

UCLA

UCLA Public Law & Legal Theory Series

Title

The Rise of Managerial Judging in International Criminal Law

Permalink

<https://escholarship.org/uc/item/70c9m211>

Journal

The American Journal of Comparative Law, 53(4)

ISSN

0002-919X 2326-9197

Author

Langer, Máximo

Publication Date

2005

DOI

10.1093/ajcl/53.4.835

Peer reviewed

The Rise of Managerial Judging in International Criminal Law

Máximo Langer

MÁXIMO LANGER*

The Rise of Managerial Judging in International Criminal Law

This article analyzes the procedure of the International Criminal Tribunal for the former Yugoslavia (ICTY) through the lens of comparative law. The article shows that while in its first phase (1993-98), ICTY adopted a predominantly adversarial model to prosecute international crimes; in its second phase (1998-2005), ICTY adopted a managerial judging model. In this way, the article challenges the two existing characterizations of ICTY procedure by showing that this procedure is neither unique because other jurisdictions have also adopted managerial judging, nor an undefined hybrid system. The article aims not only at putting the ICTY procedure under a new light, but also identifying the features that characterize managerial judging as a procedural model. In addition, it emphasizes that we can analyze procedural models not only as different techniques to handle legal cases, but also as procedural cultures, legal identities and ways to distribute powers and responsibilities between the main actors and institutions of the administration of justice. Finally, the article shows that international policy-makers should take into account path dependence considerations when designing procedures for international tribunals.

* Acting Professor of Law, UCLA School of Law. I would like to thank David Binder, Bill Burke-White, Dan Bussel, Nancy Combs, Scott Cummings, Mirjan Damaška, Vic Fleisher, Stephen Gardbaum, Fabricio Guariglia, Jenia Iontcheva Turner, Gia Lee, Alejandro Lorite, Frédéric Mégret, Randy Peeremboom, Arthur Rosett, Jackie Ross, Gary Rowe, Bill Rubenstein, David Sklansky, Carol Steiker, Vladimir Tochilovsky, Eugene Volokh, Steve Yeazell, Noah Zatz and participants in the 2004 Annual Meeting of the American Society of Comparative Law, the 2004 Law & Society Annual Meeting, the SMU Dedman School of Law Faculty Colloquium and the UCLA Faculty Colloquium for their helpful comments on earlier drafts. I would especially like to thank Carol Steiker, Mirjan Damaška, Phil Heymann, Duncan Kennedy, David Sklansky, Ruth Wedgwood, and the UCLA School of Law Faculty for their support and encouragement to write this project. I also would like to thank Jay Barron, Todd Martin and Kraig Odabashian for their research assistance, Scott Dewey for editing the article, and all four for being so careful and thoughtful about their work. As usual, the UCLA School of Law Library provided wonderful support, especially Amy Atchison, Kevin Gerson, Cheryl Kelly, June Kim, Jenny Lentz, Linda O'Connor and John Wilson. I did part of the research for this article in The Hague, The Netherlands, in the summer of 2002. I am grateful to the Center for Studies and Research of The Hague Academy of International Law for financing my research stay in The Hague. My research and ideas have evolved substantially since then, and any mistakes in the article are my exclusive responsibility. I finished this article in June 2005.

I. INTRODUCTION

What do the procedure of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY or the Tribunal) and U.S. civil procedure have in common? Dissected with theoretical tools from comparative law, these two types of procedure reveal similar skeletons.¹ In each, judges abandoned their roles as uninformed, passive umpires to become active managers and mediators of cases with the goal of expediting the docket. Understanding this change enables us to escape from sterile debates about the triumph or defeat of adversarial or inquisitorial models. Instead, we can focus on what really matters: 1) how elements of a procedural system relate to each other; 2) how legal culture impacts procedure; and 3) how procedural systems change over time.

As its main claim, this article demonstrates that the managerial judging system explains the current procedure of this international tribunal. Scholars articulated this system in order to describe similar developments in U.S. civil procedure.² The managerial judging system conceives procedure as a device that the court, with the parties' assistance, wields to expedite process. Unlike the passive and uninformed court of the adversarial system, the managerial court gets information about the case very early in the process in order to actively pressure the parties to reach factual and legal agreements and accelerate their pre-trial investigations and trial cases. But unlike the court of the inquisitorial system that actively investigates the truth, the managerial court is active to make sure that the parties do not delay proceedings.

In order to explain how ICTY procedure has adopted a managerial judging system, this article starts by describing the adversarial and inquisitorial systems of common and civil law. Legal actors brought to the Tribunal the cultural conceptions of criminal proce-

1. On potential contributions and influences of comparative law on international criminal law, see Mireille Delmas-Marty, *L'influence du droit comparé sur l'activité des Tribunaux pénaux internationaux*, in *CRIMES INTERNATIONAUX ET JURISDICTIONS INTERNATIONALES* 95 (Antonio Cassese & Mireille Delmas-Marty eds., 2002); Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 *J. INT'L CRIM. JUST.* 13 (2003). On the relationship between comparative and international law more generally, see George A. Bermann, *Le droit comparé et le droit international: alliés ou ennemis?*, in 55 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 519 (2003).

2. Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982), provides the classic description of managerial judging in U.S. civil procedure. But the literature on this model is extensive. On this literature, see the references cited in Section VI.A, *infra* notes 184-257. It is important to point out from the outset that the reader should not confuse a procedural model like managerial judging (which may apply both to national and international procedures and will be the subject of this article) with the managerial model that Chayes & Chayes articulated to explain compliance with international law. On this last model, see generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

ture prevailing in their domestic jurisdictions. The initial predominance of common law actors partly explains why ICTY originally adopted an adversarial system. Practical needs of the Tribunal to expedite the docket—rather than the predominance of common or civil law actors—have driven the later move of the Tribunal from the adversarial to the managerial judging model.

By explaining how the managerial judging model best captures the current procedure of ICTY, this article puts this procedure in a completely new light. Up to now, there have been two competing characterizations of ICTY procedure, both unsatisfactory. The first views ICTY's procedure as *sui generis*, without parallel in any national jurisdiction.³ This article will challenge this characterization by showing that the managerial judging system typifies both U.S. civil procedure and ICTY criminal procedure. According to the second position, ICTY's procedure is a hybrid between adversarial and inquisitorial conceptions of the criminal process.⁴ One problem with this position is that there are many potential hybrids or combinations between the adversarial and inquisitorial systems. If our analysis stops here—as other commentators' analyses have—then merely characterizing a procedure as a hybrid between the adversarial and inquisitorial systems tells us little about it.⁵ By offering the managerial judging system as the best description of ICTY procedure, this article aims to correct that shortcoming.

3. See, e.g., *Prosecutor v. Delalić*, ICTY Trial Chamber, Case No. IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, (May 1, 1997); Daniel Pastor, *Né "Common Law," Né "Civil Law," Né "Hybrid Law," Un Diritto Penale Speciale per dei Tribunali Speciali*, in *LES SOURCES DU DROIT INTERNATIONAL PÉNAL. L'EXPÉRIENCE DES TRIBUNAUX PÉNAUX INTERNATIONAUX ET LE STATUT DE LA COUR PÉNALE INTERNATIONALE* (Mireille Delmas-Marty et al. eds., 2004); Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT'L L. 569, 588-89 (2000); SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* (Roelof Haveman et al. eds., 2003).

4. See, e.g., Kai Ambos, *International Criminal Procedure: "Adversarial," "Inquisitorial" or Mixed?*, 3 INT'L CRIM. L. REV. 1 (2003); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 364-88 (2003) (framing his analysis of international criminal trials in terms of the adversarial and inquisitorial systems); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 727-29 (1999); Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 46 NETH. INT'L L. REV. 343, 359 (1999); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 22 (2003).

5. As far as I know, no commentator has designed or proposed a procedural model to explain what specific kind of procedure ICTY currently has. At most, commentators have pointed out that the procedure of the ICTY is a hybrid between the adversarial and inquisitorial systems and have indicated what features of ICTY procedure would correspond to each of these systems. See, e.g., CASSESE, *supra* note 4, at 384-87; Orie, *infra* note 60, at 1463-74; Tochilovsky, *supra* note 4, at 345-55.

II. THE ADVERSARIAL AND THE INQUISITORIAL SYSTEMS

One can analyze international criminal procedure partly as a competition between adversarial and inquisitorial models. One of the difficulties of defining the adversarial and inquisitorial systems⁶ is that the differences between criminal procedure in common law and civil law are so numerous that it is easy to lose sight of the basic differences between them.⁷ The most promising way to capture these basic distinctions is to describe the adversarial and inquisitorial systems as organized according to two opposing pairs of sub-systems or models.⁸

6. Practitioners and scholars also use the expression "accusatorial" instead of "adversarial" to refer to criminal procedure in common law jurisdictions and usually conceive the expressions "accusatorial" and "adversarial" as interchangeable. Following this usage, this article will use both expressions as equivalent. For an attempt to establish a distinction between the terms "adversarial"—describing a way of finding facts and implementing norms—and "accusatorial"—including not only adversary trial procedures but also a conception of the state as being neutral in disputes, see Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1017 (1974). In addition, it is important to emphasize from the outset that this article will use the expressions "adversarial system" and "inquisitorial system" as descriptive categories that respectively explain the predominant conception of criminal procedure in common law and civil law jurisdictions. This article will not use these expressions as normative categories. For instance, scholars and practitioners in the U.S. sometimes use the expression "adversarial system" as a normative ideal to refer to a criminal procedure that fully respects the rights of the defendant, epitomized by trial by jury. See, e.g., Mirjan Damaška, *Adversary System*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 24, 25 (Sanford H. Kadish ed., 1983). Similarly, the expression "inquisitorial system" is sometimes used in a negative way to refer to authoritarian conceptions of criminal procedure. However, this article will use these expressions only in a descriptive sense.

7. The expressions "accusatorial" and "inquisitorial" were already in use during the XII century in Europe "to distinguish a process that required the impetus of a private complainant to get under way (*processus per accusationem*) from a process that could be launched in his absence (*processus per inquisitionem*)."⁷ MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 3 (1986). The modern use of these expressions, which conceives of the accusatorial and the inquisitorial not as two different ways of initiating procedures but rather as two comprehensive procedural systems, likely developed during the XIX century. The first such usage of which I am aware is FAUSTIN HÉLIE, 5 *TRAITÉ DE L'INSTRUCTION CRIMINELLE OU THÉORIE DU CODE D'INSTRUCTION CRIMINELLE* 47-65 (1853). On the different meanings of the adversarial and the inquisitorial not only in comparative law but also in other contexts, see Damaška, *Adversary System*, *supra* note 6; Máximo Langer, *La Dicotomía acusatorio-inquisitivo y la importación de mecanismos procesales de la tradición jurídica anglosajona. Algunas reflexiones a partir del procedimiento abreviado*, in *EL PROCEDIMIENTO ABREVIADO* 97, 102-111 (Julio B. J. Maier & Alberto Bovino eds., 2001); reprinted in *LAS GARANTÍAS PENALES Y PROCESALES PENALES. ENFOQUE HISTÓRICO-COMPARADO* 239 (Edmundo S. Hendler ed., 2001).

8. Another difficulty in defining the adversarial and the inquisitorial systems is that the criminal procedures included in common and civil law are so numerous that it is difficult to find features that are present in every jurisdiction or that are present in a similar way in all of them; even if many of these features are very characteristic of most common law and civil law systems. Therefore, the reader should take the descriptions I will offer in this section as ideal-types that may need adjustments in relation to particular jurisdictions.

The first of these oppositions is *the dispute* versus *the official investigation*. Common law jurisdictions conceive procedure as a dispute between two active parties who present their cases before a passive decisionmaker. By contrast, civil law jurisdictions conceive criminal procedure as an investigation that impartial public officials conduct to determine the truth.⁹

These two opposing procedural models explain many features of criminal procedure. First of all, they provide an account of the predominant conceptions of the decisionmaker (judge and/or jury), the prosecutor and the defense, as well as the victim's legal role, in common and civil law countries. Under the dispute model, common law jurisdictions conceive the decisionmaker as a passive umpire who decides upon the controversies that the parties present to him;¹⁰ the prosecutor as an active party who has to investigate and defend his own case, has something at stake in winning it (usually, obtaining a conviction), and has formal powers relatively equal to those of the defense;¹¹ and the defendant and his attorney as procedural equals of the prosecutor.¹² Finally, within the binary logic of this contest pitting prosecution against defense, there is no room for the victim as a party.¹³

9. The ideas of the dispute and the investigation have long been used for comparative law purposes. See, e.g., HÉLIE, *supra* note 7, at 53.

10. For a classical description of the role of the judge and the jury in the adversary system, see Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 35, 36 (Harold J. Berman ed., 1972). This conception of the criminal adjudication process views a too-active decisionmaker with suspicion because his activism may indicate a bias toward one side or the other. See, e.g., *People v. Davis*, 549 N.W.2d 1, 50-51 (Mich. App. 1996). On the more active role of the judge in criminal trials in England than in the U.S., see Sean Doran, *The Necessary Expanding Role of the Criminal Trial Judge*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS 3 (Sean Doran & John D. Jackson eds., 2000). In this section, I will select examples to illustrate the features of the adversarial system from the U.S. because it is the common law system with which I am most familiar.

11. In the United States, practitioners usually define the role of the prosecutor as seeking not only a conviction, but also justice. Nevertheless, in comparative terms, U.S. prosecutors usually act as parties with an interest at stake in the case. For instance, they usually consider that they win a case when the defendant is convicted and lose a case when the defendant is acquitted or the case is dismissed with prejudice. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1349 (1993).

12. As such, the defendant and his attorney, too, have to develop their own case, have an interest in the decision of the controversy, and have most of the same procedural powers. On the predominant conception of the role of the advocate in the U.S., see for example the classical article by Marvin E. Frankel, *The Search for Truth: An Umpire View*, 123 U. PA. L. REV. 1031, 1035-39 (1975).

13. See DAMASKA, THE FACES OF JUSTICE, *supra* note 7, at 201. Most contemporary common law systems conduct only public prosecutions and allow no room for private prosecutions. Therefore, the role of the victim generally is limited to providing information about the case and giving testimony in the formal proceedings. On the limited role of victims in U.S. criminal procedure, see generally Symposium, *Victims and the Criminal Law: American and German Perspectives*, 3 BUFF. CRIM. L.

In the civil law, the contrasting model of the official investigation explains the predominant conceptions of the court, the prosecutor, and the defendant, as well as the victim's role in some jurisdictions. Civil law jurisdictions predominantly conceive the judge as a public official whose role is to investigate the truth.¹⁴ Therefore, she has to be active and able to pursue lines of investigation and produce evidence *sua sponte*, even if the parties have not requested it.¹⁵ She also decides in which order to produce the evidence and actively interrogates the witnesses. Civil law jurisdictions generally conceive the prosecutor not as a party but rather as another public official whose role also is to investigate the truth.¹⁶ This is why the prosecutor, like the judge, has a duty to gather both inculpatory and exculpatory evidence.¹⁷ Unlike the judge and the prosecutor, who are supposed to be objective, the defendant, notwithstanding the rights of citizens in contemporary inquisitorial systems, is seen as a target of investigation with a personal stake in how the case is decided.¹⁸ That is why,

REV. 1 (1999); GEORGE FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995).

14. For instance, regarding the determination of truth being the goal of criminal procedure in France, see MICHÈLE LAURE RASSAT, *TRAITÉ DE PROCÉDURE PÉNALE* 297 (2001). In the dispute model, truth is also one of the goals of procedure: the prosecution tries to prove that certain events occurred and that the defendant participated in them, while the defense tries to question or disprove this attempt. The difference is that the conception of truth in the dispute model is more relative and consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred. In addition, cases such as *North Carolina v. Alford*, 400 U.S. 25 (1970), where the U.S. Supreme Court accepted that a defendant pleaded guilty while claiming that he was actually innocent, are clear examples of a conception of truth that is much more relative and consensual. In the official investigation model, "truth" is conceived in more absolute terms: the official of the state—traditionally, the judge—is supposed to determine, through an investigation, what really happened, regardless of the agreements or disagreements that the prosecution and the defense may have about the event. On the more absolute conception of truth of the inquisitorial system as opposed to the accusatorial one, see Antoine Garapon, *French Legal Culture and the Shock of "Globalization,"* 4 SOC. & LEGAL STUD. 493, 496-97 (1995).

15. See, e.g., STRAFPROZESSORDNUNG [StPO] [Code of Criminal Procedure] §§ 155, II and 244, II (F.R.G.). For an analysis of these provisions, see CLAUS ROXIN, *STRAFVERFAHRENSRECHT* 94-95 (1998). This article's analysis of the judge in civil law countries refers to her role within criminal proceedings. An analysis of the role of the judge in legal interpretation more broadly is beyond the scope of this work. On this last point in France, see Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995).

16. See, e.g., Thomas Weigend, *Prosecution: Comparative Aspects*, in 3 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1233-34 (Joshua Dressler ed., 2d ed. 2002).

17. *Id.* at 1234.

18. Many commentators have said that while in the adversarial system the defendant is a citizen with rights, in the inquisitorial system she is an object of investigation. This was probably true for a long time, but after World War II—and even earlier in some jurisdictions—most inquisitorial countries began considering the defendant as a citizen with rights, both at the rule level—constitutions, human rights treaties, criminal procedure codes—and at the law-in-action level. Thus, in most civil law jurisdictions today, the defendant is presumed innocent, has a right against compelled self-incrimination, a right to assistance of counsel, etc. See, e.g., Gordon Van Kessel,

as a rule, the defense does not gather its own evidence but instead asks the investigating prosecutor or court to do it.¹⁹ Finally, even if the victim is not a necessary actor in this kind of proceeding, he fits much more easily within it.²⁰ Since the criminal procedure mainly consists of public officials undertaking an investigation to determine the truth, there is no binary logic at work here.²¹ Therefore, many civil law jurisdictions accept the victim as a participant who also has something at stake in the case and is not impartial, but who, like the defendant, can have a voice and procedural rights within criminal proceedings.²²

The dispute model and official investigation model also explain many other procedural features. For example, if procedure is a dispute between two parties, broad prosecutorial discretion in the charging decision makes sense because the prosecutor should be able to decide when the dispute is over, and the court, as umpire, should have little control over that decision.²³ In the same way, if the defendant accepts the prosecution's claim, the dispute also ends. This ex-

European Perspectives on the Accused as a Source of Testimonial Evidence, 100 W. VA. L. REV. 799 (1998). This does not mean, of course, that actual practices fully respect all the rights enunciated in rules. The point that I am trying to make is that the concept of rights seems to have lost part of its old heuristic value in establishing clear distinctions between common and civil law jurisdictions.

19. This is because the investigating prosecutor or judge is supposed to have an objectivity and impartiality that the defense lacks, and evidence gathered in a partial way is not supposed to enter into an impartial investigation. For a summary of the judicial reactions that the introduction of investigating powers by the defense generated in a jurisdiction like Italy where most legal actors had a predominant inquisitorial set of internal dispositions, see IL CODICE DI PROCEDURA PENALE 2067-69 (Piermaria Corso ed., 11th ed. 2001). On the need to distinguish between the prosecution and defense investigations given the different conceptions of both actors in Italy, see Paolo Ferrua, *La Giustizia Negoziata Nella Crisis Della Funzione Cognitiva Del Processo Penale*, in III STUDI SUL PROCESSO PENALE 132, 160 (1997).

20. Civil law countries regulate the role of the victim as a party in criminal proceedings in different ways. But there is an important distinction to make. One possibility is to let the victim be a civil actor in the criminal process. See, e.g., CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [Criminal procedure code] art. 2 (Fr.). A second way to regulate victim participation is to let the victim be a sort of private prosecutor in the criminal process—though there are very different ways to regulate this issue that I will not address here. On the powers of the victim in this respect in Germany, see generally StPO §§ 374-402 (F.R.G.).

21. See DAMASKA, *THE FACES OF JUSTICE*, *supra* note 7, at 201.

22. On the role of the victim as a civil actor in the criminal procedure of France and Italy, respectively, see for example, RASSAT, *supra* note 14, at 247-93 (2001); GILBERTO LOZZI, *LEZIONI DI PROCEDURA PENALE* 114-19 (4th ed. 2001).

23. For analyses of the broad discretion of U.S. prosecutors, see for example Norman Abrams, *Prosecution: Prosecutorial Discretion*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1272 (Sanford H. Kadish ed., 1983); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643 (2002); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Arthur Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

plains the guilty plea, a characteristic institution in common law countries. The dispute model also explains stipulations and plea bargaining,²⁴ because it is only natural that the parties may negotiate about their dispute and reach partial or full agreements about it.²⁵

The dispute model also explains why common law criminal procedure is structured as a contest between two competing cases, the prosecution case and the defense case. As a consequence of this conception, each party may run its own pre-trial investigation,²⁶ present its own case and evidence at trial,²⁷ and questions to witnesses proceed according to a contest structure through direct examination, cross-examination, re-direct, and rejoinder.²⁸

The official investigation model, by contrast, explains distinctive features of civil law criminal procedures. For instance, if the role of the prosecutor is to determine the real truth, she can only dismiss the case when there is not enough evidence that the defendant committed the offense. Prosecutorial discretion is thus much more limited in systems where this model prevails.²⁹ Similarly, these systems tradi-

24. On the factors that influence plea agreements in the U.S., see for example Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Law*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

25. See, e.g., *Brady v. U.S.*, 397 U.S. 742 (1970) (approving, for the first time, the constitutionality of plea bargaining). For historical analyses of how U.S. jurisdictions developed the practice of plea bargaining, see Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000); GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979).

26. On the duty of the defense attorney in the United States to make reasonable investigations, or to make reasonable decisions that particular investigations are unnecessary, see *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

27. On the coaching that lawyers give their witnesses in the United States, see for example WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* 21-22 (1999). But see Fed. R. Evid. 614(a) (establishing that the court may, on its own motion, call a witness); Fed. R. Evid. 706(a) (stating that the court may also appoint expert witnesses of its own selection). The courts, however, seldom use these powers. See, e.g., *United States v. Ostrer*, 422 F. Supp. 93 (S.D.N.Y. 1976) (stating that although the court has discretionary power to call a court witness, the court rarely invokes this power). For an analysis of the obstacles that judges would face in becoming more active players at trial, see Frankel, *supra* note 12, at 1041-45.

28. See, e.g., Fed. R. Evid. 611. Fed. R. Evid. 614(b) establishes that "the court may interrogate witnesses, whether called by itself or by a party." But courts also infrequently use this power in criminal trials. See Craig M. Bradley, *United States, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 395, 421 (Craig M. Bradley ed., 1999).

29. For instance, Argentina, *CÓDIGO PENAL* [CÓD. PEN.] [Penal Code] art. 59, and Italy, *Costituzione* [COST.] [Constitution] art. 112, establish a rule of compulsory prosecution. Germany establishes compulsory prosecution as the general rule, though it also includes exceptions through its opportunity principle which allows the government not to prosecute in certain specified cases (§ 152-4a). In France, the prosecutor has discretion about whether to bring charges initially. C. PR. PEN. art. 40 (Fr.). But if the French prosecutor decides to bring charges, she cannot dismiss the charges without the acquiescence of the court. See RASSAT, *supra* note 14, at 452-53. (I will

tionally have not known the concept of the guilty plea.³⁰ While the admission of guilt may be useful to the judge in seeking the truth, the judge still has the final word on the investigation and thus can find that the defendant's confession alone does not constitute proof of guilt beyond a reasonable doubt. If an admission of guilt happens during the pre-trial phase, the case still must go to trial before the judge can make a final determination.³¹ The absence of the guilty plea also explains why, traditionally, plea bargaining has been absent in this model.³²

Also under the official investigation model, criminal procedure in civil law countries presents only one "case," not two competing cases, because the procedure is a unified official investigation to determine the truth.³³ During the pre-trial phase, the judge or prosecutor is in charge.³⁴ If the defendant wants certain evidence to be produced, he

not analyze here the powers of the victim regarding this issue). As there is no system that can possibly prosecute all criminal offenses, some scholars have described the rule of compulsory prosecution as a myth. For a classical debate on this issue, see Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978).

30. See, e.g., Myron Moskovitz, *Perspective: The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1153 (1995).

31. See, e.g., JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 73-74 (1977).

32. A defendant's admission of guilt may assist the official investigator in determining the truth, but does not immediately end the phase of determination of guilt as in the dispute model. Since criminal procedure is an official investigation, the will of the parties cannot conclude it as in the dispute model. In addition, even if there may be negotiations between the impartial officials and the defendant in the official investigation model—e.g., a confession in exchange for sentencing mitigation—these negotiations are never the negotiations between equals of the dispute model. In the official investigation model, the judge, prosecutor, and defense are not equals, because the latter has an interest at stake in the process that the former do not have. For a classical analysis about the absence of plea bargains in civil law countries, see John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979). However, in the last decades, Germany and other civil law countries have tried to import institutions similar to plea bargaining. For an analysis of these reforms in Argentina, France, Germany and Italy, see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

33. Regarding the existence of only one pre-trial investigation in France, see Valérie Dervieux, *The French System*, in *EUROPEAN CRIMINAL PROCEDURES* 218, 250 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).

