Annex C

Justice Without Borders

Essays in Honour of Wolfgang Schomburg

Edited by Martin Böse, Michael Bohlander, Annette Kreß and Otto Lagodny

The Serendipitous Nature of the ICC Trial Proceedings Risks the ICC's Credibility

Michael G. Karnavas

Abstract

This chapter considers whether the ad hoc nature of ICC trial proceedings risks undermining the ICC's credibility. The Rome Statute and the ICC Rules of Procedure and Evidence have sufficient constructive ambiguity as to how trials should be conducted such that, depending on the serendipitous composition of the Trial Chamber, trials can be shaped in a more 'adversarial' or more 'inquisitorial' fashion. This malleability, which may have been the result of a diplomatic compromise, has resulted in *ad hoc* trial proceedings at the ICC; no two trials are conducted in the same manner. Since the hallmarks of any good court are uniformity, predictability, and reliability in its proceedings, does this feature, which is unique to the ICC, risk undermining the legitimacy of the ICC's judgments and, inexorably, the ICC itself?

Introduction

Innocuous as the Rome Statute and the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC) may seem, they have the capacity of turning the ICC trial proceedings into an unpredictable pendulum, with trials being conducted under the classical judge-controlled civil law procedure to the *laissez-faire* common law procedure to anything in between. Variability, unpredictability, and unreliability are not the hallmarks of a mature judicial institution – not if it wishes the public at large to recognize it as fair

* Michael G. Karnavas is an American trained lawyer qualified to appear before various international tribunals. Practicing law for over 35 years, he has appeared before State and Federal Courts in the United States, the ICTY, the ICTR, the ECCC, and the ICC and for over 27 years he has taught trial advocacy skills to lawyers and law students, lectured extensively on international criminal law and procedure, authored trial advocacy practice manuals, articles and book chapters on international criminal law and procedure, and has been engaged in a variety of legal reform and development projects in Europe and Asia.

and unbiased, and to accept its decisions and results. This is especially true at international(ized) tribunals and courts where invariably there are certain political elements at play, as recently seen by efforts of several African states to leave the ICC.[1]

If the few trial proceedings in its 14-year practice is indicative of things to come, it may not be too soon to predict that, indeed, trials at the ICC will to a large extent be conducted based on judicial preferences for how much or how little the judges may wish the proceedings to lean in one direction or another, adversarial or inquisitorial.[2] This would not necessarily or inevitably lead to unfair trials. As long as the proceedings meet the underlying criteria of being fair, expeditious, impartial, and are conducted 'with full respect for the rights of the accused',[3] all is fair game. Nonetheless, the unintended consequences may, if not will, lead to criticism and a loss of confidence in the outcomes of trials, resulting from perceptions of unfairness rising from disparate trial proceedings. Query whether this was considered or appreciated by the drafters of the Rome Statute?

Creating a legal regime for an international court to try mass atrocity crimes (to put it generically) was no easy task, yet the drafters of the Rome Statute had several models from which to draw inspiration: the International Military Tribunal in Nuremberg, the International Military Tribunal for the Far East in Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). The procedures adopted at Nuremberg and Tokyo were heavily influenced by common law

1 The African Union's February 2017 resolution adopted an ICC 'Withdrawal Strategy Document', which seeks to initiate withdrawal of the African States Parties from the Rome Statute unless the ICC adopts the proposed reforms. *See* African Union, *African Union 28th Summit in Addis Ababa*, 30–31 January 2017. *See also* 'Withdrawal Strategy Document Draft 2', Version 12 January 2017, paras. 30, 38, listing the proposed reforms.

2 I use the terms 'adversarial' and 'inquisitorial' for convenience, to compare and contrast (in the general sense) the truth-seeking nature of the criminal procedure in civil law systems, and the adversarial nature of the criminal procedure in common law systems. As Kai Ambos observed, inquisitorial-adversarial divide has only historic meaning and within modern criminal procedures, be it common law or civil law tradition, there are numerous and distinct variations. *See* Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' 3 *Int Crim Law Rev* (2003) 1, 3–4.

