Public Annex B

Transcribed extracts from Judge Marc Perrin de Brichambaut, On the Perceived Tension Between Civil and Common Law in International Criminal Justice (CAR-D20-0011-0032)

13 minute mark:

"the common law civil law debate was a side show. It was waged to a large extent by members of my own delegation from the French Ministry of Justice which on one occasion produced a complete draft Statute an alternate to what was being discussed and produced a constant flow of proposals in the working group in order to promote civil law values"

18.20 -19.26 minute mark

"Not everything was entirely geared towards the common law; there is an article 64(8)(b) that gives the Presiding Judge a great deal of authority on the proceedings and therefore allows potentially flexibility if the Presiding Judge decides to do so he can organize things in his own way. What is interesting is that the last hurrah of my colleagues from the Justice Ministry in the discussions in the Rules of Procedure and Proof of the Court after the adoption of the Rome Statute was to make sure that no vocabulary emanating from the common law tradition is present in those rules. Look for it, you do not see the word 'evidence', for instance" (19.06) Yet immediately what happened, I am anticipating is that the minute the judges started working, those- for other reasons that I will invoke – those words, those vocabulary came back" (19.26).

(21 minute mark)

"First point, the cultural influence of the ICTY, of common law, over the development of the ICC, which was, in a way, contained, at the very beginning because of the way of the efforts of the negotiation in Rome, has been increasing steadily and how has this happened, (…) the initial group of ICC judges, some of which stayed for – good for them – 12 years (…) and who were those people, well they were the people who had actually negotiated the Rome Statute, they were heads of delegations, so they liked the job and they thought that the Rome Statute was well done, and they implemented it their way, and they implemented it in a sort of common law perspective. And what did they do, they progressively hired an increasing number of Anglosaxon lawyers coming from the ICTY so there was a transfer of the dominating culture which has been mentioned this morning from the ICTY to the ICC. That came over time, because, Morten was very kind, the first Registrar of the ICC was French, there was a time when the proportion of personnel in the ICC was 56% French, 44% non-French but that didn't last unfortunately and

the balance has considerably shifted altogether . (22.39) So culture comes with people, with practice, and if I may say, implicit preferences. This was felt immediately because the vocabulary of the rules of proof and procedure changed instantly, the minute the first trial started. And the practice was adjusted (23.08)

24.43 -25.26 minute mark:
"on the Lubanga issue we had Judge Fulford a quintessential British common law personality. He put – very strong judge he put a very strong imprint on the proceedings. He ran them with an iron hand. He suspended the trial three times in order to safeguard the accused the fairness of the proceedings when the prosecutor which we have already nominally mentioned refused to disclose the source of potentially exculpatory material and therefore he exercised head on pressures on the prosecutor for those disclosures to make. Nice common law frontal fight"

30 -34.20 minute mark:

30.12 "But I will dwell a little more because this is potentially very important and this is largely the result of the input of a give personality that joined the court 2 ½ years ago is the way that the Bemba and others case was handled in 14 months. 5 accused very good 5 excellent defence teams with very good British lawyers, very offensive but we had a Chamber composed of civil law judges and the offences were offences against the administration of justice under Article 70 of the Statute so this was something a little bit specific. So what I a going to read is a sort of marching order of everything the Chamber decided which was radically anti-common law, and which has changed the way that the trials have been run at the ICC. The Chamber rejected twice attempts by the Prosecutor to introduce modes of liability that had been excluded by the Pre-Trial Chamber under Regulation 55, and once by the way, by the defence. The Chamber rejected witness preparations request by the Prosecution and only accepted a process of very limited witness familiarisation. The Presiding Judge was a very experienced German judge – I pay tribute to him and I supported him fully – took a decision on proceedings that laid down strict rules for the organisation of the trial giving a maximum of 200 hours to the prosecutors and double that time to the five defence teams. He accepted pre-recorded testimonies and provided very strict directives for the presentation of evidence and for all submission by **parties he accepted something that had never been done in the same way in the ICC – bar table motions where hundreds of written documents were taken on board but the five different bar table inputs But the most radical change that was done in the Bemba and others the decision was that as a general rule the chamber determined that it would defer its assessment on the admissibility of evidence until deliberating its judgment**. So the Chamber made no ruling on the admissibility of the evidence. except in a few cases where it was

mandated by the rules themselves. **The Chamber considered that items proposed by the parties to have been submitted and without any further elaborations it allowed for the submission of documents emanating from a number of outside sources like Western Union as well as telephone intercepts**. And the even more radical decision taken by the Chamber was that all requests by the parties for interlocutory appeals were rejected, without exception. No interlocutory appeals in the whole trial. Now if you look at what made the other trials last for 6 or 7 years you see that a key source was the problem of the assessment of the admissibility of evidence and various forms of interlocutory appeals which were accepted by the Chamber **so if you do such a radical changes of the rules**, **which in all respect is the practice of the German appeals section which was implemented by Judge Schmitt** and I supported him 100% on all this, you can change rules. (34 minute) Ah but you have to be honest what has happened – of course we reached a decision, Bemba was convicted, he was sentenced, we even innovated a little in the sentencing because we inflicted a 300, 000 euros fine on him in order to do something for the victims (34.20). But it's all now in front of the Appeals Chamber because everything that we did not take in the course of the trial has been pushed to the Appeals Chamber so they are now going to have an interesting time to answer and everything I have described to you may be vacated by the Appeals Chamber I have no idea which way they will decide but it will be interesting, which I suggest that what you keep from this is that since Judge Schmitt is now in charge of the Ongwen case he is applying the same rules in the Ongwen case and Judge Tarfusser, who is in charge of the Gbagbo case has a harder time because he has to contend with a real common law partner in the presence of Judge Henderson (…) I don't know if ultimately we will have full determination by the Appeals Chamber - it will be interesting. Theoretically they have until 9 March 2018 to take their decision. We will see if they make it or not."(36.09).

40.00- 40.55 minute mark

" There has never been an organised and concerted attempt by civil law countries to promote their model, bizarrely apart from the Gallic approach to charge ahead in Rome the civil law countries have always been divided as most of them made common cause with the like- minded particularly the Latin Americans not to be specific and therefore the common law didn't even have to put up a fight it imposed itself certainly in the ICC it came and it was accepted because it was the common an current practice"