34. Traditionally, a judge has been in charge of the pre-trial investigation in civil law countries. This is still the case in Argentina, Spain, and France (for serious cases). But in other civil law countries, the prosecutor is now in charge of the pre-trial investigation. Germany moved in this direction in 1974. But even in this case, since the prosecutor is conceived as an impartial official, she has the duty to look for both inculpatory and exculpatory evidence, and the defense may request that the prosecutor gather specific elements of proof. A jurisdiction that has tried to depart from the civil law tradition in this respect is Italy where, since 1989, the prosecutor is in charge of the pre-trial investigation, and the defense may run its own investigation.

has to request this of the public official in charge.³⁵ The idea of a unitary investigation also structures the trial. There are not competing cases of the prosecution and the defense; the presiding judge decides what evidence will be produced and in what order,³⁶ and any witnesses or expert witnesses are the court's, not the parties'.³⁷ Furthermore, since the court has the duty to investigate the truth, its members usually will start their own interrogation. Only after they finish may the parties ask additional questions.³⁸

The dispute model and the official investigation models do not explain all differences between criminal procedure in common and civil law jurisdictions, such as the former's institution of trial by jury versus the latter's system of trial by professional judges who are part of a hierarchical bureaucracy. Thus, a second pair of opposing models is necessary. Mirjan Damaška has captured these differences by proposing what he calls the *coordinate* and *hierarchical models*.³⁹ In the coordinate model, lay decisionmakers who are in a relatively horizontal relationship of power among themselves exercise authority. In the hierarchical model, legal professional decisionmakers whose relationships are hierarchically ordered exercise authority. In the coordinate model there is a bifurcated court which integrates a lay organ (the jury) and a professional organ (the judge), while in the hierarchical model the court is unitary.⁴⁰

As with the distinction between dispute and official investigation, this second broad distinction between two competing models—the coordinate corresponding to the adversarial, the hierarchical to the inquisitorial system—explains many features of the criminal procedure of the common and civil law traditions. In common law juris-

35. For instance, this is the case in France. See, e.g., Dervieux, *supra* note 33, at 250.

36. See, e.g., CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PROC. PEN.] [Criminal Procedure Code] art. 356 (Arg.). Regarding Germany, see StPO §§ 155 Nr. 2, 244 Nr. 2 (F.R.G.) See also ROXIN, *supra* note 15, § 15, at 95.

37. France is an exception because, during trial, the witnesses belong to the parties. See, e.g., RASSAT, *supra* note 14, at 405-06. However, prosecution and defense cannot coach the witnesses, and it is still the presiding judge who questions witnesses first. See C. PR. PEN. arts. 332, 454, 536 (Fr.).

38. Regarding Argentina, see COD. PROC. PEN. art. 389 (Arg.). Regarding Germany, see StPO §§ 238 Nr. 1, 240 (F.R.G.). Section 239 of StPO states that interrogatories at trial shall be developed through direct and cross-examination if the prosecution and the defense request it. However, this is rarely applied. See ROXIN, *supra* note 15, § 42, at 343.

39. See DAMAŠKA, THE FACES OF JUSTICE, *supra* note 7, at 16-71.

40. As developed by Professor Damaška, the coordinate and the hierarchical models do not include the opposition between a bifurcated and a unitary court as one of their defining features. However, Damaška has recently used this opposition to explain the traditional differences in the law of evidence between common and civil law jurisdictions. See generally DAMAŠKA, EVIDENCE LAW ADRIFT (1997). The definitions of the coordinate and hierarchical models that I will use in this article also differ from Damaška's in that I will not include in these categories the opposition between the application of community standards and technical rules.

dictions, there are detailed rules of evidence that filter the elements of proof allowed at trial and may guide the evaluation of the evidence finally introduced.⁴¹ The underlying assumption of the coordinate model is that lay people⁴² may not give proper weight to evidence that is prejudicial or not totally reliable.⁴³ The bifurcated structure of the court allows the professional judge to hinder jurors' access to such evidence. In addition, since the lay participants can only participate in the administration of justice for a limited time period, and since it is not practical that they read long pieces of written evidence together, common law jurisdictions have historically preferred oral evidence (i.e., live testimony) and the production of evidence at trial.⁴⁴

Furthermore, given the number and temporary tenure of lay decisionmakers, the coordinate model assumes that they could hardly give a group justification of how they reach their decision in every case.⁴⁵ And since the decision of the lay decisionmakers enjoys additional legitimacy given its supposedly popular source, hierarchical control over this decision—particularly the superior power of appellate review—is relatively limited. This explains, for instance, why the prosecutor may not appeal acquittals in most common law juris-

41. See generally, e.g., FED. R. EVID.

42. See, e.g., U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

43. Thayer expressed this idea by saying that the common law of evidence was "the child of the jury system." See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (1898). Historically, though, certain common law rules of evidence such as the hearsay rule did not have their origin in the distrust of the jury, but in the right of a litigant to confront witnesses against him. See Richard D. Friedman, *No Link: the Jury and the Origins of the Confrontation Right and the Hearsay Rule*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND"—THE JURY IN THE HISTORY OF THE COMMON LAW 94 (John W. Cairns & Grant McLeod eds., 2002). However, for the purposes of the explanatory power of the coordinate ideal and the other models used in this article, the important issue is not whether distrust of the jury historically explains the common law rules of evidence, but rather whether it provides a rationale for their current existence. This is the case even if the persuasiveness of such a rationale may be questioned. In the case of hearsay evidence, for instance, it is unclear whether the distrust toward the jury provides a strong rationale for the hearsay rule, given that jurors may tend to under-value, rather than over-value, this kind of evidence. See Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992).

44. DAMAŠKA, *supra* note 40, at 57-58, 61-62. For a recent confirmation of the preference for the production of live testimony at trial in common law jurisdictions, see *Crawford v. Washington*, 124 S. Ct. 1354 (2004). Historically, the fact that lay decisions-makers could be illiterate also influenced the preference for oral evidence in common law jurisdictions.

45. This explains the absence of a mandatory justification of the verdict in the U.S. See, e.g., FED. R. CRIM. P. 31. However, Spain adopted the jury in 1995 and has required the jury to provide a brief justification of its decision. For an analysis in English on the re-introduction of the jury in Spain, see for example Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 HASTINGS INT'L & COMP. L. REV. 241 (1998).

dictions.⁴⁶ Finally, since the lay decisionmakers do not learn about the defendant's personal background beyond the charges at issue, and given the court's bifurcated structure, it is possible to distinguish clearly the guilt-determination phase from the sentencing phase, the former being the responsibility of the jury and the latter that of the professional judge.⁴⁷

In the hierarchical model of the inquisitorial system, there are no detailed rules of evidence⁴⁸ and, as a general rule, all relevant evidence may be admitted at trial.⁴⁹ The assumption is that the professional decisionmakers⁵⁰ can prevent prejudicial evidence from biasing them and can correctly evaluate whether the evidence is reli-

46. In the United States, the Supreme Court settled this issue on double jeopardy grounds in *Kepner v. United States*, 195 U.S. 100 (1904). Canada is an exception among common law jurisdictions in allowing the prosecutor to appeal acquittals. See, e.g., KENT ROACH, *CRIMINAL LAW* 26-27 (3d ed. 2004).

47. For instance, in the U.S., see FED. R. CRIM. P. 31-32 (2004). The *Apprendi* line of cases of the U.S. Supreme Court—establishing that a judge may not impose a sentence that goes beyond the statutory maximum that would be available on the basis of the facts reflected in the jury verdict or admitted by the defendant in his guilty plea—do not necessarily challenge the basic distinction between a phase of determination of guilt and a phase of determination of sentence, even if they may lead to a larger participation of juries on sentencing issues in certain jurisdictions. This line of cases includes, among others, *Apprendi v. New Jersey*, 530 U.S. 266 (2000); *Blakely v. Washington*, 124 S. Ct. 2531 (2004); and *U.S. v. Booker* (decided together with *U.S. v. Fanfan*), 125 S. Ct. 738 (2005). In any case, even before this line of cases, there have been U.S. jurisdictions where the jury participates in sentencing. For proposals favoring jury sentencing, see for example Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

48. Regarding France on this point, see for example ROGER MERLE & ANDRÉ VITU, *II TRAITÉ DE DROIT CRIMINEL* 193-94 (5th ed. 2001).

49. See, e.g., CÓD. PROC. PEN., Article 356 (Arg.).

50. Some civil law countries hold mixed courts in which lay and professional judges sit, deliberate and decide together the most serious criminal cases. For instance, France, Germany, and Italy have such courts. But in these mixed courts, the professional judges are still the most influential decision-makers, given their legal knowledge and experience, because professional and lay judges deliberate together. For an analysis of mixed courts, see John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (1981). A substantial number of inquisitorial systems in continental Europe tried to import the jury during the nineteenth century. The precursor was France, which introduced the jury twice, in 1791 and 1808. Other countries, like Germany, followed its example. Nevertheless, today most inquisitorial systems have replaced the jury with mixed courts or do not have any kind of lay participation in the criminal justice system. (Two exceptions are Russia and Spain, which introduced the jury into their respective systems in 1993/2002 and 1995.) For accounts of the introduction of the jury in France and Germany during the nineteenth century, see the articles included in *THE TRIAL BY JURY IN ENGLAND, FRANCE, GERMANY 1700-1900* (Antonio Pado Schioppa ed., 1987). For an analysis of the turn against the jury court on the part of liberal and conservative legal actors alike after about 1900, see BENJAMIN C. HETT, *DEATH IN THE TIERGARTEN* (2004). For an analysis of the history of the jury in Germany and its link to contemporary debates on political philosophy, see Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227 (1995).

able and what its proper weight should be.⁵¹ The unitary court also renders detailed rules of evidence practically meaningless, because the same judges who decide about the admission of evidence participate in the verdict.⁵²

Moreover, since professional judges in civil law jurisdictions are part of a permanent bureaucracy composed of many stages and echelons of authority, a written dossier works as a tool that interconnects them.⁵³ This dossier documents all procedural activity.⁵⁴ Through the dossier, participants in procedure—including trial judges—can know, at every stage, what the case is about and the existing elements of proof.⁵⁵ Moreover, because they are part of a hierarchical apparatus, trial judges have to give a written justification of their decisions,⁵⁶ and the appellate judges can review the verdict more broadly than within the coordinate model.⁵⁷ Finally, given the unitary trial court, the written dossier, and trial judges' resulting fuller knowledge of the case and the defendant, judges try both guilt and sentencing issues jointly.⁵⁸

III. THE COMPETITION OF THE ADVERSARIAL AND INQUISITORIAL SYSTEMS IN INTERNATIONAL CRIMINAL PROCEDURE

Modern international criminal procedure began at Nuremberg. Since then, the adversarial and inquisitorial systems have had a central role in the development of international criminal proceedings.⁵⁹ Because of that impact, we can analyze international criminal proce-

51. On the regulation of second-hand evidence in civil law countries with special reference to Germany, see Mirjan Damaška, *On Hearsay and its Analogues*, 76 MINN. L. REV. 425 (1992).

52. Therefore, the rejection of evidence would not prevent their knowledge about it. *Id.* at 427-28.

53. DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 7, at 50.

54. Regarding Germany, see StPO §§ 168, 168a, 168b (F.R.G.).

55. Contemporary civil law countries rely on oral production of evidence at trial much more than in the past. For instance, the civil law principle of immediacy establishes that the decision-makers, the prosecution, and the defense must be present during the production of evidence, which the decision-makers will evaluate in order to issue their verdict and sentence. See, e.g., JULIO B.J. MAIER, 1 DERECHO PROCESAL PENAL § 8(D)(3)(c), 877-78 (2d ed. 1996). However, the elements of proof collected in the written dossier continue to have an influence on trial judges—who in most jurisdictions do not participate in pre-trial proceedings and only have knowledge of those elements of proof because of the written records. For an analysis of this issue in Germany, see Damaška, *supra* note 51, at 449-52.

56. On the duty of judges to give written justifications of their decisions in Italy, see for example COST. art. 111.6 (which was in place even before the reform of November 1999).

57. See, e.g., LANGBEIN, *supra* note 31, at 84-85.

58. See, e.g., CÓD. PROC. PEN. arts. 396, 398 (Arg.).

59. For analyses of the Nuremberg trial and the innovation it represented in international law, see for example YVES BEIGBEDER, *JUDGING WAR CRIMINALS* 27-49 (1999); Richard Overy, *The Nuremberg Trials: International Law in the Making*, in *FROM NUREMBERG TO THE HAGUE 1* (Philippe Sands ed., 2003); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

dure partly as a competition between these two systems.⁶⁰ As two different procedural techniques, the adversarial and inquisitorial systems present substantial differences in the way they structure procedure. Choosing between these two techniques may affect how accurately an international jurisdiction distinguishes the guilty from the innocent⁶¹ and establishes the historical background that led to mass atrocities;⁶² how swiftly it investigates and adjudicates cases; how fair or unfair the public perceives international criminal proceedings to be;⁶³ and similar issues. Thus, the competition between the adversarial and inquisitorial systems in the early years of ICTY was a competition about which of these two techniques would better enable ICTY to achieve its goals.⁶⁴

But it also was a competition between cultures.⁶⁵ Judges in an adversarial system act as passive umpires not only as a technique for

60. For analyses of international criminal jurisdictions in terms of the adversarial and the inquisitorial systems, see for example CASSESE, *supra* note 4, at 364-88 (2003); Guillaume Champy, *Inquisitoire-Accusatoire devant les juridictions pénales internationales*, 68 INT'L REV. PENAL L. 149 (1997); Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144 (1948-1949); May & Wierda, *supra* note 4, at 727, 729; Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1439 (Antonio Cassese et al. eds., 2002).

61. Of course, it is not easy to tell whether a certain system distinguishes between guilt and innocence better than others. But even if it is difficult to tell this with certainty, it is still possible and sensible to make assessments in this respect. For a sophisticated work based on twentieth century epistemology that articulates which features criminal law and criminal procedure have to possess in order to be as accurate as possible in distinguishing guilt from innocence—especially in not convicting the innocent—see LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE (4th ed. 1997).

62. For instance, Madaleine Albright, former U.S. Ambassador to the United Nations and former U.S. Secretary of State, stated that the primary purpose of ICTY should be to “establish the historical record before the guilty can reinvent the truth.” See Michael Scharf & Valerie Epps, *The International Trial of the Century? A “Cross-Fire” Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635, 660 (1996). On the work of ICTY in creating such a historical record, see Richard A. Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908 (2005).

63. On the link between people's perception of procedural fairness and their acceptance of the procedure's outcome, see TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

64. On the goals of ICTY in particular and of international criminal justice in general, see for example Ninth Annual Report of the ICTY, August 14, 2002, para. 328 (the U.N. Security Council gave the Tribunal the goals of combating impunity and rendering justice to the victims of war crimes and crimes against humanity). U.N. Under-Secretary General for Legal Affairs, Carl August Fleishhauer, stated that ICTY had the goals of “ending war crimes, bringing the perpetrators to justice and breaking an endless cycle of ethnic violence and retribution.” See Scharf & Epps, *supra* note 62, at 660.

65. The concept of culture recently has been under attack because it would suggest boundedness, homogeneity, coherence, stability, and structure whereas social reality would be characterized by variability, inconsistencies, conflict, change and individual agency. See, e.g., Lila Abu-Lughod, *Writing against Culture*, in RECAPTURING ANTHROPOLOGY: WORKING IN THE PRESENT (Richard G. Fox ed., 1991); Roger M.

handling criminal cases, but also because they assume that this is the only proper way for a judge to behave. Thus, if an individual judge behaves in too active a way—for instance, by constantly questioning witnesses during trial—the other actors in the system may consider this activism improper.⁶⁶ Similarly, if judges in an inquisitorial system let the prosecution and defense run the trial, other actors might consider this passivity an abdication of the proper judicial role.⁶⁷

Within each of these procedural cultures one can distinguish two different elements. First, each culture presents basic ideas about prosecution and adjudication of criminal cases. One can consider these basic ideas as two different *structures of interpretation and meaning* through which the participants in the criminal adjudication process (prosecutors, judges, defense attorneys, etc.) understand criminal procedure and their respective roles.⁶⁸ Furthermore, to the extent that legal actors internalize these structures of interpretation and meaning, they become part of the actors' *internal dispositions*.⁶⁹

Keesing, *Theories of culture revisited*, in *ASSESSING CULTURAL ANTHROPOLOGY* 301 (Robert Borofsky ed., 1994). For a convincing defense of why it is possible to use the concept of culture without assuming any of its allegedly problematic features, see Christoph Brumann, *Writing for Culture*, 40 *CURRENT ANTHROPOLOGY* S1 (1999). For an analysis of international criminal jurisdictions as an encounter of lawyers with different cultural and legal backgrounds, see Vladimir Tochilovsky, *Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW* 627 (Horst Fischer et al. eds., 2001). For a sophisticated analysis about cultural differences between Europe and the United States that explains transatlantic differences regarding criminal punishment, see JAMES Q. WHITMAN, *HARSH JUSTICE* (2003).

66. On the passive role of the judge in the United States during trial, see for example Bradley, *supra* note 28, at 421-22.

67. On the active role of judges during trial in Germany as representative of civil law jurisdictions, see for example StPO §§ 155, II, 244, II (F.R.G.). For an analysis of these provisions, see ROXIN, *supra* note 15, at 94-95.

68. I take the expression "structures of meaning" from Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 182 (1983). For a more detailed description of the concept "structure of interpretation and meaning" and its application to the adversarial and inquisitorial systems, see Langer, *supra* note 32.

69. My source of inspiration for the development of this dimension of internal dispositions is sociologist Pierre Bourdieu's concept of *habitus* which can be defined as "a set of *dispositions* which induce agents to act and react in certain ways. The dispositions generate practices, perceptions and attitudes which are 'regular' without being consciously co-ordinated or governed by any 'rule'." John B. Thompson, *Editor's Introduction to PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER* 1, 12 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991). Pierre Bourdieu describes his notion of *habitus* in other works as well. PIERRE BOURDIEU, *RAISONS PRATIQUES: SUR LA THÉORIE DE L'ACTION* 22-23 (1994); PIERRE BOURDIEU, *Some Properties of Fields*, in *SOCIOLOGY IN QUESTION* 72 (Richard Nice trans., 1993). I assert that Bourdieu's concept only inspires the dimension of internal dispositions because I do not follow his theoretical framework in this article. Thus, my use of it is idiosyncratic.

As a result of this socialization,⁷⁰ a substantial number of actors in the criminal justice system understand criminal procedure and the various roles within it in a particular way, and these dispositions become durable over time.⁷¹

In addition, the adversarial and inquisitorial labels can work, in some contexts, as *legal identities*.⁷² Legal actors may view the labels as defining who they are as legal actors—and who they are not.⁷³ In the same way in which many people think that gender, sexual orientation, race, ethnicity, religion, class, or age are important features in defining what kinds of persons they are,⁷⁴ lawyers have also thought that coming from an adversarial or inquisitorial system may also be important in defining themselves as legal actors.⁷⁵ This identity role

70. For a description of how civil law countries train and socialize lawyers, judges, prosecutors, and professors, see for example *II LAWYERS IN SOCIETY, THE CIVIL LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 101-10 (2d ed. 1985).

71. For a more detailed description of the concept “internal dispositions” and its application to the adversarial and inquisitorial systems, see Langer, *supra* note 32.

72. I believe that the adversarial and inquisitorial systems may work in some contexts as legal identities because they do not necessarily have to operate as such. There is no question that the adversarial and inquisitorial systems are two different procedural cultures or two different clusters of procedural cultures. However, this does not mean that legal actors in all of these systems consider the sharing of these cultural features as definitional of who they are as legal actors. This shows that we have to distinguish analytically the concepts of culture and identity—which are often merged. For instance, social actors may share a number of features—e.g., being factory workers—without attaching to them the importance of defining who they are. Conversely, identities may not be based on strong cultural differences. To a great extent, this was the case in Rwanda, where Hutus and Tutsis basically share the same language, religions and culture, yet many of them consider themselves different from each other. In fact, in *Akayesu*, the International Criminal Tribunal for Rwanda [hereinafter ICTR] Trial Chamber I extended the protection of genocide to “any stable and permanent group” precisely because it was difficult to distinguish the Tutsis from the Hutus based on national, religious, ethnic or racial differences. See *Prosecutor v. Akayesu*, ICTR Trial Chamber I, Case No. ICTR-96-4-T, Judgment, para. 510-16 (Sept. 2, 1998). In *Kayishema and Ruzindana*, though, ICTR Trial Chamber II took a different approach to the issue and considered that the Tutsis were among the groups protected against genocide because an ethnic group could be “a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).” See *Prosecutor v. Kayishema and Ruzindana*, ICTR Trial Chamber, Case No. ICTR-95-1-T, para. 98 (2001). The fact that culture and identity should be distinguished at a theoretical level does not go one way or the other on how one should define “protected groups” as to genocide. For analyses of how genocide should be defined, see for example Lori Fisler Damrosch, *Genocide and Ethnic Conflict*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 260-67 (David Wippman ed., 1998); and WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 109-14 (2000).

73. Using the adversarial and inquisitorial systems as legal identities is another new idea explored in this article. For an analysis of some of the potential relationships between the concepts of legal tradition and identity, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 33-40 (2d ed. 2004).

74. On the role of identities in U.S. legal discourse during the 70s and 80s, see generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

75. For instance, in the United States, the word “adversarial” has been used in laudatory terms in reference to U.S. criminal process, which had its earliest origins in

of the traditional legal systems has been particularly relevant in the context of ICTY, where interactions with “the other”—the lawyer coming from a legal tradition different from one’s own—are a daily experience. Thus, these identity roles are also important in order to explain ICTY criminal procedure and its evolution over time.

The adversarial and inquisitorial systems also differ at another level: the *dimension of procedural powers*.⁷⁶ Each of these systems assigns different quanta of procedural powers and responsibilities to the main actors and institutions of criminal procedure—judges, prosecutors, defense attorneys, etc. For example, the inquisitorial decisionmaker, as an active investigator, has more procedural power—e.g., to act *sua sponte*—than the adversarial judge or jury.⁷⁷ This also means that both the prosecution and the defense in the inquisitorial system are comparatively less powerful than in the adversarial one. For example, the defense in the adversarial system must do its own pre-trial investigation—a power generally not present in inquisitorial models.⁷⁸ In this sense, the competition between adversarial

England’s struggles for rights against the authoritarian monarchy. These struggles continued in the Colonies and finally found their way into the Bill of Rights. In this construction of the adversarial, the inquisitorial refers to the contemporary criminal procedures of continental Europe that would still be considered authoritarian—e.g., eliciting confessions in a coercive way. For an example of this construction of the adversarial and the inquisitorial in the United States, see *Miranda v. Arizona*, 384 U.S. 436, 442-43, 459-60 (1966). In this construction of the adversarial, some American lawyers are saying that using compulsory techniques to obtain confessions would be unacceptable for them because it goes against their American adversarial conception of the criminal process, which is different from the one prevailing in the civil law. In continental Europe, in one of the most widespread uses of the terms, the accusatorial refers to the modern Anglo-American criminal procedures—and the ones that prevailed in continental Europe from the fall of the Western Roman Empire until the thirteenth century—that may be considered inefficient in law enforcement terms; the inquisitorial refers to the criminal procedures that prevailed in continental Europe from the thirteenth to the nineteenth centuries, which are usually characterized as authoritarian. The modern continental European criminal procedures would constitute a mixed system that combines the best of the two systems. So, the way many European lawyers have constructed their criminal procedure identity is by opposing it to both their old European inquisitorial past (by suggesting, “We are substantially different from our historical predecessors in the way we understand criminal procedure . . .”) and the current Anglo-American process (“but also substantially different from Anglo-Americans.”). For an example of this use in early twentieth-century France, see RENÉ GARRAUD, 1 TRAITÉ THÉORIQUE ET PRATIQUE D’INSTRUCTION CRIMINELLE ET DE PROCÉDURE PÉNALE 10-22 (1907).

76. For a more detailed description of the dimension of procedural power and its application to the adversarial and inquisitorial systems, see Langer, *supra* note 32.

77. This is clear if we compare the actions of the active judges of the inquisitorial system with the adversarial system’s jury. The inquisitorial judges are also more powerful than adversarial professional judges because of their power to decide which evidence to produce at trial and in which order, as well as through their power to lead the interrogation of witnesses and expert witnesses. However, one must qualify this last statement. The adversarial judges have inherent powers—e.g., contempt powers—that the inquisitorial ones lack. In addition, since there is less hierarchical control over the decisions of the adversarial judges than the decisions of inquisitorial judges, the former also have more power in this respect.

78. Regarding France, see for example Dervieux, *supra* note 33, at 250.

and inquisitorial systems in ICTY is also a competition about which actors and institutions will have more power and responsibilities within this international jurisdiction. If the adversarial system prevailed, both prosecutors and defense attorneys would have more procedural powers and responsibilities in handling international criminal cases vis-à-vis the judges. If the inquisitorial system prevailed, it would be the other way around.

One can distinguish, then, the adversarial and inquisitorial systems on four separate levels. They offer two different techniques to handle criminal cases; two different procedural cultures—including here both structures of interpretation and meaning, and internal dispositions of the legal actors; two different legal identities; and two different ways to distribute powers and responsibilities between the main actors in criminal procedure. In any given jurisdiction—national or international—these four levels are at work simultaneously in any given set of institutional practices.⁷⁹ But in the context of this article, it is important to distinguish them conceptually for three reasons.

First, these theoretical distinctions between adversarial and inquisitorial systems explain as well as describe. They help us to understand not only what kind of procedure ICTY has, but also why and how this procedure has changed over time.⁸⁰ For instance, lawyers coming from adversarial and inquisitorial systems to participate in ICTY may have different sets of internal dispositions about how to handle criminal cases. Given that the competition between the adversarial and the inquisitorial procedural cultures in ICTY has happened through the interactions of individual legal actors, the relative power of groups from each tradition influenced the outcome of the competition between these two systems. In a similar way, the competition between professional groups for the distribution of powers and responsibilities in the Tribunal also explains some of the changes that ICTY has undergone over time. Even if these four levels cannot

79. As I explained *supra* note 72, legal actors do not use the adversarial and inquisitorial as legal identities in every criminal procedure jurisdiction, even if the adversarial and inquisitorial systems operate as such in many. But the three other dimensions—the adversarial and the inquisitorial as procedural techniques, as procedure cultures, and as different ways to distribute powers and responsibilities between the main actors of the criminal justice system—are present in all of them.

80. On the distinction between the descriptive, explanatory and normative levels, see for example William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). A way to describe the differences between these three levels is that at the descriptive level, we ask the question “what is X?”; at the explanatory level, we ask the question “why is X this way?”; and at the normative level, we ask the question “is it good or bad that X is this way?”

account for all the changes that ICTY criminal procedure has undergone, they have played an important role in this evolution.⁸¹

Second, the distinction between these four different conceptual levels also helps identify the terms of the competition between adversarial and inquisitorial systems. To some extent, the two systems compete about which can better achieve the goals of international criminal procedure. But at the same time, they are competing on a less rational level: which of the two procedural cultures and identities will prevail in the international arena, and what institutions will have the main role in handling international criminal cases. Finally, distinguishing between these four levels also is important in order to analyze the rise of the managerial judging system in ICTY.

