truth is less likely to be found where the parties are not equal or do not have an interest in establishing the truth. It also fails to recognize that more information may be adduced when a neutral judge is involved in questioning.²⁴⁶ Judicial activity means that the parties' errors or limitations are less likely to leave facts uncovered, mitigating one of the common-law system's major flaws. On the other hand, civil-law theory places unreasonable faith in the impartiality of a single figure who both investigates and adjudicates, and in the notion that a single figure will be able to discover the truth. Claude Jorda and Jérôme de Hemptinne believe that international criminal judges should play a primary, highly active role in bringing out the evidence of the parties, since this will improve the truth-seeking process.²⁴⁷ The flaw in this opinion is that where one person, with one view of the case, conducts most or all of the questioning, the evidence adduced will reflect this person's views. Civil-law theory fails to recognize that more facts will be adduced when the prosecution and defence also play an active role in the truth-seeking process.

In comparison with traditional civil-law systems, ICT judges are relatively passive, because the governing Statutes and Rules make the parties primarily responsible for presenting their cases. This means that individual judges are in a better position to maintain their subjective impartiality than they are in civil-law systems. Our review has also revealed that ICT judges have been more interventionist than in common-law systems, and that more information is adduced because of these interventions.

The *sui generis* approach to the judicial role means that the ICTs have adopted a *sui generis* approach to criminal procedure. A new theory of the trial and judicial role is required.

This new theory is that of tempered adversariality. The best way to ensure that the truth is discovered is to allow two passionately committed parties to adduce all relevant facts before a neutral adjudicator while allowing the adjudicator to play a secondary, but active, role in bringing out the evidence. This

246. The ad hoc tribunals' transcripts reveal that more information is adduced when both the parties and judges question the witnesses. See, e.g., *supra*, notes 143 and 167.

247. Jorda and de Hemptinne, *supra* note 165.

ensures that the issues in which the adjudicator, prosecution, and defence are most interested will be canvassed, and the facts relevant to these issues adduced. More facts will be adduced than if only the parties, or only the judge, perform the questioning. The prosecution and defence will be aware of the adjudicator's interests because of the questions being asked, but they will still be able to try to convince the adjudicator of the rightness of their respective cases. As the adjudicator plays a secondary role in bringing out the evidence, and is prevented from taking over the case, he or she is more likely to remain impartial throughout the trial, and is more likely to pay equal attention to the arguments and evidence adduced by each party.

The development of trial theory which I am suggesting has not been deliberately created or chosen by the framers of the ICTs. When negotiating the Rome Statute, there was considerable discussion as to what procedures should be adopted,²⁴⁸ but there was no agreement on what theory should underlie these procedures. There have been ongoing discussions over procedure in the ad hoc tribunals, with continual amendments being made to their rules. However, these discussions have focused on practical issues, such as whether it was permissible to place time limits on examining witnesses. I have found no evidence that discussions of trial theory and the judicial role have occurred in either the ad hoc tribunals, or in the preparatory work leading to the Rome Statute.

I have identified the theory of tempered adversariality by comparing international criminal procedure with the practice of national jurisdictions. Accordingly, it could be argued that this proposed new theory is of no benefit, because it simply describes practice, meaning that the theory will be subject to change when practice changes. It might further be argued that adopting the theory of tempered adversariality could undermine the future development of international criminal procedure. The new theory could divert attention from the real issues – the practical considerations arising in international criminal trials – and could discourage beneficial procedural changes.

I agree that I have identified this new theory by examining what occurs in practice in ICTs and that, to date, there has been no attempt to ground international criminal procedure (ICP) in theory. ICP has been created by practical politics, through a process of negotiation in which jurists from different theoretical traditions have attempted to preserve features of their tradition. James Crawford noted the 'tendency of each duly socialized lawyer to prefer his own criminal justice system's values and institutions'²⁴⁹ during negotiation. Despite this, I cannot agree that the theory of tempered adversariality should not be adopted, or that the search for theory is of no practical use.

To begin with, I noted in the introduction that consistent procedures are essential to a truly fair system of justice.²⁵⁰ Where different accused persons are faced with different procedures, international criminal justice is open to the complaint that

248. See, e.g., Schabas, *supra* note 190, at 94.

249. J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 AJIL 404.

250. *Supra* note 3.

different accused are treated differently, some more fairly than others. Inconsistent procedures make it more difficult for lawyers to prepare for trial, since they may not know what procedures apply until the trial actually begins.

Consistency in a procedural system can only be achieved when those participating in the system share a common understanding of how it is supposed to operate. This common understanding cannot arise by achieving consensus on how each and every procedural rule should be applied. Such consensus would be impossible to achieve, as is evidenced by the continual and ongoing debate in national systems about the way in which specific evidentiary rules or specific provisions of procedural codes should be applied. Common understanding arises out of a shared agreement on the theories underlying the procedural system and the roles to be played by the actors in that system. If the theory of tempered adversariality were adopted by the ICTs, this would provide the common understanding that is required for consistent treatment of accused persons.

The new theory should be adopted because it embraces the wisdom and addresses the flaws to be found in the approaches to truth-finding of both common- and civil-law trial theory. Most societies provide for different views to be canvassed before important decisions are made, making it more likely that relevant factors will be taken into account in making the decision. This is why public consultations take place before political decisions are made, and why we allow interveners in contentious court cases.²⁵¹ Public consultations and intervention allow different interest groups to present facts which may influence the decisions made. In court cases, where one lawyer (or a team of lawyers) is asking questions on direct or cross-examination, it is easy for that lawyer to miss important points, either because of the pressure of the moment, or because he or she fails to recognize that significant points have not been addressed. Accordingly, the truth is more likely to be discovered if both judges and parties play active roles.

Lastly, the fact that the theory of tempered adversariality reflects the procedural regimes currently in existence provides a reason why it should be adopted, not a reason why it should be rejected. The procedural regimes have arisen out of a process of negotiation in which jurists of different traditions have attempted to preserve aspects of their tradition because they consider these aspects to be beneficial. Civil-law jurists believe that an active judiciary is a good way to ensure that relevant facts are adduced because the judge has no interest in the outcome of the case. Common-law jurists believe that involvement by the parties is essential, since judges might overlook facts relevant to a party's case. The new procedural regimes have effectively amalgamated the common- and civil-law systems, and the new theory recognizes this by amalgamating the theories underlying each system.

Whether or not the theory of tempered adversariality is accepted, it is important to note that scholars and jurists have not begun debating procedural theory. Debate is a prerequisite to developing a shared consensus about the principles and theories

251. D. Shelton, 'The Participation of Nongovernmental Organisations in International Judicial Proceedings', (1994) 88 AJIL 611.

underlying international criminal procedure. Debate will force judges, prosecutors, and defence counsel to turn their minds to what their roles are, what their roles should be, and what procedural system will best allow the truth to emerge from investigation and trial. Debate will encourage a shared consensus to emerge, a consensus that is vital to the existence of a fair and consistent standard of justice. While I encourage jurists to adopt the theory of tempered adversariality, a debate needs to begin.