



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 36 | Number 2

Article 3

Winter 2011

Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models

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Cover Page Footnote

International Law; Commercial Law; Law

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Michele Caianiello†

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The author would like to thank Professor Michael Corrado and all of the editorial board of the journal, in particular Mr. Zachary Dussault, for the outstanding job done in reviewing and editing this article.

I. Introduction

The purpose of this article is to examine some features of the International Criminal Court (hereinafter "ICC") procedural system, in particular the law of evidence, making use of theoretical models. The article first deals with the disclosure phase. Second, it focuses on the admission of evidence. To conduct the analysis, two widely known theoretical models, are employed: the accusatorial versus the inquisitorial model, and the Damaška partition between the reactive and proactive State. Despite its accusatorial structure, ICC provisions provide many important exceptions to the typical features of the accusatorial theoretical model. In particular, to uphold the values inherent in the international criminal justice system, the ICC Statute and Rules provide various exceptions to the prohibition against admitting unchallenged testimonial statements at trial. Additionally, in the disclosure phase, notwithstanding a parties-led general structure, procedural sanctions seem oriented towards leading the trial to a (possibly correct) conclusion on the merits, rather than merely punishing the misconduct of a culpable party.

The above exceptions make the system, considered as a whole, partially ineffective. The emerging picture is that the accusatorial structure of the processes in international criminal procedures was adopted by the drafters without effectively implementing all its specific technical consequences. The frequent exceptions to the technical solutions implied by this theoretical model put the fairness of the system in constant tension. This tension is reminiscent of two historical precedents: the 1808 Napoléon counter-reform and the Italian struggle for an accusatorial system. The price of the inconsistencies in the accusatorial structure, in most cases, seems to be paid by the defense, which is systematically disadvantaged. Some changes in the interpretation and application of the ICC sources concerning the law of evidence would be advisable in order to rectify certain inconsistencies. Among them is a proposal for greater observation of the orality principle. To make this sustainable, it would be advisable to develop and improve the hermeneutic solution (originally conceived by the Ad Hoc Tribunals' jurisprudence), which is based on the partition between acts and conduct of the defendant,

and other contextual aspects of the indictment.

II. Reasons to Examine a Procedural System that Uses Theoretical Models

The aim of this work is mainly theoretical. Its purpose is to examine some features of the ICC procedural system—in particular the law of evidence—making use of theoretical models. For some, this approach is considered a mistake in itself. It is not uncommon at the international level to assert that procedure is almost exclusively a practical matter, that what matters is the description of what happens in every single case, and not the consideration of the theoretical nature of the system. While a completely theoretical nature simply does not exist, specific criminal proceedings deserve to be reported and studied carefully. In the international criminal scenario, procedural systems were shaped in such a way to reflect different legal traditions.¹ Particularly, but not exclusively, at the ICC, the drafters specifically sought *not* to reproduce local or national models.² Thus, some maintain that it is a mistake to analyze the ICC procedure in the light of theoretical models that were elaborated in State traditions,³ as this interpretative operation would lead to the result the drafters wanted to prevent: the implementation of passively national legal models.⁴

This kind of approach is highly controversial, even incorrect. In particular, the erroneousness of this approach—that we can define an approach merely focusing on the practice—is obvious if we look at the implied consequences. First, without making use of theoretical models, it is impossible to answer some of the most intricate questions, such as whether the system as a whole is consistent with its core values or with the goals it is meant to

¹ See Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, THE BERKELEY ELECTRONIC PRESS, 62 (2006); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 JOURNAL OF INT. CRIM. JUST. 602, 604-605 (2003).

² See Kress, *supra* note 1, at 604-605.

³ *Id.* See also K. Ambos, *International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1, 2-5 (2003); M. Findlay, *Synthesis in Trial Procedures? The Experience of International Criminal Tribunals*, in 50 INT. AND COMP. LAW QUART. 38, 40-41 (2001).

⁴ See Kress, *supra* note 1, at 605.

achieve.⁵ Secondly, a purely practical approach can separate fairness from consistency. The system is fair in name only, as its fairness is not scrutinized using theoretical models. In other words, fairness ends up being based on the intentions of the drafters (and of those called to handle the procedure) more than the consistency of the outcome with the founding values of the system. This consequence is difficult to accept because it is contradictory to the method usually adopted to test the fairness of a system. As Damaška teaches, the primary concern in any procedural mechanism is whether the outcome is predictable, consistent, and coherent with its founding values and its sources, as justice itself is almost impossible to define.⁶ For all these reasons, without the help of theoretical models, any kind of process, despite the good intentions of its founders, is in constant danger of becoming unfair.

Theoretical models are fundamental in many aspects. First, they provide for the system's consistency and predictability of the system, representing the most important component of what we call, in one simple word, justice. Most of all, theoretical models are extremely helpful in deciding what Ronald Dworkin defined as "hard cases,"⁷ cases that cannot be solved by making use of judicial precedents or applying provisions of the law. This is because these "hard cases" are ambiguous on the point. When no answer can be found in the ordinary sources, theoretical models play a decisive role. Theoretical models help us define our philosophical priorities, especially in crises when we are not able to find an answer to a problematic case.

Of course, theoretical models are not historical models. It is a

⁵ Actually, there are some very interesting attempts to apply theoretical models to the International Criminal Justice. See, e.g., Bert Swart, *Damaška and the Faces of International Criminal Justice*, 6 J. INT. CRIM. JUST. 82, 89-92 (2008); Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 834, 835 (2005); Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 242, 243 (2004).

⁶ See Mirjan R. Damaška, *The Henry Morris Lecture: What Is The Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 330, at 331-335 (2008). Of the same author, see *Problematic Features of International Criminal Procedure*, in ANTONIO CASSESE (ed.), *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* (Oxford Un. Press: Oxford, 2009), at 175-86.

⁷ RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81 (1978).

mistake to confuse the two. Theoretical models are the results of abstraction,⁸ and while they do not exist in the real world, any existing system is not pure if considered under the lens of theoretical models. Reality shows us only melted models,⁹ in which the method of blending the theoretical ingredients makes the difference. However, any living system should be studied with a theoretical approach (even if combined with other approaches), in order to understand and ascertain not only how the system works, but also how it ought to work.

In conclusion, theoretical models provide for evaluating the final political and ideological goals pursued by procedural systems as well as the means to achieve those goals. For these reasons, theoretical models are essential to test a system's dedication to justice, as concepts of "justice" and "truth" do not have a simple, clear definition, but are largely influenced by consistency and predictability of a system's outcomes more than the founding values of the system.

III. Accusatorial vs. Inquisitorial, Reactive State vs. Proactive State

In conducting an analysis on ICC provisions, this article will make use of two widely known theoretical partitions: the dichotomy between accusatorial and inquisitorial, on one side (as far as admission of evidence is concerned), and the Damaška distinction between a coordinate officialdom/resolution of conflicts model and a hierarchical officialdom/policies

⁸ As it has been said:

The traditional dichotomy alludes to two hypothetical models obtained by making a generalization from some real features of existing or historically existed systems. It follows that it is not a matter of how the law has to be interpreted. The concept rather depends on the choice of an ideologically oriented scale of values. The features of the accusatorial system are determined only as opposed to those of the inquisitorial system and vice-versa: therefore they represent only ideal models that in practice can combine in different ways, in relation to several variables.

Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C.J. INT'L L. & COM. REG. 295, 297-298 (2010).

