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THE RISE OF MANAGERIAL JUDGING IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

This article puts the procedure of the International Criminal Tribunal for the former Yugoslavia (ICTY) in a completely new and previously unexplored light. Rejecting the predominant view of ICTY procedure as a hybrid between the adversarial system of the U.S. and the inquisitorial system of civil law jurisdictions, this article shows that ICTY procedure is best described through a third procedural model that does not fit in either of the two traditional systems. This third procedural model is close to the managerial judging system that has been adopted in U.S. civil procedure. The article then explores some of the implications that the discovery of managerial judging in ICTY has for both international and domestic procedures. At the international level, the article not only provides the first full-fledged model to explain ICTY procedure and its evolution over time, but also questions the widespread assumption of international policy-makers and scholars that every international criminal procedure has to be either adversarial, inquisitorial, or somewhere along a straight line between what are presumed to be the only two possible systems. At the national level, the article explains why three systems that were initially adversarial have moved in two different directions when faced with similar time pressures: U.S. criminal procedure basically has remained close to the adversarial system, while ICTY criminal procedure and U.S. civil procedure have moved toward managerial judging. By explaining these different trajectories, the article not only highlights features of U.S. domestic procedures and explains their recent evolution, but also integrates ICTY criminal procedure and U.S. criminal and civil procedures into wider debates about international criminal procedure, managerial judging, and the globalization of law.

I. INTRODUCTION.

From its inception in Nuremberg,¹ international criminal justice has presented new challenges to legal thought.² By bringing together international and criminal law, the term itself initially looked to be an oxymoron. Under traditional definitions of law, international law was considered to be “soft” law or no law at all, while criminal law was seen as the exact opposite: the maximum exercise of state power through legal rules and procedures.³ The central challenges for international criminal procedure have been to determine what system would be best for prosecuting and trying international crimes in international tribunals, and to describe the proceedings under that system. Most policymakers and scholars have assumed that the procedure must be a blend between the adversarial system of the United States and other common law countries,⁴ and the inquisitorial system⁵ of civil law jurisdictions.⁶

¹ For analyses of the Nuremberg trial and the innovation it represented in international law, see, e.g., 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).

² For analyses of some of these challenges not only to international criminal justice but also to national criminal justice systems in dealing with mass atrocities, see, e.g., 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* 161-4 (1986); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 27-67 (2000).

³ 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 and 124 (1995). See also FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 13 (1896). Since the challenge posed by Austin to international law, most debates have been linked to a critique of classical legal positivism as a viable conception of law in general and, therefore, of international law in particular. For a varied mix of positions taken on the matter by legal theorists and internationalists, both from diverse philosophical affiliations, see Robert Ago, *Positive Law and International Law*, 51 *AJIL* 691 (1957); James L. Brierly, *Le fondement du caractère obligatoire du droit international*, 23 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 465 (1928); LON L. FULLER, *THE MORALITY OF LAW* 232-7 (2d ed. 1969); WOLFGANG FRIEDMAN, *LEGAL THEORY* 385-391 (1947); H.L.A. HART, *THE CONCEPT OF LAW* 208-231 (1961); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 18-89 (1952); Hans Kelsen, *The Essence of International Law*, in *THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS* (Karl W. Deutsch & Stanley Hoffmann eds. 1968); HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION)* 71-2 (1927); Hersch Lauterpacht, *Règles générales du droit de la paix*, 62 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 100 (1937); Roland Quadri, *Le fondement du caractère obligatoire du Droit international public*, 80 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 579 (1952); Alfred Verdross, *La volonté collective des Etats comme base du droit international et la renaissance de la doctrine classique*, 16 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 249 (1927).

⁴ 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

The International Criminal Tribunal for the former Yugoslavia⁷ (hereinafter ICTY or the Tribunal)—the first international tribunal created since the Nuremberg and Tokyo trials half a century earlier—reflects this assumption.⁸ The judges who designed the Tribunal's procedure in 1994 basically followed an adversarial model.⁹ International scholars agree with

"accusatorial" and "adversarial" as exchangeable. Following this use, this article will use both expressions as equivalent. For an attempt to establish a distinction between the terms "adversarial"—as a way of finding facts and implementing norms—and "accusatorial"—that would include 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).

⁵ 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, respectively. This article will not use these expressions as normative categories. For instance, the expression "adversarial system" is sometimes used in the United States as a normative ideal to refer to a criminal procedure in which the rights of the defendant are fully respected, see, e.g., MIRJAN DAMASKA, *ADVERSARY SYSTEM*, 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 24, 25 (Sanford H. Kadish ed., 1983), and the epitome of the adversarial system is the trial by jury. 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.

⁶ See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 364-88 (2003) (framing his analysis of international criminal trials in terms of the adversarial and inquisitorial systems); Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 144 (1948-1949) ("The landmarks of international law which have been erected in Nuremberg rest on a foundation of legal procedure which has satisfied the traditional safeguards of Continental and American law"); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, at 727 (1999) ("A feature of the historic and modern international criminal trials is that they have been bench trials...The approach to evidence has been to use elements from both the common law and civil law systems. Thus, the presentation of evidence has followed the 'adversarial model', whereas the rules governing the admissibility of evidence may be seen as more akin to the 'inquisitorial' model and leave wide discretion to the judges"), at 729 ("The Charter gave the Nuremberg Tribunal wide discretion when it came to the admissibility of evidence. Although the trials were adversarial and the parties alone were responsible for calling the evidence, the judges were sitting without a jury, and the common law rules designed to prevent jurors from hearing prejudicial evidence were discarded in favour of a liberal approach akin to that of civil law systems."); 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) (framing his analysis of international criminal proceedings in terms of the adversarial and inquisitorial systems).

⁷ The International Tribunal for the Former Yugoslavia was created by UN Security Council Resolution 827, S /RES/827 (1993), with the "purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1991 and a date to be determined," as an attempt to "put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."

⁸ See, e.g., Guillaume Champy, *Inquisitoire-Accusatoire devant les juridictions pénales internationales*, 68 INT'L REV. PENAL L. 149 (1997).

⁹ See, e.g., Antonio Cassese, *Statement by the President Made at a Briefing to Members of Diplomatic Missions*, IT/29, 11 February 1994, in VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 650 (1995). See also CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 384 (pointing out that one

this characterization.¹⁰ When the Tribunal faced pressures to speed up its docket,¹¹ ICTY judges introduced substantial reforms that commentators have described as a move from the adversarial to the inquisitorial system.¹²

of the reasons for the adoption of the largely adversarial system at ICTY and the ICTR was the intellectual and psychological appeal of the Nuremberg and Tokyo models; and adding that perhaps many felt that the adversarial system better safeguarded the right of the accused). In both the Nuremberg and Tokyo trials, it is believed that the adversarial system prevailed over the inquisitorial. See CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 376-84.

¹⁰ See, e.g., Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIMINAL LAW FORUM 167, at 175 (2001) ("The International Tribunal has an adversarial structure, and for many years operated similarly to a stereotypical common law system"); May & Wierda, *supra* note 6, 737-38 (referring to the procedures of ICTY and the International Criminal Tribunal for Rwanda as essentially adversarial); Orie, *supra* note 6, at 1463 (stating that ICTY judges opted for a largely adversarial approach when they adopted the Rules of Procedure and Evidence of the Tribunal), and at 1464 ("The Rules of Procedure and Evidence that were adopted by the judges...were largely inspired by the Anglo-American tradition. The rules introduce a typical accusatorial type of trial"); Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 1999 NILR 343, at 345 ("ICTY borrowed principles of proceedings mostly from common-law jurisdictions. Drafters of ICTY Rules opted for the common-law litigation model between two parties, where an indictment is a form of a lawsuit"); 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, at 629 (Horst Fischer et al. eds. 2001) (stating that the drafters of the Tribunal's Rules of Procedure and Evidence adopted a largely adversarial form of proceedings); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 2 (2003) (pointing out that the judges that drafted ICTY Rules of Procedure and Evidence chose an accusatorial model).

¹¹ On these pressures, see Section VI of this article.

¹² See, e.g., Gideon Boas, *Creating Law of Evidence for International Criminal Law: ICTY and the Principle of Flexibility*, 12 CRIMINAL LAW FORUM 41, at 57-58 (2001); Boas, *Developments*, *supra* note 10, at 174 ("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"); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, 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. The need to speed up proceedings has been the primary rationale for this gradual change"); 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 (2001); Orie, *supra* note 6, at 1463 ("Since the adoption of the original Rules, the judges of ICTY have amended them more than twenty times. These amendments tend toward an inquisitorial direction") and at 1492 ("The subsequent development of the law of procedure in the *ad hoc* Tribunals has on all major points been in the direction of the civil law"); Tochilovsky, *Rule of Procedure for the International Criminal Court*, *supra* note 10, 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, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 10, 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"); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 2 (2003) ("[P]ractice evidenced the drawbacks of applying a purely accusatorial model to international criminal proceedings, and

The main idea of this article is that ICTY procedure has moved not toward the inquisitorial system, but toward a third model of criminal procedure that fits in neither the adversarial nor the inquisitorial paradigm. Curiously, this third model of criminal procedure is not unknown to U.S. scholars and practitioners, because it presents substantial similarities to the managerial judging system that U.S. civil procedure has adopted to handle complex cases. By showing that managerial judging has arisen in ICTY, this article not only provides a much better description of ICTY procedure, but also integrates ICTY criminal procedure and U.S. criminal and civil procedures into wider debates about international criminal procedure, managerial judging, and the globalization of law.

By showing that ICTY has adopted a managerial judging system, this article questions the way both international policymakers and scholars have thought of international criminal proceedings since Nuremberg.¹³ These analysts have understood international criminal procedure in a strictly binary way.¹⁴ Their assumption has been that every international criminal

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.”).

¹³ There has been a second position in ICTY to describe the Tribunal’s procedure as neither adversarial nor inquisitorial but as unique in its kind. However, this second position has not provided a description of what would characterize such a unique model of international criminal procedure. Consequently, it is not particularly relevant or interesting for this article’s aim of capturing which criminal procedure system or combination of systems can best describe the procedure of ICTY and other international tribunals. This second position actually states the uniqueness of the procedure of the Tribunal not in order to describe it, but rather to isolate the interpretation of ICTY Statute and Rules from national legal systems and from the standards of fairness that these national systems establish. For examples of this second position, see, e.g., *Prosecutor v. Delalic*, Case IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, May 1, 1997; Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 *EJIL* 569, at 588-89 (2000): “The legal system established by the Statute and the Rules is neither common law accusatorial, nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*. The key to the application of the Statute and the Rules is the use of the appropriate interpretive technique which gives due weight to the four principles set out in Article 31(1) of the Vienna Convention and the law of treaties; good faith, textuality, contextuality and teleology...The Tribunal must ensure that, notwithstanding the acknowledged peculiarities of its proceedings, an accused before it does not, in terms of his rights, become a ‘poor cousin’ to his counterpart in domestic proceedings.” For an antecessor of such a position regarding post-Second World War prosecutions, see, e.g., *U.S. v. Carl Krauch*, Motion for the Reconsideration of a Ruling by the Tribunal (U.S. Mil. Trib. 1948), 15 *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10* (1946-49), at 897 (1949).

¹⁴ See, e.g., Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, *supra* note 6, at 1440 (“Although this dichotomy has been criticized for giving no explanation for many differences between the Anglo-American and continental traditional models, it still is widely accepted”), and at 1442 (“An International Criminal Court should in its law of procedure be as universal as possible. This means that it should be balanced in the degree to which it reflects each one of the major criminal justice model systems. Because of its specific function it has to choose from each of the major systems those elements that serve best the administration of justice. On therefore can expect the law of procedure to be an amalgam of the major systems.”).

procedure has to be either adversarial, inquisitorial, or somewhere along a straight line between these two systems, which are presumed to be the only possible options.¹⁵ This assumes that any reform to an international criminal procedural regime must move that regime closer to one of these two traditional legal systems and farther from the other, and that movement in any other direction is impossible. One of the main aims of this article is to question this binary thinking. The thesis of this article in this respect is that there are more options available for designing and describing international criminal procedure than the only two considered so far, and that not all that happens in criminal procedure fits within the two traditional categories.

In order to prove this thesis, this article shows that the current procedure of ICTY is best described using a third model of criminal procedure that is neither adversarial nor inquisitorial. This third model—which international criminal procedure analyses have completely overlooked—is close to what has been called “managerial judging” in U.S. civil procedure.¹⁶ The discovery of the managerial judging system in ICTY not only questions this binary conception, but also puts the procedure of the Tribunal in a completely new and previously unexplored light and provides a much better description of what ICTY has been doing. In the managerial judging system, criminal procedure is conceived as a managerial device run by the court with collaboration of the parties in order to expedite the docket. The judge actively manages cases toward this end. To do this, she actively encourages the parties to reach agreements on factual and legal matters at issue and tightly controls the way the parties run their cases. If the parties do not voluntarily cooperate with the court to expedite their case, the court can use various formal and informal sanctions to assure this collaboration. In this way, this procedure redefines the prosecutor and the defendant as collaborators with the court toward the goal of expedited process. Because of

¹⁵ There has been a recent tendency to analyze international criminal proceedings from the perspective of human rights. But, these works are still emblazoned in the adversarial-inquisitorial binary way of thinking about international criminal procedure because they analyze the tribunals using these two categories and explore which of the two systems or which blend between them would be more respectful of international standards of human rights. See CHRISTOPH J. M. SAFFERLING, *TOWARD AN INTERNATIONAL CRIMINAL PROCEDURE* (2001); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 14-15 (2003) (“Among concepts usually adopted in comparative criminal procedure the distinction made between *accusatorial* and *inquisitorial criminal proceedings* stand out. The purpose of this paragraph is not to discuss the validity of such categories; on the contrary, it is accepted that this dichotomy is appropriate, at least for descriptive purposes. Our intention is to adopt this categorization and apply it to international criminal proceedings to try to explore the relationship between the provisions on the rights of the accused and procedural mechanisms derived from one model or the other.”).

¹⁶ The classic description of managerial judging in U.S. civil procedure is found in Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). But the literature on this model is extensive. On this literature, see the references cited in Section VII.

this transformation, the parties have much less control over their cases than in the adversarial system.¹⁷

In showing that ICTY has moved in this direction,¹⁸ this article questions the existing predominant analysis of ICTY procedure. According to that analysis, ICTY criminal procedure started out close to the adversarial system,¹⁹ but substantial reforms pushed it toward the inquisitorial system from 1998 onwards.²⁰ This article accepts the first part of that characterization, because ICTY procedure was indeed primarily adversarial during its early years.²¹ But the article challenges the second part by showing that the post-1998 reforms have moved ICTY procedure not toward the inquisitorial system, but toward managerial judging.²²

Given that the managerial judging system also exists in U.S. civil procedure, the discovery of managerial judging in ICTY also sheds light on U.S. domestic procedures. Unlike U.S. civil procedure and ICTY procedure, U.S. criminal procedure has remained close to the adversarial system despite facing similar pressures to process cases faster.²³ The article analyzes how it is possible that three systems that were initially adversarial have moved in two different directions when faced with similar time pressures. U.S. criminal procedure has remained relatively close to the adversarial system, while U.S. civil procedure and ICTY have moved toward managerial judging. The article suggests that in the case of civil procedure, this may be related to

¹⁷ As mentioned, the classic description of this model is Resnik, *Managerial Judges*, *supra* note 16. However, this article will develop its own version of this system, one that will be broader and at the same time more detailed than the classic model (see Section VII).

¹⁸ See Section VIII.

¹⁹ See the bibliography cited *supra* note 10.

²⁰ See the bibliography cited *supra* note 12.

²¹ See Sections 4 and 5.

²² See Sections 7, 8 and 9.

²³ This article describes U.S. criminal procedure as adversarial, because it is still the parties who have the main responsibility of carrying on the proceedings while the judge and the jury remain in a relatively passive position limited to deciding issues presented by the parties. Some readers may initially disagree with this characterization, though, given the extensive use of plea bargains in U.S. criminal procedure, which may be considered a deviation from the adversarial system. Two comments are on point. First, recall that this article uses the expression “adversarial system” as a descriptive category that gives account of the predominant conception of criminal procedure in common law jurisdictions. See *supra* note 5. So, normative conceptions of the adversarial system that conceive it as inconsistent with plea bargains are not incompatible with this article’s approach. In other words, one can state that, as a descriptive matter, plea bargains are an important part of U.S. criminal procedure and still think that they should not be part of it. Furthermore, according to the descriptive definition of the adversarial system that this article uses, criminal procedure in the adversarial system is conceived as a dispute between two active parties before a passive umpire and plea bargains would be part of the adversarial system in this descriptive sense. If the parties are involved in a dispute, it is natural that they can negotiate and reach agreements about it.

the parties' status as private actors who cannot assume an official responsibility to systematically expedite the docket.²⁴

But the puzzle is more challenging regarding the different evolution of U.S. and ICTY criminal procedures. This article suggests two broad reasons for these divergent trajectories by analyzing differences between the U.S. criminal justice system and ICTY. The first reason is that each of these procedures presents a different institutional setting that has given judges different opportunities to become active managers of cases. Relevant differences here include different observance of the doctrine of separation of powers, a narrower interpretation of the rights of defendants in ICTY, the existence of grand juries and juries in U.S. criminal procedure but not in ICTY, and, to move the U.S. system toward managerial judging, the need to reach a broader consensus between the three branches of government than ICTY requires.²⁵

The second broad reason is that U.S. criminal procedure has had no need to make the judge a more active case manager, because U.S. prosecutors effectively have become the main managers of the criminal justice system. This role is enabled by a strong enforcement apparatus, grand juries, plea bargains for investigatory purposes, harsh criminal laws, special statutes like RICO, and substantive criminal law that creates multiple and overlapping offenses.²⁶ ICTY prosecutors either have not had these tools or gained them only gradually after the Tribunal's procedure had already moved toward managerial judging.²⁷

By comparing U.S. civil and criminal procedures to ICTY procedure and explaining their different trajectories in the face of similar pressures, this article not only highlights features of U.S. domestic procedures and explains their recent evolution, but also integrates U.S. domestic procedures into debates about globalization of law. One of these debates is about the *convergence thesis*, which holds that legal systems throughout the world are gradually converging because they confront similar problems and pressures.²⁸ The comparative analysis of U.S. civil and criminal procedures

²⁴ See Section X.

²⁵ See *infra* footnotes 544-85, and accompanying text.

²⁶ See *infra* footnotes 586-612, and accompanying text.

²⁷ See *infra*, footnotes 599, 602-604, and accompanying text.

²⁸ On the debate about the convergence thesis, see, e.g., See THE GRADUAL CONVERGENCE (B.S. Markesinis ed., 1994); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996). For a discussion of the convergence thesis in criminal procedure, see, for example, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809 (2000); Craig M. Bradley, *The Convergence of the Continental and the Common Law of Criminal Procedure*, 7 CRIM. L.F. 471 (1996) (reviewing

and ICTY shows that relatively similar systems may actually *diverge* in the face of similar pressures.

This article will proceed in the following way. Sections II to V analyze the first phase of the history of ICTY procedure—1994-1998—as a competition between the adversarial and inquisitorial systems. This is possible because during that period, the two traditional categories could actually explain the evolution of this procedure. The basic difference between these two systems is that in the adversarial system, criminal procedure is conceived as a dispute between two active parties before a passive judge and jury, while in the inquisitorial system, it is conceived as an official investigation run by impartial officials who endeavor to determine the truth.²⁹

In Section II, the article shows that the competition between the adversarial and inquisitorial systems—or any other procedural system—in international criminal justice is actually broader than is usually supposed. The adversarial and inquisitorial systems are not only two different techniques for prosecuting and trying criminal cases, but also two different procedural cultures that reflect two different basic conceptions of how criminal prosecution and adjudication should be organized,³⁰ two different legal identities through which legal actors from common and civil law countries define themselves,³¹ and two different ways to distribute powers and responsibilities between the main actors and institutions of the criminal justice system (courts, prosecutors, defense attorneys, etc.).³²

By distinguishing the adversarial and inquisitorial systems at these four levels, the article will provide theoretical tools to explain the evolution of ICTY procedure over time. In Sections III to V, the article describes in detail both the content of the adversarial and inquisitorial systems and the features of ICTY procedure in its early years. The article shows that in its early years,

CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Phil Fennell et al. eds., 1995)); Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in . CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Phil Fennell et al. eds., 1995).

²⁹ The ideas of the dispute and the investigation have been used for comparative law purposes for a long time. See, e.g., FAUSTIN HELIE, 5 TRAITE DE L'INSTRUCTION CRIMINELLE OU THEORIE DU CODE D'INSTRUCTION CRIMINELLE 53 (1853).

³⁰ For a conceptualization of the adversarial and inquisitorial systems as procedure cultures, see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARVARD INTERNATIONAL LAW JOURNAL 1, 7-17 (2004).

³¹ This idea of using the adversarial and inquisitorial systems as legal identities is another new idea explored in this article. For an analysis of common and civil law as identities, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2000).

³² On how the adversarial and inquisitorial systems differ regarding this point, see *infra* notes 79-81, and accompanying text.

ICTY criminal procedure was predominantly adversarial, despite certain resistance to such a system by lawyers from civil law jurisdictions.³³ The initial procedure of ICTY was predominantly adversarial—even if it did not have a jury or detailed rules of evidence—because it was party-driven, kept judges in the role of passive umpires, and strongly favored live witnesses and oral production of evidence at trial.³⁴

In Section VI, the article shows that in the second phase of the history of ICTY procedure—from 1998 onward—things have changed. The Tribunal received intense criticism for the length of its trials and pace of its proceedings,³⁵ and international policymakers partly blamed the adversarial system for these problems and decided to introduce substantial reforms.³⁶ The two main reforms were to transform the passive judges of ICTY into active managers of cases and to eliminate the preference for live witnesses and oral production of evidence. In these ways, ICTY policymakers aimed to speed up the docket.

Sections VII and VIII describe the managerial judging system in detail and show that the reforms introduced in ICTY—and actually its whole current procedure—are best explained by this model.³⁷ These sections show that ICTY has incorporated a substantial number of features of the managerial judging system. These include, for instance, judges who are active managers with the responsibility to expedite process; parties who are not only zealous advocates of their positions but also collaborators with the court in the goal to expedite process; formal and informal sanctions that judges can apply when the parties do not comply with their assigned expediting duties; expanded use of plea bargains; and judges' active encouragement of parties' factual and legal agreements.³⁸

In Section IX, the article analyzes two potential critiques to its main argument that the reforms of ICTY criminal procedure are better described as a move toward the managerial judging system rather than the inquisitorial one. The first of these critiques is what the article calls the *semantic critique*. According to this critique, this article's disagreement with the all other commentators' analyses is not substantial, but merely semantic, in that our disagreement arises from different definitions of the inquisitorial system. Since we use different definitions, we reach different conclusions about ICTY

³³ See *infra* notes 178, and accompanying text.

³⁴ See especially Sections 4 and 5 on this point.

³⁵ See *infra* notes 235-239, and accompanying text.

³⁶ See *infra* notes 240-261, and accompanying text.

³⁷ A detailed description of the managerial judging system is provided in Section VII.

³⁸ See Section VIII.

reforms and procedure, but there is no real disagreement between us. The article refutes the semantic critique in two ways. First, it shows that the definition of the inquisitorial system used here is not substantially different from the definition used by many commentators who have characterized ICTY procedure as inquisitorial. Second, the article explains that beyond the question of definitions, there is a real disagreement with other commentators, because the debate is whether ICTY reforms have made its procedure more like criminal procedure practices in civil law countries. Other commentators implicitly or explicitly state that the reforms have done this; this article shows that they have not.³⁹

The second potential critique analyzed in Section IX is what this article calls the *hybridization critique*. According to this critique, the new procedure of ICTY fits in neither the adversarial nor the inquisitorial system because it is merely a hybrid between them. Therefore, instead of proposing a new model such as managerial judging to understand this procedure, it is only necessary to describe which features of ICTY procedure correspond to each of the two traditional systems. The article responds to this potential critique primarily in two ways. First, it shows that some current features of ICTY procedure that do not find any correlation in the predominant contemporary conceptions of the adversarial and inquisitorial systems at the national level. These features include the conception of the judge as an active manager of cases to expedite the docket, and the conception of the parties as collaborators with the court in the goal of expediting process. Thus, ICTY procedure cannot simply be described as a hybrid between the two traditional systems. Second, the article shows that even if there were some influences of the inquisitorial system on ICTY reforms, these influences had much less impact than did the goal of expediting the docket. It was this latter goal that primarily shaped the reforms. In addition, any inquisitorial *influences* on the reforms did not result in inquisitorial *reforms* or a move toward the inquisitorial system, because the original inquisitorial ideas that influenced the reforms were deeply transformed when translated from civil law jurisdictions to the originally adversarial system of ICTY.⁴⁰ For instance, the inquisitorial idea of having active judges investigating the truth on their own initiative was translated to ICTY as active judges controlling parties' activities to expedite the process. This transformation is so deep that the

³⁹ See *infra* notes 476-479, and accompanying text.

⁴⁰ For analyses on the transformation that legal ideas and institutions may undergo when transferred between legal systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30; Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

reform itself cannot be characterized as inquisitorial, and thus it has not moved ICTY procedure toward the inquisitorial system.⁴¹

Section IX explains that my disagreement with other commentators does not originate from issues raised in the semantic and hybridization critiques, but from a deeper phenomenon: a binary way of thinking about international criminal procedure. The section shows that this binary way of thinking has its origin not in the field of international criminal law, but in the field of comparative criminal procedure.⁴² The latter field typically has used the adversarial and inquisitorial systems as its only theoretical categories, and has assumed that any criminal procedure in the world—or at least in the West—must be adversarial or inquisitorial or at some point on the continuum between these two poles.⁴³ By showing that the managerial judging system does not fit within this framework, the article questions this binary thinking and calls for students of international and comparative criminal procedure to think differently about their objects of study.

In Section X, the article explores a number of implications of the discovery of managerial judging in ICTY. First, the section shows that the managerial judging system not only provides a better description of both ICTY procedure and the shift in the Tribunal's predominant procedural culture, but also highlights a shift in the way procedural powers and responsibilities are distributed between the main actors of the Tribunal. Unlike the adversarial system, in which the judge is a passive umpire and the parties have the main power and responsibility for carrying on the proceedings, in the managerial judging system the judge is the most powerful figure who has the responsibility to make sure that the proceedings do not get delayed because of the parties' activities. In this sense, the rise of the managerial judging system in ICTY reveals that there has been a transfer of powers and responsibilities between institutional actors and professional groups. Moving ICTY procedure from the adversarial to the managerial judging system also has meant that judges have assumed powers and

⁴¹ These two as well as other responses to the hybridization critique are articulated *infra* notes 480-508, and accompanying text.

⁴² The basic difference between international and comparative criminal procedure is that while the former analyzes the procedure of international criminal jurisdictions such as Nuremberg, Tokyo, ICTY, ICTR and the ICC; the latter studies and compares criminal procedures from all over the globe—including national and international.

⁴³ See, e.g., SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS, *supra* note 10, at 14 ("Among concepts usually adopted in comparative criminal procedure the distinction made between *accusatorial* and *inquisitorial criminal proceedings* stand out."). A remarkable exception here is MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986), who develops his own theoretical categories. Damaška's work notwithstanding, the binary adversarial-inquisitorial paradigm is still the predominant way to think about these issues.

responsibilities formerly held by the office of the prosecutor and the defense bar, and have become thereby the most powerful actors in the Tribunal.⁴⁴

Section X also analyzes why ICTY judges chose not to move the Tribunal's procedure toward the inquisitorial system in the face of time pressures. The section suggests two answers to this question. The first has to do with characteristics of the inquisitorial system itself. With its emphasis on determining the real truth, its written documentation of every single act of the process and the high degree of formalization that comes with it, and its distrust of consensual disposition of cases by the parties, the inquisitorial system actually is not the fastest system for prosecuting and adjudicating criminal cases.⁴⁵ The second explanation is that the judges faced a situation of path dependence.⁴⁶ In other words, ICTY judges did not start from scratch but from criminal procedural practices that were predominantly adversarial. In this context, a shift from the adversarial to the managerial judging system was much more feasible than a shift to the inquisitorial one.⁴⁷ At first glance, this result seems counterintuitive. Given that international criminal tribunals have been created from scratch and the number of legal actors participating in them is relatively low, one might assume that introducing procedural reforms to these jurisdictions should be substantially easier than in the national context. But the short history of ICTY warns against such an assumption and illuminates the constraints on the evolution of criminal procedure in international criminal tribunals.

Finally, Section X compares ICTY criminal procedure with U.S. civil and criminal procedures. The section addresses why three procedural regimes which started out close to the adversarial system have moved in two different

⁴⁴ See Section X.

⁴⁵ See *infra* notes 520-24, and accompanying text.

⁴⁶ Questions of path dependence and the challenges it presents to legal analyses and legal reforms have been recently explored in the literature of law and economics —i.e., in relation to issues like corporate governance. See, for instance, Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

⁴⁷ On the particularly challenging obstacles that procedural reforms face when importing legal ideas and institutions from other legal traditions, see, e.g., Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiences*, 45 AM. J. COMP. L. 839 (1997); 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, *From Legal Transplants to Legal Translations*, *supra* note 30; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 429 (2004).

directions when confronted by similar pressures to expedite their dockets. U.S. criminal procedure has remained close to the adversarial ideal, while U.S. civil procedure and ICTY have moved toward managerial judging. The article suggests that in the case of U.S. civil procedure, the move toward managerial judging is partly explained by the fact that the parties to civil litigation are private actors who thus cannot assume an official, public responsibility to systematically speed up the docket.⁴⁸ In the case of U.S. and ICTY criminal procedures, the section emphasizes the two broad distinctions between these procedures already mentioned that explain the different paths they have taken: the relative power that judges have in each of these institutional settings, and the fact that U.S. criminal procedure has had no need to move toward managerial judging because U.S. prosecutors have been more successful managers of cases than their ICTY counterparts.⁴⁹

By comparing ICTY with U.S. civil and criminal procedures, the article helps to explain the trajectory that U.S. domestic procedures have followed in the last decades and integrates these procedures into broader discussions on globalization of law, such as the debate about the convergence thesis described above. The divergent trajectories of ICTY and U.S. criminal procedure also shows that an adversarial criminal procedure subjected to external pressures to process cases more swiftly has at least two different sets of options available to respond to those pressures: to maintain the adversarial system by giving the prosecutor tools with which to manage cases effectively, or to move toward managerial judging. Even if this article will not analyze which of the two options is normatively better, it will leave the ground ready for such analysis by showing that policymakers dealing with an adversarial criminal procedure facing such pressures have these two options available; and that, beyond the policy implications, these are two potential paths that an adversarial system may take when subject to this kind of pressures. In this way, this article will show that procedural models such as managerial judging are useful platforms not only for explaining the recent evolution of ICTY and U.S. domestic systems, but also for exploring future modification and normative evaluations of international and domestic procedures.

⁴⁸ See *infra* footnote 543, and accompanying text.

⁴⁹ See *infra* footnotes 544-612, and accompanying text.

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

There is no question that the adversarial and inquisitorial systems of common and civil law have been important in the creation and evolution of international criminal procedure.⁵⁰ It is because of that impact that the evolution of at least part of international criminal procedure can be described as a competition between these two systems. In the next three sections, this article will analyze the first phase of the history of ICTY procedure—1994-1998—as a competition between adversarial and inquisitorial conceptions of the criminal process. In order to do this, it is necessary to explain first what this competition has been about. This competition is broader than most would imagine, because it is a competition between not only two different techniques of prosecuting criminal cases, but also two different procedural cultures, two distinct legal identities, and two different ways to distribute powers and responsibilities between the main actors in criminal procedure. This section will demonstrate this point and develop theoretical tools that will be used later to analyze the evolution of the procedure of ICTY and the rise of the managerial judging system within it.

International criminal procedure has been conceived in terms of the adversarial and inquisitorial systems, but these systems are much more older than international criminal law. In fact, the differences between the criminal procedures of common law and civil law traditions can be traced back as far as the thirteenth century, when England and continental Europe developed different systems to replace then-prevailing practices that had been in place

⁵⁰ See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 364-88 (framing his analysis of international criminal trials in terms of the adversarial and inquisitorial systems); Benjamin B. Ferencz, *supra* note 6, at 144 (1948-1949) (“The landmarks of international law which have been erected in Nuremberg rest on a foundation of legal procedure which has satisfied the traditional safeguards of Continental and American law”); Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, Arusha*, *supra* note 6, at 727 (1999) (“A feature of the historic and modern international criminal trials is that they have been bench trials...The approach to evidence has been to use elements from both the common law and civil law systems. Thus, the presentation of evidence has followed the ‘adversarial model’, whereas the rules governing the admissibility of evidence may be seen as more akin to the ‘inquisitorial’ model and leave wide discretion to the judges”), at 729 (“The Charter gave the Nuremberg Tribunal wide discretion when it came to the admissibility of evidence. Although the trials were adversarial and the parties alone were responsible for calling the evidence, the judges were sitting without a jury, and the common law rules designed to prevent jurors from hearing prejudicial evidence were discarded in favour of a liberal approach akin to that of civil law systems.”); Alphons Orie, *supra* note 6, at 1439 (framing his analysis of international criminal proceedings in terms of the adversarial and inquisitorial systems).

since the fall of the Western Roman Empire.⁵¹ While continental jurisdictions started to develop bureaucracies in which professional officials were put in charge of prosecuting, investigating and adjudicating criminal cases, England placed greater reliance on lay persons to perform these tasks.⁵²

Both systems expanded all over the world through processes such as colonization, civilization, modernization, and globalization.⁵³ Both also changed substantially over time,⁵⁴ and, through a process of mutual influence upon each other, adopted features or elements from one another.⁵⁵ But even today, and despite this persisting mutual influence, jurisdictions under common and civil law present substantial differences in their respective conceptions of criminal procedure.⁵⁶ From at least the 19th century onward, the adversarial and the inquisitorial have been the two main categories

⁵¹ For a description of the system of ordeals, trial by combat, and oaths prevalent in Europe prior to the thirteenth century and an explanation of why this disappeared, see ROBERT BARTLETT, *TRIAL BY FIRE AND WATER* (1986).

⁵² A classic account is ADHEMAR ESMEIN, *HISTOIRE DE LA PROCEDURE CRIMINELLE EN FRANCE* (1882). There is an English edition of this work: ADHEMAR ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* (John Simpson trans., 1968) (1882). For contemporary accounts of these developments, see FRANCO CORDERO, *PROCEDURA PENALE* 16-101 (2d ed. 1993); JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* (1974); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003); JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977); JULIO B.J. MAIER, 1 *DERECHO PROCESAL PENAL* § 5 (2d ed. 1996); JEAN-PIERRE ROYER, *HISTOIRE DE LA JUSTICE EN FRANCE: DE LA MONARCHIE ABSOLUE A LA REPUBLIQUE* (2d ed. 1996).

⁵³ On the expansion of the common law throughout the world, see KONRAD ZWEIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 218-37 (3d ed. 1998). For a description of how the inquisitorial system was imposed and developed in Latin America, see MAIER, *supra* note 52, § 5(D)(8). For an analysis of these developments in a number of African, Asian and Inter-American countries, see JEAN PRADEL, *DROIT PENAL COMPARE* 186-201 (1995).

⁵⁴ On these changes over time, see all the historical works cited *supra* note 52.

⁵⁵ For a description of some of these influences from contemporary adversarial systems (mainly the U.S.) on continental-European and Latin American ones, see Grande, *supra* note 47; Langer, *From Legal Transplants to Legal Translation*, *supra* note 30. Classic examples of influences from the adversarial on the inquisitorial include the introduction of oral and public trials and trials by jury in most continental European countries during the XIX Century. For an analysis of these reforms, see, for instance, the articles included in *THE TRIAL BY JURY IN ENGLAND, FRANCE, GERMANY 1700-1900* (Antonio Padoa Schioppa ed., 1987). A classic example of the inquisitorial model influencing the adversarial one is the development of a public prosecution system by the United States as a result of the influences of the Dutch and French criminal justice systems. See Albert J. Reiss, Jr., *Public Prosecutors and Criminal Prosecution in the United States of America*, 1975 *THE JURIDICAL REVIEW* 1; ANDRÉ FOURNIER, *CODE DE PROCEDURE CRIMINELLE DE L'ÉTAT DE NEW-YORK* 9 (1893).

⁵⁶ For recent accounts on these differences, see, e.g., *CRIMINAL PROCEDURE, A WORLDWIDE STUDY* (Craig M. Bradley ed. 1999); JOHN HATCHARD ET. AL., *COMPARATIVE CRIMINAL PROCEDURE* (1996); WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* (1999); STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE* (2002).

designed to capture these differences.⁵⁷ As the differences have changed over time, the content of these categories has also changed.⁵⁸ But to the extent that there are persisting differences between common and civil law jurisdictions, the distinction between the adversarial and the inquisitorial systems still has an important heuristic value.