IV. THE COMPETITION EXEMPLIFIED: ICTY 1993-98

One can see these competing models in the story of ICTY. The U.N. Security Council established this Tribunal to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" after 1991 to "put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."⁸² Given that this was the first international tribunal established after the Nuremberg and Tokyo trials—and according to some, the first truly international criminal tribunal ever created⁸³—designing its basic organization and structure was a new and complex process of institutional engineering.⁸⁴

In the case of criminal procedure, this complexity arose from both the specific characteristics of ICTY in particular and the charac-

81. Other factors such as time and resource constraints, practical needs, path dependence and external pressures also have played an important role, and this article will consider them in its analysis of the evolution of ICTY procedure.

82. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993). The full name of ICTY is International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

83. See CHRISTOPH J. M. SAFFERLING, *TOWARD AN INTERNATIONAL CRIMINAL PROCEDURE* 34 (2001).

84. For analyses of the process that led to the creation of ICTY, see for example GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF INTERNATIONAL TRIBUNALS* (2000); MICHAEL P. SCHARFT, *BALKAN JUSTICE* (1997). For analyses of some of the challenges that not only international criminal tribunals but also national criminal justice systems have to face in dealing with mass atrocities, see for example JASON S. ABRAMS & STEVEN RATNER, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* (2d ed. 2001); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 25-51 (1998); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996); MARK OSIEL, *MASS ATROCITIES, COLLECTIVE MEMORY, AND THE LAW* (1997); JUDITH N. SHKLAR, *LEGALISM* 161-64 (1986); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 27-67 (2000).

teristics of international criminal jurisdictions in general.⁸⁵ First, the Tribunal does not have its own coercive apparatus to enforce its arrest warrants, seize property of the accused, investigate and obtain evidence in national territories, protect and guarantee the presence of witnesses, or fulfill similar functions.⁸⁶ For all these tasks, it has had to rely on the collaboration of individual nations⁸⁷ and the international community.⁸⁸ Second, the geographic distance between the

85. For an analysis of other problems that ICTY and the International Tribunal for Rwanda had to face that I will not analyze in the text, see Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., at 18-32, U.N. Doc. A/54/634 (1999) [hereinafter Expert Report].

86. See, e.g., CASSESE, *supra* note 4, at 442. The absence of an enforcement apparatus in international law has been one of the historical bases to question whether international law is law at all. The *locus classicus* for the proposition that international law is “*not properly so called*,” since by being “*positive morality*” it belongs more to the realm of the ethical than to that of the strictly legal, is to be found in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 112, 124 (Wilfrid E. Rumble ed., 1995) (1832). See also FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 13 (1896). For more recent analyses about compliance with international law, see for example Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT’L L. 361 (1999); Abram H. Chayes & Antonia Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 28 (1999); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Louis Henkin, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1979); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *THE HANDBOOK OF INTERNATIONAL RELATIONS* 28 (Walter Carlsnaes et al. eds., 2002).

87. This problem did not exist at Nuremberg, where the Allied Powers had total control over German territory, but it has been particularly relevant given the resistance that many of the countries which were part of the former Yugoslavia have shown toward the Tribunal. In addition, it is a problem that not only ICTY but also the International Criminal Court has to face. This is why the relationship between the international criminal jurisdictions and national legal systems has had such a central role in recent international criminal justice discussions. For analyses of this issue, see for example Flavia Lattanzi, *The International Criminal Court and National Jurisdictions*, in *THE ROME STATUTE OF THE ICC: A CHALLENGE TO IMPUNITY* 177 (Mauro Politi & Giuseppe Nesi eds., 2001); GÖNTER SLUITER, *INTERNATIONAL CRIMINAL ADJUDICATION AND THE COLLECTION OF EVIDENCE: OBLIGATIONS OF STATES* (2002); Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in *I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW* 391 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

88. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, Summary and para. 3-7.

Tribunal located in The Hague⁸⁹ and the sites where the crimes occurred in the former Yugoslavia poses problems for investigative purposes and for conducting criminal trials.⁹⁰ In addition, every international criminal tribunal has to deal with the question of translations between different languages, which not only increases the costs of its operations, but also substantially lengthens its proceedings.⁹¹ Furthermore, international criminal tribunals have to deal with the hybridization of legal systems and the different understandings that lawyers coming from very different legal traditions may have about them, which may lengthen the proceedings and hamper their effectiveness.⁹² Finally, prosecuting and trying international crimes usually involve proving complex factual issues such as the existence of a widespread or systematic practice—as with crimes

89. Article 31 of the Statute of ICTY establishes that the “International Tribunal shall have its seat at The Hague.” See Statute of the International Tribunal, 32 I.L.M. 1192 [hereinafter Statute]. But Rule 4 of the Rules of Procedure and Evidence of ICTY says that “(a) Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorized by the President in the interests of justice.” However, none of the Chambers of ICTY has exercised this power. The Statute of the International Criminal Court presents a similar regulation of this issue by establishing that the Court shall be established in The Hague but may sit elsewhere whenever it considers it desirable. See Rome Statute of the International Criminal Court, Art. 3 (adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CN.4/L.490) [hereinafter Rome Statute]; and Rules of Procedure and Evidence of the International Criminal Court, Rule 100 [hereinafter ICC RPE]. The regionalization of international criminal law enforcement could open new possibilities regarding this issue. On this discussion, see generally William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT’L L.J. 729 (2003).

90. The distance of ICTY from the places where the events occurred also may have had an impact on the perceived legitimacy of the Tribunal for large segments of the population in the former Yugoslavia. See, e.g., Sixth Annual Report of the ICTY, August 25, 1999, para. 148. For an analysis of the problems that trials for mass atrocities face when not held in the place where the events happened, see Jaime Malamud Goti, *The Moral Dilemmas about Trying Pinochet in Spain*, 32 U. MIAMI INTER-AM. L. REV. 1 (2001). This has been one of the reasons that have led some commentators to defend the option of hybrid courts over international criminal tribunals, at least regarding certain cases. See generally, Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1 (2005).

91. The official languages of ICTY are English and French (Article 33 of the Statute and Rule 3 (A)), but the trials are also translated to other languages such as Serbo-Croatian. The problem of translating documents and proceedings has been an issue since Nuremberg. See, e.g., TAYLOR, *supra* note 59, at 125-26, 140-41, 165, 173. In the case of the International Criminal Court, its official languages are Arabic, Chinese, English, French, Russian and Spanish, though its working languages are only English and French. See Article 50 of the Rome Statute.

92. See, e.g., CASSESE, *supra* note 4, at 442. On problems that the different understandings of lawyers coming from different legal traditions present in the context of international arbitration, see Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 341 (2002); Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT’L L. 1 (2003).

against humanity—or looking into the historical or social context of the criminal conduct.⁹³

The U.N. Secretary-General assigned the task of drafting ICTY's Statute (hereinafter Statute) to the United Nations Office of Legal Affairs (OLA), which had only 60 days to issue it.⁹⁴ Contrary to what commentators widely state,⁹⁵ the draft Statute—which the Security Council approved without changes—did not have a clear adversarial slant.⁹⁶ Even if the Statute settled important issues—such as what the main organs of the tribunal would be, who would be in charge of the pretrial investigation, and how the trial court would be composed—its drafters decided to leave most criminal procedure questions for the judges of ICTY, who would be in charge of developing the Rules of Procedure and Evidence of the Tribunal (hereinafter the Rules).⁹⁷

93. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13. The International Criminal Court is already facing similar challenges to the ones ICTY has had to face. For general analyses of the International Criminal Court, see for example Kai Ambos, *Zur Rechtsgrundlage des Internationalen Strafgerichtshofs. Eine Analyse des Rom-Statuts*, 111 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 175 (1999); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2d ed. 2004).

94. U.N. Security Council Resolution 808 (S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993)) gave 60 days to the Secretary-General to submit a report on "all aspects" for the effective and expeditious implementation of the Tribunal, and the Secretary-General assigned the task of drafting the Statute to the U.N. Office of Legal Affairs. For analyses of this assignment to the Office of Legal Affairs and its possible advantages and disadvantages in comparison to other potential ways of creating the Tribunal and drafting its Statute, see M. CHERIF BASSIOUNI, THE LAW OF THE CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 219-26 (1996); Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111, 115 (1998).

95. See, e.g., BASSIOUNI, *supra* note 94, at 863; Johnson, *supra* note 94, at 142-45; Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 65, at 629. An exception is Orie, *supra* note 60, at 1463 (stating that ICTY Statute was too rudimentary to infer from it a certain procedural model).

96. Among the "common law" features of the Statute, commentators usually include the fact that it is a prosecutor, not a judge, who does the pre-trial investigation (Article 16.1). See, e.g., BASSIOUNI, *supra* note 94, at 872. However, a number of civil law countries also assign this task to the prosecutor (e.g., Germany) even if they conceive of it as an impartial official who has to look for inculpatory and exculpatory evidence. The point that I want to make here is that the Statute did not exclude either a common or a civil law conception of the pre-trial investigation by putting it in charge of the prosecutor. The Statute also established that once the indictment has been read to the defendant, he has to enter a plea (Article 20.3). This might initially look like a common law feature given that, as I explained in Section II, the idea of a guilty plea traditionally has only existed in common law jurisdictions. However, it is unclear whether the Statute introduced the common law concept of the guilty plea because it states that once the plea has been entered, the Trial Chamber would set the date for trial. According to the common law concept, if the defendant pleads guilty, there should not be any trial. So the Statute is ambivalent about this issue too. In addition, the Statute clearly established important civil law features, such as the exclusion of the trial by jury (Article 12). Overall, though, it left most questions open for the judges to decide as drafters of the Rules of Procedure and Evidence.

97. Statute, Article 15.

The judges took only three months to draft and issue the Rules,⁹⁸ and the two main reference models that framed their discussions—together with international human rights standards—clearly were the adversarial and inquisitorial systems.⁹⁹ This may be surprising, given the very special features of an international criminal jurisdiction like ICTY. But it becomes less surprising if we take into account that the judges applied their internal dispositions about the criminal process to the international context.¹⁰⁰

The Statute then delegated the choice between systems to the judges. Those judges drafted Rules with a clear adversarial inclination.¹⁰¹ Two factors produced this result. First of all, U.S. sources were the most important input that the judges received to perform their task.¹⁰² The U.S. was the permanent member of the Security Council that most strongly supported the creation and work of the Tribunal, because the U.S. believed that the Tribunal could play an important role in dealing with the Balkans scenario.¹⁰³ The judges received proposals from several states and organizations. However,

98. The Judges did not have a specific deadline to finish the Rules as did the members of the OLA with the Statute, but they were under time-pressure to issue them in order to legitimize the role of the Tribunal and because the rules would be necessary as soon as the first cases started to arrive.

99. First Annual Report of the ICTY, August 17, 1994, para. 71.

100. The drafters of the Rules of Procedure and Evidence of ICTY had few precedents to follow for their task. The Nuremberg and Tokyo Rules of Procedure were too brief to provide a useful model for reference. In Nuremberg, the Rules of Procedure of the International Military Tribunal for the Trial of the Major War Criminals only included eleven rules; in Tokyo, only nine. See Rules of Procedure of the International Military Tribunal for the Far East, 25 April 1946, available at <http://www.yale.edu/lawweb/avalon/imtferul.htm>. However, as we will see below, despite the brevity of their rules, the precedents of the Nuremberg and Tokyo Trials did influence the design of the Rules of Procedure and Evidence of ICTY. For a brief analysis of the rules of evidence and procedure applied in the trials of major war criminals at Nuremberg and Tokyo, see for example Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851 (1999).

101. See, e.g., Orie, *supra* note 60, at 1463, 1464; Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note 4, at 345; Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 65, at 629; ZAPPALA, *supra* note 4.

102. See BASSIOUNI, *supra* note 94, at 867; CASSESE, *supra* note 4, at 384.

103. Certain permanent members of the Security Council, such as China and Russia, thought that the Tribunal could be a potential impediment to political negotiations for achieving peace in the region. But members of the U.S. government thought that the Tribunal could have an important deterrent effect on the crimes that were being committed. See BASSIOUNI, *supra* note 94, at 225; Johnson, *supra* note 94, at 132-33. According to other accounts, the position of the U.S. government was less idealistic. Michael P. Scharf, who worked as Attorney-Adviser for United Nations Affairs at the State Department from 1989 to 1993, says that the "United States' motives were also less than pure. America's chief Balkans negotiator at the time, Richard Holbrooke, has acknowledged that the tribunal was widely perceived within the government as little more than a public relations device and as a potentially useful policy tool. The thinking in Washington was that even if only low-level perpetrators in the Balkans were tried, the tribunal's existence and its indictments would deflect criticism that major powers did not do enough to halt the bloodshed there." Michael

[T]he United States submitted by far the most comprehensive set of proposed rules with commentary, numbering approximately seventy-five pages. This proposal was particularly influential because of its detailed coverage of procedural and evidentiary issues, the explanation of the reasons for the proposal contained in the commentary and the timeliness of the submission.¹⁰⁴

The second factor was that a majority of the judges favored a predominantly adversarial system. According to the first President of ICTY, this preference was “[b]ased on the limited precedent of the Nuremberg and Tokyo Trials, and in order for us, as judges, to remain as impartial as possible.”¹⁰⁵ But within this context, it was not a secondary factor that a slight majority of the judges who drafted the Rules came from common law countries.¹⁰⁶

The resulting Rules and practices reveal the dominance of the adversarial system. First of all, if we analyze the conception of the judge, the prosecutor, the defense and the victim in the early years of ICTY, we find that the dispute model prevailed over the official investigation model, despite conscious or unconscious resistance that ICTY actors with a different set of internal dispositions presented against some of its features. The judges conceived of themselves, and generally behaved, as passive umpires. The Rules gave the judges some inquisitorial formal powers to issue orders, subpoenas and warrants by their own motion,¹⁰⁷ to change the order in which the evidence

P. Scharf, *Indicted for War Crimes, Then What?*, WASH. POST, October 3, 1999, at B01, quoted by Tochilovsky, *supra* note 4, at 628-29. This shows that analyzing states as single entities—as international law analyses have traditionally done—may be problematic. What probably happened in this context was that different members of the U.S. government held different ideas on the potential role of the Tribunal. Thus, both sets of ideas co-existed in the U.S.’s support of ICTY. On the need not to analyze states as single entities, see for example ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

104. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 177 (1995). In addition, the American Bar Association created a special committee, the “American Bar Association Task Force on War Crimes in the Former Yugoslavia,” which submitted a report commenting on the U.S. proposal and suggesting changes and additions to it. This probably made the U.S. proposal even more influential. See BASSIOUNI, *supra* note 94, at 863 (mentioning that the American Judge Gabrielle Kirk McDonald brought the ABA report with her).

105. Antonio Cassese, *Statement by the President Made at a Briefing to Members of Diplomatic Missions*, IT/29, 11 February 1994, in MORRIS & SCHARF, *supra* note 104, at 650. See also CASSESE, *supra* note 4, at 384. In both the Nuremberg and Tokyo trials, authors believe that the adversarial system prevailed over the inquisitorial. See, e.g., CASSESE, *supra* note 4, at 376-84.

106. See BASSIOUNI, *supra* note 94, at 863; CASSESE, *supra* note 4, at 384. In addition, the first President of the Tribunal, Antonio Cassese, came from Italy, which traditionally has been a civil law country but which adopted a system in 1988 that Cassese himself has considered adversarial. See *id.* at 366 (2003).

107. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the For-

was presented at trial,¹⁰⁸ and to ask the parties to produce additional evidence or to summon witnesses by their own motion.¹⁰⁹ Nevertheless, the Rules generally made the parties the most active actors in the criminal proceedings, in charge of developing their own pre-trial investigations and cases at trial.

Even if the judges had few inquisitorial powers in the law-in-the-books, the law-in-action tilted even more toward a conception of judges as umpires.¹¹⁰ This happened naturally with judges from common law jurisdictions, because their internal dispositions generally tended toward the judge's role under the dispute model.¹¹¹ But besides these ingrained tendencies of common law judges, even the majority of the civil law judges basically behaved as umpires or passive decisionmakers during the initial years of the Tribunal.¹¹²

There were two reasons for this. First, because the judges were convinced that the Rules had enacted a predominantly adversarial procedure, they generally tried to behave according to that system—even those coming from civil law jurisdictions.¹¹³ Thus, legal actors who came from inquisitorial backgrounds generally accepted that many of their internal dispositions did not apply in this international

mer Yugoslavia Since 1991 Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), Rule 54. In the analysis of the original features of ICTY in this section, I will use the original Rules of Procedure and Evidence (1994), unless I indicate otherwise. I use the version of the Rules published in 5 CRIM. L.F. 651 (1994) that contains both the original version of the Rules and the fourth version of them (after their third set of amendments), U.N. Doc. IT/32/Rev. 3 (1995). In the rest of the article, unless I otherwise indicate, I am using the most recent version of the Rules available as I finish this article in June, 2005: version of February 11, 2005, with the amendments of March 11, 2005.

108. Rule 85 (1994).

109. Rule 98 (1994).

110. This is, of course, a reference to Roscoe Pound's famous distinction between the law-in-the-books and the law-in-action.

111. *See, e.g.*, Prosecutor v. Tadić, ICTY Trial Chamber II, Case No. IT-94-1-T, Trial Judgment, (May 7, 1997), where the Trial Chamber composed of three common law judges said that the prosecution had failed to elicit clear and definitive evidence in the interrogation of witnesses on the death of four prisoners. A group of judges with an inquisitorial set of internal dispositions would not have understood the success or failure in the interrogation of witnesses as the responsibility of the prosecution, but rather as theirs. As with a few other examples that I use in this section, I originally learned of this one from Tochilovsky, *supra* note 4.

112. The Expert Group that reviewed the operation and functioning of ICTY in 1999 said in its report: "From the beginning, the judges have been scrupulous in their respect for the distribution of responsibilities implicit in the common law adversarial system and have tended to refrain from intervening in the manner of presentation elected by the parties." *See* Expert Report, *supra* note 85, at 30. This was not a rhetorical statement, but rather part of the diagnosis that the Expert Group made about the Tribunal. It was precisely because the judges were generally behaving as passive umpires that the Expert Group proposed many of the reforms we will analyze later.

113. *See, e.g.*, Prosecutor v. Zejnil Delalić, Case No. IT-96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, para. 15 (May 1, 1997) ("the Judges adopted a largely adversarial, instead of the inquisitorial, approach in the Rules").

context.¹¹⁴ Second, since there is a certain interdependence between a number of features of each of these systems, the predominance of the adversarial system initially prevented, or at least weakened, the development of inquisitorial practices within it.¹¹⁵ For instance, a judge can only behave in an inquisitorially active way in the interrogation of witnesses at trial if she has information about the case beforehand. But if the judge does not participate in the pre-trial investigation or have access to the case through a written dossier that contains this investigation—as the judges did not in the initial years of the tribunal—she cannot be very active in the interrogation of witnesses even if she wants to, because she does not have enough information to ask meaningful questions.¹¹⁶ In this way, the establishment of a predominantly adversarial model in the Rules also reinforced many of the adversarial features of ICTY criminal proceedings.¹¹⁷

Like most judges, prosecutors also behaved according to the dispute model and saw the prosecutor's role not as an impartial official investigating the truth as a (relative) equal of the judge, but rather as a party who must defend her own case against that of the other party.¹¹⁸ The Rules played an important role in shaping the system

114. See, e.g., *Prosecutor v. Kupreškić et al.*, ICTY Trial Chamber, Case No. IT-95-15, Transcript, (Aug. 27, 1998). For instance, Judge Cassese, from Italy, observed:

As for the point of, "Our witnesses, their witnesses," I'm afraid this is the procedure. And this is, of course, as you know, Mr. Radovic, better than me, it is the adversarial system, which is totally different from the inquisitorial system with which you are familiar in your country and also other European persons from Continental Europe are also familiar with namely the inquisitorial system where you have a totally different approach, but we have to stick to our rules.

Prosecutor v. Kupreškić et al., ICTY Trial Chamber, Case No. IT-95-15, Transcript, (Aug. 27, 1998).

115. On the idea of the interconnectedness of various procedural systems' elements, see Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 676-77 (1994) (applying this idea to U.S. civil procedure debates).

116. This explains why Italy, in attempting to introduce the adversarial system, has eliminated the trial court's access to the pre-trial written dossier by creating a special dossier for the trial. See CODICE DI PROCEDURA PENALE [C.P.P.] [Criminal Procedure Code] art. 431 (It.).

117. On this idea of interconnectedness between elements of the adversarial and inquisitorial systems at the national level, see Mirjan Damaška, *Aspectos globales de la reforma del proceso penal*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMERICAS (Fundación para el Debido Proceso Legal ed., 1999).

118. As it happens in other predominantly adversarial jurisdictions, in *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Decision on Communication between the Parties and Their Witnesses, (Sept. 21, 1998), the Trial Chamber said that:

[t]he Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting.

this way. For instance, they did not establish that the prosecutor must search equally for inculpatory and exculpatory evidence during the pre-trial phase.¹¹⁹ More generally, the Rules conceived the criminal procedure as a competition between the cases of the prosecution and the defense.¹²⁰ In a criminal procedure structured this way, there are few incentives for impartial investigations that seek all kinds of evidence. Rather, the goal is to make one's own case as strong as possible and to weaken the case of the other party.¹²¹ This created a procedural setting where the members of the Office of the Prosecutor [hereinafter OTP] saw themselves as (relative) procedural equals to the defense team and as different from the judges.¹²²

Similarly, since ICTY judges structured the procedure as a competition between the cases of the prosecution and the defense, the latter was a procedural equal to the former. The defense not only had similar procedural powers to the prosecution for developing its own case, calling its own witnesses, interrogating its witnesses and the witnesses of the prosecution, and such, but it could also develop its own investigations, which were considered of (approximately) equal value to the prosecutor's.¹²³ However, legal actors with an inquisitorial set of internal dispositions showed a resistance toward this conception of the defense.

For instance, the sometimes aggressive style of defense attorneys in some adversarial systems fits well with a criminal procedure con-

From this statement, one would think that the conception of the prosecutor of ICTY is closer to the model of the official investigation than to the model of the dispute. But my claim is that in the law-in-action of the Tribunal, the conception of the prosecutor has, in fact, been closer to the latter. A similar process probably happened in the ICTR. For an analysis of the conception of the prosecutor in the ICTR, see Larissa J. van den Herik, *Some Insights into the Strategy of the ICTR Prosecutor* (on file with the author).

119. Perhaps showing a different conception of the prosecutor, the Rome Statute establishes the duty of the prosecution to investigate incriminating and exonerating circumstances equally (Article 54.1.(a)).

120. See, e.g., Rules 39, 66-68 (1994).

121. See *supra* note 11, and accompanying text.

122. This statement has to be qualified in the following way. Prosecutors and Judges are permanent members of the Tribunal, as opposed to defense attorneys who usually take one case or a limited number of cases. In addition, there is not an office of the public defender in ICTY. This may have produced closer relationships between judges and prosecutors than usually exist in adversarial jurisdictions. For an analysis of this question, including the proposal to create an independent defense unit, see Note, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982 (2001). The ICTR has not created a public defender office either. The ICC has created an Office of Public Counsel for the Defence, but its role seems to be limited to representing and protecting the rights of the defense during the initial stages of the investigation and providing support and assistance to defense counsel. See Regulations of the International Criminal Court, Regulation 77. Actual practices will determine, though, what role this office ultimately plays. See, in this respect, Regulation 76 that allows ICC Chambers to appoint counsel from the Office of Public Counsel for the defense.

123. See, e.g., Rules 45, 67, 85 (1994).

ceived as a dispute between two parties before a passive umpire. But civil law judges who are used to handling their own investigations may find this aggressive style a little disruptive for developing their work. The following exchange provides an illustration of this phenomenon:

There was another objection by the defense, one in a long series raised by Los Angeles lawyer Russell Hayman Judge Claude Jorda sighed loudly and peered over his wire-rimmed glasses at Mr. Hayman, who calmly complained about the casual way evidence was being introduced by the prosecution, not the way it was done in California Judge Jorda, a Frenchman, had had enough. "I think what separates us is conceptual problem," he said. "We should not constantly bring about a clash of different legal systems. It was never said in the rules of the tribunal . . . that we will apply the procedures that Mr. Hayman is used to using in Los Angeles" Hayman insists he is not trying to aggravate the court, just trying to define the legal requirements."¹²⁴

Since the judges structured ICTY procedure as a binary clash between the cases of the prosecution and defense, there was not room for the victim's participation as a formal actor.¹²⁵ His role was basically limited to providing information and testimony during the pre-trial and trial phases.¹²⁶

Regarding the other features of common and civil law that the dispute and official investigation models explain, we find that most other features of ICTY criminal procedure in its formative years also

124. See Kitty Felde, *International, A Letter from The Hague*, CHRISTIAN SCI. MONITOR, July 3, 1997. Something similar to the aggressive style of U.S. prosecutors and their use of objections may have happened in ICTR. Interview with Ambassador Pierre Prosper, Former Legal Officer of the Office of the Prosecutor in ICTR, in Cambridge, Ma. (Nov. 29, 2001).

125. See Rules 34, 69, 75, 106 (1994). The victim may have a broader participation in ICC proceedings. See Rome Statute, Art. 68.3, and ICC RPE, Rules 89-93. For analyses of the role of the victim at the ICC, see for example Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT 456 (Roy S. Lee ed., 2001); Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1387 (Antonio Cassese et al. eds., 2002).

