From ‘Common Law’ Towards ‘Civil Law’:
The Evolution of the ICTY Rules of Procedure and Evidence

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Keywords: civil law; common law; procedural reform; ICTY.

Abstract. As a result of the perception that trials at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) are too lengthy, a discernible shift in the trial practice of the ICTY is occurring, with a greater emphasis on the role that the judges play in controlling the proceedings. While the first few trials at the Tribunal closely resembled common law criminal trials, the level of control being exercised by the Trial Chambers in recent cases is moving more in the direction of the civil law approach. As a result, a truly mixed jurisdiction, that is, one that contains elements of both the common law and the civil law, is emerging. This evolutionary process will be examined in the context of: (1) The Rules of Procedure and Evidence and amendments thereto concerning case management; (2) examples of case management under the amended Rules; and (3) the future evolution of the ICTY.

1. INTRODUCTION

A discernible shift in the trial practice of the International Criminal Tribunal for the former Yugoslavia (hereinafter ‘ICTY’ or ‘the Tribunal’) is occurring, with a greater emphasis on the role that the judges play in controlling the proceedings.¹ The second President of the ICTY, Judge Gabrielle Kirk McDonald, has written that the Tribunal’s Rules of Procedure and Evidence (hereinafter ‘RPE’ or ‘Rules’)² “are truly unique and are not simply a hybrid of the civil and common law systems.”³ This is certainly true, but it does not necessarily follow that the judicial approach taken to trials, as reflected in the Rules and practice of the ICTY,
does not reflect (to varying degrees) one or the other of these two primary legal traditions.

While the first few trials at the Tribunal closely resembled common law criminal trials, the level of control being exercised by the Trial Chambers in recent cases is moving more in the direction of the civil law approach. As a result, a truly mixed jurisdiction, that is, one that contains elements of both the common law and the civil law, is emerging. The Tribunal will never become a civil law institution since the Statute contains clear references to certain adversarial or common law elements, but the practice of the ICTY is clearly moving in that direction from the more common law centred approach that dominated the early practice of the Tribunal.

This evolutionary process is being driven, to a large extent, by the perception that trials at the ICTY are too lengthy and that the best way to rectify the situation is to provide the judges with more authority to control the proceedings, thus reducing the length of trials. Under the rubric of improving case management, this course has been on-going for at least two years, since the 18th Plenary in July 1998. The practice of the Trial Chambers in the subsequent years have demonstrated that the judges have embraced the ‘hands-on’ approach reflected in the more recent amend-

4. For example, Art. 16(1) of the ICTY Statute vests in the prosecutor, rather than the judges, the responsibility for investigation and prosecution functions, which ensures that the judges will never fully control the presentation of the cases that they hear. Other examples include Art. 21(4)(c), which guarantees the accused the right to cross-examine the witnesses against him. The ICTY Statute is available at: http://www.un.org/icty/basic/statute/statute.htm.


6. The Judges who were interviewed by the Group of Experts established to review the effectiveness of the ICTY and ICTR, see infra, discussion at Section D, “expressed the belief that the prolonged nature of Tribunal proceedings was attributable to a significant degree to not enough control having been exercised over the proceedings by the Judges, and also the manner in which the Prosecution and Defence presented their cases.” See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal [sic] for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (hereinafter ‘Experts’ Report’), A/54/634 (22 November 1999), para. 77.

ments to the RPE. This process may also reflect the fact that the third president of the Tribunal, Judge Claude Jorda, is from France, a leading civil law jurisdiction.8

This analysis examines the evolution of the RPE and trial practice before the ICTY from a system primarily driven by the parties, as in most common law jurisdictions, to one in which the judges play a more active role, akin to that found in the civil law tradition.9 In many civil law jurisdictions, there are no rules of evidence, no cross-examinations, no objections and few (or no) motions filed by the parties. Judges have sole discretion regarding what evidence to accept and which witnesses to summon and the judges typically conduct the examination of the witnesses.10 In contrast to the position of the prosecutor in most common law systems, the office of the prosecutor in most civil law countries is a judicial post.11

8. Moreover, the Presiding Judge of Trial Chamber I is from Portugal, another civil law jurisdiction. It should be noted however, that Judge May, from the United Kingdom, presides over the Rules Committee and other judges from common law jurisdictions appear to readily accept many of the changes that are underway.