In the adversarial system, criminal procedure consists of a dispute or contest between two active parties before a passive professional judge and a passive jury. The contest consists of the prosecution attempting to prove, beyond a reasonable doubt, that the defendant committed an offense, while the defense tries to disprove this hypothesis. In the inquisitorial system, criminal procedure consists of an official investigation, run by one or more impartial officials of the state—judges and prosecutors—in order to determine the truth. A number of features—which are analyzed in greater detail in sections IV and V—characterize and distinguish the adversarial system as against the inquisitorial system: a bifurcated court composed of a professional judge and a jury, as against a unitary court dominated by professional judges; judges as passive umpires, as against actively investigating judges; the prosecutor conceived as a party in a contest with the defense, as against the prosecutor conceived as an impartial official; broad prosecutorial discretion, as against limited prosecutorial discretion; common law rules of evidence, as against no detailed rules of evidence; and so on.⁵⁹

Given these differences, the adversarial and inquisitorial systems handle criminal cases and the human and material resources of the criminal justice system differently. Thus, choosing between these two systems of criminal procedure may have an impact on how accurately an international

⁵⁷ 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*)” (DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 43, at 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, was likely to have 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).

⁵⁸ On the different meanings of the adversarial and the inquisitorial not only in comparative law but also in other contexts, see Mirjan Damaška, *Adversary System*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 24 (Sanford H. Kadish ed., 1983); and 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, at 102-111 (Julio B.J. Maier & Alberto Bovino eds., 2001).

⁵⁹ For an analysis in detail of the content of the adversarial and inquisitorial systems as defined in the text, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

jurisdiction distinguishes the guilty from the innocent⁶⁰ and establishes the historical background that led to mass atrocities,⁶¹ how swiftly cases are investigated, prosecuted and adjudicated, how fair or unfair international criminal proceedings are perceived to be by the public,⁶² and similar issues. In this sense, the competition between the adversarial and inquisitorial systems in the early years of ICTY can be understood as a competition between two different techniques to handle international criminal cases, and about which of these two techniques would better enable ICTY to achieve its goals.⁶³

But besides being a competition between two different sets of techniques to handle criminal cases, it was also a competition between cultures.⁶⁴ The adversarial and inquisitorial systems are not only two different techniques, but also two different conceptions of how criminal prosecution and

⁶⁰ Of course, it is not easy to tell whether a certain system distinguishes between guilty and innocent 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 that, based on 20th century epistemology, articulates which features criminal law and criminal procedure have to possess in order to be as accurate as possible in distinguishing guilty and innocent—especially in not convicting the innocent—see LUIGI FERRAJOLI, *DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE* (1989).

⁶¹ 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 the Tribunal 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, *How Have International Criminal Tribunals Written Histories of Mass Atrocities?*, 27 Human Rights Quarterly (forthcoming 2005).

⁶² On the link between people’s perception of procedural fairness and their acceptance of the procedure’s outcome, see, for instance, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

⁶³ On the goals of ICTY in particular and of international criminal justice in general, see, for instance, Ninth Annual Report ICTY, August 14, 2002, para. 328 (the goals given to the Tribunal by the U.N. Security Council have been to combat impunity and render 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 61, at 660).

⁶⁴ The concept of culture has been recently under attack because it would suggest boundness, 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. 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).

adjudication should be carried out.⁶⁵ Hence, the adversarial and inquisitorial systems can also be understood as two different procedural cultures.⁶⁶ For instance, judges in an adversarial system act as passive umpires not only as a technique for handling criminal cases, but also because they and most other actors in an adversarial system 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.⁶⁷ Similarly, if a judge in an inquisitorial system were to let the prosecution and defense run the trial completely, this passivity might be considered an abdication of the proper judicial role within an inquisitorial conception of criminal procedure.⁶⁸

Within each of these cultures it is possible to distinguish two different elements. First, each culture presents a set of basic ideas about what prosecution and adjudication of criminal cases should entail. These sets of basic ideas can be understood as two different *structures of interpretation and meaning* through which the different participants in the criminal adjudication process (prosecutors, judges, defense attorneys, etc.) understand criminal procedure and their respective roles within the system.⁶⁹ The adversarial structure of interpretation and meaning includes, among other features, a conception of criminal procedure as a contest between two parties before a passive umpire, with prosecutorial discretion, common law rules of evidence, and a bifurcated court composed of a judge and a jury. The inquisitorial structure of interpretation and meaning includes, among other features, a conception of criminal procedure as an official investigation conducted by impartial officials, with limited

⁶⁵ For an analysis of international criminal jurisdictions as an encounter of lawyers with different cultural and legal backgrounds, see Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 10, at 627.

⁶⁶ For a conceptualization of the adversarial and inquisitorial systems as procedural cultures, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

⁶⁷ On the passive role of the judge in the United States during trial, see, e.g., Craig M. Bradley, *United States*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 395, 421-22 (Craig M. Bradley ed., 1999).

⁶⁸ On the active role of judges during trial in Germany as representative of civil law jurisdictions, see, e.g., § 155, II and § 244, II StPO (German Criminal Procedure Code). For an analysis of these provisions, see CLAUS ROXIN, *STRAFVERFAHRENSRECHT* 94-5 (1998).

⁶⁹ 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, at 182 (1983) (“The turn of anthropology ... toward heightened concern with structures of meaning in terms of which individuals and groups of individuals live out their lives, and more particularly with the symbols and systems of symbols through whose agency such structures are formed, communicated, imposed, shared, altered, reproduced, offers as much promise for the comparative analysis of law as it does for myth, ritual, ideology, art, or classification systems, the more tested fields of its application.” *Id.*)

prosecutorial discretion, no detailed rules of evidence, and a unitary court dominated by professional judges.⁷⁰

Furthermore, to the extent that a particular set of ideas, or structure of interpretation and meaning, is internalized by a substantial number of legal actors within an adversarial or inquisitorial system, it also becomes part of the *internal dispositions* of these legal actors.⁷¹ These internal dispositions shaped by particular procedural structures of interpretation and meaning are internalized through a number of socialization processes (e.g., law schools, judiciary schools, prosecutor's office and law firm training, interaction with the courts).⁷² As a result of this socialization, a substantial number of actors in the criminal justice system are predisposed to understand criminal procedure and the various roles within it in a particular way, and these dispositions become durable over time.⁷³ Thus, as a consequence of their internalization of an adversarial structure of interpretation and meaning, most legal actors in common law countries will consider that judges are not supposed to behave very actively, that prosecutors have to have broad discretion to file and dismiss charges, and so on. A similar process would occur with legal actors in inquisitorial jurisdictions regarding inquisitorial structures of interpretation and meaning.

In the context of our analysis of ICTY criminal procedure and how it has evolved over time, this conceptualization of the adversarial and inquisitorial systems as procedural cultures, and the distinction between structures of interpretation and meaning and internal dispositions within each of them are important for the following reason. Given that lawyers coming from

⁷⁰ For a more detailed description of the concept "structure of interpretation and meaning" and its application to the adversarial and inquisitorial systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

⁷¹ 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 (Gino Raymond & Matthew Adamson trans., John B. Thompson ed. 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 the dimension of internal dispositions is only inspired by Bourdieu's concept, because I do not follow his theoretical framework in this article. Thus, my use of it is idiosyncratic.

⁷² For a description of how lawyers, judges, prosecutors, and professors are trained and socialized in civil law countries, see, for example, JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 101-10 (2d ed. 1985).

⁷³ For a more detailed description of the concept "internal dispositions" and its application to the adversarial and inquisitorial systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

adversarial and inquisitorial systems to participate in ICTY may have different sets of internal dispositions about how to handle criminal cases, they may tend to think and behave according to these preconceptions when designing the rules of the tribunal, pleading about legal issues, managing the pre-trial and trial phases, adjudicating criminal cases, and other matters. In this sense, the conceptualization of adversarial and inquisitorial systems as procedural cultures has not only a descriptive but also an explanatory value.⁷⁴ In other words, it will help us to understand not only what kind of procedure ICTY has, but also why and how this procedure has changed over time. The competition between the adversarial and the inquisitorial procedural cultures in ICTY has happened through the interactions of individual legal actors coming from each of these traditions, and the relative power of groups from each tradition may influence the outcome of the competition between these two conceptions of criminal procedure.

This does not mean that the predominance of one system over the other is only determined by the relative power of actors with inquisitorial or adversarial internal dispositions, or by internal dispositions in general. Many other factors also influenced the evolution of this competition, such as time and resource constraints, practical problems and needs, external political pressures on ICTY, institutional constraints, and the personal agendas of people with decision-making power regarding the tribunal, among others. But the internal dispositions and relative power of the policymakers and legal actors of international jurisdictions have also influenced these developments, so they also must be included in international criminal procedure analyses.

In addition to being two different techniques to handle criminal cases and two different procedural cultures, the adversarial and inquisitorial labels can work, in some contexts, as *legal identities*.⁷⁵ In other words, legal actors

⁷⁴ On the distinction between the descriptive, explanatory and normative levels, see, e.g., 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?”

⁷⁵ 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 the concepts of culture and identity—which often merge—should be analytically distinguished. For instance, social actors may share a number of features—i.e., being factory workers—without attaching to them the importance of defining who they are. Conversely, identities may not be based on strong cultural differences. Some people may say that this was the case in the former Yugoslavia before the

may view the labels as defining who they are as legal actors—and who they are not.⁷⁶ In the same way in which many people think that gender, sexual orientation, race, ethnicity, religion, class, or age are important features in understanding and defining what kinds of persons they are,⁷⁷ lawyers have also thought that coming from an adversarial or inquisitorial system may also be important in understanding and defining themselves as legal actors.⁷⁸ This identity role 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.

Besides being two different techniques to handle criminal cases, two different procedural cultures and two potential legal identities, the adversarial and inquisitorial systems also differ at another level that can be

beginning of the 1990s. For instance, Croats and Serbs basically shared the same language, territory, political system, and so forth, and still saw themselves as deeply distinct from each other.

⁷⁶ This idea of using the adversarial and inquisitorial systems as legal identities is another new idea explored in this article. For an analysis of common and civil law as identities, see GLENN, *supra* note 31.

⁷⁷ On the role of identities in U.S. legal discourse during the 70s and 80s, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

⁷⁸ 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 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—i.e., eliciting confessions in a coercive way. For an example of this construction of the adversarial and the inquisitorial in the United States, see *Miranda*, 384 U.S. at 442-43, 459-60. 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. (For another use of the terms in the United States that is not presented in a laudatory way and is focused on the role of the judge in each of these systems, see, for example, *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).) In continental Europe, one of the most widespread uses of the accusatorial and the inquisitorial for defining their criminal procedure practices has been the following. The accusatorial is used to refer 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 are usually 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, that 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 saying something like “we are substantially different from our historical antecessors in the way we understand criminal procedure”, and the current Anglo-American process—by saying some like “but also substantially different from Anglo-Americans.” For an example of this use in early twentieth-century France, see RENE GARRAUD, *1 TRAITE THEORIQUE ET PRATIQUE D’INSTRUCTION CRIMINELLE ET DE PROCEDURE PENALE* 10-22 (1907).

called the *dimension of procedural powers*.⁷⁹ Each of these systems assigns different quanta of procedural powers and responsibilities to the main actors 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.⁸⁰ This also means that both the prosecution and the defense in the inquisitorial system are comparatively less powerful than in the adversarial one. An example of this is the power that the defense has in the adversarial system to do its own pre-trial investigation—a power generally not present in inquisitorial models.⁸¹ Varying procedural powers among individual actors are also reflected at the institutional level in the power relations between the prosecutor's office, the judiciary, the defense bar, and other institutions.

In this sense, the competition between adversarial and inquisitorial systems in ICTY can also be understood as 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. As with the three previous distinctions between the traditional systems as two separate procedural techniques, cultures and legal identities, the dimension of procedural power also has descriptive and normative value. From a descriptive perspective, it is useful to show that the competition between adversarial and inquisitorial systems is also about which professional group, judges or prosecutors, will have the main role in handling international criminal cases. From an explanatory perspective, this dimension of procedural powers also may be useful to explain some of the changes that the procedure of ICTY has undergone over time.

⁷⁹ For a more detailed description of the dimension of procedural power and its application to the adversarial and inquisitorial systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

⁸⁰ This is clear if we compare the active judges of the inquisitorial system with the jury of the adversarial one. The inquisitorial judges are also more powerful than adversarial professional judges because of their power to decide which evidence is produced at trial and the order in which it is presented, as well as through their power to lead the interrogation of witnesses and expert witnesses. However, this last statement must be qualified. The adversarial judges have inherent powers -- i.e., 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.

⁸¹ Regarding France, see, e.g., Valérie Dervieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES 218, 250 (Mireille Delmas-Marty & J. R. Spencer eds., 2002).

To sum up this section, then, the adversarial and inquisitorial systems can be distinguished at four different levels. They can be understood as two techniques to handle criminal cases; two procedural cultures—including here both structures of interpretation and meaning, and internal dispositions of the legal actors; two 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 different levels work simultaneously in a given set of institutional practices.⁸² But in the context of this article, it is important to distinguish them conceptually for three different reasons.

First, these theoretical distinctions between adversarial and inquisitorial systems provide us with theoretical tools to analyze and explain how the criminal procedure of ICTY has evolved over time. Even if these four levels cannot account for all the changes that ICTY criminal procedure has undergone over time,⁸³ they have played an important role in this evolution. Second, the distinction between these four different conceptual levels at which the adversarial and inquisitorial systems differ is also helpful to identify what the competition between adversarial and inquisitorial systems in international criminal justice is about. To some extent, that competition is about which of the two systems can better achieve the goals of international criminal procedure. But at the same time, it is a less rational competition about 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. As will be shown later in Sections VII to IX, even if this system has not been used as a legal identity by ICTY legal actors, it is—like the adversarial and inquisitorial systems—a technique to prosecute and adjudicate criminal cases, a procedural culture, and a particular way to distribute powers and responsibilities between the main actors of the criminal justice system.

⁸² As I explained *supra* note 82, the adversarial and inquisitorial are not necessarily used as legal identities in every criminal procedure jurisdiction, even if they 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.

⁸³ Other factors such as time, practical constraints, and external political pressures also have played an important role and will be considered in this article's analysis of the evolution of ICTY procedure.

III. THE CREATION OF THE CRIMINAL PROCEDURE OF ICTY AND ITS FOUNDATIONAL TEXTS

The U.N. Security Council established ICTY for the “purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia” after 1991⁸⁴ in an attempt to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”⁸⁵ 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 created⁸⁶—designing its basic organization and structure was a new and complex process of institutional engineering.⁸⁷

In the case of criminal procedure, this complexity arose partly from the specific characteristics of ICTY in particular and of international criminal jurisdictions in general in comparison to national legal systems.⁸⁸ First, the Tribunal has not had its own coercive apparatus in order 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.⁸⁹ For all these tasks, it has had to rely on the collaboration of national states⁹⁰ and the international community.⁹¹ Second, there has

⁸⁴ ICTY has basically prosecuted and tried events that transpired between the periods 1992-95 in Bosnia; 1991-95 in Croatia, and 1998-99 in Kosovo.

⁸⁵ UN Security Council Resolution 827, S /RES/827 (1993).

⁸⁶ See SAFFERLING, *supra* note 15, at 34.

⁸⁷ For an analysis of the process that led to the creation of ICTY, see, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF INTERNATIONAL TRIBUNALS* (2000).

⁸⁸ 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 18-32, U.N. Doc. A/54/634 of 22 November 1999 [hereinafter Expert Group].

⁸⁹ See, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 442 (“The crucial problem international criminal courts face is the *lack of enforcement agencies* directly available to those courts”).

⁹⁰ This problem did not exist in 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 the 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, e.g., 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*

been a physical distance between the Tribunal located in The Hague⁹² and the sites where the crimes occurred in the former Yugoslavia that has been inconvenient both for investigative purposes and for conducting criminal trials.⁹³ 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.⁹⁴ 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.⁹⁵ Finally, prosecuting and trying international crimes usually involve proving

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).

⁹¹ See, e.g., Sixth Annual Report of ICTY, August 25, 1999, Summary ("because the Tribunal lacks effective enforcement powers to remedy such obstructionism, it continues to rely on the international community to bring such States into compliance with their clear obligations under international law.") and para. 3-7.

⁹² 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, this power has not been exercised by any of the Chambers of ICTY. 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 that a Chamber 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]). 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).

⁹³ The distance of ICTY from the places where the events occurred also may have had an impact on the legitimacy of the Tribunal in the former Yugoslavia. See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 148 ("The Tribunal is viewed negatively by large segments of the population of the former Yugoslavia...Throughout the region, the Tribunal is often viewed as remote and disconnected from the population and there is little information available about it."). 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).

⁹⁴ See, e.g., CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 443. 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 of Serbo-Croatian. The problem of translating documents and proceedings has been an issue since Nuremberg. See, for instance, TAYLOR, *supra* note 1, at 125-6, 140-1, 165, 173, etc. 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).

⁹⁵ See, e.g., CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 442 ("[T]here exists a need for international criminal courts to *amalgamate* different judges, each with a varied cultural and legal background... Some come from common law countries, others from States with a civil law tradition.").

complex factual issues such as the existence of a widespread or systematic practice—as with crimes against humanity—or looking into the historical or social context of the criminal conduct.⁹⁶ This complexity not only lengthens the proceedings but also presents all kinds of challenges to the investigation, prosecution, defense, and adjudication of international criminal cases.

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.⁹⁷ In comparison to international criminal law, international criminal procedure at the time ICTY was created was—and still is today, though to a much lesser extent⁹⁸—an almost completely undeveloped field of law.⁹⁹ To make things even more difficult, both the drafters of the Statute of ICTY (hereinafter the Statute) and the drafters of ICTY's Rules of Procedure and Evidence had very limited time in which to design these documents.

The U.N. Secretary-General assigned the task of drafting the Statute to the United Nations Office of Legal Affairs, which had only 60 days to issue it.¹⁰⁰ Contrary to what is widely stated by commentators,¹⁰¹ the drafted

⁹⁶ See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13 (“The Tribunal’s cases involve complex legal and factual issues, as well as the application of legal principles that have not previously been interpreted or applied”); and CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 442-43.

⁹⁷ In Nuremberg, the Rules of Procedure of the International Military Tribunal for 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, e.g., 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 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 851 (1999).

⁹⁸ See, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 389 (“[I]t should be emphasized that there do not yet exist international general rules on international criminal proceedings. Each international court (ICTY, the ICTR, and the ICC) has its own Rules of Procedure and Evidence...Probably, with the gradual winding down of the judicial activity of ICTY and ICTR and the contemporaneous consolidation of the ICC, the rules of procedure of this court may become generally accepted by States and then turn into general international rules. This is, however, a process that is likely to take a number of years.”).

⁹⁹ See, e.g., Boas, *Creating Law of Evidence for International Criminal Law*, *supra* note 12, at 40 (“The Rules of Procedure and Evidence of ICTY are the first coherent body of principles governing the prosecution of violations of international humanitarian law, or indeed international law, to be construed”).

¹⁰⁰ UN Security Council Resolution 808, 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 OLA. For analyses of this assignment to the OLA and its possible advantages and disadvantages in comparison to other potential ways to creating the Tribunal and drafting its Statute, see M. CHERIF BASSIOUNI,

Statute—which was approved without changes by the Security Council—did not have a clear adversarial slant.¹⁰² Even if the Statute settled important issues—such as what would be the main organs of the tribunal, who would be in charge of the pretrial investigation, and how the trial court would be composed—the decision of its drafters was to leave most criminal procedure questions to be decided by the judges of ICTY, who would be in charge of developing the Rules of Procedure and Evidence of the Tribunal (hereinafter the Rules).¹⁰³ The judges took only three months to draft and issue the Rules,¹⁰⁴ and the adversarial and inquisitorial systems were clearly the two main reference models that framed their discussions—together with human rights standards.¹⁰⁵ 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, and if we also keep in mind the binary way in which policymakers and scholars have thought about international criminal procedure—a question that will be analyzed later.¹⁰⁶

THE LAW OF THE CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 219-226 (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, at 115 (1998).

¹⁰¹ An exception is Orie, *supra* note 6, at 1463, (stating that ICTY Statute was too rudimentary to infer from it a certain procedural model).

¹⁰² See, e.g., BASSIOUNI, *supra* note 100, at 863; Johnson, *supra* note 100, at 142-5; Tochilovsky, *Legal Systems and Cultures*, *supra* note 10, at 629. 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, for instance, BASSIOUNI, *supra* note 100, at 872). However, a number of civil law countries also assign this task to the prosecutor (i.e., Germany) even if they conceive of it in a very different way that I cannot develop here. 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 will explain later, the idea of a guilty plea has traditionally 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 and to be decided by the judges as drafters of the Rules of Procedure and Evidence.

¹⁰³ Statute, Article 15.

¹⁰⁴ 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 at the Tribunal.

¹⁰⁵ First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991, para. 71, A/49/342, S/1994/1007 (1994) [hereinafter, First Annual Report].

¹⁰⁶ See *infra* Section IX.

Unlike the Statute, the Rules had a clear adversarial inclination.¹⁰⁷ There were two main reasons for the adoption of a predominantly adversarial system. First of all, the most important input that the judges received to perform their task came from U.S. sources.¹⁰⁸ This probably reflected the fact that 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.¹⁰⁹ The judges received proposals from several states and organizations. However, “[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.”¹¹⁰ 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

¹⁰⁷ See, e.g., Orié, *supra* note 6, at 1464 (“The Rules of Procedure and Evidence that were adopted by the judges...were largely inspired by the Anglo-American tradition. The rules introduce a typical accusatorial type of trial”); Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 1999 NILR 343, at 345 (“ICTY borrowed principles of proceedings mostly from common-law jurisdictions. Drafters of ICTY Rules opted for the common-law litigation model between two parties, where an indictment is a form of a lawsuit”).

¹⁰⁸ See BASSIOUNI, *supra* note 100, at 867; CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 384 (pointing out that in the first text of the Rules, the judges in essence adopted a system very close to the one proposed by the U.S. Memorandum circulated among the judges by the U.S. Department of Justice, which contained a proposal for draft Rules).

¹⁰⁹ 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 100, at 225; Johnson, *supra* note 100, at 132-3.) According to other accounts, the position of the U.S. government was less idealistic than the one just mentioned. Michael P. Scharf, who worked as Attorney-Adviser for United Nation 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 P. Scharf, *Indicted for War Crimes, Then What?*, Washington Post, October 3, 1999, at B01, quoted by Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note 10, at 628-9). 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 existed in the U.S.’s support of ICTY.

¹¹⁰ VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 177 (1995).

commenting on the U.S. proposal and suggesting changes and additions to it.¹¹¹ This probably made the U.S. proposal even more influential.¹¹²

The second factor in the adoption of a predominantly adversarial system was that a majority of the judges seem to have been inclined in favor of 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.”¹¹³ 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.¹¹⁴

This does not mean, though, that the judges simply transplanted or “copy-and-pasted” the U.S. adversarial system to the international arena.¹¹⁵ Rather, the judges had to both decide which specific rules and institutions would be part of ICTY criminal procedure, and adapt and translate an adversarial system to the international context.¹¹⁶ For instance, as the Statute had already excluded the possibility of having trial by jury in the Tribunal, the judges decided to exclude most of the institutions they

¹¹¹ See BASSIOUNI, *supra* note 100, at 864.

¹¹² See BASSIOUNI, *supra* note 100, at 863 (mentioning that the American Judge Gabrielle Kirk McDonald brought with her the ABA report).

¹¹³ 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 9, at 650. See also CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 384 (pointing out that one of the reasons for the adoption of the largely adversarial system at ICTY and the ICTR was the intellectual and psychological appeal of the Nuremberg and Tokyo model; and adding that it was perhaps felt that the adversarial system better safeguarded the rights of the accused). In both the Nuremberg and Tokyo trials, it is believed that the adversarial system prevailed over the inquisitorial. See CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 376-84.

¹¹⁴ See BASSIOUNI, *supra* note 100, at 863; CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 384. In addition, the first President of the Tribunal, Antonio Cassese, came from Italy, which is traditionally considered a civil law country but that adopted a system in 1988 that Cassese himself has considered adversarial. See his *INTERNATIONAL CRIMINAL LAW* 366 (2003). For analyses of the difficulties Italian criminal procedure has faced in trying to move in the direction of the adversarial system, see Grande, *supra* note 47; Langer, *From Legal Transplants to Legal Translations*, *supra* note 30; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial System in Italy*, 25 MICHIGAN INTERNATIONAL LAW JOURNAL 429 (2004).

¹¹⁵ On the problems that the idea of the legal transplant presents to the circulation of legal ideas and institutions between legal systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

¹¹⁶ ICTY adopted special characteristics in this respect because not only were individual legal institutions and ideas translated to this context, but also the whole institutional setting was created from scratch.

considered closely associated with it, such as common law rules of evidence¹¹⁷ and the prohibition of appeal of an acquittal by the prosecution.¹¹⁸

The enactment of predominantly adversarial rules helped to shape the criminal procedural practice of ICTY in the same direction. Even if, as will be suggested later in this article, a number of judges, prosecutors and defense attorneys with a predominantly inquisitorial set of internal dispositions consciously or unconsciously resisted certain institutions and practices characteristic of the adversarial system,¹¹⁹ there was an agreement that the system set up by the Rules was predominantly adversarial.¹²⁰ Legal actors who came from inquisitorial backgrounds generally accepted that many of their internal dispositions regarding the handling of criminal cases did not apply in this international context.¹²¹ This agreement had the effect of reinforcing the predominance of the adversarial system in the first years of the tribunal's work.

Furthermore, 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.¹²² 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

¹¹⁷ This idea had also been followed in Nuremberg. See, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 382, who says that in Nuremberg “with regard to evidentiary requirements, the USA and the UK easily accepted the idea that rules of evidence should be simplified, the more so because there was no jury and the common law rules of evidence constituted, as Jackson put it, ‘a complex and artificial science to the minds of Continental lawyers’”.

¹¹⁸ See First Annual Report, *supra* note 105, para. 72.

¹¹⁹ See *infra* Sections 4 and 5.

¹²⁰ See, e.g., *Prosecutor v. Zejnil Delalic*, Case 96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, May 1, 1997, para. 15 (“the Judges adopted a largely adversarial, instead of the inquisitorial, approach in the Rules”).

¹²¹ See, e.g., *Prosecutor v. Kupreškic et al.*, Case IT-95-15, Transcript, August 27, 1998 (Judge Cassese: “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”).

¹²² 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, at 676-77 (1994) (applying this idea to U.S. civil procedure debates).

information to ask meaningful questions.¹²³ In this way, the establishment of a predominantly adversarial model in the Rules also reinforced many of the adversarial features of ICTY criminal proceedings.¹²⁴

But in what sense did the adversarial system predominate over the inquisitorial in the first years of ICTY criminal procedure? To answer this question, it is necessary first to define what the main features of the adversarial and the inquisitorial systems are. As this article defines these terms, it will show how the main features of the initial rules and practices of ICTY corresponded to one system or the other. It will also show how legal actors with inquisitorial internal dispositions challenged a predominantly adversarial structure of interpretation and meaning, which also helped to shape criminal procedure during the initial years of ICTY.

IV. THE MODEL OF THE DISPUTE VERSUS THE MODEL OF THE OFFICIAL INVESTIGATION

Defining the adversarial and inquisitorial systems is not an easy task. One of the difficulties is that the differences between criminal procedure in common law and civil law are so numerous that it is easy to get lost in the details and to lose sight of the basic differences between them. The most promising way to capture these basic distinctive features is to describe the adversarial and inquisitorial systems as being organized mainly according to two opposing pairs of sub-systems or models.¹²⁵ This section describes and explores the first of these opposing pairs in analyzing ICTY procedure during its early years. Section V proceeds in the same way regarding the second opposing pair.

The first of these pairs is the opposition between *the model of the dispute* and *the model of the official investigation*. The basic difference here

¹²³ This explains why Italy has eliminated the access of the pre-trial written-dossier to the trial court by creating a special dossier for the trial. See C.P.P. Italy, art. 431.

¹²⁴ On this idea of interconnectedness between elements of the adversarial and inquisitorial systems at the national level, see Mirjan Damaska, *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).

¹²⁵ 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 description I will offer in this and the next section should be taken as Weberian ideal-types that may need adjustments in relation to particular jurisdictions.

is that criminal procedure rules and practices of common law jurisdictions are basically conceived as a dispute between two active parties who carry on the proceedings before a passive decisionmaker, while the criminal procedure practices of civil law jurisdictions are conceived as an official investigation done by one or more public officials in order to determine the truth.¹²⁶

These two different organizing principles or models explain many features of criminal procedure in each of these traditions. First of all, these models provide an account of the predominant conceptions of the decisionmaker (judge and/or jury), the prosecutor and the defense, as well as the role of the victim, in common and civil law countries. In common law jurisdictions, the decisionmaker is usually understood as a passive umpire who decides upon the controversies that the parties present to him.¹²⁷ A too-active decisionmaker is viewed with suspicion within this conception of the criminal adjudication process, because his activism may indicate a bias toward one side or the other.¹²⁸ By contrast, the prosecutor is seen 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.¹²⁹

The defendant and his attorney are usually understood to be procedural equals of the prosecutor. They, too, have to develop their own case, have an interest in the decision of the controversy, and have most of the same

¹²⁶ The ideas of the dispute and the investigation have been used for comparative law purposes for a long time. See, for instance, HÉLIE, 5 TRAITÉ DE L'INSTRUCTION CRIMINELLE OU THÉORIE DU CODE D'INSTRUCTION CRIMINELLE, *supra* note 57, at 53.

¹²⁷ 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, at 36 (Harold J. Berman ed., 1972). I will take my examples to illustrate both the features of the adversarial system and the *model of the dispute* from the U.S. system because it is the common law system with which I am most familiar.

¹²⁸ See, e.g., *People v. Davis*, 549 N.W.2d 1, at 50-51 (Mich.App., 1996) ("The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality... The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test is whether the 'judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, ... and whether partiality 'quite *possibly could* have influenced the jury to the detriment of defendant's case.'").

¹²⁹ In the United States, it is usually said that the role of the prosecutor is not only to look for a conviction, but also for justice. Nevertheless, in comparative terms, the 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).

procedural powers.¹³⁰ Finally, the victim plays a very limited role in the binary logic of this kind of proceeding, which pits prosecution against defense in a contest.¹³¹ 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.¹³²

The model of the official investigation explains the predominant conception of the judge, the prosecutor, and the defendant in civil law jurisdictions, as well as the roles that the victim plays in some of them. There, the judge is predominantly conceived as a public official whose role is to investigate the truth.¹³³ Therefore, he has to be active and able to decide lines of investigation and produce evidence *sua sponte*, even if the parties have not requested it.¹³⁴ In addition, he also decides in which order the evidence will be produced. The prosecutor is not conceived as a party but rather as another public official whose role also is to investigate the truth.¹³⁵ This is why the prosecutor, like the judge, has a duty to gather both inculpatory and exculpatory evidence.¹³⁶ There is a sort of division of labor between prosecutor and judge, in which the former investigates the facts and/or requests the application of the law while the latter adjudicates—without quitting her investigative role. But otherwise, the roles of both public officials are essentially the same.¹³⁷

Regarding the defendant, even if he is a citizen with rights in contemporary inquisitorial systems, he is also a target of investigation who

¹³⁰ On the predominant conception of the role of the advocate in the U.S., see, for instance, the classical article by Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, at 1035-9 (1975).

¹³¹ See DAMAŠKA, THE FACES OF JUSTICE, *supra* note 43, at 201 (“[I]n Anglo-American criminal procedure the victim has few ancillary rights because important stages of common-law prosecution are structured as a contest of two sides, so that introduction of a third actor into bi-polar litigation can adversely affect the incentives required to sustain it”).

¹³² On the limited role of victims in U.S. criminal procedure, see, generally, 3 BUFF. CRIM. L. REV. 1 (1999) (Symposium *Victims and the Criminal Law: American and German Perspectives*).

¹³³ For instance, regarding the determination of truth being the goal of criminal procedure in France, see MICHELE-LAURE RASSAT, *TRAITE DE PROCEDURE PENALE* 297 (2001). On the more absolute conception of truth more predominant in 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).

¹³⁴ See, for instance, § 155, II and § 244, II STPO (German Criminal Procedure Code). For an analysis of these provisions, see CLAUS ROXIN, *STRAFVERFAHRENSRECHT* 94-5 (1998).

¹³⁵ See, for instance, Thomas Weigend, *Prosecution: Comparative Aspects*, in 3 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1233-4 (Joshua Dressler ed., 2d ed. 2002).

¹³⁶ *Id.* at 1234.

¹³⁷ *Id.* at 1233-4.

has a personal stake in how the case is decided, unlike the judge and prosecutor.¹³⁸ This is why, as a rule, the defense does not gather its own evidence but instead asks the investigating prosecutor or judge to do it. The latter are supposed to have an objectivity and impartiality that the former lacks, and evidence gathered in a partial way is not supposed to enter into an impartial investigation.¹³⁹ Finally, even if the victim is not a necessary actor in this kind of proceeding, he fits much more easily within it.¹⁴⁰ Since the criminal procedure is mainly an investigation made by public officials to determine the truth, there is no binary logic at work here.¹⁴¹ Therefore, the victim can be accepted as a participant who also has something at stake in the case, who is not impartial, but who can have, as the defendant, a voice and procedural rights within criminal proceedings.¹⁴²

Besides explaining how the main actors of criminal procedure are predominantly understood in common and civil law jurisdictions, the dispute model and the official investigation model also explain many of the particular institutions or features of each of these procedures. For instance, the broad prosecutorial discretion in the charging decision that exists in common law

¹³⁸ Many commentators have said that while in the adversarial system the defendant is a subject of rights, in the inquisitorial system he 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 subject of 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, *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 all the rights enunciated in rules are respected in practice. 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 adversarial and inquisitorial systems.

¹³⁹ 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 2067-9 (Piermaria Corso ed., 11th ed 2001). On the need to distinguish between the investigation done by the prosecution and the defense given the different conceptions of both actors in Italy, see Paolo Ferrua, *La Giustizia Negoziata Nella Crisi Della Funzione Cognitiva Del Processo Penale*, in his III STUDI SUL PROCESSO PENALE 132, at 160 (1997).

¹⁴⁰ Civil law countries regulate the role of the victim in different ways, but there are two main ways in which they let the victim be a party in criminal proceedings. The first is as a civil actor in the criminal process. This is the system that France has adopted. The second way to regulate victim participation is by letting the victim be a sort of private prosecutor in the criminal process. For instance, Germany has adopted such a system.

¹⁴¹ See DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 43, at 201 ("It is precisely because continental criminal procedure is not a bi-polar contest that the voice of the victim can easily be accommodated. His action does not obstruct the smooth progression of criminal prosecution").

¹⁴² On the role of the victim as a civil actor in the criminal procedure of France and Italy, respectively, see, for instance, MICHÈLE LAURE RASSAT, *TRAITÉ DE PROCÉDURE PÉNALE* 247-293 (2001); AND GILBERTO LOZZI, *LEZIONI DI PROCEDURA PENALE* 114-9 (4th ed. 2001).

jurisdictions makes sense within this procedure because, if the procedure is a dispute between two parties, these parties should be able to decide when this dispute is over, and the judges, as umpires, should have little control over that decision.¹⁴³ In the same way, if the defendant accepts the prosecution's claim, the dispute is also finished. This explains the institution of the guilty plea, so characteristic of common law countries. If the defendant admits the charges and pleads guilty, the phase of determination of guilt or innocence ends, and the case moves to the sentencing phase.¹⁴⁴ Stipulations and plea bargaining¹⁴⁵ can also be explained through this model, because if the criminal procedure is a dispute between two parties, it is only natural that the parties may negotiate about their dispute and reach partial or full agreements about it.¹⁴⁶

The dispute model also explains why the criminal procedure in common law countries is structured as a contest between two competing cases, the prosecution case and the defense case. This applies both to the pre-trial and trial phases. During the pre-trial phase, each of the parties can do its own factual and legal investigation. Within this context, police investigators are conceived as an aid to the prosecution, and the defense has to hire its own investigators if it wants to gather information and evidence.¹⁴⁷ During trial, the prosecution and defense cases vie for credibility. Witnesses and expert witnesses are not witnesses of the court, but rather of the prosecution or the

¹⁴³ 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 (Sandorf 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); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). For classical analyses of how to address the problem of discretion in the criminal justice system, regarding not only prosecutorial practices but also the practices of other legal actors, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Arthur Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972).

¹⁴⁴ See, e.g., Fed. R. Crim. P. 11(c) (4).

¹⁴⁵ On the factors that influence plea agreements in the U.S., see, e.g., Stephanos Bibas, *Plea Bargaining outside the Shadow of the Law*, 117 HARV. L. REV. 2463 (2004).

¹⁴⁶ See, e.g., Brady, 397 U.S. 742 (approving, for the first time, the constitutionality of plea bargaining). For historical analyses of how the practice of plea bargaining developed in U.S. jurisdictions, 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); 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).

¹⁴⁷ 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).

defense,¹⁴⁸ and questioning of witnesses proceeds according to a contest structure through direct examination, cross-examination, re-direct, and rejoinder.¹⁴⁹

The official investigation model, in turn, explains many features of civil law criminal procedures. For instance, if the role of the prosecutor is to determine the real truth, he can only dismiss the case when there is not enough evidence that the defendant committed the offense. Hence, prosecutorial discretion is much more limited in systems where this model prevails.¹⁵⁰ The concept of the guilty plea traditionally has been unknown in these systems.¹⁵¹ While the admission of guilt may be very useful to the judge in seeking the truth, the judge still has the final word on the determination of guilt and can thus 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.¹⁵²

Stipulations and plea bargaining also long have been alien to this model.¹⁵³ First, as we just saw, the very concept of the guilty plea does not

¹⁴⁸ 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). These powers, however, are seldom used in criminal trials. 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, this power is rarely invoked). For an analysis of the obstacles that judges would face in becoming more active players at trial, see Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1041-45 (1975).