⁹ See, e.g., MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS*, 1440-1441 (1986) (discussing the difficulties of distinguishing systems according to their accusatorial or inquisitorial nature, rather than about theoretical ingredients in general).

implementation model on the other side.¹⁰

Because the latter will be used mainly in the analysis of the disclosure phase, it seems relevant to first focus on the sanctions provided for procedural violations. In a system mainly oriented towards “litigation-solving” rather than implementing policies, the violation of a procedural provision results in a sanction even if the sanction would prevent the process from achieving a final result.¹¹ The need to punish procedural misconduct is more important than the need for trial to reach its “natural” end: namely, the conviction of the guilty and the acquittal of the innocent.¹² Playing by the rules is a very important value, probably “the” value, while concrete outcomes of the trial represent a secondary, though certainly important, value.¹³ In contrast, in a policies implementation model, the most important goal is that the trial can reach an end: in other words, that a case is not brought to trial in vain.¹⁴ Procedural sanctions may certainly play a role, but will not jeopardize the ability of judges to decide a case on the merits.¹⁵ The distinction has important relevance in the law of evidence.¹⁶ While the coordinate/conflicts resolution system will prefer the exclusion of evidence gathered in violation of the rules (at least, the most important and characterizing rules), the hierarchical/policies implementation system will tend to balance the need for a procedural sanction with the preference that a trial can lead to a decision on the merits.¹⁷ A hierarchical approach to trial is adverse to the risk that procedural impropriety by a party to a case might threaten a judge’s ability to adjudicate the case on the

¹⁰ MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986). For an analysis of the Damaška distinction applied to the ICC system, see Bert Swart, *Damaška and the Faces of International Criminal Justice*, 6 J. INT’L CRIM. JUST. 87, 89-92, 97-114 (2008); Michele Caianiello, *Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?*, 10 INT’L CRIM. L. REV. 23, 24 (2010).

¹¹ See Caianiello, *supra* note 10, at 25.

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See Caianiello, *supra* note 10, at 25.

¹⁷ See *id.* at 25-26.

merits.¹⁸

In making the distinction between accusatorial and inquisitorial, this article will focus on the implications of the “equality of arms” principle in the field of the law of evidence. Equality of arms represents a specific, rigid principle of the accusatorial model, which is conceived and framed mainly as a dispute between two litigants.¹⁹ In order to make the fight fair, the two contenders must have the same chances of winning;²⁰ it is unthinkable that one side should constantly be in an advantaged institutional position. This is not a concern of the inquisitorial system, in which, conversely, one player is structurally in the prominent position. Historically, the stronger party was the judge, who acted as prosecutor; through time, the mixed procedure stemming from the Napoleonic reform made it so that the prosecutor is now in a stronger position with more access to the judge than the accused.²¹ In such a system, the main concern

¹⁸ See *id.* at 26.

¹⁹ See MIRJAN R. DAMAŠKA, *supra* note 10, at 3. “Equality of arms” is a recurring definition in international criminal trials, and for the doctrine dealing with this subject. However, the meanings attributed to this phrase are not always the same. Rarely indeed do scholars use these mentioned words to refer to a similar concept. This work attributes a particular meaning to the term “equality of arms,” as will be explained. For some alternative definitions of the concept known as “equality of arms,” compare Gabrielle McIntyre, *Equality of Arms—Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN JOURN. INT. LAW 267, 269 (2003); Stefania Negri, *The Principle of “Equality of Arms” and the Evolving Law of International Criminal Procedure*, 5 INTL. CRIM. L. REV. 508, at 513 (2005); Geert-Jan Alexander Knoops, *The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT’L L.J. 1565, 1567-1569 (2005). For a reconstruction of the equality of arms principle before international criminal tribunals, see Salvatore Zappalà, *The Rights of the Accused*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1328-1333 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones) (2002). See also VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND EVIDENCE 277-285 (Martinus Nijhoff) (2008). For an analysis of the equality of arms principle as interpreted by the European Court of Human Rights, see SARAH J. SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS 103-112 (2007).

²⁰ Illuminati, *supra* note 8, at 314.

²¹ See Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 N. C. J. INT’L & COM. REG. 578, 582-83 (2005).

regarding the fairness of the proceedings is the impartiality of the official inquiring organ—an intrinsic quality of the person—rather than an institutional feature.

The accusatorial way to conceive the equality of arms carries consequences regarding the evidence administration at trial. First, equality implies the adoption of the party presentation style to maintain the judge's impartiality and equidistance among the litigants.²² In essence, the accusatorial process consists of leaving it up to the prosecutor and the defense to introduce the relevant evidence and prove the facts of their cases.²³ But the most important element derived from the accusatorial concept of equality of arms is the exclusion of the untested evidence gathered during the investigations from the trial.²⁴ Equality means, that no party can start the trial in a position of advantage over the other party.²⁵ As mentioned before, both parties must enjoy the same chance of success at trial. Therefore, to test any provision's adherence to the equality of arms principle, it is crucial to determine whether the parties to the proceeding are in a substantially equal position.²⁶

²² See Illuminati, *supra* note 8, at 311.

²³ Even when the judge is given the power to call for some evidence, this is generally to complement the parties' strategy, in a merely subsidiary way. See Illuminati, *supra* note 8, at 313–15.

²⁴ It is well known that this assertion is highly contested, and that until now neither the European court of Human Rights nor the international criminal courts have recognized the duty to exclude evidence obtained during the investigations phase. See Ari S. Bassin, "Dead Men Tell No Tales": Rule 92 Bis—How The Ad Hoc International Criminal Tribunals Unnecessarily Silence the Dead, 81 N.Y.U.L. REV. 1763, 1766 (2006); John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MLR 734, 737-764 (2005); Elisabeth M. Dipardo, *Caught In a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses before the ICTY*, 31 B.C. INT'L & COMP. L. REV. 275, 277-301 (2005); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha*, 37 COLUM. J. TRANS. L. 725, 727-765 (1999); RICHARD MAY & MARIEKE WIERDA, *INTERNATIONAL CRIMINAL EVIDENCE* 209 (2002).

²⁵ See Illuminati, *supra* note 8, at 313-314.

²⁶ See Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. COMP. L. 489, 489-500 (2004); Illuminati, *supra* note 8, at 310-311; Giulio Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 4 WASH. U. GLOBAL STUD. L. REV. 567, 569-570 (2005); Mariangela Montagna & William T. Pizzi, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L., 429, 432-435 (2004);

In the investigation phase, the prosecutor is always in a predominant position due to the means at his or her disposal for gathering information before the trial.²⁷ To re-establish equality, it is necessary to ban all unchallenged statements collected during the investigations phase from being used as evidence. The prohibition of hearsay is strictly, though not solely,²⁸ linked to the equality of arms principle. If it were possible for the parties to use statements gathered before the trial as evidence without any confrontation with the witness, *de facto* the prosecution and defense would stand in unequal positions at trial.²⁹ The prosecutor can draw advantage from his means of investigation, which are, in general, much broader than those of the defense.³⁰ For this reason, it is not possible to define a system as accusatorial in the absence of a rule against hearsay, even if the defense were able to conduct its own investigations. The disproportion of investigative means between the two counterparts—prosecution on one side and defense on the other—would result in a systematic advantage for the prosecutor.³¹ Equality, in other words, would be superficial.³²

Some might argue that there is no cause for concern regarding

Panzavolta, *supra* note 21, at 582-583, 585-590; William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 2-3 (1992).

²⁷ See *Illuminati*, *supra* note 8, at 312-314.

²⁸ Of course, it is undeniable that the prohibition of hearsay serves many different purposes. From a historical point of view, the rule against hearsay is linked to the jury system. See MIRIAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 12-17 (1995). This is why its necessity is often denied at international level, where professional judges are called to adjudicate the case. See *infra*, Section 5). Moreover, the prohibition of hearsay is connected with the problem of reliability, as far as the possibility to challenge the credibility of the source is at stake. In other words, to verify the credibility of any evidence, cross-examination is fundamental. It follows that items of evidence for which cross-examination is not possible, such as out of court statements, affidavits, etc., are inadmissible. See 5 J. WIGMORE, *Evidence* § 1367 (3d ed. 1940) (stating Wigmore's famous definition, "*Cross examination is the greatest legal engine ever invented for the discovery of truth.*"). See also *supra* note 10. As is well known among criminal law scholars, the debate on the prohibition of hearsay evidence has been particularly exhaustive in Italy, owing to the adoption of the new Code of Criminal Procedure, which is inspired by the accusatorial model.