9. As noted by one commentator, “Judges are at the center of the civil law system,” Philippe Bruno, The Common Law from a Civil Lawyer’s Perspective, in R. Danner & M. Bernal, (Eds.), Introduction to Foreign Legal Systems, at 5 (1994). A cautionary note of explanation is in order prior to commencing this examination. Virtually every legal system in the world is a hybrid of both the common law and civil law traditions. That is, there is simply no such thing as a ‘pure’ common law or ‘pure’ civil law jurisdiction. Moreover, among comparative legal scholars there are several criteria for classifying legal systems and contrasting the common law from the civil law. For example, one scholar lists the following methodologies: race and language; culture; content of the substantive law; ideology, philosophy, conceptions of justice and legal technique; historical origins; and juristic style. See P. de Cruz, A Modern Approach to Comparative Law, para. 2.1.3, 29–30 (1993). Moreover, there are wide differences between states within both the common law and civil law worlds and most systems are hybrids of the two main legal traditions. Thus, care must be taken when attempting to make generalizations about any legal system. This analysis uses a basic formula for distinguishing between common law and civil law approaches. As used in this article, ‘common law’ refers to a system of criminal justice in which the parties play the primary role in advancing their theory of the case within the context of highly technical rules of evidence. The common law judge largely takes a ‘hands-off’ approach, intervening only to issue rulings on motions filed by the parties or on objections raised by one party to the actions of the other party. By contrast, and as used in this article, ‘civil law’ refers to those legal systems in which the investigating judge (or magistrate) plays a significant role in criminal proceedings, often summoning witnesses and reviewing the dossier containing all the evidence prior to trial. Civil law systems generally have highly technical procedural rules, but few evidentiary rules, reflecting the fact that professional judges, rather than juries, are the triers of fact. Historically, the role of the prosecutor in most civil law jurisdictions was undertaken by an investigating judge or examining magistrate. This individual was empowered both to gather evidence and make the initial finding of guilt or innocence. Some civil law jurisdictions still follow this system. See M. Damaška, The Faces of Justice and State Authority, at 183 (1986).

10. For example, in France, there are two branches of the judiciary, the ‘sitting judiciary’ (magistrature assise), composed of the examining magistrates and trial judges, and the ‘standing judiciary’ (magistrature debout), the prosecutors. See R. Vogler, Criminal Procedure in France, in J. Hatchard, B. Huber & R. Vogler (Eds.), Comparative Criminal Procedure, section 6.2.1, 62 (1996).

11. See Bruno, supra note 9, at 5–7.
This evolutionary process will be examined in the context of: (1) The RPE and amendments thereto concerning case management; (2) examples of case management under the amended Rules; and (3) the future evolution of the ICTY, particularly in light of the recent process initiated by the recent Report of the Group of Experts and the recommendations contained therein for future amendments and the resulting reform programme proposed by ICTY President Jorda.

2. **The RPE and Amendments Thereto**

As originally adopted on 11 February 1994, the Tribunal’s RPE contained 125 rules. On 18 occasions since the RPE were initially adopted, the judges have amended the rules and adopted new rules. Following the most recent plenary, held in July 2001, the RPE now contain 153 rules, an increase of nearly 25 per cent from the original version. Many of these amendments and new rules pertain to case management and represent an attempt to reduce the length of trials conducted at the ICTY, while simultaneously preserving the right of the accused to a fair and expeditious trial, pursuant to Articles 20 and 21 of the Statute.

The ICTY judges have publicly acknowledged the problems associated with the lengths of trials and have adopted a number of amendments to the RPE in order to alleviate the problem. Moreover, they have brought the issue to the attention of the delegates of the ICC PrepComm in the hopes that the ICC will not be plagued with similar difficulties. The process of amending the Rules in order to achieve the goals of improving case management and thereby expediting trials began in earnest at the 18th Plenary held on 9–10 July 1998, when six new rules were added and

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14. Art. 15 of the Statute of the ICTY empowers the judges to adopt the RPE, while Rule 6 governs the procedural aspects of amending the Rules.


16. See, e.g., the seventh Annual Report of the ICTY, A/55/273–S/2000/777, 7 August 2000, at *inter alia*, para. 7: “[T]he Tribunal must find new ways of working that will enable it to try all of the accused within a reasonable time.” See also Address of President Gabrielle Kirk McDonald to the UN General Assembly on 19 November 1998, *ad passim*.

17. See, e.g., the remarks of Judge Richard May at Fourth Session of the ICC PrepComm released as ICTY Press Release JL/PIS/479-E, available on the ICTY website at http://www.un.org/icty/pressreal/p479-e. The ICTY judges, in conjunction with the prosecutor, are attempting to further refine the Rules to rectify the problem. Under the leadership of President Jorda, the ICTY will hold an annual plenary dedicated exclusively to judicial management issues. See ICTY Press Release CC-JL/PIS/491-E, 18 April 2000 (available at http://www.un.org/icty/pressreal/p491-e) regarding the extraordinary plenary held to discuss the long-term judicial strategy of the ICTY.

18. These amendments were first reflected in Revision 13 of the Rules, which is available on the ICTY website. See supra note 2.

