

ASCERTAINMENT OF THE TRUTH
IN INTERNATIONAL CRIMINAL JUSTICE

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Abstract

This thesis seeks to answer the principal question as to whether international criminal justice systems can serve as adequate truth-ascertaining forums. In doing so, it reviews the practice of three international criminal justice systems: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). It is not the purpose of this research to review the black letter law adopted and applied by these international tribunals and court, but rather to review the implementation of the legal principles in practice. It is a socio-legal research project which focuses on the practice of the tribunals and court. It discusses socio-legal, institutional and political issues relating to the ascertainment of the truth in international criminal justice.

In addition, it examines the gaps between the theory and practice of ascertaining the truth in the ICTY, ICTR and ICC. It does so principally by exploring the roles of the parties, participants and judges in ascertaining the truth. This includes the obstacles they face in doing so and the responses given, if any, to accommodate these difficulties. Challenges include the politicised climate of most post-conflict societies, the remoteness of the crime base areas from the seat of the Court, the lack of enforcement mechanisms and reliance on State cooperation, as well as the unfamiliarities with the cultural and linguistic features of the affected communities. This thesis reveals that these difficulties are not the principal cause of truth-searching impediments. Indeed, it is asserted that the ascertainment of the truth can be fair and effective notwithstanding these difficulties. It also demonstrates that truth-ascertaining impediments are mainly caused by failures to adequately investigate the crimes and relevant evidence. At the ICTY, investigations have been carried out in the most efficient and fair manner possible under the circumstances. By contrast, the ICTR and ICC investigations are far from adequate and should be improved. The Prosecution should make more efforts to obtain the best evidence available.

It further concludes that international justice systems have set their goals too highly. Instead of seeking to meet objectives such as reconciliation, peace and security, they should restrict their focus to the question as to whether the guilt of a particular accused has been established in respect of the crimes charged.

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List of Abbreviations

ABA – American Bar Association
AFDL – Alliance des Forces Démocratiques pour la Libération du Congo
ALO – United Nations Office of Legal Affairs
ANC – African National Congress
APR – Armée Patriotique Rwandaise
BGH – German Supreme Court
BZRG – Statute on the Federal Central Criminal Register
CCP – Criminal Procedure Code
DRC – Democratic Republic of the Congo
ECCC – Extraordinary Chambers in the Courts of Cambodia
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EHRR – European Human Rights Reports
FAB – Forces Armées Burundaises
FAR – a/k/a RPF - Forces Armées Rwandaises
FDLR – Forces Démocratiques pour la Liberation du Rwanda
FRD – Forces Rwandaises de Défense
FYROM – Former Yugoslavian Republic of Macedonia
HRC – United Nations Human Rights Committee
HRW – Human Rights Watch
IBA – International Bar Association
ICC – International Criminal Court
ICG – International Crisis Group
ICJ – International Court of Justice
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
ILC – International Law Commission
KLA – Kosovar Liberation Army
MONUC – United Nations Mission in the Democratic Republic of Congo
NGO – Non-Governmental Organization
OTP – Office of the Prosecutor
OUP – Oxford University Press
RDC – Research and Documentation Center
RPF – a/k/a FAR - Forces Armées Rwandaises
SCSL – Special Court for Sierra Leone
STL – Special Tribunal for Lebanon
StPO – German Code of Criminal Procedure
TRC – Truth and Reconciliation Commission
UN – United Nations
UNGA – United Nations General Assembly
UPDF – Uganda People’s Defense Force
UPC – Union Patriotique Congolais
VWU – Victims and Witnesses Unit

Introduction

Topic of this Research

This thesis on ‘The Ascertainment of the Truth in International Criminal Justice’ principally explores the following question:

Do international criminal courts and tribunals constitute effective truth-searching institutions?

This thesis has been inspired by two recent events:

A truth to be found or constructed?

First, on 30 March 2011 in The Hague, Michelle Parlevliet opened a debate on the ascertainment of the truth in international criminal justice. This debate followed the showing of the documentary ‘Telling Truths in Arusha’,¹ with the following question: ‘is there a truth to be found or a truth to be constructed’? None of the participants of the debate which included two defence counsel who had practiced before a number of international criminal tribunals and a judge from the SCSL² had a clear answer to that question.³ This is not surprising since there is no fixed view on how truth is to be defined in the context of international criminal justice. It is an important issue since it is directly linked to the question of what interpretation should be given to the task of ascertaining the truth in international criminal justice.

The same question was also central to the documentary itself, which was based on the trial of a priest, Hormisdas Nsengimana, who was tried for genocide and crimes against humanity before the International Criminal Tribunal for Rwanda (ICTR) and

¹ This documentary was shown in the filmhuis in The Hague as part of the Amnesty International Film Festival ‘Movies that Matter’. It is a documentary made by a Norwegian filmmaker, Beate Arnestad in 2010 (SF Norge Produksjon AS). See:

<http://www.movieshatmatterfestival.nl/english_index/programma_en/film_en/513>

² One of the defence counsel for Nsengimana, Mr. David Hooper QC, was one of the participants of the debate. The other participants were Judge Sebutinde, one of the judges in the pending SCSL case of Charles Taylor, and Wayne Jordash, former counsel for Issa Sesay.

³ It appears, however, that Michelle Parlevliet who presided over the debate and asked this question had already answered it in an academic writing entitled M. Parlevliet, *Considering Truth. Dealing with a Legacy of Gross Human Rights Violations*, 16(2) Netherlands Quarterly of Human Rights 141 (1998). In this article, she held that the truth is not something that can be found but rather that needs to be constructed (at 172).

acquitted on 17 November 2009.⁴ Judge Møse, the presiding judge in this case and former President of the ICTR, gave the following answer to the question of whether a truth could be found in an international court of law: “That is a bit of a philosophical quandary. The question we as judges seek to answer is whether the guilt of an accused before us has been proved beyond a reasonable doubt”. In this case, Judge Møse and two fellow judges considered that Nsengimana’s guilt had not been established beyond reasonable doubt. Had the truth been found? That appeared to be a more difficult question to answer.⁵

Deficiencies in fact-finding in international criminal justice

Second, in June 2010, Nancy Combs published a book “Fact-finding Without Facts”⁶ with shocking results. It places doubt whether establishing accurate facts in international justice is possible. With ample examples of deficiencies in witness testimonies in the ICTR, SCSL and East Timor Special Panel, Combs concludes that there are insurmountable problems in establishing facts in conflict zones particularly in Africa and other non-Western countries where documentary evidence is sparse. The problems she addresses are, *inter alia*, (i) the problem of interpretation both in the taking of statements and in court testimony; (ii) cultural differences resulting in inaccurate answers; (iii) the inability particularly of uneducated witnesses to read maps and measure distances; and, (iv) perjury.⁷

Combs argues that some improvement can be made by increasing the budget for translation, number of site visits, and prosecutions of perjurers, as well as increasing investigation standards. She also suggests that improvement can be achieved by allowing judges greater control over the questioning of witnesses.⁸ She concludes, however, that many of these problems cannot be resolved and clearly impede on the ability to ascertain accurate facts in international justice. She believes that most of the

⁴ *Prosecutor v. Nsengimana*, T. Ch. I. Judgement, ICTR-01-69-T, 17 November 2009.

⁵ Judge Sebutinde did not seem to think so. She made the observation that, in reaching their conclusion, the judges had focused too much on contradictions between the in-court testimony of the witnesses and their prior statements, which were not taken under oath and should therefore, in her view, be given very limited weight. David Hooper, on the other hand, responded by saying that the contradictions were so significant that they could not be the result of mistakes but indicated that the witnesses did not tell the truth.

⁶ N. Combs, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010).

⁷ *Ibid.*, in particular Chapters 1-5.

⁸ *Ibid.*, 273-321.

defendants are guilty but that their guilt cannot be established beyond reasonable doubt in an international court of law. She argues that an unjustified acquittal in international criminal justice is more costly than in domestic trials, while an unjustified conviction is less costly than in domestic trials. Combs bases her argument on the fact that international trials are extremely expensive and the financiers are likely to be less willing to pay the costs if a large number of the trials end in acquittals. She also highlights that acquittals are regularly followed by public outrage, particularly of the victims who suffered unspeakable atrocities.⁹

In light of the foregoing, Combs offers two solutions in addition to improving fact-finding accuracy: (1) to apply a flexible standard of proof permitting a lower level of certainty, as appropriate in the circumstances;¹⁰ and (2) to charge more frequently under the joint criminal enterprise mode of liability.¹¹

Combs' research is a valuable contribution to the literature because it is the first socio-legal research that has been conducted in the area of fact-finding in international justice. In reaching her conclusions, she read thousands of transcripts and interviewed many defence and prosecution counsel and investigators in the field of international justice.

However, her research and conclusions are highly controversial because they question the very essence of international criminal tribunals, which is equivalent to domestic criminal courts, namely the ability to establish accurate facts. Her research has been embraced by some, and criticised by others. Some of the criticism is valid, other less, as will be discussed in this thesis.

Defence counsel in international courts and tribunals generally support her views. In one case before the ICTR, as well as in a Rwandan genocide case in the Netherlands, the defence unsuccessfully sought to introduce her book as expert evidence.¹² On the other hand, Justice Doherty, one of the SCSL judges in the case of Charles Taylor, is

⁹ *Ibid*, 352-360.

¹⁰ *Ibid*, 343-364.

¹¹ *Ibid*, 321-333.

¹² Such a request was made in the ICTR case of *Prosecutor v. Nzabonimana*, ICTR-98-44D-T; and in the Dutch case of Yvonne Basebya.

highly critical of Combs' book. She suggests that the difficulties Combs describes are not unique to fact-finding in international justice but also occur in domestic jurisdictions where practical solutions have to be found constantly to practical problems. Similarly, practical solutions must be found for practical problems in international criminal tribunals. In her view, it cannot be argued that accurate fact-finding in international justice is impossible per se.¹³ Given that Combs did not observe any of the proceedings personally but rather relied on transcripts, she was not in a position to assess the demeanour of the witnesses.¹⁴

Combs' book also provoked ample academic debate on the limitations of fact-finding in international justice and clearly warrants follow-up research. As Professor John Jackson has pointed out, some valid criticism can be made against Combs' research and conclusions, but it should be acknowledged that she managed to do what many others failed to do. She went out and conducted socio-legal research concerning the practical realities of fact-finding in international justice. This is not an easy task. Jackson encourages academics to continue the socio-legal work she started.¹⁵

Aim of this Research

This thesis seeks to take Jackson's advice and to continue the debate ignited by Combs' socio-legal research with a touch of Parlevliet's philosophical approach to the ascertainment of the truth. It examines the difficulties in ascertaining the truth in international criminal tribunals. The central question of this thesis is whether international criminal courts and tribunals constitute effective truth-searching institutions. If not, what improvements can be made to achieve this goal, if, indeed it is possible?

The aim of this research is not to review the black letter law adopted and applied by international criminal tribunals, but rather to review the implementation of the legal principles in practice. It is a socio-legal research project focusing on the practice of the tribunals, discussing socio-legal, institutional and political issues relating to the

¹³ Observations of the Honourable Justice Teresa Doherty, key speaker at *A Socio-Legal Approach to Evidence in International Criminal Tribunals*, Conference held at the University College of Dublin, Dublin, Ireland, 19 November 2011 ("the Dublin Conference").

¹⁴ *Ibid.*

¹⁵ Concluding remarks by Professor Jackson at the Dublin Conference.

ascertainment of the truth in international criminal justice. It examines the gaps between the theory and practice of ascertaining the truth in international tribunals. It then explores what improvements can be made to fill these gaps.

Structure of this Research

This research consists of four parts.

Part I

Part I analyses theoretical concepts with the aim to define the theoretical framework within which the practical issues will be discussed. It looks at the aspirations and expectations of the ascertainment of the truth in international justice, as well as the limitations of what can be achieved. It also discusses the extent to which the ascertainment of the truth is an objective of international justice, and how this objective relates to other objectives of international justice.

It explores what is actually meant by ascertaining the truth within the context of the function and perceived mandate of international trials. In this regard, it analyses whether the ascertainment of the truth corresponds with the reasonable doubt standard or whether it is subsumed within the more general restorative aims. It further examines the theoretical difficulties to achieve it as well as its scope. The principal question of whether these international criminal justice systems are effective as truth-ascertaining institutions can only be meaningfully discussed after these factors are addressed. In so doing, Part I analyses and compares the meaning and scope of the ascertainment of the truth in civil law and common law criminal justice systems.

Part I then establishes minimum conditions international courts and tribunals should meet to provide an adequate theoretical possibility of ascertaining the truth.

Part II

Part II examines the method chosen to ascertain the truth and whether it, at least in theory, has all the ingredients to succeed in this endeavour. It assesses to what extent these procedures comply with the minimum condition set out in Part I. It also

identifies the procedural aspects which are potentially problematic in the ascertainment of the truth.

Part II will provide a brief overview of two types of methodologies – civil law and common law. Mainly these methodologies have influenced the procedure which is now adopted and applied in international criminal courts and tribunals.

It then analyses whether the combining of these two types of procedures into the emerging international methodology has led to a thoroughly adequate structure of international truth ascertainment. It will address the concern frequently raised that mixing bits and pieces of fundamentally different systems with their own distinct legal philosophies may create a deformed system.

It further evaluates to what extent the emerging international truth-ascertaining methodology, essentially based on Western criminal justice methodologies, can in theory be implemented effectively in non-Western countries with potentially different views on truth and justice.

Part III

In Part III, the efficiency of international criminal justice systems as truth-searching forums is tested by considering whether the minimum conditions, as set out in Part I, are met. This part determines how well the international tribunals and courts have done so far in implementing the theoretical task of ascertaining the truth.

Part III examines the truth-searching practice in three international criminal tribunals and court: the ICTR, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC). It explores the roles of the parties, participants and judges in ascertaining the truth, the obstacles they face in doing so and the response which was given, if any, to accommodate these difficulties. Particular attention is paid to the procedural aspects which have been identified in Part II as potentially problematic in ascertaining the truth.

Part III discusses the following subjects:

- Investigations;

- Victims and Witnesses;
- Admissibility and evaluation of the evidence.

Part IV

From the analysis in Parts I to III, conclusions are drawn regarding the adequacy in practice of the ascertainment of the truth in the ICTR, ICTY and ICC. To the extent necessary, suggestions for improvement are made.

Method and Scope of this Research

Part I

Part I discusses theory rather than practice. In exploring the theoretical concepts that are later tested in practice, Part I principally relies on academic sources. It has particularly been inspired by the aforementioned debate on the ascertainment of the truth, as well as a number of scholarly works including Michelle Parlevliet's academic article on 'Considering Truth: Dealing with a Legacy of Gross Human Rights Violations'.¹⁶ Other influential authors exploring the definition of the ascertainment of the truth and conditions necessary to ascertain the truth efficiently and fairly include Rorty,¹⁷ Koskenniemi,¹⁸ and David Becker.¹⁹

The theories of Richard Ashby Wilson,²⁰ Hannah Arendt²¹ and various other observers²² are referred to in discussing the extent to which courts should get involved in establishing historical facts. To this effect, the views of practitioners in international justice are also discussed.

¹⁶ Parlevliet, *Considering Truth*, *supra* note 3.

¹⁷ R. Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press, 1989), 48; R. Rorty, *Objectivity, Relativism, and Truth. Philosophical Papers Vol. I* (Cambridge University Press, 1991), 21-45; Parlevliet, *Considering Truth*, *supra* note 3, 6.

¹⁸ M. Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law 1 (2002).

¹⁹ D. Becker, *Confronting the truth of the Erinyes: The illusion of Harmony in the Healing of Trauma*, in T. Borer (Ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, (University of Notre Dame Press, 2006) 231; at 232 he refers to 'belief rather than scientific proof', and 242-243.

²⁰ R. Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 Human Rights Quarterly 908 (2005), 908-942.

²¹ H. Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (Penguin Books, 1994) (first published in the US by the Viking Press 1963).

²² See further below, section 'Scope of the ascertainment of the truth in international justice'.

Part I further gives due consideration to the manner in which Truth and Reconciliation Commissions (TRCs) have interpreted their mandate to establish the truth and how they deal with difficulties in meeting this mandate. This is considered essential because TRCs and international criminal courts and tribunals are established in similar circumstances with similar objectives albeit with different types of truth-ascertaining methodologies.

The scope of the analysis of TRCs is limited. The analysis does not discuss practical examples – save for a number of limited references – but focuses on theory. The discussion is primarily aimed at explaining the common objectives of TRCs and international criminal justice. It points out the limits of any mechanism in meeting those objectives and emphasises the difficulties of meeting them all at once in the same procedure. The TRC experience demonstrates that the achievement of these objectives can be frustrated by seeking to over-achieve as, in particular situations, these objectives may be in conflict with each other.

Part I also discusses opinions expressed at conferences or in personal interviews by various participants from NGOs or international criminal courts and tribunals. Inclusion of such opinions is necessary to analyse the general perceptions of what the functions of international criminal courts and tribunals are, or should be.

Part II

Part II provides a comparative analysis of common law and civil law criminal justice systems. The discussion of civil law jurisdictions is based mainly on the Dutch, French and German criminal justice systems with occasional references to the Italian, Russian and Belgian systems. Whilst this clearly does not give the overall picture of all civil law systems, it offers a global picture of the common features among these various systems. The discussion of common law jurisdictions is based mainly on the criminal justice system of the United Kingdom (UK), the birth country of common law. It does not discuss other common law jurisdictions in great detail.

A classification of domestic systems as common law or civil law systems requires significant generalisations, omissions of important details and oversimplification of legal complexities. This is all the more so in light of the fact that the analysis is

limited to a number of jurisdictions only. Each jurisdiction has features unique to its own and could form the subject of an entire thesis. In addition, there are debates on whether the legal systems can and should still be classified as common law or civil law systems.

Domestic systems continue to evolve. Given the massive expansion of international relations over the last fifty years, the evolution of domestic systems is a process that is heavily influenced by cross-border developments. The European Court of Human Rights, the European Union and international treaties have had significant influence on European criminal justice systems and led to convergence between the UK common law and continental civil law criminal justice systems.²³ Simultaneously, such European developments influencing the UK system may widen the gaps between the UK and non-European common law criminal justice systems. In light of such developments, Richard Frase argues that “the value of global models may become increasingly limited; the growing complexity and hybridisation of modern criminal justice systems tend to undercut the simplicity needed for models to serve their descriptive, explanatory, predictive and normative functions.”²⁴

The impact of international developments on domestic jurisdictions and whether they should be re-classified as a result, or not classified at all, is a thesis on its own. This is, however, beyond the scope of this research. A more in depth analysis of the comparative framework of common law versus civil law and the extent to which it is still applicable is given by distinct comparative criminal law scholars like Professor Hans Nijboer, Professor Mireille Delmas-Marty, and Professor Mirjan Damaška. Their deep and challenging thinking has greatly inspired this thesis.

²³ M. Delmas-Marty, *The ‘Hybridisation’ of Criminal Procedure*, in J. Jackson, M. Langer & P. Tillers (Eds.), *Crime, Procedure and Evidence and International Context, Essays in honour of Professor Mirjan Damaška*, (Hart Publishing, 2008) 251, at 253; M. Delmas-Marty, *Procédure Pénale d’Europe* (Dalloz, 1995); C. Brants & S. Field, *Convergence in European Criminal Justice*, in E. Hondius, *De meerwaarde van de rechtsvergelijking. Opstellen aangeboden aan prof. mr H.U. Jessurun d’Oliveira, Nederlandse Vereniging voor Rechtsvergelijking*, (Deventer: Kluwer, 1999), 179-180; B. Swart & J. Young, *The European Convention on Human Rights and Criminal Justice in the Netherlands and the UK*, in P. Fennell, C. Harding, N. Jorg & B. Swart (Eds.) *Criminal Justice in Europe: A Comparative Study* (Clarendon Press, 1995).

²⁴ R. Frase, *Sentencing and Comparative Law Theory*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 351, at 369.

The following question comes to mind: why does this thesis rely on a comparative framework whose usefulness is disputed?

Most scholars still use this comparative framework, particularly in discussing elements of international criminal justice.²⁵ Even if such a classification is no longer justified, it is still used in international criminal justice. The scope and word limit of this thesis do not permit inclusion of an analysis of Chinese, Sharia or other law which has little in common with either common law or civil law. The influence of any such laws on international criminal justice is extremely limited, even if debatably they should have more impact.

Comparative research can only be done properly within a well-defined framework. Being fully cognisant of the disparities among individual criminal justice systems labelled as the same ‘ideal type’ criminal justice system, Damaška has nonetheless stressed the importance of ‘comparative modelling’. The complex legal world cannot be understood “without constructing analytical models through which to organise and interpret the empirical data which bombard our senses.”²⁶

While Paul Roberts defends the continuing relevance and importance of conceptual analysis and modelling in comparative law, he highlights that “constructing ideal-typical models should be a starting point, rather than the ultimate destination, of comparative legal analysis.”²⁷ Indeed, domestic jurisdictions are not “blueprints of procedural ideas”.²⁸

With that in mind, Part II of this thesis will explore what influence, if any, the two ideal type methodologies have had on international criminal courts and tribunals. Where necessary, a number of

²⁵ See, for instance, P. Murphy & L. Baddour, *International Criminal Law and Common Law Rules of Evidence* and V. Tochilovsky, *The Nature and Evolution of the Rules of Procedure and Evidence*, in Khan, *Principles of Evidence*, in K. Khan, C. Buisman & C. Gosnell (Eds.), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010). See also P. De Hert, *Legal Procedures at the International Criminal Court* in R. Haveman, O. Kavran & J. Nicholls (Eds.), *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003) 79, 93–94.

²⁶ P. Roberts, *Faces of Justice Adrift? Damaška’s Comparative Method and the Future of Common Law Evidence*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, at 300, citing Damaška’s reference to Weber.

²⁷ *Ibid*, 325.

²⁸ J. Jackson & M. Langer, *Introduction: Damaška and Comparative Law*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, at 7-8; M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

superficial descriptions, in particular of civil law criminal justice systems, will be corrected. International criminal justice systems frequently refer to ‘common law’ or ‘civil law’ without being more specific. They have relied over the years on generalised assumptions about common law or civil law to justify legal interpretations and modifications.²⁹ These will be addressed.

Common law jurisdictions are also referred to as ‘Anglo-American’, ‘adversarial’, ‘adversary’ and ‘accusatorial’ systems; and civil law jurisdictions as ‘continental European’, ‘inquisitorial’ or ‘non-adversary’ systems.³⁰ This thesis refers to common law and civil law criminal justice systems only. This is done for simplicity reasons, but also because the terms ‘common law’ and ‘civil law’ are most value-neutral. To refer to these two legal families as ‘Anglo-American’ and ‘continental European’ would not do justice to the many other jurisdictions falling under the common law and civil law nominators. To refer to them as ‘inquisitorial’ and ‘accusatorial’ or ‘adversarial’ would not describe the systems accurately as both ideal types are accusatorial in the sense of the prosecutor charging the defendant. Also, both have adversarial proceedings. Civil law criminal proceedings have their roots in inquisitorial proceedings, but have over the years incorporated many adversarial features.

Accordingly, Damaška considers it unfair to continue to brand these systems as ‘inquisitorial’.³¹ He argues that the traditional classification of criminal legal systems in ‘inquisitorial’ versus ‘accusatorial’ or ‘adversarial’ “does not afford a suitable conceptual framework within which to study the contrasts between modern continental and Anglo-American criminal processes”.³² Instead, Damaška proposes to use the terms ‘adversary’ for common law systems versus ‘non-adversary’ for civil law systems.³³ However, even these terms no longer adequately reflect the ideal-type

²⁹ See, for instance *Prosecutor v. Tadić*, T. Ch. II. Decision on defence motion on hearsay, IT-94-1-T, August 1996, para. 13.

³⁰ Damaška has qualified the two different families as adversary versus non-adversary systems. See M. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U Penn L Rev 506 (1972–73), 562.

³¹ *Ibid*, 560-562.

³² *Ibid*, 555.

³³ In earlier days, Damaška distinguished three types of criminal procedures: adversarial, inquisitorial, and reformed inquisitorial criminal procedures. As inquisitorial type procedures are now all increasingly adversarial, at least in parts, the differences between inquisitorial and reformed inquisitorial type criminal proceedings have diminished. See Damaška, *Evidentiary Barriers*, *supra* note 30, 562.

systems. As will be discussed in this thesis, the ‘non-adversary’ systems have become more ‘adversary’.

Part III

Part III is in part a follow-up of Nancy Combs’ research on international fact-finding realities and discusses her findings and conclusions. Having carefully scrutinised Combs’ book on fact-finding without facts, it has become clear to me that there is still ample room for further research in this area. Indeed, as Combs herself recognises in her book, her research “is preliminary and [...] much more needs to be done both to quantify [her] findings and to understand their impact”.³⁴

This thesis is complementary to Combs’ research since it focuses primarily on the ICC, a court Combs has not discussed in her book. The ICC could not have been part of her research as it had barely begun. Even today, there are no verdicts yet. However, a number of confirmation decisions have been rendered. These may reveal whether the ICC judges apply a rigorous standard of proof or simply accept the prosecution’s allegations on face value without thoroughly scrutinising the supporting evidence. Even without verdicts, a number of conclusions can already be drawn on the basis of the ongoing proceedings, the investigations that have been conducted thus far and the procedural decisions issued by different Pre-Trial and Trial Chambers. In addition, while ICTY and ICTR will soon close down, the ICC represents the future. The ICC will continue to ascertain the truth, likely facing fact-finding difficulties resembling those experienced by the ICTY and ICTR. This is precisely why this research principally examines the ICC proceedings.

In so doing, it analyses the truth-ascertaining obstacles that have occurred in the ICTY and ICTR. Combs does not include the ICTY in her analysis. The ICTY is ascertaining facts relating to a European rather than a non-Western conflict and deals with Western witnesses. Combs therefore assumes that the ICTY is not faced with the same number of fact-finding impediments as she has identified in the ICTR, SCSL and East Timor Special Panels. In addition, until now, the ICC is dealing exclusively with African situations. Accordingly, Combs asserts that it is likely that the ICC will

³⁴ Combs, *Fact-Finding Without Facts*, *supra* note 6, 366.

face similar fact-finding problems to those experienced by the ICTR, SCSL and East Timor Panels, even if the ICTY is not as problematic. These are her reasons for leaving the ICTY out of her research.³⁵ She has been criticised for failing to include the ICTY, which according to Professor Paul Roberts renders her research flawed.³⁶

This thesis reviews the assumption that the ICTY is not affected by fact-finding impediments in the same fashion as the ICTR, SCSL and East Timor Special Panels. Accordingly, it compares the fact-finding practice of the ICTR with that of the ICTY and determines whether they differ greatly. It is to be expected that the ICC will not continue to deal exclusively with African conflicts but may at some point deal with a conflict zone in a Western sector. Accordingly, the realities of ascertaining the truth in the ICTY and ICTR are both relevant to the ongoing ascertainment of the truth in the ICC.

Combs has already extensively discussed the practice of the ICTR. However, it is still worthwhile discussing this practice as part of this thesis because significant judgments (Government I and II, Bagosora & Nsengiyumva Appeal Judgment, Military II) have been passed since she wrote her book. These may alter her conclusions. This project includes an analysis of these recent judgments with the aim to determine whether there has been any change of approach to ascertaining the truth over the course of time.

Contrary to Combs' book, this research does not refer to fact-finding, but rather to the ascertainment of, or search for the truth. Conceptually, ascertaining the truth differs from ascertaining the facts as becomes clear in Part I. In addition, this research refrains from using the terms 'fact-finding' or 'truth-finding' notwithstanding that these are commonly accepted terms used frequently by scholars.³⁷ Former judge in the United States and critical legal philosopher, Jerome Frank, points out that "finding facts" is a misleading term. In his view, facts "found" in the court are not ready-made "data" waiting somewhere to be found by the court. Frank argues that it is more

³⁵ *Ibid*, 5.

³⁶ Observations of Professor Paul Roberts, one of the speakers at the Dublin Conference, *supra* note 13.

³⁷ For instance H. Friman, *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?*, 22 *Leiden Journal of International Law* 485 (2009) 485-500; W. Schomburg, *Truth-Finding in the International Courtroom: The ad-hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)*, Lecture Outline, Utrecht 29 March 2008.

appropriate to say that the court creates the facts on the basis of its subjective perceptions of the witnesses' stories.³⁸ The same reasoning applies to the truth. As is discussed in Part I, it queries whether the truth can be found or whether it must be constructed. Accordingly, the terms 'truth-finding' and 'fact-finding' are avoided in this thesis.

In discussing the obstacles to ascertaining the truth in international criminal justice, I rely on my extensive (over a decade) personal experience and observation in conducting investigations in war-affected areas as well as employment at various international criminal courts and tribunals. Having interned for the ICTY Office of the Prosecutor and participated in the defence of several accused before the ICTR, ICTY, SCSL and ICC, I observed on a daily basis in the courtroom as well as the field, everyone's struggle to ascertain the factual allegations accurately and efficiently. I conducted investigations in the Democratic Republic of Congo (DRC), Sierra Leone, Rwanda, Kenya and Kosovo with the aim to collect evidence and interview potential witnesses.

While being there, I also conducted interviews with members of the local communities concerning their expectations of international justice and their perspectives on the truth regarding the conflict through which they had lived.

In and outside Rwanda, I have spoken to at least 200 Rwandan male and female adults of both ethnic groups (although more Hutu than Tutsi) about their perceptions on ICTR justice. In the DRC, I have had similar discussions on ICC justice with at least 100 Congolese of various ethnic groups including Hema, Ngiti and Nande. The interviewees were predominantly men in their twenties or older. I also spoke to about 15 prisoners in DRC and Rwanda.

In Kosovo, I have spoken to approximately 25 male Kosovar Albanians about ICTY justice. Women were less forward in DRC and Kosovo. In addition, I have spoken to ICTY colleagues from the former Yugoslavia mainly of Serb ethnicity. These discussions were mostly informal conducted in French, Swahili or English. In

³⁸ J. Frank, *Courts on Trial, Myth and Reality in American Justice* (Princeton University Press, 1973) 23-24.

Kosovo, I relied on a translator. The people I interviewed were aware of my role in defence, which may have affected their answers. It is possible that their answers would have been different had I worked for the Prosecution, or had no affiliation with international justice. This is, of course, a problem that any socio-legal researcher, or investigator is facing.

Part III is therefore largely based on primary sources and inspired by my personal experiences in the field and in international courtrooms. My discussions are also based on the experience of other practitioners in international criminal justice.

In addition, I have reviewed all ICTY and ICTR Appeals and Trial Judgments through to the end of 2011. I have also reviewed all ICC Confirmation Decisions until 23 January 2012. Where necessary, I have studied the transcripts to review the testimonies of witnesses or legal debates. I have also examined many motions, briefs and decisions. In doing so, I have drawn a number of conclusions concerning the accuracy and efficiency of the ascertainment of the facts. The review of the case law was particularly important for writing the chapter on the evaluation of the evidence.

Any socio-legal researcher seeking to assess the credibility of witnesses or the reliability of their testimonies by reading the transcripts is faced with significant limitations. Unless a researcher has witnessed the testimony of a witness in court, it is difficult to make an assessment of the weight it should be given. A researcher attempting to do so essentially wears the hat of a judge without having had the opportunity of observing the witnesses.³⁹

Combs has, however, demonstrated that significant inferences can be drawn from the transcripts and detailed judgments rendered by the Trial and Appeals Chambers. For instance, the coherence and consistency in approach can be assessed. In cases where previous written witness statements are accessible to the public, it is possible to compare these statements with the witnesses' *viva voce* testimonies and consider whether they contradict each other. Regrettably, large parts of the transcripts and

³⁹ At the Dublin Conference, *supra* note 13, Justice Doherty expressed criticism of Nancy Combs for drawing conclusions on the basis of the transcripts without having observed the live testimonies on which the conclusions were based.

witness statements are confidential and thus not accessible to the public.

In conducting this research, I have faced such limitations, save in the ICTR case of *Bagosora et al* and the ICTY cases of *Kupreskic et al*, *Limaj et al* and *Haraqija* where I was a direct observer. I was, however, a party to the proceedings, and may thus be perceived as partial. In addition, I cannot make use of confidential material to which I have been privy.

This research, therefore, limits itself to making observations on how the judges go about evaluating the evidence without drawing conclusions on whether it was fair to convict or acquit an accused in a particular case. This research is confined to analysing the quality of the evidence produced by the parties, the Chambers' approach to certain categories of witnesses, whether defence and prosecution witnesses are treated in the same fashion, whether Chambers have been consistent, and whether there has been a change in approach over time.

As a complement to the research of primary sources and jurisprudence, this thesis is based on academic literature and addresses the scholarly debate that has arisen in relation to the practical realities of the ascertainment of the truth in international courts and tribunals.

PART IV

Part IV draws conclusions on the basis of the research in previous parts.

As Clark rightly observed, in conducting empirical research relating to international criminal justice, “self-reflection and recognition that our own “aspirations are often taken for empirical facts” are (...) important components of impact assessment.⁴⁰ Therefore, I am not offering conclusive answers, but rather material to ponder.

⁴⁰ J. Clark, *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*, 11 *International Criminal Law Review* 241 (2011).

PART I
MEANING AND SCOPE OF
ASCERTAINMENT OF THE TRUTH

Identified Objectives of International Criminal Courts and Tribunals

International criminal justice systems are set up in post conflict situations, or sometimes even during an ongoing conflict. They are often established in respect to States in transition where domestic criminal justice may be inadequate due to a variety of factors: massive scale of atrocities committed in the course of the conflict, the collapse of the domestic legal infrastructure, and/or its inability to conduct trials in a neutral and fair fashion. When a conflict is still fresh, the applicable domestic legal system is often unwilling or unable to address past atrocities.⁴¹

Indeed, the climate in a post-conflict society is often politicized with many unhealed wounds. A domestic judicial system in this context may not be suited to deliver impartial justice.⁴² Post-conflict societies have a plethora of problems and require a significant transitional period to rebuild. This rebuilding is not limited to physical infrastructure but also includes psychological rebuilding necessary to deal with communal trauma. It is during this period that international criminal justice systems step in to offer a helping hand and deliver ‘transitional justice’.⁴³ Whilst the ICTY and ICTR can enter in even in situations where the domestic State itself is willing to deal with criminal investigations and prosecutions, the ICC only has jurisdiction where a domestic State is unable or unwilling to initiate genuine criminal investigations.⁴⁴

⁴¹ J. Llewellyn, *Restorative Justice in Transitions and Beyond, The Justice Potential of Truth-Telling Mechanisms for Post-Peace Accord Societies*, in Borer, *Telling the Truths*, supra note 40, 90. See also M. Latimer, *Enforcing Human Rights Through International Criminal Law*, in M. Lattimer & P. Sands, *Justice for Crimes Against Humanity* (Hart Publishing, 2003) 387, 394-400, describing the difficulties and challenges faced by post-conflict societies.

⁴² Wilson, *Judging History*, supra note 20, 919: According to Wilson, post-conflict governments often “selectively filter the past to invent a new official history and to construct a new vision of the nation. These regimes manufacture legitimacy internally to defuse and delegitimize political opponents, and externally to assert the government’s human rights credentials to the international community. They attempt to create a new shared ‘collective memory’.”; Arendt, *Eichmann in Jerusalem*, supra note 21, 270-272. See also S. Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20(1) *Law and Social Inquiry* 7 (1995), 18, 14-15. See also *Burying Myths, Uncovering Truth*, *The Economist*, 12 March 2010, available at <<http://www.other-news.info/2010/03/burying-myths-uncovering-truth/#more-3311>>, last accessed December 2011.

⁴³ Transitional justice has been described as “the task of doing justice in the time period following the end of a conflict or repressive rule, during which a new peaceful, stable and democratic society is being established.” (see: Jennifer J. Llewellyn, supra note 41, in Borer, *Telling the Truths*, supra note 40, 83) Transitional justice can be rendered by international or domestic criminal courts, commissions of inquiry, referred to as Truth and Reconciliation Commissions (“TRCs”), or other mechanisms allowing redress for victims. See further Koskeniemi, *Between Impunity and Show Trials*, supra note 18, 9-12.

⁴⁴ 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art. 17(1)(a). The question as to whether the ability to conduct trials requires the ability to do so fairly must still be answered in light

International criminal courts are set up principally with the purpose of prosecuting and, if found guilty, punishing those responsible for the commission of serious violations of international humanitarian law.⁴⁵ This is considered necessary to pay tribute to the victims and to end impunity for such crimes with the aim to deter potential future perpetrators from doing the same. Bassiouni pointed out that these crimes are so serious that they affect mankind as a whole and the only way to work towards prevention of their recurrence is to send out a clear message to future dictators that they will have to answer for their deeds.⁴⁶

The ICC has explicitly acknowledged the right to justice for victims, which was defined as follows: “victims’ interests in the identification, prosecution and punishment of those who have victimized them by preventing their impunity. When the right to justice is to be satisfied through criminal proceedings, victims have a central interest in the outcome of such proceedings leading to the identification, prosecution and punishment of those who have victimised them. Accordingly, victims have a personal and core interest in the determination of guilt or innocence of the persons charged.”⁴⁷

of the Prosecutor’s invitation to the Libyan highest authorities to challenge the admissibility of the case of Saif Gaddafi before the ICC. See: Situation in the Libyan Arab Jamahiriya in the Case of the *Prosecutor v. Saif Al Islam Gaddafi and Abdullah al Senussi*, Public Prosecution’s Submissions on the Prosecutor’s recent trip to Libya, ICC-01/11-01/11-31, 25 November 2011.

⁴⁵ UN Doc. S/RES/808, 22 February 1993 (Resolution establishing the ICTY); UN Doc. S/RES/955, 8 November 1994 (Resolution establishing the ICTR); Preamble of the Rome Statute, *supra* note 44.

⁴⁶ M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59(4) *Law and Contemporary Problems* 9 (1996), 9-28; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59(4) *Law & Contemp. Probs.* 63 (1996), 63-74. See also Karl Jaspers who suggested this already in 1963, in ‘Lebensfragen der deutschen Politik’, referred to by Arendt in *Eichmann in Jerusalem*, *supra* note 21, 269-270. See further M. Drumbl, *Atrocity, Punishment and International Law*, (Cambridge University Press, 2007), 60-63; On identifying retribution and deterrence as the main purposes of international criminal justice, see R. Amoussouga, ICTR Spokesperson, *Strong Message to Africa’s Leaders and Warlords*, ICTR Newsletter, March 2008, available at <<http://69.94.11.53/English/newsletter/mar08/mar08.pdf>>, last accessed 2008.

⁴⁷ *Prosecutor v. Katanga & Ngudjolo*, P. T. Ch. Public Urgent Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras. 39-42, footnote 102; *Prosecutor v. Katanga & Ngudjolo*, Confirmation of Charges Hearing - Open Session, Opening Statement by Mr. Gilissen, ICC-01/04-01/07-T-38-ENG ET, page 45, lines 8-13 (“With the Court and the participants, we contribute – and I believe this firmly – we represent hope, the hope for justice, the hope in justice. You can believe me, on the ground there is a burning thirst for justice. They need justice, which is necessary, because the justice that they wish for is one of the conditions for the return to real peace on the ground”). See also the opening statement of Ms. Bapita, another victim representative, at page 52 lines 1-7: “The victims want you to know that they are thirsting for justice. This is the first time that they can speak out. Five years later, can you imagine what they have had to deal with over the last five years, how they crave for justice? And to

The prosecution of the perpetrators of serious violations of international humanitarian law is further believed to be necessary to restore and maintain international peace and security. In respect of the ICTR and ICTY, the Security Council used its powers under Chapter VII of the Charter of the United Nations, to adopt military and non-military measures deemed appropriate to maintain or restore international peace and security.⁴⁸

These objectives correspond with the ICTY's First Annual Report, which notes that the mandate of the Tribunal is "to do justice, to deter further crimes and to contribute to the restoration and the maintenance of peace".⁴⁹ Similarly, the Humanitarian Law Centre and other human rights organisations in the former Yugoslavia embraced the establishment of the ICTY because it constituted an effort to resist the culture of impunity in the former Yugoslavia, as well as stop the violence by fighting this impunity.⁵⁰

The ICTR Resolution refers to an additional objective, namely, its contribution to the process of national reconciliation.⁵¹ The ICTY Resolution, on the other hand, does not

that end, they hope that at the wake of this hearing the charges against these suspects will be confirmed. They also that they will not be victimised anew, be it by individuals or by institutions."

⁴⁸ It can do so by virtue of Art. 39 of Chapter VII of the 1945 Charter of the United Nations, 892 UNTS 119, which provides that:

"The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

⁴⁹ M. Cherif Bassiouni, *Crimes against humanity in International Criminal Law*, ed. Kluwer Law International (The Hague/London/Boston, 1999 2nd ed), page 236. This corresponds with the view expressed by Mr. Joinet in the ICTY contempt case against Florence Hartmann, holding that one of the purposes of international criminal justice is to set an example in order to prevent persons in the future from committing massive human rights violations. See *Prosecutor v. Hartmann*, IT-02-54-R77.5-T, T. 16 June 2009, page 288.

⁵⁰ *Prosecutor v. Hartmann*, IT-02-54-R77.5-T, T. 17 June 2009, pages 383-384 (per Ms Kadic). See also Michael Mansfield who cited Martin Luther King's famous phrase "There can be no peace without Justice" in the context of the bloody Sunday inquiry. See: *Expensive, but justice must be done*, Article published in The Independent, 13 June 2010.

⁵¹ UN Doc. S/RES/955, 8 November 1994. Concerns have been expressed about these objectives. They make no reference to principles of due process, which, according to Howard Morisson, former defence attorney at the ICTY and ICTR, suggests that the political agenda at the time of drafting did not prioritise defence issues. See H. Morrison, *International Criminal Tribunals*, Counsel, June 2001, 14-17, at 14. See also, L. Hammond, Professor, University of Texas, statement before the United States House of Representatives International Relations Committee, 28 February 2002, expressing concern about the objective to restore peace: "From the beginning ... the ICTY was established to carry out a specific political purpose: to restore peace. ... There may be nothing wrong with this purpose, but it is not one that should guide a court that exists to assure just trials. There is no hint of any presumption of

explicitly refer to reconciliation as an objective,⁵² but a number of judgments have nonetheless referred to such an objective. For instance, in *Deronjic*, the Chamber held that “[t]ruth and justice should also foster a sense of reconciliation between different ethnic groups within the countries ... of the former Yugoslavia”.⁵³ In *Erdemovic*, the Trial Chamber stated that efforts to end impunity ‘would contribute to appeasement and give the chance to the people who were solely afflicted to mourn those among them who had been unjustly killed.’⁵⁴

Similar objectives are set out in the Preamble of the Rome Statute, stating that, “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. Such grave crimes “threaten the peace, security and well-being of the world” and concern the international community as a whole “and must not go unpunished”. Their “effective prosecution must be ensured ... to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.⁵⁵

There is no explicit reference to reconciliation. However, it is regularly suggested that “peace, security and well-being of the world” can only be achieved if former opponents are reconciled in a new stable order.⁵⁶

The ICC recognises an additional objective of international criminal justice, that is, to give a voice to victims through participation in the proceedings and offer them a

innocence, or of the possibility that persons brought before the Tribunal might not be “responsible for serious violations” of law.... [T]here exists an always present pressure to gain convictions.”

⁵² UN Doc. S/RES/808, 22 February 1993.

⁵³ *Prosecutor v. Deronjić*, T. Ch. Judgment on sentence, IT-02-61-T, 30 March 2004, para. 133.

⁵⁴ Sentencing Judgment, IT-96-22-T, 29 November 1996, para. 65. See also J. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (T.M.C. Asser Press, 2009), footnote 141, where question marks are raised about the goal of retribution at the ICTR.

⁵⁵ Preamble of the Rome Statute, *supra* note 44; text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. See also R. Goldstone & N. Fritz, *In the Interests of Justice* and *Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 *Leiden Journal of International Law* 655 (2000), 656. See also: Jugde Kirsch, who is optimistic about preventive function of ICC at: http://www.oid.icc-cpi.int/library/about/newsletter/16/en_01.html

⁵⁶ J. Bolton, *The Global Prosecutors: Hunting War Criminals in the name of Utopia*, 78 *Foreign Affairs* 157 (1999), 657-658. See also S. de Gurmendi, *The Role of the International Prosecutor*, in R. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc., 2001) 175, at 181.

forum of redress for their losses.⁵⁷ This function does not exist in the ICTY and ICTR where victims have a voice only if they testify. However, each of these international tribunals and court intend to offer victims a forum where they can tell their truth in an officially sanctioned forum.⁵⁸ This “truth-telling” function of international courtrooms aims to “break their silence” and so instil in them “a sense of empowerment and control”.⁵⁹ Whilst the international tribunals and court were not established to serve as therapeutic centres for victims, Doak argues that, to the extent possible, they should “maximize their healing potential and minimise their harming potential”.⁶⁰ Safferling, on the other hand, is of the viewpoint that any healing objective would overstrain the system and should, therefore, be dealt with by TRCs.⁶¹

In summary, the acknowledged primary purpose of international criminal justice is the punishment of alleged perpetrators of international humanitarian law with the additional aims to

- (1) put an end to impunity;
- (2) do justice to the victims and give them a voice, as well as a forum;
- (3) deter any potential future perpetrators from doing the same;
- (4) restore and maintain the international peace and security;
- (5) reconcile former enemy fighters.

Achievability of the Identified Objectives

These objectives are both retributive and restorative in nature. They resemble the

⁵⁷ I. Bonomy, *The Reality of Conducting A War Crimes Trial*, 5 *Journal of International Criminal Justice* 348 (2007), 4; Fiona McKay, *Civil Reparation in National Courts for Victims of Human Rights Abuse*, in Lattimer & Sands, *Justice for Crimes Against Humanity*, *supra* note 41, 283, at 285; L. Francis & J. Francis, *International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice*, in L. May & Z. Hoskins (Eds.), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 58, 70-71.

⁵⁸ P. Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 *Human Rights Quarterly* 737 (1998), 737-816.

⁵⁹ M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press 1998), 66; See also J. Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 *International Criminal Law Review* 263 (2011), 270-271; See also, as Debra L. DeLaet put it, in light of the purpose of healing, “truth telling needs to be conceived as a process emphasizing the need of survivors to tell their stories, to be listened to, and to have their experiences validated, rather than as a means to an end in which the truth is primarily a product intended to serve as an authoritative record of atrocity or as a basis for punishing the guilty.”; D. DeLaet, *Gender Justice, A Gendered Assessment of Truth-Telling Mechanisms*, in Borer, *Telling the Truths*, *supra* note 40.

⁶⁰ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, at 291.

⁶¹ C. Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?* *International Criminal Law Review* 11 (2011) 183-215.

objectives of Truth and Reconciliation Commissions (“TRCs”), which similar to international courts seek to reconstruct facts.⁶² However, international criminal procedures differ from TRC procedures in that the latter do not involve criminal prosecutions. In addition, they often grant amnesty to some or all of the identified perpetrators.⁶³ TRCs focus on producing a report containing an official version of events. By contrast, the focus of international criminal justice is on the fair and efficient identification and accountability of the perpetrators of massive human rights violations. Its primary purpose is therefore retributive.⁶⁴

It is, however, often assumed that the identified restorative objectives in international tribunals will be met by holding individuals accountable for their deeds.⁶⁵ Indeed, there is great optimism as to how much international tribunals and courts can achieve.⁶⁶ As Klabbers phrases it, “we have all fallen under the spell of international criminal law and the beauty of bringing an end to the culture of impunity.”⁶⁷

⁶² Koskeniemi, *Between Impunity and Show Trials*, *supra* note 18, 9-12; Llewellyn, *Restorative Justice in Transitions and Beyond*, *supra* note 41, 91, 93-95.

⁶³ General or blanket amnesty, which is also referred to as amnesia, was granted in many countries in South America, imposed by former regimes. In South Africa, blanket amnesty was rejected; amnesty was given on an individual basis only. See W. Haubrich, *Wahrheitskommissionen, dargestellt an den Beispielen von El Salvador, Guatemala und Südafrika*, Verlag Mainz, Wissenschaftsverlag, Aachen, 1. Auflage 10 (2003) 199-245. In some TRCs the names of the identified perpetrators are not published. See also: Llewellyn, *Restorative Justice in Transitions and Beyond*, in: Borer, *Telling the Truths*, *supra* note 40, 83 at 85-87. See also W. Haubrich, *Truth Commissions Compared: El Salvador, South Africa and Guatemala*, The George Washington University Law School, Public International Law Seminar, Washington, 28 April 1997. Some observers are critical to the granting of amnesty. However, this may be a necessary measure to ensure future peace where stability can only be assured with the cooperation of former belligerents and other parties potentially connected to past wrongdoing. See Llewellyn, *Restorative Justice in Transitions and Beyond*, *supra* note 41, 85-87.

⁶⁴ M.B. Dembour & E. Haslam, *Silencing Hearing? Victim-Witnesses at War Crimes Trials*, 15 *European Journal of International Law* 151 (2004), at 152.

⁶⁵ T. Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy at a War Crimes Tribunal*, draft paper published in materials for *The ICTR Legacy from the Defence Perspective*, Conference held in Brussels, Belgium, 24 May 2010, Part I. See also: “Bringing Justice to the Former Yugoslavia – The Tribunal’s Core Achievements,” (ICTY website: <http://www.un.org/icty/glance/index.htm>); M. Scharf & W. Schabas, *Slobodan Milosevic on Trial: A Companion* (Continuum, 2002), 97-98; R. Kerr, *Peace through Justice? The International Criminal Tribunal for the Former Yugoslavia*, 7 *Southeast European and Black Sea Studies* 379 (2007). It is similarly often assumed that a TRC enquiry or international criminal trial will impact favourably on the peace and stability in a country and contribute to reconciliation. See for instance A. Allan & M. Allan, *The South African Truth and Reconciliation Commission as a Therapeutic Tool*, 18 *Behavioural Sciences and the Law* 474 (2000).

⁶⁶ P. Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 *American Journal of International Law* 712 (2003), 712.

⁶⁷ J. Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 *Finish Yearbook International Law* 249 (2001), 250. For similar observations, see F. Megret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 *Finish Yearbook International Law* 193 (2001), 201.

Empirical research is, however, lacking to conclude whether this is indeed the case. Such assertions are frequently based on mere speculations.⁶⁸ Wishful thinking is often equated with empirical evidence. Amongst other scholars, Debra L. DeLaet holds that such assumptions are based on “idealistic aspiration rather than a concrete reflection on the actual records of trials and truth commissions as truth-telling mechanisms”.⁶⁹ In reality, the impact of truth-telling mechanisms on any of these concepts may be exaggerated.⁷⁰ Drumbl suggests that such exaggeration stems from a blind faith in international tribunals and courts without giving due weight to the complexity of the situations in which they operate.⁷¹ As Doak puts it, “transitional justice is not magic bullet”.⁷² It has even been argued that the impact of international justice is counter-productive.⁷³ In any event, the impact is far less understood than the mechanics of truth-telling processes.⁷⁴ This lack of understanding is increased by the fact that concepts such as peace, justice and reconciliation are abstract, ambiguous and disputed.⁷⁵

It is impossible to verify whether the goals are achievable and have been achieved

⁶⁸ J. Clark, *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*, 11 *International Criminal Law Review* 241(2011), 243-244.

⁶⁹ Debra L. DeLaet: *Gender Justice, A Gendered Assessment of Truth-Telling Mechanisms*, in Borer, *Telling the Truths*, supra note 40, 151 at 169; also see Becker, *Confronting the Truth of the Erinyes*, supra note 19: at 232 he refers to ‘belief rather than scientific proof’, and 242-243. See also B. Hamber, “*Nunca Más*” and the Politics of Person: Can Truth Telling Prevent the Recurrence of Violence? in Borer, *Telling the Truths*, supra note 40, 207 at 211.

⁷⁰ For instance, the TRC of South Africa has been criticized for not having achieved reconciliation. The TRC responded to this criticism by emphasizing that reconciliation is a process, truth is the road to reconciliation, not the end; the TRC is only part of the journey toward reconciliation. See Truth and Reconciliation Commission of South Africa, *Report* (Juta Press, 1998), Vol. 5, Chapters 5, 8, page 97. See further Becker, *Confronting the Truth of the Erinyes*, supra note 19, at 233, where he states that “confusion about such concepts as truth, justice, trauma, and healing lead to false expectations by both victims and society about the nature of reconciliation and the extent of reparation possible in the aftermath of human-made disasters”. See also Ambos, pointing out that, for instance, the international criminal tribunals are still too new to know whether they will have a deterrent effect. But realistically, given that the powers of functions of international tribunals are limited, their objectives and goals are also limited: K. Ambos, *Crimes Against Humanity and the International Criminal Court*, in L. Sadat (Ed.), *Forging a Convention on Crimes Against Humanity* (Cambridge University Press, 2011) 297.

⁷¹ Drumbl, *Atrocity*, supra note 46, 9-10.

⁷² Doak, *The Therapeutic Dimension of Transitional Justice*, supra note 59, 264. See also Francis & Francis, *International Criminal Courts*, supra note 57, 70-71, raising doubt as to whether deterrence can be achieved.

⁷³ C. Eisnagle, *An International ‘Truth-Commission’: Utilizing Restorative Justice as an Alternative to Retribution*, 36 *Vanderbilt Journal of Transnational Law* (2003) 209, 233.

⁷⁴ D. Becker, *Cross-National Comparative Analysis*, in H. van der Merwe, V. Baxter & A. Chapman (Eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2009) 51.

⁷⁵ D. Chuter, *War Crimes, Confronting Atrocity in the Modern World*, (Lynne Rienner Publishers Inc, Ministry of Defence, Colorado 2003), 251; A. Chapman, *Approaches to Studying Reconciliation*, in van der Merwe, *Assessing the Impact of Transitional Justice*, supra note 74, 144 at 144-145; Francis & Francis, *International Criminal Courts*, supra note 57, at 60.

until adequate empirical research is conducted into the impact of international justice on its goals. Until then, as ICTY Prosecutor Blewitt puts it, “[t]he simplified dichotomy between reconciliation and justice serves academic discourse more than it accurately describes reality”.⁷⁶

If expectations are too high or unrealistic, they may have an adverse effect on the ultimate achievement of international justice. They could actually lead to great disillusion with international justice itself.⁷⁷ Rather, expectations must be “informed and pragmatic”,⁷⁸ and limited to “what can reasonably be accomplished”.⁷⁹ The potential of international tribunals in achieving the identified objectives should be recognised but not romanticised.⁸⁰ Only then may international justice make a modest contribution to the above objectives.⁸¹

Some practitioners and observers take it a step further and take the view that international trials should focus on trying alleged perpetrators only and not get side-tracked by peripheral issues such as reconciliation. If trials effect reconciliation, then that may be an asset, but it should not be the focus. Other institutions, such as TRCs, have been set up with the particular objective of seeking to reconcile former enemies. International tribunals should not be overly ambitious in trying to achieve the same.⁸² The validity of this point will be examined in Part IV.

The Ascertainment of the Truth as an Objective of International Justice

For international tribunals to have the potential to impact positively on any of the above objectives, their judgments must be perceived as truthful. It is often claimed

⁷⁶ G. Blewitt, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in Lattimer & Sands, *Justice for Crimes Against Humanity*, *supra* note 41, 145 at 151.

⁷⁷ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 244. See also Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, at 275.

⁷⁸ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 244. See also Drumbl, *Atrocity*, *supra* note 46, 9-10.

⁷⁹ Chuter, *War Crimes*, *supra* note 75, 278.

⁸⁰ Drumbl, *Atrocity*, *supra* note 46, 10.

⁸¹ C. Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?*, *supra* note 61, 115.

⁸² See Justice Doherty’s observations at the Dublin Conference, *supra* note 13. See also: J. Ku & J. Nzelibe, *Do International Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 *Washington University Law Review* 777 (2006); E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, University of Pennsylvania Press (2005).

that there can be no justice, deterrence, lasting peace or reconciliation without truth.⁸³ The ascertainment of the truth is therefore the principal objective of TRCs. Truth is considered a necessary instrument to achieve reconciliation.⁸⁴

Similarly, NGOs, civil society groups, academic scholars and other observers of international justice consider the ascertainment of the truth to be one of the core objectives of international justice. Only if the truth is established in international justice will the unspeakable crimes be uncovered and spoken about: “truth now peace forever”.⁸⁵

In Borer’s view, the purpose of trials and tribunals, arguably, “is the discovery of facts about past actions and the assignment of blame for these actions. Not only do trials contribute to justice and the rule of law – important qualities of positive and

⁸³ The revelation of why, how and by whom atrocities were committed is expected “to prevent impunity, transform social relations and the meaning of past violence, and affect how people will act in the future.” See Hamber, “*Nunca Más*”, *supra* note 69, 211. See also Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 4: “only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored. Facing the truth of its past is a necessary condition to enable a wounded community - a community of perpetrators and victims - to recreate the conditions of viable social life.” However, there are also observers who are more skeptical about the effect of truth on other objectives. For instance, at footnote 63 in Borer, *Telling the Truths*, *supra* note 40, Borer points out that some scholars do not agree that uncovering past facts is a necessary condition for, or even a contributing factor to building a lasting peace. Tristan Anne Borer also holds that truth does not automatically lead to reconciliation. See T. Borer, *Truth Telling as a Peace-Building Activity: A Theoretical Overview*, in Borer, *Telling the Truths* *supra* note 40 1, at 30-31, 36; Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 247. See also K. Asmal, L. Asmal & R. Robert, *Reconciliation Through Truth: A Reckoning of Apartheid’s Criminal Governance* (David Philip Publishers, 1996); S. Dwyer, *Reconciliation for Realists*, 13 *Ethics and International Affairs* 82 (1999); Akhavan, *Justice in The Hague*, *supra* note 58, 741; Michael Mansfield, “There can be no justice without truth” in: *Expensive, but justice must be done*, Article published in *The Independent*, 13 June 2010.

⁸⁴ S. Kurtenbach, *Dealing with the Past and Imagining the Future*, in L. Reyhler & T. Paffenholz (Eds.), *Peace-building: A Field Guide* (Lynne Rienner Publishers, 2002), 327; cited in Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, 17-18. See also Pasternak, *Wahrheitskommissionen*, *supra* note 64. However, as noted *ibid*, there are also scholars who question the unit of truth and reconciliation.

⁸⁵ This was the sub-title of *Echoes of Genocide: Bosnia 1995-2005*, Conference hosted by the Center for Holocaust and Genocide Studies & Filmtheatre Kriterion, held in The Hague, Netherlands, 25 September 2005. At this Conference, the Commission for Missing Persons observed that “if not for the ICTY many crimes would not have been registered; for that, the ICTY is a success”. Moreover, in a leaflet announcing the various speakers at this Conference, the Research and Documentation Centre (RDC) made the following submission, highlighting the importance of fact recordings: “We are aware that the search for truth and justice in Bosnia and Herzegovina in the next few years is an important precondition for confidence building, reconciliation and long – lasting peace. There are a lot of facts and stories that should be heard and recorded. I am inviting you to collaborate with the RDC and bring us any information you have in connection with the crimes committed during war in Bosnia, and Herzegovina. Victims were not defeated only because they were killed, humiliated, raped, imprisoned, or forced to leave their homes. The first sign of victim’s final defeat, and in that context, a criminal’s victory, is the silence about their suffering. Do not allow anyone to keep you silent.”

sustainable peace – they can also forge a sense of collective memory, thus serving as a tool of nation building, another quality necessary for fostering sustainable peace”.⁸⁶

The Resolutions establishing the ICTY and ICTR do not list the ascertainment of the truth as one of the objectives of these tribunals. Their Statutes also make no reference to the ascertainment of the truth as an objective of international criminal justice. The Rules of Procedure and Evidence initially adopted were equally silent on the ascertainment of the truth as a function of the tribunals.

Notwithstanding this absence of any explicit reference to the ascertainment of the truth, it has, from the beginning, been clearly and explicitly acknowledged as one of the objectives of the ICTY and ICTR and has gained importance over time.

During the inter-State debates that preceded the adoption of the Security Council Resolution to establish the ICTY, Ms. Albright, who represented the United States of America, stated:⁸⁷

The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor’s tribunal. The only victor that will prevail in this endeavour is the truth.

In a follow-up meeting, she repeated her submission on the importance of the establishment of the truth and added:⁸⁸

Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.

⁸⁶ Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, 20-21. Also see M. Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction Publishers, 1997). See also Professor Filip Reyntjens, researcher of Great Lake District, who considers that the objective of contributing to reconciliation in Rwanda indicates that the ICTR is meant to be a truth-finding institute although it has not been greatly successful at achieving either reconciliation or truth. See personal interview with F. Reyntjens, conducted in Antwerp, Belgium, 20 December 2004.

⁸⁷ States comments on UN Doc. S/RES/780, 6 October 1992, published in: V. Morris & M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia, A Documentary History and Analysis* (Volume II) (Transnational Publishers, 1995) 165 (Ms. Albright, United States of America) [emphasis added].

⁸⁸ UN Doc. S/RES/827, 25 May 1993, Record on Debate on Resolution 827, published in Morris & Scharf, *An Insider’s Guide to the ICTY*, *ibid*, 185 (Ms. Albright, United States of America) [emphasis added].

Thus, according to Ms. Albright and other State representatives,⁸⁹ the ascertainment of the truth was one of the core objectives of the ICTY and the ICTR, established subsequently.

Many NGOs, academics, international criminal judges, prosecutors and other persons concerned place similar emphasis on the ascertainment of the truth. For instance, Mr. Joinet, a retired French judge who has fulfilled a number of human rights positions in the Council of Europe and United Nations, was called as an expert in the ICTY contempt case of former ICTY prosecutor Ms Hartmann.⁹⁰ In the course of his testimony, he held that the ultimate purpose of international criminal justice is obviously to establish the truth.⁹¹

The Presiding Judge in the ICTY case against Prlic et al stated:

I am a bit like Digenious ^, who was walking in Athens with a lantern in daylight and he was asked what he was doing, and he answered, "I'm looking for a human, a human being." I myself am looking for the truth. I'm the judicial counterpart of this famous person, and I'm looking for the truth."⁹²

⁸⁹ See, inter alia, the submissions of Mr. De Araujo Castro, representative of Brazil:

".... A cry for justice breaks from every heart, and that cry cannot go unheeded. Brazil favours strong action to ensure the full ascertainment of the truth about each of the cases of war crimes and crimes against humanity committed in the territory of the former Yugoslavia. Convinced that effective prosecution and punishment of the perpetrators of these crimes is a matter of high moral duty, Brazil supports the establishment of an international criminal tribunal to bring to justice the individuals found to be responsible for such abominable acts. It is in that spirit that we will vote in favour of the draft resolution before the Security Council." [emphasis added]. Published in: Morris & Scharf, *An Insider's Guide to the ICTY*, ibid, 161 (States comments on UN Doc. S/RES/780, 6 October 1992)).

⁹⁰ Prosecutor v. Hartmann, IT-02-54-R77.5-T, T. 16 June 2009, 238-242.

⁹¹ See ibid, 292, lines 6-7; also 310 and 316. See also Ms Kandic representing the Humanitarian Law Centre in the former Yugoslavia, another witness in the Florence Hartmann contempt case, who stated that one of their objectives was to promote the judicial truth as established by the ICTY in Serbia and they discussed the evidence underlying the ICTY judgments in great detail. See ibid, 383. See also, inter alia, Research and Documentation Centre Sarajevo (<http://www.idc.org.ba/aboutus.html>), Mirsad Tokaca, President of RDC: Truth Now Peace Forever: "We are aware that the search for truth and justice in Bosnia and Herzegovina in the next few years is an important precondition for confidence building, reconciliation and long – lasting peace." Paper published in leaflet of *Echoes of Genocide*, supra note 85. See also Michael Johnson, former Registrar of the War Crimes Chamber in Sarajevo, and former senior member of the Office of the Prosecutor at the ICTY, noting at the same conference in response to a clear message from someone in the audience "catch them!": "You say, 'catch them!' But what does that mean? The Tribunals are designed to be slow because 'catching them' is a process; the evidence needs to be carefully presented and evaluated. The Tribunals are not there simply to 'catch them' but to establish the truth."

⁹² Prosecutor v. Prlić et al, IT-04-74, T. 10 February 2009, 63, lines 6-10. See also T. 36553, Monday, 9 February 2009 – examination of Stojić defence witness Slobodan BOŽIĆ:

"My colleague from the Bench was saying that there is no trick, when somebody asks a question to somebody. We're all looking for the truth. We're not trying to trick anyone. The Prosecutor has documents, and he develops his theory on the basis of these documents, and moreover to trick a former prosecutor or former judge is very difficult".

In the ICTY case against Dronjic, the Chamber recognized that the tribunal is mandated “to search for and record, as far as possible, the truth of what happened in the former Yugoslavia”.⁹³ Also, the first ICTR judgement in Akayesu refers to the ICTR objective “to establish the truth in its judgment”.⁹⁴ In many other cases before the ICTY or ICTR, the mandate of ascertaining the truth is relied on in resolving procedural issues.⁹⁵

Meanwhile, by amendment of 1 July 1999,⁹⁶ which two years later was also incorporated into the ICTY Rules,⁹⁷ a reference to truth-ascertainment has been included in the ICTR Rules of Evidence of Procedure. Rule 90(F)(i) of the ICTY and ICTR Rules of Procedure and Evidence provides that “[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to ... [m]ake the interrogation and presentation effective for the ascertainment of the truth”.

The ICC goes a step further than the ad hoc international criminal tribunals in explicitly recognising a truth-ascertaining function in its Statute. In contrast to the ICTY and ICTR Statutes, the ICC Statute embodies an explicit duty on the Prosecutor and Chambers to establish the truth. Pursuant to Article 54(1)(a) of the Rome Statute, the Prosecutor shall “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal

⁹³ *Prosecutor v. Dronjic*, T. Ch. Judgment on sentence, IT-02-61-T, 30 March 2004, para. 133.

⁹⁴ *Prosecutor v. Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para. 131.

⁹⁵ See for instance, *Prosecutor v. Kupreskić*, T. Ch. II. Decision on communication between the parties and their witnesses, IT-95-16-T, 21 September 1998, para. (ii); *Prosecutor v. Ndindiliyimana et al*, T. Ch. II. Decision on defence motions alleging violation of the prosecutor’s disclosure obligations pursuant to Rule 68, ICTR-00-56-T, 22 September 2008, para. 61 and conclusion; *Prosecutor v. Popović et al*, A. Ch. Decision on appeal against decision on impeachment of a party’s own witness, IT-05-88-A, 1 February 2008 para. 24; *Prosecutor v. Limaj et al*, T. Ch. II. Decision on prosecution’s third motion for provisional admission of written evidence in lieu of *viva voce* testimony pursuant to rule 92bis, IT-03-66-T, 9 March 2005, para. 4; *Prosecutor v. Stakić*, IT-97-24-PT (Transcript) 25 November 2002, page 9437; See further R. May & M. Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37(3) Columbia Journal of Transnational Law 725 (1998), 745; C. Buisman, *Evidence before International Criminal Courts and Tribunals*, in I. Bantekas, *International Criminal Law* (4th Ed) (Hart Publishing, 2010), 473.

⁹⁶ <http://69.94.11.53/ENGLISH/rules/010799/6.htm>.

⁹⁷ By amendment of 12 April 2001, which came into effect on 4 May 2001 (IT/32/Rev. 20), available at <http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev20_en.pdf>.

responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.

Article 69(3) of the Rome Statute further states that “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”. In addition, a similar provision as ICTY/ICTR Rule 90(F)(i) has been incorporated in the ICC Rules. According to ICC Rule 43(a), the Presiding Judge, in consultation with the other members of the Chamber, “shall determine the mode and order of questioning witnesses and presenting evidence so as to: (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth”.

The ICC Chambers also ruled that their task is to establish the truth. They make a distinction between Pre-Trial Chambers and Trial Chambers. Pre-Trial Chambers consider whether there are substantial grounds to believe that a suspect is guilty as charged pursuant to Article 61(7) of the ICC Statute. Trial Chambers consider whether there is no reasonable doubt that the accused is guilty as charged. Given the difference in standards, it has been held that the Pre-Trial Chamber is not a truth-finder, whilst the Trial Chamber is.⁹⁸ The truth in relation to the guilt of the defendant is not yet determined during the confirmation of the charges proceedings, but only during the trial itself.⁹⁹

The ICC judges and the parties refer to establishing the truth almost on a daily basis. ICC judges have stated on numerous occasions that the Chamber’s mission is to manifest the truth.¹⁰⁰ The truth provides the basis for questions from the bench to witnesses. In addition, the truth determines whether victim participants can ask a particular question to a witness,¹⁰¹ or whether evidence of which the defence had

⁹⁸ *Prosecutor v. Katanga & Ngudjolo*, Public Urgent Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para 55; also *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, paras. 109-110.

⁹⁹ *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, paras. 112-113.

¹⁰⁰ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07, T. 8 June 2010, 14. See also, for instance, submissions from the parties made on 8 November 2011 (ICC-01/04-01/07, T. 8 November 2011).

¹⁰¹ See, for instance, *Prosecutor v. Katanga & Ngudjolo*, T. 11 June 2010, 33 where it was established that, in principle, legal representatives are permitted to ask questions of clarification after the end of the

received no advance notice or documentary evidence can be admitted.¹⁰² Guidelines have also been adopted to ensure that the cross-examination contributes to the ascertainment of the truth.¹⁰³

Right of Victims to the Truth

The single judge of a Pre-Trial Chamber at the ICC has interpreted the personal interests of victims to include the “well-established” right to the truth.¹⁰⁴ She defined this as the right to “the determination of the facts, the identification of the responsible persons and the declaration of their responsibility”.¹⁰⁵ This right can be satisfied through means other than international criminal proceedings,¹⁰⁶ but when criminal proceedings are used as a tool to grant victims their right to the truth, such proceedings should: “(i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.”¹⁰⁷

Accordingly, the issue of the guilt or innocence of persons prosecuted before the ICC is not only considered to be relevant, but also to affect “the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth”.¹⁰⁸ In this regard, it was held that the victims' central interest in the search for the truth can only be satisfied if “(i) those responsible for perpetrating the crimes for which they

Prosecution’s re-examination to help in the establishment of the truth. However, in the particular circumstances, the Chamber disallowed the proposed questions because they would prolong the testimony, given that the defence would then have a right to re-examine the witness, which could affect the quality of the evidence.

¹⁰² See, for instance, *Prosecutor v. Katanga & Ngudjolo*, T. 30 March 2010, page 5; T. 25 May 2010, pages 6-7, 40-45 (new evidence: allowed to ascertain the truth; potential prejudice: calling back of witness; emphasising the importance of spontaneous statements for the manifestation of the truth but this may justify that a certain number of additional questions be asked; T. 26 Feb 2010; 4 Feb 2010, pages 6, 10; 8 June 2010, pages 14-15; 14 June 2010; 22 June 2010; 23 June 2010: pages 48-49.

¹⁰³ *Prosecutor v. Katanga & Ngudjolo*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 01 December 2009, ICC-01/04-01/07-1665-Corr, para. 71.

¹⁰⁴ *Prosecutor v. Katanga & Ngudjolo*, Public Urgent Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras. 32-36.

¹⁰⁵ *Ibid*, para. 32 footnote 39.

¹⁰⁶ *Ibid*, para. 33.

¹⁰⁷ *Ibid*, para. 34.

¹⁰⁸ *Ibid*, para. 35.

suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue”.¹⁰⁹

Whilst ICTY and ICTR Chambers have recognized their mandate to search for the truth and “bring justice to both victims and their relatives and to perpetrators”¹¹⁰, they have not explicitly granted a right to victims to the truth and justice.

However, in the view of an increasing number of scholars, the right to know the truth for victims of massive human rights violations is an emerging norm of customary international law as well as a general principle of law.¹¹¹ According to some observers, this right would then naturally extend to victims before the international criminal tribunals.¹¹²

Joinet expressed the view that victims have the right to the truth in international criminal justice.¹¹³ He defined this as the right to access to information.¹¹⁴ He emphasized the importance of the right of victims to uncover the ‘whole’ truth and referred to it as symbolic or moral reparation, as opposed to material reparation through damages granted to victims before the ICC and numerous domestic criminal justice systems.¹¹⁵

Joinet acknowledged that such access to information may not be given to victims immediately, given that international criminal justice is understandably slow, and there may be good grounds not to disclose information to the public while the criminal investigations are carrying on, but sooner or later, massive human rights violations should not remain hidden. Accordingly, Mr. Joinet held that, for international criminal tribunals to play their full role in uncovering the truth, they

¹⁰⁹ *Ibid*, para. 36.

¹¹⁰ *Prosecutor v. Deronjić*, T. Ch. Judgment on sentence, IT-02-61-T, 30 March 2004, para. 133.

¹¹¹ See, *inter alia*, Y. Naqvi, *The Right to the Truth in International Law Fact or Fiction*, 88 ICRC Int. Rev. 245 (2006), at 267 and 268; J. Mendez, *The Human Right to Truth*, in Borer, *Telling the Truths*, *supra* note 40, 115.

¹¹² See the submissions of Mr. Joignet in *Prosecutor v. Hartmann*, IT-02-54-R77.5-T, T. 16 June 2009, 257, firmly stating that victims have a right to the truth and justice. See also *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-38-ENG ET, Confirmation of Charges Hearing - Open Session, Opening Statement by Mr. Diakiese, page 56, lines 5-7.

¹¹³ *Prosecutor v. Hartmann*, IT-02-54-R77.5-T, T. 16 June 2009, 238-242.

¹¹⁴ *Ibid*, 258.

¹¹⁵ *Ibid*, 292-293; T 17 June 2009, 332-333.

must be transparent and, as soon as possible, inform the victims of the evidence which is available about the crimes committed against them.¹¹⁶

Reservations about the Ascertainment of the Truth as an Objective

In conclusion, the legal instruments of the ICC and their interpretation by the ICC judges leave no room for disputing that the ascertainment of the truth is a core objective of the court. It is also part of the evolving international vocabulary. The same can be said in respect of the ICTY and ICTR, notwithstanding the silence on the ascertainment of the truth in their Statutes and Resolutions.

However, similar to peace, justice and reconciliation, the notion of truth is ambiguous and disputed.¹¹⁷ Parlevliet refers to it as an “elusive concept”.¹¹⁸ Its relationship and compatibility with the other objectives is also unclear and ill defined.¹¹⁹ In order to test the efficiency of the ascertainment of the truth, it is important to be clear on the term.

There are voices raising concern in regard to the recognition of the ascertainment of the truth as a core objective of international justice. Common law practitioners in the international field are not as familiar with such vocabulary as their colleagues with a civil law background. They, therefore, take a critical view on the ascertainment of the truth as an objective of international justice. Common law practitioners often take the stance that international trials should focus strictly on whether the prosecution has proved the allegations against the defendants beyond a reasonable doubt, nothing more, and nothing less. They are concerned that a focus on ascertaining the truth would distract the triers of fact from the essence of the criminal trial. They regard a trial as a forum to determine the guilt of the defendant, rather than the truth of what happened. A TRC, on the other hand, can focus on establishing the truth. In their view, the two issues should not be conflated.¹²⁰

¹¹⁶ *Ibid*, T. 16 June 2009, 287.

¹¹⁷ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 247-253; Chuter, *War Crimes*, *supra* note 75, 203-241.

¹¹⁸ Parlevliet, *Considering Truth*, *supra* note 3, 2, 4.

¹¹⁹ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 260-261; Chuter, *War Crimes*, *supra* note 75, 251; Francis & Francis, *International Criminal Courts*, *supra* note 57, 58-60.

¹²⁰ There are also voices against such acknowledgement. Practitioners in international justice who adhere to this school of thought are often of the view that international trials should focus exclusively on trying alleged perpetrators of international humanitarian law and leave the establishment of the truth

These practitioners are not alone in their view. Observers, most importantly Hannah Arendt in her book 'Eichmann in Jerusalem', held that the exclusive focus of a criminal court should be on the weighing of the charges brought against the accused, rendering judgment and meting out due punishment.¹²¹

However, the search for the truth in international justice does not need to be incompatible with the standard of proof beyond reasonable doubt. Yet, the existence of such concerns demonstrates that there are different views on what the ascertainment of the truth as an objective signifies. Thus, an in-depth discussion on the meaning of the ascertainment of the truth, both in the context of legal and sociological political debates, appears necessary and will follow.

Meaning of the Ascertainment of the Truth

Meaning in domestic criminal justice systems

In order to determine the meaning of the ascertainment of the truth in international criminal justice, it is helpful to examine what interpretation domestic criminal jurisdictions have given to this term.

Truth has a particular legal meaning in domestic criminal justice. Criminal justice throughout the world and history seeks to identify perpetrators of crimes committed within a society. The method of doing so changes over time and differs from society to society. Any criminal justice system, at least in theory, seeks to punish only those who are guilty of committing the crimes charged and liberate anyone who is wrongly accused. In some jurisdictions, the process in which the guilt of an alleged perpetrator of a crime is tested is referred to as ascertaining the truth about the guilt or innocence of the accused. Other jurisdictions do not use such terminology, as frequently or explicitly.

to TRCs, which were set up explicitly to deal with that objective. In an 'off-the-record' conversation on 9 December 2010 in The Hague, one Prosecutor, one member of Chambers and one member of a defence team each expressed such a view. It is noteworthy that each of them has a common law background.

¹²¹ Arendt, *Eichmann in Jerusalem*, *supra* note 21, 9, 10, 19, 225, 253. See also Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 25.

A distinction is often made between trials conducted in a civil law and a common law criminal justice system. Whilst both types of trials inquire into, and reconstruct past events, it is generally assumed that the former emphasises the importance of establishing the truth to a much greater extent than the latter. The questionable validity of this assumption will be addressed in the following discussion on common law and civil law interpretations of ascertaining the truth.

Civil Law Justice Systems: Meaning of Ascertainment of the Truth

In many civil law systems, the mandate of ascertaining the truth is perceived as the main goal of criminal proceedings. It is considered to be ‘a precondition to a just decision’ and in that sense the ‘true ultimate aim’ of the criminal justice process.¹²² Countries, such as France, Belgium and Germany, have explicitly recognized the ascertainment of the truth as an objective of criminal justice in their criminal codes of procedure.¹²³

The aim of ascertaining the truth in civil law criminal justice systems has been described as the goal, to the extent humanly possible, to reach a factually accurate verdict.¹²⁴ The truth that is assessed in a civil law criminal trial is referred to as an

¹²² Damaška, *Evidentiary Barriers*, *supra* note 30, 580–581; E. Grande, *Dances of Criminal Justice: Thoughts on Systematic Differences and the Search for the Truth*, in Jackson, Crime, Procedure and Evidence, *supra* note 23, at 153; M. Damaška, *Evidence Law Adrift* (Yale University Press, 1997), 120.

¹²³ German criminal proceedings are guided by the principle of investigation pursuant to which the truth must be ascertained *ex officio* by the public prosecutor and the court with regard to all incriminatory and exculpatory evidence (§§ 160(2), 155 (2), 206 of the German Code of Criminal Procedure (*Strafprozeßordnung (StPO)*) an english translation of which is available at <<http://www.iuscomp.org/gla/index/html>>). See further § 244.2 StPO, which provides: ‘In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of evidence relevant to the decision.’ See also M. Bohlander, *Basic Concepts of German Criminal Procedure – An Introduction*, *Durham Law Review*, 1 *Durham Law Review* 26 (2011) 9; T. Weigend, *Rechtsvergleichende Bemerkungen zur Wahrheitssuche im Strafverfahren*, *Festschrift für Ruth Rissing-van Saan*, 2011, 749-766, at 756. M. Bohlander, *Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice*, 24 *Leiden Journal of International Law* 393 (2011), 402. Similarly, Art. 310 of the French Code of Criminal Procedure (*Code de Procédure Pénal (CPP)*), official translation available at <<http://www.legifrance.gov.fr>> provides: ‘The presiding judge is vested with a discretionary power by which he may, on his honour and his conscience, take all the measure he deems necessary for the discovery of the truth’ (unofficial translation given by the author). In other countries, such as The Netherlands, the ascertainment of the truth is not explicitly recognised but the commentary to the Dutch Code of Criminal Procedure refers to it as the principal objective of criminal proceedings. See: Memo of Information (‘*Memorie van Toelichting*’), *Kamerstukken II 1913/14*, 286, nr. 3).

¹²⁴ J. Nijboer, *Das Streben nach materieller Wahrheit im Strafprozeß*, in P. Lang, *Criminalia: Beweisprobleme und Strafrechtssysteme*, (Frankfurt am Main), band 9, 1997, 23, at 28 [hereinafter ‘Nijboer, Wahrheit im Strafprozeß’].

objective, material, substantive or ontological truth.¹²⁵ This truth goes beyond the truth of the parties. Jointly with all parties and participants, a neutral and impartial judge searches for correct answers on the theoretical assumption that “an objective reconstruction of reality is attainable”.¹²⁶

The objective truth should, however, not be confused with absolute truth or scientific truth, whose existence has been denied by many sceptics.¹²⁷ Even if absolute truth exists, it would be impossible for human beings to establish with certainty what the absolute truth is.¹²⁸ In epistemology, a distinction is made between truth (‘reality’ or ‘proposition’) and the criteria on which a specific notion of the truth is accepted through consensus in different situations, without being certain that the truth has in fact been discovered. This distinction leaves room to use terms such as ‘ascertaining the truth’ without having the illusion that human beings can achieve more than establishing with a high level of certainty what has occurred in their framework of experience.¹²⁹

In this interpretation of the truth, a verdict whose accuracy is not absolutely certain can still be consistent with the objective truth. On the basis of the evidence available, the objective truth is then the most reliable outcome that can be achieved in a courtroom run by human beings. Provided that all efforts are made to ascertain the truth, the truth-searching mandate has been successfully completed notwithstanding the absence of a guarantee of the accuracy of the outcome. The efforts referred to here include everyone involved in the criminal process, including the triers of fact and law (professional judges, sometimes assisted by lay assessors), the parties (prosecution

¹²⁵ E. Grande, *Dances of Criminal Justice*, *supra* note 122, 147; Nijboer, *Wahrheit im Strafprozeß*, *ibid* 24–29; Damaška, *Evidentiary Barriers*, *supra* note 30, 581; See further H. Lévy-Bruhl, *La Preuve Judiciaire* (1964); W. Butler, *Russian Law* (Oxford University Press, 2003), 256.

¹²⁶ J. Whitman, *No Right Answer?*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 371, at 386. Whether this belief is realistic is questionable. See Damaška, *Truth in Adjudication*, 49 *Hastings Law Journal* 289 (1998). This is also acknowledged by civil law jurists.

¹²⁷ Damaška, *Evidentiary Barriers*, *supra* note 30, footnotes 199, 568.

¹²⁸ F. Cornford, *The Republic of Plato: Translation and Commentary* (58th Ed.) (Oxford University Press, 1976), 227-235; I. Murdoch, *Metaphysics as a Guide to Morals* (Chatto & Windus, 1992), 11-12; K. Malek, *Abschied von der Wahrheitsuch*, *Strafverteidigertag*, held in Berlin, Germany, 25-27 March 2011, 1-6.

¹²⁹ *Ibid*; Nijboer, *Wahrheit im Strafprozeß*, *supra* note 124, 26-28. See also, W. Wagenaar, *Vincent plast op de grond, Nachtmerries in het Nederlands recht* (Uitgeverij Bert Bakker, 2006), 9.

and defence) and participants (civil parties). The defendant has no obligation to participate in this process, but it is generally in his interest that he does.¹³⁰

Elisabetta Grande has qualified this all-inclusive truth enquiry as a ‘rumba’ dance, which is “performed by a variable number of dancers occasionally alone and occasionally in groups with many shifts and continuous substitutions of dancers and roles. It is a genuinely communal performance in the collective search of an objective truth”.¹³¹ A similar observation – albeit not in the dancing metaphor – was made by a French judge at the ICC who has pursued his entire career in the French legal system prior to his arrival at the ICC. While addressing the defence, prosecution and victim participants, he stated: “We are jointly seeking to establish the truth, and each party, each participant, has a role to play”.¹³²

This process is intended to lead to the objective truth, which is fully justified in a reasoned written decision.¹³³ The objective truth is therefore verifiable, transparent and subject to public scrutiny and appeal to a higher court. It is also predictable as a consistent methodology is applied. The outcome is, therefore, not coincidental but upholds the certainty of the law.¹³⁴

Common Law Justice Systems: Meaning of Ascertainment of the Truth

In common law systems, the extent to which the ascertainment of truth is a core objective of criminal justice is questionable. The term ‘ascertainment of the truth’ is part of the legal vocabulary used in civil law systems but not, or at least not as firmly, as that used in common law systems.

A common law adversarial trial is structured along the line of burdens on the parties and regulations as to how and what kind of evidence can be presented to the triers of fact, rather than along the line of searching for an objective truth. Practitioners and observers take the view that dispute resolution in a fair and equal manner is the prime

¹³⁰ Bohlander, *Radbruch Redux*, *supra* note 123, 402; Damaška, *Evidentiary Barriers*, *supra* note 30, 558-559; A. Beijer, *34 Bewijs*, in J. Boksem (Ed.), *Handboek Strafzaken* (Kluwer B.V., 2006), 34.1.4 Strategy of the Accused and Counsel (the advice to defendants is to participate actively).

¹³¹ Grande, *Dances of Criminal Justice*, *supra* note 122, 148, 155.

¹³² *Prosecutor v. Katanga & Ngudjolo*, T. 4 February 2010, ICC-01/04-01/07-T-96-Red-ENG, 31; T. 10 February 2010, ICC-01/04-01/07-T-99-Red-ENG, 12, where Judge Cotte held: “All of us, even though we have different missions, wish to establish the truth.”

¹³³ De Hert, *Legal Procedures at the ICC*, *supra* note 25, 114; See also Art. 353 French CPP. In France and Belgium, when the *Chambre d’Assize*, consisting of lay and professional adjudicators, renders judgement in cases of felony, no reasoned written decision must be delivered.

¹³⁴ Whitman, *No Right Answer?*, *supra* note 126, 383.

objective of criminal justice. It is considered more important than the accuracy of the outcome.¹³⁵ This dispute is between two equal parties. On the one hand, there is the prosecution, and on the other hand, there is the defendant. The court must settle the dispute in a fair manner, because only then can it bring about just results.¹³⁶ The pivotal issues are equality of arms between the two parties and giving a voice to the defendant.

Amongst others, his Honour Judge Peter Murphy defines the objective of common law trials as follows:¹³⁷

Trials are adversarial contests engaged in by parties who have much to lose and gain, and the goal of a party to a case is not to explore objective truth, but to persuade the trier of fact that his own version of the facts is the correct one.

Some scholars, however, opine that the central question of any criminal trial lies in ‘discovering the truth of an accusation’.¹³⁸ Goodpaster observes that the high regard for fairness intends to contribute to this goal. Truth and justice are intertwined, and the fairness of the procedure determines the accuracy of the results.¹³⁹

¹³⁵ Personal interview with B. Gumpert, conducted in Arusha, Tanzania, 6 September 2006; Damaška, *Evidentiary Barriers*, *supra* note 30, 103, 123, 134, 136, 580-581: “It is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth as the just settlement of a dispute”.; Frank, *Courts on Trial*, *supra* note 38, 7; Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, at 276-277; J. Thibaut & L. Walker, *A Theory of Procedure*, 66 *California Law Review* 541 (1978) 541-566.

¹³⁶ Grande, *Dances of Criminal Justice*, *supra* note 122, 147-148, 152; also J. Rawls, *A Theory of Justice* (Revised Edition) (Harvard University Press, 1999).

¹³⁷ P. Murphy, *Evidence, Proof, and Facts, A Book of Sources* (Oxford University Press, 2003), 6. Also: De Hert, *Legal Procedures at the ICC*, *supra* note 25, 93. See also Damaška, *Evidentiary Barriers*, *supra* note 30, 581-582; Frank, *Courts on Trial*, *supra* note 38, 102: The judgment itself is not so much in the nature of a pronouncement on the true facts of the case; it is, rather, a decision between the parties. If, however, proceedings are structured as an official inquiry, the concern for ascertaining the facts of the case is much more central. Also Morgan is reported to have observed, with some regret, that a law-suit is not a forum for the discovery of the truth, but “a game in which the contestants are not the litigants but the lawyers”. See also Lord Bingham: “The common law judge, it is often said, unlike his counterpart in a civil law system and unlike the other investigators I have mentioned, is not concerned with establishing the truth of what did or did not happen on a given occasion in the past but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability.” Lord T. Bingham, *The Business of Judging, Selected Essays and Speeches* (Oxford University Press, 2000), 4.

¹³⁸ S. Uglow, *Criminal Justice* (2nd Ed) (Sweet & Maxwell 2002), 207. In his view, this is true of today’s as well as medieval justice although the mechanism for uncovering the truth has changed radically. The most important scholar in this respect is W.L. Twining, *Theories of Evidence: Bentham & Wigmore* (Stanford: Stanford University Press 1985); Weigend, *Rechtsvergleichende Bemerkungen*, *supra* note 123, 651-753.

¹³⁹ G. Goodpaster, *On the Theory of the American Adversary Criminal Trial*, 78 *Journal of Criminal Law and Criminology* 118 (1987).

Twining, one of the leading scholars on evidence and proof, refers to rectitude of decision as an important social value. He defines this term as “the correct application of valid substantive laws to facts established as true”.¹⁴⁰ He nonetheless concedes that this important social value must be balanced against other factors, such as the security of the state, the fairness of the proceedings and public expenditure. In light of such other objectives, “[t]he pursuit of truth as a means to justice under the law commands a high, but not necessarily overriding priority as a social value”.¹⁴¹

The rulings of the English Courts have been ambiguous as to whether the ascertainment of the truth is a primary aim of adversarial proceedings. It can hardly be read to support one view over the other. In one case, the Court of Appeal defined the judge’s mandate as: “above all ... to find the truth, and to do justice according to law”, and as being “at the end to make up his mind where the truth lies”.¹⁴² In a later case, the Court of Appeal, however, said that “[t]he due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof.”¹⁴³

Thus, common law trials are more focused on procedural fairness than the search for an objective truth. Unlike civil law jurisdictions, barely any thought has been given to the concept of truth-ascertainment in common law procedures. No doctrine or definition of the term has been adopted. Yet, no trial can be entirely divorced from truth ascertaining, as it equals an attempt to reconstruct accurate past facts. This exercise can only be conducted if there is an assumption that the reconstruction of facts that occurred in the past is in principle possible. The method to reconstruct past events is, however, different.

In common law jurisdictions, there is little faith in the neutrality of any fact finder, given that human beings always assimilate information selectively. Such cognitive limitations, it is said, prevent fact finders from ascertaining the objective truth through a neutral inquiry.¹⁴⁴

¹⁴⁰ Twining, *Theories, The Rationalist Tradition: ‘Assumptions about fact-finding in adjudication’*, reprinted in Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 70-76.

¹⁴¹ *Ibid.*

¹⁴² *Jones v. National Coal Board* [1957] 2 QB 55, 63-64 per Denning LJ.

¹⁴³ *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394 at p. 411, per Lord Denning M.R.

¹⁴⁴ Damaška, *Evidence Law Adrift*, *supra* note 122, page 95; Grande, *Dances of Criminal Justice*, *supra* note 122, at 147, 152.

Twining affirms that determinations concerning the truth about allegations are generally made under uncertain conditions. Present knowledge about past events is typically based on incomplete evidence. Therefore, “establishing the truth about alleged past events is typically a matter of probabilities or likelihoods falling short of complete certainty”.¹⁴⁵

Similarly, Frank held:¹⁴⁶

The axiom or assumption that, in all or most trials, the truth will out, ignores, then, the several elements of subjectivity and chance. It ignores perjury and bias; ignores the false impression made on the judge or jury by the honest witness who seems untruthful because he is frightened in the court-room or because he is irascible or over-scrupulous or given to exaggeration. It ignores the mistaken witness who honestly and convincingly testifies that he remembers acts or conversations that happened quite differently than as he narrates them in court. It neglects, also, the dead or missing witness without whose testimony a crucial fact cannot be brought out, or an important opposing witness cannot be successfully contradicted. Finally it neglects the missing or destroyed letter, or receipt, or cancelled check.

Therefore, the aim is not to ascertain an objective truth, but rather to establish a procedural truth. This then is the outcome of a battle between two parties who each present their truth to a passive arbiter. In civil law doctrinal terminology, such a truth is referred to as a formal truth. This is defined as a relative truth primarily based on the evidence produced by the parties in a civil suit.¹⁴⁷ The conclusion of the triers of fact drawn from the evidence presented in court reflects the formal truth. This conclusion is not presumed factually accurate. It merely reflects whether the party who had the burden of proving his claim failed or succeeded in doing so.

This is similar to the truth that is established in a common law criminal trial. After hearing all the evidence, a jury will consider whether the prosecution has proved its case against a defendant beyond a reasonable doubt. An acquittal does not mean that the defendant is not guilty; it only means that the prosecution failed to establish the

¹⁴⁵ Twining, *Theories*, *supra* note 140, 70-76. See also Damaška, *Evidentiary Barriers*, *supra* note 30, 584; De Hert, *Legal Procedures at the ICC*, *supra* note 25, 93; M. Redmayne, *Doubts and Burdens: DNA Evidence, Probability and the Courts*, (1995) *Criminal Law Review* 464, 479.

¹⁴⁶ Frank, *Courts on Trial*, *supra* note 38, 14-16, 20-21, 47, 80. As Frank states, trial judges or juries are fallible witnesses of fallible witnesses: 80. See also J. Frank, *Not Guilty* (Gollancz, 1957).

¹⁴⁷ It is stated ‘primarily’ because also in civil suits, judges play an active role in an attempt to reach an outcome that is factually correct. Nijboer, *Wahrheit im Strafprozeß*, *supra* note 124, 24.

defendant's guilt. Whilst it is certainly the aim to convict the guilty and acquit the innocent, there is clear appreciation that the same set of facts may lead to different truths in different court settings with different prosecutors, defence counsel and jury members. In that sense, truth is considered to be relative as it is dependent on the human beings who participate in the trial.¹⁴⁸ The outcome that is established at the end of the battle between two parties is a courtroom truth. It is less consistent and verifiable than the truth established in a civil law courtroom, which is set out in full detail in a written judgement.¹⁴⁹ By contrast, a verdict issued by a jury in a common law courtroom consists of one or two words: "guilty" or "not guilty". The manner in which the jury's verdict is reached is unknown to the public.¹⁵⁰

Elisabetta Grande refers to the truth that comes out of this process as an 'interpretive truth', a second-best truth which common law practitioners view as the only realistically discoverable truth.¹⁵¹ She compares the two-party system with a 'tango' justice. As it takes two to go to tango, it also takes two "to produce a reconstruction of reality that can be equated to truth".¹⁵²

The Objective and Procedural Truths Compared

It appears that the difference between 'material', 'objective' or 'ontological' truth, and 'formal', 'interpretative', 'relative' or 'procedural' truth is that the former presupposes a true version of events that is out there to be discovered. By contrast, the latter is a truth that is established on the basis of the information that is presented post facto in the courtroom.

Conceptually, there is a very clear distinction between these two types of truths. In practice, however, the difference between them is not as significant. This is particularly true, given that both civil law and common law jurists most often accept that there will always be some doubt about the final outcome of the inquiry. Indeed, common law and civil law scholars and practitioners alike have acknowledged that it

¹⁴⁸ Frank, a true sceptic of any real possibility of attaining the truth in the court-room, points out that, until cases arise and are decided, one does not know one's legal rights and duties. Those are determined in Court, not in the abstract. See Frank, *Courts on Trial*, *supra* note 38, 12-13, where he gives an example of a wrong finding of fact. He refers to Borchard's book, *Convicting the Innocent* (1932), reporting 65 cases of wrongful convictions. He also says that one is unaware of how many guilty men escaped the boat through mistakes in fact-finding.

¹⁴⁹ See *supra* note 133.

¹⁵⁰ This is said to give the jury an uncontrollable and incorrigible power and is therefore criticised. See Frank, *Courts on Trial*, *supra* note 38, 112-113.

¹⁵¹ Grande, *Dances of Criminal Justice*, *supra* note 122, 147-148.

¹⁵² *Ibid*, 148.

is impossible for any human assessor to acquire absolute certainty of any fact including those to which they were a witness themselves.¹⁵³

The objective truth has been described as the most reliable outcome that can be achieved in a courtroom run by human beings on the basis of the evidence available. If the objective truth is viewed in this way, there is little difference from the procedural truth because they are both determined by the procedure. Thus, the focus in any truth-searching exercise is on the procedure more than the result. If the truth-searching procedure is fair then the outcome is accepted as truthful until and unless proven wrong in appeal or review proceedings. In such a situation, the outcome will be overturned in either system. Yet, both types of criminal justice systems have adopted a procedure which is believed to produce the safest, most accurate results. Some scholars would therefore argue that both methods of criminal proceedings seek to establish the truth.¹⁵⁴

The main distinction between the material and procedural truth is the methodology applied to obtain the truth. Different notions of truth go combined with different procedural arrangements.¹⁵⁵ In establishing the procedural truth, the persuasion of the argument prevails. The search for the objective truth, on the other hand, is a quest for right answers.¹⁵⁶

The most essential difference between the two types of methodologies is that the common law criminal justice system constitutes a regulated two-party battle. The civil

¹⁵³ W. Pompe, *Het bewijs in strafzaken. Uit: Vijf opstellen van Willem Pompe. Met een herdenking door G. Th. Kempe* (Tjeenk Willink: Zwolle, 1975), 51, where Pompe states that a judge must interpret the words of a witness and accused, which is not an easy task. It requires an understanding of the person's language and person; the words cannot be simply taken on face value. See also G. Williams, *The Proof of Guilt* (London, 1955), 133-134; referred to in Pompe, at 53-54; M. Pols, *Algemeene Rechtsgeleerdheid, De wettelijke bewijsleer in strafzaken*, (Themis, 1882), 337-339, 342, referencing W. Modderman, *Verhandeling over de Wettelijke Bewijsleer in Strafzaken* (Utrechtsch Gen. Kunsten en Wetenschappen, 1867) 44-45; Frank, *Not Guilty*, *supra* note 146, Frank, Courts on Trial, *supra* note 38, 14-16, 20-21, 47, 80.

¹⁵⁴ Weigend, *Rechtsvergleichende Bemerkungen*, *supra* note 123, 751-753.

¹⁵⁵ Grande, *Dances of Criminal Justice*, *supra* note 122; Damaška, *Evidence Law Adrift*, *supra* note 122, 120; Damaška, *Evidentiary Barriers*, *supra* note 30, 578; Damaška, *Truth in Adjudication*, *supra* note 126.

¹⁵⁶ Whitman, *No Right Answer?*, *supra* note 126, at page 381. See further R. Dworkin, *No Right Answer?*, in P. Hacker & J. Raz (Eds.), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977) 58-84; W. Lucy, *Adjudication*, in J. Coleman & S. Shapiro (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 208-221.

law criminal justice system is an all-inclusive judge-led inquiry. The party-driven systems have stricter regulations and more prescribed burdens than judge-led systems in regard to the presentation and admissibility of the evidence.¹⁵⁷ A judge-led system is more flexible allowing more room for a case-to-case evaluation based on fairness and truth.

The Scope of the Search for the Truth

The truth-ascertaining methodology applied in common law and civil law jurisdictions will be explored below in Part II. Here, suffice it to say that the difference between the two methodologies should not be overestimated. The essence of a criminal trial in every system is the same, that is, to inquire into the guilt or innocence of the accused. In both types of systems, the trial is focused on whether the accused should be found guilty as charged and punished appropriately. The scope of the inquiry is defined by the charges brought by the prosecutor or in some jurisdictions by the investigative judge. Trial judges or juries cannot lay charges and can only render judgment if a case is brought before them. This is referred to as the principle of procedural passivity.¹⁵⁸

Moreover, the scope of any courtroom inquiry is limited to the question of guilt or innocence of the specific crimes charged. The indictment sets the parameters of any such inquiry, which is referred to by some scholars as the tyranny of the indictment. Given its limiting effect, this principle is said to frustrate the ascertainment of the truth.¹⁵⁹

Both methods further include safeguards to the defendant, and apply a standard equalling that of proof beyond reasonable doubt.¹⁶⁰ Indeed, as absolute certainty is

¹⁵⁷ J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law, Civil and Common Law Approaches with Special References to the American and German Legal Systems* (Kluwer Law International, 1997), 2; Bohlander, *Radbruch Redux*, *supra* note 123, 402.

¹⁵⁸ Guarnieri & P. Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press, 2003), 10.

¹⁵⁹ Pompe, *Bewijs in Strafzaken*, *supra* note 153, 36–37.

¹⁶⁰ This is similar to the ‘conviction intime’ standard, applied in France by the Cour d’Assize consisting of a jury and a judge, which is set out in Article 427 of the French Code of Criminal Procedure: “[e]xcept where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction (...)”. See J. Nijboer, *Strafrechtelijk Bewijsrecht* (5th Ed.) (Ars Aequi Libri, 2008), 45–48; M. Damaška, *Free Proof and its Detractors*, 43 *American Journal of Comparative Law* 343 (1995), 344, 345; France: J. Boré, *la cassation en matière pénale*, 1985, LGDJ, No. 1902 and Art. 335 CPP; Belgium: Art. 342 CPP.

unachievable, reasonable certainty is the highest certainty that can be reached which is still acceptable to the human conscience.¹⁶¹ If at the end of the case, there is a reasonable doubt remaining about the guilt of the accused, he must be acquitted. This is in line with the common law standard of proof beyond reasonable doubt as well as the civil law principle of *in dubio pro reo*, pursuant to which doubt must be interpreted in favour of the accused.¹⁶² This also correlates with the presumption of innocence which, at least in theory, is an internationally widespread presumption.¹⁶³

The “reasonable doubt” standard has been defined as follows:¹⁶⁴

.... in dealing with matters of importance in your own business affairs, your own business or personal affairs, you do not allow slight, whimsical doubts to deter you from going along; you brush them aside and go ahead. But surely, there comes a time when, in dealing with matters of your own affairs, you stop to think, and by reason of that doubt you decide what you are to do in your business of importance. Well, this is the quality and kind of doubt of which the law speaks when it speaks of “reasonable doubt”.

This is ultimately a subjective standard which is difficult to define, or to assess objectively. The evaluation process is an internal subjective and psychological process of the triers of fact, seeking to reach a level of reasonable certainty about the guilt or innocence of the accused.¹⁶⁵ Redmaye described this standard as “an

¹⁶¹ Twining, *Theories*, *supra* note 140, 70-76. Pompe, *Bewijs in Strafzaken*, *supra* note 153, 48; J. Nijboer, *De waarde van het bewijs* (Quint, 1996), 66, 93.

¹⁶² *In dubio pro reo* is an old Latin term which is used in civil law traditions. See Damaška, *Evidentiary Barriers*, *supra* note 30, 541. See also Nijboer, *De waarde van het bewijs*, *supra* note 161, 66, 93. In Germany, reasonable doubt is called *vernünftige Zweifel*, which must lead to an acquittal pursuant to BGHSt 10, 208; StV 1999, 5; NJW 1999, 1562; NStZ-RR 1999, 332.

¹⁶³ See for instance Article 6(2) of the European Convention on Human Rights and Article 14(2) of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171. See also Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 202–203.

¹⁶⁴ *R. v. Ching*, (1976) 63 Cr. App. Rep. 7. See for similar reasoning, Lord Denning in *Miller v. Ministry of Pensions* [1947] 2 All ER 372, 373-374: “Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence “of course it is possible but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.” See for further discussion A. Kiralfy, *The Burden of Proof* (Professional Books Limited, 1987), 14-16.

¹⁶⁵ Nijboer, *De waarde van het bewijs*, *supra* note 161, 38–39; C. Cleiren & J. Nijboer (Eds.), *Strafvordering*, Text en Commentaar (Boek II, Titel VI, Afd 3) 1189. This is the same in France. See Art. 353 CPP, which sets out the instructions read by a professional judge to jury members of the Cour d’Assize before their deliberations: “The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made

inscrutable, subjective standard which exists largely within the mind of the fact-finder in a particular case. All we can do is to describe the sort of reasoning process which we feel the fact-finder should adopt in eliminating doubt.”¹⁶⁶

Scope of the ascertainment of the truth in international justice

Desired Scope of the Ascertainment of the Truth

International criminal justice does not significantly differ from domestic justice in terms of methodology in ascertaining the facts. The prosecutor investigates crimes within the jurisdiction of the international tribunal or court. He then charges particular individuals who he will seek to bring before the court. If he succeeds, the suspect is entitled to select counsel to represent him and a trial will take place in front of a bench of three judges. At the end of the trial, the judges must determine whether the charges against the defendant have been established beyond reasonable doubt. If there is a reasonable doubt, the judges must acquit. Thus, also in international justice, the ascertainment of the truth is done in accordance with the standard of proof beyond reasonable doubt. The search for the truth is limited to the cases selected and brought by the prosecutor.¹⁶⁷

Some scholars, human rights activists and other observers go a step further. They consider that it is part of the mandate of international tribunals and courts to provide a historical analysis of the context in which the crimes charged were committed. In their view, this follows from the mandate to ascertain the truth. For instance, Piragoff states that the function of the ICC goes beyond that of an ordinary criminal court in that, to the extent possible, the parties and the Chamber have the additional obligation to clarify the historical facts underlying the crimes charged.¹⁶⁸

on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?”

¹⁶⁶ Redmayne, *Doubts and Burdens*, *supra* note 145; See also D. MacCormick, *The Coherence of a Case and the Reasonableness of Doubt*, 2 *Liverpool Law Review* 45 (1980), stating that “coherence” turns a probable case into a case which is proved beyond reasonable doubt. See further below, section ‘evaluation of the evidence’.

¹⁶⁷ See further section ‘politically motivated investigations’.

¹⁶⁸ D. Piragoff, *Article 69*, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes. Article-by-Article* (2nd Ed) (Hart Publishing, 2008), 1321.

Such a suggested mandate aligns with the other mandates, particularly of reconciliation, peace and security, and the right of victims to the truth. According to Waters, the mandate of the ICTY is to generate a definitive and authoritative account of the course and origins of a conflict. This account is to the exclusion of alternative historical narratives and is an attempt to combat denial and prevent attempts at revisionism. An accurate historical record is said to “promote reconciliation between conflicting communities”¹⁶⁹, and help educate people, often long subject to propaganda, about what really happened, and “help ensure that such horrific acts are not repeated in the future”.¹⁷⁰

Judges have expressed similar views. For instance, Judge Meron, one of the appeals judges of the ICTR and ICTY, has confirmed that the task of the judges at the international criminal tribunals extends the ordinary function of determining the guilt of alleged perpetrators: “we are judging cases in these tribunals but we also have a mandate to write history and are collecting massive information for future historians who can formulate and reformulate (write and rewrite) the history of a country”.¹⁷¹ Another ICTY judge, Judge Bonomy, has similarly stated that compiling a complete historical record of the war is one of the objectives of international criminal justice.¹⁷²

These views correspond with the Fifth ICTY Annual Report determining that, “through its judicial proceedings the Tribunal establishes a historical record which provides the basis for the long-term reconciliation and reconstruction of the region”.¹⁷³ Also at the ICTR, in the Military II case, the Chamber emphasised “its obligation to discover the truth about the events that happened in Rwanda in 1994.”¹⁷⁴

¹⁶⁹ T. Waters, [Redacted]: *Writing and Reconciling in the Shadow of Secrecy at a War Crimes Tribunal*, draft paper published in materials for *The ICTR Legacy from the Defence Perspective*, Conference held in Brussels, Belgium, 24 May 2010, Synopsis and Part I.

¹⁷⁰ Scharf & Schabas, Slobodan Milošević on Trial, *supra* note 65, 97-98.

¹⁷¹ *Echoes of Genocide*, *supra* note 85.

¹⁷² See Bonomy, *The Reality of Conducting A War Crimes Trial*, *supra* note 57, 4.

¹⁷³ UN Doc. A/53/219, 7 August 1998, para. 202. Whether international criminal courts and tribunals can effectively contribute to reconciliation has been vigorously debated at *Tribunal Penal International Pour le Rwanda: Modele ou Contre-Modele pour la Justice Internationale? Le Point de Vue des Acteurs*, Conference held in Geneva in May 2009 [hereinafter “the Geneva Conference”].

¹⁷⁴ *Prosecutor v. Ndindiliyimana et al*, T. Ch. II. Decision on defence motions alleging violation of the prosecutor’s disclosure obligations pursuant to Rule 68, ICTR-00-56-T, 22 September 22 2008, para. 61.

In these views, the notion of ascertaining the truth in international criminal justice must go beyond the ascertainment of the truth in ordinary domestic criminal trials. There is an aspiration for international trials to establish not only the facts directly implicating the accused on trial, but also depict a more general picture of what happened at the time and in the region relevant to the indictment and those responsible.

This is, however, very complicated in practice. The judges have a difficult task giving correct interpretations to historic events. The correct interpretation of such events is often in dispute. Judges are regularly faced with evidence of more than one reasonable version of the facts.¹⁷⁵ Yet, they have to choose one version as the authoritative version of the facts.