126. This limited role for the victim subsequently has been confirmed in the Tribunal. At their plenaries held from August 1, 2000, to July 31, 2001, the judges discussed the right of the victims to participate in the proceedings and to request compensation. The judges did not decide to let victims participate in the proceedings, and only recommended to the Security Council and the Secretary-General of the United Nations that the relevant United Nations bodies explore in detail possible methods of compensation for the victims of crimes in the former Yugoslavia. See Eighth Annual Report of the ICTY, August 13, 2001, para. 49. The Tribunal also has created a Victims and Witnesses Section to protect and support all witnesses that appear before the Tribunal.

corresponded to the dispute model of the adversarial system. First, the prosecutor had broad discretion to initiate investigations and bring charges.¹²⁷ The Statute and the Rules are silent on whether the court can review the decision of the prosecutor about these issues. But from the very beginning, the understanding of the judges was that it remained “entirely a matter of the Prosecutor to determine against whom to proceed.”¹²⁸ Accordingly, ICTY’s practice was to allow the prosecutor broad prosecutorial discretion that the court did not control.¹²⁹ In addition, the Rules introduced the concept of the guilty plea by establishing that if the accused entered a plea of not guilty, the case had to be sent to trial, while if he entered a guilty plea, the case had to be sent to the pre-sentencing hearing.¹³⁰ Not

127. This issue has been particularly sensitive because critics have accused international criminal justice of being a political tool of either the victors of war (in the case of Nuremberg and Tokyo) or the main Western powers (in the case of ICTY and ICTR). In the case of prosecutorial discretion, an issue in question is the *tu quoque* argument, according to which officers of the victorious or Western countries also have committed criminal acts that are no less criminal than those of the accused; and thus, they also should be prosecuted. For an analysis of this question at Nuremberg, see Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 46-47 (1947); SHKLAR, *supra* note 84, at 161-64. In the case of ICTY, critics have made arguments in this direction regarding the decision of the Prosecutor not to initiate an investigation in relation to the NATO bombing campaign against the Federal Republic of Yugoslavia. See International Criminal Tribunal for the Former Yugoslavia, The Hague, 8 June 2000, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, in 21 HUM. RTS. J. 255 (2000). For an analysis of the criticisms against this decision and, more broadly, of the relationships between international criminal justice and politics, see Frédéric Mégret, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, in XII FINNISH YEARBOOK OF INTERNATIONAL LAW 207 (2001). For a critical analysis of international humanitarian law more generally, see DAVID W. KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004). The question of prosecutorial discretion has also been at the center of the debate about the resistance of the United States toward the International Criminal Court because critics have seen the Prosecutor of the ICC as a potential danger to U.S. sovereignty. For an analysis of the power of the ICC Prosecutor and proposals to enhance his accountability, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003). For analyses on the U.S. position regarding the ICC, see Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); Mariano-Florentino Cuellar, *The International Criminal Court and the Political Economy of Anti-Treaty Discourse*, 55 STAN. L. REV. 1597 (2003); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

128. First Annual Report, *supra* note 99, para. 74.

129. The Tribunal has later confirmed this initial practice. The Prosecutor asked the former President of the Tribunal, Gabrielle Kirk McDonald, to revise the Prosecutor’s decision on the initiation of an investigation for crimes committed in Kosovo. Judge McDonald said that the President does not exercise any control in this regard. See Letter from Kirk McDonald, ICTY President to Prosecutor Justice Arbour (Mar. 16, 1999), available at <http://www.un.org/icty/pressreal/p386-e.htm>. This broad prosecutorial discretion in the charging decision was also confirmed in *Prosecutor v. Delalić et al.*, ICTY Appeals Chamber, Case No. IT-96-21-A, Judgment, para. 596-619 (Feb. 20, 2001).

130. Rule 62. The Rome Statute does not mention the expression “guilty plea” as a result of resistance to the institution by negotiators with an inquisitorial set of inter-

surprisingly, since the concept of the guilty plea traditionally has not existed in civil law countries, legal actors with predominantly inquisitorial internal dispositions understood this institution differently than did those from common law jurisdictions.

The *Erdemović* case presents two examples of this phenomenon.¹³¹ Drazen Erdemović was indicted for a crime against humanity or, alternatively, a violation of the laws and customs of war for his participation in the shooting and killing of hundreds of unarmed Bosnian Muslim men in Srebrenica—considered the worst massacre in Europe since the end of World War II.¹³² In his initial appearance before the Trial Chamber, Erdemović pleaded guilty to a crime against humanity. But at the same time, he gave an explanation for his conduct that could raise a duress defense.¹³³

According to the common law conception of the guilty plea, if the Trial Chamber considered duress only as a mitigating factor at sentencing, it could take the guilty plea and send the case directly to the sentencing phase. But if it considered that the duress claim could be a full defense, the case would be sent to trial so that the parties could present evidence on it. However, the Trial Chamber, composed of three civil law judges, did neither: it considered that duress could be a complete defense given certain factual circumstances, but since it considered that “proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided,”¹³⁴ it took the plea and sent the case directly to the sentencing phase. Erdemović’s defense attorney—who, like the trial judges, came from a civil law country—also interpreted the guilty plea differently from how legal actors would interpret it in a common law jurisdiction. He

nal dispositions. Its Article 65 introduces proceedings “on admission of guilt,” a compromise between common and civil law negotiators. For a description of such resistance as well as an analysis of the “admission of guilt” in comparison to the common law guilty plea, see Fabricio Guariglia, *Article 65. Proceedings on an Admission of Guilt*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 823 (Otto Triffterer ed., 1999).

131. Prosecutor v. Erdemović, Case No. IT-96-22-T.

132. On the Srebrenica massacre, see for example DAVID ROHDE, *ENDGAME* (1997); JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* (1996).

133. Erdemović said:

Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: “If you’re sorry for them, stand up, line up with them and we will kill you too.” I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.

See Prosecutor v. Erdemović, ICTY Trial Chamber, Case No. IT-96-22-T, Sentencing Judgment, para. 10 (Nov. 29, 1996). One also could read this explanation as a defense of obedience to superior orders but, because the Statute of ICTY expressly established in Article 7(4) that this could not relieve the accused of criminal responsibility, the superior order defense did not generate any of the questions that the duress defense did.

134. *Id.* at para. 20.

simply saw it as a confession that did not end the guilt phase. Thus, he still was pleading for the acquittal of his client at the sentencing hearing.¹³⁵

These two examples show that the internal dispositions of legal actors include not only a disposition to act and react in certain ways to procedural issues, but also to understand them in certain ways. Neither the understanding of the members of the Trial Chamber nor that of Erdemović's defense attorney was necessarily wrong. They were simply different from a common law understanding of the guilty plea. And they were different because these actors were used to understanding criminal procedure issues differently than actors accustomed to an adversarial system.¹³⁶

Furthermore, if they had obtained enough support from other legal actors, any one of these readings could have inserted itself into the practices of ICTY. However, the Court of Appeals, with common law judges forming a majority, found the Trial Chamber's interpretation and application of the guilty plea in error.¹³⁷ The appellate judges also pointed out Erdemović's attorney's misunderstanding and vacated the conviction and sentence based on a finding that Erdemović had pleaded guilty without informed consent.¹³⁸

Plea bargaining offers another interesting example of the struggle between the dispute and official investigation models. There are few institutions that legal actors with inquisitorial internal dispositions resist more firmly.¹³⁹ In the case of ICTY, even though the U.S.

135. Prosecutor v. Erdemović, ICTY Appeals Chamber, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 16 (Oct. 7, 1997).

136. A Principal Trial Attorney of the OTP—now leading the Milosević prosecution team—expressly has recognized this phenomenon in the context of ICTY:

[I]t cannot be stressed enough how difficult or impossible it is for even comparatively young lawyers, with open minds, to let go their cultural legal past and grapple with the conception of others . . . Practitioners from each of the two main different systems cannot—cannot—understand the concepts of the other.

Geoffrey Nice, *Trials of Imperfection*, 14 LEIDEN J. INT'L L. 383, 390 (2001).

137. The Court of Appeals, by a majority, held that duress did not work as a complete defense regarding a soldier charged with crimes against humanity and/or war crimes involving the killing of innocent human beings. For a critical analysis of the interpretation of duress by ICTY Court of Appeals in this decision, see Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity and Duress*, 43 VA. J. INT'L L. 861 (2003). In contrast to this decision, the ICC includes duress as a complete defense without expressly excluding its application in the case of killings of innocent human beings. See ICC Statute, Art. 31.1(d).

138. Prosecutor v. Erdemović, ICTY Appeals Chamber, Case No. IT-96-22-T, Judgment (Oct. 7, 1997).

139. In the negotiations of the Rome Statute, the resistance of civil law actors to the guilty plea was partially based on the fear that the inclusion of this institution "would automatically lead to the practice of plea bargaining being imported into the context of the ICC." Guariglia, *supra* note 130, at 824. In fact, paragraph 5 of Article 65 was expressly included to ensure that plea bargains would not be practiced in the ICC. However, paradoxically, "the language in paragraph 5 presupposes exactly what it intends to avoid: the existence of discussions between the Prosecutor and the de-

proposal that so strongly influenced the Rules of the Tribunal explicitly had included plea bargaining, the judges did not accept it.¹⁴⁰ However, in March 1998, again in the *Erdemović* case, the prosecution and defense made the first plea agreement and presented it to the Trial Chamber, which did not question the practice.¹⁴¹ Since then, the Tribunal has disposed of other cases through this mechanism.¹⁴² The slowness of the proceedings and the heavy caseload that the tribunal by then was facing—rather than the relative power of actors with adversarial or inquisitorial internal dispositions—determined the judges' acceptance of this institution from the dispute model. And, as will be shown later, once the managerial judging system replaced the adversarial one as the predominant system of the Tribunal, plea bargains multiplied even more.¹⁴³

The dispute model also triumphed over the official investigation model regarding the general structure of ICTY criminal procedure. The Rules structured it as a contest between the cases of the prosecution and defense,¹⁴⁴ classified the evidence as belonging to one party or the other,¹⁴⁵ and established examination-in-chief, cross-examination, re-direct, and rejoinder as the way to interrogate witnesses.¹⁴⁶

fence regarding modification of the charges, the admission of guilt or the penalty to be imposed." *Id.* at 831. Whether or not the ICC will allow plea bargains is, therefore, an open question that its own practices and actors will determine.

140. See First Annual Report, *supra* note 99, para. 72 and 74, where after describing how the adversarial and the inquisitorial systems framed the discussions of the judges, the first President of the Tribunal, Antonio Cassese, said, "[T]here are three important deviations from some adversarial systems . . . [T]he granting of immunity and the practice of plea-bargaining find no place in the rules."

141. See *Prosecutor v. Erdemović*, ICTY Trial Chamber, Case No. IT-96-22-T, Sentencing Judgment, para. 18 and 19 (Mar. 5, 1998).

142. See, e.g., *Prosecutor v. Jelisić*, Case No. IT-95-10; *Prosecutor v. Sikirica*, Case No. IT-95-8-S. For an analysis on the use of plea bargaining in international criminal justice, see Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1 (2002).

143. See *infra* notes 312-13, and accompanying text.

144. Rules 66, 67, 84, 85, 86 (1994).

145. Rules 84 and 85 (1994). Legal actors with a predominantly inquisitorial set of internal dispositions resisted the conception of the witnesses as being for either the prosecution or the defense. Both Trial Chambers, presided over by civil law judges, established that once the witnesses have made the solemn declaration to tell the truth before the Trial Chamber, they become "witnesses of truth" or "witnesses of justice" and the prosecution and the defense have to discontinue meeting with them. See *Kupreškić Case*, *supra* note 118; *Prosecutor v. Jelisić*, ICTY Trial Chamber, Case No. IT-95-10-T, Decision on Communication between Parties and Witnesses (Dec. 11, 1998). This doctrine was later followed in *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Decision on Prosecutor's Motion on Trial Procedure (Mar. 19, 1999). Defense attorneys from civil law jurisdictions also resisted the conception of witnesses as belonging to one of the parties. See, e.g., *Prosecutor v. Kupreškić et al.*, Case No. IT-95-15, Transcript (Aug. 27, 1998).

146. Rule 85(B) (1994). For an application of this Rule according to the common law conception of witness interrogation, see *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused (May 1, 1997) (where the Trial Chamber did not allow the defense to cross-examine a prosecu-

Just as ICTY judges and policy-makers chose between the dispute and the official investigation models, so they chose—often self-consciously—between the hierarchical and coordinate models of authority. But if the supporters of the dispute model dominated the first set of choices, the hierarchical model slightly predominated in the second. For example, the Statute established that the Trial Chamber would be composed of professional judges—thus it excluded trial by jury from ICTY.¹⁴⁷ These professional judges comprised a unitary court which decided whether to admit evidence, directed the trial, and issued a verdict at the end of it.¹⁴⁸ As drafters of the Rules, the judges decided not to include technical rules of evidence from common law jurisdictions.¹⁴⁹ The trial court could admit all relevant evidence, unless the need to ensure a fair trial would substantially outweigh its probative value¹⁵⁰ or the evidence was obtained through violations of international human rights.¹⁵¹ The trial judges had to give a reasoned opinion in writing to justify their judgment.¹⁵² Finally, the prosecution could appeal the acquittal of the defendant.¹⁵³ All these features are hallmarks of a hierarchical model of authority.

Nevertheless, the initial ICTY criminal procedure also had a number of features of the coordinate model. First, even if there were no technical rules of evidence, the Rules established a clear preference for oral evidence.¹⁵⁴ Rule 90(A) said that, in principle, the Trial Chamber had to hear the witnesses directly.¹⁵⁵ Furthermore, neither

tion witness for a second time following the prosecution's re-direct, arguing that the rule was common law in origin and did not allow a second cross-examination).

147. Statute, Article 12(a).

148. See Rule 89 (1994).

149. See First Annual Report, *supra* note 99, para. 72. The justification was precisely the one that is usually found in inquisitorial jurisdictions: there would not be trial-by-jury at the tribunal but by professional judges. See *supra* note 117. On the admissibility of hearsay evidence in the tribunal, see for example Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, para. 15 (Feb. 16, 1999).

150. Rules 89(C) and (D) (1994).

151. Rule 95 (1994). Regarding cases of sexual assault, the Rules expressly established that no corroboration of the victim's testimony shall be required. See Rule 96(i) (1994).

152. Rule 88(C) (1994).

153. Statute, Article 25; Rule 99(B) (1994).

154. See Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L. L.J. 535, 540 (2001) ("On the whole then, ICTY proceedings were originally envisioned as reliant mainly on live witness testimony, and indeed several attempts by the prosecutor to introduce written statements of witnesses, or to broaden the strict requirements of corroborative affidavits pursuant to Rule 94 were repelled, if not by the Trial Chamber, then by the Appeals Chamber.").

155. The complete text of the original Rule 90(A) (1994) was: "Witnesses shall, in principle, be heard directly by the Chambers. In cases, however, where it is not possible to secure the presence of a witness, a Chamber may order that the witness be heard by means of a deposition as provided for in Rule 71." This last rule also was quite strict in providing exceptions to the principle that the Trial Chambers should hear witnesses directly. Rule 71(A) (1994) said: "At the request of either party, a

the Rules nor the initial practices of the tribunal established that there would be a written dossier that would contain records of the pre-trial investigation. Finally, the Rules established that the question of sentencing could be decided in a different procedure after the Trial Chamber found the accused guilty of a crime.¹⁵⁶

Looking back, one sees two patterns. Choosing between the dispute and official investigation models, the judges chose the dispute one. Choosing how to organize authority, the judges struck a much more even balance between the hierarchical and coordinate models. But the latter choice to blend the hierarchical and coordinate models reflected not the relative power of actors with adversarial or inquisitorial internal dispositions, but the shared convictions of judges and policy-makers, including even those from common law jurisdictions. For instance, the drafters of the Statute thought that a trial by jury was impracticable in an international criminal jurisdiction. And, as drafters of the Rules, the judges probably thought that common law rules of evidence were not only unnecessary, but also unfavorable to the achievement of the tribunal's goals, because they would present additional obstacles to the prosecution in proving its cases.

V. THE FALL OF ADVERSARIAL CRIMINAL PROCESS IN ICTY

The analysis in the last section shows that the adversarial system prevailed in the early years of ICTY not only in its Rules, but also in its legal practices and procedural culture. The dispute model clearly prevailed over the official investigation model, and even if there were several elements from the hierarchical model, the coordinate model contributed almost as many. This predominance of the adversarial system had an impact on how the Tribunal worked, including how it organized and administered its human and material resources. It also affected how the Tribunal distinguished guilt from innocence, how it was perceived by the population in the territories of

Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial"

156. Rule 100 (1994). Applying the rationale of this rule, "Trial Chamber II consistently refused to hear any motion on the form of the indictment that came down to the allegation that one and the same act resulted in charges of different crimes, since it considered this to be relevant only for sentencing once the defendant had been found guilty. Therefore the sentencing stage was the proper time to hear these complaints." See Orie, *supra* note 60, at 1473 (mentioning Tadić, Delalić et al., and Delić and Lažlo as cases where the Trial Chamber applied this rationale). For a proposal about how to structure sentencing decisions in international tribunals, see Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001).

the former Yugoslavia,¹⁵⁷ and how rapidly it prosecuted and tried its cases, among other factors.¹⁵⁸

The last of these factors—the speed of the proceedings—started to raise important concerns for ICTY judges and members of OTP,¹⁵⁹ who wondered whether ICTY's predominantly adversarial system adequately addressed this question.¹⁶⁰ By July 1998, more than five years after its creation, the Tribunal had issued only two judgments.¹⁶¹ The rapid growth of ICTY's caseload also fed these con-

157. For instance, an empirical study done jointly by the University of California, Berkeley, and the University of Sarajevo on the attitudes of Bosnian judges towards the ICTY indicated:

Across national groups, participants generally lacked a clear understanding of the procedures of the ICTY Judges and prosecutors across national groups reported that they did not understand how the blend of common law and civil law traditions impacted the work of the ICTY. A Bosnian judge acknowledged that this structural hybrid made it difficult for judges in Bosnia to understand the procedures of the ICTY. As one Bosnian Croat judge stated: "None of us knows the rules according to which they work. Only a few people who have any contact with such a court know something about it, but the rest of us [do] not." In sum: "These rules are a bit foreign to us."

The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights, University of Sarajevo, *Accountability and Social Reconstructions: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 136-37 (2000).

158. Another issue that one can analyze in terms of the adversarial and the inquisitorial systems is deciphering which system might better determine the historical events that lead to mass atrocities and the responsibility that different social and political actors had in them. This question is crucial given that one of the proclaimed goals of international criminal justice is to contribute to national reconciliation in the territories where the atrocities happened. To what extent international tribunals can achieve this and other goals is a question that is beyond the scope of this article. For skeptical analyses of the possibility of ICTY achieving its goals, see for example Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 5000 (1994); David P. Forsythe, *Politics and the International Criminal Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994). For analyses specifically on the potentiality of international criminal jurisdictions to deter future atrocities, see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999). For an analysis of how international criminal tribunals should frame their goals, see Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031 (1998).

159. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13 ("The Tribunal's Judges are concerned about the length of time many of the trials and other proceedings are taking to complete"); Seventh Annual Report of the ICTY, July 26, 2000, para. 4 and 7 (pointing out that one of the two major problems that the Tribunal had to overcome was trying all the accused within a reasonable time-frame).

160. As the first President of the Tribunal, Antonio Cassese, said: "[I]t became clear fairly soon that, to expedite proceedings which, being grounded on the adversarial model, were rather lengthy, it was necessary to depart from the system whereby the court acts as a referee and has no knowledge of the case before commencement of trial." See CASSESE, *supra* note 4, at 385.

161. The cases were Prosecutor v. Erdemović, ICTY Trial Chamber II, Case No. IT-96-22-*Tbis*, Sentencing Judgment, (Mar. 5, 1998), which had been disposed of through a guilty plea and a plea bargaining; and Prosecutor v. Tadić, ICTY Trial Chamber II, Case No. IT-94-1-T, Opinion and Judgment, (May 7, 1997), whose appeal was still pending. Of course, the tasks of the Tribunal had not only been limited to these two

cerns. The number of accused persons in its custody more than tripled within two years, growing from eight individuals in June 1996 to 29 in June 1998.¹⁶²

Not only the judges, but also the media and several members of the international community showed concern about these issues.¹⁶³ At the very end of 1998, the General Assembly of the U.N. requested that the Secretary-General conduct a review of the functioning of ICTY and the International Criminal Tribunal for Rwanda [hereinafter ICTR], which was facing similar problems, "with the objective of ensuring the efficient use of the resources of Tribunals"¹⁶⁴ The Secretary-General appointed an Expert Group to conduct this review.¹⁶⁵ In a report issued in November 1999,¹⁶⁶ the Expert Group put the question very candidly:

Major concerns have been voiced not only by United Nations officials, Member States and others, but also by all the organs of the Tribunals with regard to the slowness of the pace of proceedings. . . . [T]he question is why, after almost seven years and expenditures totaling \$400 million, only 15 ICTY and ICTR trials have been completed¹⁶⁷

cases but also to others where investigations had been done, indictments issued, and trials held.

162. See Daryl A. Mundis, *From 'Common Law' Toward 'Civil Law': The Evolution of ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 371 (2001). The caseload of the Tribunal continued to increase in the following years. During the five year period from August 1, 1999, to July 31, 2004, 65 indicted persons were arrested or surrendered, bringing the total number of those detained at the United Nations Detention Unit to 56 by the end of that time. See Seventh Annual Report of the ICTY, July 26, 2000, para. 2; Eighth Annual Report of the ICTY, August 13, 2001, para. 188; Ninth Annual Report August 14, 2002, para. 213; Tenth Annual Report August 20, 2003, para. 232; Eleventh Annual Report August 13, 2004, para. 268, annex 2. In addition, by July 31, 2004, 5 more people were on provisional release. Eleventh Annual Report August 13, 2004, annex 2.

163. See, e.g., Charles M. Madigan & Colin McMahon, *A Slow, Painful Quest for Justice*, CHI. TRIB., Sept. 7, 1999, at 1; Carol J. Williams, *Crisis in Yugoslavia*, L.A. TIMES, May 28, 1999, at A20; Elizabeth Neuffer, *A Worldwide Tribunal on Crime Eyed*, BOSTON GLOBE, June 15, 1998, at A1; Elizabeth Neuffer, *War Criminal Tribunal Faces Trial of its Own*, BOSTON GLOBE, May 9, 1997, at A2; Tracy Wilkinson, *Problems Outweigh Progress of U.N. Tribunal*, L.A. TIMES, May 4, 1997, at A12.

164. See Expert Report, *supra* note 85, at 8. See also Seventh Annual Report of the ICTY, July 26, 2000, para. 330.

165. Jerome Ackerman (Chairman, United States), Pedro David (Argentina), Hasson Jallow (Gambia), Jayachandra Reddy (India) and Patricio Rueda (Spain) composed the Group.

166. The report of the Expert Group—which included criticisms of the adversarial system of ICTY—was very influential on the Tribunal. See, e.g., Seventh Annual Report of the ICTY, July 26, 2000, Summary ("Nearly all the recommendations contained in the Expert Group report were applied or about to be implemented") and para. 325-28.

167. *Id.* at 17-8. For a complete assessment of the work of ICTY as of August 31, 1999, see *id.* at 16.

Many judges and OTP members—even many of those from common law jurisdictions—and the members of the Expert Group thought that one of the main causes of these problems was ICTY's adversarial system, or at least some of its features.¹⁶⁸ These problems arose from the difficulties that the adversarial system had in dealing with complex criminal cases within the international context. One should not underestimate the complexity of these cases.¹⁶⁹ This complexity arises, first, from the definitions of international crimes themselves, which require certain elements that are particularly hard to prove or disprove.¹⁷⁰ As the second President of the Tribunal put it:

[E]stablishing—or defending against claims—that the conflict was widespread or systematic (as required for crimes against humanity), that there was intent to destroy in whole or in part a national, ethnical, racial, or religious group (as required for genocide), or that the conflict was international and the victims were a protected group (as required for grave breaches) necessarily requires considerable evidence.”¹⁷¹

As a consequence of some of these substantive requirements, the prosecutor usually has to prove not only one or two factual incidents—as in most intra-national prosecutions—but rather a multiplicity of incidents that may have occurred in a broad geographic area and over a relatively long span of time.¹⁷² In addition, individuals who commit international crimes usually are members of organizations, which creates additional evidentiary problems such as proving command responsibility.¹⁷³

168. See CASSESE, *supra* note 4, at 385. For an analysis of other factors that may have produced a delay in ICTY proceedings, see Expert Report, *supra* note 85, at 18-32. For a description of the Expert Report and the answer of the Tribunal toward it, see Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759 (2000).

169. See, e.g., Wald, *supra* note 154, at 536-37 (“A trial at ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.”).

170. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13; CASSESE, *supra* note 4, at 442-43.

171. Gabrielle Kirk McDonald, *Trial Procedures and Practices*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 547, 616 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

172. See, e.g., Wald, *supra* note 154, at 536-37.

173. In fact, one can read the doctrine of command responsibility as developed in international criminal law as a way to deal with these evidentiary problems. For an application of the doctrine of command responsibility at ICTY, see for example Prosecutor v. Čelebići, ICTY Appeals Chamber, Case No. IT-96-21, Judgment (Feb. 20, 2001). For analyses of the doctrine of command responsibility in international criminal law, see Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

Any procedural system would have problems in dealing with so many complicated investigative and evidentiary issues at the same time.¹⁷⁴ In the case of ICTY, the adversary system had two main problems in addressing these issues. The first problem was in the structure of the adversarial process itself, organized according to the dispute model. The adversarial system establishes a very clear distinction between the roles of prosecuting—the responsibility of the prosecutor—and adjudicating—the responsibility of the court. Since the prosecutor has the burden of proof, she must gauge in advance how much evidence will be enough to persuade the decisionmaker.¹⁷⁵

However, this evaluation is necessarily speculative. This uncertainty may lead a prosecutor to obtain and present more evidence than what the prosecutor, or even the judges, might consider necessary to support a conviction—especially in long investigations and trials where an acquittal might be especially painful. In the context of ICTY, this adversarial system of incentives, and the special evidentiary difficulties that international criminal cases presented, led OTP members to undertake especially lengthy investigations, produce an excess of evidence at trial, and spend a great deal of time in the interrogation of witnesses and experts.¹⁷⁶

Furthermore, a criminal procedure structured as a dispute between two parties usually generates a sort of “poker game” between them. Both the prosecution and the defense try to show as few “cards” (evidence, strategies, and such) as possible to the other party in order to be able to surprise it later (and not be surprised). Within this context, the uncertainty of the prosecution about the defense’s strategies and evidence may also lead it to make longer investiga-

174. In fact, the Expert Group thought that the complexity of legal issues was a problem in itself, independent of the problems that the procedure of the Tribunal had in dealing with this complexity. See Expert Report, *supra* note 85, at para. 61.