19. Rules 65ter, 73bis, 73ter, 74bis, 94bis, and 98ter.
25 others amended.\textsuperscript{20} One of the precipitating factors in favour of these changes was the relatively rapid growth in the number of accused in custody at the Tribunal in 1997 and early 1998, which put pressure on the Trial Chambers to accelerate the trial process.\textsuperscript{21} A thorough analysis of the RPE as amended is beyond the scope of this article, which will discuss several examples of the rules to illustrate the point that the practice of the Tribunal is moving in the direction of greater judicial control over the proceedings.

Of the new rules governing pre-trial matters, several merit brief description for purposes of the present analysis.\textsuperscript{22} Rule 65\textit{ter} authorizes the appointment of a pre-trial judge with responsibility for all pre-trial matters, including pre-trial filings.\textsuperscript{23} Under Rule 65\textit{ter}(E), after disclosure is complete and all preliminary motions are disposed of, the prosecutor is required to file several documents, including a pre-trial brief, witness list, documentary evidence list, and lists of contested matters and admissions of the parties.\textsuperscript{24} Pursuant to this rule, the pre-trial judge assumes greater control over moving the parties towards narrowing the issues for trial.

\begin{itemize}
  \item The following rules were amended: 11bis, 15, 45, 47(F), 50, 62bis, 65, 66, 72, 73, 77, 85, 86, 87, 88 (also moved), 88bis (also moved), 90, 94, 99, 100, 101, 102, 103, 108bis, and 111.
  \item From the arrival at the UN Detention Unit of Duško Tadić, on 24 April 1995, until 13 June 1996, the Detention Unit held a total of eight individuals (including Đorđe Đukić, who was provisionally released on 24 April 1996, and subsequently died prior to trial). Between 28 April 1997 and 15 June 1998, however, the population of the Detention Unit grew to 29 with the arrest or voluntary surrender of 22 additional indictees.
  \item Many of these practices are also becoming commonly utilized in adversarial systems, reflecting the growing convergence in general between the common law and civil law traditions.
  \item In at least one appeal, namely the Čelebići case, \textit{supra} note 5, the Presiding Judge appointed a Pre-Appeals Judge, based on the provisions of Rule 65\textit{ter} and Rule 107, which states that “the Rules of Procedure and Evidence that govern trial proceedings shall apply \textit{mutatis mutandis} to proceedings in the Appeals Chamber.” \textit{See} Prosecutor \textit{v.} Delalić and Others, Order Appointing a Pre-Appeal Judge, Case No. IT-96-21-A, Appeals Chamber, 12 October 1999.
  \item Pursuant to Rule 65\textit{ter}(E), the following documents must be filed by the prosecutor prior to the pre-trial Conference:
    \begin{enumerate}
      \item a pre-trial brief addressing the factual and legal issues, including a written statement setting out the nature of his or her case;
      \item admissions by the parties and a statement of matters which are not in dispute;
      \item a statement of contested matters of fact and law;
      \item a list of witnesses the Prosecutor intends to call with:
        \begin{enumerate}
          \item the name or pseudonym of each witness;
          \item a summary of the facts on which each witness will testify;
          \item the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; and the estimated length of time required for each witness; and a list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity.
        \end{enumerate}
    \end{enumerate}
    After the prosecution has complied with these filings, the pre-trial judge will order the defence to file a pre-trial brief, pursuant to Rule 65\textit{ter}(F). Following the close of the prosecution case, and prior to the commencement of its case, the defence is required to file lists setting forth defence witnesses and exhibits. \textit{See} Rule 65\textit{ter}(G).
\end{itemize}
Moreover, the pre-trial judge is empowered to “give directions to the parties requiring them to meet and discuss the issues relevant to the preparation of the case for trial” in order for the prosecutor to comply with sub-rules E(ii), (iii), and (v).25

Rule 73bis and Rule 73ter, which require pre-trial and pre-defence conferences, respectively, are also important in terms of pre-trial case management. Under sub-paragraphs (C) of these Rules, the Trial Chamber may call upon the parties to reduce the number of witnesses if the Trial Chamber considers the expected testimony to be cumulative, although Rule 73bis(D) and Rule 73ter(D) permit the prosecutor and defence, respectively, to file motions seeking to reinstate witnesses or to vary their decision as to which witnesses should be called. These Rules vest in the Trial Chamber important powers with respect to how the parties decide to prove their cases and represent a shift towards the approach taken in most civil law jurisdictions, whereby the judge typically decides which witnesses to call and determine the scope of the testimony.

