

# **Post Rule of Law: The Structural Problem of Hybridity in International Criminal Procedure**

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### **Abstract**

The value of developing hybrid international criminal procedure (ICP) is that it is arguably inclusive (representing two major legal traditions) and distinct from any domestic system, thus creating a separate, *sui generis* realm for international criminal law (ICL) jurists to meet. Since its inception at Nuremberg, individual elements of hybridity have consistently caused concern amongst practitioners and legal theorists, largely around questions of transposition as jurists from one tradition resisted practices from the other. Transposition problems remain unresolved in modern ICP and have received extensive attention in the literature. The practice of hybridity itself, however – the determination to operationalize ICL through procedures drawing from different legal traditions, with specific practices drawn from singular jurisdictions – has received less critical scrutiny. This article addresses the practice of hybridity in ICP, drawing examples from the construction and evolution of hybrid procedure at the International Criminal Tribunal for the Former Yugoslavia (ICTY), to argue that the hybridity practiced by international criminal tribunals renders them ‘post rule of law’ institutions, thus challenging their central didactic and norm-constructing roles.

### **I. Introduction**

Beginning with the International Military Tribunal (IMT) at Nuremberg, international criminal tribunals (ICTs) have developed and applied a hybrid criminal procedure, drawing on practices from two of the world’s major legal traditions, common law and civil law. As institutions practicing international criminal law (ICL) have expanded, and as twenty years of jurisprudence from the Yugoslav and Rwanda tribunals joins a growing jurisprudence from the International Criminal Court (ICC), international

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criminal procedure (ICP) has emerged as a legal field. ICP is the subject of several legal treatises,<sup>1</sup> and is taught in some law schools.

The value of developing *hybrid* ICP is that it is arguably inclusive (representing two major legal traditions)<sup>2</sup> and distinct from any domestic system, thus creating a separate, *sui generis* realm for ICL jurists to meet.<sup>3</sup> Since its inception at Nuremberg, individual elements of hybridity have consistently caused concern amongst practitioners and legal theorists, largely around questions of transposition as jurists from one tradition resisted practices from the other.<sup>4</sup> Transposition problems remain unresolved in modern ICP and have received extensive attention in the literature.<sup>5</sup> The

<sup>1</sup> R. Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 3<sup>rd</sup> ed, 2014); V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Leiden: Martinus Nijhoff Publishers, 2008); V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence', in K.A.A. Khan, C. Buisman et al eds, *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010); M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (Oxford: Oxford University Press, 2012); A. Whiting, 'The ICTY as a Laboratory for International Criminal Procedure', in B. Swart, A. Zahar et al eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011); R. May and M. Wierda, *International Criminal Evidence* (Leiden: Brill Publishers, 2002); J.D. Jackson and S.J. Summers, *The Internationalization of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (New York: Cambridge University Press, 2012); M.C. Bassiouni, *Introduction to International Criminal Law* (The Netherlands: Martinus Nijhoff Publishers, 2012); J. Doria, H. Gasser et al eds, *The Legal Regime of the International Criminal Court Essays in Honour of Professor Igor Blishchenko* (Leiden: Brill Publishers, 2009); A. Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009).

<sup>2</sup> But see discussion in R. Vogler, 'Making International Criminal Procedure Work: From Theory to Practice', in R. Henham and M. Findlay eds, *Exploring the Boundaries of International Criminal Justice: Strategies for Achieving Justice in Post-Conflict Societies* (Farnham: Ashgate Publishing Group, 2011), 105-127 (noting that ICP importantly neglects African and Islamic law traditions).

<sup>3</sup> M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' 1(1) *Journal of International Criminal Justice*, 13-25, 20 (2003) (arguing that hybrid international laws will have 'acquired a new dimension, independent of their original meaning'); K. Ambos, 'International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?' 3 *Third International Criminal Law Review*, 1-37 (2003); P.L. Robinson, 'Ensuring Fair And Expeditious Trials At The International Criminal Tribunal For The Former Yugoslavia' 11 *European Journal of International Law*, 569-589 (2000).

<sup>4</sup> For example, at the IMT, the charge of conspiracy, as drawn from the common law, was resisted by those trained in the civil law tradition. See S. Pomorski, 'Conspiracy and Criminal Organizations', in G. Ginsburgs and V.N. Kudriatsev eds, *The Nuremberg Trial and International Law* (The Netherlands: Martinus Nijhoff Publishers, 1990).

<sup>5</sup> See, for example, the rich discussion on plea bargaining before ICTs, eg R. Rauxloh, *Plea Bargaining in National and International Law, a Comparative Study* (Abingdon: Routledge, 2012); M. Harmon, 'Plea Bargaining: The Uninvited Guest at the International

practice of hybridity<sup>6</sup> itself, however – the determination to operationalize ICL through procedures drawing from different legal traditions, with specific practices drawn from singular jurisdictions – has received less critical scrutiny.<sup>7</sup>

This article addresses the practice of hybridity in ICP, drawing examples from the construction and evolution of hybrid procedure at the International Criminal Tribunal for the Former Yugoslavia (ICTY), to argue that ICT operation is ‘post rule of law’. Rule of law processes underwrite liberalism and legalism and shore up the rationale for ICL.<sup>8</sup> The central function of ICTs is to deliver (as courts) and model (as didactic institutions)<sup>9</sup> justice. Yet ICTs face particular pressures that distinguish them from domestic criminal courts, specifically to achieve convictions in order to justify the public resources expended on international trials.<sup>10</sup> These

Criminal Tribunal for the Former Yugoslavia’, in J. Doria, H. Gasser et al eds, n 1 above, 161-182.

<sup>6</sup> Note that the term hybrid refers entirely to the procedure applied by tribunals, and not the structure of the tribunals themselves. In international criminal law ‘hybrid’ usually references particular court structures comprising national and international judges, such as the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, the Special Panels for serious Crime in East Timor, and the Chambres Africaines Extraordinaires in Senegal. See A. Del Vecchio, *International Courts and Tribunals between Globalisation and Localisms* (The Hague: Eleven International Publishing, 2014), 156-170.

<sup>7</sup> Much of the critical commentary examining hybridity in fact seeks practical resolutions designed to improve the ‘marriage’ of the two systems as represented at ICP. See, eg R. Skilbeck, ‘Frankenstein’s Monster: Creating a New International Procedure’ 8 *Journal of International Criminal Justice*, 451-462 (2010); M. Farlie, ‘The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit’ 4(3) *International Criminal Law Review*, 243-319 (2004); J.D. Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy’ 7(1) *Journal of International Criminal Justice*, 17-39 (2009); R. Vogler, n 2 above.

<sup>8</sup> The International Bar Association defines rule of law thus: ‘An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable’. (IBAS 2009 resolution, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=a19de354-a0d7-4b17-a7ff-f6948081cd85> (last visited 24 May 2016)).

<sup>9</sup> M.R. Damaška, ‘What is the Point of International Criminal Justice?’ 83 *Chicago-Kent Law Review*, 329-365 (2008). Regarding the ICTY’s capacity in this regard, see eg, L. Nettlefield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal’s Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010).

<sup>10</sup> See, for example, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 para 42 (23 August 2004): ‘The two ad hoc tribunals have grown into large institutions, with more than 2,000 posts between them and a combined annual budget exceeding a quarter of a billion dollars – equivalent to more than 15 per cent of the Organization’s total regular budget. Although

pressures emerge from the principal-agent relationship between ICTs and the community of states they serve, a structure that excludes the interests of third parties and is common to international organizations (IOs) generally.<sup>11</sup> Unlike other IOs, however, ICTs' failures of accountability to third parties challenge their capacity to meaningfully perform their central function (because delivering and modeling 'justice' turns on the legitimacy<sup>12</sup> courts enjoy before third parties).

The paper is divided into four parts. Part one explores civil and common law systems as cultural typologies. Both traditions share similar goals and rationales for criminal sanctions – both empower a state apparatus to substitute private retribution with a public process through which the guilty are punished and the innocent exonerated – yet the means applied differ significantly. Part two contrasts the specifics of criminal procedure between the two systems, demonstrating how the logic of each typology maps onto procedural elements in domestic criminal law practice. Part three moves these considerations to the international realm, examining some specifics of ICTY procedure to show how the ICTY's evolving procedure constitutes civil law methods *harnessed* by common law methodologies, a situation that threatens institutional legitimacy through a structural disregard for the presumption of innocence. Part four argues that the practice of hybridity at ICL has effectively placed its institutions not as bulwarks of a cosmopolitan, global rule of law system, but rather as institutions that have deliberately left the rule of law in their wake (that have become, as the title evokes, 'post rule of law'). The fourth part concludes with one example of a post rule of law ICL practice, sentencing by the ICTY.

## II. Legal Typologies as Legal Cultures

John Merryman's classic monograph on the civil law distinguishes legal *traditions* (civil law and common law) from particularized legal *systems* within those traditions.<sup>13</sup> In some contemporary discourse, however,

trying complex legal cases of this nature would be expensive for any legal system and the tribunals' impact and performance cannot be measured in financial numbers alone, the stark differential between cost and number of cases processed does raise important questions.'

<sup>11</sup> J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' 26(1) *The European Journal of International Law*, 9-82 (2015).

<sup>12</sup> Re variations and measurements of judicial legitimacy see D. Bodansky, 'Legitimacy in International Law and International Relations' (2011) APSA 2011 Annual Meeting Paper, available at SSRN: <http://ssrn.com/abstract=1900289> (last visited 24 May 2016).