Cultural Context

Difficult as it is to come to one view on facts within the same cultural context, this is much more challenging when dealing with many different cultural contexts, each with their own way of looking at the world, moral values and views on what is acceptable behaviour. Turner asserts that culturally distinct groups often have different understandings of the same events stemming from their distinct cultural frameworks. He defines culture as “‘the knowledge people use to generate and interpret social behaviour’. Such knowledge is learned and, to a degree, shared. Cultural knowledge is coded in complex systems of symbols. People growing up in a society are taught ‘a tacit theory of the world’. This theory is then used to organize their behaviour, to anticipate the behaviour of others, and to make sense of the world in which they live.”¹⁷⁶

When an assessor must evaluate facts in a situation unfamiliar to him, even with the best of efforts, he can hardly avoid interpreting these facts in accordance with the norms that he has been taught within his own society. According to Rorty, it is impossible to climb out of one’s own mind, which is coloured by these societal

¹⁷⁵ Wilson, *Judging History*, *supra* note 20, 918.

¹⁷⁶ T. Turner, *The Congo Wars, Conflict, Myth & Reality* (Zed Books Ltd, 2007), 19. See also: Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 250-251 where he emphasizes cultural and language differences in dealing with truth-finding. Also, see Parlevliet, *Considering Truth*, *supra* note 3, 5; see also P. Winch, *The Idea of a Social Science and its Relation to Philosophy* (7th Ed.) (Routledge & Kegan Paul Ltd, 1971).

norms.¹⁷⁷ Similarly, in Becker's view, there is only subjective reality. Neutral and objective opinions do not exist.¹⁷⁸

Rorty's and Becker's points are solid and shared by this author, as well as numerous others.¹⁷⁹ As aforementioned, any judgement on facts involves subjective, coloured judgements. The ascertainment of the truth is not an objective undertaking as often assumed. It is rather a subjective exercise of qualifying events in accordance with the assessor's understanding of the facts. Facts cannot be fully separated from opinion because they only exist after being qualified as facts. They are not incontestable, colourless objects but are determined by subjective interpretations and perspectives, which are influenced by the personal circumstances of the assessor.¹⁸⁰ Rorty calls facts 'products of time and change'.¹⁸¹

An additional problem is that the society where atrocities occurred is typically divided in different, often opposing perceptions of what happened during the conflict. This is all the more so when the conflict involved different ethnic groups. The perception of truth concerning these conflicts can vary significantly across different ethnic groups.¹⁸² Perceptions of truth are largely related to identity, which is often defined by ethnicity.¹⁸³ The same person may be perceived as a liberator by one side and as a war criminal by the other side.¹⁸⁴ There is a risk that "trials become a battlefield over the official history and future identity of a country".¹⁸⁵

¹⁷⁷ Rorty, *Contingency, Irony, and Solidarity*, *supra* note 17, 48; Rorty, *Objectivity, Relativism, and Truth*, *supra* note 17, 21-45; cited by: Parlevliet, *Considering Truth*, *supra* note 3, 6. See also T. Franck & H. Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74(2) *American Journal of International Law*, 308 (1980), 309; J. Leurdijk, *Fact-Finding: Its place in International Law and International Politics*, 14 *Netherlands International Law Review* 141 (1967), 141.

¹⁷⁸ Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 245-250, particularly 250.

¹⁷⁹ See, for instance, Damaška, *Evidence Law Adrift*, *supra* note 122, page 95; Grande, *Dances of Criminal Justice*, *supra* note 122, at 147, 152.

¹⁸⁰ F. Cornford, *The Republic of Plato: Translation and Commentary* (58th Ed.) (Oxford University Press, 1976), 227-235; I. Murdoch, *Metaphysics as a Guide to Morals* (Chatto & Windus, 1992), 11-12. Parlevliet, *Considering Truth*, *supra* note 3, 5-7. Frank, *Courts on Trial*, *supra* note 38, 23-24.

¹⁸¹ Rorty, *Contingency, Irony, and Solidarity*, *supra* note 17, 22; also cited in: Parlevliet, *Considering Truth*, *supra* note 3.

¹⁸² Minow, *Between Vengeance and Forgiveness*, *supra* note 59, 63.

¹⁸³ Parlevliet, *Considering Truth*, *supra* note 3, 19.

¹⁸⁴ For example, the acquittal of the former Prime Minister of Kosovo, Mr. Ramush Haradinaj, who was prosecuted and tried by the ICTY (although currently being re-tried), was perceived as a just result by many Kosovar Albanians, and as a 'mockery of justice and a mockery of the innocent victims who suffered at the hands of Haradinaj' (statement made by Kostunica) by many Serbs. For many Kosovar Albanians, Mr. Haradinaj was one of the heroes who had liberated them from Serb suppression; for

One or Multiple Versions of the Truth?

Only if one of those perceptions exclusively corresponds with the accurate description of events, can one speak of an objective or ontological truth. Indeed, as defined by Parlevliet, the uncovering of the objective truth means “[r]evealing reality as it truly is, without interference of subjective perceptions nor personal or ideological frames of reference”.¹⁸⁶ She thereby refers to Carr’s definition of truth, that is, “the objective matter per excellence. What is true is true for everyone [...] independently of what anyone believes.”¹⁸⁷

The truth described here leaves little room for conflicting versions of the past because only one of them is considered accurate. If more than one perception corresponds with the accurate description of events, then they merely qualify as subjective perceptions of truth. For these reasons, it is not always evident that there is only one correct version of events. Like there is not one way to look at world politics, there is arguably not one way to look at the causes of a conflict and who is responsible and who are the victims. These are complex questions rarely with straightforward answers. As Parlevliet rightly points out, “[w]hat one considers to be true, may not seem true to others. Even if there is one truth, which goes beyond particular views and is true for all, it is hardly conceivable how one may know this truth, as it requires that one could disentangle it entirely from one’s perceptions and ideas.”¹⁸⁸

If there is more than one correct version of events, the acceptance of only one authoritative version can be dangerous and manipulative, particularly because the engagement of a court with “truth” and “memory” tends to be an engagement with

many Serbs, Mr. Haradinaj was a war criminal. See, *inter alia*, Byzantine Blog, Orthodox Journal at: <http://byzantinesacredart.com/blog/2008/04/kangaroo-court-releases-haradinaj.html>. See also Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 9-13, 34-35. See further Turner, *The Congo Wars*, *supra* note 176, 19. See also Scharf & Schabas, Slobodan Milošević on Trial, *supra* note 65, 98.

¹⁸⁵ Wilson, *Judging History*, *supra* note 20, 919; Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 25. See also Chuter, *War Crimes*, *supra* note 75, 210-211: “As soon as we turn the court into a theatre for confrontations between alleged victims and alleged perpetrators, we stop trying to establish truth and turn in the direction of politics and show business.”

¹⁸⁶ Parlevliet, *Considering Truth*, *supra* note 3, 5.

¹⁸⁷ *Ibid*, footnote 13.

¹⁸⁸ *Ibid*, 5; Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, at 276-277; Z. Bankowski, *The Value of Truth: Fact Scepticism Revisited*, 3 *Legal Studies* 257 (1981); Chuter, *War Crimes*, *supra* note 75, 203-215, 232-233.

political antagonism. Thus, according to Koskenniemi, “no truth can remain sacred within it.”¹⁸⁹ As Pacioci puts it, history is “too imbued with complexity, nuance and perspective to yield official versions”; historical events also “have to be understood in their appropriate larger context”.¹⁹⁰

Accordingly, Becker is a clear supporter of acknowledging the existence of multiple versions of reality. Such acknowledgement does not mean that right and wrong no longer matter or that everything is relative. It is an acknowledgment, however, of the complexity of the reality and that there is no easy, comfortable truth, accepted by the society at large. In Becker’s view, truth is often contradictory and can be constructive only if it reflects this complexity by including multiple perspectives. The reality is, according to Becker, “that people really believe their truths and that they are not merely victims of propaganda”.¹⁹¹

If a court has a mandate to establish accurate historical facts, it cannot adopt two or more versions of events. It has to acknowledge one as the authoritative version. In general, the outcome of the court examination must be yes or no, guilty or not guilty.¹⁹² In cases of uncertainty, the court can adopt less specific facts. For instance, where the number of victims is unknown, a court can make an estimate. A court cannot, however, leave open the identification of the victims and perpetrators, if not by name then at least by ethnicity or other group to which they belong. If a court has insufficient information to make such or other findings relevant to the charges, then in most cases it must acquit the accused due to a failure to establish his guilt beyond reasonable doubt.¹⁹³

By contrast, historians, social scientists, human rights activists, journalists or others who seek to analyse past events, can acknowledge more than one version of what happened. They do not need to reach one solid conclusion and have no burden of

¹⁸⁹ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 25.

¹⁹⁰ D. Paciocco, *Defending Rwandans Before the ICTR: A Venture Full of Pitfalls and Lessons for International Criminal Law*, in *La voie vers la Cour penale internationale: tous les chemins mènent à Rome – The Highway to the International Criminal Court: all roads lead to Rome* (Les Journées Maximilien-Caron, Editions Themis, Faculte de droit Université de Montreal, 2003) 6.

¹⁹¹ Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 242-253 (citation at 250).

¹⁹² Lord Bingham, *The Business of Judging*, *supra* note 137, 4.

¹⁹³ *Ibid.*, 4.

proof. An academically sound historical analysis tends to be pluralistic allowing for more than one interpretation of the facts.¹⁹⁴

TRCs can similarly establish various versions of past facts. The TRC established in South Africa to address the apartheid regime, has in fact done so. There were clear conflicting theories about what happened during the apartheid regime. Particularly contrasting were the views of the African National Congress (ANC), considered to be the primary liberation group, on the one hand, and the former regime and those Afrikaners who had supported the apartheid, on the other. They both largely blamed each other for everything. To accommodate both sides, two final reports were issued. One was supported by the majority and the other by the minority.¹⁹⁵ The majority report was highly critical of the former apartheid regime without excusing the crimes committed by the ANC. The minority report issued by an Afrikaner commissioner was much milder in its criticism of the former regime. It emphasised that apartheid was not on trial and that the ANC was responsible for committing massive atrocities. Neither was entirely happy with the result as nobody escaped significant criticism.¹⁹⁶

It has been debated whether “a plurality of truths” can and should be accommodated in a reconciliation process, or whether “one shared ‘Truth’” much be reached.¹⁹⁷ It may not be ideal to acknowledge more than one truth because that undermines the idea that there is one authoritative truth, which can have an adverse impact on reconciliation. However, this may be the best option for the purpose of reconciliation when it is impossible to reach a consensus between radically different, irreconcilable

¹⁹⁴ Wilson, *Judging History*, *supra* note 20, 912; Osiel, *Mass Atrocity*, *supra* note 86, 119; Minow, *Between Vengeance and Forgiveness*, *supra* note 59; J. Borneman, *Settling Accounts: Violence, Justice and Accountability in Postsocialist Europe* (1997); Lord Bingham, *The Business of Judging*, *supra* note 137, 4.

¹⁹⁵ A minority report was issued by Mr. Wynand Malan, who was on board of the TRC as a commissioner. See cited in: Borer, Truth Telling as a Peace-Building Activity, in: Borer, *Telling the Truths*, *supra* note 83, 23, footnote 84.

¹⁹⁶ The ANC was of the view that the TRC did not adequately distinguish the morality of the violence committed by the State, the suppressors, and those committed by those fighting against the suppression of the State. It had particular difficulties with the TRC’s finding that the ANC and its organs had committed gross violations of human rights “in the course of their political activities and armed struggles, for which they are morally and politically accountable”: TRC, *Report*, *supra* note 70, 5:239-242. The Afrikaners who had supported apartheid were critical of the TRC’s finding that apartheid was a crime against humanity (*ibid*, 5:440); cited in Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, footnote 84.

¹⁹⁷ S.McEvoy-Levy, *Introduction: Youth and the Post-Accord Environment*, in Borer, Truth Telling as a Peace-Building Activity, *supra* note 83, 25.

views. The alternative is to adopt one official truth, which is denounced by one or more parties to a conflict. In such a situation, the TRC process may have more negative than positive consequences for ‘fostering national unity’ and reconciliation purposes.¹⁹⁸ At least the TRC has the option to acknowledge various truths, whilst a court does not.

Additional Constraints in Establishing Historical Facts in the Courtroom

There are other constraints in determining historical facts in an international courtroom, which are not shared by other analysts of past events.

Although varying from system to system and depending on the methodology applied, courtroom proceedings include strict regulations on the type of material that can be relied on as evidence in reaching a final conclusion. Such evidence must at least be reliable and relevant. In common law jury trials, unreliable or irrelevant evidence may not even be shown to the triers of fact. Rules of evidence purposefully restrict the nature and range of material that can be produced. This is done not only out of fairness to the accused, but also in an effort to reduce the material adduced and consequently the time taken to consider it. The findings are limited to the evidential material adduced before the court. A failure to adduce sufficient convincing and credible evidence results in an acquittal.¹⁹⁹ The outcome of a trial may then “not only be inadequate in their historical approach, but positively distorting.”²⁰⁰

Time limits and procedural constraints also limit the scope of the court enquiry. Criminal proceedings cannot continue endlessly. The accused is entitled to a fair and speedy trial. Compared to historians who are entitled to take years to analyse the story of a conflict, criminal proceedings must be completed within a reasonable time.²⁰¹ Historians may travel to the conflict area they are analysing, conduct on-sight investigations or even live there for some time and get a feeling for the place. International courts, on the other hand, mostly operate from geographically remote locations and, in creating a historical record, mainly rely on the testimony of

¹⁹⁸ *Ibid*, 23.

¹⁹⁹ Lord Bingham, *The Business of Judging*, *supra* note 137, 4.

²⁰⁰ Wilson, *Judging History*, *supra* note 20, 913-914.

²⁰¹ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 35; Osiel, *Mass Atrocity*, *supra* note 86, 116.

historians, human rights activists or social scientists who are more familiar with the conflict area, as expert witnesses.

In addition, first and foremost, the triers of fact must determine the guilt or innocence of a specific individual or individuals on trial and cannot assess facts that are wholly irrelevant to the charges in the indictment. By looking at individual criminal liability only, central elements of the story are sometimes overlooked.²⁰² Trials are focused on individuals in order to avoid the demonization of an entire community. However, the counter-effect is that individuals may become the scapegoat for the crimes committed by everyone else. Indeed, the focus on individual leaders may “serve as an alibi for the population at large to relieve itself from responsibility.”²⁰³

In reality, crimes committed by State entities on a large scale are rarely the work of a few individuals. Rather, “the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects. This is why individualisation is not neutral in its effects.”²⁰⁴ Therefore, according to Koskenniemi, the truth may not be served by a narrow focus on the guilt of individuals.²⁰⁵

Further, when crimes are committed on a large scale, courts cannot judge all crimes but must select the most important crimes. In this selection process, crucial aspects of the story surrounding the conflict may be ignored. For instance, the Nuremberg trials were clearly focused on the Germans as the aggressors invading the whole of Europe, more than on their crimes against the Jews. Genocide, undefined until the Genocide

²⁰² Wilson, *Judging History*, *supra* note 20, 914-915.

²⁰³ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 14. See also Chuter, *War Crimes*, *supra* note 75, 112.

²⁰⁴ *Ibid.*, 13-14. See also Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, Part II, citing R. Teitel, *Bringing the Messiah*, 185, stating that these crimes “after all, a set of disconnected, deracinated misdeeds, but a patterned evil that itself distorted claims about the past to incite present horrors – and precisely because of which a robust judicial strategy of truth-telling is required.” See further Wilson, *Judging History*, *supra* note 20, 912-913: Historians tend to look more broadly than courts, and include in their analysis “cultural context, social patterns, and shared public practices and beliefs”. Historians often “locate individual agency within a wider context, thus diffusing guilt throughout the social fabric”.

²⁰⁵ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 13.

convention of 1948, was not charged.²⁰⁶ Extermination was charged but the focus was on the German invasion of Europe. According to many commentators, this focus was wrong.²⁰⁷

Also, the plot often gets lost in endless debates between the parties on procedural issues. Such debates are important in order to respect principles of due process but are tedious with regard to the overall picture of the conflict.²⁰⁸

Expressed Reservations on Establishing Historical Facts

Given these limitations, necessary to guarantee the fairness of the proceedings, courts are often perceived as “too selective and limited in scope to reveal the “whole story”.”²⁰⁹ Indeed, numerous scholars, including Arendt, Todorov and Paciocco, have argued that it is impossible to establish accurate historical facts without undermining the fairness of the proceedings. Each in their own way affirm that “[h]istory and justice cannot be written at the same time, with the same pen, without distorting both.”²¹⁰ In their view, any engagement of the court in writing history would distract the attention and focus from where it should be, namely on the rendering of justice and determining the charges, nothing else, not even “the noblest of ulterior purposes” including the creation of a record “which would withstand the test of history”.²¹¹ If the court attempts to answer the broader question as to why a conflict occurred and who is responsible for what, why and where, or if the court passes judgment on competing interpretations of historical explanations of the conflict, a court defeats itself and undermines the fairness of the proceedings.²¹²

²⁰⁶ The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by Resolution 260(III)(A) of the United Nations General Assembly on 9 December 1948: 78 UNTS 277.

²⁰⁷ Wilson, *Judging History*, *supra* note 20, 915. However, Arendt observed that those who received the death sentence at Nuremberg were those involved in the Final Solution, so the sentencing reflected the triers’ reactions to the crime of Genocide even if Genocide was not the verdict. See Arendt, *Eichmann in Jerusalem*, *supra* note 21, 257.

²⁰⁸ Koskeniemi, *Between Impunity and Show Trials*, *supra* note 18, 35; Osiel, *Mass Atrocity*, *supra* note 86, 116.

²⁰⁹ C. Geertz, ‘Local Knowledge’: *Further Essays in Interpretative Anthropology* (1983), 173; Chuter, *War Crimes*, *supra* note 75, 233-240; D. Mendeloff, *Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 *International Studies Review* 374 (2004); Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 252-253.

²¹⁰ Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190, 5.

²¹¹ Arendt, *Eichmann in Jerusalem*, *supra* note 21, 253. See also, for instance, Z. Salvatore, *Symposia: How to Ameliorate International Criminal Proceedings: Some Constructive Suggestions. Foreword*, 5(2) *Journal of International Criminal Justice* 346 (2007), 346-347.

²¹² Arendt, *Eichmann in Jerusalem*, *supra* note 21, 5, 91, 253; also see analysis of Arendt’s work in: Wilson, *Judging History*, *supra* note 20, 909-912. See also T. Todorov, *The Touvier Affair*, in R.

The greater the perceived responsibility of a person, the more difficult it is to produce a historical record simultaneously with a verdict on the person's guilt or innocence. The media and human rights activists will already largely have written the historical record and analysed who are the most responsible. They may have branded such a person as "guilty" long in advance of his trial. In such a situation, the judges are in a difficult position should they be asked to consider evidence which challenges the 'received' history about the conflict, including the responsibility of the accused on trial. Consequently, the trial process risks becoming an instrument for confirming a preordained result rather than an objective investigation based on the evidence that is available.²¹³

Professors Michael Scharf and William Schabas acknowledged that there was massive "adverse pretrial publicity" against Milosevic, a widespread belief that he was guilty and a public denouncement of him by prominent political leaders before he was even brought to The Hague.²¹⁴ Professional judges are generally expected to rise above such adverse pre-trial publicity,²¹⁵ but this may be difficult in reality.

Many of the above-cited observers are therefore strongly opposed to a criminal court engaging in creating a historical record of the facts underlying the conflict.²¹⁶ Their reservations are shared by a number of judges in international criminal tribunals. Judge Denis Byron, former President of the ICTR, asserted that the mandate of the ICTR to ascertain the truth is not tantamount to writing the history of Rwanda's conflict. Instead, similar to judges in domestic courts, international judges have to ask and answer the simple question whether the charges are proven or not.²¹⁷ Similarly,

Golsan (Ed.), *Memory, The Holocaust and French Justice: The Bousquet and Touvier Affairs* (1996) 114, 115 at 120; L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001), 185-96, 207-10; R. Golsan (Ed.), *The Papon Affair: Memory and Justice on Trial* (2000); R. Golsan, *History and the "Duty to Memory" in Postwar France: The Pitfalls of an Ethics of Remembrance*, in H. Marchitello (Ed.), *What Happens to History: The Renewal of Ethics in Contemporary Thought* (2001); N. Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (1999), 113-42; Chuter, *War Crimes*, *supra* note 75, 115-125.

²¹³ Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190, 3-13.

²¹⁴ Scharf & Schabas, *Slobodan Milošević on Trial*, *supra* note 65.

²¹⁵ *Ibid.*, 110.

²¹⁶ For a more optimistic view, see for instance Wilson who stated that law and history are inextricably linked and share similar methods and aims: Wilson, *Judging History*, *supra* note 20, 917.

²¹⁷ See the Geneva Conference, *supra* note 173, opening speech by the President of the ICTR (Conference notes in author's archives).

Justice Doherty, one of the SCSL judges involved in the case of Charles Taylor, described the mandate of the courts as establishing fairly a truth concerning the charges beyond a reasonable doubt.²¹⁸

Also, the ICTY Chamber in *Krstic* has stated that it would refrain from analyzing the “deep-seated” causes of the Balkan conflict, which was viewed as the work of historians and sociologists, and refrain from expressing emotions on the crimes committed in Srebrenica, with which the accused was charged.²¹⁹ The Chamber saw its own task as a more modest one, that is, to establish, “from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstic, was criminally responsible, under the tenets of international law. ... This defendant, like all others, deserves individualized consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty of acts that constitute crimes covered by the Statute of the Tribunal”.²²⁰

These observers and judges rightfully express reservations in respect to a mandate to create a historical record. It is important to be realistic as to what can be achieved in an international courtroom.²²¹ The judges have a difficult enough task in assessing the charges, as will be further explored in Part III of this thesis. Accordingly, it is suggested that the task of ascertaining the truth in international criminal justice, like in domestic criminal justice, must be interpreted in accordance with the standard of proof beyond reasonable doubt. It should be viewed as an aspiration, rather than an objective, to get as close to the truth about the charges as humanly possible.

Wider Scope of Truth-Ascertainment in International Justice

Even limiting the truth-ascertaining task to the charges, it remains a challenge to carry out this task adequately in international justice. Unlike domestic criminal courts, international criminal courts and tribunals only have jurisdiction over what are considered the most serious crimes so much so that intervention in what is usually a domestic matter is warranted. The criminal nature of acts falling within the

²¹⁸ Dublin Conference, *supra* note 13.

²¹⁹ The Chamber, however, contradicts itself by referring at para. 70 to “an unspeakable human evil”.

²²⁰ *Prosecutor v. Krstic*, T. Ch. I. Judgment, IT-98-33-T, 2 August 2001, para. 2.

²²¹ See also Chuter, *War Crimes*, *supra* note 75, 233-240.

jurisdiction of the international courts and tribunals is considered to be acknowledged worldwide and, thus, their prohibition qualifies as an international custom supported by State practice.²²² Even if not all States agree to criminalise such acts, their nature is considered to be so serious that their prohibition has attained a *jus cogens* status, binding all States irrespective of their viewpoint or conventional obligations.²²³

Criminal acts can only qualify as such if they shock mankind as a whole due to the large scale on which they were committed. An international court or tribunal cannot judge an isolated cruel act. A number of stringent threshold criteria must be met first before an international court or tribunal can exercise jurisdiction in respect to alleged criminal acts. Such acts only fall within the jurisdiction of an international court or tribunal if they qualify as war crimes, crimes against humanity, or crimes of genocide.

The threshold criteria that must be met for each of these categories of punishable international crimes are not fixed or precise. Neither the codified law nor the

²²² According to Article 38(1) of the Statute of the International Court of Justice, international custom constitutes evidence of a general practice accepted as law. It becomes legally binding on States if there is State-practice in respect of the issue and there is a subjective belief that this practice is law (*opinio juris*). If a rule of customary international law is established, only States which have openly and persistently opposed the rule, will not be bound by it. See further, M. Shaw, *Public International Law* (1997), 59; P. Kooijmans, *Internationaal Publiekrecht in Vogelvlucht* (1996); *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, 1969 ICJ Rep. 3, at 176.

²²³ See A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1966), 58, where he describes *jus cogens* norms as absolute norms from which no derogation is permitted; and which “do not exist to satisfy the needs of the individual states but the higher interest of the whole international community”; also I. Brownlie, *Principles of Public International Law* (1998), 515; A. de Hoogh, *The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 Austrian Journal of Public and International Law 183 (1991), 187; See also Article 53 of the 1969 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, stating that “such a peremptory norm is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”; also recognised by the International Court of Justice in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, 1951 ICJ Rep. 15, 23; *Case Concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, 1970 ICJ Rep. 3, where the ICJ declared in paras. 33 and 34 that genocide is a crime whose prohibition is a *jus cogens* norm. International law does not provide a list of norms which belong to the category of *jus cogens* norms, but the International Law Commission, while discussing the content of *jus cogens*, concluded that it at least includes unlawful use of force, genocide, slavery, racial discrimination and piracy. See *Yearbook of the International Law Commission*, 1966, vol. II, p. 248. See also M. Scharf, *The United States and the International Criminal Court*, 64 *Law and Contemporary Problems* 67 (2001), 77; A. Clapham, *National Action Challenged: Sovereignty, Immunity, and Universal Jurisdiction before the International Court of Justice*, in Lattimer & Sands, *Justice for Crimes Against Humanity*, *supra* note 41, 303, at 322-324; R. Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, (Cambridge University Press, 2005), 110-117.

underlying customary law is specific on the details but leave ample room for interpretation by the judges. Definitions have changed over time and vary from tribunal to tribunal.²²⁴ However, as a minimum, the crimes charged must have been committed in the context of an armed conflict (war crimes), on a widespread scale and/or systematically (crimes against humanity), or with the specific intent to destroy an ethnic group in part or in whole (genocide).²²⁵

Accordingly, before the judges can assess the guilt of a particular accused for the crimes with which he is charged, they must make assessments about the context in which the accused allegedly committed these crimes. The determination of whether there was an armed conflict is probably the most straightforward one, although the distinction between serious riots, terrorism or other rebellious movements within a country and an armed conflict is not always easy to ascertain. A distinction is further made between national and international armed conflicts. In determining the latter, judges must assess the extent to which one of the armed groups was supported by another country, which is not always clear-cut. Unless a third State is a clear party to the war, any indirect involvement through the support of a local armed group is mostly denied and hidden, which makes it difficult to prove it to a standard of proof beyond reasonable doubt.²²⁶

When assessing crimes charged as crimes against humanity, the judges must determine whether the acts charged were part of a widespread or systematic attack against a civilian population. To determine whether the crimes charged were widespread, assessments about the scale of the crimes charged, as well as crimes not charged, and the overall number of victims must be made.²²⁷ Only if the crimes charged are part of a large-scale action carried out collectively with considerable

²²⁴ See further G. Mettraux, *The Definition of Crimes Against Humanity and the Question of a "Policy" Element*, in Sadat, *Forging a Convention*, *supra* note 70, Chapter VII.

²²⁵ War crimes consist of crimes committed in domestic and international conflicts. The Nuremberg and Tokyo Tribunals also had jurisdiction in respect of crimes against the peace. Similarly, the ICC has incorporated the crime of aggression. However, a final definition has only recently been adopted and will be reviewed again in 2017. Until a final definition is adopted, the ICC has no jurisdiction in respect of this crime.

²²⁶ See *Prosecutor v. Tadić et al*, Decision on the defence motion on jurisdiction, IT-94-1, 10 August 1995, paras. 57-74.

²²⁷ *Prosecutor v. Blaškić*, A. Ch. Judgment, IT-95-14/1-A, 29 July 2004, para. 101; *Prosecutor v. Kordić & Čerkez*, A. Ch. Judgment IT-95-14/2-A, 17 December 2004, para. 94; *Prosecutor v. Limaj et al*, T. Ch. II. Judgment, IT-03-66-T, 30 November 2005, para. 183; T. Ch. I. Judgment, IT-95-14/1-T 3 March 2000, para. 206.

seriousness and directed against a multiplicity of victims, or amount to singular acts of extraordinary magnitude, can they be qualified as ‘widespread’.²²⁸ This is a case-by-case determination treated differently in each court or tribunal.²²⁹ At the ICC, the term ‘widespread’ still has to be defined by Trial Chamber or Appeals Chamber, but the Pre-Trial Chamber has given a similar definition to it as the ICTY and ICTR.²³⁰

The systematic nature of a crime depends on the level of organisation. In the ICTY, the crimes charged must have been committed as part of a deliberate pattern, rather than randomly.²³¹ Initially, it was necessary to demonstrate the existence of a plan or policy, but the Appeals Chamber both for the ICTY and ICTR got rid of this requirement.²³² At the ICC, on the other hand, the elements of crimes against

²²⁸ *Prosecutor v. Blagojević & Jokić* T. Ch. IA. Judgment, IT-02-60-T, 17 January 2005, para. 544; *Kordić & Čerkez*, T. Ch. III. Judgment, IT-95-14/2-T 16 February 2001, para. 179; *Prosecutor v. Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para. 580. See also *Prosecutor v. Rutaganda*, T. Ch. Judgment, ICTR-97-3-T, 6 December 1999, para. 69; *Prosecutor v. Musema*, T. Ch. I. Judgment, ICTR-96-13-T, 27 January 2000, para. 204; *Prosecutor v. Ntakirutimana et al*, T. Ch. I. Judgment and sentence, ICTR-96-10-T & ICTR-96-17-T, 21 February 2003, para. 804; *Prosecutor v. Kayishema and Ruzindana*, T. Ch. II. Judgment, ICTR-95-1-A, 21 May 1999, para. 123; *Prosecutor v. Bagilishema* T. Ch. I. Judgment, ICTR-95-1A-T, 7 June 2001, para. 77.

²²⁹ See, for instance, *Prosecutor v. Tadić*, T. Ch. II. Opinion and Judgment, IT-94-1-T, 7 May 1997, paras. 660, 714; *Prosecutor v. Blagojević & Jokić*, A. Ch. Judgment, IT-02-60-A, 9 May 2007, para. 101; *Prosecutor v. Limaj et al*, T. Ch. II. Judgment, IT-03-66-T, 30 November 2005 paras 191, 194-195, 204, 210, 211, 226-228; *Prosecutor v. Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para. 173.

²³⁰ *Prosecutor v. Bemba Gombo*, PT. Ch. II. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para 83: “The Chamber considers that the term “widespread” connotes the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians. The underlying offences must also not be isolated.” See also D. Robinson, *The Elements of Crimes Against Humanity*, in R. Lee (Ed.), *The International Criminal Court*, *supra* note 56, 63; R. Dixon, *Crimes Against Humanity*, in Triffterer, *Commentary on the Rome Statute*, *supra* note 168, 178.

²³¹ *Prosecutor v. Blagojević & Jokić* T. Ch. IA. Judgment, IT-02-60-T, 17 January 2005, para. 544; *Prosecutor v. Blaškić*, A. Ch. Judgment, IT-95-14/1-A, 29 July 2004, para. 101; *Prosecutor v. Kunarac, Kovač & Vuković*, A. Ch. Judgment, IT-96-23 & IT-96-23/1, 12 June 2002, para. 94; *Kordić & Čerkez*, A. Ch. Judgment IT-95-14/2-A, 17 December 2004, para. 94; *Prosecutor v Limaj et al*, T. Ch. II. Judgment, IT-03-66-T, 30 November 2005, para. 183; *Prosecutor v. Naletilić & Martinović*, T. Ch. I. Judgment, IT-9834-T, 31 March 2003, para. 236; *Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, paras. 579-580; *Prosecutor v. Rutaganda* T. Ch. Judgment, ICTR-97-3-T, 6 December 1999, para. 69; *Prosecutor v. Musema*, T. Ch. I. Judgment, ICTR-96-13-T, 27 January 2000, para. 204; *Prosecutor v. Kayishema and Ruzindana*, T. Ch. II. Judgment, ICTR-95-1-A, 21 May 1999, paras. 123, 124, 581; *Prosecutor v. Bagilishema* T. Ch. I. Judgment, ICTR-95-1A-T, 7 June 2001, paras. 77-78.

²³² *Prosecutor v. Blaškić*, A. Ch. Judgment, IT-95-14/1-A, 29 July 2004, para. 120; *Prosecutor v. Prosecutor v. Blagojević & Jokić* T. Ch. IA. Judgment, IT-02-60-T, 17 January 2005, para.546; *Prosecutor v Limaj et al*, T. Ch. II. Judgment, IT-03-66-T, 30 November 2005, para. 184; *Prosecutor v. Semanza*, T. Ch. III. Judgment, ICTR-97-20-T, 15 May 2003, para. 329; *Prosecutor v Muhimana*, T

humanity listed in the Statute itself require of an attack that it be carried out pursuant to, or in furtherance of, a State or organisational policy to commit such an attack.²³³ The extent to which ‘organisational policy’ includes policies of non-State entities is currently subject to litigation.²³⁴ Scholars disagree on this issue.²³⁵

If genocide is charged, it must be established that the accused possessed the "specific intent" or *dolus specialis* to destroy a targeted protected human group in whole or in part.²³⁶ Genocidal intent may be inferred from, amongst others:²³⁷

Ch. III. Judgment, ICTR-95-1B-T, 28 April 2005, para. 527; *Prosecutor v Gacumbitsi*, T. Ch. III. Judgment, ICTR-2001-64-T, 17 June 2004, para. 299.

²³³ See Article 7(2)(a) of the ICC Statute, which provides that “Attack direct against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisation policy to commit such attack”. Paragraph 3 to the Introduction to Article 7 in the Elements of the Crimes provides that “It is understood that ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population”. Footnote 6 to this paragraph states that “a policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at the attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action”. See further C. Hall, *Crimes Against Humanity*, in Triffterer, Commentary on the Rome Statute, *supra* note 168; Robinson, *The Elements of Crimes Against Humanity*, *supra* note 230, 64, 78; R. Dixon, *Crimes Against Humanity*, in Triffterer, Commentary on the Rome Statute, *supra* note 168, 178 at 179; A. Cassese, *Crimes Against Humanity*, in A. Cassese, P. Gaeta & J. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (Oxford University Press, 2002) 376; W. Schabas, *An Introduction to the International Criminal Court* (3rd Ed) (Cambridge University Press, 2007), 102.

²³⁴ *Situation in the Republic of Kenya*, P. T. Ch. II. Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 90; cf Dissenting Opinion of Judge Kaul, paras. 28-32, 40, 51.

²³⁵ M. Cherif Bassiouni and Schabas are of the view that a State-like organisation must be behind the policy. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Vol. 1) (Transnational Publishers, 2005), 151-152; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd Ed.) (Kluwer Law, 1999), 245-246; and: Schabas, *An Introduction to the International Criminal Court*, *supra* note 233, 102-104. Robinson, on the other hand, is of the view that non-State policies are also included in the definition: see Robinson, *The Elements of Crimes Against Humanity*, *supra* note 230, 64; Mettraux, *The Definition of Crimes Against Humanity*, *supra* note 224; Ambos, *Crimes Against Humanity*, *supra* note 70, 282-286.

²³⁶ *Prosecutor v. Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para. 498; *Prosecutor v. Krstić* T. Ch. I. Judgment, IT-98-33-T, 2 August 2001, para. 571.

²³⁷ *Prosecutor v. Seromba*, T. Ch. Judgment, ICTR-2001-66-T, 13 December 2006, para. 320, confirmed in A. Ch. Judgment, ICTR-2001-66-A, 12 March 2008, para. 176; see also *Prosecutor v. Gacumbitsi*, A Ch. Judgment, ICTR-2001-64-A, 7 July 2006, paras. 40, 41; *Prosecutor v. Rutaganda* A. Ch. Judgment, ICTR-97-3-A, 26 May 2003, para. 525; *Prosecutor v. Akayesu*, T. Ch. I. Judgment, ICTR-95-4-T, 2 September 1998, para. 523; *Prosecutor v. Kayishema and Ruzindana*, T. Ch. II. Judgment, ICTR-95-1-A, 21 May 1999, para. 93; A Ch. Judgment, ICTR-95-1-A, 1 June 2001, para. 159; *Prosecutor v. Nahimana et al*, A. Ch. Judgment, ICTR-99-52-A, 28 November 2007, para. 524; *Prosecutor v. Krstić*, A. Ch. Judgement, IT-98-33-A, 19 April 2004, para. 34; *Prosecutor v. Jelisić*, A. Ch. Judgment, IT-95-10-A, 5 July 2001, para. 47.

“(a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators”.

Failing to establish any of the above and the other ‘chapeau’ elements necessarily results in an acquittal, or, if raised before the commencement of trial, the dismissal of the case for lack of jurisdiction. These elements do not relate to the *actus reus* or *mens rea* of the accused himself, but are rather described as the contextual elements of the crimes. Thus, although the focus of any trial should be on the ultimate issue of guilt or innocence of the accused in respect to the charges, there is no escape from making findings on events on a broader scale than those charged.

This means that, in order to render judgment in an international case, judges must establish facts of historic importance to a much wider audience than those directly implicated by the criminal trial that triggers the judges to make such findings. To give an example, a finding that genocide was committed against an identifiable group not only has a significant historic and moral importance to the direct victims, but also for the history writing of the region in question. The identification of the various players directly or indirectly involved in a conflict and the role they played, may be necessary to establish that the conflict was of an international nature. This is also of paramount importance in understanding the nature, cause and background of the conflict.

The establishment of the direct *mens rea* and *actus reus* of the accused is itself of historic significance, particularly where the accused in question had a leading political or military position in the region under examination. They are usually not the ones who pulled the trigger but rather those who committed through or with others, ordered, instigated, planned or aided and abetted the crimes charged. The prosecution has a difficult task in establishing a nexus between the accused and the crimes charged particularly when the accused was remote from the crime scene when the

crimes were committed, or there is no obvious link between him and the direct perpetrators.²³⁸

Thus, unlike in ordinary domestic trials where the question is usually a simple one, ‘does the evidence show that he did, or did not commit a certain act?’, in international trials the question of guilt is more complex. In order to establish responsibility of those behind the scene, many questions have to be answered about the crimes of others and the relationship between the direct and indirect perpetrator. It is therefore usually much harder to prove a case of such complexity than it is to prove a typical murder case in a domestic court.

It must further be established, for instance, whether an act constituted a war crime or a legitimate self-defence, collateral damage or deliberate targeting of civilians. Such determinations require choices of a historical interpretation of the conflict in terms of who were the main aggressors and who were principally targeted.²³⁹

It is therefore clear that the charges against an accused before an international court or tribunal are interwoven with historical events. The judges must interpret these events in their ultimate determination of whether a particular accused is guilty as charged.²⁴⁰ However, in light of the difficulties discussed above, it is suggested that the judges should not be overly ambitious and seek to write the entire history of the conflict. In each case, judges should limit themselves to evaluating the evidence relating to the charges against the accused. Any step further to writing history may lead to distortion of that history.

The totality of the judgements rendered by international criminal courts and tribunals may, however, contribute to the overall history writing carried out by historians, sociologists, human rights advocates, the affected communities and others interested in the conflict. The volume of this contribution depends on the extent to which the findings of the tribunals are acknowledged as accurate and legitimate. History writing is a time-consuming process. In this regard, historians and other observers have an

²³⁸ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 16-17.

²³⁹ *Ibid*, 12-13, 17.

²⁴⁰ Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190, 13.

advantage because they are not restrained by the deadlines imposed on the courts. As historian and Rwanda expert Guichaoua said at a conference on Rwanda and the ICTR, he and other experts on Rwanda will continue to write and review their history of Rwanda's conflict and genocide well after the closure of the ICTR. He showed optimism that the truth on Rwanda would eventually come out.²⁴¹

The meaning of 'the ascertainment of the truth' in international justice

Relativism versus Radicalism

The frequent use of expressions such as 'revealing the truth', 'uncovering the truth' or 'truth prevails' in the context of past serious atrocities, suggests that there is a clear assumption that there is one indisputable, objective truth out there that can be found if one has sufficient tools to conduct an adequate search for the truth. It suggests that the truth that one seeks to establish is more than a procedural truth, which is constructed in the course of criminal proceedings.

The difficulties of establishing a non-contested ontological truth, if at all possible, have been set out above. These difficulties are particularly evident in international justice by comparison to domestic justice. Many different reasonable views exist rather than one authoritative correct version.²⁴²

Particularly in the context of serious human rights violations, it can be dangerous to take relativism concerning the existence of one objective truth too far. If there are only subjective perceptions none of which carries more moral weight than any other, then any extremist negationist view would have to be considered in an equal manner as any more moderate view.

Such extreme relativism should be avoided because it would undermine the moral foundation of any fact-finding exercise, given that the outcome would simply be another point of view.²⁴³ Domestic systems would be equally affected by adopting such a radical relativist position, as any criminal justice system is based on the

²⁴¹ The Geneva Conference, *supra* note 173.

²⁴² Chuter, *War Crimes*, *supra* note 75, 203-240.

²⁴³ Parlevliet, *Considering Truth*, *supra* note 3, page 7.

assumption that it is in principle possible to reconstruct facts. Convicts are sent to prison on the basis of this assumption.

The acknowledgement that the truth has more than one reasonable version is consistent with the common law notion of procedural truth, and not inconsistent with the civil law notion of objective truth. The objective truth in a civil law judicial context has a legal, more than a moral meaning with reference to a particular method. As previously stated, an objective truth in civil law systems should not be confused with absolute truth, but is rather the safest result humanly possible of criminal proceedings.²⁴⁴

By contrast, when truth is used in the context of human rights violations, it has “very strong moral, political and social dimensions”.²⁴⁵ It does not only relate to uncovering facts, it also has a strong normative value as well as an imposing tone. Truth is contrasted with the lies of an authoritarian regime or other group having committed atrocious crimes. People can no longer tolerate the concealment of their past atrocities and demand to know the truth about these atrocities, in order to expose their lies and prevent the spreading of false information about what happened in the conflict itself.²⁴⁶ The uncovering of the truth is seen as a solution to break with the past and prevent the use of propaganda to brainwash people into committing further atrocities. Truth also serves to identify those who did wrong and those who suffered this wrong. Truth is thus associated with morality and righteousness and aligns with the morally correct.²⁴⁷

It is also believed that, when faced with the ‘truth’, those who are clinging onto their inaccurate version of events will have to accept that they were in error. Truth is thus seen as a tool to bring different ethnic groups together and work towards a more

²⁴⁴ See above, section ‘Civil Law Justice Systems: Meaning of Ascertainment of the Truth’.

²⁴⁵ Parlevliet, *Considering Truth*, *supra* note 3, 4-5, 31.

²⁴⁶ An example of this is the nearly 90 years of official denial by successive Turkish governments of the genocide committed against the Armenian population between 1915 and 1917 in which an estimated number of 1.5 million people lost their lives. Although recently, voices are occasionally raised in favour of recognising that this genocide took place, throughout the years, western countries have barely pressurised Turkey to do so. See, amongst others, Cohen, *State Crimes of Previous Regimes*, *supra* note 42, 13-41. There has also been years of official silence about the crimes committed during 36 years of Franco’s dictatorship in Spain. Spain’s young democracy agreed to look forward, not back. See also *Burying Myths, Uncovering Truth*, *The Economist*, *supra* note 41.

²⁴⁷ Parlevliet, *Considering Truth*, *supra* note 3, 10.

truthful and open society.²⁴⁸ The truth, therefore, not only has a backward function in determining who was responsible for atrocities committed in the past, but also a forward function in working towards a better future society where such atrocities will not be repeated.²⁴⁹

Where a domestic country is too unstable or politically divided to render fair justice, the entire hope of the victims of serious atrocities is vested in international tribunals and courts. In a conflict zone, there usually is a greater faith in international criminal tribunals than domestic courts to establish the truth impartially.²⁵⁰ However, to achieve all the objectives international justice has set out to achieve, if at all possible, it is not sufficient to establish the truth about past events. This truth must also be accepted, acknowledged and internalised by the international community as well as the affected communities.²⁵¹ It then stands a better chance of beating negationism, manipulation and cover-ups.²⁵² It would thus be unfortunate if the truth established by international tribunals and courts were challengeable.

Accordingly, an overemphasis on relativism in relation to the objective nature of truth would significantly undermine the importance that people, including those who

²⁴⁸ Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 231, 242-253; Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, 25.

²⁴⁹ Parlevliet, *Considering Truth*, *supra* note 3, 10.

²⁵⁰ This appears from conversations the author has had with people from Kosovo, DRC and Rwanda. See also: Max-Planck-Institute for Foreign and International Criminal Law – Ernesto Kiza, Corene Rathgeber & Holger-C. Rohne, *Victims of War: An Empirical Study on Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburg: Edition HIS-Verlags GmbH, Hamburg, 2006) available online at <http://www.his-online.de>. Participants in this survey interviewed victims in 11 areas including DRC, Kosovo and Bosnia. Most of them had greater faith in international justice than in domestic justice. See also *supra* note 42.

²⁵¹ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 250-260; J. Gibson, *The Contributions of Truth to Reconciliation*, 50 *Journal of Conflict Resolution* 414 (2006); R. Rotberg & D. Thompson (Eds.), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, 2000); Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, 22; L. Weschler, "Afterword" in *State Crimes: Punishment or Pardon*, Papers and Reports of the Conference, November 4-6, 1988 (Queenstown, MD: Justice and Society Program of the Aspen Institute, 1989), 93; also Cohen, *State Crimes of Previous Regimes*, *supra* note 42, 18; Chuter, *War Crimes*, *supra* note 75, 241.

²⁵² Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, at 17; also Llewellyn, *Restorative Justice in Transitions and Beyond*, *supra* note 41, 101-103; DeLaet, *Gender Justice*, *supra* note 59, 151, 153, 173; Hamber, "Nunca Más", *supra* note 69, 208-209; P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001), 24; R. Teitel, *Transitional Justice in a New Era*, 26(4) *Fordham International Law Journal* 893 (2003); Cohen, *State Crimes of Previous Regimes*, *supra* note 42, 18-19; R. Rotberg & D. Thompson (Eds.), *Truth v. Justice*, *supra* note 251, 3; Pasternak, *Wahrheitskommissionen*, *supra* note 64, 10-14; May & Hoskins, *International Criminal Law*, *supra* note 57, 218.

suffered tremendously, attach to the determination of the truth and negate some of their hopes for a better future.

Some level of relativism and acknowledgement that there is more than one reasonable perspective is, however, healthy as well as necessary. For an international court to have legitimacy and reach its objectives, it must at least consider all competing narratives of different parties to the conflict.

This is an extremely difficult task after a conflict covered by blood and suffering on all sides. On the one hand, one must be alert not to give too many credentials to radical theories which seek to justify the behaviour of the principal aggressors in a conflict and thereby underestimate their responsibilities.²⁵³ This could undermine any possibility for reconciliation since it would not do justice to the side of the principal victims and may anger and frustrate them. It could potentially feed extremists and would not encourage national and communal healing.

This is confirmed by Clark's empirical research in different regions in Bosnia, where she spoke to 120 ordinary people from the three ethnic groups, each massively denying their own crimes and blaming all on the others. According to Clark, denial is the cause of resentment, anger and frustration on all sides and undermines reconciliation.²⁵⁴

Reconciliation would equally be undermined if the extremist voices are not listened to at all, no matter how unappealing they are to the assessors. They, themselves, would feel undermined and not accept the outcome of the process.²⁵⁵ More importantly, no safe and solid truth can be established by listening to the side only of the identified victims. This can only establish a partial, one-sided truth, while limiting any understanding as to the causes of the violence.²⁵⁶

²⁵³ Wilson, *Judging History*, *supra* note 20, 941-942.

²⁵⁴ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 256-257.

²⁵⁵ Mirsad Tokaca, President of the Research and Documentation Center Sarajevo (<<http://www.idc.org.ba/aboutus.html>>), speaker at *Echoes of Genocide*, *supra* note 85; see also S. Nino, *Radical Evil on Trial* (Yale University Press, 1996), 132-133.

²⁵⁶ Hamber, "Nunca Más", *supra* note 69, 211.

This is particularly true where the facts are not clear and different ethnic groups have played a role. There are usually perpetrators and victims from all sides even if one group has committed atrocities on a much larger scale. Also, victims are not always blameless. Sometimes, one person may be a perpetrator and victim at the same time.²⁵⁷

Accordingly, no one possesses “a monopoly on correct interpretation”.²⁵⁸ Conflict stories are seldom black and white and as simplistic as they may initially appear. Facts may be manipulated for political ends. The recorders of the facts may be easily misled by the overwhelming information of gruesome crimes being committed and the high number of persons being victimised.²⁵⁹ Led by the horrific stories during ethnic wars, everyone can become subject to manipulation. Yet, the story may deserve at least some nuance. Nuance brings complexity and ambiguity and may result in more acquittals or mitigated sentences. The end result is, however, closer to reality.²⁶⁰

Therefore, it is important that an international tribunal identifies the wrongs suffered and perpetrated by all sides. Only then can the truth stand the test of challenge. Its credibility must not be allowed to be undermined by the identified wrongdoers or their associates. Simultaneously, this very credibility must be acceptable to all sides of the conflict.²⁶¹

²⁵⁷ About such complexities, see also Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 242-253, 245. See also Chuter, *War Crimes*, *supra* note 75, 105.

²⁵⁸ J. Habermas, *The Theory of Communicative Action. Vol. I: Reason and the Rationalization of Society*, translated by T. McCarthy (Polity Press, 1991, originally 1981), 100, cited in: Parlevliet, *Considering Truth*, *supra* note 3.

²⁵⁹ A former war qualified this as “tyranny of victimology”, as cited in Chuter, *War Crimes*, *supra* note 75, 100-106; A. Cutter, *Journalists: Must They Remain Neutral in Conflict?*, 36(2) *United Nations Chronicle* (1999); M. Ignatieff, *The Warrior’s Honour: Ethnic War and the Modern Conscience* (1988), 24-25.

²⁶⁰ See *Burying Myths, Uncovering Truth*, *The Economist*, *supra* note 41; also see: Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190, 5; Parlevliet, *Considering Truth*, *supra* note 3, 18-19; Chuter, *War Crimes*, *supra* note 75, 44-51, 100-106 (“complexity is an enemy” (45)).

²⁶¹ See DeLaet, *Gender Justice*, *supra* note 59, 151, 153, 173; Parlevliet, *Considering Truth*, *supra* note 3, 31-32; Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 259.

Construction of a Collective Truth

The only possible truth that would have legitimacy and be acknowledged as accurate is one that is produced with the involvement of all parties. The end result would then reflect a “collective truth”, somewhere in between black and white.²⁶²

The process to obtain such a result must be transparent and allow for all voices to be heard in an equal manner, even if what they say is ultimately rejected. Having carefully balanced the different perspectives, the triers of fact must choose the most reasonable and plausible interpretation of facts.²⁶³ This does, however, not go without difficulty or criticism. No matter how fair the triers of fact seek to be to all parties to the conflict in addressing the wrongs and sufferings from all sides, it appears difficult, if not impossible, to satisfy them all. There will always be people or groups unhappy with the result.²⁶⁴ The important matter is that most reasonable people can live with the end result, and that the blatant lies are filtered out in the course of the process.²⁶⁵

Accordingly, as in domestic criminal justice, the truth is determined by the procedure. As Ignatieff puts it, “the past has none of the fixed and stable identity of a document.”²⁶⁶ It cannot be found, but must be constructed by a fair and democratic procedure in which the most persuasive argument wins. It is the fairness of the procedure rather than the certainty of the outcome, which determines the legitimacy and authoritative nature of the truth.²⁶⁷ Accordingly, truth “is more a notion of humanity than of science”.²⁶⁸

²⁶² Parlevliet, *Considering Truth*, *supra* note 3, 19.

²⁶³ Parlevliet, *Considering Truth*, *supra* note 3, 10; Llewellyn, *Restorative Justice in Transitions and Beyond*, *supra* note 41, 99.

²⁶⁴ M. Ignatieff, *Articles of Faith*, 25(5) *Index of Censorship* 110 (1996), 114: ‘Agreement on a shared chronology of events might be possible though even this would be contentious; but it is impossible to imagine the three sides ever agreeing on how to apportion responsibility and more blame. The truth that matters to people is not factual or narrative truth but moral or interpretative truth. And this will always be an object of dispute in the Balkans.’

²⁶⁵ Parlevliet, *Considering Truth*, *supra* note 3, 11, 17, 19, Ignatieff, *Articles of Faith*, *supra* note 264, 114; Rorty, *Objectivity, Relativism, and Truth*, *supra* note 17.

²⁶⁶ Ignatieff, *Articles of Faith*, *supra* note 264, 114.

²⁶⁷ Parlevliet, *Considering Truth*, *supra* note 3, 20. See also: Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 276-277.

²⁶⁸ Parlevliet, *Considering Truth*, *supra* note 3, 36.

Rorty has pointed out that it is difficult to define truth, but it is possible to identify certain “conditions in which a search for the truth will most likely be successful”.²⁶⁹ He and others refer to “undistorted communication”, “reciprocity and mutual recognition” and “free and open encounter” as such conditions.²⁷⁰ Instead of an objective truth, the truth that is established in such an environment is an inter-subjective truth, as it is defined by communication between human beings, rather than the relationship between a human being and the external, objective reality.²⁷¹

Conditions for the Effective Ascertainment of the Truth in International Trials

Listening to all sides in the context of international trials includes the prosecutor, defence and victims. It is particularly important and challenging for the triers of fact to listen to the side of the accused in full equality without a preconceived idea of his guilt.²⁷² This is not always easy, given the extensive pre-trial media attention given to the more notorious accused persons before international criminal tribunals.²⁷³ In any event, this author shares the view of the above-cited scholars Rorty and Becker, that neutrality is a myth.²⁷⁴ This does not, however, prevent triers of fact from ascertaining the truth accurately to the extent humanly possible. Arguably, rather than seeking to be neutral, triers of fact should seek to keep a distance from the information and information providers with whom they are confronted, while engaging genuinely with the information. In engaging with the information, triers of fact should not choose one side over the other, but they do not need to abstain from choosing any side. Instead, they should engage with all sides.²⁷⁵

²⁶⁹ Rorty, *Contingency, Irony, and Solidarity*, *supra* note 17, 176, footnote 11; cited in Parlevliet, *Considering Truth*, *supra* note 3, 13; and Rawls, *A Theory of Justice*, *supra* note 136, 13, 17-22.

²⁷⁰ Rorty, *Objectivity, Relativism, and Truth*, *supra* note 17, 23, 39, 84; cited in Parlevliet, *Considering Truth*, *supra* note 3, 13. See also T. van Boven, *Fact-finding in the Field of Human Rights*, 3 *Israel Yearbook on Human Rights* 93 (1973), 106; Parlevliet, *Considering Truth*, *supra* note 3, 12; Ignatieff, *Articles of Faith*, *supra* note 264, 119.

²⁷¹ Rorty, *Objectivity, Relativism, and Truth*, *supra* note 17, 23-37; cited in Parlevliet, *Considering Truth*, *supra* note 3, 13. See also Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, holding that some level of objectivity can be reached by “confronting the various truths and by recognizing and accepting different subjectivities” (250).

²⁷² Parlevliet, *Considering Truth*, *supra* note 3, 17.

²⁷³ See further above, section ‘Expressed reservations on Establishing Historical Facts’, in particular footnotes 213-215.

²⁷⁴ Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 245-250, particularly 250; Rorty, *Objectivity, Relativism, and Truth*, *supra* note 17, 21-45. See also Franck & Fairley, *Procedural Due Process*, *supra* note 177, 309; Leurdijk, *Fact-Finding*, *supra* note 177, 141.

²⁷⁵ A. Liebling, *Whose Side Are We On? Theory, Practice and Allegations in Prisons Research*, 41 *Brit. J. Criminology* 472 (2001).

Such engagement with all sides at a distance is essential for the establishment of a full truth rather than a partial truth based on one side only. It may be part of a legitimate defence to present the court with an alternative narrative of what occurred during the conflict and with whom lies the responsibility.²⁷⁶ The downside is that the accused may turn the trial into a propaganda show. For instance, the accused, or counsel on his behalf, can use the trial as a forum for politics, or to point to the guilt of people not on trial.²⁷⁷

The context in which crimes were committed cannot be ignored and may offer a better understanding as to why the crimes were committed. Particular political, historic, social and economic circumstances are needed for crimes against humanity, war crimes or genocide to be perpetrated. However, contextualisation is not always easy to distinguish from justification or exoneration of these crimes. Going too far in this could potentially conflict with the purpose of doing justice to the victims by acknowledging the harm done to them. The accused should thus not be allowed to use the context to excuse his criminal conduct. At most, it would mitigate his criminal conduct.²⁷⁸

Yet, he must be able to express unpopular views as part of his defence. The accused has a special status. He is the one facing a long prison sentence, and is protected by due process principles. In a specific case, granting due process to the accused may be in conflict with the mandate of ascertaining the truth.²⁷⁹ In particular, the fairness of the procedure may limit the access of the triers of fact to relevant information. For instance, what if relevant and reliable information is produced late and the accused had no advance notice thereof and could thus not prepare a defence to address the new information? Or what if it was obtained unfairly? In such situations, seemingly a

²⁷⁶ M. Osiel, *Why Prosecute? Critics of Criminal Punishment for Mass Atrocity*, 118(22) *Human Rights Quarterly* 118 (2000).

²⁷⁷ Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 17, 19, 25, 29-32, 35; Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, Part II. See also Cryer, *Prosecuting International Crimes*, *supra* note 223, 199-202.

²⁷⁸ Parlevliet, *Considering Truth*, *supra* note 3, 17-18; C. Villa-Vicencio, *The Politics of Reconciliation*, in Borer, *Telling the Truths*, *supra* note 40, 70-75 Cohen, *State Crimes of Previous Regimes*, *supra* note 42, 41.

²⁷⁹ See Cleiren & Nijboer, *Strafvordering*, *supra* note 165, De verdachte, Boek I, Titel II, Art. 29 (Spronken), 80-81; Pompe, *Bewijs in Strafzaken*, *supra* note 153, 38-42.

choice has to be made between respecting the fair trial rights of the defendant and the search for the truth.

Also rights, such as the right to silence, the right not to incriminate one-self, the right to counsel and the right to privacy are frequently considered to frustrate the ascertainment of the truth because the individual cannot be taken by surprise or lured into speaking.²⁸⁰

In the commentaries and literature, the terms ‘ascertainment of the truth’ and ‘effective prosecutions’ are often used inter-changeably – although they clearly do not mean the same thing²⁸¹ – and are contrasted with fair trial guarantees.²⁸² Damaška, for instance, opines that it is often naively denied that, usually, what is gained on the front of individual rights is lost on the front of fact-finding precision, and *vice versa*. Indeed, “in the criminal process, concern for individual rights will often set limits to the pursuit of truth and conflict with the desire to establish the facts of the case. This potential “zero-sum” effect is denied mostly by those who claim that they have established an ideal social order. Actual failure to realize the ideal leads them to idealize the real.”²⁸³

Arguably, however, and contrary to Damaška’s assertion, fact-finding precision and protection of due process principles can go hand in hand without undermining either or both. A vigorous protection of the rights of the accused does not need to hinder a thorough search for the truth. Whilst effective prosecutions with the fewest possible barriers caused by principles of due process may lead to more convictions, they may not necessarily lead to more accurate results. There is a compelling argument that respecting individual rights contributes to ascertaining the truth.²⁸⁴ For instance, putting pressure on someone to answer questions often results in inaccurate answers

²⁸⁰ Pompe, *Bewijs in Strafzaken*, *supra* note 153, 38–42.

²⁸¹ See for instance Borer, *Truth Telling as a Peace-Building Activity*, *supra* note 83, 20-21, D. Piragoff, *supra* note 168, 1321; Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 35. The UK Report of Royal Commission on Criminal Justice has distinguished the purpose of uncovering the truth from that of guaranteeing arrests and convictions. *Ibid*, 11; with reference to Royal Commission on Criminal Justice, *Report*, Cm. 2263 (1993); 1995 Criminal Cases Review Commission (Part II, Criminal Appeal Act 1995, available at <www.ccrcc.gov.uk/>

²⁸² Whenever there are calls for reform, there are those advocating for greater protection of the rights of the defendant, and those advocating greater police powers and higher punishments. See Uglow, *Criminal Justice*, *supra* note 138, 13.

²⁸³ Damaška, *Evidentiary Barriers*, *supra* note 30, 588-589.

²⁸⁴ See also Gary Goodpaster, who argues that only fair proceedings lead to accurate results: Goodpaster, *On the theory of the American Adversary Criminal Trial*, *supra* note 139, 118-153.

and may distort the truth.²⁸⁵ Further, if obtaining evidence irregularly carries no consequences, there is no encouragement to stop using irregular methods to obtain such evidence, which would adversely affect the overall quality of the proceedings and thus the end product.

Fair trial rights were introduced to prevent miscarriages of justice and determine the boundaries of the search for the truth. Arguably, the most adequate truth-searching model reflects a fair balance between the rights of the defendant on the one hand, and the need for effective prosecutions on the other. Professor 't Hart, former Dutch prosecutor and legal scholar, is of the firm view that these objectives are not in conflict with each other but must be considered as two sides of the same coin of justice.²⁸⁶ Only if the rights and obligations of the prosecution and defence are equally balanced in the truth-searching process can the end result be accurate.²⁸⁷

In conclusion, there is a constant struggle to find the right balance between protecting the interests of the accused as well as the interests of the victims. There are various types of methods that could be put in place to achieve the 'happy middle way', provided they comply with a number of minimum conditions. These minimum conditions are:

- greatest access to relevant and reliable information from all sides;
- engagement at a distance by the triers of fact;
- transparency;
- democratic, open and fair procedure to accused and victims.

²⁸⁵ In modern times, there are ample examples where pressure has led to a miscarriage of justice. For instance, the Dutch case *Schiedammer parkmoord*, which concerned a miscarriage of justice caused by the confession of innocent suspects, demonstrates how an accused may confess to a crime he has not committed. This may be the case even if the statement was taken voluntarily because the suspicion, particularly when the suspect is taken into custody, may already cause significant pressure. See further P. J. van Koppen, *De Schiedammer parkmoord; een rechtspsychologische reconstructie* (Ars Aequi Libri, 2003).

²⁸⁶ A.C. 't Hart: *Openbaar Ministerie en Rechtshandhaving* (Gouda Quint bv, 1994), 167-232.

²⁸⁷ This corresponds with the view of Judge Cotte, a French Judge at the ICC, holding that the only objective of criminal justice is the manifestation of the truth, but that this objective can be achieved only by ensuring that the substantive debates take place in a fair way. See *Prosecutor v. Katanga & Ngudjolo*, T. 25 May 2010, 40.

Part II will consider to what extent the international criminal justice model complies with these minimum conditions and identify the procedural elements which are potentially problematic in ascertaining the truth. Bearing the above definition of truth and the conditions to achieve it in mind, Part III will review how adequately international criminal tribunals ascertain the truth in the practical reality of their daily operation. More specifically, it will examine the selection of cases, the investigations, presentation and evaluation of the evidence in the ICTY, ICTR and ICC. In so doing, it will evaluate to what extent the potentially problematic procedural elements identified in Part II are problematic in reality.

In carrying out this socio-legal research, it should be borne in mind, as Becker stated, that truth “cannot and should not be developed with the idea of a master plan or with fantasies about a clear-cut tool kit that is applicable in any context of conflict in the world. So our first and most important set of recommendations to any actor in this field is about humility in reference to the enormity of the task, public honesty as to the limited goals we are able to achieve, and a capacity to respect and reflect the special characteristics of a given local context.”²⁸⁸

²⁸⁸ Becker, *Confronting the Truth of the Erinyes*, *supra* note 19, 252.

PART II
METHODOLOGIES

Origins of the Legal Principles of the ICTY and ICTR

When the Yugoslavia and Rwanda Tribunals were set up in 1993 and 1994 respectively, the only precedents available were the Nuremberg and Tokyo Tribunals, which had been established fifty years earlier.²⁸⁹ Similar to these earlier tribunals, the drafting of the Statute and Rules of Procedure and Evidence finished very rapidly. Time was of the essence, given that both tribunals responded to ongoing wars and threats of renewed and increasing violence.²⁹⁰

Both the ICTY and ICTR, which were initially almost identical in their structure, operation and legislative framework, were established on the basis of a Security Council resolution.²⁹¹ Resolution 808, pursuant to which the ICTY was established, assigned the Secretary-General the task of submitting a report containing a draft Statute for the anticipated tribunal. Since the UN has no legislative branch, the Secretary-General assigned the task of drafting the Statute of the ICTY to the Office of Legal Affairs ('ALO') in New York. The procedure was fast. Within three months the Statute was drafted and adopted. Since government positions communicated to the ALO remained secret there are no records of the drafting process.²⁹²

According to M. Cherif Bassiouni, who was part of the drafting process, many States made proposals during this process. To avoid lengthy debates on issues where no consensus existed between various States, the Security Council did not allow any

²⁸⁹ *London Agreement*, 8 August 1945; *Tokyo Charter*, 26 April 1946; Y. Beigbeder, *Judging War Criminals, The Politics of International Justice* (St. Martin's Press Inc, 1999), 54-56.

²⁹⁰ In Rwanda the war shifted to a neighbouring country, the nation formerly known as Zaire, now called the Democratic Republic of Congo (DRC).

²⁹¹ The ICTY was established pursuant to Resolution 808, adopted on 22 February 2003: UN Doc. S/RES/808. The ICTR was established pursuant to Resolution 955, adopted on 8 November 1994: UN Doc. S/RES/955. In each of these cases the Security Council used its powers under Article 39 of Chapter VII of the Charter of the United Nations, allowing it to adopt military and non-military measures it deems appropriate to maintain or restore international peace and security. This Article provides: "*The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.*"

²⁹² See M. Cherif Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers Inc, 1996), 219-221; S. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10(1) *International Legal Perspectives* 111 (1998), 113-115.

amendments once it received the draft Statute.²⁹³ Pursuant to Security Council ('SC') Resolution 827, the draft Statute was adopted without change.²⁹⁴ Save for the provisions stipulating the crimes, the ICTR Statute was copied word for word from the ICTY Statute and attached to the SC Resolution establishing the ICTR.²⁹⁵

Given the lack of a clear precedent, the drafters of the Statute had a difficult task in drafting a legal framework in a legal vacuum. The predominantly American drafters mainly referred back to a system they knew best: 'common law' as applied in American courtrooms.²⁹⁶ Bassiouni confirms that the tribunal that had been created "is more akin to court systems found in common law jurisdictions, particularly that of the US."²⁹⁷ This is particularly with regard to the manner in which its functions were separated.

Unlike the Nuremberg Charter, which had already incorporated the main evidentiary principles,²⁹⁸ the ICTY and ICTR Statutes did not include any evidentiary guideline.

²⁹³ For debate on the drafting process, see Bassiouni & Manikas, *The Law of the Tribunal for the Former Yugoslavia*, *ibid*, 221-226.

²⁹⁴ UN Doc. S/RES/827, 25 May 1993; UN SCOR 48th Sess, 3217th mtg, at 7, UN Doc S/PV.3217 (25 May 1993).

²⁹⁵ V. Morris & M. Scharf, *The International Criminal Tribunal for Rwanda* (Volume II) (Transnational Publishers, 1998), Preface xvii.

²⁹⁶ ICTY, *First Annual Report* (1994), UN. Doc. A/49/342; UN Doc. S/1994/1007, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf, last accessed January 2012.

²⁹⁷ Bassiouni & Manikas, *The Law of the Tribunal for the Former Yugoslavia*, *supra* note 292, 798. Judge Cassese also recognized that "for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach" *Prosecutor v. Erdemović*, A. Ch. Separate and Dissenting Opinion of Judge Cassese to Judgment of Appeals Chamber, IT-96-22-A, section IA, [3].

²⁹⁸ See for instance Article 19 pursuant to which "[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value". The Nuremberg Charter also included a provision pursuant to which specific items of documentary evidence, including signed statements and depositions, were to be admissible (Article 13(c)). See further Article 20, on the basis of which the Tribunal might require to be informed of evidence before it was offered, so that it could rule on its relevance. Article 21 provided that judicial notice was to be taken of "facts of common knowledge", and of official government documents, reports of the United Nations, acts and documents of national committees for the investigation of war crimes, and the records of military or other tribunals. Overall, the Nuremberg Tribunal adopted simplified evidentiary rules and took a very liberal approach towards evidence allowing all evidence in. The reason for this approach was that the trials were conducted by professional judges who were not prone to being influenced by improper evidence. The result of this liberal approach was that it was even allowed for the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys. Pursuant to Arts. 17(a), (b), (c) and 24(f) of the Charter, the judges further had the power to call witnesses, require the production of documents and other evidentiary material or even interrogate defendants. See further Morris & Scharf, *International Criminal Tribunal for Rwanda*, *supra* note 295, 7; T. Taylor, *The*

In adopting the rules of procedure and evidence, the Statutes left the task of designing evidentiary principles exclusively to the judges.

By virtue of Art 15 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute and Art 14 of the International Criminal Tribunal for Rwanda (ICTR) Statute the Rules of Procedure and Evidence were adopted on 11 February 1994 and 29 June 1995 respectively. The ICTY Rules of Procedure and Evidence served as a model for the ICTR Rules of Procedure and Evidence. Accordingly, as initially adopted, the ICTY and ICTR Rules were almost identical except for minor differences.²⁹⁹

The principal drafters of the Rules of Procedure and Evidence of the ICTY were the judges of the Trial and Appeal Chambers, in co-operation with States and organisations from all over the world.³⁰⁰ The purpose of this inclusionary approach was to ensure that different domestic legal systems would be considered and incorporated.³⁰¹ However, representatives of common law systems, particularly the US, played the most influential role in the drafting process of the ICTY Rules.³⁰² In particular, the role of the American Bar Association ('ABA') was significant.³⁰³

Anatomy of the Nuremberg Trials (Bloomsbury Publishing Limited, 1993), 241; American Bar Association Section of International Law and Practice, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia* 27 (1993); See May & Wierda, *Trends in International Criminal Evidence*, *supra* note 95, 94 and further.

²⁹⁹ This was the intention of the Security Council, as similar rules of procedure in the two tribunals would ensure consistency in the development of international criminal procedural matters. This also ensured a quick adoption of the Rules of Procedure and Evidence at the ICTR without having to elaborate on issues that were already discussed in detail in relation to the ICTY Rules. This is also in compliance with ICTR Statute, Art 14, which provides that '[t]he judges shall adopt ...the Rules of Procedure and Evidence...of the International Criminal Tribunal for the Former Yugoslavia with such changes as they deem necessary'. See also Morris & Scharf, *International Criminal Tribunal for Rwanda*, *supra* note 295, 413, 417-418.

³⁰⁰ Morris & Scharf, *International Criminal Tribunal for Rwanda*, *supra* note 295, 414.

³⁰¹ *Ibid*, 413-14. This inclusionary approach starkly contrasts with the manner in which the rules of the Nuremberg Tribunal were drafted. In accordance with Article 14(e) of the Nuremberg Charter, the four chief Prosecutors drafted the rules, eleven in total, which were accepted by the judges with the necessary amendments on 29 October 1945.

³⁰² The US representatives presented comprehensive proposals of rules: IT/14, 17 November 1993.

³⁰³ One of the participating judges, Judge McDonald, presented a complete draft set of rules prepared by a special committee of the American Bar Association (IT/INF 6/Rev 2, 18 January 1994). Many of the proposed rules were adopted. See Bassiouni & Manikas, *The Law of the Tribunal for the Former Yugoslavia*, *supra* note 292, 863-864; Morris & Scharf, *International Criminal Tribunal for Rwanda*, *supra* note 295, 177.

Many of the participating judges also came from common law countries.³⁰⁴ Consequently, similar to the Statutes, the Rules of Procedure and Evidence are predominantly common law rooted. This is particularly the case with regard to the procedure, which is based on the adversarial approach of common law.

However, from the outset, there have been important departures from common law, rooted in civil law. Over the years, through interpretation, re-interpretation and amendments of the rules of procedure and evidence, as well as the adoption of new rules, these points of departure from common law have been strengthened.³⁰⁵ Civil law has become increasingly influential.

Origins of the Legal Principles of the ICC

The ICC Statute and Rules of Procedure and Evidence have a much longer drafting history. The need to set up a permanent international criminal court had been recognised after the *ad hoc* and *post facto* Nuremberg and Tokyo Tribunals had been established. During the Cold War, however, any debates on the establishment of such a court had been discontinued. Negotiations were resumed in 1989 and a draft Statute was prepared by the International Law Commission (ILC). This Statute was then discussed by an Ad Hoc Committee and Preparatory Committee. It appeared that there were wide disparities in views among States both in respect of procedural technicalities and the political desirability of such a court. Therefore, it was a difficult and lengthy process to finalise a Statute.³⁰⁶

The establishment of the *ad hoc* tribunals gave an extra impetus to continue the negotiations for the ICC. After several years of negotiations between representatives from many jurisdictions, common law and civil law alike, as well as many NGOs, the

³⁰⁴ Bassiouni & Manikas, *The Law of the Tribunal for the Former Yugoslavia*, *supra* note 292, 863-864.

³⁰⁵ A. Mundis, *From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence*, 14(2) LJIL 367 (2001); K. Ambos, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 International Criminal Law Review 1 (2003), 1-37; A. Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC* in A. Cassese, P. Gaeta & J. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol II, 1439, (Oxford University Press, 2002).

³⁰⁶ See, among others, Philippe Kirsch QC, Introduction, XXIII – XXVIII; and: Morten Bergsmo / Otto Triffterer: Preamble; and Otto Triffterer: Part I. Establishment of the Court, in: Triffterer, *Commentary on the Rome Statute*, *supra* note 168.

Rome Statute was adopted on 17 July 1998. The reason that it took so long was that many different views, notably those from common law and civil law jurists, had to be reconciled.³⁰⁷ In 2002 the ICC Rules of Procedure and Evidence were adopted. Similar to the negotiation process that preceded the adoption of the Rome Statute, debates on the rules by a preparatory committee consisting of representatives of States Parties to the Rome Statute together with NGOs lasted for a number of years. The Assembly of States Parties subsequently approved and adopted the Rules created in this process.³⁰⁸

In drafting the ICC Statute and Rules, the drafters had an advantage over the drafters of the ICTY and ICTR Statute and Rules, in that the ICTY and ICTR Statute and Rules provided a modern and fresh example for the ICC. The drafters carefully examined the legal provisions adopted by the ICTY and ICTR, in particular with regard to the Rules.³⁰⁹ In essence and nature, the ICC Rules are similar to the ICTY and ICTR Rules and are clearly influenced by them.³¹⁰ Some of the rules were copied almost word for word from the ICTY and ICTR Rules.

Despite the instructive example the ICTY and ICTR Rules provided, the formulation of rules at the ICC also diverged. Unlike in the drafting process of the ICTY and ICTR Statutes and Rules, there was a powerful lobby from civil law jurisdictions, in particular France, seeking to assert their influence over the drafting of the ICC Statute and Rules. They succeeded. The ICC Statute and Rules are, from the outset, a true hybrid of civil law and common law principles.

Accordingly, the ICTY, ICTR and ICC are all rooted in a combination of civil law and common law principles. It is debatable whether such a mixed system can serve as an appropriate truth-ascertaining model. The two systems differ significantly, both in structure and in legal philosophy. They cannot be separated from the cultural and

³⁰⁷ P. Kirsch, 'The Preparatory Commission Today', *Establishment of the International Criminal Court, Seminar held in Helsinki, 23 February 2000* (Publications of the Ministry for Foreign Affairs, 2000), 12.

³⁰⁸ S. Fernandez de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in Triffterer, *Commentary on the Rome Statute*, *supra* note 168, 235-257.

³⁰⁹ D. Piragoff, *supra* note 168, 1318; Friman, *Inspiration from the International Criminal Tribunals*, in Triffterer, *Commentary on the Rome Statute*, *supra* note 168, 377-379.

³¹⁰ *Ibid.*

political norms of the societies in which they have evolved. They are not the product of a cursory configuration of rules, but have developed over the course of time.

A number of scholars and practitioners have suggested that it is not advisable to combine procedural aspects rooted in culturally different systems into a new criminal procedure.³¹¹ Taking parts from a system without the corresponding parts may deprive the new system of the protection mechanisms that were built into the original system. Mixing can particularly go wrong if the foundation of a legal principle or its underlying philosophy is misunderstood. This may result in an erroneous interpretation of it in a different legal context.

For instance, Haveman pointed out that it is difficult to merge different legal doctrines from inherently different and often incompatible systems, and take them out of their context without fully comprehending the origins and rationale behind those principles.³¹² Nijboer warned against copying elements from one system into another without carefully examining whether they could work in the other system.³¹³ Indeed, as suggested by Hongju Koh, evidentiary principles “are so rooted in their historical and cultural context that they cannot be transplanted piecemeal from common law to civil law jurisdictions”.³¹⁴

The difficulties of transplanting legal concepts from one domestic criminal procedure into another are increased when this other procedure is an international procedure emerging from scratch. Judge Cassese understood the difficulties of transplanting domestic legal concepts into international criminal proceedings. He rightly pointed out that domestic legal principles cannot be “mechanically imported into international criminal proceedings.”³¹⁵

³¹¹ M. Hallers et al (eds): *The Position of the Defence at the ICC, and Role of the Netherlands as Host State*, based on Conference at The Hague on 3rd and 4th November 2000 (Rozenberg Publ, A’dam 2002), presentation of J. Ackerman, 127-128.

³¹² Haveman, *Supranational Criminal Law*, *supra* note 27, 3-5.

³¹³ Nijboer, *De waarde van het bewijs*, *supra* note 161, 51-57, 85; see also L. Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Kluwer Law International, 1999), 268.

³¹⁴ H. Koh, *Mirjan Damaška: A Bridge Between Legal Cultures*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 29, 34.

³¹⁵ *Prosecutor v. Erdemović*, A. Ch. Separate and Dissenting Opinion of Judge Cassese to Judgment of Appeals Chamber, IT-96-22-A, section IA, para. 2.

It is particularly difficult to determine the ideology or legal thinking that would suit a melting pot of two fundamentally different systems. Ideologies are intertwined with the legal structure and societies in which those systems emerged over time. It is unclear whether the different ideologies underlying different domestic legal systems are even compatible and how they can merge successfully, if at all. The difficulties that come with the process of merging fundamentally different legal systems into a new one can potentially lead to a schizophrenic system.

Jackson argued that the international criminal procedure has evolved in a pragmatic rather than a principled manner. In his observation, it has mixed common law and civil law procedures with scant regard to Damaška's warning "that a mixing of procedures can produce a far less satisfactory fact-finding result in practice than under either Continental or Anglo-American evidentiary arrangements in their unadulterated form."³¹⁶

In order to test the validity of these observations, a comparative analysis of these two types of criminal justice is provided. They are defined in terms of their compatibility with the conditions identified in Part I: (i) greatest access to relevant and reliable information from all sides; (ii) engagement with the information at a distance; (iii) transparency; and, (iv) democratic, open and fair procedure.

Next, it is considered whether the international criminal justice model, combining parts of civil law principles with parts of common law principles, meets these conditions, and can accordingly serve as an efficient theoretical truth-ascertaining framework.

Comparison of civil law and common law methodologies

Access to Relevant and Reliable Information

³¹⁶ J. Jackson, *Faces of Transitional Justice: Two Attempts to Build Common Standards Beyond National Boundaries*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 221, at 240, with reference to M. Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 *American Journal of Comparative Law* 839 (1997), 852.

Civil Law Jurisdictions

Part I has established that the ascertainment of the truth is a core objective of civil law criminal proceedings. This requires a methodology that facilitates the collection, presentation and assessment of the largest possible quantity of quality information relevant to the case. Accordingly, prosecutors and investigators must make all efforts to present to the triers of fact the most complete and unbiased material truth as possible. The triers of fact include professional judges who also adjudicate on legal issues that arise in the course of the proceedings.³¹⁷

The prosecution represents the State,³¹⁸ but is not viewed as a mere party to the proceedings representing the interests of the State exclusively. Serving the public interest is the primary duty of the prosecutor,³¹⁹ who in many jurisdictions has attended the same judicial training as professional judges.³²⁰ In most civil law jurisdictions, the prosecutor is in charge of searching for incriminating and exonerating evidence equally.³²¹

³¹⁷ In the Netherlands, only professional judges take part in deliberations on law and fact. The Code d'Instruction introduced a mandatory jury system in the Netherlands in 1811. However, two years later upon Napoleon's defeat, the Netherlands immediately abolished the jury ('Geesel- en worgbesluit', 11 December 1813, art. 16) and never re-introduced it. See: J. M. van Bemmelen, *Strafvordering. Leerboek van het Nederlandsche strafprocesrecht* (3rd Ed.) ('s-Gravenhage, 1947), 78-80. Many other civil law systems, however, use mixed tribunals, consisting of lay members and professional judges jointly, for particular categories of crimes. In France and Belgium, there is the *Cour d'Assize*, which renders justice in very serious offences such as murder and rape. It consists of professional judges and lay members sitting together as triers of fact. In Russia, a defendant of serious offences can choose between a jury or a judge as a trier of fact. Germany also uses lay judges sitting alongside professional judges in all cases save in cases involving minor offences, which are treated by a single professional judge. On appeal, lay members can outvote professional judges. See Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123. See further C. Buisman, *Civil Law ('Fact Finders')*, in Khan, *Principles of Evidence*, *supra* note 25.

³¹⁸ In many civil law jurisdictions, the prosecution is hierarchically structured and is answerable to the Ministry of Justice. See Nijboer, *Wahrheit im Strafprozeß*, *supra* note 124, 33, 36, 51, 62, 84.

³¹⁹ In France and the Netherlands, the proper name for the office responsible for prosecuting cases is not Prosecution Office, but Public Ministry ('*Ministère Public*'; '*Openbaar Ministerie*'); and in the Netherlands the persons responsible for prosecuting cases are not referred to as Prosecutors, but as Officers of Justice ('*Officieren van Justitie*'); in Germany, they are members of the State Attorney Service ('*Staatsanwaltschaft*'). However, it is made explicit that the prosecutor's role extends beyond representing the State only. See further Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123, 19.

³²⁰ Nijboer, *Wahrheit im Strafprozeß*, *supra* note 124, 33, 36, 51, 62, 84. For instance, in The Netherlands, prosecutors attend a judicial education for eight years together with professional judges. At the end of this education, the prosecutors carry the title of "standing magistrates" (*staande magistratuur*); and the judges carry the title of "sitting magistrates" (*zittende magistratuur*). In Italy, even after its judicial system underwent drastic reforms, the public prosecutor (*Pubblico Ministero*) is still part of the magistracy (*magistratura*). Judges and prosecutors are recruited, appointed (for life) and salaried in the same manner and can easily rotate from the one to the other. This lack of separation between the judiciary and prosecutors has been criticized. See W. Pizzi & L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17(1) *Yale Journal of International Law* (1992); M. Costi 'Italy', 80-92, in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, *supra* note 25. See further Guarnieri & Pederzoli, *Power of Judges*, *supra* note 158.

³²¹ See, for instance, Germany: § 160(2) StPO. See also Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123. The prosecution has a similar obligation in the Netherlands. See Beijer, *Bewijs*, *supra* note 130, 34.1.4 Strategy of the Accused and Counsel. See also Arts 50–54quater of the Italian Criminal Code of Procedure.

Many civil law jurisdictions also rely on an investigative judge for investigations, although a number of civil law jurisdictions including Germany and Italy have abolished the investigative judge.³²² In jurisdictions where an investigative judge is still involved in criminal investigations, he is viewed as independent of the parties. He plays a double role of overseeing the fairness of the investigations as well as collecting incriminating and exonerating evidence independent of the police and prosecutor. The collection of evidence includes the hearing of witnesses, usually in the presence of the parties.³²³

The exact role and scope of the duties of an investigative judge vary from country to country. In some countries, such as France and Spain, the investigative judge is very active in collecting evidence, and is in charge of issuing indictments.³²⁴ In other countries, the prosecutor rather than the investigative judge is dominus litis of the

³²² Germany has abolished the investigative judge in 1975. There is an 'Ermittlungsrichter' who is assigned to a case as a pre-trial judge and controls the legality of investigative methods most of which need prior judicial authorization. Upon request of the prosecutor, the Ermittlungsrichter may conduct an interview with a witness if there is fear of the witness disappearing or retracting his or her testimony. In addition, an arrested defendant must be brought before this judge promptly after his arrest. See further H. Jung, *The German Versus the French Procedural Tradition*, in M. Delmas-Marty (Ed.), *The Criminal Process and Human Rights: Toward a European Consciousness* (Martinus Nijhoff Publishers, 1995), 60–61; Z.J. Wang, *Criminal Justice System in Germany*, in R. Frase & T. Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, *Boston College Intl and Comparative L Rev*, 1995 11 <<http://www.freewebs.com/criminalprocedure>>, 3-4; Weigend, *Rechtsvergleichende Bemerkungen*, *supra* note 123. In 1987, the investigative judge was similarly abolished in Italy. Instead, there is a preliminary investigation judge (Giudice per le indagini preliminari, 'GIP') (Art. 328 CPP), whose role is similar to that of the German Ermittlungsrichter. It is an impartial body which exercises judicial control over the investigations and decides on the issuing of search warrants, pre-trial detention and coercive measures. In addition, this judge presides over a special hearing to admit evidence (*incidente probatorio*) if requested by the parties during the investigation and there is a substantial risk that evidence will otherwise be lost. See M. Costi 'Italy', in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, *supra* note 25. In Russia, there is no specific investigative judge. Nonetheless, judges take a more active role throughout the investigative stage than they do in the later stages of trial. Investigators are responsible for making all decisions concerning the pre-trial collection of evidence. However, a court order is required to allow the investigators to conduct certain evidence-gathering actions. The court may also order investigators to allow the defence to conduct its own investigation by interviewing witnesses and experts, collecting evidence, and gaining access to individuals and documents if doing so is deemed necessary for the case. See Butler, *Russian Law*, *supra* note 125, 263.

³²³ Unless someone has a reasonable fear for his life, health, security, family life or his social economic status, and the investigative judge considers there are good grounds for him to stay anonymous from the accused.

³²⁴ See, for instance, Art. 81 of the French CPP which states that an investigative judge may undertake any investigative step he deems useful for the discovery of the truth and which is in accordance with the law. The decision of an investigative judge to issue an indictment is rendered after hearing the parties and the requisition of the prosecutor. On the basis of those observations as well as the dossier compiled in the course of the judicial investigations, the investigative judge determines whether there is sufficient evidence available to issue an indictment against an identified suspect.

investigations. This means that he is in charge of the investigations and has the responsibility of charging identified suspects.³²⁵

The extent to which the defence has an independent role in conducting investigations on behalf of the defendant also varies from jurisdiction to jurisdiction. In Germany, Italy, Russia and the Netherlands, the defence is allowed to conduct its own investigations. However, the funds available for such investigations can be limited in cases where the State, rather than the defendant, pays for the defence.³²⁶ In France, on the other hand, the defence cannot conduct its own independent investigations. Since 1993, the defence is instead in a position to ask the investigative judge to conduct certain investigative tasks. These include the ordering of a medical examination, the organizing of a confrontation, a site visit, or a hearing.³²⁷

Once the investigation has been finalised, the prosecutor, or in some countries, the investigative judge, produces a dossier detailing every investigative step taken during the investigations.³²⁸ The dossier includes exonerating and incriminating evidence produced by all parties, including the defence.³²⁹

Prior to the commencement of the trial, the judges receive full disclosure of the dossier and are thereby made aware of the whole case and all the evidence available. If, in the view of the judges, the dossier is incomplete, they may order the prosecutor or investigative judge to conduct further investigations, provide additional materials,

³²⁵ This is, for instance, the case in The Netherlands. See: Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 191-195.

³²⁶ The defence counsel for Onesphore Rwabukombe, a Rwandese who is tried before the Superior Regional Court of Frankfurt am Main (Oberlandesgericht Frankfurt am Main) for crimes committed in Rwanda in 1994, informed the author that she has no funds for investigations. The Chamber granted her request for the reimbursement of travel expenses and a hotel while in Rwanda. However, the hours she was working on the case were not reimbursed. In addition, she had to wait for nearly nine months to be authorised to conduct onsite investigations in Rwanda. The information is based on a personal interview with defence counsel Nathalie VonWistinghausen on 13 May 2011. See further: Damaška, *Evidentiary Barriers*, *supra* note 30, 519-520. On Russian law, see Butler, *Russian Law*, *supra* note 125, 257. On Dutch law, see Beijer, *Beweijs*, *supra* note 130, 34.1.5 Composition of the 'Dossier'.

³²⁷ See M. Bouazdi, 'France', in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, 65, *supra* note 25, at 68-69.

³²⁸ In France, Spain and Belgium, the investigative judge compiles the dossier. In the Netherlands, on the other hand, the prosecutor is responsible for compiling a dossier but will include the observations of the investigative judge and documents proposed by the defence. See Beijer, *Beweijs*, *supra* note 130, 34.1-2 The Role of the Officer and Judge.

³²⁹ Both the investigative judge and the prosecutor are expected to seek out evidence of innocence as well as guilt. See for instance Art 183 and further of the French Code Procédure Pénale.

and/or schedule additional witnesses.³³⁰ They can do so up to the deliberation stage. In addition, they may unlimitedly conduct their own independent examination in court and are not restricted by what the parties present.³³¹

Accordingly, the judges are not solely dependent on the prosecutor to produce sufficient convincing evidence to sustain a conviction.³³² The prosecutor must produce sufficient evidence to demonstrate the existence of a prima facie case. Otherwise, a case will be dismissed prior to trial.³³³ However, once the dossier has been finalised, the judges are in a position to complement or supplement the evidence presented by the parties, both in favour and against the accused. The parties call most of the witnesses, but the judges can call additional witnesses if necessary to complete the picture.³³⁴

In addition, judges rather than the parties are in control of the examination of witnesses. The parties can ask questions of their own witnesses as well as the witnesses called by the other party. The defendant himself can as well, even if assisted by counsel.³³⁵ The concept of cross-examination is unknown to civil law jurisdictions.³³⁶ The parties cannot be overly confrontational with the witnesses in challenging their evidence and must treat them with due respect. As Sybille Bedord puts it: “The sporting spirit, the notion of the law as a game of skill with handicaps to give each side a chance, is entirely absent on the Continent.”³³⁷

³³⁰ Kokott, *Burden of Proof*, supra note 157, 9. For Netherlands, see Arts 258(6), 316(2) and 420 of the Dutch CCP. See further Beijer, *Bewijs*, supra note 130, 34.1-2 *The Role of the Officer and Judge*). In some jurisdictions, a trial will only take place if the triers of fact consider that there is sufficient evidence to proceed. See for instance, Russia where a preliminary hearing is held to determine, inter alia, if the investigation has been sufficiently complete to proceed to trial. Butler, *Russian Law*, supra note 125, 272.

³³¹ De Hert, *Legal Procedures at the ICC*, supra note 25. In Italy, on the other hand, judges nowadays fully rely on the parties for the production of evidence. Judges can only introduce evidence exceptionally when allowed by the law (Art. 190(2) CPP). They can call witnesses ex officio, but only when absolutely necessary (Art. 507 CPP). See M. Costi, ‘Italy’, in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, supra note 25. In Germany, the courts are not bound by any declarations of the parties and investigate the facts on their own motion (Arts. 155(2) and 244(2)). See Bohlander, *Basic Concepts of German Criminal Procedure*, supra note 123, 19.

³³² In many civil law jurisdictions, the Criminal Codes of Procedure and Evidence do not explicitly indicate that the prosecutor has any burden of proving the case against the defendant. For instance, Art. 338 of the Dutch CCP states that the judge may only convict if persuaded of the guilt of the accused on the basis of evidence, which meets the legally required standards. It does, however, not indicate that the prosecutor must prove this guilt. See further, Beijer, *Bewijs*, supra note 130, 34.1-1 *Evidence: General*.

³³³ See, for instance, Arts 242–255 of the Dutch Code of Criminal Procedure.

³³⁴ Beijer, *Bewijs*, supra note 130, 34.1–2 *The Role of the Officer and Judge*.

³³⁵ Bohlander, *Basic Concepts of German Criminal Procedure*, supra note 123, 2, footnote 4.

³³⁶ In 1988, Italy has introduced the concepts of examination, cross-examination and re-examination (Arts. 498, 499 CPP). The judge is only allowed to ask questions after the parties, and the parties have the right to ask further questions following the judge’s questions (Art. 501 CPP).

³³⁷ Damaška, *Evidentiary Barriers*, supra note 30, foot note 200.

The judges may elicit information from the witnesses beyond what has been elicited by the parties. When examining a witness, judges have access to all prior statements made by such a witness and may ask a witness to clarify any answers given previously. In addition, they can confront witnesses with the statements of other witnesses and ask them to explain any contradictions.³³⁸

In many civil law jurisdictions, civil parties representing the victims of the alleged crimes are allowed to participate in criminal proceedings. Victims may only participate if they have established that their harm is personal, exists at the time of the application, and is directly linked to the offence.³³⁹ The modalities of victim participation vary from country to country. Where victim participation is allowed, the participatory rights of victims are limited to their direct interest, which is a claim to financial compensation for the alleged harm suffered. In some jurisdictions such as France, civil parties are treated as parties with full participatory rights equal to the prosecutor and defence. Civil parties can question witnesses at trial or call their own witnesses in a similar manner as the prosecutor and defence.³⁴⁰ Civil parties cannot be heard as sworn witnesses, but the judges may decide to hear them without requiring the taking of an oath.³⁴¹

Judges receive all evidence and then decide whether to exclude parts of it or accredit it less weight.³⁴² Technical rules governing the admissibility, presentation and evaluation of the evidence are generally not engaged unless the evidence was obtained irregularly or is privileged.³⁴³ For instance, hearsay evidence is admissible.

³³⁸ See for instance, Art. 292 of the Dutch Code of Criminal Procedure. See also Damaška, *The Faces of Justice and State Authority*, *supra* note 28, 162.

³³⁹ See Art. 2 of the French CPP; (Req. 1 June 1932, D. 1932.1.49, note H. Mazeaud. Any harm not yet materialized cannot sustain a civil action (crim. 26 June 1973, Bull 299, J.C.P. 1973). In Germany, instead of victims, the term ‘aggrieved persons’ is used. They can conduct private accessory prosecutions, which are then joined with the Prosecution’s case. See C. Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?*, *supra* note 61, 187-200.

³⁴⁰ The calling of witnesses is, however, not an automatic right but requires the approval of the investigative or trial judge, See Art. 82-1 of the French CPP, setting out the right of the civil party to submit a request in writing to the investigative judge to call a witness; and Art. 86 of the French CPP, allowing victim participants to produce evidence only on request of the judge. For Germany, see Zheng, *Criminal Justice System in Germany*, *supra* note 322, 10–11; C. Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?* *Supra* note 61, 187-200. In The Netherlands, the victim cannot present evidence and his is limited to his request for compensation. See Cleiren & Nijboer, *Strafvordering*, *supra* note 165, Boek 1, Titel IIIA, Rechten van het slachtoffer, Art. 51 (Van Maurik) 173–208.

³⁴¹ Crim. 28 January 1958, Bull. Crim. No. 91, on this matter the Cour de cassation stated that no one can be both party and witness in the same case. In Netherlands, victims are allowed to make unsworn statements. See Cleiren & Nijboer, *Strafvordering*, *supra* note 165, Boek 1, Titel IIIA, Rechten van het slachtoffer, Art. 51 (Van Maurik) 173–208.

³⁴² See, *inter alia*, V. Tochilovsky, *Nature and Evolution of the Rules*, in Khan, *Principles of Evidence*, *supra* note 25, 161-164.

³⁴³ Most civil law jurisdictions recognize testimonial privileges for close family, husbands, wives or

This, however, does not suggest that Courts can always rely on a written statement instead of oral testimony. It can usually do so only if the statement was taken by an investigative judge or other judicial officer in the presence of the parties.³⁴⁴ A finding of guilt can further not be based solely on written statements.³⁴⁵ Most civil law jurisdictions apply a rule of immediacy, pursuant to which witnesses have to be heard directly by the triers of fact in the presence of the accused. They should also testify exclusively to what they have personally observed.³⁴⁶

registered partners, violation of which normally leads to exclusion. See for instance the German case: BGH St 11, 216. Also, communications between counsel and client, or doctor or psychiatrist and patient, are usually privileged, and can, therefore, not be used as evidence if seized. See for instance the German case: BGH St 18, 229. In The Netherlands, testimonial privileges for close family are set out in Arts. 217 and 219 of the Dutch Code of Criminal Procedure; and the professional privilege in Art. 218 of the Code. The grounds to exclude illegally obtained evidence have been expanded, particularly in Germany when it concerns violations of the fundamental rights of the accused. The German Supreme Court (“Bundesgerichtshof” (BGH)) has developed a theory based on the defendant’s “sphere of rights” (“Rechtskreistheorie”). According to this approach the admissibility of the illegally obtained evidence depends on whether the violation in obtaining the evidence substantially affects the defendant’s sphere of rights or if it is only of subordinate importance to him. See: Entscheidungen des Bundesgerichtshofs in Strafsachen (BGH St) 11, 213. See further C. Roxin, *Strafverfahrensrecht* (25th edn, 1988) 182; Weigend, *Rechtsvergleichende Bemerkungen*, *supra* note 123, 754.

³⁴⁴ In the Netherlands, for instance, The record of a witness’s sworn declaration made to an investigative judge can be relied on as a *viva voce* declaration, provided that the parties were present and had the opportunity to ask questions, and that the witness has died, cannot reasonably appear or has security concerns (see Art. 295 of the CCP). In Germany, § 250 (1) StPO sets out the general rule that the reading out of prior statements cannot replace the witness’s in court testimony. However, § 251 StPO sets out the situations in which the general rule can be departed from. See further E. Löwe & W. Rosenberg, *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: § 250 StPO* (24th Ed. 1987) 24-26; L. Meyer-Gossner, *Strafprozessordnung § 250*, Rn.12, Rn. 3, 4 (49th ed. 2006). Under influence of the European Court of Human Rights, the reliance on witness statements in lieu of oral testimony in any other circumstances has significantly diminished. See: *Unterpertinger v. Austria*, Judgment of 24 November 1986, 1986 ECHR (Ser. A.) 110; *Barbera, Messegué & Jabardo v. Spain*, Judgment of 6 December 1988, 1988 ECHR (Ser. A.) 146; *Isgro v. Italy*, Judgment of 19 February 1991, 1991 ECHR (Ser. A.) 194; *Asch v. Austria*, Judgment of 26 April 1991, 1991 ECHR (Ser. A.) 203; *P.S. v. Germany*, Judgment of 20 December 2001, 2001 ECHR; *Kostovski v. The Netherlands*, Judgment of 20 November 1989, 1989 ECHR (Ser. A.) 166; *Delta v. France*, Judgment of 19 December 1990, 1991 ECHR (Ser. A.) 191, para 35; *Lüdi v. Switzerland*, Judgment of 15 June 1992, 1992 ECHR (Ser. A.) 238; *Saïdi v. France*, Judgment of 20 September 1993, 1993 ECHR (Ser. A.) 2619; *Lucà v. Italy*, Judgment of 27 February 2001, 2001 ECHR; *Cardot v. France*, Judgment of 19 March 1991, 1991 ECHR (Ser. A.) 200; *Kamasinski v. Austria*, Judgment of 19 December 1989, 1989 ECHR (Ser. A.) 168; *Windisch v. Austria*, Judgment of 27 September 1990, 1990 ECHR (Ser. A.) 186.

³⁴⁵ *AM v. Italy*, Judgment of 14 December 1999, 1999 ECHR; *Saïdi*, *supra* note 344, paras. 43-44, *Unterpertinger*, *supra* note 344, paras. 31-33; *Lucà*, *supra* note 344, paras. 39-45; *Kostovski*, *supra* note 344; *Delta*, *supra* note 344; *Lüdi* *supra* note 344.

³⁴⁶ See, for instance, § 250 StPO which incorporates the German version of the immediacy principle, and the German case BGH St 26, 332 where it was held that the examination of a witness in the absence of the accused leads to exclusion of the testimony as evidence. See further Löwe & Rosenberg: *Die Strafprozessordnung*, *supra* note 344; L. Meyer-Gossner, *Strafprozessordnung § 250*, Rn.12 (49th ed. 2006), Rn. 3,4; See also Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123. As for the Dutch principle of immediacy, see Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 70-71; G.J.M. Corstens, *Het Nederlands Strafrecht*, (Deventer Kluwer 2008, 6th edition) 615-618.

A former US judge and distinguished legal scholar, Jerome Frank describes the ‘investigatory’ or ‘truth’ method of trying cases as conducting “an intelligent inquiry into all the practically available evidence, in order to ascertain, as near as may be, the truth about the facts of that suit.”³⁴⁷ The criminal investigation must be unbiased, impartial and non-prejudicial.³⁴⁸

At the end of the trial, judges withdraw to deliberate in private and write their judgment. If they are convinced that the accused is guilty, they will enter a conviction and simultaneously determine the appropriate sentence. If they are not so convinced, they must acquit.³⁴⁹ Dissenting opinions, if any, are not published. Only the majority opinion is reflected in the judgment.³⁵⁰

Irrespective of the verdict (guilty or not guilty), both parties may lodge an appeal against it before the Court of Appeal. The Court of Appeal examines all findings de novo, which means that the parties may produce additional evidence, introduce a new line of defence or prosecution and/or adopt a new strategy. The appeals judges are active and may recall witnesses heard at trial or heard by an investigative judge prior to trial. They may also conduct their own investigations, possibly with the assistance of an investigative judge. The Court of Appeal routinely overturns verdicts. In such situations, the Court of Appeal may refer the matter back to the court of first instance, order a re-trial by another court of first instance or determine the matter itself.³⁵¹

After the Appeals Chamber renders its judgment, an appeal is still open before the Supreme Court or Court of Cassation as it is called in Belgium and France. Cassation

³⁴⁷ Frank, *Courts on Trial*, *supra* note 38, 80.

³⁴⁸ Nijboer, *Wahrheit im Strafprozeß*, *supra* note 124, 31–32; Malek, *Abschied von der Wahrheitssuch*, *supra* note 128. See, however, Russia, where the aspiration is to establish the ‘judicial’ truth. To establish the ‘judicial’ truth, it is required that criminal proceedings are conducted in accordance with the relevant legal provisions. An investigation does not need to have been ‘full, comprehensive, or objective.’ See Butler, *Russian Law*, *supra* note 125, 256.

³⁴⁹ Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 23, 81, 82, 196–200.

³⁵⁰ H. Kötz, Emeritus Professor at the University of Hamburg, Director of the Max Planck Institut für Ausländisches und Internationales Privatrecht, author of the pre-advice ‘Die Begründung höchstrichterlicher Urteile’, 1982: *Die Begründung höchstrichterlicher Urteile*, in E. Hondius, *De meerwaarde van de rechtsvergelijking. Opstellen aangeboden aan prof. mr H.U. Jessurun d’Oliveira*, Nederlandse Vereniging voor Rechtsvergelijking, 57 (Deventer: Kluwer, 1999) 23, 29–32.

³⁵¹ See in relation to the Dutch system Beijer, *Bewijs*, *supra* note 130, 34.2.10 Evidence on Appeal; De Hert, *Legal Procedures at the ICC*, *supra* note 25, page 124. In relation to the German system, see: L. Meyer-Gossner, *Strafprozessordnung* § 337, 27 (49th ed. 2006).

is allowed against both convictions and acquittals.³⁵² This is not a trial de novo; the Supreme Court will marginally examine whether the defendant has received a fair trial and whether the issues have been properly adjudicated. The test applied by the Supreme Court is whether the judges in the first instance or on appeal could have reached their verdict on the basis of the evidence available; not whether they should have reached this verdict.³⁵³

Thus, the determination of guilt or innocence does not become final until it has been tested on three levels, two of which include a full test of the facts. This in combination with the thorough investigation preceding the trial is in agreement with the truth-ascertaining objective.

In summary, the ascertainment of the truth does not only indicate that the criminal process is aimed at a factually accurate result, but it also refers to a particular methodology in obtaining that result. The methodology exists in many different versions, but is generally aimed at acquiring the greatest quantity of attainable and available relevant information to enable active triers of fact and law to assess and reconstruct the fullest possible picture.

Common Law Systems

The English system and other common law systems modelled on the English system can be described as a battlefield. To quote Frank: “I want, therefore, to stress the fact that litigation in our courts is still a fight. The fighting, to be sure, occurs in a courtroom, and is supervised by a government officer known as a judge. Yet, for the most part, a law-suit remains a sort of sublimated, regulated brawl, a private battle conducted in a court-house”.³⁵⁴

The parties can argue their dispute with any means they wish to use within the limits of the law. They are autonomous. The parties are responsible for gathering the

³⁵² The acquittal on appeal of Mr. Kouwenhoven, charged with delivery of weapons to Charles Taylor, then President of Liberia, in violation of a UN embargo, was quashed by the Court of Cassation, holding that the Court of Appeal had not adequately explained why it had refused to hear two anonymous witnesses. See C. Hornby, *Dutch court to re-examine Liberia arms dealing case*, Reuters Amsterdam, 20 April 2010.

³⁵³ See, in relation to the Dutch system: HR 23 October 1973, NJ 1974, 31; HR 4 January 2000, NJ 2000, 225. See further: Beijer, *Bewijs*, *supra* note 130, 34.2 Discussion of Evidence in Cassation.

³⁵⁴ Frank, *Courts on Trial*, *supra* note 38, 7.

evidence they wish to rely on at trial. At trial the prosecution presents its case first, followed by the defence. If the prosecution fails to establish a prima facie case, the defence has no case to answer. An acquittal will then be entered without the need to hear from the defence.³⁵⁵

The parties call their witnesses one by one and examine them after they have taken the oath to tell the truth. Leading questions, unless they concern matters not in dispute, are prohibited. The opposite party subsequently has an opportunity to cross-examine the witnesses. The cross-examining party is entitled to ask leading questions of the witness.³⁵⁶ The examining party will then be able to ask some final questions in re-examination, but only on matters raised in cross-examination.³⁵⁷ Nobody can ask any questions of the defendant unless he decides to testify under oath during the defence case. In that instance, the defendant would be examined like any other witness.³⁵⁸

The parties, themselves, decide what information to elicit from the witnesses. The triers of fact simply listen, but cannot themselves ask questions to the witness. In examining and cross-examining the witnesses, parties intentionally attempt to put the best portrayal of their version of the truth. Being an efficient party to the criminal proceedings requires the discrediting of adverse witnesses. It also requires the presentation of the party's own witnesses in the best possible light while concealing the weaknesses in their testimony and boosting up their credibility. Consequently, if the parties are successful in doing so, there is a risk that "the trial court is denied the benefit of observing the witness's actual normal demeanour, and thus prevented from accurately evaluating the witness."³⁵⁹ Nonetheless, a vigorous cross-examination is considered the most efficient tool to test the credibility of the witnesses and to unmask dishonesty and uncertainty. It therefore seeks to ensure that the triers of fact are aware of the weaknesses in the evidence.

³⁵⁵ See further, P. Richardson & D. Thomas, *Archbold* (Sweet & Maxwell, 2006), paras. 4-292-4-297; Kiralfy, *The Burden of Proof*, *supra* note 164, 18.

³⁵⁶ J. Sprack, *A Practical Approach to Criminal Procedure* (12th Ed.) (Oxford University Press, 2008), para. 20.43.

³⁵⁷ Richardson, *Archbold*, *supra* note 355, paras. 8-72, 8-116, 8-247.

³⁵⁸ *Ibid*, paras. 8-49; *Criminal Evidence Act 1898* (UK) s. 1; amended and repealed in part by the *Police and Criminal Evidence Act 1984* (UK).

³⁵⁹ Frank, *Courts on Trial* (n 12 above) 83-86.

In presenting their cases and cross-examining the witnesses of the opposition, both parties are bound by ethical obligations. They cannot, for instance, deliberately mislead the court or produce evidence with the knowledge that it is false. However, particularly for defence counsel, defending the interests of their clients is more important than helping to establish the truth about their guilt or innocence, unless their clients are truly innocent or have pleaded guilty. This is true in any system, civil law and common law systems alike. In civil law systems, however, there is more judicial control in the manner in which evidence is being collected and the witnesses are being questioned.³⁶⁰

There is a clear separation between the triers of law and the triers of fact. The trial is presided over by a judge, who is the trier of law. A jury, also present at trial, is the trier of fact.³⁶¹ The jury and judge are passive in the process and allow the parties to proceed in the manner they choose, provided they abide by the rules. The jury is silent throughout the trial and the judge will only intervene where necessary to ensure the fairness and integrity of the proceedings,³⁶² which may include some supplementary questioning to clarify issues that arise. Such an intervention is, however, the exception rather than the rule, unless triggered by an objection from one of the parties. The judge must always rule on objections made by either side, but rarely intervenes if no objection is made.³⁶³

As the overseer of the fairness and integrity of the proceedings, the judge must protect the accused from unfair prejudice. In doing so, he may exercise his discretionary powers in an attempt to ensure that the form in which the case is presented to the jurors will lead them to decide on it fairly.³⁶⁴ The judge should, for instance, prevent

³⁶⁰ Damaška, *Evidentiary Barriers*, *supra* note 30, 558-559, 561; Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 185-186; De Hert, *Legal Procedures at the ICC*, *supra* note 25; In Italy, on the other hand, judges nowadays fully rely on the parties for the production of evidence. Judges can only introduce evidence exceptionally when allowed by the law (Art. 190(2) CPP). They can call witnesses *ex officio*, but only when absolutely necessary (Art. 507 CPP) See also Costi, 'Italy', in Buisman, *Civil Law*, in Khan, *Principles of Evidence* *supra* note 25.

