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Drawing the Missing Map: What Socio-legal Research Can Offer to International Criminal Trial Practice

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Abstract

The nature of international criminal trial practice is integral to the perception of the legitimacy of international criminal justice. However, our understanding of what transpires within the trial chambers of international courts and tribunals (ICTs) comes primarily from the reports of judges, lawyers, and stakeholders within the system. This article argues that, while the vast body of international criminal justice scholarship barely draws on socio-legal research, empirical work can contribute to a more objective understanding of international criminal trial practice. It examines prevailing academic approaches to the study of international trial practice as a backdrop to the assessment of data from one of the most expansive empirical studies of international trial practice, undertaken during the second mandate (1999–2003) of the International Criminal Tribunal for Rwanda (ICTR). The findings illustrate significant variations in how judges in different Trial Chambers chose to exercise discretion, revealing the co-existence of two distinct modalities of practice in 'proactive' and 'reactive' Trial Chambers. Quantitative and qualitative data allow for an assessment of the efficiency of these modalities, revealing the critical role of the performance of the judge in the trial process. It is argued that these findings highlight the potential for further socio-legal research to motivate 'light-touch reform' within the international criminal justice system.

Key words

international criminal trial practice; judges; International Criminal Tribunal for Rwanda (ICTR)

1. Introduction

The rapid evolution of international criminal law makes it a natural laboratory sitting at the intersection of law and the social sciences. However, this is barely reflected in the scholarship of the past two decades. This article is based on the author's experience of engaging in one of the most expansive empirical studies of international trial practice, undertaken during the second mandate (1999–2003) of the International Criminal Tribunal for Rwanda (ICTR), a period which witnessed a doubling of the judicial output of the tribunal.[1][2] The multiple issues involved in

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1 See R. Byrne, 'The New Public International Law and the Hidden Art of International Criminal Trial Practice', (2010) 25 Conn. J. Int.'l L. 243.

2 The mandates of the ICTR are measured by four-year periods: the first mandate was 1995–99, the second mandate 1993–2003, the third mandate 2003–7, the fourth 2007–11. For an overview of the judicial activity during the first and second mandates, see E. Møse, 'Main Achievements of the ICTR', (2005) 3 JICJ 920.

designing this trial observation study and in analysing the data it produced offer insights into how empirical socio-legal research can inform our understanding of aspects of trial practice that remain largely undocumented.

While of interest to scholars of international, comparative, and criminal law, socio-legal research may initially seem to be of limited value for those legal professionals entrusted with the delivery of fair and expeditious justice in international courts and tribunals (ICTs). Their task is a pressured one, since unlike practitioners in most municipal jurisdictions, international criminal lawyers must perform within courts whose legitimacy is questioned not only by observers on the outside, but by some actors within – as most disturbingly illustrated by the silenced proclamations of Alternative Judge Sow at the delivery of the verdict for Charles Taylor at the Special Court for Sierra Leone.[3] Yet the outside world, and even committed stakeholders, know very little of what transpires within the sanctified domain of the international courtroom. Once one departs from the formality of written decisions and judgments, our understanding of the dynamics of the trial process depends primarily upon the selective hearsay of the legal actors within the trial chamber.

Considering that the trial is, in the words of Judith Shklar, the 'supreme legalistic act',[4] reliance upon the hearsay of practitioners is a somewhat tenuous basis on which to assess the practices that happen within it. For these proceedings are the epicentre of the international criminal justice system, where the human dimension of atrocities is narrated via the presentation of oral testimonial evidence, and it is upon this that many of the century's most awaited verdicts rest. The integrity of this charged process is vested in the powers of the judge, who when presiding presents the 'face of justice' to the global audience.[5] While an awareness of the importance of the qualifications of those who assume the 'face' of international justice has now infiltrated selection procedures, we have limited awareness of how these judges perform in the difficult undertaking of presiding over international trials of

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3 Following the delivery of the Charles Taylor verdict by Trial Chamber II of the Special Court for Sierra Leone on 26 April 2012, the following statement is reported to have been made by Alternative Judge Sow from the bench, provoking the walkout of the permanent sitting judges in the trial and the turning off of his microphone:

> The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and, pursuant to the Rules, when there are no serious deliberations, the only place left for me is the courtroom. I won't get — because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, because for me under any mode of liability, under any accepted standard of proof, the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with all the values of international criminal justice, and I'm afraid the whole system is under grave danger of just losing all credibility, and I'm afraid this whole thing is headed for failure.

The statements of Judge Sow that were reported by witnesses in the public gallery were largely ignored by the general media. The controversy was discussed on international criminal law blog sites, including: www.internationallawbureau.com/blog/?p=4714; www.intlawgrrls.com/2012/04/judge-sows-struck-statement-reflections.html; humanrightsdoctorate.blogspot.fr/2012/04/charles-taylor-judgment-suggests-more.html; humanrightsdoctorate.blogspot.fr/2012/05/more-on-removal-of-judge-sow.html.