<sup>13</sup> J. Merryman and R. Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Palo Alto: Stanford University Press, 3<sup>rd</sup> ed, 2007). See also H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 4<sup>th</sup> ed, 2010); S. Zappalà, *Human*

making distinctions between the dichotomies of the two systems has become *passé*. Challenges come in several forms. Some commentators insist that the extensive borrowing between legal systems makes discussions of distinct or separate legal schools obsolete.<sup>14</sup> Others seek to draw distinctions between domestic and international practices that would make categories applied to domestic legal systems inapplicable at international law.<sup>15</sup> Moreover, there is a scholarly split between theorists of ICL and comparative law scholars,<sup>16</sup> and within comparative law scholarship itself, regarding the possibility and compatibility of legal transplants.<sup>17</sup>

Resistance from contemporary commentators notwithstanding, this first section traces the distinct ideological impulses that distinguish the two western legal traditions of common and civil law, arguing that these ideological frameworks substantiate individual understandings of how justice and fairness are practiced. At criminal law procedure is the framework for substantive justice to be performed. Faulty procedure, or procedure not received as legitimate, will raise justice concerns even where the outcome is desired or understandable. Put another way, procedure seen as legitimate has the potential to make even an undesired outcome ‘fair’ to observers.<sup>18</sup> Thus the question of ICP’s structure has traction far beyond its practitioners, with wider ramifications for the legitimacy of ICL and its

*Rights In International Criminal Proceedings* (Oxford: Oxford University Press, 2003), 15-16 (arguing that important distinctions exist that substantially differentiate the two traditions).

<sup>14</sup> K. Ambos, n 3 above (arguing that both systems are equally adversarial and inquisitorial); M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) (defining legal traditions in terms of separate ideas of officialdom, but nonetheless noting that the extensive borrowing from outside engaged in by modern legal systems obscures strict divides).

<sup>15</sup> M. Langer, ‘The Rise of Managerial Judging in International Criminal Law’ *Bepress Legal Series Working paper*, 343 (2005); F. Mégret, ‘In Search of the ‘Vertical’: An Exploration of What Makes International Criminal Tribunals Different (and Why)?’ *Working Paper Series*, 1-57 (2008).

<sup>16</sup> See M. Delmas-Marty, n 3 above, 15 (arguing that ICP represents a rapprochement between ICL and comparative law); E. Grande, ‘Comparative Criminal Justice’, in M. Bussani and U. Mattei eds, *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012), 191-209 (noting that comparative criminal law is an underdeveloped field that has blossomed with the rise of ICL); see also R. Vogler, n 2 above, 111-112.

<sup>17</sup> Where there is a debate regarding whether practices can be ‘transplanted’ (A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scotland: Scottish Academic Press, 1974)) or whether the context in which a rule exists is essential to that rule’s function, so that where a rule or practice removed from its native context likely loses significant meaning (see D. Nelken, ‘Comparativists and Transferability’, in P. Legrand and R. Munday eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 437-466); P. Legrande, ‘The Impossibility of Legal Transplants’ 4(111) *Maastricht Journal of European and Comparative Law*, 111-124 (1997).

<sup>18</sup> T. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 1990).

understood capacity as a mechanism for transitional justice and institutional modeling.

### **1. Criminal Law Processes in Common Law and Civil Law Traditions**

Rule of law practice is central to common and civil law traditions in the modern age.<sup>19</sup> Rule of law practices place the transparency and even application of democratically determined laws at the center of state action.<sup>20</sup> The rule of law encompasses ideas of balance, fairness, and the social contract, where the legitimacy of government rests on the consent of the governed. Rule of law practice is particularly central to the sensitive business of turning the massive power of the state against the individual to potentially deprive him of liberty or property: ie, the practice of criminal law. Criminal procedure is substantive criminal law operationalized per a rule of law standard.

Although western criminal systems have indeed borrowed much from each other,<sup>21</sup> there remain central foundational ideologies that separate the common and civil law traditions. Common law, also referred to as ‘judge-made law’ developed in England and was exported to her former colonies. Common law recognizes precedent – previously decided cases – as a form of legal authority. Also known as ‘adversarial law’, the common law tradition subscribes to the value of a contest in order to determine truth. This ‘marketplace of ideas’ approach, wherein the strongest idea should triumph, positions the court, and very specifically the trial, as the site where social and legal norms are decided or affirmed.

Common law ensures a fair trial through procedural safeguards surrounding the performance of the trial itself (such as common law’s

<sup>19</sup> M. Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ 74 *Southern California Law Review*, 1307-1351 (2001).

<sup>20</sup> J. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven: Yale University Press, 2011), 6 (discussing the creation of post war democracies in Europe as a ‘constitutional settlement’).

<sup>21</sup> The reform of the Italian criminal system in the 1980s to incorporate elements of adversarialism is the most discussed example, although there are others (see W. Pizzi and 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*, 1-40 (1992); E. Grande, ‘Italian Criminal Justice: Borrowing and Resistance’ 48 *American Journal of Comparative Law*, 227-259 (2000). Borrowing goes the other way, as well: see R. Subramanian and A. Shames, ‘Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States’ *VERA Institute of Justice* (2013), available at <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf> (last visited 24 May 2016) (discussing a project where US judges were introduced to Dutch and German sentencing practices and ideologies and reported implementing ideas into their own practice).

notoriously complex rules of evidence). At common law, trials represent the exposition, climax and *dénouement* of the story being told. Trials are characterized by spectacle and performance<sup>22</sup> (often referred to as the central ‘orality’ of the proceedings). Because of the uncertainty of trial outcomes, both sides in the contest (the prosecution and the defense, who are adversaries) enjoy incentives to bargain or otherwise avoid trial. In the particularized common law system of the US, for example, plea bargaining (wherein defendant and prosecution agree on the outcome of the case and thereby avoid jury trial) is estimated to dispose of up to ninety-five percent of criminal cases.<sup>23</sup>

Civil law, also known as ‘codified law’ or inquisitorial law, follows the principle articulated by Montesquieu that a legal code, drafted by legislators, constitutes the law that must be applied, without creativity or approximation, by judges.<sup>24</sup> Civil law systems construct procedure around an investigation carried out by several state parties which engage in, and oversee, the state’s search for the truth. This is seen as the ‘one case’<sup>25</sup> or ‘unity of meaning’<sup>26</sup> approach because impartial public officials seeking the truth of a matter construct a single *dossier* containing all evidence and argument gathered. The unity of the argument means that criminal liability is assessed before trial; in the words of ICTY defense attorney Michael Karnavas, ‘before indicting a suspect and putting him or her through the meat-grinding process of a criminal trial, the prosecutor in the civil law system will be virtually certain that the evidence gathered and available to the court will support a guilty verdict’.<sup>27</sup> Trials in civil law systems serve as moments of transparency to reveal the work of the state and are unavoidable (ie, a defendant’s admission of guilt does not cancel the requirement that she face trial). Acquittals are rare, and in the event a defendant is acquitted, this decision may be appealed by the prosecutor. Finally, civil law views law and politics as antithetical; civil law processes are designed to limit subjectivity, understood as contradiction of the uniformity and predictability that constitutes the rule of law. From the administrative nature of judicial appointments and review, to the prohibition

<sup>22</sup> R.P. Burns, *A Theory of the Trial* (Princeton: Princeton University Press, 2001).

<sup>23</sup> G. Fisher, ‘Plea Bargaining’s Triumph’ 109 *The Yale Law Journal*, 857–1087 (2000) (stating that ninety/ninety-five percent of cases were resolved through guilty pleas).

<sup>24</sup> C. Montesquieu, *The Spirit of the Laws* (1750), translated and edited by A.M. Cohler, B.C. Miller et al (Cambridge: Cambridge University Press, 1989).

<sup>25</sup> K. Ambos, n 3 above.

<sup>26</sup> A. Garapon and I. Papadopoulos, *Juger en Amérique et en France: Culture Juridique Française et Common Law* (Paris: Odile Jakobs, 2004).

<sup>27</sup> M.G. Karnavas, ‘Gathering Evidence in International Criminal Trials: The View of a Criminal Defence Lawyer’, in M. Bohlander ed, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007), 75-152.

that judges participate in political organizations, and extending to its treatment of a singular truth, the civil law is committed to engaging in a scientific, objective pursuit of justice.

## 2. Legal Traditions' Ideologies and Cultures

A central ideological distinction between common law and civil law systems is epistemological, and concerns the question of how best to reach truth.<sup>28</sup> It is important not to overstate this difference: some commentators would make truth 'seminal'<sup>29</sup> to the civil law or merely 'procedural'<sup>30</sup> to the common law. Both systems seek truth, because the substantive justice of imprisoning an individual resides in truth.<sup>31</sup> Rather, the epistemological divide between the two systems consists of the means of knowing. This divide has been categorized as the 'two case' versus 'one case' model,<sup>32</sup> or the 'dispute' versus 'the official investigation' model.<sup>33</sup> Common law criminal procedure is characterized by two sides (the prosecution and the defense), each an 'interested party' with a stake in the outcome of the contest. The defendant, whose liberty is at issue, is obviously an interested party. But the prosecution, too, though nominally charged with pursuing justice, tends to view convictions as 'wins' and acquittals as 'losses'.<sup>34</sup> At common law the prosecution and the defense separately assemble their own facts, witnesses, and arguments in order to present two competing cases, which come to a head at trial. The contest between the parties consists largely in the disclosure (or withholding) of information. The judge acts as a referee in this contest, assuring that procedural rules are followed and controlling the information available to the decision maker, the jury. As Mirjan R. Damaška notes, the binary

<sup>28</sup> S. Zappalà, n 13 above, 16; W. Pizzi and L. Marafioti, n 21 above. M.R. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' 45 *American Journal of Comparative Law*, 839-852, 843 (1997).

<sup>29</sup> M. Farlie, n 7 above.

<sup>30</sup> S. Zappalà, n 13 above.

<sup>31</sup> J.v.H. Holtermann, ' "One of the Challenges that Can Plausibly Be Raised Against Them"?: On the Role of Truth in Debates about the Legitimacy of International Criminal Tribunals', in N. Hayashi and C. M. Bailliet eds, *The Legitimacy of International Criminal Tribunals*, (Cambridge: Cambridge University Press, 2016). Vladimir Tochilovsky locates the distinction in 'statutory obligation' where civil law judges are *statutorily obligated* to discover the truth, whereas common law judges are merely 'interested' in truth. V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 162.