Similarly, several rules governing trial procedure were amended with the consequence that the Trial Chamber assumes greater control over the course of the proceedings. For example, two amendments made to Rule 90, which governs witness testimony, permit the Trial Chamber to exercise control over the mode and order of examining witnesses and presenting evidence. Sub-rule 90(G) was added giving the Trial Chamber ‘control over the mode and order of interrogating witnesses and presenting evidence’ in order to ascertain the truth and “avoid needless consumption of time.”26 Sub-rule 90(H) was added, including sub-paragraph (i) limiting cross-examination to subjects covered in the opposing party’s direct examination, unless the Trial Chamber extends the scope of the cross-examination.27 Sub-rule 90(H)(ii) attempts to obviate the necessity of recalling witnesses who can provide evidence relevant to the case for the cross-examining party.28

Rule 87(C)29 was also added to permit the Trial Chamber to render one combined verdict, including sentence. Thus, in cases where the accused is found guilty of at least one offence, there is no need for a separate sentencing hearing, and the parties are therefore permitted to introduce

25. Rule 65ter(E).
26. Rule 90(G).
27. Rule 90(H)(i). Similar rules exist in many common law jurisdictions.
28. Rule 90(H)(ii) states: “In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by that witness.”
29. As amended, Rule 87(C) provides: “If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilty.”
evidence that is relevant only for purposes of sentencing during the trial and prior to conviction.\textsuperscript{30}

At the 20th Plenary, Rule 84\textit{bis}, which governs statements of the accused prior to the presentation of the prosecutor’s case, was adopted.\textsuperscript{31} This Rule has its origins in the civil law tradition, in which the accused is often called upon, at the outset of the trial, to provide the examining magistrate or prosecutor with his or her version of the events in question.\textsuperscript{32} It should be noted that pursuant to Rule 84\textit{bis} the accused may only make such a statement at the discretion of the Trial Chamber and there is no requirement that the statement is given under oath. In the event the accused opts not to take the oath, the prosecution or the Trial Chamber may not question him on the contents of his statement.\textsuperscript{33}

Since its adoption, this Rule has been invoked in at least one case, although the accused opted to make their statements under oath and were thus subject to cross-examination. In \textit{Prosecutor v. Kvočka and Others (Omarska case)},\textsuperscript{34} the Trial Chamber permitted two of the five accused to testify under oath immediately after the prosecution’s opening statement, but prior to the commencement of the prosecution’s case. Because the accused were under oath, the prosecution will have the opportunity to cross-examine them. However, in an interesting development, the prosecution sought – and was granted in an oral decision on 24 February 2000 – permission from the Trial Chamber to defer its cross-examination of these accused until the defence’s case began.

It should also be noted that in the trial of General Blaškić, the accused made a statement in his own defence following the prosecutor’s case. During the course of his testimony, he confirmed many of the facts that the prosecution had established during its case-in-chief, through voluminous documentary evidence and exhibits and lengthy witness

\textsuperscript{30} This new sub-rule required amendments to several others rules as well. For example, new Rule 85(A)(vi) permits the introduction at trial of any relevant information which may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty of one or more of the charges in the indictment. Rule 86 has similarly been clarified to permit the defence to make a closing argument whether or not the prosecution has done so, and to permit the parties to address sentencing matters in their closing arguments.

\textsuperscript{31} Rule 84\textit{bis}(A) states: After the opening statements of the parties or, if the Defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

\textsuperscript{32} By utilizing this technique, the examining magistrate has greater insight into the defence that the accused will raise and therefore is better suited to determine which witnesses should be called. This approach can have the effect of narrowing the contentious issues for trial and eliminating matters that are not relevant, thus greatly reducing the scope – and length – of the trial.

\textsuperscript{33} Rule 84\textit{bis}(B) provides that the Trial Chamber “shall decide on the probative value, if any, of the statement” of the accused.

\textsuperscript{34} Case No. IT-98-30/1.
testimony. Had Rule 84bis been in effect at the time of this trial, and had General Blaškić taken advantage of that rule, it is likely that his trial would have been considerably shorter than the two years that it otherwise consumed.35

3. EXAMPLES OF CASE MANAGEMENT UNDER THE AMENDED RULES

The practice under the Rules that were amended for the express purpose of expediting trials through more efficient case management have already had an impact on the routine handling of cases. It is now fully established that the parties will appear in a series of Rule 65bis Status Conferences in the pre-trial stage,36 with the filing of the Rule 65ter ‘package’ of documents37 prior to the Rule 73bis Pre-Trial Conference shortly before the case commences. However, because Rule 65ter(B) empowers the pre-trial judge to “take any measure necessary to prepare the case for a fair and expeditious trial,” the pre-trial judge may assume extraordinary authority to shorten the length of the proceedings. Whether an individual judge opts to do so depends on that judge’s caseload, judicial philosophy, temperament and professional background and experience. A few examples from the recent pre-trial Conference in the Krnojelac case38 will demonstrate this point. The pre-trial judge in the case, Judge Hunt (from Australia), in presiding over the Rule 73bis Pre-Trial Conference several days before the trial commenced, accomplished the following, inter alia:

1. Obtained the consent of the defence to allow the prosecution to tender witness statements rather than calling numerous witnesses to testify solely on the fact that some of the victims in the case are dead;39