²⁹ See *Illuminati*, *supra* note 8, at 312-314.

³⁰ See *id.*

³¹ See *id.*

³² See *id.*, at 310-11.

the disproportion of investigative means at the international level, where the defense can often carry out its own investigations efficiently.³³ This is not a well-founded opinion. In fact, due to the Rome Statute provisions, the prosecutor is given a structural advantage over the defendant during the investigations phase. The prosecutor is an official organ of the Court, appointed in a way similar to a judge, with express power to seek the cooperation and compliance of any state or intergovernmental organization and to enter into agreements with them.³⁴ The prosecutor, moreover, may officially be informed on matters concerning compliance with requests for cooperation issued by the Court, under Article 93 provisions (specifically dealing with the collection of evidence).³⁵ Furthermore, during investigations, the prosecutor has discretion to select the cases to prosecute on the basis of the evidence collected.³⁶ Finally, in practice, the policy of “self-referrals” by the State Parties,³⁷ formulated by the Office of the Prosecutor,

³³ See *id.*

³⁴ See the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/10, art. 54 [hereinafter Rome Statute].

³⁵ *Id.* art. 93.

³⁶ According to Article 53 of the Rome Statute, there are various parameters that the Prosecutor must take into consideration when deciding to start an investigation or to file an indictment: the gravity of the case, the interests of victims, the admissibility of the case according to Article 17, and the interests of justice. Among those parameters, Article 53 ¶ 2 provides for the “sufficient legal or factual basis to seek a warrant or summons under Article 58.” *Id.* art. 53. This criterion is nothing more than an evidence test. In fact, Article 58 ¶ 1 recalled by Article 53, defines as sufficient legal or factual basis to seek a warrant or a summons when “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” *Id.* art. 58.

³⁷ At the time of writing, the Office of the Prosecutor is dealing with the following situations: the Democratic Republic of the Congo (ICC-01/04); the Central African Republic (ICC-01/05-01/08); Uganda (ICC-02/04); Darfur, Sudan (ICC-02/05); and, since March 31st, 2010, Kenya. With the exception of Darfur and Kenya, the other situations were taken into consideration by the OTP as a consequence of a referral by the State parties or, more properly, by the State in whose territory the events for which the Prosecutor decided to start the investigation took place. In practice, all but Darfur were cases of so called self-referrals (while Darfur was started after UN Security Council referral, and Kenya *proprio motu* by the Prosecutor, pursuant to Article 15 of the Statute). See Claus Kress, *Self Referrals and Waivers of Complementarity, Some Considerations in Law and in Policy*, 2 J. INT'L CRIM. JUST. 944, 944-948 (2004); see also, Mahnouch. H. Arsajani & W. Michael Reisman, *The Law-in-Action of International Criminal Court*, 99 AM. J. INT'L L. 385 (2005); William. A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J.

makes it reasonable to assume that State parties are more keen to cooperate with the Prosecutor than with the defense on concrete cases at stake before the ICC,³⁸ without regard to whether the Office of the Prosecutor conducts its work with an impartial and fair approach.³⁹

In order to achieve consistency and coherence, it is necessary that once the accusatorial framework has been chosen, testimonial statements collected *ex parte* out of court should be banned as evidence at trial (or, at most, should only be admitted in very limited circumstances). Of course, the opposite is true if the inquisitorial model is selected. In this case, as stated before, the system relies mostly on the impartiality of the chief actors in

INT'L CRIM. JUST 731 (2008); William A. Schabas, 'Complementarity in Practice': *Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5, 5-33 (2008); Mohamed M. El Zeidy, *The Gravity Threshold under the Statute of the International Criminal Court*, 19 CRIM. L. F. 35, 35-37 (2008); William W. Burke-White, *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 J. INT'L. L. 557, 557-90 (2005); William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L. F. 59, 59-85 (2008); William W. Burke-White & Scott Kaplan, *Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 J. INT'L CRIM. JUST 257, 257-79 (2009); Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L. F. 87, 87-113 (2008); Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court*, 8 INT'L CRIM. L. REV. 185, 185-228 (2008).

³⁸ As William Schabas observes in one case:

The Prosecutor was content, because the arrest warrant was issued, and he could now provide tangible evidence that he was doing his job. The judges were delighted to have a real trial, after years of relative inactivity. The State Party was satisfied to have disposed of a troublesome rebel leader who would be judged in distant Europe. And the accused, who might normally be expected to challenge irregular application of the law in a prosecution, was thrilled that he would remain in The Hague and not be sent back home, where he was facing charges of genocide and crimes against humanity. It was a 'win-win' situation for all concerned.

William Schabas, *Prosecutorial Discretion v. Judicial Activism*, 6 J. INT'L CRIM. JUST. 757, 760 (2008).

³⁹ See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT. A COMMENTARY ON THE ROME STATUTE* 676 (2010) ("The complex litigation concerning disclosure to the defence and the obtaining of evidence under confidentiality agreement . . . suggests that, despite the herms of article 54 (1)(a), the Office of the Prosecutor in its early years may not have approached the gathering of evidence in an entirely even-handed manner.").

trying the case: the judges.⁴⁰ In such a context, no rule against hearsay is necessary, even though in an historical perspective, various inquisitorial models adopted provisions ordering the judge to consider *summa cum prudentia* unchallenged written statements.⁴¹ Perhaps, the worst hypothesis for the fairness of the system occurs when, despite the accusatorial structure, hearsay evidence is broadly admitted. In such cases, the process combines the worst aspects of the two models. On one side, it is polarized in the accusatorial way, and therefore both the collection and presentation of evidence rely primarily on the parties.⁴² On the other, it is structurally unequal because the prosecutor is systematically in a better position than the defense.⁴³

IV. ICC Disclosure of Evidence: A Parties-Based Activity (Without Severe Sanctions)

A closer view of the ICC disclosure system reveals various provisions depicting a party based activity.⁴⁴ There is no official investigation file.⁴⁵ The prosecutor and the defense must select the evidence they consider relevant for their respective cases.⁴⁶ This is true for the confirmation hearing preceding the trial, governed by Article 61 of the ICC Statute, as well as for the trial itself.⁴⁷ At both stages, it is up to the parties to select the materials to present to the judge, and to disclose those materials to their counterpart.⁴⁸

⁴⁰ See Illuminati, *supra* note 8.

⁴¹ See Mirian Damaška, *Of Hearsay and Its Analogues*, 76 MINN. L. REV. 425, 436-439 (1992).

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Caianiello, *supra* note 10.

⁴⁵ See *id.*

⁴⁶ See Rome Statute, *supra* note 34, art. 54.

⁴⁷ The judges have some powers to interfere with disclosure options adopted by the parties. The most important powers are, on one side, the control over the Prosecutor's duty to disclose exculpatory evidence to the defendant, and on the other, the power to call for new evidence. Regarding the latter, the interferences are of indirect nature, but effective nonetheless. Once disposed of *proprio motu*, for the admission of additional evidence, the parties must exchange the relevant information (such as, for example, previous testimonial statements). See Caianiello, *supra* note 10, at 27; see also THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 403 (Roy S. Lee et al. eds., 2001).