³⁶¹ Sprack, *Criminal Procedure*, *supra* note 361, *supra* note 356, para. 19.01.

³⁶² *Ibid*, para. 20.02.

³⁶³ Damaška, *Evidentiary Barriers*, *supra* note 30, 525-526. In continental European systems where lay members are included in rendering the verdict, lay members are entitled to play an active role in the criminal proceedings and ask questions to the witnesses and accused (545).

³⁶⁴ Armytage, *Educating Judges*, *supra* note 313, 256-258.

evidence that is irrelevant, unreliable or unfairly prejudicial, from being presented to the jury. The reason for excluding such evidence from the jury is to avoid that a conviction is based on it.³⁶⁵ As John Henry Wigmore stated, the purpose of rules of evidence is “to guard the tribunal (particularly the jury) against erroneous persuasion”.³⁶⁶ The jury may, however, erroneously believe that any evidence they review is relevant and reliable because otherwise, it is assumed, it would have been excluded.³⁶⁷

The judge will rarely exclude evidence on his own initiative. Usually, one of the parties will invite the judge to use his discretion.³⁶⁸ If he decides to exclude the evidence, the jury is not even aware that the excluded evidence exists. In some cases, the jury therefore renders its verdict on incomplete evidence.

In acquittal cases, the verdict of the jury is final,³⁶⁹ unless highly compelling new evidence comes to light or the verdict can be shown to have been “tainted” by

³⁶⁵ De Hert, *Legal Procedures at the ICC*, *supra* note 25, 107; Damaška, *Evidence Law Adrift*, *supra* note 122, 46. John Henry Wigmore (1863-1943) and James Bradley Thayer (1831-1902) considered that exclusionary rules and jury were inter-related. Edmund Morgan (1956) has challenged these perspectives on the ground that non-jury trials in common law jurisdictions also apply the exclusionary rules; and jury trials today and in the past in civil law jurisdictions have never applied any of this type of exclusionary rules. See for similar thoughts Damaška, *Evidentiary Barriers*, *supra* note 30, 514; A. Levin & H. Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. Pa. L. Rev. 905 (1971); H. Hammelmann, *Hearsay Evidence: A Comparison*, 67 L.Q. Review 67 (1951); Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 4: “Indeed, there is a school of thought that, if it were not for jury trials, we would not have rules of evidence at all, and the Continental Romano-Germanic systems of law are often held up as apparent proof of this point”. Murphy holds that neither the history of common law nor contemporary common law sustains such a conclusion, given that the common law rules of evidence apply to civil and criminal cases and jury and non-jury trials. See also J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), where Thayer states that the exclusionary rules were included from preventing jury to be misled. Re-printed in Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 35.

³⁶⁶ J. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (3rd Ed) (Little, Brown & Co) (VII Works 599), re-printed in Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 52. See also De Hert, *Legal Procedures at the ICC*, *supra* note 25, 107; Damaška, *Evidence Law Adrift*, *supra* note 122, 46. According to the Honourable Justice Peter Murphy, two additional purposes for introducing rules of evidence were to rectify the disadvantage on which the accused was placed until the 19th century, and to avoid perjury, fabrication and attempts to pervert the course of justice. See Murphy, *above*, 4.

³⁶⁷ C. Callen, *Cognitive Strategies and Models of Fact-Finding*, in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 165.

³⁶⁸ Murphy, *Evidence, Proof, and Facts*, *supra* note 137, ‘An Introductory Essay’, 5-6. Common law jurists generally feel uncomfortable if the judge intervenes too much in the conduct of the parties. Damaška, *Evidentiary Barriers*, *supra* note 30, 570. Also Damaška, *Evidence Law Adrift*, *supra* note 122, 2.

³⁶⁹ Sprack, *Criminal Procedure*, *supra* note 356, para. 21.42.

interference with the jury.³⁷⁰ In case of a conviction, the verdict can be appealed before a Court of Appeal, consisting of judges only.³⁷¹ There is no jury. Factual issues can only be the subject of an appeal where the verdict is unsafe, or where there is said to be fresh evidence. Leave to appeal must first be granted by a single judge on the papers alone.³⁷²

On allowing an appeal the Court may direct either that the defendant stand acquitted, or that there should be a fresh trial at first instance.³⁷³ The evidence is tested only marginally and witnesses are called only in exceptional circumstances. When the Court of Appeal is presented with new evidence on appeal which could not have been introduced earlier with due diligence, it will hear the new evidence directly. On the basis of such a hearing, the Court of Appeal must consider whether the new evidence caused it to entertain a reasonable doubt about the conviction.³⁷⁴

The Court of Appeal does not lightly overturn errors. Where a party fails to exploit all procedural tools available to it, it cannot complain to the Court of Appeal on the grounds that a miscarriage of justice has occurred.³⁷⁵ There is particular reluctance to

³⁷⁰ The judge's inappropriate instructions, or failure to instruct the jury appropriately, is challengeable, but not the jury's verdict except in exceptional situations. Armytage, *Educating Judges*, *supra* note 313, 256.

³⁷¹ In England and Wales a Court for the determination of appeals in criminal cases was first established late, in 1907. It was established as a reaction to public concerns expressed in respect of the criminal justice system following a significant miscarriage of justice. See Armytage, *Educating Judges*, *supra* note 313, 259. The case in question concerned Mr. Adolf Beck who had been wrongfully identified by fifteen honest witnesses.

³⁷² If the single judge refuses leave to appeal, the application can be renewed in front of the full, three judge, court, but Legal Aid is not available to cover the cost of such applications.

³⁷³ For more details on the test on appeal and examples of successful grounds of appeal, see Richardson, *Archbold*, *supra* note 355, paras. 7-43 – 7-101.

³⁷⁴ *R v Stafford & Luvaglio* [1974] AC 878. Prior to this judgement, the standard was whether the new evidence might have led the original jury to entertain a reasonable doubt about the guilt of the accused (*R v Parks* (1961) 46 Cr. App. R. 29). The change was criticized because it requires judges to usurp the jurors' role. There are also practical problems, because, although the Court of Appeal has heard and observed the new evidence, it has only access to the written record of the evidence presented at trial and is not in a position to know the basis on which the jury decided to convict and whether the new evidence would have made a difference. Instead, as suggested by Lord Devlin, the Court of Appeal should be much readier to exercise its power to order a re-trial under *Criminal Appeal Act 1964* (UK) s. 1; *Criminal Appeal Act 1968* (UK) s. 7; *Criminal Justice Act 1988* (UK) s. 43. See Lord P. Devlin, *The Judge and the Jury: Sapping and Undermining The Judge* (1981). Also Armytage, *Educating Judges*, *supra* note 313, 264.

³⁷⁵ Damaška, *The Faces of Justice and State Authority*, *supra* note 28, 126-127, 145; *R v. Cooper* [1969] 1 QB 267, "a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which

reverse the jury's decision on the facts, provided that the case has been fully and fairly laid before it. The reasoning is that the Court of Appeal is not given an opportunity to see or hear the witnesses and can, therefore, not form a first-hand impression of the witnesses' demeanour.³⁷⁶ This reluctance has been criticized as it effectively deprives a convicted person of a remedy against miscarriages of justice involving no error of law or irregularity of procedure.³⁷⁷ It is clearly in contrast with the civil law approach where the filing of an appeal by either party is an automatic right both against a conviction and an acquittal.

In summary, the parties run the proceedings and the jury decides by whom they are convinced, bearing in mind the burden and standard of proof. The extensive participation of the parties and their autonomy is often perceived as the most significant feature of the common law trial and reflect its adversarial nature. Fuller, for example, expressed the view that “[t]he essence of the adversary system is that each side is accorded a participation in the decision that is reached, a participation that takes the form of presenting proofs and arguments.”³⁷⁸ The jury is also an important element of this system.³⁷⁹

To conclude on the issue of access to information, civil law and common law jurisdictions both have their own distinct way to channel information which ultimately forms the foundation for the findings of fact. The triers of fact in civil law jurisdictions receive all relevant available information, including from the victims. By contrast, the common law triers of fact only receive relevant information which is presented by the parties and considered reliable enough as a basis for a conviction. Whilst this reduces the chances of wrongful convictions, it does not automatically strengthen the ascertainment of the truth. The latter does not only seek to ensure that

a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere.”

³⁷⁶ Armytage, *Educating Judges*, *supra* note 313, 259-263.

³⁷⁷ *Ibid*, 264. In 1993, the Royal Commission on Criminal Justice produced a report (Cm. 2263 (1993)) in which it recommended to replace the wholly inadequate Court of Appeal. This recommendation was supported by Sir John May in his report on the Guildford Four (July 1994). See also Criminal Cases Review Commission (Part II, Criminal Appeal Act 1995; www.ccrj.gov.uk/); and: Uglow, *Criminal Justice*, *supra* note 138, 11.

³⁷⁸ Damaška, *Evidentiary Barriers*, *supra* note 30, 570.

³⁷⁹ See J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003), 178. See also G. Fletcher, *The Grammar of Criminal Law*, (Oxford University Press, 2007), 136-142.

innocent defendants are acquitted, but also that guilty defendants are convicted.³⁸⁰ For that reason, the civil law method of presenting all relevant information to the triers of fact may be more efficient. The downside of this is that the triers of fact may be influenced by relevant, but unreliable information.³⁸¹ They may for instance have formed an opinion on the papers concerning the guilt of the accused before the trial has even begun.³⁸² In addition, witnesses in civil law jurisdictions are not subjected to a cross-examination. Witnesses are thus more protected from unpleasant questioning, but their credibility is not tested in a similarly vigorous manner.

Thus, of the two, the civil law method guarantees the greatest access of the triers of fact to relevant information from all sides. However, this includes unreliable evidence, which should be excluded in the ultimate determination of the facts. Whether this is done depends on the ability of the triers of fact to engage, yet keep a distance from the information and sources subject to their evaluation. In common law, the unreliable information has been filtered out before the triers of fact get to see the information. Accordingly, there is less risk that a finding is made on unreliable evidence. All in all, both methods have advantages and disadvantages.

Engagement at a Distance

Common law jurisdictions rely mainly on laypersons to determine the facts. Civil law jurisdictions rely on professional judges. Professional judges are the more obvious choice to ascertain the truth. This is because the determination of the guilt of a defendant includes the legal qualification of facts, which may be too complex a task

³⁸⁰ Damaška, *Evidentiary Barriers*, *supra* note 30, 579-580.

³⁸¹ Wagenaar, *Vincent plast op de grond*, *supra* note 129, 9.

³⁸² Damaška, *Evidentiary Barriers*, *supra* note 30, 558-9, 561; Weigend, *Rechtsvergleichende Bemerkungen*, *supra* note 123, 756. See also Pompe, a distinguished Dutch scholar, who argues that the prior review by judges of the dossier does not respect the accusatorial nature of the trial because judges may already have formed an opinion about the evidence prior to the hearing. Pompe, *Bewijs in Strafzaken*, *supra* note 153, 55-64. He suggests, therefore, that judges do not review the dossier in detail prior to the trial. A.L. Melai, on the other hand, argues that judges should carefully review the dossier because they are responsible for ensuring that the guilt assessment is complete and fair. (A. L. Melai, 'De onbevungen strafrechter', *Delikt en Delinkwent (DD)* 1975, 124-127). J. F. Nijboer discusses both views and is more inclined to support the view of Melai without ignoring that Pompe has raised an important point. See Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 185-186. In Italy, on the other hand, since the reform of the system in 1988, the judges no longer have access to the investigative dossier. See Art. 431 of the Dutch Code of Criminal Procedure.

for a layperson. Judges are also more academically trained in civil law jurisdictions than judges in common law jurisdictions.³⁸³

In searching for the truth, professional judges are seeking to get to the essence of the testimony by engaging in dialogue with the witnesses and the defendant. Simultaneously to determining whether the defendant has done as alleged, judges seek to comprehend his motive for doing so. The defendant's state of mind is important to determine his culpability and what sentence, if any, would be appropriate. Accordingly, judges assess both the credibility and the personality of the defendant and witnesses and thus engage with the information. Yet, they have been trained to be impartial and evaluate the facts in a dispassionate manner. Professional judges are therefore assumed to be less susceptible to improper influence from irrelevant or prejudicial information than jurors. In reality, the ability to remain impartial in the process varies from judge to judge.³⁸⁴

A trial by jury is more random. A defendant can be lucky or unlucky with the personalities and independent minds of the jurors. They are randomly selected from society.³⁸⁵ The defendant can ask that individual jury members be disqualified if they can demonstrate bias on their part.³⁸⁶ In other situations, the defendant's fate is in the hands of twelve unknown citizens who may, or may not be fair and open minded with regard to his innocence.

In the eyes of many civil law practitioners and some common law practitioners,³⁸⁷ it is curious that the common law system entrusts jurors, who have no legal

³⁸³ Bohlander, *Radbruch Redux*, *supra* note 123, 405.

³⁸⁴ The ability of judges to engage fully and understand where the accused is coming from has been questioned in light of the fact that judges tend to be from a different class as the accused. See M.G. Rood, H.L. Wedeven, J.C.M. Leyten, C.J.M. Schuyt: *Class justice and Judge & politics intertwined: 'De plaats van de rechterlijke macht in de Nederlandse samenleving: preadviezen'* in: *Handelingen der Nederlandse Juristen-Vereniging*, Zwolle, 105 (1975) deel I.

³⁸⁵ See Sprack, *Criminal Procedure*, *supra* note 361, paras. 18.01-18.25.

³⁸⁶ *Ibid*, 18.30-18.34.

³⁸⁷ Frank, *Courts on Trial*, *supra* note 38, 108-124. See also Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 4, where Murphy suggests that some may "argue that jury trial is in many ways aberrational, and that a better approach would be to examine the use of evidence by a judge sitting alone." If there is any truth in the film 'twelve angry men', it is well possible that dominant characters persuade other jury members to convict. Or, as research into jury verdicts in the UK has pointed out, jury members may have agreed with the majority because they were tired and wanted to go home. Given that a near absolute majority is required for a verdict, the liberation can take long. See also

qualification or forensic expertise, with the ultimate decision on guilt or innocence of the accused no matter how notorious or legally complex the case may be.³⁸⁸ Often, the determination of the ultimate issue requires an understanding of the law because it involves a determination as to whether the facts qualify as a crime and whether it was committed with the requisite mens rea. It is difficult to imagine that, in just a few days, the jurors without any legal background could grasp the often complex legal matters. Where legal definitions are fluid, the jurors would even operate as legislators, and there is no way of verifying whether the jury has understood the judge's instructions.³⁸⁹

It is particularly striking that, on the one hand, enough faith is placed in jurors to render a verdict while, on the other hand, they are not sufficiently trusted with evidence which prejudices the accused unfairly because it may render them biased against the accused.³⁹⁰

Lacking expertise and full information, it is questionable whether jury members can engage with the information. It is further contested that jury members can evaluate the information in a dispassionate manner. Research has demonstrated that jury members are regularly manipulated by the media or other prejudicial information that may place the accused in a bad light.³⁹¹

Yet, in the common law tradition, professional judges are viewed with suspicion. They usually come from a different class than the persons on trial. They are, therefore, not viewed as the peers of the defendants.³⁹²

Wigmore, *A Treatise on the System of Evidence*, *supra* note 363, 2511; L. Cohen, *The Probable and the Provable* (Clarendon Press, 1977), 108-110.

³⁸⁸ Although there is now provision for complex cases such as high level fraud to be tried by a judge.

³⁸⁹ Frank, *Courts on Trial*, *supra* note 38, 110-120.

³⁹⁰ *Ibid.*, 143-144.

³⁹¹ Research done by the Law Commission for England and Wales suggests that "a previous conviction of indecent assault on a child, because of the "all-round negative evaluation" of such a person, will have a significant impact on the jurors perception of the defendant's credibility as a witness *whatever the offence charged*", available at <<http://www.lawcom.gov.uk/library/lccp141/summary.htm>>.

³⁹² See *supra* note 384. See also Damaška, *Evidence Law Adrift*, *supra* note 122, 2; reference to Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), 266. There is also criticism in civil law jurisdictions. In the Netherlands, for instance, until recently, most judges were white male from the higher classes of society. See: L. de Groot-van Leeuwen, *De rechterlijke macht in Nederland: samenstelling en denkbeelden van de zittende en staande magistratuur* (Arnhem, 1991), 193.

This explains why greater faith is placed in lay members of society than on professional judges to determine the guilt or innocence of an accused.³⁹³ Trial by jury is considered pivotal to criminal justice and “the final check against suppression of liberty by the state.”³⁹⁴ It has been described as “the lamp that shows that freedom lives”³⁹⁵ and has enormous popular support. According to Lord Bingham, Lord Chief Justice, this support for trials by jury is shared by judges who are uncomfortable making decisions on facts, given that no authority or rational rules can assist them. The trier of fact is merely dependent on ‘his own unaided judgment’.³⁹⁶

An additional safeguard is offered by the fact that the judge is mandated to sum up the case to the jury and explain coherently the principles of law applicable in the case. He must be more careful in presenting the facts. He cannot be seen to attempt to influence the jury one way or the other. He should caution the jury in respect to certain categories of dubious evidence, such as evidence from a co-perpetrator. The judge must also clearly indicate that it is for the jury, not him, to decide on what evidence to rely and whether guilt has been proved beyond a reasonable doubt. He must further emphasize that the jury cannot convict the accused unless all of the jurors are convinced beyond reasonable doubt that he is guilty as charged, or, after a long period of deliberation and a further judicial direction, by a majority of not less than 10-2.³⁹⁷ By contrast, judges render verdicts solely or in a bench of three, two of whom must agree with the verdict.³⁹⁸

³⁹³ This faith has grown historically. During past dictatorial regimes, particularly under the monarchies of the Tudors and Stuarts, the jury was viewed as the more lenient trier of fact. For a long time, jurors had the power to pardon a defendant and acquit him irrespective of the evidence. They took advantage of this power where they considered the punishment or the law on which it was based too harsh. Therefore, it occurred from time to time that a defendant was acquitted on compassionate or political grounds rather than the lack of evidence. This faith in juries continued to be strong, as was evidenced in a vigorous popular and parliamentary protest in 1986 against proposal to conduct complex cases of serious fraud without a jury, Fraud Trials Committee Report (1986), see Armytage, *Educating Judges*, *supra* note 313, 256; Lord Bingham, *The Business of Judging*, *supra* note 137, 3; Damaška, *Evidentiary Barriers*, *supra* note 30, 584-586; L. Radzinowicz, *A History of English Criminal Law* (Stevens & Sons, 1948), 91-97.

³⁹⁴ J. Brady, *Fair and Impartial Railroad: The Jury, The Media, and Political Trials*, 2 *Journal of Criminal Justice* 241 (1983), 241; Sprack, *Criminal Procedure*, *supra* note 356, para. 19.01.

³⁹⁵ Lord Devlin, *Trial by Jury* (Stevens & Sons Ltd, 1956, 1966) 164 as cited in Lord Bingham, *The Business of Judging*, *supra* note 137. See also A. Gray, *Mockery and the Right to Trial by Jury* 6(1) *Queensland University of Technology Law and Justice Journal* 66 (2006); Brady, *Fair and Impartial Railroad*, *ibid*, 241; Frank, *Courts on Trial*, *supra* note 38, 108.

³⁹⁶ Lord Bingham, *The Business of Judging*, *supra* note 137, 3.

³⁹⁷ The unanimity rule is set out in the UK Criminal Justice Act 1967, § 13. Prior to 1967, unanimity was required for a conviction. Likewise, in the US, until 1972, there was a unanimity requirement for conviction. In *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)

The impression commonly held by supporters of trial by jury is that lay triers of fact are more lenient, and require more evidence in support of a conviction. Lay triers of fact do not routinely determine whether an accused is guilty as charged. It has been suggested that they, therefore, often feel a greater responsibility for the fate of the defendant, who could end up serving a long prison sentence as a result of their finding.³⁹⁹ Professional judges, on the other hand, become depersonalized with the consequence that convicting becomes less of a “unique human drama” and thus less of a “big deal”. Also, they are more inclined to use a mathematical test, based on prior experience: *e.g.* if factor x is present then result y will follow.⁴⁰⁰

If at all true, this in itself does not guarantee more accuracy in ascertaining the facts, given that an acquittal is not necessarily more reliable than a conviction. Accuracy and even fairness cannot be tested by the number of acquittals, but rather by the procedure as a whole leading to the outcome. The assessment of jurors which leads them to doubt may be inaccurate. Their doubt may have been based on sympathy for the defendant rather than on the actual evidence.⁴⁰¹ According to Honourable Judge Murphy, jurors “are extremely susceptible to being affected, either positively or negatively, by a combination of dialectic and rhetoric”.⁴⁰²

In conclusion, it is difficult to determine which type of trier of fact is best suited to engage with the information while simultaneously keeping a distance. It depends on the personality of individual judges and jury members. Both open minded and biased judges and jurors exist. However, truth-ascertainment is more consistent when done by a constant pool of professional judges than a continuously changing selection of jurors.

the US Supreme Court held that jury unanimity was not constitutionally mandated. See Damaška, *Evidentiary Barriers*, *supra* note 30, 536-537. For summing up by the judges, see *Juries Act 1974* (UK) s. 17; Richardson, *Archbold*, *supra* note 355, paras. 4-404i-4-404r (general summing up directives concerning caution in respect of dubious evidence); paras. 13-68; 4-410-415 (warning in relation to bad character evidence admitted to show propensity to commit offences or to be untruthful and general summing up directions); paras. 14-12-14-24 (Turnbull warning concerning identification evidence).

³⁹⁸ However, as stated above, many civil law courts include jurors as triers of fact. See *supra* note 317.

³⁹⁹ Damaška, *Evidentiary Barriers*, *supra* note 30, 538-539. Also Frank, *Courts on Trial*, *supra* note 38, 347.

⁴⁰⁰ *Ibid.*

⁴⁰¹ Frank, *Courts on Trial*, *supra* note 38, 110-114.

⁴⁰² Murphy, *Evidence, Proof, and Facts*, *supra* note 137, 9.

Transparency

On most issues, civil law proceedings are conducted in a much more transparent manner than common law proceedings. All information that is collected during the investigation is compiled in a dossier that is accessible to all. The defence has a right to inspect and challenge the dossier for incompleteness.⁴⁰³ The defence can do that before the prosecutor, investigative judge or the court. The defence can also ask that missing materials be added to the dossier, which can in principle not be denied. Information can only be withheld from the defendant where a concrete interest of the investigation so requires.⁴⁰⁴

The transparency of the proceedings is, however, undermined where necessary to protect witnesses. Many civil law jurisdictions allow the use of witnesses whose identities are not disclosed to the defence.⁴⁰⁵ The European Court of Human Rights (“ECHR”) has accepted that, under circumstances, granting anonymity may be

⁴⁰³ In France and Belgium, the right of the defence to inspect the dossier during the investigative stage has been introduced by laws of 4 January and 24 August 1993 under influence of the European Court of Human Rights (*Lamy v. Belgium*, Judgment of 30 March 1989, 1989 ECHR). In addition, Article 281 of the French Code Procédure Pénale establishes a compulsory disclosure for all parties ‘as early as possible’ and in any case at least 24 hours before the start of trial.

⁴⁰⁴ See, for instance, the Dutch case: Dutch Supreme Court: Hoge Raad (HR), 26 May 1987, *Nederlandse Jurisprudentie* (NJ) 1988, 177, stating the principle of full disclosure of all materials in and outside the dossier upon request of the defence. Art. 30(1) sets out the materials to which the defendant must have access. Art. 30(2) of the Dutch CCP sets out the exception of a concrete investigative interest. Such interest may include the protection of prosecution sources. See Beijer, *Bewijs*, *supra* note 130, 34.1.5 Composition of the ‘Dossier’. For France, see Arts. 2bis and 114 of the French CPP (*le secret de l’enquête et de l’instruction*) defence counsel has a right to have access to all confidential materials but he must respect the secrecy of the criminal investigations. Counsel may make photocopies of the files for the accused unless the investigative judge considers that such disclosure would create a risk that pressure be put on victims, persons being examined or their counsel, witnesses, investigators, experts or other persons connected with the criminal proceedings. In those circumstances, access of the accused to confidential material can be denied, provided that the investigative judge gives explicit written reasons for such denial within five days. This denial is subject to appeal with the president of the Chamber of investigations. (Art. 114 CCP; <http://archives.cnb.avocat.fr/VieDuConseil/VDC_dossierspublications_rin.php>).

⁴⁰⁵ See for instance, the Netherlands, Arts. 226(a)-(d) and 344a(2) CCP. See further Cleiren & Nijboer, *Strafvordering*, *supra* note 165, Boek II, Titel III, Afd 4A, Arts 226a-f (Van der Meij) 865-881; Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 178-182; A. van Hoorn & E. De Wet *getuigenbescherming – een uitzonderlijke regeling* (1996); Beijer, *Bewijs*, *supra* note 130, 34.2.10: Anonymous Declarations. See further Russia, where anonymous statements may be admitted, provided that the specific procedural rules concerning the admission of such statements are met, requiring documentation and authentication. See further Butler, *Russian Law*, *supra* note 125, 272. The European Court of Human Rights has allowed this practice provided that a finding of guilt is not solely or primarily based on the testimony of anonymous witnesses.

necessary to protect the safety of a witness.⁴⁰⁶ However, this is permissible only if the defence is offered full counterweight to offset the prejudice caused by such use. A finding of guilt cannot be based solely on anonymous witnesses.⁴⁰⁷ The triers of facts are always aware of the identities of the witnesses.

In common law jurisdictions, the defence is entitled to full pre-trial disclosure of any incriminating evidence the prosecutor intends to use at trial. Only in exceptional circumstances can information be withheld from the defence. In the United Kingdom non-disclosure to the defence is increasingly acceptable. Since 2008, the use of anonymous witnesses is even permitted in exceptional circumstances.⁴⁰⁸ The defence is further in possession of its own evidence, as well as the exonerating evidence collected and disclosed by the prosecution.⁴⁰⁹ The triers of fact, on the other hand, are not in possession of any evidence, unless one of the parties adduces it in court.

The judges' reasoning in reaching their factual findings is transparent. Each step in the evaluation process is described and justified in a written public verdict. This ensures that judges rely on reliable and relevant evidence only in their ultimate findings of fact. A reasoned verdict also creates precedent. By contrast, jurors deliberate freely and reach a conclusion in full independence of rules or precedent without disclosure of their thought process.⁴¹⁰ Apart from giving the jury an appropriate warning as to the reliability of the evidence that was admitted, the judge

⁴⁰⁶ *Doorson v. The Netherlands*, Judgment of 26 March 1996, 1996 ECHR.

⁴⁰⁷ *Kostovski v. The Netherlands*, Judgment of 20 November 1989, 1989 ECHR (Ser. A.) 166; *Van Mechelen & Ors v. The Netherlands*, Judgment of 23 April 1997, 1997 ECHR; *Visser v. The Netherlands*, Judgment of 14 February 2002, 2002 ECHR.

⁴⁰⁸ See *R v Davis* [2008] UKHL 36; [2008] AC 1128; *R v Horncastle & Ors* [2009] UKSC 14. Parliament even amended the common law principle that the defendant has a right to confront his accuser directly. In 2008, it adopted the Criminal Evidence (Witness Anonymity) Act pursuant to which witness anonymity is allowed subject to certain conditions. See also: http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html. The UK is said to have gone even further than the European Court of Human Rights permits in accepting criminal liability solely on the basis of anonymous witnesses. For further commentaries, see: <http://uksblog.com/reflections-on-horncastle>.

⁴⁰⁹ Sprack, *Criminal Procedure*, *supra* note 356, paras. 9.13-9.15.

⁴¹⁰ Frank, *Courts on Trial*, *supra* note 38, 123: "To my mind a better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of the R's, and unpredictability of decisions." Frank further states: "Yet little, practically, is done to ensure that these officials, jurymen, 'act upon principles and not according to arbitrary will,' or to put effective restraints upon their worst prejudices. Indeed, through the general verdict, coupled with the refusal of the courts to inquire into the way the jurors have reached their decisions, everything is properly conducted according to the procedural rules, the jurors' decision may be as arbitrary as they please; in such circumstances, their discretion becomes wholly unregulated and unreviewable." (132)

has no say in the adjudication of the facts.⁴¹¹ This is to ensure that the triers of fact make findings based solely on what they consider to be accurate in light of the evidence presented in the case. However, it gives the jury an uncontrollable and incorrigible power.⁴¹²

Thus, civil law proceedings are clearly more transparent to the triers of fact, but are generally less transparent to the accused and the public if required to protect the identity of witnesses.

Democratic, open and fair procedure

Common Law Systems

It is often assumed that the common law adversarial procedure is more democratic, open and fair to the accused. Part I already established that common law criminal justice systems focus more on fairness and equality between the two parties than on the ascertainment of the truth. Trial by the defendant's peers is also perceived as more democratic than trial by professional judges.⁴¹³

However, in terms of equality of arms, the prosecution has a clear advantage over the defendant because it has the massive resources of the state to rely on for investigations. The defendant has only his counsel and such resources as can be bargained for from limited legal aid funds. Unlike in continental Europe, there is no

⁴¹¹ Murphy, Evidence, Proof, and Facts, *supra* note 137, 5-6.

⁴¹² Frank, Courts on Trial, *supra* note 38, 112-113.

⁴¹³ Traditionally, democracy and a jury system go hand in hand together. The word democracy stems from the Greek words 'demos' and 'kratein': 'the people govern'. Democracy is the will of the people. The purest form was implemented in the Greek city Athens around 500 BC. Ordinary citizens carried out both legislative and judiciary tasks. Judgments were issued by a large jury instead of an educated elite. A jury of one's peers was an important component of the Athens democracy. On the issue of democracy, Pericles held: 'Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. When it is a question of settling private disputes, everyone is equal before the law; when it is a question of putting one person before another in positions of public responsibility, what counts is not membership of a particular class, but the actual ability which the man possesses. (...) We give our obedience to those whom we put in positions of authority, and we obey the laws themselves, especially those which are for the protection of the oppressed, and those unwritten laws which it is an acknowledged shame to break.' Cited in D. Held, *Models of Democracy* (Cambridge, 1987), 16-17. See also J. van den Berg, Th. L. Bellekom, H.M. Th. D. ten Napel, E. M. Peeters, *Inleiding Staatskunde* (Deventer: Kluwer, 1995), Chapter 2 (Democracy, M.J. Trapenburg) 41-60, particularly 45-47; Brants & Field, *Convergence*, *supra* note 23, 182-183.

judicial officer involved in the criminal investigations to whom the defendant may address himself for assistance.⁴¹⁴

Judges do not participate in the investigations or in the adversarial contest between the parties at trial. They cannot intervene to correct errors or technical choices of a party, even if they clearly damage the position of that party. If, for instance, defence counsel fails to produce a credible and available alibi witness, there is nothing a judge can do to assist the defendant. A judge may, in the absence of the jury, question the parties' advocates (particularly the prosecution) as to why particular witnesses are, or are not being called. If, however, they were to enter into the arena and effectively steer the case in one direction or another by the introduction of evidential material against the wishes of the parties an appeal on grounds of partiality would be inevitable, and its success likely.⁴¹⁵ Thus, the defendant's fate is largely dependent on the competence of his counsel.

The parties however, have different roles. The prosecution brings a case against the defendant. If he so wishes and considers it necessary, the defendant may challenge the case against him by calling witnesses and presenting evidence of his own. He may simply suggest that the prosecution evidence is insufficient. To win its case, the price of which would be the conviction of the defendant, the prosecution must convince the triers of fact beyond reasonable doubt that the defendant is guilty. The defendant on the other hand bears no burden of proof at all, unless otherwise stated in the law or he presents an alibi or other positive defence. In such cases, the defendant would be required to produce some evidence in support of his assertion.⁴¹⁶ In every other way, his active participation in the process of presenting evidence is optional and he is

⁴¹⁴ See M. Delmas-Marty & J. Spencer (Eds.), *European Criminal Procedures* (Cambridge University Press, 2002), 168-169.

⁴¹⁵ *Ibid*, 181-182.

⁴¹⁶ A burden can be placed on the defendant by virtue of common law or statutory law. Where the Defence raises the defence of insanity or diminished responsibility, it has the burden to persuade the jury that it is more likely than not that the defendant's contention is true. This is referred to as the standard of proof on the balance of probability. Regarding this standard, Lord Denning held in *Miller v. Ministry of Pensions* [1947] 2 All ER 372: "It must carry a reasonable degree of probability....If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not." It has been suggested that such burdens on the defence violate the presumption of innocence as set out in *R v. Lambert* [2002] 2 AC 545. See further: Kiralfy, *The Burden of Proof*, *supra* note 164; P. Murphy, *Murphy on Evidence* (10th Ed.) (Oxford University Press, 2007), 74-100.

presumed innocent until proven guilty. This is a fundamental element of a fair trial.⁴¹⁷ If there is anything less than a perfectly convincing performance by the prosecution, the defendant wins.⁴¹⁸

Civil Law Systems

Civil law criminal justice systems are often described as hierarchical and bureaucratic in light of their professional judiciary and centralised investigations.⁴¹⁹ It is also sometimes suggested that civil law jurisdictions prioritise the ascertainment of the truth at the expense of the fairness of the proceedings.⁴²⁰

However, the important role played by professional judges in civil law criminal proceedings is frequently associated too strongly and negatively with excessive bureaucracy, and inquisitorial proceedings.⁴²¹ Whilst historically, this may have been true, it no longer is. In medieval times, criminal investigations were entirely secretive and conducted proprio motu by an investigator without any involvement of the identified suspect. Upon completion of the investigations, the investigator would submit an official dossier (acta inquisitionis) to a court. The court would then examine the contents of the dossier. It would determine, solely or primarily on the basis of this dossier, whether the accused was guilty or not. This would occur with or without having communicated with him or counsel acting on his behalf.⁴²² Torture was used routinely in cases where an accused refused to confess and there was insufficient other evidence available.⁴²³

⁴¹⁷ Murphy, *Murphy on Evidence*, *supra* note 411, 81; *R v. Lambert* [2002] 2 AC 545, para. 33.

⁴¹⁸ This was spelled out in the famous case of *Woolmington v DPP* [1935] AC 462, per Viscount Sankey LC (at 481-2): “Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt. ... If, at the end of and on the whole of the case, there is a doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

⁴¹⁹ Jackson & Langer, *Introduction: Damaška and Comparative Law*, *supra* note 28, 1, 3-6.

⁴²⁰ Damaška, *Evidentiary Barriers*, *supra* note 30, 588-589; Cleiren and Nijboer, *Strafvordering, Text en Commentaar* (n 58 above), De verdachte, Boek I, Titel II, Art. 29 (Spronken), 80-81; Pompe, *Bewijs in Strafzaken*, *supra* note 153, 38-42.

⁴²¹ Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123, 52.

⁴²² Damaška, *Evidentiary Barriers*, *supra* note 30, 556-7, 560.

⁴²³ *Ibid.* In accordance with Roman law, torture was not allowed if there already was sufficient evidence to prove the defendant’s guilt, or if there was insufficient ground to believe that the accused was guilty as charged. However, in practice, torture was used frequently in cases where sufficient other evidence was available to prove the defendant’s guilt. There was an urge for a confession even if there

In the beginning of the nineteenth century, following the French revolution, this so-called ‘inquisitorial’ mode of proceeding, which was applied in most of continental Europe, was abolished.⁴²⁴ Since that time, significant amendments have been introduced into the civil law criminal justice systems which set clear boundaries to the unlimited and secretive criminal proceedings previously in place. Particularly Italy and Germany have departed rigorously from their inquisitorial past.⁴²⁵ Everywhere in continental Europe, whilst the investigation still has somewhat of an inquisitorial character, the trial itself has become rather adversarial.⁴²⁶ In addition, principles of fairness to the accused have increasingly become of paramount importance in criminal justice. Such principles are codified in domestic constitutions as well as

was overwhelming evidence because: (1) corporal punishment or the death penalty could only be imposed if the accused made a confession; (2) in the event that the accused confessed, he lost his right to appeal. As Van de Vrugt observed, torture as a tool of truth-finding is dubious at best and demonstrates a complete negation of the suspect as an equal subject of the law. There was criticism against the use of torture but most courts continued to allow it for a long time because no alternative was available to them to discover the truth. There was a firm belief that torturing an accused in order to obtain a confession was an effective means of truth-finding and when this was abolished, there was nothing to replace it. One had little faith in witness testimony. Thus, it was a difficult practice to abolish this custom. See M. Van de Vrugt, *De Criminele Ordonnantien van 1570: enkele beschouwingen over de eerste strafrechtcodificatie in de Nederlanden* (De Walburg Pers, Zutphen, 1978), 141-148; J. van den Berg, Th. L. Bellekom, H.M. Th. D. ten Napel, E. M. Peeters, *Inleiding Staatskunde* (Deventer: Kluwer, 1995), 70-71, 77-78; Bemmelen, *Strafvordering*, *supra* note 317, 70-71, 78-80; A. J. van Weel (Nijmegen), ‘De Nasleep van de Afschaffing van de Pijnbank, in Verslagen en mededeelingen van de Vereeniging tot uitgaaf der bronnen van het oud-vaderlandsche recht’, 14, 2 (1975) 355-367.

⁴²⁴ For many of those systems, the *Code d’Instruction Criminelle* (1808) introduced by Napoleon served as a model. Torture and other types of pain infliction were abolished. Also less degrading forms of asserting pressure on someone to speak or cooperate were banned. In most continental European systems, torture was already banned prior to the introduction of the *Code d’Instruction Criminelle*. In practice, however, torture or other types of pain infliction were still carried out. The *Code d’Instruction Criminelle* adopted in 1808 terminated any possibility of inflicting pain. Pursuant to this Code, the suspect did not have an obligation to answer questions and a judge could only through persuasion attempt to convince the suspect to confess. See Weel, *Afschaffing van Pijnbank*, *supra* note 423; Bemmelen, *Strafvordering*, *supra* note 317.

⁴²⁵ The German system has sometimes been described as an accusatorial system, in which the prosecutor charges, the parties are responsible for presenting evidence and the judge decides on innocence or guilt. As stated earlier, unlike most other civil law systems, Germany has abolished the investigative judge. The trial also tends to be more adversarial than in other civil law jurisdictions in that most witnesses testify *viva voce*. Some observers have expressed concern that Germany is going too far in copying elements from the American adversarial system. See, for instance, Malek, *Abschied von der Wahrheitssuch*, *supra* note 128, 11-13. In essence, however, Germany is still similar to other civil law criminal justice systems where the judge plays a significant role in taking evidence and has a great flexibility to admit any type of evidence deemed reliable and relevant. See G. Fletcher & S. Sheppard, *American Law in a Global Context* (Oxford University Press, 2005), 532; Wang, *Criminal Justice System in Germany*, *supra* note 322. Italy, on the other hand, has really departed from the inquisitorial method. See further M. Costi: ‘Italy’, 80-92, in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, *supra* note 25.

⁴²⁶ See for instance, the Netherlands, in Beijer, *Bewijs*, *supra* note 130, 34.1.4 Strategy of the Accused and Counsel); Cleiren & Nijboer, *Strafvordering*, *supra* note 165, De verdachte, Boek I, Titel II, Art. 29 (Spronken) 65.

applicable human rights treaties, most importantly, the European Convention on Human Rights (“ECHR”).⁴²⁷

The right to be tried without undue delay and the right not to incriminate oneself limit the scope of criminal proceedings. A defendant is further entitled to be informed of the charges against him, review and challenge the prosecution’s evidence and present his own evidence. Most civil law jurisdictions have sought to balance the different interests at stake to ensure that “truth-finding is not only lawful and effective, but that the process is fair and the exercise of state power legitimate”.⁴²⁸ Only if proceedings are fair can the truth be safely ascertained.⁴²⁹ In this regard, a German court held that the decision whether to exclude evidence is partly based on the consideration “that the truth cannot be ascertained at all costs.”⁴³⁰

The prosecutor does not have a strict burden of proof as in common law jurisdictions. The judges can fill in the gaps.⁴³¹ However, the defence has no burden to produce evidence favourable to the defendant or even to raise objections where the interests of the defence are at stake.⁴³² Where it fails to do either, judges may intervene to protect the rights of the defendant and order, proprio motu, additional investigations in order to complement the evidence favourable to the defendant.⁴³³

To safeguard the fairness of the proceedings, the defendant, assisted by counsel, is given a voice, which he can use at any time he wishes and this voice is heard.⁴³⁴ The defendant can make unsworn statements, but he cannot give evidence or perjure

⁴²⁷ Given these alterations, distinguished comparative scholars like Damaška consider it unfair to refer to modern civil law criminal proceedings as inquisitorial given its association with the unfair medieval criminal proceedings as described above. See Damaška, *Evidentiary Barriers*, *supra* note 30, 555, 562.

⁴²⁸ Brants & Field, *Convergence*, *supra* note 23, 183.

⁴²⁹ Delmas-Marty, *Procédure Pénale d’Europe*, *supra* note 23; ‘t Hart: *Openbaar Ministerie*, *supra* note 286, 167-232. This corresponds with the view of Judge Cotte, a French Judge at the ICC, holding that the only objective of criminal justice is the manifestation of the truth, but that this objective can be achieved only by ensuring that the substantive debates take place in a fair way. See *Prosecutor v. Katanga & Ngudjolo*, T. 25 May 2010, 40.

⁴³⁰ Decision of the German Supreme Court (Bundesgerichtshof): BGH St 38, 372 (373-374).

⁴³¹ Kokott, *Burden of Proof*, *supra* note 157, 9.

⁴³² This is, however, ill advised. Guidance books suggest to counsel to advise their clients to play a more active role. See for instance, the Netherlands, in Beijer, *Bewijs*, *supra* note 130, 34.1.4 Strategy of the Accused and Counsel).

⁴³³ Beijer, *Bewijs*, *supra* note 130, 34.1.4 Strategy of the Accused and Counsel.

⁴³⁴ Damaška, *Evidentiary Barriers*, *supra* note 30, 558-9, 561 Beijer, *Bewijs*, *supra* note 130, 34.1.4 Strategy of the Accused and Counsel; Bohlander, *Radbruch Redux*, *supra* note 123, at 397.

himself. Judges can ask him direct questions without him taking the oath. The defendant has the choice to answer or not to answer such questions.⁴³⁵

The trial itself is fully transparent and open. It is based on the adversarial principle, pursuant to which triers of fact and law must hear both parties before arriving at a decision. They are also required to give reasons in support of their decision, “and they must do so solely on the basis of legal and factual arguments free of personal bias so that the judgment will appear impartial.”⁴³⁶

Everyone involved in the truth inquiry is bound by the law. In gathering evidence, the police and prosecutors cannot exceed their powers explicitly granted by the law. They are bound by principles of legal certainty and legality. Judges are similarly bound by such principles, which prevents them from creating new legal norms. This ensures that the parties to the criminal trial have advance notice of the criteria guiding the decisions.⁴³⁷

Accordingly, in both types of criminal justice, fairness is of paramount importance, the trial is open and adversarial, and the defendant is given a voice.

Conclusion

In conclusion, both the common law and civil law methods meet the minimum conditions of an effective truth-ascertaining system as identified in Part I. It appears that the civil law method includes more features required to reconstruct a full and transparent picture of events painted with the assistance of everyone concerned including the victims. Thus, in theory, this method offers greater opportunities to work towards the restorative objectives of international justice.

⁴³⁵ *Ibid.* In some jurisdictions, such as the Netherlands, a choice to remain silent or tell an obvious lie may in certain circumstances be used against the defendant. See, for instance, Art. 286(4) of the Dutch CCP, and the Supreme Court’s decisions: HR 15 June 2004, NJ 2004, 464; HR 24 March 1987, NJ 1987, 893; HR 8 June 1993, DD 93.469; HR 28 May 1996, DD 96.317. See further: Beijer, *Bewijs*, *supra* note 130, 34.2.3 Interrogation of the Accused; Nijboer, *Strafrechtelijk Bewijsrecht*, *supra* note 160, 219-224; E. Jessurun d’Olivier-Prakken, ‘Bewijs als toetssteen van strafrecht’ (Recht, macht en manipulatie (Kempe bundle, Utrecht/Antwerpen 1976), 20; G.J.M. Corstens, *Het Nederlands Strafprocesrecht*, (Deventer Kluwer 2008, 6th edition) 667-668.

⁴³⁶ Guarnieri & Pederzoli, *Power of Judges*, *supra* note 158, 10–11.

⁴³⁷ *Ibid.* However, in interpreting the law, some judicial creativity is not only allowed but also desired (5).

Both types of procedure, however, have their strengths and weaknesses in seeking to achieve accurate results. Civil law jurisdictions allow the triers of fact to review all evidence, including unreliable evidence that should not be relied on for any of the findings. Yet, their triers of fact are judicially trained and are, therefore, at least in theory able to separate reliable from unreliable information. As a safeguard against erroneous factual findings, they must offer an explanation of their findings, which is appealable. Common law systems do not require the triers of fact to explain their findings. However, they seek to ensure that the triers of fact can only base their findings on relevant and reliable evidence.

It is therefore apparent that the salient factors of the two types of procedure are interrelated and interdependent. The totality of these ingredients works as a system. It remains to be seen whether these same ingredients still work as a system if they are torn apart and mixed with other ingredients in a new procedure.⁴³⁸

The ultimate accuracy of the outcome in individual cases depends on the people involved in the process, as well as the political climate in a country. In civil law jurisdictions, a defendant is particularly dependent on the openness of the judge. In common law jurisdictions, a defendant predominantly depends on the diligence and vigilance of his counsel.⁴³⁹ The overall quality of justice depends on all parties, participants and triers of fact and law involved. Their freedom to act in accordance with legal principles depends strongly on their political independence. For instance, a judge may be less inclined to acquit if that would ruin his career.⁴⁴⁰

Even in democratic countries, things go wrong in both types of criminal justice. Miscarriages of justice have been brought to light in both common law and civil law

⁴³⁸ See R. Haveman: *The Context of the Law*, in: R. Haveman, O. Kavran & J. Nicholls (Eds.), *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003), 9, at 35-36. Also E. van Sliedregt, *Introduction: Common Civility – International Criminal Law as Cultural Hybrid*, 24 *Leiden Journal of International Law* 389 (2011), 389.

⁴³⁹ Kokott, *Burden of Proof*, *supra* note 157, 1.

⁴⁴⁰ This fear led the Supreme Court of the Netherlands to collaborate with the German regime during the occupation in World War II. Its impartiality and independence were thereby compromised. See J. van den Berg, Th. L. Bellekom, H.M. Th. D. ten Napel, E. M. Peeters, *Inleiding Staatskunde* (Deventer: Kluwer, 1995), Chapter 19: 'De rechterlijke macht' J.Th.J van den Berg, H.-M.Th.D. ten Napel pages 389-406.

procedures.⁴⁴¹ It is impossible to determine which method is safer in obtaining accurate results, as it is unknown how often miscarriages of justice have gone unnoticed. In addition, when miscarriages of justice are referred to, they tend not to include wrongful acquittals.⁴⁴²

The reality of criminal justice is not necessarily in accordance with its theory. Each criminal justice system is fallible. In individual cases, fair trial principles are not always duly respected, and the triers of fact may be biased. Research has demonstrated that miscarriages of justice increase where the cases are higher profile.⁴⁴³ When crimes stir up a public outrage and condemnation, mistakes are made more regularly. This increases where crimes are hard to prove because they are committed by the mafia, a terrorist organisation or other organised crime group. Placed under pressure to collect sufficient quality evidence for a conviction, overzealous police officers or prosecutors are more inclined to use unlawful methods to obtain evidence and secure convictions.⁴⁴⁴ Ambitious investigators may also be too

⁴⁴¹ See, for instance, the Dutch case Schiedammer parkmoord, which concerned a miscarriage of justice caused by the confession of innocent suspects. See further P. J. van Koppen, *De Schiedammer parkmoord; een rechtspsychologische reconstructie* (Nijmegen: Ars Aequi Libri, 2003); Evaluation report of the Commission Posthumus in the Schiedammer park-moord, 13 September 2005, 172). As for France, examples of miscarriages of justice are given in: Bouazdi, 'France', in Buisman, *Civil Law*, in Khan, *Principles of Evidence*, *supra* note 25. In the UK, the most well-known miscarriages of justice concerned trials involving Northern Irish terrorist suspects. See, for instance, the Birmingham Six, Maguire Seven, and Guildford Four, which led to public outrage. See further: Armytage, *Educating Judges*, *supra* note 313, (Sir Dorabji Tata Memorial Lecture, delivered under auspices of Sir Dorabji Tata Trust in New Delhi, 5 January 1999 and in Mumbai on 6 January 1999), 274-275.

⁴⁴² See, for instance, C. Walker & K. Starmer (Eds.), *Miscarriages of Justice* (Oxford University Press, 1999), Chapter 2. See also Armytage, *Educating Judges*, *supra* note 313, 259: "I suppose a purist might argue that a miscarriage of justice occurs as much when a guilty man is acquitted as when an innocent man is convicted. It is not, however, the acquittal of the guilty which on the whole gives rise to public disquiet, and the occasional acquittal of guilty defendants is, I think, generally accepted as the price which has to be paid for observance of the beneficial principle that the defendant shall enjoy the benefit of any doubt."

⁴⁴³ See *supra* note 441. In respect of the Irish terrorist cases, most notably the Birmingham Six, Guildford Four, and Maguire Seven, it was held that "[t]here is a widespread reaction of public outrage. The situation is fraught with difficulty, because the responsible police forces come under the strongest pressure to bring the perpetrators of such atrocities to justice and jurors would be less than human if, despite the strongest judicial warnings, they were not tempted to reflect the sense of outrage felt by the community as a whole" (Armytage, *Educating Judges*, Ch VII 'The English Criminal Trial: The Credits and the Debits', 252, at 262. See also Pompe, *Bewijs in Strafzaken*, *supra* note 153, 49-50.

⁴⁴⁴ For instance *Malone v. United Kingdom*, Judgment of 2 August 1984, 1984 ECHR (Ser. A.) 82; *Schenk v. Switzerland*, Judgment of 12 July 1988, 1988 ECHR (Ser. A.) 140; *Unterpertinger v. Austria*, Judgment of 24 November 1986, 1986 ECHR (Ser. A.) 110; *Barbera, Messegué & Jabardo v. Spain*, Judgment of 6 December 1988, 1988 ECHR (Ser. A.) 146; *Kostovski v. The Netherlands*, Judgment of 20 November 1989, 1989 ECHR (Ser. A.) 166; *Delta v. France*, Judgment of 19 December 1990, 1991 ECHR (Ser. A.) 191, para. 35; *Lüdi v. Switzerland*, Judgment of 15 June 1992, 1992 ECHR (Ser. A.) 238; *Saïdi v. France*, Judgment of 20 September 1993, 1993 ECHR (Ser. A.) 261.

fixated on guilt and, therefore, turn a blind eye to evidentiary leads suggesting otherwise.⁴⁴⁵

The media closely follows high profile cases and often condemns the alleged perpetrator before he has had a chance to defend himself in a court of law. Adverse pre-trial media may influence triers of fact. One only has to think of the extreme public reactions provoked by cases involving paedophilia or rape, as was recently demonstrated in the case of Dominique Strauss-Kahn. The American media thoroughly condemned him for raping a hotel employee in New York. The prosecution then withdrew the case against him, as it had lost faith in its only witness.⁴⁴⁶ Others were less lucky. In the United Kingdom, a number of Northern Irish “terrorists” were erroneously convicted.⁴⁴⁷ Many “terrorists” have been held by the US for years on vague or non-existing charges in an extrajudicial detention camp at Guantánamo Bay.⁴⁴⁸

These are a few examples to demonstrate that the quality of justice is often determined by extra-judicial factors, rather than the criminal justice model which is in place. When a miscarriage of justice is identified in a democratic society, usually a strong public reaction follows resulting in amendments to the law. In other words, a system has a tendency to rectify itself over time and address deficiencies that come to light.⁴⁴⁹

⁴⁴⁵ In the Netherlands, a blind focus on the guilt of the accused at the exclusion of alternative options has been referred to as a tunnel vision (*koker visie*). The prosecution has frequently been accused of applying a tunnel vision which has led to serious errors. See Wagenaar, *Vincent plast op de grond*, *supra* note 129, 15-17, 30-49, 62-72, 223-225.

⁴⁴⁶ http://www.courts.state.ny.us/whatsnew/pdf/dsk_motion_to_dismiss.pdf;

<http://www.nytimes.com/interactive/2011/08/22/nyregion/dsk-recommendation-to-dismiss-case.html>

⁴⁴⁷ See *supra* note 441.

⁴⁴⁸ See, for instance, http://en.wikipedia.org/wiki/Guantanamo_Bay_detention_camp

⁴⁴⁹ For instance, in the UK, a Court of Appeal was established in 1907 as a reaction to public concerns expressed in respect of the criminal justice system following the case of Mr. Adolf Beck who had been wrongfully identified by fifteen honest witnesses. In 1985, a Crown Prosecution Service (CPS) was established as a response to criticism with regard to police misconduct, which had resulted in miscarriages of justice. See Uglow, *Criminal Justice*, *supra* note 138, 177, 180-181, 191; Armytage, *Educating Judges*, *supra* note 313, 259. In France, reforms were proposed following the Outreau case scandal. A Parliamentary Commission investigated the case and drafted a report with recommendation to amend the French criminal procedure in order to avoid any repetition at: <http://www.assemblee-nationale.fr/12/dossiers/outreau_aff_aire_dysfonctionnements_justice.asp>.

Thus, the civil and common law domestic jurisdictions experienced a progression steeped in tradition and fashioned over centuries through trial and error. Procedural changes that have occurred in this process corresponded with the contemporaneous political climate. Legal structures cannot be separated from societal norms, structures and culture as developed over time.⁴⁵⁰

The more recently formed international criminal court and tribunals did not undergo the same historical development. The crimes under the jurisdiction of international criminal courts and tribunals are of the worst kind and attract wide public attention. Part I has described the ambitious goals international courts and tribunals have set for themselves, and the urge felt to do justice to the victims. Many of the accused before international tribunals are extremely high profile and have been condemned in the media long time before they are brought to justice.⁴⁵¹

In such circumstances, a strong judicial system is needed to withstand the political pressure and manipulation from all sides. It is therefore all the more important that the international criminal justice model meets the conditions, which have been identified in Part I. It has already been pointed out that, at least in theory, the civil law and common law criminal procedures both meet the minimum conditions set out in Part I. Now, it will be considered whether the combination of the two into the ICTY, ICTR and ICC criminal proceedings still meets these conditions.

Combination of civil law and common law methodologies

From the start, the union of civil and common law legal principles had deep tensions within it. The international criminal justice systems mix a powerful judiciary controlling the conduct of the proceedings with autonomous, independent parties.⁴⁵²

⁴⁵⁰ Jackson & Langer, *Introduction: Damaška and Comparative Law*, *supra* note 28, 1, at 3-6.

⁴⁵¹ See above, section 'Expressed Reservations on Establishing Historical Facts'.

⁴⁵² For an analysis of the main features of the two systems and their interaction in international jurisdictions, see Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the ad hoc Tribunals* (1999) 46 *Netherlands International Law Review* 343; and V. Tochilovsky, 'Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia' in Horst Fischer Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law* (Berlin Verlag Arno Spitz, 2001) 627.

Investigations and Charging Suspects

The roles of the parties as described in the Statute and the Rules are based on common law. The parties may choose their own strategy and conduct their own independent investigations. The Prosecutor is responsible for conducting investigations, identifying suspects of crimes falling within the jurisdiction of the tribunal and bringing charges against them.⁴⁵³ The defence is responsible for gathering evidence in support of the defendant's case. If the defence faces difficulties, for instance because it has been refused access to material essential for the preparation of a defence, and it has done all within its means to obtain this material, it may call upon the Chamber for assistance.⁴⁵⁴

There is no investigative judge or any similar body, and in the ICTY and ICTR, the judiciary is not ascribed any investigative role. The ICC, on the other hand, has a Pre-Trial Chamber, consisting of three judges.⁴⁵⁵ The Pre-Trial Chamber has multiple tasks and is actively involved in the management of the pre-confirmation and confirmation phases. It has the task to oversee the fairness of the pre-trial proceedings and ensure that there is compliance with the pre-confirmation disclosure obligations. However, its role is not comparable to the role of an investigative judge. The Pre-Trial Chamber has no investigative powers, except in situations where a unique investigative opportunity arises. In such a situation, pursuant to Article 56(1)(b) of the ICC Statute, the Pre-Trial Chamber may, “upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.”⁴⁵⁶

⁴⁵³ Art 16(1) ICTY Statute; Art 15(1) ICTR Statute.

⁴⁵⁴ ICTY/ICTR Rule 54; Part IX of the ICC Statute. In certain circumstances, a Chamber may order the prosecution to obtain certain documents for the defence pursuant to Rule 89 even if the Defence made no efforts to obtain such documents. However, in general, a Chamber would only make such an order where the Defence has made its own independent efforts “to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution.” (*Prosecutor v. Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, ICTR-2001-76-T, 4 October 2004, para. 11).

⁴⁵⁵ Rome Statute, *supra* note 44, Art. 56.

⁴⁵⁶ In accordance with Article 56(2), such measures may include “(a) Making recommendations or orders regarding procedures to be followed; (b) Directing that a record be made of the proceedings; (c) Appointing an expert to assist; (d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence; (e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons; (f) Taking such other action as may be necessary to collect or preserve evidence.”

Where the Prosecutor fails to take such measures without good reason and after consultation with him, the Pre-Trial Chamber may take such measures *proprio motu* if necessary to preserve evidence (Article 56(3) ICC Statute). However, this power can be exercised in exceptional situations only and, thus, constitutes a limited investigative power.

In the ICTY and ICTR, a judge is charged with confirming charging documents and issuing arrest warrants provided it is satisfied that the Prosecutor has established a *prima facie* case against an identified suspect of crimes under the jurisdiction of the tribunal.⁴⁵⁷ The defence does not participate in this process. In the ICC, on the other hand, a confirmation hearing takes place before the Pre-Trial Chamber. This is after the Pre-Trial Chamber has determined *ex parte* that there is a reasonable ground to believe that the defendant is guilty as charged and issued a warrant of arrest or a summons to appear.⁴⁵⁸ The defence is entitled to participate actively in the confirmation hearing and challenge the charges. Both parties are entitled to submit evidence and call live witnesses in this process.⁴⁵⁹ Counsel representing victims are also allowed to participate and make oral and legal submissions.⁴⁶⁰

On the basis of all evidence presented, the Pre-Trial Chamber determines whether there are substantial grounds to believe that the suspect committed the crimes charged. If so satisfied, the Pre-Trial Chamber issues a decision confirming the charges. If not so satisfied, it dismisses the charges.⁴⁶¹ It can also modify them or the mode of liability, in which case it may order a new confirmation hearing.⁴⁶²

⁴⁵⁷ Art 18(4), Art 19(1) and Art 19(2) ICTY Statute; Art 17(4), Art 18(1) and Art 18(2) ICTR Statute. At the request of the Prosecutor, the judge may “issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial” (19(2) ICTY Statute; 18(2) ICTR Statute. A duty or reviewing judge is designated for this matter pursuant to Rule 28 ICTY/ICTR.

⁴⁵⁸ In the case of *Katanga*, the Prosecutor had initially sought his arrest on the basis of ordering the crimes charged as the mode of liability. The Single Judge confirmed the warrant of arrest but added common plan as an alternative mode of liability. Eventually, the charges against Mr. Katanga and his co-accused Mr. Ngudjolo were confirmed only under the common plan mode of liability. See *Prosecutor v. Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July, 2007, ICC-01/04-01/07-4; *Prosecutor v. Katanga & Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717.

⁴⁵⁹ Rome Statute, *supra* note 44, Art. 61; ICC Rules of Procedure and Evidence, Rule 121.

⁴⁶⁰ See further below, section ‘victim participation’.

⁴⁶¹ See, for instance, Bahar Idriss Abu Garda whose case was not confirmed due to insufficient

Disclosure Obligations

Since June 2006, through amendment of ICTY Rule 73bis the Chamber in the ICTY has the power to invite the Prosecutor in advance of the trial to reduce the number of counts charged in the indictment (73bis(D)), or direct him to select those on which to proceed (73bis(E)). This amendment was in line with a Report produced earlier by the Expert Group which made recommendations to transform the party-based proceedings into proceedings controlled more tightly by the judges.⁴⁶³ This amendment was not adopted by the ICTR, where the Prosecutor is still exclusively responsible for charging defendants without judicial intervention, other than the confirmation of the indictment.

Judicial control particularly at the ICTY has also significantly increased in the areas of prior disclosure of material to the bench. Initially, disclosure obligations existed only vis-à-vis the opposite party, not the Chamber. In line with common law, the Chamber was not intended to have information, other than the indictment, prior to the start of the trial. The Defence had no disclosure obligation at all other than to give a notification of an alibi or other special defence.⁴⁶⁴ The disclosure regime has changed drastically over the years, although it is still a point of dispute between common law and civil law jurists.⁴⁶⁵

As a result of the adoption of new rules 65ter, 73bis and 73ter in July 1998 for the ICTY, and 73bis and 73ter in June 1998 for the ICTR and subsequent amendments, the parties are now required to submit to the Court and opposing party a pre-trial brief. It addresses the factual and legal issues and is accompanied by a list of

evidence to meet the ‘substantial grounds to believe’ standard: *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red.

⁴⁶² This occurred in the *Bemba* trial: *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15-06-2009.

⁴⁶³ ‘Statement by Tribunal President Judge Fausto Pocar to the Security Council 7 June 2006’. Published in: Tochilovsky, *Nature and Evolution of the Rules* in: Khan, Principles of Evidence, *supra* note 25, 173-174.

⁴⁶⁴ Rules 67(A)(ii)(a) & (b) obligates the defence to notify the prosecution of its intent to offer the defence of alibi or any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi or special defence.

⁴⁶⁵ This was still in dispute during the ICC negotiations. See Tochilovsky, *Nature and Evolution of the Rules* in Khan, Principles of Evidence, *supra* note 25, 167-169.

witnesses and their particulars, summaries and length of their anticipated testimony, as well as a list of exhibits upon which the parties intend to rely.⁴⁶⁶ At the ICTY, the pre-trial judge is designated who is in charge of pre-trial proceedings to ensure to ensure that the parties meet their disclosure obligations in a timely manner.⁴⁶⁷ A failure for either party to meet any of the deadlines set for disclosure may lead the Chamber to impose sanctions such as the exclusion of testimonial or documentary evidence.⁴⁶⁸ The ICTR did not follow this example.

In advance of the trial, the Prosecutor is obliged to disclose all this information, as well as all supporting material which accompanied the indictment, in advance of the trial.⁴⁶⁹ If disclosure has an adverse impact on the safety of the witness or on the ongoing investigations, such disclosure may be delayed until such moment that the Trial Chamber considers disclosure thereof to the defence necessary to allow adequate time for preparation of the defence. The public may never be informed of the identities of witnesses whose safety is at risk and be excluded from large portions of their testimonies.⁴⁷⁰

The Prosecutor must further allow the defence, if so requested, to inspect any documents which are material to the preparation of the defence, intended for use by the Prosecutor as evidence at trial, or which have been obtained from, or belonged to the accused.⁴⁷¹ At the ICC, and since March 2008 at the ICTY as well, the defence is likewise required to permit the Prosecution to inspect all materials on which it intends to rely. This is, however, only the case in the event that the defence decides to present a case after the close of the Prosecutor's case.⁴⁷² The ICTR did not adopt a similar obligation.⁴⁷³

⁴⁶⁶ ICTY Rule 65ter(E) and (G); ICTR Rule 73bis(D) and 73ter(D), adopted in Fifth Plenary Session, 1-8 June 1998.

⁴⁶⁷ ICTY Rule 65ter.

⁴⁶⁸ ICTY Rule 65ter(N).

⁴⁶⁹ ICTY/ICTR Rules 66(A)(i), 66(A)(ii), 67(A)(i).

⁴⁷⁰ ICTY/ICTR Rule 69; 75; Article 67(1)(b) ICC Statute; Rules 81(2) & (4) ICC Rules.

⁴⁷¹ ICTY/ICTR Rule 66(B).

⁴⁷² Rule 67(A) of the ICTY Rules now provides: "(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98bis, but not less than one week prior to the commencement of the Defence case, the Defence shall: (i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial..." Rule 78 of the ICC Rules requires the defence to permit inspection of materials intended for use by the defence as evidence at either the

The Prosecution further has an obligation to provide to the Chamber the written statements of each witness he intends to call to testify.⁴⁷⁴ Initially, he only had an obligation to disclose those statements to the defence. The ICTR *Akayesu* case was the first case where the Prosecutor was ordered to disclose, not only to the defence but also to the Chamber, the statements of the witnesses to be called.⁴⁷⁵ It soon became routine in both tribunals and a legal obligation upon the Prosecutor in 1998.⁴⁷⁶ In some cases, in order to acquire complete knowledge of the facts, judges of a civil law background would even ask for disclosure of the exculpatory material that had been disclosed to the defence.⁴⁷⁷

Closer to the commencement of the trial, the defence at the ICTY is obliged to file a statement of admitted facts and law and a pre-trial brief addressing factual and legal issues, including the nature of the accused's defence, the contested issues and the grounds on which these issues are contested.⁴⁷⁸ The defence has a similar obligation at the ICC.⁴⁷⁹ In the ICTR, the defence may be ordered to produce a pre-trial brief,⁴⁸⁰ but is in reality rarely ordered to do so.

Unless it relies on an alibi or special defence, the defence does not need to give details about witnesses it intends to rely on, or disclose their statements until after the close of the Prosecutor's case. Initially, the defence had no obligation to provide the Prosecutor and/or Chamber with statements of witnesses it intended to rely on.

confirmation hearing or trial, and which does not require the trigger of a defence request for inspection of prosecution materials.

⁴⁷³ It should, however, be noted that the ICTR Rule 67(C) still provides for reciprocal disclosure, requiring the defence to allow the prosecution to inspect defence material but only if the defence has made a request for disclosure under rule 66(B). The notion of reciprocal disclosure was removed from the ICTY rules in December 2003 (29th Plenary Session (12 December 2003) (IT/32/Rev.29).

⁴⁷⁴ ICTY/ICTR Rules 66(A)(i), 66(A)(ii), 67(A)(i).

⁴⁷⁵ *Prosecutor v. Akayesu*, Decision by the tribunal on its request to the prosecutor to submit the written witness statements, 28 January 1997, ICTR-96-04-T.

⁴⁷⁶ Rule 73bis(B), adopted by the ICTY on 10 July 1998, IT/32/Rev. 13; and by the ICTR in the 5th Plenary Session on 8 June 1998.

⁴⁷⁷ *Prosecutor v. Stakić* (Transcript), 25 November 2002, IT-97-24-PT, 9437.

⁴⁷⁸ ICTY Rule 65ter(F). Amended during 21st Session, 15 – 17 November 1999, IT/32/Rev. 17, incorporated on 7 December 1999.

⁴⁷⁹ Regulations of the Court, Reg. 54. See also *Prosecutor v. Lubanga*, Decision on Defence disclosure by the Defence, 20 March 2008, ICC-01/04-01/06-1235, para. 41; *Prosecutor v. Katanga & Ngudjolo*, Decision on the prosecution's application concerning disclosure by the defence pursuant to Rules 78 and 79(4), 14 September 2010, ICC-01/04-01/07-2388.

⁴⁸⁰ ICTR Rule 73bis(F).

However, since June 2000, the ICTR Chambers have the power to order the defence to provide it with copies of such statements,⁴⁸¹ and has routinely used this power.⁴⁸² Since March 2008, the defence at the ICTY similarly has an obligation to provide statements of defence witnesses, but to the Prosecutor only, not the Chamber.⁴⁸³ At the ICC, no defence team has yet been ordered to disclose statements of the witnesses it intends to call.⁴⁸⁴

Such pre-trial disclosure to the Chamber as well as the opposite party has increased the Chamber's prior knowledge of the dossier. This was considered necessary to enable the Chamber to control the proceedings more efficiently and ensure more expeditious trials.⁴⁸⁵ However, this disclosure is not tantamount to the disclosure of a dossier in civil law systems because none of the items constitute evidence. Its purpose is simply to manage the trial—statements or summaries contained in the pre-trial brief have no evidentiary value. Only if a witness testifies and his statement is used in whole or in part, may such a statement be introduced into evidence.

The Prosecutor also has an ongoing obligation to disclose to the defence “any material, which in the actual knowledge of the Prosecutor may suggest the innocence, mitigate the guilt of the accused or affect the credibility of the Prosecution evidence”.⁴⁸⁶ Only in highly exceptional circumstances and with leave of the Chamber may exonerating information be withheld from the defence if, for instance, its disclosure may affect State security interests,⁴⁸⁷ or where information was given to

⁴⁸¹ ICTR Rules, Rule 73ter(B), adopted during Eighth Plenary Session: 26 June 2000.

⁴⁸² *Prosecutor v. Rwamakuba*, T. Ch. III. Decision on prosecution motion for disclosure of witness list and witness statements, 4 October 2005, ICTR-98-44C; *Prosecutor v. Bagosora*, Decision on alleged deficiencies in the Kabiligi pre-defence brief, 30 October 2006, ICTR-98-41-T), para. 5.

⁴⁸³ Rule 67 of the ICTY Rules, as amended 3 March 2008 by IT/256.

⁴⁸⁴ In the Lubanga and Katanga trials, the Defence was not ordered to disclose statements. See *Prosecutor v. Lubanga*, Decision on Defence disclosure by the Defence, 20 March 2008, ICC-01/04-01/06-1235, para. 41; *Prosecutor v. Katanga & Ngudjolo*, Decision on the prosecution's application concerning disclosure by the defence pursuant to Rules 78 and 79(4), 14 September 2010, ICC-01/04-01/07-2388. Regulations of the Court, Reg. 54, however, allows Chambers to order the Defence to provide the witness statements. This regulation provides: ‘At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, inter alia... f) The production and disclosure of the statements of the witnesses on which participants propose to rely...’

⁴⁸⁵ See Tochilovsky, *Nature and Evolution of the Rules*, in Khan, *Principles of Evidence*, *supra* note 25, 164-174.

⁴⁸⁶ ICTY/ICTR Rule 68(A).

⁴⁸⁷ ICTY/ICTR Rule 66(C). The Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose exculpatory materials if the disclosure thereof to the Defence may prejudice further or ongoing investigations, be contrary to the public interest or affect the security

the Prosecutor on a confidential basis.⁴⁸⁸

This duty does not include an obligation on the part of the Prosecutor to search actively for exonerating material. It simply obliges the Prosecutor to disclose such materials if he is aware of their existence. At the ICC, on the other hand, the Prosecutor not only has a statutory obligation to disclose exonerating evidence, but also to search for incriminating and exonerating evidence equally.⁴⁸⁹ Only in exceptional cases and with leave of the Pre-Trial Chamber may the Prosecutor be exempted from his disclosure obligations. This occurs when disclosure may affect the Prosecutor's ongoing investigations, put victims and witnesses at risk, or is obtained on the basis of an agreement of confidentiality with an NGO.⁴⁹⁰

Trial Proceedings

In the course of the trial, while presenting their cases, the Prosecutor proceeds first, followed by the defence, if at all. The parties are entirely free to make strategic choices as to what evidence to use and what not to use, provided the disclosure obligations have been followed.

The parties call their own witnesses and examine them. The parties are not allowed to use leading questions except during cross-examination or if a witness is declared hostile.⁴⁹¹ The parties are entitled and expected to cross-examine the witnesses of the opposite party. A failure to cross-examine a witness on all aspects of its case may be interpreted "as a tacit acceptance of the truth of the witness's evidence on that

interests of any State (Rule 68(D)). In determining whether the prosecutor is exempt from his disclosure duty to the Defence, the Chamber must carefully balance the rights of the accused and the interests at stake. See, for instance, *Prosecutor v. Karemera*, Decision on the prosecutor's motion for special protective measures for witnesses G and T and to extend the decision on protective measures for the prosecutor's witnesses in the Nzirorera and Rwamakuba cases to co-accused Ngirumpatse and Karemera and defence's motion for immediate disclosure, 20 October 2003, ICTR-98-44-T, para. 18.

⁴⁸⁸ See ICTY/ICTR Rule 70. Rule 70(A) exempts from disclosure the internal working documents of a party, while Rule 70(B) to (G) protects sources of certain information given on a confidential basis. See *Prosecutor v. Brđanin*, Public version of the confidential decision on the alleged illegality of rule 70, IT-99-36-T, 6 May 2002, para. 18; *Prosecutor v. Milutinović*, A. Ch. Decision on request of United States of America for review, IT-05-87-AR108bis 2, 12 May 2006, para. 38.

⁴⁸⁹ Rome Statute, *supra* note 44, Art. 54(1)(a).

⁴⁹⁰ See, for instance: *Prosecutor v. Katanga & Ngudjolo*, Decision on Article 54(3)(e) documents identified as potentially exculpatory or otherwise material to the defence's preparation for the confirmation hearing, ICC-01/04-01/07-621, 20 June 2008. See below section 'Protective Measures'.

⁴⁹¹ *Prosecutor v. Limaj et al*, T. 2104 – T. 3164; *Prosecutor v. Katanga & Ngudjolo*, T. 8 Feb 2010, 64-68. See also K. Khan & R. Dixon, *Archbold International Criminal Courts Practice: Procedure & Evidence* (3rd Ed.) (Sweet & Maxwell, 2009), para. 9-125.

matter”.⁴⁹² The parties are allowed to cross-examine on all issues raised in examination-in-chief or affecting the witness’s credibility. With leave of the Chamber, the cross-examining party can also enquire into additional matters, or put its case to a witness and ask him to comment on it, or explain an apparent contradiction.⁴⁹³

After cross-examination, the party whose witness is on the stand may conduct re-examination.⁴⁹⁴ At the ICC, the terms “examination-in-chief”, “cross-examination”, and “re-examination” have been left out of the Statute and Rules of Procedure and Evidence. This was done deliberately so as not to give preference to the common law over the civil law style of the procedure. However, until now, the parties have been allowed to cross-examine in a manner similar to common law trials.

With the purpose of ensuring effective truth-ascertainment and avoiding needless consumption of time, the judges exercise control over the manner and order in which the parties examine the witnesses and present their evidence.⁴⁹⁵ Accordingly, they can intervene to ensure that the questions posed to the witness are relevant, not leading unless in cross-examination, and respectful to the witness. They can also limit their time for cross-examination.⁴⁹⁶ In addition, they can order the parties to shorten the examination-in-chief of their witnesses,⁴⁹⁷ or to reduce the total number of witnesses scheduled to be called.⁴⁹⁸ While the ICTR rules refer to a request from the Chamber that the parties reduce witnesses or length of testimony, the ICTY rules use more forceful language indicating that it is the Chamber which shall determine the number

⁴⁹² *Rutaganda v. Prosecutor*, A. Ch. Judgment, ICTR-97-3-A, 26 May 2003, para. 310.

⁴⁹³ Amendments to Rule 90(H) ICTY Rules and Rule 90(G) ICTR Rules (by amendment of 17 November 1999 at ICTY and 27 May 2003 at ICTR).

⁴⁹⁴ ICTY/ICTR Rule 85(B).

⁴⁹⁵ Rule 43 ICC Rules; ICTY/ICTR Rule 90(F)(i), as amended in the ICTR on 1 July 1999: <http://69.94.11.53/ENGLISH/rules/010799/6.htm>. The ICTY Rule was amended on 12 April 2001, which came into effect on 4 May 2001 (IT/32/Rev. 20), at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev20_en.pdf

⁴⁹⁶ Often, a certain percentage of the time given to the party-in-chief is given to the cross-examining party. See, for instance, *Prosecutor v. Prlić et al*, A. Ch. Decision on prosecution appeal concerning the Trial Chamber’s decision on the evidence of witness Milan Babić, IT-04-74-A, 14 September 2006. For an overview of cases in respect of judicial control over the proceedings, see Khan & Dixon, *Archbold International Criminal Court*, supra note 486, paras. 8-100 – 8-105.

⁴⁹⁷ ICTR: 73bis(C), 73ter(C); ICTY: 73bis(B). See also *Prosecutor v. Milošević*, A. Ch. Reasons for refusal of leave to appeal from decision to impose time limit, IT-02-54-A, 16 May 2002, para. 10, where the Appeals Chamber noted that the Chamber’s power to control proceedings during the course of the trial is an inherent power.

⁴⁹⁸ ICTR 73bis(D), 73ter(D); ICTY 73bis(C); 73ter(C) & 73ter(E).

of witnesses to be called by the parties and the time available to present the evidence. In a similar manner, the ICC judges can exercise control over the presentation of the evidence by the parties.⁴⁹⁹

In the ICTY, ICTR and ICC, the Chamber is not dependent only on the parties asking relevant questions for the establishment of the truth. It can also ask questions of a witness. For instance, where important and relevant evidence is not elicited from a witness by the parties, the Chamber may seek to elicit this information.⁵⁰⁰ The Chamber's questions are aimed at clarifying matters raised by the parties and participants.⁵⁰¹ They "can be closed, they can be open, they can be leading while they are -- they are done with a view to finding the truth. ... The Chamber has a possibility to ask questions which will make it possible to continue together in the search of the truth".⁵⁰²

New to the proceedings of the ICC is, the victims may participate in criminal proceedings and bring matters to the attention of the Court.⁵⁰³ Article 69(3) gives the Court a general right to request the presentation of all evidence necessary for the determination of the truth. Victims may assist in the determination of the truth and may, for that purpose, be permitted to tender and examine evidence. They may also put appropriate questions pursuant to Rule 91(3) of the ICC Rules of Procedure and Evidence, not only in respect of reparation issues but whenever their personal interests are engaged by the evidence under consideration.⁵⁰⁴

⁴⁹⁹ *Prosecutor v. Katanga & Ngudjolo*, Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, ICC-01/04-01/07-956, 13 March 2009; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010; *Prosecutor v. Ruto, Kosgey and Sang*, Pre-Trial Chamber II, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, ICC-01/09-01/11-221, 10 August 2011.

⁵⁰⁰ *Prosecutor v. Milutinović* (Transcript) IT-05-87 (9 August 2006) 1291–1292; *Prosecutor v. Katanga & Ngudjolo*, T. 9 Feb 2010, 20.

⁵⁰¹ *Prosecutor v. Katanga & Ngudjolo*, T. 9 Feb 2010, 20.

⁵⁰² *Prosecutor v. Katanga & Ngudjolo*, T. 8 Feb 2010, 67.

⁵⁰³ Art. 68 of the Rome Statute, *supra* note 44. The Trial Chamber in *Lubanga* held that in order to determine which applicant victims will have the right to participate in the trial, the Trial Chamber will consider whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85, and whether the interests of the victim are affected in the proceedings in accordance with Art. 68(3) of the Statute. See *Prosecutor v. Lubanga*, T. Ch. I. Decision on victim's participation ICC-01/04-01/06-1119, 18 January 2008.

⁵⁰⁴ *Ibid.*, para. 108; *Prosecutor v. Lubanga* A. Ch. Judgment on the appeal of the prosecutor and the defence against Trial Chamber I's decision on victims' participation of 18 January 2008, ICC-01/04-01/06-1347, 11 July 2008; *Prosecutor v. Katanga & Ngudjolo*, A. Ch. Decision on the Set of Procedural

In 1998, the ICTY and ICTR introduced a new Rule 98bis pursuant to which, at the end of the Prosecutor's case, the defence can make 'half time' submissions challenging the sufficiency of the prosecution evidence to sustain the offences on the indictment.⁵⁰⁵ Only if the judge then considers that the Prosecutor has established a *prima facie* case is there a case to answer for the defence. This is a common law practice.⁵⁰⁶ The ICC has not adopted such a provision, given that the charges have already been confirmed on the higher standard of 'substantial ground to believe'.⁵⁰⁷

If new significant issues have arisen during the defence case, which could not reasonably have been anticipated, the judges at the ICTY and ICTR may allow the Prosecutor to bring evidence in rebuttal.⁵⁰⁸ If new significant issues arise directly out of rebuttal evidence, and the defence "could not be expected to have been addressed during the Defence case", the defence can subsequently present evidence in rejoinder.⁵⁰⁹ At the ICC, rebuttal evidence is not permissible.⁵¹⁰

In highly exceptional circumstances, the Prosecutor can apply to re-open his case after the close of his case but before the judgment is rendered. This right is not provided in the Statute or Rules but has been created by jurisprudence. The Prosecutor can invoke this right if he is in possession of fresh evidence, which could not have been found with the exercise of reasonable diligence before the close of the case, and its probative

Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008; *Katanga & Ngudjolo*, Decision on limitations of set of procedural rights for non-anonymous victims, ICC-01/04-01/07-537, 30 May 2008; *Katanga & Ngudjolo*, T. Ch. Decision on the modalities of victim participation at trial, ICC-01/04-01/07-1788-tENG, 22 Jan 2010.

⁵⁰⁵ Rule 98bis was introduced on 10 July 1998 for the ICTY (IT/32/Rev. 13) and on 8 June 1998 for the ICTR (Fifth Plenary Session).

⁵⁰⁶ *Prosecutor v. Strugar*, Decision on defence motion requesting judgment of acquittal pursuant to Rule 98bis, IT-01-42-T, 21 June 2004, para. 10; *Prosecutor v. Milošević*, Decision on motion for judgment of acquittal, IT-02-54-T, 16 June 2004, paras. 11-12.

⁵⁰⁷ *Prosecutor v. Katanga & Ngudjolo*, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12, ICC-01/04-01/07-412, 18 April 2008, p. 4.

⁵⁰⁸ ICTY/ICTR Rule 85(A)(iii). See further *Prosecutor v. Delalić et al*, A. Ch. Judgment, IT-96-21-A, 20 February 2001, paras. 273, 275-276; *Prosecutor v. Ntagerura et al*, T. Ch. III. Decision on the prosecutor's motion for leave to call evidence in rebuttal pursuant to rules 54,73, and 85(A)(iii) of the Rules of Procedure and Evidence, ICTR-99-46-T May 21, 2003, paras. 33-34.

⁵⁰⁹ ICTY/ICTR Rule 85(A)(iv). See further *Prosecutor v. Galić*, T. Ch. Decision on rejoinder of evidence, IT-98-29-T, 2 April 2003; *Prosecution v. Semanza*, T. Ch. III. Decision on defence motion for leave to call rejoinder witnesses, ICTR-97-20-T, 30 April, 2002, para. 4.

⁵¹⁰ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-222-Red-ENG WT, 24 November, 2010, p.72-78; *Prosecutor v. Lubanga*, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005 ICC-01/04-01/06-2727-Red, 28 April 2011, para.36-67.

value is of such significance that it outweighs the prejudice against the accused caused by its late admission.⁵¹¹

After the presentation of all the evidence, the parties may present closing arguments, including rebuttal and rejoinder arguments.⁵¹² At the end of the closing arguments, the presiding judge declares the hearing closed and the Chamber withdraws to deliberate in private. The Chamber has to consider whether the Prosecutor has established the guilt of the accused beyond reasonable doubt. Only if the majority is so satisfied will the Chamber reach a finding of guilt and simultaneously impose an appropriate sentence.⁵¹³ It will be announced in public and accompanied by a reasoned written judgement with separate or dissenting opinions, if any, attached to it.⁵¹⁴

Thus, the criminal proceedings resemble common law proceedings in terms of their structure and the roles of the parties. There is no dossier, but rather two cases: one presented by the prosecution and the other by the defence. The main departure from the common law model is that there is no jury. The judges are responsible for all legal and factual determinations throughout the case and must give reasons for any such determination. Their power in controlling the conduct of the parties has increased over the years, and was strong from the outset at the ICC. Thus, the ICTY, ICTR and ICC judges have a very different role from the passive judge in a common law jurisdiction. Yet, their role is more limited than it would be in civil law jurisdictions.

Rules of Evidence

The absence of a jury has given rise to important departures from the common law rules of evidence.

⁵¹¹ *Prosecutor v. Delalić et al.*, A. Ch. Judgment, IT-96-21-A, 20 February 2001, paras. 273, 280, 283, 290; *Prosecutor v. Hadzihasanovic et al.*, Decision on the prosecution's application to re-open its case, IT-01-47-T, 1 June 2005, paras. 31- 46; *Prosecutor v. Zigiranyirazo*, Decision on the prosecution joint motion for reopening its case and for reconsideration of the 31 January 2006 decision on the hearing of witness Michel Bagaragaza by video-link, ICTR-2001-73-T, 16 November 2006; *Prosecutor v. Nyiramasuhuko et al.*, Decision on Kanyabashi's motion to reopen his case and to recall prosecution witness QA, ICTR-96-15-T, 2 July 2008, para. 23).

⁵¹² ICTY/ICTR Rule 86(A).

⁵¹³ Article 23 ICTY Statute; Article 22 ICTR Statute; ICTY/ICTR Rule 87; Rome Statute, *supra* note 44, Art. 74(4).

⁵¹⁴ Articles 23(2) and 24 ICTY Statute; Articles 22(2) and 23 ICTR Statute; ICTY/ICTR 88(C); Rome Statute, *supra* note 44, Arts. 74(2), (4) & (5), 75(5).

When the ICTY Rules of Procedure and Evidence were adopted, Antonio Cassese J, President of the ICTY at the time, stated:

Based on the limited precedent of the Nuremberg and Tokyo trials, and in order for us, as judges, to remain as impartial as possible, we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and elsewhere ...

...there are two important adaptations to that general adversarial system. The first is that, as at Nuremberg and Tokyo, we have not laid down technical rules for the admissibility of evidence... [T]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial by jury system. All relevant evidence may be admitted to this Tribunal unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial. An example of this would be where the evidence was obtained by a serious violation of human rights. Secondly, the Tribunal may order the production of additional or new evidence *proprio motu*. This will enable us to ensure that we are fully satisfied with the evidence on which we base our final decisions and to ensure that the charge has been proved beyond reasonable doubt. It will also minimise the possibility of a charge being dismissed on technical grounds for lack of evidence. We feel that, in the international sphere, the interests of justice are best served by such a provision and that the diminution, if any, of the accused's rights is minimal by comparison.⁵¹⁵

The first exception to the adversarial model is reflected in Rule 89(C) of the ICTY and ICTR Rules, stating that a Chamber 'may admit any relevant evidence which it deems to have probative value'. The ICC has adopted a similar provision.⁵¹⁶

Similar to civil law criminal proceedings, the drafters of the legal provisions of the international criminal tribunals sought to guarantee the greatest access to available and attainable information by the adjudicators. Given that the adjudicators of law and fact are professional judges, the drafters did not introduce technical barriers to the admissibility of evidence, except when it is irregularly obtained.⁵¹⁷ As held by the Trial Chamber in the first ICTY case of Tadic, "the trials are conducted by Judges

⁵¹⁵ Statement by the President of the International Tribunal to members of diplomatic missions concerning the adoption of the Rules of Procedure and Evidence of the ICTY (UN Doc IT/29, 11 February 1994), reprinted in Morris & Scharf, *International Criminal Tribunal for Rwanda*, *supra* note 295, 649, 651. See also UNGA, *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 49th Session (29 August 1994) UN Doc. A/49/342, 72, para. 24.

⁵¹⁶ See Rome Statute, *supra* note 44, Art. 69(4), stating that "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence". This provision has been interpreted in a similar fashion as ICTY/ICTR Rule 89(C).

⁵¹⁷ ICTY/ICTR Rule 95, *supra* note 512.

who are able, by virtue of their training and experience, to hear the evidence in the context in which it was obtained and accord it appropriate weight. Thereafter, they may make a determination as to the relevancy and the probative value of the evidence.”⁵¹⁸

This had led to the adoption of a new rule in the ICTY and ICTR which permits the admission of testimonial evidence in the form of a written statement. This possibility was initially introduced only in respect to statements which did not intend to prove the acts and conduct of the accused,⁵¹⁹ and only if certain conditions were met.⁵²⁰ If the statement concerned was pivotal to the Prosecution’s case, cross-examination could be ordered.⁵²¹ In the ICTY, this possibility was later extended to statements which go to proof of the acts and conduct of the accused, provided that the makers of the statements are available for cross-examination.⁵²² Such a statement can be admitted without cross-examination if the witness is dead, untraceable or unable to testify.⁵²³ Since 2009, such a statement can also be admitted if the witness was scheduled to testify but failed to attend as a result of improper interference as a result of threats, intimidation, injury, bribes or coercion.⁵²⁴

⁵¹⁸ *Prosecutor v Tadić*, T. Ch. II. Decision on defence motion on hearsay, IT-94-1-T, 5 August 1996, paras 14, 17; See also *Prosecutor v. Brđanin & Talić*, Order on the Standards governing the admission of evidence, IT-99–36-T, 15 February 2002, Case No IT-99–36-T, para 14; and *Prosecutor v Delalić et al*, T. Ch. Decision on the Motion of the Prosecution for the Admissibility of Evidence, IT-96–21-T, 19 January 1998, para 20. See also May & Wierda, *Trends in International Criminal Evidence*, *supra* note 95, 745.

⁵¹⁹ ICTY/ICTR Rule 92*bis*.

⁵²⁰ As set out in Rule 92*bis*(B).

⁵²¹ *Prosecutor v. Bizimungu*, Decision on Casimir Bizimungu’s motion to vary witness List; and to admit evidence of witness in written form in lieu of oral testimony, 1 May 2008, para 19; *Prosecutor v. Karemera et al*, Decision on Joseph Nzirorera’s motion to admit statements of Augustin Karara, ICTR-98-44-T, 9 July 2008, para 4; *Prosecutor v. Milošević*, Decision on prosecution’s request to have written statements admitted under Rule 92*bis*, 21 March 2002, paras. 24, 26; *Prosecutor v Limaj et al*, Decision on prosecution’s motion to admit rebuttal statements via Rule 92*bis*, 7 July 2005, para 5.

⁵²² ICTY Rule 92*ter*. It was introduced on 13 September 2006 to expedite the proceedings. See ICTY *Prosecutor v D. Milošević*, (Transcript), 15 January 2007, 354.

⁵²³ ICTY Rule 92*quater*, introduced on 13 September 2006. Evidence that is pivotal to the prosecution’s case is more likely than not admitted under Rule 92*quater* where it is corroborative and cumulative to other evidence. See *Prosecutor v. Haradinaj*, T. Ch. I. Decision on prosecution’s motion for admission of evidence pursuant to Rule 92*quater* and 13th motion for trial-related protective measures, IT-04-84-T, 7 September 2007, paras. 7, 10, 12; *Prosecutor v. Prlić* . Ch. Decision on the prosecution motion for admission of a written statement pursuant to Rule 92*quater* (Hasan Rizvić), IT-04-74-T, 14 January 2008, paras. 13, 16 and 22.

⁵²⁴ Rule 92*quinquies* ICTY Rules.

These new rules, which were not adopted by the ICTR, have clearly undermined the principle that witnesses be heard orally in court.⁵²⁵ Directly incriminating statements can now be introduced without the judges having had an opportunity to assess the demeanour of the witness and without the defence having had an opportunity to ask questions to the witness. These new provisions were adopted to accelerate the proceedings in light of the completion strategy. The ICTY has been under great pressure to complete the cases and close the tribunal. With that purpose in mind, it introduced these measures and increased judicial control.⁵²⁶ The ICTR has a similar completion strategy but did not consider it necessary to incorporate these changes. It is, therefore, questionable whether these curtailments of the principle of orality were truly necessary and whether they have even assisted in accelerating the proceedings. Neither tribunal has yet closed its doors.

Ironically, these rules were said to have been inspired by civil law principles.⁵²⁷ However, in civil law jurisdictions written testimonial evidence is usually only admitted if the examination of the witness was conducted by a judicial officer in the presence of the parties. This is also more in accordance with the adversarial principle as part of fair proceedings enshrined in the human rights conventions, as well as the ICTY, ICTR and ICC Statutes.⁵²⁸ Thus, this is an illustration of an adoption of a legal principle in international justice based on an erroneous interpretation of domestic legal principles.

No similar rules exist in the ICC Statute or Rules. The only rule regulating the admissibility of recorded testimonial evidence is Rule 68, which allows such admission only when the parties have an opportunity to examine the witness during

⁵²⁵ Initially, Rule 90(A) of the ICTY and ICTR Rules reflected the principle of orality, stipulating that: “Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.” Whilst ICTR Rule 90(A) still reads the same, ICTY Rule 90(A) has been adjusted in a manner undermining the preference for oral testimony. ICTY Rule 89(F), which has replaced the original Rule 90(A), reads: “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.”

⁵²⁶ UN Doc. S/RES/1503, 28 August 2003; UN Doc. S/RES/1534, 26 March 2004. See also G. Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court*, 12 CLF 167 (2001), 168-170; Tochilovsky, *Nature and Evolution of the Rules*, in Khan, *Principles of Evidence*, *supra* note 25, 163-164.

⁵²⁷ Tochilovsky, *Nature and Evolution of the Rules*, in Khan, *Principles of Evidence*, *supra* note 25, 161-174 (3. Incorporation of Civil Law Elements into the Rules).

⁵²⁸ Article 21 ICTY; Article 20 ICTR; Rome Statute, *supra* note 44, Article 67.

the proceedings, or had such an opportunity during the recording. This reflects the civil law practice better than the ICTY position. Until now, it has only been used as background evidence not central to the core issues of the case.⁵²⁹ Whether this rule can be circumvented and written testimonial evidence can be admitted under the general power to admit any relevant and reliable evidence whose prejudice is outweighed by its probative value is still a pending issue. It is also still unclear whether the transcripts of Prosecutor's interviews with dead or untraceable witnesses can be admitted into evidence if the conditions of Rule 68(a) were not met.⁵³⁰

The second exception to the adversarial model cited by Judge Cassese is enshrined in Rule 98 of the ICTY and ICTR Rules, allowing judges, *proprio motu*, to order either party to produce additional evidence or to summon witnesses and order their attendance.⁵³¹ At the ICC, if one or both of the parties would like additional witnesses to be called, they can request the Chamber to call them as Chamber witnesses. Pursuant to Articles 64(6) and 69(3) ICC Statute, and Rule 84, the Chamber can also decide on its own initiative that additional witnesses be called or documentary evidence produced.

Appellate Proceedings

Any oral or written ruling from the Chamber is subject to interlocutory appeal if certified by the Trial Chamber. Certification may be granted where the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵³² There is also appeal, as of right, against a final verdict, whether an

⁵²⁹ *Lubanga* Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses (15 Jan 2009), paras 19-24; *Katanga and Ngudjolo*, Transcripts (23 Feb 2010), 48, Rule 68(b) cannot be implemented at the end of the testimony of a witness.

⁵³⁰ *Katanga and Ngudjolo* Defence Objections to Admissibility in Principal and in Substance (23 Oct 2009). For the purpose of the confirmation hearing, the interview of a witness who since died was admitted; see *Katanga and Ngudjolo* Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 (18 April 2008).

⁵³¹ Rule 98 of the ICTY Rules states that: 'A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance'. Rule 98 of the ICTR Rules states: 'A Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance.' For concern about this rule, see Daniel David Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia' (1994) 5 Crim. L Forum 507, 538.

⁵³² ICTY/ICTR Rule 73(B & C); Rome Statute, *supra* note 44, Article 82.

acquittal or a conviction.⁵³³ Appeal is, however, not an opportunity for the parties to remedy any error of judgment or oversight made at trial.⁵³⁴ The appellate proceedings are not equivalent to a trial ‘*de novo*’, as in civil law systems.

The ICC Statute has codified more elaborate grounds of appeal. Both parties can appeal the decision on the basis of a procedural error, an error of fact or law.⁵³⁵ The convicted person can further appeal the decision on any ground affecting the fairness or reliability of the proceedings.⁵³⁶ The ICC Statute does not impose conditions on bringing new evidence. Pursuant to Article 83(1), the Appeals Chamber has all the same powers of the Trial Chamber. If it finds that an unfairness to the defendant has affected the reliability of the decision, or a procedural error or error of fact or law has materially affected the decision, the Appeals Chamber may call evidence to determine the issue itself.⁵³⁷ In light of those powers, the appellate proceedings could develop into more substantial proceedings than those at the ICTY and ICTR. Whether they will remain to be seen.

Does the international criminal justice model meet the conditions in Part I?

Having adopted ample civil law influenced amendments, the ICTY system in its current shape represents a modified version of an adversarial system. It moved closer to the ICC which from the outset has been inspired by civil law. The ICTR system has not incorporated civil law features to the same extent as the ICTY. However, similarly to the ICTY and ICC it represents a modified version of an adversarial system. As the ICTR Trial Chamber in *Bagosora* held, the rules “are broader than either the common or civil law systems and they reflect an international amalgamated system without necessarily adopting a single national system of evidence”.⁵³⁸

The efficiency of this international criminal procedure as a truth-ascertaining methodology will be tested in Part III. However, some observations can be made with

⁵³³ US attorneys consider that the allowance for appeal of an acquittal amounts to “double jeopardy”. See, De Hert, *Legal Procedures at the ICC*, *supra* note 25, 124.

⁵³⁴ *Prosecutor v Nahimana*, A. Ch. Decision on additional evidence, ICTR-99-52-A, 12 January 2007, para. 71; *Prosecutor v Akayesu*, A. Ch. Judgment, ICTR-96-4-A, 1 June 2001 para. 177.

⁵³⁵ Rome Statute, *supra* note 44, Art. 81(1).

⁵³⁶ *Ibid*, Art. 81(1)(b)(iv).

⁵³⁷ *Ibid*, Art. 83(2).

⁵³⁸ *Prosecutor v Théoneste Bagosora*, Case No. ICTR-96-7-T, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, 8 July 1998, 4.

regard to the compliance of the theoretical framework with the conditions in Part I. Seemingly, the combination of the two systems is the cause of a number of weaknesses in the international truth-ascertaining procedure.

Access to Relevant and Reliable Information

The access to all available relevant and reliable information is more limited than in civil law procedures. There is no dossier and no investigative judge. Instead, the Chamber relies on the Prosecutor to select the suspects, and on both parties to conduct investigations. The Trial Chamber is not presented with the available exculpatory material unless one of the parties introduces it at trial. There may also be incriminating, or partly incriminating and partly exonerating, material that the Chamber has never seen because neither party, for strategic or other reasons, introduces it at trial. Such evidence then is not considered in the ultimate decision on guilt or innocence of the accused. The Chamber has increasingly great powers to exercise control over the manner in which the parties conduct themselves. They have a wide discretion to admit evidence and call additional witnesses. Both the parties and the judges are entitled to examine the witnesses.

The international criminal justice model truly combines the strengths of the judges and the parties in acquiring the greatest access to relevant and reliable information. This is potentially frustrating both for the parties and for the judges, as the strength of their position is weakened by the strength of the position of the other. The manner of questioning the witnesses illustrates this clearly. Judges are not in a position to take the lead in questioning the witnesses, as they would be in civil law jurisdictions. For the main part of the questioning, they have to restrain themselves from intervening in the performance of the parties, even if in their view the examination could be conducted more efficiently for the ascertainment of the truth.

The parties on their part are considerably more limited in cross-examining witnesses than they would be in a common law jurisdiction. They have to be more careful in their approach to witnesses and are under significant time constraints. The extent to which their cross-examination is ultimately compromised depends on the judges before whom they appear. It also depends on the judges whether their compromised

position is remedied by the greater powers granted to the judges in questioning the witnesses at the end of their examination. These powers are, however, not unlimited as judges should not be seen as partial or leading the witnesses to their answers. Potentially, the parties and judges can strengthen each other. If a party fails to ask a crucial question or produce an important document or witness, the judges can still do it.

The roles of the Chamber and parties in collecting the evidence is an aspect that will be looked at in more detail in Part III. Another aspect that will be discussed is whether the flexibility of the rules of evidence, in particular with regard to admissibility, has undermined or strengthened the ascertainment of the truth.

In addition to the parties and the judges, victim participants at the ICC can also adduce evidence and examine witnesses. Given that they are allowed to bring additional matters to the attention of the court, their participation potentially contributes to the ascertainment of the truth. However, a number of observers and practitioners consider that the participation of victims in the ICC proceedings is troublesome and undermines the ascertainment of the truth.⁵³⁹ Their arguments will be further discussed in Part III. Overall, the structure itself offers sufficient access to reliable information.

Engagement at a Distance

In principle, it must be assumed that the international judges can engage with the information and information providers while keeping a distance. They are selected from a pool of diverse candidates from all over the world. They must be “of high moral character, impartiality and integrity”, and “possess the qualifications required in their respective countries for appointment to the highest judicial offices.”⁵⁴⁰ In addition, the ICC requires judges to have an excellent knowledge in at least one of the

⁵³⁹ C. Van Der Wijngaert, ICC Judge, lecture on 21 November 2011 in Klatsky seminar in Human Rights presented by Frederick K. Cox International Law Centre at Case Western Reserve University (Cleveland Ohio), forthcoming publication in: Case Western Reserve University Journal of International Law; S. Johnson, *Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court*, 16 ILSA J. Int'l & Comp. L. 489, 2009-2010.

⁵⁴⁰ Article 13 ICTY Statute; Article 12 ICTR Statute; Rome Statute, *supra* note 44, Art. 23(3)(a). See also Rome Statute, Art. 40, emphasising the judge's independence, and Art. 41 concerning the disqualification.

working languages of the court. They must also have established competence in “criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings”; or “relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court”.⁵⁴¹

Their nomination is, however, political which potentially compromises their position. In the ICTY and ICTR, judges are appointed by the UN General Assembly upon initial nomination by UN Member-States and subsequent pre-selection by the Security Council.⁵⁴² They are elected for a renewable four-year term. It has been argued that this undermines their independence. If the UN is not satisfied with the performance of the judges, it can be assumed that their contract will not be renewed.⁵⁴³ In the view of numerous practitioners, the independence of the judges can only be ensured if they are appointed for life.⁵⁴⁴ At the ICC, judges are elected for nine years. Their nomination must be approved by a secret vote of two thirds of the members of the Assembly of State Parties.⁵⁴⁵

A political nomination in itself does not suggest that the judges cannot be impartial and independent of political considerations.⁵⁴⁶ A judge whose impartiality might reasonably be doubted may be disqualified from sitting in a particular case.⁵⁴⁷ Thus,

⁵⁴¹ Rome Statute, *supra* note 44, Arts. 23(3)(b)(i), (ii) & 23(3)(c).

⁵⁴² Art. 13*bis* ICTY; Art. 12-3 ICTR. This system follows the one established for the selection and appointment of the Judges of the International Court of Justice. The International Court of Justice consists of 15 Judges elected by concurrent votes of the Security Council and the General Assembly.

⁵⁴³ See S. Johnson, *On the Road to Disaster*, *supra* note 292, 119. See also: M Bohlander, *The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics*, in M Bohlander (Ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007) 325, at 355-361.

⁵⁴⁴ Arguments, raised at a Conference, entitled *The Position of the Defence at the ICC, and Role of The Netherlands as Host-State*, held in The Hague on 3-4 of November 2000, published in M. Hallers *et al* (Eds), *The Position of the Defence at the ICC, and Role of The Netherlands as Host-State*, (Rozenberg, 2002). See also M. Cherif Bassiouni & Peter Manikas: *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publishers Inc, 1996), at 806, stating that the eligibility for re-election “could mitigate against the principle of judicial independence”.

⁵⁴⁵ Rome Statute, *supra* note 44, Art. 36.

⁵⁴⁶ In the US, the nomination of judges is also political. In the US federal system judges are appointed by the President and have to be confirmed by the US Senate. A judge is approved based on his judicial qualifications.

⁵⁴⁷ See, for instance, the US case *Caperton v. AT Massey Coal Co.* 129 S Ct 2252 (2009) at: http://en.wikipedia.org/wiki/Caperton_v._A.T._Massey_Coal_Co. See further: http://templelaw.tenintencients.com/wp-content/uploads/2011/07/McManus_Degnan.pdf

in theory the appointed international judges should be able to engage in ascertaining the truth impartially and independently.

Transparency and Fairness

The ICTY, ICTR and ICC Statutes guarantee the transparent and fair nature of the proceedings. The judges must ensure that a trial is fair and expeditious and in accordance with the Rules of Procedure and Evidence, “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.⁵⁴⁸ The trials are public. The Chamber may, however, order that proceedings be held in closed session to protect victims and witnesses, or confidential information.⁵⁴⁹ The judgement is public and detailed. The defence is a full and autonomous party to the proceedings. The defendant can testify under oath or give an unsworn statement.⁵⁵⁰

Throughout the proceedings, the principle of equality of arms must at all times be respected. The right to equality of arms has been recognized as one of the most fundamental elements of a fair trial enshrined in the ICTY, ICTR and ICC Statutes.⁵⁵¹ With regard to the defence, the ICTY and ICTR Statutes and Rules were silent about the responsibilities of the Registry. The ICC Rules, on the other hand, include a number of provisions, which impose duties on the Registry to arrange defence issues.⁵⁵²

⁵⁴⁸ Article 20(1) ICTY Statute; Article 19(1) ICTR Statute; Rome Statute, *supra* note 44, Arts. 64(2) & 64(8)(b). The rights of the accused are enshrined in Article 21 ICTY Statute; 20 ICTR Statute and Rome Statute Art. 64.

⁵⁴⁹ Rome Statute, *supra* note 44, Art. 64(7).

⁵⁵⁰ Rome Statute, *supra* note 44, Art. 67(1)(h) (the right to make an unsworn oral or written statement in his or her defence); Rule 84bis(A) ICTY Rules (“After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement”). The ICTR did not incorporate this Rule. However, the judges still have the discretionary power to allow the defendant to give an unsworn statement, as the judges did in the case of *Bagosora*.

⁵⁵¹ Article 21(2) ICTY Statute; Article 20(2) ICTR Statute; Rome Statute, *supra* note 44, Art. 64; *Neumeister v. Austria*, ECtHR Judgement of 27 June 1968, A-37 [4] [hereinafter ‘*Neumeister*’]; *Prosecutor v. Tadic*, Case N° IT-94-A, Appeals Chamber, Judgement, 15 July 1999, para 52; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N° ICTR-95-1-A, Appeals Chamber, Appeals Judgement, 1 June 2001.

⁵⁵² See in particular Rule 20 of the Rules of Procedure and Evidence. See further C Buisman, ‘Defence and Fair Trial’ Ch VI in: Haveman, *Supranational Criminal Law*, *supra* note 27, 231-237.

The equality of arms principle must be read in light of the different burdens and roles of the different parties. The Prosecutor has the burden to prove the guilt of the accused beyond reasonable doubt. The defence has no burden except to provide some evidence in support of an alibi or special defence.⁵⁵³ If the defence establishes that the alibi or special defence is plausible, it is then the Prosecutor's responsibility to establish beyond reasonable a doubt that the accused is guilty as charged notwithstanding this alibi or special defence.⁵⁵⁴

Given these different burdens and roles, the parties also have different types of rights, powers and obligations. The defence enjoys more rights in order to compensate for the greater powers which the Prosecutor possesses. For instance, the accused is entitled to full and timely disclosure, and is protected by the presumption of innocence and the right not to incriminate himself.⁵⁵⁵

Accordingly, the international proceedings appear to be transparent and fair. Whether this is true in reality will be addressed in Part III. In particular, it will be considered whether the proceedings are indeed transparent, and if not, whether that has an adverse impact on the ascertainment of the truth. In addition, the treatment of the defence in reality, and its consequences for the ascertainment of the truth, if any, will be analysed.

Conclusion

Thus, in theory the system can serve as an adequate truth-ascertaining system. It has incorporated most of the minimum safeguards inherent to domestic systems. Because it is a judge-led system, the main safeguards of producing reasoned written verdicts and a full new hearing on appeal have been incorporated.

⁵⁵³ ICTY/ICTR Rule 87(A); Rome Statute, *supra* note 44, Art. 31 ICC Statute.

⁵⁵⁴ Khan & Dixon, *Archbold International Criminal Court*, *supra* note 486, paras. 17-57 – 17-59. For ICC, see Rome Statute, *supra* note 44, Article 66(2), and Rule 79 of the Rules of Procedure and Evidence (relating to the obligation upon the defence to disclose its alibi).

⁵⁵⁵ Article 21(3) ICTY Statute; Article 20(3) ICTR Statute; Rome Statute, *supra* note 44, Article 64(3). See also Judge Robinson: '[w]hat the Prosecutor did in terms of information to the Accused is not necessarily a correct basis for determining the Accused's responsibilities, because the Prosecution has obligations under the Rules which the Defence does not have. Conversely, the Defence has rights which do not apply to the Prosecution...' *Prosecutor v. Milošević*, T 17 June 2004, IT-02-54-TC, P32086.

In reality, this has however been a struggle. The hindrances to an effective ascertainment of the truth that have occurred so far in the ICTY, ICTR and ICC are numerous and will be analysed in Part III. Most of them are unrelated to the methodology, but have rather to do with the implementation. Yet, some observers and practitioners continue to criticise the methodology itself. An often-heard legitimate criticism is against the ease with which testimonial evidence can be admitted in the form of a written statement.⁵⁵⁶ Unlike in civil law jurisdictions, such a statement is not taken by an investigative judge in the presence of the parties. The extent to which this, as well as other problematic practices have adversely affected the ascertainment of the truth is addressed in Part III.