<sup>32</sup> K. Ambos, n 3 above.

<sup>33</sup> M.R. Damaška, n 14 above.

<sup>34</sup> W. Pizzi, 'Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform' 54 *Ohio State Law Journal*, 1325-1373 (1993).



nature of the contest between prosecution and defense excludes the possible of representing a third interest, that of the victim.<sup>35</sup> This is in stark contrast with civil law traditions, where the truth is discovered through the studied construction, by disinterested parties, of all the relevant facts.

The two traditions imagine a very distinct role for the judge, what Mirjan R. Damaška calls ‘separate ideas of officialdom’.<sup>36</sup> The civil law judge is a bureaucrat: positions are appointed by examination, and judges in civil law systems are both more numerous, and younger, than their common law counterparts.<sup>37</sup> The job of the civil law judge is decide ‘correctly’, which may be understood as uniformly; dissenting opinions are generally swallowed except in the highest courts, and judgments move up a hierarchical pyramid to be corrected as necessary.<sup>38</sup> The common law judge, on the other hand, is encouraged to ‘individualize’ justice.<sup>39</sup> This is operationalized through the production of carefully reasoned judgments, including concurring and dissenting opinions. The reasoning offered by these decisions may enter wider social conversations and direct social and political narratives, or styles of argument.<sup>40</sup> Thus the institutionalization of legal apparati translates into distinct legal cultures between the two traditions. Justice as idealized within the civil law tradition resides in the careful, measured adherence to formalities decreed by the legislature and institutionalized in judicial practice. Justice as idealized within the common law tradition resides in the strength of the argument made within a judicial determination.<sup>41</sup>

Commitment to one’s legal culture (specifically, the understandings of how justice is served imagined through one’s native legal typology)<sup>42</sup>

<sup>35</sup> M.R. Damaška, n 14 above.

<sup>36</sup> Ibid.

<sup>37</sup> M. Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart Publishing, 2012).

<sup>38</sup> J. Merryman and R. Perez-Perdomo, n 13 above, 38; M.R. Damaška, n 14 above.

<sup>39</sup> M.R. Damaška, n 14 above, 19.

<sup>40</sup> J. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, (1964) 1986); M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction Publishers, 1997).

<sup>41</sup> These are ideal types. Note that the actual practice of justice in both systems would recognize both of these ideal types as important: common law lawyers would reject the suggestion that law for them is not ‘measured’, and civil law lawyers would reject the notion that strength of argument should be absent from law.

<sup>42</sup> For a thorough definition of legal culture see K. Klare, ‘Legal Culture and Transformative Constitutionalism’ 14 *South African Journal of Human Rights*, 167 (1998): ‘By legal culture I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies developed by participants in any given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other contexts (eg in political philosophy), are deemed outside the professional discourse of

appears moral, even quasi-religious.<sup>43</sup> In the nineteenth century, Max Weber characterized the common law system as ‘irrational’,<sup>44</sup> and contemporary sources suggest little has changed regarding the distrust that legal practitioners show for typologies not their own. Even those practitioners positioned at legal crossroads – practitioners working in hybrid international systems, or comparativists interested in legal systems outside their own – exhibit great difficulty overcoming a bias towards their primary understanding of how justice, fairness, and rule of law are practiced. Interviews conducted by the author with ICTY personnel confirmed these deep-rooted biases playing out in ICL practice. One civil-law-trained employee in the ICTY’s Office of the Prosecutor (OTP), considering the deep differences he noticed between how different chambers at the ICTY work, explained:

‘Some (ICTY procedural) rules make more sense to you, so you apply them. The rest you ignore. As you’re reading through the rules, you pick the ones you like, that make sense. Everybody does this. OTP, defense, judges – they all do. This is wrong – people should come to the ICTY to learn. But instead they import some things and not others.’<sup>45</sup>

Even where lawyers trained in one tradition seek to praise practices borrowed from the other, the prejudices emerging from their native typology emerge. Consider one common-law-trained attorney in the OTP, on the ‘value’ of civil law procedure:

‘One of the benefits of working at the ICTY is that I see how stupid many common law things are. The civil law is totally intolerant of many stupid technical arguments why evidence shouldn’t be admitted.

lawyers? What enduring political and ethical commitments influence professional discourse? What are understandings of and assumptions about politics, social life and justice? What inarticulate premises (are) culturally and historically ingrained in the professional discourse and outlook.’ (internal citations omitted).

<sup>43</sup> ‘To common law ears, the strange cluster of the words ‘the Appeals Chamber convicted him’ sounds blasphemous.’ G. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’ 1 *Bepress Legal Series*, 45 (2006).

<sup>44</sup> For civil-law-based Max Weber, Anglo-American law was ‘empirical justice’, where formal judgments are rendered not ‘by subsumption under rational concepts, but by drawing on ‘analogies’ and by depending upon and interpreting concrete ‘precedents’’. M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, in G. Roth and C. Wittich eds (Berkeley: University of California Press, 1978). As Alan Hunt notes, ‘(Weber’s) picture of the development of the common law is of a gradual stripping away of the irrational elements and their replacement by legal formalism which does not in itself rid the system of its irrationality.’ A. Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978), 123.

<sup>45</sup> Interview May 2005 ICTY The Hague OTP.

Civil law lets in everything, and the judge can decide what weight to give things. This is very good at getting at the truth. Because the role of a good defense attorney is to stop the truth from getting out. A good defense attorney just needs to throw enough obstacles in front of the prosecutor so that he hasn't proved his case, and he's won. That's not good for truth. In order to advance reconciliation, you don't want to use technical argument to exclude evidence. You want to let the truth get out.<sup>46</sup>

For this OTP employee, legal practice was still very much based in an adversarial typology, and civil law procedure had appeal because of what it might permit him 'to win'. Opinion remains divided even at the highest judicial eschelons. Although ICTY Justice Antonio Cassese called the hybridity 'felicitous' in the *Erdemović* case,<sup>47</sup> other judges at the ICTY are less sanguine.<sup>48</sup>

Of course, problems of transposition and translation are only magnified for practitioners without experience of other legal cultures.<sup>49</sup> This has ramifications regarding equality of arms, an imbalance to which common law processes are quite sensitive.

<sup>46</sup> Ibid.

<sup>47</sup> *Prosecutor v Dražen Erdemović*, case n IT-96-22, 7 October 1997, (United Nations - International Criminal Tribunal for the former Yugoslavia), Appeals Chamber, Separate and Dissenting Opinion of Judge Antonio Cassese para 5.

<sup>48</sup> A. Orie, '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 et al eds, *The Rome Statute of The International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 1445; P.M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' 5 *The Washington University Journal of Law and Policy*, 87-118, 90, 104 (2001) (discussing problems arising from hybrid cultural practices, where judges from either system 'apply what comes naturally' and where defence counsel trained in civil law systems produce ineffective cross examinations because they are unfamiliar with the practice).

<sup>49</sup> The defence attorney in the *Kupreskić et al*, case n IT-95-16 (United Nations - International Criminal Tribunal for the former Yugoslavia), for example, admitted to being entirely confused by ICTY investigation techniques: 'We (...) asked the investigators to come to Vitez and not to interview only one side (...) It was first time that I come across the problem of 'my witnesses and your witnesses', because in the area in which we worked, we usually had witnesses of the court, a person who has to tell the truth regardless of whether he is speaking in favour of the Defense or the Prosecution. He conveys what he saw and what he heard.' *Kupreskić Trial Transcript* (27 August 1998), available at [www.icty.org](http://www.icty.org), Defense Attorney Radovan, 1220:11- 1221:3. See also R.L. Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises' 3 *University of Illinois Law Review*, 791-856, 791, 819 (2001) (detailing the difficulties of explaining how the adversarialness of US proceedings colors all forms of evidence and inquiry for a French judge and prosecutor).

### 3. Is Either Tradition ‘Better’ for International Criminal Procedure?

Both civil law and common law search for truth: does one system do it better, or is one system better positioned to function for ICTs? ICL is characterized by particularities which distinguish it from domestic criminal law.<sup>50</sup> Thus, arguably, the rationales applied to strengths and weaknesses of procedure within the two traditions must be reconfigured when applied to the international realm. For example, the presumption of innocence that obtains domestically, permitting defendants to remain free pending trial barring extenuating circumstances, is necessarily different at ICL, where ICTs do not enjoy police powers and can have great difficulty procuring defendants. Likewise, relaxing rules of evidence is sometimes argued as essential in ICL practice, where chaotic conditions make the collection of evidence in relation to a crime difficult or render it non-existent.

The strength of the civil law is seen as its written, multi-party investigation, where police, prosecutor, and judicial official are all charged explicitly with finding the truth of a crime, a process which translates legally into finding *all* evidence, both incriminating and exculpatory.<sup>51</sup> This means that the substantial resources of the state are (at least in theory) at the service of the defense as well as the prosecution. The one-case approach imagines that a defendant gets what is coming to him, but not what shouldn't be. The written nature of civil law procedure also curtails the defendant's capacity to 'get off on a technicality', as it permits fewer surprises. As applied to ICL, inquisitorial traditions are argued to serve ICL's ends because of a desire for ICL procedures to produce objective history.<sup>52</sup>

The weakness of the one-case approach hinges on the capacity of the state to represent 'justice' that includes a defendant's right not to stand falsely accused or convicted. Civil law pre-trial investigations hinge on

<sup>50</sup> C. Warbrick, 'International Criminal Courts and Fair Trial' 3(1) *Journal of Conflict Security Law*, 45-64 (1998); F. Mégret and F. Hoffman, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' 25(2) *Human Rights Quarterly*, 314-342 (2003); M. Langer, n 15 above; F. Mégret, 'Beyond Fairness: Understanding the Determinants of International Criminal Procedure' *UCLA Journal of International Law and Foreign Affairs*, 37 (2009).