⁴⁸ Actually, provisions in the Statute and in the Rules permit the judges to admit

As a general rule, the selection is discretionary, with only one party being able to decide what is necessary to win its case and what is not.⁴⁹ One very important exception to this rule is for the prosecutor.⁵⁰ He or she must disclose to the defendant at the first possible moment any exculpatory evidence, defined in broad terms as “evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”⁵¹ However, this exception does not alter the structure of the system, which remains party-based.⁵² Disclosure is completely in the hands of the litigants, even though one of them must comply with the duty to inform the counterparts of the existence of exculpatory materials.⁵³

Notwithstanding a party-based shape, the sanctions system is far more proximate to a policies-implementation model than a litigation-solving model.⁵⁴ As such, the system of sanctions in the field of disclosure remains proactive—the State tends to reach its ends irrespective of the parties behavior rather than remain passive, leaving the burden on the parties to make a proper use of the procedural machine.⁵⁵ First, it is expressly provided in the ICC statute that failure by the parties to comply with such detailed provisions will not limit their right to present evidence.⁵⁶ In a reactive system, it would be exactly the opposite. Secondly, in the first famous case that dealt with the ICC, the judges, though finding that the prosecution disregarded its duty to disclose

proprio motu new evidence, though in a complementary way, as it was confirmed in the decision *Prosecutor v. Germain Katanga et Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Directions for the Conduct of the Proceedings and Testimony In Accordance with Rule 140 (November 20, 2009). These provisions do not, however, alter the fact that disclosure is primarily, if not exclusively a burden of the parties.

⁴⁹ See Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, *supra* note 37; Schabas, ‘Complementarity in Practice’: *Some Uncomplimentary Thoughts*, *supra* note 37, at 5-33.

⁵⁰ See Rome Statute, *supra* note 34, art. 67.

⁵¹ *Id.*

⁵² See Arsajani and Reisman, *supra* note 37.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See generally Rome Statute, *supra* note 34.

exculpatory evidence to the defense, opted for a simple adjournment of the proceeding (a stay), and not for the inadmissibility of the undisclosed evidence or for the dismissal of the charges due to the abuse of process.⁵⁷ In other words, the judges took responsibility over the process, intervening to redress a development that otherwise would have been unfair.⁵⁸ In so doing, however, they clearly showed a preference for a policies implementation approach to the proceeding, rather than a litigation-solving approach, despite the Statute and the Rules provisions, all providing for a parties-based activity when dealing with disclosure.⁵⁹

V. Admission of Evidence: The Large Use of *Ex Parte* Statements Collected Before Trial

As we have seen, the ICC provisions depict a party-led process in the pre-trial phase.⁶⁰ This polarized structure is affirmed, with some exceptions, at trial. Rule 140, notwithstanding its ambiguity, confirms that the burden to introduce information and prove facts relies mainly on the litigants, giving the judge some subsidiary powers.⁶¹ The accusatorial structure of the trial was confirmed by one of the first decisions issued by Trial Chamber II, in the Katanga and Ngudjolo Chui Case.⁶² In issuing directions for the way in which the trial was conducted, the ICC judges shaped the process in a manner very similar to that provided for by Rule 85 of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR), with slight amendments due to the

⁵⁷ See Caianiello, *supra* note 10, at 26-31.

⁵⁸ See *id.*

⁵⁹ See *id.* at 38.

⁶⁰ See Kress, *supra* note 37.

⁶¹ See *supra* note 36.

⁶² Prosecutor v. Germain Katanga et Mathieu Ngudjolo Chui, *supra* note 48. It is worth mentioning that the accusatorial structure is confirmed even in *Le Procureur v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-1/06, Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges, § 2 (January 25, 2010) in which it is pointed out that: “il n’appartient pas à la Cour d’analyser, d’interroger les témoins par le détail sur des questions qui pourraient être fort litigieuses dans ce procès” (meaning “it is not for this Court to examine, question witnesses in detail on issues that could be very contentious in this trial.”).

attendance of the Victims' Legal Representatives at the trial. Typical accusatorial rules of evidence were applied, such as the division of cases for the prosecution and for the defense of the trial, the subsidiary and complementary role of the judges, the prohibition of the party conducting the examination-in-chief from posing leading questions (which are, by contrast, allowed during cross-examination), and so on.⁶³ Subsequent decisions make the framework less clear and more uncertain.⁶⁴ Yet, as a general consideration, it is possible to postulate that the statutory provisions are more similar to an accusatorial structure than to an inquisitorial one at trial.

However, a number of relevant provisions allow for the admissibility of written statements at trial, even when gathered *ex parte* during the investigations. For example, Article 69 of ICC Statute permits the use of "recorded testimony," "documents," and "written transcripts," as long as the evidence is not "prejudicial to or inconsistent with the rights of the accused." Moreover, Rule 68

⁶³ See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06, Decision on judicial questioning (Mar. 18, 2010). During the examination of one witness, the defense argued against "introducing into the proceedings criminal acts or charges which do not fall within the scope of the charges confirmed against the accused," and in this context it observed that "a significant portion of the questions put by the Bench have related to the commission of acts of sexual violence, whilst no charge of this nature was confirmed against the accused and, indeed, earlier in their evidence some witnesses had not referred to this subject." The Trial Chamber I denied the motion, affirming that:

The Rome Statute framework, and national judicial systems generally, do not limit the role or the independence of the judges in the way suggested, and it is for the judges to decide whether, when they intervene, it is appropriate to use leading questions, depending on all the circumstances. For instance, the Bench may conclude that earlier answers given by the person testifying, or other witnesses, justify a judge dealing with an issue by way of leading rather than neutral questioning.

Id. See also Lee Procureur v. Thomas Lubanga Dyilo, Case No. ICC 01/04-01/06, Decision on the defense observations regarding the right of the legal representatives of victims to question defense witnesses and on the notion of personal interest; Decision on the defense application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defense witnesses (Mar. 11, 2010) (concluding that presence of the victim's legal representative was important to protect the victim's interest fully).

⁶⁴ Prosecutor v. Germain Katanga et Matheu Ngudjolo Chui, Transcript No. ICC-01/04-01/07-T-83-Red-ENG WT 26-11-2009 1/68 NB T (Nov. 26, 2009) at 62; ICC-01/04-01/07-T-86-Red-ENG WT 27-11-2009 1/31 NB T (Nov. 27, 2009) at 12.

provides:

[T]he Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defense had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defense and the Chamber have the opportunity to examine the witness during the proceedings.⁶⁵

In addition, the tradition at the international level is less favorable to providing for strict rules on the admissibility of evidence, instead relying on the principle of the free assessment of information (so that parties unfamiliar with the international procedural system can easily present their cases without being limited by the technicalities typical of national models).⁶⁶

Most likely, the jurisprudence of the European Court on Human Rights on the right of the defendant to examine or have examined witnesses will be reproduced at the ICC level. What matters is that the defendant has an opportunity to challenge the witness, and that the judgment does not rely exclusively or decisively on written unchallenged statements. The first decision on the point confirms the judge's bias in favor of hearsay evidence.⁶⁷ On the basis of the previous considerations, we can

⁶⁵ See Rome Statute, *supra* note 34, art. 68.

⁶⁶ ANNE-MARIE LA ROSA, JURISDICTIONS PENALES INTERNATIONALES. LA PROCEDURE ET LA PREUVE 253-55 (Presses Universitaires de France: Paris) (2003).

⁶⁷ See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, *Prosecution's Consolidated Response to Defense Objections to Admissibility in Principal and in Substance*, ICC-01/04-01/07-1558 and *Requête de la Défense en vue d'obtenir une décision d'irrecevabilité des documents liés aux témoins décédés référencés sous les numéros T-167 et T-258*, ICC-01/04-01/07-1556, Case No. ICC-01/04-01/07 (Nov. 16, 2009).

argue that the system gives rise to some inconsistencies. On the one hand, it is shaped as a dispute between the parties; on the other hand, it does not strictly prohibit written *ex parte* statements (on the contrary, it largely allows for them). The predictable consequence of this inconsistency is that the outcome of the trial will be strongly influenced by the elements collected during the investigations, and that the prosecutor will play a predominant role in the dispute because, structurally, the prosecutor is the party with more resources in the pre-trial phase.