3 Rome Statute 1998, art 64(2): 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. Rome Statute 1998, art 67(1): '... the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality'.

adversarial proceedings as the United States played a dominant role in shaping the way trials would be conducted. The ICTY, and subsequently the ICTR, drew from the procedures and attendant adversarial modalities of the Nuremberg and Tokyo tribunals, with the judges tweaking several times the RPE, often adopting inquisitorial modalities. Notwithstanding these amendments (tinkering and recalibrating) of their respective RPE, both the ICTY and the ICTR, hybrid as they may be, maintained an adversarial pedigree, this despite making tolerant allowances for the trial chambers to adopt their own trial management directives.[4] For the most part, the trial proceedings at the ICTY and ICTR have been uniform and predictable, although not entirely free of criticism.[5]

While the ICTY and ICTR were established by the United Nations Security Council (UNSC) under Chapter 7 of the United Nations Charter (which included the UNSC drafting their founding documents and respective statutes),[6] the Rome Statute is nothing short of a compromise between States from various legal systems and procedures. It appears that the drafters of the Rome Statute were going for a new frontier – *where no tribunal has gone before*. It also appears that many of the drafters were only acquainted with their own legal and

4 The Trial Chambers regulate and manage the trial by adopting the time tables, time-limits for the presentation of evidence, admitting documentary evidence from the bar table, etc. For example, in *Popović et al.*, the Trial Chamber decided not to set a specific limit on the Defence for the cross-examination of Prosecution witnesses. *Prosecutor v. Popović et al.*, IT-05-88, Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings, 14 July 2006, para. 3(c). In *Prlić et al.*, the Trial Chamber limited the amount of cross-examination by applying a mathematical one-sixth-solution: the Defence collectively have the same time for cross-examination as the OTP takes for direct examination, and in the absence of an agreement between Defence Counsel, each would have one-sixth of the time allocated to the Prosecution for direct examination. This decision was upheld on appeal. *See Prosecutor v. Prlić et al.* ICTY-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006, 4.

5 Discussing the inefficiencies in trial management *see* Judge O-Gon Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench' (2007) 5 *Journal of Int Crim Justice* 360; Judge Patricia M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court' (2001) 5 *Journal of Law & Policy* 87, 104; Lilian A. Barria and Steven D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR' (2005) 9(3) *Int Journal of Human Rights* 349.

6 UNSC Res 827 (25 May 1993) UN Doc S/RES/827, establishing the ICTY; UNSC Res 925 (8 July 1994) UN Doc S/RES/935, establishing ICTR.

criminal procedure, or were promoting their own legal systems, or were unreceptive to other legal procedures.[7] Many common law and civil law experts and practitioners have an aversion – mainly based on ignorance or bias – towards the other's legal system. The intent was to establish a *sui generis* statute with rules of procedure and evidence that would be detailed, yet flexible enough to accommodate the fancies of the judges, so long as the proceedings adopted by them – based on their interpretation of the Rome Statute and the RPE – ensured fairness and impartiality.[8]

To ensure that the Rome Statute and the RPE represented no particular legal system, neutral terms were adopted to the extent possible. This can be seen in the use of the terms 'examine' and 'have examined', as opposed to 'examine and cross-examine'.[9] 'To have examined' connotes that the opposing party would have the opportunity to confront the witness. Seems appropriate and does in fact avoid the term cross-examination, a term associated with the common law system. But what does 'have examined' really mean? It depends. Those coming from the common law system would axiomatically think that it means having the right to pose leading (suggestive) questions to opposing witnesses. Not necessarily so to those who hail from the civil law system – where

7 As Peter Lewis, a participant in the negotiations of the Rome Statute and the RPE, commented, 'It would be easy to characterize the debate about Rule 140 as a clash of cultures between the civil law and the common law. The delegations of France and the United States certainly championed their respective legal traditions'. Peter Lewis, 'Trial Procedure' in Roy S. Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc 2001), 550. *See id.*, 547–549 on the history of negotiation of Article 64 and Rule 140. *See also* Hans-Jorg Behrens, 'The Trial Proceedings' in Roy S. Lee (ed), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations* (Oxford University Press, 1999). 239–241, discussing the various proposals of Article 64 during the drafting of the Rome Statute.

8 *See* Gilbert Bitti, 'Article 64 Functions and Powers of the Trial Chamber' in Otto Triffterer (ed) *Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck Hart Nomos 2016), 1616: 'What transpires from this debate is that delegations, at least some of them, wanted to reach a greater certainty on how future trials at the ICC would look like. This was obviously a praiseworthy effort although unlikely to succeed. Indeed, uncertainty in how trials are to be conducted was simply unavoidable during the first yeas of the Court: Judges and participants to the proceedings ... have to determine gradually how trials at the ICC are to be conducted according to the unique needs and features of this institution. Of course such a *sui generis* system may take more than just a decade to build itself'.