¹⁴⁹ See, e.g., Fed. R. Evid. 611. Federal Rule of Evidence 614(b) establishes that "the court may interrogate witnesses, whether called by itself or by a party." But this power is also infrequently used in criminal trials. See Bradley, *United States*, *supra* note 67, at 421.

¹⁵⁰ For instance, Argentina (Penal Code, art. 59) and Italy (Constitution, art. 112) establish a rule of compulsory prosecution. Germany establishes compulsory prosecution as the general rule, though it also includes exceptions to it through its opportunity principle (§ 152-4a). In France, the prosecutor has discretion about whether to bring charges initially. Code de procédure pénale [C. PR. PEN.] [Criminal procedure code] art. 40 (Fr.). But if the French prosecutor decides to bring charges, he/she cannot dismiss the charges without the acquiescence of the court. See RASSAT, *supra* note 133, at 452-53. (I will not analyze here the powers of the victim regarding this issue). As there is no system that can possibly prosecute all criminal offenses, the rule of compulsory prosecution or limited prosecutorial discretion has been described as a myth. For a classical debate on this issue, see Abraham S. Goldstein and Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977); John H. Langbein and Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. (1978).

¹⁵¹ 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).

¹⁵² See, e.g., JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 73-74 (1977).

¹⁵³ For a classical analysis, see, for instance, John H. Langbein, *Land without Plea Bargaining: How the Germans Do It*, 78 MICHIGAN LAW REVIEW 204 (1979). However, in the last decades,

exist here.¹⁵⁴ An admission of guilt by the defendant may help the official investigator to determine the truth, but it does not immediately end the guilt-determination phase as in the dispute model. In addition, in the official investigation model there are not two parties who can negotiate and bargain toward a compromise about their respective claims as in the adversarial system. The prosecutor is not a party as in the adversarial system, but rather another official who, like the judge, must determine what has happened.¹⁵⁵ Thus the “real” truth has to be determined by the prosecutor and cannot be negotiated or compromised.¹⁵⁶ And the judge has the last word. In addition, inquisitorial officials traditionally perceived the very act of getting into negotiations with the defendant to be improper conduct. In negotiations and bargains, the parties have to recognize each other as equals, at least at a certain level. But 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.

The official investigation model also explains other features of criminal procedure in civil law countries. First, in these systems, there is only one case, which can be characterized as the case of the court, not two competing cases.¹⁵⁷ This makes sense within this model because the procedure is conceived as one official investigation to determine the truth.¹⁵⁸ During the pre-trial phase, the judge or the prosecutor is in charge.¹⁵⁹ If the defendant wants certain evidence to be produced, he has to request this of the public official in charge.¹⁶⁰ In addition, the trial also is structured according to the idea of a unitary investigation. There are not separate cases made by the prosecution and the defense; the presiding judge decides what evidence will

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 Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

¹⁵⁴ See LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE; GERMANY*, *supra* note 152, at 73-74; Moskovitz, *supra* note 151, at 1153.

¹⁵⁵ See Weigend, *Prosecution: Comparative Aspects*, *supra* note 135, at 1233-34.

¹⁵⁶ On the more absolute conception of truth more predominant in 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).

¹⁵⁷ Regarding France, see, for example, Dervieux, *supra* note 81, at 250.

¹⁵⁸ Regarding the existence of only one pre-trial investigation in France, see *id.*

¹⁵⁹ Traditionally, a judge has been in charge of the pre-trial investigation in civil law countries. This is still the case in Argentina, France for serious cases, and Spain. 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 of as an impartial official, she has the duty to look for both inculpatory and exculpatory evidence. 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 can run its own investigation.

¹⁶⁰ For instance, this is the case in France. See, e.g., Dervieux, *supra* note 81, at 250.

be produced and in what order,¹⁶¹ and any witnesses and expert witnesses are the court's, not the parties'.¹⁶² Furthermore, since the court has the duty to investigate the truth, its members usually will start their own interrogation. Only after they finish can the parties ask additional questions.¹⁶³

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 in ICTY's procedural structure of interpretation and meaning, despite conscious or unconscious resistance that legal actors with a different set of internal dispositions presented against some of its features. First, the judges were basically conceived and generally behaved as passive umpires. The Rules gave them some inquisitorial formal powers to issue *motu proprio* orders, subpoenas and warrants,¹⁶⁴ to change the order in which the evidence was presented at trial,¹⁶⁵ and to ask the parties to produce additional evidence or to summon witnesses *motu proprio*.¹⁶⁶ 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,¹⁶⁷ the law-in-action was even more tilted toward a conception of judges as umpires. This happened naturally when the judges came from

¹⁶¹ See, e.g., Código Procesal Penal de la Nación [COD. PROC. PEN.] [Criminal Procedure Code] art. 356 (Arg.). Regarding Germany, see §§ 155 Nr. 2, 244 Nr. 2 StPO (F.R.G.). See also ROXIN, *supra* note 68, § 15, at 95.

¹⁶² France is an exception because, during trial, the witnesses belong to the parties. See, e.g., RASSAT, *supra* note 133, at 405-06. However, the witnesses cannot be coached, and it is still the presiding judge who questions witnesses acting *sua sponte* or on the request of the parties. See C. PR. PEN. arts. 312, 332, 454, 536 (Fr.). Since January 1, 2001, questions can also be put to the witnesses directly by the parties. See Dervieux, *supra* note 81, at 258-59.

¹⁶³ Regarding Argentina, see COD. PROC. PEN. art. 389 (Arg.). Regarding Germany, see §§ 238 Nr. 1, 240 StPO (F.R.G.). Section II39 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 68, § 42, at 343.

¹⁶⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), Rule 54. In the analysis of the original features of ICTY in this and the next section, I will use the original Rules of Procedure and Evidence, unless I otherwise indicated it. 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, I am using the most recent version of the Rules of April 6, 2004.

¹⁶⁵ Rule 85.

¹⁶⁶ Rule 98.

¹⁶⁷ This is, of course, a reference to Roscoe Pound's famous distinction between the law-in-the-books and the law-in-action.

common law jurisdictions, because the internal dispositions of these judges were generally closer to a conception of their role based on dispute model.¹⁶⁸ But besides these ingrained tendencies of common law judges, it seems that even the majority of the civil law judges basically behaved as umpires or passive decisionmakers during the initial years of the Tribunal. 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.”¹⁶⁹

The reasons for this refrain seem to have been the two already mentioned in the previous section. First, because the judges were convinced that the procedure enacted by the Rules was predominantly adversarial, they generally tried to behave according to that system—even those coming from civil law jurisdictions.¹⁷⁰ Second, even if some judges may have wanted to be more active, they could not do so because, given the adversarial structure of the procedure, they did not have enough knowledge about the case before trial, since they did not participate in the pre-trial investigation and had no written dossier containing it.¹⁷¹

Nevertheless, a number of civil law judges resisted what they saw as an overly passive role in the management of the trial and the interrogation of witnesses, a resistance that can be explained both in terms of their inquisitorial set of internal dispositions and their discomfort with the limited procedural powers they had in a predominantly adversarial system. This resistance is exemplified in a decision of ICTY’s Trial Chamber in *Dokmanovic* where the Chamber requested that the prosecution submit written witness statements prior to the commencement of the trial. The Chamber justified its decision by saying that perusal “of such documents by

¹⁶⁸ See, for instance, Tadic Trial Judgment, Case No. IT-94-1-T, para. 238 & 241 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II May 7, 1997), available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>, where the Trial Chamber composed by 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 knew about this one through Tochilovsky, *Rules of Procedure*, *supra* note 12.

¹⁶⁹ Expert Group, *supra* note 88, 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.

¹⁷⁰ See *supra* notes 120-21, and accompanying text.

¹⁷¹ See *supra* notes 122-24, and accompanying text.

the Trial Chamber is primarily for the purpose of promoting better comprehension of the issues and more effective management at trial.”¹⁷² In other words, the judges requested this information to help them be more active investigators at trial.

The prosecutor also was conceived and behaved according to the dispute model. She was not conceived as an impartial official whose role is to investigate 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.¹⁷³ The Rules played an important role in shaping the system this way. For instance, they did not establish that the prosecutor must search equally for inculpatory and exculpatory evidence during the pre-trial phase.¹⁷⁴ More generally, the Rules conceived the criminal procedure as a competition between the cases of the prosecution and the defense.¹⁷⁵ In a criminal procedure structured this way, there are few incentives for impartial investigations that seek all kinds of evidence impartially. Rather, the goal is to make one’s own case as strong as possible and to weaken the case of the other party. This created a procedural setting where the members of the Office of the Prosecutor, or OP, saw themselves as (relative) procedural equals to the defense team and as different from the judges.¹⁷⁶

¹⁷² Dokmanovic Order of 28 November 1997, IT-95-13a-PT (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II), quoted by Tochilovsky, *Legal Systems*, *supra* note 12, at 634. As we will see later, the door open by this decision had important consequences in the way criminal procedure was later conceived in ICTY.

¹⁷³ As it happens in other predominantly adversarial jurisdictions, In Kupreškić Decision on Communication between the Parties and Their Witnesses, Case IT-95-16-T, September 21, 1998 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II), the Trial Chamber said that “the 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.” 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).

¹⁷⁴ 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)).

¹⁷⁵ See, for instance, Rules 39, 66, 67 and 68.

¹⁷⁶ 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 the ones that usually exist in adversarial jurisdictions. For an analysis of this question including the proposal to create an

Similarly, since ICTY criminal procedure was structured as a competition between the cases of the prosecution and the defense, the latter was seen as a procedural equal to the former. The defense not only has 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 can also develop its own investigations, which are considered of (approximately) equal value to the prosecutor's.¹⁷⁷ However, as with the predominantly adversarial conception of the judge, legal actors with an inquisitorial set of internal dispositions also 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 conceived 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.¹⁷⁸

Since ICTY criminal procedure was structured 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.¹⁷⁹ His role was basically limited to providing

independent defense unit, see Note, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982 (2001).

¹⁷⁷ See, for instance, Rules 45, 67, 85, etc.

¹⁷⁸ Kitty Felde, *International, A Letter from The Hague*, THE CHRISTIAN SCIENCE 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, USA (11/29/01)).

¹⁷⁹ See Rules 34, 69, 75 and 106.

information and testimony during the pre-trial and trial phases.¹⁸⁰ 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 corresponded to the dispute model of the adversarial system.

First, the prosecutor had broad discretion to initiate investigations and bring charges.¹⁸¹ The Statute and the Rules are silent on whether the judges 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.”¹⁸² Accordingly, in ICTY’s initial years of operation, the practice was to allow the prosecutor broad prosecutorial discretion that the judges did not control.¹⁸³ In addition, the Rules introduced the concept of the guilty

¹⁸⁰ This limited role for the victim has been later 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 Eight Annual Report ICTY, August 13, 2001, para. 49. The Tribunal has also created a Victims and Witnesses Section to protect and support all witnesses that appear before the Tribunal.

¹⁸¹ This issue has been particularly sensitive because international criminal justice has been accused 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 the ICTR). In the case of prosecutorial discretion, the question is the *tu quoque* argument, which is whether officers of the victorious or Western countries have also committed criminal acts that are no less criminal than those of the accused. For an analysis of this question in Nuremberg, see Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, at 46-7 (1947); JUDITH N. SHKLAR, LEGALISM 161-4 (1986). In the case of ICTY, similar criticisms have been developed regarding the decision of the Prosecutor to not 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 HUMAN RIGHTS JOURNAL 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). 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 the Prosecutor of the ICC has been seen as a potential danger to U.S. sovereignty. The question is regulated in Article 15 of the Rome Statute that expressly establishes that the Pre-Trial Chamber controls the decision of the prosecutor to initiate an investigation (Article 15.4.). It is hard to know in advance, though, what the *law in action* of the ICC will be in relation to this issue.

¹⁸² First Annual Report, *supra* note 105, para. 74.

¹⁸³ This initial practice has been lately confirmed. 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 of ICTY President Kirk McDonald to Prosecutor Justice Arbour, 16 March 1999, available at <http://www.un.org/icty/pressreal/p386-e.htm>. This broad

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.¹⁸⁴ Not 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.¹⁸⁵

The *Erdemovic* case presents two examples of this phenomenon.¹⁸⁶ Drazen Erdemovic 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 his initial appearance before the Trial Chamber, Erdemovic pleaded guilty to a crime against humanity. But at the same time, he gave an explanation for his conduct that could be understood as a defense on the grounds of duress.¹⁸⁷

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 depending on the factual circumstances, the case would be sent to trial so that evidence could be presented regarding factual issues, which the parties could then discuss. 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

prosecutorial discretion in the charging decision was also confirmed in the Elibici Judgment, Case IT-96-21-A, para. 596-619 (Int’l Crim. Trib. for Former Yugoslavia Trial Appeals Chamber 20 February 2001).

¹⁸⁴ Rule 62. The Rome Statute does not mention the expression “guilty plea” as a result of the negotiators’ resistance with an inquisitorial set of *internal dispositions* toward the institution. Its Article 65 introduces proceedings “on admission of guilt” a compromise between common and civil law negotiators. For a description of these resistances 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).

¹⁸⁵ This shows that my category of *internal dispositions* includes not only a disposition to act or react in certain ways, but also to *understand* procedural issues in certain ways.

¹⁸⁶ Erdemovic Case No. IT-96-22-T.

¹⁸⁷ Erdemovic 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 Erdemovic Sentencing Judgment, Case No. IT-96-22-T, para. 10 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber I 29 November 1996). This explanation could also have been read 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, this did not generate any of the questions that could be raised by the potential defense of duress.

circumstances which would fully exonerate the accused of his responsibility has not been provided”,¹⁸⁸ it took the plea and sent the case directly to the sentencing phase. Erdemovic’s defense attorney—who, like the trial judges, came from a civil law country—also interpreted the guilty plea differently from how it would be interpreted in a common law jurisdiction. He simply saw it as a confession that did not end the phase of determining guilt or innocence. Thus, he still was pleading for the acquittal of his client at the sentencing hearing.¹⁸⁹

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 Erdemovic’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.¹⁹⁰

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. The appellate judges also pointed out Erdemovic’s attorney’s misunderstanding and vacated the conviction and sentence based on a finding that the guilty plea was made without informed consent.¹⁹¹ In this way, the dispute model also prevailed regarding this issue.

Plea bargaining offers another interesting example of this struggle between the dispute and official investigation models. There are few institutions that are more firmly resisted by legal actors with inquisitorial internal dispositions.¹⁹² In the case of ICTY, even though plea bargaining

¹⁸⁸ *Id.* at para. 20.

¹⁸⁹ Erdemovic Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-T, para. 16 (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber 7 October 1997).

¹⁹⁰ A Senior Trial Attorney of the OP—now in charge of the Milosevic case—has expressly recognized this phenomenon in the context of ICTY: “...it 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 JOURNAL OF INTERNATIONAL LAW 383, at 390 (2001)).

¹⁹¹ Erdemovic Judgment, Case No. IT-96-22-T (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber 7 October 1997).

¹⁹² 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, *Article 65*.

had been explicitly included in the U.S. proposal that so strongly influenced the Rules of the Tribunal, the judges did not accept it.¹⁹³ However, in March 1998, again in the *Erdemovic* case, the prosecution and defense made the first plea agreement and presented it to the Trial Chamber, which did not question the practice.¹⁹⁴ Since then, other cases have been disposed of through this mechanism.¹⁹⁵ The judges' acceptance of this institution from the dispute model seems not to have been determined primarily by the relative power of actors with adversarial or inquisitorial internal dispositions, but rather by the slowness of the proceedings and the heavy caseload that the tribunal by then was facing. 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.¹⁹⁶

Finally, 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,¹⁹⁷ classified the evidence as belonging to one party or the other,¹⁹⁸

Proceedings on an admission of guilt, *supra* note 184, 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 defence regarding modification of the charges, the admission of guilt or the penalty to be imposed" (*id.* at 831). Whether or not the ICC will present plea bargains is, therefore, an open question that its own practices and actors will determine.

¹⁹³ See First Annual Report, *supra* note 105, 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 "there are three important deviations from some adversarial systems....the granting of immunity and the practice of plea-bargaining find no place in the rules" (para. 72 and 74).

¹⁹⁴ See *Erdemovic* Sentencing Judgment, Case No. IT-96-22-T, para. 18 and 19 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber 5 March 1998).

¹⁹⁵ See, for instance, *Jelisić* Case IT-95-10; and *Sikirika* Case IT-95-8-S.

¹⁹⁶ See *infra* notes 423-24, and accompanying text. 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).

¹⁹⁷ Rules 66, 67, 84, 85, 86.

¹⁹⁸ Rules 84 and 85. The conception of the witnesses as being either prosecution or defense witnesses was resisted by legal actors with a predominantly inquisitorial set of *internal dispositions*. Both Trial Chambers, presided 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 173; and *Jelisić* Decision on Communication between Parties and Witnesses, Case No. IT-95-10-T (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber I 11 December 1998). This doctrine was later followed in *Prosecutor v. Dario Kordić and Mario Cerkez*, Case IT-95-14/2, "Lasva Valley", Decision on Prosecutor's Motion on Trial Procedure, March 19, 1999. Defense attorneys from the civil law also resisted the conception of witnesses as belonging to one of the parties. See, e.g., *Prosecutor v. Kupreškić et al.*, Case IT-95-15, Transcript, August 27, 1998.

and established examination-in-chief, cross-examination, re-direct, and rejoinder as the way to interrogate witnesses.¹⁹⁹

V. THE COORDINATE MODEL VERSUS THE HIERARCHICAL MODEL

The second broad distinction between common and civil law criminal procedures relates to the institution of trial by jury characteristic of the former, as opposed to the latter's system of trial by professional judges who are part of a hierarchical bureaucracy. Mirjan Damaška has tried to capture these differences by proposing what he calls the *coordinate and hierarchical models*.²⁰⁰ According to Professor Damaška, in the coordinate model authority is exercised by lay decisionmakers who are in a relatively horizontal relationship of power among themselves and who apply community standards to their decisions. In the hierarchical model, authority is exercised by legal professional decisionmakers whose relationships are hierarchically ordered and who apply technical rules to their decisions. In the coordinate model there is a bifurcated court which integrates a lay organ (the jury) and a professional one (the judge), while in the hierarchical model the court is unitary.²⁰¹

These two models or organizing principles—the coordinate corresponding to the adversarial, the hierarchical to the inquisitorial system—also explain many features of the criminal procedure of the common and civil law traditions. In the coordinate model, there are detailed rules of evidence that filter the elements of proof that are allowed at trial and that guide the evaluation of the evidence which is finally introduced.²⁰² Because the final decisionmakers are lay people,²⁰³ the underlying assumption is that

¹⁹⁹ Rule 85(B). For an application of this Rule according to the common law conception of witness interrogation, see *Prosecutor v. Delalic et al.*, Case 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 prosecution 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).

²⁰⁰ See DAMAŠKA, *FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 43, at 16-71.

²⁰¹ As developed by Prof. 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, this author has recently used this opposition to explain the differences in the law of evidence that common and civil law jurisdictions have traditionally presented. See his *EVIDENCE LAW ADRIFT* (1997). The definition of the coordinate and the hierarchical models that I will use in this article also differs from Prof. Damaška's in that I will not include in these categories the opposition between the application of community standards and technical rules.

²⁰² See, e.g., FED. R. EVID.

²⁰³ See, e.g., U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

they may not give proper weight to evidence that is prejudicial or not totally reliable.²⁰⁴ 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, there is a preference for oral evidence and for the production of evidence at trial.²⁰⁵

Furthermore, given their number, the lay decisionmakers could hardly give a group justification of how they reach their decision.²⁰⁶ And since the decision of the lay decisionmakers enjoys an additional legitimacy given its supposedly popular source, the hierarchical control over this decision and, more specifically, the superior control through appeals, are relatively limited. This explains, for instance, why the prosecutor cannot appeal acquittals in most common law jurisdictions.²⁰⁷ Finally, since the lay decisionmakers do not know about the defendant's personal background before trial, and given the court's bifurcated structure, it is possible to distinguish clearly the phase of determination of guilt from the sentencing phase, the former being the responsibility of the jury and the latter that of the professional judge.²⁰⁸

In the hierarchical model, there are not detailed rules of evidence²⁰⁹ and, as a general rule, all relevant evidence can be admitted at trial.²¹⁰ The assumption is that since the decisionmakers are professional judges,²¹¹ they

²⁰⁴ DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 201, at 28-46, though questioning whether this traditional justification provides a good analytical rationale for the development of the detailed rules of evidence of common law.

²⁰⁵ DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 201, at 57-8, 61-2.

²⁰⁶ This explains the absence of a mandatory justification of the verdict in the U.S. See, e.g., FED. R. CRIM. P. 31.

²⁰⁷ In the United States, the Supreme Court decision that settled this issue was *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). Canada is an exception among common law jurisdictions given that the prosecutor can appeal against acquittals.

²⁰⁸ For instance, in the U.S., see FEDERAL RULES OF CRIMINAL PROCEDURE, Rules 31 and 32 (2001).

²⁰⁹ Regarding France on this point, see, e.g., ROGER MERLE & ANDRE VITU, II TRAITE DE DROIT CRIMINEL 193-94 (5th ed. 2001).

²¹⁰ See, for instance, Argentine Criminal Procedure Code, Article 356.

²¹¹ 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, the province of Cordoba in Argentina, France, Germany, and Italy have this kind of 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 the inquisitorial systems in continental Europe tried to import the jury during the nineteenth century. The precursor

can prevent themselves from being biased by prejudicial evidence and can correctly evaluate whether the evidence is reliable and what its proper weight should be.²¹² 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. Therefore, the rejection of evidence would not prevent their knowledge about it.²¹³

In addition, since professional judges are part of a permanent bureaucracy that is composed of many stages and echelons of authority, a written dossier works as a tool that interconnects them.²¹⁴ This written dossier documents all procedural activity and the evidence that has been produced so far.²¹⁵ Through this dossier, the participants of the procedure — including trial judges— can know, at every stage, what the case is about and what evidence has been produced to confirm or disprove the charges against the defendant.²¹⁶ Moreover, because they are part of a hierarchical apparatus, trial judges have to give a written justification of their decisions²¹⁷ that the appellate judges can review more broadly than the verdict within the

was France, who set up 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, who introduced the jury into their respective systems in 1993/2002 and 1995.) For accounts of the introduction of the jury by 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 explanation of why France and Germany finally rejected this institution and adopted mixed courts, see Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, in *SELECTED WRITINGS* 294, 310 (1978). 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 Tiergarten and Other Stories: Murder and Criminal Justice in Berlin, 1891-1933*, 343-45 (2001) (unpublished Ph.D. dissertation, Harvard University) (on file with the author). 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).

²¹² 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).

²¹³ *id* at 427-28.

²¹⁴ Damaška, *FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 43, at 50.

²¹⁵ Regarding Germany, see StPO § 168, 168a, and 168b.

²¹⁶ 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., MAIER, *supra* note 52, § 8(D)(3)(c), at 877-78. 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 Mirjan Damaska, *Of Hearsay and Its Analogues*, 76 *MINN. L. REV.* 425, 449-52 (1992).

²¹⁷ On the duty of judges to give written justifications of their decisions in Italy, see, e.g., COST. art. 111.6 (which was in place even before the reform of November 1999).

coordinate model.²¹⁸ Finally, given the unitary trial court, the written dossier, and trial judges' resulting knowledge of the case and the defendant before the trial, both guilt and sentencing issues are tried jointly.²¹⁹

The criminal procedure of ICTY in its initial years presented a relatively equal number of features of the hierarchical and coordinate models, with a slight predominance of the former. First, the Statute established that the Trial Chamber would be composed of professional judges—thus it excluded trial by jury from ICTY.²²⁰ In addition, the Rules established a unitary court which decides whether to admit evidence, directs the trial, and issues a verdict at the end of it.²²¹ Second, as drafters of the Rules, the judges decided not to include technical rules of evidence from common law jurisdictions.²²² All relevant evidence could be admitted, unless its probative value would be substantially outweighed by the need to ensure a fair trial²²³ or it was obtained by means contrary to internationally protected human rights.²²⁴ Third, the trial judges had to give a reasoned opinion in writing to justify their judgment.²²⁵ Finally, the prosecution could appeal the acquittal of the defendant.²²⁶

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.²²⁷

²¹⁸ See, e.g., LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY*, *supra* note 152, at 84-85.

²¹⁹ See, for instance, Argentine Criminal Procedure Code, Articles 396 and 398.

²²⁰ Statute, Article 12(a).

²²¹ See Rule 89.

²²² See First Annual Report, *supra* note 105, 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, e.g., Prosecutor v. Aleksovsky, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, February 16, 1999, para. 15 (where the Chamber stated that decisions in the *Tadić* and *Blaskić* cases unquestionably established the broad discretionary power of Trial Chambers to admit relevant evidence under Rule 89 (C) because "the fact that the evidence is hearsay does not necessarily deprive it of probative value").

²²³ Rules 89(C) and (D).

²²⁴ Rule 95. Regarding cases of sex assault, the Rules expressly established that no corroboration of the victim's testimony shall be required. See Rule 96(i).

²²⁵ Rule 88(C).

²²⁶ Statute, Article 25; Rule 99(B).

²²⁷ See, e.g., Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 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

Rule 90(A) said that in principle, the witnesses had to be heard directly by the Trial Chamber.²²⁸ Furthermore, neither 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 or some of the evidence that would be presented at trial. 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.²²⁹

Regarding the opposition between the hierarchical and coordinate models the procedural structure of interpretation and meaning of ICTY was initially a hybrid between the adversarial and the inquisitorial systems. This hybrid was probably determined not by the relative power of actors with adversarial and inquisitorial internal dispositions, but rather by the conviction, held by even common law policymakers and judges, that it was not possible or convenient to apply some of the features of the coordinate model in an international criminal context. 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.

VI. RISE AND FALL OF THE ADVERSARIAL SYSTEM IN ICTY

The analysis in the last two sections 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

affidavits pursuant to Rule 94 were repelled, if not by the Trial Chamber, then by the Appeals Chamber.”).

²²⁸ The complete text of the original Rule 90(A) 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 was also quite strict in providing exceptions to the principle that witnesses should be heard directly by the Trial Chambers. Rule 71(A) said: “At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial...” In the case of the ICC, this question is regulated in Article 69(2) of the Rome Statute, which establishes that, as a general rule, the testimony of a witness at trial shall be given in person. However, because Article 69(2) also establishes exceptions to this rule, it is unclear how this issue will actually be regulated and practiced in this jurisdiction.

²²⁹ Rule 100. 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 Orić, *supra* note 6, at 1473, mentioning Tadić, Delalić et al, and Delić and Lažlo as cases where the Trial Chamber applied this rationale).

the official investigation model, and even if there were several elements from the hierarchical model, there were almost as many from the coordinate one. 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 between guilt and innocence, how it was perceived by the population in the territories of the former Yugoslavia, and how rapidly it prosecuted and tried its cases, among other factors.²³⁰

The last of these factors—the speed of the proceedings—started to raise important concerns for ICTY judges and members of ICTY's Office of the Prosecutor (hereinafter OP),²³¹ who wondered whether the predominantly adversarial system of the tribunal was adequately dealing with this question.²³² By July 1998, more than five years after the creation of the tribunal by the Security Council, only two judgments had been issued.²³³ The rapid growth in the caseload of the Tribunal also fed these concerns. The number of accused persons under its custody more than tripled within two

²³⁰ Another issue that should be analyzed 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 its other goals is a question that is beyond the scope of this article. For skeptical analyses on the potentiality of ICTY to achieve its goals, see, e.g., Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 5000 (1994); and David P. Forsythe, *Politics and the International Criminal Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994). For a defense of 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).

²³¹ 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 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).

²³² As the first President of the Tribunal, Antonio Cassese, said: "it became clear fairly soon that, to expedite proceeding 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, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 385.

²³³ The cases were Erdemovic Sentencing Judgment, Case No. IT-96-22-Tbis (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II, 5 March 1998), which had been disposed of through a guilty plea and a plea bargaining; and Tadic Opinion and Judgment, Case No. IT-94-1-T (Int'l Crim. Trib. for Former Yugoslavia Appeals Trial Chamber II 7 May 1997), whose appeal was still pending. Of course, the tasks of the Tribunal have not only been limited to these two cases but also to others where investigations have been done, indictments issued, and trials were held.

years, growing from eight individuals in June 1996 to twenty nine in June 1998.²³⁴

Not only the judges, but also the media and several members of the international community showed concern about these issues.²³⁵ 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 ..."²³⁶ The Secretary-General appointed an Expert Group to conduct this review.²³⁷

In a report issued in November 1999,²³⁸ 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 completed...²³⁹

²³⁴ See Mundis, *supra* note 12, at 371. The caseload of the Tribunal continued to increase in the following years. See, e.g., Seventh Annual Report ICTY, July 26, 2000, para. 2 (pointing out that from August 1, 1999, to July 31, 2000, thirteen indicted persons were arrested in a single year, bringing to 37 the total number of those detained).

²³⁵ See, e.g., Charles M. Madigan & Colin McMahon, *A Slow, Painful Quest for Justice*, CHICAGO TRIBUNE, Section News, September 7, 1999; Carol J. Williams, *Crisis in Yugoslavia; Wheels of Justice Turn Slowly at Tribunal*, LOS ANGELES TIMES, Part A, page 20, May 28, 1999; Elizabeth Neuffer, *A worldwide tribunal on crime eyed; Talks aim for permanent court*, THE BOSTON GLOBE, Section National/Foreign, page A1, June 15, 1998; Elizabeth Neuffer, *War criminal tribunal faces trial of its own; UN panel facing fiscal pressures*, THE BOSTON GLOBE, Section National/Foreign, page A2, May 9, 1997; Tracy Wilkinson, *Problems Outweigh progress of U.N. Tribunal; War Crimes: Lack of International Cooperation, Slow Pace of Arrests Bring Panel to Turning Point*, LOS ANGELES TIMES, Part A, page 12, May 4, 1997.

²³⁶ See Expert Group, *supra* note 88, at 8. See also Seventh Annual Report ICTY, July 26, 2000, para 330 ("The aim of report was to find pragmatic and flexible solutions which would enable the judges to deal effectively with the considerable increase in their workload over the past few years and with the expectations of the accused, the victims and the international community.").

²³⁷ The Group was composed of Jerome Ackerman (Chairman, United States), Pedro David (Argentina), Hasson Jallow (Gambia), Jayachandra Reddy (India) and Patricio Rueda Spain.

²³⁸ The report of the Expert Group—which included criticisms to the adversarial system of ICTY—was very influential on the Tribunal. See, e.g., Seventh Annual Report 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.

²³⁹ *Id.* at 17-8. For a complete assessment of the work of ICTY as of 31 August 1999, see *id.* at 16.

Many judges and members of the OP—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 the adversarial system of ICTY, or at least some of its features.²⁴⁰ These problems seemed to have arisen from the difficulties that the adversarial system had in dealing with complex criminal cases within the international context. The complexity of these cases should not be underestimated.²⁴¹ This complexity arises, first, from the definitions of international crimes themselves, which require certain elements that are particularly hard to prove or disprove.²⁴² 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.²⁴³

As a consequence of some of these substantive requirements, the prosecutor usually has to prove not only one or two factual incidents—as usually happens in national jurisdictions—but rather a multiplicity of incidents that may have occurred in a broad geographic area and over a

²⁴⁰ See CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 385 (“it became clear fairly soon that, to expedite proceeding 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”). For an analysis of other factors that may have produced a delay in ICTY proceedings, see Expert Group, *supra* note 105 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).

²⁴¹ See, e.g., Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 536-37 (2001) (“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.”).

²⁴² See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13 (“The Tribunal’s cases involve complex legal and factual issues, as well as the application of legal principles that have not previously been interpreted or applied”); and CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 442-43.

²⁴³ Gabrielle Kirk McDonald, *Trial Procedures and Practices*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 547, at. 616 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

relatively long span of time.²⁴⁴ In addition, international crimes are usually committed by individuals who are part of organizations, which creates additional evidentiary problems, such as proving command responsibility.²⁴⁵

Gideon Boas provides a good description of these difficulties regarding *Kordić*, a large-scale command responsibility case before ICTY:

The prosecution needed to prove not only the position of Dario Kordić and Mario Čerkez in the military and/or political chain of command, but also the alleged atrocities for which they were said to be responsible...[which included the] attacks and atrocities allegedly committed in the entire Lasva Valley...In addition, the prosecution stated that it would establish the command structure of the HVO [Bosnian Croat Army], the role of the co-accused in that command structure (both political and military), the authority of the HVO over the region in which the atrocities were committed, and the conditions and structure of the HVO detention facilities, as well as their existence. Furthermore, the prosecution asserted that it would establish, for the purposes of article 2 of the *Statute*, that the armed conflict in the region of central Bosnia at the time of the offences was international in nature.²⁴⁶

Any procedural system would have problems in dealing with so many complicated investigative and evidentiary issues at the same time.²⁴⁷ In the case of ICTY, the adversary system was having 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. Because it is structured as a dispute between two parties before a passive decisionmaker, the adversarial system establishes a very clear distinction between the roles of prosecuting—the responsibility of the prosecutor—and adjudicating—the responsibility of the judge. Since the prosecutor has the

²⁴⁴ See, e.g., Wald, *supra* note 227, 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”).

²⁴⁵ For a critical analysis 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).

²⁴⁶ Boas, *Creating Law of Evidence for International Criminal Law*, *supra* note 12, at 60.

²⁴⁷ 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 88, para. 61 (“Once started, trial proceedings are lengthened by a host of additional problems. The most important of these thus far has arisen out of the legal complexity involved in establishing guilt of one or more of the crimes proscribed by the Statute.”).

burden of proof, she must gauge in advance how much evidence will be enough to persuade the decisionmaker about each element of the alleged crimes.²⁴⁸

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 after so many resources had been spent on them. In the context of ICTY, this adversarial system of incentives, and the special evidentiary difficulties presented by international criminal cases, led the members of the OP 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.²⁴⁹

Furthermore, a criminal procedure structured as a dispute between two parties usually generates a sort of “poker game” between them. Both the

²⁴⁸ In both contemporary civil and common law countries, the judges or jurors have to reach certainty in order to convict a defendant. This duty is framed in common law countries 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 he/she issues a conviction. In civil law countries, a similar principle is expressed through the principle “in dubio pro reo,” which establishes that judges cannot convict the defendant unless they have certainty about his guilt. 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 the principle that the prosecution has the burden of proof is not expressly established in either the Statute or the Rules. However, it has been the understanding in ICTY practices that the prosecution has such a burden. For instance, Rule 98 *bis* establishes that after the prosecution has presented its case at trial, the Trial Chamber can acquit the defendant—after a defense motion for judgment of acquittal or *motu proprio*—if the evidence is insufficient to sustain a conviction. This demonstrates that the prosecution has such a burden. For critical analyses of these issues, see CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 390-93; SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, at 91-97.

²⁴⁹ See Expert Report, *supra* note 88, para. 65 (“From the standpoint of the prosecution, its position has been that, in order to carry out its mandate faithfully, it has no choice but to indict for as many crimes as appear to have been committed or to combine alleged individual offences into broad categories such as genocide and crimes against humanity, and to introduce as much evidence and as many witnesses as appear necessary to establish guilt beyond a reasonable doubt. Were a Trial Chamber erroneously to exclude evidence and later wrongly to acquit an accused on the ground of insufficient evidence, this might lead to a retrial ordered by the Appeals Chamber with the associated emotional burdens on witnesses of having to repeat their testimony and the corresponding drain on prosecutorial resources. Some inkling of the dimensions of what the nature of the prosecution burden of proof and the defence response produces may be gleaned from the fact that in ICTY proceedings during 1997 and 1998, 699 witnesses testified and their testimony covered almost 90,000 pages of transcript. In the absence of authoritative guide from the Appeals Chamber enabling the prosecution to reduce the size of its case, without fearing that it will be found to have failed to sustain its burden of proof, it is very difficult to fault the prosecution’s position. And this, of course, has a significant bearing on the optimum use of prosecution counsel and support staff.”).

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 investigations and case presentations at trial, especially in complex criminal cases like most of those heard by ICTY. 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 to get as much information as possible about the prosecution case during the pre-trial phase, to withhold as much information as possible about its own case, to stipulate as little as possible about facts that the prosecution has to prove, to vigorously cross-examine the prosecution witnesses during trial, and so on.²⁵⁰

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.²⁵¹ Of course, the adversarial system also faces these challenges in complex cases at the national level. But there the adversarial system offers tools such as plea bargaining, immunities, and others that will be analyzed in detail in Section X which fit well within this conception of the criminal process, as we already have seen. However, such tools were used sparingly if at all in the early years of ICTY.²⁵²

²⁵⁰ See, e.g., Expert Report, *supra* note 88, 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”).

²⁵¹ See, e.g., Expert Report, *supra* note 88, para. 67 (“The common law adversarial system...is largely reflected in the Statutes of the Tribunals and in their Rules of Procedure and Evidence. This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused, as is their right, not only under the Statutes, but also under basic human rights law, being uncooperative and insisting upon proof by the Prosecutor of every element of the crime alleged. From the standpoint of the accused, this represents optimum use of defence counsel. In turn, this reality is one of the factors contributing to the extensive nature of prosecutorial and defence investigations which often continue in distant places even after trial start...”).