VI. Origins and Justification at the Basis of the Favor for Written Evidence in Place of the Oral One

The frequent admissibility of unchallenged statements in international criminal proceedings dates back, in recent times, to the beginning of the new century. At the end of the 1990s, in fact, the UN Secretary General appointed an expert group with the task of examining which amendments could have been adopted to improve the efficiency of the *Ad Hoc* Tribunals—the ICTY and ICTR—in the administration of the cases pending before them. The expert group presented a report, observing, *inter alia*, that the use of written evidence in lieu of oral evidence would have been helpful at this aim. Since then, the *Ad Hoc* Tribunals repeatedly adopted a series of amendments to shift the fact-finding from oral evidence to a system based on the written testimony (or, *rectius*, in which oral and written evidence have roughly the same value, and are admissible under the same conditions).⁶⁸ The ICC has been developing its case law on the point with a similar approach, implementing and furthering the lesson learned from the *Ad Hoc* Tribunals.⁶⁹

In support of the shift from the oral to the written method, it

⁶⁸ See *supra* note 11. See also Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. LAW FORUM 169, 171 (2001); Gideon Boas, *Creating Laws of Evidence for the International Criminal Law: the ICTY and the Principle of Flexibility*, 12 CRIM. LAW FORUM 42, 45 (2001); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUROPEAN J. INT. LAW 569, 576 (2000); Langer, *supra* note 5, at 886-94. See also Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L.J. 47, 60-64 (2003).

⁶⁹ See Illuminati, *supra* note 8, at 313.

was argued that the lack of a jury would have rendered it unnecessary to provide for a rule against hearsay. In jury systems, the hearsay rule is intended, in part, to prevent jurors from overestimating evidence with little probative value but high emotional impact. With cases tried before professional judges, the risks of overestimation are greatly reduced, if not completely absent. Besides, professional judges must justify their decisions while jurors must not. The written justifications permit us to detect mistakes related to erroneous evaluation of evidence not challenged at trial. These observations seem to be shared by the majority of studies advocating the shift to written evidence.⁷⁰

Frankly, the observations of the study are not convincing. In particular, it appears disputable that professional judges are able, because of their training, to assess unchallenged statements. It is far from clear the scientific basis on which the reasoning rests. If we look at the issue in an historical perspective, it becomes apparent that the opposite has been true in different times and places: professional judges do not have any special skills to detect unconvincing, unchallenged testimonial statements.

For example, in the nineteenth century, a prominent scholar and judge at the French *Cour de Cassation*, Faustin Hélie, commenting on the biases inherent in adjudication, wrote:

However, who does not know the almost despotic power of our minds? Who does not know that we do more easily and with inertia what we do every day, and how habit weakens ardor and resistance? Our conscience carelessly dozes off in the day-to-day fight, and the continuous repetition of the same acts makes weaker its control. Time after time, the judge, who has heard so many false protests, so many false pleas of innocence, so many culprits who refused to face the facts, so many shameless and perverse persons, allows a sort of presumption that the accused is immoral and guilty to penetrate his heart. He cannot see but through this shadow. And, because of his integrity, he is indignant at the wickedness that is constantly before his eyes. Thus,

⁷⁰ MAY & WIERDA, INTERNATIONAL CRIMINAL EVIDENCE, *supra* note 70, at 117-119. See also VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS. PROCEDURE AND EVIDENCE 399-402 (2008). The fact that judges are professional is outlined in Kai Ambos, *supra* note 3, at 2-4. See also Fairlie, *supra* note 5, at 281-82.

he is led to mix up one accused with another, and then to punish all with heavier sentences, having this sole remedy in his hands. It is not that the judge comes to consider every accused person guilty, but rather that he comes to prematurely suspect the accused of being guilty. In this state of mind, the most grave facts charged take on the value of clues, and the clues take on the value of clear evidence.⁷¹

For these reasons, H  lie concluded that non-professional jurors would have been better prepared to weigh prudently the evidence in a criminal process, whereas professional judges would have been subject to the risk of bias caused by previous experiences (such as the presumption of the defendant's guilt).

Analogous considerations were cited by Patricia M. Wald, judge at the ICTY, when that tribunal was shifting from oral to written evidence. Ms. Wald observed:

Donning a robe does not enshroud its occupant with a seventh sense of whether something written on paper is true or false. In that sense, the judge is on a par with the juror, who must rely on his or her human instinct in evaluating the person doing the testifying. To permit critical material to be admitted without the ability to directly view and question the witness goes to the heart of the process and threatens to squander the ICTY's most precious asset—its reputation for fairness and truth seeking.⁷²

The argument that a professional judge is more likely to presume the guilt than the innocence of the defendant because of professional experience was expressed with undoubted humor by another famous American scholar, Alan M. Dershowitz, in "Rules of Justice," who again pointed out the risks of judge's professional judgment being clouded by bias.⁷³

⁷¹ FAUSTIN H  LIE, *TEORICA DEL CODICE DI PROCEDURA PENALE* 54-64 (Luigi Sampolo) (1880) (translated by the author).

⁷² Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 471, 473 (2004).

⁷³ As is well known, the following would be the "rules of justice," according to Mr. Dershowitz:

Almost all criminal defendants are, in fact, guilty. II. All criminal defense lawyers, prosecutors and judges understand and believe Rule I. III. It is easier to

It is also interesting to observe that while some scholars maintain that professional judges at the international criminal level do not need complicated rules on evidence admissibility, others maintain just the opposite, especially in regard to issues other than the preference for live testimony over written testimony. One such instance is that of witness proofing. Dealing with the first case on witness proofing, the Pre-Trial Chamber I of ICC decided that witness proofing by the parties should have been declared inadmissible.⁷⁴ This decision gave rise to an ample debate,⁷⁵ with some scholars supporting the opinion of the ICC judges while some others contested it. Among the former, Kai Ambos, defending the Pre-Trial Chamber's conclusions, observed that the

convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution. IV. Almost all police lie about whether they violated the Constitution in order to convict guilty defendants. V. All prosecutors, judges and defense attorneys are aware of Rule IV. VI. Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants. VII. All judges are aware of Rule VI. VIII. Most trial judges pretend to believe police officers who they know are lying. XIX. All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers. X. Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth. XI. Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charges (or closely related crime). XII. Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers. XIII. Nobody really wants justice.

ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, xxi-xxii (1989).

⁷⁴ Prosecutor v. Lubanga Dyilo, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679, PTC I (Nov. 8, 2006). An analogous procedural solution was adopted one year later by Trial Chamber (TC) I concerning lay witnesses for the purposes of trial proceedings. Prosecutor v. Lubanga Dyilo, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, T. Ch. I (Nov. 30, 2007). In contrast to lay witnesses, expert witnesses may be instructed by the parties jointly or separately. See Prosecutor v. Lubanga Dyilo, Decision on the Procedures to be Adopted for Instructing Expert Witnesses, ICC-01/04-01/06-1069, T. Ch. I, (Dec. 10, 2007).