35. See Experts’ Report, supra note 6, at para. 87.
36. This rule provides for such conferences within 120 days after the initial appearance of the accused and further conferences every 120 days thereafter.
37. See, e.g., Prosecutor v. Sikirica, Kolundžija and Došen, Scheduling Order, Case No. IT-95-8, T.Ch. III, 22 September 2000 (hereinafter ‘Keraterm case’) for a typical Rule 65ter scheduling order. Pursuant to this order, the prosecutor filed the following documents on 13 October 2000:
1. Prosecutor’s Second Revised Pre-Trial Brief;
2. Prosecutor’s Statement of Admissions of the Parties and Matters Not in Dispute Pursuant to Rule 65ter(E)(ii);
3. Prosecutor’s Statement of Contested Matters of Fact and Law Pursuant to Rule 65ter(E)(iii);
4. Prosecutor’s Amended Witness List Pursuant to Rule 65ter(E)(iv); and
5. Prosecutor’s List of Exhibits Pursuant to Rule 65ter(E)(v).
2. Elicited several admissions from the defence, notwithstanding the fact that the prosecution had previously requested the defence to admit to those very facts without success;\(^40\)

3. Encouraged the prosecution to withdraw the counts under Article 2 of the Statute, on the grounds that establishing that there was an international armed conflict (a jurisdictional element for that offence) would be too time consuming in light of the fact that similar counts were charged under Articles 3 and 5 of the Statute;\(^41\)

4. Encouraged the prosecution to reduce the number of witnesses with respect to several charges;\(^42\)

5. Encouraged the parties to work out an arrangement whereby the testimony of witnesses who had previously testified at the Tribunal in another case could be tendered through their transcripts, with the witness appearing solely for the purpose of cross-examination;\(^43\)

6. Allowed the prosecution to submit 11 trial binders containing 393 evidentiary items.\(^44\)

Taken together, these steps – which reflect an active approach to case management – will undoubtedly reduce the length of the proceedings in this trial.

In several cases, the pre-trial judge has directed the parties to intensify their efforts to agree to matters of fact and law in an effort to reduce the number of contested issues that must be dealt with at trial. For example, in one case the pre-trial judge raised the issue of agreement between the parties on these matters on several occasions, including during the two Status Conferences and at the Pre-Trial Conference and also directed the parties to consult with each other prior to filing motions.\(^45\)

Pre-trial judges in other cases have shown a willingness to move beyond issues relating solely to reducing the length of trials, however. For example, in the Keraterm case, the pre-trial judge ordered the prosecution, at a Status Conference held on 7 June 2000, to file a new Rule 65ter Pre-Trial Brief on the grounds that the previously filed Pre-Trial Brief was too theoretical and stressed the law rather than presenting an analysis of

\(^{40}\) Id.

\(^{41}\) Id. On 27 October 2000, the prosecution filed a motion requesting the withdrawal of the Art. 2 charges. See supra note 38.

\(^{42}\) Krnojelac Transcripts, 26 October 2000, supra note 38.

\(^{43}\) Id. This approach is consistent with the Appeals Chamber ruling on the Aleksovski evidentiary appeal. See Prosecutor v. Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Appeals Chamber, 16 February 1999. It is also analogous to the approach taken by the Group of Experts who recommend the use of prepared testimony as a means of expediting trials. See, e.g., Experts’ Report, supra note 6, inter alia, para. 88 and Recommendation 12.

\(^{44}\) Krnojelac Transcripts, 26 October 2000, supra note 38.

\(^{45}\) Unfortunately, these proceedings occurred during a closed session and it is not possible to cite to them.
the evidence which the Prosecution anticipated would support the charges
alleged in the indictment.46

A final example relates to rebuttal evidence, pursuant to Rule 85(A)(iii),
and has arisen in several cases, most recently in Prosecutor v. Kordić and
Čerkez.47 In that case, the prosecution sought to elicit the testimony of 27
rebuttal witnesses, including affidavits or formal statements in lieu of the
viva voce testimony of some of those witnesses. In order to expedite the
trial, The Trial Chamber refused to allow the prosecution to call that many
witnesses, ordering that “only highly probative evidence on a significant
issue in response to Defence evidence and not merely reinforcing the
Prosecution case-in-chief” would be permitted.48 In so holding, the Trial
Chamber also ruled that evidence “on peripheral and background issues”
would also be excluded.49

Many of these changes have the potential to severely impact upon the
rights of the accused, particularly those that may limit the ability of the
defence to mount vigorous cross-examination of prosecution witnesses. It
remains to be seen, of course, how many of these amended rules will be
interpreted and put into practice. At the very least, these proposals may
result in greater unity among defence counsel and may intensify their
efforts to establish an organized ICTY Defence Bar Association.