The main reason for continued criticism is that practitioners and observers continue to think in terms of common law or civil law. They often support the system they are most familiar with and criticise the features that have their roots in unfamiliar systems.⁵⁵⁷

People employed by the international criminal justice systems come from different domestic systems. When they arrive at the international forum, they come armed with their own legal philosophy and language which they cannot remove completely from their minds. They are trained in their domestic jurisdiction and are familiar with the terminology and philosophy applied in their own system.⁵⁵⁸ These different legal vocabularies and philosophies must be merged into a uniform legal vocabulary inherent and unique to international criminal justice.⁵⁵⁹

⁵⁵⁶ See Jackson, *Transnational Faces of Justice* in Jackson, *Crime, Procedure and Evidence*, *supra* note 23, 221, at 238-241; M. Fairlie, *The Marriage of Common Law and Continental Law at the ICTY and its Progeny: Due Process Model 4* *International Criminal Law Review Journal* 243 (2004).

⁵⁵⁷ Bohlander, *Radbruch Redux*, *supra* note 123, 410.

⁵⁵⁸ According to Pakes, this has led to considerable differential treatment of case-management issues in the ICTY. See: F. Pakes, *Styles of Trial Procedure at the International Criminal Tribunal for the former Yugoslavia*, 17 *Perspectives in Law and Psychology* 309 (2003). See also Sliedregt, *Introduction: Common Civility*, *supra* note 433.

⁵⁵⁹ See also M. Delmas-Marty who refers to such vocabulary as a 'common grammar': "I would stress that a system of justice conceived by hybridisation will necessarily be distinguishable from its national 'parents' and will progressively become autonomous. In other words, hybridisation goes hand in hand with autonomisation. Therefore the system's coherence cannot be pre-established and cannot simply be borrowed from a preexisting one, but must be built. True hybridisation, as distinct from simple transplantation, makes it easier to do so by using not only common technical rules, but also a common 'grammar', that is, the guiding, or meta principles that structure the system around general international law principles, human rights instruments and a comparison of the main national criminal justice systems. This 'grammar' then guides the interpretation of the questions of first impression that will

Indeed, international criminal justice systems “combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken from States of continental Europe and in other countries of civil-law tradition). This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems”.⁵⁶⁰ This philosophy is further influenced by factors unique to international criminal justice and unrelated to domestic criminal justice. This confuses domestic legal concepts, language and philosophy even more.

Practitioners and observers must familiarise themselves with this emerging international vocabulary and philosophy. Only then can the systems melt efficiently.⁵⁶¹ This appears to be difficult for many of them, which increases the ‘hybridisation’ problems.

Unique Context of International Justice

In order to discuss thoroughly any of these issues and to evaluate whether the international criminal justice systems can in reality be an adequate truth-ascertaining systems, it is necessary to place these systems in their proper context. International criminal justice systems are more than mere hybrids between common law and civil law criminal justice systems. They operate in circumstances which are very different from the circumstances in which domestic criminal justice systems operate and, therefore, include elements that are unique to international criminal justice.⁵⁶² The

inevitably arise and makes it possible, when suitable, to integrate in a unified, pluralist manner.”: *The Hybridisation of Criminal Procedure*, *supra* note 23, 251 at 258-259.

⁵⁶⁰ *Prosecutor v. Erdemović*, A. Ch. Separate and Dissenting Opinion of Judge Cassese to Judgment of Appeals Chamber, IT-96-22-A, para. 3. See also para. 6: Once transposed onto the international level, legal concepts may have acquired “a new lease of life, absolutely independent of their original meaning”, or they may have been adjusted to the characteristic features of international proceedings. See also Tuinstra’s observation that international criminal justice systems “lack a clear philosophy”: Tuinstra, *Defence Counsel*, *supra* note 54, 103.

⁵⁶¹ See also Justice Doherty’s observation expressed at the Dublin Conference, *supra* note 13, that we should stop thinking in common law and civil law.

⁵⁶² *Prosecutor v. Erdemović*, A. Ch. Separate and Dissenting Opinion of Judge Cassese to Judgment of Appeals Chamber, IT-96-22-A, para. 5. See also para. 3:

“One might wonder why international courts show such great caution in drawing upon national law when establishing the meaning of national law concepts and terms. Indeed, such caution might be

international criminal justice systems are *sui generis* rather than hybrid courts.⁵⁶³

Indeed, as the ICTY Trial Chamber held in *Tadic*:

In interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses, the judges of the International Tribunal must do so within the context of its own unique legal framework. (emphasis added)⁵⁶⁴

Some of the unique circumstances have been discussed in Part I. International criminal courts and tribunals have set themselves very ambitious objectives. They aspire to achieve many goals in addition to the accurate assessment of the guilt or innocence of a particular defendant. These goals are: end impunity, justice to the victims, deterrence, restoration or maintenance of the peace and security, reconciliation, and the ascertainment of the truth.

The legal and factual determinations to be made in international justice are extremely complex. Particularly in ethnically divided societies, there are different versions of events. It is a challenge to collect sufficient reliable evidence in support of allegations against a person who did not participate directly in any crimes. This is particularly challenging in a war-torn society where many interested parties may either seek to manipulate the collectors of information or destroy evidence.

The task of ascertaining the truth in international justice is therefore considerably more challenging than in domestic justice. The tools available to international criminal justice systems are more limited both in terms of its structure and capacity.

regarded as inconsistent with the fact that the whole body of international law owes so much to national or municipal rules: as is well known, over the years international norms have greatly borrowed from the internal law of sovereign States, particularly from national private law. However, this historical spilling over from one set of legal systems into the law of nations does not detract from these legal systems (those of States on the one side, and international law, on the other) being radically different: their structure is different, their subjects are different, as are their sources and enforcement mechanisms. It follows that normally it would prove incongruous and inappropriate to apply in an inter-State legal setting a national law concept as such, that is, with its original scope and purport. The body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law.”

⁵⁶³ Haveman, *Supranational Criminal Law*, *supra* note 27, 3-5, where Haveman argues that the ICTY and ICTR Systems are more appropriately referred to as Systems *Sui Generis* than hybrid systems.

⁵⁶⁴ *Prosecutor v. Tadić*, T. Ch. II. Decision on prosecutor's motion requesting protective measures for victims and witnesses, IT-94-1-T, 10 August 1995, para. 27.

Structural and Capacity Limitations

International criminal justice systems suffer from structural limitations since they have not been established by an existing State to try perpetrators among its population for crimes committed on its territory. Instead, they have been established on an inter-State level and exercise their function within territories under the authority of sovereign States. International criminal courts and tribunals have no autonomous power to carry out any act within the territory of a sovereign State without its permission and assistance. Investigators of both parties must be given permission to enter into the country to conduct on-site investigations and search for potential witnesses as well as documentary and forensic evidence. Investigations can only be effective if the investigators are able to do their work freely and independently without the intervention of local *de jure* or *de facto* authorities or other powerful groups.

The assistance of the local authorities is required for any investigative act that requires a judicial authorisation, for instance a house search or an interview with a prisoner. International courts and tribunals do not have their own independent police force with any power of arrest or other powers police officers have in domestic jurisdictions. Accordingly, in conducting investigations and securing arrests and transfers of suspects, international criminal tribunals and courts are entirely dependent on State cooperation.⁵⁶⁵

The ICTY and ICTR have more means than the ICC to enforce cooperation on unwilling States. The ICTY and ICTR have been established by the Security Council using chapter VII of the United Nations Charter. Therefore, they have primary jurisdiction in respect to crimes described in their Statutes committed in the former Yugoslavia or Rwanda.⁵⁶⁶ All States are under a statutory duty to cooperate fully with the ICTY and ICTR.⁵⁶⁷ These tribunals can report any refusal of States to cooperate fully to the Security Council, which can then take measures against these

⁵⁶⁵ It is noteworthy that, today, there are nine outstanding arrest warrants issued by the ICC which have not been executed. See further S. Maupas, *Cour pénale internationale: nouvelle victoire américaine*, *Le Monde*, 28 July 2010.

⁵⁶⁶ Art 7(2) ICTY Statute; 8(2) ICTR Statute and ICTY/ICTR Rules 8, 11, 56-58. See further Cryer, *Prosecuting International Crimes*, *supra* note 223, 127-142.

⁵⁶⁷ Art. 29 ICTY Statute; Art. 28 ICTR Statute.

uncooperative States.⁵⁶⁸ Whether this option has had the desired impact is questionable and will be analysed further in Part III. At least there is some level of political pressure the tribunals can assert on unwilling States.

The ICC, on the other hand, has concurrent jurisdiction and was established on the basis of a treaty. In signing the Rome Statute, States-parties have committed themselves to cooperate fully with the Court.⁵⁶⁹ Failure to do so can be reported to the Assembly of States Parties. The ICC has, however, no effective power to take compulsory measures against States that fail to abide by their obligations. Unlike the ICTY and ICTR, the ICC has no power over non-States-parties.⁵⁷⁰

These are fundamental structural differences with domestic criminal courts and have had significant consequences. As Judge Cassese put it:

To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings, whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.⁵⁷¹

Cassese is right. For instance, the international tribunals and court must be watchful so as not to compromise their political independence. Part III will assess whether they have dealt with the issue of State cooperation in a responsible manner. It will also consider to what extent there is a difference in reality between the ICC and the tribunals in terms of their enforcement mechanisms.

⁵⁶⁸ Where State authorities fail to comply with an obligation under any of the Rules in conjunction with Article 29 ICTY Statute or Article 28 ICTR Statute, the President may report the matter to the Security Council if satisfied that this is indeed the case (ICTY/ICTR Rule 7*bis*, Rule 11, Rule 59(B)).

⁵⁶⁹ Rome Statute, *supra* note 44, Part IX. See also Judge Kirsch: http://wwwold.icc-cpi.int/library/about/newsletter/16/en_01.html.

⁵⁷⁰ This is a problem, for instance, in Sudan, which is not a State-party to the Rome Statute. It has closed all borders for investigations carried out by anyone from the ICC. This has meant that the parties in the Sudan cases against Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus are unable to conduct investigations in the field. This makes investigations impossible. See further Cryer, *Prosecuting International Crimes*, *supra* note 223, 142-159; Blewitt, *The International Criminal Tribunals*, *supra* note 76, 145, 150-152; Chuter, *War Crimes*, *supra* note 75, 139-149; May & Hoskins, *International Criminal Law*, *supra* note 57, 211, 216.

⁵⁷¹ *Prosecutor v. Erdemović*, A. Ch. Separate and Dissenting Opinion of Judge Cassese to Judgment of Appeals Chamber, IT-96-22-A, para. 5.

International courts and tribunals also have insufficient capacity to deal with all the crimes committed in a conflict. There is a limited budget, number of investigators, cell capacity and courtrooms. Accordingly, international courts and tribunals cannot deal with proceedings against more than a handful of alleged perpetrators. This forces the collectors of information to conduct selective investigations and focus only on a small percentage of the totality of the crimes committed within a particular geographical area and time zone. Given the dependence on State cooperation, this potentially leads to selective justice based on political rather than legal criteria. It also limits the capacity to ascertain the truth, since many aspects of the overall picture of the war will never be addressed by the court or tribunal.⁵⁷²

Cultural Diversity

The enforcement of international justice is further complicated by the fact that the courts and tribunals are geographically, culturally and temporally far removed from the crime scene. The geographical distance between the seat of the ICTY, ICTR and ICC from the localities whose crimes and perpetrators they are judging makes the operation very costly and difficult. Unless the court or tribunal organises site visits, only the investigators will usually have visited the crime scene. In most situations, the crimes will not be investigated and assessed until years later. Evidence may get lost or destroyed in that time period and the memories of witnesses fade. Culturally and linguistically, the tribunals and courts are also separated from the local territories and their local people. Combs has highlighted the difficulties caused by this cultural and linguistic gap in assessing the credibility of the witnesses and interpreting their stories. Combs also pointed out that it may be more acceptable to lie in some cultures than in others.⁵⁷³

It is questionable whether the international truth-ascertainment methodology can adequately accommodate these unique circumstances. Significantly, only common law and civil law principles have ever been properly relied on in international criminal justice systems. Raimondo pointed out that ‘multiculturalism’ within

⁵⁷² Chuter, *War Crimes*, *supra* note 75, 139-149.

⁵⁷³ Combs, *Fact-Finding Without Facts*, *supra* note 6, 131-135. See further C. Murphy, *Political Reconciliation and International Criminal Trials*, 224-225, pointing out that such difficulties can also undermine reconciliation.

international justice systems has been reduced to ‘biculturalism’ consisting of two legal families: common law and civil law. To the dismay of some observers,⁵⁷⁴ other legal traditions are removed from most legal discussions.⁵⁷⁵

Common law and civil law systems have their differences and different historical roots, and reaching compromises between them can be challenging. They are nonetheless both Western-types of criminal methodologies and at least share their legal foundation. The differences between them are minimal compared to the differences with non-Western-types of criminal methodologies. A high number of non-Western criminal procedures have been influenced heavily by civil law or common law procedures as a result of their imposition during Colonialism. This is not to say that such procedures are regarded as legitimate by the local communities even if approved by their Government.⁵⁷⁶

There are ample countries that have adopted a different style of criminal proceedings. Islamic countries, for instance, apply Sharia: a set of legal rules, often misunderstood in the Western world.⁵⁷⁷ In addition, there are various types of local criminal justice that have little in common with either common law or civil law. For instance, both Rwanda and Northern Uganda have a local justice system in place.

Two examples of local justice

In June 2002, Rwanda introduced *Gacaca* Courts, mixing local traditional conflict-resolution with a modern retributive legal procedure to deal with genocide cases. They have been operational from 2005 until today. Rwanda’s President Kagame referred to this initiative as an “African solution to African problems”.⁵⁷⁸

⁵⁷⁴ Bohlander, *Radbruch Redux*, *supra* note 123, 395.

⁵⁷⁵ F. Raimondo, *For Further Research on the Relationship Between Cultural Diversity and International Criminal Law*, 11 *International Criminal Law Review* 299 (2011), 307; also B. Jia, *Multiculturalism and the Development of the System of International Criminal Law*, in S. Yee and J. Morin (Eds.), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Martinus Nijhoff, 2009) 629, 630-633.

⁵⁷⁶ Drumbl, *Atrocity*, *supra* note 46, 126-128.

⁵⁷⁷ See, for instance: Sadakat Kadri: *Heaven on Earth: A Journey through Shari'a Law*, January 2012, Bodley Head (book review at: <http://www.guardian.co.uk/books/2012/jan/20/sharia-heaven-earth-sadakat-kadri-review>). See also Bohlander, *Radbruch Redux*, *supra* note 123, 395.

⁵⁷⁸ Observations of President Paul Kagame at the International Peace Institute, New York, 21 September 2009, cited by Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts*, May 2011, available at <<http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf>> , last accessed January 2012, 1.

The term ‘*gacaca*’ means grass in Kinyarwanda and stems from the local custom to sit on the grass to resolve disputes. In the modern types of *Gacaca* Courts, people indeed sit on the grass in front of the local administration office. Seven judges from the local community, with little to no education and limited judicial training,⁵⁷⁹ decide on the fate of the defendants who face allegations of genocide. Initially, the *Gacaca* Courts dealt with all but the most serious category of genocide cases, involving planners, leaders, organisers, instigators, well-known killers and rapists. As of 2007, *Gacaca* Courts also had jurisdiction to deal with these most serious cases.⁵⁸⁰

Between June 2002 and the end of 2004, adult community members met weekly in a general assembly to gather information about what happened during the genocide and to identify the victims, perpetrators and lost property. As of 15 January 2005, the Government took over and assigned local authorities to collect information.⁵⁸¹ These local authorities collect their information with the assistance of local villagers and then present the accusations to the entire community in a verification hearing.

Once all information is gathered and verified, the trials begin. All villagers and other interested parties can attend and participate in the trials.⁵⁸² A defendant is not assisted by counsel, but can bring family members, friends and witnesses to support him. The victims can do the same. There is no prosecution. A defendant may confess which usually decreases his sentence. If he does not confess, there will be a direct confrontation between the defendant and the victims, their supporters, the judges and

⁵⁷⁹ In 2002, magistrates and law students offered a six-day compulsory training to *Gacaca* judges, which is arguably inadequate to deal with genocide cases. See further Amnesty International, *Gacaca: A Question of Justice*, December 2002, available at <<http://www.amnesty.org/fr/library/>>, last accessed January 2012.

⁵⁸⁰ Organic Law of 1 March 2007 Establishing the Organization, Competence and Functioning of *Gacaca* Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes Against Humanity, Committed between October 1, 1990 and December 31, 1994, article 11.

⁵⁸¹ National Service of *Gacaca* Jurisdictions (SNJG), Procedure for the Gathering of Information in the *Gacaca* Courts, Truth-Justice-Reconciliation, Kigali, November 2004, in: “Monitoring and Research Report on the *Gacaca* Information-Gathering during the National Phase” June 2006 at: http://www.penalreform.org/files/rep-ga8-2006-info-gathering-en_o.pdf.

⁵⁸² Initially, many community members appeared but over the years, people stopped appearing out of fear of being identified as a ‘genocidaire’ or of demonstrating emotions, or because they had to earn a living. Local authorities put pressure on people to attend, imposed fines or used defence forces to enforce their appearance. In 2004, participation was made compulsory through Article 29 of the *Gacaca* Law. See further HRW, *Justice Compromised*, *supra* note 573, 83-93.

everyone else who was a witness to the events. Each of them is expected to say publicly what they know about the defendant's conduct during the course of the genocide. If the confrontation gets out of hand, the judges may warn any person stirring up emotional heat or even charge him with contempt and order his imprisonment up to several months. If found guilty, the defendant may face community service or a prison sentence with or without special provisions. If he is found guilty of property crimes only, the sentence imposed could be compensation.⁵⁸³ If the defendant has disappeared the judges may contemplate charging a member of his family instead.⁵⁸⁴

Leaving its deficiencies aside,⁵⁸⁵ the *gacaca* type of justice appears to be much more community-based and involve everyone concerned.⁵⁸⁶

In Northern Uganda, the Acholi community has its own traditional justice system, which is more ceremonial than punitive in nature. *Mato oput* (bitter root or justice) is the common nominator in the Acholi justice for healing rituals and blessings performed by *rwodi moo* (anointed chiefs). These ceremonies blend various traditional ceremonies. The most well-known traditional ceremonies are the *mato oput* (bitter root or juice), and the *gomo tong* (bending of spears). Traditionally, if someone had been killed, Acholi traditional chiefs led a *mato oput* ceremony between the wrongdoer and a representative of the harmed family. The wrongdoer had to confess

⁵⁸³ See further *ibid.*, 73-80.

⁵⁸⁴ Based on personal observation in *Gacaca* information gatherings and trials in 2005 and 2006.

⁵⁸⁵ There is ample criticism. It is often suggested that people cannot speak out freely because they all live in the same neighbourhoods and fear for their lives or livelihood, or they fear being accused as 'genocidaires'. In addition, the fact that the defendant is not entitled to employ counsel is considered as unfair. See HRW, *Justice Compromised*, *supra* note 573; C. Tertsakian, *Le Château, The Lives of Prisoners in Rwanda* (Arves Books, 2008), 360-380.

⁵⁸⁶ Based on personal observation in *Gacaca* information gatherings and trials in 2005 and 2006. See also: *ibid.* In addition, see reports of Penal Reform International, Amnesty International and Avocats Sans Frontières, published at their websites <www.penalreform.org/>; <www.amnesty.org/>; and <www.asf.be/>. In particular, see Penal Reform International, *PRI Research on Gacaca Report No. 4: The Guilty Plea Procedure, Cornerstone of the Rwandan Justice System*, January 2003, available at <http://www.penalreform.org/publications/gacaca-research-report-no4-guilty-plea-procedure-cornerstone-rwandan-justice-system-o>, last accessed January 2012; Avocats Sans Frontières, *Monitoring of the Gacaca Courts, Judgment Phase: Analytical Report No. 2, October 2005 – September 2006*, available at <http://www.asf.be/publications/Rwanda_MonitoringGacaca_RapportAnalytique2_EN.pdf>, last accessed January 2012; Avocats Sans Frontières, *Monitoring of the Gacaca Courts, Judgment Phase: Analytical Report No. 3, October 2006 – April 2007*, available at <http://www.asf.be/publications/Rwanda_MonitoringGacaca_RapportAnalytique3_EN.pdf>, last accessed January 2012; Avocats Sans Frontières, *Monitoring Des Juridictions Gacaca, Phase de Jugement: Rapport Analytique No. 5, janvier 2008 – mars 2010*, available at: <http://www.asf.be/publications/Rwanda_MonitoringGacaca_RapportAnalytique5_Light.pdf>, last accessed January 2012.

to his wrongdoing, ask for forgiveness and accept to pay compensation. Then, to reconcile social divisions, both the wrongdoer and the family representative were to drink the blood of a sacrificed sheep mixed with *mato oput*. The *gomo tong* was performed to seal the conflict resolution between clans. Nowadays, these ceremonies are used to reintegrate former members of the Lord Resistance Army (“LRA”) into society by offering them forgiveness.⁵⁸⁷

Such criminal justice methods differ substantially from the international method. These local justice systems can reach out to the direct victims of a conflict in a much more engaging and impacting manner than an international court. They may also be more efficient in ascertaining the truth. It is often stated that within the local community everyone knows exactly what happened and who did what. The truth could potentially come out less shaped in a community-based justice model.⁵⁸⁸

This corresponds with the initial reaction to the introduction of the *Gacaca* Courts from many Rwandan prisoners. The majority of them had been waiting for justice for many years. They were initially very positive about the idea of *Gacaca* and thought that the truth had a better chance of getting out during such trials. They also thought it would have a positive effect on reconciliation. They, however, rapidly lost their faith.⁵⁸⁹ Years before the *Gacaca* Courts were operational, the prisoners had introduced their own unofficial *Gacaca* system in prison under charge of a committee of prisoners who presided over, and recorded the *Gacaca* meetings. The prisoners had much greater faith in their own *Gacaca* system.⁵⁹⁰

⁵⁸⁷ T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, (Zed Books, 2006) 128-168; D. Pain, *The Bending of the Spears: Producing Consensus for Peace & Development in Northern Uganda*, (London International Alert and Kacoke Madit, 1997), published at: www.km-net.org/publications/spear.doc.

⁵⁸⁸ Truth and reconciliation were among the core objectives of the *Gacaca* Courts in trying genocide cases. See *Speech of the Vice-President and Minister of Defence on the Occasion of the Opening of the Seminar on Gacaca Tribunals*, Kigali, 18 June 2002, reproduced by Penal Reform International in PRI Research on Gacaca Report: Rapport III, April – June 2002, available at <<http://www.penalreform.org/publications/gacaca-research-report-no3-jurisdictions-pilot-phase-o>>, last accessed January 2012.

⁵⁸⁹ See Tertsakian, *Le Château*, *supra* note 580, 376-377.

⁵⁹⁰ *Ibid*, 364-366.

Impact of Local Justice on International Justice

These systems, as well as any other system with different rationales and modalities of punishment have largely been ignored in drafting, interpreting and implementing the legal provisions of any of the international courts or tribunals. This is particularly striking because it is mainly these countries that are subject to the jurisdiction of international courts and tribunals.⁵⁹¹

Drumbl is of the firm view that indigenous approaches are not sufficiently incorporated into the international criminal justice methodology. Too little attention is paid to local views on justice and what the communities who suffered the most want from international justice. Drumbl proposes that horizontal and vertical approaches be included. He defines horizontal approaches as the inclusion of extralegal interventions in addition to meting out punishment. Vertical approaches refer to the inclusion of bottom-up influence of local communities and societal institutions.⁵⁹²

Almqvist also emphasised the importance of cultural proximity.⁵⁹³ It is imperative that local cultural norms and perceptions are considered. Failure to do so may undermine the legitimacy of international tribunals which essentially depends on their acceptance by the affected communities, as well as the international community. Local communities are less likely to acknowledge international tribunals as legitimate if they cannot identify with them at all.⁵⁹⁴ A lack of consideration for local cultures can also affect the ability to ascertain the truth. It would create a gap between the assessors and those who are being assessed.⁵⁹⁵

According to Doak, international justice focuses predominantly on retribution, while it addresses restorative elements inadequately.⁵⁹⁶ Clark suggests that further studies

⁵⁹¹ Drumbl, *Atrocity*, *supra* note 46, 7.

⁵⁹² *Ibid*, 125-127, 181-187.

⁵⁹³ J. Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, 4 *Journal of International Criminal Justice* (2006), 746-747.

⁵⁹⁴ I. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 *ILSA Journal of International & Comparative Law* 1 (2005-2006), 1-3; See also C. Bickerton, P. Cunliffe, & A. Gourevitch (Eds.), *Politics without Sovereignty: A Critique of Contemporary International Relations* (UCL Press, 2007).

⁵⁹⁵ *Ibid*; see also Raimondo, *For Further Research*, *supra* note 575, 299-314; Combs, *Fact-Finding Without Facts*, *supra* note 6.

⁵⁹⁶ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 295-296.

are required on “how to bridge the gap between transitional justice processes and local communities”.⁵⁹⁷

International courts seek to be culturally sensitive. They recruit people from all over the world. This can lead to difficulties. Lawyers do not all share the same education, experience, language and legal qualifications. It is then hard to compare the profiles of potential candidates. In addition, many among them, particular those who have no background in common law or civil law, may have great difficulties in familiarising themselves with the international procedural rules.⁵⁹⁸

The new ICC chief Prosecutor is an African woman. Her candidacy was supported by the African Union.⁵⁹⁹ She appears to have been selected in part on the basis of her African origin and gender. The ICC thereby hopes to tackle the criticism that it is an anti-African court, as it has so far only addressed situations in Africa.⁶⁰⁰ It remains to be seen whether her appointment will strengthen the legitimacy of the court in the eyes of African nations.

Judges are selected on the basis of their geographical representation as well as of the principal legal systems of the world.⁶⁰¹ Yet, it is questionable whether the recruitment of judges worldwide, including those from countries that are subject to the jurisdiction of the court, helps to bring the tribunal closer to the affected areas. Judges are recruited from the educated elite and may have little familiarity with the villagers even from their own country.

⁵⁹⁷ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 256.

⁵⁹⁸ Chuter, *War Crimes*, *supra* note 75, 133-134. Bohlander, *Basic Concepts of German Criminal Procedure*, *supra* note 123.

⁵⁹⁹ African Union, Executive Council, Nineteenth Ordinary Session, 23-28 June 2011, Malabo, Equatorial Guinea, EX.CL/Dec.665(XIX): Decision on African Candidatures for Posts Within the International System, Doc. Ex.CL/673(XIX).

⁶⁰⁰ F. Bensouda, *caution africaine de la CPI*, published in *Slate Afrique*, 12/12/2011; and Women’s Initiative for Gender Justice, *Election of the Prosecutor for the International Criminal Court*, available at <<http://www.iccwomen.org/documents/Prosecutor-Election-2011.pdf>>.

See also her own interview in *Jeune Afrique* where she states clearly that she intends to defeat the accusation that the Court is racist against Africa: <http://www.jeuneafrique.com/Article/ARTJAJA2657p050-051.xml0/cpi-gambie-laurent-gbagbo-cour-penale-internationalefatou-bensouda-non-la-cpi-n-est-pas-a-la-solde-des-blancs.html>.

⁶⁰¹ Article 13bis(1)(c); Article 13ter(1)(c) ICTR Statute; Article 12bis(1)(c); Article 12ter(1)(c) ICTR Statute.

The ICC, more than the ICTY and ICTR, must consider local justice systems, as it can intervene only if such systems are perceived as inadequate or unwilling to deal with a case.⁶⁰² Further, the Prosecutor has an explicit statutory obligation to take into account the “interests of victims” and the “interests of justice”.⁶⁰³

The Prosecutor also issued a policy paper in September 2003, encouraging States and civil society “to take ownership of the Court”, and promising to consider “the need to respect the diversity of legal systems, traditions and cultures”.⁶⁰⁴

Thus, the ICC attempts to be cognisant of cultural diversity. Whilst it is important to create cultural awareness within international systems, it should not be overlooked that cultural differences can also be exaggerated. This is evident from the above-described local justice systems in Rwanda and Northern Uganda.

Exaggeration of Cultural Differences

The *Gacaca* Courts were no longer in use in Rwanda. The traditional version came into existence in the pre-colonial period and remained in use until 1962. The *Gacaca* Courts were previously never used for serious crimes before. Rather, they were used to settle property, monetary and personal injury disputes. Community elders were the mediators between the families involved in the dispute. The emphasis was on social harmony rather than punishment and compensation. As a means of reconciliation, the losing family could be ordered to offer beer to the community. They were re-introduced for the purpose of trying the many thousands of suspects of genocide, imprisoned for years in the overcrowded prisons in Rwanda. However, apart from the name, the modern *Gacaca* justice system dealing with genocide has little in common with the traditional *Gacaca* justice system. In particular, they differ in the modern *Gacaca* system being retributive more than restorative.⁶⁰⁵

⁶⁰² See further Article 17(1)(a) of the Rome Statute, *supra* note 44.

⁶⁰³ Article 53(1)(c); Article 53(2)(c); Article 54(1)(b) of the Rome Statute, *supra* note 44.

⁶⁰⁴ ICC paper on some policy issues before the Office of the Prosecutor, ICC-OTP, September 2003 (published at www.icc-cpi.int/otp/otp_policy.html), 2, 5.

⁶⁰⁵ See HRW, *Justice Compromised*, *supra* note 573, 17-26.

The modern *Gacaca* Courts are criticised for being heavily Government-controlled as well as corrupt and unfair.⁶⁰⁶ NGOs which have monitored the *Gacaca* trials cite ample examples of defendants being pressured to pay witnesses or judges; *Gacaca* trials being used to settle old scores; and the Rwandan authorities being involved directly or indirectly in influencing the outcome. Monitoring Reports state that judges and witnesses are frequently bribed, harassed, intimidated or simply pressured to conduct themselves in a manner securing convictions.⁶⁰⁷ At times, this pressure appears to come from the community, and at times from the authorities. It is, therefore, not infrequent that the Government rather than the community determines the fate of the defendants in the name of community justice.

Similarly, the *mato oput* and *gomo tong* were no longer in use for twenty years or more when they were reintroduced in 1999. The Acholi elders insist that the *mato oput* ceremony of forgiveness is more suitable to the Acholi culture than retributive justice. They want to use the same ceremony in relation to the leaders of the LRA against whom the ICC has issued a warrant of arrest.⁶⁰⁸ Many observers support their views and consider that the ICC should not intervene in the local attempts at reintegration and reconciliation.⁶⁰⁹

Tim Allen, a cultural anthropologist who spent over four years in Northern Uganda, expresses a different view. He describes the traditional justice system as “deeply flawed” because it does not offer a national solution.⁶¹⁰ Allen and his team of researchers have conducted many interviews with members of the Acholi community. These interviews depict a different reality and suggest that more Acholi people than assumed disagree that the *mato oput* ceremony offers a solid alternative to retributive justice. A large number of the interviewed members of the Acholi community, who

⁶⁰⁶ See Tertsakian, *Le Château*, *supra* note 580, 360-380; HRW, *Justice Compromised*, *ibid*; PRI and ASF Reports cited above, *supra* note 582.

⁶⁰⁷ See particularly HRW, *Justice Compromised*, *supra* note 573, 90-121.

⁶⁰⁸ Allen, *Trial Justice*, *supra* note 582, 132-138.

⁶⁰⁹ For instance: Caritas, Gulu Archdiocese, *Traditional Ways of Preventing and Solving Conflicts in Acholi*, Psychosocial Support Programme, January 2005. See also Drumbl, *Atrocity*, *supra* note 46, 145. L. Hovil & J. Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper no. 17, Makerere University, July 2005, available at <www.research@refugeelawproject.org>, ways are suggested to reconcile the ICC retributive justice with the Acholi restorative justice.

⁶¹⁰ T. Allen, *Bitter Roots: The ‘Invention’ of Acholi Traditional Justice*, in T. Allen & K. Vlassenroot, *The Lord’s Resistance Army, Myth and Reality* (2010) 242, at 259.

are the most affected by the LRA crimes, prefer punishment over forgiveness.⁶¹¹ The empirical research conducted by the International Center for Transitional Justice and Human Rights Center has reached a similar conclusion.⁶¹²

Cultural differences can, therefore, be used in a manipulative manner to justify an outdated or inhuman local practice.⁶¹³ It can also occur that cultural diversity is used as a cover-up for an outright lie, or exaggerated for other negative purposes. It is not entirely clear what the affected communities want from justice. Opinions also differ among individuals within the affected communities.⁶¹⁴ The question is then which view is authoritative and represents the view of the entire local community most accurately.⁶¹⁵

Most likely, individual victims from all over the world have their own views on justice and forgiveness. Some of them prefer justice over peace and reconciliation; others prefer peace and reconciliation over justice. At least, there does not appear to be a striking difference between what victims want in Northern Uganda and Rwanda versus in the West. Similar to Western-type justice systems, the *Gacaca* Courts are focused on retributive rather than restorative justice. Many of the Acholi people have also stated a preference for retributive over restorative justice. Allen suggests that the Acholi people do not constitute ‘a race apart’, but resemble people elsewhere.⁶¹⁶ Thus, the differences between “them” and “us” are perhaps overstated.

An additional difficulty for the ICC is that it deals with a variety of regions each with their own unique cultural framework. The ICC should, therefore, not adopt a “one-

⁶¹¹ Allen, *Trial Justice*, *supra* note 582, 138-168. See also *ibid*, 258-261.

⁶¹² International Center for Transitional Justice and the Human Rights Center (Berkeley), *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (2005), available at <<http://ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf>>, last accessed December 2011. Of the 2585 adults that were interviewed in April and May 2005, 22 percent preferred forgiveness and reconciliation, and 66 percent preferred punishment.

⁶¹³ See also May & Hoskins, *International Criminal Law*, *supra* note 57.

⁶¹⁴ As is clearly suggested by Allen’s empirical research. See above, *supra* note 582. See also: Max-Planck-Institute for Foreign and International Criminal Law – Ernesto Kiza, Corene Rathgeber & Holger-C. Rohne, *Victims of War: An Empirical Study on Victimization and Victims’ Attitudes towards Addressing Atrocities* (Hamburg Edition HIS-Verlags GmbH, Hamburg, 2006) available online at <http://www.his-online.de>. Participants in this survey interviewed victims in 11 areas including DRC, Kosovo and Bosnia. Most of them are in favour of prosecution of at least those most responsible for their suffering.

⁶¹⁵ Allen, *Trial Justice*, *supra* note 582, 128-181, particularly 176-177.

⁶¹⁶ *Ibid*, 181.

size-fits-all” approach.⁶¹⁷ The success of a specific methodology in one post-conflict region does not guarantee its success in another post-conflict region.⁶¹⁸

Thus, it is difficult to create a methodology that would encompass all different cultural elements. Each specific situation demands its own individual approach.⁶¹⁹ The international procedure should, therefore, be applied with a level of flexibility so it can be adjusted to each situation with its own cultural specifics. In Clark’s view, international justice “needs to be contextually and culturally sensitive”.⁶²⁰

A final issue to be considered is how far international justice should go in accommodating local justice practices that are not in accordance with its standards of fairness. ICTY Appeals Judge Meron firmly stated that “there can be no cutting corners” in upholding due process principles.⁶²¹ However, not everyone shares this view. Drumbl, for instance, has observed that the notion of due process is a typically Western concept, which is transplanted to conflict areas where it may not be respected in the same manner. While not suggesting due process is irrelevant, he states that “justice is not a recipe and due process is not a magic ingredient”.⁶²²

Part III will address the question of whether the international methodology is capable of dealing adequately with the cultural challenges, as well as other challenges it is faced with in the unique context of international justice.

⁶¹⁷ M. Findlay, *Decolonising Restoration and Justice*, 10 *Current Issues in Criminal Justice* (1998) 85-89; Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 296; Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 245.

⁶¹⁸ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 245.

⁶¹⁹ Drumbl, *Atrocity*, *supra* note 46, 185-187; Findlay, *Decolonising*, *supra* note 612, 88.

⁶²⁰ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 245.

⁶²¹ Cited in M. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 *Geo. Wash. L. Rev.* 1165 (2007).

⁶²² Drumbl, *Atrocity*, *supra* note 46, 136.

PART III
PRACTICE OF ASCERTAINING THE TRUTH AT THE
ICTY, ICTR AND ICC

Investigations

General Observations

As previously held, a minimum condition for a successful truth inquiry is that the collectors of the evidence have access to sufficient probative and reliable information that is sufficiently relevant to the subject of the inquiry. Thus, the efficiency of investigations is of the utmost importance.⁶²³

In addition, it is important that the inquiry is conducted in an unbiased fashion and produces information reflecting all views equally and fairly. The goal is to present to the adjudicators the fullest picture of the events in question. To the extent possible, this picture should be based on all attainable and available relevant, probative and reliable incriminating and exonerating evidence.

This is always difficult, given that one seeks to reconstruct facts that have already occurred in the past. Evidence may be lost. Documents may have been destroyed and witnesses may have died or disappeared. It has already been noted that it is impossible to reconstruct the facts fully and to obtain all relevant evidence. One should nonetheless seek to get close to this goal. For this, it is important that the inquiry is complete and conducted with the utmost care and scrutiny and that all potential leaks have been explored. The gathering of evidence is the most essential part of the inquiry because without adequate information, the fact finders are in no position to make any findings.

Various methods can be applied to achieve this. As aforementioned, international criminal justice systems apply the adversarial investigative method. They rely exclusively on the parties to collect and produce the evidence. Each is responsible to present their side of the story. To produce the fullest picture in such a setting, it is

⁶²³ This was recognised by the Registrar from the ICC, Ms Arbia. She said “it break or makes a case”. See the Geneva Conference, *supra* note 173. See also Schomburg, *Truth-Finding in the International Courtroom: The ad-hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)*, Lecture Outline, Utrecht 29 March 2008.

essential that both parties have an equal and adequate opportunity to conduct effective investigations. For this, both parties must be given adequate time and facilities.⁶²⁴

Equality of Arms in Practice

Thus, the principle of equality of arms must be upheld throughout the investigations. In theory, this principle is applied fully at all stages of the proceedings. In reality, however, the parties are never equal, whether on a domestic or international level. On a domestic level, the prosecution represents the State and has a police force to rely on to conduct the investigations. On an international level, there is no State, but the Prosecutor's office is one of the organs of the tribunal or court. Defence counsel, on the other hand, is a visitor. At the ICTY, there is one office to share with all defence teams, as well as a limited number of additional offices in another building. The ICTR has defence offices for defence teams on trial. It however does not offer paper and other work material to the defence. The ICC offers better facilities to the defence including offices and office equipment.

In the two *ad hoc* tribunals, a defence structure has been established to represent the defence – in the ICTR by defence counsel themselves and in the ICTY by the Registry. Initially, these structures had little significance, but over the years, their role and influence has increased to the extent that they are even consulted directly for proposed amendments to the rules. The defence is, however, not recognised as an official organ of the court, which, according to some commentators, amounts to an 'architectural defect'.⁶²⁵

In the ICC, the Office of Public Counsel for the Defence ("OPCD"), an official registry organ, assists the defence and represents its views in any negotiations with other sections. The OPCD can also propose rules amendments or object to propositions. The OPCD typically asks individual defence teams for their views on

⁶²⁴ Unlike in US or UK, due process principles apply equally to both parties. See *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1, 10 August 1995, paras 55, 72.

⁶²⁵ See E. Groulx, *The Defence Pillar: Making the Defence a Full Partner in the International Criminal Justice System*, Conference paper, The Hague Conference, 3-4 November 2000. S. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10(1) *International Legal Perspectives* 111 (1998), 117-119.

any issue which touches on the defence. This partly rectifies the imbalance between the two parties. It provides the defence with an institutional voice and significant assistance in conducting legal research.

Thus, a change in mentality has occurred over the years. Whilst initially the defence was merely regarded as an outside and disruptive body to the system, there is presently much more comprehension for the position of the defence and it is listened to more frequently than in the past.⁶²⁶

The parties nonetheless remain unequal in conducting investigations. The accused has one, possibly two, defence counsel, as well as a handful of supporting staff members. The Prosecutor's office is regarded as one organ. It has, therefore, many more people available to work on one case than the defence and a greater budget to spend on investigations. Thus, the Prosecutor has an institutional advantage over the defence and has significantly more resources available to him.⁶²⁷

For years, investigators for the prosecution have continually investigated the alleged crimes. Unless he is being interrogated or imprisoned, a suspect may not even be aware of the investigation against him. In most cases, an accused has not done any defence preparations before he is in the custody of the tribunals or court and has recruited a defence team. Still later, he receives all incriminating material necessary with which to prepare a defence.⁶²⁸

Once the accused is within the custody of the tribunals or court, his means to prepare personally a defence are limited, given that the tribunals or court are located in areas remote from the crime scene. In addition, the contacts of the accused with the outside

⁶²⁶ For instance, there is more inclusion of the defence in meetings, and their views are requested and considered in rule or other amendments. There is also greater access to parts in the building. Whilst the defence initially could only enter the courtroom and defence room of the ICTY, it now has also access to the cafeteria and library.

⁶²⁷ C Buisman, *Defence and Fair Trial*, in R. Haveman, O. Kavran & J. Nicholls (Eds.), *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003), Chapter VI, 228-231.

⁶²⁸ *Ibid*; See further M. Wladimiroff, *Rights of Suspects and Accused*, in: Gabrielle Kirk McDonald & Olivia Swaak Goldman (eds.): *Substantive and Procedural Aspects of International Criminal Law. The experience of International and National Courts*, Vol I, Commentary, Chapter 11, at 429. See also M. Wladimiroff: *Position of the Defence: The Role of Defence Counsel before the ICTY and the ICTR*, in H. Bevers & C. Joubert, *An Independent Defence before the International Criminal Court* (Intersentia 2002) 35-42, at 39.

world are restricted and subject to monitoring. He, therefore, relies mostly on his defence team to conduct investigations and prepare his defence.

In such circumstances, it is not realistic to offer equal means to the defence, nor is it necessary in light of their different roles and burdens. The tribunals confirmed that equality of arms is not tantamount to equality of means and resources.⁶²⁹ In the view of Goldstone, who was the first chief Prosecutor of the ICTY and ICTR, one should do away with the notion of equality of arms because it is a promise that cannot be fulfilled. Instead, the test should be whether the defence has sufficient resources.⁶³⁰

The question then is what amounts to sufficient resources. If there is reason for doubt concerning the guilt of an accused, it is not to be expected that such doubt will be raised by the prosecution. Therefore, it is essential that the defence has sufficient means to investigate.

The sufficiency of means must be determined against the background of each specific case. Investigations in remote areas are expensive and time-consuming for both parties. It includes airfare and possibly expensive hotel fees. If the crime base area is wide, it requires additional travel time and expenses. For instance, potential ICTR witnesses are spread throughout the world, but mostly in Europe and Africa. Particularly many defence witnesses have fled Rwanda in 1994 and now live elsewhere. This requires a larger budget for the defence than in a situation where all witnesses live in one place. In the DRC, the parties have had to divide their limited resources to investigate and meet potential witnesses in places separated by considerable distance. Travel and communication in these areas is difficult and time consuming. Possible contacts have often moved to different and distant Provinces. Others are to be found in remote, country villages or rural areas. Possession of mobile phones, the only available telephone, is limited. Security issues have occasionally prevented investigations, or limited the opportunity to conduct them.⁶³¹

⁶²⁹ *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N° ICTR-95-1-A, Appeals Chamber, Appeals Judgement, 1 June 2001, [63], [69].

⁶³⁰ *Conference of the International Bar Association*, held in The Hague, Netherlands, 9 June 2009; also see IBA Equality of Arms Review - Issue 3, July 2009.

⁶³¹ The Prosecution supervisor of investigations in the DRC case of *Katanga & Ngudjolo* testified about such general obstacles in conducting investigations. See ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 6/79 NB T, page 10. Similar arguments have been raised by the Katanga defence in: ICC-

Given their more limited budget, such circumstances affect the defence to a much greater extent than the Prosecution. For instance, the Prosecution often chooses to meet and interview its witnesses, or potential witnesses, in surroundings conducive to an interview. Some Prosecution witnesses in the *Katanga & Ngudjolo* case were met on ‘safe’ territory, such as at The Hague, or in Uganda, or elsewhere, where in addition the facilities are better. The defence does not have the means to do so, and has no office space available to it in the country where it must conduct investigations. Accordingly, it has to meet its witnesses in their mud huts or houses, or public places such as bars, restaurants or hotel lobbies often without electricity. In addition, the defence only has its investigator to rely on for translations.⁶³²

Such circumstances should be taken into account when determining the defence investigative budget. The international criminal justice systems are attempting to offer the defence the necessary means. In the view of defence counsel, however, the budget attributed to the defence is far from adequate.⁶³³ The defence must constantly negotiate its investigative budget with the registry. The registry generally seeks to be reasonable, and over the years, the defence budget has become more realistic. Nonetheless, whenever the tribunal or court is faced with budgetary problems, the defence budget is generally the first to be downgraded. There are currently pending negotiations at the ICC regarding the defence budget for 2012 and after. The ICC State Parties have refused to increase the total ICC budget. Therefore, the registry intends to reduce the defence expenditure by 15 percent and has proposed drastic cuts in their salaries and investigation budget.⁶³⁴ Thus, in general, defence counsel legitimately consider their resources insufficient.

01/04-01/07-2709-Red, Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony, 17 February 2011. This is also based on the author’s own experience in conducting field operations.

⁶³² *Ibid.* This is also based on the author’s own experience in conducting field operations in DRC. The chief Prosecution investigator in the *Katanga & Ngudjolo* case complained that the Prosecution also had a limited amount of safe and suitable interview locations available. She was willing to concede that the defence faced similar difficulties. However, she said that she was not in a position to confirm that, as a result of more limited funding, the defence suffered from them to a greater extent than the Prosecution. See ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 6/79 NB T, page 10; ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, p. 59.

⁶³³ David Hooper Q.C. (Interview in The Hague, 3 June 2010), Peter Robinson (Interview in The Hague, 21 November 2009) and Gregor Guy-Smith (Interview in The Hague, 12 April 2011).

⁶³⁴ Discussion Paper on the Review of the ICC Legal Aid System, 626 Annex, internal document – on file with the author.

The Prosecution's means may not be sufficient either. If done properly, investigations are very expensive for both parties, and the prosecution's budget is not unlimited, albeit significantly larger than the budget for the defence.⁶³⁵ In addition, both parties suffer from hindrances inherent to international justice, as already touched upon in Part II. These hindrances will now be considered in light of the practice of the ICTY, ICTR and ICC.

Prohibition of Contact with the Parties

At the ICTY and ICTR, before the parties are put on the stand, the parties are entitled to be in contact with their witnesses and prepare them for testimony upon their arrival at the seat of the court. This has led to many legal disputes, as new allegations are often made during such meetings. These new allegations are then disclosed to the defence in the form of an unsigned "supplementary information sheet" (ICTY) or a "will-say statement" (ICTR). Sometimes, they include references to criminal conduct of the accused that the witness has never raised before.⁶³⁶ This seriously hampers the defence in preparing an effective cross-examination in respect to the new issues. An effective cross-examination requires an adequate investigation into the allegations. This includes their verification by speaking to other people in the field who have knowledge of them. This is a time-consuming exercise.⁶³⁷

Being routinely confronted with new evidence on the eve of the witnesses' testimonies, the defence in the ICTY case of *Limaj et al* requested that the meetings between the Prosecutor and the witness be videotaped or otherwise transcribed and disclosed as a signed statement to the defence. This request was rejected, as the "practice of proofing, by both the Prosecution and Defence, has been in place and

⁶³⁵ See ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 6/79 NB T, page 10; ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, page 59.

⁶³⁶ For instance, in the case of *Bagosora et al*, witness DBQ mentioned one of the four accused, Mr. Kabiligi, for the first time in a meeting with the Prosecutor a few days prior to his testimony. See: *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ, November 18, 2003.

⁶³⁷ This is confirmed by the author's own experience in conducting investigations, as well as that of her colleagues. See personal interviews with David Hooper Q.C. (3 June 2010) and Peter Robinson (21 November 2009) both conducted in The Hague.

accepted since the inception of the Tribunal”.⁶³⁸ The Chamber considered that alternative measures could be taken to remedy the late notice to the defence, depending on the circumstances of each individual situation.⁶³⁹ In most cases, Chambers permit the Prosecutor to lead the new evidence in examining the witnesses at trial, but postpone the cross-examination to allow the defence adequate time to prepare.⁶⁴⁰ The Appeals Chamber has accepted that it is within the Trial Chambers’ discretion to allow witness proofing notwithstanding the silence on this issue in the Statutes or Rules.⁶⁴¹

The ICC put an end to this widely endorsed, but highly contentious practice. On request of the defence,⁶⁴² the Trial Chamber in *Lubanga* held that neither party is entitled to proof their witnesses from the moment that they are within the control of the Victims and Witnesses Unit (“VWU”) whose task it is to familiarise the witness with Court practice and testimony.⁶⁴³ In the case of *Katanga & Ngudjolo*, the defence stated its agreement with the prohibition of “substantive preparation of a witness for their in court testimony,” or “a preparation session directly before giving testimony”.⁶⁴⁴ Indeed, it strongly objected to such a practice, which strongly implies “rehearsing” or “training” a witness, and is thus “capable of abuse”.⁶⁴⁵

However, the defence expressed concern that the manner in which the matter had been resolved in the *Lubanga* case may create unfairness, in particular for the Defence. Rather than prohibiting all contact, the defence requested that the parties

⁶³⁸ *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December, 2004, p. 2.

⁶³⁹ *Ibid*, p. 3; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, 7 June, 2005, para. 26.

⁶⁴⁰ *Ibid*; see also: *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ, November 18, 2003; *Prosecution v. Bagosora et al.*, Written Reasons for Oral Decision of February 18, 2004 on Motions for Further Postponements of Testimony of Witness DBQ, March 1, 2004; *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP, November 18, 2003. In some cases, the new evidence was excluded: *Prosecutor v. Nahimana et al.*, Oral Ruling of March 1, 2001, pp. 9564-9562; *Prosecutor v. Casimir Bizimungu et al.*, Oral Decision of December 3, 2003.

⁶⁴¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, Appeal Chamber, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, paragraph 8.

⁶⁴² ICC-01/04-01/06-T-58-ENG 30 October 2007, page 73.

⁶⁴³ *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November, 2007.

⁶⁴⁴ *Defence Observations Regarding Registry Reports 821 and 842*, ICC-01/04-01/07-857-Conf, dated 28 January 2009, para. 10.

⁶⁴⁵ *Ibid*.

could meet their witnesses in The Hague prior to the commencement of the familiarisation process. The Defence submitted the following arguments:⁶⁴⁶

What is of concern to the Defence is if a defence witness were to travel, for example, to the Hague, fell immediately into the welcoming hands of the VWU, and the Defence were thereafter unable to communicate with their witness, nor, if need be, to take a further and more extensive statement from the witness. This is a particular concern for the Defence as circumstances often do not permit sufficient time and contact with potential witnesses to enable a full and satisfactory review of their potential contribution to the case. The Defence lack the financial and logistical support available to the Prosecution. It is to be noted that the Prosecution's interviews with their witnesses often run into several days, with a team of professional investigators supervising and conducting the interviews, all of which are recorded. The Defence do not have that capacity. From experience, many defence witness interviews take place in imperfect, and sometimes difficult, circumstances. The opportunity to meet with and conduct further fact finding interviews with witnesses is an important factor for the Defence in its preparation of a complex case and the witnesses presence at the Hague is a further and economical opportunity to do that. Such an exercise is to be distinguished from the prohibited exercise of 'rehearsing' or 'witness proofing' as characterized by the Prosecution in the Lubanga case and the object of judicial disapproval.

The Trial Chamber did not explicitly rule on these submissions, but simply adopted a similar "Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" to that in *Lubanga*.⁶⁴⁷

In *Bemba*, the defence requested the Chamber leave to contact witnesses immediately prior to trial in order to conduct a limited form of substantial preparation. It raised similar arguments of fairness and judicial economy.⁶⁴⁸ In its Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, the majority of Trial Chamber III rejected the Bemba defence request on the ground that it saw "no compelling reasons to depart from the

⁶⁴⁶ *Defence Observations Regarding Registry Reports 821 and 842*, ICC-01/04-01/07-857-Conf, dated 28 January 2009, paras. 12-14, in particular para. 13.

⁶⁴⁷ ICC-01/04-01/07-1134, Decision on a number of procedural issues raised by the Registry, 14 May 2009, para. 18. See also: *Décision relative aux modalités de participation des victimes au stade des débats sur le fond*, ICC-01/04-01/07-1788, dated 22 October 2010, para. 80; Public Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), ICC-01/04-01/07-2711-Red, 10 mars 2011.

⁶⁴⁸ ICC-01/05-01/08-620-Corr, Corrigendum Observations de la Défense relatives à la jurisprudence de l'Affaire Lubanga sur les questions procédurales se rapportant aux droits de la Défense, 26 novembre 2009 (notified on 27 November 2010), paras 5-31, and especially para. 9.

uncontroversial jurisprudence of the Court and maintains the view that no proofing or preparation of witnesses for trial by the parties shall be allowed.”⁶⁴⁹

One of the judges, however, issued a partly dissenting opinion in which he stated that the parties should be allowed to meet with their witnesses before trial.⁶⁵⁰ He stated as follows:

For the purposes of the present Opinion, witness proofing refers to a meeting between a witness and the party calling the witness for the purpose of substantive preparation of the witness's testimony. It effectively consists of confirming with the witness as to whether his/her statement is accurate and complete, presuming that the witness already has been given the opportunity to review his/her statement during the familiarisation process, and going through the evidence and relevant exhibits. It may also include a question and answer session, but should not be a rehearsal of the questioning that is to take place during the in-court session. "Rehearsing", "practicing", "coaching" or any intentional or unintentional contamination of the evidence is therefore not included in the definition.⁶⁵¹

The judge considered that such a practice is justified on the basis of the ICC rules dealing with the presentation of evidence. These rules are more akin to the common law than to the civil law system,⁶⁵² where “the manner in which the evidence is presented through the testimony of witnesses is of the utmost importance”.⁶⁵³ He also justified it in light of the scale, complexity, geographical and temporal scope of the case, and of the cultural and linguistic remoteness from the Court:

In tackling a case of such magnitude and complexity, I do not believe it is practical and reasonable to prohibit any pre-trial meeting between the parties and their witnesses. Indeed, under these circumstances, witness proofing could be considered as a "genuine attempt to clarify a witness' evidence", and to ensure the smooth conduct of the proceedings by enabling a more accurate, complete, methodical and efficient presentation of the evidence.⁶⁵⁴

⁶⁴⁹ ICC-01/05-01/08-1016, 18 November 2010, para. 34. The Chamber also considered the defence request as withdrawn because it was not reiterated in the defence observations on the Unified Protocol (para. 35). In these observations, the defence stated that it did not object to the terms of the Unified Protocol on Practices for Witnesses Giving Testimony at Trial, while it reserved ‘the right to revisit the terms of this protocol, and make additional submissions on its application prior to the commencement of the Defence case’. See: ICC-01/05-01/08-992, Defence Observations on the VWU Unified Protocol on Practices for Witnesses Giving Testimony at Trial, 3 November 2011, para. 4.

⁶⁵⁰ ICC-01/05-01/08-1039, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010, para. 7.

⁶⁵¹ ICC-01/05-01/08-1039, para 17.

⁶⁵² ICC-01/05-01/08-1039, para 20.

⁶⁵³ ICC-01/05-01/08-1039, para 21.

⁶⁵⁴ ICC-01/05-01/08-1039, paras 22, 25.

Arguably, these are valid points. Time and budgetary limits do not always permit adequate preparation time with a witness at his location. The parties must travel a considerable distance to conduct onsite investigations and meet with potential witnesses. Witnesses are not always easily accessible and traceable. There is no guarantee that a party will be able to discuss with witnesses during each, or most of their investigation missions. Sometimes months or even years pass by without contact between a witness and a party. The stories of the witnesses can change drastically over time.⁶⁵⁵ Thus, it is important for a party to meet its witnesses shortly before their testimony to assess the consistency of their testimonies and the witnesses' credibility. This assessment is to be made with a view to finally determine whether they should be called in light of the Court's mandate to ascertain the truth. In addition, such a meeting is important to ensure that the witnesses are adequately prepared and understand what is expected from them.

On such grounds, the defence in *Katanga & Ngudjolo* requested the Chamber to be allowed on an exceptional basis to meet four defence witnesses in The Hague prior to their familiarisation program.⁶⁵⁶ This request was based on the fact that, despite its very best efforts, the defence had had insufficient time and budget to meet with these witnesses in adequate circumstances. It highlighted general obstacles it had faced in seeking to conduct effective investigations in geographically remote areas within the time limit set and budgetary restraints.⁶⁵⁷ In particular, it had been difficult to spend sufficient time with the witnesses in question. They were detained in the *Prison Centrale de Makala* in Kinshasa, some 2500 kilometers from Ituri, the core investigation area. Visiting the prison was, therefore, a serious drain on the defence investigation budget. The DRC authorities had obstructed the defence in meeting with the detained witnesses on a number of missions.⁶⁵⁸ Accordingly, the defence had not been able to spend a sufficient amount of time with these witnesses, particularly compared to the time spent by the Prosecution in meeting their witnesses.⁶⁵⁹

⁶⁵⁵ This is confirmed by the experience of the author in conducting investigations, as well as of her colleagues David Hooper Q.C. (Interview in The Hague, 3 June 2010), Peter Robinson (Interview in The Hague, 21 November 2009) and Gregor Guy-Smith (Interview in The Hague, 12 April 2011).

⁶⁵⁶ ICC-01/04-01/07-2709-Red, Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony, 17 February 2011.

⁶⁵⁷ *Ibid*, paras. 4-13. See also section 'equality of arms in practice'.

⁶⁵⁸ ICC-01/04-01/07-T-56-ENG CT WT 03-02-2009, pp. 49-51.

⁶⁵⁹ ICC-01/04-01/07-2709-Red, paras. 14-21.

In addition, the defence highlighted the difficulties in obtaining high-quality interviews in an overcrowded noisy prison without any private interview room. It took hours for the authorities to make available a work space somewhere in the prison, to locate the prisoners sought and to produce them for an interview. Some of the detained witnesses had health problems and were, therefore, not always available. The defence pointed out that, when the Prosecution interviewed one of them for three days, this interview took place outside the prison. Accordingly, the defence argued that the effective application of the principle of equality of arms required that the defence be given an opportunity to speak with the detained witnesses one last time outside the prison.⁶⁶⁰

The Prosecution and victim representatives objected to the defence request.⁶⁶¹ The Chamber acknowledged the difficulties the defence had faced in meeting with the detained witnesses. It nonetheless dismissed the request but instead allowed the defence to return to the DRC to interview them in the prison before their departure to The Hague. It ordered the Registry to contact the DRC authorities to ensure that a private office in the prison be made available to the defence and that access to the prison be granted immediately upon arrival.⁶⁶² Thus, the Chamber was prepared to accommodate the defence but chose the more expensive and inconvenient option of sending two members of the defence back to the DRC over the option of granting an exception to the prohibition of contact rule. Consequently, the defence had to conduct the interviews in less than ideal circumstances which included excessive noise and waiting time. No private and quiet offices are available in Kinshasa central prison.⁶⁶³

⁶⁶⁰ *Ibid*, para. 22; citing: IT-04-74-AR73.4, Prosecutor v. *Prlić et al.*, Decision on Prosecution Appeal following Trial Chamber's decision on remand and further certification, 11 May 2007, para. 38.

<http://www.icty.org/x/cases/prlic/acdec/en/070511.pdf>

⁶⁶¹ Bureau du Procureur, Réponse de l'Accusation à la Défense Request for leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony (ICC-01/04-01/07-2709-Conf du 17 février 2011), 2 mars 2011 ICC-01/04-01/07-2753-Red; Représentants légaux des victimes. Réponse conjointe des représentants légaux à la requête de la Défense de G. Katanga intitulée « Défense Request for leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony » (ICC-01/04-01/07-2709-Conf), 2 mars 2011, ICC-01/04-01/07-2754-Red.

⁶⁶² ICC-01/04-01/07-2755-Red, Décision sur la requête de la Défense de Germain Katanga aux fins d'être autorisée à rencontrer des témoins à La Haye (article 64-6-f du Statut), 4 March 2011.

⁶⁶³ This information is based on the author's own participation.

Contact between the parties and their witnesses in The Hague has been allowed on an exceptional basis. For instance, in *Lubanga* such contact was allowed when new evidence was disclosed.⁶⁶⁴ In addition, the Chamber authorised the defence to be in contact with its witness in The Hague on two occasions when the witness had brought new material. The Chamber reasoned that this contact would save time which would otherwise have to be spent in the courtroom to discover its content and eventual relevance.⁶⁶⁵

In *Katanga & Ngudjolo*, contact was allowed between the Prosecution and a witness after completion of his testimony but before the end of the presentation of all evidence. The VWU had terminated the witness's participation in the witness protection program. The Prosecution was granted an opportunity to discuss alternative protective measures with the witness if so required.⁶⁶⁶ In addition, contact was allowed in the presence of a jurist from the Registry when an interview given by a defence witness was published on the internet while the witness was already in The Hague. In this interview, which was entirely new to the defence, the witness incriminated the accused in whose favour he was about to give evidence. The defence was granted an opportunity to ask the witness about this interview and consider whether it should still call him in light of the new incriminating information.⁶⁶⁷

Thus, on a case-to-case evaluation, Chambers may authorise contact in the presence of the Registry, but in most circumstances, contact is prohibited. This has generally been perceived as an improvement to the ICTY and ICTR practice. Prohibition of contact is considered to be fairer to the defendant who has a right to know the

⁶⁶⁴ ICC-01/04-01/06-T-239-Red-ENG CT2 WT 02-02-2010 1-55 EA T, pp. 6-7. See pp. 1-7 for the complete debate.

⁶⁶⁵ ICC-01/04-01/06-T-280-Red-ENG WT 05-05-2010 (11/05/10), pp. 12-13; ICC-01/04-01/06-T-284-Red-ENG WT 11-05-2010, pp. 21-24.

⁶⁶⁶ Public Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), ICC-01/04-01/07-2711-Red, 10 mars 2011.

⁶⁶⁷ The journalist from Congolese newspaper Milene Info Plus who claimed he had conducted this interview with the witness before his departure to The Hague later stated both to the prosecution and defence that the content of the article did not reflect the conversation he had with the witness, in particular in relation to the allegations made against Katanga. The witness himself denied that the interview even took place. Eventually, the witness was called and the parties and participants agreed not to ask questions about the interview. See: ICC-01/04-01/07-T-249, 18 April 2011, p 3-19; ICC-01/04-01/07-T-250, 19 April 2011; ICC-01/04-01/07-T-251, 20 April 2011; ICC-01/04-01/07-T-252, 21 April 2011.

allegations against him in advance of the trial. Such prohibition of contact has, however, not prevented the witnesses from raising new allegations. Instead of raising them to the prosecution before trial, they now raise them in court directly.⁶⁶⁸

Thus, the defence is caught by surprise even more than when such allegations are disclosed to it a few days before commencement of the testimony. Prohibition of contact also hampers significantly the investigations of both parties, as indicated above. The defence is more affected by it because they have more budgetary limitations to travel back and forth to the location of the witnesses. Thus, the prohibition of contact further undermines the equality of arms between the parties and should ideally be reconsidered.

Academics and practitioners have similarly argued in favor of the adoption of witness proofing at the ICC. In their view, witness proofing will encourage both the fairness and the expeditiousness of trial proceedings at the ICC.⁶⁶⁹ They have also underlined its “capacity to adduce more evidence for consideration at trial,” and the eventual “detrimental effects to the truth-seeking process of prohibiting proofing: probative evidence lost or distorted by the surprise – to both parties – inherent in sudden witness box revelations.” Witness proofing, it has been argued,

[...] as it has been developed, practised, and endorsed at the international criminal tribunals – appears to be a better modality for enhancing the efficiency, integrity, and legitimacy of the truth-seeking process than does the prohibition of proofing.⁶⁷⁰

Lack of State Cooperation

In order to establish a record of the crimes committed and the causes of the conflict, international criminal courts depend on expert and factual witnesses as well as

⁶⁶⁸ See, for instance, P-161 in the Katanga & Ngudjolo case who incriminated Katanga for the first time in the course of his testimony from 26 February until 15 March 2010, ICC-01/04-01/07-T-109 – ICC-01/04-01/07-T-116 (starting from T-109). Similarly, witness P-159 gave evidence against Katanga for the first time during his testimony from 17 March 2010 until 29 March 2010 (ICC-01/04-01/07-T-118 - ICC-01/04-01/07-T-125 (starting from T-119).

⁶⁶⁹ Witness Proofing at the International Criminal Court, American University Washington College of Law, War Crimes Research Office – ICC – Legal Analysis and Education Project, July 2009, p. 25.

⁶⁷⁰ R. Karemaker, B. Taylor and T. Pittman: *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, Leiden Journal of International Law, 21 (2008), pp. 683–698, in particular pp. 694 and 698.

documentation from governments, the UN and NGOs operational within the territory under investigation. To establish that the accused was involved directly or indirectly in the crimes charged, international criminal courts and tribunals tend to rely heavily on factual witnesses. To establish the context of a conflict and the crime base, they tend to rely on expert evidence and reports from governments, the UN and NGOs.

It has already been noted that the international tribunals and court are dependent on the cooperation of the authorities of the crime-base State for conducting any onsite operations.⁶⁷¹ The lack of State apparatus and enforcement mechanisms significantly affect the efficiency of the investigations conducted by the parties, as well as the ability of the judges to verify the reliability of the information.

The *ad hoc* tribunals have faced significant difficulties despite their primary jurisdiction and their chapter VII mandate with the result that they have some powers to put pressure on States to cooperate. The ICC has no such powers but is fully dependent on voluntary state cooperation resulting in very limited powers to pressurise States to provide cooperation.⁶⁷²

The parties require the assistance of the government for various matters. First of all, the State must allow the parties into the country. Rwanda has often threatened to close its borders.⁶⁷³ This is a problem in Sudan for both parties, neither of which has been granted access to Sudan despite ongoing post confirmation proceedings against Abdallah Banda and Saleh Jerbo, two opposition rebels.⁶⁷⁴ This has led the defence for these accused to request for a stay of the proceedings. It argued that it is impossible to prepare an effective defence for the accused due to the ongoing insecurity in Darfur and the inability of both the defence and the Prosecution to enter

⁶⁷¹ See section 'Structure and Capacity Limitations'.

⁶⁷² As Carla Del Ponte pointed out, despite the legal obligation on States to cooperate, this is not always enforceable in reality. Carla Del Ponte calls this lack of political independence the greatest weakness of international criminal justice. See the Geneva Conference, *supra* note 173.

⁶⁷³ As explained by James Stewart in a personal interview conducted in Arusha, Tanzania, 8 October 2004, the Rwandan government refused co-operation after Carla Del Ponte expressed her determination to investigate RPF crimes. The Prosecution was not allowed in for several months. This was confirmed by Carla Del Ponte herself at the See the Geneva Conference, *supra* note 173.

⁶⁷⁴ (ICC-02/05-03/09) Banda is the Commander-in-Chief of the Justice and Equality Movement (JEM) Collective-Leadership, one of the components of the United Resistance Front. Jerbo is the Chief-of-Staff of the Sudan Liberation Movement/Army. They are tried jointly. There are also outstanding arrest warrants against Omar al-Bashir, Ahmed Haroun and Ali Kushayb.

the country despite the defence's best efforts to visit Sudan. In addition, the defence stated it was severely restricted in obtaining evidence because a Government authority announced a public death threat against anyone who would cooperate with the ICC.⁶⁷⁵ This has resulted in severe restrictions on the ability of the defence to secure evidence, access documents and ensure the safety of witnesses even when they are contacted by phone. Accordingly, the defence considered that the Chamber should order a stay since guarantees of a fair trial cannot be met in these circumstances.⁶⁷⁶ This is a valid argument, not merely because a minimum condition for having international trials is that the crimes can be adequately investigated. The outcome of this request is still pending.

Once in the country, the parties depend on the government for the collection of documents in the hands of the State. They also need the government's authorisation to meet and interview potential witnesses in an official function, prisoners or other potential witnesses under government control. The parties also rely on the cooperation of local authorities for the calling of witnesses. In this regard, the prosecution has a clear advantage over the defence. As an organ of the court, it has more means to enforce cooperation on the government and often enters into a cooperation agreement with the government.

Yet, this can be problematic because, the more the powers of the Prosecutor are restrained, the greater the dangers that « selective justice » may occur.⁶⁷⁷ Indeed, the Prosecutor's dependency on State cooperation makes it very difficult to investigate the conduct of persons with links to the government. In the event that the Prosecution shows a suspicion towards any such persons, the government may try to manipulate the investigations, refuse cooperation or otherwise frustrate the work of the Prosecution.⁶⁷⁸ Prosecutors have admitted that these limitations have forced them to

⁶⁷⁵ ICC-02/05-01/07-48-Red, paras. 33–36. In this filing, Salah Gosh, the Sudanese Director of Intelligence, is quoted as saying on 22 February 2009 that “*anyone who attempts to put up his hands to execute [ICC] plans we will cut off his hands, head and parts because it is a non-negotiable issue*”.

⁶⁷⁶ See ICC-02/05-03/09-274 06-01-2012, *Defence Request for a Temporary Stay of Proceedings*.

⁶⁷⁷ Richard J. Goldstone & Nicole Fritz: “*In the Interests of Justice*” and *Independent Referral: The ICC Prosecutor's Unprecedented Powers*, in 13 *Leiden Journal of International Law* 655-667 (2000) 658 [hereinafter ‘Goldstone & Fritz, “*In the Interests of Justice*” and *Independent Referral*’].

⁶⁷⁸ L. Arbour & M. Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, 1 *International Law Forum du droit international* 13 (1999), at 18.

compromise their investigative focus.⁶⁷⁹ As one Prosecutor put it, it is an illusion to think that international courts and tribunals can be independent from domestic or international political authorities.⁶⁸⁰

Politically motivated Investigations

ICTR

Political factors have clearly come into play in determining the Prosecutor's investigative focus in Rwanda. The crimes committed by the RPF guerrillas, who now constitute the Government of Rwanda, have barely been investigated, and nobody from the RPF side has been prosecuted. As a result, all of the approximately 100 individuals who have been arrested and indicted at the ICTR are of Hutu ethnicity. All are associated with the old regime. While there is little doubt that the large majority of killers during the events of April to July 1994 were Hutus, and that a large number of the victims were Tutsi, it is near universally acknowledged that the RPF also committed atrocities and were responsible for unlawful killings on a large scale.⁶⁸¹ The UN Commissioner for Refugees estimates that the RPF killed between 25,000 and 45,000 civilians in 1994.⁶⁸²

Prosecutors in the ICTR have admitted that political considerations have played a role in selecting alleged perpetrators to be brought before the tribunal. Carla Del Ponte, former chief prosecutor at the ICTY and ICTR, who lost her position at the ICTR when she opened investigations against the RPF, has acknowledged that politics controls international justice.⁶⁸³ The frequent difficulties with the Rwandan

⁶⁷⁹ Carla Del Ponte made observations to that effect at the Geneva Conference, *supra* note 173. Del Ponte has personally experienced a tendency of the Rwandan government to seek to manipulate the ICTR fact-finding process. She also admitted that this had a real impact on the investigations.

⁶⁸⁰ See Muna's observations at the Geneva Conference, *supra* note 173.

⁶⁸¹ This was the primary reason why, in 2005, Professor Reyntjens publicly denounced his cooperation with the ICTR after six months of full-time assistance and several years of part-time assistance. See personal interview with Professor Reyntjens, Antwerpen, 20 December 2004. See also Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes from Human Rights Watch, 26 May, 2009, <http://www.hrw.org/node/83536>.

⁶⁸² Cited in: Human Rights Watch, *Unfinished Business – Closing Gaps in the Selection of ICC Cases*, 1 Sept 2011 published at: <http://www.scribd.com/doc/65101796/HRW-Unfinished-Business-Closing-Gaps-in-the-Selection-of-ICC-Cases>, pages 5-6. See also: L. Haskell and L. Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, *Hastings International and Comparative Law Review*, vol. 34 (2011), pp. 70-76.

⁶⁸³ Resolution 1503 UN Doc S/RES/1503 – splitting ICTY / ICTR Prosecutor on request of Rwandan Government with threats of no cooperation. See also Del Ponte's submissions at the Geneva

Government whenever there is a discussion on indicting members of the RPF has led the Prosecutor's Office to decide against issuing such indictments.⁶⁸⁴

Many commentators equate this one-sided justice with victor's justice because those who won the war have escaped prosecution and dictate who is prosecuted and who is not before the ICTR. In their view, as long as only one side is being targeted for prosecution, any efforts to reconcile the different ethnic groups have been frustrated. This has also given credibility to the revisionist and negationist theories, which have further decreased any chance of reconciliation. Whilst one cannot escape certain political pressure, giving in too much to such pressure may undermine all of the objectives international courts and tribunals have set out to achieve.⁶⁸⁵

ICTY

In the ICTY, however, the Prosecution adopted a very different strategy. It took a tough approach to uncooperative governments. It did not bend to pressure from the Yugoslav authorities, but rather pressured them into cooperation with significant political and financial bargains.⁶⁸⁶ Initially, the ICTY investigators had a rough time in acquiring access to certain crime-base areas and crucial witnesses, particularly in

Conference, *supra* note 173. After she was replaced by Justice Hassan B. Jallow, the current ICTR Prosecutor, the investigations discontinued. At the same conference, Muna, one of the ICTR prosecutors, calls it an illusion to think that any decision can be taken without the approval of the political authorities and admits that this undermines what they can do effectively for reconciliation purposes.

⁶⁸⁴ This has been the main subject of the Geneva Conference, *supra* note 173. During two days and a half, prosecutors, judges, defence counsel, experts, Rwandan interpreters, journalists and others concerned in the story of Rwanda have debated the question as to why the RPF was not prosecuted and whether this should be, or should have been done. The general view is that the ICTR's failure to have prosecuted anyone linked to the current regime was clearly politically motivated and amounts to its greatest weakness.

⁶⁸⁵ See particularly the critical remarks of Belgian investigative judge, Mr. Van Der Meersch, Mr. Degni-Ségui, Nsengimana, Sorel and Guichaou, highlighting that, not only reconciliation efforts are undermined by one-sided justice, but also the truth-finding function of the tribunal. See the Geneva Conference, *supra* note 173. Another problem is that the ICTR jurisdiction exclusively deals with crimes committed in 1994. See also: Cryer, *Prosecuting International Crimes*, *supra* note 223, 109-210; Chuter, *War Crimes*, *supra* note 75, 93, 138-139, 189-200, 220-221; Payam Akhavan: *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda* (1997) 7 DjCIL 325, 328; Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190; Human Rights Watch, *Unfinished Business*, *supra* note 682, 5-6.

⁶⁸⁶ P. Lopez-Terres (Chief of Investigations ICTY): *Arrest and transfer of indictees. The experience of the ICTY*, 15 December 2006. Paper presented at the ICC Office of the Prosecutor, 15 December 2006. On file with the author. See also: Carla Del Ponte & Chuck Sudetic: *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Other Press 2009 (original version in Italian 2008).

the Republika Srpska within Bosnia and Herzegovina.⁶⁸⁷ However, with time and persistence, they eventually managed to investigate the bulk of the most significant crimes committed by all sides, including Serbs, Croats and Muslim throughout the former Yugoslavia.⁶⁸⁸ More specifically, the Prosecution investigators conducted their main investigations in Croatia between 1991 and 1995; in Bosnia and Herzegovina between 1992 and 1995; in Kosovo between 1998 and 1999; and in Macedonia between May and August 2001.⁶⁸⁹ Accordingly, it appears that the ICTY Prosecutor's approach worked well. Human Rights Watch observes that the fact that the ICTY has investigated crimes committed by all sides in the Yugoslav conflict "stands as a record against claims that it was biased against one particular group".⁶⁹⁰

There is still criticism. The ICTY Prosecutor has for instance been criticised for seeking to prosecute all sides at all costs and irrespective of the evidence.⁶⁹¹ The fact that many of the prosecutions of members of the Muslim community have led to acquittals may prove that there is some value in this criticism.⁶⁹² Prosecutions should be based on the evidence available, not on any pre-determination to prosecute all sides.

The ICTY Prosecutor was also criticised for failing to prosecute anyone from NATO for war crimes committed in the course of the bombing of Kosovo and Serbia in 1999. It has been alleged that this decision was based on political, rather than legal

⁶⁸⁷ *Ibid.*

⁶⁸⁸ There has even been a case against two citizens of Macedonia for crimes committed against ethnic Albanians. This case concerned two accused: Ljube Boškoski and Johan Tarčulovski. Ljube Boškoski was acquitted and Johan Tarčulovski was sentenced to 12 years. See Judgement of 10 July 2008, IT-04-82-T.

⁶⁸⁹ *Ibid.* The ICTY had jurisdiction over crimes committed in Macedonia and Kosovo because of its open-ended mandate, unlike the ICTR, which is limited to crimes committed in 1994. See also: Cryer, *Prosecuting International Crimes*, *supra* note 223, 209.

⁶⁹⁰ HRW, *Unfinished Business*, *supra* note 682, 5.

⁶⁹¹ Cryer, *Prosecuting International Crimes*, *supra* note 223, 211-212. Defence counsel John Jones clearly shares this criticism of 'evenhandedness', which he expressed at a seminar on international justice "Between Impunity and Show Trials", held on 4 February 2012 at Garden Court Chambers.

⁶⁹² For instance, out of six KLA members who were on trial in the ICTY, only two were convicted (Haradin Bala, Lahi Brahimaj), but the more important defendants (Ramush Haradinaj, Fatmir Limaj) were acquitted. However, on 19 July 2010, a partial re-trial was ordered for all three defendants in the case of Haradinaj (Appeals Chamber Judgement, IT-04-84-A). Naser Orić, a Muslim commander in Bosnia, was acquitted on appeal (Appeals Chamber Judgement of 3 July 2008, IT-03-68-A. Enver Hadzihasanovic & Amir Kabura, both in the Bosnian army, received low sentences; on appeal, Kubura received 2 years and Hadzihasanovic 3,5 years (Appeals Chamber Judgement of 22 April 2008, IT-01-47-A).

reasons.⁶⁹³ However, as one ICTY Prosecutor, Blewitt, rightly noted, NATO could not have been prosecuted before the ICTY, because it only deals with crimes committed by individuals. No specific war crimes committed by individuals had been identified. If NATO can be blamed for launching an illegitimate war, that in itself does not lead to criminal liability under the ICTY Statute, as it is not one of the recognised crimes under the jurisdiction of the ICTY.⁶⁹⁴

Criticism is unavoidable in any situation where a Prosecutor can only investigate a handful of the totality of the crimes. Selectivity is a necessary ingredient of international justice. On the whole, however, the ICTY Prosecutor's selection policy has been balanced and fair to victims and perpetrators of all ethnic groups.

ICC

At the ICC, politics also appear to have influenced Prosecutorial choices.⁶⁹⁵ This has led to similar scenarios as in Rwanda, namely that the crimes committed by one side of the conflict are investigated, whilst the crimes committed by the other side are not.⁶⁹⁶ According to Human Rights Watch, this one-sided justice can be perceived as “victor's justice”, undermining the perceptions of independence and impartiality.⁶⁹⁷ As was suggested in Part I, for a successful truth-ascertaining exercise with a potentially positive impact on reconciliation, it is important to look into the sufferings, and crimes committed by all sides.⁶⁹⁸ This should be done even if “politically inconvenient or otherwise difficult”.⁶⁹⁹ If not, the ICC may lose legitimacy in the eyes of the affected communities who are all too aware of violations committed by various parties. Therefore, Human Rights Watch has a point when it states that it is “essential for the credibility of the ICC in its delivery of meaningful

⁶⁹³ Chuter, *War Crimes*, *supra* note 75, 189-200; Cryer, *Prosecuting International Crimes*, *supra* note 223, 216-220.

⁶⁹⁴ Blewitt, *The International Criminal Tribunals*, *supra* note 76, 145, 149.

⁶⁹⁵ W. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 JICJ (2009) 731, 753; W. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 Criminal Law Forum (2009), 5, at 33.

⁶⁹⁶ May & Hoskins, *International Criminal Law*, *supra* note 57, 219, 242.

⁶⁹⁷ HRW, *Unfinished Business*, *supra* note 682, 2, 5.

⁶⁹⁸ See above, section ‘Relativism versus Radicalism’.

⁶⁹⁹ HRW, *Unfinished Business*, *supra* note 682, 5.

justice that it act impartially and be seen to be doing so.”⁷⁰⁰

The Prosecutor can initiate investigations *proprio motu* on the basis on information received from individuals or organizations. He can also initiate investigations on the basis of a referral from any State Party or from the United Nations Security Council.⁷⁰¹ Until today, 14 cases in 7 situations have been brought before the ICC. Three of the situations are self-referrals by the territorial States (Uganda, the Democratic Republic of Congo (“DRC”) and the Central African Republic (“CAR”). Two situations have been referred to the ICC by the Security Council (Darfur and Libya).⁷⁰² Two situations have been opened by the Prosecutor *proprio motu* after having been authorized by the Pre-Trial Chamber to do so (Kenya on 31 March 2010 and Côte d’Ivoire on 3 October 2011).⁷⁰³

DRC

In the first ICC situation, the Democratic Republic of Congo (“DRC”), opened on 23 June 2004, it appears that no investigations have been conducted in respect of crimes allegedly committed by persons on the side of the DRC government. This choice has been made notwithstanding the numerous allegations made in respect of its involvement in the war in Ituri, the eastern part of DRC.⁷⁰⁴ This conflict zone is subject to the Prosecution’s investigation in other DRC cases (*Lubanga* and *Katanga & Ngudjolo*). In the *Katanga & Ngudjolo* case, even specific individuals in the current DRC Government and army have been identified as having played a role in the crimes charged against Katanga and Ngudjolo.⁷⁰⁵

⁷⁰⁰ *Ibid*, 5.

⁷⁰¹ Articles 14 and 15 of the Rome Statute.

⁷⁰² Darfour: Resolution 1593, 31 March 2005 – Libya: Resolution 1970, 26 February 2011.

⁷⁰³ See: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

⁷⁰⁴ See, for instance, the opening of the Lubanga trial when the defence made the following submission (which was not broadcasted in DRC): “The Prosecutor announces proudly this trial, that this trial is the trial of the child soldiers, but who gave -- who scandalously gave justification to that criminal practice? Who has given awful prestige to the Great Lakes region of Africa and to these children taken up in war? Laurent-Desire Kabila who had an army of kadogo. Who was the commander of operations of that shameful army, that army of children? His son, Joseph Kabila, today at the head of the country. And what is more, which is the army that at this very point in time is enlisting and sending on the hills of the Kivus child soldiers? The armed forces of President Joseph Kabila, the army of he who delivered to you Thomas Lubanga, Madam Prosecutor. And we want to make -- and you want to make of Thomas Lubanga the emblematic criminal of events which are not of his making and for which those who bear the greatest responsibility are not being prosecuted, and that is why instead of making or rising to the challenge of the international criminal justice a major injustice is being created. That is the nature of the first case brought before the International Criminal Court.” (See ICC-01/04-01/06-T-109-ENG WT 27-01-2009, pages 31-32).

⁷⁰⁵ See in particular the testimonies of Pitchu Iribi DRC-D02-P-0228, ICC-01/04-01/07-T-249 – ICC-01/04-01/07-T-253, in particular: ICC-01/04-01/07-T-252, 21-04-2011, page 65-67; as well as Ndjabu

There are also suspicions that the ICC Prosecution protects the Rwandan regime rendering it immune from prosecution for any crimes in the Kivu provinces of the DRC allegedly committed by Rwandan armed groups or Congolese armed groups in collaboration with Rwanda. The ICC Prosecution maintains close contacts with the Rwandan Government. For instance, the deputy Prosecutor attended President Kagame's inauguration as President on 5 September 2011.⁷⁰⁶

Having just returned from Kigali, in the *Katanga & Ngudjolo* case, the Prosecutor opened the case with the 1994 Rwandan genocide:⁷⁰⁷ "At the root of the Congo wars is the genocide in Rwanda" he said while inflating the number of people who were exterminated in Rwanda within three months to one million fifty thousand.⁷⁰⁸ It is unclear where he derived this number from because it is significantly higher than the number of victims acknowledged by the ICTR or any Rwandan expert.⁷⁰⁹ He then went on to explain that some of the *génocidaires* from Rwanda had escaped to neighboring Congo. Their regrouping in DRC had been a crucial factor in triggering the two Congo wars. According to the Prosecutor, "[t]he Bogoro attack is the consequence of the national and international failures to prevent and control such massive crimes".⁷¹⁰

The Rwandan genocide has, however, no relevance in respect to the *Katanga & Ngudjolo* case. Those Rwandans who regrouped operated from a different area. Thus, this opening created the impression that the Prosecution was putting on a show to please the Rwandan Government. It also gave the impression that the Prosecutor has

Ngabu (ICC-01/04-01/07-T-242-Red-ENG WT 30-03-2011, pages 55-59; ICC-01/04-01/07-T-244-ENG CT WT 06-04-2011, pages 55-57) directly implicating Mbusa Nyamwisi, currently Minister of Sport in the DRC government, Bovic Bolanga, former commissioner for the interior in Mbusa's government, the RCD-K/ML, Colonel Aguru, the RCD-KML and Kinshasa in training and providing weapons and other logistics to the militia with the specific purpose of attacking Bogoro and Bunia. See also HRW, *Unfinished Business*, *supra* note 682, 12-16.

⁷⁰⁶ OTP Weekly Briefing, 31 August – 6 September – Issue 53, published at: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>

⁷⁰⁷ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009 55/73 NB T, 22-26

⁷⁰⁸ *Ibid.*, 22. Until today, the exact number of deaths in

⁷⁰⁹ Until today, the exact number of deaths in Rwanda has not been established, but estimations are made between half a million and a million. See, for instance: <http://fr.hirondellenews.com/content/view/10504/26/>, 8 February 2002 (the Kigali government has counted 1074017 deaths, but in fact, only 934218 victims have been identified with certainty).

⁷¹⁰ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009 55/73 NB T, 22. Similar observations were made by the Deputy Prosecutor at pages 26-27.

adopted a biased view on historical events which led to the Congo wars. The causes of the Congo wars are not established historical facts, but are in dispute.⁷¹¹

The Prosecutor made no mention of the fact that, according to the UN draft report, the APR together with the *Alliance des Forces Démocratiques pour la Libération du Congo* ('AFDL') and the *Forces Armées Burundaises* ('FAB') committed serious violations of human rights and international humanitarian law against Hutu refugees in DRC between March 1993 and June 2003.⁷¹² Given the targeted, indiscriminate and systematic nature of the massacres of the Hutu ethnic group, whose victims included women, children, elderly and sick people, and given the systematic use of barriers to facilitate the elimination of the Hutu population, the report asserts that, if they were proven beyond reasonable doubt before a competent court, "they could be classified as crimes of genocide".⁷¹³

Most of these allegations relate to a period which falls neither under the jurisdiction of the ICTR, nor of the ICC. However, if the Prosecutor chooses to give a historical narrative, it is unfortunate if he addresses one side of the story only. Even in the period under the jurisdiction of the ICC, allegations have been made against the

⁷¹¹ See for instance: T. Turner, *The Congo Wars, Conflict, Myth & Reality* (Zed Books Ltd, 2007). See also: HRW, *Ituri Covered in Blood: Ethnically Targeted Violence in Northeastern DR Congo*, 7 July 2003, available at <<http://www.hrw.org/reports/2003/ituri0703/>>, last accessed January 2012; HRW, *Unfinished Business*, *supra* note 682.

⁷¹² Democratic Republic of the Congo, 1993–2003 Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, June 2010 (hereinafter 'UN Draft Report'), pages 74-111, in file with the author. This report was leaked to the French journal '*Le Monde*', which published the information on 26 August 2010 (Christophe Châtelot and Philippe Bolopion: L'ONU ne veut pas laisser impunis dix ans de massacre au Congo RDC, *Le Monde* 26 August 2010, at: <http://abonnes.lemonde.fr/>). The Rwandan government reacted strongly to the allegations in this UN draft report, refuting all of them and threatening to withdraw all Rwandan soldiers employed for UN peace keeping missions in Africa. See Christophe Châtelot and Philippe Bolopion: L'ONU ne veut pas laisser impunis dix ans de massacre au Congo RDC, *Le Monde* 26 August 2010, at: <http://abonnes.lemonde.fr/>. See also: <http://rnanews.com/politics/4080-statement-by-the-government-of-rwanda-on-leaked-draft-un-report-on-drc->

⁷¹³ UN Draft Report, paras. 513-518. The UN Draft Report also refers to a joint mission authorized by the Commission on Human Rights which, in July 1997, reported to the General Assembly that some of the alleged massacres of Hutu refugees in DRC "could constitute acts of genocide". See Report of the joint mission charged with investigating the allegations of massacres and other human rights violations taking place in eastern Zaire (now the DRC) since September 1996 (A/51/942), para. 80). In 1998, another mission sent by the Secretary-General also reported on the systematic nature of the massacres committed against the Hutu refugees in DRC, including, and demanded further investigation to determine whether these massacres constituted genocide (511-512). See *Report of the Investigative Team of the Secretary-General* (S/1998/581), appendix, paras. 95-96. See further UN Draft Report paras. 510-512.

Rwandan government for financing, training and otherwise supporting armed militia groups in the Kivu provinces, which were allegedly implicated in committing war crimes and crimes against humanity.⁷¹⁴ However, the Prosecution's investigations appear to focus merely on crimes committed by the *Forces Démocratiques pour la Libération du Rwanda* ("FDLR"), the main current opposing army to the Rwandan regime. It is a splinter group of *Armée de Libération du Rwanda* ("ALIR"), which succeeded the earlier armed group called *Rassemblement pour le retour des Réfugiés Rwandais*. The initial group was established in 1995 to re-conquer Rwanda and overthrow the Rwandan regime. It mainly consists of Rwandan soldiers from the former Rwandan army (Force Armée Rwandaise ("FAR")) and *interahamwe* who fled from Rwanda to North and South Kivu in 1994 after losing the war against the Rwandan Patriotic Front ("RPF") led by Paul Kagame, the current President of Rwanda.⁷¹⁵

The FDLR is alleged to be responsible for multiple atrocities in DRC. The Prosecution alleges that, in January 2009, the FDLR launched a campaign "aimed at attacking the civilian population and creating a "humanitarian catastrophe" in the Kivu provinces of DRC, in order to draw the world's attention to the FDLR's political demands".⁷¹⁶ The extent to which this allegation is accurate has not yet been established. Witnesses typically identified FDLR soldiers by the fact that they spoke Kinyarwanda. However, in light of the fact that many other Kinyarwanda-speaking armed groups were operational in the same area, the alleged crimes or part thereof could have been carried out by other armed groups.⁷¹⁷

More surprising, however, is that the Prosecution charged Mbarushimana for these

⁷¹⁴ This was even acknowledged by the ICC Deputy Prosecutor, yet without any condemnation. See: ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009 55/73 NB T, 26-27. See also: HRW, *Ituri Covered in Blood: Ethnically Targeted Violence in Northeastern DR Congo*, 7 July 2003, available at <<http://www.hrw.org/reports/2003/ituri0703/>>, last accessed January 2012, 5-19; *Unfinished Business*, 9.

⁷¹⁵ Rwanda: *Arming the perpetrators of the genocide*, Amnesty International, June 1995. See also: *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, paras. 2-4.

⁷¹⁶ ICC-01/04-01/10-465-Red, 16 December 2011, para. 6.

⁷¹⁷ See: P. Clark, *Identification of Armed Groups in North and South Kivu, Democratic Republic of Congo*, Expert Report in the case of *Mbarushimana* (for the Defence), DRC-D06-0001-0012. See also *ibid.*, paras. 78, 117, 120, 136 where the Chamber found that certain crimes could not conclusively be attributed to the FDLR. The Chamber held that the evidence was too thin and speculative to be relied on to establish substantial grounds to believe that the FDLR was responsible for those crimes.

crimes, although he was in Paris, far remote from the crime base, during the entire period covering the charges. The Prosecution describes his role in the alleged FDLR crimes as follows: “On the one hand, whilst having full knowledge of the attacks perpetrated by the FDLR against the civilian population, he issued several press releases on behalf of the organisation in the aftermath of operations, systematically denying any responsibility of the group. On the other hand, he engaged in international peace talks and negotiations, shrewdly portraying the FDLR as an actor seeking peace and stability in the Kivu area”.⁷¹⁸

In the main, Mbarushimana’s *post facto* press releases deny the involvement of the FDLR in alleged crimes and demand international investigations into these crimes. At no time is Mbarushimana alleged to have ordered, incited or instigated the crimes. Nor is it suggested that he had power to exercise authority over FDLR soldiers.⁷¹⁹ Thus, in fact, all he can be blamed for is being the Executive Secretary of the FDLR. However, even if the FDLR can legitimately be described as a criminal organisation, membership therein is insufficient to trigger liability under the ICC Statute. No wonder, therefore, that the Pre-Trial Chamber by majority held that Mbarushimana “did not provide any contribution to the commission of such crimes, even less a “significant” one”.⁷²⁰

Instead, the Prosecution could have charged one of the FDLR commanders present in the DRC. Therefore, one cannot help to wonder whether, in charging Mbarushimana, an outspoken enemy of the current Rwandan regime, the Prosecution was led by political more than legal motives. Alternatively, it is a sign of inefficient and inadequate investigations.

Further prosecution investigations are being carried out in the Kivu provinces. It appears that these investigations continue to be focused exclusively on the FDLR, and not on any Rwandan or Congolese armed group linked to the current Rwandan regime.⁷²¹

⁷¹⁸ Document Containing the Charges (DCC), paras 119-120; ICC-01/04-01/10-465-Red, 16 December 2011, para. 8.

⁷¹⁹ ICC-01/04-01/10-465-Red, 16 December 2011, para. 297.

⁷²⁰ ICC-01/04-01/10-465-Red, 16 December 2011, para. 292.

⁷²¹ See also HRW, *Unfinished Business*, *supra* note 682, 9, 16-18.

Uganda

The second situation was opened in Uganda on 29 July 2004. In January 2004, the Ugandan government had already referred its country to the ICC Prosecutor. On 29 January 2004, Uganda's President Museveni and the ICC Prosecutor held a press conference together in London to announce publicly that the ICC Prosecutor would look into the situation in Northern Uganda.⁷²² These ICC investigations eventually led to the arrest warrants of 5 members of the Lord Resistance Army ("LRA"), one of whom is confirmed dead.⁷²³ From the beginning, the Prosecutor indicated that he would also investigate allegations against the Ugandan People's Defence Force ("UPDF"), the Government army which had been involved in an armed struggle with the LRA in Northern Uganda. However, today, eight years later, there is no sign that the Prosecutor ever scrutinized the conduct of UPDF soldiers. Failing to assess the criminal liability, if any, of the Government's side in the conflict has undermined the credibility of the ICC in the eyes of the affected communities in Northern Uganda.⁷²⁴

Central African Republic

Bemba's case is similarly surprising. At the time of his arrest by the ICC, Bemba was a powerful political figurehead in DRC and came second in the presidential elections in DRC held in 2006. He is the most feared enemy of the current President in the DRC, President Kabila, whose popularity and power have significantly weakened over the last few years. NGOs have made many allegations against Mr. Bemba and his group. Yet, Mr. Bemba has been charged with one attack only, which was launched not in DRC but in CAR. This has raised suspicion as to whether the choice of charges, as well as the choice of the suspect was not politically motivated. Those in support of Bemba were of the view that President Kabila was behind his arrest, as he constituted a political threat against him.⁷²⁵ Others have raised a question mark as to

⁷²²http://www.icccpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20Uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB.

⁷²³ Decision to terminate the Proceedings against Raska Lukwiya, 11 July 2007, ICC-02/04-01/05-248.

⁷²⁴ Allen, *Trial Justice*, *supra* note 582, 99-102; HRW, *Unfinished Business*, *supra* note 682, 23-29; M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*; Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21(2) *Ethics & International Affairs* (2007) 179-198.

⁷²⁵ Jacques Mbokani: 'Jean-Pierre Bemba, victime d'un procès politique?' at: http://jeanpierrebemba.org/complot_politique_jBokani.pdf. See also: William W. Burke-White:

why Bemba has not been charged for crimes allegedly committed by his armed group in the DRC conflict.⁷²⁶

In addition, he is clearly not the only one responsible for crimes committed in CAR. Yet, the Prosecutor has not initiated any investigations into crimes other than those allegedly committed by Bemba's armed group, the *Mouvement de Libération du Congo* ("MLC"). Initially, the Prosecutor alleged that Bemba had sent the MLC to CAR on the request of Ange-Félix Patassé, President of the CAR to resist a 'coup d'État' led by General François Bozizé. The MLC soldiers allegedly raped, pillaged and murdered anyone opposing them in the period between October 2002 and March 2003. Bemba was initially charged under the common plan liability with President Patassé as his co-perpetrator.⁷²⁷ The latter, however, was never charged; nor was his role in the common plan sufficiently investigated. When asked why Bemba was the only person prosecuted in the dossier on CAR, the Prosecutor said that he was considered the main person responsible for the alleged crimes. The Prosecutor added that, at the beginning, the Prosecution Office thought that Bemba and Patassé were jointly responsible, but that the evidence has since demonstrated that the soldiers who committed the crimes were those under Bemba's responsibility.⁷²⁸ In a second confirmation hearing, Bemba's charges were confirmed under the criminal liability mode of command responsibility rather than common plan.⁷²⁹

Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo, 18 *Leiden Journal of Int. Law* 557, at 559 (2005); referring DRC case to ICC has allowed President Kabila to offer a "politically expedient solution for the Congolese president to deal with potential electoral rivals".

⁷²⁶ HRW Report 'Ituri Covered in Blood, Ethnically Targeted Violence in Northeastern DR Congo', 7 July 2003, at: <http://www.hrw.org/reports/2003/ituri0703/> (particularly 36-38); HRW, *Unfinished Business*, *supra* note 682, 31-33; ICC Hearing against Former Vice-President of DR Congo Jean-Pierre Bemba, 7 January 2009, at:

<http://www.hrw.org/en/news/2009/01/07/icc-hearing-against-former-vice-president-dr-congo-jean-pierre-bemba>; Keith Harmon Snow, 'A People's History of Congo's Jean-Pierre Bemba', 18 September 2007, at <http://towardfreedom.com/home/content/view/full/1123/1/>; Joe Bavier, 'Bemba arrest removes rival to Congo President', 25 May 2008, at: <http://www.reuters.com/article/idUSL2550628>; <http://www.unhcr.org/refworld/country,,HRW,,BEL,,4843fd4a2,0.html>

⁷²⁷ Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome, ICC-01/05-01/08-424 15-06-2009.

⁷²⁸ AFP: "Bemba face à ses juges", published at the internet site of 'l'hebdomadaire français Le Point', 22 November 2010.

⁷²⁹ *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15-06-2009, paras 341-501.

Kenya

In the Kenya I case, high-up politicians, most notably Ruto, Kenyatta and Muthaura have been charged. The Prosecutor has targeted both sides that are held responsible for the post-election violence in Kenya at the end of 2007 until January 2008. However, the President and Prime Minister are spared. This separation is surprising, particularly in the case of Ruto, who was of the same party as Prime Minister Odinga (Orange Democratic Movement “ODM”). At the time of the events under the ICC’s jurisdiction, they were working closely together and often seen together in videos and political rallies.⁷³⁰ Prosecution witnesses made allegations against Odinga.⁷³¹ Yet, the Prosecution claims not to have evidence against him.⁷³² The result is that two potential candidates for presidency (Ruto and Kenyatta) cannot participate in Kenya’s 2012 elections.⁷³³

It remains to be seen how the Libyan and Côte d’Ivoire situations will evolve. For now, only the losing sides to the conflicts in Libya and Côte d’Ivoire are facing ICC charges.

Causes and Consequences of Selective Prosecutions

In light of the above examples, there is at least a valid perception that the ICC Prosecutor does not act fully independently, or impartially in his investigations. This goes against the Prosecutor’s statutory obligations of independence and impartiality, as well as its own stated policy. Pursuant to article 42(1) of the Rome Statute, the Prosecution “shall not seek or act on instructions from any external source.” In accordance with the Prosecutor’s policy, the duty of independence “goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, nor the importance of cooperation of any particular party, nor the quality of cooperation provided. The

⁷³⁰ For instance: EVD- PT- D12- 00237, ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011, 89-91.

⁷³¹ Witness 6: ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, pages 41-42; ICC-01/09-01/11-353, Kosgey Confirmation Brief, 24 October 2011, paras. 64-65. See also confirmation hearing, defence opening : ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011, at 94.

⁷³² ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, page 7. During his press conference on 24 January 2012, the Prosecutor repeated that he had no evidence against the top authorities of Kenya. See: Press Conference held by Ocampo on 24 January 2012 relating to the Pre-Trial Chamber’s decision on the confirmation of the charges in Kenya I and II, issued on 23 January 2012.

⁷³³ As was also pointed out by the Ruto defence: ICC-01/09-01/11-T-6-Red-ENG WT 02-09-2011, p 146.

selection process is independent of the cooperation-seeking process.”⁷³⁴

Some have alleged that this has been the result of allowing States to refer a situation to the ICC, as was done by Uganda, DRC and CAR.⁷³⁵ Schabas, for instance, firmly believes that self-referrals increase the potential for political manipulation.⁷³⁶ However, as Robinson points out, political manipulation is not determined by the trigger mechanism, but is an inherent problem of international criminal justice.⁷³⁷ Provided the Prosecutor makes the final decision as to whether a situation should be opened in a self-referral State based on the admissibility and complementarity criteria set out in the Statute, it makes little difference which State has referred the situation to him. Irrespective of who has referred the situation to the ICC, Government members targeted for prosecution are likely not inclined to cooperate.⁷³⁸

The consequences of such selective prosecutions can be quite significant, particularly for the secondary objectives of the ICC. As May and Hoskins state:⁷³⁹

“How and which cases are selected for prosecution will affect the image of impartiality of the international community. First, especially in deeply divided societies where atrocities were committed by members of both sides of a conflict, solely singling out representatives of one community for prosecution is likely to erode perception of impartiality among the targeted community. Second, local law enforcement officials will only serve to entrench, and potentially legitimate, the practices too often found within transitional contexts.”

⁷³⁴ Office of the Prosecutor, International Criminal Court (OTP), “Criteria for Selection of Situations and Cases,” draft policy paper, June 2006, pp. 1-2, published at: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>.

⁷³⁵ W. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 *JICJ* (2009) 731, 753; W. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 *Criminal Law Forum* (2009), 5, at 33; Adam Branch: ‘Uganda’s Civil War and the Politics of ICC Intervention’ 21(2) *Ethics & International Affairs* (2007) 179-198; A. Cassese, *Is the ICC Still Having Teething Problems?*, 4 *Journal of International Criminal Justice* 434 (2006); M. Arsanjani & W. Reisman, *The Law in-Action of the International Criminal Court*, 99 *Am Journal International Law* 385 (2005), at 386-397.

⁷³⁶ W. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 *Criminal Law Forum* (2009), 5, at 16, 22.

⁷³⁷ D. Robinson, *The Controversy over Territorial State Referrals and Reflections on ICL Discourse*, 9 *Journal of International Criminal Justice* 355 (2011), 355, 368, 369, 377.

⁷³⁸ L. Arbour & M. Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, 1 *International Law Forum du droit international* 13 (1999), at 18.

⁷³⁹ May & Hoskins, *International Criminal Law*, *supra* note 57, 242.

Whilst acknowledging that the Prosecutor needs to work efficiently with governments in order to broker any success, it is suggested that he should retain his independence in selecting suspects. Otherwise, the ICC cannot achieve the goals it has set out to achieve. As John Bolton stated, a « politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations » may destabilise the society and undermine regional peace and reconciliation efforts.⁷⁴⁰ If unwelcome prosecutions result in the closing of borders, as it has in Sudan, then that is the unfortunate price to pay for independent justice. Through political and economic pressure, as was used by the ICTY Prosecutor, that may not be a lasting situation. Time will tell. The ICTY practice demonstrates that patience and persistence can bring results.

Securing Arrests

The next difficulty is to have the identified and charged suspects arrested. This has been reasonably easy at the ICTR. Most of the suspects had fled Rwanda in 1994 to neighbouring countries most of which were prepared to arrest the suspects and transfer them to the ICTR. The only suspect at large remaining is Kabuga who is alleged to have financed the genocide.⁷⁴¹

This has been much more challenging in the ICTY. For many years, the Yugoslav authorities were unwilling to cooperate and arrest the ICTY indictees especially the high-level ones. A significant number of arrest warrants were not implemented until a new rule 59bis was introduced, explicitly allowing peacekeeping forces deployed in Bosnia-Herzegovina to arrest ICTY indictees. As of 1996, many lower-level indictees were arrested by NATO forces. However, local NATO commanders were reluctant to order the arrest of higher-level indictees like Radovan Karadzic and Ratko Mladic. Consequently, in 2001, the ICTY set up a specialised team to track the whereabouts of indictees. Its purpose was to provide timely intelligence to governments and organisations with the power of arrest. The intelligence gathered by this tracking team has been essential in identifying the hiding places of high-level indictees in Bosnia-

⁷⁴⁰ John Bolton : *The Global Prosecutors : Hunting War Criminals in the name of Utopia*, 78 *Foreign Affairs* 157 (1999), 657-658. Also see : S. Fernandez, de Gurmendi: 'The Role of the International Prosecutor', in R. Lee (Ed.): *The International Criminal Court. The Making of the Rome Statute* 175, at 181 (1999).

⁷⁴¹ Prosecutor v. Kabuga, Case No. ICTR-98-44B- Amended Indictment, 1 Octobre 2004, at: <http://www.unictl.org/Portals/0/Case/English/Kabuga/kabuga%20041001.pdf>

Herzegovina and Serbia. Yet, the ICTY still depended on States to act upon this information and secure their arrests.⁷⁴²

The Prosecution thus developed a new strategy to lure governments into cooperation by creating strong incentives for doing so. To implement this strategy, the Prosecution was dependent on the assistance of the international community. The international community demonstrated preparedness to condition aid programs and admission to international organizations upon the cooperation of the State concerned with the ICTY. For instance, the arrest and surrender to the ICTY of former President Milosevic on 28 June 2001 was the direct result of a US threat to boycott a key donor's conference. Croatia communicated Ante Gotovina's whereabouts, which led to his arrest and transfer several months later, only after the European Union ("EU") suspended accession talks with Croatia in March 2005. Serbia arrested a significant number of indictees in order to begin the negotiation process to enter the EU. The negotiation process was suspended in 2006. The arrest of Karadzic was still not sufficient for the EU to re-enter into negotiations with Serbia. Particularly the Dutch government insisted that Serbia should not be allowed access to the EU until Mladic was arrested. This persistence eventually led to the recent arrests of Mladic and Hadzic. There are currently no indictees at large. Thus, the strategy and significant efforts of the ICTY Prosecutors has ultimately been very effective.⁷⁴³

The success of the ICC in arresting suspects has been a mixed bag. The Prosecutor has managed to secure the arrests of low and high level indictees including a former President and a former President candidate. He has also secured the cooperation of six Kenyan suspects, four of whom are now accused, without the need to arrest them. Similarly, two Sudanese accused have not been arrested but are, until now, fully cooperative. Trials for the Kenyans and Sudanese accused are due to be scheduled.

⁷⁴² P. Lopez-Terres (Chief of Investigations ICTY): Arrest and transfer of indictees. The experience of the ICTY, 15 December 2006. Paper presented at the ICC Office of the Prosecutor, 15 December 2006. On file with the author. See also: Carla Del Ponte & Chuck Sudetic: *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Other Press 2009 (original version in Italian 2008).

⁷⁴³ *Ibid.*

It is, however, striking that ten outstanding arrest warrants have not been executed.⁷⁴⁴ As long as President El Bashir stays in his own country or travels to countries that are unwilling to arrest him, the Prosecutor is unable to effect his arrest or that of those at his side. It is similarly practically impossible to arrest Koni, who currently appears to reside in a border area of Sudan and DRC. His arrest warrant can only be effected if the DRC army, ideally with the assistance of other armies, is prepared to launch a risky offensive on the LRA base. It is more surprising, however, that the arrest warrant against Bosco Ntaganda has still not been executed. Instead of arresting him, the DRC authorities promoted him in the army. It is nonetheless the official position of the Prosecution that the DRC government cooperates “sans limites”.⁷⁴⁵

Lack of Cooperation with the Defence

Governments also frequently frustrate the work of the defence. This is particularly the case if it concerns a case against an enemy of the government. In addition, the government regularly seeks to obstruct any attempt on the part of the defence to incriminate the government as part of its defence. Many international defence counsel confirm that this is a real not a mere theoretical problem.⁷⁴⁶

The defence has particularly endured difficulties in conducting investigations in Rwanda. Most of the Rwandan investigators are not allowed, or do not dare to enter

⁷⁴⁴ This includes four LRA members (one of the original five has been declared dead: Rascal Luqia); three Sudanese (El Bashir, Aruh, Kusheb); one Congolese (Bosco Ntaganda) and two Libyans (Abdullah El-Senoussi and Saif Gaddafi who is in prison and his father is declared dead). There is currently no arrest warrant against the Kenyans and Sudanese opposition rebels.