⁷⁵ See Sergey Vasiliev, *Proofing The Ban on 'Witness Proofing': Did the ICC Get It Right?*, 20 CRIM. L. F. 193, 193-261 (2009); Kai Ambos, *'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman*, 21 LEIDEN J. OF INT'L. L. 910, 911-916 (2008); Ruben Karemaker, B. Don Taylor III, & Thomas Wayne Pittman, *Witness Proofing in International Criminal Tribunals: Response to Ambos*, 21 LEIDEN J. OF INT'L. L. 917, 917-23 (2008).

international judges would have lacked the necessary skills to detect the interferences of the counsels due to witness proofing in the evaluation of the witness testimony at trial. Ambos observed that:

The *superiority of professional judges* over lay jurors (section 5.3.2) as to the *verification of the authenticity of a witness statement*—that is, a question of fact—is also highly doubtful. In fact, the involvement of lay persons in the criminal justice process, be it as jurors or as members of a mixed bench, rests on the belief that these persons are, due to their professional or social background, often in a better position to judge the veracity of a witness statement. In addition, the superiority argument rests on the false assumption that the judges of international criminal tribunals are all professional judges. The sad reality is, however, that too many judges have no judicial background at all and only pass the eligibility test (Art. 36(3)(b) ICC Statute) because of an all-too-generous interpretation of the requirement of ‘competence in relevant areas of international law.’⁷⁶

The last quotation on the proofing issue shows how disputable—if not wrong—the assumption that professional judges have a superior ability to make prudential assessments of the evidence produced in written form can be. If it is debatable that professional judges have sufficient preparation to detect the improper interferences on live witness testimony due to proofing, the assumption that they are prepared enough to assess properly unchallenged statements formed in the pre-trial phase is even more questionable. Actually, it should be far less difficult to weigh the spontaneity and genuineness of the witness when the witness is present at trial and is subject to cross-examination than to evaluate the reliability of an unchallenged testimonial written statement. The witness’s attendance allows the verification of his or her credibility, and in some cases even the admission that he or she was influenced in some way by the proofing activity. However, when written statements are at stake, there is no means by which it is possible to test the reliability of the source. In a nutshell, if

⁷⁶ Ambos, *supra* note 3, at 5 (citing Rome Statute, *supra* note 34, art. 36(3)(b)(ii)) (citations omitted).

judges are not sufficiently trained to assess witness credibility in the case of proofing, they should be considered far less prepared to handle written, unchallenged statements collected out of court.

VII. Inconsistencies and Their Consequences

The considerations discussed above show that the ICC procedural system is flawed by inconsistencies, and these inconsistencies can be detected using traditional theoretical models.

Looking at the disclosure phase, it is evident that the defense is systematically disadvantaged. On the one hand, in the presentation phase the defense is subject to the prosecutor's choices and has few powers to challenge them. On the other hand, the misconduct of the prosecutor appears far from being effectively sanctioned because judges prefer to use procedural sanctions to keep the case on track, rather than closing it because of prosecutorial negligence. If we consider the admission of evidence phase, notwithstanding a general accusatorial framework, the rules governing admissibility resemble the inquisitorial model more.⁷⁷ The Chambers have interpreted the Statute and the Rules to give the judge the greatest discretion concerning which items of evidence can be admitted at trial, leaving no room for technical formalities in this area. This solution risks undermining the equality of arms between the prosecution and the defense. As noted previously, the prosecutor is advantaged by the admissibility of information collected during the investigations phase because of

⁷⁷ D.K. Piragoff, *Evidence, in THE INT'L CRIM. CT-ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 349, 351 (R. S. Lee ed., Transnational Publishers 2001) ("The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the *flexibility of the civil law system*, provided that the Court has a discretion to 'rule on the relevance or admissibility of any evidence.'" (emphasis added). For a similar but more critical approach, see Fairlie, *supra* note 5, at 291. Fairlie observes:

[T]he essential absence of rules governing admissibility of evidence generally results in a loss of protection for the accused. In light of the foregoing, it is certainly possible that the 'largely adversarial approach' of the Tribunal could itself give new life to the perception that the adversarial system provides 'only a veneer of fairness'. The argument advanced is not, however, that the Tribunal suffers from an adversarial deficit; rather, it is that there exists a danger of a due-process deficit.

Id.

the far broader means at his disposal. Therefore, the framework emerging from this analysis shows that trial provisions are not completely shaped to redress the advantages gained by the prosecutor during the pre-trial phase. In other words, the defense's relatively weaker position (with respect to the prosecutor) remains unbalanced at trial, despite the fact that Article 67, paragraph 1(e) of the ICC Statute concerning the admission of evidence establishes the defense's entitlement to enjoy the same conditions as the prosecution.

VIII. Possible remedies

A. *Neo-Inquisitorial Reform of the System?*

To remedy the inconsistencies outlined above, two options appear possible. The first and most direct option, drawn from the conclusions discussed previously, is to move the system toward a more continental, inquisitorial model. The exceptions to the accusatorial structure are at the same time too broad and too specific to be compatible with the actual general structure of the proceeding. It is better, therefore, to renounce any accusatorial ambitions and rebuild the system in an inquisitorial way.⁷⁸ Consequently, it could be suitable to gather the evidence in the hands of a sort of judge of instructions (*juge d'instruction*); at the ICC, this would imply giving the necessary powers to the Pre-Trial Chamber to operate as a "juge d'instruction." Moreover, it should be feasible to provide for an official file of the proceeding, accessible by the parties after the end of the investigations (and, at any rate, in due time before trial). At trial, the principle of free admission and evaluation of evidence should rule. The judges should play a proactive role in trying the case, provided that the prosecutor and the defendant have the same possibilities to present further evidence and that the conviction is not based exclusively (or in a decisive manner) on evidence never subject to cross-examination. In other words, except for this specific safeguard—that the defendant had an effective occasion to challenge witnesses when the evidence is decisive—no rule against hearsay should be

⁷⁸ For a provocative, perhaps drastic position on the issue, see William T. Pizzi, *Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals*, 1 INTERNATIONAL COMMENTARY ON EVIDENCE 4, 1, 3 (2006).

provided for.

Notwithstanding its consistency and lack of ambiguity, the neo-inquisitorial reform of the ICC appears far from being implemented at the moment. First of all, it would be necessary to amend the Statute, a very complicated task.⁷⁹ To modify the Statute, Article 127 provides that two-thirds of States Parties (acting at an assembly of states parties or at a review conference) may "adopt" amendments.⁸⁰ In order to come into force, the amendments need to be accepted by individual State Parties.⁸¹ For all the amendments not concerning the definition of the crimes (or the introduction of a new crime), paragraph 4 provides that they will be effective for all State Parties once they have been accepted by seven-eighths of the State Parties, which is an extremely high threshold.⁸² Accordingly, since the Rome Statute currently counts 111 State Parties, an amendment would have to be ratified by 74 of them. Moreover, paragraph 6 provides a State that does not accept an amendment the right to withdraw from the Statute with immediate effect.⁸³ In light of the aforementioned hurdles to

⁷⁹ To understand the relevant provisions for amending the Rome Statute, *see* Rome Statute, *supra* note 34, art. 121, §§ 3-6:

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties. 4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. 5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. 6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

Id. *See also*, Schabas, *supra* note 39, at 678-82.

⁸⁰ *See* Rome Statute, *supra* note 34, art. 127.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See* Rome Statute, *supra* note 34, art. 127, ¶ 6.

amendment, the aim of modifying the Statute in order to resolve the inconsistencies in the procedural system does not seem very realistic. Finally, it must be taken into account that the first Review Conference on the Rome Statute held in Kampala, Uganda ended on June 11th, 2010, and during the review conference the delegates did not take any action concerning amendments of procedural provisions.⁸⁴

B. A More Realistic Approach: Some Changes in the Interpretation of the Existing Sources

1. Disclosure

All of the above considerations lead to the conclusion that the structure of the proceedings will remain in its prevailingly accusatorial form for the long run. For the sake of rendering the

⁸⁴ The Kampala Conference represented the first opportunity to consider amendments to the Rome Statute from its entry into force in 2002, and to take stock of its implementation and impact. The most important result achieved in Kampala has been the amendment of the Statute as to include the definition of the crime of aggression, which will be Article 8 of the Statute. According to Article 8:

“For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

Rome Statute, *supra* note 34, art. 8. For a complete version of the Resolution adopted by the ICC, see Resolution RC/Res.6, The Crime of Aggression, ICC Resolution (June 11, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf. In addition to the resolution on the crime of aggression, the Conference:

... also adopted a resolution by which it amended article 8 of the Rome Statute to bring under the jurisdiction of the Court the war crime of employing certain poisonous weapons and expanding bullets, asphyxiating or poisonous gases, and all analogous liquids, materials and devices, when committed in armed conflicts not of an international character. Furthermore, the Conference adopted a resolution by which it decided to retain article 124 in its current form and agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. Article 124 allows new States Parties to opt for excluding from the Court’s jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years.