²⁵² See, e.g., in 2001, Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 549 (2001), claimed: “(S)o far, ICTY prosecutor has no formal policy of encouraging guilty pleas by dropping charges or recommending a reduced sentence, although there have been a few spontaneous pleas. Nor does she have any announced policy of conferring immunity on a witness who testifies against another accused.”

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.²⁵³ First, the number of witnesses that had to testify in these trials was often huge.²⁵⁴ For instance, in the *Kordić* case, there were 241 witnesses.²⁵⁵ If all of the witnesses in this kind of case have to give full testimony at trial, as the coordinate ideal generally would require, then the trial necessarily will be very long. In addition, proving such facts as widespread attacks on a certain civilian population can be both very time-consuming and related to more than one defendant. But if all the (same) testimony to prove these charges must be presented orally in each separate case—as the coordinate model would indicate—then this too will substantially lengthen each of these trials.²⁵⁶

In order to speed up the proceedings, the judges decided to move ICTY criminal procedure away from the adversarial system, at least regarding a substantial number of its features.²⁵⁷ Their two main approaches were to make judges more active managers of cases to speed up the docket,²⁵⁸ and to

²⁵³ See, e.g., the article by the former President of ICTY Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 536 (2001) (“it 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.”).

²⁵⁴ See, e.g., Robinson, *supra* note 13, 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”); Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 549 (2001) (“ICTY trials, on average, involve a hundred witnesses or more, and each witness, on average, takes up a full trial day.”).

²⁵⁵ See Boas, *Creating Law of Evidence for International Criminal Law*, *supra* note 12, at 60.

²⁵⁶ 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...There are a number of causes for the length of trials and other proceedings...(U)nlike the Nürnberg and Tokyo trials, a great of reliance is placed on the testimony of witnesses rather than on affidavits.”).

²⁵⁷ See CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 385 (“it became clear fairly soon that, to expedite proceeding 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”).

²⁵⁸ See, e.g., Expert Report, *supra* note 88, para. 77-78 (“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. This surely contributed to the length of the proceedings and is recognized as having done so by the judges...Some judges in ICTY and ICTY...have been moving in the direction of asserting greater control over the proceedings, and the Expert Group recommends that this be accelerated and become general practice.”).

change ICTY's initial preference for oral production of evidence at trial.²⁵⁹ Even common law judges and the OP supported these ideas.²⁶⁰ Commentators generally have described these reforms as a shift from common to civil law criminal procedure.²⁶¹ This article's claim in the next three sections is that even if the reforms have moved ICTY criminal proceedings away from the adversarial system, they have moved them not toward the inquisitorial system, but toward the managerial judging system that now prevails in complex litigation cases in U.S. civil procedure. In this way, this article will show that the established view does not give the best description of ICTY criminal procedure, because it has only conceived this procedure according to the traditional, binary adversarial-versus-inquisitorial paradigm.

²⁵⁹ For proposals in this direction by the Expert Group, see, e.g., Expert Report, *supra* note 88, para. 86 and 88.

²⁶⁰ On the support of some common law judges, see Mundis, *supra* note 12, 369. Several common law judges supported these reforms even if they went against their original predominantly adversarial set of internal dispositions, because they agreed with the diagnosis that the adversarial system was not dealing with cases in an expeditious way. In addition, despite the potential decrease in their procedural powers, many members of the OP also supported these reforms. The explanation seems to be the following. First, the OP had as much at stake as the judges in the success of the tribunal in performing its tasks. In this sense, the slowness of the proceedings was a serious problem for them too. Second, many members of the OP agreed that the adversarial system was one of the explanations for this slowness. Therefore, they generally supported the reforms even if they carried a decrease in their procedural powers.

²⁶¹ See, e.g., Gideon Boas, *Creating Law of Evidence for International Criminal Law*, *supra* note 12, at 57-58; Boas, *Developments*, *supra* note 10, at 174 ("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"); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 387 ("over 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. The need to speed up proceedings has been the primary rationale for this gradual change"); Daryl A. Mundis, *From 'Common Law' Toward 'Civil Law'*, *supra* note 12; Orie, *supra* note 6, at 1463 ("Since the adoption of the original Rules, the judges of ICTY have amended them more than twenty times. These amendments tend toward an inquisitorial direction") and at 1492 ("The subsequent development of the law of procedure in the *ad hoc* Tribunals has on all major points been in the direction of the civil law"); Tochilovsky, *Rule of Procedure for the International Criminal Court*, *supra* note 12, 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, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 10, 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"); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, at 2 ("[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.").

VII. THE MANAGERIAL JUDGING SYSTEM

As explained in the previous section, around 1998, ICTY began to face external pressures to process its cases more quickly. In order to speed up the proceedings, the judges decided to move ICTY criminal procedure away from various aspects of the adversarial system. The two main reform ideas were to make judges more active and increase their procedural powers relative to the prosecution and defense,²⁶² and to change ICTY's initial preference for oral production of evidence at trial.²⁶³ Commentators have described these reforms as a move from adversarial to inquisitorial conceptions of criminal procedure.²⁶⁴

But the claim of this article is that these reforms have actually moved ICTY procedure toward a third procedural model that fits neither adversarial nor inquisitorial conceptions of the criminal process. This third type of procedure is close to what has been characterized as managerial judging.²⁶⁵ Hence, in order to explain why ICTY criminal procedure fits in this third model, it is necessary first to describe the managerial judging model.²⁶⁶ This

²⁶² See, e.g., Expert Report, *supra* note 88, para. 77-78 ("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. This surely contributed to the length of the proceedings and is recognized as having done so by the judges...Some judges in ICTY and ICTY...have been moving in the direction of asserting greater control over the proceedings, and the Expert Group recommends that this be accelerated and become general practice.").

²⁶³ See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13-14 ("The Tribunal's judges are concerned about the length of time many of the trial and other proceedings are taking to complete...There are a number of causes for the length of trials and other proceedings...(U)nlike the Nürnberg and Tokyo trials, a great deal of reliance is placed on the testimony of witnesses rather than affidavits...The judges have taken a number of steps to reduce the length of trials. These include adopting amendments to the Rules in July 1998...providing for the admission of affidavits in certain instances.").

²⁶⁴ See bibliography cited in note 261.

²⁶⁵ The classic description of managerial judging is found in Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

²⁶⁶ 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' JOURNAL 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 PUBLIC ADMINISTRATION REVIEW 686 (1985); Judith Resnik, *Managerial Judges and Court Delay: the Unproven Assumptions*, 23 JUDGES' JOURNAL 8 (1984); Judith Resnik, *The Assumptions Remain. (Critique of Paul R.J. Connolly's; Why We Do Need Managerial Judges)*, 23 JUDGES' JOURNAL 37 (1984).

section will provide such a description by using U.S. civil procedure as an example of managerial judging.²⁶⁷ A discussion of civil procedure for this purpose will temporarily divert us from our analysis of the criminal procedure of ICTY. But this diversion is justified for two different reasons. The first is that U.S. civil procedure is one of the jurisdictions where the managerial judging system initially arose. Thus, using this procedure as an example will allow us to establish a dialogue with the civil procedure scholars that initially identified and described this system in order to develop a more refined version of the managerial judging system.²⁶⁸ In addition, given that in Section X we will compare ICTY procedure with U.S. civil and criminal procedures, it will be helpful to describe certain features of U.S. civil procedure in this section.

For a long time, U.S. civil procedure was characterized as an adversarial system.²⁶⁹ Even more than its sister, domestic criminal procedure,²⁷⁰ U.S. civil procedure could be characterized as a dispute between two parties

²⁶⁷ For a challenge to whether the managerial judging system actually describes current U.S. civil procedure in mass tort and security class actions today, see 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). I do not need to get into this debate for the purposes of this article for three different reasons. First, even if Rubenstein were right and the managerial judging system no longer describes mass tort and security class actions, managerial judging still would apply to other civil cases. Second, my goal in this Section VII is to describe the managerial judging system as an ideal-type in order to use this ideal-type in the rest of this article to analyze the criminal procedure of ICTY. My use of U.S. civil procedure in this Section is only aimed at providing examples for my description of the system. So, even if Rubenstein were right and the managerial judging system no longer captures all complex litigation in U.S. civil procedure, this would not represent a challenge to this article's main argument that the managerial judging system has arisen in ICTY procedure. Finally, Rubenstein's claim is that the managerial judging system no longer describes mass tort and security class actions, not that this system never described them. So, his claim would not constitute a substantial challenge either for my comparative analysis in Section X of U.S. civil and criminal procedures and ICTY procedure, because the assumption in that section is that U.S. civil procedure partially moved, at some point in time, from the adversarial system to the managerial judging one. The fact that U.S. civil procedure later partially move from the managerial judging system to the transactional model would not challenge that assumption.

²⁶⁸ Some commentators have characterized civil procedure in some civil law countries as also close to the managerial judging system. See, e.g., Langbein, *The German Advantage*, 52 U. CHI. L. REV. 823 (1985). ; Resnik, *Managerial Judges*, *supra* note 16. 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 before than in the U.S., U.S. scholars were the first in identifying 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 and scholars is particularly important.

²⁶⁹ See e.g. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1 (1988); Resnik, *Managerial Judges*, *supra* note 16, at 380-2.

²⁷⁰ For an interesting comparative analysis of current U.S. civil and criminal procedure, see Stephen C. Yeazell & David A. Sklansky, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Viceversa* (on file with the author).

before a passive decisionmaker.²⁷¹ The private parties did their own pre-trial investigation, framed both the factual and legal issues, and presented them to the decisionmakers for their determination.²⁷² The parties were the active players in the process, and the roles of judge and jury were limited to deciding those factual and legal issues that the parties presented.²⁷³

During the second half of the 20th century, though, the role of judges in U.S. civil procedure started to change.²⁷⁴ Partly due to changes in the discovery rules that gave judges more knowledge about the case long before the trial started,²⁷⁵ an increase in the volume and complexity²⁷⁶ of federal litigation,²⁷⁷ and increasing interactions between federal judges and institutional changes in the Federal Judiciary,²⁷⁸ judges became active managers of cases in order to speed up their cases and reduce their dockets.²⁷⁹ In a path-breaking article, Judith Resnik diagnosed and identified this change in U.S. civil procedure practices.²⁸⁰ She called the new

²⁷¹ LANDSMAN, READINGS ON ADVERSARIAL JUSTICE, *supra* note 269, at 2.

²⁷² *Id.* at 3-4; Resnik, *Managerial Judges*, *supra* note 16, at 381-2.

²⁷³ *Id.* at 3-4, 2-3, 15-6. On the traditional role of judges in the U.S., see Resnik, *Managerial Judges*, *supra* note 16, at 374.

²⁷⁴ 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, *Managerial Judges*, *supra* note 16, at 379, and 397-400.

²⁷⁵ Resnik, *Managerial Judges*, *supra* note 16, at 378-9 ("This new managerial role has emerged for several reasons. One is the creation of pretrial discovery rights."); also at 391-3.

²⁷⁶ 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).

²⁷⁷ Resnik, *Managerial Judges*, *supra* note 16, at 379 ("[P]artly because of increasing case loads, many judges have become concerned with the volume of their work.") also at 395-9. Resnik, *Managerial Judges*, *supra* note 16, at 393-5 also mentions the use of lawsuits by diverse groups to assert novel legal rights (i.e., prison conditions) as another reason for the emergence of managerial judging in U.S. civil procedure. On the reasons of why the caseload of the courts has increased since the promulgation of the Federal Rules of Civil Procedure in 1938, see Resnik, *Managerial Judges*, *supra* note 16, at 396-7 (The caseload of the courts has increased significantly because of the growth of the population, Congress and the courts has created or articulated a multitude of new rights and legally cognizable wrongs; more lawyers are available than before; and Congress has provided for the payment of attorneys' fees to various classes of victorious plaintiffs, thereby creating new incentives to litigate). 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.

²⁷⁸ See, generally, Resnik, *Trial as Error*, *supra* note 274, at 943-49.

²⁷⁹ Resnik, *Managerial Judges*, *supra* note 16, at 379.

²⁸⁰ 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,

approach “managerial judging.”²⁸¹ But the move toward managerial judging also was reflected in the Federal Rules of Civil Procedure²⁸² and the Federal Judicial Center’s *U.S. Manual for Complex Litigation*.²⁸³

According to Professor Resnik, two main sets of changes followed this re-definition of judges’ role in U.S. civil procedure. First of all, judges now actively manage cases from very early in the litigation process and control their evolution.²⁸⁴ In order to do this, judges hold pre-trial conferences to establish early and continuing control over the way the parties manage their cases so that the proceedings are not unnecessarily protracted;²⁸⁵ issue scheduling orders that limit the time in which to file motions, complete discovery, and establish the date or dates for pre-trial conferences, and trial;²⁸⁶ and ensure that the participants formulate a plan for trial, including a program for facilitating the admission of evidence.²⁸⁷ The second main change has been that now judges have an active role in encouraging the

Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm, 33 VAL. U. L. REV. 413 (1999).

²⁸¹ Resnik, *Managerial Judges*, *supra* note 16, 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., Costantino, *Judges as Case Managers*, TRIAL, March, 1981; Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. 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 THE JUSTICE SYSTEM JOURNAL 135 (1978); Honorable Hubert L. Will, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203.

²⁸² Managerial judging was explicitly introduced in the U.S. Federal Rules of Civil Procedure in 1983. The 1983 amendments to rule 16(a) were intended to make “case management an express goal of pretrial procedure.” See Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 323 (1986).

²⁸³ 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.

²⁸⁴ See MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 2 (“In offering an array of litigation management techniques and procedures, the *Manual* does not recommend that every complex litigation necessarily employ any such procedures or follow a standard pattern. Choices will depend on the needs of the litigation and many other considerations. What the *Manual* does urge is that choices be made, and that they be made starting early in the litigation.”); at 7 (“Fair and efficient resolution of complex litigation requires at least that...the court exercise early and effective supervision (and, where necessary, control).”); at 9 (“Judicial supervision is most needed and productive early in the litigation.”)

²⁸⁵ Federal Rules of Civil Procedure, Rule 16(a). See also MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 9 (“The judge should hold an initial pretrial conference under Rule 16 as soon as practical...”)

²⁸⁶ Federal Rules of Civil Procedure, Rule 16(b) (The order must be issued as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant.)

²⁸⁷ See Rule 16(d).

parties to reach agreements on factual and legal issues and, ideally, to settle the case.²⁸⁸

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.”²⁸⁹ 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.²⁹⁰ At trial, the traditional adversarial system would still predominate in U.S. civil procedure.²⁹¹

However, this section reveals that managerial judging, as a procedural ideal-type, can and should be conceived 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 redefines the role not only of the judge, but also of the parties.²⁹² The transformations are more detailed because managerial judging explains many more procedural features than simply expanded resources to promote settlements and new management techniques—the two features that the first descriptions of the model emphasized.²⁹³ In order to show these points, this section will analyze the aspects of procedure previously linked to adversarial and inquisitorial systems,²⁹⁴ and will compare these systems to managerial judging.²⁹⁵

²⁸⁸ See Resnik, *Managerial Judges*, *supra* note 16, at 390 (describing the new role of the judge in settlements through a hypothetical case).

²⁸⁹ Resnik, *Managerial Judges*, *supra* note 16, at 378 (“Judges have described their new tasks as ‘case management’—hence my term ‘managerial judges’.”)

²⁹⁰ Resnik, *Managerial Judges*, *supra* note 16, at 377-8, 386, 403, where she only analyzes managerial judging as a pre-trial and post-trial phenomenon, not as a trial one. The statement of the main text should be qualified in the following way. Professor 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.

²⁹¹ See, e.g., Elliot, *supra* note 282, at 326 (“The jury is still out on managerial judging.”)

²⁹² It is partially because of its 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 74, at 418.

²⁹³ See, e.g., Rubenstein, *A Transactional Model*, *supra* note 74, at 416, who describes these accounts as focused “on two salient features of current adjudicatory practice. First, judges do not simply preside at trials following the development of a case by the attorneys; rather, judges ‘manage’ lawsuits from filing to finish. Second, ‘finish’ increasingly means settlement, not trial. In short, judges manage cases, rather than adjudicate trials.”

²⁹⁴ See Sections 4 and 5.

²⁹⁵ The comparison will be to the adversarial and inquisitorial criminal procedure systems (as defined). It will not be a comparison to civil procedure in civil law countries because the latter comparison is not necessary to develop the main arguments of this article. However, it is worth

The first point to be emphasized is that managerial judging redefines the role not only of the judge, but also of the parties.²⁹⁶ It is true that in this model the judge is no longer the investigator of the inquisitorial system or the umpire of the adversarial system, but an active manager, negotiator and mediator of the case.²⁹⁷ However, the role of the parties is also transformed. Unlike the adversarial system in which the parties both are conceived mainly as zealous advocates of their cases,²⁹⁸ and unlike the contemporary inquisitorial system in which the prosecutor is conceived as an impartial investigator²⁹⁹ and only the defendant as a zealous advocate of his case,³⁰⁰ in the managerial judging system, the parties both are conceived not only as zealous advocates of their positions, but also as collaborators with the judge who have the duty to help the judge reduce the court caseload, simplify the case and speed up the procedure.³⁰¹ In other words, 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 have a duty to collaborate with the court in expediting the process.³⁰² In this way, their role as officials of the court is deepened and emphasized.³⁰³

mentioning that, contrary to what some U.S. commentators have stated, civil procedure in civil law countries is not inquisitorial because it is as party-driven as U.S. civil procedure. For a description of civil procedure in contemporary civil law jurisdictions as a party-driven procedure, see KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* 3-35 (2003).

²⁹⁶ On this transformation, see, generally, *MANUAL FOR COMPLEX LITIGATION*, *supra* note 283, at 22-30.

²⁹⁷ Resnik, *Managerial Judges*, *supra* note 16, at 379.

²⁹⁸ On the conception of parties and lawyers as zealous advocates of their cases, see, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

²⁹⁹ See, for instance, Thomas Weigend, *Prosecution: Comparative Aspects*, in 3 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1233-4 (Joshua Dressler ed., 2d ed. 2002).

³⁰⁰ 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 can 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.

³⁰¹ *MANUAL FOR COMPLEX LITIGATION*, *supra* note 283, at 7 ("Fair and efficient resolution of complex litigation requires at least that...counsel act cooperatively and professionally; and...the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings.")

³⁰² The *Manual for Complex Litigation*, *supra* note 283, 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 and officers of the court. The complexity of legal and factual issues makes judges especially dependent on the assistance of counsel ...The added demands and burdens of complex litigation place a premium on attorney professionalism, and the judge should encourage counsel to act responsibly...Counsel need to fulfill their obligations as advocates in a manner that will

In this sense, 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 run by one or more impartial officials in order to determine the truth, the managerial judging system conceives procedure as a managerial device run by the judge with 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 initially presented to the court by the parties, 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 model,³⁰⁴ and determines the relationship between the main actors of the process.³⁰⁵

In U.S. civil procedure, this re-definition of the role of the parties has mainly happened during the pre-trial and post-trial phases, initially in complex litigation and public litigation, because at trial, the presence of the jury usually puts the judge and the parties back in their traditional roles.³⁰⁶ This is why Resnik originally characterized the managerial judging model as limited to the pre-trial and post-trial phases.³⁰⁷ But this does not mean that

foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute.”

³⁰³ Of course, in any contemporary procedural system in the West, lawyers are conceived of 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 in the managerial judging system are broader and more active than in contemporary adversarial and inquisitorial systems.

³⁰⁴ See, e.g., Resnik, *Managerial Judges*, *supra* note 16, at 431 (“Case processing is no longer viewed as means to an end; instead, it appears to have become the desired goal.”).

³⁰⁵ It is because of this re-definition of their role that, in the managerial judging system, the parties have the duty to collaborate with 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. Since the parties are conceived of as collaborators of the court, sanctions can be imposed when these duties are not performed. Both the Federal Rules of Civil Procedure and the Manual for Complex Litigation are explicit in this respect.

³⁰⁶ See, e.g., Langbein, *The German Advantage*, *supra* note 268, at 19 (“managerial judging in the pretrial process leaves adversary domination of the trial (especially jury trial) largely unaffected.”).

³⁰⁷ Resnik, *Managerial Judges*, *supra* note 16, at 377-8, 386, 403 (she only analyzes managerial judging as a pre-trial and post-trial phenomenon, not as a trial one).

this procedural model could not also apply at trial.³⁰⁸ Even during trial, the parties have duties to disclose as much information to the other party as possible to make the trial a foreseeable and manageable event,³⁰⁹ limit the length of their cases and the extent of their interrogatories,³¹⁰ and seek stipulations on factual and legal questions.³¹¹ The judge also has a much more active role in limiting the extent of the parties' cases and the length of their interrogatories than she usually does in the adversarial system.³¹² This role includes avoiding repetitive or cumulative evidence,³¹³ appointing court

³⁰⁸ 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 283, at 131-66.

³⁰⁹ See MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 138 ("Counsel should exchange lists (with copies if not previously supplied) for each trial day indicating the order in which expected witnesses and exhibits will be called or offered. The lists should identify those portions of depositions to be read. The court should specify the amount of advance notice required, balancing opposing counsel's need for time to prepare against the possibility that intervening developments will require changes. Some judges require a tentative listing of the order of witnesses and exhibits a week or more in advance, with instructions to communicate changes as soon as known, and give a final list at a conference at the close of the preceding day.").

³¹⁰ The number and length of interrogatories also have to be limited during the pre-trial phase. See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 90-2.

³¹¹ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, 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.").

³¹² See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 127 ("Some attorneys understand the advantages of selectively presenting evidence, but others leave no stone unturned, resulting in trials of excessive length unless limited by the judge. Where the parties' pretrial estimates suggest that trial will be excessively long, the judge should discuss the possibility of voluntary, self-imposed limits with the lawyers, perhaps suggesting exhibits or testimony that could be eliminated and inviting further suggestions...If this approach is not productive, consider imposing limits in some form, using the authority under Federal Rule of Civil Procedure 16(c)(4) and Federal Rules of Evidence 403 and 611. Announcing an intention to impose such limits may suffice to motivate counsel to exercise the discipline necessary to expedite the litigation to form a reasonable judgment about the time necessary for trial and the scope of the necessary evidence...Limits may be imposed in a variety of ways...by limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate; ...by controlling the length of examination and cross-examination of particular witnesses; ...by limiting the total time allowed to each side for all direct and cross-examination; and ... by narrowing issues, by order or stipulation...Generally, limits are best imposed before trial begins so that the parties can plan accordingly, but the need for limits may not become apparent until trial is underway."). *Id.* at 132 ("A trial schedule is essential to the orderly conduct of a trial. The schedule may, but need not, limit the length of the trial itself or the time allotted to each side for examination and cross-examination...It is appropriate to set the trial schedule only after consultation with counsel and after making appropriate accommodations for other time demands of the participants."); at 147 ("Limits on time and evidence are ordinarily set at the pretrial conference so that counsel can plan accordingly before the trial begins...Judicial intervention may become necessary, however, if evidence exceeds reasonable bounds and does not contribute to resolving the issues presented."); at 149 ("Limits may grant each party a specified number of hours for all direct and cross-examination, restrict the time for specific arguments, or limit the time for examination of particular witnesses.").

³¹³ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 148 ("One judicial alternative is to limit or bar the examination of witnesses whose testimony is unnecessary or cumulative and to

experts to avoid the repetition of expert witnesses presented by the parties,³¹⁴ holding conferences during trial,³¹⁵ reviewing the order in which the evidence is produced,³¹⁶ and asking her own questions to witnesses.³¹⁷ Of course, the judge 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.

In addition to these transformations in the role of the main actors in the process, managerial judging also implies a re-definition and re-signification of other procedural features. The main academic characterizations of this model have also left out a number of these features. As we have seen, since the adversarial system views procedure as a dispute between two parties before a passive umpire, both parties have the power to dispose of the case by dismissing the charges, pleading guilty,³¹⁸ and reaching agreements, and the judge remains in a passive position regarding these issues.³¹⁹ Unlike the inquisitorial system but like the adversarial one, the managerial judging model also allows the parties to dispose of their case by similar methods, or

call for stipulations where a number of witnesses would testify to the same facts...The judge may intervene, even without objection, in order to...bar testimony on undisputed or clearly cumulative facts—testimony may be disallowed as cumulative if it relates to evidence to be covered in later testimony, or matters beyond the scope of the examination”).

³¹⁴ On the use of expert witnesses in complex litigation cases in U.S. civil procedure, see MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 111-4.

³¹⁵ See MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 135-6 (“The court should consider scheduling a conference with counsel at the end of each trial day, after the jury has been excused. The conference may be brief, but should generally be on the record to avoid later misunderstandings. Such a conference helps avoid bench conferences and other trial interruptions. It can be used to plan the next day’s proceedings and to fix the order of witnesses and exhibits, avoiding surprises and ensuring that the parties will not run out of witnesses...The judge may, in light of other evidence previously presented, determine that further evidence on a point would be cumulative”).

³¹⁶ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 148 (“Judges can review the order in which witnesses are to be called to determine if it would interfere with an orderly trial. For example, counsel may try to call an adversary’s expert witness before critical evidence has been presented and before the party’s own expert has testified.”).

³¹⁷ As I will explain later (see footnotes 338-43 and accompanying text), the ideal-type 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, the U.S. civil procedure does not correspond to this feature of the ideal-type. The presence of the jury in U.S. civil procedure explains why the MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 139 suggests that judges refrain from asking questions to witnesses as much as possible (“In jury trials, judicial restraint in questioning witnesses minimizes both the appearance of partiality and the disruption of counsel’s presentation. The court should generally refrain from asking questions until counsel have finished their examination and even then limit questions to matters requiring clarification.”). In a similar way, see *id.* at 149.

³¹⁸ See *supra* notes 143-46, and accompanying text.

³¹⁹ See *supra* note 143, and accompanying text.

to focus their controversy by stipulations or agreements.³²⁰ In fact, these features are prime ways to achieve the goal of reducing the caseload and simplifying cases.³²¹

But even if both the adversarial and managerial judging systems share these features, they also present two differences on this point. The first has to do with the role of the judge regarding stipulations and agreements.³²² In the managerial judging system, if the parties negotiate and reach stipulations or agreements without the court's participation, these agreements are welcomed as a way to reduce the caseload and speed up the proceedings.³²³ But if the parties do not negotiate or reach agreements, the managerial judge, unlike the adversarial umpire, not only can get involved in the negotiations, but also must encourage the parties to reach agreements.³²⁴

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. The role of the court is limited to checking whether the agreement is voluntary and the parties understand its extent. But in the managerial judging system, parties' agreements on

³²⁰ See, e.g., Elliot, *supra* note 282, at 320-6 (pointing out that the original function of managerial judging was to narrow issues during the proceedings and that the new main function of managerial judging is settling cases). See also MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 167-82.

³²¹ 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 122, at 638.

³²² See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 94 ("The judge can...encourage stipulations of facts that, after an appropriate opportunity for discovery has been afforded, should no longer be genuinely in doubt.").

³²³ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 44 ("The process of identifying, defining, and resolving issues begins at the initial conference. The attorneys should confer and submit a tentative statement of disputed issues in advance, agree on to the extent possible.")

³²⁴ MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 40 (At each pretrial conference, "the judge should explore the settlement posture of the parties and the techniques, methods, and mechanisms that may help resolve the litigation short of trial."); 95 ("When voluntary means of narrowing factual disputes have been exhausted, admissions may be obtained under Federal Rule of Civil Procedure 36...Because parties often deny a requested admission on the basis of a trivial disagreement with a statement or without indicating the portions of the stated fact that are true, the court can urge the parties to observe their obligation under the rule of respond in good faith and point out the availability of sanctions for failure to do so."). For an example of judicial activism in encouragement settlement, see, e.g., *Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. 1987), and Steve Yeazell's analysis of it in his *The Misunderstood Consequences*, *supra* note 122, at 657-59. On the techniques that judges can use to identify, define, and resolve issues in complex litigation, see *id.* at 45.

particular issues are only welcomed when they expedite the case or reduce the caseload of the court; otherwise, the court will reject them.³²⁵

The next set of features of managerial judging that deserve emphasis are those related to the structure of procedure. We saw that one of the differences between the adversarial and inquisitorial systems was that in the former, procedure is structured as a contest between the competing cases of the prosecution (plaintiff) and the defense, while in the latter, procedure is structured as a unitary investigation run by impartial officials. In the managerial judging system, procedure is structured as a competition between two cases, and in this respect it differs from the inquisitorial system. But even if it conceives procedure as a competition between two cases, there are two differences between managerial judging and 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. There is competition to the extent that each of the parties runs its own pre-trial investigation and presents its case at trial. But at the same time, the parties have to cooperate with each other in order not to delay the proceedings unnecessarily.³²⁶ For instance, the parties may not use discovery requests to delay the proceedings,³²⁷ and they have to limit the controversy only to material issues genuinely in dispute.³²⁸ Second, the

³²⁵ Resnik, *Managerial Judges*, *supra* note 16, 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 twenty 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 - twenty days after receipt of service." For another example of this feature of managerial judging, see, e.g., Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 18-9 (2001).

³²⁶ This duty usually is articulated as lawyers' responsibility. See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 23 ("Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court. They need to communicate constructively and civilly with one another and attempt to resolve disputes informally as often as possible. Even where the stakes are high, counsel should avoid unnecessary contentiousness and limit the controversy to material issues genuinely in dispute. Model Rule of Professional Conduct 3.2. requires lawyers to make 'reasonable efforts to expedite litigation consistent with the interests of the client'.").

³²⁷ See, e.g., Yeazell, *The Misunderstood Consequences*, *supra* note 122, at 651 ("[d]iscovery in the United States is supposed to function as a cooperative venture among the adversaries, who, guided by the Rules, explore the facts"); MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 23 ("The certification requirements of Federal Rules of Civil Procedure 11 and 26(g) reflect some of the attorneys' obligations as officers of the court. By presenting a paper to the court, an attorney certifies in essence that he or she, based on a reasonable inquiry, has not filed the paper to delay, harass, or increase costs.").

³²⁸ *Id.* at 23.

parties are less masters of their cases than in the adversarial system.³²⁹ The court exercises a constant control over their cases to expedite process.³³⁰ Thus, the court may set time limits for the pre-trial phase through scheduling orders,³³¹ put pressure on the parties to reach total and partial agreements,³³² limit the presentation of the parties' cases at trial³³³ and the number of witnesses that may be produced,³³⁴ set time limits on direct and cross-examinations,³³⁵ call its own expert-witnesses,³³⁶ and act in other ways to control and expedite the case.

In addition, the managerial judging system differs from the adversarial and inquisitorial systems regarding those features related to the hierarchical and coordinate models.³³⁷ First of all, juries and a bifurcated court are not welcomed in the managerial judging system.³³⁸ Trial by jury are more time-consuming than bench trials because of the jury selection process, jury instructions, jury deliberations, and such.³³⁹ And 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

³²⁹ Mullenix, *Lessons from Abroad*, *supra* note 325, at 19-20 ("In modern complex litigation..., the central role of adversariness has been diminished to the extent that judges no longer rely solely on the parties to frame legal issues, present facts or evaluate legal conclusions. Moreover, activist judges in complex litigation are perfectly willing to override the attorney's role in controlling and conducting the litigation, such as when the judges takes the lead in formulating the trial plan, examining witnesses or freely admitting various forms of testimony into court records.").

³³⁰ This statement 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, the pretrial in the managerial judging system is longer and the trial is 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 his *The Misunderstood Consequences*, *supra* note 122, at 647.

³³¹ Federal Rules of Civil Procedure, Rule 26(b).

³³² See *supra* notes 322-24, and accompanying text.

³³³ See *supra* notes 312-17, and accompanying text.

³³⁴ See *supra* note 310, and accompanying text.

³³⁵ See *supra* note 310, and accompanying text.

³³⁶ See *supra* note 314, and accompanying text.

³³⁷ On the hierarchical and coordinate models, see Section V.

³³⁸ See, e.g., 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 282, at 309.

³³⁹ Of course, given that the U.S. Constitution mandates trial by jury even in civil cases, this feature of U.S. civil procedure is not consistent with managerial judging as an ideal-type. 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 283, at 150-63.

substantial powers.³⁴⁰ (At this level, then, U.S. civil procedure departs from the managerial judging ideal-type, since the U.S. Constitution establishes a right to a trial by jury also in civil cases.³⁴¹) In this sense, the managerial judging system shares with the inquisitorial a preference for the professionalization of the legal process. But unlike the inquisitorial system, which distrusts lay participants out of a corporatist attitude which favors bureaucratic control over legal cases,³⁴² the managerial judging system disfavors lay participants because they lengthen and complicate the handling of these cases.³⁴³

The managerial judging system also differs from the inquisitorial and the adversarial in its conception of how much hierarchy or coordination there is between the various actors and levels of the legal process. Hierarchical control between courts is very time-consuming, and this is why the managerial judging system does not welcome broad appellate review of either interlocutory or final decisions.³⁴⁴ In this sense, managerial judging differs from the inquisitorial system. But at the same time, in its conception of the relationship between the judge and the parties, managerial judging is more hierarchical than both the adversarial and the inquisitorial systems. As we saw, in the managerial judging system, the parties are conceived as collaborators of the court that may be sanctioned if they do not perform their

³⁴⁰ On the bifurcated court in U.S. civil and criminal procedure, see DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 201, at 26-57.

³⁴¹ See U.S. CONS., VII AM: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

³⁴² See DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY, *supra* note 43, at 18-19 (who, describing the hierarchical ideal of inquisitorial systems, says: "Permanently placed officials carve out a sphere of practice which they regard as their special province. Over time, they also develop a sense of identity with similarly situated individuals, so that lines become rigid between 'insiders' and 'outsides'. If outside participation in making of decisions is imposed upon such officials, it is viewed, at best, as meddling which deserves to be contained and made innocuous.").

³⁴³ 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).

³⁴⁴ 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 important because of broader discovery, joinder, and judicial encouragement of settlement. And given the doctrine of final judgment 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, *The Misunderstood Consequences*, *supra* note 122, at 646-48. On the interlocutory appeals available in complex litigation cases in U.S. civil procedure, see MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 208-11.

duties of speeding up the procedure and reducing the court's docket.³⁴⁵ Neither the adversarial nor contemporary inquisitorial systems conceive the relationships between the judge, prosecution and defense in such a hierarchical fashion.³⁴⁶

Since in the managerial judging system there is no jury and the court is unitary, there is no justification for the existence of detailed technical rules of evidence.³⁴⁷ In addition, parties' discussions about the admission or rejection of evidence at trial may be very time-consuming.³⁴⁸ And since the judges need to know as much as possible about the case in order to manage it efficiently, the managerial judging system does not welcome technical rules of evidence that prevent the judge from getting this information.³⁴⁹

As to reliance on oral testimony or a written dossier for evidence, the managerial judging system presents the following features. First, the judge needs to have as much information as possible about the case in order to manage it effectively. 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, this information is obtained through pre-trial conferences and extensive discovery. 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,³⁵⁰ except when depositions are helpful to avoid or shorten the trial.³⁵¹ Furthermore, in order to reduce the length of the trial, once a deposition or statement from a

³⁴⁵ See *supra* notes 296-303, and accompanying text.

³⁴⁶ See *supra* notes 79-81, and accompanying text. .

³⁴⁷ See, e.g., Mullenix, *Lessons from Abroad*, *supra* note 325, at 19 ("another attribute of the judicial function that has been modified in complex litigation concerns the extent to which judges flexibly administer evidentiary rules.").

³⁴⁸ On this point, see, e.g., Langbein, *Land without Plea Bargaining*, *supra* note 153.

³⁴⁹ Resnik, *Managerial Judges*, *supra* note 16, at 408 ("The supposedly rigid structure of evidentiary rules, designed to insulate decisionmakers from extraneous and impermissible information, is irrelevant in case management. Managerial judges are not silent auditors of retrospective events retold by first-person storytellers. Instead, judges remove their blindfolds and become part of the sagas themselves.").

³⁵⁰ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 83 ("Depositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation. The judge should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those that are taken, and ensure that the process of taking depositions is as fair and efficient as possible"). Federal Rules of Civil Procedure 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.

³⁵¹ 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.

witness has been taken, the managerial judging system welcomes the reading of summaries of these depositions or statements rather than hearing live witness.³⁵² On the distinction between the guilt-determination and sentencing phases, managerial judging does not make a clear distinction between these phases, unlike the adversarial system and its coordinate model. Holding two separate sets of hearings for each of these determinations can be very time-consuming; thus, the managerial judging system includes them in a single process.