<sup>51</sup> There are common law commentators who concur. See J.H. Langbein, 'The German Advantage in Civil Procedure' 52 *University of Chicago Law Review*, 823-866 (1985); R. Burns, 'The Rule of Law in the Trial Court' 56 *DePaul Law Review*, 307-334 (2006).

<sup>52</sup> R. May and M. Wierda, 'Evidence before the ICTY', in R. May, D. Tolbert et al eds, *Essays on the ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Amsterdam: Kluwer, 2001), 253; R.E. Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' 10 *International Criminal Law Review*, 739-770 (2010); R. Wilson, *Writing History in International Criminal Tribunals* (Cambridge: Cambridge University Press, 2011).

individuals representing the state impartially. Some (common-law-trained) academics argue it is unrealistic to imagine that the state's investigators can remain impartial,<sup>53</sup> finding that civil law processes 'require (...) an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures'.<sup>54</sup> In the case of ICL, where the scale of atrocity, human suffering, or both, is so high, where 'the very seriousness of the charge means that only limited analogies may be made with domestic processes at large'<sup>55</sup> is the impartiality of investigators taxed too heavily to be believed?

More critically, the civil law model presumes, for the purposes of justice, a certain homogeneity of understanding, where all parties to the case, from the defendant to the state representatives, share expectations regarding justice.<sup>56</sup> Heterogeneous cultural expectations present challenges to criminal trials in any legal tradition,<sup>57</sup> but common law traditions at least open a space for debate about heterogeneity of meaning, from the use of a lay jury which has the capacity to 'nullify' the law as dictated by the judge<sup>58</sup> to the adversarial training that teaches liberal constructions of analogy and empowers every lawyer to seek to perform wizardry through the law.<sup>59</sup> Civil law traditions do not possess these same spaces or tools, and are thus arguably particularly challenged in adjudicating across heterogeneous cultures, ideas, or interpretations.

The question then remains, would common law processes perform better? Common law procedures are often referred to as 'friendly for the defence', because to secure acquittal (which is generally unappealable) the defence need only introduce reasonable doubt into the prosecution's case. Common law is criticized for its sensitivity to inequality of arms issues: the 'fight' that characterizes common law processes cannot be fair when both sides are not equipped for it. In domestic systems, a central obstacle to equity at arms is financial; what sort of representation can a defendant

<sup>53</sup> See for example P. Keen, 'Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals' 17(4) *Leiden Journal of International Law*, 767-814, 773 (2004).

<sup>54</sup> N. Jörg, S. Field and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?', in P. Fennell, C. Harding et al eds, *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995), 46.

<sup>55</sup> C. Warbrick, n 50 above.

<sup>56</sup> B. McKillop, *Anatomy of a French Murder* (Anandale: Hawkins Press, 1997).

<sup>57</sup> See A. Renteln, *The Cultural Defense* (Oxford: Oxford University Press, 2004) (discussing problems of adjudicating cases where US law criminalizes conduct which constitutes a non-criminal norm in a party's culture of origin).

<sup>58</sup> See C.S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham: Carolina Academic Press, 1998), 167-185.

<sup>59</sup> K. Carlson, 'Found in Translation: The Value of Teaching Law as Culture' 5 *Drexel Law Review*, 407-421 (2013).

afford? Michael Karnavas, a defense attorney at the ICTY, states that inequality of resources between prosecution and defense has characterized ICTY practice.<sup>60</sup> Moreover, in the international arena, resource questions extend beyond the defendant's financial capacity to hire a competent lawyer, and include international politics and evolution of ICL procedure and judging itself. William Schabas argues that the difficulties procuring evidence from uncooperative states might argue in favor of defendants being better served by an inquisitorial system.<sup>61</sup> As Martin Shapiro notes, all law necessarily serves a sovereign.<sup>62</sup> As Jan Klabbers observes, for international organizations that sovereign is the body of states constructing them. ICL already, problematically, holds individuals accountable for actions made possible (or sometimes even mandated) by a collective.<sup>63</sup> Is it possible to equip an individual defendant for a 'fair fight' when the opponent is 'humanity'?

Thus the critical question should be not which tradition offers greater 'efficiency' but rather, whether either system offers resources to subvert Jean François Lyotard's *différend* paradox, where 'to accept a method or criterion of settlement is already to have accepted the position of one's adversary'.<sup>64</sup> Does either system provide meaningful tools to permit the international organization that is an ICT to escape the principle-agent model identified by Jan Klabbers in order to meaningfully include the interest of third parties?

### III. Criminal Law Practice

This section describes and contrasts select elements of domestic criminal pre-trial and trial procedure within civil and common law systems in order to tie the procedural mechanisms used in both systems to the animating epistemological logics discussed above. Even where both systems share forms, roles, rules, and goals, it is problematic to compare any element from one system against its partner in the other without considering what a

<sup>60</sup> Michael Karnavas, a defense attorney at the ICTY, describes precisely this issue at work in ICTY practice. M.G. Karnavas, n 27 above. Payment to defence counsel was also the topic of the 1999 UN report suggesting reforms to ICTY practice, discussed in Part III.

<sup>61</sup> See W. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 4<sup>th</sup> ed, 2011), 252.

<sup>62</sup> M. Shapiro, *Courts* (Chicago: University of Chicago Press, 1986).

<sup>63</sup> P. Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1995); M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

<sup>64</sup> M. Koskeniemi, 'Between Impunity and Show Trials' 6(1) *Max Planck Yearbook of United Nations Law*, 1-35, 17 (2002).

rule, or practice, means within a system, and what purpose the rule or practice serves. Thus imbalances will obtain where, for example, practitioners apply the civil law's 'ease of conviction' without similarly incorporating the civil law's front-loaded, state-balanced investigation procedure.

As discussed above, a central distinction between the two systems is evidenced by the purpose of the trial: at civil law, the trial showcases the work of the state to the public (where the defendant's guilt has been determined in the pre-trial phase); at common law, the trial is the site where guilt or innocence is determined. The forms taken by pre-trial and trial procedures fit these distinct purposes.

### 1. Pre-Trial

Pre-trial investigations begin in both systems with a crime and police investigation. When the investigation is sufficiently advanced, the prosecutor is brought in. At common law, the prosecutor has discretion as to whether or not to press charges against the accused, as well as to what the content of such charges should be;<sup>65</sup> this is the beginning of the 'bargain' with the defense which will, in the vast majority of cases, preclude the case going to trial. In most civil law systems, such prosecutorial discretion is substantially curtailed.<sup>66</sup> In civil law systems, the 'grade' of the crime determines whether

<sup>65</sup> There is a vast literature on prosecutorial discretion. See eg, F.W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little Brown, 1970); K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969). K.L. Levine, 'The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload' 55 *Emory Law Journal*, 691-732, 697 (2006) identifies two 'filters' of discretion, the first at the macro-level (which relies on the understood purpose of a statute to distinguish between 'real' and 'technical' crimes), and the second at the micro-level (which includes 'office policy, resource allocation, and the multitude of decisions prosecutors must make in each case against the backdrop of discretion exercised by other criminal justice actors').

<sup>66</sup> There is also a significant English-language literature on prosecutorial discretion, or lack thereof, in the civil law, focusing largely on Germany and France. German civil law, for example, is said to mandate prosecution through application of the *Legalitätsprinzip*. Other authors, however, dispute this mandatory prosecution theory, citing the German law's *Opportunitätsprinzip*, a principle of expediency, which permits prosecutors not to move forward on a case based on the triviality of the offense. This is still quite distinct from US-styled prosecutorial discretion, as any application of *Opportunitätsprinzip* must be justifiable on 'rational' grounds and can be reviewed by higher courts on this ground. See M.R. Damaška, 'The Reality of Prosecutorial Discretion: Comments on a German Monograph' 29 *American Journal of Comparative Law*, 119-138 (1981) (reviewing T. Weigend's book, *Anklagepflicht und Ermessen. Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschen und amerikanischen Recht* (Baden-Baden: Nomos, 1978)); see also J.H. Langbein, 'Controlling Prosecutorial Discretion in Germany' 41 *University of Chicago Law Review*, 439-467 (1974); and the exchange between John H. Langbein, Lloyd L. Weinrib, Abraham S. Goldstein and

there will be an administrative hearing or whether an independent investigating arm of the state will be assigned to the case.

A central feature of the civil law pre-trial investigation is the responsibility of the arms of the state investigating to seek *incriminating and exculpatory* evidence regarding subjects of inquiry. This process is overseen by other, separate state entities, also charged with investigating the truth. This might be, as in France, the *juge d'instruction* (investigating judge), the *Ermittlungsrichter* (intermediate judges) in Germany, or the *giudici per le indagini preliminari* (judges of preliminary inquiry in Italy).<sup>67</sup> In the event that a defendant is believed to be responsible for a crime, a charge is brought against her, at which time the entirety of the dossier is made available to her. The defense is entitled to the full benefit of the information contained in the dossier; civil law hews to the theory that open investigations are the best methods of ascertaining the truth of events. Finally, at civil law, the victim of a crime may join the case, not as a witness for the state (as at common law) but as an actual party to the criminal case. Such participation begins in the pre-trial stage of the proceedings.

At common law, the prosecutor receives the police investigation, and determines whether to bring a charge and if so what charge to bring. While ostensibly an arm of the state, the common law prosecutor is an adversarial party. This plays out, in the investigation stage, in the prosecutor's requirement to *turn over* to the defense any exculpatory evidence she finds during her investigation, but not to *seek out* such exculpatory evidence. After an investigation, the prosecutor brings a charge. Charge inflation is typical. Charge inflation is an effective technique to encourage a defendant to plead guilty to a lesser charge and thus to dispense with the necessity of a trial.

The central distinction between the pre-trial process in the two systems is its purpose. At civil law, pre-trial procedure is designed to determine the likely guilt of the party charged. The standard of proof is 'intime conviction' the 'inner certainty' of the trier of fact.<sup>68</sup> This standard is the same across all stages of the proceedings, from pre-trial through the trial,

Martin Marcus in the *Yale Law Journal* 1977 and 1978. M. Bohlander, n 37 above, 25-27 (showing that only twenty-three point four percent of criminal charges were actually indicted using data from the German prosecution service in 2006).