⁷⁴⁵ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-258-FR, 12-05-2011, page 39; HRW, *Unfinished Business*, *supra* note 682, 10.

⁷⁴⁶ The author has personally experienced numerous difficulties in conducting investigations in this regard in Rwanda, Sierra Leone and DRC. See further M. Wladimiroff, defence attorney with experience in the ICTY and ICTR: 'Position of the Defence: The Role of Defence Counsel before the ICTY and the ICTR', in H. Bevers & C. Joubert, *An Independent Defence before the International Criminal Court* (Intersentia, 2000) 35, at 39-40, where he speaks about his own difficulties in obtaining evidence in the Tadic case at the ICTY, and the Musema case at the ICTR. See also *Prosecutor v. Zigiraniirazo*, No. ICTR-01-73-PT, *Request for the Cooperation of the Government of Rwanda* (6 May 2005) where the defence sought the Chamber's assistance in obtaining access to Rwandan prisons for the purpose of interviewing witnesses in there. Also, members of the Katanga defence team, including this author, were refused access to potential defence witnesses detained in the Kinshasa central prison. This refusal lasted two weeks and was repeated on a subsequent mission. The Defence raised this before the Trial Chamber: ICC-01/04-01/07-T-56-ENG CT WT 03-02-2009, pp. 49-51. See also: *Katanga Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony*, ICC-01/04-01/07-2709-Red, 17 February 2001. ICC-01/04-01/07-2755-Red, *Décision sur la requête de la Défense de Germain Katanga aux fins d'être autorisée à rencontrer des témoins à La Haye* (article 64-6-f du Statut), 4 March 2011.

Rwanda. A handful of defence investigators live in Rwanda. However, one of them fled and sought asylum in The Netherlands. Another one was accused and convicted for contempt of court.⁷⁴⁷ A defence counsel was arrested as a revisionist.⁷⁴⁸ Even though he was not in Rwanda on an official mission of the ICTR, his arrest had a significant intimidating effect on other defence counsel. Anyone who brings nuance to the Rwandan official story about the genocide risks being charged as a revisionist and held liable to minimum ten years imprisonment in Rwanda.⁷⁴⁹

Regularly, defence counsel have difficulties obtaining documents from governments.

⁷⁴⁷ The information is based on the author's familiarity with the situation. One of the investigators who fled Rwanda quit his job and sought asylum in the Netherlands. Also see Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 147-148.

⁷⁴⁸ On 28 May 2010, a defence counsel before the ICTR was arrested on the allegation that he had negated the genocide committed against the Tutsi population in Rwanda in 1994. Since he was in Rwanda not on official duty of the ICTR, but to defend one of the opposition leaders arrested on the same allegation, the ICTR initially held that he had no immunity. Only when Rwanda showed the basis for his arrest, largely on statements defence counsel made before the ICTR in the context of his work, the ICTR changed its position and held that there was immunity against prosecution in Rwanda. The immunity claim from the ICTR was ignored by Rwanda. He was eventually released on health grounds. For ICTR decisions on this, see: *Prosecutor v. Bagosora et al*, 98-41-A, Order in Relation to Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 9 June 2010 (requesting further information to the Rwandan authorities concerning the basis of Erlinder's arrest); *Prosecutor v. Bagosora et al*, 98-41-A, Further Registrar's Submissions Under Rule 33(B) of the Rules of Procedure and Evidence in Respect of the Appeals Chamber Order to the Registrar dated 9 June 2010, 15 June 2010 (immunity being granted after finding that Erlinder was arrested mainly for what he had said in courtroom). For further information on the allegations and course of events, see, *inter alia*: <http://www.govtrack.us/congress/billtext.xpd?bill=hr111-1426> (US bill of House of Congress, dated 8th June 2010, urging Rwanda to immediately release Mr. Peter Erlinder from prison and allow him to return to the US); RPGR0678/10/Kgl/NM - COURT DECISION - RDP0312/10/TGJI/GSBO (setting out allegations); <http://www.newtimes.co.rw/index.php?issue=14288&article=30153> ("ICTR lawyers causing deliberate confusion – Mushikiwabo"); Josh KRON, Jeffrey GETTLEMAN: Lawyers Report Intimidation by Rwanda, 12 June, 2010, at:

<http://www.nytimes.com/2010/06/13/world/africa/13rwanda.html> ; Niloufer Bhagwat: Lawyers Who Reveal the Truth: The Arrest and Threats to the Life of Attorney Professor Peter Erlinder, Global Research, 8 June 2010, at: <http://www.globalresearch.ca/PrintArticle.php?articleId=19621> ; The Associated Press c/o The Canadian Press: bail on medical grounds, 17 June 2010; Associated Press: U.S. lawyers departs Rwanda after bail is granted, 20 June 2010, at: <http://www.washingtonpost.com/wpdyn/content/article/2010/06/19/AR2010061903158.html?referrer=emailarticle>.

⁷⁴⁹ HRW, *Justice Compromised*, *supra* note 573; *Prosecutor v. Uwinkindi*, ICTR-01-75-I, *Amicus Curiae* Brief of Human Rights Watch in Opposition to Rule 11 bis Transfer, paras. 40-47. Alison DesForges, Human Rights Watch researcher and leading expert for the Prosecution at the ICTR, was called a 'genocidaire'. Professor Filip Reyntjens, who denounced his cooperation with the ICTR since only one party to the war is being prosecuted at the ICTR, was the first scholar to be qualified *non grata* by the RPF government in 1995 because his outspoken criticism was not appreciated. Professor Reyntjens who spent significant time in Rwanda as a legal adviser and knows a great number of leading players well, was very critical of the old regime but is equally critical of the new regime in Rwanda. See personal interview with Professor Reyntjens in Antwerpen, 20 December 2004. See also: Burying myths, uncovering truth, published by The Economist on 12 March 2010, at: <http://othernews.info/index.php?p=3311#more-3311>.

It is not uncommon for defence teams to submit various requests for documents to a government without receiving any response. Most States whose authorities are not subject to prosecution investigations are much more willing to cooperate with the Prosecution than with the defence. This is so because the Prosecution is typically regarded as the representative of the court or tribunal. It also has more powers to enforce cooperation through political channels. Some countries including the Netherlands and Belgium have adopted an explicit policy to treat any request from the Prosecutor's office as a request from the tribunal, which is then routinely implemented. A request submitted by the defence, on the other hand, is automatically refused unless there is a court order to grant it.⁷⁵⁰

If the defence has taken all steps available to it without success, it can address itself to the Chamber for assistance.⁷⁵¹ If the Chamber is satisfied that the defence cannot obtain the information in any other way, and the information is relevant for the ascertainment of the facts, or the preparation of the defence, it can order the State to provide the documents.⁷⁵²

⁷⁵⁰ Author's personal experience in the Netherlands in relation to a request for documentary evidence relevant to one of the witnesses called in the case of *Bagosora et al*, ICTR-98-41-T. In Belgium, cooperation with the defence absent a Court's order is prohibited by law. This is sufficient for the defence to approach the Chamber for assistance without demonstrating further efforts to obtain the documents itself. See: *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute* (21 April 2006) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mr. Bicamumpaka's Request for Order for Cooperation of the Kingdom of Belgium* (12 September 2007); *Prosecutor v Ndingyimana et al*, No. ICTR-00-56-T, *Decision on Ndingyimana's Request for the Cooperation of the Kingdom of Belgium for the Appearance of Witnesses CBP3 and CBP4* (14 December 2007); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Urgent Second Motion of Defendant Bicamumpaka Regarding Cooperation of the Kingdom of Belgium* (27 February 2008) at para. 10.

⁷⁵¹ *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on the Defence Request for the Cooperation of the Rwandan Government Pursuant to Article 28* (28 October 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation of the Government of Rwanda* (27 Nov 2006) at paras.14-15; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, or in the Alternative, Motion for Subpoena to the Government of the United States of America* (8 December 2004). It is, however, not required that a party exhaust all possible mechanisms before requesting the Chamber's assistance. See: *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Government of Burundi* (30 October 2008) at para. 14. It is sufficient for the defence to demonstrate that it submitted requests to the relevant authorities even if they remain unanswered: *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW* (25 July 2007) at para. 7; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Government of Burundi* (30 October 2008) at para. 14; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sreten Lukic's Amended Rule 54 bis Application* (29 September 2006) at para. 7.

⁷⁵² *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Addendum to Further Defence Report re Access to Foss Material and Additional Motions re Criminal Record of Prosecution Witnesses Filed on*

Such an order is, however, not always executed. The defence in the *Katanga & Ngudjolo* case is still waiting for the DRC government to comply with a court order to provide it with non-contentious documents such as lists of combatants who participated in the demobilisation program, as well as the ranks of those who integrated into the Congolese army.⁷⁵³ The international courts and tribunals do not have the power to take enforcement measures against a State.⁷⁵⁴ If a State refuses to implement its order, the Chamber can order the Prosecution to obtain the requested documents. It has done so in the ICTR on a number of occasions, using its power under Rule 98 to request additional evidence.⁷⁵⁵

The Prosecution can also make an application to the Chamber for an order for cooperation of a State, but this is far less common. Generally, the Prosecution is able to resolve cooperation issues without the need for the Chamber's assistance. Nonetheless, in the ICTY case of *Gotovina et al*, the Chamber ordered the government of Croatia to intensify its search for documents requested by the Prosecution. It also ordered Croatia to provide detailed reports of its efforts where its claim that it could not find the requested documents was not conclusive.⁷⁵⁶

Assistance from UN and NGOs

5 January 2005 and 11 February 2005 (18 March 2005); *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (17 November 2005) at para.18; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 11. The defence must set out its reasons. If this cannot be done without jeopardising the defence strategy, it must so indicate and still provide general reasons: *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Requests by the Accused for Trial Chamber II to Issue Subpoena Orders* (3 June 2005).

⁷⁵³ See ICC-01/04-01/07-2019-Conf-Exp-Red 23-04-2010, *Order on the 'Urgent Defence Motion for Cooperation of the DRC'*, and ICC-01/04-01/07-2619-Red 17-08-2011, *Décision relative à la seconde requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo*, paras.15-17. Unlike the ICTY and ICTR, the ICC cannot issue binding orders.

⁷⁵⁴ *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at paras. 8-9.

⁷⁵⁵ *Prosecutor v. Bagilishema* (Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses) ICTR-95-1A-T (8 June 2000), paras 18, 19; *Prosecutor v. Bagosora* (Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses) ICTR-98-41-T (16 December 2003); See also *Prosecutor v. Karemera* (Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records) ICTR-98-44-PT (14 September 2005), para. 11.

⁷⁵⁶ *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Order in Relation to Prosecution's Application for an Order Pursuant to Rule 54 bis* (16 September 2008).

The Prosecution tends to rely heavily on the support of the UN, NATO, Interpol, local and international NGOs and civil society groups, and other governments. Such support may be necessary to compensate for the lack of cooperation from the regional State. Such organisations tend to be much more reluctant to cooperate with the defence.⁷⁵⁷

Often, before international tribunals and courts have opened their investigations, such bodies have been operational in the post-conflict-zone under investigation of an international court. Such bodies are therefore usually more familiar with the territory than ICC investigators. Their assistance can be useful in providing details of potential witnesses as well as documentary or other evidence. They may orientate the investigators in their investigative work and bring to their attention the most serious crimes committed in a particular region. They may even suggest the names of alleged perpetrators.

For instance, MONUC, the UN mission in the Democratic Republic of the Congo (DRC), has been charged with documenting the massive violations of human rights in the eastern part of the DRC.⁷⁵⁸ It has transmitted a large quantity of their collected material to the prosecution of the ICC on the condition that it not be disclosed to the defence.⁷⁵⁹

Another example of a fact-finding entity which has the explicit mandate to assist the investigations carried out by the prosecution of an international criminal tribunal is the Humanitarian Law Documentation Project in Kosovo. This is a project of the International Crisis Group established in 1999. Its aims are to identify violations of international humanitarian law as well as record evidence of such violations in order

⁷⁵⁷ The author has personally experienced difficulties in securing the cooperation from UN or NGOs. See further C Buisman, *Defence and Fair Trial*, in R. Haveman, O. Kavran & J. Nicholls (Eds.), *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003), Chapter VI, 198-205.

⁷⁵⁸ The Security Council mandate of MONUC includes a human rights component, and MONUC teams have on several occasions investigated allegations of specific violations; for instance, in December 2002 a MONUC team was sent to investigate allegations that grave violations had occurred in Mambasa and the surrounding area. The team interviewed over 350 eyewitnesses. See Thirteenth report of the Secretary-General on MONUC (S/2003/211), February 21, 2003.

⁷⁵⁹ This has led to great difficulties in the Lubanga and Katanga cases because a large quantity of this information included exonerating evidence which should in principle be disclosed to the defence. This has led to a stay in Lubanga and severe criticism of the prosecutor in the Katanga & Ngudjolo cases. See further below, section 6.7 'Confidentiality'.

to provide information about witnesses and reported crimes to the ICTY.⁷⁶⁰ In seven months, 4700 records were created from victims and witnesses and, together with an extensive list of potential witnesses, were handed over to the ICTY Prosecutor. In doing so, this project complemented the work of the ICTY prosecution investigators, but not of the defence investigators.

UN and NGO human rights investigations have, however, a number of deficiencies. There is, for instance, no standard procedure for fact-finding missions conducted by the UN or NGOs.⁷⁶¹ This lack of standardized methods precludes any way to test the validity of the research and conclusions. UN Missions rely heavily on NGOs, government reports, and the media. Reports on human rights violations, for instance, in South Africa, Iran, Iraq and Israel have been made by people who have never set foot in the country.⁷⁶²

According to M. Cherif Bassiouni, given this close link between the UN and other bodies, including governments and NGOs, UN reports are often “designed to please the influential Geneva-based non-governmental organization (NGO) community and certain governments, particularly the three Western permanent members and a number of Western European countries that champion human rights.”⁷⁶³

Bassiouni further points out that the UN is not a politically independent body. Rather, it was established “as a political organization, and, as such, it is largely governed by political considerations [...] the Security Council is unbridled in its determination of peace and security issues. These considerations are elevated above judicial or other forms of review, although always subject to self-review whenever considerations of power and interest require it.”⁷⁶⁴ He also considers it problematic that accountability of those involved in fact-finding missions “has yet to be clearly established as one of

⁷⁶⁰ The project is described in International Crisis Group, *Reality Demands: Documenting Violations of International Humanitarian Law in Kosovo 1999*, 27 June 2000, available at <<http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/reality-demands-documenting-violations-of-international-humanitarian-law-in-kosovo-1999.aspx>>, last accessed January 2012.

⁷⁶¹ M. Cherif Bassiouni, *The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 Washington University Journal of Law & Policy (2001) 35, 37.

⁷⁶² M. Cherif Bassiouni, *The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 Washington University Journal of Law & Policy (2001) 35, 37.

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

the goals of fact-finding missions. Indeed, to date the UN has not promulgated guidelines for accountability.”⁷⁶⁵

UN and NGO fact-finding missions also frequently rely on second hand hearsay or other dubious sources whose identities are often not disclosed.⁷⁶⁶ Reports produced by NGOs or the UN are, therefore, generally viewed with scepticism.⁷⁶⁷ For instance, in ICC case of *Bemba*, the Chamber decided with regard to the admissibility of NGO reports or portions thereof, that their provenance and reliability is entirely uninvestigated and untested. Therefore, these materials carry little, if any, evidential weight.⁷⁶⁸ Similarly, the Chamber in *Katanga & Ngudjolo* treated UN and NGO reports with caution.⁷⁶⁹ On a case-by-case basis, it determined whether such a report was relevant to a live issue in the case. If so, the Chamber then determined whether it had sufficient reliability and significance, and whether its admission would cause unfair prejudice to the opposing party.⁷⁷⁰ On the basis of these criteria, the Chamber excluded a large part of the proposed UN and NGO reports. It particularly declined to admit reports whose methodology was unknown, and/or which were largely based on anonymous sources or hearsay information.⁷⁷¹

In the Special Court for Sierra Leone, Justice Robertson Q.C. said the following, which is rightly on point:

Courts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the

⁷⁶⁵ *Ibid.*

⁷⁶⁶ The ICJ in *DRC v Uganda* declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, 2005 ICJ Rep. 116, para. 159.

⁷⁶⁷ Partial Award, Civilian Claims – Eritrea’s Claims 15, 16, 23 & 27-32 (Eth. V. Eri), p. 34, Eritrea Ethiopia Claims Commission, 17 December 2004 (“[...] the Parties also noted the potential pitfalls and limitations of uncritical reliance on such materials, which were not prepared as evidence in legal proceedings . . . Third-party reports may indeed be based on incomplete or inaccurate information that the reporting entity cannot test or verify, including information provided by one or the other of the Parties. Such reports may reflect the interests or agendas of the reporters or those who provided them with information”).

⁷⁶⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, paras. 235, 254-255.

⁷⁶⁹ ICC-01/04-01/07-3184 21-10-2011, *Decision on the Bar Table Motion of the Defence of Germain Katanga*.

⁷⁷⁰ *Ibid.*, paras. 8, 16, 17; ICC-01/04-01/07-2635, *Decision on the Prosecutor's Bar Table Motions of 17 December 2010*, para.14.

⁷⁷¹ ICC-01/04-01/07-2635 17-12-2010, *Decision on the Prosecutor's Bar Table Motions*, para.28-31.

media. The right of sources to protection is not a charter for lazy prosecutors to make a case based on second-hand media reports and human rights publications.⁷⁷²

Even at the confirmation stage, anonymous hearsay can only be used for the purpose of corroborating other evidence. In *Mbarushimana*, the Pre-Trial Chamber highlighted that anonymous hearsay contained in human rights reports must be given a low probative value “in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information”.⁷⁷³

The ability to cross-examine the person who compiled the report does not necessarily cure the fact that the defence is deprived of the opportunity to cross-examine the persons whom the investigator interviewed whilst compiling the report.⁷⁷⁴ This will principally depend on the reliability of the methodology applied.⁷⁷⁵

In addition, the impartiality from members of international organizations cannot be verified. Also, their knowledge of events is often limited and sometimes contradictory in nature. They frequently rely on information from representatives of warring factions. Since they are denied access to the relevant headquarters or camps, they are

⁷⁷² *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-AR73-506, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, to the Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, 26 May 2006, para. 35. This quote was cited in: See ICC-01/09-01/11-354 24-10-2011, *Joshua Arap Sang Defence Brief following the Confirmation of Charges Hearing*, para. 25.

⁷⁷³ *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 78. See also ICC-02/05-02/09-243-Red 08-02-2010, paras. 50-52.

⁷⁷⁴ *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, para. 20, referring to *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.2, Appeal Chamber Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002, para. 22

⁷⁷⁵ *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92Bis, 13 September 2006, para. 14 (“The Chamber has found that reports contained no explanation of the conditions of interviews, duration of interview, number of interviewed persons and similar details, and that they constituted second hand hearsay which weakens any probative value they might have”). The admission of OSCE reports were eventually excluded on the grounds that (at para. 21): (a) the methods of these organizations can at best assure the accuracy of the process for recording the information, not the reliability of material; (b) the reports do not identify the persons interviewed, leaving the sources of the critical information largely anonymous; (c) the witness to testify on these reports was in supervisory role with respect to collection and analysis of information, but she never took any of these information herself; (d) the other witness to testify on the report, although personally interviewed some of the persons, it was not possible to determine, which portions of the report were based on his interviews; (e) most of the tendered excerpts of the reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to these crime, and the court had no opportunity of hearing any of these persons upon whose statements these entries were based; and the Chamber was not in position to assess the reliability of factual connections contained therein).

not able to observe personally the warring parties' combat operations at close proximity.⁷⁷⁶

Accordingly, the heavy reliance of investigators of international criminal courts and tribunals on UN or NGO investigations may diminish the quality of the investigations. In addition, their moral and political independence may be compromised.⁷⁷⁷

Practice at the international tribunals and court

Particularly at the ICC, excessive use is made of the assistance of the UN and NGOs. The ICC Prosecution appears to rely on such bodies more than their own investigations.⁷⁷⁸ Off-the-record, members of NGOs even complain about this. Their reports were never meant to replace the Prosecutor's own investigations, but rather to invite him to investigate certain crimes identified by the UN or NGOs.⁷⁷⁹

This was one of the factors that led the Pre-Trial Chamber not to confirm the case against *Mbarushimana*. In this case, for many of the alleged attacks, the Prosecution solely relied on a single UN Report or a single Human Rights Watch Report. The sources contained in these reports were anonymous.⁷⁸⁰ Some of the attacks were only incidentally referred to without any reference to the circumstances in which they would have occurred.⁷⁸¹ In light of "(i) the paucity of the information provided in these UN reports, (ii) the identified inconsistencies between the information provided in these UN reports, (ii) the identified inconsistencies between the information

⁷⁷⁶ These were factors why the ICTY Chamber in *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47, Trial Chamber Judgment, 15 March 2006, paras 303, 578-579, held UN reports should be treated with caution. The lack of neutrality of some NGOs is also apparent from their joint letter to the ICC Prosecutor, 31 July 2006, at: http://www.iccnw.org/documents/DRC_joint_letter_eng.PDF.

⁷⁷⁷ At the Geneva Conference, *supra* note 173, Getti, who has been involved in initial investigations in ICTY and ICTR, gave examples where undue pressure was put on prosecutors by UN and/or NGOs.

⁷⁷⁸ See for instance, the Prosecution's report before the UN Security Council on 2 November 2011, affirming that its "first assessment mission to Libya to prepare for the collection of further evidence on the territory where the alleged crimes took place" had occurred during the last weekend. See website: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>

⁷⁷⁹ Off-the-record conversations with a member of HRW (6 June 2010, The Hague) and a member of Medecins Sans Frontieres (13 August 2010, Bunia, DRC). See also: Public Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, 10-10-2006, criticizing the Prosecutor for failing to conduct on-site investigations in Darfur.

⁷⁸⁰ *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 117.

⁷⁸¹ *Ibid*, para. 120.

provided and the Prosecution's allegations, and (iii) the lack of any corroborating evidence”, the Pre-Trial Chamber found that the evidence submitted by the Prosecution “is not sufficient to establish substantial grounds to believe that the alleged attacks occurred in Ruvundi, Mutakato, or Kahole”.⁷⁸²

The Kenyan investigations have so far been primarily focused on the WAKA and HRW report.⁷⁸³ In the press release of Ocampo on 24 January 2012 following the confirmation of the charges of four out of six Kenyan suspects, he explicitly specified that, until now, they had no witness in Kenya and that their investigations were mainly carried out outside Kenya. He indicated that, now the charges were confirmed, the Prosecution would need to move into Kenya to investigate the crime base and engage with the victims.⁷⁸⁴ Similarly, no investigative mission had been carried out in Libya before the beginning of November 2011, long after charging three Libyan suspects.⁷⁸⁵

Similarly, the ICC Prosecution seemingly has not conducted any onsite investigations in Sudan. The Prosecution appears not to have conducted any onsite investigations even before the arrest warrants against al-Bashir, Haroun and Kushayb were issued and Sudan closed its borders for anyone connected with the ICC. Instead, in its factual analysis, the Prosecution has relied on information gathered by intermediaries as well as UN reports. The Prosecution maintained that it was important to keep a low profile in Sudan because, otherwise, it would have put its potential witnesses and informants in serious danger. However, both the UN High Commissioner for Human Rights,

⁷⁸² *Ibid*, para. 120. The Pre-Trial Chamber similarly found that numerous other attacks were not proven on the “sufficient grounds to believe” standard because they were not substantiated at all other than by assumptions or information from third parties. See paras. 121-136.

⁷⁸³ See for instance ICC-01/09-01/11-355 24-10-2011, paras. 28-29.

⁷⁸⁴ Press Conference held by Ocampo on 24 January 2012 relating to the Pre-Trial Chamber’s decision on the confirmation of the charges in Kenya I and II, issued on 23 January 2012. See also: Statement by the Prosecutor of the International Criminal Court on Kenya ruling, at: <http://www.icc-cpi.int/NR/exeres/54E6388D-4DD0-4E85-8FA9-90DA95A2AFB3.htm>

⁷⁸⁵ Indeed, the Prosecution issued a report before the UN Security Council on 2 November 2011, affirming that it had not done onsite investigations other than an assessment mission during the weekend before; and affirming its cooperation with local civil society groups and various local committees, mandated to investigate crimes committed by all parties in Libya. This report also states that the Prosecutor’s Office’s analysis “will benefit from the work of the UN Commission of Enquiry, which should present a report in March 2012”. Finally, it announces that “[t]he investigation will benefit from a reporting system that has been set up by the NTC, through the Ministry of Women and Social Affairs, with the purpose of affording rape victims the opportunity to come forward” (para. 15). See website: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>.

Louise Arbour, and the Chairman of the UN Commission of Inquiry on Darfur, Cassese, strongly recommended that the Prosecution enter Sudan and conduct onsite investigations. Arbour argued that the ICC presence in Sudan could be effective and have a positive impact on the human rights situation. Based on her own experience in investigating human rights violations in Sudan, she maintained that it should be possible for the Prosecutor to conduct investigations in Sudan without increasing the risk for witnesses. Arbour acknowledged that “[r]isks can never be eliminated absolutely” but added that security threats were caused more by the ongoing conflict in Sudan than by their interaction with human rights investigators, which would be the same for the ICC.⁷⁸⁶ She added that, in any event, “security challenges particular to investigation of international crimes while an armed conflict is ongoing should not per se prevent the Court from acting in pursuance of its international mandate towards timely and effective individual criminal accountability.”⁷⁸⁷ Cassese warned that valuable testimonial evidence, as well as documents, such as minutes of security meetings, flight records and orders issued by the military authorities in Khartoum to the military authorities in Darfur would perish if investigations were not carried out immediately.⁷⁸⁸ However the Prosecution chose not to follow this advice.

A comparable approach was adopted in the *Lubanga* and *Katanga & Ngudjolo* cases. In these cases, the ICC Prosecution so far has barely investigated in the local territories. In the *Katanga & Ngudjolo* case, only one investigative mission was made to the village of Bogoro before issuing an arrest warrant against Katanga for crimes committed in Bogoro.⁷⁸⁹

After that first mission to Bogoro, which took place in February or March 2007, it took the Prosecution two years to return. Meanwhile, the defence had visited Bogoro

⁷⁸⁶ Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, 10-10-2006, paras. 62, 64, 68. See also: Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur pending before the ICC, ICC-02/05-14, 1 September 2006; A. Cassese, *Is the ICC Still Having Teething Problems?* A. Cassese, 4 Journal of International Criminal Justice 434 (2006).

⁷⁸⁷ ICC-02/05-19, 10-10-2006, para. 76.

⁷⁸⁸ Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur pending before the ICC, ICC-02/05-14, 1 September 2006.

⁷⁸⁹ ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 21, 40.

on multiple occasions.⁷⁹⁰ The Prosecution never visited any other village of import. Until the judicial site visit which took place between 16 and 20 January 2012 after the presentation of all evidence,⁷⁹¹ nobody from the Prosecutor's office ever visited Aveba and Zumbe.⁷⁹² These locations are of particular importance to the case as they were the home fronts of the two accused in the period relevant to the charges. Allegedly, they prepared the crimes charged from these localities. Presumably therefore, many villagers in Aveba and Zumbe were witnesses to the events and could have provided information to the Prosecutor. The Prosecutor may thus have lost good opportunities to obtain both incriminating and exonerating evidence.

The purported reason for keeping onsite investigations to an absolute minimum is security of the Prosecution's personnel and safety of anyone assisting the Court. The chief of investigations in Ituri explained to the Court that, in conducting onsite investigations, the Prosecution faces security risks and health risks, including cholera, Ebola and Malaria. These risks had delayed the investigations.⁷⁹³ The same risks, however, did not delay defence missions.⁷⁹⁴

It is further alleged that it is too dangerous to travel around the Eastern Congo because there are still active militia groups around. The defence, however, managed to reach all relevant villages on numerous occasions without great difficulties.⁷⁹⁵ If need be, the UN is prepared to offer security items, such as radios, protective outfits, tanks and escorts. This may, however, have an impact on the willingness of prospective witnesses to cooperate. Even without the assistance of the UN, most of the time, it is possible to travel safely between different locations.⁷⁹⁶

⁷⁹⁰ Between 2008 and 2012, the author participated in multiple defence missions to Bogoro, Aveba, Zumbe and other villages in Ituri.

⁷⁹¹ Press release: *ICC judges in case against Katanga and Ngudjolo Chui visit Ituri*, ICC-CPI-20120127-PR765. The author participated personally in this judicial site visit.

⁷⁹² As was confirmed by the chief investigator in Ituri: ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 65-66.

⁷⁹³ ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 8-10. See also ICC-01/04-01/06-2690-Red2, 8 March 2011, paras. 123-124.

⁷⁹⁴ The defence conducted onsite investigations at the beginning of 2008 despite an Ebola epidemic in the region. The ICC medical unit explicitly informed the defence that the Ebola epidemic in no way endangered the ICC personnel. The information is based on the author's personal experience.

⁷⁹⁵ At times, it is difficult to visit any place outside Bogoro, and particularly Aveba. At such times, missions are not approved. However, most of the times it was considered safe enough to travel around in Ituri.

⁷⁹⁶ The author has personal experience. See *ibid*.

On 10 July 2009, the chief Prosecutor succeeded in visiting Zombe without any difficulty. He was transported by a UN helicopter. The purpose of his visit was to listen to the views and sufferings of the Zombe local communities.⁷⁹⁷ The local authorities were content that he had made the effort to arrive at Zombe.⁷⁹⁸ On 18 January 2012, in the course of the first judicial site visit of the Court, representatives of the defence, victims, prosecution and the judges all visited Zombe, Aveba and Bogoro.⁷⁹⁹ It is thus surprising that the Prosecution never attempted to visit any place other than Bogoro, and even then on significantly fewer occasions than the defence and victim representatives.

Mention has already been made of the fact that witnesses are often interviewed in safe and comfortable locations. It is impossible to hide when conducting investigations in small villages. The international personnel of the Court clearly stand out in such an environment. Everyone knows immediately when an international investigator of the Court has passed through. This can put the safety of prospective witnesses and their family members at risk. In light of prevailing insecurity in most of the ICC situations and the lack of a police force necessary to protect witnesses, the Prosecution considered it safer for the witnesses to interview them elsewhere.⁸⁰⁰ The ICC has not employed local investigators in any of their situations. Instead, they rely on intermediaries to identify and contact potential witnesses, as well as to collect security information regarding the region.⁸⁰¹ The Prosecution considers this the “best practice” during investigations.⁸⁰² Reliance of intermediaries has, however, been the source of many problems, which will be addressed below.⁸⁰³

⁷⁹⁷ DRC-OTP-1063-0002, EVD-D03-00101, EVD-D03-00102 (Prosecution Video about Ocampo visit to Zombe on the 10th of July 2009).

⁷⁹⁸ Personal interviews in the field with the representatives of the communities who had attended the meeting with Ocampo. They produced a document listing the concerns they had addressed with the Prosecution (document on file with the author). In general, the people were content that he had come to listen to their views and observations.

⁷⁹⁹ Press release: *ICC judges in case against Katanga and Ngudjolo Chui visit Ituri*, ICC-CPI-20120127-PR765. The author participated personally in this judicial site visit.

⁸⁰⁰ ICC-01/04-01/06-2690-Red2, 8 March 2011; citing Prosecution confidential filing ICC-01/04-01/06-2678.

⁸⁰¹ ICC-01/04-01/06-2690-Red2, 8 March 2011, para. 126; citing Prosecution confidential filing ICC-01/04-01/06-2678, para. 18.

⁸⁰² ICC-01/04-01/06-2690-Red2, 8 March 2011, para. 124; citing Prosecution confidential filing ICC-01/04-01/06-2678, para. 14.

⁸⁰³ See section ‘false testimony’.

Forensic Evidence

In the ICC, little forensic evidence has been introduced in the trials thus far. In *Katanga & Ngudjolo*, the Prosecutor conducted a number of forensic examinations of the ‘Institut de Bogoro’ where allegedly a significant number of people were killed. However, this exercise was undertaken several months after the deadline for disclosure of all Prosecution incriminating and exonerating evidence. In addition, it added very little value because “the expert was unable to provide even a rough estimation of the date when the bullets were fired or match them to a particular weapon; nor does it, as the Prosecution admits, bring to light previously unknown facts which have a significant bearing upon the case”.⁸⁰⁴ The four expert reports were not admitted because the defence had not been involved in the process.⁸⁰⁵ Thus, the forensic examinations were conducted too late to be meaningful. No forensic examination had been conducted on the bodies. Thus, the Prosecutor’s determination of the number of victims, the manner in which they were killed, as well as their status as civilians belonging the targeted ethnic group was made solely on the basis of eye-witness testimony.⁸⁰⁶

At the ICTY and ICTR, Prosecution investigators similarly faced issues of safety. Nonetheless, they managed to conduct onsite investigations. UN and NGO reports are relied on for context only. For the assessment of who is responsible for what, the ICTY and ICTR Prosecution have largely relied on their own investigations. At the ICTR, they were perhaps not as efficient as would be expected, but at least local and international investigators were actively involved in searching for witnesses and documents. Often, there is little to no forensic evidence. In few cases, some forensic evidence was introduced, demonstrating that large-scale massacres had occurred and that many of the victims were Tutsi.⁸⁰⁷ Yet, to the dismay of Alison DesForges and

⁸⁰⁴ ICC-01/04-01/07-1515-Corr 09-10-2009, *Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28,29 and 31 March 2009*, para. 34.

⁸⁰⁵ *Ibid*, paras. 74-76.

⁸⁰⁶ As was confirmed by the chief Prosecution investigator in Ituri: ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, 22. She conceded that their information was not precise. When the judges enquired why no forensic examination had been conducted, she informed them that it was too late to do so meaningfully (page 25).

⁸⁰⁷ *Kayishema & Ruzindana* Judgement, paras. 325-326.

Timothy Longman, no serious effort was made to collect documentary or forensic evidence to link identified suspects to particular crimes.⁸⁰⁸

The ICTY investigations have been most efficient. ICTY investigators have managed to gather forensic evidence in almost every case.⁸⁰⁹ They have also interviewed many prospective witnesses and have gathered volumes of documentary and tangible material. They often use methods such as telephone taps to obtain direct evidence of conversations.⁸¹⁰ The ICTY has some advantages over the ICTR. First, the war was still going on as the bulk of the investigations were carried out. Second, the armies in the former Yugoslavia were much more organised than the Rwandan army and militia. Consequently, more orders were issued in writing.⁸¹¹ Third, the numbers of victims in the Yugoslav conflict were significantly lower than those in Rwanda. This facilitated the ICTY investigators in obtaining forensic evidence.

Nonetheless, even if investigators are conducting onsite investigations, they may encounter numerous difficulties, which are discussed below.

Uncooperative Witnesses

As a result of witness intimidation

The environment in which the parties must conduct their investigations is often hostile. This is equally a problem for the prosecution as for the defence. Most of the times, there is a highly politicised climate in a post-war society. Many on the side of those being prosecuted are adverse to the tribunal or court and, therefore, unwilling to

⁸⁰⁸ Alison DesForges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, 49, 53.

⁸⁰⁹ See, for instance, *Prosecutor v. Gotovina et al*, Trial Judgement of 15 April 2011, IT-05-87/1-T, paras. 454, 456, 465, 509-520, ; *Prosecutor v. Popovic et al*, Trial Judgement of 10 June 2010, IT-05-88-T, paras. 411, 412, 502, 523, 544, 550, 598, 607.

⁸¹⁰ See, for instance: *Prosecutor v. Haraqija and Morina*, Judgement on Allegations of Contempt, 17 December 2008; *Prosecutor v. Beqaj*, Judgement on Contempt Allegations, 27 May 2005. Both cases could be brought because the telephones including mobile phones of the suspects had been tapped.

⁸¹¹ See, for instance, *Prosecutor v. Gotovina et al*, Trial Judgement of 15 April 2011, IT-05-87/1-T, paras. 45, 74-84, 94-100, 1399, 1465 (included many military documents; for instance: HV orders (P1125 and D281); Červenko's order D559 (para 99)); *Prosecutor v. Popovic et al*, Trial Judgement of 10 June 2010, IT-05-88-T, paras. 237, 367, 372, 375, 565, 566 (included many documents including a report on the reassignment of a unit from the 1st Krajina Corps; Zvornik Brigade Duty Officer Notebook; A report from the ABiH to the Zepa Municipality, diary of Mirko Trivić, Commander of the Romanija Brigade).

cooperate with the Prosecution. They may be more welcoming to the defence, particularly where the defence represents a local hero. In such a situation, they may give all their assistance to the defence and none to the prosecution.⁸¹² When, on the other hand, the defence represents someone who is hugely unpopular in the region where investigations take place, it will be very difficult for the defence to conduct any investigations.⁸¹³

ICTR

Potential witnesses may also fear retaliation if they cooperate with either party. It often occurs that, initially, potential witnesses are open and ready to talk, but on a subsequent occasion, they have either amended their story or they are no longer willing to cooperate. This could be due to the fact that they may have been interfered with in the meantime. This is particularly a problem in Rwanda where many potential witnesses refuse to cooperate with the defence for fear of retaliation from the government.⁸¹⁴ This seriously frustrates the work of defence, particularly in the context of the ICTR.

Many ICTR defence witnesses allege that they have been harassed as a result of their cooperation with the defence.⁸¹⁵ A number of them appear to have been arrested or re-arrested after testifying for the defence.⁸¹⁶ Others were never freed from prison

⁸¹² In Kosovo, for instance, people were much more willing to cooperate with the defence than the prosecution in the two cases against members of the Kosovo Liberation Army (“KLA”). The author has personal experience in conducting investigations there.

⁸¹³ See M. Wladimiroff, *Position of the Defence: The Role of Defence Counsel before the ICTY and the ICTR*, in H. Bevers & C. Joubert, *An Independent Defence before the International Criminal Court* (Intersentia 2002) 35.

⁸¹⁴ Nzabonimana Motion for Stay of the Proceedings, Reconsideration, and/or Certification (n 835 above), Annex A, pages 5-11. Also see: Chris Mahony: *The justice sector afterthought: Witness protection in Africa* (South Africa: Institute for Security Studies 2010), 58-76.

⁸¹⁵ See, for instance, *Prosecutor v. Bizimungu et al*, Prosper Mugiraneza’s First Amended Emergency Motion to Institute Proceedings Pursuant to Rule 77, 6 June 2008; *Prosecutor v. Bizimungu Casimir et al*, Case No. ICTR-99-50-T, Judgement and Sentence, September 2011, para. 108; *Prosecutor v. Gatete*, Decision on Defence and Prosecution Motions for Admission of Written Statements and Defence Motion to Postpone Filing of Closing Briefs, 24 June 2010, para 6.

⁸¹⁶ See, for instance, Uwizeye, who testified for the defence in Akayesu in March 1998. Within two months of his return in Rwanda, he was arrested and remained in detention until 28 January 2000. Both Amnesty International and the International Crisis Group have stated that reliable information suggested he was imprisoned as retaliation for testifying in Akayesa. Similarly, witness GKJ was arrested after he testified in the Akayesu trial. He was a witness for the prosecution who provided exculpatory evidence in relation to the allegations against the accused. In 2004, he was still in prison. See further, *The Prosecutor v. Casimir Bizimungu et al.*, Judgement and Sentence, September 2011, Case No. ICTR-99-50-T, 940, 941, 942, 1138-1140.

despite being acquitted. Some of them suspect that there is a correlation with the fact that they gave testimony for one of the defendants at the ICTR.⁸¹⁷ Many of them live in constant fear of being accused by the *Gacaca* Courts.⁸¹⁸ Threats also come from the population or civil society groups. In particular 'IBUKA' has a reputation for putting pressure on Rwandans not to testify for defendants before the ICTR.⁸¹⁹

As a result, a large number of potential defence witnesses are reluctant to speak to the defence or to testify.⁸²⁰ The refusal to cooperate for reasons of fear has now also extended to Rwandan potential witnesses living in other countries including European countries.⁸²¹

Numerous defence teams have addressed their Trial Chamber in relation to the problem of alleged threats or intimidation of their witnesses by State authorities. Chambers have acknowledged that, if proven, such conduct would be a serious violation of Rwanda's duty to cooperate with the ICTR.⁸²² In *Simba*, the Chamber found that it was improper for a State official to warn a prospective witness that he will be viewed as opposing the government if he testifies in ongoing criminal proceedings, particularly if the witness is detained and dependent on the State for his welfare.⁸²³

In the view of the Appeals Chamber, a fair trial may not be possible if crucial witnesses refuse to testify for the defence as a result of State interference. It is,

⁸¹⁷ The author has spoken to a two prisoners who had testified for defendants before the ICTR. One of them was acquitted but never released. The other was released for a day and then re-arrested. Both were of the firm view that this was the result of their testimony for the defence.

⁸¹⁸ HRW, *Justice Compromised*, *supra* note 573; C. Tertsakian, *Le Château, The Lives of Prisoners in Rwanda* (Arves Books, 2008), 363-373

⁸¹⁹ See, for instance, *Prosecutor v. Bizimungu et al*, Prosper Mugiraneza's First Amended Emergency Motion to Institute Proceedings Pursuant to Rule 77, 6 June 2008, para. 12; *Prosecutor v. Nahimana et al*, Transcripts 20 January 2003, pages 15-19; *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Judgement and Sentence, 24 June 2011, paras. 334-338. See also Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 155-157.

⁸²⁰ *Prosecutor v. Renzaho*, T. 17 May 2007 (F) pp. 12 and 13; *Prosecutor v. Renzaho*, T. 6 March 2007 (E) p. 45.

⁸²¹ Nzabonimana Motion for Stay of the Proceedings, Reconsideration, and/or Certification (n 835 above), Annex A, pages 5-11.

⁸²² *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion Concerning Alleged Witness Intimidation*, (28 December 2004) at paras. 7, 9; *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 50; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 50-52.

⁸²³ *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 50.

however, incumbent on the defence to (1) demonstrate that such interference has taken place; and (2) exhaust all available means to secure taking the witness' testimony.⁸²⁴ Trial Chambers usually find that the defence has failed to establish on the balance of probabilities that such intimidation or interference with its witnesses occurred.⁸²⁵ In cases where the defence succeeds in so establishing, it must then request for a stay of proceedings if the evidence was essential to a fair trial. Failure to do so cannot be remedied on appeal.⁸²⁶ Thus, in reality, little has been done about such allegations.

ICTY

In the ICTY, the defence rarely encounters similar problems.⁸²⁷ The Prosecution, on the other hand, often alleges witness interference on the part of the accused, people related to the accused, members of the defence team or others in the local communities.⁸²⁸ This appears to be particularly a problem in Kosovo where many prospective witnesses refuse to cooperate with the Prosecution. The Prosecution claims that this refusal is the result of threats and intimidation. The defence, on the other hand, claims that these allegations are exaggerated and serve merely to put the defendants in a bad light.⁸²⁹

Three Kosovar Albanians have been charged with contempt of court on the basis of

⁸²⁴ *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 41.

⁸²⁵ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion Concerning Alleged Witness Intimidation*, (28 December 2004) at paras. 7, 9.

⁸²⁶ *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 50; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 50-52; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 19.

⁸²⁷ In the first ICTY case, however, the defendant complained against his counsel who acted on instructions of the government to protect certain people. According to the Institute of War and Peace reporting, "Vujin's principal aim, Tadic said, was to prevent the appearance before the Tribunal of witnesses or evidence that could implicate "important personalities" in the Republika Srpska or the FR Yugoslavia" (see <http://iwpr.net/report-news/tadic-testifies-against-his-former-counsel>). The tribunal found that he worked against its client's interest since he (i) put forward a case in relation to a witness' statement he knows to be false and (ii) since he had manipulated two witnesses by seeking avoiding identification by them in statements of their evidence of the persons who may have been responsible for the crimes for which Tadic was convicted. See further: *Prosecutor v. Tadic*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, January 31, 2000 paras 134, 138, 150, 160.

⁸²⁸ See, for instance, *Prosecutor v. Seselj*, IT-03-67-R77.3, Second Contempt Case.

⁸²⁹ Interview with Gregor Guy Smith, lead counsel for Idriz Balaj (Interview in The Hague, 12 April 2011).

allegations of witness interference.⁸³⁰ One was found guilty for having interfered with a witness in the first Kosovo Liberation Army case of *Limaj et al*⁸³¹ by requesting him to repudiate his earlier statements.⁸³² The two others were jointly charged with the interference of a witness. The Minister of Culture of Kosovo, Astrit Haraqija, was found to have instructed his co-defendant Morina to travel to a third country to dissuade a witness from testifying against Ramush Haradinaj. They were both found guilty of contempt.⁸³³ However, Haraqija was acquitted on appeal because the totality of the evidence against him stemmed from his co-defendant.⁸³⁴

The issue of witness interference was key in the case of the former Prime Minister of Kosovo, Ramush Haradinaj, and two co-defendants, Idriz Balaj and Lahi Brahimaj.⁸³⁵ Haradinaj and Balaj were acquitted, and Brahimaj received a low sentence. The Prosecution blamed this result on witness intimidation, which had frustrated the Prosecution's investigations.⁸³⁶ The refusal of two witnesses to cooperate with the Prosecution has led to the re-trial of the three of them. The Prosecutor had unsuccessfully tried to persuade a key witness to testify. He refused even after being subpoenaed.⁸³⁷ The Prosecutor had asked the Chamber for additional time to attempt a final time to secure his testimony. The Chamber refused the request because the Prosecutor had exceeded the hours allotted to him and his case was deemed closed.⁸³⁸ The judges also refused to hear two additional witnesses, who could have testified to the same events as the unwilling witness. Their principal grounds for refusal were the "orderly and timely case management" and "the proximity of the close of the Prosecution's case".⁸³⁹

⁸³⁰ Also persons from other parts of the former Yugoslavia have been charged with witness interference. See, for instance: *Prosecutor v. Margetic*, Judgement on Allegations of Contempt, 7 February, 2007; *Prosecutor v. Radoslav Brdjanin* Concerning Allegations Against Milka Maglov, Decision on Motion for Acquittal Pursuant to Rule 98 bis, 19 March, 2004.

⁸³¹ *Prosecutor v Limaj et al*, IT-03-66-T.

⁸³² *Prosecutor v. Beqaj*, Judgement on Contempt Allegations, 27 May 2005.

⁸³³ *Prosecutor v. Haraqija and Morina*, Judgement on Allegations of Contempt, 17 December 2008.

⁸³⁴ *Prosecutor v Haraqija & Morina* Appeals Chamber Judgment (23 July 2009).

⁸³⁵ *Prosecutor v. Haradinaj et al*, IT-04-84-T.

⁸³⁶ Carla Del Ponte & Chuck Sudetic: *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, Other Press 2009 (original version in Italian 2008).

⁸³⁷ *Prosecutor v. Kabashi*, IT-04-84-R77.1.

⁸³⁸ *Prosecutor v. Haradinaj et al*, IT-04-84-A, Appeals Judgement, 19 July 2010, para. 41.

⁸³⁹ *Ibid*, para. 46.

The Appeals Chamber criticised the Trial Chamber for these interventions saying it had “manifestly prioritised logistical considerations and the specific number of hours assigned to the Prosecution case over the much more significant consideration of securing the testimony of a potentially important witness who was finally available to testify.”⁸⁴⁰ Accordingly, by majority, the Appeals Chamber quashed the Trial Chamber’s acquittal of the three accused in respect of specific counts and ordered a re-trial on these counts. The re-trial is still pending. However, whilst the Prosecution has been allowed to call additional witnesses, the two witnesses whose refusal to testify had led to the re-trial still refuse to testify. The trial is adjourned until February to offer a final opportunity to the Prosecution to secure their testimonies.⁸⁴¹

These alleged problems of witness intimidation eventually led to the introduction of new rule *92quinquies*. This rule allows the admission of testimonial evidence by written statement in lieu of oral testimony if the maker of the statement was scheduled to testify but failed to attend as a result of improper interference through threats, intimidation, injury, bribes or coercion.⁸⁴²

ICC

In the ICC, witness intimidation is alleged in every case.⁸⁴³ It has, however, not yet been established whether these allegations are sound. No findings have yet been made in this regard.

Insider Witnesses

In addition, insider witnesses are usually reluctant to cooperate unless they receive

⁸⁴⁰ *Ibid*, para. 43; also see paras. 40 and 46. It should be noted that a number of observers, including defence counsel representing the accused, fundamentally disagreed with the Appeals Chamber’s decision and are of the view that the facts are distorted. In their view, ample opportunities were offered to the Prosecutor to bring the witnesses in question within the time set.

⁸⁴¹ Information from Gregor Guy-Smith, defence counsel for Balaj (Interview in The Hague, 12 April 2011).

⁸⁴² This rule was introduced on 10 December 2009, after the acquittal of Ramush Haradinaj and Balaj. Pursuant to Rule *92quinquies*(B)(iii), written testimonial evidence is admissible even if it goes to proof of the acts and conduct of the accused, provided that reasonable efforts have been made to secure the attendance of the maker of the statement as a witness (Rule *92quinquies*(A)(iii)) and that it is in the interests of justice to admit the statement (Rule *92quinquies*(A)(iv)).

⁸⁴³ For instance, in Kenya I, the victim representative claimed that some of her clients were threatened by Ruto or his associates. She did so in her closing arguments, thereby depriving Ruto of an opportunity to respond. See further ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, pages 15-34.

something in return, for instance, a guarantee that they will not be prosecuted. Where they are willing to cooperate, their credibility is often in doubt given that they may be seeking to cover up or diminish their own involvement and shift the blame onto the accused. This is so particularly where they are charged with similar crimes as the accused in whose case they are testifying.⁸⁴⁴ Nonetheless, international justice heavily relies on the testimonies of insiders. Only insider witnesses can establish the link between the crime and the accused who is often charged under an indirect, rather than a direct mode of liability.

Subpoena

At the ICTY and ICTR, unwilling insiders, as well as other unwilling witnesses can be compelled to participate in a pre-trial interview,⁸⁴⁵ or subpoenaed to testify at trial.⁸⁴⁶ There is, however, a general risk that they then turn hostile to the party that called them.⁸⁴⁷ A Chamber may issue a subpoena when it is necessary for the purposes of an investigation or for the preparation or conduct of the trial.⁸⁴⁸ Subpoena is, however, the last resort. It should not be issued lightly for it involves the use of coercive powers and may lead to the imposition of a criminal sanction.⁸⁴⁹ If the necessary information in the possession of the prospective witness is obtainable by other means, a Chamber will not order a subpoena.⁸⁵⁰

⁸⁴⁴ Many Rwandan prisoners are at least of the impression that they be better off if they provide testimony against the accused before the ICTR. See, for instance, the testimony of a recanting witness in *Prosecutor v. Karemera et al*, ICTR-98-44-T, T 10, 14, 15, 16, 17 April 2008. See further Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 136-137.

⁸⁴⁵ *Prosecutor v Mrksic et al*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party* (30 July 2003) at para. 15.

⁸⁴⁶ *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 19.

⁸⁴⁷ For instance: *Prosecutor v. Limaj et al*, T. 2104 – T. 3164; *Prosecutor v. Katanga & Ngudjolo*, T. 8 Feb 2010, 64-68. See also: K.A.A. Khan & R. Dixon: *Archbold International Criminal Courts, Practice, Procedure & Evidence* (London: Sweet & Maxwell, 3rd ed 2009) § 9-125 [hereinafter ‘Khan & Dixon, *Archbold International Criminal Court*’].

⁸⁴⁸ *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at paras. 5-6; *Prosecutor v. Krstić*, IT-98-33-A, *Decision on Application for Subpoenas*, (1 July 2003) at para. 10. The application of Milosevic to subpoena Tony Blair and Gerhard Schroeder was rejected as the prospective relevance of their testimonies was insufficiently specified: *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 48.

⁸⁴⁹ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 399.

⁸⁵⁰ *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 36

Unlike the tribunals, the ICC has no explicit power to subpoena witnesses. This indicates that it has no means to compel witnesses to testify. As a result, many important witnesses may not be brought to the court if they do not wish to appear voluntarily. In addition, the ICC cannot issue other binding orders on States. According to Kress and Prost, this absence of direct enforcement power “constitutes a serious weakness” of the ICC.⁸⁵¹

Even with powers of subpoena, it has proved difficult to ensure the appearance of witnesses. Witnesses may prefer to spend time in prison for their refusal to testify than to testify.⁸⁵²

Factors affecting the credibility of witnesses

Different cultural norms

The assessment of the truthfulness of a witness can be difficult, given that one is dealing with an unfamiliar culture and its own customs. International investigators are often not acquainted with the local customs.⁸⁵³ Even if both parties are genuinely looking for truthful witnesses, they may mistakenly take a convincing liar for a truthful witness.⁸⁵⁴ To fully comprehend the answers of a witness during an interview,

⁸⁵¹ C. Kress & K. Prost, *Article 93*, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article (2nd Ed)* (Beck, Hart, and Nomos, 2008) 1576. This was one of the arguments raised by the Defence for Germain Katanga in support of its submission that the ICC may not be able to offer the accused a fair trial. See *Prosecutor v. Katanga & Ngudjolo*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, ICC-01/04-01/07-949, 11 March 2009, para. 24; see further: See G. Bitti, *Article 64*, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article (2nd Ed)* (Beck, Hart, and Nomos, 2008) 1213. It has already had an adverse effect in cooperation requests in the *Katanga & Ngudjolo* case.

⁸⁵² See, for instance, Kabashi who refused to answer questions in the case of Haradinaj because he had security concerns and was then prosecuted for contempt. *Prosecutor v. Kabashi*, IT-04-84-R77.1. His refusal has led to a re-trial of *Haradinaj et al.* However, he still refuses to testify.

⁸⁵³ That investigators do not know the historical, sociological and political context in which they will carry out investigations, and that this complicates the work of the prosecutor was confirmed by Cécile Aptel, former spokesperson of former chief prosecutor, Carla Del Ponte, as well as Getti, who assisted the OtP investigations at ICTY and ICTR in early stages (See Geneva Conference, *supra* note 173). The Registrar of the ICC, Ms. Arbia, has recognized the importance of investigators being experienced and properly trained. As she said at the first day of the Geneva Conference, “[t]he investigation determines the success of a trial”. In this light, the ICC has included a list of experienced investigators the Defence can employ for its investigations. However, whilst these investigators may have experience in investigating, they lack the requisite cultural knowledge. In addition, their salary is too high to be paid by the defence budget. Therefore, until now, no defence team has employed anyone from the list. Instead, they rely on local investigators.

⁸⁵⁴ This was confirmed by an interpreter, Mr. Alphonse Mpatsumugabo, at Geneva Conference, *supra* note 173, who says that the work of interpreters is complicated because sometimes they realise

knowledge of the cultural barriers and the cultural codes is essential. For instance, in the context of Rwanda, it is often alleged that witnesses speak about events as if they have witnessed them personally. In reality, they may have only heard about them through others. Awareness of such culturally accepted manners of speaking would help in distinguishing that which the witness personally observed, from that which he heard from others.⁸⁵⁵

In her research, Combs points out a number of cultural obstacles. She has observed that many of the witnesses appearing before the ICTR are uneducated and cannot write and read.⁸⁵⁶ They are often unable to read maps, and estimate distance, dates or duration.⁸⁵⁷ She gives ample examples of witnesses' estimations of time or distance that are very far from reality, or inconsistent to what they stated previously.⁸⁵⁸ Yet they may be truthful witnesses. Whilst agreeing that these are serious and genuine concerns, it is suggested that these are not insurmountable problems. To some extent, domestic jurisdictions are also regularly confronted with witnesses from a very different cultural and educational background than the assessors. It is important to be aware of such differences and of the fact that people in sub-societies or different societies may not share the same basic assumptions and general knowledge. The questions posed to witnesses should be adjusted accordingly. Similarly, investigative techniques must be amendable to ensure that the interviewer and interviewee clearly understand each other.

Many years after the events, precise dates are difficult to remember for anyone irrespective of a witness's cultural or educational background. Thus, it may be useful to provide a witness with a time frame based on well-known dates of memorable

that a witness is lying but they have to use neutral language because they have to exercise neutrality. During a personal interview on 8 October 2004 with James Stewart, former chief of the ICTR appeals section of the prosecution, Stewart said that the prosecution needs to be convinced of the credibility of a witness for such a witness to be called. It would be unethical to call a witness despite serious doubts about his credibility. To assess the credibility, the prosecution looks at inherent inconsistency. Once, properly investigated, it assumes someone is telling the truth. The prosecution may, however, be mistaken, given that it relies heavily on investigators who took statements from witnesses years before they are called to testify.

⁸⁵⁵ James Stewart confirms that witnesses often mix up the things they saw or they heard. This is not a lie but a different concept of the terms. In Stewart's own experience, with some patience and accuracy in questioning one can determine what the witness actually experienced and what he heard from others (personal interview conducted in Arusha, Tanzania, 8 October 2004).

⁸⁵⁶ Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 63-66.

⁸⁵⁷ *Ibid*, pages 21-43.

⁸⁵⁸ *Ibid*, pages 22-44.

events. A witness can then estimate dates by referring to events rather than precise dates. Distances can be estimated by identifying locations well known to a witness. Rather than calculating the distance in (kilo)metres a witness can calculate it by reference to a distance between point a and b. Accordingly, there are many possibilities to overcome difficulties caused by diversity in understanding issues. To use such possibilities, it is however important that investigators are aware of this diversity. Otherwise, it will be difficult to assess the reliability of the witnesses' answers.

Suggestive Questions

The manner in which questions are being asked of a potential witness is of crucial importance.⁸⁵⁹ Consciously or subconsciously, prospective witnesses may provide the answers they think the interviewer would like to hear. In order to get information based on the witnesses' own recollection of events, interviewers should therefore avoid expressing any hint of what they expect to find. Questions must be value-neutral and open so that the witness is free to answer in the manner he is most comfortable with. Suggestive questions must be avoided. This accords with the advice of Anthony Forde who conducts trainings in investigation techniques.⁸⁶⁰

If no audio or video record exists of pre-trial interviews conducted with prospective witnesses, it is difficult to establish how answers came about. At the ICTR, the defence is rarely provided with a full transcript including the questions and answers provided in such interviews. Mostly, the Prosecution merely discloses a statement from the witness without including the questions asked. As Combs' research clearly confirms, at the ICTR, there are usually significant differences between prior

⁸⁵⁹ In a personal interview with James Stewart conducted in Arusha, Tanzania, 8 October 2004, he expressed the view that leading questions during in an interview should be avoided by both parties. The manner of questioning may lead to different answers. Investigators may not have asked certain pertinent questions which are asked on a later occasion resulting in inconsistencies. Judge Arrey confirms that there are often gaps between different statements some of which may be caused by the fact that they were taken by different investigators with different styles of questioning. Some questions may not have been asked and, according to Mr. Kwende, Rwandan interpreter, Rwandans do not volunteer information unless they are specifically asked. Thus, there may be gaps simply because a certain question was not asked. Yet, the Defence will use it to try to impeach a witness, which is time consuming and easily avoidable by asking all the relevant questions. See Geneva Conference, *supra* note 173.

⁸⁶⁰ ICC Defence Investigative Interview Course 2011, The Institute for International Criminal Investigations (IICI), on file with the author.

statements of witnesses and their testimonies in court.⁸⁶¹ Various factors could explain such differences. One of them is that, during pre-trial interviews, witnesses were prompted to answer in conformity with the Prosecution's theory of the case.

In the ICTY, the defence is usually provided with a full transcript of pre-trial interviews, as well as an audio and video record thereof. This offers a much better opportunity both to the defence and the Chamber to verify the reliability of the answers given. In some situations, this has led the defence to suggest that the Prosecution leads the witnesses in answering one way or another.⁸⁶² This debate then becomes part of the public record and the Chamber is made aware of it. In the ICC, the Prosecution tends to provide a full transcript and audio or video tape of prior recorded testimony, which is one of the conditions for its admission under Rule 68. This is a significant improvement for the establishment of the truth as it makes the investigative methods more transparent to the judges. It helps judges verify whether inconsistencies between prior statements and *viva voce* testimonies of witnesses can be explained by misunderstandings by the investigators.⁸⁶³

The Prosecution states that its investigators refrain from asking leading questions and are open to any answers, incriminating or exonerating alike. They seek to duly report the witness's account as he has experienced the events and take good care not to manipulate the answers. Investigators have no pre-conceived notion as to what they want, or expect to hear.⁸⁶⁴

This, however, does not always correspond with the reality. In *Mbarushimana*, the Pre-Trial Chamber raised concern about the Prosecution's investigation technique of putting leading questions to witnesses during interviews and being impatient with their answers if incompatible with their theory of the case. The Pre-Trial Chamber qualified this technique as "utterly inappropriate" and contrary to the Prosecution's duty under Article 54(1) to establish the truth by investigating incriminating and

⁸⁶¹ Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 106-122.

⁸⁶² For instance: *Prosecutor v. Limaj et al*, T. 2104 – T. 3164.

⁸⁶³ As was claimed, for instance, by Witness P-0280, ICC-01/04-01/07-T-161-Red-ENG WT 28-06-2010, pages 52-53; and: Witness P-0250, ICC-01/04-01/07-T-103-Red-ENG WT 16-02-2010, page 14-15.

⁸⁶⁴ ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 11-20, 26.

exonerating evidence equally. In the *Mbarushimana* confirmation decision numerous examples are cited of the Prosecuting investigators “showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations.”⁸⁶⁵

The Pre-Trial Chamber referred specifically to suggestions made by the Prosecution investigators that the witness may not be “really remembering exactly what was said”; that he does not “really understand what is important” to the investigators of the case; or that he may be “trying to cover” for the suspect.⁸⁶⁶

By majority, the Pre-Trial Chamber observed that “none of the FDLR insider witnesses directly and spontaneously confirm the existence of an order emanating from the FDLR leadership” to launch attacks against the civilian population and to create a “humanitarian catastrophe” in the manner alleged by the Prosecution.⁸⁶⁷ Some witnesses deny having heard of such an order. Others state the opposite, that is that there were specific instructions to protect the civilians from the consequences of the fighting.⁸⁶⁸ Many of those who remember that such an order was issued by the FDLR leadership remember it only after the investigator persistently spelt out the existence of the order, its timing and specific content.⁸⁶⁹

Being repeatedly left with the impression that the Prosecution investigators are so attached to their theory that they lost their impartiality in questioning witnesses, the Pre-Trial Chamber assigned significantly less weight to any answers prompted in such a manner.⁸⁷⁰

Language Barriers

Language barriers may increase the difficulties in interviewing witnesses. If the investigator is unfamiliar with the language of the interviewee, he must rely on an interpreter and thus receives the information through the interpretation of a third

⁸⁶⁵ *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 51.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*, para. 255.

⁸⁶⁸ *Ibid.*, para. 255.

⁸⁶⁹ *Ibid.*, paras. 248 and 257.

⁸⁷⁰ *Ibid.*, para. 51.

party. Interpretation is difficult because it is not only a question of interpreting words, but also of particular cultural understandings of such words.⁸⁷¹ For instance, in the Eastern part of DRC, people often use the term “les enfants” to refer to persons of a lesser status. They do not necessarily mean to say “children” in the sense this term is understood in the West. When they speak of the militiamen still active today in Ituri, they use the term “les enfants” notwithstanding that they are all adults. This is significant, given that the three Congolese accused are charged with the recruitment of child soldiers. It is then important to be sure that when witnesses refer to “les enfants”, they refer to young people under the age of 15.⁸⁷² There is also an issue with the word “makubwa” in Swahili, which refers to someone significant. Depending on the context, this word is used simultaneously for the chief and for someone who is respected. The distinction is important if one seeks to establish the position of a person charged with international crimes.⁸⁷³

It is particularly difficult to speak with witnesses about sexual crimes. Such matters can be extremely sensitive and are dealt with differently in different cultures. In some cultures, it is completely taboo to speak about any sexual experiences. In other cultures the word rape does not even exist. This is, for instance, the case in local eastern Congolese languages, such as Lendu and Ngiti.⁸⁷⁴ In Kinyarwanda, the same word is used for sexual violence as for marriage.⁸⁷⁵ It is essential to understand the

⁸⁷¹ Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 66-79. This was confirmed by an interpreter, Mr. Alphonse Mpatsenumugabo, at Geneva Conference, *supra* note 173, who says that the work of interpreters is complicated because they find it hard to bring out any nuance and have been criticised for not replicating the ideas a witness was expressing. However, this is not an easy task. Mr. Mpatsenumugabo and Ms Vidal also expressed difficulties in translating accurately what a witness says. At the same Conference, Mr. Kwende, one of the prosecutors before the ICTR, also expressed concern about the reliance on interpretation. He affirmed that most of their investigators do not speak Kinyarwanda, the language spoken in Rwanda, and thus rely on interpreters. The job of interpretation is beyond interpreting words. It is also interpreting the culture into the statements that are being recorded by witnesses. He affirms that, in interviewing witnesses, most of the sense is lost, and they are spending more time trying to get into the frame of mind of the witness to understand what he is saying. In addition, some interpreters filter out some important information that is being communicated by the witness. These are serious challenges. Often, there are great disparities between prior statements and viva voce testimony. Many times, witnesses claim that the investigators must have misunderstood their previous answers.

⁸⁷² The author noted that everyone she spoke to in Ituri, Eastern DRC, referred to the active militia as “les enfants”. During conversation, it appeared that they were not referring to their ages, but rather to their position in life. This information was given in interviews in Ituri in the period of February 2011.

⁸⁷³ See ICC-01/04-01/07-T (W-30/373), on 31.03.10-01.04.10, T-127-128; (W-2/268) on 23-25.02.10, T-106-108.

⁸⁷⁴ This was confirmed by many Congolese in Ituri, Eastern DRC in interviews with the author in the period of February 2011.

⁸⁷⁵ See the submissions of Ms. Ngendahayo at the Geneva Conference, *supra* note 173.

specific cultural codes relating to sexual crimes when approaching alleged victims of such crimes. This is important not only as a matter of respect for the interviewee, but also to be able to assess whether the person is credible.

Trauma

Witnesses may further be reluctant to speak because of severe trauma. An interview may re-traumatise them.⁸⁷⁶ Those witnesses who decided to testify despite their fear to relieve their trauma are often confused.⁸⁷⁷ They may need counselling in the course of an interview, a service the Prosecution can offer but not the defence.⁸⁷⁸ According to Professor Wagenaar, time lapse between testimony and events combined with trauma significantly undermine the reliability of the testimony.⁸⁷⁹

Fabrication of Evidence

Documents

Given the often highly politicised climate in the country of investigations, there is also more risk that documents are fabricated or witnesses unreliable. In a post-conflict society, there tends to be more fabrication of documents for the purposes of propaganda or for shifting blame onto the other side.⁸⁸⁰ The extent to which documents are fabricated is more difficult to assess due to unfamiliarity with the culture. For instance, if one is familiar with the culture, one can better assess whether a particular stamp on a document gives the document more authenticity or whether it is easy to get an official certificate providing incorrect information. In corrupt systems, officials may be prepared to forge official documents as long as the receiver is willing to pay a sufficient amount of money for it.

⁸⁷⁶ This was confirmed by the ICC chief of investigations in DRC. See ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 6/79 NB T, pages 10-12.

⁸⁷⁷ According to James Stewart, it is a delicate issue to deal with traumatised witnesses. Casualties of war clearly have an impact on the psychology of affected witnesses. These witnesses should be treated with caution and one should not be cruel to witnesses. It is a balancing process to establish whether a witness is telling the truth and test the evidence and treating the witness with respect (personal interview conducted in Arusha, Tanzania, 8 October 2004).

⁸⁷⁸ ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009 6/79 NB T, pages 10-12.

⁸⁷⁹ W.A. Wagenaar, *Identifying Ivan: A Case Study in Legal Psychology* (Harvard University Press, 1988). See also H. Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (Penguin Books, 1994) (first published in the US by the Viking Press 1963), 220-233; G. Wolters, *Herinneringen door getuigen*, in: P.J. van Koppen a.o. (eds), *Het recht van binnen. Psychologie van het recht*, (Kluwer 2002), 397-415; E. Loftus, *Eyewitness Testimony* (Harvard University Press 1979).

⁸⁸⁰ P. Murphy, *Excluding Justice or Facilitating Justice? International Criminal Law would Benefit from Rules of Evidence*, 12 *International Journal of Evidence & Proof* 2 (2008), 16-21, 30.

For instance, in DRC, anyone who is willing to pay money can at any time obtain an identity card. The personal information of the person requesting a card is rarely verified. Some people appear to have multiple identity cards each with a different date of birth. The date of birth that appears on the identity card also frequently differs from the date indicated on other official papers, such as school bulletins or birth certificates. Accordingly, whilst such documents are not forged, the contents may be based on erroneous or false information. Many people in DRC are not certain of their date of birth. Others have ulterior motives to lie about their age.

This has become a real issue both in the *Lubanga* and in the *Katanga & Ngudjolo* cases. Numerous alleged child soldiers appeared to have lied about their age to make themselves younger than they were in order to qualify as child soldiers. At least, their age differed drastically from document to document. The ultimate findings in both cases are still pending, but both Chambers have expressed concern about this and allowed the defence significant time to explore the issue of genuine ages.⁸⁸¹

False Testimony ICTY

Witnesses may fabricate evidence for solidarity or financial reasons. In the context of the former Yugoslavia, ethnic loyalties can go very deep and override any sense of

⁸⁸¹ ICC-01/04-01/06-2690-Red2 08-03-2011, *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*; *Redacted Decision on Intermediaries*, ICC-01/04-01/06-2434-Red2 31-05-2010. For *Katanga & Ngudjolo*, see for instance, Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-220-Red-ENG WT 22-11-2010, pages 27-28: "Q. Let me put a simpler question to you. Do you agree that the two reports you produced in the course of this interview, or prior to this interview, had been forged, were false, false documents? Do you agree?"

A. You talk about forgery. What are you talking about? Do you mean that I falsified or forged some of the information in this report card, or I have forged the entire report card?

Q. Do you agree that these two documents are false documents?

A. Well, this is what I'm telling you: I would say yes, because I have never attended the Songolo school as indicated here. I never attended that school. This is to say that these reports were prepared simply to help me to attend school in the locality where I was living, but it does not mean that I attended school in Songolo. Does that answer your question? Q. Now, we can recall from last week that you told us that you graduated from your second year secondary in Bunia in July."

See also: ICC-01/04-01/07-T-221-Red-ENG WT 23-11-2010 WT 24-11-2010, Witness DRC-OTP-P-0028, page 6: "Can you remember being registered at that school with a birthday of the 8th of August, 1988? Why does that birthday appear in that form and not the birth date that so far you've provided us with? Can you account for the difference?" See also: Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-220-Red-ENG WT 22-11-2010, see pages 27-28.

duty to tell the truth to a foreign court in a foreign country.⁸⁸² However, this has never become an overwhelming issue, as in the ICTR.

False Testimony ICTR

In the context of Rwanda, it has been suggested that lying is a common phenomenon acceptable in the culture.⁸⁸³ Numerous Rwandans, sometimes rather proudly, agree with this thesis.⁸⁸⁴ According to Professor Ndengejeho who testified as a defence expert in the *Semanza* trial, lying is a sign of intelligence, and is therefore not only accepted but also encouraged in the Rwandan culture.⁸⁸⁵ Combs cites a number of scholars who reached similar conclusions about the Rwandan culture.⁸⁸⁶

James Stewart, former head of the Prosecution's Appeal section at the ICTR, does not believe in the theories that Rwandans have a tendency to lie. According to him, there are other issues, which explain the misunderstanding of the Rwandan witnesses, such as the regimented functional placement of people in their society, mechanisms to survive and behaviour in a social context.⁸⁸⁷

Whether such theories are sound or not, there is a real suspicion that false witness testimonies are frequently being manufactured for use in the trials. Witnesses have testified to that extent. In particular at the ICTR, there are allegations of concoction not of the evidence of one witness only, but of several in one trial, on the instigation of public authorities.⁸⁸⁸ Other witnesses claim that civil society groups instigated them to give false testimony and threatened them when they refused to do so.⁸⁸⁹

⁸⁸² *Prosecutor v. Limaj et al*, T. 2104 – T. 3164.

⁸⁸³ See J. De Lange, *Rwandan Realities – 10 Years After the Genocide*, GTI Conference 29-30 October 2004. Professor Reyntjens did not use those words but has pointed out the dangers of evidence concoction. He also pointed out the fact that the oath does not have the same meaning for Rwandan witnesses as it has for European and American witnesses. See personal interview with F. Reyntjens, conducted in Antwerp, Belgium, 20 December 2004.

⁸⁸⁴ This is confirmed by interviews with Rwandan defendants before the ICTR, as well as their family members and Rwandans living in The Netherlands.

⁸⁸⁵ *Prosecutor v. Semanza*, ICTR-97-20-T, T. 31 January 2002, page 116; *Prosecutor v. Semanza*, ICTR-97-20-T, Trial Judgement, 15 May 2003, para. 572.

⁸⁸⁶ Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 131-135.

⁸⁸⁷ Personal interview conducted in Arusha, Tanzania, 8 October 2004.

⁸⁸⁸ In *Prosecutor v Akayesu* ICTR-96-4-A, 16 May 2001 *Arret (Requete Aux Fins de Renvoi De L'affaire Devant La Chambre de Premiere Instance I)*, the Defence was unsuccessful in reopening the trial, or having fresh evidence admitted on appeal, from a Tutsi witness, BBB, who came forward after trial to provide a detailed, notarized statement to the effect that evidence against Akayesu was systematically manufactured with the intervention of government agents. In *Prosecutor v Ntakirutimana*, ICTR No-96-10, ICTR-96-17-T, defence witnesses provided similar testimony

In particular prisoners appear to be under the assumption that they will be rewarded if they testify against one of the ICTR defendants.⁸⁹⁰ In light of Tertsakian's research in Rwandan prisons, it is not surprising that the prisoners are rather desperate to get out of their situation. Some of them have been imprisoned for many years without ever having seen a case file.⁸⁹¹ They have very limited liberties or time with their families. Apparently, there was a strong encouragement from the authorities for prisoners to confess and incriminate others.⁸⁹² Thus, it is not necessary to come from a society where lying is regarded as acceptable behaviour. Many people would be inclined to concoct stories if they found themselves in an equally desperate situation.

It cannot be said with certainty that these allegations are true, but they are so serious that they should not be rejected out of hand. There are so many allegations of this kind that, *prima facie*, they appear to have at least some foundation. If it is true that witnesses are manipulated into making up stories, particularly if this is done in a structured and systematic way under auspices of the government, the tribunal may have to re-open most of its cases. It would have to doubt the credibility of many, if not all, of the witnesses who have appeared before it.⁸⁹³

(Witness 9 and Witness 31). The same thing happened in *Prosecutor v Rutaganda* ICTR-96-3 (Witness DD), (see False Witnesses Testified to Genocide Court" inews@habari.co.tz, March 17, 1999) and in the "Media Trial," *Prosecutor v. Nahimana, Barayagwiza and Ngeze* ICTR-99-52-T, (Witness RM 14) (see "Genocide Survivors Coerced me to Lie, Says Defence Witness," Foundation Hirondelle - Hirondelle Press Agency in Arusha International Criminal Tribunal for Rwanda, 16 January 2003.) In *Prosecutor v Kajelijeli* ICTR-98-44-T, a death row inmate testified that he and his family were threatened by a Rwandan prosecutor if he testified in the defence of the former Rwandan mayor. He claimed that he was promised his death sentence would be commuted if he did not testify (see "State Prosecutor Threatened Me Against Testifying, Says Defence Witnesses," Foundation Hirondelle - Hirondelle Press Agency in Arusha International Criminal Tribunal for Rwanda, 21 November 2002.

⁸⁸⁹ See, for instance, *Prosecutor v. Nahimana et al*, ICTR-99-52-T, 13 March 2003, page 61; *Prosecutor v. Niyitegeka*, TR-96-14-T, 16 May 2003, Judgment, para. 222; *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Judgement and Sentence, 24 June 2011, paras. 334-338.

⁸⁸⁹ For instance, *Prosecutor v. Seromba*, ICTR-2001-66- I, 13 December 2006, Judgement, para. 73.

⁸⁹⁰ *Ibid*, para. 73.

⁸⁹¹ C. Tertsakian, *Le Château, The Lives of Prisoners in Rwanda* (Arves Books, 2008).

⁸⁹² *Ibid*.

⁸⁹³ It is indeed the view of many defence counsel that all cases must be reviewed. See views expressed at two conferences organised by ICTR defence counsel in The Hague and Brussels in November 2009 and May 2010 respectively; *The ICTR, Law and International Politics: A Defence Perspective, held in The Hague, Netherlands*, 14-16 November 2009; *The ICTR Legacy from the Defence Perspective*, Conference held in Brussels, Belgium, 24 May 2010; See http://www.ictrlegacydefenseperspective.org/Hague_14_16_November_2009/ICTR-Law-Politics_Hague_conference_14_16_November_2009.pdf; <http://www.ictrlegacydefenseperspective.org/En.html>).

Until now, most of the claims of fabrication at the ICTR have not been properly investigated.⁸⁹⁴ Some judges appear to have a preconceived view that such claims themselves are fabricated.⁸⁹⁵ Cases where a prosecution witness has been demonstrated to be lying extensively on significant issues have gone without sanction or disapproval.⁸⁹⁶ In this regard, it is interesting to note that the only prosecution that has taken place of a witness who allegedly gave false testimony under oath was one who recanted in favour of the accused.⁸⁹⁷ This led to the arrest and conviction of a defence investigator who allegedly incited the witness in question to give false evidence before the tribunal which was favourable to the accused.⁸⁹⁸

False Testimony ICC

⁸⁹⁴ For a critical note, see A. Zahar, The Problem of False Testimony at the International Criminal Tribunal for Rwanda, in A. Klip and G. Sluiter, (Eds.), *Annotated Leading Cases of International Criminal Tribunals, Vol. 25: International Criminal Tribunal for Rwanda, 2006-2007* (Intersentia, 2010). At the Geneva Conference, *supra* note 173, ICTR judge Arrey justified the non-action in this regard because she feared it would discourage witnesses from testifying.

⁸⁹⁵ In *Prosecutor v. Augustin Ndirabatware*, ICTR-99-54-T, a number of witnesses (DWAN-13 and DWAN-9) testified that they had received offers of payment from one of the Prosecution witnesses. In response, one of the judges routinely suggested that the witnesses were not honest. For instance, he said: "Please, be honest, be frank, and be concise in your answers to my questions. And so, please, do not beat about the bush. Please, Witness." See: T. 22 August 2011, pages 3-15.

⁸⁹⁶ In one case, however, a Trial Chamber ordered the prosecution of a prosecution witness for perjury. Prosecution witness GFA testified in multiple trials and then recanted while saying that many other witnesses had equally lied. Having been informed by the witness that he had lied under oath about *Bicamumpaka's* liability in the presence of a Prosecution representative (Exhibit 2D118 (Kampala Interview of Witness GFA, 8 February 2008), the defence for *Bicamumpaka* asked to call him back. This request was granted. Meanwhile, in the *Karemera et al* trial, he confirmed under oath that he had lied under oath when he incriminated several accused (*The Prosecutor v. Édouard Karemera et al.*, Case No ICTR-98-44-T, T. 10 April 2008 pp. 47-48, pp. 50-51). However, in the course of his testimony in the *Bicamumpaka* proceedings, Witness GFA indicated that he was not prepared to testify and subsequently absconded (*Prosecutor v. Bizimungu et al*, T. 5 May 2008, pages 52-53, 58; T. 6 May 2008, pages 35, 37-40). The Chamber in *Bizimungu et al* then issued a subpoena compelling his attendance (T. 21 May 2008, pages 28-30). Both the Chambers in *Karemera et al* and *Bizimungu et al* ordered that an *amicus curiae* be appointed to investigate whether reasonable grounds existed to prosecute Witness GFA for perjury. The investigator found that he had knowingly and wilfully given false testimony "during all or at least some of the occasions on which he had testified before the Tribunal". Nonetheless, the Chamber in *Bizimungu et al* declined to order his prosecution as he had only appeared once before it and the *amicus curiae* was unable to establish if he lied while testifying in the *Bizimungu et al* proceeding, or only during the *Karemera et al* trial or both. The *Karemera et al* Trial Chamber, on the other hand, has ordered that the witness be prosecuted for false testimony (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion to Prosecute BTH for Providing False Testimony (TC), 10 September 2009, paras. 1, 6). The Appeals Chamber, however, overturned this decision based on an erroneous application of the law (*Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's and Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony (AC), 16 February 2010, paras. 19, 21; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Remand Following Appeal Chamber's Decision of 16 February 2010, 18 May 2010, paras. 5-6, p. 7 (order)).

⁸⁹⁷ *Prosecutor v. GAA*, ICTR-07-90-R77, Judgement.

⁸⁹⁸ *Prosecutor v. Leonidas Nshogoza*, ICTR-2007-91-T, 7 July 2009, Judgement.

In places like DRC, where people live in extreme poverty, money can be a stimulant.⁸⁹⁹ In the first ICC trial of *Lubanga*, the issue of false testimony has been the key subject of several filings. The reliability and credibility of the intermediary was contested. The defense argued that four intermediaries gave instructions to witnesses and even provided them with false letters and other documents to support their stories. Two witnesses followed their instructions and lied about their age and experience as child soldiers.⁹⁰⁰ One of them testified that he was a child soldier in the UPC. Yet, he did not know the name of his brigade, commander, or even what ‘UPC’ stood for.⁹⁰¹

During cross-examination, some of them declared that they had received money or that they had been trained for days by those intermediaries in order to build their story as a child soldier.⁹⁰² The Chamber considered that those accusations were grounded and made several orders for the Prosecution to recall those witnesses and intermediaries.⁹⁰³ When the Prosecution refused to disclose the identity of one of the intermediaries concerned to the defence,⁹⁰⁴ the Chamber even stayed the procedure, stating that it could not offer a fair trial if the Prosecutor failed to follow court orders.⁹⁰⁵ The Appeals Chamber, however, overturned this decision. While severely criticizing the Prosecutor for failing to abide by the Chamber’s order to disclose, the Appeals Chamber held that alternative, less drastic measures were open to the Chamber. Instead of staying the procedure, the Chamber could have imposed sanctions on the Prosecution.⁹⁰⁶

⁸⁹⁹ See Combs who drew similar conclusions on Sierra Leone and Rwanda: Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 138-142.

⁹⁰⁰ ICC-01/04-01/06-2690-Red2 08-03-2011, *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*; pages 13-14.

⁹⁰¹ *Ibid*, page 16 of the decision, citing: ICC-01/04-01/06-2657-Conf-tENG, para. 44.

⁹⁰² ICC-01/04-01/06-2690-Red2 08-03-2011, *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*, page 24, citing: ICC-01/04-01/06-2657-Conf-tENG, paragraphs 82 – 85.

⁹⁰³ *Redacted Decision on Intermediaries*, ICC-01/04-01/06-2434-Red2 31-05-2010.

⁹⁰⁴ In *Katanga & Ngudjolo*, where some of the same intermediaries had been employed to search for witnesses. The defence in that case repeatedly requested for the disclosure of the identity of the same intermediary 143. Ironically, both defence teams had learned his identity while conducting investigations.

⁹⁰⁵ *Prosecutor v. Lubanga*, Public Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06-2517-Red, issued on 8 July 2010, para. 31.

⁹⁰⁶ ICC-01/04-01/06-2582 08-10-2010, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation

Eventually, the defence asked for a permanent stay on the ground that the evidence was so unreliable that a fair trial could no longer be guaranteed.⁹⁰⁷ The Chamber dismissed the request, but not the arguments underlying it. The Chamber did not consider it necessary to stay the procedure because it would be able, despite those abuses, to reach a final conclusion on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the alleged prosecutorial misconduct or negligence.⁹⁰⁸ The judgement is still pending.

Similar issues arose in the *Katanga & Ngudjolo* trial. As said earlier, some witnesses appeared to be older than they had initially claimed they were.⁹⁰⁹ One witness had

of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", paras. 45-61.

⁹⁰⁷ See ICC-01/04-01/06-2657-tENG-Red 12-08-2011, *Defence Application Seeking a Permanent Stay of the Proceedings* (Public Redacted Version – with confidential annexes). See also: ICC-01/04-01/06-2678-Red 29-03-2011, *Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures »*.

⁹⁰⁸ ICC-01/04-01/06-2690-Red2 08-03-2011, *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*, pages 74-92.

⁹⁰⁹ See, for instance, Witness P-0279 ICC-01/04-01/07-T-151-Red-ENG WT 08-06-2010, pages 22-25: "Q. So which date is your correct date of birth, do you say? Is it the date you gave the investigators, a date in 1991; or is it the date you gave in your evidence, at the beginning of your evidence, a date in 1990; or neither of those dates? What do you say? Is it 1990? 1991? 1984, as shown on the card? Or another date? Don't give us the full date, just the year.

A. It's in 1990.

Q. And just remind us how old you are today. How old are you today? Have you forgotten again? How old are you today?

A. With regard to my age, given the date that I gave you, in that case I would be 20 years old.

Q. No, I think you're 19, actually. But I accept it's probably difficult to remember in your situation. You, I suggest, were born in 1984. That's right, isn't it? Let me ask you this: Tell us how you got this card and tell us why the date on it is August -- sorry, is 1984. Why is the date on this card 1984?"

See also page 24-25: "Q. But according to you, at that time you were only 15. What advantage was it to you to say you were 20?

A. I didn't fully understand your question.

Q. According to you and your correct date of birth, you were just 15. So what advantage was it to you to show a card to soldiers that stated you were 20, that you were older than you were? How does that or would that help your safety?

A. (No verbal response)

Q. Well, again that's a long pause. Do you have an answer to it, to the question?

A. I do not have any answer to that question.

Q. Now, when you went along to the Electoral Commission to get a card that clearly was regarded as very important by everybody, what document did you produce to show that you were born on the year that appears on that card?

A. I didn't have any other documents. What I showed them there --well, it was my big brother who had written something on a bit of paper, it was written by my older brother, and that is what I presented where you had to register.

Q. And you went along yourself, did you?

A. Yes.

Q. As a 14-year-old and you said, "I'm 20"; is that right?"

See also Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-220-Red-ENG WT 22-11-2010, pages 25-28;

invented an entire detailed story about being kidnapped with four other boys by 36 militiamen and forced to join the militia. He claimed he had done so on instructions of his intermediary. During trial, this witness stated:⁹¹⁰

“I have already said that this is a statement which does not reflect the truth. I say this because at that time I was never attending school in Aveba. May I add that I have never attended school in Aveba. And even during that period, I did not know the Walendu-Bindi collectivity well. Well, to answer your question, therefore, I will tell you the following: That is an untruth. Someone asked me to say that, and the person who asked me to say that is still alive.”

The testimony of one witness who alleged to have been kidnapped and joined the militia by force was so contradictory that one of the defence teams requested the Chamber to order the Prosecution to initiate proceedings for perjury against this witness.⁹¹¹ This request was rejected.⁹¹² However, recently, the Chamber asked the Prosecution whether it intended to initiate proceedings against a victim witness who had pretended to be at Bogoro when it was attacked, while in fact, he was in Bunia.⁹¹³ Upon discovery of this lie after completion of his testimony, the Prosecution had sought and received permission to withdraw this witness as a witness of truth.⁹¹⁴

Absence of Documentary and Tangible Evidence

Witness P-0280, ICC-01/04-01/07-T-160-Red-ENG CT WT 23-06-2010, see pages 74-75.

⁹¹⁰ Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-220-Red-ENG WT 22-11-2010, pages 55-59.

⁹¹¹ ICC-01/04-01/07-2243-Red 22-09-2010 “*Requête de la Défense de Mathieu Ngudjolo aux fins de solliciter le déclenchement des poursuites judiciaires à charge du Témoin P-279 de l’Accusation pour atteintes à l’administration de la justice - Article 70 (1) (a) (b) du Statut de Rome* ».

⁹¹² ICC-01/04-01/07-T-190-Red-ENG WT 22-09-2010.

⁹¹³ ICC-01/04-01/07-3223 13-01-2012, *Order to the Prosecutor regarding the alleged false testimony of witness P-159*, see para 4: “considering that more than a year has passed since the Prosecution informed the Chamber of its renunciation of the testimony of witness P-159, the Chamber is of the view that the Prosecution has had sufficient time to determine its position in relation to this issue. As perjury is a very serious matter, the Chamber hopes that the Prosecution has meanwhile taken the necessary steps to investigate the issue and has decided on the appropriate course of action.” In its response, the Prosecution however claimed good faith on the part of the victim: ICC-01/04-01/07-3225 31-01-2012, *Prosecution’s response regarding its investigations into the alleged false testimony of witness P-159*, see para. 4: “It bears reminding that the Prosecution withdrew witness P-159’s evidence because, after the witness had already testified, it received contrary information that raised credibility questions.⁴ In that circumstance, the remedy the Prosecution undertook, notifying the parties and Chamber of its intent to not rely on witness P-159’s in-court testimony, immediately and completely protected the rights of the accused. The Prosecution’s Notice ensured that the evidence of witness P-159, the credibility of which was called into question by other information that the Prosecution deemed to have been given in good faith, would not have the potential to mislead the Chamber in its finding of guilt or innocence.”

⁹¹⁴ “Prosecution’s Notice that it will not rely on the testimony of Prosecution Witness P-159 to prove its case”, 14 December 2010, ICC-01/04-01/07-2631-Conf; Public Decision on the Prosecution’s renunciation of the testimony of witness P-159, ICC-01/04-01/07-2731, 24-02-2011.

Thus, there are serious obstacles in finding credible witness who are willing to testify. This is particularly problematic because the main reliance is on eyewitness testimony. Unlike the Nazis who left a trail of documentary evidence behind,⁹¹⁵ as well as the Yugoslav perpetrators, who left behind significant volumes of written orders, video and other tangible evidence, the Congolese and other African perpetrators left behind very little on paper.⁹¹⁶ There was no structural organisation in any of those countries. If orders were given, they were usually given orally. Most of the defendants were high up in the hierarchy and were therefore acting behind the scenes, if at all. This makes it more difficult to find eyewitnesses who are in a position to confirm that these defendants gave orders to commit crimes under the jurisdiction of the international criminal court or tribunal or facilitated the commission of these crimes in any other way.

However, the non-existence of documentary and other tangible evidence is often exaggerated. Rwanda, for instance, has a well-deserved reputation of being an organised society. There is ample documentation. There are diaries, media broadcasts, speeches of politicians, army and intelligence documents. Unfortunately, the best use has not always been made out of these documents. For instance, although not strictly necessary for the admissibility of such documents, their weight would be increased if introduced through a witness who could make useful comments on them. This is often not done.

Even in DRC, documents such as school bulletins and birth certificates have proven essential to establish the correct age of certain witnesses. It was the defence, rather than the Prosecution, that obtained these documents. Presumably, there are volumes of intelligence documents in the possession of the Government. So far, it has refused to allow the parties access to these documents, relying on the protection of State security. The Prosecution has never made a serious effort to persuade it to disclose at least some of these documents. The defence sought to receive such documents from the DRC government. When the government was non-responsive, it requested the

⁹¹⁵ In many ways, the circumstances in which the Nuremberg Tribunal was operating were ideal. The war had finished, the Germans had surrendered completely with the result that Germany was freely accessible to conduct any kind of investigations. In addition, the archives were available to the court. This is an ideal situation but atypical. It is more common that it is a struggle to get access to any material. See further M. Garapon, at the Geneva Conference, *supra* note 173.

⁹¹⁶ Combs, *Fact-Finding Without Facts*, *supra* note 6, at 6-7.

Chamber's intervention in obtaining them. However, the Chamber rejected this request since the actual existence of these documents was based on speculation.⁹¹⁷

In Kenya, it should not be too difficult to obtain tangible and documentary evidence. "Kenya is not Somalia" as counsel for Ruto, one of the Kenyan suspects, affirmed during the confirmation hearing.⁹¹⁸ Kenya is a well-structured society with lots of traceable paperwork. Among the six Kenyan suspects were very senior politicians, including two (Ruto and Kenyatta) who intend to run for the presidential elections in 2012. Their paths were permanently followed by the active Kenyan media. Contemporaneous videos, press clips, radio broadcasts and newspaper articles exist which can show a pattern of their conduct and the public statements they made.⁹¹⁹ Contemporaneous documents may also demonstrate that the suspects were occupied elsewhere at specific dates that witnesses allege they were at meetings.⁹²⁰

The Prosecution left most of such materials untouched although they are in the public domain and thus easily obtainable. In addition, when the Prosecution alleged that the suspects purchased weapons, it relied solely on anonymous witnesses. It had not made any efforts to obtain purchase receipts, bank transfers or other tangible evidence. In a society like Kenya, if it exists, it should have been possible for the Prosecution to obtain it.⁹²¹

One witness told the Prosecution that Citizen TV had recorded a rally at which Ruto allegedly addressed a crowd of youths and told them to prepare to barricade roads, destroy property and kill the Kikuyus.⁹²² Another witness stated that he had read in

⁹¹⁷ See ICC-01/04-01/07-2019-Conf-Exp-Red 23-04-2010, *Order on the 'Urgent Defence Motion for Cooperation of the DRC'*, and ICC-01/04-01/07- 2619-Red 17-08-2011, *Décision relative à la seconde requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo*.

⁹¹⁸ ICC-01/09-01/11-T-6-Red-ENG WT 02-09-2011, p. 116.

⁹¹⁹ This point was made by the Ruto defence: ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011, 91.

⁹²⁰ The Ruto defence argued that evidence of Ruto's absence at alleged meetings because he was elsewhere, was readily available. See: Ruto Defence Brief, ICC-01/09-01/11-355 24-10-2011, para. 7; ICC-01/09-01/11-T-6-Red-ENG WT 02-09-2011, 62-72.

⁹²¹ This was one of the arguments of the defence – failure to investigate properly. See, for instance, ICC-01/09-01/11-T-12-ENG, 8 September 2011, pages 41-45. See also: Muthaura Confirmation Brief, ICC-01/09-02/11-374-Red, 2 December 2011, paras 71-72. The defence relied on the following examples: EVD-PT-D12-00063 at para. 2; EVD-PT-D12-00062 at para. 13; EVD-PT-D12-00088 at para. 2; EVD-PT-D12-00054 at para. 6; EVD-PT-D12-00053 at para. 5.

⁹²² Ruto Defence Brief, ICC-01/09-01/11-355 24-10-2011, para. 22.

the newspaper that grenades were found at the house of Ruto's accomplice Cherambos.⁹²³ The Prosecution failed to search for these recordings and newspaper article and thus missed an opportunity to verify the accuracy of the stories of witnesses it relied on as witnesses of truth.

More significantly, the Prosecution should have been able to obtain the broadcasts of the radio station KASS FM, broadcasted from Nairobi. Its radio operator, Sang, was one of the Kenyan suspects before the ICC. The Prosecution relied on anonymous witnesses to establish that he incited people to attack the Kikuyu civilian population, and that he allowed other people to use his radio program to organise the attacks. The Prosecution produced abstracts from KASS FM broadcasts, published by BBC. It never sought to obtain the full transcripts of KASS FM broadcasts even though they are readily available in Nairobi. The BBC abstracts did not include a single inciting broadcast. Rather, they called for peace.⁹²⁴ The defence produced broadcasts of the relevant time period which all referred to peace rather than war. These broadcasts were ultimately rejected because they were not translated into an official language of the Court.⁹²⁵ The Pre-Trial Chamber, Judge Kaul dissenting, nonetheless found that there were substantial grounds to believe that Sang had contributed to a network which had as its purpose the attacking of Kikuyu civilians.⁹²⁶

Difficulties in finding credible and willing witness can also be exaggerated. ICTR defence teams have generally managed to present to the Court both Hutu and Tutsi Rwandan witnesses living in Rwanda including survivors of the genocide. Thus, a

⁹²³ Ruto Defence Brief, ICC-01/09-01/11-355 24-10-2011, para. 23.

⁹²⁴ These points were raised by the Sang and Ruto defence: ICC-01/09-01/11-T-6-Red-ENG WT 01-09-2011, 104; ICC-01/09-01/11, 05 September 2011, pages 51-57; ICC-01/09-01/11-T-6-Red-ENG WT 02-09-2011 109/162 NB PT, pages 114-116, 141-143.

⁹²⁵ ICC-01/09-01/11-300-Red, Decision on the "Prosecutor's Request for an Order Excluding the Evidence Intended to be Relied Upon at the Confirmation of Charges Hearing by the Defence for Ruto and Sang, and the Defence for Kosgey" 29-08-2011.

⁹²⁶ ICC-01/09-02/11-382-Red 23-01-2012, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, see paras. 49-53. This confirms with the reasoning of the Pre-Trial Chamber in Abu Garda, see: ICC-02/05-02/09-243-Red 08-02-2010, para.48: "As the Chamber has already made clear, at this stage of the proceedings, the Defence's objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the Defence's objection raised, in this instance cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the part of the Prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold."

sufficient number of witnesses continue to be willing to testify despite the serious pressure put on them. Also, whilst cultural differences between investigators and potential witnesses makes the investigations significantly more challenging, it does not make them impossible.

It is important to be aware of such differences in order to distinguish lying witnesses from honest witnesses who have difficulty expressing themselves in a, for the investigators, comprehensible manner. It may not be advisable to call honest but forgetful, or entirely incomprehensible witnesses. Such witnesses risk having their credibility destroyed in cross-examination. To that extent, Combs is right. It is difficult to conduct a trial with witnesses who are completely disconnected from the world, culture and language in which the trial is conducted. However, in most situations, a means of communication can be found. It simply takes more time and effort.

Moreover, if investigations are conducted thoroughly, ample credible and comprehensible witnesses can be found. In light of the high number of victims in most international cases, there are also many potential witnesses. Sufficient time and effort must be devoted to finding them, communicating with them, testing their consistency and verifying their stories with other potential witnesses. The ICTY investigators have done a diligent job and found a great deal of the evidence there was to be found.⁹²⁷ However, both at the ICTR and ICC, much more effort could and should be made in order to ensure that the judges are presented with the fullest and most reliable picture of events.

ICTR prosecutors rely heavily on witness statements taken by investigators several years before the witnesses are brought. There are many discrepancies between these statements and the in-court testimonies. This could be avoided by keeping in closer contact with the witnesses by interviewing them more regularly.⁹²⁸

⁹²⁷ See, for instance, *Prosecutor v. Gotovina, Cermak and Markac*, IT-05-87/1-T, Trial Judgement of 15 April 2011, where a total of 145 factual and expert witnesses were called and 4825 exhibits including exhumation reports, orders, photographs, and maps. See paras. 10-59. The findings of fact were to a large extent based on orders, presidential decrees and military documents (paras. 70-94).

⁹²⁸ In an interview in Arusha on 8 October 2004, J. Stewart, former chief of prosecutions at the ICTR, conceded that a serious concern is that there is insufficient collaboration between the Prosecution counsel and the investigators and that years pass by without being in contact with the witnesses. The

Furthermore, when a witness testifies, for instance, about a meeting which was attended by various other people, investigators should try to find these other attendants and verify whether the meeting took place and what was discussed. Also personal information about a witness relating to his age or family members who were allegedly killed, can easily be verified. The necessity of doing so has become apparent in many trials where the defence dug up the relevant information and used in its cross-examination.⁹²⁹ Regularly, the defence calls as defence witnesses, persons mentioned in statements and testimony from prosecution witnesses. Such witnesses often contradict the prosecution witnesses accounts.⁹³⁰

Regrettably, the ICTR and ICC investigators do not tend to verify any of the information given by witnesses. Rather, they take the veracity of the information for granted.⁹³¹ It of course does not help that the ICC investigators hardly visit the locations but rely on intermediaries instead. It is rather surprising that the Prosecution does not find it necessary to recruit local investigators. Most defence teams, on the other hand, consider the recruitment of a reliable local investigator of the utmost importance.⁹³² The Lubanga situation where witness credibility has become a pivotal issue could have been avoided if the Prosecution had taken this basic measure.

Protective Measures

Protection of persons – non-disclosure of identity

first contact between the witness and Prosecution counsel is often in Arusha upon the witness's arrival for testimony.

⁹²⁹ This was for instance the case in the Lubanga and Katanga trials where the defence presented the Chamber with birth certificates and school bulletins to demonstrate that some witnesses lied about their age. In the ICTR, the defence often produces criminal dossiers from witnesses prosecuted in Rwanda to demonstrate contradictions. See also, for instance, *Prosecutor v. Nsengiyumva and Bagosora*, T. 12 October 2004, pp. 11-12, 48-49; Kabiligi Defence Exhibit 85 (Judgment of 16 August 2001, Military Court Rwanda) p. 201. See also: Judgement and Sentence 18 December 2008, ICTR-98-41-T, paras. 1558-1567.

⁹³⁰ For instance, *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, paras. 275, 290, 298, 299, 1558-1567

⁹³¹ Contrary to what the Prosecutor alleges: ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 37-38.

⁹³² David Hooper Q.C. (Interview in The Hague, 3 June 2010), and Peter Robinson (Interview in The Hague, 21 November 2009). Defence teams before the ICC have all recruited local investigators instead of the more expensive well-trained international investigators. Local investigators are essential to open doors in the field.

In order to ensure cooperation from witnesses without putting them at risk, international courts and tribunals can take protective measures. The main protective measure is confidentiality. The identities of victims, witnesses, members of their families or other persons who assist the court or tribunal can be withheld from the public and defence. The identities of many prosecution witnesses in international criminal justice systems are disclosed to the defence shortly before the proceedings begin, and sometimes even later. At the confirmation stage of the ICC, the identities of prosecution witnesses are rarely disclosed either to the defence or to the public.⁹³³ The defence has, however, the right to know their identities a significant period prior to their testimonies at trial. This is similar in the ICTY and ICTR. It only happened once in the ICTY *Tadic* case that the identities of witnesses were not disclosed at all to the defence. Sources, however, can be protected for longer, and in some situations permanently.⁹³⁴

In each of the three international tribunals and court, non-disclosure to the defence of identifying details of sources and witnesses is a measure of last resort and must be balanced with the rights of the defendant. The “overriding principle is that full disclosure should be made”.⁹³⁵ The ability to investigate can be seriously infringed if the identities of important information providers are redacted. Indeed, an efficient investigation commences with enquiries about such persons, which cannot be done unless their identities are known.⁹³⁶

⁹³³ The Statute explicitly authorises the prosecution to rely on summaries of anonymous witnesses (articles 61(5) ICC and 68(5) ICC Statute). However, the weight is significantly less. See, for instance, Public Redacted Version of the URGENT Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428, 21-04-2008, para. 14; citing confidential filing: ICC-OI/04-01/07-374-Conf-Exp, para. 18; ICC-01/04-01/06-517. pp. 4 and 6; *Prosecutor v. Abu Garda*, Public Redacted Version of the Decision on Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, paras.173 and 177; *Prosecutor v. Muthaura, Ali and Kenyatta*, ICC-01/09-02/11-382-Red 23-01-2012, paras. 89-90.

⁹³⁴ See, for instance, ICC-01/04-01/07-1395-Corr-tENG 13-01-2010, para. 27.

⁹³⁵ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, para. 63.

⁹³⁶ This is the case for prospective witnesses, or other informants. See Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, para. 62: “The Appeals Chamber agrees with the appellant that, in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence. In such circumstances, the assessment carried out by the Pre-Trial Chamber in deciding whether or not to authorise any particular redaction will necessary take this factor

Non-disclosure of the identities of their family members can also affect the rights of the defence, most notably the right to have adequate time and facilities to prepare a defence. To verify the veracity of the testimony of witnesses, speaking to members of their families or persons in their close proximity has proved essential. It is particularly through such persons that the discovery can be made that certain parts of the testimony are not truthful.⁹³⁷ As addressed above, it frequently occurs that the Prosecution does not make these necessary enquiries. It is then even more important that the defence be offered an opportunity to do so. On the ground, defence investigators can usually find the identities of family members of witnesses through their own sources. However, this requires time and efforts that the defence could have used for other purposes. Moreover, the fact that such information can be found by the defence itself demonstrates that there is no legitimate reason to withhold it from the defence.

Judges are aware that non-disclosure of relevant information may impinge on the defence's ability to adequately investigate and prepare a defence. At the same time, in some situations, judges consider that such measures are the only way to properly protect persons who assist the court or tribunal. As one ICTY Chamber put it:⁹³⁸

If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

into account". See also: *Prosecutor v. Lubanga*, "Decision on Third Defence Motion for Leave to Appeal", ICC-01/04-01/06-514, 4 October 2006.

⁹³⁷ ICC-01/04-01/07-3223 13-01-2012, *Order to the Prosecutor regarding the alleged false testimony of witness P-159*. Many family members have been called by the defence to testify. See, for instance, D147 testimony from 17 to 19 May 2011; ICC-01/04-01/07-T-263-Red-ENG CT WT 19-05-2011, page 52 (D147 = D03-P026); D146 D03-P340, 20-24 May 2011; D145, D03-P0100, see ICC-01/04-01/07-T-310-Red-ENG CT WT 13-09-2011, pages 56, 67-68.

⁹³⁸ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2010, para. 29. See also: See also Waters, [Redacted]: *Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, PART IV.

Nonetheless, the rights of the accused remain “the first consideration”.⁹³⁹ Accordingly, such protective measures can be granted, but only on an exceptional basis, after exhausting the possibility of employing less extreme measures (principle of necessity). Protective measures must also be strictly limited to the exigencies of the situation (principle of proportionality), and not infringe the right of the defence.⁹⁴⁰ More concretely, the Chamber must determine on a case-to-case basis whether the disclosure of the person’s identity generates an objectively justified security risk; whether less restrictive protective measures are reasonably available; and whether non-disclosure gravely prejudices the defence.⁹⁴¹ General security problems in the region alone do not justify redactions from the defence.⁹⁴² For this, it must be shown that such security problems are prompted by the defendant.⁹⁴³

In practice, however, this exceptional measure is routinely applied. Particularly the ICC has gone far in allowing redactions from the public and defence, not infrequently

⁹³⁹ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2010, para. 30: “Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, inter alia, interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration. It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases”.

⁹⁴⁰ ICC-01/04-01/06-108, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, 19 May 2006; ICC-01/04-01/06-102, Decision on the final system of disclosure and the establishment of a time table, 15 May 2006.

⁹⁴¹ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, paras. 59, 60, 71-72; ICC-01/04-01/07-3122 22-08-2011, page 9. See also: *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, 13 October 2006, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, paras. 36-37; *Prosecutor v. Lukic & Lukic*, Order on Milan Lukic’s Request for Protective Measures, 23 July, 2008, pp. 3-4; *Prosecutor v. Simba*, Decision on Defence Request for Protection of Witnesses, 25 August, 2004, para. 5; *Prosecutor v. Nzirorera*, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, July 12, 2000, para. 9; *Prosecutor v. Bizimungu et al.*, Decision on Justin Mugenzi’s Confidential Motion for Protection of Defence Witnesses, June 27, 2005, para. 9.

⁹⁴² *Prosecutor v. Lubanga*, Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, para. 21; *Prosecutor v. Blaskic*, Decision of Trial Chamber I on the applications of the prosecutor dated 24 June and 30 August 1996 in respect of the protection of witnesses’ 2 October 1996; *Prosecutor v. Brdjanin and Talic*, Decision on motion by prosecution for protective measures, 3 July 2000, para. 11.

⁹⁴³ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, para. 71; *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2003, para. 29; *Prosecutor v. Brdjanin and Talic*, Decision on Third Motion By Prosecution for Protective Measures, 8 November 2002, paras. 14-18.

on a permanent basis.⁹⁴⁴ Such redactions can include sources, as well as the names of persons and organisations who act as intermediaries between the Court and potential witnesses.⁹⁴⁵ The names of staff members of the Prosecution, NGOs or other intermediaries are regularly redacted at least until the start of the trial.⁹⁴⁶

Arguably, the protection of NGOs and Prosecution personnel is excessive. Given the nature of their work, they should be prepared to take more risks than ordinary citizens.⁹⁴⁷ The fact that several NGOs cooperate with the ICC is not in itself a confidential matter, and can easily be ascertained from the respective internet sites of these NGOs. As well, in an *amicus* brief, submitted in the DRC situation, the Womens' Institute for Gender Justice broadcasted to the entire world the fact that it had conducted interviews in the DRC, and transmitted its findings to the ICC Prosecutor.⁹⁴⁸

In the ICTY and ICTR, with the exception of the International Committee for Red Cross ("ICRC"), these types of redactions have generally been rejected. The defence is usually entitled to receive the identities of anyone involved in taking witness information, be it investigators, interpreters, Prosecution staff members and/or NGO

⁹⁴⁴ See, for instance, ICC-01/04-01/07-1395-Corr-tENG 13-01-2010, para. 27; ICC-01/04-01/07-1096-tENG 18-11-2009, paras.26-27; ICC-01/04-01/07-1097-tENG 18-11-2009, para. 21. See also ICC-01/04-01/07-3122 22-08-2011, page 9 where the permanent redaction of a defence source was authorized for the first time in international justice. The Appeals Chamber nonetheless held that "non-disclosure must be kept under review and altered should changed circumstances make that appropriate" (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, para. 63). Chambers have followed this instruction. Examples of Decisions which rejected permanent redactions sought and only allowed temporary ones, are: ICC-01/04-01/07-1098-tENG 30-12-2009, para.13-18, and ICC-01/04-01/07-1101-tENG 21-06-2010, para.19-28, and ICC-01/04-01/07-1096-tENG 18-11-2009, paras. 27-31.