4. THE FUTURE OUTLOOK


Notwithstanding these attempts to improve case management at the ICTY,
and based on lingering perceptions that the trials were taking too long to
complete, the General Assembly requested the Secretary-General to
assemble a Group of Experts to study the functioning of ICTY and the
ICTR, and to make recommendations concerning improving the func-
tioning of the International Tribunals.50 The Expert Group made 46 such

46. See Keraterm Transcripts, 7 June 2000, supra note 37.
47. Case No. IT-95-14/2-T.
48. In so ruling, the Trial Chamber cited to the Tribunal’s practice relating to rebuttal evidence,
and concluded that in none of the cases, including Blaškić, did the rebuttal case last more
than five days. Kordić Transcripts, 18 October 2000. The Trial Chamber noted that the
present trial had begun in April 1999, and had already taken 222 days and at the time of
its ruling. The Trial Chamber had heard the testimony of 228 witnesses, including 115 for
the prosecution, and 3,213 exhibits had been tendered. The judges concluded that, “Against
this background, the Trial Chamber has to bear in mind the duty under the Statute to ensure
a fair and expeditious trial. In the Chamber’s view, to allow an extensive rebuttal case and
evidence would be to contravene that duty.” Kordić Transcripts, 18 October 2000, supra
note 47.
49. Id.
recommendations,51 many of which reflect the civil law tradition and will probably result in further amendments to the ICTY RPE at future Plenaries.52

For example, the Experts recommend that the ICTY consider whether the right of an accused who had voluntarily surrendered to be tried in person is waivable by the accused following his initial appearance. In the event this right is waivable, and if certain conditions are met,53 then the accused could be granted provisional release from pre-trial confinement and trial in absentia would be permitted in the event that the accused failed to return for trial.54 The ICTY judges have indicated that this proposal will be discussed,55 although the prosecutor opposes this idea.56

Another proposal by the Expert Group concerns requiring the accused to describe, in general terms, the nature of his defence57 and indicate “the matters on which he takes issue with the Prosecution and stating the reason in relation to each.”58 If the defence failed to do so or set forth inconsistent theories, or asserted a different theory at trial (without justification), the Trial Chamber could then “draw such inferences as appeared proper, i.e., whether a new defence was an afterthought or whether inconsistent

51. See supra note 6.
53. The three conditions are: (1) the accused had freely and knowingly consented to trial in absentia; (2) the personal circumstances of the accused, including character and integrity, as well as state guarantees for his appearance and other appropriate conditions were such that the likelihood of his not appearing for trial were minimal; and (3) defence counsel gave a solemn commitment binding themselves to participate in a trial in absentia, should one occur. See Experts’ Report, para. 54 and Recommendation 3.
54. Experts’ Report, supra note 6, at paras. 51–54 and Recommendation 3. In making this recommendation, the experts made reference to several civil law jurisdictions that permit trials in absentia. Id., para. 53. It should be pointed out that even among civil law jurisdictions, only a minority of states employ the trial in absentia procedure.
56. Id., at para. 7.
57. It should be pointed out that in most civil law jurisdictions, there really is not a ‘defence case’ as it exists in the common law. Because the judge(s) largely conduct the proceedings, the defence is not given the opportunity to present a case on its behalf. Rather, it is the duty of the judge(s) to thoroughly raise any exculpatory issues and determine whether they have merit. The role of the defence counsel is limited, to a certain extent, to commenting on the evidence during oral arguments.
58. Experts’ Report, supra note 6, at para. 89 and Recommendation 13. This proposal is a procedural analogy to the notion of permitting the accused to make a statement prior to the opening of the prosecution case and could also be a tool of narrowing the issues and even impact on the scope of the prosecutor’s disclosure obligations. See also n. 13 in the Experts’ Report.
defences signified a lack of confidence in either.⁵⁹ Although the judges have indicated Rule 65ter addresses this concern, further efforts to place greater responsibilities on the defence by ‘locking’ the accused into a set theory of the case early on in the proceedings may be necessary if all other attempts to expedite the trials fail.⁶⁰ Efforts to further limit the choices of the defence, as a means of improving effective case management, should be pursued only with great caution, since they have a potential to seriously hinder the right of the accused to a fair trial pursuant to Articles 20 and 21 of the Statute. For example, if the defence is limited to presenting a case based on a theory (or theories) set forth prior to trial and before the prosecution has lead its evidence, the right of the accused against self-incrimination may be thwarted. The accused may feel compelled to testify in order to avoid the Trial Chamber’s drawing a negative inference from his failure to elaborate upon the theory set forth at the pre-trial phase. Moreover, if the parameters of the prosecution’s disclosure requirements were established based on the accused’s pre-trial theory, as suggested by the Expert Group,⁶¹ this raises questions of the application of Rule 68, i.e., would the prosecution be required to disclose to the defence only that exculpatory evidence in its possession that relates to the defence(s) that the accused intends to rely on?