<sup>67</sup> See discussion in D. Salas, 'The Role of the Judge', in M. Delmas-Marty and J. Spencer eds, *European Criminal Procedures* (Cambridge: Cambridge University Press, 2006), 488-541 (regarding how the German and Italian models differ from the French *juge d'instruction* and are designed to prevent the concentration of power that one finds in the French model).

<sup>68</sup> P. Ricouer, *Le Juste, entre le légal et le bon* (Paris: Esprit, 1991). Michael Bohlander finds that the level of certainty for the civil law judge is the same as the common law's 'beyond a reasonable doubt' standard. M. Bohlander, n 37 above, 8, 32.



which is distinct from the common law, which uses a *prima facie* standard at pre-trial, before a Grand Jury, to determine whether or not to go forward, and a 'beyond reasonable doubt' standard at the trial phase of criminal proceedings. At civil law, the resources of the system are concentrated on determining whether or not further system resources should be expended – clearly, neither the state nor the defendant benefits from prosecuting an innocent party. Defendants imagined guilty on the balance of all evidence are sent on to trial, where an official determination of guilt is virtually assured.

At common law, the guilt of the party charged is determined at trial. Trials, however, consume substantial state resources, and are largely avoided. In addition to the work of the prosecutor in preparing for trial, there is the selection and employment of a jury, counsel for indigent defendants, and the trial itself, an affair that can range from less than a day to several years. These costs must all be borne by the state. Moreover, the unscripted, oral trial process before a lay jury makes outcomes uncertain and trials carry a high likelihood of acquittal. Jury trials, the nearly mythic centerpieces of common law, are thus in fact comparatively very rare occurrences; only a tiny fraction of the criminal offenses committed in common law systems are ever adjudicated by a judge and jury. We should therefore understand that the purpose of the pre-trial process at common law is to seek to avoid trial. This avoidance, however, is not obtained by expending additional state resources, as in the civil law tradition, to determine the defendant's guilt during an investigative phase and therefore *to try only guilty parties*. Instead, common law systems use prosecutorial discretion and, in some systems, plea bargaining to cull criminal charges from proceeding to trial.

## 2. Trial

As detailed above, a central facet distinguishing the *trial* in common and civil law criminal procedure begins with the *pre-trial* apparatus, which sets up what kind of truth finding (ascertaining the truth, as at common law, or confirming the truth, as at civil law) the trial is designed to produce. At common law, the trial is the proving ground, where the majority of the 'action' happens.<sup>69</sup> At civil law, the action happens during the investigation preceding the trial, and the trial is the transparent element

<sup>69</sup> In fact, if one considers pretrial motions at common law to be arguments about how the trial will be conducted (including discovery, which determines the information that is known and included, as well as motions regarding the inclusion and exclusion of expert testimony, evidence, and witness participation), then we can say that the trial comprises not the majority of the action but the entirety of the action at common law.

of the process that allows the public to observe the judicial branch in action.<sup>70</sup>

The different role played by trials in the two systems is furthermore demonstrated through the different demands on the participating parties through the roles they are required to play in both systems. Common law proceedings are understood to represent a contest between two sides, in which prosecution and defense square off, with the judge as neutral arbitrator. In this conception of the trial, the intervention of judges should be limited to guiding the parties regarding the tools they are allowed to bring or use in the contest. Judicial participation is limited in part by the inferior familiarity of judges with the case. At trial, the case is laid out before the judge in its specifics for the first time; the parties are the experts, and the judge is a level removed. But judicial participation is also limited for reasons of neutrality and legitimacy: any further, or more direct, intervention on the part of judges – such as questioning a witness – is understood to threaten the objectivity of the proceedings by allowing the finder of law (the judge) to potentially influence the views of the finders of fact (the jury). The jury, after hearing the cases presented by the two opposing sides, and upon being instructed on the applicable law by the judge, retires to confidentially determine the guilt of the accused. This determination must usually be unanimous.

Civil law trials, by contrast, are generally overseen by a three-judge panel. Judges direct the process and enjoy a much more active role than their common law counterparts, questioning witnesses directly, and demanding further evidence, investigation, or witness testimony where they deem necessary. The dossier containing all relevant facts of a case is provided to the judges before trial, allowing the judge to become an ‘expert’ in the case beforehand. At the end of the trial, the judicial panel convenes and determines the guilt of the accused, by majority vote.

The role of the defendant is also very different in the two systems. At common law, the defendant enjoys a right to silence because of the possibility of self-incrimination. This right means that no negative inference may be drawn from the defendant’s unwillingness to address the court. As a principle, the right to silence enforces the prosecution’s burden to prove its case on its own, and ensures that the defendant is treated as ‘innocent until proven guilty’. While defendants at common law are permitted to take the

<sup>70</sup> Michael Bohlander describes the German trial thus: ‘Although the trial is from a traditional perspective the dramatic culmination of the struggle between prosecution and defence, and in Germany it is fair to include the court in that tug-of-war, much of what happens at trial will have been predetermined to a large degree – and mostly irreversibly so at the pre-trial stage – by the investigations of the police, the prosecution, the examining pre-trial judge and sometimes also the defence’. M. Bohlander, n 37 above, 67.

stand and speak in their defense, such statements are open to cross-examination by prosecutors, all of which may be considered by the jury in making its determination. Thus structurally, defendants are encouraged to remain silent, as their silence may not be used to make the case against them, whereas their participation may.

At civil law, defendant participation may be demanded by the judge (although it is not technically mandatory) because the defendant is not permitted, as a party with an interest in the case, to act as a witness for himself. No element of the defendant's testimony may therefore be used as a factual component to strengthen the dossier. With judges checking facts and law, as well as pronouncing the sentence, a defendant's participation can usually only help his case, by shedding light on his motivation or the context of his action. While technically 'innocent until proven guilty', defendants at trial in civil law in fact carry the burden of proving their innocence at the moment of trial by showing some misstep made in the investigation. The upshot is that most defendants do address the court at civil law, which serves to add legitimacy to the proceedings because when a defendant participates in the case against him this signals his consent.<sup>71</sup>

#### **IV. The ICTY's Peculiar Hybrid: 'An Adversarial Court with Continental Flavors'**<sup>72</sup>

The first established and most accomplished international criminal court of the modern era is the ICTY. Operational for more than twenty years, the ICTY has issued dozens of judgments and thousands of procedural determinations. ICTY procedure is particular to that court and need not be replicated or adapted by other *ad hoc* tribunals or the permanent International Criminal Court. Yet the longevity and productivity of ICTY practice make it a suitable case study to consider the problem of procedural hybridity, because this very practice of hybridity is ongoing in international criminal courts, though their procedural particulars may look distinct.

The ICTY was designed on an adversarial procedural model. Its rules of procedure were assembled by a largely American team,<sup>73</sup> and early ICTY practitioners hailed mostly from common law jurisdictions.<sup>74</sup> Yet as the ICTY endured, increasing in size and beginning the work of trying cases,

<sup>71</sup> M. Shapiro, n 62 above.

<sup>72</sup> Interview with defense counsel before ICTY, The Hague, May 2005.

<sup>73</sup> V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above.

<sup>74</sup> J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University Of Chicago Press, 2003).

its procedure adopted several mechanisms borrowed from civil law systems. These practices were pronounced more 'efficient', and embraced as more familiar by the growing number of practitioners at the ICTY originating from civil law systems. It is nonetheless an error to read additions of procedural rules practiced by civil law systems as a sign of the 'inquisitorial drift' of the ICTY.<sup>75</sup> The adversarial calculus of the ICTY did not change with these evolutions. Instead, reforms introducing practices culled from civil law sought to increase the ICTY's capacity to meet the challenges of securing convictions in chaotic evidentiary circumstances. Yet *securing convictions of the accused* is a prosecutorial function, with common law and civil law systems differing significantly regarding how an accused becomes, and remains, someone against whom a conviction must be secured. This section discusses the evolution of ICTY procedure towards a structure facilitating conviction.

### 1. The ICTY at Its Inception

When the Rules of Procedure (ROP) of the ICTY were drafted in 1994 by the first ICTY judges, the particular make-up of the court staff, as well as the influence over the Tribunal exerted behind the scenes by the United States, dictated that the ostensibly 'hybrid' procedure of the Tribunal, intended to represent a mixture of both common and civil law, leaned decidedly toward the common law and owed a clear debt to US jurisprudence in particular.<sup>76</sup> The Prosecutor's office, while situated in The Hague in the same building as the Tribunal, is not subject to administrative control in the same way that a typical civil law prosecutor would be.<sup>77</sup> Under the 1994 ROP the OTP investigates and draws up indictments.<sup>78</sup> As an 'independent body', the OTP brings the charges she sees fit against a defendant. Unlike in civil law systems, the OTP is not constrained by an

<sup>75</sup> R. Vogler, n 2 above (lamenting the 'inquisitorial drift' of ICTs when other courts around the globe are rather turning towards adversarialism in making reforms).

<sup>76</sup> C. Bassouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New Brunswick: Transaction Publishers, 1995), 872; V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 157-160.

<sup>77</sup> As was the case with the IMT, the institutional space-sharing raises concerns regarding objectivity, because the two bodies are not perceived as sufficiently independent. (Author interviews ICTY defense counsel, The Hague, May 2005). At common law the adversarial nature of the process requires a clear separation between judges and prosecutors. At civil law, structural distinctions are not as sharp, because both the prosecutor and the judge are working towards the same goal and thus can be understood to share interests to a certain degree.