Finally, the managerial system is characterized by the use of a specific set of management techniques to speed up the docket.³⁵³ These techniques include the power of the court to hold pre-trial conferences to expedite the disposition of the action, to establish early and continuing control over the case, and to encourage stipulations and settlement;³⁵⁴ a case-management

³⁵² See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 283, at 143 (“If the contents of a deposition are a necessary element of a party’s proof, the preferred mode of presentation is a succinct stipulated statement or summary of the material facts that can be read to the jury”). 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 (“Where credibility or recollection is not at issue, and particularly when the evidence is complicated or technical, a court may consider ordering witnesses under the parties’ control to present their direct testimony in substantial part through written statements prepared and submitted in advance of trial. At trial, the witness is sworn, adopts the statement, may supplement the written statement orally, and is then cross-examined by opposing counsel and perhaps questioned by the judge. The statement is received as an exhibit and is not read into the record...This procedure—which may be particularly appropriate for expert witnesses, witnesses called to supply factual background, or those needing an interpreter—has several advantages. The proponent can ensure that it has made a clear and complete record; the judge and opposing counsel, having read the statement, are better able to understand and evaluate the witness’s testimony; opposing counsel can prepare for more effective cross-examination; and the reduction in live testimony saves time.”)(*id.* at 164).

³⁵³ Elliot, *supra* note 282, at 311-2 (“The programs proposed by the proponents of managerial judging have, by and large, been true to the implications of the image of judge as ‘manager’. Stripped to their essentials, the techniques of managerial judging ration a scarce good—the procedural moves available to litigants under the Federal Rules of Civil Procedure. According to the advocates of managerial judging, this good is offered to its consumers (lawyers) at well below its true social cost; therefore they consume too much of it. The essential function of managerial judging is to increase the price of procedure. One can in fact define managerial judging as the selective imposition by judges of costs on lawyers for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure. Managerial judging techniques accomplish their goal of increasing the costs to lawyers of exercising their clients’ procedural rights in a number of different ways, some more explicit than others.”)

³⁵⁴ See, e.g., *MANUAL FOR COMPLEX LITIGATION*, *supra* note 283, at 36 (“Federal Rule of Civil Procedure 16 authorizes the court to hold pretrial conferences in civil cases. These conferences are the principal means of implementing judicial management of litigation”), at 32 (“The court’s first step in establishing control of the litigation is promptly scheduling the initial conference with counsel, generally within 30 to 60 days of filing, but with sufficient time for counsel to become familiar with the litigation and prepare for the conference. The judge should hold the conference before any adversary activity begins, such as filing of motions or discovery requests, and the order setting the

plan that may include procedures for identifying and narrowing disputed issues of fact and law, carrying out disclosure and conducting discovery in an efficient and economical matter, and preparing for trial;³⁵⁵ scheduling orders that limit the time to amend the pleadings, file motions and end the discovery process;³⁵⁶ 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;³⁵⁷ and related techniques.

conference may require that all such activity may be deferred.") On the historical origin of the use of pretrial conferences, see Resnik, *Trial as Error*, *supra* note 274, at 939-40.

³⁵⁵ See MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 36-7. The Manual provides the following checklist for designing case-management plans: identifying and narrowing issues of fact and law; establishing deadlines and limits on joinder of parties and amended or additional pleadings; coordinating with related litigation in federal and state courts, including later filings, removals, or transfers; effecting early resolution of jurisdictional issues; severing issues for trial; consolidating trials; referring, if possible, some matters to magistrate judges, special masters of other judges; appointing liaison, lead, and trial counsel and special committees, and maintaining time and expense records by counsel; reducing filing and service requirements; exempting parties from or modifying local rules or standing orders; applying and enforcing arbitration clauses; planning for prompt determination of class action questions, including a schedule for discovery and briefing on class issues; managing disclosure and discovery; planning for the presentation of electronic or computer-based evidence at trial, including the use of any audiovisual or digital technology in the courtroom; setting guidelines and schedules for the disclosure and exchange of digital evidentiary exhibits and illustrative aids; establishing procedures for managing expert testimony; creating schedules and deadlines for various pretrial phases of the case and setting a tentative or firm trial date; discussing any unresolved issues of recusal or disqualification; evaluating prospects for settlement; instituting any other special procedures to facilitate the management of the litigation. On the historical origins of the use of special masters and magistrates in U.S. federal civil procedure, see Resnik, *Trial as Error*, *supra* note 274 at 988-91.

³⁵⁶ See Federal Rules of Civil Procedure, Rule 16(b). See also MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 39 ("Scheduling orders are a critical element of case management. They help ensure that counsel will timely complete the work called for by the management plan. Rule 16(b) requires that a scheduling order issue early in every case, setting deadlines for joinder of parties, amendment of pleadings, filing of motions, and completion of discovery. Scheduling orders in complex cases should also cover other important steps in the litigation, in particular discovery activities and motion practice.")

³⁵⁷ Regarding the appointment of special masters, see, e.g., Federal Rules of Civil Procedure, Rule 53. See also MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 114-6. Regarding the use of magistrate judges, see Federal Rules of Civil Procedure, Rules 53(i) and 72. See also MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 13-4 ("The judge should decide early in the litigation whether to refer all or any part of pretrial supervision and control to a magistrate judge...Even without general referral to a magistrate judge, referral of particular matters may be helpful. Such matters include supervision of all discovery matters or supervision of particular discovery issues or disputes, particularly those that may be time-consuming or require an immediate ruling...Magistrate judges may also help counsel formulate stipulations and statements of contentions, and may facilitate settlement discussions...Referral of pretrial management to a special master (not a magistrate judge) is not advisable for several reasons...Because pretrial management calls for the exercise of judicial authority, its exercise by someone other than a district or magistrate judge is particularly inappropriate."); and at 117.

It is important to mention three 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.³⁵⁸ The managerial judging system should be understood as a procedural system. The fact that this procedural system is structured to process cases as quickly as possible should not bring confusion about this issue. There are actually many management techniques and devices that fit perfectly with all procedural models. For instance, increasing the number of judges³⁵⁹ court employees, or courtrooms,³⁶⁰ or putting judicial documents in a database which the judges and parties can access,³⁶¹ are ways to increase the efficiency of most procedural models.

All procedural systems manage legal cases, and all seek to avoid excessive delay.³⁶² What distinguishes the managerial judging system is that this goal of expediting cases becomes particularly important, *and* that the judge becomes the main manager in charge of expediting the cases. This re-definition of the role of the judge and this aspiration to expedite cases bring with them a re-definition of the role of the parties and other procedural features. All of this together characterizes managerial judging as a procedural model.

The second point is that the description of the managerial judging system just provided should be taken as an ideal-type.³⁶³ Like the adversarial

³⁵⁸ 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 the manager of the case or has an active role in making sure that the proceedings are not delayed, or that they tend to incentive agreements between the parties.

³⁵⁹ For instance, ICTY has increased the number of its judges over time, but this should not be considered part of managerial judging as a procedural mode. The Tribunal started with 11 judges but had 16 permanent judges and 8 ad litem judges by the end of 2003. The U.N. Security Council created a group of 27 ad litem judges available for the Tribunal to draw upon to increase its judgment capacity. See, e.g., Eight Annual Report ICTY, August 13, 2001, Summary. As many as 9 ad litem judges can serve at one time.

³⁶⁰ For instance, ICTY started working with one courtroom and today has three. See First Annual Report, para. 36; and Tenth Annual Report ICTY, August 20, 2003, para. 47.

³⁶¹ ICTY has developed a judicial database. See Ninth Annual Report ICTY, August 14, 2002, para. 290; See Tenth Annual Report ICTY, August 20, 2003, para. 314.

³⁶² In the U.S. adversarial system, the VI Amendment right to a speedy trial and the Federal Speedy Trial Act show this concern. Inquisitorial systems are also 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—reflect these concerns.

³⁶³ In his classic description of Weber's ideal-types methodology, Max Rheinstein writes: "Situations of such 'pure' type have never existed in history. They are artificial constructs similar to the pure constructs of geometry. No pure triangle, cube, or sphere has ever existed. But never could reality have been penetrated scientifically without the use of the artificial concepts of geometry. For the 'pure' concepts created by him, Weber used the term 'ideal type'.... The 'ideal types' ... are simply

and inquisitorial systems described above, no actual procedure exactly matches the ideal managerial judging system. But procedures in different jurisdictions may be closer or farther from the ideal-type, and this proximity or distance is helpful not only to classify a concrete procedure and compare it to other procedures, but also to explain how this concrete 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 and human and material resources for the administration of justice, but also a procedural culture and a way to distribute powers and responsibilities among the main actors in the legal process.³⁶⁴ As a procedural culture, managerial judging conceives procedure as a managerial device run by the judge with the collaboration of the parties whose goal is processing cases as swiftly as possible. And, 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.³⁶⁵ 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.³⁶⁶

mental constructs meant to serve as categories of thought the use of which will help us to catch the infinite manifoldness of reality by comparing its phenomena with those 'pure' types which are used, so to speak, to serve as guide in a filing system." Max Rheinstein, *Introduction* to MAX WEBER ON LAW IN ECONOMY AND SOCIETY XXIX-XXX (Edward Shils & Max Rheinstein trans., Max Rheinstein ed., 1954).

³⁶⁴ On the conception of procedural systems as procedural cultures that have different ways to distribute powers and responsibilities among the main actors and institutions of the criminal process, see *supra* Section II.

³⁶⁵ On the concepts of structures of interpretation, meaning, and internal dispositions, see *supra* respectively notes 69-70 and 71-73, and accompanying text.

³⁶⁶ In comparison to the adversarial system, the managerial judge is more powerful and has more responsibilities than the adversarial passive umpire. The managerial judge has the power and responsibility not only to adjudicate the issues presented to her by the parties but also of managing the case. On the other hand, the parties of the managerial judging system, as collaborators of the court, have less power and more responsibilities than their adversarial counterparts. The managerial court has a much greater say in how the cases of the parties are handled. This is why the parties have less power than in the adversarial system while the parties of the managerial judging system not only have the right to zealously defend their interests but also the responsibility of disposing cases swiftly. (At the same time, though, even if the court has more power over the parties in the managerial judging system, it is possible that the trial court in current U.S. federal civil procedure exercises less scrutiny of the parties due to the demise of the trial's significance and the higher importance of the

VIII. 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.³⁶⁷ These reforms have aimed to speed up the pace of the proceedings, not only to reduce the length of pre-trial detention³⁶⁸ but also to defend ICTY's legitimacy and international support.³⁶⁹ Since two of the main reforms have been to make the judges more active players and to rely more on written evidence, commentators have described these reforms as a swing from the

pretrial phase. On this point, see Yeazell, *The Misunderstood Consequences*, *supra* note 122, at 646-48.) Finally, the managerial judge is also more powerful because of the relatively weak control by the Court of Appeals over him, which is even weaker than in the adversarial system. In comparison to the inquisitorial system, the managerial judge has, simultaneously, more and less procedural powers than the inquisitorial counterpart. The managerial judge has the power to put pressure on the parties and tell them what to do to speed up proceedings, a power that contemporary inquisitorial judges do not have. On the other hand, the managerial judge is less powerful because he cannot do the investigation by himself but rather has to still rely on the parties to handle their own pre-trial investigations and to present their cases at trial. In addition, the managerial and the inquisitorial judges have a similar amount of responsibilities but of different kinds. While the managerial judge has the responsibility of managing and adjudicating the case, the inquisitorial judge has the responsibility to investigate and adjudicate it. Meanwhile, the parties in the managerial judging system have more and less powers than their adversarial counterparts due to the flipside of the analysis already done regarding the judge: the parties run their own pre-trial investigations and present their cases at trial but, at the same time, can receive orders from the judge about how to do things. Furthermore, the parties of the managerial judging system have more responsibilities than in contemporary inquisitorial systems because they are at the same time advocates of their positions and collaborators of the court. Vis-à-vis the court of appeals, the managerial judge has more power than the inquisitorial one because there is less hierarchical control in the managerial judging system than in the inquisitorial one.

³⁶⁷ 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 ICTY, August 14, 2002, Summary.

³⁶⁸ 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. Since the accused is generally in custody from the time of his arrest or voluntary surrender until the final disposition of his case, long trials result in lengthy periods of detention for the accused and also affect other accused in custody awaiting trial.").

³⁶⁹ See, e.g., Seventh Annual Report 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.").

adversarial to the inquisitorial system.³⁷⁰ But this section will show how these reforms have actually moved the criminal procedure of ICTY toward managerial judging.

The reforms have indeed made judges more active players during the pre-trial and trial phases, but not in order to make judges more active investigators of the truth as in the inquisitorial system. Rather, as in the managerial judging system, ICTY judges have become more active managers to assure that the parties do not delay the proceedings.³⁷¹

During the pre-trial phase, no later than seven days after the initial appearance of the accused, the presiding judge of the Trial Chamber must designate from among its members a judge responsible for the pre-trial proceedings.³⁷² This pre-trial judge shall, under the authority and supervision of the Trial Chamber, coordinate communication between the parties during the pre-trial phase, ensure that the proceedings are not unduly delayed, and take any measure necessary to prepare the case for a fair and expeditious trial.³⁷³

In order to achieve this goal of expediting the proceedings,³⁷⁴ the pre-trial judge uses a number of techniques characteristic of the managerial judging system.³⁷⁵ These include holding pre-trial or status conferences “to organize exchanges between the parties so as to ensure expeditious

³⁷⁰ See works cited *supra* note 12.

³⁷¹ 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...”).

³⁷² 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 283, at 9-10 (“Courts that do not assign actions automatically to a specific judge upon filing should nevertheless make an individual assignment as soon as a case is identified as complex or a part of complex litigation.”)

³⁷³ Rule 65 *ter* (B). Trial Chambers have embraced these goals as the duty of the pre-trial Judge. See, e.g., Naser Oric, Casa IT-03-68-I, Order Concerning Rule 66(A)(II) Materials, Expert Report and Pre-Trial Briefs Decision of July 30, 2003, p. 1 (considering 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).

³⁷⁴ See, e.g., Seventh Annual Report of ICTY, July 26, 2000, para. 288-89 (“Many of these amendments were intended to speed up trials and the pre-trial process and to minimize delays...(A)mentments were made to the powers and role of the pre-trial judges and to improve pre-trial management...”).

³⁷⁵ See *supra* notes 353-57, and accompanying text.

preparation for trial”;³⁷⁶ 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”;³⁷⁷ setting a time for the making of pre-trial motions and, if required, any hearing thereon;³⁷⁸ and ordering the parties to meet to discuss issues related to the preparation of the case.³⁷⁹ In doing all this, the judge may be assisted by a Senior Legal Officer³⁸⁰—who plays a role similar to the special master of U.S. civil procedure³⁸¹—whose job

³⁷⁶ 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., Naser Oric, Casa IT-03-68-I, Status Conference, July 29, 2003, p. 50 (“This is the first Status Conference held in accordance with Rule 65 *bis* of the Rules of Procedure and Evidence. The purpose of having this Status Conference is to organize changes between the parties and to review the status of the case so as to ensure the expeditious preparation for trial.”); Prosecutor v. Vojislav Seselj, Case IT-03-67-I, Status Conference, October, 29, 2003, p. 116. 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).

³⁷⁷ Rule 65 *ter* (D)(ii). See, e.g., Prosecutor v. Damir Dosen and Dragan Kolundzija, Scheduling Order, June 9, 2000.

³⁷⁸ Rule 65 *ter* (K).

³⁷⁹ 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.”). See, e.g., Prosecutor v. Stanislav Galic, Scheduling Order and Order on the Prosecution’s Motion for the Trial Chamber to Travel to Sarajevo, January 22, 2001 (ordering the parties to meet prior to the Status Conference on January 30, 2001, and informing the parties that during the Status Conference they should be prepared to report on the progress made on these issues, including matters regarding the trial preparation of the case: disclosure of materials pursuant to Rule 66(A)(ii) and Rule 68; progress toward completing the pre-trial filings required by Rule 65 *ter*, particularly whether the parties have made any progress in agreeing on undisputed matters of law and fact; and, with respect to the Prosecution, the filing of a pre-trial brief, a list of witnesses it intends to call at trial, and a list of exhibits it intend to use at trial; and so forth).

³⁸⁰ See Seventh Annual Report of ICTY, July 26, 2000, Summary (“In November 1999, the new President, the judges, the Registrar and the Chambers Legal Support Service began to consider ways to permit the Tribunal to accomplish its mission more effectively and to deal with its greatly increased workload...In the end, the judges advocated a more flexible two-tier solution which would accelerate pre-trial case management through increased utilization of senior legal officers from pre-trial case management...”), para. 10 and para. 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.”); Eight Annual Report of ICTY, August 13, 2001, para. 58. Ninth Annual Report of ICTY, August 14, 2002, para. 295; See Tenth Annual Report of ICTY, August 20, 2003, para. 318 (“This reporting period has continued to see the active implementation of the substantial additional responsibilities assigned to the Senior Legal Officers...in respect of pre-trial management. Pursuant to rule 65 *ter* (D) and under the authority and direction of the pre-trial judge, the Senior Legal Officers now oversee the practical implementation of and compliance with the rules governing pre-trial management.”).

³⁸¹ On the use of special masters in U.S. civil procedure, see *supra* note 357. For a classic analysis of the use of special masters in U.S. civil procedure, see Hazard & Rice, *Judicial Management of the*

is to oversee the implementation of the work plan³⁸² and keep the pre-trial judge informed of the progress of the discussions between and with the parties.³⁸³ Other management techniques also are available.³⁸⁴

The court is also an active manager during the trial and its preparation. Prior to the commencement of the trial cases of the prosecution and the defense, the Trial Chamber must hold pre-trial conferences.³⁸⁵ In these conferences, the Trial Chamber may call upon the prosecutor and the defense to shorten the estimated length of the examination-in-chief for some witnesses,³⁸⁶ determine the number of witnesses that each of the parties may call,³⁸⁷ and set the time available to the prosecution and the defense to present evidence at trial.³⁸⁸ The Trial Chamber also may select a number of

Pretrial Process in Massive Litigation: Special Masters as Case Managers, 1982 AM. B. FOUND. RESEARCH J. 375.

³⁸² See, e.g., Eight Annual Report of ICTY, August 13, 2001, para. 52 (describing reforms to the Rules of Evidence and Procedure under which, in order to expedite the proceedings, the Senior Legal Officers in Chambers may assist the Pre-Trial Judge in facilitating a work plan by which the parties will be required to prepare cases for trial).

³⁸³ Rule 65 *ter* (D)(iii). Judges have made use of these powers. See, e.g., Naser Oric, Casa IT-03-68-I, Initial Appearance, April 15, 2003, p. 7 (in which the judge wanted the senior legal officer to recommend to arrange a conference with the parties in order to discuss matters relating to the preparation of the trial and to establish a work plan for it. The judge also wanted the conference to be held before the status conference which has to take place 120 days after the initial appearance).

³⁸⁴ Another technique that is worth mentioning is that, on 19 May 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.

³⁸⁵ See Rule 73 *bis* (A) and Rule 73 *ter* (A).

³⁸⁶ See Rule 73 *bis* (B) and Rule 73 *ter* (B).

³⁸⁷ Rule 73 *bis* (C)(i) and Rule 73 *ter* (C). The rationale for the introduction of these reforms has been expediting the procedure. See Eight Annual Report ICTY, August 13, 2001, para. 52-53. For examples of how trial courts have used these powers, see Prosecutor v. Dario Kordic and Mario Cerkez, "Lasva Valley", Case IT-95-14/2, Open Session, February 16, 2000, p. 14418-19; Prosecutor v. Dario Kordic and Mario Cerkez, "Lasva Valley", Case IT-95-14/2, Scheduling Order, April 4, 2000 (noting that the provisions of Rule 73 *ter* (C) permit a Trial Chamber to call upon the Defense to reduce the number of witnesses, consider the extensive nature of the Kordic Defense witness list, and call upon the Cerkez defense to justify to the Trial Chamber the extensive number of witnesses to be called); Prosecutor v. Dario Kordic and Mario Cerkez, "Lasva Valley", Case IT-95-14/2, Scheduling Order, April 28, 2000 (noting that the provisions of Rule 73 *ter* (C) permit a Trial Chamber to call upon the Defense to reduce the number of witnesses, consider the extensive nature of the Cerkez Defense witness list, and call upon the Cerkez defense to justify to the Trial Chamber the extensive number of witnesses to be called); Prosecutor v. Sikirica, "Keraterm Camp", Case IT-95-8-T, Pre-Trial Conference, February 8, 2001.

³⁸⁸ Rule 73 *bis* (C)(ii) and Rule 73 *ter* (E). See, e.g., Eight Annual Report ICTY, August 13, 2001, para. 3-4 ("[T]he reforms are intended to make the procedures more responsive to the International Tribunal's overriding need for expeditiousness through the fine-tuning of many of the rules of procedure and evidence...[S]everal rules of procedure and evidence were amended: the judges may now set the number of witnesses the parties call to testify, (and) determine the length of the cases...") and para. 19.

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.³⁸⁹

During trial, the Trial Chamber "shall 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".³⁹⁰ The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses submitted by the parties before the beginning of the presentation of their cases.³⁹¹

The judges have also used a number of managerial devices not explicitly included in the Rules to simplify and speed up trials. For instance, in *Stakic*, in response to a request from the Trial Chamber, the Prosecution conceded that four specific allegations included in the indictment were unproven and that there was insufficient evidence to sustain a conviction.³⁹² 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 was running, applying by analogy rule 65 *ter* that regulates the work of the pre-trial judge as a case manager.³⁹³

Notice 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.³⁹⁴ In

³⁸⁹ See Rule 73 *bis* (D). This last power was included in the amendment of Rule 73 *bis* of July 28, 2003, developed by the Judicial Practices Working Group in order to give the Trial Chambers greater authority to control the scope of the case presented by the Prosecution. See Tenth Annual Report ICTY, August 20, 2003, para. 12 and 34.

³⁹⁰ Rule 90 (F). See, for instance, *Prosecutor v. Jelusic*, Case IT-95-10, Trial Transcript, September 7, 1999, p. 17 (applying Rule 90 (G)—the antecessor of the current Rule 90 (F)—to establish that the time for carrying a cross-examination correspond 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, e.g., *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-S, Sentencing Hearing, January 27, 2004, p. 124 (judge interrupts a testimony to avoid the repetition of everything that has already been admitted into evidence); *id.* at p. 126 ("Mr. Deronjic, please understand, our time is limited. Let's try to focus on the core issues that are relevant for the crime we are seized with"); similarly, *id.* at 131-32, 155-6.

³⁹¹ Rule 90 (G). The rationale for the introduction of this power to the Trial Chamber was expediting the proceedings. See Eight Annual Report ICTY, August 13, 2001, para. 52-53.

³⁹² *Stakic*, *Judgment*, para 971.

³⁹³ *Id.* at para. 980.

³⁹⁴ Seventh Annual Report of ICTY, July 26, 2000, para. 19 ("During the reporting period, the judges were confronted with the problems resulting from the Tribunal's significantly increased

fact, the Tribunal itself has recognized that the main goal of these reforms is to expedite proceedings.³⁹⁵ 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.³⁹⁶ 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.³⁹⁷

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 collaborators with the court in the goal of expediting cases.³⁹⁸ As collaborators, 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

workload and with its consequences for the length of the proceedings and, in particular, for pre-trial detention. As a result, the judges have sought to maximize those resources available to them in dealing with these difficulties. They have, for instance, prepared the cases more thoroughly at the pre-trial phase so as to be in a position to hold fair and expeditious trials.”). An example of the expediency goal of the reforms, rather than the truth-determination one, 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 88, para. 75 (“it was noted that the interrogation of witnesses, other than experts, seems to be characterized by the absence of crisp, focused questions and by long, rambling answers tending to be narratives, at times vague, repetitive and irrelevant.”) and para. 76.

³⁹⁵ 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.”).

³⁹⁶ 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).

³⁹⁷ 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 and continues his analysis of international criminal proceedings in terms of the adversarial-inquisitorial dichotomy. See Orie, *supra* note 6, at 1465 (“The introduction of a pre-trial judge in Rule 65 *ter*, although often regarded as a feature taken from the inquisitorial tradition, cannot, however, be compared with a pre-trial judge in the civil-law systems. The pre-trial judge has no task in investigating the case. He is serving mainly as a motor behind the parties in their trial preparation.”).

³⁹⁸ 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), 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 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 ICTY, August 14, 2002, para. 17, that said on the plan presented by the Registrar of the Tribunal to establish an international bar for defense counsel: “The President supported the initiative, as it would result in better-trained defense counsel, which would in turn make the operation of the Tribunal more efficient.” See also Tenth Annual Report ICTY, August 20, 2003, para. 11: “These reforms should help improve the quality and accountability of defense counsel.”

management function more effectively during trial preparation and trial.³⁹⁹ In her pre-trial brief,⁴⁰⁰ 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 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.⁴⁰¹

In addition, the pre-trial judge orders the prosecutor to submit, not less than six weeks before the pre-trial conference, the list of witnesses the prosecutor intends to call.⁴⁰² This list includes a summary of the facts on which each witness will testify,⁴⁰³ the points in the indictment as to which each witness will testify,⁴⁰⁴ the total number of witnesses, the number of witnesses who will testify against each accused on each count,⁴⁰⁵ an indication of whether the witness will testify in person or by way of written statement or use of a transcript of testimony,⁴⁰⁶ the estimated length of time required for each witness, and the total time estimated for presentation of the prosecutor's case.⁴⁰⁷ 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.⁴⁰⁸

³⁹⁹ See Rule 65 *ter* (E) and Rule 65 *ter* (F). These two rules find antecessors in managerial judging in U.S. civil procedure. See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 283, at 124 ("One method used by judges to ensure adequate preparation, streamline the evidence, and prevent unfair surprise is to have each party prepare and submit a statement listing the facts it intends to establish at trial and the supporting evidence...If adopted, evidence not included in the statement should not be permitted at trial. Exchanging such statements may help narrow factual disputes and expedite the trial"). See also Elliot, *supra* note 282, at 313 ("At one time, Judge Charles Richey's standard pretrial order required litigants to file detailed pretrial briefs identifying, among other things, all issues and 'all facts which plaintiff [defendant] intends to prove at trial to sustain [defend against] each element of the claim for relief'. Then, counsel for each of the parties was required to go through the opposing side's proposed findings of fact and conclusions of law, and to underline the disputed portions in red, the admitted portions in blue, and those portions deemed to be irrelevant in yellow.").

⁴⁰⁰ The prosecutor has to submit his pre-trial brief not less than six weeks before the pre-trial conference. See Rule 65 *ter* (E).

⁴⁰¹ Rule 65 *ter* (E)(i).

⁴⁰² Rule 65 *ter* (E)(ii)(a).

⁴⁰³ Rule 65 *ter* (E)(ii)(b).

⁴⁰⁴ Rule 65 *ter* (E)(ii)(c).

⁴⁰⁵ Rule 65 *ter* (E)(ii)(d).

⁴⁰⁶ Rule 65 *ter* (E)(ii)(e).

⁴⁰⁷ Rule 65 *ter* (E)(ii)(f).

⁴⁰⁸ Rule 65 *ter* (E)(iii).

The defense also has to submit a pre-trial brief,⁴⁰⁹ which must indicate the nature of the accused's defense,⁴¹⁰ any matters with which the accused takes issue in the prosecutor's pre-trial brief,⁴¹¹ and why the accused takes issue with them.⁴¹² In addition, after the prosecutor has closed her case at trial and before the commencement of its case, the defense also has to submit lists of witnesses⁴¹³ and exhibits the defense intends to offer in its case, stating where possible whether the prosecutor has any objection as to authenticity.⁴¹⁴

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.⁴¹⁵

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 or other specified obligations, the Trial Chamber will

⁴⁰⁹ The defense has to submit its pre-trial brief after the pre-trial submission by the Prosecutor and, within a time-limit set by the pre-trial Judge, though it cannot be later than three weeks before the pre-trial conference. See Rule 65 *ter* (F).

⁴¹⁰ Rule 65 *ter* (F)(i).

⁴¹¹ Rule 65 *ter* (F)(ii).

⁴¹² Rule 65 *ter* (F)(iii). For a justification of these reforms, see, e.g., Seventh Annual Report ICTY, July 26, 2000, para. 288-89 ("Many of these amendments 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").

⁴¹³ 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, e.g., Prosecutor v. Dario Kordic and Mario Cerkez, "Lasva Valley", Case IT-95-14/2, Open Session, February 16, 2000, p. 14419-20. See also Prosecutor v. Zoran Kupreškić et al, "Lasva Valley", IT-95-16, Decision, January 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", Case IT-98-33, Scheduling Order, September 12, 2000 (ordering the defense to present its list of witnesses and exhibits).

⁴¹⁴ Rule 65 *ter* (G)(ii). For an example of a pre-defense conference see, e.g., Prosecutor v. Krstić, "Srebrenica-Drina Corps", Case IT-98-33, Pre-Defence Conference, October 5, 2000 (discussing, among other things, the amount of detail needed in the summary of facts on which each witness will testify and the list of exhibits and authentication of documents).

⁴¹⁵ See, e.g., Export Report, *supra* note 88, para. 89 (stating that the underlying logic for broader disclosure duties by the defense would be expediting the trial by enabling the parties and the court to focus on the real issues).

decide on sanctions to be imposed on that party,⁴¹⁶ including possible exclusion of testimonial or documentary evidence from trial.⁴¹⁷ Other rules and directives also include sanctions for a party that does not comply with its discovery duties⁴¹⁸ or other requirements imposed by the Tribunal.⁴¹⁹ In addition, the judges have used informal rewards,⁴²⁰ warnings⁴²¹ and sanctions to make sure that the parties collaborate. 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.

⁴¹⁶ The rationale for the introduction of these sanctioning powers have precisely been to expedite proceedings. See Eight Annual Report ICTY, August 13, 2001, para. 52-53.

⁴¹⁷ Rule 65 *ter* (N). For a discussion among a Trial Chamber and the parties on the meaning of this Rule, see *Prosecutor v. Mladen Naletilic aka 'Tuta' and Vinko Martinovic aka 'Stela'*, IT-98-34, Open Session, April 12, 2002. See also Rule 68 *bis* (the pre-trial judge or the Trial Chamber may decide *motu proprio*, 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); Rule 77 (regulating the contempt powers of the Tribunal); and 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).

⁴¹⁸ 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 in December 13, 2001 to enhance the Tribunal's ability to conduct trials expeditiously. See Ninth Annual Report ICTY, August 14, 2002, para. 38 and 41.

⁴¹⁹ See Practice Directive on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155 Rev. 1. This directive was amended mainly to add a provision enabling the Appeals Chamber to punish parties for failing to respect the directives. See Ninth Annual Report ICTY, August 14, 2002, para. 14.

⁴²⁰ See, e.g., *Prosecutor v. Limaj, Bala, and Musliu*, Case IT-03-66-PT, Status Conference, June 25, 2003, p. 71 (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.").

⁴²¹ See, e.g., *Prosecutor v. Mladen Naletilic aka 'Tuta' and Vinko Martinovic aka 'Stela'*, IT-98-34, Decision on the Accused Naletilic's Motion to Continue Trial Date, August 31, 2001, para. 12 (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.").

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. McCloskey: I think we need to get Mr. Karnavas here and get his views and just to 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 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.⁴²²

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 agreements⁴²³ has substantially increased since 1998, and in 2003, there were more cases concluded through plea agreements than through trials.⁴²⁴ Both the Rules and the judges have offered incentives to

⁴²² Obrenovic, Status Conference, October 19, 2001, page 23-4.

⁴²³ 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 ICTY, August 20, 2003, para. 230.

⁴²⁴ While seven defendants were convicted through trials in 2003, eight defendants offered guilty pleas (even if, in some cases, the sentencing judgments were entered 2004). See Nancy Amoury Combs, *Plea Bargaining after Mass Atrocities: Bridging Justice and Truth* (on file with the author). The trials were Prosecutor v. Simić et al., Case IT-95-9-T, Judgment, October 17, 2001 (convicting Blagoje Simić, Miroslav Tadić, and Simo Zarić); Prosecutor v. Stakić, Case IT-97-24-T, Judgment, July 31, 2003 (convicting Milomir Stakić); Prosecutor v. Naletilić & Martinović, Case IT-98-34-T,

the parties to agree on as many factual and legal issues as possible in order to narrow down the issues under discussion.⁴²⁵ 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,⁴²⁶ while the defense must indicate the matters with which the accused takes issue in the Prosecutor's pre-trial brief and why.⁴²⁷

When the parties have not reached agreements by themselves,⁴²⁸ most judges have followed the managerial judging model by actively encouraging them to reach factual and legal agreements.⁴²⁹ Judges have used different

Judgment, March 31, 2003 (convicting Mladen Naletilić and Vinko Martinović); and Stanislav Galić, Case IT-98-29-T, Judgment, December 5, 2003. Defendants were offered guilty pleas in Prosecutor v. Meakić et al., Case IT-02-65-PT, Sentencing Judgment, October 28, 2003; Prosecutor v. Momir Nikolić, Case IT-02-60-PT, Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor, Annex A, Amended Plea Agreement, May 7, 2003 (the sentencing judgment was entered on December 3, 2003); Prosecutor v. Obrenović, Case IT-02-60-PT, Joint Motion for Consideration of Plea Agreement between Dragan Obrenović and the Office of the Prosecutor, Annex A, Plea Agreement, May 20, 2003 (the sentencing judgment was entered on December 10, 2003); Prosecutor v. Dragan Nikolić, Case IT-94-2-S, Judgment, December 18, 2003; Prosecutor v. Darko Mrdja, Case IT-02-59-S, guilty plea entered on July 24, 2003 (the sentencing judgment was entered on March 31, 2004); Prosecutor v. Miodrag Jokić, Case IT-01-41/1-S, Joint Motion for Consideration of Plea Agreement between Miodrag Jokić and the Office of the Prosecutor, August 27, 2003 (the sentencing judgment was entered on March 18, 2004); Prosecutor v. Deronjić, Case IT-02-61-PT, Plea Agreement, September 29, 2003 (the sentencing judgment was entered on March 30, 2004); and Prosecutor v. Cesić, Case 95-10/1-PT, Plea Agreement, October 8, 2003 (the sentencing judgment was entered on March 11, 2004).

⁴²⁵ In the case of plea agreements, most negotiations have transpired between the prosecution and defense. But 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, Case IT-02-65/1-S, Sentencing Judgment, October 28, 2003 (para. 61: "The Trial Chamber observes that co-operation with the Prosecutor is generally considered in mitigation of sentence" and imposed a sentence of 8 years of imprisonment as the parties jointly recommended); Prosecutor v. Miroslav Deronjić, Case IT-02-61-S, Sentencing Judgment, March 30, 2004, para. 235 (considering a guilty plea a mitigating factor, the Chamber imposed a sentence of ten years of imprisonment as requested by the prosecution).

⁴²⁶ Rule 65 *ter* (E)(i).

⁴²⁷ Rule 65 *ter* (F)(ii) and (iii).

⁴²⁸ The prosecution has tried to reach agreements to simplify trials and cases. See, e.g., Naser Oric, Case IT-03-68-I, Status Conference, July 29, 2003, p. 57-8 (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, and that would show the strengths and weaknesses for both sides, thus helping in terms of potential agreement between the parties).

⁴²⁹ The Expert Group encouraged ICTY judges to move in this direction. See Expert Report, *supra* note 88, para. 84 ("Some judges have required that, when there is no apparent reason for a dispute as to certain facts, the party declining to so stipulate, usually the accused, explain why. This practice, is adhered to, could be quite helpful in eliminating the need for the introduction of potentially massive amounts of evidence, particularly by the Prosecutor, to establish facts that may not really be in dispute.").

techniques for that purpose.⁴³⁰ For instance, in *Stakic*, Judge 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. Stakic. And I think Dr. Stakic 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, in each courtroom on the globe, and this is also true for this Court, this Tribunal here in The Hague, every kind of cooperation, also when it's only a question of this

⁴³⁰ See, e.g., *Prosecutor v. Vojislav Seselj*, Case IT-03-67-I, Initial Appearance, February 26, 2003, p. 4 (Judge Schomburg told the defendant that any kind of substantial cooperation would be to his advantage. In the event that it does not come to a sentencing stage, the defendant's cooperation will be in his own interest to speed up the proceedings. In case it would come to a sentencing stage, such kind of substantial cooperation will always be held in defendant's favor); *Prosecutor v. Limaj, Bala, and Musliu*, Case IT-03-66-PT, Status Conference, June 25, 2003, p. 71 (where Judge Martin Canivell said to the parties: "I would also ask you—tell you to remember that it is a possibility of arriving to an agreement of facts. Of course, in the time this Tribunal has already been working, many of the facts which are common from one case to the other had been—sometimes it has been rejected by the accused, but in the course of the proceedings some of the facts have been really so well proven that I would say it would be of little use, no use at all, to come again on that, that you can 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*, Case IT-03-66-PT, Status Conference, October 23, 2003, p. 83; *Prosecutor v. Zeljko Meakic, Momcilo Gruban, Dusan Fustar, Predrag Banovic, and Dusko Knezevic*, Case IT-02-65-PT, Status Conference and Further Appearance, December 10, 2002, p. 9-10 (Judge Patrick Robinson: "The Prosecution has prepared a list of facts for possible agreement. And the list of findings from previous judgments. These have provided by the Defense, and the parties are to meet to discuss this matter and come to an agreement, if that is possible. I encourage the parties to do that as quickly as possible...I encourage the parties to come to agreement, if that is possible, and shorten the case."); 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 or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber; *Prosecutor v. Banovic, Fustar, and Knezevic*, Case IT-02-65-PT, Status Conference, April 8, 2003, p. 62 (Judge Patrick Robinson: "Rule 92 *bis*, 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."); *Id.* at p. 67 (Judge Patrick Robinson: "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."); *Prosecutor v. Zeljko Meakic, Momcilo Gruban, Dusan Fustar, Predrag Banovic, and Dusko Knezevic*, Case IT-02-65-PT, Status Conference and Further Appearance, July 23, 2003, p. 90-1.

cooperation on agreed facts, to put it this way, will be helpful for an accused, an accused being not guilty has of course an interest...to have an expeditious as possible a trial. Just in case, if, and I once again emphasize, if there would be a sentencing stage in this case, it (sic) always this kind of cooperation would be honoured in the sentencing stage, ex officio by the Judges. And therefore, this should be always—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 cooperate. Probably then it's too late. And this should be really discussed between the Defence counsel and Dr. Stakic 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.⁴³¹

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.⁴³² 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.⁴³³ Before trial, they also must try to reach agreements on as many

⁴³¹ Stakic, Pre-Trial Conference, 10 April, 2002, page 1568-70.