In addition, in order to reduce the length of trials, the Expert Group recommended consideration of the use of “prepared testimony,” which they defined as:

[W]ritten testimony submitted in advance in question-and-answer form, with an opportunity given to the other party later to object to questions, and the witness being later made available for cross-examination.⁶²

This proposal envisions that the written submissions of the witness would serve as a substitute for direct examination, with the witness appearing solely for purposes of cross-examination.⁶³

As an alternative to the use of prepared testimony, the experts recommend the use of a dossier, which would be prepared by the prosecution. This dossier would contain:

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⁵⁹. Id.
⁶⁰. Comments on the Experts’ Report, supra note 52, at para. 62. Moreover, as noted in the Comments of the ICTR, by placing additional restraints on the defence, there is a potential conflict with the principle that the burden of proof lies with the prosecution. Id., at para. 63.
⁶². Id., at para. 88 and Recommendation 12.
⁶³. Id., at para. 88.
[W]itness statements, with comments by the defence, to permit the selection of relevant witnesses by the Trial Chamber and admission of witness statements as documentary evidence.64

The ICTY judges objected to the use of the word ‘select’ in conjunction with the decision of which witnesses to call at trial,65 stating, “Judges may request the Office of the Prosecutor and the Defence to submit a list of their most relevant witnesses for approval. It is nonetheless the prerogative of the Defence and the Prosecution to bring their ‘best’ witnesses from this list.”66 The prosecutor, however, is a strong proponent of the dossier approach and seems to be of the view that moving even further in the direction of the civil law approach is warranted:

The Prosecutor considers that the key to reducing the length of trials is that the judge should be fully informed in advance about the case. In order to manage the proceedings efficiently judges should have the benefit of a complete dossier of evidence. On the basis, in agreement with the parties, the judges are then well placed to decide which witnesses need to be heard and which evidence can be admitted in writing or agreed by other means.67

To this end, the prosecutor has directed her trial attorneys to present a complete dossier to the trial chamber and defence counsel immediately after the initial appearance of the accused.68 As a result of this policy of the prosecutor, the volume of documents introduced, and even admitted, into evidence prior to trial has grown tremendously. For example, in the Keraterm case,69 the prosecution has successfully introduced into evidence more than 315 documents prior to trial.70 The dossier approach has been taken even one step farther in other cases. Similarly, in the case of Prosecutor v. Kunarac, Kovač and Vuković (Foča case),71 the prosecutor

64. Id. and Recommendation 12.
65. With the exception of instances in which Rule 98 is applied. Under this Rule, which has been in force since the original version of the RPE, the Trial Chamber may order either party to produce additional evidence or may proprio motu summon witnesses and order their attendance at the Tribunal.
67. Id., at para. 39. See also, id., at paras. 40–44.
68. Id., at para. 54.
69. See supra note 37.
70. See Prosecutor v. Došen and Kolundžija, Decision Granting Request for Admission of Documentary Evidence, Case No. IT-95-8-PT, T.Ch. III, 1 August 2000; Prosecutor v. Sikirića, Decision Granting Request for Admission of Documentary Evidence With Respect to Duško Sikirića, Case No. IT-95-8-PT, T.Ch. III, 22 September 2000; and Prosecutor v. Sikirića, Kolundžija and Došen, Decision Granting Prosecutions Additional Request for Admission of Documentary Evidence, Case No. IT-95-8-PT, T.Ch. III, 20 December 2000. The documents were admitted with the proviso that at trial, the defence may challenge the authenticity of any of the documents that have been admitted, with the prosecution being permitted to deal with any issues relating to authenticity by way of rebuttal. Taken together, these documents, which numbered into the hundreds of pages, filled five large binders.
71. Case No. IT-96-23 and Case No. IT-96-23/1.
provided the Trial Chamber and defence, prior to trial, with all the documents that the prosecution intended to introduce and copies of the written statements of all the witnesses that the prosecution intended to call. This permitted the judges to ask informed questions of the witnesses, in the event they chose to do so pursuant to Rule 85(B).72

It is not surprising that an emphasis will be placed on the role of documentary evidence in trials at the Tribunal, particularly with respect to cases involving senior political and military leaders. Documents play a much more important role in the trials of more senior leaders for several reasons, the most important of which is that unless an insider opts to testify against the senior leader on trial (which is highly unlikely), there will be no witness that can testify about the plans or policies that resulted in the offences alleged. However, through the production of enormous volumes of documents, certain patterns often emerge that can be used to draw the necessary inferences with respect to the guilt or innocence of the accused.73

Taken together, it is clear that the Tribunal is moving towards the use of a dossier as a means of reducing the length of trials. Notwithstanding the recent approach taken by certain Trial Chambers with respect to dossiers, and the prosecutor’s direction to her senior trial attorneys to provide such dossiers, however, one important distinction remains between typical civil law practice and the emerging practice of the ICTY in this respect. Namely, under the prevailing approach in most civil law countries, the dossier represents the entire evidentiary package concerning the crime(s) and the accused. That is, it contains both inculpatory and exculpatory information, and sets forth, in effect, all the information concerning the offence and the accused that is known to the examining magistrate or prosecutor. By contrast, the ‘document packages’ submitted in recent cases before the ICTY have not highlighted exculpatory evidence, and certainly does not necessarily contain evidence that might relate to any possible defences raised by the accused, such as alibi, mistake of identity or diminished mental capacity of the accused.74 As such, the