Press Release, ICC, Review Conference of the Rome Statute concludes in Kampala, ICC Press Release ICC-ASP-20100612-PR546 (June 12, 2010). For more on the Kampala Conference, see Robert L. Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. L. F. 417 (2010).

system less inconsistent, it is suitable to intervene at the interpretative level, taking into account the general accusatorial nature of the mechanisms.⁸⁵

Some possible interpretative changes could concern the disclosure phase. The first interpretative change should concern the standard to be met by the defense when applying for additional disclosure of potentially exculpatory evidence. The defense should not be required to meet too severe of a standard to obtain access to further information. The second interpretative change should concern sanctions. The failure to disclose evidence in due time, which is required at trial by any party, should lead to the inadmissibility of that evidence. In other words, the judges should refrain from intervening to remedy the parties' misbehavior (except when the evidence at stake seems to have the potential for playing a decisive role in the adjudication of the case).

Finally, if the prosecutor's failure to disclose exculpatory evidence is repeated and blatant, it should lead to the dismissal of the charges against the accused (and not to a mere postponement of the trial). Although there is not any clear provision permitting the adoption of such sanctions, there is not a prohibition by the Statute or by the Rules, and these sanctions would be consistent, for the considerations expressed above, with the party's litigation structure for the trial.

At the present time, the ICC practice on disclosure seems to have opted for a third way: to implement a managerial style in the disclosure phase, giving the judges the power to influence the activity of the parties.⁸⁶ Judges seem to have an increasingly

⁸⁵ But cf. Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1439-1495, (Antonio Cassese, Paola Gaeta, John R.W.D. Jones) (2002) (acknowledging that "[i]n the ICC, the position of the essential parties, prosecution and defense, at the trial is still very much common-law oriented."). Orie also observed that "[a]part from the fundamental aspects, practice has shown (especially in the United States and ICTY) that the characteristic elements of the adversarial model tend to paralyse the administration of justice in serious and complex cases." *Id.* at 1442. This sounds like an implicit suggestion to the interpreter to apply the system with an inquisitorial hermeneutic approach, rather than remaining faithful with the lines indicated by the legislature.

⁸⁶ See, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Prosecution's Application for Leave to Appeal the "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol," (Mar. 23, 2009),

active approach in the disclosure phase.⁸⁷ This option can undoubtedly be helpful for the defense who may take advantage when the prosecutor does not completely fulfill his disclosure duties.⁸⁸ The defendant may reasonably rely on judicial intervention to redress the lack of communication exchange between the prosecutor and defense due to prosecutorial inertia.⁸⁹ However, judges remain reluctant to sanction severely in cases of prosecutorial negligence during disclosure.⁹⁰ This aspect should be at least slightly redressed. The proactive judicial approach risks being inefficient,⁹¹ considering that the collection of information is in the hands of the prosecutor during the investigation phase; only the prosecutor knows the entirety of the evidence gathered by his office before trial.⁹² Judges cannot search in the prosecutors' files to gather more information relevant to a case.⁹³ For this reason, a more rigid interpretation in the field of procedural sanction appears desirable when disclosure provisions are found to have been violated.⁹⁴

2. Admission of Evidence

As far as the admission of evidence is concerned, a possible solution to the disparity between the prosecution and defense, especially when faced with the dilemma of written versus oral evidence, could be to develop and improve the line of

available at <http://www.icc-cpi.int/iccdocs/doc/doc648874.pdf>. The Prosecutor asked for leave to appeal the decision of the Trial Chamber dated March 13, 2009, with which the trial chamber ordered the Prosecutor "to prepare a detailed and comprehensive analytical chart of all the incriminatory evidence it intends to offer at trial and to provide that chart to the Court and the Defence at least several months in advance of the trial," notwithstanding they recognized that "the Prosecution . . . remains master of its case and has full control over the selection and presentation of evidence in the Table." *Id.*

⁸⁷ See, e.g., *id.* at ¶ 1.

⁸⁸ See MAY, *supra* note 70, at 84.

⁸⁹ See *id.*

⁹⁰ See *id.* (explaining that courts generally have not imposed harsh sanctions where, typically, no prejudice can be shown as against the defense).

⁹¹ Cf. *id.* at 278-79 (stressing the importance of an expeditious trial).

⁹² Cf. Panzavolta, *supra* note 21, at 403.

⁹³ See *id.* at 425.

⁹⁴ See discussion *supra* Part II (detailing the considerations expressed regarding the disproportion of means between the prosecutor and the defense).

interpretation of the acts and conduct of the accused adopted at the ICTR and ICTY level. It is noteworthy that ICTR Rule 92⁹⁵ and ICTY Rule 92⁹⁶ both dichotomize the approach to evidence concerning the acts and conduct of the accused and evidence pertaining to contextual features.⁹⁷ To prove the former, counsel should utilize oral evidence⁹⁸ through examination and cross-examination, as outlined in Rule 85 of the ICTR⁹⁹ and ICTY.¹⁰⁰ Conversely, to prove the latter, documents and statements collected out of court (even if untested) are admissible, or implicitly preferable.¹⁰¹ Furthermore, in ICTR and ICTY best case law, it is well established that when evidence is crucial for the defendant, even if it does not directly refer to the acts and conduct of the accused, live testimony must be given preference over written testimony.¹⁰² This way, the accused's right to examine or cross-examine witnesses provided for in the *Ad Hoc* Tribunals Statutes is respected in the most practicable way possible.¹⁰³ If

⁹⁵ Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia [ICTY RPE] Rule 92 at ¶ 2.

⁹⁶ Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda [ICTR RPE] Rule 92*bis*.

⁹⁷ See ICTY RPE, Rule 92*bis* (A)(i) at ¶ 2. The Rule provides:

Factors in favour of admitting evidence in the form of a written statement include but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence;

Id. See also *supra* notes 11, 29.

⁹⁸ See MAY AND WIERDA, *supra* note 70, at 143, 165, and 343-44.

⁹⁹ See ICTR RPE, Rule 85.

¹⁰⁰ *Id.*

¹⁰¹ See May, International Criminal Evidence, *supra* note 70, at 344.

¹⁰² See Robinson, *supra* note 68, at 578-80.

¹⁰³ See *id.* (discussing tribunal cases). See also Gordon, *supra* note 1, at 42-44; MAY AND WIERDA, *supra* note 70, at 229-31 (discussing tribunal cases). It can be observed that the preference for hearing the witness live at trial because of crucial evidence, even if falling under the cases in which formally written statements could be admitted, is still prevalent at the ICTY despite the introduction of Rules 92 *ter* and 92 *quater*. See, e.g., Prosecutor v. Milutinović, et al., IT-05-87-T, Decision on Prosecution Motion for

applied scrupulously, the line of interpretation based on the “crucial evidence” doctrine could produce a satisfactory blend of the various exigencies that any international criminal trial must fulfill.¹⁰⁴ One would also have to refrain from the constant temptation to consider items of evidence as non-crucial merely because they do not directly affect the acts and conduct of the accused.¹⁰⁵ This occurs occasionally at the *Ad Hoc* Tribunals.¹⁰⁶ For example, witnesses who make statements concerning the acts and conduct of co-perpetrators should always be cross-examined, and out of court statements could be admitted, at most, *in lieu* of the examination-in-chief.¹⁰⁷ Testimonial statements regarding co-perpetrators, far from concerning merely contextual features, are, indeed, crucial in terms of capacity to influence the judges.

It is true that at the *Ad Hoc* Tribunals, the evidentiary system is shifting progressively and, perhaps worryingly, toward the admissibility of any type of written evidence.¹⁰⁸ For example, Rule 92-*quinqies* provides for broader exceptions to the orality principle.¹⁰⁹ However, these latest changes, obtained in part by

Admission of Evidence Pursuant to Rule 92 at ¶ 13 (Feb. 16, 2007); Prosecutor v. D. Milošević, IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 at 3,4 (Feb. 22, 2007).