⁴³² The judges have constantly tried to encourage a spirit of cooperation between the parties. See, e.g., Naser Oric, Case IT-03-68-I, Status Conference, July 29, 2003, p. 50-1 ("Prior to present Status Conference, there have been two Rule 65 *ter* conferences convened by the senior legal officer of this Chamber. She has kept me well-informed of the conferences, and I would like to comment that the spirit of cooperation demonstrated by both parties is very much welcomed by the Trial Chamber, and I strongly encourage such spirit to continue."); Prosecutor v. Zeljko Meakic, Momcilo Gruban, Dusan Fustar, Predrag Banovic, and Dusko Knezevic, Case IT-02-65-PT, Status Conference and Further Appearance, July 23, 2003, p. 93 (Defense Attorney: "Your Honour, I would like to inform you and that the Defence will by no means obstruct the schedule that you set. We shall do everything in order to be prepared for trial when you are prepared. If we should not have enough time, but if our time is not drastically shortened, we would accept to start with the trial if we were allowed to present evidence. We will do everything in order to be prepared for trial when you decide that the trial should start." Judge Robinson: "Thank you very much, Mr. Simic, for your spirit of cooperation. There are many strategies that can be employed and that are open to Trial Chambers to deal with a matter of this kind. But at the—at the bottom, of course, we have in mind that the question of fairness to all the accused.").

⁴³³ Rule 65 *ter* (D)(v). See, e.g., Prosecutor v. Stanislav Galic, Scheduling Order and Order on the Prosecution's Motion for the Trial Chamber to Travel to Sarajevo, January 22, 2001 (ordering the parties to meet prior to the Status Conference on January 30, 2001, and informing the parties that

factual and legal issues as possible,⁴³⁴ and they have broader disclosure duties toward each other.⁴³⁵

Also typical of managerial judging, the parties now are less masters of their cases than before the reforms. 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.⁴³⁶ 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,⁴³⁷ determine the number of witnesses that each side may call,⁴³⁸ and determine the time available to each for presenting evidence.⁴³⁹

during the Status Conference they should be prepared to report on the progress made on such matters as the trial preparation of the case, including the following: disclosure of materials pursuant to Rule 66(A)(ii) and Rule 68; progress toward completing the pre-trial filings required by Rule 65 *ter*, particularly whether the parties have made any progress in agreeing on undisputed matters of law and fact; and, with respect to the Prosecution, the filing of a pre-trial brief, a list of witnesses it intends to call at trial, a list of exhibits it intend to use at trial; and so forth).

⁴³⁴ See *supra* notes 425-31, and accompanying text.

⁴³⁵ On the disclosure duties by the parties in the current regime of ICTY, see Rules 65 *ter* (E), 65 *ter* (F), and 66 to 70. Judges constantly remind the parties about their discovery duties. See, e.g., Naser Oric, Case IT-03-68-I, Initial Appearance, April 15, 2003, p. 6; Prosecutor v. Franko Simatovic, Case IT-03-69-I, Initial Appearance, June 2, 2003, p. 4-5; Prosecutor v. Jovica Stanisic, Case IT-03-69-I, Initial Appearance, June 13, 2003, p. 11. The judges supervise the discovery process to assure that it goes smoothly, put pressure on the parties to cooperate in allowing the discovery process to proceed as smoothly as possible, and apply pressure to reach agreements on discovery issues. See, e.g., Prosecutor v. Limaj, Bala, and Musliu, Case IT-03-66-PT, Status Conference, October 23, 2003, p. 82 (where Judge Martin Canivell said: "it seems to me there is not complete accordance between the Prosecution and the counsels about the possibility of cooperating in this last one—I mean the counsels for the accused—in tracing and devising what could be the points of the methods even of exculpatory evidence that could be included in the Prosecutor's papers. I think they had offered you to give to the Office of the Prosecution an answer about how to devise—how to get, to recover, in other words, whatever could be exculpatory evidence for your clients. So I would encourage you to try to find a solution to that, and then that you find for you to do that. Well, I hope that could be done in order to push a little bit the expeditiousness of the—and the resolution of the case."); Prosecutor v. Miroslav Deronjic, Case IT-02-61-S, Status Conference, October 30, 2002, para. 27-8 (Judge Mumba: "The Trial Chamber is keen to have this stage of the preparatory stage completed as quickly as possible, because it normally holds the preparation stages because the Defence are not given the materials on time...So the Trial Chamber would very much appreciated the process of disclosure to move very fast, because then it will provide materials for discussion at the meeting in which the Defence may want to deal with.").

⁴³⁶ Rule 65 *ter* (D)(ii).

⁴³⁷ Rule 73 *bis* (B) and Rule 73 *ter* (B).

⁴³⁸ Rule 73 *bis* (C)(i) and Rule 73 *ter* (C). For an interesting reaction by the prosecution against these powers of the Trial Chamber, see Prosecutor v. Kordic and Cerkez, IT-95-14/2, Transcript, July 19, 1999, where Geoffrey Nice, from the OP, 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 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

Besides this increase in judges' activism, which clearly fits the managerial judging system much better than the inquisitorial one, 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.⁴⁴⁰ After the prosecutor files her pre-trial brief and lists of witnesses and exhibits for trial, 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 in the performance of his or her functions.⁴⁴¹ Once the defense presents its pre-trial brief and list of witnesses and exhibits, the pre-trial judge submits a second file.⁴⁴²

These two files are functionally equivalent to a written dossier and give the Trial Chamber considerable information about the case. As they present certain similarities to the written dossier and allow judges to be more active, commentators have seen them as a shift toward the inquisitorial system.⁴⁴³ However, given that judges have needed more information mainly to become active managers rather than active investigators, the introduction of these proto-written dossiers is much better described, again, as a reform in the direction of managerial judging. The aim of these reforms has been to give more information to the Trial Chamber so that it can manage trials more efficiently. In addition, unlike the written dossier of the inquisitorial system that documents all activities performed in the pre-trial phase and is gathered by an impartial official, 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.

Similarly, the reforms have changed the orientation of ICTY criminal procedure from a clear preference for oral production of evidence at trial to

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, and I think they were difficulties that arose in the original case of Tadic, where there was an indication that something was satisfactorily dealt with by evidence, and then some counter-evidence emerged to outweigh it."

⁴³⁹ Rule 73 *bis* (C)(ii) and Rule 73 *ter* (E).

⁴⁴⁰ See, e.g., CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 386 (characterizing as inquisitorial the process at the beginning of trial by which the prosecution and the defense hand over to the judges a *file* with the essentials of their cases).

⁴⁴¹ Rule 65 *ter* (L)(i).

⁴⁴² Rule 65 *ter* (L)(ii).

⁴⁴³ See, e.g., CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 386 (characterizing as inquisitorial the process at the beginning of trial by which the prosecution and the defense hand over to the judges a *file* with the essentials of their cases).

liberally allowing the introduction of written evidence.⁴⁴⁴ The original version of Rule 90(A), which established that “(w)itnesses shall, in principle, be heard directly by the Chambers”,⁴⁴⁵ was replaced by Rule 89(F),⁴⁴⁶ which in a much more ambivalent way states that a “Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.”⁴⁴⁷

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.”⁴⁴⁸ In addition, Rule 92 *bis* (B) now says: “A written 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...and the person witnessing the declaration verifies in writing that the person making the statement is the person identified in the said statement.”⁴⁴⁹ In a similar direction, Rule 92 *bis* (D) states that a Chamber may admit a transcript of evidence given by a witness in another proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.⁴⁵⁰ And Rule 92 *bis* (E) declares that the “Trial Chamber shall decide, after hearing the parties,

⁴⁴⁴ For an analysis of this tendency, see, e.g., Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 545-48 (2001).

⁴⁴⁵ See Rules, version of October 6, 1995.

⁴⁴⁶ The new version of Rule 89 (F) was introduced in the reform of the Rules of Procedure and Evidence of December 13, 2000.

⁴⁴⁷ Rule 89 (F). For applications of this rule to sentencing hearings, see, e.g., *Prosecutor v. Milan Babic*, Case IT-03-72-S, Decision on Defence Motion for Admission of Witness Statements and to Call Witnesses, March 29, 2004, p. 2; *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-S, Order on Admission into Evidence of Psychological Report, December 19, 2003 (considering that it is in the interests of justice to allow the psychological report’s admission into evidence in written form, as it saves the Tribunal’s resources).

⁴⁴⁸ Rule 92 *bis* (A). For decisions discussing how the phrase “other than the acts and conduct of the accused” should be interpreted, see, e.g., *Prosecutor v. Slobodan Milosevic*, Case IT-02-54, Decision on Prosecution’s Request to have Written Statements admitted under Rule 92 *bis*, March 21, 2002.

⁴⁴⁹ Rule 92 *bis* (B).

⁴⁵⁰ Rule 92 *bis* (D). The Tribunal has used this rule extensively. See, e.g., *Prosecutor v. Mladen Naletilic aka ‘Tuta’ and Vinko Martinovic aka ‘Stela’*, IT-98-34, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), July 9, 2001, para. 7 (admitting transcripts of testimonies and accompanying exhibits produced in the Blaskic and Kordic cases in order to prove the existence of an international armed conflict, as well as the widespread or systematic nature of the attack).

whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.”⁴⁵¹ 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.”⁴⁵²

These changes are also best described as a move toward the managerial judging system.⁴⁵³ Commentators, again, have characterized them as part of the swing toward an inquisitorial conception of the criminal process.⁴⁵⁴ But if we analyze the changes and their motivation carefully, the increasing

⁴⁵¹ Rule 92 *bis* (E). On the criteria for applying this rule, see Prosecutor v. Sikirica, “Keraterm Camp”, Case IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts under Rule 92 *bis*, May 23, 2001, para 4 (establishing that the principal criterion for determining whether a witness should be required to appear for cross-examination pursuant to Rule 92 *bis* (E) is the overriding obligation of a Chamber to ensure a fair trial under Articles 20 and 21 of the Statute. In that regard, among the matters for consideration are whether the transcript goes to proof of a critical element of the Prosecution’s case against the accused and whether the cross-examination of the witness in the other proceedings dealt adequately with the issues relevant to the defense in the current proceedings). See also Prosecutor v. Mladen Naletilic aka ‘Tuta’ and Vinko Martinovic aka ‘Stela’, IT-98-34, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), July 9, 2001, para. 12 (The Chamber established that the element requiring the existence of a widespread or systematic attack may be linked to the conduct of the accused because, in order to be convicted of a crime against humanity, the accused must have knowledge that there is an attack on the civilian population and that his or her act is part of the attack. However, the Chamber denied the recall of the witnesses for cross-examination in the present case because (1) the witnesses had been subjected to cross-examination in previous cases by accused persons having a similar interest to the present accused in contesting the existence of a widespread or systematic attack; and (2) the accused did not provide any specific information as to why cross-examinations in the previous cases were inadequate or the substance of additional lines of inquiry).

⁴⁵² Rule 94 *bis* (C). For examples of the use of this Rule, see, e.g., Prosecutor v. Kupreskic et al., IT-95-16, Open Session, January 29, 1999 (accepting cross-examination of expert witnesses by the prosecution despite the fact that its request was presented long after the deadline established by Rule 94 *bis*); Prosecutor v. Miroslav Kvocka et al., “Omarska, Keraterm and Trnopolje Camps”, Case IT-98-30/1, Order Granting Request for Admission of Testimony of Expert Witness, March 19, 1999; Prosecutor v. Sikirica, “Keraterm Camp”, Case IT-95-8-T, Order Admitting into Evidence Expert Witness Statements under Rule 94 *bis*, May 16, 2001 (admitting the statements without requiring the witnesses to be called to testify in person given that the defense did not oppose the prosecution request within the period established then by the Rule 94 *bis*). For examples of invocation of this rule *motu proprio* by the Trial Chamber to shorten the proceedings, see, e.g., Prosecutor v. Kupreskic et al., IT-95-16, Open Session, January 27, 1999. For examples of the use of Rule 94 *bis* in the sentencing phase *motu proprio* by the Trial Chamber, see, e.g., Prosecutor v. Miroslav Deronjic, Case IT-02-61-S, Order on Admission into Evidence of Testimony of Expert Witness Prof. Dr. Ulrich Sieber, December 17, 2003.

⁴⁵³ Another reform in the direction of relying more on written evidence that I will not analyze here is the changes introduced by the reform of the Rules of November 17, 1999, to Rule 71 that regulates the use of depositions.

⁴⁵⁴ See, e.g., Boas, *Creating Laws of Evidence for International Criminal Law*, *supra* note 12, at 58 (characterizing the reforms introduced in Rule 92 *bis* as a trend toward the continental system).

reliance on written evidence is not motivated by a bureaucratic preference for documentation as in the hierarchical model of the inquisitorial system.⁴⁵⁵ Rather, as ICTY has expressly acknowledged, written evidence has been increasingly accepted at trial as a way to speed it up,⁴⁵⁶ even at the expense of fairness⁴⁵⁷ and truth-determination⁴⁵⁸—which goes against an inquisitorial conception of the criminal process. In addition, in inquisitorial systems, the written statements directly introduced at trial have been gathered in the written dossier by the impartial official in charge of the pre-trial investigation. This is why they are particularly trusted by trial judges for evidentiary purposes.⁴⁵⁹ 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.⁴⁶⁰

⁴⁵⁵ See *supra* note 342, and accompanying text.

⁴⁵⁶ See, e.g., Sixth Annual Report of ICTY, August 25, 1999, para. 13-14 (“The Tribunal’s judges are concerned about the length of time many of the trial and other proceedings are taking to complete...There are a number of causes for the length of trials and other proceedings...(U)nlike the Nürnberg and Tokyo trials, a great deal of reliance is placed on the testimony of witnesses rather than affidavits...The judges have taken a number of steps to reduce the length of trials. These include adopting amendments to the Rules in July 1998...providing for the admission of affidavits in certain instances.”); Eighth Annual Report ICTY, August 13, 2001, para. 51 (pointing out that the purpose of Rule 92 *bis* “is to facilitate the admission by way of written statement of peripheral or background evidence in order to expedite proceedings while protecting the rights of the accused under the Statute.”). See also, e.g., Prosecutor v. Kupreskic et al., IT-95-16, Open Session, September, 1998 (Judge Cassese: “This Rule 94 *bis*, testimony of expert witnesses, was drafted precisely to avoid any delay in the proceedings.”); Prosecutor v. Mladen Naletilic aka ‘Tuta’ and Vinko Martinovic aka ‘Stela’, IT-98-34, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 *bis* (D), July 9, 2001, para. 7 (“Rule 92 *bis* (D) was intended to alleviate the need for witnesses to reappear before the Tribunal multiple times to present similar testimony, thus avoiding unnecessary expense and reducing the length of trials, in situations where it will not infringe the rights of the accused.”); Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 549 (2001) (“The new Rules sharply respond to the problem of lagging trials.”).

⁴⁵⁷ For an analysis of the risks that this tendency entails for the fairness of proceedings at ICTY, see Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: the Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARVARD INTERNATIONAL LAW JOURNAL 535, at 549 (2001).

⁴⁵⁸ 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 60.

⁴⁵⁹ See DAMAŠKA, THE FACES OF JUSTICE, *supra* note 43, at 50 (“In order not to confuse the file of the case with its false cognates, it is important to realize that hierarchical officials prefer to decide on the basis of written records. Documents contained in the file are not internal official documents, helping a particular official to organize his activity, but rather sources of information on which to base both original and reviewing decisions...And while the accuracy of information in the file is not unchallengeable, it commands considerable weight.”).

⁴⁶⁰ Rules 92 *bis* (A) and (C) include cases in which written statements gathered by the parties may be accepted at trial in lieu of oral testimony.

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 phases,⁴⁶¹ and the limitation of interlocutory appeals.⁴⁶² Regarding the first of these reforms, the original Rule 100 that established the possibility of a pre-sentencing procedure⁴⁶³ was modified, and now the trial is used both for adjudicatory and sentencing purposes in every case.⁴⁶⁴ Regarding interlocutory appeals, decisions on preliminary motions⁴⁶⁵ are without interlocutory appeal save in very limited

⁴⁶¹ For a characterization as inquisitorial of the merging of the determination of guilt phase and the sentencing phase, see, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 87.

⁴⁶² 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 88, para. 102-04. The Judicial Practices Working Group—created in September 1999 and composed by judges and representatives of the Office of the Prosecutor, the Registry and defense counsel—proposed reforms to address the impact that interlocutory appeals was having in the length of the proceedings. See Seventh Annual Report ICTY, July 26, 2000, para. 316-17 (“[T]he Group first drafted proposed amendments to the Rules of Procedure and Evidence in order to accommodate the many interlocutory appeals and their impact on the length of the trials. The proposals were reviewed by the judges of the Chambers and then submitted to the judges to the Rwanda tribunal...Similar proposals were submitted to the judges of the Yugoslavia Tribunal, who also approved them at their plenary session on 13 and 14 July 2000”). 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 See Ninth Annual Report ICTY, August 14, 2002, para. 14).

⁴⁶³ See Version of the Rules of October 6, 1995, Rule 100 (“If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence”). 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 Orić, *supra* note 6, at 1473, mentioning Tadić, Delalić et al, and Delić and Lažlo as cases in which the Trial Chamber applied this rationale).

⁴⁶⁴ See, e.g., Rule 85(A)(vi) (establishing that any relevant information in determining an appropriate sentence shall be presented at trial).

⁴⁶⁵ 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).

cases,⁴⁶⁶ and decisions on all other motions are without interlocutory appeal unless certified by the Trial Chamber.⁴⁶⁷

These two last reforms also fit nicely in the managerial judging system as described in this article, and their motivation has been, once again, to speed up the docket of ICTY.⁴⁶⁸ Other original features of ICTY—such as broad prosecutorial discretion,⁴⁶⁹ guilty pleas, no technical rules of evidence,

⁴⁶⁶ 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, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”). In the case of appeals for denial of provisional release, the decision is subject to appeal in cases where leave is granted by a bench of three judges of the Appeals Chamber. See Rule 65 (D). On the appeal by the prosecution against a decision by the Trial Chamber to release the accused, see Rule 65 (E) to (G).

⁴⁶⁷ Rule 73 (B) (“Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”). For the rationale of this rule as a way of expediting the proceedings, see Eight Annual Report ICTY, August 13, 2001, para. 52-53. For applications of this rule by the Trial Chamber see, e.g., *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 (denying the application for certification of appeal against the amendment of the indictment because it does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial). See also Practice Directive on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155 Rev. 1. This directive was amended mainly to add a provision enabling the Appeals Chamber to punish parties for failing to respect the directive. See, e.g., See Ninth Annual Report ICTY, August 14, 2002, para. 14.

⁴⁶⁸ See *supra* note 462; Eight Annual Report ICTY, August 13, 2001, para. 3-4 (“[T]he reforms are intended to make the procedures more responsive to the International Tribunal’s overriding need for expeditiousness through the fine-tuning of many of the rules of procedure and evidence...[S]everal rules of procedure and evidence were amended: the judges may now...take the measures required to preclude interlocutory appeals from interrupting the trials.”), and para. 19.

⁴⁶⁹ In *Prosecutor v. Agim Murtezi and others*, the prosecutor withdrew the indictment against Mr. Murtezi and requested that Mr. Murtezi be immediately released from the United Nations Detention Unit because there was doubt on whether Mr. Murtezi was the actor in the events laid out in the indictment. The judge accepted the withdrawal of the indictment. See *Prosecutor v. Agim Murtezi and others*, Case IT-03-66-PT, Motion Hearing, February 28, 2003. See also *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-S, Sentencing Hearing, March 5, 2004, p. 314 (Mr. Harmon, official of the OP in charge of the case, explaining 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

and the absence of a trial by jury—also fit within the managerial judging system. This system thus provides the best account of the current criminal procedure of ICTY, including the reforms that have been adopted from July 1998 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. First, as already mentioned, managerial judging is an ideal-type.⁴⁷⁰ Thus, the claim of this article is that the procedural practices of ICTY have become closer to the managerial judging ideal-type than to the adversarial or inquisitorial ones. This does not mean, though, that every single rule, decision and practice of ICTY fits perfectly with managerial judging. But to the extent that ICTY criminal procedure is closer to managerial judging than to any other system, managerial judging provides the best account of its rules and practices.

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,⁴⁷¹ not all judges have been equally comfortable about becoming active managers of cases. For instance, in plea agreements, some judges have felt that the defendant deserved a sentence higher than the one the parties had agreed on,⁴⁷² a reaction that goes against incentivizing the rapid disposition of case through plea bargains.

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 re-definition of their roles as collaborators toward expedited process, and thus they have not always collaborated with the court as judges expected. For instance, defense attorneys and defendants have

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.”).

⁴⁷⁰ See *supra* notes 363, and accompanying text.

⁴⁷¹ Recall that the rules are changed by the judges. See Statute, Art. 15.

⁴⁷² See, e.g., *Prosecutor v. Banović*, Case IT-02-65/1-S, Sentencing Judgment, Judge Patrick Robinson's Dissenting Opinion, October 28, 2003; *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-S, Sentencing Judgment, Judge Wolfgang Schomburg's Dissenting opinion March 30, 2004, para. 19. The Tribunal has repeatedly emphasized that the Trial Chamber's discretion to impose a greater sentence than the one the parties agreed on remains untouched. See, e.g., *Prosecutor v. Banović*, Case IT-02-65/1-S, Sentencing Judgment, October 28, 2003, para. 89; *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-S, Sentencing Judgment, March 30, 2004, para. 41.

been reluctant to agree on factual issues before trial.⁴⁷³ Another example comes from the length limits to parties' motions and briefs that the Tribunal established as a way to shorten the proceedings.⁴⁷⁴ In *Seselj*, 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.⁴⁷⁵

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

IX. THE SEMANTIC AND HYBRIDIZATION CRITIQUES AND THE LIMITS OF BINARY THINKING ABOUT CRIMINAL PROCEDURE

This section will discuss two potential critiques to this article's argument that the post-1998 reforms have moved ICTY toward the managerial judging system, not toward the inquisitorial system. It will also explore why most commentators and judges have considered these reforms to be inquisitorial.

⁴⁷³ See, e.g., *Prosecutor v. Banovic, Fustar, and Knezevic*, Case IT-02-65-PT, Status Conference, April 8, 2003 (defense notes the limited nature of facts to which it can agree because they are beyond the knowledge of the accused).

⁴⁷⁴ 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 Eight Annual Report ICTY, August 13, 2001, para. 50 and 59.

⁴⁷⁵ *Prosecutor v. Vojislav Seselj*, Case IT-03-67-I, Status Conference, July 3, 2003, p. 100-101. *Seselj* is a case where the defendant had been particularly confrontational to the Tribunal and had questioned its legitimacy. This exchange is also part of this broader dynamic that exceeds the procedural context.

According to the first critique, which I will call the *semantic critique*, this article's disagreement with the rest of the commentators is not substantial, but merely semantic.⁴⁷⁶ Under this critique, the origin of the disagreement is simply that my definition of the inquisitorial system in this article is different from that of other commentators, but we are all describing the same phenomena using different labels. By this reasoning, the only disagreement between us concerns the labels we use to describe ICTY procedure, not the substance of the procedure we are describing or whether it has moved toward the inquisitorial system.⁴⁷⁷

However, this is not the case. First, the definition of the inquisitorial system used in this article is not substantially different from the definitions used by commentators that have characterized ICTY as inquisitorial.⁴⁷⁸ In addition, beyond the question of definitions, there is a real debate between us about whether the recent reforms of ICTY match the conceptions of criminal procedure that traditionally have prevailed in civil law countries. The commentators' claim that these reforms make ICTY's procedure more like criminal procedure practices in civil law jurisdictions.⁴⁷⁹ This article

⁴⁷⁶ For an application of the *semantic critique* to debates on whether or not the importation of U.S. plea bargaining by civil law countries is a move toward the adversarial system, see Langer, *La Importación de Mecanismos Procesales*, *supra* note 58, at 102-11.

⁴⁷⁷ This kind of criticism or analysis has a long tradition in analytical philosophy. Within contemporary debates, Dworkin has made use of it with his "semantic sting" argument. See RONALD DWORKIN, *LAW'S EMPIRE* 45-46 (1986). For answers to the challenge that Dworkin's semantic sting argument presents to Hart's theory of law, see, e.g., H.L. HART, *THE CONCEPT OF LAW* *Postscript*, (2d ed. with postscript, Penelope A. Bulloch & Joseph Raz eds. 1994); and Joseph Raz, *Two Views of the Nature of the Theory of Law*, 4 *LEGAL THEORY* 258 (1998).

⁴⁷⁸ For instance, CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 365-66; Mundis, *supra* note 12; Orie, *supra* note 6, at 1442-56; and Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note 10; who give definitions of criminal procedure in civil law jurisdictions that are not substantially different from the one I use article. Some of these authors even mention the opposition between the ideas of the *dispute* and the *official inquiry* as one of the basic differences between the criminal procedures of common and civil law (see, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 396; Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note 10, at 344). Boas, *Creating Laws of Evidence*, *supra* note 12, does not give any explicit definition of the systems, but seems to assume a conception of them not substantially different from the one provided here. Given the central role that the adversarial and inquisitorial systems play in his analysis, ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, surprisingly does not provide a clear definition of these systems.

⁴⁷⁹ See, e.g., Gideon Boas, *Creating Law of Evidence for International Criminal Law: ICTY and the Principle of Flexibility*, *supra* note 12, at 58 ("This trend in the admission and testing of evidence toward the continental system can be seen in some of the recent amendments to the Rules" [underlining is not in the original text]); Boas, *Developments*, *supra* note 10, at 174 ("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" [underlining is not in the original text]); Daryl A. Mundis, *From 'Common Law' Toward 'Civil Law': The Evolution of ICTY Rules of*

claims that they do not. The question is, of course, an empirical one. This article already has shown why the new ICTY reforms fit with neither the adversarial nor the inquisitorial system, but rather with managerial judging.

The second potential critique to this article's main argument, which I will call the *hybridization critique*, would be that the new ICTY criminal procedure does not fit in either the adversarial or the inquisitorial systems because it is *merely* a hybrid between them. Therefore, instead of developing a new model, it is only necessary to describe which features of the new ICTY criminal procedure correspond to each of the two traditional systems.⁴⁸⁰ This potential criticism would correspond, in fact, to the predominant view regarding the current ICTY criminal procedure that has described it as a mixture between adversarial and inquisitorial systems.⁴⁸¹ I will address it in detail here.

The first point I wish make about this position is that this kind of mere-hybridization analysis would ignore the current state of ICTY criminal procedure—and also of any other procedures that ultimately include elements of this system. One of the main points of this article is precisely that the new conceptions of the judge, the prosecutor, and the defense in ICTY do not find any parallel in either of the two traditional systems; thus,

Procedure and Evidence, *supra* note 12 (the characterization of the amendments as a move toward civil law jurisdictions conceptions is even in the title); Orie, *supra* note 6, at 1492 (“The subsequent development of the law of procedure in the *ad hoc* Tribunals has on all major points been in the direction of the civil law” [underlining is not in the original text]); Tochilovsky, *Rule of Procedure for the International Criminal Court*, *supra* note 10, 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” [underlining is not in the original text]); Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 10, at 632 (“It was mostly a wish to expedite trials and, for that purpose, to give the judges more control over proceedings that prompter ICTY Judges to turn to a civil law practice” [underlining is not in the original text])).

⁴⁸⁰ This classificatory work is what many commentators have done regarding the procedure of ICTY. See, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 384-87; Orie, *supra* note 6, at 1463-74; Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note 10, at 345-55.

⁴⁸¹ See, e.g., Tochilovsky, *Rules of Procedure for the International Criminal Court*, *supra* note , 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”); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, at 22 (“Originally, the Rules of Procedure and Evidence...of the Tribunals were mainly based on *common law procedure*; in particular, they bore strong resemblance to the American model. However, since their adoption they have undergone several significant amendments, and thus to a large extent it can be said that a new procedural system has been created: a sort of hybrid that fits somewhere in between adversarial and inquisitorial.”).

they cannot be explained as just a hybrid between them. For instance, the conception of the judge as an active case manager who has the responsibility of expediting cases, and of the prosecutor and the defense attorney as collaborators with the judge in this endeavor, cannot be captured using the contemporary conception of criminal procedure of the adversarial and inquisitorial systems. We need new theoretical tools—like the ones developed in this article—to capture these and other phenomena.

The second point about the hybridization critique is that it would be possible to present the current ICTY criminal procedure as just a mixture between adversarial and inquisitorial systems by redefining the fundamental aspects of these two systems. There would be two main ways to do this. The first would be simply to define the adversarial system as the procedure in which the judge is passive and oral evidence is used, and the inquisitorial system as the procedure in which the judge is active and written evidence is utilized. Under this redefinition, ICTY reforms, by definition, would be a move toward the inquisitorial system because they have made judges more active and have increased the use of written evidence.⁴⁸²

The problem with this definition is that judges can be active for many different reasons: for example, to investigate the truth, as in civil law countries; 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 these different types of procedure.⁴⁸³ In other words, commentators would have to broaden the content of the adversarial and inquisitorial systems in order to make ICTY procedural reforms fit into them, but in so doing, they would strip the adversarial and inquisitorial systems of their analytical power to describe and distinguish between different kinds of criminal procedure. The same would

⁴⁸² At least some of the commentators have implicitly made this move. See, e.g., Boas, *Developments in the Law of Procedure and Evidence*, *supra* note 10, at 174 (“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 to be tested”).

⁴⁸³ 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 Prof. Damaška’s opposition between conflict-solving and policy-implementing types of procedure, see his *THE FACES OF JUSTICE*, *supra* note 43, at 71-180. This is one of the reasons why I do not use this opposition to define adversarial and inquisitorial systems in Section IV, and I rather use the opposition between the model of the dispute and the model of the official investigation.

happen regarding the reliance on written evidence. There are many potential reasons for such reliance, and traditionally, the inquisitorial system has relied on written evidence collected by disinterested officials for reasons of hierarchy and impartiality. Thus, it would be a mistake to characterize as inquisitorial an exclusively pragmatic rationale for relying on written evidence mostly gathered by the parties.⁴⁸⁴

A second possible redefinition would be to define the inquisitorial system as an official investigation designed to process cases as swiftly as possible, not to determine the truth, or as an official investigation in which truth determination and expedited process are coequal goals of the procedure. Under this redefinition, ICTY reforms could be described as inquisitorial. However, there are two problems with this position. The first is that commentators and judges have not used either of the definitions of the inquisitorial system just suggested, but rather the traditional one described above in answer to the *semantic critique*.⁴⁸⁵ Yet under that definition, they nevertheless have considered the recent ICTY reforms to represent a move toward the inquisitorial system. This would mean that those who maintain that ICTY criminal procedure has shifted toward the inquisitorial system should at least redefine the basic aspects of this last category.

More importantly, the second problem is that changing the traditional content of the inquisitorial system as defined in this article—and also by commentators on ICTY—would not be warranted under current circumstances. The definition of the inquisitorial system as an official investigation to determine the truth run by impartial officials who are members of a hierarchical structure still basically captures the conception of criminal procedure that prevails in civil law countries.⁴⁸⁶ If commentators changed their definition of the inquisitorial system to make ICTY reforms fit in this system, they could not use this category to accurately describe the current criminal procedures of most civil law jurisdictions.

This does not mean that the conception of criminal procedure that prevails in civil law countries could not change over time, or that the content of the inquisitorial system as a theoretical category could not also change. The adversarial and inquisitorial systems have evolved over time in the past,⁴⁸⁷ and a change in the prevailing conception of criminal procedure in

⁴⁸⁴ Rules 92 *bis* (A) and (C) include cases in which written statements gathered by the parties may be accepted at trial in lieu of oral testimony.

⁴⁸⁵ See *supra* note 478.

⁴⁸⁶ See Sections 4 and 5.

⁴⁸⁷ On the evolution of the adversarial and inquisitorial systems over time, see the works cited *supra* note 52.

civil law toward conceiving it as an investigation done to process cases as swiftly as possible could happen in the future. In fact, changes in this direction have been identified in Germany, which has one of the most emblematic criminal procedures among civil law jurisdictions.⁴⁸⁸ But since this change has not happened yet and may never happen in most civil law countries, modifying the content of the inquisitorial system as a theoretical category would be unwarranted at present. The traditional content of the inquisitorial system still has theoretical value to explain the predominant conception of criminal procedure in civil law. Thus, it would be a mistake to change it just to make ICTY criminal procedure fit the traditional adversarial-inquisitorial dichotomy.

The next point worth mentioning as to the hybridization critique is that this article still would make at least two substantial contributions to comparative criminal procedure as a discipline, even if the evolution of criminal procedure in civil law countries eventually required changing the content of the inquisitorial system at some point in the future. The first contribution would be highlighting that the traditional definition of the inquisitorial system could become obsolete at some point and that we should pay attention to such a possibility—even if this change of content is not warranted at present. The second is that, even if this happened, this article still would provide a model to understand the particular kind of criminal procedure currently used by ICTY.

This last point is particularly important. Commentators analyzing ICTY criminal procedure have been content with pointing out what features of this procedure would correspond to either the adversarial or the inquisitorial system, and describing ICTY criminal procedure as a hybrid of both systems.⁴⁸⁹ But saying that a particular procedure is a hybrid between the adversarial and inquisitorial systems does not tell us much about such a procedure, because there could be many very different possible hybrid or mixed procedures with different combinations of elements from each system.⁴⁹⁰ Thus, it is necessary to explain not only what the features of a

⁴⁸⁸ See Langer, *From Legal Transplants to Legal Translations*, *supra* note 30, at 42-45.

⁴⁸⁹ See, e.g., *supra* notes 480 and 481.

⁴⁹⁰ As already mentioned, Mirjan Damaška has developed a sophisticated typology of procedural systems in his *THE FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 43. Based on his two oppositions of conflict-solving and policy-implementing proceedings, as well as hierarchical and coordinate ideals, he has developed four possible combinations of these two opposing pairs (the policy-implementing process of hierarchical officialdom, the conflict-solving process before hierarchical officialdom, the conflict-solving problem before coordinate officialdom, and the policy-implementing process of coordinate officialdom). The models do explain how their features are connected and interact with each other as well as strengths and weaknesses of each of these models. However, his typology is limited to four possible combinations, and two of them (the policy-

particular procedure are, but also the relations and interactions between them.⁴⁹¹ A model such as the one offered in this article would provide such an account. Therefore, if the content of the adversarial and inquisitorial systems were to change in the future such that the managerial judging system could be considered a hybrid of the two classic systems, then this article would have provided a detailed model to analyze this kind of procedure.

This situation remains purely hypothetical because, as noted, we should neither see managerial judging as a hybrid between the traditional systems nor change the content of the two classic models. Rather than analyzing the reforms of ICTY criminal procedure as a move from the adversarial to the inquisitorial system, it would be more accurate and fruitful to analyze them as one of the potential paths that an adversarial system may take when reacting to pressures to process cases more swiftly.

When an adversarial system reacts to such pressures by transforming the judge into the main actor responsible for the management of cases, then the system undergoes the changes described in the last two sections. In other words, the system that ICTY currently uses is not the product of the importation of inquisitorial features into an adversarial system. Rather it is mainly the product of the adoption by an adversarial system of certain case management techniques handled by the judge. The inquisitorial system need not play any role in this transformation. This is precisely what has happened to the adversarial system in U.S. civil procedure, without any borrowing from the inquisitorial system. And this is what has happened to a certain extent to the adversarial system in ICTY.

This does not mean that there have been no inquisitorial influences on ICTY reforms. In fact, the Expert Group that proposed some of these reforms framed some of them in terms of the inquisitorial system,⁴⁹² and ICTY

implementing process of hierarchical officialdom and the conflict-solving problem before coordinate officialdom) would actually correspond to the traditional criminal procedures of civil and common law. So, there would be only two potential mixed systems. However, the combinations I have in mind between adversarial and inquisitorial elements, as well as other elements that fit in neither of the two traditional categories, are more numerous.

⁴⁹¹ For good analyses of mixed systems in the direction indicated in the text, see *id.*; Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AMERICAN JOURNAL OF CRIMINAL LAW 1 (1995); and JOHN JACKSON AND SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995) (analyzing the impact of having trials based on the model of the dispute but without jury).