<sup>78</sup> The OTP closed new indictments in 2004 as part of the ICTY's winding down strategy.

external body that considered the validity of the case as a whole. This pre-trial work hews closely to the procedure of adversarial systems: the OTP is required to hand over, but not to seek out, exculpatory evidence.<sup>79</sup>

Once drafted by the ICTY Prosecutor, an indictment is reviewed by a chamber of judges at the ICTY, who apply a relaxed standard of proof like that of the Grand Jury in the US. The ICTY Chamber looks at the indictment only for proof that the charges brought, if true, constitute criminal offenses.<sup>80</sup> As with a hearing before a grand jury in the US, suspects before the ICTY may not contest the evidence that may result in an indictment. Furthermore, during the review of the indictment itself, the reviewing judge hears not the defendant but only the Prosecutor, who may present new information to the court.<sup>81</sup> Civil law systems, in contrast, typically allow an indicted person to contest the evidence against him contained in the indictment.

This means that, as at common law, the first real chance a defendant before the ICTY has to prove his innocence before an objective body is at trial. The trial itself follows a strictly common law calculus. While ICTY judges are permitted a greater role than their common law counterparts in that they are permitted to question witnesses and even request additional witnesses, the ROP ensure that the trial remains the space at which truth would be proven in a process where judicial control is limited by judges' inferior access to information. As at common law, acquittals are common: of the one hundred and sixty-one individuals indicted by the ICTY, eighteen have been acquitted.<sup>82</sup>

The Rules of Procedure originally drafted by the ICTY (1994) took the fundamental elements of common law procedure as described above and made two significant, civil-law based alterations:<sup>83</sup> (1) majority determination of guilt by judicial panel (instead of unanimous determination of guilt by separate fact finder, as is common to most common law systems) and (2) the possibility for the OTP to appeal acquittals.<sup>84</sup> These two hybrid additions

<sup>79</sup> M.G. Karnavas, n 27 above; M. Harmon and M. Karagiannakis, 'The Disclosure of Exculpatory Material by the Prosecution to the Defense under Rule 68 of the ICTY Rules', in R. May et al eds, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Amsterdam: Kluwer Law International, 2001), 322 (noting that Rule 68 requires that the prosecution disclose the existence of exculpatory evidence to the defence, but not the evidence itself).

<sup>80</sup> M. Shahabuddeen, n 1 above, 131.

<sup>81</sup> Statute of ICTY, Rule 47D.

<sup>82</sup> ICTY available at <http://www.icty.org/sid/24> (last visited 24 May 2016). An acquittal rate of ten percent would be remarkable in a civil law system.

<sup>83</sup> See C. Bassouni and P. Manikas, n 76 above, 955 (where it is argued that ICTY procedure 'selectively incorporate(d) civil law concepts into a predominantly common law framework') quoted in F. Mégret and F. Hoffman, n 50 above.

<sup>84</sup> In addition to appealing, the OTP under Rule 99(B) is permitted to request the arrest and detention of the acquitted accused pending the appeals hearing. ICTY Rules

would appear to increase the power of the prosecution, first by lessening the weight necessary for it to obtain conviction (majority rather than unanimity), and second by giving the OTP ‘a second bite at the apple’ through the right to appeal.

## **2. Adding Civil Law Procedure ‘for Efficiency’: The 1999 Reforms**

Since the ICTY’s inception, there has been much discussion of civil law systems’ benefits in terms of ‘efficiency’,<sup>85</sup> and the reforms made to ICTY procedure have, generally speaking, taken more from civil-law generated processes than common law.<sup>86</sup> In 1999, concerned with cost and inefficiency in the two *ad hoc* Tribunals operating under United Nations mandate, the Security Council commissioned an Expert Group to report on the work of the ICTY and ICTR and to submit recommendations as to how this work could be strengthened. The one hundred twenty-six page report articulated forty-six precise recommendations. In 2000, the ICTY and ICTR responded to the Expert Report’s Recommendations, agreeing with and adopting most of them.<sup>87</sup>

The procedural suggestions made by the Expert Report mostly called for an increase in civil law methods, on the principle that ‘Some civil law models can doubtless deal with criminal law cases *more expeditiously* than the common law adversarial system’.<sup>88</sup> The Expert Report further justified this by observing that, ‘Since the accused before the Tribunals are from civil law backgrounds, it could hardly be objectionable to them’.<sup>89</sup>

Broadly speaking, the Expert Report pushed three central reforms, each of them ostensibly drawing from civil law procedural methods. First,

of Procedure and Evidence adopted pursuant to Art 15 of the Statute of Tribunal, as amended on 6 October 1995 (‘ICTY Rules of Procedure’).

<sup>85</sup> G. Sluiter, ‘Beyond the Written Law: Why International Criminal Tribunals Function the Way They Do’, Paper delivered at the International Law and Society Conference, Berlin, July 2007; W. Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals’, 4(1) *International Commentary on Evidence*, 1051 (2006).

<sup>86</sup> Not all reforms of ICP have moved Tribunals in an ‘inquisitorial’ direction. For example, plea bargaining, a specialized process among some common law systems, was adopted by the ICTY and ICTR. This article, however, is interested in looking at how an ‘evolution’ of practice from an adversarial conception towards an inquisitorial decreases defendant’s rights. Thus adoptions of common law procedure would, arguably, ‘fit in’ to a model designed under a common law ideological impetus.

<sup>87</sup> Some recommendations had already been put into effect. Others were adopted following the Expert Report’s recommendations. Still others, objected to in the ICTY Commentary, were eventually adopted. (See in this regard Recommendations regarding limiting expenses to Defense Bar).

<sup>88</sup> A/54/634 page 32, emphasis added.

<sup>89</sup> *Ibid.*

the ICTY created the role of a ‘pre-trial judge’, a case-manager designed to expedite cases. The central proposed reform was the institution of a ‘pre-trial judge’ à la the *juge d’instruction* who serves in some civil law systems.<sup>90</sup> The goal was to streamline information by encouraging parties to stipulate to uncontested facts, and to create a dossier that would assist trial judges in being better informed when the case came to trial. In its Recommendation 9, the Expert Report suggested that pre-trial judges should enjoy a ‘more interventionist role, *inter alia*, including authority to act for the Trial Chamber (...) and making a pre-trial report to the other judges with recommendations for a pre-trial order establishing a reasonable format in which the case is to proceed’.<sup>91</sup> While certainly unknown at common law, the ICTY’s pre-trial judge is not in fact a counterpart to the civil law’s *juge d’instruction*, with that position’s inherent mandate to investigate exculpatory evidence. Studying the impact of the reforms, Máximo Langer found that the addition of a pre-trial judge has made little impact on ICTY efficiency, because ICTY pre-trial judges do not have the capacity enjoyed by the *juge d’instruction* to radically alter charges or impact the case.<sup>92</sup>

Second, the reforms gave ICTY judges more power to limit interlocutory appeals, which the report encouraged. Interlocutory appeals are a problem at the ICTY due to their high number and their capacity to delay cases (the Expert Report noted that there were more than five hundred pre-trial motions in 1997 and 1998). At the same time, interlocutory appeals are part of the ‘game’ played in the adversarial process, categorized by the UN Expert Report as follows:

‘(M)ore of a combat situation between two parties than the protection of international public order and its values under the control of the court ... This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused, as is their right (under the ICTY Statute and human rights law) being uncooperative and insisting upon proof by the Prosecutor of every element of the crime alleged. From the standpoint of an accused, this represents optimum use of defense counsel.’ (UN Expert Report (1999) para 67)<sup>93</sup>

<sup>90</sup> Specifically, the *juge d’instruction* is a central figure in French criminal cases that meet a certain requirement of gravity. Michael Bohlander notes that there is no such role in Germany criminal law, and that even in French criminal law, the *juge d’instruction* is being phased out.

<sup>91</sup> UN Expert Report para 83.

<sup>92</sup> M. Langer, n 15 above.

<sup>93</sup> See also para 84 regarding Defense Counsel reluctance to accept stipulations.

The Expert Report cited as evidence of efficacy that counsel for the accused was ‘cooperative’<sup>94</sup> and Chambers obtained witness statements in advance of trial, and the Trial Chamber ‘exercised considerable control over the length of courtroom testimony and the trial was completed in about three months’.<sup>95</sup> The Report does not specify the case, whether or not ‘cooperation’ was entailed, or the outcome for the defendant.

Finally, and perhaps most significantly, the reforms permitted greater use of written witness statements at trial, a procedure designed to cut down on the lengthy, costly process of examining live witnesses. Observers agree that in civil law systems there is a wider use of written statements than at common law.<sup>96</sup> Although initially stating a preference for ‘live testimony’ in its Rules of Procedure, the ICTY reforms pushed for an increased use of written witness statements.<sup>97</sup> The ICTY currently advocates a ‘no preference alternative’.<sup>98</sup> Rule 92 *bis* essentially replaced Rule 94 *ter*, which had been even more permissive with respect to admission of written statements.<sup>99</sup>

The OTP, in its response to the UN Expert Group, suggested that efficiency demands would be met by permitting ‘rulings during trials on matters of fact proved to the satisfaction of the Chambers, or in relation to using the record of prior testimony to create rebuttable presumptions of fact that shift the evidential burden in the course of the trial’.<sup>100</sup>

At issue in the increase of the use of written witness statements in place of live testimony is fundamentally a question of the right of the

<sup>94</sup> The characterization of defense counsel engaging in ‘uncooperative’ methods, when exercising the practices, the adversarial system requires as an element of the protection of defendants’ rights, suffers a more direct assault under the Expert Report in its consideration of Defense Counsel fees. While steering away from such blunt language in the body of its report, in its Recommendations section the UN Expert Report (1999) suggests that ‘In order to reduce the potential for obstructive and dilatory tactics by assigned defense counsel, the amount of legal fees allowed might properly take into account delays in pre-trial and trial proceedings deemed to have clearly been caused by such tactics.’ ((UN Expert Report (1999), ‘Recommendations’, 90 para 5)).

<sup>95</sup> *Ibid* fn 23.

<sup>96</sup> P.M. Wald, n 48 above. Y. McDermott, ‘The Admissibility and Weight of Written Witness Testimony’ 26(4) *Leiden Journal of International Law*, 971-989 (2013).