175. In both contemporary civil and common law countries, the judges or jurors have to reach certainty in order to convict a defendant. Common law countries frame this duty as the burden on the prosecution to prove the guilt of the defendant beyond a reasonable doubt and the duty of the decision-maker to be certain beyond a reasonable doubt that the defendant committed the offense when she issues a conviction. In civil law countries, the principle *in dubio pro reo*, which establishes that judges cannot convict the defendant unless they have certainty about his guilt, establishes a similar (even if arguably not exactly identical) requirement. These principles are usually derived from the presumption of innocence that applies in both contemporary civil and common law countries. In the context of ICTY, the presumption of innocence is established in Article 21.3 of its Statute, but neither the Statute nor the Rules expressly establishes the principle that the prosecution has the burden of proof beyond a reasonable doubt. However, ICTY Appeals Chamber has said that the prosecution has such a burden. See *Prosecutor v. Delalić et al.*, “Čelebići Camp” case, ICTY Appeals Chamber, Case No. IT-96-21, Judgment, para. 206 (Feb. 20, 2001). For a critical analysis of this issue in international criminal law, see ZAPPALA, *supra* note 4, at 91-97.

176. See Expert Report, *supra* note 85, at para. 65. The need to establish a historical record may have been another reason for the prosecution to make specially lengthy investigations.

tions and trial case presentations, especially in complex criminal cases like those ICTY hears. In addition, since the prosecution has to obtain an indictment and prove the case at trial beyond a reasonable doubt, the usual strategy of the defense is getting as much information as possible about the prosecution's case during the pre-trial phase, withholding as much information as possible about its own case, stipulating as little as possible about facts that the prosecution has to prove, vigorously cross-examining the prosecution witnesses during trial, and so on.¹⁷⁷

At the national level, where most cases involve a limited universe of facts and evidence, these issues seldom generate substantial problems in terms of the length of the proceedings. But in international criminal cases, where the number of facts to be established and the amount of potential evidence to be presented can be huge, these legitimate defense tactics may substantially lengthen the proceedings. For instance, few stipulations, and lengthy cross-examinations, can substantially lengthen an already long trial.¹⁷⁸ Of course, the adversarial system also faces these challenges in complex domestic cases. But there the adversarial system offers tools such as plea bargaining, immunities, and others which fit well within this conception of the criminal process, as we already have seen. However, ICTY used such tools sparingly if at all in its early years.¹⁷⁹

The second main problem that the adversarial system faced had its origin in the coordinate ideal and its preference for the oral production of evidence at trial.¹⁸⁰ First, the number of witnesses that had to testify in these trials was often huge.¹⁸¹ For instance, in the *Kordić* case, there were 241 witnesses.¹⁸² If all of the witnesses in such cases have to give full testimony at trial, as the coordinate ideal would require, then trials necessarily will be very long. In addition, proving such facts as widespread attacks on a certain civilian population can be very time-consuming and often involves more than one defendant. But if the prosecution must present orally all the (same)

177. *Id.* at para. 67 ("The common law adversarial system . . . is largely reflected in the Statutes of the Tribunals and in their Rules of Procedure and Evidence [I]t is not uncommon for accused to believe that it is in their interest to engage in obstructive and dilatory tactics before and during trial.").

178. *Id.*

179. *See, e.g.,* Wald, *supra* note 154, at 549 (for 2001).

180. *See, e.g., id.* at 536 ("[I]t is primarily the live witnesses who take up trial time (an average witness is on the stand for a full trial day). If trials are to be notably shortened, witnesses must be substantially cut.").

181. *See, e.g., id.* at 549 ("ICTY trials, on average, involve a hundred witnesses or more"); Robinson, *supra* note 3, at 584 ("The major difference between domestic trials and those at the Tribunal lies in the scale of the proceedings. Few domestic trials will have as many as 50 witnesses for both parties. In contrast, only one Tribunal trial so far has had less than 50 witnesses and some have had more than 100.").

182. *See* Gideon Boas, *Creating Laws of Evidence for International Criminal Law: ICTY and the Principle of Flexibility*, 12 CRIM. L.F. 41, 60 (2001).

testimony to prove these charges in each separate trial—as the coordinate model would indicate—then this too will substantially lengthen trials.¹⁸³

VI. MANAGERIAL JUDGING AS A RESPONSE: ICTY 1998-2005

A. *A Sketch of Managerial Judging*

In order to speed up the proceedings, ICTY judges began to manage procedure. The two main reform ideas have been to make judges more active and increase their procedural powers relative to the prosecution and defense,¹⁸⁴ and to change ICTY's initial preference for oral production of evidence at trial.¹⁸⁵ Since the claim of this article is that these reforms have moved ICTY procedure toward managerial judging, it is necessary first to describe this system.¹⁸⁶ This subsection will provide such a description by taking examples of managerial judging from U.S. civil procedure.¹⁸⁷ Before proceeding, one note of caution: I do not claim in this article that managerial judging explains all U.S. civil procedure practices.¹⁸⁸ But when judges control civil procedure—especially in the U.S. federal system—they often do so through managerial judging.

U.S. civil procedure has long been characterized as an adversarial system.¹⁸⁹ During the second half of the 20th century, though,

183. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, at para. 13.

184. See, e.g., Expert Report, *supra* note 85, para. 77-78.

185. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13-14.

186. There is an extensive literature on managerial judging in U.S. civil procedure, and I will only cover a fraction of it in this article. See, e.g., Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Paul R. J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' J. 37 (1984); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Managerial Judges: the Potential Costs*, 45 PUB. ADMIN. REV. 686 (1985); Judith Resnik, *Managerial Judges and Court Delay: the Unproven Assumptions*, 23 JUDGES' J. 8 (1984); Judith Resnik, *The Assumptions Remain. (Critique of Paul R.J. Connolly's; Why We Do Need Managerial Judges)*, 23 JUDGES' J. 37 (1984).

187. For an interesting comparative analysis of current U.S. civil and criminal procedure, see David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 95 GEO. L.J. (forthcoming 2006). On the civil and criminal procedure divide more generally, see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Civil-Criminal Procedural Divide*, 85 GEO. L.J. 775 (1997).

188. For instance, there has been an important tendency in U.S. civil procedure toward the privatization of cases by the parties that may not fit in the managerial judging model. See, e.g., William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001) (proposing a new model, the transactional model, to describe mass tort and security class actions).

189. See, e.g., STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1 (1988); Resnik, *Managerial Judges*, *supra* note 2, at 380-82. Despite this predominant characterization, it was not until 1938 that U.S. civil procedure became entirely adversarial, with the adoption of the Federal Rules of

the role of courts in U.S. civil procedure started to change in some cases.¹⁹⁰ Courts became active managers of cases in order to speed up their cases and reduce their dockets, partly due to changes in the discovery rules that gave judges more knowledge about the case long before the trial started,¹⁹¹ an increase in the volume and complexity¹⁹² of federal litigation,¹⁹³ and increasing interactions between federal judges and institutional changes in the Federal Judiciary.¹⁹⁴ In a path-breaking article, Judith Resnik identified this change in U.S. civil procedure practices.¹⁹⁵ She called the new approach “managerial judging.”¹⁹⁶ The Federal Rules of Civil Procedure¹⁹⁷ and the Federal Judicial Center’s *U.S. Manual for Complex Litigation*¹⁹⁸ also reflected the move toward this model.

Civil Procedure. Before then, the equity courts represented a long inquisitorial tradition in the U.S. and England. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

190. For a detailed description of these developments, whose background conditions can be traced back to the 1920s and 1930s, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). See also Resnik, *supra* note 2, at 379, 397-400.

191. Resnik, *supra* note 2, at 378-79, 391-93.

192. On the concept of complex litigation, see Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992).

193. Resnik, *supra* note 2, at 379, 395-99. Resnik also mentions the use of lawsuits by diverse groups to assert novel legal rights (e.g., prison conditions) as another reason for the emergence of managerial judging in U.S. civil procedure. *Id.* at 393-95. Resnik adds that in addition to increased case filings, motion practice under the discovery rules has substantially increased the burdens of the federal court system.

194. See generally Resnik, *Trial as Error*, *supra* note 190, at 943-49.

195. For other articles that propose models to capture these changes (even before Resnik did), see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). For critiques of the Public Litigation Model that Chayes articulated, see Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999).

196. Resnik, *supra* note 2, at 378 (“Judges have described their new tasks as ‘case management’—hence my term ‘managerial judges.’”). Even if Resnik provided the classic description of this model, other articles described this tendency in U.S. civil procedure before she did. See, e.g., Constantino, *Judges as Case Managers*, TRIAL, Mar. 1981; Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 779 (1981); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions about Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978); Hon. Hubert L. Will, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976).

197. The U.S. Federal Rules of Civil Procedure explicitly introduced managerial judging in 1983. The 1983 amendments to rule 16(a) intended to make “case management an express goal of pretrial procedure.” See E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 323 (1986).

198. See MANUAL FOR COMPLEX LITIGATION (4th ed. 2004). The Manual is now in its fourth edition, and it was first edited in 1969. It is not considered a legal or administrative policy authority, see *id.* at 1, but it has been very influential on judges and practitioners.

According to Professor Resnik, two main sets of changes followed this re-definition of judges' role in U.S. civil procedure.¹⁹⁹ First of all, judges now actively manage cases from very early in the litigation process and control their evolution.²⁰⁰ In order to do this, judges hold pre-trial conferences to establish early and continuing control over the way the parties manage their cases;²⁰¹ issue scheduling orders that limit the time for filing motions and completing discovery and set dates for pre-trial conferences and trials;²⁰² and ensure that the participants formulate a plan for trial.²⁰³ The second main change has been that judges now have an active role in encouraging the parties to reach agreements on factual and legal issues and, ideally, to settle their cases.²⁰⁴

In her classic description of this model, Resnik emphasized this re-definition of the role of judges to speed up cases; that is why she called the model "managerial judging."²⁰⁵ She also concluded that the managerial judging model would only apply during the pre-trial and post-trial phases, but would leave the trial intact.²⁰⁶ At trial, the traditional adversarial system would still predominate in U.S. civil procedure.²⁰⁷

This article conceives managerial judging, as a procedural model, much more broadly. The transformations implied by the model are both broader and more detailed than what Resnik's description suggested. The transformations are broader because managerial judging

199. Some commentators have characterized civil procedure in some civil law countries as also close to the managerial judging system. See, e.g., John H. Langbein, *The German Advantage*, 52 U. CHI. L. REV. 823 (1985). I do not need to analyze the accuracy of this statement for the purposes of this article because questions of where this system initially arose are not important for developing my different arguments. Even if the managerial judging system had arisen in other civil procedures earlier than in the U.S., U.S. scholars were the first to identify such a model. Therefore, in order to define the managerial judging system as a theoretical model, engaging in a dialogue with U.S. civil procedure scholars is particularly important.

200. See MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 2, 7, 9.

201. Fed. R. Civ. P. 16(a). See also MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 9.

202. Fed. R. Civ. P. 16(b).

203. See Fed. R. Civ. P. 16(d).

204. See Resnik, *supra* note 2, at 390.

205. *Id.* at 378.

206. See *id.* at 377-78, 386, 403, where she only analyzes managerial judging as a pre- and post-trial phenomenon, not one during trial. The statement of the main text should be qualified in the following way. Resnik does not think that the managerial judging system would apply at trial. However, this does not mean that she thinks that the rise of the managerial judging system in U.S. civil procedure would leave the trial unaffected because, by encouraging parties' agreements, the managerial judging system would reduce the number of trials and denigrate the importance of trial in the profession's ideology. On other factors that would explain the demise of trials in U.S. civil procedure, see Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004). On the normative implications of some of these changes, see Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

207. See, e.g., Elliot, *supra* note 197, at 326.

redefines the role not only of the court, but also of the parties.²⁰⁸ The transformations are more detailed because managerial judging explains many more procedural features than simply expanded resources to promote settlements and new management techniques.²⁰⁹ In order to show these points, this subsection will compare the adversarial and inquisitorial systems to managerial judging. This comparison also is important because some U.S. civil procedure scholars have wrongly assumed that managerial judging is a type of inquisitorial system.²¹⁰ Through this comparison, the subsection will flesh out the main features of managerial judging as a procedural model and show what specific type of hybrid procedure managerial judging is.

Managerial judging redefines the role not only of the court, but also of the parties.²¹¹ Unlike the adversarial system that conceives the parties mainly as zealous advocates of their cases,²¹² and unlike the contemporary inquisitorial system that conceives the prosecutor as an impartial official²¹³ and only the defendant as a zealous advocate of her case,²¹⁴ the managerial judging system conceives the parties not only as zealous advocates of their positions, but also as the court's assistants in the goal of expediting process.²¹⁵ The parties can be zealous advocates of their positions as long as this zeal does not delay the proceedings, but they also have an active duty to collaborate with the court and to coordinate with each other to expedite the case. These duties of the parties also imply a transformation of the conception of the parties' attorneys in litigation, who also must help expedite process.²¹⁶ In this way, their role as officers of the

208. It is partially because of his concentration only on the role of the judge that Rubenstein does not find Resnik's description of managerial judging adequate to capture current securities and mass tort class actions. See Rubenstein, *A Transactional Model*, *supra* note 80, at 418.

209. See, e.g., *id.* at 416 (pointing out that these are the two features that the first descriptions of the model emphasized).

210. See, e.g., Resnik, *Managerial Judges*, *supra* note 2, at 445 (referring to managerial judging as some version of the continental or inquisitorial model).

211. On this transformation, see generally, MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 22-30.

212. On the conception of parties and lawyers as zealous advocates of their cases, see for example DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

213. See, e.g., Weigend, *supra* note 16, at 1233-34.

214. The defendant in most contemporary inquisitorial systems is not only a target of investigation but also a subject of rights, and these rights are similar in kind and in extent to those recognized in common law countries. The defendant and his lawyer may use these rights—including the right against compulsory self-incrimination, to produce evidence, to confront his accuser, to interrogate witnesses, to an impartial court, to counsel, and so forth—to zealously advocate for their position.

215. MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 7.

216. *Id.* at 22-23, is explicit in this respect:

Judicial involvement in the management of complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, such litigation places greater demands on counsel in their dual roles as advocates

court is deepened and emphasized.²¹⁷ Since the parties are assistants of the court, the latter may impose sanctions when the former do not perform these duties. Both the Federal Rules of Civil Procedure and the Manual for Complex Litigation are explicit in this respect.²¹⁸

If the adversarial system conceives the relationship between the main procedural actors as a dispute between two parties before a passive umpire, while the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible. This definition does not mean that its only procedural goal is to process cases swiftly, just as dispute-resolution is not the adversarial system's only goal, nor impartial truth-determination the only goal of the inquisitorial system. Managerial judging also tries to resolve the controversy that the parties present to the court, and in order to do this, the procedure has a truth-determining dimension. But the goal of processing cases swiftly is particularly important in the managerial judging model²¹⁹ and determines the relationship between the main actors of the process.²²⁰

In U.S. civil procedure, this re-definition of the role of the parties has focused mainly on the pre-trial and post-trial phases. At trial, the presence of the jury usually puts the judge and the parties back in their traditional roles.²²¹ But as judges and practitioners have discerned, expediting management can also occur at trial.²²² During

and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute.

217. Of course, any contemporary procedural system in the West conceives lawyers not only as advocates of their clients but also as officials of the court. The point I am making is that the duties of lawyers as officials of the court are broader and more active in the managerial judging system than in the adversarial and inquisitorial systems.

218. *See, e.g.*, Fed. R. Civ. P. 11(c), 16(f); MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 15-22.

219. *See, e.g.*, Resnik, *supra* note 2, at 431 ("Case processing is no longer viewed as means to an end; instead, it appears to have become the desired goal.").

220. It is because of this re-definition of their role that, in the managerial judging system, the parties have the duty to collaborate in the management of the case by stipulating to as many factual and legal issues as possible, trying to settle the case, meeting the schedule set by the court, disclosing as much information as possible to the other party so that the trial transpires without major surprises, not presenting unnecessary or repetitive evidence, limiting the number of witnesses and the length of their interrogatories, and so on.

221. *See, e.g.*, Langbein, *supra* note 199, at 19 ("Managerial judging in the pretrial process leaves adversary domination of the trial (especially jury trial) largely unaffected.").

222. An indication of this is that the Manual for Complex Litigation devotes an entire Section to trial management. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 131-66.

trial and its preparation, the parties have duties to disclose as much information to the other party as possible to make the trial a foreseeable and manageable event,²²³ limit the length of their cases and the extent of their interrogatories,²²⁴ and seek stipulations on factual and legal questions.²²⁵ The court also has a much more active role in limiting the parties' cases and interrogatories than in the adversarial system.²²⁶ Of course, the court also has almost all these powers in the adversarial system. But unlike the adversarial judge who uses them very sparingly in order not to abandon her role as a passive umpire, the managerial judge embraces these powers as central to her work and does not shy away from actively using them.²²⁷

Managerial judging also implies a re-definition and re-signification of several procedural features. Unlike the inquisitorial system but like the adversarial one, the managerial judging model allows the parties to dispose of their case partially or *in toto* by dismissing charges, pleading guilty and reaching agreements.²²⁸ But even if both the adversarial and managerial judging systems share these features, they also present two differences on this point. In the managerial judging system, if the parties negotiate and reach stipulations or agreements without the court's participation, these agreements

223. See *id.* at 138.

224. The number and length of interrogatories also have to be limited during the pre-trial phase. See, e.g., *id.* at 90-92.

225. See, e.g., *id.* at 148 ("The judge may intervene, even without objection, in order to . . . encourage stipulations by opposing counsel to avoid routine testimony, such as the date of a document.").

226. See, e.g., *id.* at 127, 132, 147, 149. This role includes avoiding repetitive or cumulative evidence, see, e.g., *id.* at 148, appointing court experts to avoid the repetition of parties' expert witnesses, *id.* at 111-14, holding conferences during trial, *id.* at 135-36, reviewing the order in which the evidence is produced, *id.* at 148, and asking her own questions to witnesses. Regarding this last point, the presence of the jury in U.S. civil procedure explains why the Manual suggests that judges refrain from asking questions to witnesses as much as possible, *id.* at 139, 149. But, as I will explain later, see *infra* notes 236-41 and accompanying text, the theoretical model of the managerial judging system that I propose for this article does not include a trial by jury, but trial by professional judge or judges. In this sense, U.S. civil procedure does not correspond to this feature of the model.

227. For instance, even if in the U.S. judges have the power to ask questions to witnesses, judges are usually careful in not exercising these powers very actively in order not to look biased toward one of the parties. This shows that adversarial self-perception is still very important in U.S. civil and criminal procedure. See, e.g., *Alexander ex rel. Ramsey v. Willard*, 542 S.E.2d 899, 905-06 (W. Va. 2000) (W. VA. R. EVID. 614 permits the judge to ask questions to prevent misunderstanding, but extended examination of any witness has not been favored); *United States v. Filani*, 74 F.3d 378, 384 (2d Cir. 1996) ("experienced trial judges have championed the view that our adversarial system gives little room for trial judges' questioning of witnesses"); *United States v. Tilton*, 714 F.2d 642, 644 (6th Cir. 1983) ("potential prejudice lurks behind every intrusion into a trial made by a presiding judge").

228. See, e.g., *Elliot*, *supra* note 197, at 320-26. See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 167-82.

are welcomed as a way to reduce the caseload²²⁹ and speed up the proceedings.²³⁰ But if the parties do not negotiate or reach agreements, the managerial court, unlike the adversarial umpire, not only can get involved in the negotiations, but also must encourage the parties to reach agreements.²³¹

The second difference is that in the managerial judging system, parties have less power to dispose of procedural and substantive issues. In the adversary system, when parties reach an agreement regarding a particular issue, that generally disposes of the question. But in the managerial judging system, parties' agreements on particular issues are only welcomed when they expedite the case or reduce the caseload of the court; otherwise, the court will reject them.²³²

The next set of features of managerial judging that deserve emphasis relates to the structure of procedure. We saw that one of the central differences between the adversarial and inquisitorial systems was that in the former, procedure is a contest between the competing cases of the prosecution (plaintiff) and the defense, while in the latter, procedure is a unitary investigation that impartial officials undertake. In the managerial judging system, procedure is a competition between two cases, and in this respect it differs from the inquisitorial system. But even if managerial judging sees procedure as a competition between two cases, it differs with the adversarial system on this point.

First, in the managerial judging system, the cases of the plaintiff or prosecutor and the defendant are as much in coordination and cooperation as in competition. The parties compete in running separate pre-trial investigations and in presenting their cases at trial. But at the same time, the parties have to cooperate with each other in order not to delay the proceedings unnecessarily.²³³ Second, the parties

229. Between 1940 and 1990, the number of cases settled in U.S. federal civil procedure more than doubled—from about 14% to about 34%. See Yeazell, *The Misunderstood Consequences*, *supra* note 115, at 638.

230. See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 44, 94.

231. *Id.* at 40, 95.

232. Resnik, *supra* note 2, at 400-01, provides the following example of this phenomenon:

In the hypothetical Ms. Paulson's attorney, Mr. Adams, filed the complaint on January 4, 1982. But suppose that, instead of promptly replying, defendant asked for an additional 20 days to respond. Plaintiff's counsel readily agreed, and the parties filed a stipulation to that effect. However, Judge Kinser refused to permit any extension beyond the time permitted by the Federal Rules—20 days after receipt of service.

For another example of this feature of managerial judging, see Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 18-19 (2001).

233. For instance, the parties may not use discovery requests to delay the proceedings, and they have to limit the controversy only to material issues genuinely in dispute. See, e.g., Yeazell, *The Misunderstood Consequences*, *supra* note 115, at 651; MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 23. This duty usually is articulated as lawyers' responsibility. See, e.g., *id.*

are less masters of their cases than in the adversarial system because the court exercises constant control over their cases to expedite process.²³⁴

Just as managerial judging cuts across the divide between the dispute and official investigation models, so it intersects the hierarchical and coordination models.²³⁵ First of all, the managerial judging culture does not welcome juries and a bifurcated court.²³⁶ Trials by jury take longer than bench trials.²³⁷ A bifurcated court presents additional problems of coordination as against a unitary court, and deprives the judge, the most powerful figure in the managerial judging system, of substantial powers.²³⁸ (At this level, then, U.S. civil procedure departs from the managerial judging model, since the U.S. Constitution establishes a right to a trial by jury in civil cases.)²³⁹ The managerial judging system thus shares with the inquisitorial a preference for the professionalization of the legal process. But unlike the inquisitorial system, which distrusts lay participants mainly out of a corporatist attitude which favors bureaucratic control over legal cases,²⁴⁰ the managerial judging system disfavors lay participants because they lengthen and complicate the handling of these cases.²⁴¹

234. Mullenix, *supra* note 232, at 19-20. Thus, the court may set time limits for the pre-trial phase through scheduling orders, put pressure on the parties to reach total and partial agreements, limit the presentation of the parties' cases at trial and the number of witnesses that may be produced, set time limits on direct and cross-examinations, call its own expert-witnesses, and act in other ways to control and expedite the case. Nevertheless, the statement that the court exercises a tighter control over the case in the managerial judging system should be qualified in the following way. It is true that in the managerial judging system the court actively controls the parties through pre-trial conferences, scheduling orders and so forth, and that this makes them less masters of their cases. But, at the same time, in the managerial judging system the pretrial may be longer and the trial shorter than in the adversarial system because of broader discovery and judicial encouragement to settlement. Since the court can continuously watch the parties at trial but not during the pretrial phase, the move toward managerial judging may, thus, reduce the level of scrutiny of the court over the parties. Yeazell makes this point in *The Misunderstood Consequences*, *supra* note 115, at 647.

235. On the hierarchical and coordinate models, see *supra* Section II.

236. See, e.g., Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 209 (1976) (arguing that the jury system is a limit on the institutional capacity of courts to adjudicate complex cases and advocating abolition of the right to a jury in such cases), cited by Elliot, *supra* note 197, at 309.

237. On the attempts to deal with these issues in complex litigation cases in U.S. civil procedure, see generally MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 150-63.

238. On the bifurcated court in U.S. civil and criminal procedure, see DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 40, at 26-57.

239. See U.S. CONST. amend. VII.

240. See DAMAŠKA, THE FACES OF JUSTICE, *supra* note 7, at 18-19.

241. See, e.g., Jay Tidmarsh & Roger Trangsrud, *Complex Litigation and the Adversary System* 1209-19 (1998) (suggesting that juries should be eliminated in complex and technical situations).

Hierarchical control between courts takes time. So, the managerial judging system dislikes broad appellate review.²⁴² In this sense, managerial judging differs from the inquisitorial system's hierarchical model. But at the same time, in its conception of the relationship between the court and the parties, managerial judging is more hierarchical than both the adversarial and the inquisitorial systems. As we saw, the managerial judging system conceives the parties as assistants of the court that may be sanctioned if they do not perform their duties of speeding up the procedure. Neither the adversarial nor inquisitorial systems conceive the relationships between the court, prosecution and defense in such a hierarchical fashion.

Since a pure managerial judging system has a unitary court and no jury, there is no need for detailed technical rules of evidence in this model.²⁴³ Parties' discussions about the admission or rejection of evidence at trial may be very time-consuming.²⁴⁴ And since the judges need to know as much as possible about the case in order to expedite it, the managerial judging system does not welcome technical rules of evidence that prevent the court from getting this information.²⁴⁵

An inquisitorial hierarchical model typically depends on a dossier, which provides guidance for the court; managerial judges need such guidance too for case management. A written dossier could provide this information. But other functionally equivalent ways to get this information are equally good. For instance, in the case of U.S. civil procedure, pre-trial conferences may provide this information. In addition, in order to shorten the pre-trial phase, the managerial judging system limits the number and length of pre-trial depositions as much as possible,²⁴⁶ except when depositions are helpful to avoid or shorten the trial.²⁴⁷ Furthermore, in order to reduce the length of the trial, once the parties have taken a deposition or statement from

242. In U.S. civil procedure, the move toward managerial judging has limited the control of appellate courts over the trial courts, especially during the pretrial phase. Since the Federal Rules of Civil Procedure were initially enacted, the pretrial phase has become increasingly longer and more important because of broader discovery, joinder, and judicial encouragement of settlement. And given the final judgment doctrine in U.S. civil procedure—which basically states that only final decisions can be appealed—the overall control of appellate courts over trial courts has diminished. See Yeazell, *supra* note 115, at 646-48. On the interlocutory appeals available in complex litigation cases in U.S. civil procedure, see *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 208-11.