⁴⁹² See, e.g., Expert Report, *supra* note 88, para. 78 (asking for more judicial activism and stating that this is not an unusual practice in civil law countries). A caveat should be stated here, though. The fact that the Expert Group framed part of its proposals as a move toward civil law systems should not be necessarily read as an actual influence of this kind of jurisdiction given that the Expert Group also carried out its analysis in terms of the binary paradigm adversarial-inquisitorial.

necessarily is constantly influenced by the civil law, due to the very fact that many of its legal actors—including judges—come from civil law jurisdictions.⁴⁹³ But these inquisitorial influences have neither translated into inquisitorial reforms nor moved ICTY toward the inquisitorial system for two different reasons. The first reason is that inquisitorial influences were a much less important engine for the reforms than the urgency to expedite the docket.⁴⁹⁴ Thus, the content of the reforms was determined by pragmatic needs more than by cultural influences of inquisitorial models.

The second reason is that when legal ideas and institutions are transferred between legal systems, they may be deeply transformed in the process.⁴⁹⁵ A way to think about this circulation of legal ideas between legal systems is through the metaphor of the legal translation. If we think of legal systems not only as technical tools to decide cases but also as systems of production of meaning—as our conceptualization of procedural systems as procedural cultures allows us to do⁴⁹⁶—then we can understand the process of transferring a legal institution from legal system A to legal system B as a translation between these two different systems of production of meaning. Due to this process of translation, the original and the translated legal ideas may differ deeply either due to decisions by the translators (the legal reformers) not to be faithful to the original “text” (the original legal idea or institution), or due to structural differences between the source and the

⁴⁹³ On these unavoidable influences, see the conception of internal dispositions in Section II, and examples of the manifestation of this concept in Sections 4 and 5.

⁴⁹⁴ In fact, even if the Expert Group framed some of its proposals in terms of civil law, one of its main focuses, if not the main, was on judicial management. See, e.g., Expert Report, *supra* note 88, para. 7. (“the Advisory Committee believed that the review, with full participation of the Tribunals, should focus on judicial management rather than administrative management...”), para. 8 (“The Expert Group concluded instead that its evaluation should examine the operation and functioning of the three principal organs of each Tribunal—the Chambers, the Office of the Prosecutor and the Registry—with a particular focus on judicial management, but at the same time assessing the organizational structure of each as well as the optimum use of investigation personnel, trial and defence attorneys, co-counsels, witnesses and expert witnesses.”).

⁴⁹⁵ This has been one of the main ideas under discussion in debates about the importation and exportation of legal ideas and institutions between legal systems. For analyses on the transformation that legal ideas and institutions may undergo when transferred between legal systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30; Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

⁴⁹⁶ See the concept “structures of interpretation and meaning” developed in Section II.

target systems of production of meaning (the original and receiving legal systems).⁴⁹⁷

This heuristic device helps to explain why the inquisitorial influences on ICTY procedure neither translated into inquisitorial reforms nor took ICTY procedure in the direction of civil law criminal procedure. The inquisitorial idea of having “active judges investigate the truth by themselves,” found in civil law jurisdictions, was translated to ICTY as “active judges controlling parties’ activities to expedite the process.” The transformation is so deep that that we can hardly recognize the first idea in the second. The transformation is explained by decisions of the judges—the translators—not to be faithful to the inquisitorial idea, and by structural differences between the inquisitorial system of civil law countries and the originally adversarial system of ICTY.

The judges decided to become active managers to expedite the cases, instead of active investigators of the truth, because they had to handle intense pressures to speed up the docket—and the inquisitorial system was not an appealing option for achieving this goal. In addition, given the originally adversarial structure of ICTY procedure, in which the parties already were in charge of running their own investigations and trial cases, it would have been practically impossible for the judges to completely disempower the parties and start to run the pre-trial and trial phases by themselves—as the inquisitorial idea of the investigating judge would have required. Both judges’ decisions and the pre-existing adversarial procedure of ICTY thus explain why, even if there were some inquisitorial influences in the changes to ICTY procedure, they neither translated into inquisitorial reforms nor moved ICTY procedure toward a hybrid between adversarial and inquisitorial systems.

In a similar way, the adoption of a proto-written dossier, and the increasing use of written statements at trial—ideas that also may have had some inquisitorial inspiration—also were transformed when translated to ICTY adversarial procedure. The proto-written dossier—files based on the pre-trial briefs of the prosecution and the defense that the pre-trial judge presents to the Trial Chamber—is substantially different from the written dossier of the inquisitorial system, and these differences again are explained either by decisions by the judges that introduced the reforms or by structural differences between civil law inquisitorial systems and the originally adversarial system of ICTY.

⁴⁹⁷ For a more detailed analysis of how the metaphor of the legal translation can be used to analyze the transfer of legal ideas and institutions between legal systems, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

First, the judges introduced these pre-trial briefs to know more about the case before trial in order to be more active case managers, not active investigators.⁴⁹⁸ In addition, these proto-written dossiers do not document every act of an investigation run by impartial officials.⁴⁹⁹ Rather, they reflect the pre-trial briefs gathered by the parties which, by definition, do not document every act performed during the pre-trial phase,⁵⁰⁰ are not official, and gathered by parties with an interest in winning the case.⁵⁰¹ This is because the idea of the inquisitorial written dossier was translated to a procedure where the parties already did their own investigations.⁵⁰² Thus, instead of creating a written dossier that entirely reflects one impartial official investigation, as in the inquisitorial system, the reform created a

⁴⁹⁸ On the introduction of pre-trial briefs by the prosecution and the defense, and the elaboration of files based on them that the pre-trial Judge submits to the Trial Chamber, see Rule 65 *ter* (E), (F), (G), and (L).

⁴⁹⁹ Even if they have analyzed ICTY procedure in terms of the adversarial-inquisitorial paradigm, some commentators have correctly pointed out that this file does not correspond to the civil law written-dossier. See Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, *supra* note 6, at 1470 ("The introduction of a pre-trial judge...and his authority to order the parties to explain their position in one or more pre-trial briefs is not yet to be compared with the creation of a dossier in the civil-law tradition...(T)he briefs give general information on the case of the parties and sometimes in more detail their views on certain (legal) issues. The exact content of the evidentiary materials, as they have been presented only in lists and summaries to the pre-trial judge, is still unavailable to the Trial Chamber."); Tochilovsky, *Legal Systems and Cultures in the International Criminal Court*, *supra* note 10, at 634 ("...the witnesses statements submitted to the Trial Chambers by the prosecution in the *Ad Hoc* Tribunals is not equivalent to the civil law 'dossier'. For instance, unlike civil law judges, the Tribunals' judges would have received only statements of those witnesses whom the Prosecutor intend to call. Moreover, the unique nature of the international criminal justice inevitably affects the reliability of these written statements. Most of the victims and witnesses do not speak ICTY working languages. For numerous ICTY investigators and lawyers the working languages of the Tribunal are also foreign languages.").

⁵⁰⁰ The pre-trial briefs by the prosecution and the defense basically are required to include a summary of the evidence the prosecutor intends to bring; the nature of the accused's defense; the list of witnesses for the prosecution and the defense and a summary of the facts on which each witness will testify; and the list of exhibits the parties intend to offer in the case.

⁵⁰¹ Boas, *Creating Laws of Evidence for International Criminal Law*, *supra* note 12, at 66, has correctly pointed out some of the consequences of having an adversarial pre-trial phase: "An obvious distinction between the continental system and the procedure of ICTY is the manner in which crimes are investigated and indictments brought before the court. In the continental system, the investigating judge forms an essential part of the *independent* investigation and assessment of evidence. ICTY has been given an adversarial structure..., leaving the prosecutor sole power in the investigation of alleged crimes and the presentation of the indictment. The tribunal cannot therefore rely upon a member of the independent judiciary in the presentation of evidence before it and must treat any such material presented by the prosecution as part of the prosecution case in an adversarial structure..."

⁵⁰² See, for instance, Rules 39, 66, 67, and 68 that reflect that each party does its own pre-trial investigation.

dossier that reflects two non-impartial investigations.⁵⁰³ This, along with the judges' motives for shaping the reforms as they did, explains why this written dossier could not substantially move ICTY procedure toward the inquisitorial system. In an inquisitorial system, a written dossier connects and unifies the echelons of the bureaucracy that run the process and allows hierarchical control between them, precisely because it is official.⁵⁰⁴ But a pre-trial judge's brief based on the parties' incomplete, self-serving briefs hardly could play such a role.

In a similar way, the increasing use of written statements at trial, although partly inspired by civil law models, also was deeply transformed when translated to an adversarial system such as ICTY's. First, in inquisitorial systems, the written statements directly introduced at trial have been gathered in the written dossier by the impartial official in charge of the pre-trial investigation. This is why they are particularly trusted by trial judges and can be used for evidentiary purposes.⁵⁰⁵ But in the context of ICTY, as a consequence of the party-driven pre-trial investigations, written statements admitted at trial include statements not gathered in such an impartial fashion.⁵⁰⁶ In addition, judges have admitted written statements as a way to expedite process, not because they trust them.⁵⁰⁷

Thus the inquisitorial influences on the reforms have not only been relatively minor as against the pressures to expedite the docket, but also have

⁵⁰³ Besides reflecting the pre-trial briefs presented by the parties, the files that the pre-trial Judge submits to the Trial Chamber include all the other filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of her pre-trial functions. See Rule 65 *ter* (L).

⁵⁰⁴ See DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 43, at 50 ("A multistage hierarchical process needs a mechanism to integrate all its segments into a meaningful whole. Material gathered over time by various officials must be assembled for decision making, and traces of official audits must be preserved for future audits. Officials in charge of procedural stages are therefore expected to maintain files to ensure completeness and authenticity of documentation.").

⁵⁰⁵ See DAMAŠKA, *THE FACES OF JUSTICE*, *supra* note 43, at 50 ("In order not to confuse the file of the case with its false cognates, it is important to realize that hierarchical officials prefer to decide on the basis of written records. Documents contained in the file are not internal official documents, helping a particular official to organize his activity, but rather sources of information on which to base both original and reviewing decisions...And while the accuracy of information in the file is not unchallengeable, it commands considerable weight.").

⁵⁰⁶ Rules 92 *bis* (A) and (C) include cases in which written statements gathered by the parties may be accepted at trial in lieu of oral testimony.

⁵⁰⁷ The Judges have tried to diminish the impact of the potential unreliability of these written statements in two main ways. First, by limiting their use "to proof of a matter other than the acts and conduct of the accused." See Rule 92 *bis* (A). On how the Tribunal has interpreted such a limitation, see *supra* note 448. Second, by establishing that the Trial Chamber, after hearing the parties, decides whether the witness whose statement is incorporated to the trial has to appear at trial for cross-examination.

been radically transformed when translated from civil law jurisdictions to the originally adversarial system of ICTY. As a consequence of these deep transformations, the reforms cannot be characterized as inquisitorial, and they have not brought ICTY procedure closer to the criminal procedure practices of civil law jurisdictions.

There is a final argument to analyze in relation to the hybridization critique—that the current procedure of ICTY is a hybrid not only between adversarial and inquisitorial systems (as the first version of the hybridization critique suggests), but also between these systems and case management techniques designed to expedite the docket. In principle, this article has no strong quarrel with such a characterization of the procedure of ICTY, because this variation of the hybridization argument would no longer think in binary terms about criminal procedure. In other words, it would acknowledge one of the points this article has insisted upon: that the adversarial-inquisitorial dichotomy alone cannot give an adequate account of the procedure of the Tribunal. It would acknowledge that this procedure cannot be described simply as a hybrid of the two traditional systems.

Two comments are on point, though. First, note that the hybridization argument would be vague and insufficient if it stopped here, as commentators analyzing ICTY generally have done. It is not sufficient to say that the procedure of ICTY is a hybrid or mixture between adversarial and inquisitorial elements and case management techniques to expedite the docket, because again, there are many possible combinations between these three kinds of elements. It is necessary to provide a model to explain specifically how the different features of this and other procedures are combined and relate to each other.

Second, although some might be inclined to view managerial judging as this sort of three-way hybrid, it is neither analytically nor historically accurate to describe the managerial judging systems of U.S. civil procedure and ICTY as a hybrid between these three kinds of elements.⁵⁰⁸ An adversarial system can move in the direction of managerial judging without substantial elements from the inquisitorial system. U.S. civil procedure and, to a lesser extent, the procedure of ICTY provide historical examples of this possibility.

The preceding analysis raises a question: why have the sophisticated jurists who have analyzed ICTY procedure perceived the post-1998 reforms

⁵⁰⁸ It is necessary to point out, though, that even if the managerial judging system is not necessarily a mixture between these three kinds of elements, it is possible that individual procedures that get closer to this system be a combination of adversarial, inquisitorial and expediency-case-management elements. My point in the text is that this is not necessarily the case.

as a move toward the inquisitorial system? There are at least two explanations for this phenomenon. The first has to do with how the field of comparative criminal procedure has framed its analyses and debates. The main theoretical dichotomy in this field has long been the distinction between the adversarial and inquisitorial systems.⁵⁰⁹ Comparative criminal procedure traditionally has assumed that any existing criminal procedure—at least within the West—has to be either adversarial, inquisitorial, or somewhere between these two poles.⁵¹⁰ The assumption has been a fruitful one, because comparative criminal procedure developed as a discipline and produced some of its best scholarship based on this assumption.

But the example of ICTY also shows that this binary way of thinking can be problematic in our present context. As has been shown, the procedural model that has arisen in ICTY cannot be explained simply as a mix between the traditional conceptions of criminal procedure. Hence, if we do not develop new categories to describe these new legal phenomena, but instead limit ourselves to our old theoretical tools, the adversarial and inquisitorial systems may become procrustean beds into which commentators try to force legal realities that do not actually fit into these systems. To a great extent, this is what has happened with the analysis of ICTY reforms. Since the post-1998 reforms moved ICTY procedure away from the adversarial system, commentators have assumed that the reforms had to be inquisitorial instead.⁵¹¹ But, in fact, they are neither.

The second explanation of why the rise of managerial judging in ICTY has not been noticed is also related to the dichotomy between the adversarial and inquisitorial systems, but in a different way. As explained in Section II,

⁵⁰⁹ Mirjan Damaška's *THE FACES OF JUSTICE*, *supra* note 43, has been an exception in this respect because he has developed his own categories. However, he has partially done so because he wanted to explain differences between all kinds of procedure—not only criminal ones. See *id.* at 6.

⁵¹⁰ See, e.g., ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, at 14-15 ("Among concepts usually adopted in comparative criminal procedure the distinction made between *accusatorial* and *inquisitorial criminal proceedings* stand out.").

⁵¹¹ See, e.g., CASSESE, *INTERNATIONAL CRIMINAL LAW*, *supra* note 6, at 365-66 (framing his analysis of international criminal procedure in terms the adversarial and inquisitorial systems as the two available models for international criminal procedure); Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings*, *supra* note 6, at 1440 (framing his whole analysis of international criminal proceedings in terms of the adversarial and inquisitorial categories); ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS*, *supra* note 10, at 14-15 ("Among concepts usually adopted in comparative criminal procedure the distinction made between *accusatorial* and *inquisitorial criminal proceedings* stand out. The purpose of this paragraph is not to discuss the validity of such categories; on the contrary, it is accepted that this dichotomy is appropriate, at least for descriptive purposes. Our intention is to adopt this categorization and apply it to international criminal proceedings to try to explore the relationship between the provisions on the rights of the accused and procedural mechanisms derived from one model or the other.").

the traditional legal systems in particular—and common and civil law more broadly—function as legal identities in certain contexts.⁵¹² In other words, legal actors may attach to them a role in defining themselves.⁵¹³ Again, this identity role of the adversarial and inquisitorial systems has been particularly relevant in the context of ICTY, where interactions between lawyers from differing legal traditions are a daily experience. As shown in Sections IV and 5, this has played a role in the interactions between the actors of ICTY. The adversarial and the inquisitorial as legal identities also may have played a role regarding how the procedural reforms were defined. In a context where legal actors agreed that ICTY criminal procedure was predominantly adversarial⁵¹⁴—with the consequent feeling by civil law actors that they were operating in a system that was not “theirs”⁵¹⁵—defining these reforms as a move toward the inquisitorial may have been comforting or compensatory for those within ICTY who identify with the inquisitorial system as a legal identity.⁵¹⁶

X. IMPLICATIONS OF THE DISCOVERY OF THE MANAGERIAL JUDGING SYSTEM IN ICTY

The discovery of managerial judging in ICTY has all kinds of implications for the Tribunal. From a descriptive perspective, it provides a much better account of what kind of procedure ICTY has. The existing

⁵¹² See *supra* note 75, and accompanying text.

⁵¹³ For examples of some of the ways these identities have been constructed in the U.S. and Europe, see *supra* note 31.

⁵¹⁴ See, e.g., Prosecutor v. Zejnil Delalic, Case 96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, May 1, 1997, para. 15 (“the Judges adopted a largely adversarial, instead of the inquisitorial, approach in the Rules”); Prosecutor v. Kupreškic et al., Case IT-95-15, Transcript, August 27, 1998 (Judge Cassese: “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”).

⁵¹⁵ See, e.g., Tochilovsky, *Legal Systems and Legal Cultures*, *supra* note 10, at 642 (“...because of the numerous technical rules governing adversarial trials, civil law lawyers do find themselves in a position of ‘students’ who are to be ‘mentored’ and ‘educated’ by their common law counterparts.”)

⁵¹⁶ See, e.g., Sikirica et. al, Case IT-95-8, Transcript, April 4, 2001, p. 1752 (defining as inquisitorial the possibility of the Trial Chamber to ask questions in a predominantly adversarial system). The question of balance between the different legal traditions has been constantly present in ICTY, the ICTR and the ICC at all levels. See, e.g., Expert Report, *supra* note 88, para. 230 (describing how the ICTR Registrar has considered the balance of the principal legal systems of the world as one of the criteria to select appointed counsel).

characterizations of this procedure as a mixture of the adversarial and inquisitorial systems is not particularly helpful to understand what ICTY has been doing. It only provides a sort of taxonomy of what features of the tribunal procedure fit in one or the other system, but it does not propose a model—like the one proposed here—to explain ICTY procedural practices and their evolution over time. In addition, it does not provide an account of all those features that are not adversarial or inquisitorial, such as the conception of a judge as a manager in charge of expediting proceedings, the transformation of the role of the parties as collaborators of the court, the active role of judges in encouraging factual and legal agreements, the fact that the cases of the parties are as much in coordination and cooperation as in competition, and the pragmatic attitude of the system toward relying on oral or written production of the evidence.

Instead, this article's characterization of ICTY procedure as managerial judging not only provides a comprehensive and coherent description of this procedure, but also explains what the judges have attempted to do with the reforms they have introduced. The judges have not randomly picked out features of the adversarial and inquisitorial systems. They also have not sought to become more active investigators of the truth as in the inquisitorial system. Rather than incorporating inquisitorial features in an adversarial model, the reforms have adopted a particular set of case management techniques to speed up the docket. Under pressures to process cases more quickly, ICTY judges departed from a predominantly adversarial system and decided to become active managers. This re-definition of their role brought with it a re-definition of the parties' roles and of other features of ICTY criminal procedure. And the product of this decision and the resulting transformations is a criminal procedure that can be best described as close to the managerial judging system.

The managerial judging system provides the best account of ICTY criminal procedure not only understood as a set of rules but also as a procedural culture.⁵¹⁷ 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,⁵¹⁸ and they have required the parties to collaborate in

⁵¹⁷ On the conceptualization of managerial judging as a procedural culture, see *supra* notes 364-65, and accompanying text.

⁵¹⁸ 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 in their work and have tried to make ICTY succeed in 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

this endeavor and to add the goal of expediting the docket to their other professional duties and concerns. In this sense, managerial judging and the resistance against it explain many of the current interactions between ICTY legal actors, as was shown in Section VIII. Whether the arrival of the managerial judging procedural culture at ICTY is good or bad for the Tribunal is something that this article will not analyze.⁵¹⁹ But the development itself is undeniable.

The arrival of managerial judging at ICTY is also important regarding the dimension of procedural powers. As we saw, during its initial years, the Tribunal used a predominantly adversarial system in which the parties—and particularly the prosecution—had the main responsibility to run the proceedings in international criminal cases. With ICTY's adoption of managerial judging, the distribution of powers and responsibilities has shifted. Now the judges, as a professional group, have much greater responsibility and control over how the Tribunal prosecutes and tries its cases. Again, this article will not address whether this is good or bad for ICTY and its goals. But this development is something that should be taken into account in both descriptive and normative analyses of the Tribunal.

Besides its importance for understanding and explaining the work of ICTY, the discovery of the managerial judging system in this jurisdiction has implications for the adversarial and inquisitorial systems in international criminal procedure generally, and even broader implications for the adversary system both at the national and the international levels. The two questions that will be explored in the rest of this section are, first, why is it that ICTY judges chose neither of the two traditional systems to deal with the external and internal pressures to process cases more swiftly? Second, why is it that other adversarial systems—such as U.S. criminal procedure—have not moved in the direction of managerial judging despite facing similar pressures to expedite the handling of criminal cases?

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 systematic level, faster proceedings could produce fairness and more truth-determination in the sense that more defendants could be convicted for the commission of international crimes and that this 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.

⁵¹⁹ For normative analyses of managerial judging, though in reference to civil, not criminal procedure, see Resnik, *Managerial Judges*, *supra* note 16, at 414-31; Judith Resnik, *Managerial Judges: The Potential Costs*, 45 PUBLIC ADMINISTRATION REVIEW 686 (1985); Judith Resnik, *Managerial Judges and Court Delay: the Unproven Assumptions*, 23 JUDGES' JOURNAL 8 (1984); Judith Resnik, *The Assumptions Remain*, 23 JUDGES' JOURNAL 37 (1984). For a response to some of these criticisms, see, e.g., Paul R.J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' JOURNAL 34 (1984).

I will start with the first of these two questions. Regarding the inquisitorial system, there are two main reasons why ICTY judges did not move in that direction. The first has to do with characteristics of the inquisitorial system itself. With its emphasis on determining the real truth,⁵²⁰ its highly formalistic written documentation of every act of the process,⁵²¹ and its distrust of consensual dispositions of the cases by the parties,⁵²² the inquisitorial system is not the fastest system for prosecuting and adjudicating criminal cases.⁵²³ The system may have other virtues, but speed is not one of them. Actually, at the national level, inquisitorial jurisdictions have been adopting features of the adversarial system to deal with increasing caseloads and public opinion pressure to process cases faster.⁵²⁴

Second, the judges faced a question of *path dependence*.⁵²⁵ 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 predominantly adversarial in their structure of interpretation and meaning, the predominant internal dispositions among most of their actors, and the dimension of procedural powers, as discussed in Sections IV to VI. Thus, to swing ICTY criminal procedure from an adversarial to an inquisitorial system would have been very difficult. It would have required modification of most features of ICTY's procedure and a very deep change in 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.⁵²⁶

⁵²⁰ See *supra* note 133.

⁵²¹ See *supra* note 215, and accompanying text.

⁵²² See *supra* note 153-56, and accompanying text.

⁵²³ Statistics are not always easily comparable on this point. So, we should be careful in their evaluation and in making broader conclusion from them. But, for instance, in 2002, the average length of criminal proceedings in U.S. federal district courts was 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 Sourcebook of Criminal Justice Statistics 2002, pages 445-46); in France, the average length of only the pre-trial investigation by an investigating judge was 21.7 months (see *Annuaire statistique de la Justice—Édition 2004*, page 117).

⁵²⁴ On these tendencies in Argentina, France, Germany and Italy, see, e.g., Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

⁵²⁵ Questions of path dependence and the challenges it presents to legal analyses and legal reforms have been recently explored in the literature of law and economics —i.e., in relation to issues like corporate governance. See, for instance, Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

⁵²⁶ On the particularly hard obstacles that procedural reforms face when importing legal ideas and institutions from other legal traditions, see, e.g., Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiences*, 45 AM. J. COMP. L. 839 (1997); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L.

To be sure, moving ICTY criminal procedure from a predominantly adversarial system to a managerial judging one has not been easy, either. 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 collaborators with the court.⁵²⁷ 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 is structured as 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.⁵²⁸ Given these shared features, the transition from the adversarial to the managerial system was more feasible.

That ICTY judges faced a question of path dependence when deciding what reforms were needed is a very important element that cannot be overemphasized regarding institutional design of international criminal tribunals. These tribunals historically have been created from scratch, and the number of lawyers, judges, prosecutors and personnel participating in them has been low in comparison to national jurisdictions.⁵²⁹ Therefore, one might assume that path dependence issues should have much less impact in this context than in a national 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

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, *From Legal Transplants to Legal Translations*, *supra* note 30; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 429 (2004).

⁵²⁷ See *supra* note 471-75, and accompanying text.

⁵²⁸ See *supra* notes 143-46 and 469, and accompanying text.

⁵²⁹ The Tribunal currently has a total of 24 judges: 16 permanent judges and eight ad litem judges. The current number of posts authorized for the Office of the Prosecutor is 1058. See Tenth Annual Report ICTY, August 20, 2003, Summary.

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 already limited. The point here is not that it was good or bad for ICTY to end up adopting the managerial judging system. 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 than others for dealing with international crimes, 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. This is another lesson from this article which should be taken into account in designing international criminal procedures and tribunals.

Another question is why ICTY judges did not keep the adversarial system—perhaps by introducing reforms to improve its efficiency—instead of moving toward managerial judging. We have already explored the problems that the adversarial system experienced in dealing with international criminal cases rapidly, including delays caused by the system of incentives and reliance on oral evidence in adversarial procedure, that led ICTY judges to move away from that system. But here I would like to explore this issue from a different perspective by comparing ICTY's reaction to external pressures to process cases more quickly with the reactions of U.S. civil and criminal procedure to similar pressures. The comparison of ICTY to these latter two systems will highlight different paths that adversarial systems can take in response to such pressures, and will reveal certain features of ICTY relative to national jurisdictions that we have not analyzed so far.

As explained in Section VII, managerial judging partly arose in U.S. civil procedure as a way to deal with the adversarial system's problems in handling an ever larger and more complex caseload faster.⁵³⁰ Dissatisfied

⁵³⁰ Elliot, *supra* note 282, at 319-20, says: "the problem that managerial judging aims to solve is, at base, structural: it results from a fundamental imbalance in the Rules between the techniques available for developing and expanding issues and those for narrowing or resolving them prior to trial...That the issue-narrowing capacity of the Federal Rules is emaciated can be brought into focus by recalling the predecessor system of 'common law pleading.'" We all learned in law school about the old practice of pleading back and forth until a single issue was joined. The drafters of the Federal Rules understood well the frailties of this system, which required parties to narrow their contentions prior to developing a full understanding of the facts. Moreover, under a system which narrows issues based on common law pleadings, litigants' cases are likely to turn on procedural choices by counsel, rather than on the legal merit of a party's case...The new system under the Federal Rules was supposed to be different. Through full discovery of the facts, lawyers were supposed to learn which of their contentions were supportable at trial and which were not...And if an occasional recalcitrant litigant refused to accept the results of discovery voluntarily, summary judgment was to be available to dispose of unsubstantiated claims prior to trial. Thus, as the framers envisioned their new system,

with the manner and pace at which parties were handling cases, judges became active managers of the proceedings.⁵³¹ As already described, a similar process has happened in ICTY. Under increasing pressures to process cases more swiftly, the judges also moved ICTY's criminal procedure from a predominantly adversarial to a managerial judging model.⁵³²

Interestingly, despite confronting similar pressures to process cases more swiftly,⁵³³ U.S. criminal procedure has handled these pressures without substantially deviating from its traditional adversarial system.⁵³⁴ In this procedure, the judge basically has remained a passive umpire,⁵³⁵ and the

the issue-narrowing function was to be performed not by pleading, but by discovery and summary judgment...According to the proponents of managerial judging, it hasn't worked out that way."

⁵³¹ As explained *supra*, this redefinition of the role of the judge was not only motivated by an increasing caseload but also by broader discovery rules and by increasing interactions between federal judges and institutional changes in the Federal Judiciary. See Resnik, *Managerial Judges*, *supra* note 16, at 378-79; Resnik, *Trial as Error*, *supra* note 274, at 943-49.

⁵³² See *supra* Section VIII.

⁵³³ On the increase in state trial courts, see Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics—2001 (showing that the total of criminal cases filed in these courts between 1993 and 2002 increased 19 %). On the increase of criminal cases in the federal system, see, e.g., J. Clifford Wallace, *Tackling the Caseload Crisis*, June 1994 ABA JOURNAL 88 (pointing out that between 1981 and 1991, the number of criminal cases filed in the federal district courts increased by nearly 50 percent, which resulted in increased delay and expense); Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, at 456 and 472 (1994) (federal criminal cases filings between 1980 and 1990 increased nearly seventy percent while the number of judges remained relatively static).

⁵³⁴ There have been some tendencies in U.S. criminal procedure in the direction of managerial judging. See, e.g., Federal Rules of Criminal Procedure, Rule 17.1 ("On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference."); and MANUAL FOR COMPLEX LITIGATION 263 (3rd edition, 1995)). But, despite these tendencies, U.S. criminal procedure has remained basically adversarial and judges still behave, to a great extent, as passive umpires. An indication of this is that the different editions of the Manual for Complex Litigation—probably the main tool to evaluate managerial judging in the U.S.—have either failed to include a Section on criminal cases (see the last edition of the Manual) or have included only a short Section on it emphasizing the differences between criminal and civil cases (see, e.g., MANUAL FOR COMPLEX LITIGATION 263 (3rd edition, 1995)).

⁵³⁵ In the last years, criminal courts have incorporated a number of management techniques such as "differentiated case management" (DCM) that put different cases on different tracks to speed up the docket and encourage plea agreements. On DCM see, e.g., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, Fact Sheet, *Differentiated Case Management*. The implementation of this kind of programs may have led certain judges to step out of their traditional roles. See, e.g., Legrome Davis, *Developing Felony Tracks*, 33 JUDGES' J 9, at 32 (Winter 1994) (describing a differentiated case-management program in Philadelphia Court of Common Pleas that would often require planning sessions with the attorneys in which the judges would step out of his or her traditional role). But the incorporation of these management techniques have not radically transformed the traditional role of criminal judges as passive umpires as it has happened in complex cases in U.S. civil procedure. As explained in the text, this is partially because, in U.S. criminal procedure, the prosecutor has actually become the main manager of cases. Thus, the role of the judge did not need to be radically transformed to speed up the docket. Recall, also, that the adversarial system should be understood as an ideal-type. So, even if some judges may have become more active

parties still have the main responsibility to carry on the proceedings.⁵³⁶ This has been possible because the prosecutor—instead of the judge—has become the main manager of criminal cases.⁵³⁷ In order to expedite the docket, the prosecutor has used a number of features that are characteristic of the adversarial system, such as broad prosecutorial discretion,⁵³⁸ plea agreements⁵³⁹ and stipulations, and also a number of features which are not characteristic of the adversarial system but do not substantially challenge it,⁵⁴⁰ such as diversion mechanisms.⁵⁴¹ These mechanisms—combined with

as a consequence of the incorporation of these case management techniques, this would not question the general point made in the text to the extent that the adversarial system, understood as an ideal-type, still provides the best account of U.S. criminal procedure before regular criminal courts.

⁵³⁶ This statement applies to regular criminal proceedings before regular criminal courts. However, even if U.S. criminal procedure remains basically adversarial today in these kinds of courts, there has been a departure from the adversarial system in the case of specialized courts—such as drug and domestic violence courts. These specialized courts have been created partly as a way to deal with an increasing number of specific kinds of cases (such as drug and domestic violence cases), partly as an attempt to give more effective answers to certain situations. In these specialized courts, the roles of the judge and the parties have been transformed, and their procedure has moved away from the adversarial system. On the transformation of the roles of the judge and the parties before drug courts, see, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 37 (2000-2001).

⁵³⁷ See, e.g., Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717 (1996) (“In the past thirty years, the diffusion of responsibility has begun to abate and power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system...the centralization of authority in the prosecution is a development necessary for a coordinated and responsive criminal justice system in which the prosecutor will ultimately be held accountable to the voters for the successes and failures of the system.”).

⁵³⁸ See, e.g., Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717 (1996).

⁵³⁹ On the predominant role of prosecutors in the bargaining process—that according to many have been strengthened with the Federal Sentencing Guidelines, see, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U.CHI.L.REV. 901 (1991); Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM.L.REV. 1 (1979); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U.CHI.L.REV. 50 (1968); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U.ILL.L.REV. 37; Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP.L. 532 (1970); Stephen J. Schulhofer, *Criminal Justice Discretion in a Regulatory System*, 17 J. LEGAL STUD. 43 (1988). Most plea negotiations transpire between the prosecutor and the defense without the participation of the judge. However, courts can still contribute by providing incentives for plea agreements without abandoning their passive role. For instance, a firm judicial criminal calendar may provide those kinds of incentives. See, e.g., Burrell Ives Humphreys, *Taking Control*, April 1994, ABA JOURNAL 46, at 47.

⁵⁴⁰ Diversion mechanisms do not challenge the adversarial system because these cases get diverted from the formal criminal proceedings. Thus, they leave intact the adversarial structure of U.S. criminal procedure. At another level, though, when the defendants whose cases are diverted cases are subjected to drug treatments, community work, and so forth, they cannot use the legal tools that they would have in adversarial proceedings.

other tools that will be analyzed later in this section—have allowed U.S. prosecutors to handle even complex criminal cases swiftly, without requiring U.S. criminal procedure to abandon the adversary system.

The question here is why U.S. civil procedure and ICTY criminal procedure have taken such a different path from that followed by U.S. criminal procedure. U.S. criminal procedure basically has remained close to the adversarial system, while ICTY criminal procedure and U.S. civil procedure have moved toward managerial judging.⁵⁴² In the case of civil procedure the answer may have to do with the fact that U.S. civil procedure could not effectively give the management of the case to one of the parties—as U.S. criminal procedure gave it to the prosecutor—because all parties in U.S. civil procedure are private. Within this context, reformers had a more limited range of options, and they may have thought that the judge, as a public official, had to bear the public responsibility of systematically managing cases in a swifter way.⁵⁴³

But if we compare U.S. and ICTY criminal procedure, the answer is not that obvious. In each of these two procedures, there is a prosecutor who can also be the main manager of cases, yet policymakers have taken different paths with each. So, why is it that these two similar procedures took different paths when subjected to similar pressures? I would like to suggest two main sets of reasons.

⁵⁴¹ See, e.g., Misner, *Recasting Prosecutorial Discretion*, *supra* note 143, at 744 (“decisions regarding diversion programs...are left to the unreviewable discretion of the prosecutor.”)

⁵⁴² The statement that U.S. civil procedure has moved in the direction of managerial judging should not be understood as implying that judges actively manage all civil cases in the U.S. Actually, most civil cases in the U.S. are solved by the parties without the judge’s participation. However, this is not a challenge to my statement that U.S. civil procedure has moved in the direction of managerial judging for three different reasons. First, recall that, as defined in this article, the managerial judging system welcomes parties’ agreements without participation of the court because they are a way to keep the court’s docket under control. In other words, the fact that most civil cases in the U.S. are solved by parties agreements without the participation of the court is not in tension with characterizing U.S. civil procedure as having moved toward managerial judging. Second, to the extent that the judges actively control civil cases (as opposed to simply ruling on the parties’ motions as they present themselves), they generally do so by using the techniques of managerial judges. Finally, recall that the managerial judging system is an ideal-type. So, even if there were cases in U.S. civil procedure that do not fit into this model, this would not necessarily constitute a challenge to the statement that U.S. civil procedure has to some extent moved toward managerial judging.

⁵⁴³ This is not a necessary path, though. There are ways to incorporate management techniques in civil procedure without making the judge the main manager. For instance, court personnel can become the main case managers, or alternative dispute resolutions centers that take cases away from the civil courts can be implemented. For these and other alternatives to deal with an increasing caseload in civil justice, see, e.g., Resnik, *Managerial Judges*, *supra* note 16, at 436-44.

The first involves the dimension of procedural powers.⁵⁴⁴ As adversarial systems, in both U.S. criminal procedure and the initial procedure of ICTY, the prosecution and the defense were responsible for carrying on the proceedings, and they had more procedural powers vis-à-vis the judge than in an inquisitorial system. U.S. criminal judges and ICTY judges were basically passive umpires.⁵⁴⁵ But U.S. judges have faced a number of institutional, legal and ideological limitations and constraints that ICTY judges have not had. The lack of these limitations explains why disempowering the parties by making judges active managers was an option available in ICTY, but not in U.S. criminal procedure.

The first limitation is that in criminal cases, U.S. judges are very reluctant to tell the prosecutor what to do—at least regarding certain issues such as prosecutorial discretion—because of the doctrine of separation of powers.⁵⁴⁶ Since prosecutors are members of a different branch of government—the Executive power in the federal system⁵⁴⁷—judges, as members of the Judiciary, usually assume they are not legally allowed to tell prosecutors what to do, or at least that their power is limited in this respect.⁵⁴⁸ Within this context, managerial judging's conception of the

⁵⁴⁴ On the dimension of procedural powers in adversarial, inquisitorial and managerial judging systems, see *supra* notes 79-81 and 364-66.

⁵⁴⁵ See *supra* note 127-28 and 164-69, and accompanying text.

⁵⁴⁶ See, e.g., *U.S. v. Armstrong*, 517 U.S. 456, at 464 (1996) ("A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive"); *U.S. v. Bass*, 536 U.S. 862, at 864 (2002). See also James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV.L.REV. 1521, at 1546 (1981) ("Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review."). U.S. courts have also justified judicial deference to decisions by prosecutors based on the institutional competence of prosecutors and courts and on the delay that judicial revision of prosecutorial decisions would bring. See *U.S. v. Wayte*, 105 S.Ct. 1524, at 1530-31 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.").