⁹⁴⁵ ICC-01/04-01/07-1101-tENG 21-06-2010, see para 25-26.

⁹⁴⁶ See also ICC-01/04-01/07-1034-tENG 18-11-2009, see paras. 50-51. The supervisor of investigations in Ituri testified under pseudonym: ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009. By contrast, particularly the ICTY has been strict on disclosure of the identities of sources: *Prosecutor v. Haradinaj*, Decision on Motions on Behalf of Idriz Balaj and Lahi Brahimaj to Receive Ten Unredacted Witness Statements, 3 May 2006; *Prosecutor v. Kordic*, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999; *Prosecutor v. Brdjanin and Talic*, Decision on Fifth Motion by Prosecution for Protective Measures, 15 November 2000; *Prosecutor v. Brdjanin and Talic*, Decision on Prosecution's Request for Variation of Third Protective Measures Decision, 29 November 2000, para. 14.

⁹⁴⁷ On similar grounds, the European Court of Human Rights has held that the protection of the identities of police officers was excessive. See *Kostovski v. The Netherlands*, Judgment of 20 November 1989, 1989 ECHR (Ser. A.) 166.

⁹⁴⁸ See: ICC-01/04-373, 20 August 2007.

members.⁹⁴⁹ If not, the defence would be deprived of an opportunity to contest the methodology of the collection of witness statements.⁹⁵⁰ Given how often witnesses allege that interpreters or investigators have misunderstood them in cases of inconsistencies with their *viva voce* testimonies, it is imperative for the defence to receive disclosure of their names.

If the redactions pertain to the name of an organisation or a person who has transmitted a document to the Prosecution, or referred a victim or witness to Prosecution investigators, then their identity is crucial to the ability of the defence to analyse and challenge chain of custody issues, possible collusion, undue influence, as well as the existence of prior statements.

Accordingly, the defence is genuinely prejudiced by excessive redactions. Often, such redactions are not even necessary. For instance, it has been suggested that the need for protection in the ICTR is exaggerated. Indeed, many of the protected witnesses have testified publicly before *Gacaca* courts in Rwanda.⁹⁵¹ Similarly, in the DRC, very few people feel genuinely threatened.⁹⁵² This is confirmed by the fact that a person who testified in the case of *Katanga & Ngudjolo* returned to his community after being relocated for security concerns. He has not faced any difficulties since he is back although it is generally known in the community that he testified as a witness for the Prosecution.⁹⁵³

⁹⁴⁹ That this applies equally to humanitarian organisations is clear from: *Prosecutor v. Milutinovic et al*, Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), para. 14; and *Prosecutor v. Milosevic*, Decision on Prosecution Motion for Protective Measures (Concerning a Humanitarian Organisation).

⁹⁵⁰ *Prosecutor v. Pauline Nyiramasuhuko et al*, ICTR-97-21-T, ‘Décision relative à la Requête de la Défense en extreme urgence tenant au respect, par le Procureur, de la “Décision relative à la Requête de la Défense en Communication de preuves” rendue le 1er novembre 2000’, 8 June 2001; *Prosecutor v. Nyiramasuhuko et al*, Decision on the Prosecutor’s Motion for, *inter alia*, Modification of the Decision of 8 June 2001, 25 September 2001, para. 19; *Prosecutor v. Nzirorera* Decision on the Defence Motion for Disclosure of Exculpatory Evidence, Rule 68 of the Rules of Procedure and Evidence, 7 October 2003, para. 20 (the name of a prosecution investigator can be exculpatory information).

⁹⁵¹ See the intervention of D. Webster, one of the prosecutors at the ICTR, at the Geneva Conference, *supra* note 173, where he agreed that there is no reason to protect witnesses before the ICTR who can testify without protection in Rwanda.

⁹⁵² Personal interviews with local Congolese in the period of February 2011, the author has been informed that one witness who has been relocated is still frequently in the region for business purposes and has been boasting about his new house paid by the ICC Prosecution. He then obviously shows little fear for repercussions.

⁹⁵³ Public Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), ICC-01/04-

Accordingly, claims of security concerns should not be accepted on face value. Many allegations of threats from the defendant or an associate turn out to be false.⁹⁵⁴ Caution is particularly appropriate when defendants have lost their stronghold, as in Rwanda. Allegations of security issues can simply be made to put the defendant in a bad light, or render him eligible for relocation. It often seems that confidentiality is invoked not genuinely to protect the safety of a witness, but for strategic reasons.⁹⁵⁵ Protection may also be an incentive to give false testimony because there will be no consequences.⁹⁵⁶ Witnesses can comfortably invent anything they like without being subjected to public scrutiny.

Even where the fear is genuine, threats often do not come from the defendant, but from society members. They frequently act on their own initiatives rather than on instructions from the defendant. In such a situation, non-disclosure to the defendant will not increase the safety of the witness concerned. The main fear is that the defendant will inform others within his community of the identities of witnesses. It should however be noted that, very often, they are already known in the communities before the accused is even aware of their identity. It may be the witness himself who speaks about his involvement with the tribunal or court, or his family. It may also be an officer of the court or tribunal who accidentally provides such information to people on the ground.⁹⁵⁷

Thus, in reality, the identities of potential witnesses are not hidden locally for very long. Witnesses often come from very small communities where everyone knows everything about everyone else. If investigators arrive at a village to speak to someone, everyone will immediately know that the person in question is cooperating with the tribunal or court. If a witness fears retaliation from the government, it is even

01/07-2711-Red, 10 mars 2011. In conducting fieldwork the author has observed that most people were aware of the identities of most, if not all, Prosecution witnesses in the *Katanga & Ngudjolo* case.

⁹⁵⁴ For instance, in Kenya I, the victim representative claimed that some of her clients were threatened by Ruto or his associates. She did so in her closing arguments, thereby depriving Ruto of an opportunity to respond. See further ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, 15-34.

⁹⁵⁵ See also Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, PART V.

⁹⁵⁶ See the intervention of Mr. Haguma, lawyer based in Kigali, at Geneva Conference, *supra* note 173.

⁹⁵⁷ For instance, the Katanga defence team had discovered the identity of intermediary W-143 in the field long before the name was officially disclosed to it.

more difficult to keep his identity confidential. The authorities need to grant witnesses visas and passports. Thus, at least some public officials will know that a witness intends to travel.

In the ICTR, the protected witness identifying information is provided to the Rwandan Prosecutor-General, the Minister of Justice, the Department of Immigration and copied to the Rwandan Special Representative to the ICTR based in Arusha. The reason proffered for providing all this confidential information to the most senior government officials is to obtain travel documents.⁹⁵⁸ This defence has alleged that this practice puts defence witnesses unnecessarily at risk, and that there is a way of obtaining travel documents without informing the highest authorities.⁹⁵⁹ This arguments were, however, rejected.⁹⁶⁰ In the case of *Nshogoza*, witnesses had not been informed that their information would be submitted to the highest Rwandan officials. Upon hearing this, a significant number of defence witnesses decided to testify publicly. While on the stand, one such witness testified that the ICTR witness protection programme was “a total farce”.⁹⁶¹

⁹⁵⁸ In the *Prosecutor v. Nshogoza*, T. 9 March 2009, pages 4-6 (E), the Registry explained this as follows: “[...] I would like to -- furthermore, with regard to the procedure that has been used regarding the movement of witnesses, either those who are free in Rwanda or who are already in custody -- under our custody, as you know, Your Honour, we cannot issue a travel document without notifying the country of residence, notifying them of their identity. So you cannot issue this document using a pseudonym. And so the country's authorities have to be aware of the identity for the issuance of travel documents. The procedure in Rwanda, and which has been simplified through an agreement with -- between the Tribunal and the Rwandan authorities, consists in officially notifying the prosecutor's office in Kigali regarding the movement of all witnesses from Kigali, whether they are in detention or not. So an official letter is sent to them via the registrar of the Tribunal, including all the detail -- the particulars of the witness. It is the prosecutor's office in Kigali which cross-checks the availability of these witnesses and to see if they are ready to come and testify or not. Once this phase has been passed, then the document is forwarded to the minister of justice, which then does what it has to do with the file. And when the minister -- minister of justice approves it, then the file is forwarded to the department of immigration for the issuance of travel documents.”

⁹⁵⁹ The motion argued that interference by the Rwandan Deputy Prosecutor-General rendered it impossible for Mr Nshogoza to obtain the attendance of witnesses on his behalf under the same conditions as those of the witnesses who testified against him in violation of Article 20(4)(e). *Prosecutor v. Nshogoza*, Urgent Motion for Stay of Proceedings Due to Interference with Defence Witnesses, 4 March 2009.

⁹⁶⁰ *Prosecutor v. Nshogoza*, Decision on Defence Motion to Make Public the Confidential Decision on Defence Motion for Stay of Proceedings; and Annexure Comprising Redacted Version of Said Decision for Public Consumption, 26 June 2009: “[T]he Defence failed to demonstrate how the contact between the Rwandan Prosecutor General’s office and the witnesses adversely impacted the Accused’s right under Article 20(4)(e) to obtain attendant of and examination of witnesses on his behalf, under the same conditions as those who have testified against him”.

⁹⁶¹ See, e.g., witness Straton Nyarwaya, T. 20 March 2009, p. 5 “[F]or me, all this issue of a protected witness is a farce.”). The other three witnesses were Augustin Nyagatare, Fulgence Seminega, and Cyprien Hakizimana.

Arguably, hiding the identities of the potential witnesses from the defence and public increases, rather than decreases security issues. If it is not public information that the person is a potential witness for the tribunal or court, it is much easier to make someone disappear, take revenge or put pressure on the witness in other ways. Someone may die from natural causes. If, on the other hand, it is known publicly that the person is a potential witness for the tribunals or court, there is public scrutiny concerning his fate.

Disclosure of the identity of a witness to the local communities in itself may serve as a protection because it is easier to keep control over the situation. Given the lack of police or another independent force, the international tribunals and court have no way of protecting a witness if he stays in his community. Thus, in offering protection, they make a promise that cannot, in reality, be fulfilled. The tribunals and court must rely on the community for his protection. If the community is excluded from knowing who is a potential witness and, accordingly, who is in danger, the witness is rather defenceless.⁹⁶²

In light of this reality, the protective scheme should be applied as intended, that is, as an exception to the rule that the proceedings are public and all relevant information is disclosed to the defence. It should stop being applied as the rule, as it currently is in the ICC.⁹⁶³ Many witnesses ask for protection even if not strictly required. Testifying publicly means that everyone in the world can follow the testimony. In addition, the public gallery can fill up with unfamiliar and familiar faces to the witness. That can be frightening for anyone. However, the test is not, nor should it be, whether the witness is comfortable testifying publicly. Rather, he must have an objectively justifiable fear for his security.

⁹⁶² A counter-argument, as ICTR judge Arrey pointed out, is that witnesses may refuse to testify unless they are protected. See Geneva Conference, *supra* note 173.

⁹⁶³ The Prosecution is of the view that the ICC protection program does not go far enough. In its view, “the starting point for protective measures should be the elimination of all foreseeable risks ... because any lower standard of risk would not permit the Court, or the Prosecution, to discharge its obligations to protect victims and witnesses as mandated by article 68(1) of the Statute” (Public Redacted Version of the URGENT Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428, 21-04-2008, para. 14; citing confidential filing: ICC-OI/04-01/07-374-Conf-Exp, para. 13, citing the confidential filing: ICC-01/04-01/07-374-Conf-Exp, p 10).

Even the disclosure of his identity to the defence only may involve a level of risk of which he should be made aware. The situation should be adequately discussed with the witness. As the Katanga & Ngudjolo Pre-Trial Chamber held:⁹⁶⁴

(i) The first and foremost protective measure is to give the witnesses a clear idea of what they can expect from the Court in terms of protection, which requires that it be explained to the witness upfront and in detail the type of operational and procedural measures that may be available to them, as well as the basic features of the procedure for the granting of such measures;

Accordingly, the witness should not be under the false impression that he has the final say in whether his identity is to be disclosed to the defence. His consent for the use of his statement is valid only after he is made to understand that his identity might have to be disclosed to the defence. The Prosecution cannot give any witness a guarantee of anonymity.⁹⁶⁵ It should also be explained to him that it is not his preference for public or private testimony that counts.

In these proposed conditions, there is a risk that the Prosecution loses witnesses, but at least it will be a more honest approach. As long as the situation is clear to the witnesses, they may still be willing to cooperate. In the ICTY, where protection measures have been kept to a minimum, the Prosecution succeeded in obtaining the cooperation from most witnesses it relied on. The only real exception has been Kosovo. Between 1996 and 2001, less than a quarter of the total number of witnesses had some type of protective measure. Less than 20 % had a pseudonym and most witnesses testified in public sessions. This stands in stark contrast with the ICC where almost all Prosecution witnesses have a pseudonym and large parts of their testimonies are listened to in closed or private sessions.⁹⁶⁶ Yet, this lower level of protection at the ICTY has not prevented witnesses from testifying.

Relocation

The only way in which the tribunals and court can effectively protect someone is by relocating him to another area. It is, however, very expensive for the tribunals and

⁹⁶⁴ *Ibid*, para. 17(i).

⁹⁶⁵ *Ibid*, para. 17(ii).

⁹⁶⁶ 71% of the witnesses had no protection; 1,5% had a pseudonym; 1,1 % testified in closed session; 5,9% testified in closed session and had a pseudonym; 1,2% testified with face distortion; 11,3% testified with face distortion and pseudonym; 7,5 % testified with face and voice distortion, as well as a pseudonym; 0,2% testified with face and voice distortion. See: <http://www.icty.org/sid/10175>.

court to relocate a person. If a witness is relocated for his safety, everything is being paid for, e.g. his house, education and living expenses. For these reasons it is intended to be used only as an absolute last resort. However, given that it is the only way to protect witnesses properly, this resort is used much more often than perhaps desired by the tribunals and court.

In the ICC, the Victims and Witness Unit (“VWU”) decides on requests from both parties for relocation of their witnesses. In the ICTR and ICTY, the defence does not have any option of requesting for relocation of its witnesses. The Prosecution, on the other hand, can decide to relocate its witnesses. The ICTR Prosecution has, for instance, done so with regard to a number of insider witnesses with their entire families. The Prosecution has conceded that the costs for doing so are excessive. Relocation is therefore applied only in highly exceptional circumstances.⁹⁶⁷ In the ICTY, “[l]ess than a fraction of one per cent of witnesses have been granted long-term protection such as relocation to third countries”.⁹⁶⁸

In the ICC, a high percentage of Prosecution witnesses have been relocated. In Kenya, it appears from the Prosecutor’s observations that all of the witnesses have been relocated to a third country.⁹⁶⁹ Also in the *Katanga & Ngudjolo* case, many of the Prosecution witnesses have been relocated. The number of applications for relocation of Prosecution witnesses in this case was “unprecedented”.⁹⁷⁰ In a number of situations, the Prosecution preventively relocated its witnesses while waiting for a decision of the VWU, or where the VWU had denied its request for relocation. The measure of ‘preventive relocation’ is a provisional measure. It means that witnesses are temporarily relocated by the Prosecution, pending the provision of protection by the VWU.⁹⁷¹ The Prosecution had sought no prior authorisation from the Chamber to

⁹⁶⁷ Cited in Combs, *Fact-Finding Without Facts*, *supra* note 6, page 141.

⁹⁶⁸ <http://www.icty.org/sid/10175>.

⁹⁶⁹ Press Conference held by Ocampo on 24 January 2012 relating to the Pre-Trial Chamber’s decision on the confirmation of the charges in Kenya I and II, issued on 23 January 2012. See also: Statement by the Prosecutor of the International Criminal Court on Kenya ruling, at: <http://www.icc-cpi.int/NR/exeres/54E6388D-4DD0-4E85-8FA9-90DA95A2AFB3.htm>.

⁹⁷⁰ Public Redacted Version of the URGENT Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428, 21-04-2008, para. 14; citing confidential filing: ICC-OI/04-01/07-374-Conf-Exp, para. 20.

⁹⁷¹ *Ibid*, paras. 9, 15, 18, 19.

implement this measure; nor any statutory mandate to do so.⁹⁷² Accordingly, this practice of unilateral preventive relocation was severely criticised and disallowed by the Pre-Trial Chamber and Appeals Chamber.⁹⁷³ In cases of disagreement between the assessment of the VWU and the Prosecutor, “the ultimate arbiter of whether the serious measure of relocation be undertaken is the Chamber”.⁹⁷⁴

Preventive relocation forces the issue of relocation and thus effectively shifts the power to decide whether relocation is necessary from a neutral organ of the Registry to the Prosecution. Indeed, as was held by the Pre-Trial Chamber, “once a witness is taken to a new location (alone or with members of his or her family) where he or she remains for a certain period of time in this new environment, returning the witness to their former place of residence as a result of the Registrar’s decision not to include the witness in the ICCPP would be disruptive for the witness and his or her family and would also most likely put them at risk”.⁹⁷⁵ The Prosecution also relocated witnesses whose request for relocation was rejected. The Pre-Trial Chamber called this “reactive relocation”, rather than “preventive relocation” and criticised it for infringing the decision of the competent organ of the Court to decide upon the relocation of a witness.⁹⁷⁶

The excessive use of relocation is both regrettable and unnecessary. Apart from the expenses, relocation has many other undesired effects. The consequence of relocation is that witnesses are cut off from their communities for an indefinite period of time. They cannot easily return to their community, at least not for a significant period of time. This can cause significant problems for the witness, his friends, family and other members of the community.⁹⁷⁷ It has already occurred that a witness felt too lonely

⁹⁷² *Ibid*, paras. 21-31.

⁹⁷³ *Ibid*, paras 20-37; See ICC-01/04-01/07-776 26-11-2008, *Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I*, paras.1-2 and 64-104.

⁹⁷⁴ See ICC-01/04-01/07-776 26-11-2008, para. 2.

⁹⁷⁵ *Ibid*, para. 25.

⁹⁷⁶ *Ibid*, para. 25. See also ICC-01/04-01/07-776 26-11-2008, paras. 91-92.

⁹⁷⁷ This was also pointed out at length by the Appeals Chamber: See ICC-01/04-01/07-776 26-11-2008, paras. 64-104.

and decided to return to his community.⁹⁷⁸ He has not had any security issues since his return, which suggests that his relocation was not necessary from the outset.

Relocation can equally be upsetting for the family that is left behind. Three fathers of Prosecution witnesses appeared on behalf of the defence. They were all extremely upset that their children were taken away from them and asked the Court to return them. As D-147 put it:

Without lying to you, the departure of Pierre who left the family and who is at the root of the tension between the members of the family is a problem, and the fact that the -- and also the fact that Pierre doesn't do what he's supposed to do and the fact that Pierre lied. All of this is not worthy of the family. Pierre should be left alone. I would like to know where he is and I would like to have Pierre returned to me and I would like to be able to go (Expunged) with Pierre. Everything that has been said here stems from lies.⁹⁷⁹

Another problem with relocation is that it is an incentive for anyone to come and testify irrespective of whether a person was, in reality, a witness to events. Relocation, especially to a western country, in many people's minds equals a better life with more economic opportunities. This is particularly true in societies where the standard of living is significantly lower than in western countries. Some of these people are keenly looking to flee their poor economic situation. There is a shared perception that cooperating with the court may lead to certain benefits. Whilst it is unethical for either party to offer money to a witness, paying for someone's food and transport may already be an incentive for someone to cooperate. In DRC for instance, the reality is that many of the potential witnesses have a salary at the most of 30 USD per month. Many of them are waiting for payment for three months on average. The best way to benefit from testifying is relocation. When relocated, health care, insurance and education for the entire family are paid for. This may have an adverse impact on the

⁹⁷⁸ Public Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), ICC-01/04-01/07-2711-Red, 10 mars 2011.

⁹⁷⁹ D147 testimony from 17 to 19 may 2011; ICC-01/04-01/07-T-263-Red-ENG CT WT 19-05-2011, page 52 (D147 = D03-P026). See also the testimonies of D146 D03-P340, 20-24 May 2011, who said similar things in private session (ICC-01/04-01/07-T-265-CONF-ENG ET 23-05-2011); D145, D03-P0100, see ICC-01/04-01/07-T-310-Red-ENG CT WT 13-09-2011, pages 56, 67-68 (I should like to thank you for giving me these short moments to express myself. I should like to know, as I said not long ago, something in respect of the life of my child which is now being wasted away. What can you tell me about this? Is there going to be reparation?).

credibility of such witnesses.⁹⁸⁰

For example, in the ICTY case of *Martic*, witness MM-079 testified that after his lawyer had suggested that he contact the Tribunal to seek assistance with his asylum, he was interviewed by the Prosecution on this issue. The witness was subsequently informed that the Prosecution had written a letter to the authorities of the State where he currently lives to ask that he be allowed to stay there until he finishes testifying at the Tribunal”. The Prosecution “acknowledged that the evidence of Witness MM-079 should be “scrutinised with care” since “he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated.”” The Chamber ultimately concluded that in light of the assistance provided to witness MM-079 and another Prosecution witness, “there is significant doubt as to the credibility of both witnesses”. The Chamber therefore gave “weight only to the parts of their respective evidence which are corroborated by other evidence”.⁹⁸¹

However, as was rightly pointed out by the Trial Chamber in the ICTY case of *Naletilic & Martinovic*, the fact that a witness has ulterior motives for testifying does not necessarily mean he is not telling the truth.⁹⁸²

A final issue of concern is that relocation undermines the equality of arms between the parties. Defence witnesses have never been relocated. At the ICTY and ICTR this option does not exist for the defence. In particular at the ICTR, the lack of the relocation option for the defence has led to the refusal of numerous crucial witnesses from Rwanda to testify. In certain situations, relocation can be the only way to persuade witnesses to testify. It is thus unfair that this tool is available to the

⁹⁸⁰ J. de Lange, who used to work for the Dutch ministry of foreign affairs and was positioned at the Royal Dutch embassy in Rwanda until September 2003 and was responsible for the programme on justice, good governance and human rights, said in a conference “Genocide whose responsibility? Rwanda and beyond” that, in his experience, the story of Rwandans varied depending on what they would receive in exchange for their story. See J. De Lange, *Rwandan Realities – 10 Years After the Genocide*, GTI Conference 29-30 October 2004.

⁹⁸¹ *Prosecutor v. Martić*, Trial Judgement of 12 June 2007, paras. 37-38. See also: *Prosecutor v. Zigiranyirazo*, Scheduling Order – In Camera Hearing on Prosecutor’s Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness Ade and His Family Rules 66(C) and 68(D) of the Rules of Procedure and Evidence, 19 January 2006; *Prosecutor v. Bizimungu*, Decision on Prosper Mugiraneza’s Motion for Records of all Payments made directly or indirectly to Witness D, 28 September 2006; *Prosecutor v. Karemera*, ICTR- 98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7.

⁹⁸² *Prosecutor v. Naletilic & Martinovic*, IT-98-34-A, 3 May 2006, para. 506.

Prosecution only. This is better organised at the ICC, where in principle defence witnesses have an equal chance to be relocated as Prosecution witnesses. This was emphasised by the Single Judge of Pre-Trial Chamber I:⁹⁸³

The Single Judge would like to highlight that the Defence should also benefit, on the same conditions, from the above-mentioned system to be set up by the Registrar. Furthermore, in the view of Single Judge, the Court can only adequately address these types of exceptional situations if the Prosecution and the Defence do not abuse the system and only resort to it when exceptional circumstances make it absolutely necessary.

It remains to be seen whether, in reality, a defence application would be treated equally to a Prosecution application. In the author's knowledge, no defence team has yet requested for relocation of any of its witnesses. However, the Registry's reaction to the request of four detained defence witnesses to seek asylum in The Netherlands, is concerning. Through the lawyer assigned to them, the witnesses addressed the Court in respect to their security concerns in the event that they would be sent back to the DRC where they had been held in prison in Kinshasa since early 2005 without charge. They had implicated members of the DRC government in crimes committed in Ituri for which *Katanga* and *Ngudjolo* were charged. As a result, they feared repercussion back in the Kinshasa central prison.⁹⁸⁴

The Registry vehemently opposed any possibility for any witness to seek asylum in The Netherlands. It insisted that the witnesses remained within the power of the DRC authorities even when on Dutch soil and in the ICC premises.⁹⁸⁵ It stressed that, if the witnesses were not returned to the DRC, the DRC authorities might discontinue their cooperation with the Court. In addition, it would prevent governments in the future from cooperating.⁹⁸⁶ It also stated that the witnesses' claim that their security would

⁹⁸³ ICC-01/04-01/07-428, 21-04-2008, para. 37.

⁹⁸⁴ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-T-258-FR, 12-05-2011.

⁹⁸⁵ See ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011.

⁹⁸⁶ *Ibid*, See also ICC-01/04-01/07-3003 09-06-2011, Registry's observations, paras, 40-48, especially para. 45: « 45. Par ailleurs, le Greffe a tenu à faire part à la Chambre de son inquiétude sur les conséquences que pourraient avoir, sur la volonté des autorités congolaises de poursuivre leur coopération avec la Cour, le non-respect, par cette dernière, de son engagement ! d'assurer le retour des témoins détenus conformément à l'article 93(7)(b) du Statut. Il a en outre regretté que ces mêmes autorités n'aient pas été consultées sur le statut juridique des trois témoins et sur la Requête du Conseil de permanence. » See also ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011, pages 51-64 : "for the transcript it is important to note that the Court is perfectly aware of what could -- what the consequences of the decision that it would give would be on co-operation between itself and the state's

be at risk was baseless, as their allegations against the government were not new. The witnesses had raised similar arguments when they were still in prison and underwent no repercussions.⁹⁸⁷ The Netherlands was equally opposed to opening the asylum route to any ICC witness or accused. The Netherlands suggested that the Court deal with the request as a request for protective measures.⁹⁸⁸ Notwithstanding these arguments, the Chamber held that the witnesses should have a right to seek asylum.⁹⁸⁹ Recently, a Dutch Court confirmed that they were entitled to go through each step of the asylum procedure.⁹⁹⁰ This issue was unprecedented.

In light of the number of relocated Prosecution witnesses, one of whom returned to his community, the Registry's position towards these defence witnesses appears inconsistent. Prisoners who have been imprisoned for almost seven years without a charge are by nature in a vulnerable position. Their future fate in DRC is very uncertain. They, therefore, appear to have reasons to be genuinely concerned for their safety. No other protective measures are available, given that they could not hide from the authorities that they would be testifying before the ICC. The Chamber took it seriously enough to allow them to seek asylum. The Registry clearly did not.

Organisations

Many entities and States that provide information to the Prosecution at international tribunals make confidentiality a condition of their cooperation. NGOs, TRCs or the UN may be concerned about the safety of their sources and may have promised these

parties. But once again, the Court did not call for the submissions which were put to it; it has to answer them with all the consequences that that might have."

⁹⁸⁷ ICC-01/04-01/07-3003 09-06-2011, Registry's observations, para. 5.

⁹⁸⁸ ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011, pages 69-74 : « The Court can do so with reference to the specific situation on the ground and it can determine and implement appropriate and specifically tailored protective measures and security arrangements. The Netherlands expresses its confidence that the Trial Chamber will carefully consider and decide whether, and if so, under what protective measures and security arrangements the detained witnesses are to be returned. ...

In so far as other applicable international law obligations of the Netherlands are concerned, in terms of substance, the Netherlands will defer to the decision of the ICC as regards the safety of the return of the witnesses; that is to say, if the Court determines that it is safe for a witness to be relocated, possibly under protective measures and security arrangements, the Netherlands will assume the same position and transport the person to the point of departure."

⁹⁸⁹ ICC-01/04-01/07-3003, « Décision sur une requête en amicus curiae et sur la « requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile » (articles 68 et 93-7 du Statut) » en date du 9 juin 2011 rendue par la Chambre de première instance II (la « Chambre »).

⁹⁹⁰ LJN: BU9492, Rechtbank 's-Gravenhage , AWB 11/25891, 11/25904, 11/25907, 11/36660, 11/36662, 11/36664, 11/39010, 11/39011, 11/39012, Rechtspraak.nl – LJN:BU9492, 28 December 2011.

sources that their identity will not be disclosed to the defence or the public at large. States often invoke State security. Such demands are often granted because, otherwise, States may stop cooperating and refuse to open their archives whenever their interests are at stake.⁹⁹¹

Rules 70(B) of the ICTR and ICTY Rules, and article 54(3)(e) of the ICC Statute permit the Prosecution to enter into agreements with NGOs, the UN, States or other entities, thereby promising confidentiality of any document or information unless the provider of the information consents to disclosure. Such agreements are limited to documents or information which has been obtained “solely for the purpose of generating new evidence”.

Whilst pragmatically such agreements may be the only way to obtain information, it can be problematic when this power is used excessively. This is particularly so where the information includes exculpatory information. The Prosecutor is under an obligation to disclose to the defence any exculpatory information. Thus, there may be a conflict between the Prosecutor’s right to enter into confidentiality agreements and his simultaneous obligation to disclose exonerating evidence.

The excessive use by the ICC Prosecutor of his power to enter into confidentiality agreements has led to a stay in the *Lubanga* case and severe criticism in the *Katanga and Ngudjolo* case.⁹⁹² In *Lubanga* the Prosecutor identified several hundreds of

⁹⁹¹ See also Waters, [Redacted]: *Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, Part II, PART IV.

⁹⁹² See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07-621, 20 June, 2008. In this decision, the Single Judge criticized the prosecution for generating the disclosure problems which were identified as early as October 2006 although the prosecution did not act upon it until the very last minute by proposing one alternative measure after another, as opposed to proposing a coherent and comprehensive approach. The Single Judge considered that “this dynamic evinces a demonstrable lack of foresight”, and “continuing bringing additional alternative measures even after the deadlines for actual disclosure have expired, is not, in the Single Judge’s view, up to the standards required by an International Criminal Court” (para. 17). The current situation “demonstrates that the Prosecution has wholly disregarded its duty to act with due care in accepting documents pursuant to article 54(3)(e) of the Statute. Instead, the Prosecution has recklessly accepted, as a matter of course, thousands of documents from numerous providers pursuant to the said provision” (para. 46). Nonetheless, the Single Judge made a distinction between confirmation and trial on the grounds of their specific goals and features (see paras. 66 & 70). Given that the Pre-Trial Chamber does not yet make an ultimate determination on the guilt or innocence of the accused in respect of the charges, the disclosure of analogous information was considered to be a measure that would sufficiently compensate the unfairness to the accused at this

documents received mainly from the UN and some NGOs pursuant to article 54(3)(e) as potentially exculpatory material. The UN refused to permit the defence or even the Chamber to receive any of the information given to the Prosecutor. Plainly this refusal prevented the Chamber from exercising its ultimate duty to assess whether the trial could still be fair if this material was not disclosed to the defence and whether alternative measures were available to compensate the unfairness to the defence caused by the non-disclosure. Following refusal by the Prosecution to comply with a court order that the material be provided to the Chamber, a conditional stay of the proceedings was ordered.⁹⁹³

The Appeals Chamber agreed with the Trial Chamber that reliance on Article 54(3)(e) of the Statute should be “exceptional” and not excessive as it had been in the instant case.⁹⁹⁴ It therefore found that the Trial Chamber rightly came to the conclusion that “in the circumstances of the case, where a large number of potentially exculpatory information or information material to the preparation of the defence had neither been disclosed to the accused person nor to the Chamber, there was no prospect of a fair

stage of the proceedings (paras. 65-66, 77-85, 93-94, 108). The use of summaries was, however, rejected even for the purpose of the confirmation hearing (paras. 75-76). In light of all circumstances, the Single Judge held that the Prosecution had satisfied the bulk rule for the purposes of the confirmation hearing and, accordingly, rejected the applications of both Defences for an order to stay the proceedings (paras. 124-125). The Single Judge, however, urged the Prosecution to find a more permanent solution to what could no longer be regarded as a “Prosecution’s problem” but rather as an “institutional” problem. Unless a solution is found, “the Prosecution may be prevented from discharging its article 67(2) and rule 77 disclosure obligations for the purposes of the trial in all DRC-related cases at a minimum” (paras. 102-103). Then, four days before the confirmation hearing the Single Judge was presented by the Prosecutor with 1172 previously undisclosed items, most coming from the United Nations. The Single Judge noted that these had ‘been within the Office of the Prosecutor for years’ (*Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04/01/07, Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54 (3)(e) and 67 (2) of the Statute and rule 77 of the Rules, 25 June 2008, para. 7). However, she still declined to order a stay of the proceedings.

⁹⁹³ *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01704-01/06-140 [hereinafter ‘Lubanga Decision on the consequences of non-disclosure’]. This decision was confirmed on appeal: Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, ICC-01/04-01/06-1486, 21 October 2008 [hereinafter ‘Lubanga Appeals Chamber Decision on the consequences of non-disclosure’].

⁹⁹⁴ *Lubanga Appeals Chamber Decision on the consequences of non-disclosure*, *ibid*, para. 55. See also: *Katanga & Ngudjolo*, hearing of 17 Nov 2009, pages 4-18 (“in the establishment of the truth, the relevant division of the Court says that Article 54(3)(e) is exceptional”).

trial”. Accordingly, it correctly conditionally stayed the proceedings.⁹⁹⁵

The Appeals Chamber held that the Prosecutor needed to concentrate its investigations on generating evidence which could be given in court rather than amassing material with which it could do nothing because of confidentiality agreements. The Appeals Chamber held that “[it] follows from article 54 (1) of the Statute that the investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be presented in open court. This is in order to establish the truth and to assess whether there is criminal responsibility under the Statute”.⁹⁹⁶

The Appeals Chamber also underscored that “whenever the Prosecutor relies on article 54 (3) (e) of the Statute he must bear in mind his obligations under the Statute. He must apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial”.⁹⁹⁷ It was particularly the Prosecutor’s failure to do so which raised the Appeals Chamber’s concern. In accepting large amounts of UN material under a confidentiality agreement which prevented even the judges seeing it, “the Prosecutor effectively prevented the Chambers from assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents, a role that the Chamber has to fulfil pursuant to the last sentence of article 67 (2) of the Statute”.⁹⁹⁸

The stay of proceedings in Lubanga was lifted after the UN agreed that the information could be disclosed to the Chamber. It could then make a determination on the exonerating nature of the document and the potential need for its disclosure to the defence. The Appeals Chamber also contemplated the position should the Trial Chamber determine that the defence were entitled to see material which was the subject of a confidentiality agreement. It ruled that the Trial Chamber “while prohibited from ordering the disclosure of the material to the defence, will then have

⁹⁹⁵ Lubanga Appeals Chamber Decision on the consequences of non-disclosure, *ibid*, paras. 75-76, also see paras 4-5, 80-84, 97, Judge Pikis dissenting.

⁹⁹⁶ *ibid*, para. 41.

⁹⁹⁷ *ibid*, para. 44; also see para. 42.

⁹⁹⁸ *Ibid*, para. 45.

to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information”.⁹⁹⁹ After the *Lubanga* and *Katanga* fiascos the number of documents obtained under article 54(3)(e) has significantly reduced.

Exonerating Evidence

ICTY and ICTR

In light of the foregoing, it is clear that the equality of arms is undermined in international justice. The parties start off unequally, which is also the case in domestic adversarial systems. The principle of equality of arms is further affected by the imbalance of means to tackle the problems unique to international justice. For instance, it has been mentioned that the Prosecution has the assistance of NGOs, and the UN. It has more abilities to enforce State cooperation and gain access to State archives. The Prosecution further regularly applies protective measures, which affects the defence ability to investigate.

The duty on the Prosecution in the ICTY and ICTR to disclose all exonerating evidence within its possession in a timely fashion is intended to partly compensate the imbalance between the parties. This duty has been referred to as equally important as the duty to prosecute.¹⁰⁰⁰ Indeed, it has been emphasised that the Prosecutor is like a minister of justice “whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence in order to assist the Chamber to discover the truth in a judicial setting”.¹⁰⁰¹ Particularly at the ICTR, the defence frequently complains that the Prosecutor failed to disclose exculpatory evidence. Unless defence requests for disclosure of exculpatory evidence are specific, they are often rejected as amounting to a “fishing

⁹⁹⁹ *Ibid*, para. 48.

¹⁰⁰⁰ *Prosecutor v. Kordic and Cerkez*, Decision on Motions to Extend for Filing Appellant's Briefs, 11 May, 2001, para. 14; *Prosecutor v. Kordić & Čerkez*, Appeals Chamber Judgement, 17 December, 2004, paras. 183, 242; *Prosecutor v. Blaskic*, Decision on Production of Discovery Materials, 27 January 27, 1997, para. 50.1; *Prosecutor v. Blaskic*, Appeals Chamber Judgment, 29 July, 2004, para. 264; *Prosecutor v. Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June, 2006; *Prosecutor v. Théoneste Bagosora et al.*, Decision on Interlocutory Appeals on Witness Protection Orders, 6 October, 2005.

¹⁰⁰¹ *Prosecutor v. Kupreškić*, Decision on Communication Between the Parties and Their Witnesses, 21 September, 1998, para. (ii).

expedition”.¹⁰⁰² There is an assumption of good faith on the part of the Prosecution.¹⁰⁰³ It is thus for the defence to establish good cause to believe that the Prosecution has failed to abide by its obligation to disclose exculpatory information.¹⁰⁰⁴ This is not always straightforward. However, recently, failure to disclose exculpatory evidence in a timely manner led to the acquittal of the Rwandan minister of foreign affairs and cooperation.¹⁰⁰⁵

ICC

The ICC Statute goes a step further. Not only does it require that the Prosecution disclose all exculpatory evidence within its possession, it also mandates the Prosecution to search incriminating and exonerating circumstances equally. This obligation is set out in article 54(1)(a) of the Rome Statute, which ascribes the role of independent and neutral truth-finder to the Prosecutor.¹⁰⁰⁶

Civil law practitioners regarded the adoption of article 54(1)(a) as an improvement on the situation at the *ad hoc* tribunals. There, the Prosecutor was under the sole duty to disclose exonerating evidence if it happened to come into his possession, and the burden of collecting exonerating evidence was otherwise left to the Defence. The drafting of Article 54(1)(a), in fact, is based on a German proposal that was widely

¹⁰⁰² *Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September, 2004, para 10; *Prosecutor v. Casimir Bizimungu et al.*, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November, 2004, para. 14; *Prosecutor v. Nahimana et al*, Public Redacted Version of the Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November, 2006, para. 11; *Prosecutor v. Ndindiliyimana et al* (Military II), Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September, 2008, paras. 28-29, 34, 37; also see: *Prosecutor v. Bagosora et al*, Decision on the Ntakabuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68, 6 October, 2006, para. 2.

¹⁰⁰³ *Prosecutor v. Miroslav Bralo*, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August, 2006, para. 31; *Prosecutor v. Miroslav Kvočka et al.*, Appeals Chamber Decision, 22 March, 2004, page 3; *Prosecutor v. Kajelijeli*, Appeal Judgement, 23 May, 2005, para. 262.

¹⁰⁰⁴ *Ibid*; *Prosecutor v. Karemera et al.*, Decision on Defence Motion for Disclosure, 15 January, 2004, para. 8; *Prosecutor v. Kordić & Čerkez*, Appeals Judgment, paras. 39, 182; *Prosecutor v. Brdanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, December 7, 2004, page 3; *Prosecutor v. Ndindiliyimana et al* (Military II), Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September, 2008, paras. 13, 32; *Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 10 December, 2003, para. 20.

¹⁰⁰⁵ *Prosecutor v. Casimir Bizimungu et al.*, Judgement and Sentence, ICTR-99-50-T, 30 September 2011), paras. 119-177.

¹⁰⁰⁶ See also Judge Kaul Dissenting Opinion to: ICC-01/09-02/11-373-Red, paras. 45-47.

supported by civil law jurisdictions.¹⁰⁰⁷ It can thus be said to reflect the influence of civil law criminal proceedings where a Prosecutor has a similar obligation.¹⁰⁰⁸

According to Antonio Cassese, “[t]he Prosecutor is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee’s conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice”.¹⁰⁰⁹ Article 54(1)(a) attempts to strike the balance between common law and civil law traditions, and “build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems”.¹⁰¹⁰

Given the difficulties that the defence faces in seeking to obtain evidence, in theory, this is a significant improvement to the position at the ICTY and ICTR. The Prosecutor with easier access to relevant information must obtain evidence on behalf of the defence. This remedies, at least in part, the deficiencies in the defence investigations and the inequality of arms. In reality, however, it is highly doubtful that the Prosecutor fulfils this role. In light of the aforementioned inadequacies in the Prosecutor’s investigations of incriminating circumstances, it does perhaps not come as a surprise that his investigations for exonerating circumstances are thus far wholly unsatisfactory.

In every case before the ICC, the defence has raised the concern that the Prosecutor failed to genuinely investigate even the most basic exonerating circumstances. Prosecutorial violations of article 54(1)(a) of the ICC Statute were pleaded.

Mention has already been made of the fact that the Prosecutor never visited the localities of the accused *Katanga* and *Ngudjolo*. This is a significant omission in searching for exonerating evidence. The starting point of such a search is the locality

¹⁰⁰⁷ Vol. I of the Report of the Preparatory Commission on the Establishment of an International Criminal Court, U.N. Doc. A/51/22, Proposal II.B.5 & 6 pages 113-114.

¹⁰⁰⁸ See *supra* note 321.

¹⁰⁰⁹ Antonio Cassese: “The Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10 EJIL 168.

¹⁰¹⁰ Morten Bergsmo and Pieter Kruger: “Article 54”, in O. Triffterer, Commentary on the Rome Statute of the ICC, Observers’ notes, Article by Article, 2nd ed. C.H.Beck.Hart.Nomos, pp. 1077-1087.

of the accused where the Prosecutor can discover what the accused did or did not do. He should further reach out to the family and friends of the accused, if nothing else, to obtain mitigating evidence relating to his good character. The Prosecutor has taken no such initiatives. Until today, in no case did he interview anyone close to the accused other than insider witnesses. In interviewing these insiders, the Prosecutor does not always appear neutral as has become clear in the line of questioning adopted in the *Mbarushimana* case.¹⁰¹¹

In addition, the Prosecution never follows up any leaks presented to it that could potentially lead to exonerating evidence. For instance, in *Abu Garda*, the defence complained that, contrary to its investigative duties under article 54, the Prosecution never requested the exonerating evidence mentioned by one Prosecution witness despite his expressed willingness to provide it.¹⁰¹² Similar complaints were made in *Kenya I*, where the Prosecution failed to follow up the issue of “coaching witnesses, being paid 60,000 and being ... rented mansions” mentioned by one of its witnesses. During his interview, Prosecution investigators told this witness that, for now, all it was interested in is the facts, and they would come back to this issue on another occasion. They, however, never followed it up.¹⁰¹³

Also in *Kenya I*, the Prosecution disclosed a handful of newspaper articles and video clips of two persons, who say there were coached and induced to implicate Ruto and recruited others to do the same.¹⁰¹⁴ They were allegedly asked to co-operate and change their statements, so they could be systematic and consistent, in exchange for upkeep, paid apartments, and relocation outside of Africa.¹⁰¹⁵ These persons worked for organisations whose reports the Prosecution relied on. Yet, it had not investigated the allegations of impropriety, which was a particularly serious omission because at least one Prosecution witness for the confirmation hearing appeared to be among those recruited by these persons.¹⁰¹⁶ The Prosecution did not even ask the witness in question or any other witness, about these inducements.¹⁰¹⁷

¹⁰¹¹ See above, section ‘suggestive questions’.

¹⁰¹² ICC-02/05-02/09-243-Red 08-02-2010, paras. 46-47.

¹⁰¹³ Ruto Defence Brief, ICC-01/09-01/11-355 24-10-2011, para. 20.

¹⁰¹⁴ EVD-PT-OTP-00464; -00433; -00434; -00463; -00464.

¹⁰¹⁵ EVD-PT-D09-00048.

¹⁰¹⁶ EVD-PT-D09-00048.

¹⁰¹⁷ ICC-01/09-01/11-355 24-10-2011, paras.19-21; ICC-01/09-01/11-354 24-10-2011, paras. 34-35.

In Kenya II, similar complaints were made. The defence for Muthaura submitted that the Prosecution did not even make an attempt to conduct “the necessary and most basic investigations” and never interviewed anyone from the inner circles of the suspect.¹⁰¹⁸ General Ali’s defence complained that the Prosecution had completely failed to exploit Ali’s efforts to combat the Mungiki because these efforts undermined the Prosecution’s “theory of “inaction” designed to create a “free zone” for violence”.¹⁰¹⁹ The defence also claimed that the Prosecution “consistently downplays evidence that many Kenya Police officers regularly received actionable intelligence from General Ali”.¹⁰²⁰ The defence referred to the police raid on the Stem Hotel in Nakuru on 10 January 2008 to illustrate that General Ali had conveyed vital intelligence to his officers, which made this raid possible.¹⁰²¹ According to the defence, police orders were issued and patrols intensified in the affected areas in an attempt to get the security situation under control. Notwithstanding that this information is well documented and known to the Prosecution, it failed to incorporate it in the story it presented to the Pre-Trial Chamber.¹⁰²²

The Pre-Trial Chambers in *Abu Garda*, and *Kenya I* and *II* have taken the position that the alleged Prosecution failure to comply with its article 54 obligations “does not fall within the scope of the Chamber’s determination pursuant to article 61(7) of the Statute”.¹⁰²³ Accordingly, defence arguments to this effect “can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the Defence’s objection raised, in this instance cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the

¹⁰¹⁸ Muthaura Confirmation Brief, ICC-01/09-02/11-374-Red, 2 December 2011, paras 71-72. The defence submitted evidence in support of this allegation: EVD-PT-D12-00063 at para. 2; EVD-PT-D12-00062 at para. 13; EVD-PT-D12-00088 at para. 2; EVD-PT-D12-00054 at para. 6; EVD-PT-D12-00053 at para. 5.

¹⁰¹⁹ Ali Confirmation Brief, ICC-01/09-02/11-373-Red, 2 December 2011, para. 23 citing: ICC-01/09-02/11-T-5-CONF-ENG, p. 41:1-4 and ICC-01/09-02/11-T-6-ENG, p.42:3-22 (all 3 NSIS reports referenced had corresponding Situation Reports sent from General Ali to his PPOs).

¹⁰²⁰ Ali Confirmation Brief, ICC-01/09-02/11-373-Red, 2 December 2011, para. 27.

¹⁰²¹ *Ibid.*

¹⁰²² *Ibid.*, paras. 27-30, 46.

¹⁰²³ ICC-01/09-02/11-373-Red 23-01-2012 (Kenya I), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Kenya I), para. 51; ICC-01/09-02/11-382-Red 23-01-2012, Decision on the Confirmation of Charges Pursuant to Article 67(7)(a) and (b) of the Rome Statute (Kenya II), para. 63.

part of the Prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold."¹⁰²⁴

Thus, the Prosecutor's duty to search for incriminating and exonerating evidence equally was not looked at as a distinct issue at the confirmation stage. In *Kenya I* and *II*, dissenting Judge Kaul expressed his disagreement with the majority ruling that this issue does not fall within the scope of the confirmation hearing. He pointed out article 54 required of the Prosecution investigations to cover all incriminating and exonerating facts and evidence. In his view, these requirements are fundamental and must be respected at the confirmation stage. The dissenting judge acknowledged that the Appeals Chamber authorized the Prosecution to continue its investigations after confirmation. However, he pointed out that this is only permitted "in certain circumstances", and in particular "in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing[...]".¹⁰²⁵ Thus, the bulk of the investigations must be carried out in advance of the confirmation hearing. Given this situation, Judge Kaul stated the following:¹⁰²⁶

I underline once again the absolute necessity for the Prosecutor to exhaust all ways and means to make the investigation ab initio as comprehensive, expeditious and thus as effective as possible, as required by article 54(1) of the Statute. I hold that it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the Hearing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons, such as those mentioned above in paragraph 50. In case a Pre-Trial Chamber is not convinced that the investigation is complete, it may use its powers under articles 61(7)(c) and 69(3) of the Statute in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial. I consider this issue to be of utmost importance for the success of this Court."

Accordingly, in the opinion of Judge Kaul, "the Chamber cannot satisfy itself solely with the evidence, which the Prosecutor claims to be relevant and reliable, in order to

¹⁰²⁴ See ICC-02/05-02/09-243-Red 08-02-2010, para. 48; ICC-01/09-02/11-373-Red 23-01-2012, paras. 51-52; ICC-01/09-02/11-382-Red 23-01-2012 (Kenya II), paras. 63-64.

¹⁰²⁵ Judge Kaul Dissenting Opinion to: ICC-01/09-02/11-373-Red, paras. 50-51, citing: Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', ICC-01/04- 01/06-568, para. 54.

¹⁰²⁶ Judge Kaul Dissenting Opinion to: ICC-01/09-02/11-373-Red, para. 52.

effectively and genuinely exercise its filtering function. Such a general approach would have, in my view, the untenable consequence that Prosecution evidence would be considered as credible almost by default through the formal act of its presentation. Likewise, it would have the equally untenable consequence that the role and rights of the Defence would be dramatically and unfairly curtailed.”¹⁰²⁷

Arguably, the dissenting Judge is correct on this point. The Prosecution has a duty to investigate incriminating and exonerating circumstances equally from the outset of its investigations, the major part of which must be conducted prior to the confirmation. If the full picture is not presented to the Pre-Trial Chamber, the latter risks confirming charges that should not have been confirmed. It is precisely the task of the Pre-Trial Chamber to ensure that only those cases are confirmed that should proceed to trial.

Nonetheless, the Prosecutor’s investigative failures were seemingly important factors in finding that the Prosecutor failed to prove to the requisite “sufficient grounds to believe” confirmation standard that Abu Garda, as well as four out of the six Kenyan suspects were guilty as charged.

Article 54 Obligations: Overly idealistic or realistic?

It is debatable whether the notion of a truly independent Prosecutor searching for evidence that undermines his own case is a workable concept in international criminal justice systems. Practitioners often come from common law backgrounds where the notion of prosecutors doing the work of the defence is foreign. Most prosecutors in international justice are not trained as magistrates or the like. In addition, the proceedings bear the mark of the typical adversarial model. It is not a joint search for the truth, duly reported in a dossier, in which the defence is an active participant and engages with the Prosecution to suggest certain investigative steps. Rather, it is a party-based gathering exercise.

In this context, it is perhaps not realistic to expect from the Prosecutor to search too enthusiastically for information that may destroy the credibility of his cases.

¹⁰²⁷ Judge Kaul Dissenting Opinion to: ICC-01/09-02/11-382-Red 23-01-2012, Decision on the Confirmation of Charges Pursuant to Article 67(7)(a) and (b) of the Rome Statute (Kenya II), para. 62.

Understandably, the Prosecutor, typically persuaded of the guilt of the accused whose case he has brought before an international criminal justice system, seeks to secure his conviction. This is especially true, given the difficulty of bringing cases before international criminal courts and tribunals, the small percentage of cases that are brought before an international jurisdiction and the high pressure from NGOs, victim groups and other observers to succeed. The perceived success of an international criminal court or tribunal largely depends on the Prosecutor's conviction figures.¹⁰²⁸ The pressure is enormous and this is likely to impact upon the enthusiasm with which he Prosecutor will provide the defence with tools to challenge aspects of his case.

Common law practitioners before the ICC are sceptical about the compatibility of neutrality and the task of prosecuting in an adversarial procedure.¹⁰²⁹ One of the senior ICC Prosecutors even mentioned in passing and off the record that the Prosecution's office does not consider the active search for exonerating evidence as part of its mandate. Instead, its objective is to disclose all exonerating evidence within its possession in a timely manner.¹⁰³⁰ This is similar to the viewpoint expressed in the Prosecution's Confirmation Brief in Kenya I.¹⁰³¹ This suggestion is also fully in line with the Prosecution's practice until today.

Suggested Solutions

Thus, to comply fully with its obligations under article 54(1)(a) of the ICC Statute, the Prosecution must drastically change its attitude with regard to the collection of all evidence rather than only that evidence which supports its theory of the case. Until now, the Prosecution failed to demonstrate a sufficient level of neutrality in its search for evidence.

¹⁰²⁸ See Scott Johnson, On the Road to disaster: The rights of the accused and the International Criminal Tribunal for the Former Yugoslavia, in 10(1) *International Legal Perspectives* 111 (1998) at page 116; Statement of Larry A. Hammond Before the [United States] House [of Representatives] International Relations Committee, 28 February 2002.

¹⁰²⁹ See, for instance, the observations made by David Hooper QC, Defense Counsel at the ICC, at SCL Lecture on 14 December 2001, held at T.M.C. Asser Institute, The Hague.

¹⁰³⁰ Informal consultation with the chief Prosecutor in Katanga in January 2008.

¹⁰³¹ Prosecution Closing Brief in Ruto et al Confirmation, para. 72. The Ruto defence commented as follows: "The Prosecutor has a statutory duty to investigate exculpatory matters. Contrary to prosecution claims at para 72 of its Brief, the Defence submits that the disclosure of potentially exculpatory material without further, reasonable investigation of the same is not sufficient to fulfil this duty" (ICC-01/09-01/11-355, 24 October 2011, para. 19).

The Prosecutor's failure to abide by its investigative obligations renders problematic the fact that State Parties rely on Article 54 to limit the already tight investigation budgets of defence teams. If the Prosecutor truly searched for exonerating and incriminating evidence equally, it may be legitimate to reduce funds for independent defence investigations. This is, however, not done in reality.

It is perhaps better that the obligation to search for exonerating evidence be left in the hands of a neutral body not subject to these pressures. The adoption of a neutral investigative body for the ICC might also prevent political considerations from prevailing over legal considerations in selecting and charging defendants. As a result of the dependence of the Prosecutor on the cooperation of States and other entities, there is a risk that these States or other entities dictate to him who should be charged.¹⁰³²

A neutral investigative body for the ICC may further ensure equality of arms between the parties. It may not experience similar difficulties as the defence in obtaining the cooperation of States, NGOs or the UN.¹⁰³³ Such a body could then more easily ensure that all relevant information obtained is presented to the Chamber. Also, if the parties are in charge of selecting the evidence that is presented to the judges, they may both present only those portions which support their case. In reality, many documents simultaneously support and undermine the case of a party and may therefore be suppressed by both, to the detriment of the truth-ascertaining function of the court. Neutral and independent investigators may ensure that all relevant evidence in respect of the charges would reach the triers of fact and, therefore, enhance the truth-ascertaining function of the court.¹⁰³⁴ This is particularly appropriate where a court is charged with the determination of historical facts and where allowing the evidence to

¹⁰³² See above, section 'selection of suspects'. See also: J. de Hemptinne, *Plaidoyer en faveur de l'institution de chambres d'instructions à la Cour pénale internationale*, in *Revue de Droit Pénal et de Criminologie* 608-625, at 614-618.

¹⁰³³ See also Olivier Dubois, 'Rwanda's national criminal courts and the International Tribunal', in the 23 *International Review of the Red Cross* 717 (1997), at 722, where the author argues that the lack of any investigative body responsible for gathering evidence for the defence makes the task of defence attorneys more active and more delicate, in particular when they have to conduct investigative acts in hostile environments.

¹⁰³⁴ J. de Hemptinne, *Plaidoyer en faveur de l'institution de chambres d'instructions à la Cour pénale internationale*, in *Revue de Droit Pénal et de Criminologie* 608-625, 612-614.

be confined to the evidence presented by the parties may present a partial view of historical interpretations.

Leaving the investigations in the hands of experienced and neutral investigators who look for evidence for both sides may result in a perception of greater fairness and objectivity.¹⁰³⁵ Given their perceived neutrality, witnesses may be more inclined to co-operate, as they would not feel they were making any declaration of partisanship.

There may also be a cost benefit in employing independent investigators. Independent investigators can ensure that the limited resources are spent carefully and for relevant purposes and that the investigations come to an end within a reasonable time.¹⁰³⁶ Given the importance of conducting thorough investigations, it is, however, questionable whether economic considerations should trump all others. What is vital is that the evidence presented by the Prosecutor is capable of being properly verified and contextualised. The role of the defence and accused in establishing an unbiased and complete truth are of the utmost importance. Budgetary and time restraints must be considered secondary to this.

As has already been indicated there is a price to pay for giving the defence a full participatory role and voice in the proceedings. Sometimes judges have to listen to irrelevant, lengthy political arguments. The difficulty is that, hidden within such diatribes may lie factual nuggets of considerable importance. The careful consideration of the position of the defence is essential in order to achieve the objectives of international criminal justice and to ensure that the proceedings cannot be dismissed as show trials.¹⁰³⁷

One of the perceived advantages of a neutral investigative body is that the accused is less dependent on the quality of his counsel. On the other hand, he is then fully dependent on the quality and diligence of the neutral investigators to be employed. In

¹⁰³⁵ *Ibid*; see also O. Dubois, *Rwanda's National Courts and the International Tribunal*, 37 International Review of the Red Cross 717 (1997), at 722, where he argues that the defence may be better off with the assistance of a neutral investigative body.

¹⁰³⁶ J. de Hemptinne, *Plaidoyer en faveur de l'institution de chambres d'instructions à la Cour pénale internationale*, in *Revue de Droit Pénal et de Criminologie* 608-625, 610-612.

¹⁰³⁷ See M. Koskeniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law 1 (2002), 32-35.

either system, the quality of justice will depend on the quality and diligence of the personnel concerned and the resources afforded to them.

In Part I, it has been suggested that assessors of facts should engage with the information and information providers while keeping an appropriate distance from them. It would be an asset if independent investigators, were they to be employed, had knowledge of, and experience with the culture in which they carry out their investigations. Too much familiarity with the culture may lead to a loss of objectivity and choosing sides. On the other hand a lack of familiarity with the situation in question can lead to uninformed decisions. Interpreters from the region, who may deliberately or unintentionally distort information, must still be employed.

It would be vital for independent investigators to keep an open mind about the guilt or innocence of the suspect. The risk that, otherwise, they become additional prosecutors is particularly great where investigative judges play a significant role in charging individuals, as they do in certain civil law countries.¹⁰³⁸ This is one of the reasons why common law jurists are wary of employing investigative judges. They prefer a system where both the prosecutor and defence have sufficient means to conduct their own investigations.¹⁰³⁹

If investigative judges do not keep a sufficient distance to the incriminating information they are receiving, the fear is that, once they have identified a certain individual as potentially criminally liable for certain identified crimes, they may lose sight of evidentiary traces that would put his liability in question. They may draw certain conclusions too fast, particularly when they truly believe in the merits of their case. Victim witnesses may be believed without further inquiry and sight can be lost of the necessity to verify the background and identifying details of all witnesses, including seemingly credible witnesses. This is particularly important in light of the high risk of manipulation, fabrication and unreliability of the evidence collected in politicised post-conflict environments.¹⁰⁴⁰

¹⁰³⁸ See above, section 'civil law'.

¹⁰³⁹ See: David Hooper Q.C. (Interview in The Hague, 3 June 2010), and Gregor Guy-Smith (Interview in The Hague, 12 April 2011).

¹⁰⁴⁰ See further section 'fabrication of evidence'

Thus, it comes down to the quality of individual investigative judges whether their recruitment would enhance the ascertainment of the truth. However, even if the fairest and most competent investigative judges are employed, it is still debatable whether they are in the best position to collect the available exonerating evidence. An adequate defence inquiry requires significant time, patience and effort. Often, exonerating material is not found overnight. It is necessary for a defence investigator to familiarise himself with the communities concerned and gain their trust. It is only after some time that people begin to open up and provide information. Relevant information usually comes from unexpected sources and may require the travelling to remote locations. It may be necessary to open doors that appear firmly closed.

In addition, while neutral investigators may be more effective to deal with reluctant States and other international entities, the community, family and allies of the accused would in most circumstances not open up as easily to a neutral investigator than the defence counsel for the person they side with. In many occasions, the perceived lack of neutrality on the part of the defence is an asset in gaining trust of those on the side of the person he represents.

Thus, in order to conduct such investigations thoroughly and efficiently, it is best to leave it to investigators who are exclusively concerned with the interests of the accused, rather than investigators who must be perceived as neutral at all times and divide their time, focus and resources among serving the often conflicting interests of the community at large, the victims and the accused. Alternatively, both can play a role in investigations. Independent investigators could focus on the context and the defence on the exonerating circumstances surrounding the defendant. The problem with this proposition is that it will increase rather than reduce costs. There may then be a tendency to further reduce the defence investigation budget.

In light of these considerations, instead of changing the structural elements of international justice, a solution should better be found within the existing structure. It is suggested that the best solution would be to follow Judge Kaul's proposition and create a real incentive to the Prosecutor to do his job properly, failure of which would result in him losing his cases.

Role of Victims and Witnesses in International Trials

Expert Evidence

To explain the context in which the alleged crimes were committed, it is necessary to establish an historical record of events. International courts and tribunals often rely on historians, social scientists, anthropologists or human rights activists as expert witnesses.¹⁰⁴¹ Such experts have not personally observed the events but analyse information received from sources in the field. Whether they produce reliable opinions on the events in question depends on the quality of the researchers involved. This directly relates to their neutrality and expertise, the quality and quantity of the information available to them and the quality of the methodology applied in terms of its transparency and reliability. Low quality in any of those areas may lead to exclusion of the evidence although more often it simply undermines the weight given to the evidence at the end of the day.¹⁰⁴²

Particularly at the ICTR, many historians and human rights researchers have been allowed to testify in respect to contextual matters. This includes the socio-economic and political situation leading up to the 1994 massacres. In addition, it includes the reasons for the genocide and human rights abuses in 1994, the role of the media in Rwandan society, the role of the military in 1994 Rwanda and the civil defence structure.¹⁰⁴³

¹⁰⁴¹ The judges in international criminal courts and tribunals can only rely on expert testimony to explain the context in which the crimes charged were allegedly committed, but not to establish the guilt or innocence of an accused.

¹⁰⁴² If the judges find that the proposed expert is not competent in his proposed field or fields of expertise, or possesses no specialized knowledge acquired through education, experience or training in a field that may assist the judges in determining the issue at hand, they may exclude the proposed testimony. See, for instance, *Bagosora* Oral Decisions on Defence Objections and Motions to Exclude the Testimony and Report of the Prosecution's proposed Expert Witness, Dr Alison DesForges, or to Postpone her Testimony at Trial (4 Sep 2002), para 5; see also *Bagosora* Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens (28 Sep 2004), para 8; *Nahimana* Oral Decision (20 May 2002) 122–26; *Martić* Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis (13 Jan 2006), para 22; *Bizimungu* Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyekebe (2 May 2005); *Nyiramasuhuko* Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness, para 5.

¹⁰⁴³ *Bagosora* Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens (28 Sep 2004), para 8.

Their job does not vary significantly from the job of the adjudicators in court. This is due to the fact that they equally assess the reliability and credibility of the information they have collected and draw certain conclusions on the basis of that evidence. Expert testimony is admissible only if it assists the adjudicators in that it enlightens them “on specific issues of a technical nature, requiring special knowledge in a specific field”,¹⁰⁴⁴ and it is relevant and useful for the Chamber’s deliberation.¹⁰⁴⁵ If the evidence relates to legal issues, rather than issues of a technical nature, it will not be admitted unless such legal issues fall outside the knowledge and expertise of professional judges. An example is where they fall under domestic law.¹⁰⁴⁶ In any other situations legal expertise does not assist the professional judges who are highly capable of drawing their own conclusions on legal matters.¹⁰⁴⁷

In collecting evidence, expert witnesses suffer from similar problems as the parties in an international criminal trial. The international criminal courts and tribunals deal with cases of particular complexity. The crimes under their jurisdiction such as war crimes, crimes against humanity and genocide must be committed on a large scale.

¹⁰⁴⁴ *Akayesu* Decision on a Defence Motion for the appearance of an Accused as an Expert Witness (9 March 1998); reiterated in *Nahimana* Decision on the Expert Witnesses for the Defence (24 Jan 2003), para 2. In the case of *Prosecutor v Delic*, Decision on Paul Cornish’s Status as an Expert, (20 March 2008), para. 12, a proposed military expert because he lacked specialised knowledge of the Bosnian conflict, particularly central Bosnia. Similarly, in *Popovic* Second Decision Regarding the Evidence of General Rupert Smith (11 Oct 2007) 4, a British general did not qualify as an expert in respect of the function and operation of the General Staff of the Bosnian Serb Army. He was, however, allowed to testify as a factual witness as per his personal observations with members of that army.

¹⁰⁴⁵ *Nahimana* Decision on the Expert Witnesses for the Defence (24 Jan 2003), paras 6 and 11; *Bizimungu* Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (2 Sept 2005), para 12; *Nyiramasuhuko* Oral Decision on the Qualification of Mr Edmond Babin as Defence Expert Witness (13 April 2005), para 5; *Karempera* Order Relating to Defence Witness Bernard Lugan (5 May 2008), para 7; *Milosevic* Decision on Admission of Expert Report of Robert Donia (15 Feb 2007), para 10; *ICTY Prosecutor v Stanisic and Simatovic*, Decision on Prosecution’s Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis (18 March 2008), para 11; *Milosevic* Decision on Admissibility of Expert Report of Vasilije Krestic (7 Dec 2005), para 6.

¹⁰⁴⁶ For instance, in *ICTY Prosecutor v Boskovski & Tarculovski*, Decision on Prosecution’s 94 bis Notice re Expert Witness Slagjana Taseva (8 Feb 2008), a former employee of the Ministry of Interior of FYROM, who was also a Professor of criminal law, was allowed to provide expert opinion on the regulations and laws governing criminal investigations in FYROM. See also *Stakic* Appeal Judgement (22 March 22 2006), para 164.

¹⁰⁴⁷ *Sesay* Decision on Admissibility of Certain Parts of Expert Report of Johan Hederstedt (29 July 2008), paras 23-24; *Nahimana* Decision on the Expert Witnesses for the Defence (24 Jan 2003), paras 16 and 22; *Nahimana* Decision to Reconsider the Trial Chamber’s Decision of 24 January 2003 on the Defence Expert Witnesses (25 Feb 2003), para 4; *Stakic* Appeal Judgment, para 164; *Popovic* Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas (1 July 2008). However, in the *Nahimana* Appeal Judgment, para 71, an expert was permitted to draw the legal conclusion that widespread attacks against the Tutsi population across Rwanda began after the plane crash on 6 April 1994.

Inevitably, these crimes involve public authorities, rebel groups or other entities capable of perpetrating crimes in a systematic or widespread manner. Such entities are often involved in destroying evidence and concealing the identities of the perpetrators. In addition, documentation of crimes perpetrated during an armed conflict is difficult because of the circumstances in which they have occurred. It is much easier to establish globally the nature and level of violence that occurred during a conflict in a particular region than to establish “who committed what, where, when, why and how ».¹⁰⁴⁸

Professor Sunga acknowledges that facts do not speak for themselves but are open to an indefinite number of interpretations concerning their actual meaning. Therefore, “great care must be taken to ensure that the particular facts actually represent the real situation as a whole. Accurate reporting of ‘facts’ might be highly misleading, even prejudicial, if presented out of context. Even more fundamental, preconceptions about what one is looking for, conditions one’s view even about what counts as ‘a fact’, and what does not. People, including investigators, tend to recognize as ‘fact’, representations about reality that support rather than contradict their own background views, suppositions, presumptions and prejudices.”¹⁰⁴⁹

Human rights reporters must be cautious of this. They often share certain objectives of international criminal justice, such as the fight against impunity for serious violations of international human rights and humanitarian law. With a view to prevent such violations from continuing, human rights reporters seek to uncover them and focus the world’s attention on them. In this process, they often call for accountability of the perpetrators of serious human rights abuses and welcome the efforts made by international criminal courts and tribunals in this respect. Whilst human rights reporters do not all have similar mandates, some of them – for instance, those working for the NGO Human Rights Watch (‘HRW’) – have a tendency to call for prosecutions of certain individuals and identify alleged perpetrators.

¹⁰⁴⁸ Professor Lyal S. Sunga, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden: *The Role of NGOs in UN Human Rights Special Procedures, Treaty Bodies and Field Presences in Relation to ICC Fact-Finding* [hereinafter ‘Sunga, The Role of NGO’], 2.

¹⁰⁴⁹ *Ibid*, 3.

Whilst HRW and similar NGOs pride themselves in being objective and providing accurate information,¹⁰⁵⁰ their mandate is to report on human rights abuses. Accordingly, their natural tendency is to associate themselves with the victims of such abuses and to identify with their side of the story. In siding with the party of the conflict which suffered the most, they may unintentionally and perhaps even unconsciously lose their neutrality. They do not always seek to discover the views of those they have identified as the perpetrators.¹⁰⁵¹ Nor are they looking for nuance in the story of the conflict. On the contrary, it is usually part of their mandate to reveal in detail to the public at large all crimes they have uncovered. This emphasises the serious nature of those crimes in an attempt to encourage States, the UN, NATO or any other decisive political entity to act.¹⁰⁵²

Accordingly, there is a risk that the official story they record is one-sided and does not reflect the other side of the story. In the context of Rwanda, human rights activists face the additional difficulty that the story of events is heavily influenced, directly or indirectly, by the government of Rwanda.¹⁰⁵³ Any expert who criticises the government may be refused entrance or be thrown in prison. This would seriously obstruct the work of a researcher on Rwanda.¹⁰⁵⁴ In addition, the vast majority of people in Rwanda are scared to openly criticise the government. Doing so may lead to their arrest as ‘genocidaire’ or ‘genocide negationist’.¹⁰⁵⁵ Researchers must, therefore, be vigilant in ensuring that their sources are speaking freely and do not present a narrative dictated by the Rwandan regime.

Experts are also dependent on factual witnesses. As aforementioned, it is not an easy task to find reliable factual witnesses. The sources used by expert witnesses

¹⁰⁵⁰ See HRW website which states: “The hallmark and pride of Human Rights Watch is the even-handedness and accuracy of our reporting” (<http://www.hrw.org/about/howweare.html>).

¹⁰⁵¹ Sunga, *The Role of NGO*, *supra* note 1048, 3, 5, 6. See also Alison DesForges who admitted in cross-examination by counsel for Bagosora that she had not spoken to anyone linked to the accused.

¹⁰⁵² *Ibid*, 3, 5, 6, 8, 9.

¹⁰⁵³ Jeroen de Lange held that the current government in Rwanda was responsible for a very distorted and biased truth about Rwanda. See Jeroen De Lange: *Rwandan Realities – 10 Years After the Genocide*, GTI Conference 29 and 30 October 2004. See also *ibid*, 6 where it is acknowledged that NGOs are not always able to operate freely and are often vulnerable to interference in their work from official and non-official agencies.

¹⁰⁵⁴ See, for instance, Professor Reyntjens, who has been declared *persona non grata* since 1995 because he criticised the current Rwandan regime. Defence counsel Peter Erlinder was also arrested. See above, section ‘lack of cooperation with the defence’.

¹⁰⁵⁵ See above, section ‘lack of cooperation with the defence’.

frequently condition their cooperation on the non-disclosure of their identities. These sources may be persons who personally witnessed the events that are subject to the research conducted by the experts. They may also be persons who have information about the events in question without having personal and direct knowledge. The research upon which historians, social scientists, anthropologists or human rights activists draw their conclusion is often based on anonymous hearsay evidence. They prefer to rely on direct witnesses whose identity can be disclosed to the wider public, but often such evidence is not available. Unlike courts, they do not have to reach any conclusion based on the minimum standard of proof. Provided that they explain adequately the methodology they have used in their analysis, human rights reporters do not need to follow strict rules in collecting and analysing evidence. As acknowledged by Professor Sunga, “human rights fact-finding is usually more general and less rigorous than fact-finding required for criminal prosecutions.”¹⁰⁵⁶ Thus, they can and often have no choice but to rely on multiple hearsay which is anonymous, and other dubious material.¹⁰⁵⁷

Scholars have raised concerns about the use of social scientists, historians or human rights researchers as experts in criminal trials. This is due to the impossibility of forming certain opinions in this field, that are required and expected from an expert witness.¹⁰⁵⁸ Some expert witnesses themselves are uncomfortable with their role as expert in criminal proceedings and share at least some of the criticism expressed. For instance, Henry Rousso, Director of the Institute for Contemporary History, who testified as an expert in the French case against Papon, one of the famous WWII cases, stated: “In my soul and conscience, I believe that an historian cannot serve as a “witness” and that his expertise is poorly suited to the rules and objectives of a judicial proceedings. ... The discourse and argumentation of the trial ... are certainly not of the same nature as those of the university.”¹⁰⁵⁹

¹⁰⁵⁶ Sunga, The Role of NGO, *supra* note 1048, 3-4, at page 4.

¹⁰⁵⁷ *Ibid*, 14.15.

¹⁰⁵⁸ L Rosen, ‘The Anthropologist as Expert Witness’ (1977) 79 *American Anthropologist: New Series* 555.

¹⁰⁵⁹ Letter to the President of the Bordeaux Assizes Court, in *The Papon Affair* (Golsan ed). Cited in: Wilson, *Judging History* (n 6 above), 193-194.

In addition, the testimony of social scientists, historians or human rights researchers, which is not of a technical nature, frequently touches upon issues that are closely intertwined with the ultimate issues for the judges to determine.¹⁰⁶⁰ Their opinions are generally formulated upon the narratives of others. Often, they are based on “second, third, and even fourth hand testimony of victims and witnesses.”¹⁰⁶¹ This may be acceptable within the context of research into human rights abuses. However, in a court of law, this raises difficulties given that the credibility of the witnesses whose stories are being told cannot be tested in cross-examination.¹⁰⁶²

Objections have been raised in relation to non-disclosure of the identity of persons or sources that form the basis of the expert opinion. In one such case, the Trial Chamber stated that there was no danger of a deprivation of the right to know the expert’s sources, as the defence teams had ample opportunity to ask questions relating to the sources during cross-examination.¹⁰⁶³ Yet, the use of anonymous sources may lead to unfairness against the accused. This is particularly true given that in their reports experts often reproduce hearsay evidence from other sources. This means that they themselves have not even tested these sources. It is true that the defence can ask expert witnesses how they selected their sources and in what manner they assessed the truthfulness of their sources, as well as other questions on their methodology. The defence and the Chamber are nonetheless deprived of an opportunity to assess the demeanour and credibility of the sources and the reliability of their stories. In addition, given that the identities of the sources are unknown, the defence is also hampered in conducting investigations into their credibility. The effectiveness of the cross-examination of the expert is, therefore, clearly undermined.¹⁰⁶⁴

¹⁰⁶⁰ See, for instance, the testimony of Professor Reyntjens, given in the ICTR trial of Bagosora. *Bagosora*, Transcripts (22 Sep 2004) 4-9 (Reyntjens oral testimony).

¹⁰⁶¹ KL Fabian, ‘Proof and Consequences: An Analysis of the Tadic & Akayesu Trials’ (2000) 49 *DePaul Law Review* 981, citing MP Scharf, *Balkan Justice: The Story behind the First International War Crimes Trials since Nuremberg* (Durham, Carolina Academic Press, 1997) 128 [hereinafter ‘Fabian, Proof and Consequences’].

¹⁰⁶² This was conceded by Professor Reyntjens, an expert on Rwanda, who testified in a number of trials before the ICTR. He stated that his methodology was good and in his own view scientifically justified, but did not meet the standard of proof beyond reasonable doubt. See personal interview with Professor Reyntjens in Antwerpen, 20 December 2004.

¹⁰⁶³ *Bagosora* Oral Decisions on Objections to Exclude Testimony (4 Sep 2002), para 11.

¹⁰⁶⁴ Fabian, Proof and Consequences, 981.

For these reasons non-disclosure of the sources of the information on which the expert opinion is based may affect the reliability of the expert report or testimony. However, as long as the expert opinion is not exclusively based on unidentified sources, this is a matter of weight, not of admissibility.¹⁰⁶⁵ Indeed, notwithstanding these issues of reliability, the testimony or a report of a proposed expert, provided he will testify to the contents of his report, is rarely excluded.

Rights of Victims to Truth and Justice

As addressed in Part I, a core objective of international justice is to do justice to the victims. It has been suggested that the victims have the right to truth and justice. These rights have been explicitly recognised by one of the ICC Pre-Trial Chambers.¹⁰⁶⁶ They also provide the basis for the right of victims to participate in trials before the ICC. The ICTY and ICTR have not incorporated victim participation. Notwithstanding this, the ICTY and ICTR equally appear to have a high regard for victims. Employees of the ICTY and ICTR, most notably Carla Del Ponte, former chief Prosecutor of both, has affirmed that she sees her role as doing justice for victims.¹⁰⁶⁷

However, the ICC clearly goes a step further. The Chief Prosecutor at Nuremberg, Justice Robert Jackson acted on behalf of Civilization.¹⁰⁶⁸ ICTR Prosecutor Pierre-Richard Prosper and ICTY Chief Prosecutor Carla Del Ponte acted on behalf of the international community.¹⁰⁶⁹ In the ICC, Chief Prosecutor Ocampo made a switch to

¹⁰⁶⁵ *Bizimungu* Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges (2 Sep 2005), paras 5, 17 & 25; *Bagilishema* Trial Judgment (7 June 2001), para 139.

¹⁰⁶⁶ Prosecutor v. Katanga and Ngudjolo, Public Urgent Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, paras. 32-36. No other Chamber has affirmed this. However, recently, a legal representative in the Kenyan I case relied on this authority in seeking the expansion of the Prosecution's investigations.

¹⁰⁶⁷ Submissions from Muna, Carla Del Ponte at Geneva Conference, *supra* note 173.

¹⁰⁶⁸ Justice Robert H. Jackson's opening speech at Nuremberg, 21 November 1945. Reprinted in: *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, 42 vols. (Nuremberg: International Military Tribunal, 1947), 2:98-103, 104-05, 153-54; published in: Michael R. Marrus: *The Nuremberg War Crimes Trial 1945-46. A Documentary History*, Bedford Series in History and Culture (Bedford Books) 1997).

¹⁰⁶⁹ Opening statement of Chief Prosecutor Carla Del Ponte in the ICTY *Milosevic* trial, 12 February 2002; Closing statement of Pierre-Richard Prosper in the ICTR *Akayesu* case, 19-23 March 1998.

the victims and emphasised that he had a “mandate to pay particular attention to the suffering of the victims”.¹⁰⁷⁰

It is obvious that international justice must pay significant attention to the interests of victims. International criminal courts and tribunals were established in the name of the victims. Without victims, there would be no need for international justice. International justice does not, however, solely concern the victims. Rather, as was acknowledged by the prosecutors at Nuremberg, ICTY and ICTR, it concerns the international community as a whole. Given that the international community encompasses the victims, arguably there is no need to circle out the victims as a specific group international justice is to focus on.

It is difficult to identify the victims in a conflict. Victims are often contrasted with perpetrators, but the line between these two categories is not always clear. Some persons qualify as both or neither.¹⁰⁷¹

On this issue, May and Hoskins state as follows:¹⁰⁷²

When one can recognize, in contexts of conflict and strife, a clear victim and a clear victimizer, one can then insist on protection of the victim as a universal value. Although this may appear to be taking sides (politically or otherwise), taking the side of the victim is a universal stance, a clear expression of justice, global or otherwise. Also, spotlighting the victim is an aid – both practically and theoretically – for the issue of identity: Who are we, and for whom do we stand up? The victim – even if he belongs to the enemy.

Even if victims can be identified clearly, it is still debatable whether international justice should grant them a right to truth and justice. This is an ambiguous phrase. A violation of a right warrants a remedy. Does it then follow that a victim is entitled to a remedy if his right to truth and justice has been violated in a particular case? For instance, a guilty accused may be acquitted due to insufficient evidence or irregularities of the procedure. It is also possible that an alleged perpetrator is not

¹⁰⁷⁰ Opening statement of Chief Prosecutor Ocampo in the *Lubanga* case, 26 January 2009, at: <http://www.icc-cpi.int/iccdocs/doc/doc623638.pdf>.

¹⁰⁷¹ M. Drumbl, *Atrocity, Punishment and International Law*, (Cambridge University Press, 2007), 44.

¹⁰⁷² A. Biletzki, *Politicizing Human Rights (Using International Law)*, in L. May & Z. Hoskins, *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 180 at 194. See also: D. Golash, *The Justification of Punishment in the International Context*, in L. May & Z. Hoskins, *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 201; R. Meister, *Human Rights and the Politics of Victimhood*, 16(2) *Ethics & International Affairs* 91 (2002), 91-108.

brought to justice because he is untraceable or the Prosecutor did not select him to be brought. Such situations surely do not, nor should they, lead to a remedy for the victims.

The right to truth and justice was first introduced in the particular context of human rights abuses in central and South America. In the brutal civil wars in places like Guatemala, Peru, Colombia, Honduras, Argentina and Chile, many people disappeared and never returned. Family members had no idea where they were, what happened to them, whether they were dead or alive and would ever return. Their bodies were never found. In this situation, the Inter-American Court of Human Rights held that the families of the disappeared persons had a right to know the truth of what had happened to their beloved ones.¹⁰⁷³ The European Court of Human Rights adopted similar terminology.¹⁰⁷⁴ It was increasingly acknowledged as a general right of victims in the context of seeking remedies from the State. This cannot, however, be simply transformed into a general right of victims to truth and justice in the context of international criminal trials. Different concepts of truth and justice exist in different contexts.¹⁰⁷⁵ As well, international criminal trials should primarily focus on determining the guilt or innocence of the accused, rather than on granting victims a right to truth and justice.

It can also not be assumed that all victims want truth and justice. Victims are often spoken about as if they were one homogeneous group of people with the same

¹⁰⁷³ See, *inter alia*, *Bàmaca- Velasquez v Guatemala*, Judgement of 25 November 2000, Series C, No 70, para 201, *Barrios Altos v Peru*, Judgement of 14 March 2001, Series C, No 75, para 48, *Masacre de Mapampân v Colombia*, Judgement of 15 September 2005, Series C, No 134, para 297; *Almohacid-Arellano et al v Chile*, Judgement of 26 September 2006, Series C, No 154, paras 148 et seq; *Velasquez-Rodriguez v Honduras*, Judgement of 29 July 1988, Series C, No 7, paras 162-166 and 174; *Comumd ad Monvana v Suriname*, Judgement of 15 June 2005, Series C, No 124, paras 204, *Masacre de Mapiripàn v. Colombia*, Judgement of 15 September 2005, *Almohacid-Arellano et al vs Chile*, Judgement of 26 September 2006, Series C, No 154, para 148; *Vargas-Areco v. Paraguay*, Judgement of 26 September 2006, Series C, No 155, paras 153 et seq, and *La Cantuta v. Peru*, Judgement of 29 November 2006, Series C, No 162, para 222. See also General Comment 31 of the Human Rights Committee.

¹⁰⁷⁴ *Hugh Jordan v UK*, Judgement of 4 May 2001, Application No 24746/1994, [2001] ECHR 327, paras, 16, 23, 93, 157 and 160; *Aksoy v. Turkey*, Judgement of 18 December 1996, Application No 21987/93, 1996 ECHR 68, para 98, *Aydm v Turkey*, Judgement of 25 September 1997, Application No 21178/94, 1997 ECHR 75, para. 103, *Selcuk and Asker v Turkey*, Judgement of 24 April 1998, Application No 23184/94, 1998 ECHR 36, para 96, *Kurt v Turkey*, Judgement of 25 May 1998, Application No. 24276/1994, 1998 ECHR 44, para 140, *Selmoum v. France*, Judgement of 28 July 1999, Application No 25803/94, 1999 ECHR 66, para 79.

¹⁰⁷⁵ A. Rubin, *Challenging the Conventional Wisdom: Another View of the International Criminal Court*, 52 *Journal of International Affairs* 783 (1999). See further Part I.

emotions, needs, and urge for justice. In reality, however, victims are like any other human beings and differ significantly from each other. The only thing that binds them universally is that they have suffered from an internationally recognised crime. They do not speak with one voice, but multiple voices with different expectations from justice.¹⁰⁷⁶ Many NGOs speak for victims, but it is questionable whether they truly represent each single one, or even a high percentage of them. Victims are often spoken of in a patronising way and represented as passive creatures. It is not necessarily their own choice to be called ‘victims’. Many of them prefer to be called ‘survivors’ or ‘freedom fighters’.¹⁰⁷⁷

The empirical research conducted by various researchers and institutes suggests that most victims want truth and justice, but may have a different perception of how this should be achieved. Many of them want punishment, but some prefer forgiveness, a combination of the two, or simply to move on and forget about it.¹⁰⁷⁸ Truth can re-open old wounds, which is not desired by all victims.¹⁰⁷⁹ Even if victims generally desire truth and justice, they may be disappointed with the process put in place to achieve this, as it will not always bring the desired result. It may also not necessarily bring relief or emotional repair.¹⁰⁸⁰

Doak suggests that energy should be invested “in acquiring a greater degree of understanding of the diverse needs and experiences in order to provide clearer answers to the problems that confront them.”¹⁰⁸¹ This may indeed be the only way to evaluate what significance international justice can have for victims.¹⁰⁸²

¹⁰⁷⁶ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 290.

¹⁰⁷⁷ Personal interviews with Rwandan survivors of the genocide who prefer the term ‘survivor’ over victim. See also M. Parlevliet, *Considering Truth. Dealing with a Legacy of Gross Human Rights Violations*, 16(2) *Netherlands Quarterly of Human Rights* 141 (1998) 28.

¹⁰⁷⁸ Ernesto Kiza, Corene Rathgeber and Holger-C Rohne: “Victims of War – An Empirical Study on War-Victimization, and Victims’ Attitudes Towards Addressing Atrocities (Hamburger Institut für Sozialforschung (2006); International Center for Transitional Justice and the Human Rights Center (Berkeley), *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (2005), available at <<http://ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf>>, last accessed December 2011; M. Drumbl, *Atrocity, Punishment and International Law*, (Cambridge University Press, 2007), 43-44.

¹⁰⁷⁹ B. Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health* (Springer, 2009), 66.

¹⁰⁸⁰ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 291.

¹⁰⁸¹ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 297.

¹⁰⁸² *Ibid*, 265; P. Hazan, *Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice*, 88 *International Review of the Red Cross* (2006) 19-47.

The rights of victims must further bend when in conflict with the rights of the accused.¹⁰⁸³ First and foremost, the accused has a right to truth and justice. He is the one standing trial and facing a long prison sentence, if found guilty. If his guilt is not established, he must be acquitted irrespective of whether a not-guilty verdict corresponds with the actual truth. Thus, the rights of the victim to truth and justice are not always easily reconcilable with the rights of the accused.¹⁰⁸⁴ International criminal tribunals and courts are sometimes reluctant to acknowledge that the rights of the accused have first priority. They regularly state that a fair balance must be struck between the rights of the accused and the rights of the victims.¹⁰⁸⁵

Some observers even suggest that, in case of a conflict, the rights of the victim to truth and justice should prevail.¹⁰⁸⁶ Other observers have criticised the balancing exercise. They firmly state that the rights of the accused should prevail over the rights of the victims.¹⁰⁸⁷ Given that it puts human beings on trial, international justice first has a retributive nature. Its primary purpose is to investigate and prosecute individuals for internationally recognised crimes in fair and efficient proceedings.¹⁰⁸⁸ The restorative objectives come second. It is, therefore, indeed inappropriate to give the accused and victims equal status.

Accordingly, it is suggested that truth and justice should be viewed as aspirations rather than rights of the victims. Truth and justice are not solely the victims'

¹⁰⁸³ The Chamber has an obligation to “ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. See Articles 20(1), 22 ICTY Statute; Articles 19(1), 20(1) ICTR Statute; Article 64(2) ICC Statute. See also: *Prosecutor v. Brdanin and Talic*, Decision on Motion by Prosecution for Protected Measures, 3 July 2000, para. 31.

¹⁰⁸⁴ J. Llewellyn, *Restorative Justice in Transitions and Beyond, The Justice Potential of Truth-Telling Mechanisms for Post-Peace Accord Societies*, in T. Borer (Ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, (University of Notre Dame Press, 2006), at 85-87.

¹⁰⁸⁵ For instance: *Prosecutor v. Haradinaj et al.*, Decision on Prosecution's Application for Pre-Trial Protective Measures for Witnesses, May 20, 2005, p. 4.

¹⁰⁸⁶ L. May & Z. Hoskins, *International Criminal Law and Philosophy* (Cambridge University Press, 2010), 243.

¹⁰⁸⁷ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), 360-362.

¹⁰⁸⁸ M. Dembour & E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 *European Journal of International Law* 151 (2004).

prerogatives, but are of interest to everyone including the affected communities, victims, accused and society at large.¹⁰⁸⁹

Victim Participation

At the ICC, whenever the interests of victims are concerned and with leave of the Court, victims may make written or oral submissions. In giving victims a voice, the ICC has prioritised their rights and needs and explicitly acknowledged the right of victims to the truth and justice. This has an impact on the entire process.

This is a novelty in international criminal justice. It is generally viewed as a positive development.¹⁰⁹⁰ If testifying does not have a therapeutic effect, then at least victim participation can have such an effect.¹⁰⁹¹ Indeed, it is suggested that victim participation contributes to the healing process and, thus, defeats secondary victimisation, if any, caused by testifying.¹⁰⁹² Therefore, many scholars consider victim participation as a victory of international justice.¹⁰⁹³

As one victim representative said, “the participation of victims in a judicial process is wholly relevant. Before all else, the aim is to allow those who are at the very centre, who are the people who have suffered from the crime to participate in the judicial process to establish the truth about the crimes.”¹⁰⁹⁴ Other victim representatives have made similar submissions emphasizing the right of victims to truth and justice.¹⁰⁹⁵

¹⁰⁸⁹ Doak would disagree. In his view, the trials should promote legal rights for victims, rather than moral objectives: “Victims ought to be afforded the respect and dignity of being treated as individuals with their own specific needs and rights which need to be safeguarded by legal and political processes”, Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 297.

¹⁰⁹⁰ See, for instance, E. Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 *International Review of the Red Cross* 870 (2008), 409-440, at 409-410.

¹⁰⁹¹ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?* in D. McGoldrick, P. Rowe & E. Donnelly (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, 2004), 315-316.

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*; C. Jorda & J. de Hemptinne, *The Status and Role of the Victim, in the Rome Statute of the International Criminal Court: A Commentary*, in A. Cassese, P. Gaeta & J. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol II* (Oxford University Press, 2002).

¹⁰⁹⁴ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-38-ENG ET, Confirmation of Charges Hearing - Open Session, Opening Statement by Mr. Gilissen, page 42, lines 2-6.

¹⁰⁹⁵ *Ibid.*, Opening Statement by Mr. Diakiese, page 56, lines 1-12; Opening Statement by Mr. Mulamba, page 62 lines 1-4; page 64 lines 21-25.

Reservations about this development have also been expressed.¹⁰⁹⁶ This is an area of law where one has to be particularly careful not to transplant “wholeheartedly” the domestic system of victim participation and its underlying rationale.¹⁰⁹⁷ For instance, a significant difference between victim participation in domestic jurisdictions and that in international jurisdictions is the large number of victims who participate in each trial. In part, this is the result of the wide definition of a victim that has been applied.¹⁰⁹⁸ In larger part, this has to do with the fact that the international court barely deals with crimes other than massive crimes committed on large scale. Unless a charge is confined to, for instance, torture of a handful of prisoners of war as a war crime, the number of victims caused by the crimes charged can be extremely high. Currently, 127 victims participate in the *Lubanga* trial; 366 in the *Katanga* trial; and 1889 in the *Bemba* trial.¹⁰⁹⁹ Approximately 1500 more victims are in the process of applying to participate in the *Bemba* trial, notwithstanding that the Prosecutor only alleges the existence of about 200 victims of the crimes charged.¹¹⁰⁰ In domestic jurisdictions, there are usually only a number, or just one.

¹⁰⁹⁶ H. Friman, *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?* 22 *Leiden Journal of International Law* 485 (2009); C. Van Der Wijngaert, lecture on victim participation, *supra* note 539.

¹⁰⁹⁷ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), page 342.

¹⁰⁹⁸ Indirect victims from any crime under the jurisdiction of the Court, not necessarily the crimes contained in the charges are also allowed to participate as victims in a situation (*Prosecutor v. Lubanga*, Decision on Victims' Participation, 18 January 2008, ICC-01/04-01/06-1119, para. 93 [hereinafter ‘Lubanga Decision on Victim’s Participation’; confirmed by the Appeals Chamber in: Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 32 [hereinafter ‘Lubanga Appeals Chamber Decision on Victim’s Participation’]). However, in order to participate in a particular trial, a victim must have suffered personal harm related to the charges (Appeals Chamber Judgment on Victims' Participation, paras 63-64). The Appeals Chamber held that, in light of the fact that ‘the purpose of the trial proceedings is the determination of guilt or innocence of the accused person of the crimes charged’, “only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests” (para. 62). See also H. Friman, *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?* 22 *Leiden Journal of International Law* 485 (2009).

¹⁰⁹⁹ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, at 6.

¹¹⁰⁰ ICC-01/05-01/08-424, 15-06-2009 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, see para. 134. The Chamber rejected the need to establish a specific number of victims and relied thereby on the following ICTY and ICTR jurisprudence: ICTY, *Prosecutor v. Stokte*, Case No. IT-97-24-T, Judgment, 31 July 2003, para. 201, and ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-40-T, Judgment, 2 September 1998, para. 282: Pursuant to a question from the Chamber as to the killing of teachers, witness K stated she was unsure how many were killed, but that she knew the names of some of them; ICTR, *The Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, "Judgment", 22 January 2004, para. 345: "Prosecution Witness GEA testified that he could not say how many people had died at that location, because "that day there were very many." (...); ICTR, *The Prosecutor v Ntakirutimana*, Case No. ICTR-96-10 & TCTR-96-17-T, "Judgment and Sentence", 21 February 2003, para. 631: the witness specified that "many people were killed as a result of this attack".

Having to deal with such high numbers of victim participants has significant adverse consequences both for the fairness of the proceedings and for the ascertainment of the truth. In addition, the hopes of victims may have been raised too highly. This could then also undermine the healing and therapeutic effects, which are considered to be the principle objectives of victim participation. These points will be discussed more thoroughly while analysing how the victim participatory system operates in reality.

Victim Participants: Who Are They?

Victims who wish to participate must put in an application at each stage of the proceedings.¹¹⁰¹ They can apply to be a participant in a situation, or in a case. Victims who want to be eligible for reparations must be acknowledged as victims in a particular case. For each application, the Chamber has to consider whether there are grounds to believe that the victim is who he claims to be; and that he suffered direct or indirect harm from the commission of one or more crimes within the jurisdiction of the Court.¹¹⁰² An institution or organisation can also apply for victim status. This will be granted if it can show that the property it owned suffered direct harm from a crime committed within the jurisdiction of the Court. This property must further have been dedicated to religion, education, art or science or other charitable purpose.¹¹⁰³ To participate in a specific case, it must be established that the applicant is a victim of one or more of the crimes charged.¹¹⁰⁴

Until now, the ICC has received almost ten thousand applications, one third of which have been granted.¹¹⁰⁵ The parties have a right to respond before the Chamber rules on the veracity of these applications. This is an incredibly burdensome exercise both for the parties and for the Chamber. One Judge in the *Katanga* case reported that easily one third of their supporting staff was working on victim applications for several months.¹¹⁰⁶ On the side of the defence, the Office of Public Counsel for

¹¹⁰¹ Rule 89 ICC Rules.

¹¹⁰² Rule 85 ICC Rules; Situation in DRC, ICC-01/04-177-tENG, 31 July 2006; Situation in DRC, ICC-01/04-101-tEN-Corr, 17 Jan 2006, paras 66 and 79.

¹¹⁰³ Situation in DRC, ICC-01/04-423-Corr-tENG, 31 January 2008, paras 139-143.

¹¹⁰⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-601-tEN, 20 October 2006, page 9; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-357, 2 April 2008, page 8.

¹¹⁰⁵ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, 6.

¹¹⁰⁶ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, 14-15, Judge Van Der Wijngaert particularly stresses the difficulties in respect of an individual application procedure that

Defence (“OPCD”) deals with applications submitted in the situations. A large percentage of their staff work on these applications on a nearly full-time basis.¹¹⁰⁷ Defence teams deal with victim applications in their specific case, which easily amount to hundreds. In light of the many other tasks they need to focus on, this is a heavy burden on their shoulders. Presumably, this is the same on the Prosecutor’s side. Accordingly, dealing with victim applications is a serious strain on the system. It can take a very long time.¹¹⁰⁸

In addition, from their seven-page application form, it is difficult to determine whether they are genuine victims. The identity of the applicants, as well as any information that could potentially lead to their identification, is redacted in most of the applications. Often, the identity of the person who assisted them is also redacted.¹¹⁰⁹ As a protective measure in respect to the victim applicants, the defence is not entitled to review the redacted information. To give due consideration to the

needs to be applied at each stage of the proceedings. Under the current prevailing interpretation, the assessment of personal interest in the proceedings must be made anew each time a victim applies to participate at a different procedural stage. For example, the Appeals Chamber has held that if a victim wants to intervene in an interlocutory appeal, that victim must demonstrate how his interests are affected by the appeal, even if this person already has victim status in the proceedings that gave rise to the appeal. Such applications are made by written submission, on which the parties have the possibility to comment. This process inevitably delays the appeals proceedings. Some Chambers have also taken the approach that even within the same procedural phase, e.g. a confirmation hearing or trial hearing, victims must justify each intervention they want to make, by explaining how the intervention relates to their interests. For example, under Rule 91(3) if a victim wishes to question a particular witness, the legal representative must submit a written request, explaining which questions they want to ask and how these questions further their interests. This was in part meant to rein in questioning by victims sense of article 68.3 of the Statute. The side effect, however, is a steady stream of requests. Prosecution and the Defence have the right to make observations on each such request, and the Chamber must rule on them separately. This individualised approach to victim participation may work in a national proceeding, where there are only a few victims in each case. At the ICC, however, the number of victims is becoming overwhelming. The judges had to go through this entire process for each of the nearly 10.000 applications received, and more applications continue to arrive, now that the Court is investigating the Libya and Ivory Coast situations. The Court may soon reach the point where this individual case by case approach becomes unsustainable. It may well have to consider replacing individual applications with collective applications. This would, of course, require amendments to the applicable texts. (page 6).

¹¹⁰⁷ Personal Interview with an OPCD member, 11 November 2011. They are currently also dealing with the 1500 new applications in the *Bemba* trial.

¹¹⁰⁸ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), pages 243-257.

¹¹⁰⁹ The requests of the victims to participate at the proceedings are disclosed *ex parte* only to the defense, Prosecution, legal representatives, the Registry, and Chambers. The name of the intermediaries who helped the applicant to fill the form are redacted for the defence, and also probably for the prosecution, but not for the Chamber and for legal representatives of the victims (these latter have only access to those of the victims they represent). See ICC-01/04-01/07-1347 31-07-2009, Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure; ICC-01/04-01/07-1491-Red-tENG 10-03-2010, paras. 42-43.

principle of equality of arms, the redacted information is equally withheld from the Prosecution.¹¹¹⁰

Apart from one or two paragraphs containing the victim's allegations of harm suffered, practically all information is blackened out. As a result, the parties are prevented from conducting any investigations into the veracity of the allegations, or the identity of the victims. The judges do not have any investigative function.¹¹¹¹ In addition, given the voluminous applications, the judges do not have the capacity to thoroughly scrutinise each application. In this regard, it does not help that they are geographically and culturally far removed from the victims. Reasonable grounds that applicants qualify as victims do not need to be established.¹¹¹²

Consequently, it is impossible to be sure that all victim participants are in fact genuine victims. It is, of course, hoped that the lawyers and NGOs who assist victims in filling out the forms and putting in their application to the Court carefully verify whether the victims are who they say they are – and scrutinise the story. The close resemblance of different applications does not inspire confidence. They are clearly written with the same pen, and it is highly questionable whether these are the words of the applicant or the reporter.

When the issue of close resemblance was raised in the case of *Katanga & Ngudjolo*, the Chamber held that “the fact that one statement is similar to others is not in itself sufficient to affect its credibility, but means that the statement needs to be scrutinized in light of the other information contained in the application for participation.”¹¹¹³ To give due weight to the defence observations, the Chamber called on the Registry “to remind intermediaries that their role is restricted to explaining to applicants any terms which they may not understand and assisting them in drafting their application. They should not, however, exert any influence whatsoever on the actual content of statements, in particular in respect of anything relating to the nature of the alleged

¹¹¹⁰ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), 253-255.

¹¹¹¹ Apart from unique investigative opportunities. See further Part II.

¹¹¹² Situation in DRC, ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 99-100.

¹¹¹³ ICC-01/04-01/07-1347 31-07-2009, Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure; ICC-01/04-01/07-1491-Red-tENG 10-03-2010, para. 42.

crimes or the harm suffered.”¹¹¹⁴

In *Lubanga*, the judges were much less careful. They held that the similarities in applications were unsurprising given the “broad context of the systematic conscription of children under the age of 15 into the military forces of the UPC”.¹¹¹⁵ This observation raises question marks about the presumption of innocence. It also undermines the principle that “a decision to grant an applicant a procedural status in the proceedings in no way predetermines any factual findings that could be made by a Chamber in any judgment on the merits”.¹¹¹⁶

That the presumption of innocence is affected by victim participation is a general concern. Judges frequently feel the urge to apologise to the victims if they do not decide in their favour. This is an indicator of how important the rights of the victims are considered. For instance, dissenting Judge Kaul, who found that the post election violence in Kenya did not amount to crimes against humanity, started off with an apology to the victims:¹¹¹⁷

“I wish to confess that I have taken this position with a heavy heart. I am profoundly aware of the crimes and atrocities described in the Application for summonses to appear for the three suspects William Ruto, Henry Kosgey and Joshua Sang pursuant to article 58(7) of the Statute. I understand and sympathise with the hopes and expectations of the victims of the crimes committed in different locations, including Turbo town, the greater Eldoret area (Huruma, Kyambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts. I am aware of the victims' expectation that those responsible for these crimes should be brought to justice. I am also painfully aware that there are currently many citizens in the Republic of Kenya who hope for and support the intervention of the Court in this country because they do not have confidence in their own criminal justice system.”

This orientation on victim participants is all the more troublesome in light of the fact that it is very unclear whether they are genuine. Yet, their allegations are taken for granted. It cannot be assumed that all victim applicants are honest. The assumed financial interest in participating should not be underestimated. Persons who were victim of an attack not subject to investigations may feel legitimate in pretending they were victims of the attack under investigation. It has already happened that, in the

¹¹¹⁴ *Ibid*, para. 43.

¹¹¹⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2509, 29 June 2010.

¹¹¹⁶ *Situation in DRC*, ICC-01/04-505, 3 July 2008, para. 30.

¹¹¹⁷ ICC-01/09-01/11-2 15-03-2011, para. 3.

course of the proceedings against Katanga and Ngudjolo, it became apparent that participating victims were not present at Bogoro, the crime base. Rather, they were victims of an attack on Kasenyi, not subject to any investigations.¹¹¹⁸

It is difficult for the Court to establish whether the victim applicants are who they claim they are. Searching for someone's identity is in reality a difficult exercise. The correctness as stated in their identity cards cannot be assumed. Often, there are no official papers. A large number of the birth certificates and registration cards have been destroyed in the war. Victims and witnesses have given different birthdates at different times. For instance, in Bogoro, it is difficult to be sure who was in Bogoro on 24 February 2003. No register of Bogoro inhabitants of that time exists.

If granted victim status, they are represented by counsel. One victim representative can easily represent hundreds of victims. In Kenya, for instance, one victim representative has been assigned for 327 victims. In Katanga, two representatives represent a total of 388 victims. Many of them keep their anonymity throughout the proceedings. This diminishes their right to review confidential material and their right to present and challenge evidence.¹¹¹⁹ The extent to which their identities are disclosed to the defence varies from case to case. They rarely are disclosed to the public.

Even if the names are known to the defence, they are always referred to by their numbers. There are so many of them that one tends to forget that they have names and individual stories. Their legal representatives barely know the names of their clients. In light of the geographical distance, their contact with their clients is sporadic. Most

¹¹¹⁸ See: Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant legal, ICC-01/04-01/07-2695, 16 August 2011, Pursuant to Trial Chamber II's Decision ICC-01/04-01/07-3064, 7 July 2011; Confidential Urgent Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal ICC-01/04-01/07-2699, 16-08-2011, Pursuant to Trial Chamber II's Decision ICC-01/04-01/07-3064, dated 7 July 2011, this document is reclassified as "Public"; Public document Decision on the notification of the removal of Victim a/0381/09 from the Legal Representative's list of witnesses, ICC-01/04-01/07-2674-tENG 08-08-2011; Confidential Rapport du représentant légal conformément à la décision ICC-01/04-01/07-2699- Conf et demande depouvoir mettre fin à son mandat concernant deux victimes (article 18 du Code de conduite professionnel), ICC-01/04-01/07-2782-Conf 18-03-2011, ICC-01/04-01/07-2782 16-08-2011 Pursuant to Trial Chamber II's Decision ICC-01/04-01/07-3064, dated 7 July 2011, this document is reclassified as "Public".

¹¹¹⁹ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011), 253-255.

of them do not have a mobile phone. The legal representatives visit their clients from time to time. However, when in the field, they must divide their attention between their multiple clients. They may not even find their clients at home when they arrive. One legal representative confirmed how difficult it is to keep in regular contact with the victims and give them information on the proceedings in which they participate. Months pass by without any contact.¹¹²⁰ Thus, victim participation is rather fictitious. It does not bring the victims any closer to the courtroom. It only brings additional lawyers into the courtroom.¹¹²¹

Victim Participation in Practice

Investigations

During investigations, the participation of victims is limited. If the Prosecutor seeks to open an investigation *proprio motu*, he needs the authorisation of the Pre-Trial Chamber. In such a situation, pursuant to Article 15(3) of the Statute, the victims have a right to present their views and concerns to the Pre-Trial Chamber. Also, if the Prosecutor decides in the interests of justice not to initiate an investigation which was referred to him by a State or the Security Council, he needs the Pre-Trial Chamber's authorisation for that decision. In reviewing the Prosecutor's decision not to investigate, the Pre-Trial Chamber must take the concerns of the victims into consideration.¹¹²² However, victims cannot initiate investigations.

Until now, all attempts to broaden the investigations in respect to particular individuals have been rejected. For instance, in the cases of *Lubanga* and *Bemba*, various attempts have been made by victims and NGOs to be heard on the scope of the charges. In the case of *Lubanga*, their purpose was that investigations be broadened to include sexual offences. In *Bemba*, it was to include crimes committed in DRC. These requests were initially rejected because the Prosecutor's investigations were still ongoing.¹¹²³ In *Bemba*, no further attempts have been made in this regard.

¹¹²⁰ Personal interview with Gillisen, legal representative in Katanga trial who confessed that he was unsure who he was still representing as many had disappeared (interview in Bunia in the course of judicial site visit, 19 January 2012).

¹¹²¹ This was also pointed out by Judge Van Der Wijngaert: C. Van Der Wijngaert, lecture on victim participation, *supra* note 539.

¹¹²² Article 53(3)(b) of the ICC Statute.

¹¹²³ Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence,

In *Lubanga*, once the case was confined to the allegation of enlistment, conscription and active use of child soldiers, any request to add additional allegations was considered to have no link with the case itself.¹¹²⁴

Towards the end of the prosecution's case, victim representatives made another attempt to add charges on the basis of the evidence that had been presented. They submitted a request to the judges to consider a legal re-characterisation of the facts as sexual slavery, and inhuman and / or cruel treatment involving rape,¹¹²⁵ which, had it been accepted, would have significantly altered and broadened the scope of the charges against him.

The initial decision was favourable. In the particular context of the case at hand, the majority of the Trial Chamber was persuaded by the submissions of the victim representatives and the evidence heard so far during the course of the trial that the evidence presented may allow for a modification of the legal characterization and put the parties on notice that the legal characterisation of facts may be subject to change.¹¹²⁶ There was a strong dissent, given that the proposed modifications would involve additional, and arguably more serious, offences, which in the dissenting view is in violation of the Rome Statute and the Regulation it was based on.¹¹²⁷ Meanwhile,

ICC-01/04-373, 20-08-2007; Public Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on further Investigation", ICC-01/04-399 26-09-2007; Public Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582 26-10-2010.

¹¹²⁴ Public Decision on Request pursuant to Rule 103 (1) of the Statute, ICC-01/04-01/06-480, 26-09-2006; Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS 1 à VPRS 6 dans l'affaire Le Procureur c. Thomas Lubanga Dyilo ICC-01/04-01/06-172, 29-06-2006.

¹¹²⁵ *Prosecutor v. Lubanga*, Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, 22 May 2009, ICC-01/04-01/06-1891.

¹¹²⁶ *Prosecutor v. Lubanga*, Public - Urgent Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/06-2049, paras. 27-30, 33-35. The majority came to that conclusion by separating Regulation 55(1) limiting any modification to the legal characterization to those not exceeding the facts and circumstances described in the charges, from Regulation 55(2) which does not include any limitation save for those set out in Regulation 55(3) (allowing the Defence adequate time and prepare a defence against the modified charges and to bring back witnesses previously heard and/or call additional witnesses and/or present other additional evidence).

¹¹²⁷ *Prosecutor v. Lubanga*, Public Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 17 July 2009, ICC-01/04-01/06-2054, para. 44. The minority of the judges submits the view that Regulations 55(2) and (3) cannot be relied upon to

the decision has been overturned on appeal.¹¹²⁸ Thus, Mr. Lubanga is left with the charge of child soldiers.