¹⁰⁴ Cf. MAY, INTERNATIONAL CRIMINAL EVIDENCE, *supra* note 70, at 348.

¹⁰⁵ Cf. *id.* at 345.

¹⁰⁶ Cf. *id.* at 227 (providing that some courts exclude some evidence that does not address the acts and conduct of the accused).

¹⁰⁷ See Mark Wasef, *Procedural Rules in International Litigation: Admissibility of Transcript of Interview of Accused Against Co-accused*, 20 CRIM. L.F. 447 (2009).

¹⁰⁸ See, e.g., ICTY RPE Rule 92*ter* and Rule 92*quater* (codifying the admissibility of a wide range of written evidence).

¹⁰⁹ See *id.* The rule provides in total:

(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:

- (i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;
- (ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;
- (iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and

amending the Rules¹¹⁰ and in part by abandoning the previous case law regarding crucial evidence, are due to both the completion strategy imposed by the U.N. Security Council on the *Ad Hoc* Tribunals¹¹¹ and the practical need to speed up the work of the Tribunals.¹¹² In other words, the previous sources were amended for expediency and not because they were considered unfair. These time concerns should not influence the ICC, which has not provided for any completion strategy.¹¹³ This is why the implementation at the ICC level of the jurisprudence originally developed through Rule 92-*bis* of the ICTY and ICTR seems plausible. Indeed, it seems an efficient way to balance the right of

(iv) the interests of justice are best served by doing so.

(B) For the purposes of paragraph (A):

(i) An improper interference may relate *inter alia* to the physical, economic, property, or other interests of the person or of another person;

(ii) the interests of justice include:

(a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;

(b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and

(c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment. (iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Id.

¹¹⁰ See *id.*

¹¹¹ See S.C. Reg. 1534, ¶ 3, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

¹¹² See *id.* Recent scholarship has focused on these critical considerations involving issues related to evidence, among others. See Dominic Raab, *Evaluating the ICTY and its Completion Strategy. Efforts to Achieve Accountability for War Crimes and their Tribunals*, 3 J. INT'L. CRIM. JUST. 82, 97 (2005); Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 Am. J. Int'l L. 142, 142-43 (2005); Larry D. Johnson, *Closing an International Criminal Tribunal while Maintaining International Human Rights Standards and Excluding Impunity*, 99 Am. J. Int'l L. 158, 159-61 (2005); Lorenzo Gradoni, *You Will Receive a Fair Trial Elsewhere: The ad hoc International Criminal Tribunals Acting as Human Rights Jurisdictions*, 54 NETH. INT'L L. REV. 1, 2-4 (2007).

¹¹³ See Kevin Jon Heller, *Completion Strategies* 1 (Leuven Centre for Global Governance Studies, Working Paper, 2009), available at <http://www.ipp.ghum.kuleuven.be/publications/heller.pdf>.

confrontation with the need to conduct the trial within a reasonable time.¹¹⁴

IX. Conclusion

ICC rules of evidence depict a mixed system which is, unsurprisingly, neither wholly inquisitorial nor wholly accusatorial. Among the numerous provisions, some inconsistencies seem to emerge, most noticeably in both the disclosure and admission of evidence phases. Consequently, a discrepancy becomes apparent between the general structure of the system—seemingly reliant on the parties' initiative—and the provisions concerning procedural sanctions and prohibitions—reliant on judicial initiative.

It is time to intervene at the interpretative level to redress the

¹¹⁴ It must be added that, in spite of the necessity to close cases because of the completion strategy, this line of protection for the accused's rights has been maintained in many cases throughout the existence of the tribunal. *See, e.g.* Prosecutor v. Karadžić, Case No. IT-95-5/19-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92, ¶ 14 (Aug 20, 2009) (addressing facts committed by subordinates, when the accused is a military commander or superior); Prosecutor v. Milutinović, et al., Case No. IT-05-87-PT, Decision on Prosecution's Rule 92 Motion, 11 n.76 (July 4, 2006) (addressing fact regarding statements concerning a participant in a joint criminal enterprise). In such cases, Trial Chambers of ICTR and ICTY preferably opt for either the live testimony *in lieu* of a written statement, or admission of the written statement in substitution of the examination-in-chief only, thereby leaving the defense the right to cross-examine the witness directly. *See* Prosecutor v. Dordević, IT-05-87/1-T, Decision on Prosecution's Motion for Admission of Evidence of Witness Milan Daković Pursuant to Rule 92, ¶¶ 8-9 (Aug 13, 2009); *Karadžić*, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92, ¶ 14 (admitting evidence requested by the Prosecutor after observing that the witness had already been cross-examined previously, in a separate proceeding, by another defendant in a position similar to Karadžić's); *Milutinović*, Case No. IT-05-87-PT, Decision on Prosecution's Rule 92 Motion, ¶¶ 21-22; Prosecutor v. S. Milosevic, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, ¶ 16 (Sep. 30, 2003); *Milosevic*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in lieu of Viva Voce Testimony Pursuant to 92(d) – Foca Transcripts, ¶ 48 (June 30, 2003). *But see* Prosecutor v. Gotovina, et al., Case No. IT-06-90-T, Decision on Defendant Ante Gotovina's Motion for Admission of Evidence of one Witness Pursuant to Rule 92, ¶¶ 6-7 (Sep. 16, 2009) (admitting written testimony from witness eliciting relevant "historical, political, and military background").

system in a manner more coherent with its accusatorial general structure. Focusing on the admission of evidence, the adoption of both the distinction between acts and conduct of the accused versus contextual features and the "crucial evidence doctrine," could improve the equality of arms principle at trial if applied rigorously at ICC level. Further, this could address the disproportionate means existing between the Prosecution and Defense in Pre-Trial phase.

By not adopting these suggested analytical solutions, the ICC risks evolving into the worst among the hypotheticals previously depicted: a system giving rise to a general accusatorial structure with specific inquisitorial provisions during crucial passages of the proceeding. If this is to be the final outcome, the defendant will be systematically disadvantaged because of the structural superiority of means provided to the Prosecutor, who may produce as evidence any statements or item gathered during the investigations.¹¹⁵ As one Italian scholar once affirmed, the worst thing, for the sake of fairness of process, is to bear the accusatorial principles "in the mouth," while maintaining a strong preference for the inquisitorial features "in the heart."¹¹⁶

¹¹⁵ One could argue that the duty to act in an impartial way in the investigation phase, provided by article 54 (1)(a) of the Rome Statute, provides for an effective mean to protect the chances of the defendant to win at trial. See Rome Statute, *supra* note 34, art. 54(1)(a). This observation is unconvincing. If remaining impartial represents an almost impossible goal for the judge of instruction, as most scholars pointed out in Italy before the accusatorial reform, *a fortiori* this should be true for the Prosecutor, called to take action at the end of the investigation and to present the prosecution case at trial: inevitably he will always be biased by his role in the proceedings and by the choices the law requires him to adopt.

¹¹⁶ The original phrase was pronounced during a Conference in 1964 by Pietro Nuvolone, a famous scholar of criminal law. The complete quotation, translated by me from Italian, sounds: "many . . . of those who apparently talk about an 'accusatorial process' have in practice the inquisition, the inquisitorial process in their heart" PIETRO NUVOLONE, *CRITERI DIRETTIVI PER UNA RIFORMA DEL PROCESSO PENALE* 196 (Giuffrè: Milano, 1965). The metaphor was taken back in another famous scholar's article, see Massimo Nobili, *L'accusatorio sulle labbra, l'inquisitorio nel cuore*, 4-5 *CRITICA DEL DIRITTO*, at 11-17(1992).