243. See, e.g., Mullenix, *supra* note 232, at 19.

244. On this point, see for example Langbein, *supra* note 32.

245. Resnik, *supra* note 2, at 408.

246. See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 83. Fed. R. Civ. P. 30(a)(2)(A), 31(a)(2)(A), 30(d)(2), 26(b)(2), among others, establish limits to the number and length of depositions and give the court final authority over these issues.

247. Long depositions can contribute to shortening the trial in U.S. civil procedure, because the information that is acquired through them may lead to summary judgments or narrow down the issues under discussion at trial.

a witness, the managerial judging system welcomes the reading of summaries of these depositions or statements rather than hearing live witnesses.²⁴⁸ Unlike the adversarial system and its coordinate model, managerial judging does not make a clear distinction between the guilt-determination and sentencing phases. Holding two separate sets of hearings for each of these determinations can be very time-consuming; thus, the managerial judging system would include them in a single process.

Finally, the managerial system uses a specific set of management techniques to speed up the docket.²⁴⁹ These techniques include the power of the court to hold pre-trial conferences to expedite the disposition of the action;²⁵⁰ a case-management plan that may include procedures for identifying and narrowing disputed issues, conducting discovery efficiently, and preparing for trial;²⁵¹ scheduling orders that limit the time to amend the pleadings, file motions and end the discovery process;²⁵² referring the case to magistrate judges or special masters to closely supervise the parties' progress toward simplifying and streamlining the case during the pre-trial proceedings;²⁵³ and related techniques.

It is important to mention four final general points about the managerial judging system as a theoretical model. The first is that managerial judging should not be confused with management in general or case management in particular.²⁵⁴ The managerial judging system is a procedural system. That this procedural system is structured to process cases as quickly as possible should not confuse us about this issue. There are actually many management techniques

248. See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 143. The Manual clearly prefers these stipulated statements or summaries over reading the whole deposition at trial, which is discouraged in jury trials. See *id.* at 143. In nonjury trials, the Manual even more strongly encourages the introduction of written statements. *Id.* at 164.

249. Elliot, *supra* note 197, at 311-12.

250. Pre-trial conferences are held to establish early and continuing control over the case, and to encourage stipulations and settlement. See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 32, 36. On the historical origin of the use of pre-trial conferences, see Resnik, *Trial as Error*, *supra* note 190, at 939-40.

251. See *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 36-37.

252. See Fed. R. Civ. P. 16(b). See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 39.

253. Regarding the appointment of special masters, see for example Fed. R. Civ. P. 53. See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 114-16. Regarding the use of magistrate judges, see Fed. R. Civ. P. 53(i), 72. See also *MANUAL FOR COMPLEX LITIGATION*, *supra* note 198, at 13-14, 117. For a classic analysis of the use of special masters in U.S. civil procedure, see Geoffrey C. Hazard, Jr. & Paul R. Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 Am. B. FOUND. RES. J. 375. On the historical origins of special masters in the U.S., see Kessler, *supra* note 189.

254. The management techniques that I mentioned *supra* as characteristic of the managerial judging system are such to the extent that they assume that the judge is an expediting manager of the case and that the parties still run their pre-trial investigations and trial cases.

and devices that fit perfectly with all procedural models.²⁵⁵ And all procedural systems manage legal cases and seek to avoid excessive delay.²⁵⁶

What distinguishes the managerial judging system is that this goal of expediting cases becomes particularly important, *and* the court becomes the main manager in charge of expediting cases while the parties still keep the main responsibility in running their pre-trial investigations and trial cases. This re-definition of the role of the court and this aspiration to expedite cases bring with them a re-definition of the role of the parties and other procedural features.

The second point is that the description of the managerial judging system just provided should be taken as a procedural model. Like the adversarial and inquisitorial systems described above, no actual procedure exactly matches the managerial judging system. But procedures in different jurisdictions may be closer or farther from the procedural model, and this proximity or distance is helpful not only to classify an existing procedure and compare it to other procedures, but also to explain how this existing procedure may change and reproduce itself over time.

The third point bearing emphasis is that the managerial judging system, like the adversarial and inquisitorial ones, is not only a technique to handle legal cases, but also a procedural culture and a way to distribute powers and responsibilities among the main actors in the legal process. As a procedural culture, managerial judging conceives procedure as a device that the court uses with the compelled collaboration of the parties to process cases as swiftly as possible.²⁵⁷

255. For instance, increasing the number of judges, court employees, or courtrooms, or putting judicial documents in a database which the judges and parties can access, are ways to increase the efficiency of most procedural models. Thus, even if ICTY has increased the number of its judges over time, this should not be considered part of managerial judging as a procedural model. The Tribunal started with eleven judges but now has sixteen permanent judges and nine ad litem judges. The U.N. Security Council created a group of twenty-seven ad litem judges available for the Tribunal to draw upon to increase its judgment capacity. *See, e.g.*, Eighth Annual Report of the ICTY, August 13, 2001, Summary. As many as nine ad litem judges can serve at one time. Regarding courtrooms, ICTY started working with one courtroom and today has three. *See* First Annual Report, para. 36; Tenth Annual Report of the ICTY, August 20, 2003, para. 47. ICTY has developed a judicial database. *See* Ninth Annual Report of the ICTY, August 14, 2002, para. 290; Tenth Annual Report of the ICTY, August 20, 2003, para. 314.

256. In the U.S. adversarial system, the Sixth Amendment right to a speedy trial and the Federal Speedy Trial Act show this concern. Inquisitorial systems also are contemporarily concerned with the speed of the proceedings, and human rights treaties—such as the European Convention of Human Rights and the American Convention of Human Rights—establish speedy trial rights.

257. As with the adversarial and inquisitorial systems, it is possible to identify within this procedural culture a structure of interpretation and meaning through which the different participants of the legal process understand procedure and their role within the system, and the internal dispositions of the legal actors who have internalized this structure of interpretation and meaning. Managerial judging may

The description of managerial judging in this section has given content to this structure of interpretation and meaning and set of internal dispositions. From these features, it should also be apparent that as to the dimension of procedural powers, the managerial judge has more power vis-à-vis the parties than the adversarial judge, though she has less power than the inquisitorial judge who can run the process by herself.

Finally, even if the managerial judging system captures a particular technique to handle legal cases, a procedural culture and a way to distribute powers and responsibilities among the main actors in the legal process, the managerial judging system is not a pure model like the adversarial and inquisitorial systems. The adversarial and inquisitorial systems are pure models in the sense that their defining features do not overlap between them. Each defining feature of the adversarial and the inquisitorial systems finds an opposing feature in the other: judge as passive umpire vs. judge as active investigator; prosecutorial discretion vs. rule of compulsory prosecution; guilty pleas vs. absence of guilty pleas; cases of the parties vs. unitary investigation; jury vs. professional judges; and so on.

The managerial judging system presents elements that the other two systems do not present in their traditional formulations, such as the court actively encouraging parties' agreements on factual and legal issues. But, at the same time, the managerial judging system presents definitional features that overlap with features of the other two models. For instance, it has professional judges and no rules of evidence like the inquisitorial system; and broad prosecutorial discretion and guilty pleas like the adversarial system. These features may have different rationales in the managerial judging system than in the adversarial and inquisitorial systems—i.e., expediting management as opposed to either dispute resolution or truth determination. But given this overlap between these features, it is not possible to think of the managerial judging system as a pure model like the adversarial and the inquisitorial ones.

In this sense, the managerial judging system is a hybrid model. For the purposes of this article it is not necessary to analyze, though, whether the managerial judging system is a hybrid *just* between the adversarial and inquisitorial systems, or rather between the adversarial and inquisitorial systems and other procedural features. An analysis of this issue would require a more detailed analysis of the adversarial and inquisitorial systems as theoretical categories and would deviate from the main purpose of this article, which is to explain the evolution of ICTY procedure.

also work as a legal identity. For instance, some judges have proudly embraced their role as managers in U.S. civil procedure. For examples, see Connolly, *supra* note 186.

B. The Reforms to ICTY Criminal Procedure and the Rise of International Managerial Judging

Since July 1998, ICTY judges have introduced a substantial number of reforms to ICTY's procedure, moving it away from the adversarial system.²⁵⁸ The driving force behind these reforms has not been ICTY legal actors' different cultural understandings of the criminal process, but the criticisms and problems about the pace of proceedings described in Section V.²⁵⁹ ICTY judges have aimed to expedite the docket, not only to reduce the length of pre-trial detention, but also to defend ICTY's legitimacy and international support.²⁶⁰ By introducing these reforms, the judges also have transformed the procedural culture of the Tribunal. Since three of the main reforms have been to make the judges more active players, to create a sort of proto-written dossier and to rely more on written evidence, commentators have described these reforms as inquisitorial.²⁶¹ But this section will show how these reforms do not actually

258. Recall that, according to Article 15 of the Statute of ICTY, the judges have the power to amend the Rules of Procedure and Evidence of the Tribunal. The fact that ICTY judges have been in charge of developing their own Rules of Procedure and Evidence has been criticized on the grounds that they simultaneously perform legislative and adjudicative roles. See, e.g., Fabricio Guariglia, *The Rules of Procedure and Evidence of the International Criminal Court. A New Development in International Adjudication of Individual Criminal Responsibility*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1111 (Antonio Cassese et al. eds., 2002). Perhaps to address this kind of criticism, the judges have reformed the Rules of the Tribunal to take into consideration the opinions and interests of the Office of the Prosecutor and the representatives of the Defense Counsel. See Ninth Annual Report of the ICTY, August 14, 2002, Summary.

259. An indication that different cultural understandings about the criminal process have not driven these expediting reforms is that the reforms were initiated under the leadership of the second president of the Tribunal, Gabrielle Kirk McDonald, from a common law jurisdiction like the United States; and then deepened under the leadership of the third president of ICTY, Claude Jorda, from a civil law jurisdiction like France. The pressures on the Tribunal to expedite the docket have continued over time. As a way to address the criticisms about the pace of proceedings, Claude Jorda promised the U.N. Security Council in May, 2000, that the Tribunal would finish its trials by the end of 2007 (which later extended to 2008). The Security Council approved the proposal. Security Council Res. 1503 (2003) was the first comprehensive blueprint for the so-called "Completion Strategy" emanating from the Security Council rather than ICTY itself. The Completion Strategy comprises three stages: the 2004 deadline for completion of investigations, the 2008 deadline for completion of first-instance trials and the 2010 deadline for completion of all work of ICTY. See Dominic Raab, *Evaluation of the ICTY and its Completion Strategy*, 3 J. INT'L CRIM. JUST. 82 (2005). See also Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142 (2005).

260. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13; Seventh Annual Report of the ICTY, July 26, 2000, Summary ("The judges are of the view that the Tribunal has reached a turning point in its history and that its credibility and the international support it enjoys are at stake. They also believe that the prompt return to a lasting, deep-rooted peace in the Balkans is linked to the accomplishment of the Tribunal's mission within a reasonable time-frame.").

261. See, e.g., Boas, *supra* note 182, at 57-58; Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former*

fit the conventional understanding of the inquisitorial system and are better described—together with the whole current ICTY criminal procedure—as fitting into the managerial judging model.²⁶²

During the pre-trial phase, no later than seven days after the initial appearance of the accused, the Trial Chamber presiding judge must designate from among its members a judge responsible for the pre-trial proceedings.²⁶³ This pre-trial judge must coordinate communication between the parties during the pre-trial phase, ensure that nobody unduly delays the proceedings, and take any measure necessary to prepare the case for a fair and expeditious trial.²⁶⁴

Yugoslavia and the International Criminal Court, 12 CRIM. L.F. 167, 174 (2001) (“What all these amendments embody is a radical change in the focus of ICTY on trial preparation. These amendments encompass continental law concepts whereby it is the court that determines the nature and scope of the case and determines which evidence is best tested.”); CASSESE, *supra* note 4, at 387 (“[O]ver the years there has been a gradual incorporation of significant features of the inquisitorial model into the procedural system of ICTY and the ICTR, which initially was largely based on the adversarial scheme.”); Mundis, *supra* note 162; Tochilovsky, *Rule of Procedure for the International Criminal Court*, *supra* note 4, at 359 (“Although most of ICTY Rules of Procedure were borrowed from the common-law systems, ICTY practice has proved that the *ad hoc* Tribunal’s criminal proceedings are evolving into a real hybrid of the two major legal systems in operation in the world today. The proceedings tend to combine a common-law contest between two parties before uninformed judges and a civil-law scrutiny of evidence with active, informed judges”); Tochilovsky, *supra* note 65, at 632 (“It was mostly a wish to expedite trials and, for that purpose, to give the judges more control over proceedings that prompted ICTY Judges to turn to a civil law practice.”); ZAPPALA, *supra* note 4 (“[P]ractice evidenced the drawbacks of applying a purely accusatorial model to international criminal proceedings, and thus amendments were required. In amending the procedural system of the *ad hoc* Tribunals . . . some inquisitorial elements were upheld, thereby diluting the originally adversarial imprint.”).

262. As explained in the previous subsection, managerial judging is a hybrid model whose features partially overlap with those of the adversarial and inquisitorial systems. One could thus conclude that by moving away from the adversarial system and towards managerial judging, ICTY procedure has become in a sense closer to the inquisitorial system. My disagreement with these commentators is that they have described ICTY reforms as inquisitorial. This subsection will show that these reforms do not correspond with any of the features that we find in the inquisitorial system. Rather, the reforms fit into the managerial judging system. The second shortcoming of the commentators’ position is that they have characterized the new procedure of ICTY as a hybrid, without explaining what specific kind of hybrid the Tribunal has adopted. Since there are many potential hybrids or combinations of the adversarial and inquisitorial systems—and between the elements of these systems and other elements that do not fit into either of these two classic models—merely characterizing a procedure as a hybrid tells us little about it. By offering the managerial judging system as the best description of ICTY procedure, this subsection also aims to correct that shortcoming.

263. Rule 65 *ter* (A). On the importance of early assignment of cases to a judge in U.S. civil procedure, see MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 9-10.

264. Rule 65 *ter* (B). Trial Chambers have embraced these goals as the duty of the pre-trial Judge. See, e.g., Prosecutor v. Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Order Concerning Rule 66(A)(II) Materials, Expert Report and Pre-Trial Briefs Decision, 1 (July 30, 2003) (finding that the duty of the Pre-Trial Judge is to ensure that the proceedings are not unduly delayed and to take any measure necessary to prepare the case for a fair and expeditious trial).

In order to achieve this goal of expediting the proceedings, the pre-trial judge uses a number of techniques characteristic of the managerial judging system. These include holding pre-trial or status conferences "to organize exchanges between the parties so as to ensure expeditious preparation for trial,"²⁶⁵ establishing a work plan for the parties "indicating the obligations that the parties are required to meet . . . and the dates by which these obligations must be fulfilled,"²⁶⁶ setting a time for the making of pre-trial motions and any hearing thereon,²⁶⁷ and ordering the parties to meet to discuss issues related to the preparation of the case.²⁶⁸ In doing all this, a senior legal officer²⁶⁹—who plays a role similar to the special master of U.S. civil procedure—may assist the judge.²⁷⁰ Other management techniques also are available.²⁷¹

The court is also an active manager during the trial and its preparation. Prior to the commencement of the parties' trial cases, the Trial Chamber must hold pre-trial conferences.²⁷² In these conferences, the Trial Chamber may call upon the prosecutor and the de-

265. Rule 65 *bis* (A) ("A Trial Chamber or a Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference . . . to organize exchanges between the parties so as to ensure expeditious preparation for trial"). Judges have embraced this goal of status conferences. *See, e.g.,* Prosecutor v. Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Status Conference, 50 (July 29, 2003); Prosecutor v. Vojislav Šešelj, ICTY Trial Chamber, Case No. IT-03-67-I, Status Conference, 116 (Oct. 29, 2003). The other stated purpose of status conferences is to review the status of the accused's case and to allow him or her the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused. *See* Rule 65 *bis* (A)(ii).

266. Rule 65 *ter* (D)(ii). *See, e.g.,* Prosecutor v. Damir Došen and Dragan Kolundžija, Scheduling Order, ICTY Trial Chamber (June 9, 2000).

267. Rule 65 *ter* (K).

268. Rule 65 *ter* (D)(iv). *See also* Rule 65 *ter* (D)(v) ("Such meetings are held *inter partes* or, at his or her request, with the Senior Legal Officer and one or more of the parties."). For an application of these powers, see for example Prosecutor v. Stanislav Galić, ICTY Trial Chamber, Case No. IT-98-29, Scheduling Order and Order on the Prosecution's Motion for the Trial Chamber to Travel to Sarajevo (Jan. 22, 2001).

269. *See* Seventh Annual Report of ICTY, July 26, 2000, Summary, para. 10, 340 ("[T]he pre-trial management would be accelerated through increased recourse to the senior legal officers, thus freeing up the judges to devote more of their time to hearings and to the drafting of decisions and judgements."); Eighth Annual Report of ICTY, August 13, 2001, para. 58; Ninth Annual Report of ICTY, August 14, 2002, para. 295; Tenth Annual Report of ICTY, August 20, 2003, para. 318.

270. The senior legal officer oversees the implementation of the work plan, *see, e.g.,* Eighth Annual Report of ICTY, August 13, 2001, para. 52, and keeps the pre-trial judge informed of the progress of the discussions between and with the parties, Rule 65 *ter* (D)(iii). Judges have made use of these powers. *See, e.g.,* Prosecutor v. Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Initial Appearance, 7 (Apr. 15, 2003).

271. Another technique worth mentioning is that, on May 19, 2003, the Security Council adopted resolution 1481 (2003), amending the Tribunal's Statute to permit ad litem judges to do pre-trial work in addition to participating in trials. *See* Tenth Annual Report of ICTY, August 20, 2003, para. 5. The use of ad litem Judges for this pre-trial management function is similar to the use of Magistrate Judges for pre-trial management in U.S. civil procedure.

272. *See* Rule 73 *bis* (A); Rule 73 *ter* (A).

fense to shorten the estimated length of the examination-in-chief for some witnesses,²⁷³ must determine the number of witnesses that each of the parties may call,²⁷⁴ and must set the time available to the prosecution and the defense to present evidence at trial.²⁷⁵ The Trial Chamber also may select a number of crime sites or incidents as representative of the crimes charged in the indictment, and restrict the prosecution's presentation of evidence to those sites or incidents.²⁷⁶

During trial, the court must "exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of truth; and (ii) avoid needless consumption of time."²⁷⁷ The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses that the parties submit before presenting their trial cases.²⁷⁸

The judges have also used a number of managerial devices not explicitly included in the Rules to speed up trials. For instance, in *Stakić*, in response to a Trial Chamber's request, the prosecution conceded that it had not proved four specific allegations included in the indictment.²⁷⁹ This saves trial time because the defense does not have to deal with such allegations. In the same case, the Trial Chamber held eleven meetings with the parties in chambers while the trial

273. See Rule 73 bis (B); Rule 73 ter (B).

274. Rule 73 bis (C)(i); Rule 73 ter (C). The rationale for the introduction of these reforms has been expediting the procedure. See Eighth Annual Report of the ICTY, August 13, 2001, para. 52-53. For examples of how trial courts have used these powers, see Prosecutor v. Dario Kordić and Mario Čerkez, "Lasva Valley," ICTY Trial Chamber, Case No. IT-95-14/2, Open Session, 14418-19 (Feb. 16, 2000); Prosecutor v. Dario Kordić and Mario Čerkez, "Lasva Valley," ICTY Trial Chamber, Case No. IT-95-14/2, Scheduling Order (Apr. 4, 2000); Prosecutor v. Dario Kordić and Mario Čerkez, "Lasva Valley," ICTY Trial Chamber, Case No. IT-95-14/2, Scheduling Order (Apr. 28, 2000); Prosecutor v. Sikirica, "Keraterm Camp," ICTY Trial Chamber, Case No. IT-95-8-T, Pre-Trial Conference (Feb. 8, 2001).

275. Rule 73 bis (C)(ii); Rule 73 ter (E). See, e.g., Eighth Annual Report of the ICTY, August 13, 2001, para. 3-4, 19.

276. See Rule 73 bis (D). Amendment of Rule 73 bis of July 17, 2003, included this last power. The Judicial Practices Working Group drafted the amendment in order to give the Trial Chambers greater authority to control the scope of the prosecution case. See Tenth Annual Report of the ICTY, August 20, 2003, para. 12, 34.

277. Rule 90 (F). See, e.g., Prosecutor v. Jelisić, ICTY Trial Chamber, Case No. IT-95-10, Trial Transcript, 17 (Sep. 7, 1999) (applying Rule 90 (G)—the antecedent of the current Rule 90 (F)—to establish that the time for carrying a cross-examination corresponds as much as possible to the time taken for the examination-in-chief). For examples of judges interrupting *motu proprio* testimony during the sentencing hearing to avoid repetitions and to make sure that the testimony remains focused, see Prosecutor v. Miroslav Deronjić, ICTY Trial Chamber, Case No. IT-02-61-S, Sentencing Hearing, 124, 126, 131-32, 155-56 (Jan. 27, 2004).

278. Rule 90 (G). The rationale for the introduction of this power to the Trial Chamber was expediting the proceedings. See Eighth Annual Report of the ICTY, August 13, 2001, para. 52-53.

279. Prosecutor v. Milomir Stakić, ICTY Trial Chamber, Case No. IT-97-24-T, Judgment, para. 971 (July 31, 2003).

was running, applying by analogy Rule 65 *ter* that regulates the work of the pre-trial judge as a case manager.²⁸⁰

Note that this active court that controls the case during the pre-trial and trial phases differs from an inquisitorial one on at least two levels. First, the goal of its activism is not to be an active investigator of the truth, but an active manager who tries to expedite and simplify the court's cases.²⁸¹ In fact, the Tribunal itself has perceived this judicial activism in this way.²⁸² Furthermore, unlike an inquisitorial court, an ICTY court does not make its own investigation before or during trial, but rather leaves this responsibility to the parties.²⁸³ The main role of the court is not to actively investigate the truth, but to actively coordinate and supervise the work of the parties, so that their investigations and trial cases get simplified and expedited.²⁸⁴

Also in accord with the managerial judging system, the reforms have re-defined the role of the parties as not only zealous advocates of their cases, but also assistants of the court in the goal of expediting

280. *Id.* at para. 980.

281. Commentators have assumed that the more active role taken by ICTY judges is an inquisitorial reform. The problem with this approach is that judges can be active for many different reasons: for example, to investigate the truth, as in traditional inquisitorial systems; to expedite proceedings, as in managerial judging systems; to implement state policies, as in certain socialist systems; or to protect constitutional rights, as some judges in the U.S. adversarial system seek to do. To put all these different kinds of judicial activism under the same label would blur the important differences between them. I think this may be a problem into which the first dichotomy of Prof. Damaška's theoretical framework—the opposition between conflict-solving and policy-implementing types of procedure—may also fall, given that the policy-implementing type of procedure seems to equate judicial activism with policy-implementing goals. On the opposition between conflict-solving and policy-implementing types of procedure, see DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 7, at 71-180. This is one of the reasons why I do not use this opposition to define adversarial and inquisitorial systems in Section II, and I rather use the opposition between the model of the dispute and the model of the official investigation.

282. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 14 ("The judges have taken a number of steps to reduce the length of trials. These include adopting amendments to the Rules in July 1998, which provide for active pre-trial management of pending cases and strengthening the ability of the Trial Chamber to control trial proceedings."); Seventh Annual Report of ICTY, July 26, 2000, para. 288 ("28 rules were amended and 3 new rules were adopted, entering into force on 7 December 1999 Many of these amendments were intended to speed up trials and the pre-trial process and to minimize delays [A]mendments were made to the powers and role of the pre-trial judges and to improve pre-trial management."). An indication of the expediting (rather than truth-determining) goal of the reforms is the fact that the Expert Report urged judges to be more active in the interrogation of witnesses as a way to reduce the length of testimony, not to be more accurate in determining the truth. See Expert Report, *supra* note 85, para. 75, 76.

283. See, e.g., Rule 39 (establishing the powers of the prosecutor while conducting his investigation); Rule 85 (regulating the order in which the parties present their evidence at trial).

284. Alphons Orie is the only commentator who correctly sees that the active judge incorporated by ICTY does not resemble the inquisitorial judge. However, he does not propose any model to give an account of this phenomenon. See Orie, *supra* note 60, at 1465.

cases.²⁸⁵ As assistants, the prosecution and the defense now have a number of new duties. For instance, before trial, both the prosecution and the defense have to submit to the court pre-trial briefs that let the court perform its management function more effectively.²⁸⁶ In her pre-trial brief,²⁸⁷ the prosecutor has to disclose substantial parts of her trial case and strategy and show her good will about settling as many issues as possible.²⁸⁸

In addition, the prosecutor has to submit, not less than six weeks before the pre-trial conference, the list of witnesses she intends to call at trial.²⁸⁹ This list includes a summary of the facts on which each witness will testify,²⁹⁰ the number of witnesses who will testify against each accused on each count,²⁹¹ an indication of whether the witness will testify in person or by way of written statement,²⁹² the estimated length of time required for each witness, and the total time estimated for presentation of the prosecutor's case.²⁹³ The prosecutor also must provide a list of exhibits she intends to offer, stating where possible whether the defense has any objections as to authenticity.²⁹⁴

The defense also has to submit a pre-trial brief,²⁹⁵ which must indicate the nature of the accused's defense,²⁹⁶ and any matters with which the accused takes issue in the prosecutor's pre-trial brief²⁹⁷ and why.²⁹⁸ In addition, before its case begins, the defense also must

285. In September 2002, pursuant to decisions made at the July 2002 plenary, the Tribunal witnessed the establishment of an Association of Defence Counsel. Under revised Rule 44 (A)(iii), attorneys representing accused persons at the Tribunal must belong to the Association, which makes them subject to a code of professional conduct and a disciplinary system. See Tenth Annual Report of the ICTY, August 20, 2003, para. 11. But the creation of this institution has been considered a way not only to have more independent counsel but also to expedite the proceedings through a deepening of the professionalization of ICTY defense attorneys. See, e.g., Ninth Annual Report of the ICTY, August 14, 2002, para. 17.