<sup>97</sup> Written witness statements Rules 73*bis* and *ter*.

<sup>98</sup> G. Gordon, n 43 above, 40; M. Farlie, n 7 above.

<sup>99</sup> *Ibid*. See *Prosecutor v Dario Kordić and Mario Čerkez*, Appeals Chamber Judgment, case n IT-95-14/2-Y, 18 September 2000, (United Nations – The International Criminal Tribunal for the former Yugoslavia) (Appeals Chamber decision overruling Trial Chamber’s admission of statement of deceased witness implicating accused that was not given under oath, never subject to cross-examination, uncorroborated by other evidence, and was verbally translated by an interpreter from Croatian to English before it was written down in English by an investigator whose native language was Dutch).

<sup>100</sup> Response to UN Expert Report (1999) para 43.



defendant to challenge accusations brought against him. The ICTY procedure now permits the Trial Chamber to rule on whether or not previous witness testimony (and other facts) have been sufficiently established to be brought in as written statements, and not oral testimony. This case-by-case analysis, however, does not address structural fairness issues at stake. At civil law, these fairness issues are addressed largely by permitting the defendant access to the dossier compiled against him, and by collecting the evidence in that dossier as a neutral party, ie where both inculpatory and exculpatory evidence is collected.<sup>101</sup>

While each of these three amendments to ICTY procedure does, on its face, draw on civil law procedure, none of them preserves the meaningful characteristics that these processes possess at civil law, features that serve to balance the state's interest in deterrence, punishment, and social control and the defendant's interest in due process.

### 3. ICL and the Presumption of Innocence

The presumption of innocence is at the heart of both the civil and the common law systems' capacity to deliver justice: it is a fundament of rule of law, because it requires the state to affirmatively prove the guilt of an individual (rather than casting a charge at an individual, and requiring that she disprove the charge). The presumption of innocence is often the element of a legal tradition that practitioners schooled in that tradition cite as the central benefit, where the assumed critique is that the other system is less able to recognize and/or protect the presumption.<sup>102</sup>

The ICTY recognizes the presumption of innocence of defendants before it,<sup>103</sup> and like other common law systems, links the presumption of innocence to acquittals.<sup>104</sup> As noted, over ten percent of all indictments at the ICTY have resulted in acquittal, most of which 'have come about in

<sup>101</sup> It should be noted, however, that even civil law systems are instituting increased oral procedures regarding witness testimony, in part in response to the human rights dictates of the ICCPR.

<sup>102</sup> See J. Merryman and R. Perez-Perdomo, n 13 above, 132 (discussing common law lawyers' belief that civil law traditions do not include a presumption of innocence); M.R. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Procedure: A Comparative Study' 121 *University of Pennsylvania Law Review*, 546 (1973) ('That continental criminal law has discarded guilt-presumptive devices while common law courts frequently operate with them is by now a cliché of comparative law'); see M. Bohlander, n 37 above, 7 (arguing that the presumption of innocence 'is stronger under German law than under English law and models based on the English understanding, because it attaches until the conviction has become final, that is until the last avenue of appeal has been exhausted').

<sup>103</sup> Art 21(3) of the 1993 ICTY Statute.

<sup>104</sup> <http://www.icty.org/sid/9984> (last visited 24 May 2016).

cases in which the evidence presented by the Prosecution was either insufficient to establish that specific crimes occurred, or insufficient to demonstrate that the accused bore criminal responsibility for the commission of the crime'.<sup>105</sup> In the case of guilt by finding of the majority, this follows a civil law model whereby a panel of judges sits in judgment of both law and facts. Where civil law systems generally use 'lay judges' to constitute two-thirds of the judicial panel, the ICTY in contrast employs only professional judges. Thus the ICTY judicial mechanism is entirely devoid of a 'community' element, the peerage that civil law systems achieve by employing lay judges and common law systems through the use of a jury. Furthermore, as the ICTY jurisprudence has developed, there have been an increasing number of majority decisions. This means that situations obtain that one cannot find at civil law. In the event of a majority decision at civil law, one judge has not been convinced to the level of *intime conviction*. What the presence of majority findings of guilt should be understood to mean for the standard 'beyond a reasonable doubt' is an open question. It would seem that any doubt that can be held by a professional judge faced with all the evidence would be able, legally speaking, to constitute the sort of 'reasonable doubt' that would give pause to her colleagues.

In summary, the procedural history of the ICTY permits a snapshot of the problem of hybridity in an international legal institution. Drawing procedure from two divergent cultural systems has permitted the legitimization of certain procedural applications because they *originate* in an acknowledged, rule-of-law serving system, instead of addressing a more fundamental question, which is what function such procedure serves in the *actual* hybrid system where it is practiced. The final section observes the response of the ICTY when its practices are challenge to complete the argument that international criminal tribunals are so beyond rule of law constraints as to earn the label post rule of law.

## V. Post Rule of Law: Hybridity and the Operationalization of ICL

The preceding sections have reviewed the significance of cultural and theoretical impulses underlying criminal practices in the common and civil law traditions (Part I), and has traced these impulses through examples

<sup>105</sup> Ibid. Recall that within the common law tradition where the trial is a contest, acquittal can function as a demonstration of the presumption of innocence (ie acquittals are to be expected, and a system not returning acquittals would be suspect). Within the civil law tradition, where trial should check the work of the state, acquittal demonstrates anomalies (which are then considered for correction by a higher court).

of their interpretation in domestic criminal procedure (Part II) and on to the hybrid procedure of the ICTY (Part III). This final section concludes the article's argument that the practice of hybridity as currently operationalized by ICTs is 'post rule of law'.

The argument that ICP is *post* rule of law is not designed as a critique of individual procedures as violating rule of law practices. The ICTY's rules were hastily assembled, in marked contrast to the deliberate construction of hybridity at the ICC, for example.<sup>106</sup> ICL is a young discipline and its institutions face steep learning curves; some room for experimentation, for trial and necessary error, must be permitted. Rather, the argument that ICL as operationalized by ICP is 'post rule of law' is based in an analysis of hybridity itself – as practiced by ICTs – as *deliberately* operating outside of rule of law constraints. ICTs as post rule of law institutions articulate the value of the rule of law, operate in its shadow, are legitimized by it, and deliberately resist rule of law constraints as intolerably inflexible to the task set for them.

As previous sections have detailed, criminal processes rest within and represent operationalizations of ideologies regarding the application of criminal sanctions in service to a state. Comparative law scholars have long cautioned that borrowing a practice outside of the contextualization of that practice risks losing meaning, fairness, or both. Yet these cautions, long iterated in comparative law scholarship, have been slow in coming to ICL. At ICL, the synthesis of procedure is 'pragmatic' rather than 'balanced or fused'.<sup>107</sup> This 'pragmatism' results in what John Jackson calls 'procedures that maximize the volume of relevant evidence and provide opportunities for testing its probative value' which are preferred because they 'are likely to achieve higher levels of accuracy than procedures which limit the flow of relevant information and do not provide opportunities for testing it'.<sup>108</sup>

<sup>106</sup> V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' n 1 above, 160.

<sup>107</sup> M. Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' 50 *International and Comparative Legal Quarterly*, 26-53 (2001).

<sup>108</sup> J.D. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy' 7(1) *Journal of International Criminal Justice*, 17-39 (2009) (arguing for a procedure that increased equality of arms and maintains 'the principle of adversarial procedure' as a means of testing evidence); see also J.D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment' 68(5) *Modern Law Review*, 737-764 (2006) (discussing the hybridization of practices from common and civil law traditions at the European Court of Human Rights).

### 1. One Example of Post Rule of Law Practice: Sentencing at ICTs

It is widely recognized that sentencing at ICL is theoretically underdeveloped and empirically understudied.<sup>109</sup> As the International Criminal Law Services' manual entitled 'Sentencing' notes, 'Sentencing is essentially a discretionary responsibility of the judges at the international tribunals. There are no guidelines or scales for the various crimes, as there might be in domestic jurisdictions'.<sup>110</sup> ICTY case law emphasizes this approach as well, with myriad judicial findings emphasizing the complete discretion of the Chambers in imposing the appropriate sentence.<sup>111</sup>

Sentences at ICL are perhaps best characterized as 'predictably irrational'.<sup>112</sup> The 'confusing, disparate, inconsistent, and erratic' sentencing policy of the ICTY,<sup>113</sup> in particular, has been characterized as a form of 'Russian roulette'.<sup>114</sup> In addition to problems regarding uniformity and predictability, the content of sentences has been criticized. Some

<sup>109</sup> M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 1 *Northwestern University Law Review*, 1-74 (2005); J. Meernik and M. King, 'The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis' 16 *Leiden Journal of International Law*, 717-750 (2003); R. Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research' 5(3) *Journal of International Criminal Justice*, 757-778 (2007); S. D'Ascoli, *Sentencing in International Criminal Law: The Approach of the Two ad hoc Tribunals and Future Perspectives for the International Criminal Court* (Oxford: Hart Publishing, 2011).

<sup>110</sup> International Criminal Law & Practice Training Materials: Sentencing available at [http://wcpj.unicri.it/deliverables/docs/Module\\_13\\_Sentencing\\_and\\_penalties.pdf](http://wcpj.unicri.it/deliverables/docs/Module_13_Sentencing_and_penalties.pdf) (last visited 24 May 2016), 1-76.

<sup>111</sup> Discretion in sentencing is unquestioned in ICTY jurisprudence. See *Stakić*, Trial Chamber, case n IT-97-24 (United Nations - International Criminal Tribunal for the former Yugoslavia), para 884; *Delalić*, Appeals Chamber, case n IT-96-21-A (United Nations - International Criminal Tribunal for the former Yugoslavia), para 758 (which states that a pattern of sentences does not exist yet). See also *Prosecutor v Miroslav Deronjić*, case n IT-02-61, 30 March 2004 (United Nations - International Criminal Tribunal for the former Yugoslavia), (where Judge Schomburg recommended a twenty-year sentence in his dissenting opinion; the Majority awarded a ten-year sentence). This includes discretion in determining concurrent or cumulative sentences. *Delalić*, Appeals Chamber, para 771; *Prosecutor v Tihomir Blaškić*, case n IT-95-14, 29 July 2004 (United Nations - International Criminal Tribunal for the former Yugoslavia), available at [www.icty.org](http://www.icty.org) ('*Blaškić Appeals Chamber*') paras 721-722 (which describes types of convictions that are impermissibly cumulative).