⁵⁴⁷ See, e.g., *U.S. v. Armstrong*, 517 U.S. 456, at 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws...They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take care that the Laws be faithfully executed'. U.S. Const., Art II, §3; see 28 U.S.C. §§516, 547.").

⁵⁴⁸ See, e.g., Misner, *Recasting Prosecutorial Discretion*, *supra* note 143, at 743 ("The prosecutor's decision not to prosecute a case is virtually unreviewable. Although for some this

prosecutor as a collaborator with the court would be in tension with these separation-of-powers concerns.⁵⁴⁹ The Tribunal has established that the principle of separation of powers is included in its Statute, but it has not given this principle the same reach that it has in the U.S. legal system.⁵⁵⁰ Thus, ICTY judges did not find it an impediment to re-defining their role and the role of the prosecutor.⁵⁵¹

The second limitation has to do with the rights of the defendant.⁵⁵² In U.S. criminal procedure, the defendant is protected by a number of constitutional rights, such as the right against compulsory self-incrimination,⁵⁵³ the right to counsel,⁵⁵⁴ the right to cross-examination,⁵⁵⁵ the right to confrontation,⁵⁵⁶ and the right to an impartial court.⁵⁵⁷ These constitutional rights would prevent U.S. judges from considering the defendant and the defense attorney as collaborators with the court in the goal of expediting proceedings, from substantially limiting the defense case at trial, from using certain types of written statements, and from participating

authority "border[s] on anarchy,"...the case law in both federal and state jurisdictions have ignored the criticism and have only rarely constrained the decision in any meaningful way.").

⁵⁴⁹ Evidence of these difficulties is that even radical proposals to limit prosecutorial discretion have generally not been adopted. Among these proposals, see, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV.L.REV. 1521 (1981).

⁵⁵⁰ Based on arts. 12 and 13 of the Statute, the Tribunal has established that the doctrine of separation of powers not only applies to the Tribunal but also includes the principles of judicial independence and impartiality. See *Prosecutor v. Zejnil Delalic et. al*, Case IT-96/21, Appeals Chamber, Judgment, February 20, 2001, para. 689. However, it has not included this principle in its analysis of prosecutorial discretion in ICTY. See *id.* para. 596-619.

⁵⁵¹ Note that the separation of powers doctrine similarly does not apply in U.S. civil procedure where there are two private parties and only one public official—the judge.

⁵⁵² See, e.g., Manual for Complex and Multidistrict Litigation 145 (as revised May 18, 1970) ("Because of the guarantees afforded criminal defendants under the Fourth, Fifth and Sixth Amendments to the Constitution, pretrial proceedings in criminal cases must be on a purely voluntary basis, except the extent that discovery by the government is authorized under division (c) of Rule 16, F.R.Cr.P.").

⁵⁵³ U.S. CONST. amend. V. ("No person... shall be compelled in any criminal case to be a witness against himself").

⁵⁵⁴ U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.").

⁵⁵⁵ The right to cross-examination has been considered part of the Confrontation Clause of the VI Amendment of the U.S. Constitution (see, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)) and essential to due process (see, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973)). The Supreme Court has established that the right is constitutionally protected. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974).

⁵⁵⁶ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him").

⁵⁵⁷ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury"). The right to an impartial trial also includes the right to an unbiased judge. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroe*, 409 U.S. 57 (1972).

actively, as the managerial judging system would require. To be sure, ICTY Statute recognizes similar rights.⁵⁵⁸ But ICTY judges have interpreted them less strictly than in the U.S.,⁵⁵⁹ and have determined they are not an obstacle to the adoption of managerial judging in ICTY criminal process.⁵⁶⁰ Thus, these rights have been additional potential limitations that have not prevented ICTY judges from moving toward managerial judging.⁵⁶¹

The third limitation to moving U.S. criminal procedure toward managerial judging is institutional and consists of the presence of the grand jury during the pre-trial phase.⁵⁶² In the U.S. federal system and in many states, the grand jury exercises not only the screening function of issuing

⁵⁵⁸ Art. 21 of the Statute of the Tribunal reproduces art. 14 of the International Covenant for Civil and Political Rights. Thus, art. 21 of the Statute includes the right not to be compelled to testify against himself or to confess guilt (art. 14 (g)); the right to defend himself through legal assistance of his own choosing (art. 14 (d)); and the right to examine, or have examined, the witnesses against him (art. 14 (e)). ICTY Court of Appeals have held that the right to be tried before an independent and impartial tribunal is generally recognized as integral component of the requirement that an accused should have a fair trial. See *Prosecutor v. Furundžija*, Case IT-95-17/1-A, Appeals Chamber, Judgment, July 21, 2000, para. 177.

⁵⁵⁹ A way in which ICTY judges have restricted defense rights has been by conceiving some of these rights as rights of the prosecution. This would be unthinkable in the U.S., where it is clear that constitutional rights are protections of the individuals against the government. ICTY Appeals Chamber made this interpretation and refused to apply more lenient standards of admissibility to hearsay evidence presented by the defense, arguing that the prosecution is also entitled to a fair trial. See *Prosecutor v. Zlatko Aleksovski*, Case IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence, February 16, 1999, para. 22-28. The Tribunal has also established that the excessively succinct and summary nature of many defense-witnesses' statements violated the principle of equality of arms. See *Prosecutor v. Zoran Kupreškić et al*, "Lasva Valley", IT-95-16, Decision, January 11, 1999. For an analysis of the two decisions just mentioned, see CASSESE, *supra* note 6, at 396.

⁵⁶⁰ A clear example of this has to do with the admission of written statements authorized by Rule 92 *bis* that is in tension with the right to confrontation and the right to cross-examination. For analyses of this tension, see, e.g., Cristian Defrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381 (2001); Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at ICTY*, 34 CAL. W. INT'L L.J. 47 (2003); Wald, *supra* note 227, at 550 ("even when the written testimony is concededly background or jurisdictional, defendants can be expected to raise the core issue of whether written testimony not subject to cross-examination violates ICTY statutory Article 21 mandate that the accused be allowed to question witnesses against him."). One of the justifications for the use of written statements despite its tension with the rights to confrontation and cross-examination has been the specific characteristic of the Tribunal. See, e.g., Wald, *supra* note 227, 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"). I will not analyze here whether this justification makes the use such written statements normatively permissible. Rather, my point is a positive one about how ICTY has given a more restrictive interpretation to the rights included in its Statute than the interpretation given to similar rights in the U.S. and in other national jurisdictions.

⁵⁶¹ These rights are much weaker or do not exist in U.S. civil procedure.

⁵⁶² On the grand jury in the U.S., see, generally, SARA S. BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW AND PRACTICE* (1986).

“true bills” that become indictments once signed by the prosecutor,⁵⁶³ but also an important investigatory role—especially in complex criminal cases.⁵⁶⁴ While performing their functions, grand juries usually act under the control of the prosecutor,⁵⁶⁵ judges are not present during their proceedings,⁵⁶⁶ and the regulation of grand juries’ proceedings is basically considered beyond the judge’s powers.⁵⁶⁷ Thus, this is another constraint that would prevent U.S. judges from becoming active managers during the pre-trial phase. Unless the grand jury proceedings are deeply modified or eliminated—a difficult reform given the constitutional stature of the grand jury in the federal system⁵⁶⁸—there would be a whole part of the proceedings that managerial judges could not control, and there would be an important institution that they could not treat as a court collaborator in the goal of expediting the docket. But the grand jury is an institutional constraint that has not existed in ICTY.⁵⁶⁹

The fourth limitation is also institutional and is related to the jury.⁵⁷⁰ Like the grand jury, the presence of the jury in U.S. criminal procedure is

⁵⁶³ On the screening function of grand juries, see, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

⁵⁶⁴ See, e.g., RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 888 (2001) (“It is beyond doubt...that the modern grand jury’s most prominent role is investigatory. Federal grand juries, in particular, are extremely important to the unraveling of complex crimes that may be impervious to investigation and prosecution by means of traditional police investigative techniques.”).

⁵⁶⁵ See, e.g., FRANK W. MILLER ET AL., CRIMINAL JUSTICE ADMINISTRATION 538 (5th ed. 2000) (“Although prosecutors have no formal legal power to control the grand jury, they have immense practical authority. Prosecutors generally propose avenues of inquiry, subpoena witnesses, question witnesses when they appear, and advise the grand jurors concerning all matters.”).

⁵⁶⁶ See, e.g., Leipold, *supra* note 563, at 266 (“The most striking feature of grand jury hearings is their secrecy. The press and public are barred from the proceedings, as are suspects and their counsel. Even judges are not allowed in the grand jury room; attendance is limited to the prosecutor, the jurors, the court reporter, and the single witness being questioned.”).

⁵⁶⁷ The courts can quash grand jury subpoenas but have almost no supervisory powers to regulate grand jury proceedings. See *U.S. v. Williams*, 504 U.S. 36 (1992) (“any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. It certainly would not permit judicial reshaping of the grand jury institutions, substantially altering the traditional relationship between the prosecutor, the constituting court, and the grand jury itself.”).

⁵⁶⁸ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury”).

⁵⁶⁹ The grand jury is not present in U.S. civil procedure either.

⁵⁷⁰ U.S. CONST. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury.” The right applies to serious offenses (usually offenses that have a maximum potential punishment of more than six months of imprisonment). See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970); *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989); *U.S. v. Nachtigal*, 507 U.S. 1 (1993)(per curiam); *Lewis v. U.S.*, 518 U.S. 322 (1996).

relevant for the dimension of procedural powers because it also reduces the power of the judge—in this case, during trial. The presence of the jury prevents U.S. judges from becoming too active at trial for several reasons. First of all, jurors may perceive a too-active judge as partial toward one of the parties.⁵⁷¹ In addition, given that the jury adjudicates the case, trial judges have fewer tools to subtly or not-so-subtly encourage the parties to collaborate with the goal of expediting proceedings.⁵⁷² The presence of the jury also brings back to the system technical rules of evidence,⁵⁷³ another feature that the managerial judging system rejects.⁵⁷⁴ Interestingly, the jury probably has been the main factor preventing managerial judging during trial in U.S. civil procedure.⁵⁷⁵ ICTY criminal procedure has not faced this limitation, and this also explains why ICTY has been able to move in this direction even during trial.⁵⁷⁶

The fifth limitation for U.S. criminal procedure is that the U.S. institutional setting is more complex and would require broader consensus than ICTY to move strongly in the direction of managerial judging. I have two issues in mind here. First, even if ICTY has said that the principle of separation of powers applies to its institutional setting,⁵⁷⁷ the Tribunal is clearly the most powerful actor in ICTY.⁵⁷⁸ ICTY's Office of the Prosecutor is

⁵⁷¹ See, e.g., *People v. Davis*, 549 N.W.2d 1, at 50-51 (Mich.App., 1996) ("The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality... The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test is whether the 'judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, ... and whether partiality 'quite *possibly could* have influenced the jury to the detriment of defendant's case.'").

⁵⁷² On the impact that the bifurcated character of the court has in several features of common law jurisdictions, see MIRJAN DAMAŠKA, *EVIDENCE LAW ADRIFT* 46-57 (1997).

⁵⁷³ On the relationship between the jury and detailed rules of evidence, see *supra* note 209-13.

⁵⁷⁴ On the tension between the managerial judging system and detailed rules of evidence, see *supra* Section VII.

⁵⁷⁵ See, e.g., Langbein, *The German Advantage*, *supra* note 268, at 19 ("managerial judging in the pretrial process leaves adversary domination of the trial (especially jury trial) largely unaffected.").

⁵⁷⁶ The Expert Group that proposed deepening judicial activism at ICTY hinted that this would be enabled by the absence of a jury in this system. See Expert Report, *supra* note 88, para. 78 ("Such increased control would in no sense be inconsistent with the Statutes or with the unique character of the Tribunals as International Tribunals drawing upon common and civil law traditions. In the latter and even in the former, particularly in non-jury cases, it is not unusual for the court to take a strong hand in the entire process...").

⁵⁷⁷ See *Prosecutor v. Zejnir Delalic et. al*, Case IT-96/21, Appeals Chamber, Judgment, February 20, 2001, para. 689.

⁵⁷⁸ For criticisms that affirm that the Tribunal has too much power in the institutional setting of ICTY, see, e.g., Fabricio Guariglia, *The Rules of Procedure and Evidence of the International*

an independent body,⁵⁷⁹ but it is not considered an essential part of a strong Executive branch as in the U.S. federal system, and does not have the sort of legitimacy and public support enjoyed by popularly elected local prosecutors in the U.S.⁵⁸⁰ In addition—and also related to the fact that the Tribunal is the most powerful actor in its institutional setting—ICTY judges have the power to issue and change their own rules of procedure,⁵⁸¹ a power that is not subject to review and that has been crucial in the adoption and implementation of managerial judging reforms.⁵⁸² U.S. courts also can issue rules of criminal procedure as part of their supervisory powers,⁵⁸³ and the U.S. Supreme Court has a very prominent role in the amendment of the Federal Rules of Criminal Procedure.⁵⁸⁴ But Congress also participates in this process.⁵⁸⁵

Besides the different legal, ideological and institutional constraints that judges have faced in U.S. criminal procedure and at ICTY, the second set of reasons that explains why these two adversarial criminal procedures have moved in different directions is related to the degree of success that the prosecutor has had in being an effective manager of criminal cases. In this regard, the U.S. prosecutor clearly has been more successful than his ICTY

Criminal Court, *supra* note 367; André Klip, *The Decrease of Protection under Human Rights Treaties in International Criminal Law*, 68 INT'L REV. PENAL L. 291, at 302-03 (1997).

⁵⁷⁹ ICTY Statute, art. 16.2 ("The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.").

⁵⁸⁰ On the election of local prosecutors in the U.S. and its impact in U.S. criminal procedure, see, e.g., 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 (1993).

⁵⁸¹ ICTY Statute, art. 15 ("The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.").

⁵⁸² For criticisms of the fact that there is no review on the power of ICTY judges to issue their own rules of procedure and evidence, see, e.g., BASSIOUNI & MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL*, *supra* note 100, at 824, 827.

⁵⁸³ On this power by Federal District Courts, see Federal Rules of Criminal Procedure, Rule 57(a)(1) ("Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.").

⁵⁸⁴ 28 U.S.C. 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

⁵⁸⁵ 28 U.S.C. 2074(a) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under Section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").

counterpart,⁵⁸⁶ though the latter had little time to show his managerial abilities before managerial judging reforms started to be introduced just four years after the work of the tribunal started.⁵⁸⁷ To the extent that U.S. prosecutors have become successful managers of the system, there has been less pressure to move in a different direction. There are several reasons that explain the relative success of the U.S. prosecutor in performing this task as against the ICTY Office of the Prosecutor.

The first reason is that while in U.S. criminal procedure most cases are very simple, and thus prosecutors can handle them more easily with a traditional adversarial system, almost all ICTY cases are very complex⁵⁸⁸ and have presented many more challenges to the adversarial procedure of the Tribunal.⁵⁸⁹ The second reason is that, even regarding complex criminal cases, U.S. prosecutors can rely upon more powerful legal tools to investigate and prosecute these cases.

First of all, U.S. prosecutors have at their disposal a criminal justice system with its own law enforcement mechanisms, which is usually close to the place where the alleged criminal events occurred, does not require translation of documents and proceedings into several languages, and does not have to deal with lawyers and judges from different legal traditions.⁵⁹⁰ In addition, U.S. federal prosecutors, who handle most complex criminal cases in this country, can make use of grand juries that have very broad and powerful investigative powers.⁵⁹¹ For instance, grand jury proceedings are

⁵⁸⁶ Of course, there have been criticisms of the role of U.S. prosecutors as the main managers of cases. However, these criticisms have either been circumscribed by particular prosecutors or cases or have resulted in substantial reforms—like with the criticisms to the excessive power of U.S. prosecutors in plea bargains. In fact, during the 1990s, the power of U.S. prosecutors as managers of cases probably increased after the enactment of the Federal Sentencing Guidelines in the second half of the 1980s.

⁵⁸⁷ See *supra* Section VIII.

⁵⁸⁸ See, e.g., Expert Report, *supra* note 88, para. 126 (“While national criminal investigations normally focus on a perpetrator, known or unknown, of a crime, ICTY and ICTR investigations focus on atrocities in geographic and functional areas.”).

⁵⁸⁹ On the complexity of cases in ICTY, see Wald, *supra* note 227, 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”); Sixth Annual Report of ICTY, *supra* note 91, para. 13 (“The Tribunal’s cases involve complex legal and factual issues, as well as the application of legal principles that have not previously been interpreted or applied”); and CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note 6, at 442-43.

⁵⁹⁰ See *supra* notes 88-95, and accompanying text.

⁵⁹¹ On the investigatory powers of grand juries, see, e.g., SARA S. BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE (1986).

secret,⁵⁹² and the grand jury can subpoena witnesses⁵⁹³ who in most jurisdictions cannot be assisted by a lawyer,⁵⁹⁴ need not be given the equivalent of Miranda warnings before testifying,⁵⁹⁵ and are not constitutionally required to be informed that they are targets of the investigation.⁵⁹⁶ The grand jury also has a subpoena power with few limits regarding documentary and other physical evidence.⁵⁹⁷ As already pointed out, ICTY prosecutors cannot rely upon this institution in running their investigations.⁵⁹⁸

Furthermore, U.S. prosecutors can make extensive use of plea bargains⁵⁹⁹ and stipulations. Plea bargains provide U.S. prosecutors not only

⁵⁹² See generally Fed. Rules Crim. P. 6(d): "Who may be present: (1) While Grand Jury is in Session. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session"; and Fed. Rule Crim. P. 6(e). On this last rule, see, e.g., Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999).

⁵⁹³ Also called subpoena *ad testificandum*. See, e.g., ALLEN ET. AL, *supra* note 564, at 894-95 ("it is important to note that grand jury's broad subpoena power is not limited to physical and documentary evidence, but rather that it is actually founded on the authority to compel oral testimony, at least in the absence of a valid privilege. Indeed, many criminal investigations become grand jury investigations when potential witnesses either cannot (because they are under legal obligations committing them to secrecy in the absence of legal compulsion) or will not voluntarily provide information to police. In such circumstances, neither the police nor prosecutors can compel disclosure in most cases; it is the grand jury that provides investigators with this authority.").

⁵⁹⁴ ALLEN ET. AL, *supra* note 564, at 896 ("There are also strict limits on the people who may be present during grand jury proceedings—to the point that in the federal system and most states, not even the lawyer representing the witness may attend."). On the role of defense attorneys in investigations carried out by grand juries on white-collar crimes, see, e.g., KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME* (1985).

⁵⁹⁵ *U.S. v. Mandujano*, 425 U.S. 564 (plurality opinion).

⁵⁹⁶ *U.S. v. Washington*, 431 U.S. 181 (1977).

⁵⁹⁷ In order to issue this kind of subpoena—called subpoena *duces tecum*—it is not even necessary to show probable cause that an offense has been committed or that there are even reasons to believe that the target of the subpoena possessed documents or other evidence related to the commission of an offense. There are three major limits to the subpoena power of the grand jury regarding documentary and other physical evidence: "First, the subpoena must seek material that is relevant to a lawful grand jury investigation...Second, the subpoena must not be 'unreasonably broad or oppressive...Third, grand jury subpoenas seeking the production of documents or other physical evidence may be subject to claims of compelled self-incrimination, though these claims will generally relate only to the act of production of such materials." See, e.g., ALLEN ET. AL, *supra* note 564, at 893. On the first limit, see *U.S. v. R. Enterprises*, 498 U.S. 292 (1991); on the second, see *Hale v. Henkel*, 201 U.S. 43 (1906); on the third, see, e.g., *U.S. v. Hubbell*, 530 U.S. 27 (2000).

⁵⁹⁸ Note that similarly there are no grand juries in U.S. civil procedure.

⁵⁹⁹ Plea bargains are such an essential tool for U.S. prosecutors today that even Attorney General John Ashcroft, who issued guidelines to reduce plea agreements based on a tough-on-crime rationale, has established important exceptions based on expediency and investigative purposes. See, e.g., Vanessa Blum, *Ashcroft Memo Endorses Plan for Swift Pleas*, *LEGAL TIMES*, September 29, 2003,

with a mechanism to obtain convictions without having a trial—with corresponding savings of time and human and material resources—but also a powerful investigatory tool to deal with complex criminality, because they enable prosecutors to make deals with lower echelons in a criminal enterprise.⁶⁰⁰ In other words, as part of the plea agreement, lower members of a criminal enterprise not only may have to plead guilty, but also provide information and testify at trial for the prosecution against the upper echelons of a criminal enterprise or organization.⁶⁰¹

ICTY prosecutors also have used plea bargaining for these purposes.⁶⁰² But the incorporation of this technique has been gradual,⁶⁰³ and came only

page 1 and 12 (explaining the exception created by Attorney General John Ashcroft's guidelines regarding fast-track programs).

⁶⁰⁰ See, e.g., Sheila Creaton, *Progressing the Fight against Crime or Fighting Witnesses?*, 5 SUFFOLK JOURNAL OF TRIAL AND APPELLATE ADVOCACY 37 (2000) ("Cases aimed at dissolving notorious organized crime rings hinged on the validity of plea-bargains signed by accomplices. Rejecting this practice threatens to eradicate any possibility of conviction and allows reputed criminals to go unpunished. Prosecutors have alternative methods, including the use of the government's agents, surveillance, and resources, to aid in the investigation and prosecution of criminals. Plea bargains, however, help connect evidence gathered in the field investigation to courtroom testimony.").

⁶⁰¹ See, e.g., Leo Romero, *Procedures for Investigating and Prosecuting White Collar Crime*, 11 UNITED STATES-MEXICO LAW JOURNAL 165, at 167 (2003) ("For the target witness who asserts a Fifth Amendment privilege, the prosecutor may obtain his or her testimony and cooperation by means of a plea bargain. Because a white-collar crime may involve the investigation of multiple targets, the prosecutor can pick one that might have information that would be valuable for prosecuting the other defendants, and offer him or her a plea to a lesser crime or lesser number of counts or charges. Generally, the prosecutor will give the chosen target a sweet deal in exchange for his or her testimony and cooperation. If the particular offer is advantageous to the target individual that person can agree to plead guilty to a lesser offense in exchange for testifying against the other members or the other targets of the investigation.").

⁶⁰² ICTY plea agreements today normally contain a clause where the defendant commits himself or herself to cooperate with the prosecutor's investigation by providing information or testimony. For example, the Miroslav Deronjic plea agreement bound the defendant to such levels of cooperation as the following: "Miroslav Deronjic agrees to meet as often as necessary with members of the Office of the Prosecutor and to co-operate with and provide them with truthful and complete information that is known to him regarding individuals and events in the former Yugoslavia. He agrees to be truthful and candid and to freely answer all questions put to him by members of the Office of the Prosecutor. Miroslav Deronjic agrees to testify truthfully in any trials, hearings, and proceedings before the Tribunal where the Prosecutor deems his evidence may be relevant, whether those matters are presently before the Tribunal or may be in the future." See *Prosecutor v. Miroslav Deronjic*, Case IT-02-61-PT, Plea Agreement, September 30, 2003. Other plea agreements are more specific with regards to the defendant's obligations to testify in a certain case. See, e.g., *Prosecutor v. Momir Nikolic*, Case IT-02-60-PT, Joint Motion for Consideration of Plea Agreement Between Momir Nikolic and the Office of the Prosecutor, Annex A, Amended Plea Agreement, May 7, 2003; *Prosecutor v. Dragan Obrenovic*, Case IT-02-60-T, Joint Motion for Consideration of Plea Agreement Between Dragan Obrenovic and the Office of the Prosecutor, Annex A, Plea Agreement, May 20, 2003; *Prosecutor v. Zeljko Mejakic et al.*, Case IT-02-65-PT, Annex 2 to Plea Agreement, June 26, 2003 (filed June 2, 2003). In these cases, the parties jointly recommended to delay sentencing until after the defendant has testified in order to gauge the level of cooperation, which can be used as a mitigating factor. Thus, a number of people who entered into these agreements have actually testified

after ICTY judges already initiated the post-1998 managerial reforms.⁶⁰⁴ Furthermore, in making plea agreements, U.S. prosecutors have a lot of leverage vis-à-vis the defense because of the harshness of U.S. criminal law.⁶⁰⁵ The death penalty,⁶⁰⁶ mandatory minimum sentences,⁶⁰⁷ three-strikes laws,⁶⁰⁸ and lengthy prison terms⁶⁰⁹ are examples of this

for the prosecution at trial. See, e.g., *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case IT-02-60-T, Open Session, September 19, 2003 (Momir Nikolic begins testifying); *id.*, Open Session, October 1, 2003 (Dragan Obrenovic begins testifying); *Prosecutor v. Blagoje Simic et al*, Case IT-95-9-T, Open Session, June 6, 2002 (Stevan Todorovic begins testifying).

⁶⁰³ For instance, there were only two plea agreements in 1998, none in 1999, one in 2000, three in 2001 (all involving defendants in the same case), two in 2002, eight in 2003, and one so far in 2004. Erdemovic, whose case was the first involving a plea agreement, originally agreed to a plead guilty in 1996 without a plea agreement, but had it struck down by the Appeals Chamber as being uninformed. Subsequently in 1998, he pleaded guilty again, now as part of a plea agreement. He provided information to the Prosecution and was described as being extremely cooperative without asking for anything in return. The Trial Chamber took note of this and believed that such cooperation warranted mitigation, pursuant to Rule 101. See *Prosecutor v. Drazen Erdemovic*, Case IT-96-22, Sentencing Judgment, March 5, 1998. The Trial Chamber in the Jelusic case, the second involving a plea agreement, noted that any cooperation by the defendant did not amount to the “substantial cooperation” required for mitigation under Rule 101. See *Prosecutor v. Goran Jelusic*, Case IT-95-10, Judgment, December 14, 1999. The Todorovic plea agreement in 2000 included the defendant’s agreement to provide information and to testify against his former co-accused. See *Prosecutor v. Stevan Todorovic*, Case IT-95-9/1, Sentencing Judgment, July 31, 2001. Plea agreements have evolved since these early cases to the point where they nearly always include a carefully tailored cooperation clause to ensure that the defendant will provide information or testimony whenever needed by the Prosecutor.

⁶⁰⁴ Recall that the move toward managerial judging began in July 1998. Of the 17 defendants who have accepted plea agreements to date, only the Erdemovic plea occurred prior to this.

⁶⁰⁵ On the factors that would explain the harshness of U.S. sentences vis-à-vis European ones, see JAMES Q. WHITMAN, *HARSH JUSTICE* (2003). For a critical review of this book indicating other factors that may explain these differences, see Carol S. Steiker, *Why We’re So Tough on Crime*, <<http://bostonreview.net/BR28.5/steiker.html>> (website visited on May 10, 2004). On the connection between procedural safeguards, harsh sentences and unfunded indigent defense services, see William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

⁶⁰⁶ On the death penalty in the U.S. see, STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002); Carol S. Steiker & Jordan Steiker, *Abolition in our Time*, 1 OHIO ST. J. CRIM. L. 323 (2003); Carol S. Steiker, *Things Fall Apart, but the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475 (2002); Carol S. Steiker, *Capital Punishment and American Exceptionalist*, 81 OR. L. REV. 97 (2002); Carol S. Steiker & Jordan Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417 (2002); Carol S. Steiker & Jordan Steiker, *The Constitutional Regulation of Capital Punishment since Furman v. Georgia*, 29 ST. MARY’S L.J. 971 (1998); Carol S. Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

⁶⁰⁷ For instance, according to a 1991 report, there were more than 100 mandatory minimum penalty provisions located in 60 different criminal statutes that accounted for 60,000 federal sentences between 1984 and 1990. See U.S. SENTENCING COMM’N, *MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 10, at 13 (1991), cited by Chippendale, *supra* note 533, at 462.

⁶⁰⁸ See *Ewing v. California*, 123 S. Ct. 1179 (2003); and *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (holding the constitutionality of California’s three strikes law).

phenomenon.⁶¹⁰ The maximum penalty in ICTY is life imprisonment.⁶¹¹ And given the seriousness of the crimes involved, ICTY sentences generally have been mild by the standards of the U.S. criminal justice system.⁶¹²

Legal, ideological and institutional constraints on judges' activism in U.S. criminal procedure and ICTY, as well as the average complexity of criminal cases and the different legal tools prosecutors can use in each of these systems, thus mostly explain why two adversary criminal procedures like those of the U.S. and pre-1998 ICTY have taken different paths when subjected to similar pressures. Both systems faced pressures to handle cases more swiftly. The U.S. adversarial criminal procedure has handled those pressures by making the prosecutor a more effective manager of criminal

⁶⁰⁹ See, e.g., Recent Legislation, *Corporate Law—Congress Passes Corporate and Accounting Fraud Legislation—Sarbanes-Oxley Act of 2002*, 116 HARVARD LAW REVIEW 728, at 734 ("because prosecutors can already choose from a bevy of charges for securities fraud, the greater range in penalties under the amended federal sentencing guidelines, including the threat of longer jail sentences, will likely further expedite settlements. For high-profile cases in which the evidence is weak, the prosecutor can use the increased penalties and sentencing guidelines to secure plea bargains and avoid expensive trials."); Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime*, 1 OHIO STATE JOURNAL OF CRIMINAL LAW 521 (2004) ("At the urging of Congress, the United States Sentencing Commission has increased sentences for both individuals and firms in white-collar crimes, making the value of cooperating with the government through information disclosure even greater").

⁶¹⁰ Substantive criminal law in the U.S., with numerous and overlapping offenses, has also given tools to prosecutors to negotiate pleas. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Daniel A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-3: On Sideshow Prosecutions, Spitzer's Clash with Donalson over Turf, The Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO STATE JOURNAL OF CRIMINAL LAW 443 (2004) (describing the prosecutor's tactic of 'piling-on': "In 'piling-on' a prosecutor subdivides a basic charge of financial fraud into numerous charges so as to increase the offender's exposure to a lengthy sentence and encourage a plea bargain. Prosecutors also commonly use mail and wire fraud charges to 'pile-on.' Moreover, the many charges increase a prosecutor's flexibility in negotiating tailor-made plea agreements."). In addition, statutes like RICO have provided prosecutors with powerful tools to plea bargain—and also for trials. See, e.g., Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AMERICAN JOURNAL OF CRIMINAL LAW 115, at 140-41 (1997) ("prosecutors can use RICO, or by implication its state law equivalents, with its broad reach and harsh penalties to force plea bargains and transform minor infractions into serious crimes."); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

⁶¹¹ See ICTY Statute, art. 24.1 ("The penalty imposed by the Trial Chamber shall be limited to imprisonment."); Rule 101(A) ("A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.").

⁶¹² See, e.g., Kelly D. Askin, *Reflections on the Most Significant Achievements of ICTY*, 37 NEW ENGLAND LAW REVIEW 903, at 912 (2003) ("A recurring criticism of the Tribunals, especially from countries allowing the death penalty or regularly imposing long or harsh domestic sentences for persons convicted of crimes, involves the surprisingly low sentences handed down by ICTY and ICTR, including for those convicted of crimes against humanity and genocide. Despite the Yugoslav Statute allowing for a sentence of life imprisonment, and despite convictions for some of the most serious international crimes committable, of the thirty individuals convicted thus far in ICTY, not a single person has been sentenced to life imprisonment, and indeed the average sentence imposed is approximately sixteen years.")

cases, including complex ones, and so did not need to move away from its traditional adversarial structure. ICTY adversarial criminal procedure has handled those pressures by moving to managerial judging.

The discovery of the managerial judging system as the best account of ICTY criminal procedure, and the comparison between the evolution of this procedure and that of U.S. criminal or civil procedure, have important implications for a number of policy and theoretical debates. From a policy perspective, it shows that an adversarial criminal procedure subjected to external pressures to process cases more swiftly has at least two different sets of options available to respond to those pressures; to maintain the adversarial system by giving the prosecutor tools with which to manage cases effectively, or to move toward managerial judging. I leave for the future an analysis of which of these two options would be better from a normative perspective. Here, the key point arising from the comparative analysis of ICTY and U.S. criminal procedures—a point which deserves emphasis—is that policy makers dealing with an adversarial criminal procedure that faces these sorts of pressures have these two options available.

From a theoretical perspective, the analysis also has implications for debates about globalization of law.⁶¹³ The debate about the convergence thesis is one of them.⁶¹⁴ Again, this thesis holds that legal systems throughout the world are gradually converging because they face similar problems and pressures that ultimately will lead them to adopt similar features and tools.⁶¹⁵ The comparative analysis between ICTY and U.S. criminal procedure actually shows that two similar systems may react very differently to similar pressures and problems.⁶¹⁶

⁶¹³ The bibliography on debates about globalization of law is voluminous. See, for instance, David G. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949 (2001); Duncan Kennedy, *Two Globalization of Law and Legal Thought: 1850-1968*, 31 SUFFOLK UNIVERSITY LAW REVIEW 631 (2003); Saskia Sassen, *The State and Economic Globalization: any Implications for International Law?*, 1 CHI. J. INT'L L. 109 (2000); Martin Shapiro, *The Globalization of Law*, 1 GLOBAL LEGAL STUDIES JOURNAL 37 (1993); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internalization of Legal Fields and the Creation of Transnational Areas*, 44 CASE W. RES. L. REV. 407 (1994); William Twining, *Globalization and Legal Theory: Some Local Implications*, 49 CURRENT LEGAL PROBLEMS 1 (1996).

⁶¹⁴ On the debate on the convergence thesis, see, e.g., THE GRADUAL CONVERGENCE (B.S. Markesinis ed., 1994); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52 (1996); Gunter Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

⁶¹⁵ See, e.g., THE GRADUAL CONVERGENCE, *supra* note 28.

⁶¹⁶ For a similar conclusion regarding the importation of plea bargaining by civil law countries, see Langer, *From Legal Transplants to Legal Translations*, *supra* note 30 (showing that, being subject to similar pressures coming from increasing and more complex caseloads, civil law systems

Subject to similar pressures to process cases more swiftly, the predominantly adversarial criminal procedures of the U.S. and ICTY adopted divergent paths. Of course, one can explain these divergent reactions by emphasizing the important differences between national and international jurisdictions in general, and specific differences between U.S. and ICTY criminal procedures and cases—differences that have been analyzed in this article.⁶¹⁷ But there are also similar differences between national legal systems. So, at the national level, two adversarial systems may also take different paths when subject to similar pressures.⁶¹⁸ This does not mean that convergence is not happening and may not happen in a multiplicity of legal arenas, including criminal procedure.⁶¹⁹ But such convergence is not necessary or inevitable. As our case studies show, similar legal systems can *diverge* in response to similar forces.

XI. CONCLUSION

This article has shown that ICTY procedure is best described as a managerial judging system, and that this discovery has important implications regarding the way we think about not only international criminal procedure, but also domestic procedures. Scholars and policymakers have thought that international criminal procedure necessarily has to be adversarial or inquisitorial or somewhere between these two poles. However, ICTY has adopted a third type of procedure that fits in neither of the two traditional models and cannot be described as a hybrid between them. This third model—the managerial judging system—is familiar to U.S. scholars and practitioners because it presents substantial similarities with the way U.S. civil procedure has been handling complex cases.

have adopted different versions of plea bargaining that may take their formerly similar criminal procedures in different directions).

⁶¹⁷ See *supra* Section III.

⁶¹⁸ There are indications that some adversarial criminal procedures at the national level may be moving in the direction of managerial judging. See, e.g., Mr. Justice John H. Phillips, *The duty of counsel*, 68 THE AUSTRALIAN LAW JOURNAL 834 (1994); and Melinda Brown, *Pegasus II Makes Flying Start*, 73 LAW INST. J. 19 (March 1999) (both articles describing the implementation of reforms in the management of criminal cases in the Supreme Court of Victoria, Australia, that seem to go in the direction of managerial judging).

⁶¹⁹ For discussion of the convergence thesis in criminal procedure, see, for example, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809 (2000); Craig M. Bradley, *The Convergence of the Continental and the Common Law of Criminal Procedure*, 7 CRIM. L.F. 471 (1996) (reviewing CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY (Phil Fennell et al. eds., 1995)); Nico Jörg et al., *Are Inquisitorial and Adversarial Systems Converging?*, in CRIMINAL JUSTICE IN EUROPE, *supra* 28; Langer, *From Legal Transplants to Legal Translations*, *supra* note 30.

The discovery of managerial judging in ICTY allows this article not only to provide a much better description of what ICTY has been doing, but also to articulate a more refined version of what the managerial judging system is about, and to integrate international and domestic criminal procedures into wider debates about managerial judging and the globalization of law. The case of ICTY shows that managerial judging is a procedural system that can be applied not only in civil cases, but also in criminal ones. This article has explained why ICTY has followed this path, while U.S. criminal procedure has remained close to the adversarial ideal. But it also has demonstrated that for any adversarial criminal procedure facing pressures to process cases more quickly, one of the central dilemmas is whether the prosecutor or the judge should be put in charge of expediting and managing the docket. In this way, the article has shown that procedural models such as managerial judging and the adversarial system are useful platforms not only for understanding individual legal systems and explaining how these systems change over time, but also for exploring future modification and normative analyses of international and domestic procedures. These are significant considerations for scholars and policymakers interested in civil or criminal procedure at either the national or the international level.