286. See Rule 65 *ter* (E); Rule 65 *ter* (F). These two rules find antecedents in managerial judging in U.S. civil procedure. See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 198, at 124. See also Elliot, *supra* note 197, at 313.

287. The prosecutor has to submit her pre-trial brief not less than six weeks before the pre-trial conference. See Rule 65 *ter* (E).

288. The prosecutor has to show her good will about settling issues by providing, among other things, a summary of the evidence which the prosecutor intends to bring for each count, any admissions by the parties, a statement of matters which are not in dispute, and a statement of contested matters of fact and law. See Rule 65 *ter* (E)(i).

289. Rule 65 *ter* (E)(ii)(a).

290. Rule 65 *ter* (E)(ii)(b).

291. Rule 65 *ter* (E)(ii)(d).

292. Rule 65 *ter* (E)(ii)(e).

293. Rule 65 *ter* (E)(ii)(f).

294. Rule 65 *ter* (E)(iii).

295. The defense has to submit its pre-trial brief after the pre-trial submission by the Prosecutor and within a time-limit that the pre-trial Judge sets, though the limit cannot be later than three weeks before the pre-trial conference. See Rule 65 *ter* (F).

296. Rule 65 *ter* (F)(i).

297. Rule 65 *ter* (F)(ii).

298. Rule 65 *ter* (F)(iii). For a justification of these reforms, see for example Seventh Annual Report of the ICTY, July 26, 2000, para. 288-89 ("Many of these amend-

submit lists of witnesses²⁹⁹ and exhibits it intends to offer, stating where possible whether the prosecutor has any objection as to authenticity.³⁰⁰

All this information is aimed at making sure that the parties agree on as many factual and legal issues as possible, to enable efficient trial management and avoid cumulative or unnecessary evidence or potentially disruptive surprises at trial.³⁰¹ As a way to try to assure that the parties will collaborate with the court to expedite the proceedings, Rule 65 *ter* (N) expressly provides that if a party fails to perform these obligations, the Trial Chamber will decide on sanctions to be imposed on that party,³⁰² including possible exclusion of testimonial or documentary evidence from trial.³⁰³ Other rules and directives also include sanctions for a party that does not comply with its discovery duties³⁰⁴ or other requirements that the Tribunal

ments were intended to speed up trials and the pre-trial process and to minimize delays New rules now require the defence to set out its case in more detail in advance and to raise matters relevant to its case in cross-examination whenever possible.”).

299. Rule 65 *ter* (G)(i). With its list of witnesses, the defense has to indicate the name or pseudonym of each witness; a summary of the facts on which each witness will testify; the total number of witnesses and the number of witnesses who will testify for each accused and on each count; an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* by way of a written statement or use of a transcript of testimony from other proceedings before the tribunal; and the estimated length of time required for each witness and the total time estimated for the presentation of the defense case. For an exchange on the extent of this defense duty, see for example *Prosecutor v. Dario Kordić and Mario Čerkez*, “Lasva Valley,” ICTY Trial Chamber, Case No. IT-95-14/2, Open Session, 14419-20 (Feb. 16, 2000). *See also* *Prosecutor v. Zoran Kupreškić et al*, “Lasva Valley,” ICTY Trial Chamber, Case No. IT-95-16, Decision (Jan. 11, 1999) (ordering the defense to provide the Trial Chamber and Prosecution with more detailed summaries of the witnesses it intends to call at trial); *Prosecutor v. Radislav Krstić*, “Srebrenica-Drina Corps,” ICTY Trial Chamber, Case No. IT-98-33, Scheduling Order, (Sep. 12, 2000) (ordering the defense to present its list of witnesses and exhibits).

300. Rule 65 *ter* (G)(ii). For an example of a pre-defense conference see *Prosecutor v. Krstić*, “Srebrenica-Drina Corps,” ICTY Trial Chamber, Case No. IT-98-33, Pre-Defense Conference, (Oct. 5, 2000).

301. *See, e.g.*, Export Report, *supra* note 85, para. 89 (stating that the underlying logic for broader disclosure duties by the defense would be to expedite the trial by enabling the parties and the court to focus on the real issues).

302. The rationale for the introduction of these sanctioning powers has been precisely to expedite proceedings. *See* Eighth Annual Report of the ICTY, August 13, 2001, para. 52-53.

303. Rule 65 *ter* (N). For a discussion among a Trial Chamber and the parties on the meaning of this Rule, see *Prosecutor v. Mladen Naletilić aka ‘Tuta’ and Vinko Martinović aka ‘Stela’*, ICTY Trial Chamber, Case No. IT-98-34, Open Session (Apr. 12, 2002).

304. *See* Rule 68 *bis*: “The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.” This Rule was introduced on December 13, 2001 to enhance the Tribunal’s ability to conduct trials expeditiously. *See* Ninth Annual Report of the ICTY, August 14, 2002, para. 38, 41. *See also* Rule 77 (regulating the contempt powers of the Tribunal); Rule 90 (G) (establishing that the Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled during the pre-trial and pre-defense conferences).

imposes.³⁰⁵ The Tribunal has also changed its fee system to assure that defense counsel does not delay the proceedings unnecessarily.³⁰⁶ And one also can read the decision to impose counsel in the Milosević case as a way to assure defense collaboration with the court in not obstructing process.³⁰⁷

In addition, the judges have used informal rewards,³⁰⁸ warnings³⁰⁹ and sanctions³¹⁰ to make sure that the parties collaborate.

305. See Practice Directive on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155 Rev. 1. The Tribunal amended this directive mainly to add a provision enabling the Appeals Chamber to punish parties for failing to respect the directives. See Ninth Annual Report of the ICTY, August 14, 2002, para. 14.

306. Appointed counsel has handled more than ninety percent of the cases before the Tribunal. See, e.g., Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 945, 951 (2003); David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975, 978 (2003). So, the legal aid system of ICTY has been one of the main ways to regulate counsel conduct. This legal aid system requires the defense to be efficient in its management of cases. See *Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system*, at para. 4, U.N. Doc. A/58/150 (2003) [hereinafter *Comprehensive Report*]. In 1995, the:

[t]ribunal set hourly rates for counsel ranging between \$80 and \$110 In an effort to rationalize the system and to control costs, the Registry established a ceiling on the amount of allowable hours per month for the remuneration of assigned counsel However, the system in place had its drawbacks. There was limited incentive for defence teams to perform efficiently, as the system was based on payments of monthly maximum allotments for as long as a case lasted In order to reduce the potential for obstructive and dilatory tactics by assigned counsel, the Registry decided in 1998 that it would take into account delays in pre-trial and trial proceedings deemed to have clearly been caused by such tactics. In such cases, counsel invoices were reduced accordingly In January 2001, the Registry introduced its first major reform of the legal aid system. The reforms were motivated by the need . . . to create incentives for counsel to work efficiently While payment was previously made for hours billed by defence regardless of the duration of the proceedings, this modified system is based on the allocation by Registry of a maximum number of hours, paid out in monthly disbursements for pre-trial and appeal stages based on invoiced hours

Id. at para. 7, 8, 11, 12, 16. For the trial, the Tribunal introduced a lump-sum system to "provide defence teams with greater flexibility and incentive to manage their resources and time in the most efficient manner." *Id.* at para. 24.

307. See *Milosević v. Prosecutor* ("Kosovo, Croatia and Bosnia"), ICTY Appeals Chamber, Case No. IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel (Nov. 1, 2004) (affirming in part and reversing in part the Trial Chamber's decision to impose counsel on Slobodan Milosević who, until then, had represented himself at trial, based on the trial delays that Milosević's health condition had produced).

308. See, e.g., *Prosecutor v. Limaj, Bala, and Musliu*, ICTY Trial Chamber, Case No. IT-03-66-PT, Status Conference, 71 (June 25, 2003) (where Judge Martin Canivell said: "I had heard that the Prosecution has mentioned the possibility of speeding up, if possible, the case, the proceedings, and that perhaps will be able to start with the case in mid-February. So I . . . rejoice of this possibility and encourage you to keep going in this way so as to try to keep this alleged promised schedule.").

309. See, e.g., *Prosecutor v. Mladen Naletilić aka 'Tuta' and Vinko Martinović aka 'Stela'*, ICTY Trial Chamber, Case No. IT-98-34, Decision on the Accused Naletilić's

For instance, judges have expected that the parties would agree to introduce a larger number of Rule 92 *bis* written statements at trial, instead of producing oral testimony, and the judges have not hesitated to pressure the parties to collaborate in this endeavor. The following exchange between Judge Hunt (acting as pre-trial judge) and a prosecutor in a status conference provides an example of this phenomenon:

Mr. McLoskey: I think we need to get Mr. Karnavas here and get his views and . . . find out what kind of strategy he has. As you know, there are many different strategies that can be employed, and if he wishes to take on everything, it will be significantly longer.

Judge Hunt: Yes, I can believe that.

Mr. McCloskey: Though with 92 *bis* actively enforced, it wouldn't necessarily need to be taken (sic) that much longer. As you know, the court has quite a bit of discretion about that.

Judge Hunt: Oh, yes. It is actually starting to bite quite well, that particular Rule, I believe, perhaps we've got—I've been lucky to have had some cooperative Defence counsel, but so far the matter has been delayed only by Prosecution counsel. In one particular case, it took me three quarters of an hour to get Prosecution counsel to tender the statement.

Mr. McCloskey: Well, you shouldn't have that much trouble with this group.

Judge Hunt: I'm sure that everybody will know to whom I'm referring, but it was difficult.³¹¹

Motion to Continue Trial Date, para. 12 (Aug. 31, 2001). Here, the prosecution failed to meet the deadline for discovery set in a status conference, and the defense used this fact as one of the arguments to request the continuance of the trial. The Trial Court denied the continuance request and said:

The administration of justice can only be carried out effectively and fairly when parties to the proceedings undertake to fully co-operate with the Tribunal and efficiently carry out instructions given. On this occasion no serious adverse consequences followed the late compliance with the pre-trial judge's direction at the Status Conference. Both the Prosecution and Defence, however, should now consider themselves on notice that any failure to carry out an order or direction of the Trial Chamber in an orderly and timely manner will be met with adverse consequences for that party. In certain domestic jurisdictions it is the norm for parties to employ dubious tactical trial strategies with a view to diverting the opposite party from the real issues in the case. Such a practice is not to be encouraged before this Trial Chamber.

310. For instance, in 2001 the Tribunal modified the RPP relating to misconduct of defense counsel to allow Chambers to indicate, in their decisions and orders, whether a defense motion appears dilatory. The Registry refused payment of certain fees on the basis of such assessments and on its own review of the defense motions. *Comprehensive Report*, *supra* note 306, at para. 14.

311. Obrenović, Status Conference, 23-24 (Oct. 19, 2001).

Also characteristic of managerial judging, ICTY increasingly has relied on parties' agreements to dispose of or narrow down cases. For instance, the number of plea agreements³¹² substantially increased since 1998, and in 2003, there were more cases concluded through plea agreements than through trials.³¹³

Moreover, both the Rules and the judges have offered incentives to the parties to agree on as many factual and legal issues as possible in order to narrow down the issues under discussion.³¹⁴ When the parties have not reached agreements by themselves,³¹⁵ most judges have followed the managerial judging model by actively encouraging them to reach factual and legal agreements.³¹⁶ Judges have used different techniques for that purpose.³¹⁷ For instance, in *Stakić*, Judge

312. The Tribunal has explicitly welcomed guilty pleas not only as a way to confirm the commission of crimes and as a demonstration of remorse and acceptance of responsibility but also as a way to save court time, including appeal court time. See, e.g., Tenth Annual Report of the ICTY, August 20, 2003, para. 230.

313. While seven defendants were convicted through trials in 2003, eight defendants offered guilty pleas (even if, in some cases, the sentencing judgments were entered in 2004). See Nancy Amoury Combs, *Plea Bargaining after Mass Atrocities: Bridging Justice and Truth* (on file with the author). On the introduction to ICTY of plea bargaining over both sentencing and charges, see Michael P. Scharft, *Trading Justice for Efficiency*, 2 J. INT'L CRIM. JUST. 1070 (2004).

314. Thus, as we have seen, the prosecution has to include in its pre-trial brief any admissions by the parties and a statement of matters which are not in dispute, as well as a statement of contested matters of fact and law, Rule 65 *ter* (E)(i), while the defense must indicate the matters with which the accused takes issue in the Prosecutor's pre-trial brief and why, Rule 65 *ter* (F)(ii), (iii).

315. The prosecution has tried to reach agreements to simplify trials and cases. See, e.g., Prosecutor v. Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Status Conference, 57-58 (July 29, 2003) (mentioning the so-called Case Map program presented by the prosecution that enables both parties to show the links between certain events, certain locations, and certain persons, which would also show the strengths and weaknesses for both sides and help facilitate agreement between the parties).

316. The Expert Group encouraged ICTY judges to move in this direction. See Expert Report, *supra* note 85, para. 84. In the case of plea agreements, many negotiations have transpired between the prosecution and defense. But even in these cases, most judges have encouraged the agreements by considering the guilty plea a mitigating factor and respecting, in most cases, the upper sentence agreed to by the parties. See, e.g., Prosecutor v. Banović, ICTY Trial Chamber, Case No. IT-02-65/1-S, Sentencing Judgment, para. 61 (Oct. 28, 2003); Prosecutor v. Miroslav Deronjić, ICTY Trial Chamber, Case No. IT-02-61-S, Sentencing Judgment, para. 235 (Mar. 30, 2004).

317. See, e.g., Prosecutor v. Vojislav Šešelj, ICTY Trial Chamber, Case No. IT-03-67-I, Initial Appearance, 4 (Feb. 26, 2003) (Judge Schomburg told the defendant that any kind of substantial cooperation would be to his advantage. In the event that it did not come to a sentencing stage, the defendant's cooperation would be in his own interest to speed up the proceedings. In case it would come to a sentencing stage, such substantial cooperation would always be held in the defendant's favor). In another case, Judge Martin Canivell said to the parties:

I would also ask you . . . to remember that it is a possibility of arriving to an agreement of facts. Of course, in the time this Tribunal has . . . been working, many of the facts which are common from one case to the other had been . . . sometimes . . . rejected by the accused . . . (B)ut in the course of the proceedings some of the facts have been really so well proven that . . . it would be of little use, no use at all, to come again on that . . . [Y]ou can

Schomburg from Germany explicitly said that the collaboration by the defense on this issue would weigh favorably at sentencing:

[I]t should be considered whether or not the accused in person or the Defence, together or alone, make a contribution giving us some common basis whereupon we can work when we come to the central and the key issue of this case, the individual responsibility of Dr. Stakić. And I think Dr. Stakić know (sic) that of course it is his right to remain silent, and no inference can be drawn from the fact that he remains silent. But, on the other hand, . . . every kind of cooperation, also when it's only a question of this cooperation on agreed facts, to put it this way, will be helpful for an accused [A]n accused being not guilty has of course an interest . . . to have an expeditious as possible a trial (sic). Just in case, if, and I once again emphasize, if there would (sic) be a sentencing stage in this case, . . . always this kind of cooperation would be honoured in the sentencing stage, ex officio by the Judges. And therefore, this should be always . . . be seen as an incentive at the beginning of the trial because later on, and we have already some judgements of this Tribunal, later on it may be too late, and it may be not regarded as a kind of cooperation at all if we have heard already numerous witnesses, and if then there is an attempt to

make an effort so as to reach agreements of these facts. That would be helpful also in the disposal of the case.

Prosecutor v. Limaj, Bala, and Musliu, ICTY Trial Chamber, Case No. IT-03-66-PT, Status Conference, 71 (June 25, 2003). See also Prosecutor v. Limaj, Bala, and Musliu, ICTY Trial Chamber, Case No. IT-03-66-PT, Status Conference, 83 (Oct. 23, 2003); Prosecutor v. Željko Meakić et al., ICTY Trial Chamber, Case No. IT-02-65-PT, Status Conference and Further Appearance, 9-10 (Dec. 10, 2002). In another case, Judge Patrick Robinson said:

I understand that the parties have been encouraged to commence discussions on the use of transcript evidence, in particular from the Sikirica trial and that most of the 92 *bis* material would be by way of transcript rather than witness statements. May I inquire from Ms. Chana and from the Defence how these discussions are going? Because if they are not proceeding well, then I think the Chamber will have to consider a particular course of action.

Prosecutor v. Banović et al., ICTY Trial Chamber, Case No. IT-02-65-PT, Status Conference, 62 (Apr. 8, 2003); Judge Patrick Robinson also stated:

I turn next to the length of trial. The Prosecutor had indicated that if it got substantial agreement on the facts in the indictment, its case could be presented in about six weeks; if not, it could be as much as six months. So it's absolutely important to proceed with the endeavour to get agreement.

Id. at 67. See also Prosecutor v. Željko Meakić et al., ICTY Trial Chamber, Case No. IT-02-65-PT, Status Conference and Further Appearance, 90-91 (July 23, 2003). Rule 65 *ter* (H) establishes that the pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact; and that, in this respect, he may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.

cooperate. Probably then it's too late. And this should be really discussed between the Defence counsel and Dr. Stakić before we hear the pleading and we hear the decision whether or not either to testify or to make a statement in the beginning of the trial.³¹⁸

The reforms have not changed the structure of procedure as a competition between the investigations and trial cases of the prosecution and the defense. But, as a consequence of the managerial judging reforms, the cases of the parties are today as much in coordination and cooperation as in competition.³¹⁹ For instance, during the pre-trial phase, the parties have to hold meetings *inter partes* to discuss issues related to the preparation of the case.³²⁰ Before trial, they also must try to reach agreements on as many factual and legal issues as possible,³²¹ and they have broader disclosure duties toward each other.³²² Also typical of managerial judging, the parties now are less masters of their cases than before the reforms.³²³

318. Prosecutor v. Milomir Stakić, ICTY Trial Chamber, Case No. IT-97-24-PT, Pre-Trial Conference, 1568-70 (Apr. 10, 2002).

319. The judges have constantly tried to encourage a spirit of cooperation between the parties. See, e.g., Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Status Conference, 50-51 (July 29, 2003); Prosecutor v. Željko Meakić, Momčilo Gruban, Dušen Fuštar, Predrag Banović, and Duško Knežević, ICTY Trial Chamber, Case No. IT-02-65-PT, Status Conference and Further Appearance, 93 (July 23, 2003).

320. Rule 65 *ter* (D)(v). See, e.g., Prosecutor v. Stanislav Galić, ICTY Trial Chamber, Case No. IT-98-29, Scheduling Order and Order on the Prosecution's Motion for the Trial Chamber to Travel to Sarajevo, (Jan. 22, 2001).

321. See *supra* notes 314-20, and accompanying text.

322. On the disclosure duties by the parties in the current regime of ICTY, see Rules 65 *ter* (E), 65 *ter* (F), 66-70. Judges constantly remind the parties about their discovery duties. See, e.g., Prosecutor v. Naser Orić, ICTY Trial Chamber, Case No. IT-03-68-I, Initial Appearance, 6 (Apr. 15, 2003); Prosecutor v. Franko Simatović, ICTY Trial Chamber, Case No. IT-03-69-I, Initial Appearance, 4-5 (June 2, 2003); Prosecutor v. Jovica Stanišić, ICTY Trial Chamber, Case No. IT-03-69-I, Initial Appearance, 11 (June 13, 2003). The judges supervise the discovery process to assure that it goes smoothly, put pressure on the parties to cooperate, and apply pressure on the parties to reach agreements on discovery issues. See, e.g., Prosecutor v. Limaj, Bala, and Musliu, ICTY Trial Chamber, Case No. IT-03-66-PT, Status Conference, 82 (Oct. 23, 2003); Prosecutor v. Miroslav Deronjić, ICTY Trial Chamber, Case No. IT-02-61-S, Status Conference, para. 27-28 (Oct. 30, 2002).

323. Thus, during the pre-trial phase, the pre-trial judge now establishes a work plan indicating, in general terms, the obligations that the parties are required to meet and the dates by which these obligations must be fulfilled, Rule 65 *ter* (D)(ii). At trial, the court has broad powers to limit the length of the examination-in-chief of the prosecution and the defense for some witnesses, Rule 73 *bis* (B) and Rule 73 *ter* (B); determine the number of witnesses that each side may call, Rule 73 *bis* (C)(i) and Rule 73 *ter* (C); and determine the time available to each for presenting evidence, Rule 73 *bis* (C)(ii), Rule 73 *ter* (E). For an interesting reaction by the prosecution against these powers of the Trial Chamber, see Prosecutor v. Kordić and Čerkez, ICTY Trial Chamber, Case No. IT-95-14/2, Transcript (July 19, 1999), where Geoffrey Nice, from the OTP, said:

As to the general proposition that a Trial Chamber can say "Enough's enough," of course, it can. The Rules give you that power, and we recognise

Besides this increase in judges' activism—which clearly fits the managerial judging system much better than the inquisitorial one—and this redefinition of the parties' role—which cannot be explained using the conventional adversarial or inquisitorial models—there are other series of reforms that commentators have considered inquisitorial. The first of these reforms is the introduction of a sort of proto-written dossier that would let the judges be more active during the proceedings. After the prosecutor files her pre-trial brief and lists of witnesses and exhibits, the pre-trial judge must submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held.³²⁴ The pre-trial judge submits a second file after the defense presents its pre-trial brief and list of witnesses and exhibits.³²⁵ These two files are functionally equivalent to a written dossier and give the Trial Chamber considerable information about the case. As they give information to the judges about the case before trial and allow judges to be more active, commentators have described them as inquisitorial.³²⁶ However, given that judges have needed more information mainly to become active expediting managers rather than active investigators, the introduction of these proto-written dossiers is much better described, again, as a managerial judging reform. The aim of these reforms has been to give more information to the Trial Chamber so that it can manage trials more efficiently, and judges have perceived them as devices for that purpose.³²⁷ In addition, unlike the

that. There is, of course, a potential problem, and that is that if a Prosecutor is cut off, "Well, you've had one witness on that topic, and that's enough," and the Defence then call contrary evidence at a later stage, the Trial Chamber may be embarrassed by having indicated satisfaction at an early stage when, on reflection, it finds it cannot be satisfied because of the Defence evidence that may be put on, and the Prosecutor may also be in the embarrassing position of then having to seek by rebuttal to add further to the evidence, but it only can do that if it knows what the Trial Chamber's later decision is, so there are problems there. All of those problems, in the standard adversarial system, are dealt with by the Prosecutor making his decision as to how many bits of evidence he wants to put in this scale on one side to ensure that however much the other side puts other evidence on the other scale, the scale stays down on the ground. I'm the first to recognise that we may need to be more flexible than that here in the interests of economy of time, but there are obvious difficulties with that

324. Rule 65 *ter* (L)(i).

325. Rule 65 *ter* (L)(ii).

326. See, e.g., CASSESE, *supra* note 4, at 386.

327. ICTY judges introduced the current version of Rule 65 *ter* (L) in the amendments to the RPP of April 14, 2001. Referring to this set of amendments, the former President of the Tribunal said:

[T]he President established a working group to review ways to expedite the proceedings both prior to and during the trial The working group met several times and put forward a set of amendments to the Rules of Procedure and Evidence which were adopted at the extraordinary plenary session of 12 April 2001 The amendments . . . relate to the judges' powers of control over the proceedings.

written dossier of the inquisitorial system that documents all activities performed in the pre-trial phase and that an impartial official gathers, the two files that the pre-trial judge presents to ICTY's Trial Chamber are mainly based on the pre-trial briefs of the parties. As such, they do not document all previous activity and are not impartial in the sense of the inquisitorial system.³²⁸

Similarly, the reforms have changed the orientation of ICTY criminal procedure from a clear preference for oral production of evidence at trial to liberally allowing the introduction of written evidence.³²⁹ Rule 89 (F) replaced the original version of Rule 90 (A), which established that "(w)itnesses shall, in principle, be heard directly by the Chambers."³³⁰ Rule 89 (F), in a much more ambivalent way, now states that a "Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."³³¹

Furthermore, Rule 92 *bis* (A) now establishes: "A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment."³³² In addition, Rule 92 *bis* (B) now says: "A written

Eighth Annual Report of the ICTY, August 13, 2001, para. 18, 19.

328. Judge Hunt has seen this point:

[I]t is necessary to emphasize that this Tribunal has not adopted the system found in many civil law countries of having a dossier for use in the trial prepared by a judicial officer, who is required to seek out exculpatory and inculpatory evidence with equal determination, and who is expected not to favor either the prosecution or the defense. As already indicated, the statements to which Rule 92*bis* is directed are *those prepared by a party* for the purposes of the legal proceedings in which they are to be tendered, not by an independent judicial officer.

Milosević v. Prosecutor ("Kosovo, Croatia and Bosnia"), ICTY Trial Chamber, Case No. IT-02-54, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, para. 6 (Oct. 21, 2003).

329. For an analysis of this tendency, see for example Wald, *supra* note 154, at 545-48.

330. See Rule 90 (A) (1994).

331. Rule 89 (F). The reform of the Rules of Procedure and Evidence of December 13, 2000, introduced the new version of Rule 89 (F). The Court of Appeals has made an expansive reading of this rule in order to allow the use of written statements at trial. See Milosević v. Prosecutor ("Kosovo, Croatia and Bosnia"), ICTY Trial Chamber, Case No. IT-02-54, Decision on Interlocutory Appeal on the Admissibility of Evidence in Chief in the Form of Written Statement, (Sep. 30, 2003). On the interpretation of Rule 89 (F), see also Prosecutor v. Galić, ICTY Trial Chamber, Case No. IT-98-29, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (June 7, 2002). For applications of Rule 89 (F) to sentencing hearings, see for example Prosecutor v. Milan Babić, ICTY Trial Chamber, Case No. IT-03-72-S, Decision on Defence Motion for Admission of Witness Statements and to Call Witnesses, 2 (Mar. 29, 2004); Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-S, Order on Admission into Evidence of Psychological Report (Dec. 19, 2003).