72. Rule 85(B) provides as follows: Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

73. The author would like to thank Fabricio Guariglia, of the OTP Appeals Section, for this helpful insight.

74. This is not to suggest that the evidence submitted to the Trial Chamber prior to trial does not contain exculpatory material, since such material is certainly contained in the documents and witness statements filed with the Trial Chamber. Such exculpatory material is not segregated or highlighted, however. For example, in the Foća trial, the Trial Chamber received, prior to trial, all of the witness statements taken by ICTY investigators of individuals that the prosecution called at trial. Several of these witness statements contained exculpatory information. The prosecution certainly was not duty-bound to call these exculpatory statements to the attention of the Trial Chamber. Moreover, under Rule 68, the prosecution has a duty to disclose to the defence all the exculpatory evidence in its possession prior to trial.
emerging dossier approach still retains certain components of the common law.  

4.2. The Jorda Report

Finally, the reform programme put forward by President Jorda, on behalf of the Tribunal judges to improve the effective operation of the ICTY, contains certain elements that reflect the civil law tradition. This programme has two fundamental components: the partial delegation of some of the pre-trial management functions to the senior legal officers of the Trial Chambers and the adoption of ad litem (or ad hoc) judges. Only the former proposal is relevant for purposes of this discussion.

Under this plan, which would require additional amendments to Rule 65ter, some of the currently existing powers of the pre-trial judge with respect to judicial administration, such as setting deadlines or taking testimony by way of deposition, would be delegated to the senior legal officers of the Trial Chambers. Any decisions going to jurisdictional issues, however, would be non-delegable and the full bench of judges would supervise the pre-trial activities of the senior legal officers. The senior legal officer would then produce a written report for the Trial Chamber, containing a summary of the procedural history, making specific

75. Namely, the parties still retain certain important roles in the presentation of their cases. For example, although the prosecution will now submit to the Trial Chamber documentary evidence and witness statements, the prosecution does not endeavour to provide the Trial Chamber with all the information relevant to the crime and the accused, but rather only that evidence which supports the prosecution’s theory of the case. Thus, it remains for the defence to submit exculpatory evidence and to call witnesses for the accused.


77. Since this proposed plan contemplates delegation of certain judicial functions to non-Judges in the context of improving pre-trial case management, it could be argued that the judges are contemplating using the senior legal officers as de facto ‘administrative judges,’ notwithstanding the fact that the judges maintain a supervisory role over the pre-trial functions carried out on a day-to-day basis by the senior legal officers. This would, in effect, create a de facto two-tiered judiciary, not unlike the structure that exists in certain civil law jurisdictions.

78. Jorda Report, supra note 76, at paras. 93–95. The concept of ad litem judges was also addressed in paras. 108 and Recommendation 21 of the Experts’ Report, supra note 6.

79. Such amendments would include simplifying the form of Status Conferences so that they could be held outside of the courtrooms with the senior legal officer presiding and the parties in attendance, with a court deputy taking a record of the proceedings. Jorda Report, supra note 76, at para. 99.

80. Under the existing Rules, depositions may be taken where it is in the interests of justice to do so, following a request of a party or proprio motu. The Trial Chamber appoints a presiding officer, which can be a senior legal officer, to conduct the deposition. See Rule 71.


82. Id., at paras. 97–98.
reference to, *inter alia*, the agreements reached by the parties on those points still in issue.83

5. **Conclusion**

There has been a noticeable shift in the practice of the ICTY from one in which the parties played the primary role in controlling their cases to one in which judicial control is assuming an ever-important role, although the parties will undoubtedly continue to play the major role in advancing their respective theories of the cases being tried. This approach, which had its genesis in the amendments made to the Rules at the 18th Plenary in July 1998, is noticeable through recent amendments to the Tribunal’s Rules and in the resulting trial practice. Moreover, as the judges continue to explore new options for improving case management, they are likely to be guided by some of the recommendations made in the Experts’ Report. This will, in all likelihood, accelerate the trend toward adopting procedures frequently associated with the civil law tradition, as a means of ensuring that the accused are provided with a fair – yet expeditious – trial. The Expert Group, referring to the Statutes of both International Criminal Tribunals, noted in its Report that:

The Statutes are largely, though not entirely, reflective of the common law adversarial system, and the future evolution of the Tribunals’ procedural jurisprudence, while necessarily complying with their Statutes, is apt to adopt aspects of the civil law model. In some respects, it seems to be doing so already.84

83. *Id.*, at para. 98 and n. 16.
84. Experts’ Report, *supra* note 6, at para. 82.