The role of the victims during investigations is still evolving. However, until now, it has been severely restricted. In light of earlier observations on the Prosecutor's politicised selection of suspects, it would have served the ascertainment of the truth in a wider sense had the victims been given an opportunity to challenge the Prosecutor's choices. In addition, victims are principally affected by the Prosecutor's choices of suspects and charges. Indeed, they can only participate and seek reparation if the Prosecutor decides to charge the particular crimes of which they are victims.

Trial

At trial, victim participants may, with leave of the Court, ask questions of witnesses to ascertain the truth and where the personal interests of the victims are concerned.¹¹²⁹ The right to ask questions to witnesses is not limited to reparation issues but extends to questions pertaining to the guilt or innocence of the accused.¹¹³⁰ In addition, they may call their own witnesses.

circumvent the stricter requirements under Regulation 55(1) limiting re-characterisation of facts to those not exceeding the charges. Pursuant to Article 61(9) of the Rome Statute, the charges can no longer be amended once the trial has begun to provide an accused 'with a high degree of certainty as to charges that he or she will face once the trial has commenced', and Regulation 55 has to be read in that light (paras. 15-17). If it were allowed for modifications to exceed the facts and circumstances described in the charges, such modifications would amount to amendments of the charges in violation of Article 61(9) and, in the view of the minority, "would markedly undermine the rights of the accused under Article 67(1)(a) "[t]o be informed promptly and in detail of the nature, cause and content of the charge [...]", set against the general restrictions on changes to the charges as reflected in governing provision, Article 61(9)". The facts of a criminal case frequently - in reality, invariably - change and develop as the trial unfolds, and under the approach preferred by the majority, the accused could be confronted, at any stage, with a re-characterization based on the new facts and circumstances that have emerged during the trial. Even allowing for the safeguards under sub-regulations 2 and 3, this would be inimical to the statutory provisions just set out, which strongly tend towards finality and certainty as regards the charges, rather than to flexibility, particularly if this leads to a significant change" (para. 28).

¹¹²⁸ *Prosecutor v. Lubanga*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205.

¹¹²⁹ *Lubanga Decision on Victim's Participation* (n 1036 above), paras. 108-109.

¹¹³⁰ *Ibid.*, paras. 119-120; see also: *Lubanga Appeals Chamber Decision on Victim's Participation* (n 1036 above), para. 102. Appeals Chamber Judges Pikis and Kirsch submitted strong dissenting opinions to this ruling. See further H. Friman, *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?* 22 *Leiden Journal of International Law* 485 (2009), 493.

Thus victim participants have a potentially powerful role as a third party in conducting investigations and presenting evidence to the Court. The Appeals Chamber has addressed the distinction between parties and participants in ICC proceedings, emphasising that victims have the latter status with much more limited rights and obligations. However, as Friman has pointed out, “[t]he determination that victims may lead and challenge evidence pertaining to guilt or innocence at trial pushes the role of the ‘participant’ very far, indeed so far that it is difficult to avoid the notion of their in fact being ‘parties’”.¹¹³¹

The active participation of independent victims may assist the truth-ascertaining process. They may present evidence to the Court that the parties do not have in their possession or prefer to ignore for tactical reasons. In the case against Ngudjolo and Katanga a victim representative informed the Court of his intention to demonstrate that the responsibility which the Prosecution attributed solely to the two defendants extended to many others, including the political leaders of their own and neighbouring States.¹¹³²

If the trend is for victims to seek to depict the fuller picture surrounding the crimes charged, going beyond the determination of the guilt or innocence of the accused, but not interfering with that determination then the ICC can be truly said to be a Court where the ascertainment of the truth is being given its proper significance. However, if the victim participants effectively act as additional prosecutors, whose primary interest lies in securing a conviction skewed in their own interest then the fairness, and efficiency of the proceedings will have been severely impaired for little gain.

It is to be expected that, in most cases, the victims will be hostile to the accused. It will be in their direct interest to act like semi-prosecutors and produce evidence or ask questions demonstrating that guilt. A particular difficulty will arise where it is the case that the accused is an alleged indirect rather than direct perpetrator. The victims

¹¹³¹ H. Friman, *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?* 22 *Leiden Journal of International Law* 485 (2009), 500.

¹¹³² *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-38-ENG ET, Confirmation of Charges Hearing - Open Session, Opening Statement by Mr. Diakiese, pages 56-62. Also see S. Maupas, *La Chronique d'Amnesty International Mai 2010, Premier check-up pour la Cour pénale internationale*, noting Gillison's opening statement in the case of *Katanga and Ngudjolo* where he made similar submissions.

may not even know who is responsible for their suffering, but will have been told by others that it was the accused. Their submissions and questions, inevitably hostile to the interests of the accused, will be unlikely to bear upon the real issues to be decided by the bench and may simply muddle and lengthen proceedings. In addition, their submissions prolong the proceedings and place a heavy additional workload on the Chamber and the defence. If the defence is not allocated sufficient additional funds to deal with this workload, the equality of arms will be further distorted.¹¹³³

The first cases before the ICC are instructive as to the roles played by victim representatives, who may often represent hundreds of victims, with the difficulties that this brings with it. They have tended to ask questions seeking to implicate the accused, and to take the side of the Prosecutor in each legal argument. In the case of *Katanga and Ngudjolo*, a victim representative suggested to a witness who had not yet implicated the group allegedly led by one of the accused in the abduction of women and children that that group had in fact been involved. In response to an objection from the defence, the victim representative said: “I do understand that this is rather embarrassing for the Defence. I can put myself in their shoes, but I think truth is worth the price, regardless of how embarrassing it may be.”¹¹³⁴

The interventions of the victim representatives in *Katanga & Ngudjolo* have still been rather limited. Frequently the Chamber has reminded them of their neutral role and that they are not Prosecutors *bis*.¹¹³⁵ On the other hand, the Chambers in the *Lubanga*, *Bemba* and *Kenya* cases allowed far reaching interventions going directly to the guilt of the defendant. In *Lubanga*, for instance, victim representatives were allowed to ask questions about Lubanga’s link to the financial support to the UPC in order to help establish his role in the UPC leadership structure.¹¹³⁶ In *Kenya*, the legal

¹¹³³ C. Safferling, *The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?*, *supra* note 61, at 211; G.S. Gordon, “Toward an International Criminal Procedure: Due Process Aspiration and Limitations” 45 *Columbia Journal for Transnational Law* (2007) 635, at 699 – may dilute basic structural due process protections of ICC defendants; C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, 11.

¹¹³⁴ *Prosecutor v. Katanga & Ngudjolo*, hearing of 27 May 2010, ICC-01/04-01/07-T-148, pp 8-9, lines 23-25.

¹¹³⁵ *Prosecutor v. Katanga & Ngudjolo*, hearing of 12 July 2010, page 15; 14 May 2010, 28-34; 23 June 2010, 20.

¹¹³⁶ *Prosecutor v. Lubanga*, T. 12 Feb 2009, 73; 02 July 2009, 2. See also: 9 July 2009, pages 24-25 where the judges allowed questions about specific contact between the witness and the accused, as well as his knowledge of the use of child soldiers. In *Bemba*, questions to clarify facts or elicit additional

representative was allowed to read out personal emails she received from her clients alleging threats and intimidation from the suspects. This was part of her closing submission at the confirmation. Thus, the defence did not even have an opportunity to respond to these new allegations based on anonymous hearsay. The defence objected a number of times until the judge firmly stated: 'Interruption will not be granted.'¹¹³⁷

These examples demonstrate that victim participants are not neutral. They have a direct monetary interest in establishing that the accused has committed crimes charged of which the victim participants are directly or indirectly a victim. The court, while making appropriate acknowledgment of the severe suffering endured by some of the victim participants and many other victims, must not place undue emphasis on it when deciding whether it is sure that the accused is guilty as charged.

Another problem for the accused is that victim participants do not have the same disclosure obligations as the Prosecutor. The Appeals Chamber has held that '[i]f the Trial Chamber decides that the evidence [from victims] should be presented then it could rule on the modalities for the proper disclosure of such evidence before allowing it to be adduced'¹¹³⁸ Thus, it is for the Chamber to determine on an *ad hoc* basis the extent of disclosure obligations on victim participants.

Unlike the Prosecutor, victim representatives do not need to disclose the evidence before the start of the trial, but at a later point to be determined on a case-to-case basis by the Chamber. This will put the accused under time pressure in terms of seeking cross-examination material and rebuttal evidence. Victim representatives have no obligation to disclose exonerating evidence,¹¹³⁹ and may fail to do so for dubious tactical reasons, potentially depriving the Chamber of relevant information and the accused of a fair trial.¹¹⁴⁰

facts are allowed. They can include direct allegations against the accused (*Bemba* ICC-01/05-01/08-807-Corr, 12 July 2010, paras 38-40).

¹¹³⁷ ICC-01/09-01/11-T-12-ENG, 08-09-2011, 15-34 (quote at page 25).

¹¹³⁸ Lubanga Appeals Chamber Decision on Victim's Participation (n 1036 above), para. 100.

¹¹³⁹ This was confirmed recently by the Appeals Chamber in the case against Mr. Katanga and Ngudjolo: Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial" ICC-01/04-01/07-2288, 16 July 2010, para. 71.

¹¹⁴⁰ In the Katanga trial, one of the legal representatives had exonerating information which he declined to provide to the defence. Family members of a Prosecution witness who was simultaneously a victim

What can Victims Expect at the End of the Day?

Victim participation may raise unrealistic hopes both as to the righting of individual wrongs and as to the issue of compensation since no price is high enough to remedy the injuries suffered. It is also unclear how victim participants will be remedied. Given their increasing number, whatever they will receive in compensation will probably be below expectations. This may then result in “tertiary victimisation” as Judge Van Der Wijngaert calls it.¹¹⁴¹

Whatever may be its merits in principle, victim participation is one of the greatest challenges for the ICC and potentially delays and complicates already lengthy and complex trials. The ICC is still in the process of sorting out the modalities of victim participation in a manner consistent with its truth-ascertaining mandate and principles of due process.

The proposed budget for 2012 for victim-related issues exceeds seven million Euros.¹¹⁴² This stands in stark contrast to the envisaged budget reductions for defence related issues. While the budget for victims and witnesses increases each year, the defence budget decreases this year by 15 percent. Drastic measures are being proposed including significant cuts of salaries and investigation budget. Thus, victim participation clearly undermines the position of the defence. On balance, it is debatable whether this sharp focus on victims is worth the price.

Victims as Witnesses

Victims can play a role as witnesses in the trials held in international courts and tribunals. This is a very crucial role. Trials cannot be held without victim witnesses who give testimony about their victimisation. However, empirical researchers suggest that many victims at the ICTY were disappointed with the experience of testifying. They found the court testimony stressful and felt let down and humiliated by defence

had informed the legal representative that, contrary to his claim in court, he was not at Bogoro when it was attacked. The representative gave this information to the Prosecutor who subsequently investigated it. This eventually led to the withdrawal of one Prosecution witness who was simultaneously a victim. See: Public Decision on the Prosecution's renunciation of the testimony of witness P-159, ICC-01/04-01/07-2731, 24-02-2011.

¹¹⁴¹ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, 14-15.

¹¹⁴² *Ibid*, pages 4, 14-15.

counsel. They also complained because they received no information about the case after their testimony. Accordingly, Stover concludes that testimony invokes “intrusive post-traumatic symptoms in victims of war crimes”.¹¹⁴³ ICTR victim witnesses have made similar complaints.¹¹⁴⁴

If victim witnesses perceive the experience of testifying as a traumatising event, other victim witnesses may be put off from testifying. This would have a consequent negative impact on the availability of evidence and on the ascertainment of the truth. This may also be unfortunate for the purpose of reconciliation, which some observers consider to be served by giving victims an opportunity to tell their story about what happened to them.¹¹⁴⁵

The veracity and causes of these complaints, as well as potential improvements, will be addressed below.

Treatment of Witnesses Outside the Courtroom

Victim witnesses are treated similarly to other witnesses. Sometimes, witnesses who are not qualified as victims equally express dissatisfaction with the experience of testifying. Witnesses have to come from far to an unfamiliar court whose language they barely speak or not at all. Many of them have never in their entire life left their region or been on a plane. They are also unsure what is to be expected from them. It is thus not surprising that witnesses feel uncomfortable about testifying.¹¹⁴⁶

A Victim and Witness Unit (“VWU”) is in charge of organising the visas, journey, accommodation and food.¹¹⁴⁷ If requested, the VWU sends an escort to accompany

¹¹⁴³ E. Stover *The Witness: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005), 81; see also Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 281-283.

¹¹⁴⁴ See for instance the submissions of Florida MS. Mukeshimana at Geneva Conference, *supra* note 173, speaking about her traumatising experience as a witness before the ICTR. Ms. Conde, defence counsel explained to her that this is the function of the Court.

¹¹⁴⁵ See the submissions of Xavier Nsanzuwera at the Geneva Conference, *supra* note 173. See also Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59. However, as aforementioned above (Part I), trials cannot be considered as therapeutic centres.

¹¹⁴⁶ See also D. Chuter, *War Crimes, Confronting Atrocity in the Modern World*, (Lynne Rienner Publishers Inc, Ministry of Defence, Colorado 2003), 205-206.

¹¹⁴⁷ In the ICTY, this unit is called the Victim and Witness Section (“VWS”). In the ICTR, it is called Witness and Victims Support Section (“WVSS”).

the witness. They arrange for pocket money, accommodation and food. In the ICC, the witnesses are also provided with a suit to wear in court, as well as comfortable winter clothes, if required. Urgent medical or dental problems can also be sorted out while witnesses are present at the seat of the Court. The VWU can further accommodate additional individual demands, provided they are reasonable and connected with the witnesses' testimonies.¹¹⁴⁸ Dependent on their availability, VWU staff members regularly take witnesses out for day-tours to cities or the beach during weekends or other breaks during their testimonies.

Women with babies can come accompanied by an accompanying person who will look after the babies during the course of the women's testimonies. Vulnerable witnesses can also be accompanied. Alternatively, a contact person from the VWU will pay particular attention to such witnesses and be available at any time they are in need. Psychological assistance is also available.¹¹⁴⁹

Upon request, witnesses who face a potential risk of self-incrimination may receive a guarantee that they will not be prosecuted for what they say in court, apart from perjury. The protection against self-incrimination offered at the ICC is more elaborate than at the ICTY and ICTR.¹¹⁵⁰ The ICC legal provisions explicitly allow witnesses to give incriminating parts of their testimony in closed session. In addition, they are entitled to counsel.¹¹⁵¹

The period of absence can be long. Many witnesses spend several weeks at the seat of the Court even if the testimony itself is shorter. The period is particularly long at the ICC. The VWU at the ICC has created a lengthy familiarisation program to prepare witnesses for their testimony. This program starts a few days prior to the witness's

¹¹⁴⁸ Personal experience with the VWU in ICTR, ICTY and ICC.

¹¹⁴⁹ Personal experience in ICC with regard to a female defence witness with two very young children who was accompanied by a family member from the DRC to The Hague. Another witness was offered psychological assistance after the sudden and tragic death of a close family member.

¹¹⁵⁰ The ICTY and ICTR Rules do not refer to a guarantee as such, but state as follows (Rule 90(E)): "A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony."

¹¹⁵¹ Article 93(2) ICC Statute; Rule 74 ICC Rules. See, for instance: Version publique expurgée de « Ordonnance relative à la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit de témoins de la Défense de Germain Katanga » (ICC-01/04-01/07-2748-Conf) ICC-01/04-01/07-2748-Red, 3 May 2011.

testimony, and ends a number of days after his testimony. In the course of his familiarisation program, the parties and participants have an opportunity to greet the witness. The witness is further shown the courtroom and explained who sits where and the order in which the parties and participants will ask him questions.¹¹⁵²

The length of absence often causes difficulties to witnesses with jobs. Employers do not always act reasonably when a witness requests for leave of absence for a month or longer. This is particularly problematic if the employer is not informed of the real reason for the witness's departure, which is the case when a witness testifies anonymously. The VWU can act as an intermediary and, for instance, write a letter to the employer, or assist the witness in inventing a credible story to explain his absence. The VWU reimburses witnesses for any lost income.¹¹⁵³ In addition, if a witness is a student when he is called to testify, the VWU is prepared to assist him financially in re-taking any missed courses.

There is no specific program to inform each individual witness of the continuation and outcome of the case in which they testified. There is, however, a very extensive outreach program at the ICTY, ICTR and ICC. The purpose of this program is to reach out to the affected communities and keep them informed about the developments at the international tribunals and court. Thus, witnesses are not forgotten after the completion of their testimony. They are clearly more than mere instruments of the international tribunals and court, as Judge Jorda put it.¹¹⁵⁴

Accordingly, witnesses for the Prosecution, defence and victim representatives are treated very well. This is particularly the case at the ICC, which is characterised by its "victim-friendliness".¹¹⁵⁵ However, even at the ICTY and ICTR, the VWU is extremely helpful and generous to witnesses. In general, witnesses are satisfied with

¹¹⁵² Personal experience in the ICC *Katanga* trial.

¹¹⁵³ The VWU has assisted a number of defence witnesses in their interactions with their employers. Where necessary, the VWU wrote official invitations stressing the importance of their testimonies. Consequently, employers authorised the witnesses leave of absence without great difficulty.

¹¹⁵⁴ C. Jorda & J. de Hemptinne, *The Status and Role of the Victim, in the Rome Statute of the International Criminal Court: A Commentary*, in Cassese et al (2002), 1387, 1388.

¹¹⁵⁵ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539.

their treatment at the tribunals and court.¹¹⁵⁶ This undermines the viewpoint that the ICTY and ICTR are not sufficiently victim-centred.¹¹⁵⁷

However, despite the best efforts on the part of the VWU, some witnesses still complain. Sometimes, the logistical arrangements are not implemented as smoothly as intended.¹¹⁵⁸ On other occasions, witnesses demand more money for lost income or other issues. Witnesses from poor countries with very sparse resources do not always realise that the international courts and tribunals have budgetary limits. They can be under the erroneous belief that testifying is a financially profitable business. These witnesses undoubtedly find themselves disappointed.¹¹⁵⁹

There is also a genuine belief shared by many defence witnesses in the DRC that they are not treated equally to prosecution witnesses. This belief is based mainly on the fact that many prosecution witnesses are relocated and funded for housing and education. Relocated witnesses, however, fall in a different category from other witnesses. There is no reason to believe that defence witnesses receive a differential treatment from non-relocated prosecution or victim witnesses. All witnesses are in the very gentle and capable hands of the VWU.

However, such a system comes at an extremely high price at the expense of other important issues, such as the investigation budget of the parties. The financial side of the witness program will be discussed below.

Prohibition of Contact with the Parties

The prohibition of contact at the ICC and its adverse impact on the defence ability to adequately investigate has already been discussed. This prohibition also has consequences for the well being of witnesses while in The Hague. Witnesses

¹¹⁵⁶ Personal interviews with witnesses from ICTY, ICTR and ICC after completion of their testimonies.

¹¹⁵⁷ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 297.

¹¹⁵⁸ Things have gone particularly wrong with airport arrangements and visa. A number of witnesses have been kept by customs or had to pay airport tax although they were penniless. It has also occurred that witnesses had been left entirely deserted for weeks without proper information while waiting in a hotel in Kinshasa, a big city they had never been before, for their visa.

¹¹⁵⁹ Personal experience of the author; confirmed by the experience of colleagues from the defence, prosecution and victims.

generally build up a relationship of confidence with members of the party they have been in contact with in their home country. Such relationships cannot easily be replaced by the VWU. In light of the cultural differences, it can take some time for witnesses to confide in a person. It can therefore be discomfoting for witnesses to have no contact at all with the person they trust while in a foreign country. Often they do not know anyone there.

Many of them have never left their area and have never been on a plane before. This can be either exciting, or frightening, or both at the same time. In the ICTY and ICTR, a party can welcome its witnesses at the airport or meet them at their hotels. It can have both casual and professional contact with them before and after their testimony, which generally reassures witnesses to the extent necessary. In the ICC, on the other hand, they are exclusively under charge of the VWU. The parties only have the right to greet them during a courtesy meeting lasting ten minutes when they arrive and five minutes after their testimony to say thank you.

Some witnesses find this really difficult, even if the VWU treats them very well.¹¹⁶⁰ The prohibition of contact extends to the presentation of all evidence in the case.¹¹⁶¹ Thus, even after their departure from The Hague, the parties cannot be in contact with the witnesses until the very end of the trial. This can be particularly unnatural for local investigators who live in the same area and who are used to having frequent contact with the witnesses up until their departure.¹¹⁶²

To avoid that parties willingly or unwillingly influence the witnesses' testimonies, it may be considered necessary to disallow contact between them prior to these testimonies. Elsewhere, it has, however, been argued that appropriate and succinct contact should be allowed prior to the familiarisation program, and where necessary,

¹¹⁶⁰ Interviews with DRC defence witnesses after their testimonies.

¹¹⁶¹ Public Version publique expurgée de la Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250 (ICC-01/04-01/07-2711-Conf, 18 février 2011), ICC-01/04-01/07-2711-Red, 10 mars 2011.

¹¹⁶² For instance, the investigator in the *Katanga* case resides in Bunia, the main town in Ituri, the eastern part of DRC. He lives in the close proximity of many defence witnesses and regularly meets them accidentally in the streets. His obligation not to engage in any conversation with them when that happens can be misunderstood and considered rude. This is all the more problematic given that he is from the enemy tribe. It has taken him significant time and effort to build up relations with the community of the accused, which was necessary to conduct investigations.

to take an additional statement from the witness.¹¹⁶³ Not everyone agrees with that proposition.¹¹⁶⁴ Nevertheless, there are no compelling reasons to prohibit contact after the completion of the witnesses' testimonies. It would be too late for a witness to change his testimony even in the event that a party makes it apparent that parts of the testimony were not helpful. If the concern is that the party passes on a message for another witness, the party can simply contact the other witness directly. In theory, a witness can be recalled to clarify an issue that came up after his testimony. However, in practice this rarely happens.¹¹⁶⁵ This is, therefore, arguably an insufficient ground to prohibit all contact. In a party-system, the judges have no choice but to trust that the parties conduct themselves ethically. Indeed, unless proven otherwise, the good faith of the parties is assumed.¹¹⁶⁶

The prohibition of contact also extends to the accused. In the ICTY and ICTR, witnesses have the right to visit the accused in prison after the completion of their testimonies. The defence in *Katanga & Ngudjolo* asked that all defence witnesses be permitted to meet with the accused in prison after their testimony.¹¹⁶⁷ The Prosecution and victim representatives objected on the ground that the Chamber had already ruled that contact between the parties and the witnesses was prohibited until the end of the presentation of all evidence. Such contact was allowed on an exceptional basis only.¹¹⁶⁸ The Prosecution submitted that, were the Chamber to allow such meetings to

¹¹⁶³ See further 'Investigations'.

¹¹⁶⁴ For instance, Andreas O'Shea, associate defence counsel in the *Katanga* case, as well as the defence counsel in Lubanga have informed the author that they are against such contact.

¹¹⁶⁵ This has nonetheless already occurred in the *Katanga & Ngudjolo* case where Prosecution witness 323 was called back because he had referred to a person with the same name as another witness in the case as a member of the UPC. The witness in question, however, had informed the court that he was a civilian. Therefore, the Chamber was of the view that "in order to establish the truth, it needs to be furnished with more evidence on the identification of the UPC soldier in question pursuant to Articles 64(6)(d) and 69(3) of the Statute. In the view of the Chamber, the most effective and efficient way to achieve this is to re-call Witness P-323, either in person or via video-link" (ICC-01/04-01/07-2325-Red, para. 23; ICC-01/04-01/07-T-185-Red-ENG, pages 1 – 5).

¹¹⁶⁶ *Prosecutor v. Tadic*, Judgment on allegations of contempt against prior counsel, Milan Vujin, January 31, 2000, paras 166-168.

¹¹⁶⁷ Defence Request for Defence Witnesses to Visit Germain Katanga in Prison after Completion of their Testimony (ICC-01/04-01/07-2773, 14 March 2011).

¹¹⁶⁸ ICC-01/04-01/07-2780, Réponse conjointe des représentants légaux à la requête de la Défense de G. Katanga intitulée "Defence Request for Defence Witnesses to Visit Germain Katanga in Prison after Completion of their Testimony", 18 mars 2011; ICC-01/04-01/07-2779, Réponse de l'Accusation à la Defence Request for Defence Witnesses to Visit Germain Katanga in Prison after Completion of their Testimony (ICC-01/04-01/07-2773, 14 mars 2011), 18 mars 2011.

take place, it should be brief and in the presence of someone from the Registry. Discussing the testimony or using unknown languages should not be permitted.¹¹⁶⁹

The Registry also submitted observations holding that such meetings should not be allowed. It held that this could be a motive for witnesses to testify, as frequently occurred in the ICTY and ICTR. It also said it would delay the witnesses' departure back to their home country and that the visit to prison could have a traumatising effect on the witnesses as they would have to go through the prison security. Instead, it suggested allowing the accused to greet the witnesses briefly in the Court immediately after their testimony.¹¹⁷⁰

Arguably, these are unconvincing grounds not to allow meetings between an accused and his witnesses. The defence cannot call an unlimited number of witnesses. It has to demonstrate their relevance; otherwise the Chamber may not authorise their appearance. Thus, it is extremely unlikely that anyone would be called on the sole basis that they can visit the accused. The traumatising effect of the prison security would surely be outweighed by the trauma of travelling thousands of miles to testify and not be able to meet with the accused. Since the accused is facing a potentially lengthy prison sentence, it could be the last opportunity to see him for a long time, or even for good. Some of them have close links with the accused. In the specific case of Katanga, the accused had not seen his family and friends since January 2005, when he left the eastern part of Congo for Kinshasa, thousands of miles away. Shortly after, he was arrested and remained in the Kinshasa central prison until his transfer to The Hague in October 2007.¹¹⁷¹ Nobody from his home area, including his family, could afford coming to visit him in Kinshasa or The Hague. Like any other prisoner, Mr. Katanga is entitled to receive visitors. To then not allow him to receive visits from the witnesses who he has not seen for years and have come all the way to testify in his

¹¹⁶⁹ ICC-01/04-01/07-2779, para. 6.

¹¹⁷⁰ ICC-01/04-01/07-2784-Red, Observations du Greffe s'agissant de la "Defence Request for Defence Witnesses to visit Germain Katanga in Prison after Completion of their Testimony (ICC-01/04-01/07-2773)", 18 mars 2011.

¹¹⁷¹ ICC-01/04-01/07-T-39-ENG, David Hooper's statement page 14: «*He's been in prison now since February of 2005. Three and a half years already.*» See also ICC-01/04-01/07-717, para. 42 page 17: «*On 17 October 2007, Germain Katanga was surrendered by the Congolese authorities and transferred to the seat of the Court in The Hague*».

defence, is rather inhuman. Such visits can be subject to monitoring and do therefore not raise difficulties for the Court.

The Chamber nonetheless rejected the request and reiterated that it would authorise contact on an exceptional basis only. It authorised a monitored meeting between the accused and his brother for half an hour immediately after his testimony.¹¹⁷² All other witnesses were allowed a five-minute monitored meeting in a little cell behind the courtroom. Further requests for longer meetings with close allies were rejected.¹¹⁷³

The prohibition of contact has become a serious problem when three detained witnesses sought asylum and were thus not sent back to DRC immediately after their testimony as anticipated.¹¹⁷⁴ They were detained in the same prison as the accused, but were not allowed to speak to him until all evidence had been presented. This has led to great logistical difficulties. They could not simultaneously take fresh air, participate in sport activities or use the common facilities such as the kitchen and dining room. If the witnesses were outside of their cell, the accused had to stay in his cell, and *vice versa*. As a result, both the witnesses and the accused were locked up in their cell for a significantly longer period than prisoners normally are. This situation lasted for over five months. It was particularly difficult in the summer break when the accused did not leave the prison to attend trial. For five consecutive weeks, both accused were locked up for twenty hours a day.¹¹⁷⁵

¹¹⁷² ICC-01/04-01/07-T-238-ENG ET WT 23-03-2011 pages 1-7.

¹¹⁷³ See *Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony*, ICC-01/04-01/07-2709-Red 17-02-2011, and *Décision sur la requête de la Défense de Germain Katanga aux fins d'être autorisée à rencontrer des témoins à La Haye (article 64-6-f du Statut)*, ICC-01/04-01/07-2755 23-03-2011 (pursuant to Trial Chamber II's instruction, dated 22-03-2011, this document was reclassified as "Public").

¹¹⁷⁴ See further section 'protective measures'.

¹¹⁷⁵ See oral submissions from Lead Counsel for Germain Katanga, ICC-01/04-01/07-T-291-Red-ENG CT WT 15-08-2011, pages 52-55: "... *What has happened is that they've been subject to a regime where they have been let out of their cells between the hours of 1300 and 1700; that is a period of four hours a day. For all the rest of the time, Germain Katanga, and I think I must therefore include also Mathieu Ngudjolo, have spent in their locked cell with no opportunity of leaving it. They have been let out just four hours a day; less on weekends. They, therefore, have been locked in their cells for 20 consecutive hours, and these are cells that have no opening window at all. So, normally, with a week of 168 hours in it, 71-and-a-half hours, under a normal regime, would allow these men to spend those hours, 71-and-a-half hours, outside their cell. At present, they've been reduced to 27.5 hours. That is a loss of 44 hours a week. That means that out of 168 hours in a week, 141 hours would have been spent in a locked cell. Bizarrely, the Kinshasa detainees, as opposed to the 27.5 hours spent outside the cell by the two accused, they have the opportunity of 44.5 hours outside the cell. So, really, the burden of accommodating the Kinshasa detainees has fallen full and square on the shoulders of the two accused.* ..."

Counsel for the detained witnesses, as well as the defence for Katanga have made multiple requests to the Chamber that the witnesses and accused be allowed contact in this exceptional situation; or that an alternative solution be found.¹¹⁷⁶

The Prosecution and victim representatives objected because they said there was a possibility that the witnesses would be called back.¹¹⁷⁷ They had given lengthy testimonies, so there was no apparent reason for them to be called back. Indeed, in reality, there were not called back. The Chamber declined to review its decision that contact was prohibited. Instead, it ordered the Registry to make all efforts to allow the witnesses and accused sufficient time out of their cell, even if it required the employment of more security guards.¹¹⁷⁸ The Registry, however, informed the Chamber that the logistical arrangements in the prison did not allow for a more humane solution.¹¹⁷⁹

¹¹⁷⁶ ICC-01/04-01/07-2988 14-06-2011, *Defence Observations on the Conditions of Detention of Three Detained Witnesses*, 7 June 2011 (pursuant to Trial Chamber II's Oral Decision, dated 14 June 2011, this document was reclassified as "PUBLIC"); ICC-01/04-01/07-T-273-Red-ENG, 01-06-2011, page 39 and following. See also *ibid*.

¹¹⁷⁷ ICC-01/04-01/07-T-273-Red-ENG WT 01-06-2011, pages 46, 49.

¹¹⁷⁸ ICC-01/04-01/07-T-281-Red-ENG WT 14-06-2011, 4-7, in particular 6-7: “*Regarding the interest to act by the Katanga Defence, the Chamber considers that it is legitimate for the Defence to be concerned with the detention conditions of the witnesses that they called and that they are justified in asking for this lifting of restrictions. Now, regarding the merits of the issue itself, the Chamber would like to point out that the restriction measures were ordered in accordance with the jurisprudence relating to contacts between a witness and a party that called that witness, and this is to avoid any future challenge regarding the integrity of the proceedings. To this end, the Chamber is of the opinion that the implementation of the restrictions by the Registry means that it is necessary to avoid any contact between the two groups of detained persons given the objective sought, that is, to prevent the exchange of information. That said, the Chamber would like to point out that it is not necessary to take measures to lock the witnesses up just in order to prevent visual contact or to prevent the groups from meeting and from seeing each other in the detention centre. Furthermore, as already indicated, during a hearing of the 1st of June, 2011, the Chamber is sensitive to the humanitarian considerations raised. To that end, the Chamber intends to ensure that the detention of persons under the responsibility of the Court should take place under the best possible conditions, particularly in the instant case when this detention concerns a case of witnesses who have filed for asylum and which may lead to an extension of the stay of those witnesses in the detention centre of the Court. Under these exceptional conditions, the Court is of the opinion that the implementation of less restrictive measures authorising contacts with the co-detained persons of the two accused while the accused are in the hearings would be the most acceptable decision. The Chamber would like to ask Mr. Mabanga, who is the counsel of the detained witnesses, to remind the detained witnesses that they should not in any way whatever the circumstances discuss the case with the detained persons who, from now on, will be authorised to meet them. The Chamber, however, will not come back on its decision on the restrictions relating to direct contacts between the accused and the detained witnesses. The Chamber is of the opinion that the detention conditions described by the Registry do not involve total isolation and they had been initially announced and are not in any way and should not in any way be used as justification to order a waiver.*”

¹¹⁷⁹ ICC-01/04-01/07-2983-Conf-Red, Version confidentielle expurgée du Rapport du Greffe sur les

Thus, the prohibition of contact has done more damage than good and should arguably be reviewed. It has contributed to the discomfort of witnesses and has served little purpose.

In addition, there is no good reason to treat victims differently from other witnesses. If the well being of victims is important to international justice, then the well being of non-victim witnesses should be considered equally important. Testifying can be traumatising for all witnesses, including victims, insider witnesses and any other defence or prosecution witnesses. Doak rightly observed that international courts and tribunals “can only function with the full assistance of victims”.¹¹⁸⁰ However, they equally need the full assistance of insider and other witnesses. Therefore, Doak’s suggestion that this need for victim witnesses creates obligations towards them should be extended to all witnesses.¹¹⁸¹ The needs of each witness should be looked at individually, rather than categorically. This has been the approach of the VWU at the ICTY, ICTR and ICC and has generally worked well.

Testimony

It is the testimony itself, more than the treatment outside the courtroom that causes witnesses to complain. Both educated and uneducated witnesses find testifying a difficult and exhausting exercise.¹¹⁸² The bulk of testimonies last at least a few days each counting four to five hours. Some may even take a few weeks. The testimony is frequently interrupted by objections from the parties. Most of the objections pertain to the suggestive nature or irrelevance of a question posed. Procedural discussions can take days sometimes.¹¹⁸³

conditions de détention actuelles des trois témoins détenus, 6 June 2011. Pursuant to Trial Chamber II's Oral Decision, dated 14 June 2011, this document is reclassified as "PUBLIC"; Rapport du Greffier sur les conditions de détention des témoins détenus depuis le 14 juin 2011 ICC-01/04-01/07-3058, 05-07-2011.

¹¹⁸⁰ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 291.

¹¹⁸¹ *Ibid*, 291.

¹¹⁸² After completion of their testimonies, defence witnesses have informed the author of the difficulties they encountered in the course of their testimonies.

¹¹⁸³ For instance, in Military I the testimony of Allison Des Forges lasted two months (Sept and Oct 2002). Many days, however, were devoted to procedural matters only without even calling in the witness to continue her testimony.

Witnesses have to answer questions from both parties as well as the judges. In the ICC, they also have to answer questions from the victim representatives. These questions tend to be challenging, as they seek to undermine the credibility of the witnesses. The witnesses are well aware that their credibility is not taken for granted and often feel trapped by questions from the other side. This can be unpleasant and stressful.¹¹⁸⁴

It can also be frustrating for witnesses that they cannot tell their story uninterruptedly in their own style. The lawyers, rather than the witnesses are the storytellers. Lawyers lead them through the evidence and elicit only those elements helpful to their case. Witnesses have to give succinct answers to precise questions asked. Consequently, their accounts are often suppressed, distorted or taken out of context.¹¹⁸⁵ According to Doak, this manner of presenting the evidence leads victims to feel let down. It also has anti-therapeutic effects.¹¹⁸⁶

Accordingly, scholars have suggested that testimony in an adversarial setting leads to second victimisation. In their view, subjecting victims to cross-examination at all dehumanises them and makes them re-live their trauma.¹¹⁸⁷ An adversarial system is confrontational and hostile to the witness even if efforts are made to control the questioning.¹¹⁸⁸

Some observers opine that this is even more the case in international trials than in common law adversarial trials. Particularly victims of rape are said to suffer from a second victimisation in the courtroom. Doak, for instance, states that rape victims often have to answer questions from defence counsel that are extremely aggressive

¹¹⁸⁴ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59; N. Combs, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010); E. Stover *The Witness: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005).

¹¹⁸⁵ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 271-274; E. Stover *The Witness: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) (above).

¹¹⁸⁶ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 273-274.

¹¹⁸⁷ M. Dembour & E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 *European Journal of International Law* 151 (2004); R. Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here*, 13 *European Journal of International Law* 697 (2002).

¹¹⁸⁸ DeLaet, *Gender Justice*, *supra* note 59, at 165.

and humiliating in an attempt to destroy their credibility.¹¹⁸⁹ In reaching this conclusion, he relies on empirical researchers including Amanda Beltz who have personally observed some of the international trials. Beltz witnessed a trial where a woman testified that she was not selected to be raped, while other women with her were. Defence counsel then asked her whether she was jealous of the women who were chosen to be raped.¹¹⁹⁰

On the basis of this example, Doak concludes:¹¹⁹¹

Although this type of questioning is now widely frowned upon and is restricted in many common law jurisdictions, victims of rape can still expect a raw deal in the type of questioning they might experience at international courts. Rules prohibiting use of previous sexual history evidence have been bypassed on occasions at both the ICTY and SCSL severely damaging any prospect of emotional repair. We can only hope that the ICC adopts a more robust approach to the exclusion of such evidence.

It is questionable how Doak reaches this conclusion on the basis of such limited empirical research conducted by others than himself. The given example indisputably constitutes an unacceptable and irrelevant question. Such a question does not serve any purpose other than humiliating the witness. For a competent counsel, it should not be necessary to humiliate a witness to such an extent in order to undermine her credibility. Strategically, this is very unwise. By humiliating a traumatised victim, the defence loses the sympathy of the judges and audience, and the victim's credibility is boosted rather than undermined.¹¹⁹² Thus, defence counsel rarely choose such a strategy. In many cases, the defence does not even challenge the victimhood of a witness.¹¹⁹³

¹¹⁸⁹ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 283-284. See also M. Dembour & E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 *European Journal of International Law* 151 (2004); R. Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here*, 13 *European Journal of International Law* 697 (2002), 705.

¹¹⁹⁰ A. Beltz, *Persecuting rape in international criminal tribunals: the need to balance victims' rights with the due process rights of the accused*, 23 *St. John's Journal of Legal Commentary* 167 (2008), cited by Doak, Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 284.

¹¹⁹¹ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 284.

¹¹⁹² Personal experience of the author; interviews with defence counsel: Ben Gumpert (August 2006); David Hooper Q.C. (Interview in The Hague, 3 June 2010), Peter Robinson (Interview in The Hague, 21 November 2009).

¹¹⁹³ See for instance, Defence Counsel for Katanga in respect of Witness P-0132, ICC-01/04-01/07-T-139-Red-ENG WT 11-05-2010, page 14:

“A. Some of them raped me.

Q. Before we continue on this aspect, I know that it is extremely difficult for you to talk about this to us today, but for us to be clear, when you say that you were raped --

Most of the accused at the ICTY and ICTR are not charged with direct participation in any of the alleged atrocities, but rather with indirect forms of liability such as ordering, instigating, planning, aiding and abetting, participating in a joint criminal enterprise or commanding. The link of the accused to any of the alleged crimes is more often in dispute than the actual commission of the crimes.¹¹⁹⁴ It is then not necessary to challenge crime-base evidence. It can even be more advantageous for an accused to accept the credibility of a victim witness and use him or her to confirm contested elements favourable to the accused.¹¹⁹⁵ Therefore, unless victims incriminate the accused directly,¹¹⁹⁶ they generally have a much easier time in cross-examination than insider witnesses whose evidence is mostly more vigorously contested.¹¹⁹⁷

It can be trickier when a victim is questioned by the accused himself. The advantage, however, is that the accused and accusers have an opportunity to confront each other directly. By some, a direct confrontation is preferred over a confrontation through lawyers.¹¹⁹⁸ For instance, one witness who was cross-examined by Slobodan Milosevic himself, seemed to appreciate the opportunity to direct his anger to the man

MR. HOOPER: (Previous translation continues) ... for my part, I'm sure for my colleagues as well, when this witness asserts "rape," we understand it to mean penile penetration per vagina, and that's not disputed.

THE WITNESS: (Interpretation) Yes, that is how it happened.

PRESIDING JUDGE COTTE: (Interpretation) Madam Witness, take some time to rest.

MR. GARCIA: (Interpretation) Mr. President, I think it would be necessary to suspend, given the state of the witness.

PRESIDING JUDGE COTTE: (Interpretation) Madam Witness, we are going to break for 15 minutes. We will resume at 10.00 a.m. This should give you time to recover.

¹¹⁹⁴ See, for instance, the opening observations of counsel for Katanga, ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009, page 51: "And all Ituri, all its inhabitants became victims. Nobody was left untouched. In this trial, we hear the voices mainly of Hema victims. And I don't detract from their miseries one iota, but it is, we must remember, a selective voice. And we will not hear from the mass of Ngiti victims, of which there were a great number. »

See also the opening observations of Mr. Musau, counsel for Ruto in Kenya I: ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011, p. 87: "The violence that broke out in Kenya had never been witnessed before. We think the devil must have made a short journey to the republic but not at the invitation of William Ruto."

¹¹⁹⁵ See for instance, cross-examination of Witness DRC-OTP-P-0166, where the defence sought to have the witness confirm elements favourable to the accused: ICC-01/04-01/07-T-225-Red-ENG CT WT 30-11-2010, ICC-01/04-01/07-T-226-Red-ENG WT 01-12-2010 and ICC-01/04-01/07-T-227-Red-ENG WT 02-12-2010.

¹¹⁹⁶ For instance: Witness DRC-V19-P-0002, ICC-01/04-01/07-T-231-Red-ENG WT 21-02-2011, p. 57; DRC-V19-P-0004, ICC-01/04-01/07-T-234-Red-ENG CT WT 24-02-2011, page 26.

¹¹⁹⁷ See for instance, ICC-01/04-01/07-T-221-Red-ENG WT 23-11-2010 WT 24-11-2010, Witness DRC-OTP-P-0028, page 6.

¹¹⁹⁸ Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59.

he held responsible for his victimisation.¹¹⁹⁹ Witnesses who were cross-examined by *Karadzic* spoke to him on equal foot and generally did not appear intimidated. This is apparent from the following dialogue between *Karadzic* and prosecution witness *Fatima Zaimovic*, who was the chief of the nursery department in a hospital in Sarajevo during the war:¹²⁰⁰

Q. All right. We'll come to that. But you didn't know, you say, that all the offensives that were launched in Sarajevo were launched by the BH Army. Is that what you said?

A. Yes, that's right. I didn't know.

Q. How is that possible when it was on television, the information was broadcast over television? The people were told what positions they had taken control of and where they broke through, and so on.

A. Mr. *Karadzic*, I was at the clinic. There was no electricity or water. The children were wounded. We didn't know where to turn first, we had so much work to do. We worked from morning to night. And when I went home, I was so tired and I didn't even have any food to cook for the children. My life during the war was very difficult, and I don't know about anything of the things you're asking me about, and I'm not interested in them. I have to be quite sincere there. You're asking me about military matters, something that you should ask military experts and not me. I have come here to testify about the difficulties that the children were facing, children who were wounded and who were killed, whose parents were crying, whose lives were disrupted and were targeted like pigeons in town. Of that's what I want to say. Do you have any conscience? Do you have a conscience, because you destroyed the Muslim children and the Croatian children and the Serbian children. That's what you did. You destroyed them all. That's what I've come here to talk about and not to speak about military strategy that I know nothing whatsoever about.

Q. Thank you, madam, but as soon as you say that somebody shot, you provide the basis for me to ask you why and how. As soon as you're saying that Breka was shelled, I had to put it to you that your son was a member of the 105th Brigade which numbered 6.000 men and that the whole place was teeming with soldiers, that there were more soldiers than the inhabitants of Breka.

A. Leave my son alone. That's not true and leave my son alone. I'm not talking about your children. I don't want us to talk about our children. We're discussing

¹¹⁹⁹ See the testimony of a survivor from Glogova in the ICTY case of *Milosevic*, T. 15 April 2003

B1701:

3 Q (*Milosevic*). Let us just try and clear up one thing. You say that those people
4 had socks over their heads.

5 A. Yes, socks.

6 Q. And you can't recognise them. And do you know that the JNA did
7 not wear socks on their heads?

8 A. They didn't, but I -- we lived as brothers in the old days when we
9 used to say, "Comrade *Milosevic*." Everything changed when you came to
10 power. You knew about everything. And don't ask me too many questions.

See also the cross-examination of protected witness VS 033, a former subordinate of *Seselj*, conducted by *Seselj* himself, T. 2 April 2008, (ICTY case of *Seselj*) at: <http://www.icty.org/x/cases/seselj/trans/en/080402ED.htm>.

¹²⁰⁰ T. 5 May 2010, page 1865 at: <http://www.icty.org/x/cases/karadzic/trans/en/100505ED.htm>. See also *Karadzic's* cross-examination of a witness to whom he put it that he did not believe his story. The witness answered as follows: "Karadzic, when you are saying that as if that is the truth, may you look at your own children dead. When you see them dead, the way mothers did when their children were killed, and this is going to be confirmed to you by a witness who found clothing by the grave" (T. 22 April 2010, page 1449 at: <http://www.icty.org/x/cases/karadzic/trans/en/100422ED.htm>).

something quite different here.

Q. Madam, I have every respect for your husband who was a friend of mine and your child, and it was his duty to --

JUDGE KWON: Mr. Karadzic. Mr. Karadzic.

THE ACCUSED: [Interpretation] Yes.

JUDGE KWON: Come to your questions. You haven't cross-examined yet the evidence which was given by this witness. Let's move on to your real topic, please.

In cases where an accused or his counsel go too far in asking embarrassing questions, judges will almost certainly intervene. Typically in international courts, the examination of witnesses is subject to greater control by the judges than in domestic common law proceedings. Questions that are considered to humiliate or embarrass the victim are generally not permitted.¹²⁰¹ Judges barely tolerate suggestions being put to witnesses that they are lying.¹²⁰²

Indeed, in the course of twelve years as participant in, and observer of international trials in the ICTY, ICTR, SCSL and ICC, this author has not observed a single line of questioning of a similar nature as the above example. On the contrary, judges are generally very courteous to witnesses and try to make them feel comfortable. They frequently ask witnesses on the stand about their well-being and willingness to proceed.¹²⁰³

¹²⁰¹ Personal observation from the author. See also ICTR Judge Khan's submissions at the Geneva Conference, *supra* note 173, explaining how much care her Chamber takes to make a witness feel comfortable. See also: ICC-01/04-01/07-T-270-Red-ENG CT WT 27-05-2011, female defence witness DRC-D02-P-0161 questioned by the Prosecution, page 23 : "JUDGE DIARRA: (Interpretation) Your Honour, I don't understand this. He asked were you demobilized. She said yes. He said you weren't a soldier. She said yes. And now she's asked if she was lying. Does she have to insult herself to continue this?"

¹²⁰² *Ibid.* See further, for instance, Judge Mose in Military I who routinely repeated to the parties that "people do not lie in this courtroom". See, for instance, T. 15 June 2004 pages 87-89. Although judges have the ability to prosecute witnesses who have lied under oath but are reluctant to do so, even if there is ample evidence to show this to be the case. For a critical comment on this reality, see A. Zahar, *The Problem of False Testimony at the International Criminal Tribunal for Rwanda*, *supra* note 890.

¹²⁰³ See, for instance, Judge Schomburg in: http://www.icty.org/x/cases/dragan_nikolic/trans/en/031103ED.htm, page 227: "Should you have any problems, please tell the Bench immediately that we can take the necessary measures", also page 258: "Please take into account the state of the witness, and I -- I ask you on purpose: Do you have inevitable, mandatory, additional questions?"; See also Judge Cotte in the *Katanga & Ngudjolo* case, Witness DRC-OTP-P-0353, ICC-01/04-01/07-T-213-Red-ENG WT 04-11-2010, page 63: "Q. Did they do anything else other than sing? A. What I saw was that they would sing. One day they brought a young man, and they slit his throat. That disgusted me.

MS. DARQUES-LANE: (Interpretation) Your Honour, perhaps we could suspend for a few moments.

PRESIDING JUDGE COTTE: (Interpretation) Madam Witness, we will stop for a few moments so you can regain your composure. Please take some time. Witness, do you think you can go on?

THE WITNESS: (Interpretation) Yes.

PRESIDING JUDGE COTTE: (Interpretation) We will go on, madam, but you must realize that it is entirely legitimate to cry. If you need to cry from time to time because you cast your mind back to

Judges further tend to protect victim witnesses, particularly victims of rape. A provision has been adopted which deals specifically with the evidence of victims of sexual assault. Pursuant to Rule 96 of the ICTY and ICTR Rules and Rules 70 to 72 ICC Rules, evidence relating to prior sexual conduct is not admissible; and relating to consent only upon a Chamber's predetermination of its credibility and relevance.¹²⁰⁴ Protective measures, as well as special measures to comfort a witness are also available. Special measures may include the allowance of the presence in the courtroom of a counsel, legal representative, psychologist or family member during the testimony of the victim or witness.¹²⁰⁵ In addition, Chambers are under an obligation to be "vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence."¹²⁰⁶

The extent to which these principles have been applied in practice varies from Chamber to Chamber. However, contrary to the suggestion of Doak and other observers, these rules have been applied with rigor by almost all ICTY, ICTR and ICC Chambers. Beltz's example is really the exception rather than the rule. The author's experience in this respect concords with Judge Van Der Wijngaert's experience at the ICTY. During a lecture, she informed her audience that she saw "many courageous victims who were very keen to come and testify and tell their stories, and the cross-examination process, although difficult at times, was practiced with restraint and caution by counsel appearing before the tribunal and, if necessary, was controlled by presiding judges."¹²⁰⁷

This does not take away the fact that some witnesses are not happy witnesses. Both in the ICTY, ICTR and ICC, judges intervene frequently to calm down a witness. Emotions can be very heated and tears are often shed. This is particularly the case

things that are difficult for you, the Court and everyone here certainly understands that. So if it happens again, we will stop for a moment so that you can take some time and then feel better."

¹²⁰⁴ ICTY/ICTR Rule 96(ii) and (iii) respectively; Rules 70-72 ICC Rules. Rule 72(2) refers to relevance and admissibility, rather than credibility as under the ICTY/ICTR Rules.

¹²⁰⁵ Rule 88 ICC Rules; ICTY/ICTR Rules 34 and 75(B)(iii).

¹²⁰⁶ Rule 88(5) ICC Rules. See also ICTY/ICTR Rule 75(D) pursuant to which "A Chamber shall control the manner of questioning to avoid any harassment or intimidation."

¹²⁰⁷ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539.

when victim witnesses testify to traumatising events.¹²⁰⁸ However, also insider witnesses regularly burst out in tears.¹²⁰⁹ Most of these strong reactions from witnesses are, however, not caused by improper questioning from the parties. Being reminded of unpleasant memories mixed with stress can stir up such emotions. Frequently, witnesses react in a very rude and angry manner to normal and appropriate questions, so much so that judges must intervene and insist that they answer the question.¹²¹⁰ One accused had a very strong and tearful reaction to a completely neutral question from the judge.¹²¹¹

¹²⁰⁸ See, for instance, Witness P-0132, ICC-01/04-01/07-T-138-Red-ENG WT 10-05-2010, page 76: “PRESIDING JUDGE COTTE: (Interpretation) Please stop for a moment, ma'am. (Trial Chamber confers)

PRESIDING JUDGE COTTE: (Interpretation) Ma'am, it is very painful for you to tell us what you experienced at that time, and at the same time, Witness, it is very important, it is very important for the Court, it is very important for all those who are taking part in this trial and who are here to shed light on matters for the Court, the Defence teams, the Legal Representatives, and it's important for you as well even though it is very difficult to talk about all that. And it is also very important for all the people who died, and you -- people who died and you're telling us how they died before an International Criminal Court, and these people deserve to have their stories told before an International Criminal Court. So it is very difficult but very important.”

See also Witness DRC-OTP-P-0353, ICC-01/04-01/07-T-213-Red-ENG WT 04-11-2010, page 63.

¹²⁰⁹ See for instance DRC-OTP-P-0028, ICC-01/04-01/07-T-216-Red-ENG WT 15-11-2010, page 52-53.

¹²¹⁰ See Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-220-Red-ENG WT 22-11-2010, page 25-26: “Q. So what it comes down to, Mr. Witness, is this: In order to give or provide some proof of your date of birth being as it appears on these documents, you produced forged documents. That's right, isn't it?

A. Your Honour, I am ashamed. I am really ashamed, Mr. Presiding Judge. I wanted to ask you the following question: What is the ICC's work? What is the aim of this court? What motivates the court? Because I do not know what the objective of the ICC is. The only thing that I do know is that the International Criminal Court does exist, but I don't know what the objective of it is. I don't know what its aims are. If you could please tell me, your Honour, what the ICC does.

PRESIDING JUDGE COTTE: (Interpretation) Witness, in the very first hearing, I think I recalled that it's normally not up to the witness to ask questions, but the witness, rather, has questions put to him or her. Having said this, I shall now answer some of your questions. I am now going to answer the question you are asking now. We are here, and you know, to try two accused persons who have been accused of a certain number of crimes. And as I told you some time ago, that is important, and I think you understood me. But let me remind you. These two accused persons have a right to a legal defence. That is the situation in which all accused persons should be before all criminal courts in the world when we are in a democratic country, and within the framework of the legal defence of an accused person, the counsel for that accused person can ask a certain number of questions. Those questions I are asked not to persecute the witness, but, rather, to ensure that a certain number of statements made by the witness in the course of his interviews before the OTP are correct. What Counsel Hooper is trying to do now is -- he's trying to understand why different dates of birth appear in documents which purport to be your documents. He's trying to clarify this, because he feels that this is important for the defence of his client. He has just asked you whether or not you falsified certain identity documents, and apparently you are shocked by these questions, because you probably feel that you are being accused of committing an offence. The only thing that is requested of you, Mr. Witness, is to answer. If you feel that falsification did not take place, say so. You should simply tell us what you deem to be the truth. However, this counsel or the counsel from the other Defence team do not intend to deliberately put you in difficulty. They are doing their job, and you have to understand that. They are doing their job, and you should answer the questions spontaneously, and you should say things to the best of your knowledge. We have already gone over this territory, but I have to repeat these things to you, because I

Thus, it is apparent that testifying may be the cause of frustration, anger and tears. This is the case for all witnesses, not only for victim witnesses. Regrettably, scholars have mainly focused on the experience of victim witnesses despite the fact that many other witnesses testifying for either side are also vulnerable and traumatised.¹²¹² In light of their incredible experiences, it is not surprising that witnesses react emotionally. Testifying cannot remove their initial victimisation.¹²¹³

However, accepting that testifying can be a painful process does not justify the conclusion that such witnesses experience a second victimisation. The expression of emotions is not necessarily evidence of a feeling of victimisation. On the contrary, it

see that you are shocked. You should answer. You should tell the truth. That's what you promised to do. You should speak the truth. That's the only thing we request of you."

See also Witness DRC-OTP-P-0028, ICC-01/04-01/07-T-221-Red-ENG WT 23-11-2010, page 8-9: "Q. Wait for a moment. Please wait for a moment. Just look at the document that's coming now with the underlined -- there it is.

A. We're not joking around here. We're not joking around. I -- I can stand up if you want. I could stand up and answer you, if you want. We're not joking around here.

PRESIDING JUDGE COTTE: (Interpretation) Witness. Witness. It is not easy, as Mr. Hooper pointed out, to work on the basis of rather full documents with a lot of information. The Court Usher will stay with you for a moment, if you will, so that we will be sure that you're looking at the correct line, which is the line upon which Mr. Hooper is basing his questions. So, Court Usher, please make sure that you are on the page 0319 with the reference 832/01, and from thereon, on that very line, Mr. Hooper will be basing his questions.

THE WITNESS: (Interpretation) Yes.

JUDGE DIARRA: (Interpretation) Mr. Witness.

THE WITNESS: (Interpretation) This is completely separate. It has got nothing to do with me.

JUDGE DIARRA: (Interpretation) You do not have to stand up to answer this question. Everybody is sitting around this room, and we are here to hear you. If you were to stand up, it would be looked upon badly. Getting angry solves nothing. Please, I beg you, remain calm and answer the question for respect for the Chamber. I beseech you, do not go thinking that standing up would be a good idea. This would be seen very negatively.

THE WITNESS: (Interpretation) He's making a mockery of me.

JUDGE DIARRA: (Interpretation) He's doing his job. This is the way that it goes. Please do not stand up.

PRESIDING JUDGE COTTE: (Interpretation) Mr. Witness, we shall now continue calmly, as Judge Diarra has just said. Counsel Hooper is going to ask his questions. Perhaps it will not always be obvious to you why he's asking those questions, but he has a strategy in his head that is his strategy, and your job is just to answer to the best of your knowledge."

¹²¹¹ See the testimony of Mr. Ngudjolo (Witness DRC-D03-P-0707, ICC-01/04-01/07-T-331-Red-ENG ET 09-11-2011), page 63; ICC-01/04-01/07-T-332-Red-ENG ET 10-11-2011, page 1-2: "Q.(Interpretation) Good morning, Mr. Ngudjolo.

¹²¹² See, for instance, Protected Witness K 41, who testified that, every night, he dreamt about a child who was hit by three bullets in the massacre in which he participated. He indicated that he had come to tell the truth in the hope that it would feel easier in his soul. See: examination by the Prosecution, 6 September 2002, available at:

<http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020906ED.htm>; It is noteworthy that many Tutsi genocide survivors have testified for the defence before the ICTR.

¹²¹³ This is acknowledged by Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 297.

may have a therapeutic effect.¹²¹⁴ Showing anger, frustration and tears may well be the best way of getting rid of them.¹²¹⁵

There are many other witnesses before the ICTY, ICTR and ICC who, with or without showing emotions, have found the experience of testifying rewarding. They appreciated the opportunity to tell their story to a wider audience and to be listened to.¹²¹⁶ For some witnesses, testifying can even help the healing process. For instance, a victim witness in the case of *Dragan Nikolic* was really desperate to find out what had happened to her sons who appeared to have been murdered. It was the accused himself, who informed her in open court where and when her sons had been liquidated, and where the bodies could very likely be found. He told the Court that he had wanted to meet her before to inform her about the fate of her sons, knowing how anxious she was to find out.¹²¹⁷ As difficult as it must have been for this witness to hear about the tragic fate of her sons, it was rewarding to find out what happened to them and have hope of retaining their bodies. At the end of her testimony, President Judge Schomburg thanked her and said:¹²¹⁸

I know it was a very difficult period of time for you. We're very grateful that you came to The Hague and gave this important testimony. I hope that you will know better in the future about the fate and the whereabouts of the remainders of your beloved ones. Thank you for your testimony.

Also witnesses who were on the side of the perpetrators may have experienced testifying as contributing to their healing process. For instance, in the ICTY case of *Milosevic*, one witness confessed to having participated in massacres of civilians in Kosovo. He gave details of an “unbelievably loud” screaming baby being shot with

¹²¹⁴ Even Doak accepts that procedural justice, even if the outcome is below expectations, may have a healing effect on victims; and that storytelling, even if painful, can help restore a sense of esteem and self-worth. See Doak, *ibid.*, 279-280.

¹²¹⁵ This was confirmed by a Tutsi genocide survivor who informed the author of her experience as a witness before the ICTR.

¹²¹⁶ E. Stover *The Witness: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005), 76 – 87; Rebecca Horn, Simon Charters and Saleem Vahidy: ‘Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone’, 3 *International Journal of Transitional Justice* (2009) 135-149: 80 percent of witnesses had a positive experience and would testify again. This is also confirmed by the author’s own encounters with witnesses after their testimony.

¹²¹⁷ http://www.icty.org/x/cases/dragan_nikolic/trans/en/031103ED.htm 256-258.

¹²¹⁸ *Ibid.*, 258.

three bullets. He informed the Court that the reason he had come forward to give his evidence was:¹²¹⁹

I wanted in this way to express everything that is troubling me, that has been troubling me for the past three years since the time I completed my service in the army. The thing that I find most troubling is that never a night goes by without my dreaming of that child who was hit by that bullet and who was crying. And I thought that if I come forward and tell the truth that I will feel easier in my soul. And that is the only reason why I am here.

Some witnesses clearly take pleasure out of the challenge of cross-examination.¹²²⁰ For some, this may be a terrifying experience; for others a confrontational line of questioning can be extremely satisfying. This largely depends on the personality of a witness, more than his status as a victim or non-victim. It can thus not be assumed that all victims prefer a safer, less confrontational environment where they can tell their story without being interrupted.

Even if this assumption can be proven, it should still not be implemented. TRC procedures can allow witnesses to tell their stories without interruption or subjecting them to cross-examination. Unlike TRCs, however, international criminal procedures focus on determining the guilt or innocence of an accused who potentially faces a long prison sentence. The fact that cross-examination may be an unpleasant experience for the witnesses should not prevent an accused from having the opportunity to challenge the allegations made against him by his accusers. It is also an acknowledged right of the accused to confront his accusers.¹²²¹

A trial cannot, nor should it simultaneously serve as a therapeutic centre for victims.¹²²² In the *Stakic* Judgment, the Chamber acknowledged that it is impossible

¹²¹⁹ Protected Witness K 41, examination by the examination by the Prosecution, 6 September 2002, available at:

<http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020906ED.htm>

¹²²⁰ See for instance, Ndjabu Ngabu, Witness DRC-D02-P-0236, ICC-01/04-01/07-T-244-ENG CT 06-04-2011 - ICC-01/04-01/07-T-248-ENG ET WT 15-04-2011; Pitchu Iribi: Witness DRC-D02-P-0228, ICC-01/04-01/07-T-249-Red-ENG CT WT 18-04-2011 - ICC-01/04-01/07-T-253-ENG ET WT 02-05-2011, Jean Logo: Witness DRC-D02-P-0258 ICC-01/04-01/07-T-286-Red-ENG CT WT 06-07-2011 - ICC-01/04-01/07-T-290-Red-ENG WT 12-07-2011, Germain Katanga : Witness DRC-D02-P-0300, ICC-01/04-01/07-T-314-ENG CT WT 27-09-2011 - ICC-01/04-01/07-T-325-ENG CT WT 19-10-2011.

¹²²¹ 1950 European Convention on Human Rights, Art. 6(d); 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 Art. 14(3)(e).

¹²²² Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 288.

for a trial to do justice to each individual story of each victim. Victims are by necessity treated as statistics, but in reality, each of them is a human being with his own personality and story. The Chamber in that case restricted itself to elaborating on three individual victim accounts.¹²²³ Victims and witnesses can be disappointed if their expectations are too high.¹²²⁴ It is, therefore, important that they are properly informed of the procedure in advance. This is a shared responsibility of the parties themselves and the VWU.

Testing the Evidence: in Control of the Judges or Parties?

Thus, the primary purpose of a trial is to test the evidence, rather than offer a forum to individual victims to tell their stories. To determine the guilt of the accused adequately, the evidence must pass a rigorous test.

The examination of witnesses can be subject to the control of judges or parties. As addressed earlier, in civil law jurisdictions, judges take the lead in examining the witnesses. They tend to be less confrontational than the parties. Nonetheless, they may confront witnesses with contradictions and ask them to explain them. They can do so because they have access to the entire case file. In common law jurisdictions solely the parties are in charge of examining the witnesses. This feature is linked with the fact that trials are run by juries who have no information about the witnesses.

In common law jurisdictions, cross-examination is regarded as the most effective tool of testing the credibility of a witness. The efficiency of this tool is also acknowledged by the judges in international courts and tribunals.¹²²⁵ The scholars who criticise cross-examination in international trials do so on the basis of human aspects but rarely suggest that it undermines the ascertainment of the truth. DeLaet, for instance, opines that putting witnesses to a rigorous test of cross-examination enhances the

¹²²³ Stakic Judgment, 31 July 2003, Stakic Judgment, IT-97-24-T, 31 July 2003, para.18.

¹²²⁴ B. Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health* (Springer, 2009), 66.

¹²²⁵ See, for instance, *Prosecutor v. Martić*, Decision on Defence Motion to Exclude the Testimony of Milan Babić, Together with Associated Exhibits from Evidence, 9 June 2006; Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babić, 14 September 2000.

ascertainment of the truth. It may either enhance or diminish a witness's credibility before the Chamber.¹²²⁶

This is, however, not always true in reality. An honest and reliable witness can appear unreliable after going through a vigorous cross-examination. In his book "Hints on the Trial of a Law Suit", Longenecker sets out how "a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness".¹²²⁷ He refers to a truthful, honest, over-cautious witness. The trial tactics described in this book may be beneficial to the party's case, but they may not assist the triers of fact in accurately reconstructing the facts. A witness may be so intimidated in cross-examination that, due to his high level of stress as a result thereof, he loses the ability to give answers in a logical manner and, consequently, his answers may not represent his actual knowledge on the subject. As Wigmore pointed out, "questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value".¹²²⁸

A competent trial lawyer will do his utmost to present his case in the best manner he can even if that means that the truth be distorted. According to Frank, "the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation."¹²²⁹

It is therefore not a foregone conclusion that cross-examination is the most efficient tool to test the credibility of witnesses. This is particularly questionable when the witnesses are uneducated, cannot read maps, do not speak the same language as the lawyers and judges, and are from an entirely different culture. International tribunals and courts often deal with such witnesses. It is very easy to confuse them and make them look incredible even if, in reality, they are truthful and solid witnesses.

¹²²⁶ DeLaet, *Gender Justice*, *supra* note 59, at 165. See also Doak, *The Therapeutic Dimension of Transitional Justice*, *supra* note 59, 277.

¹²²⁷ Frank, *Courts on Trial*, *supra* note 38, 81. Frank cites many more examples of guidebooks of how to conduct a cross-examination recommending how to make a witness look more hostile than he is. This is, however, much more common in US than in UK.

¹²²⁸ Quoted by J. Frank, *ibid*, 82.

¹²²⁹ Frank, *Courts on Trial*, *supra* note 38, 85.

Combs is of the view that, for honest but confused witnesses, it would be better if they were examined primarily by the judges. If judges are in control of their examination, witness can tell their story in more relaxing, narrative way without being interrupted excessively. Psychological research suggests that it is easier to recall and relay information accurately and effectively if the observer is comfortable than under stress.¹²³⁰ In addition, the narrative option could also “enrich communication and enhance understanding”.¹²³¹ Combs also notes that “judges are more apt than lawyers to elicit accurate and complete testimony from international witnesses because it is the function of the judge, when questioning, to seek accurate and complete testimony.”¹²³²

When dealing with lying witnesses, however, Combs considers cross-examination the most efficient tool to test their credibility.¹²³³ Combs points out that many of the witnesses who appear before international tribunals lie. She cites different reasons for this phenomenon, and suggests that it could be cultural feature.¹²³⁴ This author’s observations correspond with Combs’ observations. However, it is suggested that this is not an African problem. People, wherever they are have a potential to lie if there is a reason to do so. In the ICTY, people lie mainly for reasons of solidarity to their own ethnic group. Insider witnesses may seek to exempt themselves from any culpability and blame it all on the accused. Victims can also lie or exaggerate. They may need someone to blame. This has become particularly evident in the ICTR, where some victims have been demonstrated to incriminate different accused for the same deed.¹²³⁵

The acknowledgment that witnesses in each category potentially lie leads to the conclusion that international justice depends on an effective examination and cross-examination. Indeed, Combs’ research demonstrates very clearly that the honesty of

¹²³⁰ Combs, *Fact-Finding Without Facts*, *supra* note 6, 304.

¹²³¹ Combs, *Fact-Finding Without Facts*, *supra* note 6, 305.

¹²³² Combs, *Fact-Finding Without Facts*, *supra* note 6, 307.

¹²³³ Combs, *Fact-Finding Without Facts*, *supra* note 6, 312-321.

¹²³⁴ Combs, *Fact-Finding Without Facts*, *supra* note 6, 131-135.

¹²³⁵ Zahar, *Problem of False Testimony at the ICTR* in: ‘Klip & Sluiter, *Annotated Leading Cases*’ (n 559 above). Combs, *Fact-Finding Without Facts*, *supra* note 6, 149 and further.

witnesses cannot be assumed. In general, it is easier to detect lies through a confrontational line of questioning.

In addition, in international trials, it would be difficult for judges to lead the examination of witnesses effectively. Almost all witnesses are called by the parties. Judges have a right to call additional witnesses but rarely do in reality. On the rare occasions that judges do, the witnesses have mostly been identified by one of the parties. For instance, where a party withdraws a witness it initially intended to call, the judges may call this witness if they are of the view that his testimony may assist them in ascertaining “the truth in respect of the crimes of which the Accused has been charged”.¹²³⁶

Thus, the judicial power to call witnesses overrides the right of parties to withdraw one or more of their witnesses. Once witnesses are on their list, the parties cannot withdraw witnesses without leave of the Chamber, which it will grant only if in the interests of justice. Witnesses are not viewed as witnesses of the parties, but rather as witnesses of the court, witnesses of justice or witnesses of truth.¹²³⁷

When the judges call a witness, it may be more appropriate and logical for them to examine the witness first. If, however, a witness is called by one of the parties, judges are not the best placed to take the lead in his examination. They do not have access to the entire case file and do not have anyone in the field to conduct investigations and verify the stories and personal details of witnesses. In such a system, judges have insufficient information to take charge. Instead, they must rely on the two parties to present them with all relevant information pertaining to the credibility of the witnesses.

International justice potentially offers a suitable compromise between the two systems. Whilst cross-examination is allowed, judges control the manner in which this

¹²³⁶ *Prosecutor v. Blaskić* (Decision of Trial Chamber I in Respect of the Appearance of General Enver Hadžihasanović) IT-95-14 (25 March 1999), second consideration. See also *Prosecutor v. Kupreskić* (Transcript) IT-95-16 (30 September 1998) 3407.

¹²³⁷ *Prosecutor v. Jelisić* (Decision on Communication between Parties and Witnesses) IT-95-10-T (11 December 1998), para. 2; *Prosecutor v. Kupreškić* (Decision on Communication between the Parties and their Witnesses) IT-95-16-T (21 September 1998), para. 3; ICC-01/04-01/06-1049, para. 34; 01/04-01/06-679, para 26; ICC-01/04-01/07-428 21-04-2008, para. 30.

is done. In addition, they can ask additional questions to witnesses. In so doing, judges can potentially restore the credibility of witnesses if their credibility was destroyed unfairly and allow them to complete their story. Relevant information that was not elicited by the parties can then still come out. Arguably, such a system is the most efficient system to test the evidence in a fair manner. Judges, particularly those of a civil law background, are of the firm belief that this enhances the truth-ascertaining process.¹²³⁸

Whether this is the most efficient truth-ascertaining method in reality depends on two factors: whether judges exercise their control over the examination of witnesses by the parties in appropriate fashion; and whether their own interventions are proper.

Control by the judges

Time Management

In line with the completion strategy, ICTY and ICTR Chambers have sought to shorten the trials. To this end, Chambers have restricted the time allowed for the presentation of the Prosecution and defence cases, as well as for cross-examination of the witnesses presented by the opposite party. It is well within the Chamber's discretion to do so. However, it must be reasonable and flexible in allocating time. The allocated time must also be proportional and more or less equal to one another.¹²³⁹ Both parties have complained that the Chamber's time restrictions have been too drastic.¹²⁴⁰ Particularly at the ICTY, these restrictions have been excessive for both parties.¹²⁴¹

¹²³⁸ See, for instance, the observations of ICC Judge Cotte, Presiding Judge in the *Katanga & Ngudjolo* case, hearing of 8 February 2010, ICC-01/04/01/07-T 97, pages 66-67. See also W. Schomburg, *Truth-Finding in the International Courtroom: The ad-hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)*, Lecture Outline, Utrecht 29 March 2008.

¹²³⁹ *Prosecutor v. Karemera et al*, Scheduling Order, 21 August, 2007, para. 4; *Prosecutor v. Oric*, Interlocutory Decision on Length of Defence Case, 20 July, 2005, paras. 8-10; *Prosecutor v. Prlic*, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief, 4 July, 2006; *Prosecutor v. Prlic et al*, Decision on Prosecution Appeal following Trial Chamber's decision on remand and further certification, 11 May 2007; *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January, 2004.

¹²⁴⁰ *Ibid*; *Prosecutor v. Milosevic*, Reasons for refusal of leave to appeal from decision to impose time limit, 16 May, 2002, paras.10-13; *Prosecutor v. Prlic et al*, Decision on Prosecution appeal concerning the Trial Chamber's ruling reducing time for the Prosecution case, 6 February 2007, para. 14.

¹²⁴¹ See in particular: *Prosecutor v. Oric*, Interlocutory Decision on Length of Defence Case, 20 July, 2005; *Prosecutor v. Prlic et al*, Decision on adoption of new measures to bring the trial to an end within a reasonable time, 13 November, 2006; *Prosecutor v. Prlic et al*, Decision on Prosecution appeal concerning the Trial Chamber's ruling reducing time for the Prosecution case, 6 February 2007.

With regard to cross-examination, ICTY Chambers tend to give the parties a particular percentage of the time used in examination-in-chief. In a multi-defendant case, the defence is not given equal time in cross-examination as in examination-in-chief. Their cross-examination time usually amounts to approximately 60% of the examination-in-chief. The defence has regularly complained that this time is insufficient to do an adequate job, particularly because each defendant has his own strategy sometimes even opposing each other.¹²⁴² Such complaints are more frequent in the ICTY than in the ICTR. This is not surprising because generally ICTR Chambers allow the parties more time than at the ICTY. However, ICTR trials are excessively long and could easily be shortened without being unfair to the parties. Time must then be shortened in an equal and fair manner to both parties. This does not always appear to be the case. In recent accelerated ICTR cases, the defence sometimes complains that its cross-examination time is reduced unfairly and unequally to the Prosecution.¹²⁴³

ICC Chambers similarly tend to allocate a specific time to the parties. Oddly, the Chamber in *Katanga & Ngudjolo* allocated 60% to the defence and 100% to the Prosecution for cross-examination. The logic behind this unequal treatment was that the Prosecution had the burden of proof beyond reasonable doubt.¹²⁴⁴ It is unclear why this burden should give the Prosecution a right to cross-examine each witness of both defendants for significantly longer than the defence had to cross-examine the Prosecution witnesses. An additional unfairness on paper is reflected in the fact that the second defendant was not entitled to re-visit issues already addressed by the first attendant.¹²⁴⁵ However, in reality the defence was not prejudiced by these modalities, as the Chamber was flexible enough to allow both parties to cross-examine for longer than scheduled, provided the questions were relevant.

It is suggested that this latter approach is the correct one. It is not disputed that judges should intervene where necessary to ensure that no valuable court time is wasted in asking irrelevant questions. However, relevance cannot be measured in a percentage. Thus, rather than setting strict time limits, it is best if the Chamber intervenes only to the extent that questions are irrelevant. If relevant, the parties should be able to explore any issue that will assist the Chamber in assessing the credibility of the witnesses. If Chambers wish to set a time line, then at least a level of flexibility in applying it is warranted. There is a great disparity between Chambers in how well, equally and fairly they manage

¹²⁴² See, for instance, *Prosecutor v. Prlic et al*, oral ruling, 15 May, 2007, T. 18304-05, 18527-29; 16 May, 2007, T. 18528-29).

¹²⁴³ For instance, in *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, the bench refused to give the defence additional time to make up for the witness's refusal to answer its questions and the endless interventions from the Prosecution and the bench. See, for instance, T 8 Feb 2010, pages 26-35, 53-58, 94-95.

¹²⁴⁴ See ICC-01/04-01/07-1665-Corr 01-12-2009, *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, para.10.

T. 14 June 2004 pp. 12-13, 17-20, 26-27; T. 15 June 2004 pages 2, 84-85, 87-89

¹²⁴⁵ ICC-01/04-01/07-1665-Corr 01-12-2009, *Directions for the conduct of the proceedings and testimony in accordance with rule 140*.

time. The rushed attitude of some Chambers have not accelerated them.¹²⁴⁶ Yet, in general, the parties have been granted sufficient time to explore the relevant issues adequately.

Control over Types of Questions

As aforementioned, judges at the ICTY, ICTR and ICC tend to be very protective in respect of victim witnesses. Many observers approve of such protective attitude and even suggest that judges are not protective enough.¹²⁴⁷ However, they ignore that this has consequences for the fairness of the proceedings. Victim or not, it is vital for the defence to be able to examine vigorously all incriminating witnesses. There is no witness whose credibility and reliability can be taken for granted. Victims are equally likely to lie or suffer from a faulty memory as anyone else. If anything, their stories should be considered with more caution given that the trauma they have experienced may have affected their memory.¹²⁴⁸ Therefore, the triers of fact must be vigilant to assess victim witnesses with the same vigour as any other witness notwithstanding the compassion and indignation their testimony may arouse.¹²⁴⁹

There is a thin line between expressing sympathy to the victim, and showing bias in favour of him or her. The extent to which sympathy translates into excessive control over the questioning by the parties varies significantly from Chamber to Chamber across the tribunals and courts.¹²⁵⁰

¹²⁴⁶ For instance the ICTY judgement in the case of *Prlic et al* is still outstanding. The trial itself lasted until the end of 2010. In fairness to the judges, however, this case involved six accused each of whom was entitled to participate directly alongside their counsel. In addition, although the bench was extremely controlling in an attempt to move the case forward, it was reasonably fair in allocating additional time if used for relevant matters. For instance, Mr. Prlic and his counsel were both granted additional time in cross-examination (14 and 15 May 2007, page 18527). See also: Prosecutor v. Prlic et al, Decision Allocating Additional Time for Completion of Case-in-Chief, 22 August 2007, granting additional time to the Prosecution.

¹²⁴⁷ See above 'victims as witnesses'.

¹²⁴⁸ G. Wolters, *Herinneringen door getuigen*, in: P.J. van Koppen a.o. (Eds.), *Het recht van binnen. Psychologie van het recht*, (Kluwer 2002), 397-415; E. Loftus, *Eyewitness Testimony* (Harvard University Press 1979), 397-415; W. Wagenaar & J. Groeneweg, *The Memory of Concentration Camp Survivors*, 4 *Applied Cognitive Psychology* 77 (1990); W.A. Wagenaar: *Identifying Ivan: A Case Study in Legal Psychology* (Harvard University Press, 1988); H. Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil* (Penguin Books, 1994) (first published in the US by the Viking Press 1963), 220-233.

¹²⁴⁹ P. Levi, *Les naufragés et les rescapés*, cited in S. Maupas, *Juges, bourreaux, victimes, voyage dans les pretoires de la Justice internationale* (edition Autrement, 2009): « Il est naturel et évident que le matériau le plus substantiel pour la reconstruction de la vérité sur les camps soit constitué par les souvenirs des survivants. Au-delà de la pitié et de l'indignation qu'ils provoquent, il faut les lire d'un œil critique ».

¹²⁵⁰ For instance, the Chamber in *Katanga & Ngudjolo* appears not to be influenced by the overwhelming suffering of the victims. This is clear in the conduct of the judges vis-à-vis the parties. They made it clear that it was not for them to handle issues relating to the well-being of the victims.

Judges Interventions

In each international tribunal and court many examples can be found of interventions of judges that have truly assisted the ascertainment of the truth. This has, for instance, been the case where relevant questions were not asked by either party. In the ICC case of *Katanga & Ngudjolo*, Presiding Judge Cotte usually asked more coherent, clear and relevant questions than the parties and frequently managed to get an answer out of a witness where the parties had failed to do so.¹²⁵¹

This is rather the task of the VWU. See: T. 11 June 2010, pages 27-30. By contrast, other Chambers regularly put the victims' interests first. See, for instance, the Bemba case.

¹²⁵¹ Own observation, shared by many colleagues in the *Katanga & Ngudjolo* case. See for example for Witness DRC-D02-P-0236, ICC-01/04-01/07-T-246-Red-ENG WT 13-04-2011, pages 19-20: PRESIDING JUDGE COTTE: (Interpretation) As far as he knows, is that what you have just said, Mr. Floribert Ndjabu? As far as you know were there within the UPC delegation members who were not of the Hema ethnic group who had in a certain sense become members to protect themselves or their families? Answer the question if you know about this; if not, say so. Is this a reasonable possibility? This seems to be the question that the Prosecution is putting to you, and Mr. Hooper is concerned that you might fail to understand this question. If you have an answer you will tell us; if not, that doesn't matter". See also, pages 15, 22, 45.

See also: Witness DRC-D02-P-0300, ICC-01/04-01/07-T-320-ENG CT WT 11-10-2011, page 65-66: "PRESIDING JUDGE COTTE: (Interpretation) Before going to Aveba, I would like to put a question to Mr Katanga. Now, you gave us a hierarchy of the persons who were present at the meeting and in answering the Prosecutor you mentioned Kakado, Kasaki, Pastor Saradu and so on and so forth. Now, on page 77 of the transcript, line 19, you mentioned that Move, Bebi and others may also have been there. Now, can you remind us, in relation to the date of 3 March 2003, what the specific status and position of Move and Bebi were? You did not mention them in the hierarchy at the beginning, but I would like to know from you what their status and their positions were at that time. Maybe you have already mentioned this, but please provide us with that clarification.

THE WITNESS: (Interpretation) To that date, Mr President, Move and Bebi were under the control of the APC. They were acting under the orders of the APC. Move on his side was in Nyabiri, whereas I Bebi was in Bukiringi as commander of a platoon or company or what have you, and that is how things were.

PRESIDING JUDGE COTTE: (Interpretation) And you do remember that there were platoon or company commanders? Do you remember? These are not the same positions. Do you know -- do you remember what their ranks were and the positions they had within the sections, platoons and companies? You understand this military terminology very well.

THE WITNESS: (Interpretation) When Bebi left Aveba for Bukiringi, he was still a platoon commander. That, I do remember. Now, when he became a company commander, I must say that I am not able to tell you whether it was before 3 March or after, so I expressed some reservations on that point, but as for Move, while he was in Nyabiri he was a company commander.

PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr Katanga. Mr Prosecutor, I return the floor to you." See also ICC-01/04-01/07-T-320-ENG CT WT 11-10-2011, pages 70-71; DRC-D02-P-0300, ICC-01/04-01/07-T-321-ENG ET WT 12-10-2011, page 36-37; DRC-D02-P-0300, ICC-01/04-01/07-T-322-ENG ET WT 13-10-2011, Page 20:

"PRESIDING JUDGE COTTE: (Interpretation) Just so that we fully understand, because we have been dealing with the same issue for a long time, you said that you did not take part in the meetings, but you have said that you had the opportunity to meet with the participants in that meeting, either in the morning to have a coffee, or in the evening to have a beer, or perhaps at other times during the day. I can see that you are nodding. You have also told us that it was not possible for you to take the initiative to have a discussion with Chief Manu, for example, but that on the other hand it could have been possible for you to discuss with Chief Manu if he wanted to speak with you. Did he ever want to

However, if the judges are not open minded to both sides and engage genuinely with all relevant information, their interventions may positively distort the truth. Indeed, if judges appear biased against a witness, being already nervous, the witness may get even more nervous which may undermine the certainty and thus credibility of his answers. As well, if the judges' questions disclose in any way a preference or expectation for one answer over another, the given answer may be unreliable. The answer may be that which the witness assumes the judges want to hear rather than an attempt at the truth.¹²⁵² Leading questions are not allowed either by the judges or the parties. Asking leading questions is particularly inappropriate if in connection with matters in dispute, as this could imply that the Chamber is actively seeking to

discuss with you? Did he ever initiate a discussion with you? That is what we want to understand so that we can make some progress, because we are beating about the bush here. Please answer the question.

THE WITNESS: (Interpretation) Mr President, Chief Manu did not request any discussion with me. He did not ask me to speak to him." See also, pages 34-35, 43, 51-52; DRC-D02-P-0300, ICC-01/04-01/07-T-323-ENG ET WT 14-10-2011, page 13: "PRESIDING JUDGE COTTE: (Interpretation) Mr Prosecutor, I'm going to have to interrupt. Now, Mr Katanga, you said that there's a distinction to be made between a brief absence and going away to go to the front. Now, is this the distinction that explains why you were able to leave Aveda despite the risk of Kisoro the day that you went to Tchey on the 3rd? Because you said you weren't in Bogoro, there were too many threats, but on 3 March you were in Tchey. So that trip to Tchey, how long was that; this celebration, the ceremony in Tchey?"

See also: Witness DRC-D02-P-0236: ICC-01/04-01/07-T-245-Red-ENG CT WT 08-04-2011, page 53-54; 61: "PRESIDING JUDGE COTTE: (Interpretation) I'm not quite sure that you are quite on the same wavelength with the witness, Prosecutor. So perhaps one last time you would like to rephrase your question, but if you don't want to do that, let's go on to something else. The reference to the fact that Mr. Augustin Lobbo as being a friend is something that the witness has responded to twice, saying that it was not because he was a friend that he was appointed commissioner for external affairs. Mr. Witness, actually the Prosecutor simply wants to know whether or not Mr. Augustin Lobbo was a friend of yours, which he is entitled to do. But he doesn't want to infer from that that you appointed him as commissioner simply because he was a friend. I hope now that you are on the same wavelength. We need to avoid that because it would take up too much time.

THE WITNESS: (Interpretation) Your Honour, I think you have understood everything quite clearly.

PRESIDING JUDGE COTTE: (Interpretation) So Mr. Lobbo was a friend of yours, but you did not appoint him because he was a friend but because of his abilities; is that right?

THE WITNESS: (Interpretation) Yes, your Honour, that's precisely what I meant.

PRESIDING JUDGE COTTE: (Interpretation) Well, in that case, Prosecutor, we can proceed."

See also: Witness DRC-D02-P-0228, ICC-01/04-01/07-T-251-ENG CT WT 20-04-2011, pages 28, 34-35; Witness DRC-D02-P-0258, ICC-01/04-01/07-T-290-Red-ENG, pages 61-62: "PRESIDING JUDGE COTTE: (Interpretation) Very well. Mr. Prosecutor, from the beginning of the cross-examination, or should I say from the beginning of today's hearing, you have put the question at least three times to the witness, whether Germain Katanga suggested any names of witnesses for him to meet. And on all occasions, the witness briefly from the beginning told you that this was true -- absolutely untrue and then he went on to explain. So please move on -- move on with the cross-examination under conditions which I insist should not lead us to repeat -- a constant repetition. Mr. Prosecutor, you have the floor."

¹²⁵² *Prosecutor v. Prlic*, "Decision on Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements, 4 July 2008, para 18; *Prosecutor v. Oric*, Transcript 11 April 2005, pages 7031-7033, at: <http://www.un.org/icty/transe68/050411IT.htm>.

establish a particular response, or to impugn the credibility of the witness in question. Rather than leading questions, the Chamber should ask open questions instead.¹²⁵³

The questions of the judges should further be led by the principle of impartiality and their truth-ascertaining objective. As the jurisprudence has established, "Judge[s] should [. . .] be subjectively free from bias, [and . . .] there should be nothing in the surrounding circumstance which objectively gives rise to an appearance of bias; that impartiality must be assessed with regard to the perception of a hypothetical fair-minded observer with sufficient knowledge of the actual circumstance to make a reasonable judgement; that this hypothetical fair-minded observer is in a position different to that of the parties".¹²⁵⁴

There have, however, been many allegations of judges posing biased or leading questions to witnesses, particularly at the ICTR. In various ICTR cases, the defence has the impression of dealing with judges who have preconceived views on the guilt of the accused. In their perception, there also appears to be a tendency to have more patience with Prosecution witnesses than with defence witnesses.¹²⁵⁵

In the ICTR case of *Ngirabatware*, one judge routinely suggested to defence witnesses that they were not honest in answering his questions even if there was no apparent contradiction in the witnesses' answers. When, for instance, a witness explained how he had come to confess, the judge asked the following question:

“So you were in prison and ICTR investigators came and questioned you, if I understood you correctly. You were in a group in prison and the investigators were questioning you, not individually, but collectively, the questions were put to the group. So my question is as follows: So when a question was put, you all answered in a chorus collectively?”

¹²⁵³ *Prosecutor v. Prlic*, Transcript of 19 March 2007, at: <http://www.ictytranscripts.org/TrialTranscripts/HTML/transe74/07-03-19-IT.html>

¹²⁵⁴ *Prosecutor v. Hadzihasanovic*, Decision on Defence Motion Seeking Clarification of the Trial Chamber's Objective in its Questions Addressed to Witnesses, February 4, 2005; *Prosecutor v. Furundzija*, Appeals Judgment, July 21, 2000, para. 189; *Prosecutor v. Brdjanin and Talic*, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, May 18, 2000, para 15; *Prosecutor v. Krajisnic*, Decision on the Defence Application for Withdrawal of a Judge from the Trial, January 22, 2003, para. 14; *Prosecutor v. Rutaganda*, Appeals Judgment, May 26, 2003, paras 36-125; and *Prosecutor v. Bagilishema*, Grounds for the Appeals Judgment, July 3, 2002, para. 100.

¹²⁵⁵ An example of a cases where bias was alleged are: *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, Judgement, 28 November 2007, para. 32.

To which the witness answered:

I explained to you that the investigators asked the group and asked what Ngirabatware did in our region. And in answer, we said that he did good things and did nothing bad.

The judge did not like the answer and said: “Please do not try to avoid my question. It is direct and it is as follows: They asked one, two, three questions to the group, and my question is as follows: So the group answered in chorus all at the same time in the same breadth?”¹²⁵⁶

In the same case, the defence was not allowed to ask questions to the accused about the allegations made against the accused. When defence counsel asked the accused Ngirabatware to comment on the accusations made against him, she was interrupted. The presiding judge said:¹²⁵⁷

“You are not going to take the evidence of a witness and discuss the evidence of the witness, you know directly in that way. Raise the issue that arise from the whatever either from the testimony of the witness but it will be a question and answer answer session, as it were, with the witness, not situation whereby the witness be invited to comment or otherwise give his views on any other evidence has been given.

That is not his function. That’s the function for the for the Trial Chamber. And any formulations any position taken will be taken by his by his counsel on both sides. So raise the issue that are relevant to a particular aspect that you want to address in the normal way and the proper way.

...

When defence counsel sought to suggest that the accused has a fundamental right to answer the allegations made against him, the Presiding Judge stated: “No. No. No. It can’t go that way.” This is extremely absurd and unprecedented. It is indisputable that the accused has a right to answer the allegations made against him. One would normally assume that the judges would want to hear what the accused has to say before rendering judgment. That is the advantage for a bench if an accused chooses to testify.

¹²⁵⁶ *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Transcripts, 22 August 2011, pages 3-15 (DWAN-9). For similar lines of questioning, see: Transcripts, 16 August 2011, pages 28-32 (DWAN-45); Transcripts, 20 January 2011, page 38.

¹²⁵⁷ *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Transcripts, 30 November 2010, pages 41-42.

Indeed, the Appeals Chamber in *Nahimana et al* confirmed that “the concept of a fair trial includes equal opportunity to present one’s case and the fundamental right that criminal proceedings should be adversarial in nature, with both prosecution and accused having the opportunity to have knowledge of and comment on the observations filed or evidence adduced by either party”.¹²⁵⁸

In the ICTR case of *Nizeyimana*, the presiding judge had a tendency to ask very leading questions. He regularly put a proposition to the witness and asked him if that was correct. This is a typical way of questioning a witness in cross-examination. Yet, as aforementioned, it is not proper for a judge to adopt such a style, particularly when issues are contentious.¹²⁵⁹

At the ICTY, the issue of bias has not been raised as often. Yet, some judges have used language that suggests a lack of impartiality. For instance, one judge told one of the accused on the stand to “[s]pare us your fantasy”. The accused, Kovacic, reacted as follows:¹²⁶⁰

I can only say that I understand the statement in the following way. It actually expresses a certain position and a certain conviction on the part of the Judge, the position or the conviction that was put forward during a trial. This might be an indicator of prejudice in terms of the conclusions being made. Any sensible person could have read it this way. We don't need to talk. I have arrived at my conclusion, everything else is fantasy. I will give it some serious thought, whether I can perhaps ask the Judge to step down from the Chamber. I do believe that a Judge who is part of the Chamber should not be allowed to address the accused in this way before the OTP's cross has even begun. Perhaps this was a piece of awkward phrasing by the Judge. Maybe it was too emotional. I'm not going into that. Perhaps the Judge can explain. Nevertheless, the way it looks now on the transcript really seems like someone is jumping to conclusions there and as if the Judge already had his own solution made up in his head.

On another occasion, that same judge asked the following questions to another accused while on the stand:¹²⁶¹

Judge: “I'm sorry. Mr. Bozic, we must assume that you as a lawyer, have a certain

¹²⁵⁸ *Nahimana et al*, Case No. ICTR-99-52-A, Judgement 28 November 2007, para. 181; as raised by the defence: *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Transcripts, 30 November 2010, page 45.

¹²⁵⁹ T. 19 January 2011, pages 75-76. For instance, he asked the witness: “And he was assisted in that activity by a minister for defence after he had reached that office himself, correct?”

¹²⁶⁰ *Prosecutor v. Prlic et al*, Transcripts of 9 July 2009.

¹²⁶¹ *Prosecutor v. Prlic et al*, 10 February 2009, T. 36652 – 36656, at: <http://www.icty.org/x/cases/prlic/trans/en/090210IT.htm>.

intelligence, and if that is so, then you should be aware when you're just repeating yourself instead of answering a question. Now, you have told us that the document could have – everyone could have heard about it. That was not the question at all. It is obvious that if there is a press release, everybody could have heard about it. The question was: Did you personally take -- have knowledge of this? This is the question that you are repeatedly being asked, and you have to answer by yes or no finally. ...

I want this answer. There has been so much time spent just for such a simple answer.

...

Mr. Bozic, yes or no?

Witness: All I want to say is this, that in the -- in translation, a document means something official, something that comes from a certain -- one organ to another organ, whereas a press release I see as something quite different. I knew or, rather, heard about this press release, and I take cognizance of it.

Judge: You are really trying our patience. We do not need lectures about what is a document or not, and you are not here to lecture the Chamber. You are here, and I quote myself, I said to tell us whether you have taken cognizance of this. I did not use the word "document."

...

WITNESS: [Interpretation] First of all, Your Honour, I want to say that it is not my intention to avoid answering the question; far from it. And I said that as far as this press release is concerned, I heard about it from the media, not from any official sources, and I went on to explain this precisely in response to the question by Judge Antonetti."

Defence counsel intervened and requested that the judge refrain from cross-examining the accused and impatiently asking strident and accusatory questions. Counsel stressed the importance of the process being fair, detached and objective. He added that it would be unfortunate if an independent and impartial judge “would inadvertently, no doubt, give the appearance of being other than independent and impartial”.¹²⁶²

The judge conceded that he “may have been a little bit emotional” and agreed with the defence in principle.¹²⁶³ However, in light of the non-responses to questioning in a row, he considered it understandable that one loses patience. The Presiding Judge added that it had nothing to do with partiality; rather, that it was part of the search for the truth that judges enter into the arena of litigation and ask questions to witnesses.¹²⁶⁴ Defence counsel clarified that he did not question the right of the bench to ask questions: “I accept on many occasions it’s most illuminatory, and it sheds an awful lot of light for the Prosecution and for the Defence on questions that are opaque or not clarified”. However, he underlined that “[t]he truth can be arrived at

¹²⁶² *Ibid*, T. 36656 – 36658.

¹²⁶³ *Ibid*, T. 36659.

¹²⁶⁴ *Ibid*, T. 36660.

particularly by the Bench by non-leading, neutral, and rather balanced questions. But when one talks about the intelligence of a witness, as the Judge did, and when one talks about the Bench losing patience, it is perhaps unnecessary and lends more heat to the debate than light”.¹²⁶⁵

The language used in these examples indeed gives the impression that some judges have preconceived views. However, it is very difficult to demonstrate bias. There is a strong presumption that the judges take their decisions in full independence, and it is for the accused to rebut this presumption.¹²⁶⁶ The author is only aware of one recusal case based on the appearance of bias;¹²⁶⁷ but not of any other granting of a complaint of bias.

Thus, in conclusion, there clearly is a great disparity between different benches when it concerns appropriate interventions and trial management. The difference is not explained so much by the common law or civil law background of judges; but rather whether the judges have significant court experience or not. Professor Bohlander has made the correct observation that the degree of control exercised by judges depends largely on their individual attitude.¹²⁶⁸ The appropriateness of their interventions varies depending to a large extent on the level of training and experience judges have. Many of the appointed judges in international criminal courts and tribunals have no court experience. It is obviously difficult to run a court properly and to make appropriate interventions, if and when necessary, without any case management experience. Particularly the job of the presiding judge is as much a management job as it is a job of judging. It is no easy task to run an international trial lasting for years with a significant number of witnesses speaking different languages and from an unfamiliar culture. This is challenging for any judge, let alone one without proper criminal trial experience.

To manage a case of such magnitude properly, it would greatly assist the judges to

¹²⁶⁵ *Ibid*, T. 36661 – T. 36662.

¹²⁶⁶ *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 28

¹²⁶⁷ Judge Vaz recused herself upon discovery that she had lived temporarily with a prosecutor in her case. This was in the *Karemera et al* case before it split and Rwamakuba was dealt with separately.

¹²⁶⁸ M. Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts*, 12 *New Criminal Law Review* 529 (2009), 531.

have “the experience of many years of learning to deal with victims and witnesses, assessing credibility, sifting through evidence, distinguishing relevant facts from irrelevant ones, balancing the interests of prosecution and defense against each other, acquiring case management skills, cooperating and deliberating on a collegiate panel as well as honing the craft of judgment writing to a fine art”.¹²⁶⁹

Public Trials?

As stated earlier, protective measures can be taken if necessary to guarantee the safety of witnesses. These protective measures can apply throughout the investigations as well as trial. They must be balanced carefully with the rights of the accused. Thus, disclosure of at least the identity of all witnesses must be disclosed to the defence adequate time before they commence their testimonies. However, the public at large has no acknowledged right to full disclosure. Consequently, the identities of the witnesses, as well as any information that could potentially identify them remains confidential to the public at large.

This means that it can be very difficult for the public to follow the trials. Many of the trials are conducted out of the public view through the excessive use of closed and private sessions.¹²⁷⁰ Prosecution witnesses testify in private session for large chunks of time and documents are usually redacted. The extent of closed and private sessions has meant that interested third parties seeking to follow the proceedings are confronted with a disrupted and disjointed record. Attempts to monitor the proceedings remotely and in the public gallery are significantly hampered by the frequent movement into or out of closed sessions.

This is particularly a problem with regard to ICC proceedings. Most of the time, for individuals following remotely via the ICC’s web-link, the message appearing on the screen indicates “closed or private session”, or “no broadcast”. The ICTY has sought to keep closed sessions to a minimum. Less than 10% of the hearings are conducted in closed session. The remainder of the trial sessions are public. In the ICTR, on the

¹²⁶⁹ *Ibid*, 538. The quality of judges will be further discussed below, in section ‘evaluation of the evidence’.

¹²⁷⁰ In the ICC, closed session means that the public is completely denied access in that the curtains are down, whilst private session means that the sound is switched off, but the public can still see the courtroom. In the ICTY and ICTR, no such distinction is made.

other hand, confidential hearings are very frequent, but still not as frequent as at the ICC. In the ICC, it varies from trial to trial. The *Katanga & Ngudjolo* proceedings have been significantly more accessible to the public than *Lubanga* or *Bemba*, which are in closed or private session virtually all the time.

The International Bar Association ('IBA') expressed concern about this excessive use of closed and private sessions.¹²⁷¹ The IBA held that "to many observers, aspects of the [case] appear to be shrouded in secrecy."¹²⁷² The IBA further noted with regard to many of the closed and private sessions that it was clear from the reclassified transcript that there had in fact been no need to resort to closed session.

The Chamber in the case against *Katanga* and *Ngudjolo* acknowledged the "superfluous" recourse to private or closed session.¹²⁷³ On several occasions, the presiding judges in the *Katanga* and *Lubanga* cases emphasized the importance of a public hearing.¹²⁷⁴

The Prosecution, however, routinely asks for confidential or private sessions even if the risk of identification is negligible. For instance, in *Katanga & Ngudjolo* the Prosecution requested for a closed session each time an NGO or a person who had cooperated with the Court was mentioned. Most of the time, the mere mentioning of such a person or NGO does not disclose the fact that the organisation or the person had provided assistance to the Court. Their mentioning in public does then not put them at any risk. The Chamber agreed that such information can be discussed publicly.¹²⁷⁵

Recourse to closed or private session where not strictly necessary, undermines the fundamental right of the defence to a public hearing and thus to a fair trial pursuant to

¹²⁷¹ International Bar Association, *The ICC Trials: An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010*, May 2010, 17. See, e.g., ICC-01/04-01/07-T-144, 20 May 2010, 25-29.

¹²⁷² International Bar Association, *The ICC Trials: An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010*, May 2010, 17, 39.

¹²⁷³ ICC-01/04-01/07-T-149, 28 May 2010, 53-54.

¹²⁷⁴ ICC-01/04-01/07-T-147, 26 May 2010, 42; ICC-01/04-01/07-T, 19 April 2010, p. 9 (In asking the parties for their observations on the protective measures granted for DRC-OTP-287; ICC-01/04-01/07-T-144, 20 May 2010, 4-5; ICC-01/04-01/06-T-104, 16 January 2009, 3-4.

¹²⁷⁵ ICC-01/04-01/07-T-240-CONF-ENG CT 24-03-2011, page 33. See also ICC-01/04-01/07-T-144, TC Decision on the protective measures for W-11/279, page 4-5.

Article 21 ICTY Statute, Article 20 ICTR Statute and Article 67(1) of the ICC Statute. Indeed, irrespective of whether confidentiality is justified in a particular situation or not, they “deny access to knowledge and indicate its undeniable existence. This ‘undeniable denial’ is consequential, as courts sit in judgment and mete out penalties according to evidence that cannot be viewed by any but themselves.”¹²⁷⁶

A real advantage of public testimony is that there is a greater possibility that persons involved in the event in question will be in a position to identify false testimony. In addition, they may be able to offer to testify as a defence witness. This will not happen if the public is unable to access key information pertaining to the testimony of the witness.¹²⁷⁷

In this regard, the ECtHR has held that the public character of proceedings “protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial.”¹²⁷⁸ Thus public trials are important, not only to protect the fairness of the proceedings, but also to allow the public to follow what is going on. The public nature of criminal proceedings “offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered”.¹²⁷⁹

Former Vice-President and ICTY Appeals Judge Florence Mumba has underscored the point that while there may be a need for limited exception to the right of a public trial, public hearings “serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on

¹²⁷⁶ See also Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, Part II, PART IV.

¹²⁷⁷ *Ibid*, 28.

¹²⁷⁸ ECHR, *Werner v. Austria*, Judgement of November 24, 1997, para. 45. See also UN Human Rights Committee (HRC), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, §6.

¹²⁷⁹ *Prosecutor v. Delalić*, Case No. IT-96-21, Decision on the Motions by the Prosecution or Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through To “M”, 28 April 1997, paras 33- 34.

‘framed’ trials, and giving the public a chance to suggest changes to the law or justice system.”¹²⁸⁰

Oral testimony aside, almost all documents at the ICC are submitted confidentially. This means that only the parties, participants and the Chamber are allowed to review their contents. Whilst a redacted version of most confidential filings and transcripts is produced at a later stage, considerable quantities of database material remain unavailable to the public.¹²⁸¹ Consequently, the trials and evidence on which the judgements rely are barely accessible to the communities who were affected by the war under investigation of the various international criminal courts and tribunals.

There is a clear conflict between different interests that need to be balanced carefully by the international criminal courts and tribunals. On the one hand, confidentiality may encourage witnesses to come forward and States and other entities to disclose their documentation. In that way, this may assist the truth-ascertaining exercise of the international criminal courts and tribunals. On the other hand confidentiality of the proceedings may affect the fairness of the proceedings as well as many of the secondary objectives upheld by international criminal courts and tribunals. This most notably includes the right of victims to the truth, reconciliation and the creation of an accurate and authoritative historical record.

The lack of access to important material and testimony on which the international criminal justice systems rely deprives victims of their right to know the truth. It is insufficient that the judgements are public because the victims and their communities should be able to verify the evidentiary foundation underlying the judgements and assess for themselves whether they agree with the conclusions drawn. People are not

¹²⁸⁰ F. Mumba, *Ensuring a Fair Trial Whilst Protecting Victims and Witnesses: Balancing of Interests*, in R. May et al (Eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), 359, 365. See also Al Rawi [2010] EWCA Civ 482, para. 21 (The common law has long accepted that there are exceptions to the open justice principle. In Scott [1913] AC 417, Viscount Haldane LC made it clear while affirming and applying the open justice principle, that a court could sit in private where “justice could not be done at all if it had to be done in public”, but went on immediately to say, that the court considering the issue “must treat it as one of principle, and as turning, not on convenience, but on necessity” – [1913] AC 417, 437-438. (see too per Lord Diplock in *Leveller* [1979] AC 440, 450B-F)).

¹²⁸¹ This is supposed to change once the tribunals close down, but individual documents in ICTY archives will be restricted for years or even indefinitely (R. Donia and E. Becirevic: “ICTY Archive must be open to all” IWPR, http://www.iwpr.nl/?p=tri&s=f&o=343812&apc_state=henh). See also: Chuter, *War Crimes*, *supra* note 75, 209.

inclined “to believe by a text they cannot see”.¹²⁸²

Reconciliation is also clearly compromised by the excessive use of confidentiality. According to Waters, confidentiality “inhibits the reception of the court’s judgments and documents as a legitimate source that might displace alternatives; and second, the strategic aspects of redaction create incentives to harness arguments about history to agendas of prosecution and power that are unresponsive to local sensibilities.” Accordingly, confidentiality undermines the court’s ability “to craft authoritative reconciliatory narratives”.¹²⁸³ It is usually presumed that “it is the authoritative truth-record established by international trials that makes denial impossible and paves the way for reconciliation – but essential to that process is undeniable truth.”¹²⁸⁴ A non-transparent truth cannot be undeniable as long as most of the evidence relied on to reach that truth, to the exclusion of other truths, is unknown to the public and cannot be tested adequately by those affected by the truth that is being established.

In addition, confidentiality undermines the contribution the court could potentially make to the creation of a historical record of the conflict which is shared by the different communities involved because “[p]rojects of shared understanding require a shared body of reference.”¹²⁸⁵ If based largely on confidential material and testimony, the narrative created by the international court or tribunal cannot be reflective of “the perspectives of those parties most affected and most concerned with generating a history”.¹²⁸⁶ This prevents them from making any contribution to the creation of an authoritative historical narrative of their own conflict situation. The historical narrative created by an international court or tribunal may, therefore, be distorted and rejected as authoritative by the communities most concerned.

Thus, more efforts should be made to retain the public nature of international proceedings. It is conceded that international courts and tribunals operate in a delicate position. They fully rely on cooperation of States and other entities and they cannot

¹²⁸² See also Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, PART V.

¹²⁸³ *Ibid.*

¹²⁸⁴ *Ibid.* See also Parlevliet, *Considering Truth*, *supra* note 3, 25-26.

¹²⁸⁵ See also Waters, *[Redacted]: Writing and Reconciling in the Shadow of Secrecy*, *supra* note 169, PART V.

¹²⁸⁶ *Ibid.*

offer adequate protection to victims and witnesses. In exceptional situations, confidentiality seems therefore to be a condition for the effective operation of international criminal courts and tribunals. However, with due respect for fairness and in the light of the ambitious objectives set for international courts and tribunals, any decision to withhold information from the public for reasons of confidentiality must be exceptional and well reasoned, rather than routine.

Admissibility of Evidence

International criminal justice systems commonly operate an inclusionary policy towards evidence, whereby material presented to the Chamber will be admitted in evidence unless there is a particular problem with it. In order to be admissible, there must only be *indicia* of reliability, *indicia* of relevance and *indicia* of probative value. In addition, the probative value must outweigh the prejudicial effect of any evidence. Further, where evidence is unlawfully obtained such evidence will be excluded.¹²⁸⁷

The approaches towards the admissibility of evidence vary significantly from Chamber to Chamber.¹²⁸⁸ For instance, the ICC Chamber in the *Katanga & Ngudjolo* made a case-by-case determination of the relevance, significance, probative value and prejudice of a document. On that basis, it excluded reports from independent observers where the author's identity and the sources of the information were not revealed with sufficient detail or it relied heavily on hearsay information. Reports of NGOs and third States were excluded where insufficient guarantees of non-partisanship and impartiality were provided. They were also held inadmissible where insufficient information was given on the sources and methodology used, or where the contents largely relied on hearsay evidence.¹²⁸⁹

¹²⁸⁷ For further details, see: Caroline Buisman: 'Evidence before International Criminal Courts and Tribunal the Ad Hoc Tribunals', in: Ilias Bantekas: *International Criminal Law* (Oxford: Hart Publishing Ltd, 4th ed. 2010) Chapter 21, 473.

¹²⁸⁸ For a thorough discussion on the practice at the tribunals in respect of admissibility, see C. Gosnell: 'Admissibility of Evidence', Ch 8 in: Khan, *Principles of Evidence*.