332. Rule 92 *bis* (A). For decisions discussing how the phrase "other than the acts and conduct of the accused" should be interpreted, see for example *Prosecutor v. Slobodan Milosević*, ICTY Trial Chamber, Case No. IT-02-54, Decision on Prosecu-

statement under this Rule shall be admissible if it attaches a declaration by the person making the statement that the contents of the statement are true . . . and . . . the declaration is witnessed by . . . a person authorized to witness such a declaration in accordance with the law and procedure of a State.”³³³ In a similar direction, Rule 92 *bis* (D) states that a Chamber may admit a transcript of evidence that a witness gave in another proceeding before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.³³⁴ And Rule 92 *bis* (E) declares that the “Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.”³³⁵ Finally, Rule 94 *bis* regulates the testimony of expert witnesses and establishes that if “the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.”³³⁶

These changes are also best described as part of ICTY’s managerial judging system.³³⁷ Again, commentators have characterized them as corresponding to an inquisitorial conception of the criminal

tion’s Request to have Written Statements admitted under Rule 92 *bis* (Mar. 21, 2002).

333. Rule 92 *bis* (B).

334. Rule 92 *bis* (D). The Tribunal has used this rule extensively. *See, e.g.*, Prosecutor v. Mladen Naletilić aka ‘Tuta’ and Vinko Martinović aka ‘Stela,’ ICTY Trial Chamber, Case No. IT-98-34, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), para. 7 (July 9, 2001) (admitting transcripts of testimonies and accompanying exhibits produced in the Blaškić and Kordić cases in order to prove the existence of an international armed conflict, as well as the widespread or systematic nature of the attack).

335. Rule 92 *bis* (E). On the criteria for applying this rule, see Prosecutor v. Sikirica, “Keraterm Camp,” ICTY Trial Chamber, Case No. IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts under Rule 92 *bis*, para. 4 (May 23, 2001). *See also* Prosecutor v. Mladen Naletilić aka ‘Tuta’ and Vinko Martinović aka ‘Stela,’ ICTY Trial Chamber, Case No. IT-98-34, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), para. 12 (July 9, 2001).

336. Rule 94 *bis* (C). For examples of the use of this Rule, see Prosecutor v. Kupreškić et al., ICTY Trial Chamber, Case No. IT-95-16, Open Session (Jan. 29, 1999); Prosecutor v. Miroslav Kvočka et al., “Omarska, Keraterm and Trnopolje Camps,” ICTY Trial Chamber, Case No. IT-98-30/1, Order Granting Request for Admission of Testimony of Expert Witness (Mar. 19, 1999); Prosecutor v. Sikirica, “Keraterm Camp,” Case No. IT-95-8-T, Order Admitting into Evidence Expert Witness Statements under Rule 94 *bis* (May 16, 2001). For examples of invocation of this rule *motu proprio* by the Trial Chamber to shorten the proceedings, see Prosecutor v. Kupreškić et al., ICTY Trial Chamber, Case No. IT-95-16, Open Session (Jan. 27, 1999). For examples of the use of Rule 94 *bis* in the sentencing phase *motu proprio* by the Trial Chamber, see Prosecutor v. Miroslav Deronjić, ICTY Trial Chamber, Case No. IT-02-61-S, Order on Admission into Evidence of Testimony of Expert Witness Prof. Dr. Ulrich Sieber (Dec. 17, 2003).

337. Another reform in the direction of relying more on written evidence that I will not analyze here is the reform of the Rules of November 17, 1999, which introduced changes to Rule 71 that regulates the use of depositions.

process.³³⁸ But if we analyze the changes carefully, judges have not introduced these reforms out of a bureaucratic preference for documentation as in the hierarchical model of the inquisitorial system.³³⁹ Rather, as ICTY judges have expressly acknowledged, they have perceived the increasing introduction of written evidence at trial as a way to speed it up,³⁴⁰ even at the expense of fairness³⁴¹ and truth-determination.³⁴² In addition, in inquisitorial systems, an impartial official gathers the written statements in a written dossier during the pre-trial investigation. This is why trial judges particularly trust them for evidentiary purposes.³⁴³ But in the context of ICTY, as a consequence of the party-driven investigations, written statements admitted at trial include statements not gathered in such an impartial fashion.³⁴⁴

Finally, two additional reforms that also have gone in the direction of the managerial judging system are the elimination of a distinction between the guilt-determination and sentencing phases³⁴⁵ and the limitation of interlocutory appeals.³⁴⁶ Regarding the first of these reforms, ICTY judges modified the original Rule 100 that established the possibility of a pre-sentencing procedure, and now the trial

338. See, e.g., Boas, *supra* note 182, at 58 (characterizing the reforms introduced in Rule 92 *bis* as a trend toward the continental system).

339. See DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 7.

340. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13-14; Eighth Annual Report of the ICTY, August 13, 2001, para. 51. See also Prosecutor v. Kupreškić et al., ICY Trial Chamber, Case No. IT-95-16 Open Session (Sep. 1998); Prosecutor v. Mladen Naletilić aka 'Tuta' and Vinko Martinović aka 'Stela,' Case No. IT-98-34, Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), para. 7 (July 9, 2001); Wald, *supra* note 154, at 549 ("The new Rules sharply respond to the problem of lagging trials.").

341. For an analysis of the risks that this tendency entails for the fairness of proceedings at ICTY, see Wald, *supra* note 154, at 549.

342. The increasing reliance on written statements in ICTY trials and verdicts has probably diminished their truth-determination abilities. On the connection between both, see FERRAJOLI, *supra* note 61.

343. See DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 7, at 50.

344. Rules 89 (H), 92 *bis* (A), (C) include cases in which written statements that the parties gather may be accepted at trial in lieu of oral testimony. Judge Hunt has seen the differences between these statements and those that an impartial official gathers in the inquisitorial system. See *supra* note 328.

345. For a characterization of the merging of the guilt-determination and sentencing phases as inquisitorial, see for example CASSESE, *supra* note 4, at 87.

346. The Expert Report pointed out interlocutory appeals as one of the areas in which reforms were needed to expedite the process. See Expert Report, *supra* note 85, para. 102-04. The Judicial Practices Working Group—created in September 1999 and composed of judges and representatives of the OTP, the Registry and defense counsel—proposed reforms to address the impact that interlocutory appeals were having on the length of the proceedings. See Seventh Annual Report of the ICTY, July 26, 2000, para. 316-17. Furthermore, in April 2002, "at the proposal of the Appeals Chamber, the judges of the Tribunal adopted an amendment to rules 72 and 73 of the Rules of Procedure and Evidence restricting applications for leave to appeal to issues certified by the Trial Chamber." See Ninth Annual Report of the ICTY, August 14, 2002, para. 14.

fulfills both adjudicatory and sentencing functions in every case.³⁴⁷ Regarding interlocutory appeals, decisions on preliminary motions³⁴⁸ are without interlocutory appeal save in very limited cases,³⁴⁹ and decisions on all other motions are without interlocutory appeal unless the Trial Chamber certifies it.³⁵⁰

These two last reforms also fit nicely in the managerial judging system as described in this article, and the judges have perceived them, once again, as a way to speed up ICTY's docket.³⁵¹ Other original features of ICTY—such as broad prosecutorial discretion, guilty pleas, no technical rules of evidence, and the absence of trial by jury—also fit within the managerial judging system.³⁵² This system thus provides the best account of the current criminal procedure of ICTY, including the reforms that have been adopted from July 1998

347. See, e.g., Rule 85 (A)(vi) (establishing that any relevant information in determining an appropriate sentence shall be presented at trial).

348. See Rule 72 (A) (preliminary motions include motions which challenge jurisdiction, allege defects in the form of the indictment, seek the severance of counts or defendants, or raise objections based on the refusal of a request for assignment of counsel).

349. See Rule 72 (B) ("Decisions on preliminary motions are without interlocutory appeals save . . . (i) in the case of motions challenging jurisdiction; . . . (ii) in other cases where certification has been granted by the Trial Chamber . . ."). In the case of appeals for denial of provisional release, the decision is subject to appeal in cases where a bench of three judges of the Appeals Chamber grant leave. See Rule 65 (D). On the prosecution's appeal against a Trial Chamber decision to release the accused, see Rule 65 (E) to (G).

350. Rule 73 (B). For the rationale of this rule as a way of expediting the proceedings, see Eighth Annual Report of the ICTY, August 13, 2001, para. 52-53. For applications of this rule by the Trial Chamber see for example *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Decision on Musliu's Application for Certification to Appeal Decision on Prosecution's Motion to Amend the Amended Indictment, February 25, 2004. See also Practice Directive on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155 Rev. 1. The Tribunal amended this directive mainly to add a provision enabling the Appeals Chamber to punish parties for failing to respect the directive. See, e.g., Ninth Annual Report of the ICTY, August 14, 2002, para. 14.

351. See *supra* note 346; Eighth Annual Report of the ICTY, August 13, 2001, para. 3-4, 19.

352. See, e.g., *Prosecutor v. Miroslav Deronjić*, ICTY Trial Chamber, Case No. IT-02-61-S, Sentencing Hearing, 314 (Mar. 5, 2004). Mr. Harmon, official of the OTP in charge of the case, explained why the prosecution had limited the charges included in the indictment in this case:

[T]his is indeed a limited Indictment. It was purposefully done so because, among other things, this institution has had trials that have lasted more than two years. Indeed, I participated in one of those trials, and we could have a huge trial on a case that can be resolved very quickly on facts that are clearly provable in this case. So a decision was made by me to limit this Indictment for purposes of resolving this case quickly in order to fulfill the mandate of this institution. The choice being we could have a 25-month trial on this, which would consume huge resources and limit the number of cases that are heard before this institution, or the Prosecutor using her discretion can limit the case to very serious cases, I might add, that are provable and can be resolved expeditiously. That is why that choice was made in this case.

Id.

onward. The fact that managerial judging as conceptualized in this article provides the best account of the procedure of ICTY does not mean that system is unchallenged within ICTY procedural practices. Managerial judging is a model. Thus, the claim of this article is that the procedural practices of ICTY have come closer to the managerial judging model than to the adversarial system, the inquisitorial system, or any other hybrid system. This does not mean, though, that every single rule, decision and practice of ICTY fits perfectly with managerial judging. Given that it provides the best account of ICTY procedural rules and practices, managerial judging has gradually become the predominant structure of interpretation and meaning, set of internal dispositions, and way of distributing powers and responsibilities for ICTY's legal actors. But this does not mean that there has not been resistance to managerial judging, just as there was resistance to the adversarial system in ICTY's early years.

Even if the analyzed changes in the rules came out of a consensus between ICTY judges,³⁵³ not all judges have been equally comfortable about becoming active managers of cases.³⁵⁴ For instance, in plea agreements, some judges have felt that the defendant deserved a sentence higher than the one the parties agreed on, a reaction that goes against incentivizing the rapid disposition of cases through plea bargains.³⁵⁵ And some judges have resisted what they have seen as an overly expansive reading of Rules 89 (H) and 92 *bis* on the introduction of written statements at trial. For instance, Judge Hunt, from Australia, said in a dissenting opinion:

That Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore its previously carefully considered interpretations of the law or of the procedural rules The only reasonable explanation for these decisions appears to be a desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion. I have been unable to agree with those decisions because I do not believe that, in doing so, I would

353. Recall that the rules are changed by the judges. See Statute, Art. 15.

354. For instance, members of the Milosević prosecution team have expressed their frustration at what they consider an insufficient use of expediting tools by the Trial Chamber in handling that case. See Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crime Trials*, 3 J. INT'L CRIM. JUST. 354 (2005).

355. See, e.g., Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment (Dec. 2, 2003); Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgment (Dec. 18, 2003); Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgment (June 29, 2004). These decisions have produced a sharp decrease in the use of plea bargaining in ICTY. Given that historically plea bargaining has not existed in inquisitorial systems, it is probably not coincidental that most of the trial judges that participated in those decisions came from civil law jurisdictions. But we should also interpret this trend as a reaction by those judges against plea agreements that set sentences too low or distorted the historical truth.

be performing my duties “honorably, faithfully, impartially and conscientiously” as the solemn declaration which I took when I became a judge of the Tribunal requires me to do This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.³⁵⁶

Furthermore, due to their internal dispositions, their reluctance to lose some of their procedural powers, and defense strategy, the parties in some cases have resisted the re-definition of their roles as assistants toward expedited process, and thus they have not always collaborated as judges expected. For instance, defense attorneys and defendants have been reluctant to agree on factual issues before trial.³⁵⁷ Another example comes from the length limits to parties’ motions and briefs that the Tribunal established as a way to shorten the proceedings.³⁵⁸ In *Šešelj*, the defendant had the following reaction to such limitations:

After one and a half months . . . , some legal counselor tried to give me back my motion, and his explanation was that it was longer than ten pages. My motion totaled 116 pages You said that it couldn’t be longer than so many pages, and I was able to reduce it to 116 pages and it could not have been shorter than that. Now my complaint to the indictment is my absolute right which nobody can take away from me It was your duty to respond to my complaint to the indictment to rule. You accept it or you don’t accept it. I expected you to reject it straight away, but it was up to you to respond in one way or another. As the Trial Chamber, you cannot fail to respond to my submission and just say that it was too long.³⁵⁹

356. See *Milosević v. Prosecutor* (“Kosovo, Croatia and Bosnia”), ICTY Trial Chamber, Case No. IT-02-54, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, para. 20, 22 (Oct. 21, 2003). Given that the adversarial system has a clear preference for live testimony, it is not surprising that other judges coming from common law jurisdictions also manifested their discomfort with an overly liberal use of written evidence at trial. See Wald, *supra* note 154, at 549.

357. See, e.g., *Prosecutor v. Banović, Fuštar, and Knežević*, ICTY Trial Chamber, Case No. IT-02-65-PT, Status Conference (Apr. 8, 2003) (defense notes the limited nature of facts to which it can agree because they are beyond the knowledge of the accused).

358. Former President of ICTY Claude Jorda issued the Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 1. On the rationale of the directive to expedite the work of the Tribunal, see Eighth Annual Report of the ICTY, August 13, 2001, para. 50, 59.

359. See *Prosecutor v. Vojislav Šešelj*, ICTY Trial Chamber, Case No. IT-03-67-I, Status Conference, 100-01 (July 3, 2003). *Šešelj* is a case where the defendant had been particularly confrontational to the Tribunal and had questioned its legitimacy.

But even if such resistance and challenges are undeniable, this subsection has shown that managerial judging has gradually been imposed as the predominant system in ICTY criminal procedure.

C. *Path Dependence in International Criminal Procedure*

The last subsection has shown that ICTY judges have moved this procedure away from the adversarial system and toward managerial judging. But why did ICTY judges not adopt an inquisitorial system to deal with these problems instead of a managerial judging one? There are two main obstacles that the judges would have faced had they attempted that.³⁶⁰

The first has to do with characteristics of the inquisitorial system. It is at least unclear whether this system is faster than the adversarial one for prosecuting and adjudicating criminal cases, given its emphasis on determining the real truth, its highly formalistic written documentation of every act of the process, and its distrust of consensual dispositions of the cases by the parties.³⁶¹ Actually, in recent years, at the national level inquisitorial jurisdictions have been adopting features of the adversarial system to process cases faster.³⁶²

This exchange is also part of this broader dynamic that exceeds the procedural context.

360. There is no evidence that ICTY judges considered adopting the inquisitorial system as a way to expedite process. The two obstacles mentioned in the text may explain why.

361. Statistics are not always easily comparable on this point. So, we should be careful in their evaluation and in drawing broader conclusions from them. In 2001-02, the average length of criminal proceedings in U.S. federal district courts was 6.2 months (including here dismissals, and dispositions through guilty pleas and trials), 6.1 months for cases in which the defendant pleaded guilty, 3 months in cases decided by bench trials, and 11.9 months in cases decided by trial by jury. See JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR 218. In France, the average length of only the pre-trial investigation by an investigating judge (*juge d'instruction*) was 17.7 months, and the average length of the cases that the *cour d'assises de premier ressort* (with jurisdiction over the most serious offenses) decided was 32.5 months. See MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE 115, 125 (2004). So, even if this evidence is not totally comparable, it might indicate that criminal proceedings are longer in an inquisitorial jurisdiction like France than in an adversarial jurisdiction like the U.S. federal system, at least regarding the most serious cases. However, the average length of criminal proceedings in an inquisitorial system like Germany seems to be shorter than in the U.S. federal system; only four months before the local courts (*Amtsgerichte*), and six months before the regional courts of first instance (*Landgerichte in erster Instanz*). See STATISTISCHES BUNDESAMT. RECHTSPFLEGE. STRAFGERICHTE. FACHSERIE 10, REIHE 2.3 (2002). So the question is unclear not only because statistics are not always comparable, but also because there may be broad variation in procedure length among inquisitorial jurisdictions. Determining the issue with more precision would require additional extensive research that is beyond the scope of this article.

362. On these tendencies in Argentina, France, Germany and Italy, see for example Langer, *From Legal Transplants to Legal Translations*, *supra* note 32.

Second, the judges faced a question of *path dependence*.³⁶³ In other words, when the judges decided to start the reforms, they did not start from scratch, but rather from criminal procedure practices that were already on an adversarial path.³⁶⁴ Thus, switching ICTY criminal procedure from an adversarial to an inquisitorial system would have been very difficult.³⁶⁵ It would have required modification of most features of ICTY's procedure and a very deep change in

363. In the last 20 years, there have been path dependence analyses in a multiplicity of disciplines (including economics, history, law, political science and sociology). See, e.g., W. BRIAN ARTHUR, *INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY* (1994); Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); Jack A. Goldstone, *Initial Conditions, General Laws, Path Dependence, and Explanation in Historical Sociology*, 104 AM. J. SOC. 829 (1998); Marcel Kahan & Michael Klausnev, *Path Dependence in Corporate Contracting*, 74 WASH. U. L.Q. 347 (1996); Margaret Levi, *A Model, A Method, and a Map: Rational Choice in Comparative and Historical Analysis*, in *COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE* (Mark I. Lichback & Alan S. Zuckerman eds. 1997); DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Richard A. Posner, *Path-Dependency, Pragmatism, and a Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000); William H. Sewell Jr., *Three Temporalities: Toward an Eventful Sociology*, in *THE HISTORIC TURN IN THE HUMAN SCIENCE* 245 (Terrance J. McDonald ed. 1996). For classifications of different path dependence processes, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); James Mahoney, *Path dependence in historical sociology*, 29 THEORY & SOC'Y 507 (2000); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996).

364. Path dependence does not simply mean that "history matters," but rather that once an institution has taken a path, the costs of reversal may be very high, so that earlier plausible options (like the inquisitorial system) are now excluded. In this sense, preceding steps in a particular direction induce further movement in the same direction, see, e.g., Pierson, *supra* note 363, at 252, which makes earlier events—even small ones—matter more than later ones, *id.* at 253. Economists have characterized this self-reinforcing phenomenon as increasing returns because the relative benefits of the current activity compared with other possible options increase over time. *Id.* at 252. In addition, certain conceptualizations of path dependence include among its features that contingent events determine the original path. See, e.g., *id.* at 253; Goldstone, *supra* note 363, at 833-43; Mahoney, *supra* note 363, at 512. In our case, as I explained in Section IV, the factors that determine the original choice of adversarial rules of procedure and evidence—the timely submission of the U.S. proposal to the judges and the fact that a majority of the initial group of judges favored a predominantly adversarial system—are contingent in that sense.

365. On the particularly hard obstacles that procedural reforms face when trying to move a procedure from an inquisitorial path to an adversarial one or vice versa, see for example Ennio Amodio, *The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy*, 52 AM. J. COMP. L. 489 (2004); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227 (2000); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *SELECTED WRITINGS* 294, 310 (1978); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545 (1995); John H. Langbein, *The Influence of the German Emigrés on American Law: The Curious Case of Civil and Criminal Procedure*, in *DER EINFLUSS DEUTSCHER EMIGRATEN AUF DIE RECHTSENWICKLUNG IN DEN USA UND IN DEUTSCHLAND* 321 (Marcus Lutter et al. eds., 1993); Langer, *supra* note 32; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L. L. 429 (2004).

its procedural culture and institutional structure, which assumed a certain distribution of powers and responsibilities between the office of the prosecutor, the defense bar, and the judges.

To be sure, moving ICTY criminal procedure from an adversarial system to a managerial judging one has not been easy, either.³⁶⁶ As we have seen, not all the judges have felt equally comfortable about their new role, and the parties have resisted the disempowerment that came with the redefinition of their roles as assistants of the court. But the transition has been easier than a transition from an adversarial to an inquisitorial system would have been. The managerial judging system shares a number of features with the adversarial one that made the transition between systems more feasible in ICTY's institutional context. In both the managerial judging and adversarial systems, criminal procedure involves a competition between two cases, and it is still the parties who have the responsibility to conduct their own pre-trial investigations and present their cases at trial. Both systems welcome prosecutorial discretion, guilty pleas, plea bargains, and stipulations.³⁶⁷

That ICTY judges faced a question of path dependence when deciding what reforms were needed is a very important element regarding institutional design of international criminal tribunals. Unlike national jurisdictions, these tribunals recently have been created from scratch, and the number of lawyers, judges, prosecutors and personnel participating in them has been low.³⁶⁸ Therefore, one might assume that path dependence issues should have much less impact in this context. In other words, given that the procedural culture and the distribution of powers and responsibilities between the main actors of the legal process are fairly new in these tribunals, one could expect that moving between different models of criminal procedure would be easier than in a long-established legal system.

However, the short history of ICTY provides a caveat against such an assumption. It is true that ICTY was created from scratch and that any procedural model could have been chosen at that initial moment. But within a few years after ICTY adopted a predominantly adversarial path, the range of options for procedural change was al-

366. Path dependence situations do not mean that once an institution is in a particular path, there will not be other choice points. As Levi, *supra* note 363, at 28, says: "There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and smaller branches." In this sense, given the hybrid character of the managerial judging system, one can understand the choice for this system as one of the potential small branches that an adversarial path may take when subjected to pressure to expedite the docket.

367. See *supra* notes 23-25, 355, and accompanying text.

368. The Tribunal currently has a total of 25 judges: 16 permanent judges and nine ad litem judges. The current number of posts authorized for the Office of the Prosecutor is 1048. See Eleventh Annual Report of the ICTY, August 13, 2004, Summary.

ready limited. The point here is not that it was good or bad for ICTY to end up adopting the managerial judging system.³⁶⁹ Rather, the point is that policy makers have to be very careful in choosing what initial model they adopt for international criminal courts and tribunals, not only because certain models may be better or worse, but also because once a model is adopted and takes root in certain procedural practices, the range of possibilities for introducing substantial changes to this model is limited.

VII. CONCLUSION

ICTY judges moved the Tribunal's procedure from an originally predominantly adversarial system to a managerial judging system. Showing how and why this happened puts the procedure of the Tribunal in a new and unexplored light. The managerial judging system provides the best account of ICTY criminal procedure not only understood as a set of techniques to handle criminal procedure but also as a procedural culture. In recent years, ICTY judges have been at least as worried about processing cases swiftly as about truth-determination and fairness in a given case,³⁷⁰ and they have required the parties to collaborate in this endeavor. In this sense, managerial judging and the resistance against it explain many of the current interactions between ICTY legal actors, as was shown in Subsection VI.B. This article did not analyze whether the arrival of the managerial judging procedural culture at ICTY is good or bad for the Tribunal. But the arrival itself is undeniable.

Comparative procedural models help us understand legal cultures. The shift in ICTY from a predominantly adversarial system to

369. Path dependence processes may lock institutions into alternatives that are less efficient or optimal than others. See, e.g., Pierson, *supra* note 363, at 253; ARTHUR, *supra* note 363, at 112, 116. But this is not necessarily the case. See, e.g., NORTH *supra* note 363, at 99; Roe, *supra* note 363, at 646-47. In this article, I am not making any assessment or assumptions on whether the managerial judging, adversarial or inquisitorial systems would be better or worse options (including efficiency considerations) for ICTY.

370. This should not be read as implying that the judges have acted in bad faith or convicted people they thought were innocent. Rather, ICTY judges have put a lot of good faith and energy into their work and have tried to make ICTY succeed at achieving its goals. But there is a tension between judicial activism to expedite proceedings on the one hand and fairness and truth-determination on the other. For instance, this judicial activism may have created problems of impartiality, and the use of written statements has probably worsened the truth-determination ability of ICTY trials. Of course, there are also situations in which expediting proceedings and fairness go together because shorter proceedings may benefit the defendant. However, this is not always the case. I say in the main text that truth-determination and fairness may have been compromised "in a given case" because one could say that, at a more systemic level, faster proceedings could produce more truth-determination in the sense that more defendants could be convicted for the commission of international crimes, which could enhance the process of determining the historical truth for the events that occurred in the territory of the former Yugoslavia. Analyzing all these issues in detail would require a normative analysis that is beyond the scope of this article.

managerial judging opens the door to understanding other problems and jurisdictions. Have all adversarial systems facing pressures to expedite the docket responded as ICTY and U.S. civil procedure have done?³⁷¹ If so, why? What are the normative advantages and disadvantages of such a move?³⁷² Beyond the scope of this article, these and other important issues related to civil and criminal procedure now lie open.

371. There are indications that some adversarial criminal procedures at the national level may be moving in the direction of managerial judging. See, e.g., John Jackson, *Judicial Responsibility in Criminal Proceedings*, 49 CURRENT LEGAL PROBS. 59 (1996) (describing developments in this direction mainly regarding Great Britain); Mr. Justice John H. Phillips, *The duty of counsel*, 68 AUSTL. L.J. 834 (1994); and Melinda Brown, *Pegasus II Makes Flying Start*, 73 LAW INST. J. 19 (March 1999). Also some inquisitorial systems may be moving, to some extent, in this direction. Regarding Germany, see Langer, *supra* note 32, at 42-45.

372. For normative analyses of managerial judging, though in reference to civil, not criminal procedure, see Resnik, *supra* note 2, at 414-31; Resnik, *Managerial Judges: The Potential Costs*, *supra* note 186; Resnik, *Managerial Judges and Court Delay*, *supra* note 186; Resnik, *The Assumptions Remain*, *supra* note 186. For a response to some of these criticisms, see for example Connolly, *supra* note 186.