<sup>112</sup> U. Ewald, 'Predictably Irrational': International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices' 10(3) *International Criminal Law Review*, 365-402 (2010).

<sup>113</sup> M. Drumbl, n 63 above, 11.

<sup>114</sup> O. Olusanya, *Sentencing War Crimes and Crimes Against Humanity under the International Criminal Tribunal for the Former Yugoslavia* (Groningen: Europa Law Publishing, 2005), 139.

commentators critique sentencing as too aggressive because it comes at the end of the liability phase and is not reserved for its own procedure.<sup>115</sup> Others criticize ICTY sentences as too lenient, particularly given the gruesome nature of the crimes in question.<sup>116</sup>

There are few guidelines as to sentencing stated in the ICTY statute<sup>117</sup> or rules of procedure.<sup>118</sup> Instead, guidelines for sentencing, such as they exist, have been articulated through ICTY case law. For example, in its cases, the ICTY has established that it has discretion to consider other potentially mitigating factors,<sup>119</sup> which it has defined as voluntary surrender,<sup>120</sup> guilty plea,<sup>121</sup> expression of remorse,<sup>122</sup> good character with no

<sup>115</sup> P. Wald, 'ICTY Judicial Proceedings - An Appraisal from Within' 2(2) *Journal of International Criminal Justice*, 466-473 (2004).

<sup>116</sup> J. Ohlin, 'Proportional Sentences at the ICTY', in B. Swart et al eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011).

<sup>117</sup> As regards sentencing guidelines, the ICTY Statute states, in full:

'1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners' (Art 24 Penalties).

<sup>118</sup> The Rules of Procedure add little to the statute's bare skeleton, except to note that mitigating and aggravating circumstances shall also be considered. The Rules address only one mitigating circumstance: 'substantial' cooperation with the Prosecutor. ICTY Rules of Procedure Rule 101(B)(ii).

<sup>119</sup> *Prosecutor v Radislav Krstić*, case n IT-98-33, 2 August 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia) (*Krstić Trial Chamber*), para 713.

<sup>120</sup> See eg, *Kupreskić*, Trial Chamber, paras 853, 860, 863; *Prosecutor v Drago Josipović, Vladimir Šantić, Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić & Dragan Papić*, case n IT-95-16-A, 23 October 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), available at [www.icty.org](http://www.icty.org), para 430; *Kunarac*, Trial Chamber, para 868; *Prosecutor v Biljana Plavšić*, case n IT-00-39&40/1-S, 27 February 2003, paras 82-84.

<sup>121</sup> See, eg *Kupreskić*, Appeals Chamber, para 464; *Prosecutor v Goran Jelisić*, Appeals Judgment, case n IT-95-10, 5 July 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), para 122; *Prosecutor v Duško Sikirica, Damir Došen & Dragan Koludžija*, case n IT-95-8, 13 November 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 148-151, 192-193, 228; *Prosecutor v Stevan Todorović*, case n IT-95-9/1 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 75-82; *Erdemović Sentencing Judgment II* para 16(ii); *Plavšić Sentencing Judgment* paras 66-81.

<sup>122</sup> See, eg *Sikirica Sentencing Judgment* paras 152, 194, 230; *Todorović Sentencing Judgment* paras 89-92; *Erdemović Sentencing Judgment II* para 16(iii); *Plavšić Sentencing Judgment* paras 66-81.

prior criminal convictions,<sup>123</sup> and the post-conflict conduct of the accused. And although the sole reference to Yugoslav law made by the ICTY statute regards the practice of sentencing in the former Yugoslavia, ICTY chambers have treated this statutory reference as more of a suggestion than a rule.<sup>124</sup> Moreover, in making reference to Yugoslav sentencing practice, Chambers have also made quite free with the *substance* of the practice. Thus, the Chamber in *Babic*, without citation to Yugoslav law, held:

‘The Trial Chamber has found that *Babic* (sic) participated in a JCE whose objective – the forcible and permanent removal of non-Serb populations from the SAO Krajina – was carried out through persecutory acts of murders, deportations or forcible transfers, imprisonment, and destruction of property (...). The commission of this crime would have attracted the harshest sentence in the former Yugoslavia.’<sup>125</sup>

The law of the former Yugoslavia provides for either criminal sentences of up to twenty years, or the death penalty. The death penalty, however, is not utilized by international tribunals, and thus it was suggested that life imprisonment should replace the Yugoslav death penalty tradition in sentencing before the ICTY.<sup>126</sup>

Academics and commentators have made various propositions regarding a hierarchy of crimes or other sentencing guidelines that would increase uniformity and predictability in international criminal law

<sup>123</sup> See, eg *Krnjelac* Trial Judgment, para 519; *Kupreskić* Trial Chamber, para 478; *Kupreskić*, Appeals Chamber, para 459; *Prosecutor v Zlatko Aleksovski*, Trial Chamber Judgment, case n IT-95-14/1, 25 June 1999 (United Nations – International Criminal Tribunal for the former Yugoslavia), para 236; *Erdemović* Sentencing Judgment II, para 16(i).

<sup>124</sup> See *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, case n IT-96-23, 22 February 2001 (United Nations - International Criminal Tribunal for the former Yugoslavia) (‘Kunarac Trial Chamber’), para 349, 377; *Prosecutor v Zejnil Delalić, Hazim Delić, Zdravko Mucić, Esad Landžo*, case n IT-96-21, 20 February 2001 (United Nations – International Criminal Tribunal for the former Yugoslavia) (‘Delalić Appeals Chamber’), para 818; *Prosecutor v Milomir Stakić*, case n IT-97-24, 31 July 2003 (United Nations – International Criminal Tribunal for the former Yugoslavia), available at [www.icty.org](http://www.icty.org), (‘Stakić Trial Chamber’) para 887 (national sentencing ‘will (...) be considered, although in itself is not binding’); *Prosecutor v Darko Mrđa, Sentencing Judgment*, case n IT-02-59, 31 March 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia), paras 121, 122, 129 (holding that national sentencing practices are ‘merely indicative’).

<sup>125</sup> *Babić* Sentencing Judgment para 50.

<sup>126</sup> Some opponents, most notably Mahmoud Cherif Bassiouni, argue that this violates the principle of *nullum crimen nulla poena*. See W. Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ 7 *Duke Journal of Comparative and International Law*, 461-518 (1997).

sentencing.<sup>127</sup> So far, the ICTY has categorically rejected such suggestions.<sup>128</sup> Some commentators have supported this approach. Uwe Ewald, for example, argues that there is legal significance (ie precedent) to the scattered World War II jurisprudence regarding sentences and their fulfillment, arguing that ‘the patterns of sentence at the Nuremberg and Tokyo trials as well as the so called twelve succession Trials in Germany already show that diversity in international sentencing is an obvious feature from the outset’.<sup>129</sup> In essence, Uwe Ewald argues that there is ‘precedent’ to find unpredictability (euphemistically referred to as ‘diversity’) in international sentencing. Ewald’s 2010 article, grounded in seven years’ practice in the ICTY OTP, sets a dangerous course for ICTs. For Uwe Ewald, sentencing irregularity is not an error to be addressed or corrected, but rather a deliberate practice to be sheltered as part of the identity of ICTs. Uwe Ewald references the notion of proportionality in sentencing, originating with the social theorist Cesare Beccaria, but dismisses such a theoretical underpinning for ICL as naught but ‘humble legal principles’ that cannot ‘provide a sufficient ground for conceptualizing and operationalizing the complexity of factors “behind” international sentencing decision-making’.<sup>130</sup> In essence, Uwe Ewald would claim a space outside of rule of law constraints for ICTs.

What makes sentencing at ICL an example of post rule of law practice is not that there is measurable discrepancy in sentencing between ICTs, or even within ICTs; discrepancy can be the mark of growing pains, lack of unifying processes, etc. Measurable discrepancy could be accident or error at ICL, which ICTs could address and reform. Rather, sentencing at ICTs is demonstrably post rule of law because ICTs have not embraced error as a moment for reform, but have rather determined that rule of law concerns do not apply to them.

## VI. Conclusion

The article argues that the operationalization of ICL through ICTs challenges the project of ICL, when understood as a training ground for liberal, democratic governance, or rule of law modeling. As Jan Klabbbers

<sup>127</sup> A. Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ 87(3) *Virginia Law Review*, 415-501 (2001).

<sup>128</sup> *Prosecutor v Radislav Krstić*, case n IT-98-33, 19 April 2004 (United Nations – International Criminal Tribunal for the former Yugoslavia) (*Krstić Appeals Chamber*), para 242 (the Appeals Chamber rejected as inappropriate the setting down of a definitive list of sentencing guidelines).

<sup>129</sup> U. Ewald, n 112 above, 373.

<sup>130</sup> *Ibid.*

argues, accountability to third parties is a structural problem of all international organizations.<sup>131</sup> International organizations practicing criminal justice, however, face doubled structural challenges as regards accountability, as failures of ‘objectivity’ through service to particularized interests threaten the legitimacy of the systems themselves. The article has argued that proclaiming ‘hybridity’ and instituting procedures, regardless of their legitimacy in their systems of origin, is insufficient to guarantee objectivity, and thus legitimacy, for ICTs. ICL practitioners and theorists must begin a more serious consideration of the methods and costs associated with hybrid procedures. This consideration must begin by more rigorously insulating ICL practice from ICL’s particular political structures and aims.

<sup>131</sup> J. Klabbers, n 11 above.