9 Rome Statute 1998, art 67(1)(e), providing for the right of the accused '[t]o examine, or have examined, the witnesses against him or her'.

parties are generally forbidden to pose leading questions (judges can ask any sort of questions in whichever mode they think is conducive in assisting them in their truth-seeking quest). This will be discussed further below as one of the examples showing just how divergent the emerging trial proceedings at the ICC are based on its modest history of conducting nine trials.

Having examined the cases that have been tried thus far and from my reading of the Rome Statute and the RPE, I will attempt to show that there appears to be sufficient constructive ambiguity on how trials can be conducted. Depending on the serendipitous composition of the Trial Chamber, trials can be shaped in a more adversarial or more inquisitorial fashion. And although, arguably, this would not necessarily lead to unfair trial results (as already noted, with no two trials being conducted in the same manner due to the inherent malleability of the Rome Statute and the RPE resultant from diplomatic compromises by the drafters, it begs the question just how accepted will the ICC's judgments and legacy be.

Due to space and the narrow focus of this chapter, my analysis will be limited to the Trial Chamber's powers under Article 64 of the Rome Statute and Rule 140 of the RPE to shape the conduct of the proceedings. Other statutory provisions and rules will be discussed where and when relevant to this analysis. Raw analysis of the Rome Statute and the RPE (as has been done by some with remarkable prescience before there were cases from which to draw conclusions on the application of these articles and rules)[10] essential as it may be, remains an academic exercise, unless analyzed in the context of their application as reflected in the ICC trial proceedings. To illustrate the point that the unique procedure of the ICC risks undermining the legitimacy of its judgments and the ICC itself, I will examine the Trial Chambers' practice of ruling on the admissibility of evidence, witness proofing, examination of witnesses, judicial questioning, and trial management.

This chapter is divided in two sections. For contextual purposes, I will first discuss the legal basis for procedural discretion before turning to the examples that may assist in drawing conclusions and identifying possible solutions – if, indeed, solutions are needed.

10 *See e.g.* Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 *Journal of Int Crim Just* 603; Stefan Kirsch, 'The Trial Proceedings before the ICC' (2006) 6 *Int Crim Law Rev* 275; see Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 *Int Crim Law Rev* 1.

The Legal Basis for Procedural Discretion in Directing the Conduct of the Trial Proceedings. What Kind of Procedure is it Anyway?

Similar to what has been adopted by other international(ized) tribunals and courts – save for the Extraordinary Chambers in the Courts of Cambodia (ECCC)[11] and the Special Tribunal for Lebanon (STL),[12] which are predominantly civil law-based – the procedure at the ICC is hybrid, a mixture of common law and civil law modalities.[13] As was noted, the Rome Statute is a product of accommodation, drafted by committee based on haggling and diplomatic

11 'Unlike the other United Nations and United Nations-assisted tribunals, the Extraordinary Chambers in the Courts of Cambodia forms part of the national court structure. It is a Cambodian national court, based on the French civil law system, with special jurisdiction, and with United Nations participation. It is an example of a special chamber within a national jurisdiction.... [It] is a national court of Cambodia'. *See* UNSC 'Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy of the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results'. (26 July 2010) UN Doc S/2010/394, 42–43.

12 Unlike the ICTY and ICTR, the STL system provides for other civil law system modalities: the victims can participate in the proceedings through legal representatives (STL RPE Rule 86), the Pre-Trial Judge may question anonymous witnesses at the request of the party (STL Rule 93), the Pre-Trial Judge has to make a report for the Trial Chamber on: (a) arguments set out by the parties and participating victims; (b) points of agreement and disagreement; (c) probative material produced in the proceedings; (d) a summary of decisions and orders rendered; (e) suggestions as to the number/relevance of witnesses; and (f) issues of law the Pre-Trial Judge finds contentious (STL RPE 95). STL RPE Rule 92(C) grants the Pre-Trial Judge the authority to gather the evidence himself '[w]here he considers that the interests of justice, the need for the impartial establishment of truth and the necessity to ensure a fair and expeditious trial, in particular the need to ensure the equality of arms and to preserve evidence, make it imperative'.

13 Analyzing the ICC RPE in 2003, Kai Ambos rightly anticipated: 'In sum, it is fair to say that the rules of evidence adopt, despite the broad powers of the Trial Chamber, a mixed approach combining civil and common law features. The practical application of these rules will ultimately depend on the legal background of the judges who are given sufficient discretion to conduct trials in accordance with their own preferences'. Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 *Int Crim Law Rev* 1, 32.