¹²⁸⁹ ICC-01/04-01/07-2635 17-12-2010, *Decision on the Prosecutor's Bar Table Motions*, paras. 14, 28-31. See also: ICC-01/04-01/07-3184 21-10-2011, *Decision on the Bar Table Motion of the Defence of Germain Katanga*, paras 16-20.

This is in stark contrast to the approach taken by the *Bemba* Trial Chamber. Without predetermining their ultimate weight, it made a *prima facie* determination of admissibility as evidence of all of the materials included by the Prosecution in its list of evidence.¹²⁹⁰ The Chamber justified this decision by referring to its right under the Statute to admit non-oral evidence, and held the wholesale admission of evidence would save time and serve the search for the truth.¹²⁹¹ The Appeals Chamber, however, overturned the decision. It considered that, in admitting all Prosecution documents without a cautious item-by-item evaluation and giving reasons, the Chamber acted outside the legal framework of the Court and inconsistent with the principle of orality under article 69(2) of the Statute.¹²⁹²

Thus, some limits to admissibility have been imposed. However, aside from the obligation to assess documents on their individual *indicia*, there are few additional requirements. There is, for instance, no ban on hearsay or other dubious evidence. Documents of contested authenticity because they are unsigned and undated copies or excerpts of exhibits, may still be admitted.¹²⁹³ Even a written statement made by a suspect or accused, incriminating his co-accused, without a requirement for him to take the stand and be subject to cross-examination by this co-accused, can be admitted in this fashion.¹²⁹⁴ Given that the co-accused has not had an opportunity to cross-examine his accuser, such a statement can, however, only be relied upon for a finding

¹²⁹⁰ ICC-01/05-01/08-1022 19-11-2010, *Decision on the admission into evidence of materials contained in the prosecution's list of evidence*, paras. 9 and 35.

¹²⁹¹ *Ibid*, paras. 24-28.

¹²⁹² ICC-01/05-01/08-1386 03-05-2011, *Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"*, paras. 1-3.

¹²⁹³ The extent to which such factors prevent the admission of the document varies from Chamber to Chamber. See C. Gosnell: 'Admissibility of Evidence', Ch 8 in: Khan, *Principles of Evidence* (n 2 above).

¹²⁹⁴ The ICTY Appeals Chamber, on the other hand, has held that "it would be wrong to exclude evidence solely because of the intrinsic lack of reliability of the contest of a suspect's questioning in relation to persons who later became that suspect's co-accused." See *Popovic* Decision On Appeal Against Decision Admitting Material Related to Borovcanin's Questioning (14 Dec 2007), para 49. See for further details: Caroline Buisman: 'Evidence before International Criminal Courts and Tribunal the Ad Hoc Tribunals', in: Ilias Bantekas: *International Criminal Law* (Oxford: Hart Publishing Ltd, 4th ed. 2010) Chapter 21, 473 at 500, 21.4.5. Until now, the ICTR has not taken the same approach. See: *Karemura* Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumapatse (2 Nov 2007), para 46. In *Nyiramasuhuko* Decision on Arlene Shalom Ntahobali's Motion to Exclude Certain Evidence from the Expected Testimony of Kanyibashi's Witness D-2-13-O (29 June 2007), such a statement was admitted because the co-accused against whom the statement was directed had an opportunity to cross-examine the maker of the statement.

of guilt if sufficiently corroborated.¹²⁹⁵

Thus, while there are certain thresholds for admissibility of evidence, many categories of evidence that would be excluded or tightly controlled in common law criminal justice systems, such as hearsay, are admissible in international criminal justice systems. Documents do further not need to be introduced through a witness, but can be introduced through the bar.¹²⁹⁶ As a result, a large quantity of evidence is admitted without any explanation from anyone who is familiar with the document and without significant discussion in court.

The reason for this approach to admissibility is that the evidence is not reviewed by a jury who might be distracted or improperly affected by certain evidence, but by a bench of professional judges who seek to establish the truth. Truth is not dependent on the parties.¹²⁹⁷

As previously discussed, the fundamental norm that witnesses be heard orally in court has been undermined, particularly at the ICTY, by the introduction of new rules, e.g. rule 92*ter*, rule 92*quater* and rule 92*quinquies* allowing the admission of written witness declarations in lieu of oral testimony in specific circumstances. Under these rules, directly incriminating statements can be introduced without the judges having had an opportunity to assess the demeanour of the witness and without the defence having had an opportunity to question the witness.

These provisions were introduced not to advance the ascertainment of the truth, but rather for reasons of efficiency. As aforementioned, they were based on a misinterpretation of civil law principles of evidence. Whenever civil law proceedings are looked at as a better model for international criminal justice, it is because such

¹²⁹⁵ *Prlić* Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, para 33; *Blagojevic and Jokic* Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement (18 Sep 2003), para 26; *Prlic* Decision on Request for Admission of the Statement of Jadranko Prlic (22 Aug 2007), paras 17, 27-28, 33.

¹²⁹⁶ *Ibid*, section 21.5. However, usually, documents that were authenticated by a witness will be given more probative value than documents that were not introduced by a witness. See, for instance, *ICTY Prosecutor v Hadzihasanovic & Kubura*, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, (22 June 2005), paras 33-35; *Oric* Trial Judgement (30 June 2006), para 29.

¹²⁹⁷ Donald K. Piragoff: Article 69, in: Triffterer, *Commentary on the Rome Statute* (n 610 above) 1321; Olga Kavran, 'The *Sui Generis* Rules of Procedure and Evidence', Ch V in: Haveman, *Supranational Criminal Law* (n 2 above) 133-135.

proceedings, without the ‘technicalities’ of common law procedures, are viewed as being likely to provide a quicker and easier determination of guilt, if appropriate, rather than to enhance truth-finding.

However, the measures adopted go further than the principles of evidence adhered to in civil law systems. This is so, particularly in respect of rules 92*quater* and 92*quinquies* allowing the judges to rely on a witness statement directly going to the acts and conduct of the accused without having had an opportunity to assess the demeanour of the witness and without the defence having been given an opportunity to cross-examine. In most civil law systems, particularly under influence of the ECHR, this is no longer acceptable. Most witnesses the judges tend to rely on without having seen them have previously been questioned by an investigative judge in the presence of the parties who were also given an opportunity to ask questions.¹²⁹⁸

This difference between civil law proceedings and international criminal proceedings was pointed out by former ICTY Judge Hunt. He pointed out that this new approach went further than either common law or civil law proceedings. He emphasised that the civil law dossier was prepared by a judicial officer whose mandate it is to look for exonerating and incriminating evidence equally and who is expected to be neutral.¹²⁹⁹ International criminal tribunals do not employ an independent judicial officer to take statements, but rely on the parties for doing so. The result is that international criminal tribunals, whilst readily accepting the use of out-of-court evidence, have not incorporated the safeguards inherent in domestic systems which have a tendency to rely on paper evidence.¹³⁰⁰

Other practices, such as the admission of an incriminating statement made by one accused against his co-accused even where the maker of the statement has not given oral evidence would not be permitted at common law nor in some civil law jurisdictions.¹³⁰¹

¹²⁹⁸ See above, Part II ‘methodologies’.

¹²⁹⁹ *Milošević* Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement (Majority Decision given 30 September 2003 (21 Oct 2003), para 6.

¹³⁰⁰ P L Robinson, ‘Rough Edges in the Alignment of Legal Systems in the Proceedings of the ICTY’ (2005) 3 *Journal of International Criminal Justice* 1037, at 1046.

¹³⁰¹ See, for instance Arts 210, 500, 511, 513 and 514 of the Italian Code of Criminal Procedure and its Dutch counterpart (HR 27 mei 1929, NJ 1929, 1329; HR 15 December 1953, NJ 1954, 71).

In approving the admissibility of statements from a co-accused the Appeals Chamber of the ICTY concluded that the practice was inconsistent with common law principles while, with regard to civil law “no discernable general principle may be inferred from domestic practice in this area”.¹³⁰² Once again the reason for approving the admission of such statements was the fact that international trials are conducted by professional judges, as opposed to a lay jury. According to the Appeals Chamber, “professional judges are better able to weigh evidence and consider it in its proper context than members of a jury. Furthermore, as opposed to a jury’s verdict, professional judges have to write a reasoned decision, which is subject to appeal.”¹³⁰³

The ease with which evidence is admitted before the tribunals has been subject to criticism. Scholars have suggested that such a lenient admission policy removes any kind of quality test.¹³⁰⁴

The tendency to admit rather than exclude most of the proposed evidence is arguably more problematic in the circumstances in which the tribunals operate. Given the complexity of the cases, thousands of documents tend to be admitted per case without any explanation by a witness who is familiar with the documents.¹³⁰⁵ The quantity is so great that it would be useful, simply on pragmatic grounds, to introduce stricter admissibility criteria. As Murphy has pointed out, “far from furthering the search for truth through free proof, they actually frustrate their objective by making trials longer, more complex, and less efficient, and by tending to bury the truly important evidence in the midst of an enormous accumulation of evidential debris.”¹³⁰⁶ An additional reason to introduce a more vigorous admissibility test is the high risk of document fabrication in ethnically divided war areas.¹³⁰⁷

¹³⁰² *Prlić* Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, para 50.

¹³⁰³ *Ibid*, para 57.

¹³⁰⁴ See Julian Nicholls, ‘Evidence: Hearsay and Anonymous Witnesses’, Ch VII in Haveman, *Supranational Criminal Law* (n 2 above); also Murphy, ‘Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence’, 12 *Int’l J. Evidence & Proof*, 2008.

¹³⁰⁵ Murphy, ‘Excluding justice or facilitating justice? International Criminal Law would benefit from rules of evidence’, 12 *Int’l J. Evidence & Proof* 2008, 2.

¹³⁰⁶ See Murphy, *ibid*, 2, 3. See also pages 25-27, where he cites Sir James Fitzjames Stephen who says, inter alia: ‘No judge can possibly be expected, by the mere light of nature, to know how to set limits to the inquiries in which he is engaged, yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his court, is sure to follow.’ See further: His Honour Judge Peter Murphy and Lina Baddour, ‘International Criminal Law and Common Law Rules of Evidence: Are Exclusionary Rules of Evidence Useful in International Criminal Law?’ In: Khan, *Principles of Evidence* (n 2 above).

¹³⁰⁷ Murphy, ‘Excluding justice or facilitating justice?’ 2, 16-21, 30.

The admission of dubious evidence does not necessarily lead to less accurate findings. The real issue is whether the oft recited mantra (that the professional judges in international criminal proceedings are capable of winnowing out such material in a way that juries would not be) is to be relied upon. The question whether the judgments handed down over the last fifteen years do indeed show that the judges have been able to set aside evidence that is irrelevant, unfairly prejudicial or unreliable will be looked at in the next chapter.

Assessment of the Evidence

The evaluation system

The reliability of the outcome depends on two components, the degree of access to the information related to the underlying charges and secondly the efficacy of the evaluation of this information. The actual evaluation equates to the cognitive component of a search for the truth. It is much more difficult to regulate the cognitive, than the procedural component, as was addressed above, because that is essentially a subjective process of the uncertain human mind.

In the ICTY, ICTR and ICC, the evidence is evaluated by a Trial Chamber consisting of three professional judges, a majority of whom must be in agreement with the outcome. The Chamber's verdict is final unless one or both parties lodge an appeal against the verdict. In such a case, the enforcement of the judgment is stayed until the Appeals Chamber has ruled on it.¹³⁰⁸ An acquitted person is released immediately upon the pronouncement of the judgment unless the Chamber uses its discretion to issue an order for his continued detention. This may occur pending the determination of the appeal if the Prosecutor has advised it at the time the judgment is pronounced and in open court of his intention to file an appeal.¹³⁰⁹ Any appeal against an acquittal or conviction is allowed provided it is based on an error of law invalidating the decision, or an error of fact which has occasioned a miscarriage of justice.¹³¹⁰ The

¹³⁰⁸ Rule 102 ICTY/ICTR Rules.

¹³⁰⁹ Rule 99 ICTY/ICTR Rules.

¹³¹⁰ Article 25(1) ICTY Statute; Article 24(1) ICTR Statute.

Appeals Chamber may affirm, reverse or revise the Trial Chamber's judgment.¹³¹¹

The ICC includes an extra layer of review of the factual allegations. There is already a full assessment of the evidence at the confirmation hearing by a Pre-Trial Chamber. The Pre-Trial Chamber's findings do not, however, constitute findings on the guilt or innocence of the defendant. The purpose of the confirmation hearing is to ensure that "no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged."¹³¹² The evidence is tested marginally and few witnesses, if any, will be called to testify *viva voce*.¹³¹³ The Prosecution is explicitly allowed to rely on anonymous witnesses and summaries, although the weight will be reduced.¹³¹⁴ The confirmation hearing has a limited scope and "by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial."¹³¹⁵

Despite its limited scope, so far four out of fourteen cases have not been confirmed. These cases were not confirmed because of insufficient evidence, or inherent contradictions and inconsistencies between the witness statements.¹³¹⁶ In the case of *Mbarushimana*, the majority of the Pre-Trial Chamber even held that the evidence failed to demonstrate that the suspect made any contribution to the commission of crimes under the ICC Statute, let alone a "significant" one, as is required for criminal

¹³¹¹ Article 25(2) ICTY Statute; Article 24(2) ICTR Statute.

¹³¹² ICC-01/04-01/07-428, 21-04-2008, para. 5. See also: *Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges ICC-01/04-01/10-465-Red, 16 December 2011, paras.39-41; *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29 January 2007, paras 37-39; *Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 1 October 2008, paras 61-64; *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC- 02/05-02/09-243-Red, 8 February 2010, paras 35-40; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Pre-Trial Chamber I, Corrigendum of the Decision on the Confirmation of Charges, ICC-02/05-03/09-121-Corr-Red, 7 March 2011, paras 29-31.

¹³¹³ The confirmation process is somewhat akin to a grand jury proceeding in certain common law systems such as the US where jurors make this preliminary finding in terms of what if any charges will be brought against an accused.

¹³¹⁴ *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 78. See also ICC-02/05-02/09-243-Red 08-02-2010, paras. 50-52.

¹³¹⁵ ICC-01/04-01/07-428, 21-04-2008, para. 6.

¹³¹⁶ See further *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-02/11-373-Red 23-01-2012, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras 293-300; *Prosecutor v. Muthaura, Ali and Kenyatta*, ICC-01/09-02/11-382-Red 23-01-2012, paras. 420-427; *Prosecutor v. Abu Garda*, Decision on the Confirmation of the Charges, ICC-02/05-02/09-243-Red 08-02-2010, paras. 173-236.

liability under the Statute.¹³¹⁷

This amounts to 29% of the totality of the cases, a number of which were not even challenged at the confirmation level.¹³¹⁸ In light of the significantly lower standard of proof, this is a high percentage. Unfortunately, it demonstrates that the Prosecutor failed significantly in producing sufficient evidence in support of the cases he himself brought before the Court. On a more positive note, it also demonstrates that there is a real test at the ICC and that judges are independent of the Prosecutor's Office. Until now, the judges have rigorously applied the requisite confirmation standard and did not confirm the cases that should not have been confirmed.¹³¹⁹

General Principles

As aforementioned, the burden is on the Prosecutor to prove the case beyond reasonable doubt and the only question the judges should focus on is whether the Prosecutor met this burden. This is perceived as the principal safeguard against wrongful convictions of defendants before international criminal courts and tribunals.

As Coleen Rohan, defence counsel before the ICTY, has stated:¹³²⁰

The requirement that the Prosecution must prove cases brought in international forums beyond a reasonable doubt [...] is a critical means of attempting to assure that verdicts returned on the international stage, involving, as they do, previous heads of state, military, government and political leaders, are as reliable as they can be, given the flaws of human nature and the flaws inherent in any system of law. Application of this standard of proof assures that all Prosecution evidence will be properly subjected to rigorous, thoughtful scrutiny including a thorough examination of its strengths and weaknesses. It also obviates, to a significant extent, the concern that verdicts can or will be based on rumor, innuendo, assumptions, suspicion, political or ethnic bias or

¹³¹⁷ *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, para. 292.

¹³¹⁸ For instance, the defence for Germain Katanga only challenged the legal definition of common plan, but did not present a defence on the facts. Similarly, the defence for Abdallah Banda and Saleh Jerbo did not challenge the factual allegations at the confirmation hearing. Had they done so, the Chamber may equally have found that their guilt had not been established on substantial grounds to believe.

¹³¹⁹ The Kenyan suspects whose cases have been confirmed are disappointed with the result. However, they perceived the confirmation as a trial, which it is clearly not. The cases of two suspects were not confirmed because the evidence was inherently inconsistent and insufficient to establish substantial grounds to believe. See further *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-02/11-373-Red 23-01-2012, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, paras. 82-92; *Prosecutor v. Muthaura, Ali and Kenyatta*, ICC-01/09-02/11-382-Red 23-01-2012, paras. 88-100.

¹³²⁰ Colleen M. Rohan, 'Reasonable Doubt Standard of Proof in International Criminal Trials', Ch 13 in: Khan, *Principles of Evidence* (n 2 above).

ill-informed, though nonetheless popular pre-conceptions as to who must be held liable for individual war crimes and who must not.

If the Prosecutor fails to produce sufficient evidence, the judges can do very little other than acquit the accused even if they believe that the accused is guilty as charged. His guilt must be firmly demonstrated by evidence produced during the course of trial. Surprisingly, in one case, the judges considered themselves competent to rely on documents “not specifically tendered in evidence”.¹³²¹ This case has, however, not established a rule or practice. In general, judges rely solely on the evidence produced in the proceedings. Such evidence can, however, be produced on the Chamber’s order. If the judges believe there is relevant and reliable evidence available which is not produced by the parties, they may request that this additional evidence be produced. Such additional evidence may complete or shed doubt on the Prosecutor’s case. In one case, additional evidence produced on the Chamber’s order has led to the acquittal of the accused.¹³²²

If at the end of the case two out of these three judges are satisfied that the defendant’s guilt has been established beyond reasonable doubt, he risks being sentenced to life imprisonment or at least a significant number of years. This is because of the serious nature of the crimes most defendants are charged with before international criminal tribunals and courts. Given the impact of their decision on the defendant’s life, the judges carry a heavy responsibility. This is particularly true in light of the mandates of the international criminal justice systems, *e.g.* the maintenance of international peace and security, reconciliation and the manifestation. NGOs, civil society groups, victims and other interested persons or organisations also have a keen interest in the outcome. Some observers consider it appropriate for the judges to take into account the interests of victims and other groups and individuals concerned when determining the appropriate sentence to be imposed on the defendant if found guilty.¹³²³

However, in determining whether the defendant is guilty as charged, such interests

¹³²¹ Akayesu Judgment, para 144.

¹³²² This occurred in the case of Bagilishema who was acquitted. The judgment was based, in part, on the fact that records the Prosecutor had been ordered to obtain on behalf of the defence, significantly contradicted what a number of witnesses had said. See *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Trial Chamber Judgment, 7 June 2001.

¹³²³ Baumgartner, Aspects of Victim Participation (n 1033 above) 434-437.

should not play any role. Instead, the judges are expected to engage with the information but keep their distance, and determine the guilt or innocence only on the basis of the evidence presented. It is this very rationale which explains why the rules of admissibility of evidence are so flexible as opposed to jurisdictions with lay jury-members. Professionally trained judges are assumed to be able to render emotionless decisions. Indeed, as one ICTR Trial Chamber put it, “[i]n spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent. Moreover, the seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full respect of all the rights of the Accused.”¹³²⁴

Extra-judicial Considerations

In reality, this may be difficult even for professionally trained judges. The judges may subconsciously have pre-determined views concerning the guilt of the accused. Such risk is heightened in light of the participation of victims before the ICC and their acknowledged right to the truth, as well as the active role of the media and human rights activists in investigating the crimes under the jurisdiction of international criminal justice systems, and publicly identifying those who are allegedly responsible. In domestic jurisdictions, identified perpetrators in high profile cases causing public outrage are usually at a higher risk to be wrongly condemned.¹³²⁵ International criminal courts and tribunals exclusively deal with high profile cases. Any human is prone to be influenced by extra-legal considerations. A professional judge does not stop being a human being.¹³²⁶

As Frank put it:¹³²⁷

¹³²⁴ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement of 2 September 1998, para. 129.

¹³²⁵ The Armytage, *Educating Judges*, Ch VII ‘The English Criminal Trial: The Credits and the Debits’, 262, for instance: Birmingham Six, Guildford Four, Maguire Seven.

¹³²⁶ Pompe: bewijs in strafzaken, 51. See also Frank, *Courts on Trial*, *supra* note 38, 151-152, where he describes psychological factors affecting the mind and the antipathies and sympathies we all have for reasons not always rationally explained: “A certain facial twitch or cough or gesture, may affect the judge’s initial hearing or subsequent recollection, of what the witness said, or the weight or credibility which the judge will attach to the witness’ testimony.” (151).

¹³²⁷ Frank, *Courts on Trial*, *supra* note 38, 152.

Now the trial judge is a man, with a susceptibility to such unconscious prejudiced “identifications” originating in his infant experiences. Sitting at a trial, long before he has come to the point where he must decide what is right or wrong, just or unjust, with reference to the facts of the case as a whole, he has been engaged in making numerous judgments or inferences, as the testimony dribbles in. His impressions, colored by his unconscious biases with respect to the witnesses, as to what they said, and with what truthfulness and accuracy they said it, will determine what he believes to be the “facts of the case”. His innumerable hidden traits and predispositions often get in their work in shaping his decision in the very process by which he becomes convinced what those facts are. The judge’s belief about the facts results from the impact of numerous stimuli – including the words, gestures, postures and grimaces of the witnesses – on his distinctive “personality”; that personality, in turn, is a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did not marry), his children, the books and articles he has read.”

The most problematic aspect of the ascertainment of the guilt or innocence of the accused is that the mind of the triers of fact cannot be controlled or known. A standard of proof can be set. However, it is impossible to know, let alone regulate, how the triers of fact determine when the requisite standard is met and what level of certainty is required for meeting this standard. One can control the type of evidence the triers of fact are allowed to consider in evaluating the question of guilt or innocence. One can also impose legal conditions for the standard to be met. The international judges are for instance obligated to justify in writing if, and on what basis the standard of proof was met. This constitutes a safeguard against erroneous convictions, as it renders the findings and reasoning transparent. Accordingly, the judgement can be put to the test of scrutiny by the public as well as the Appeals Chamber. This also guarantees consistency in approach from Chamber to Chamber as well as greater certainty before the law.

The obligation upon the judges to justify their findings also ensures that the society at large and the people from the affected communities including the victims have access to the full truth established in international trials. Thus, the delivery of public detailed judgements may also contribute to the secondary mandates, most notably reconciliation, peace and security, and the creation of a historical record.

It is therefore a positive phenomenon that international tribunals have incorporated the civil law requirement of producing reasoned written decisions. It nonetheless remains difficult to assess whether a given decision is fair. Whilst the judges tend to

produce very lengthy written findings,¹³²⁸ it is often impossible to verify which factors have led them to decide one way or the other. The reliability and credibility of witness testimony is determined on a case-by-case basis.¹³²⁹ Judges are not required to provide reasoning for each step they took in the process of weighing and assessing the evidence.¹³³⁰ Reviewing the judgements, particularly those at the ICTR, one cannot help to wonder whether it is a chess game or a search for the truth. The judgements contain lengthy analyses on witness credibility. They discuss each factor that could potentially undermine or enhance the credibility and reliability of the evidence. However, on the basis of such factors, the ultimate determination on the witness credibility can easily go either way: credible or not credible. It seems rather arbitrary.

The judgements further do not address any extra-legal considerations that may have played a determinative role in the subjective decision-making process of the judges.¹³³¹ They do not address the personal process the trier of facts has gone through to make up their mind about the ultimate issue of guilt or innocence.¹³³² Nor do they disclose the real motives and reasons underlying their findings. If judges are even aware of their real motives for deciding as they did, such motives will rarely be included in the decision, in particular where the decision was essentially based on prejudice.¹³³³ At least, one cannot be sure that the reasons given for the judges'

¹³²⁸ This is in accordance with their statutory obligation to do so under Art. 22(2) of the ICTY Statute, Art. 21(2) of the ICTR Statute and Rule 88(C) of the Rules. In the *Furundzija* Appeal Judgment (21 July 2000), para 69, the ICTY relied on ECHR jurisprudence, stating that the right to a reasoned opinion is an aspect of the fair trial requirement embodied in Arts 20 and 21 of the Statute.

¹³²⁹ *Ruiz Torija v Spain* (1994) 19 EHRR 553, para 29, cited in *Furundzija* Judgment, *ibid*, para 69.

¹³³⁰ *Delalic* Appeal Judgment (20 Feb 2001), paras 481, 498; *Musema* Appeal Judgment, para 20; *Akayesu* Appeal Judgment, para 306. In addition, the Appeals Chamber has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account: *Musema* Appeal Judgment, para 19; *Akayesu* Appeal Judgment, para 306.

¹³³¹ According to Frank, “[t]he trial judge is therefore in this position: He can begin with the decision he considers desirable, and then, working backwards, figure out and publish an F and an R which will make his decision appear to be logically sound, if only there is some oral testimony which is in accord with his reported F, and if he applied the proper R to that reported F. If so, it does not matter whether actually he believed that testimony, i.e., whether the facts he reports are the facts as he believes them to be. In other words, he can, without fear of challenge, “fudge” the facts he finds, and thus “force the balance”. No one will ever be able to learn whether, in the interests of what he thought just, or for any other cause, he did thus misstate his belief.” See Frank, *Courts on Trial* (n 12 above) 168.

¹³³² Damaška, *Evidentiary Barriers*, *supra* note 30, 540, ft note 77.

¹³³³ Frank, *Courts on Trial*, *supra* note 38, 157-159; citing: Rohrlich ‘Judicial Technique’ 17 *Amer. Bar Ass’n J.* (1931) 480:

findings match what, in truth, they think.¹³³⁴

It is difficult, if not impossible, to explore the mind of any human being, but particularly that of a trier of fact. A witness can be cross-examined, which may expose his thoughts to some degree, but no one is permitted to cross-examine a judge or to use other methods applicable to witnesses. How, then, can one “investigate his secret thoughts ...? He is the master of them, and what he says must be conclusive, as there is nothing to contradict or explain it.”¹³³⁵

Cultural and Linguistic Difficulties

In addition, judges in international criminal courts and tribunals suffer from the same deficits as investigators in assessing an unknown situation usually not covered by their training or expertise. It is questionable how much their professional training assists judges in assessing what happened during conflicts in unfamiliar cultures.¹³³⁶

It does not help that the deliberation takes place far from the war zone in a quiet office in The Hague or Arusha. Many judges have not even visited the crime base and may, therefore, have no affinity with the culture under investigation.

It is, for instance, not uncommon for international judges dealing with African conflicts to be presented with command structures based on magic. For instance, in his ICC trial, Katanga has alleged that the true war chiefs in his culture were the ‘féticheurs’, spiritual leaders with magical powers. Katanga testified that it was the spiritual leader or ‘sage’ who decided when and where an attack should be launched. Such decisions were based on the messages the sages of war received. Prior to an attack, the sages would gather the militiamen together and organise a ceremony and provide them with ‘fétiche’. The ‘fétiche’ consisted of a mix of herbs and animal bones and made the militiamen bullet proof, provided they abided by the rules.¹³³⁷

¹³³⁴ Frank, *Courts on Trial* (n 12 above) 167-168 at 167.

¹³³⁵ *Duke of Buccleuch v. Metropolitan Board*, L.R. 5 H.L. 418, 434 (1872), cited by Frank, *Courts on Trial*, *supra* note 38, 167.

¹³³⁶ As Wagenaar points out, cultural clashes may already be a problem when judges are dealing with an accused from their own society, let alone when dealing with a strikingly different culture. Judges are not necessarily trained in establishing facts, particularly not when judges have to deal with superstition, prejudice and cultural differences. He also states in his introduction that the authorities have very little knowledge outside the strictly legal domain; and worse even, that they make that knowledge secondary to abstract legal fictions without any concern whether that undermines the “truth”. Wagenaar, *Vincent plast op de grond*, *supra* note 129, 7, 10-11.

¹³³⁷ ICC-01/04-01/07-T-315-ENG CT2 WT, 28 September 2011, pages 35-37 ; ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 20-21.

This has been confirmed by other witnesses.¹³³⁸ Throughout the trial, the judges have expressed genuine interest in this aspect of the story.¹³³⁹ It will be interesting to see whether the judges will treat this evidence, if believed, as mitigating or exempting liability. In many African villages, there is a strong belief in mythical powers. It is thus difficult for anyone to refuse to abide by the orders of a war sage.¹³⁴⁰

In each individual case in international justice, it is difficult, if not impossible, to determine what type of conduct is internationally condemnable in the extraordinary circumstances of a conflict. Unlike in domestic systems, the conduct of an accused in a war situation is often conformist rather than deviant.¹³⁴¹ Is that a factor that should mitigate the sentence? No expert presumably has the expertise to give an authoritative answer on this, particularly because every conflict is unique. There is often simply no precedent for “reasonable” behaviour.

To the extent that expert witnesses can give some guidance, the reader is reminded that there are numerous problems with expert testimony. Expert witnesses are not always impartial and dispassionate even if they try. Moreover, they have not personally witnessed any of the events they describe but often rely on anonymous sources to reconstruct them. Their sources were not always eyewitnesses to the events but may narrate the accounts of others. Such factors are taken into consideration in weighing the reliability and credibility of expert testimony.¹³⁴² Thus, a finding of guilt cannot be made exclusively on expert testimony.¹³⁴³ Expert evidence may be useful to complement eyewitness testimony, but can never replace it. Expert evidence is therefore of limited assistance only.

¹³³⁸ See for instance Witness DRC-OTP-P-0219, ICC-01/04-01/07-T-206-Red-ENG WT, 19 October 2010, pages 32-33 and 36-41; and Witness DRC-D02-P-0148, ICC-01/04-01/07-T-279-Red-ENG WT, 10 June 2011, pages 29 and 31-32; see also Witness P-0279, ICC-01/04-01/07-T-144-Red-ENG WT 20-05-2010, pages 45-48.

¹³³⁹ ICC-01/04-01/07-T-325-ENG CT WT, 19 Octobre 2011, pages 28-31 ; ICC-01/04-01/07-T-281-Red-ENG WT 14-06-2011, page 20-21; ICC-01/04-01/07-T-207-Red-ENG CT WT, 20 Octobre 2010, pages 25-26; ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009, pages 20-21.

¹³⁴⁰ Raimondo, *For Further Research*, *supra* note 575.

¹³⁴¹ Drumbl, *Atrocity*, *supra* note 46, 8, 185-187, 211-217, Ch 2.

¹³⁴² *Milosevic* Decision on Admissibility of Expert Report of Vasilije Krestic (7 Dec 2005), para 5; *Semanza* Trial Judgment, para 279; *Bizimungu* Decision on Expert Witness Dr Alison Des Forges, paras 17 and 25; *Karemera* Decision on Joseph Nzirorera’s Motion to Limit the Scope of Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua, paras 5, 17, 25.

¹³⁴³ *Nahimana* Appeal Judgment, para 509.

It can also be challenging to assess the demeanour of witnesses from a culture with very different customs. A witness's evasiveness in answering questions can be the result of lying, a misunderstanding or a cultural reason the assessor cannot quite comprehend. Combs has highlighted many such difficulties. She also pointed out that a witness's lack of education can cause a credible witness to look incredible. On the other hand, witnesses can also hide behind cultural differences when, in fact, they are stuck in their own lies.¹³⁴⁴

An additional difficulty is caused by multiple translations and interpretations. International tribunals have more than one official language. The more languages are involved, the more likely mistakes occur in simultaneous translation. The ICC is faced with a particular complexity as it deals with a large number of different languages spoken by the accused and witnesses, including non-written local or tribal languages, for instance Zaghawa spoken by a particular tribe in Sudan. Languages are often translated into different languages first before being translated into a language which the judges understand, thus widening the gap between them and the witness.

There are already serious discrepancies between the English and French versions of the transcript.¹³⁴⁵ In light of the recognised potential impact of translation errors on the outcome of the case, such discrepancies have led the Chamber in *Katanga & Ngudjolo* to order a full review of the English and French translations of Katanga's and Ngudjolo's testimonies.¹³⁴⁶

Such translation errors can lead to significant misinterpretations of what the witness has said. Inconsistencies between a witness's testimony in court with his previous statement, or between different parts of his testimony could be the result of translation

¹³⁴⁴ Combs, *Fact-Finding Without Facts*, *supra* note 6, 100-105.

¹³⁴⁵ See, for instance: ICC-01/04-01/07-T-289-Red-Fr ET 11-07-2011, T-289, pages 30-31 of the French : "Cependant, moi, je pense peut-être, lorsqu'il est arrivé à Kinshasa, j'ai appris par la voie des ondes et personne ne m' a dit que Germain Katanga était le responsable des FRPI, mais qualité présidence; en tout cas, ça, je ne... je ne l'avais pas appris à l'époque." This was translated as follows: (ICC-01/04-01/07-T-289-Red-EN ET 11-07-2011, p. 33): People told me that Germain Katanga was one of the officials of the FRPI, but I didn't know that he was the president. In any event, that is something that I had not been told at the time and I'm telling you this in all sincerity and honesty.

¹³⁴⁶ ICC-01/04-01/07-3216 14-12-2011, *Décision relative à la requête de la Défense de Mathieu Ngudjolo Chui concernant la révision complète des transcriptions de la déposition de ce dernier* ; ICC-01/04-01/07-T-325, pages 80-81.

errors. Witnesses often blame it on interpretation.¹³⁴⁷ It could, however, also simply be the result of perjury or confusion. Additional difficulties are caused by the interpretation of words. As previously discussed, divergent meanings can be given to the same terms. Translation therefore renders the task of judging very challenging.

Quality of Judges

In these circumstances, the quality of judges is of the utmost importance. It has already been noted that this quality varies significantly between excellent and poor. Defendants tried by properly trained and experienced judges generally have a greater chance of receiving a fair trial. According to Professor Bohlander, the recruitment of judges does not measure up and is not always in conformity with the recruitment criteria set out in the Statutes.¹³⁴⁸

Paciocco has pointed out that politics have plagued the judicial appointments process, with the result that the decision-makers who have been chosen are not always the best qualified.¹³⁴⁹ Paciocco finds this distressing, “particularly given that international criminal law is in its infancy, and that these judges are the ones developing the jurisprudence that may well frame the law for generations. It is also distressing because the rules adopted tend to invite broad judicial discretion; it takes a better lawyer to handle that latitude, than to apply a technical jurisprudence, because the wise use of discretion requires intimate familiarity with principles, and the purposes underlying the rules.”¹³⁵⁰ Paciocco rightly observes that good quality decision-makers are essential for a satisfying development of international jurisprudence.¹³⁵¹

¹³⁴⁷ Combs, *Fact-Finding Without Facts*, *supra* note 6, pages 66-79.

¹³⁴⁸ M. Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts*, 12 *New Criminal Law Review* 529 (2009), 530-531; M Bohlander, *The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics*, in M Bohlander (Ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007) 325, at 328-333, 385-386. See also section ‘Does the international criminal justice model meet the conditions in Part I?’

¹³⁴⁹ Paciocco, *Defending Rwandans Before the ICTR*, *supra* note 190, 12-14. See also Hans S. Nichol, quoted by David M. Paciocco, who reported about the ICTR that “the judges - especially because of their lack of experience and tact - are the biggest problems.” In: *Special Report: U.N. Court Makes Legal Mischief*, 23 December 2002. This view is shared by Bohlander, *ibid.*

¹³⁵⁰ *Ibid.*, p. 15.

¹³⁵¹ *Ibid.*, p. 15.

Paciocco expresses alarm at the sight of judges of the Tribunal becoming immersed in political issues, such as advocating for victim compensation.¹³⁵² Indeed, the independence and objectivity of a court are questionable if the judges are too much focused on victims.

It is particularly problematic that judges at international courts and tribunals are not necessarily professionally trained as judges in criminal matters. Among them are academics and diplomats with no court experience at all. Bohlander, who has experience both as an academic and a judge, has no hesitation in saying that, in his experience, “judges usually do a better job at academic work than academics at judging.”¹³⁵³ In any judicial system, judges receive some training. In civil law jurisdictions this training tends to be longer than in common law systems. However, for instance in the UK, judges have been practicing barristers for a significant period of time before being appointed.¹³⁵⁴ International criminal justice systems are about the only courts at least in the western world where persons can become judges without judicial training or experience.¹³⁵⁵ They do not even receive any training upon arrival in the international arena, but must immediately participate in rendering judgment on as serious an issue as genocide, war crimes or crimes against humanity. In Bohlander’s view, “diplomats, government officials, academics are ill-suited for such an important and complex judicial office, absent substantial judicial experience.”¹³⁵⁶

¹³⁵² “ICTR President Calls for Compensation for Victims” ICTR Press, 31 October 2002; Hans S. Nichol, “UN Court Makes Legal Mischief” Insight, 23 December 2002, www.insightmag.com/news/342415.html. Quoted by David M. Paciocco, *ibid*, p. 29.

¹³⁵³ M. Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts*, 12 *New Criminal Law Review* 529 (2009), 535.

¹³⁵⁴ In addition, they receive training: <http://www.judiciary.gov.uk/training-support/judicial-college>.

¹³⁵⁵ Bohlander agrees that this is not a sensible approach and that judges need proper training. See *ibid*, 535. See also M Bohlander, *The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics*, in M Bohlander (Ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007) 325.

¹³⁵⁶ M. Bohlander, *Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts*, 12 *New Criminal Law Review* 529 (2009), 531.

The International Crisis Group in a report in 2001 proposed to revisit the selection of the judges in order to ensure that only judges with a real professional experience in criminal law would be employed.¹³⁵⁷

These are valid criticisms. Some academic judges have, however, been among the better judges.¹³⁵⁸ This shows that training and experience does not always guarantee better quality. For trial management purposes, it is essential that the presiding judge is properly trained and experienced in judging. Academic judges could serve as appeal judges, or be part of a trial bench jointly with professional judges. Experience and training certainly assist in assessing the credibility and reliability of the evidence.

Principles of Ascertaining the Facts Applied in ICTY and ICTR

The ICC has not rendered any final judgement yet. It is currently waiting for the Chamber in Lubanga to reach a verdict, but it has not yet been announced. Thus, the analysis below is focused on the ICTY and ICTR only.

The ICTY and ICTR have adopted a liberal system of proof, which means that legal provisions do not set out minimum requirements for a conviction, or directives to be followed in deliberating on the issue of guilt. In principle, the judges are entirely free to determine what weight, if any, to attach to the evidence admitted in each case. The only two exceptions are embodied in Rule 90(B) of the ICTY Rules and Rule 90(C) of the ICTR Rules, requiring corroboration of witnesses who did not take the oath, and in Rule 96 ICTY, ICTR Rules, imposing that no corroboration shall be required in cases of sexual violence.

The requirements of corroboration at the ICTY and ICTR in specific circumstances have strengthened over the years. For instance, untested evidence directly implicating the accused must be corroborated.¹³⁵⁹ As was held by the Appeals Chamber,

¹³⁵⁷ International Crisis Group: *Tribunal Penal International Pour le Rwanda: l'Urgence de Juger*, 7 juin 2001, Rapport Afrique nr. 30, Nairobi/Arusha/Bruxelles, pg. iii.

¹³⁵⁸ The author has appeared before Judge Van Der Wijngaert, an academic judge without any prior court experience, in three cases (Limaj, Haraqija, Katanga). In the author's personal view and observation, shared by her colleagues and accused, Judge Van Der Wijngaert has been a proper judge with a good sense of what judging is about.

¹³⁵⁹ *Martic* Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic, para 53; reliance on *AM v Italy*, App No 37019/97, para 25; *Saïdi v France* (1994) 17 EHRR

“evidence which has not been cross-examined and goes to the acts and conduct of the accused or is pivotal to the Prosecution’s case will require corroboration if used to establish a conviction.”¹³⁶⁰

Statements admitted under Rule 92*quater* or Rule 92*quinquies* of the ICTY Rules can only be relied upon if sufficiently corroborated. In the case of *Haraqija and Morina* the Chamber held that

[i]n order for a piece of evidence to be able to corroborate untested evidence, it must not only induce a strong belief of truthfulness of the latter, i.e. enhance its probative value, but must also be obtained in an independent manner. Rejecting a technical approach to this issue, the Trial Chamber holds that corroborating evidence may include pieces of evidence that, although originating from the same source, arose under different circumstances, at different times and for different purposes. Such evidence would indeed meet the requirement of “sufficient corroboration”, which is aimed at preventing an encroachment on the rights of the accused.¹³⁶¹

The Appeals Chamber affirmed that a conviction cannot rest decisively on untested evidence. It found that “[w]hether untested evidence is sufficiently corroborated is necessarily a fact specific inquiry and varies from case to case”.¹³⁶² In this particular case, the Appeals Chamber was not satisfied that the untested evidence from the co-accused was sufficiently corroborated, given that all other available evidence was also untested, consisting of double or triple hearsay. The Appeals Chamber, therefore, overturned the conviction of one of the accused.¹³⁶³

Another category of evidence that is usually expected to be corroborated is evidence given by a co-perpetrator or others with a motive to incriminate the accused.¹³⁶⁴ Co-perpetrators are frequently considered to be of diminished credibility, given that their

251, paras 43-44; *Unterpertinger v Austria*, paras 31-33; *Lucà v Italy* (2001) 36 EHRR 807, paras 39-45. See also *Prosecutor v Haraqija & Morina* Appeals Chamber Judgment (23 July 2009), para 61.

¹³⁶⁰ *Martic* Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic, para 20; *Martic* Trial Judgment, para 27; *Haraqija & Morina* Judgement on Allegations of Contempt (17 Dec 2008), para 23; *Milutinovic* Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* (16 Feb 2007), para 13; *Haradinaj* Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures (7 Sep 2007), para 12; *Prlic* Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvic), paras 22-23; *Prlic* Appeals Decision on Transcripts of Jadranko Prlic, para 53; *Blagojevic* Trial Judgement, para 26; *Halilovic* Trial Judgement, para 19.

¹³⁶¹ *Haraqija* Contempt Judgment, para 41.

¹³⁶² *Haraqija & Morina* Appeals Judgment (23 July 2009), para 62.

¹³⁶³ *Ibid*, paras 64-69.

¹³⁶⁴ *Muvunyi* Appeal Judgement, paras. 130-131.

answers are not trustworthy because they may seek to put the blame on the accused to avoid self-incrimination. Their evidence should, therefore, be treated with suspicion even where the co-perpetrator came to testify as a *viva voce* witness in the case and, as such, was subjected to the test of cross-examination. In most cases, although not a strict requirement, such evidence is only relied upon if corroborated.¹³⁶⁵

The inherent reliability is particularly undermined where evidence is given in an interview with the prosecution by a co-perpetrator who is jointly tried with the accused but does not himself testify. Due to the lack of oath and the test of cross-examination and demeanour such evidence must be treated with caution and, at a minimum, be corroborated.¹³⁶⁶

In any other situation - although it is usually preferred that evidence is corroborated¹³⁶⁷ - the judges are perfectly allowed to rely on non-corroborated evidence for the finding of guilt. Provided it is relevant and credible, the Chamber can rely on a single testimony.¹³⁶⁸

This is no different when it constitutes uncorroborated hearsay or circumstantial evidence which can be relied upon for the finding of guilt, provided it is credible and

¹³⁶⁵ See *Cyangugu* Trial Judgement (25 Feb 2004), paras 92, 95, 108, 113, 118, 131, 135, 141, 174, 176, 216, 321, 403, 438, 484, 540, 587, where the Trial Chamber required corroboration of such testimony. In *Limaj* Trial Judgement, para 29, the Trial Chamber was extremely cautious of witnesses who were motivated by avoiding self-incrimination and considered one witness, who was clearly motivated as such, to be of diminished credibility. See also *Halilovic* Trial Judgement, para 17; *Martic* Trial Judgement, para 25.

¹³⁶⁶ *Prlic* Appeals Decision on Transcripts of Jadranko Prlic, paras 26, 38, 62; *Milosevic* Decision on Admissibility of Prosecution Investigator's Evidence (30 Sep 2002), para 18; *Blagojevic and Jokic* Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, (18 Sep 2003), paras 24, 26, 28, 33; *Limaj* Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence (25 April 2005), para 27; Popović Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 Ter Exhibit List, para 65; and Judge Kimberly Prost's conclusion in his Partial Dissenting Opinion.

¹³⁶⁷ *Kayishema and Ruzindana* Trial Judgment, para 80; *Musema* Trial Judgment, paras 42 and 75: "[a]ny evidence which is supported by other evidence logically possesses a greater probative value than evidence which stands alone, unless both pieces of evidence are not credible." *Krnjelac* Trial Judgment, paras 81 and 71; *Brdjanin* Trial Judgment, para 27.

¹³⁶⁸ *Akayesu* Trial Judgment, para 135; *Rutaganda* Trial Judgment, para 18; *Musema* Trial Judgment, para 43; *Semanza* Appeals Judgment, para 153; *Gacumbitsi* Appeals Judgment, para 72; *Tadic* Trial Judgment, paras 535, 539; *Krnjelac* Trial Judgment, para 71. This is different in a number of civil law jurisdictions which apply the principle *unus testis, nullus testis* (one witness is no witness), which postulates that corroboration of evidence is required before any weight can be attached to it. See, for instance, arts. 341(2) and 342(3) CCP of the Dutch Criminal Code of Procedure pursuant to which the testimony of a witness or the admissions from the accused must be corroborated. See further: Nijboer, *De waarde van het bewijs* (n 58 above) 43.

reliable.¹³⁶⁹ However, caution is warranted in such circumstances.¹³⁷⁰ Indeed, hearsay evidence “may be affected by a potential compounding of errors of perception and memory”.¹³⁷¹ Its reliability is usually affected by the fact that the source of the information is not tested in cross-examination and often has not taken the oath.¹³⁷² Double hearsay raises greater concerns of reliability because the truthfulness of that information depends not only on the credibility of the witness and the accuracy of his observation, but also on the credibility and reliability of the declarant.¹³⁷³

In *Muvunyi*, the Appeals Chamber found that the Trial Chamber had not acted reasonably and with the requisite degree of caution when it relied on hearsay evidence from two witnesses to establish the systematic killing of Tutsi lecturers and students, notwithstanding their lack of detail in respect of those killings.¹³⁷⁴

Accordingly, most Chambers are reluctant to rely on uncorroborated hearsay evidence even if it is otherwise reliable and credible. Although it is a case-to-case determination depending on “the content of the evidence and the circumstances under which it arose”,¹³⁷⁵ as well as its voluntariness, truthfulness and trustworthiness,¹³⁷⁶ Chambers rarely rely on hearsay evidence standing alone.¹³⁷⁷

¹³⁶⁹ *Muvunyi* Appeal Judgment (29 Aug 2008), para 70; *Haraqija & Morina* Appeal Judgment, para 62.

¹³⁷⁰ *Rutaganda* Trial Judgment, para 18; *Sesay* Trial Judgment, para. 495. *Milosevic* Decision on Admissibility of Prosecution Investigator’s Evidence (30 Sep 2002), para 18; see also *Kordic & Cerkez* Appeal Judgment (17 Dec 2004), para 787; *Tadic* Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses (10 Aug 1995) 2–3; *Simba* Trial Judgment (13 Dec 2005), para 209; *Naletilic* Trial Judgment, para 11; *Nahimana* Trial Judgment, para 97.

¹³⁷¹ *Kamuhanda* Decision on Kamuhanda’s Motion to Admit Evidence Pursuant to Rule 89 of the Rules of Procedure and Evidence (10 Feb 2003), para 10; *Simic* Trial Judgment, para 23; *Naletilic* Trial Judgment, para 11 and *Krnjelac* Trial Judgment, para 70; *Naletilic* Appeal Judgment, para 217.

¹³⁷² *Krnjelac* Trial Judgment, para 70.

¹³⁷³ *Ntakirutimana* Appeal Judgment, para 211. See also *Aleksovski* Decision on Prosecutor’s Appeal on Admission of Evidence (16 Feb 1999), para 15; *Blaskic* Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, para 12.

¹³⁷⁴ *Muvunyi* Appeal Judgment, para 70.

¹³⁷⁵ *Aleksovski* Decision on the Prosecutor’s Appeal on Admissibility of Evidence (16 Feb 1999), para 15; *Limaj* Decision on the Prosecution’s Motion to Admit Prior Statements as Substantive Evidence (25 April 2005), para 17.

¹³⁷⁶ *Aleksovski* Decision, *ibid*, para 15; *Blagojevic and Jokic* Trial Judgment, para 21; *Halilovic* Trial Judgment, para 15; *Martic* Trial Judgment, para 24; *Brdjanin* Trial Judgment, para 28.

¹³⁷⁷ *Limaj* Oral Ruling of 18 November 2004, at 447–49; *Limaj* Decision on the Prosecution’s Motions to Admit Prior Statements as Substantive Evidence (25 April 2005), para 27; *Prlic* Appeals Judgment, para 51; also *Aleksovski* Decision on Prosecutor’s Appeal on Admissibility of Evidence (16 Feb 1999), para 25; *Popović* Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s

Inconsistencies with Prior Statements

Discrepancies between in-court testimony and earlier accounts or between the testimonies of different witnesses on the same events in relation to matters peripheral to the charges in the indictment in general weaken the credibility of the witness in question.¹³⁷⁸ Discrepancies must, however, be looked at in light of the testimony as a whole, and the overall credibility of each particular witness,¹³⁷⁹ as well as the testimony of other witnesses,¹³⁸⁰ and documents.¹³⁸¹ Significant lapses of time between the events, written and oral statements,¹³⁸² language and translation problems may provide an explanation for discrepancies.¹³⁸³ Also, different techniques of questioning a witness may result in different answers. A witness may, for instance, provide new information or additional details in court which he had not provided before because he was not specifically asked questions about it.¹³⁸⁴ Thus, a lot depends on the “conditions under which the prior statement was provided, as well as on other factors relevant to, or indicia of, the prior statement’s reliability or credibility, or both”.¹³⁸⁵

In general, great faith is placed on the oath. Sworn testimony, particularly when tested in cross-examination, is usually given considerably more weight than an unsworn written statement.¹³⁸⁶ The test of cross-examination is arguably the most effective tool to test a witness’s credibility, but it is questionable how much extra value the oath

Questioning (14 Dec 2007), para 50; *Prosecutor v. Bizimungu Casimir et al.*, Case No. ICTR-99-50-T, Judgement and Sentence, September 2011, 712.

¹³⁷⁸ *Simic* Trial Judgment, para 22; *Krnjelac* Trial Judgment, para 69; *Blagojevic* Trial Judgement, para 23; *Prosecutor v. Casimir Bizimungu et al.*, Judgement and Sentence, ICTR-99-50-T, 30 September 2011), paras. 119-165.

¹³⁷⁹ *Akayesu* Appeal Judgment, para 136.

¹³⁸⁰ *Simic* Trial Judgment, para 26.

¹³⁸¹ *Ntagerura* Appeal Judgment, paras 172–74.

¹³⁸² *Ibid.*, para 77; *Akayesu* Trial Judgment, para 140, where the Chamber held that memory over time naturally degenerates.

¹³⁸³ *Akayesu* Appeal Judgment, para 133; *Akayesu* Trial Judgment, para 137; *Rutaganda* Trial Judgment, para 19; *Musema* Trial Judgment, para 85.

¹³⁸⁴ *Limaj* Trial Judgment, para 13; *Naletilic* Trial Judgement, para 10; *Vasiljevic* Trial Judgment, para 21; *Fofana* Trial Judgement, para. 263; *Sesay* Trial Judgement, para. 489-491; *Norman* Decision on Disclosure of Witness Statements, para. 25.

¹³⁸⁵ *Musema* Trial Judgment, para 83. See also: *Prosecutor v. Casimir Bizimungu et al.*, Judgement and Sentence, ICTR-99-50-T, 30 September 2011, paras. 119-139.

¹³⁸⁶ *Akayesu* Trial Judgment, para 137; *Musema* Trial Judgment, para 86; *Naletilic* Trial Judgement, para. 12.

brings.¹³⁸⁷ It is uncertain whether the oath has the same value in every culture. Particularly the fact that witnesses must take the oath before a foreign jurisdiction in a foreign country may undermine the effect of it.

It is often the case that witnesses have an interest in the outcome of the trial, which may influence their testimony even if given under oath. This may occur subconsciously, which makes the witnesses still fall in the category of ‘honest’ witnesses, or consciously, which transforms them into ‘dishonest’ witnesses. Over and over again, history has shown that, notwithstanding the oath, there are ample witnesses who deliberately attempt to mislead the court for a variety of reasons. It has been evidenced that this is no different in international trials.¹³⁸⁸

The oath aims to ensure that witnesses will be telling the truth in court. They can, however, only tell the truth as they perceived it. Perceptions of what happened may vary from ‘honest’ witness to ‘dishonest’ witness, depending on a witness’s background and personal circumstances. They may each give a different account of the same event while all are telling the truth. As a Cambodian lawyer before the ECCC stated, the truth is too complex to be monolithic.¹³⁸⁹

There may also be a disparity between what occurred and a witness’s memory of what occurred. Trauma and time lapse may have a particular impact on the accuracy of a witness’s testimony. As principal reasons for erroneous identifications, Wagenaar mentions the time lapse between the events and the identification, the trauma of the witnesses, the confusion with images published in the media and mistakes made in the identification process, such as suggestive gestures by the investigator or distinguishing features between the image of the alleged perpetrator and the images of

¹³⁸⁷ According to Reyntjens, the oath has hardly any additional value as was proven in the ICTR. See personal interview, Antwerpen, 20 December 2004. See also: A.L.T. Choo, *Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press 1996), 29-30.

¹³⁸⁸ Zahar, Problem of False Testimony at the ICTR’ in: ‘Klip & Sluiter, *Annotated Leading Cases*’ (n 559 above). Combs, *Fact-Finding Without Facts*, *supra* note 6, 149 and further. See also examples given in this thesis. For instance, Witness 159 who lied under oath in the *Katanga & Ngudjolo* trial: ICC-01/04-01/07-3223 13-01-2012, *Order to the Prosecutor regarding the alleged false testimony of witness P-159*; Public Decision on the Prosecution's renunciation of the testimony of witness P-159, ICC-01/04-01/07-2731, 24-02-2011.

¹³⁸⁹ Pierre-Olivier Sur Le livre : *Dans les yeux du bourreau*. Edition Jean Claude Lattès.

the other persons.¹³⁹⁰ Misidentification even by many honest and convincing witnesses is a common phenomenon and has led the UK to adopt guidelines directing juries in eye-witness identification cases.¹³⁹¹

In this regard, it is troubling that the judges in *Gacumbitsi* relied on one uncorroborated witness, whose oral testimony departed significantly from her previous statement,¹³⁹² to find that the accused had instructed people through a microphone to rape Tutsi women. She had not seen him, but heard his voice through the microphone. The Chamber found that she knew him sufficiently well to be able to identify him by his voice.¹³⁹³ The potential unreliability of a voice-identification is even more apparent than that of a face-to-face identification.¹³⁹⁴

By contrast, Musliu in the ICTY case of *Limaj et al* had been acquitted notwithstanding that two witnesses who knew him had identified him by his voice as he was wearing a mask.¹³⁹⁵

It is also disconcerting that Chambers, in general, have a tendency to believe traumatised victim witnesses irrespective of discrepancies in their testimony. Indeed, where it concerns victim witnesses, Chambers hold that minor discrepancies are to be

¹³⁹⁰ W. A. Wagenaar & J. Groeneweg, 'The Memory of Concentration Camp Survivors', 4 *Applied Cognitive Psychology* 77-87 (1990); W.A. Wagenaar: *Identifying Ivan: A Case Study in Legal Psychology* (Cambridge, M.A Harvard University Press, 1988). See also G. Wolters, 'Herinneringen door getuigen', in: P.J. van Koppen a.o. (eds), *Het recht van binnen. Psychologie van het recht*, Deventer: Kluwer 2002, 397-415; Elizabeth F. Loftus, *Eyewitness Testimony* (Cambridge: Harvard University Press 1979).

¹³⁹¹ *R v Turnbull* [1977] QB 224. In line with these guidelines, juries must be told "to consider the circumstances in which the witness saw the defendant, the length of time the witness saw the defendant, the lighting conditions, the opportunity for close observation, the previous contact between the parties (if any), and so on. Above all, the jury must be told in clear terms that a mistaken witness may be a very convincing witness and that an entirely honest witness may none the less be mistaken. These rules fall somewhat short of Lord Devlin's recommendation, but the Court of Appeal is likely to quash a conviction if a full *Turnbull* direction is not given to the jury in a case where it should have been." Armytage, *Educating Judges*, Ch VII 'The English Criminal Trial: The Credits and the Debits', 260-262.

¹³⁹² The Chamber, however, found that the discrepancies were minor and could be explained by the lapse of time (Prosecutor v. Sylvestre Gacumbutsi, ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 212).

¹³⁹³ *Ibid*, paras. 210-213.

¹³⁹⁴ See Wagenaar Expert Report in *Limaj et al*, Defence Exhibit 35. See also: G. Wolters, 'Herinneringen door getuigen', in: P.J. van Koppen a.o. (eds), *Het recht van binnen. Psychologie van het recht*, Deventer: Kluwer 2002, 397-415.

¹³⁹⁵ See *Prosecutor v. Limaj et al*, IT-03-66T, 30 November 2005, para. 671-688 and see also paras. 26-28. On appeal, however, one of the judges found that the Trial Chamber had erroneously not relied on these two witnesses: Judge Schomberg, see IT-03-66TA, 20-09-2007, p. 120-122.

expected in light of the time lapse between the events and the witness's testimony and the impact of trauma, none of which generally discredit the witness.¹³⁹⁶

Frequently, however, the discrepancies judges excuse on such grounds are not that minor. For instance, in the *Akayesu* trial, one witness had previously declared that one of his three brothers was killed by the accused by gun while the other two brothers were killed by machetes by associates of the accused as they tried to escape. At trial, however, this witness testified that the three of them were shot by the accused. His testimony also differed from his previous statement in that he had previously stated that he had buried his brothers. Under cross-examination, he declared that he had no time to bury his brothers and that someone else buried them instead.¹³⁹⁷

These are significant discrepancies which are difficult to explain away because of trauma or translation errors. If a witness is so traumatised that he can no longer recall whether he buried his brothers or not, then such a witness should not be relied on in determining the guilt or innocence of an accused. Nonetheless, the Trial Chamber found that the witness gave a truthful account of events and that he did so without exaggeration or hostility.¹³⁹⁸ Accordingly, the Chamber relied substantially on his testimony for finding *Akayesu* guilty as charged.

This accords with the *Akayesu* Chamber's premise that all the witnesses suffered from post-traumatic or extreme stress disorders and "[i]nconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to".¹³⁹⁹ Moreover, "there is no recognised rule of evidence that traumatic

¹³⁹⁶ *Krnojelac* Trial Judgement, para 69; *Kunarac* Trial Judgement, para 564; *Vasiljevic* Trial Judgement, para 21; *Brdjanin* Trial Judgement, paras 25, 26; *Strugar* Trial Judgement, para 8. *Fofana* Trial Judgement, para. 262; *Sesay* Trial Judgement, para. 489-491. *Kayishema and Ruzindana* Trial Judgment, para 75, where the Trial Chamber also stated that "[t]he possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light"; see *Akayesu* Trial Judgment, para 142; *Rutaganda* Trial Judgment, para 22. See also *Naletilic* Trial Judgement, para 10.

¹³⁹⁶ *Akayesu* Trial Judgment, para 143.

¹³⁹⁷ *Prosecutor v. Casimir Bizimungu et al*, Trial Judgment, paras. 237, 238.

¹³⁹⁸ *Ibid*, paras. 161-162.

¹³⁹⁹ *Akayesu* Trial Judgment, para 143.

circumstances necessarily render a witness's evidence unreliable. It must be demonstrated *in concreto* why "the traumatic context" renders a given witness unreliable".¹⁴⁰⁰

In general, victim witnesses are believed easier than other witnesses, particularly "insider" witnesses. Judges rarely dare to conclude that a victim witness is dishonest. However, victim witnesses are human beings like anyone else and equally prone to dishonesty as anyone else. They may similarly have an incentive to lie, for instance for reasons of revenge, a sense of duty to the community or solidarity with other victims. Judges could easily mistake a credible liar for an honest witness, particularly if the witness in question was a victim of horrific events. Even for professional judges, it is easy to get carried away by the often shocking nature of the victim's narrative.¹⁴⁰¹

However, in the ICTR, there has been a change in attitude of the judges. In more recent cases, many witnesses are looked at with caution and can be relied on only if corroborated. This is the case even for victim witnesses who depart significantly from their prior statements.¹⁴⁰²

Adoption of more stringent guiding principles

Apart from these guiding principles, the judges are entirely free in assessing the evidence. Evidence is to be assessed in the overall circumstances and in its overall context. The judges should not look at the evidence of each witness separately as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when

¹⁴⁰⁰ *Kunarac* Appeal Judgment, paras 12 and 267; *Furundzija* Appeal Judgment, para 109, holding that "[t]here is no reason why a person with [post-traumatic stress disorder] cannot be a perfectly reliable witness". Some Chambers have, however, been more cautious in relying on traumatised witnesses. For instance, in the ICTY case of *Limaj*, in evaluating the reliability of the testimonies given by traumatised witnesses, the Trial Chamber took into consideration "that any observation they made at the time may have been affected by stress and fear; this has called for particular scrutiny on the part of the Chamber." *Limaj* Trial Judgment, para 15.

¹⁴⁰¹ Primo Levi, *Les naufragés et les rescapés*, cited in book authored by Stephanie Maupas (Juges, bourreaux, victimes, voyage dans les pretoires de la Justice internationale, edition Autrement, 2009): « Il est naturel et évident que le matériau le plus substantiel pour la reconstruction de la vérité sur les camps soit constitué par les souvenirs des survivants. Au-delà de la pitié et de l'indignation qu'ils provoquent, il faut les lire d'un œil critique ».

¹⁴⁰² See, for instance, *Prosecutor v. Bizimungu Casimir et al*, Case No. ICTR-99-50-T, Judgement and Sentence, September 2011, paras. 757-764.

considered in isolation, may appear at first to be of poor quality, but may gain strength from other evidence in the case. The converse also holds true.¹⁴⁰³ Witness testimonies can also be relied on in part, and rejected in other.¹⁴⁰⁴

Thus, in general, there are no clear criteria that should be followed in assessing the evidence, which falls within the discretionary domain of the Chamber. On occasions defendants have complained that the Chambers have not established sufficiently clear criteria in order to assess the weight of evidence.¹⁴⁰⁵ In response the Appeals Chamber pointed out that “it is neither possible nor proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner”.¹⁴⁰⁶ In this regard the ICTY Trial Chamber in *Strugar* held that:

the general background circumstances to material events, and the actual course of material events, at times has offered valuable assistance in the task of determining where the truth lies in a body of conflicting and inconsistent oral and documentary evidence about a particular issue.... As will be seen, the Chamber has accepted some evidence notwithstanding the presence of contradicting or inconsistent evidence. At times, the Chamber rejected evidence despite the presence of other consistent evidence. At times, the Chamber has been persuaded it should accept only part of the evidence of a witness, while rejecting other parts. Where this has occurred it has been done in light of the other evidence on the issue and only after very careful scrutiny indeed of the witness and the evidence.¹⁴⁰⁷

It is indeed impossible to establish clear guidelines as to how to assess evidence. One can regulate the collection, presentation and admissibility of the evidence, but it is much harder to set criteria for the assessment of evidence. No criterion can properly assist the triers of fact in the determining the key question “whether, and how far, he ought to believe what the witnesses say”; and if yes “what inference should be drawn”.¹⁴⁰⁸ Evaluating evidence is a personal business that cannot be regulated. Two reasonable persons can look at information and draw completely different

¹⁴⁰³ *Tadic* Judgment on Allegations of Contempt, para 92.

¹⁴⁰⁴ *Prosecutor v. Strugar*, Trial Chamber Judgment (31 Jan 2005), para. 7.

¹⁴⁰⁵ See, *inter alia*, *Kayishema and Ruzindana* Appeal Judgment, paras 307–11.

¹⁴⁰⁶ *Ibid*, para 319.

¹⁴⁰⁷ *ICTY Prosecutor v Strugar*, Trial Chamber Judgment (31 Jan 2005), para 7.

¹⁴⁰⁸ Frank, Courts on Trial, *supra* note 38, 152. See also John Henry Wigmore, ‘All the artificial rules of Admissibility might be abolished; yet the principles of Proof would remain, so long as trials remain as a rational attempt to seek the truth in legal controversies’ (VII Works 599). In: ‘A Treatise on the Anglo-American System of Evidence in Trials at Common Law’ (cited in Twining: Rethinking Evidence).

conclusions. Guidelines or directives can barely prevent a judge from deciding one way or the other.

With regard to assessing documentary evidence, some objective criteria could be adopted. For instance, one can argue that a document with an authentic stamp or signature has more value than one without. More frequently though in the context of international tribunals, a document's value may only be apparent upon the full presentation of the evidence and whether the document actually corroborates or is at odds with the larger body of evidence. The weight should also be considered significantly reduced when it is not introduced through a witness. Given the lack of cultural familiarity of the judges, it will be hard for them to assess whether a document is authentic unless an explanation is given as to what it is about. In general, judges have assessed the weight of documents fairly. Apart from contemporaneous documents, little weight is normally attached to documents.

The primary source of evidence, however, constitutes witness testimony. The assessment of witness credibility does not lend itself to strict regulations. A person who, on the face of it, has an incentive to lie may in fact not lie; and a person who has the appearance to be credible may not be credible. Thus, the assessment of a person is a case-per-case determination which can be based only on intuition, at times spot on, at other times not at all.

Only a limited number of factors can objectively and in all circumstances be said to undermine or strengthen a witness's credibility. Thus, only broad criteria have been developed to assess witness testimony. For instance, it has been held that, in order to determine the credibility of *viva voce* witnesses the Trial Chamber must consider "their demeanour, conduct and character", as well as "the probability, consistency and other features of their evidence, including the corroboration which may be forthcoming from other evidence and circumstances of the case", as well as "the knowledge of the facts upon which they give evidence, their disinterestedness, integrity [and] veracity".¹⁴⁰⁹ Chambers have further acknowledged that an incentive

¹⁴⁰⁹ *Brdjanin* Trial Judgment, para 25. See also *Akayesu* Appeal Judgment, para 128. *Blagojevic* Trial Judgement, para 23.

to lie or a particular bias against or in favour of the accused are factors undermining a witness's credibility.¹⁴¹⁰

In addition, corroboration or at least significant partial corroboration could and should be made a requirement for any verdict of guilt or significant factual findings underpinning the verdict. This would undoubtedly reduce the risk of error. Given the importance of fact-finding precision particularly in light of the greater risks of fabrication in international criminal justice, requiring corroboration in all circumstances may well be advisable. Corroboration should particularly be required where there are ample potential corroborative witnesses available. For instance, if a witness testifies to a meeting, which was attended by many people, there is no good reason to rely on one witness only as evidence that such meeting took place or in the manner alleged.

Corroboration of such evidence is even more essential where the defence has called one or more witnesses to testify about the same events but with a completely different narrative.¹⁴¹¹ Also, in situations where the defence relies on an alibi to support its assertion that the accused was not present at a particular meeting, his presence at such meeting should not be accepted on the basis of one witness alone.¹⁴¹²

¹⁴¹⁰ *Limaj* Trial Judgement, para 13.

¹⁴¹¹ The Chamber in *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, indeed showed reluctance to do. For instance, Witness AAA, a Hutu local official in Kigali, testified that, between mid and late April 1994, he attended a meeting of the Kigali prefecture security council in which Kabiligi participated as a military representative together with Colonel Luc Marchal and General Gatsinzi and that General Kabiligi promised to deliver weapons, which was done at the end of April (T. 14 June 2004 pp. 12-13, 17-20, 26-27; T. 15 June 2004 pages 2, 84-85, 87-89). However, this was contradicted by a defence witness who was said to have held the meeting. This witness claimed not to know witness AAA, and that he met Kabiligi only in June 1994 (T. 23 Feb 2006, p. 4, 61-62, 65-67; T. 24 Feb 2006, pp. 28, 35-37). Even the Prosecution admitted that witness AAA is not "worthy of being described as a wholly believable witness" but invites the Chamber to accept certain aspects of his testimony (Prosecution Closing Brief, para. 1471). In these circumstances, the Chamber did not rely on him (paras. 1548-1557).

¹⁴¹² Again, in *Bagosora et al*, the Chamber did not rely on a witness who testified that Kabiligi presided over a meeting at Ruhengeri Military Camp on 15 February 1994. Kabiligi provided an alibi for this date. Luc Marchal, the Belgian Colonel in charge of the Belgian UN soldiers in Kigali testified that Kabiligi was in a meeting with him in Kigali on that day. He even provided the court with his minutes of that meeting. The witness was uncorroborated and convicted and sentenced to death in Rwanda. His appeal was pending during his testimony (T. 12 October 2004, pp. 11-12, 48-49), Kabiligi Defence Exhibit 85 (Judgment of 16 August 2001, Military Court Rwanda) p. 201. Particularly in light of Kabiligi's alibi, the Chamber did not rely on this witness. Nonetheless, it was not prepared to discredit him entirely. See: *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, paras. 275, 290, 298, 299, 1558-1567.

Corroboration, however, does not offer any guarantee of accuracy. As Wagenaar has pointed out, even many honest witnesses can mistakenly identify the accused as the perpetrator, particularly when they are traumatised and a long time has lapsed.¹⁴¹³ In addition, evidence concoction can take place on a large scale.¹⁴¹⁴ Thus, corroboration of testimonies, even by many witnesses, “does not establish the credibility of those testimonies”.¹⁴¹⁵ Some witnesses are so inherently unreliable, and found to be so in each and every case in which they testify that they should not be relied on even if corroborated. Chambers are very reluctant ever to discredit a witness completely even if they lied routinely in previous statements or in Rwandan courts.¹⁴¹⁶ They treat such witnesses with caution but may rely on them in part and where corroborated. In light of the frequent allegations of witness tampering particularly at the ICTR, judges should be even more cautious than they are today.

In addition, reliance on double or further remote hearsay, or hearsay evidence from anonymous witnesses should be reconsidered. Either more stringent criteria for the admissibility of such evidence should be adopted or judges should set aside such evidence irrespective of the existence of corroborative evidence. Evidence must have

¹⁴¹³ W.A. Wagenaar: *Identifying Ivan: A Case Study in Legal Psychology* (Cambridge, M.A Harvard University Press, 1988).

¹⁴¹⁴ For instance, see: In *Prosecutor v Akayesu* ICTR-96-4-A, 16 May 2001 Arret (Requete Aux Fins de Renvoi De L’affaire Devant La Chambre de Premiere Instance I), the Defence was unsuccessful in reopening the trial, or having fresh evidence admitted on appeal, from a Tutsi witness, BBB, who came forward after trial to provide a detailed, notarized statement to the effect that evidence against Akayesu was systematically manufactured with the intervention of government agents. In *Prosecutor v Ntakirutimana*, ICTR No-96-10, ICTR-96-17-T, defence witnesses provided similar testimony (Witness 9 and Witness 31). The same thing happened in *Prosecutor v Rutaganda* ICTR-96-3 (Witness DD), (see False Witnesses Testified to Genocide Court” inews@habari.co.tz, March 17, 1999) and in the “Media Trial,” *Prosecutor v. Nahimana, Barayagwiza and Ngeze* ICTR-99-52-T, (Witness RM 14) (see “Genocide Survivors Coerced me to Lie, Says Defence Witness,” Foundation Hirondelle - Hirondelle Press Agency in Arusha International Criminal Tribunal for Rwanda, 16 January 2003.) In *Prosecutor v Kajelijeli* ICTR-98-44-T, a death row inmate testified that he and his family were threatened by a Rwandan prosecutor if he testified in the defence of the former Rwandan mayor. He claimed that he was promised his death sentence would be commuted if he did not testify (see “State Prosecutor Threatened Me Against Testifying, Says Defence Witnesses,” Foundation Hirondelle - Hirondelle Press Agency in Arusha International Criminal Tribunal for Rwanda, 21 November 2002.

¹⁴¹⁵ *Musema* Trial Judgment, para 46; *Tadic* Judgment on Allegation on Contempt Against Prior Counsel Milan Vujin, para 92.

¹⁴¹⁶ For instance, Ruggiu was discredited by the Cyanguu Chamber. In *Bagosora et al*, the Chamber did not follow this example but treated him with caution. See *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, para. 1984. For other examples where inherently unreliable witnesses, who departed drastically from their prior statements, were treated with caution, see paras. 251, 252, 258-274, 292-338, 1645, 1715, 1731. The Chamber did not discredit a single one of them entirely, but required corroboration. Even Serushago, who gave a different account in each case he testified, was treated with caution and relied on in parts (see also *Nahimana et al* Judgment, para. 824).

a minimum level of inherent quality before it should be considered even if it is relied on only to demonstrate peripheral matters or is heavily corroborated. If sufficient other evidence is available, there is no need to rely on such evidence. If insufficient other evidence is available, the particular element that is sought to be established can simply not be established. Otherwise, a risk exists that the “beyond reasonable doubt” standard be lowered to enter a conviction on insufficient credible and reliable evidence.

Evaluation by the Appeals Chamber

The Appeals Chamber is often compared with the Appeals Chamber in common law rather than civil law jurisdictions, as it usually stays away from the facts. The appellate proceedings do not constitute a trial *de novo* and the witnesses will not be called back. It is unusual for the Appeals Chamber to hear new witnesses. New evidence on appeal will only be admitted if relevant and credible, it was not available at trial and it could have been a decisive factor in reaching the decision at trial.¹⁴¹⁷ Thus, unless the Trial Chamber’s factual determination is wholly erroneous, or no reasonable Chamber could have reached the same finding, the Appeals Chamber’s usual reasoning is that the Trial Chamber was in a much better position to evaluate the evidence having been able to assess the demeanour of the witnesses.¹⁴¹⁸

The Appeals Chamber rightly refrains from assessing the credibility of witnesses it has not seen, or the reliability of their testimonies it has not heard. Yet, the Appeals Chamber routinely overturns verdicts. Mostly, findings are overturned on the basis of an incorrect application of a legal principle. This is, for instance, the case where established facts were not pleaded in sufficient detail in the indictment,¹⁴¹⁹ or where the evidentiary standard of an alibi assessment was incorrectly applied.¹⁴²⁰

¹⁴¹⁷ Rule 115 (B) ICTY/ICTR Rules. See *Prosecutor v Semanza* (Decision on Additional Evidence) ICTR-97-20-A (5 April 2005). See Inneke Onsea and Linda Bianchi, ‘Additional Evidence on Appeal, Review Proceedings and the Remedy of Reconsideration’, Ch 16 in: Khan, *Principles of Evidence*.

¹⁴¹⁸ *Ibid.* See also *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, para. 18; *Krstic Appeal Judgment*, para. 40; *Munyakazi Appeal Judgment*, para. 8; *Setako Appeal Judgment*, para. 10; *Muvunyi Appeal Judgment* of 1 April 2011, para. 10.

¹⁴¹⁹ See, for instance, *Prosecutor v. Kupreskic et al*, Appeals Chamber Judgment of 23 October 2001, para. 92; *Prosecutor v. Muvunyi*, Appeals Chamber Judgment, 29 August 2008, para. 18.

¹⁴²⁰ *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Appeals Chamber Judgment, 16 November 2009, paras. 36-52.

In addition, the Appeals Chamber can, and often does, review the level of consistency and coherency of the Trial Chamber's own analysis of the facts set out in great detail in its judgment easily counting 500 or more pages. For instance, in the case of *Bagosora et al*, the Chamber relied exclusively on prosecution witness HV for finding that soldiers participated in the attack at Mudende University in the morning of 8 April 1994.¹⁴²¹ The Chamber found her identification of at least two soldiers based on their camouflage uniforms reliable as she was in a position to follow the attack briefly from close-up, heard gunfire and was personally questioned by a soldier.¹⁴²²

The Appeals Chamber was not convinced and reversed this factual finding.¹⁴²³ It relied on the Chamber's own doubts of the same witness's identification of soldiers present at Mudende University in the evening of 7 April 1994, and her identification in the evening of 8 April 1994 of masked assailants carrying lists as soldiers.¹⁴²⁴ As the witness no longer recalled whether the soldiers were wearing berets - the main distinguishing feature in the uniforms of soldiers of different units or gendarmes¹⁴²⁵ - in the opinion of the Appeals Chamber, no reasonable Chamber could have concluded beyond reasonable doubt that these men in uniform were in fact soldiers.¹⁴²⁶ This was so, particularly in light of the witness's confusion on the issue of identification in her written statement of 28 November 1995,¹⁴²⁷ as well as the fact that none of the Defence witnesses who had witnessed the attack and whom the Trial Chamber found credible, had identified soldiers among the attackers.¹⁴²⁸ According to the Appeals Chamber, the fact that gunfire was used did not necessarily imply the presence of soldiers.¹⁴²⁹

The Appeals Chamber did not make its own assessment of the credibility of the witness, but relied on the Trial Chamber's own analysis in finding that the part of

¹⁴²¹ Bagosora Trial Judgment, para. 1248.

¹⁴²² Bagosora Trial Judgment, para. 1248.

¹⁴²³ Bagosora Appeal Judgment, paras 352-362.

¹⁴²⁴ Bagosora Appeal Judgment, para. 359, relying on: Trial Judgment, paras. 1246, 1249.

¹⁴²⁵ Bagosora Trial Judgment, para. 166.

¹⁴²⁶ Bagosora Appeal Judgment, paras 361-362.

¹⁴²⁷ Initially, the witness had stated that the soldiers were wearing red caps, but in an addendum to this statement on 10 September 2003, the witness corrected this and stated that she only recalled the gendarmes wearing caps. See Bagosora Appeal Judgment, footnote 830.

¹⁴²⁸ Bagosora Appeal Judgment, para. 360.

¹⁴²⁹ Bagosora Appeal Judgment, para. 358, relying on the Trial Chamber's finding that civilians were trained and armed (Bagosora Trial Judgment, paras 489, 1203).

witness HV's testimony relating to the identification of soldiers could not serve as the basis for a finding beyond reasonable doubt.

In the same judgment, the Appeals Chamber held that the Trial Chamber erred in relying on witness XBG whose reliability it seriously questioned. It expressed clear concerns about his general credibility and reliability and rejected certain aspects of his testimony. The Chamber nonetheless relied on him on the issue of the participation of soldiers in a particular attack because this had been consistent allegation.¹⁴³⁰ The Appeals Chamber, however, noted that his accounts of the circumstances of the soldiers' involvement and role in the killings differed significantly between his prior statements to the Rwandan judiciary and his testimony in the case. In these circumstances, the Appeals Chamber considered that "a reasonable trier of fact would not have relied on Witness XBG's evidence of soldiers assisting civilians and playing a supporting role as Tutsis were sought out and killed, even as mere background evidence".¹⁴³¹ For Nsengiyumva, it made no difference because there was an additional witness testifying to the same event who did not need corroboration.¹⁴³²

In addition, in correcting errors of law, which the Appeals Chamber does not hesitate from doing, the Appeals Chamber often corrects the corresponding factual findings. For instance, where the Appeals Chamber finds an error of law arising from the application of an incorrect legal standard, the Appeals Chamber will enunciate the correct legal standard and review the Chamber's relevant findings of fact accordingly.¹⁴³³ In doing so, the Appeals Chamber "not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal."¹⁴³⁴

In the ICTY, the Appeals Chamber also often finds that the established facts do not

¹⁴³⁰ Bagosora Trial Judgment, paras 1243, 1244, 1254.

¹⁴³¹ Bagosora Appeals Chamber's Judgment, para. 257.

¹⁴³² Bagosora Appeals Chamber's Judgment, para. 258.

¹⁴³³ Bagosora Appeals Chamber's Judgment, para. 17; Munyai Appeal Judgment, para. 7; Setako Appeal Judgment, para. 9; Muvunyi Appeal Judgment of 1 April 2011, para. 9.

¹⁴³⁴ *Ibid.*

match the legal findings, or that the legal finding is not the only reasonable inference that can be drawn from the facts.¹⁴³⁵ It has also found that the Chamber erred in not drawing the only reasonable inference on the facts.¹⁴³⁶ For instance, in the case of *Martić* the Appeals Chamber found that the Chamber had erred in establishing a link between the defendant and the perpetrators of acts of destruction a number of murders because the evidence did not demonstrate that he controlled or influenced these perpetrators most of whom were unidentified.¹⁴³⁷ Orić was acquitted on appeal because only one of his subordinates had been identified as having committed crimes against Serbian detainees. In addition, the evidence failed to demonstrate that Orić was even aware of the commission of these crimes, let alone that his one subordinate took part in them.¹⁴³⁸

Thus, with increasing frequency, the Appeals Chamber reverses the Chambers' verdicts, both the legal and factual findings. The time that the Chamber's verdict was final is clearly over. Common law practitioners find this problematic, particularly when an acquittal is reversed or the sentence is increased.¹⁴³⁹ It is also not a foregone conclusion that the Appeals Chamber always gets it right and issues better judgments than the Trial Chambers. Nonetheless, it means that more eyes have gone over the

¹⁴³⁵ See, for instance: *Prosecutor v. DRAGOMIR MILOŠEVIĆ*, IT-98-29/1-A, Appeals Judgment of 12 November 2009, where the Chamber found that it was unreasonable for the Trial Chamber "to infer that Milošević ordered the shelling of the BITAS building and the Markale Market on the mere basis that the incidents in question were similar to the ones that took place in his presence and thus were part of "the overall plan and general orders of Milošević" (para. 293).

¹⁴³⁶ For instance, in the case of *Veselin Šljivančanin*, the Appeals Chamber entered an additional conviction for aiding and abetting the murder of 194 prisoners on the basis that "upon learning of the order to withdraw the JNA troops from Mrkšić at their meeting of the night of 20 November 1991, the only reasonable inference is that Šljivančanin must have been aware that the TOs and paramilitaries would likely kill the prisoners of war and that if he failed to act, his omission would assist in the murder of the prisoners" (*Prosecutor v. Veselin Šljivančanin*, IT-95-13-A, Appeals Judgment of 5 May 2009 and 8 December 2010 (Case number IT-95-13/I-R.1) para. 63; also paras. 74, 75, 81, 99, 100, 103). The conviction was later vacated when new evidence was presented to a new Appeals Chamber (*Prosecutor v. Veselin Šljivančanin*, IT-95-13/I-R.1, Appeals Judgment of 8 December 2010, paras. 23, 30, 32, 36).

¹⁴³⁷ *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgment of 8 October 2008, paras. 192-193, 199-201, 207-208, 210-214.

¹⁴³⁸ *Prosecutor v. Orić*, IT-03-68-A, Appeals Judgment of 3 July 2008, paras. 47-48, 57, 60, 188-189.

¹⁴³⁹ The most striking example is the case of Haradinaj, Balaj and Brahimaj, two of whom were acquitted (Haradinaj and Balaj), and who are now being re-tried on the basis that the Prosecutor was given insufficient time to seek to arrange for the appearance of two reluctant witnesses (*Prosecutor v. Haradinaj et al*, Appeals Chamber Judgment, IT-04-84-A, 19 July 2010, paras. 41-43). These witnesses, however, still refuse to appear. Meanwhile, the Prosecutor has been allowed to call additional evidence (Interview with Gregor Guy-Smith in The Hague, 12 April 2011). See further above, section 'uncooperative witnesses, ICTY'.

facts, which increases the chances of fact-ascertaining accuracies. The evaluation of factual witnesses correctly remains within the Trial Chamber's domain.

The scope of the appeal review at the ICC is yet to be determined but appears to be wider than that at the ICTY and ICTR. The Statute and Rules do not impose any limit on the production of new evidence and explicitly leave open the possibility for the Appeals Chamber to call witnesses.¹⁴⁴⁰ It is, however, highly unlikely that the appellate proceedings will be the equivalent of a trial *de novo*.¹⁴⁴¹

PART IV

CONCLUSION AND RECOMMENDATIONS

¹⁴⁴⁰ Article 83(2) ICC Statute.

¹⁴⁴¹ Since the ICC has not yet completed any of its trials, its jurisprudence cannot form part of the analysis on the evaluation of the evidence.

CONCLUSION

In conclusion, I agree with Combs that the ascertainment of the facts in international tribunals thus far has been highly problematic. This thesis has identified numerous causes of fact-ascertaining inaccuracies. They will be discussed below.

Can a Mixed System be a Fair and Effective Truth-Ascertaining System?

Mixed Legal Principles

Many observers have expressed concern that blending the civil law and common law types of procedure can lead to a dysfunctional international court or tribunal. This thesis, however, suggests otherwise. Whilst a number of difficulties have arisen due to unfamiliarity of international practitioners with the new procedure, this is not the main cause of fact-ascertaining impediments. International lawyers had to adjust themselves to a new way of thinking, which initially did not come naturally but has improved over time. The initial adjustment problems were principally based on criticism against the other system, rather than the mixing of systems. Slowly, a new international vocabulary and philosophy is emerging.

In law, with some exceptions, international justice has taken the best of both worlds. It has combined the two-party common law model with the judge-led civil law model in a manner doing justice to the philosophy behind both models. Whilst the parties retain their independence in conducting investigations and presenting their cases to the judges, the judges have discretion to intervene in that independence where necessary to uphold the fairness and expeditiousness of the proceedings or to ascertain the truth.

The Statutes and rules give important weight to the rights of the accused, which take precedence over the rights of the victims and witnesses. Provided the judges are fair, as they should be according to the Statutes and rules, the defence has a genuine opportunity to present its case in a fair manner in equality with the Prosecution. The parties must respect the dignity of the witnesses in testing their credibility. If not, the judges legitimately have a discretion to intervene. Humiliating witnesses is not necessary for the ascertainment of their credibility and should indeed be disallowed by the judges.

The judges are also entitled to fill in the evidentiary gaps left by the parties. They can ask additional questions and order that further evidence be produced. If done properly, this discretion can genuinely contribute to the ascertainment of the truth. It ensures that the parties cannot manipulate the truth and present only partially what a witness has to say in favour of their case. It equally ensures that the Court can complement the two one-sided truths presented by the parties if this is in fact the case.

The powers of the judiciary remain, however, limited in conducting investigations. In the absence of investigative judicial officers, the judges exclusively rely on the parties to collect the evidence. This thesis has demonstrated that the parties do not have equal opportunities in conducting investigations. In addition, the means available to the defence are not always adequate. To remedy this imbalance, the ICC drafters sensibly included an obligation on the Prosecution to search for incriminating and exculpatory information equally. If done properly and not at the expense of defence investigations, this provision strengthens the truth-ascertaining system.

Thus, overall, there is no problem with mixing the two types of procedure, provided that the legal principles are truly implemented in practice. They complement each other and fill each other's gaps.

In theory, international justice systems also meet the requirements set out in Part I. The proceedings are transparent, open and fair and potentially offer the judges sufficient access to relevant and reliable information from all sides. In theory, the judges are highly experienced and professionally trained. They should thus be able to engage with the information while keeping an appropriate distance to the information providers.

Mixed Legal Principles Applied in Practice

The fact-ascertaining impediments are not so much caused by the law, but rather by the law in action. The implementation of the law depends on the quality of those implementing it, as well as the conditions in which they must carry out this task.

As regards the conditions unique to international justice, this thesis has focused particularly on the reliance on State cooperation and cultural diversity.

State Cooperation

This thesis has established that there is a dilemma between the need to cooperate with States while conducting investigations independently of those States. A particular problem arises where the State was one of the belligerents in the conflict. Such a State has a clear interest in who will be charged. If a State does not agree with the Prosecutor's focus of his investigations, it may seek to manipulate or even prevent them. Thus, in order for the Prosecutor to be successful some level of political compromise may be deemed necessary. However, the ICTR and ICC Prosecutors have clearly gone too far in this respect, effectively rendering immunity to rebel groups associated with a number governments. The ICTY has not compromised, but managed nonetheless to get everyone on its list. The ICTY Prosecutor had the advantage of being backed by the European Union and NATO. Had the ICTR and ICC Prosecutors been firmer in their refusal to compromise, they may also have had the political support of such international organisations.

Cultural Diversity

This thesis has also raised the problem of cultural and linguistic differences between the witnesses and their assessors, as well as the problem of perjury. These problems occur both at the investigative and trial stages. This thesis has also pointed out the dangers for investigators and judges to be carried away by the horrific victim stories and to be too victim-driven. This may lead them to believe victim witnesses too easily without adequately scrutinising their credibility and the reliability of their stories.

Overall, the ICTY has done a much better job at ascertaining the facts than the ICTR. Investigators got their hands on more reliable evidence than at the ICTR. Contrary to Combs' assumption, the principal explanation for this difference between the two tribunals is not that the cultural differences with African regions are greater than with the former Yugoslavia. Without underestimating the problems caused by cultural and linguistic diversity, this thesis has demonstrated that such problems are not insurmountable, nor the principal cause of the fact-finding impediments described in Combs research as well as this thesis.

The main problem is the quality of people working in the international criminal courts and tribunals. This thesis suggests that the quality of those involved in the international law implementation varies significantly and can be improved.

Standard of Proof Beyond Reasonable Doubt

Combs' research principally focuses on the role of the judges. She concludes that the judges do not always apply the standard of proof beyond reasonable doubt. This thesis has not looked at the correctness of the actual findings. However, it has identified numerous problem areas. It establishes that Chambers regularly find a fact proven beyond a reasonable doubt on the basis of a single witness or on two or more unreliable witnesses. In light of the numerous problems addressed in respect to witness testimony, particularly the alleged witness interference at the ICTR, it is hard to imagine any situation where a finding based on a non-corroborated witness can objectively be seen as proven beyond a reasonable doubt. Similarly, if unreliable testimony is corroborated by other unreliable testimony, the standard of proof beyond reasonable doubt is not reached. It may be more likely than not that the accused is

guilty as charged, but that does not equal the standard of proof beyond reasonable doubt. To that extent, Combs is correct.

The ICTY has not relied on equally unsafe evidence. It must, however, be acknowledged that it did not have to. In most cases, there are many documents in support of witness testimony. There are tapped telephone conversations, videos and contemporaneous documents including agendas, military documents and written orders. The ICTY also did not have to deal with the same level of alleged witness tampering as the ICTR. Thus, as a result, judges were able to apply the standard of proof beyond reasonable doubt without the unfortunate consequence that most of the accused are acquitted.

Until now, the ICC has not yet demonstrated whether it rigorously applies the standard of proof beyond reasonable doubt. However, the Pre-Trial Chambers have shown preparedness not to confirm cases where the “substantial grounds to believe” standard has not been met. This inspires confidence in the future of the ICC.

The quality of judges varies significantly. Defendants in front of properly trained and experienced judges generally have a greater chance of receiving a fair trial. The willingness to acquit has also increased with time. Initially, almost all accused were found guilty. However, there is a drastic change, particularly at the ICTR. In recent judgements, high profile accused including ministers have been acquitted. The Appeals Chamber has also become increasingly rigorous in overturning Chambers’ findings. Thus, there is clearly a change in the attitude of the judges. There is more awareness of problems with the evidence even where it stems from victims. It is much more likely for an accused to be acquitted or receive a reduced sentence nowadays than it was initially.

The best judges are not always recruited. However, there have been excellent judges among them. In any event, this thesis suggests that the main failure of the ascertainment of the truth is not caused by the judiciary. Rather, this thesis has identified the failure of the Prosecution to adequately investigate the charges as the principal cause of fact-finding impediments.

Judges must be able to trust the Prosecution in conducting adequate investigations, particularly given that they have no judicial officers at their disposal who they can send out for clarifications. Their own experience in the field, if any, is limited to judicial site visits. Important as they may be, they cannot replace adequate investigations.

Once the evidence is presented to the judges for their assessment, their capacity to rectify inadequate investigations is limited. They can call additional witnesses but even then they rely on the evidence brought to their attention. They cannot make their own independent inquiries. If the evidence is insufficient, they can only do one thing, and that is to find that the standard of proof is not met. However, this does not necessarily suggest that the truth has been found. Some of the accused are acquitted simply because the Prosecution has failed to produce sufficient reliable evidence demonstrating their guilt. This is regrettable if good quality evidence is readily attainable but has not been presented to the Chamber. It is suggested that this is often the case in international justice.

Victim Participation

Another area of concern is victim participation. What was a good idea in theory may not work so well in practice. This is, however, not due to the blending of systems, but rather to the unique circumstances in which international justice systems operate. Victim participation significantly burdens the system while it remains to be seen whether it delivers justice to the victims. It does not bring them closer to the courtroom as their interests are served by lawyers who barely know their names. It creates expectations for victims that may not be fulfilled. For now, it is unclear what the system can offer to a continuously increasing number of victim participants. Unmet expectations can lead to a 'third victimisation' as Judge Van Der Wijngaert called it.¹⁴⁴²

It is difficult to verify the veracity of the stories of the victim participants. Most of them will never appear before the Court. Accordingly, their stories are not tested through examination by the judges and, or the parties. Given the potential financial

¹⁴⁴² C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, at 14.

gain for victim participants, their applications should be scrutinised more carefully. Already, there have been cases of victim applicants who were not who they claimed they were.¹⁴⁴³

In the courtroom, victim representatives act as additional prosecutors even if they are meant to be neutral. It is perhaps unfair to expect victim representatives who clearly have an interest in the outcome of the case to be neutral. The reparation of victims depends on the finding of the guilt of the accused. Thus, the outcome is more important for them than for the Prosecution. This can create an unfairness to the accused, depending on how much leeway the judges offer to victim participants. Different Chambers react differently to victim participants. While the Chamber in *Katanga & Ngudjolo* has fairly balanced the rights and interests of the different parties and participants, the Chambers in *Bemba* and *Kenya* favour victim participants too strongly.

In charging and selecting appropriately the suspects before the ICC, victim participants could make an effective contribution. Victims have a very direct interest in who is charged for what crime. Their potential claim for reparation depends on whether the Prosecutor has selected the crime for which the persons concerned are victims. Thus, it would only be fair for them to challenge a Prosecutor's decision not to prosecute a particular person. However, the role of the victims in this regard is limited. Victims are not in a position to challenge a non-prosecution and cannot expand the scope of the charges. Victims can only request that charges be added if they can be justified on the basis of the evidence brought by the Prosecution.

As this thesis has addressed, the Prosecutor's selection of suspects does not always appear to be based on complete independence and impartiality. In light of its dependence on State cooperation, it is not always evident that the Prosecution can be fully independent. An independent voice of the victims could therefore ensure that the selection process is less influenced by political considerations.

¹⁴⁴³ See above, section 'Victim Participant: Who Are They?'

Accordingly, it is suggested that victim participants be given greater powers to challenge the charges and non-charges against suspects at the preliminary stages. However, their participation in the proceedings themselves should be reconsidered. There could be a separate reparation stage once the guilt of an accused is established in the courtroom. Victim participants can then fully participate and seek to gain reparations for their sufferings. There is, however, little added value to their participation in the criminal proceedings.

Victim participation may raise unrealistic hopes both as to the righting of individual wrongs and as to the issue of compensation since no price is high enough to remedy the injuries suffered. It is also unclear how victim participants will be remedied. Given their increasing number, whatever they will receive in compensation will probably be below expectations. This may then result in a “tertiary victimisation” as Judge Van Der Wijngaert called it.¹⁴⁴⁴

Recommendations for Improvement

In conclusion, there is ample room for improvement. To address the cultural issues properly, expert witnesses could be called. Judges can also learn a significant deal by listening to the factual witnesses. Key is that judges are aware that witnesses do not all react in the same manner and that their demeanour can sometimes be explained by their cultural background. Cultural differences can also be exaggerated. To evaluate this properly, it helps for the judges to have sufficient experience domestically in dealing with many different types of witnesses.

It is certainly recommended, as suggested by Combs, that judges move to the location in each and every case. Such a judicial site visit can be fruitful, not only to verify whether witnesses could have seen what they claim they, but also for the judges to get a sense for the local culture.

Most importantly, high quality judges must be recruited. As aforementioned, the quality of judges can and should be increased. Bohlander has suggested a sensible

¹⁴⁴⁴ C. Van Der Wijngaert, lecture on victim participation, *supra* note 539, 14.

way to improve the recruitment procedure of judges. He proposes to create an international pool of potential candidates consisting of national judges with solid experience in criminal trials and who are familiar with international criminal justice. This pool of judges should receive training from internationally qualified trainers at the national judicial academics. From this pool, a selection is made on the basis of merit alone. Court experience as a defence or Prosecution trial attorney could be accredited. However, diplomats and academics without any court experience should be exempted.¹⁴⁴⁵

I agree with this proposition. However, I would not entirely exclude academics. Academic judges can be well-equipped appeal judges. They could also be equipped as trial judges provided that they are in a bench with a highly experienced presiding judge.

Standard of Proof Beyond Reasonable Doubt

Combs argues that it is not realistic to tackle the fact-finding impediments to such an extent that accuracy of the outcome can be guaranteed. Yet, she is of the view that convictions are needed to meet the objectives of international justice. She holds that acquittals in international justice are more expensive than in domestic justice. She bases this on the immense suffering of the victims and the need for these courts to work effectively because of the expenses involved. Essentially, she bases it on the secondary objectives of the international courts and tribunals. In light of this, she suggests lowering the standard to a level which is more realistically achievable.¹⁴⁴⁶

Combs is not alone in this view. May and Hoskins state, “if standards are too high, then it appears that the legacy of impunity, far from being successfully countered, will in fact be continued through international criminal trials.”¹⁴⁴⁷ They suggest that “careful consideration may need to be given to whether it is possible to ease specific standards so as to make convictions possible but in a way that avoids the appearance

¹⁴⁴⁵ Bohlander, *Pride and Prejudice*, pages 537-540.

¹⁴⁴⁶ Combs 343-364.

¹⁴⁴⁷ L. May & Z. Hoskins: *International Criminal Law and Philosophy*, Cambridge University Press, New York 2010, page 243.

or reality of replicating problematic patterns displayed during conflict or by repressive regimes.”¹⁴⁴⁸

Also, in the context of the trial of former President of Malawi who was acquitted due to lack of evidence to prove that he ordered the killings, Kadri, one of the Prosecutors involved, observed that “for many people the fairness of the proceedings stood in contrast to the inexplicability of the verdict, a salutary reminder that due process alone will not deliver justice.”¹⁴⁴⁹

This thesis, however, suggests that there is no need to lower the standard. The standard can be met if investigations are conducted more efficiently. Domestic justice similarly deals with fact-finding impediments and has had to find practical solutions, over the years. A practical solution is not to lower the standard. This undermines justice and increases the chances of wrongful convictions. It is not clear on what basis Combs believes that most people in international tribunals are guilty but that their guilt cannot be established. This is a dangerous suggestion and not justified in the absence of sufficient evidence to prove it.

There is no legitimate reason to treat international justice differently from domestic justice in this regard. In both, one hopes that most defendants who appear are guilty. If not, it means that the Prosecution has not done its job properly. If someone is not guilty, ideally the person is filtered out at an earlier stage. However, it happens that innocent people are being charged. This is precisely why it is so important to have a careful evaluation on the basis of proof beyond reasonable doubt. The primary purpose of any trial is to establish whether the accused is guilty as charged. This should not be conflated with victims’ justice.

Chuter rightly suggests that it is a very dangerous notion that an international tribunal can only be successful if it achieves a high conviction rate.¹⁴⁵⁰ On the contrary, it is healthy for a judicial system to acquit. Acquittals show that a justice system works. Only then will the Prosecutor be pushed to do a better job in the future. This is very

¹⁴⁴⁸ *Ibid.*

¹⁴⁴⁹ Sadakat Kadri: *Prosecuting Hastings Banda in Malawi*, Chapter 13.2 (Personal Perspectives) in: Lattimer & Sands: *Justice for Crimes Against Humanity*, 347-354.

¹⁴⁵⁰ Chuter, *War Crimes*, *supra* note 75, 205.

clear in the ICTR. For years, Prosecutors got away with inefficient investigations, as their suspects were routinely found guilty. Recently, however, they do not get away with such conduct any longer. They are often criticised for failing to disclose exculpatory evidence. Recently, judges have been more prepared to acquit if the evidence is too unconvincing. Had this occurred at an earlier stage, the ICTR would most likely have operated much more efficiently.

Investigations

The option of investigative judges has been discussed. This shifts the burden of impartiality to the investigative judges rather than the Prosecution. This is an option that could be explored, provided that the investigative officers do not take over completely from the defence. They could operate alongside the parties. This may, however, be a costly option. Instead of changing the structure of international justice, it is better to improve the system internally. First and foremost, the Prosecution can and should change its investigation strategy.

Most importantly, the Prosecution should recruit competent investigators with an open mind. It should have its investigators in the field and conduct onsite investigations. Rather than rely on intermediaries whose identities are often not disclosed to the defence, it is suggested that they should employ local investigators. Being officially employed, local investigators are scrutinised to a much greater extent than intermediaries. As well, the Prosecution must take responsibility for their conduct. The best investigative teams are mixed, consisting of at least one local and one international investigator. The investigative team should receive proper training in investigative techniques.

The investigators must thoroughly scrutinise the credibility of their witnesses. To be able to better assess their demeanour, investigators should familiarise themselves with the local culture. They should also employ an interpreter who they fully trust, and instruct them not to be overly creative in interpreting but rather to translate exactly what the witness has stated.

It is not sufficient to interview witnesses at length. Investigators should refrain from asking leading questions. They should interview the witnesses on numerous occasions

to evaluate whether they are consistent. Their stories must be verified by speaking to other sources. To the extent possible, investigators should always look for corroboration. If a witness testifies to a meeting attended by various other people, investigators should seek to interview these other people as well and compare their stories. This proposed method is more time-consuming. However, it is of the utmost importance for an adequate truth-ascertaining system that the investigations are conducted thoroughly.

If investigations are efficient, there is no need to charge defendants with membership of a joint criminal enterprise instead of other modes of liability, unless this is the most appropriate liability mode on the basis of the evidence. It should not be relied on to avoid difficulties in proving allegations under another mode of liability, as was suggested by Combs.¹⁴⁵¹

Secondary Objectives

It is difficult to determine in any situation whether the secondary objectives, e.g. reconciliation, peace and security, and contribution to a historical record have been achieved. International courts do not operate in a vacuum but are part of numerous efforts to rebuild a transitional society. They are not “ends in themselves”, and can only be successful if other measures are simultaneously being taken.¹⁴⁵² The impact of an international criminal tribunal can be the work of generations, “changing over time and in the light of myriad mediating factors”.¹⁴⁵³ Clark suggests that “if impact is not static but fluctuating, which further compounds the problem of measuring direct impact, there is arguably a strong case to be made for longitudinal approaches to impact assessment. Yet, such approaches themselves present considerable challenges, not least in terms of time and resources.”¹⁴⁵⁴

¹⁴⁵¹ Combs, 321-333.

¹⁴⁵² Drumbl, *Atrocity*, *supra* note 46, 205, 209; Chuter, *War Crimes*, *supra* note 75, 233-240.

¹⁴⁵³ Diane F. Orentlicher: *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Washington D.C.: Open Society Justice Initiative, 2008) p. 29 <www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080502.pdf> 1 December 2009. See also: Koskenniemi, *Between Impunity and Show Trials*, *supra* note 18, 33-34.

¹⁴⁵⁴ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, page 247.

Thus, it is too early to assess properly whether the international tribunals and courts have achieved their secondary objectives. However, it is not too early to make a number of preliminary observations. The effectiveness of a truth-ascertaining system in a wider sense than the legal establishment of guilt depends on the perception of the affected communities. Only if they accept the outcome as truthful can the secondary objectives potentially be met. This thesis has established that the truth about a conflict “is multilayered and complex”, and, thus, there is not one mechanism which “can capture the truth completely”.¹⁴⁵⁵ It has also concluded that it is a difficult task to establish a truth that is “embracing enough to connect profoundly different views”.¹⁴⁵⁶

Clark’s empirical research conducted in different parts in the former Yugoslavia with the involvement of different ethnic groups suggests that the ICTY did not bring the ethnic communities closer together, at least not yet. In Clark’s observation, the three ethnic groups still believe in their own truth, deny their own crimes, and disregard some of the findings made by the ICTY. Clark concludes that this widespread denial on all sides has obstructed the reconciliation process.¹⁴⁵⁷

Indeed, many Serbs continue to argue that the ICTY is an anti-Serb court, particularly because the highest acquittal and low sentencing rate is among the Muslim defendants. Also, many Serbs, including the less radical ones, disagree with the finding that the massacre at Srebrenica amounted to a genocide. Some go further and disagree with the number of deaths. The Croats are dissatisfied because their main hero, Gotovina, has been convicted. The Muslim communities are irritated because their heroes had to face international justice too.¹⁴⁵⁸

Overall, however, the ICTY has considerably more legitimacy in the eyes of the affected communities than the ICTR or the ICC. Many individuals among all ethnic communities in the former Yugoslavia continue to have faith in the work of the ICTY and acknowledge its findings as truthful. The radical voices appear to have a limited

¹⁴⁵⁵ DeLaet, *Gender Justice*, *supra* note 59, at 174.

¹⁴⁵⁶ Minow, *Between Vengeance and Forgiveness*, *supra* note 59, 63.

¹⁴⁵⁷ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 249, 256-257, 259-261; E. Stover *The Witness: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005), 143-144.

¹⁴⁵⁸ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 249.

audience only. The legitimacy of their arguments is undermined by the fact that the crimes of all ethnic groups have been addressed.¹⁴⁵⁹

An international tribunal cannot achieve more than that. There will always be people or interested groups who will contest the legitimacy of the tribunal and the accuracy of the outcome. Reconciliation between the ethnic communities has not been a great success. The ethnic communities continue to be suspicious of one another and stick to their version of events. However, reconciliation is a process which does not happen over night. Tribunals are not the only institutions that seek to assist this process. Accordingly, their achievements must be considered in light of other peace and reconciliation initiatives. If nothing else, at least the ICTY judgements opened a debate about the past atrocities. This is the first step to reconciliation. Seeking to achieve more is unrealistic and therefore unwise. A modest contribution to peace and reconciliation would be a great achievement.

The reconciliation of the different views concerning the Rwanda conflict has proved impossible and remains unresolved. The gap between different views, particularly of Rwandans, appears to be growing and any possibility of reconciliation between Rwanda's ethnic groups (Hutu and Tutsi) seems to be increasingly remote.¹⁴⁶⁰ The reason is that the entire focus has been on the genocide committed against the Tutsi population. The Hutu population is bitter about the fact that their suffering has not been acknowledged or addressed.¹⁴⁶¹ Local communities in the DRC similarly appear to have little faith in the tribunals. Many of them are of the view that the selection of suspects by the tribunals are politically motivated.¹⁴⁶²

This apparent lack of faith from the local communities does not mean that attempts to run international justice courts and tribunals should be dismissed altogether. However, it is important to be realistic about what international justice can achieve. It

¹⁴⁵⁹ Personal conversations with people in Kosovo (May 2005, July 2007), as well as Serbian attorneys in The Hague (2004-2005).

¹⁴⁶⁰ Personal conversations with Rwandans of Hutu and Tutsi origin, particularly those living in exile. Over the years, their views have radicalised. See also *Tribunal Penal International Pour le Rwanda: Modele ou Contre-Modele pour la Justice Internationale? Le Point de Vue des Acteurs*, Conference held in Geneva in May 2009 ('the Geneva Conference'), where some participants expressed views that victims and perpetrators cannot be expected to reconcile.

¹⁴⁶¹ Clark, *Transitional Justice, Truth and Reconciliation*, *supra* note 68, 250-251.

¹⁴⁶² Personal conversations with local people in Ituri and North Kivu, February - March 2010.

is a stretch from reality to consider international courts and tribunals capable of establishing the truth about the allegations against an accused on trial while simultaneously establishing the truth about the conflict, restoring peace and security and reconciling different communities who were previously at war with each other. The claim that international criminal justice can achieve all these objectives at the same time and through the same process equates aspiration with empiricism. Moral claims are often taken as empirical statements, which is not only scientifically unsound but also manipulative.¹⁴⁶³

Accordingly, it is strongly suggested that international tribunals and courts should not focus on the secondary objectives although positive steps in their direction are of course welcome. Tribunals should keep it simple and focus on establishing the facts as accurately as possible in the circumstances. If this is done properly, there is a much greater chance that the secondary objectives will also be served. A realistic and modest perspective of what can be achieved is appropriate. The ascertainment of the truth can never lead to absolutely certain results, let alone in the uncertain circumstances in which international tribunals must operate. International tribunals are conditioned by their structure and lack of independent *modus operandus*. Many obstacles had to be overcome in securing arrests and conducting investigations. The fact that these courts and tribunals have managed to function at all is an achievement in and of itself.

¹⁴⁶³ Borer, Truth Telling as a Peace-Building Activity in: Borer, *Telling Truths*, *supra* note 40, 26-27; also: P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge, 2001), 6; Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' *University of Toronto Journal* 49, no. 3 (Summer 1999) 316-317; Michael Ignatieff: 'Articles of Faith' *Index on Censorship* 25, no. 5 (Sept. 1996), 110.

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