4 J. Shklar, *Legalism: Laws, Morals, and Political Trials* (1986), 144.

5 For two different approaches to comparative trial research that are framed by this metaphor, see S. Bedford, *The Faces of Justice: A Travellers Report* (1961); and M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

extreme crimes. As international criminal procedure remains quite rudimentary, this undertaking involves the exercise of judicial discretion in the absence of detailed rules. The discretion that is exercised by judges in their choices relating to the allocation of professional roles among legal actors within trials, particularly with respect to the examination of witnesses, has implications for the allocation of power between counsel and the bench. This, in turn, has consequences for the perceptions of fairness and the objectives of efficiency in trial proceedings.

International trial process remains integral to discussions of the legitimacy of international criminal justice. The distinction between the legitimacy of creation and that of performance,[6] as applied to institutions within the broader realm of global governance, explains the paradox of how the legitimacy of international criminal justice is challenged, despite a near universal consensus regarding the establishment of ICTs as part of the emerging global governance regime. Where legitimacy questions surface, not about the values and institutions of international justice, but in relation to its fair and efficient delivery, the trial becomes critical to the credibility of the legal system.

Our understanding of the implementation of the varied hybrid procedures adopted by the different ICTs in day-to-day practice is informed largely by the analysis we receive from judges and lawyers recounting their experiences within these historic trials. While informative, it is hard to divorce these perspectives from the professional roles and agendas of legal actors, be they prosecutor, defence counsel, judge, or human rights advocate.[7] Their views often demonstrate deeply conflicting opinions on the standard of justice delivered in ICTs. As the international criminal justice system matures, the small but welcome increase in empirical research on international criminal trials offers the prospect of moving from the impressionistic to a more measured analysis of the system at work.[8] However, even much of the qualitative empirical work rests on well-conducted interviews with legal actors, shaded by the perspectives of practitioners within the trial chamber. Likewise, the excellent research of non-governmental organizations, whose staff are among the few to have engaged in sustained attendance at international criminal trials, is focused on issues relevant to the mandates of advocacy organizations.[9]

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6 J. D'Aspremont and E. de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', (2011) 34 Fordham Int'l L.J. 190; A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', (2012) 25 JICJ 491.

7 See S. Bibas and W. Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', (2010) 59 Duke L.J. 637, 660–7 (arguing that ICTs are staffed 'exclusively' by international idealists, creating the need for a broader range of viewpoints within the international criminal justice system to guarantee the system's integrity).

8 For recent studies on international trials using quantitative and/or qualitative methods see M. Langer and J. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms', (2011) 36 Yale J. Int'l L. (2011), 241; N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010). Several excellent studies and reports have relied extensively upon qualitative research methods, reflecting the perspectives of international criminal practitioners. These include, J. I. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', (2008) 48 Va. J. Int'L L. 529.

9 For instance, the Human Rights Report analysis of the Charles Taylor Trial omits any mention of the proclamations of Judge Sow, *supra* note 3. While his statements have no formal legal significance, from the

This article describes the evolution of a trial observation project as a means of illustrating how socio-legal research might inform our understanding of international trial practice. Section 2 presents the approaches to analysing international trial practice that were dominant at the time the research began, and discusses other preliminary issues encountered when setting up the project at the ICTR. Section 3 presents a brief selection of some of the study's findings, based on both qualitative and quantitative data drawn from eight ICTR trials studied over an 18-month period between 2000 and 2002. This was the first period of activity in the Tribunal that witnessed multiple ongoing trials in the then three Trial Chambers of the Tribunal.[10] Section 4 concludes with reflections on the potential for further socio-legal research to motivate 'light-touch reform' within the international criminal justice system.

2. Approaching international criminal trial practice

Looking back at the empirical project exploring international criminal trial practice at the ICTR, it is striking that the most compelling reason then to adopt a methodology of both quantitative and qualitative trial observation would apply as readily if conducting a study today at the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Court (ICC). In 2000 the absence of both legal precedent and an elaborate legal framework for trial procedure meant that the Rules of Procedure and Evidence (RPE) offered only vague direction for the conduct of judges and lawyers within trial chambers. Proceedings in international criminal justice to establish individual accountability developed in the void that international law bequeathed, notwithstanding the procedural rules of IMT Nuremberg and IMTFE Tokyo that were so skeletal as to offer only limited solutions to the complex practical issues that needed to be addressed in the next generation of international criminal justice.[11]

A review of the 1999 report of the UN Expert Group that was appointed by the Secretary-General to review the ad hoc international criminal tribunals, and the first published study following the judgment of the Charles Taylor trial in July 2012,

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vantage point of an advocacy organization seeking to celebrate and constructively critique international justice, a reference to this credibility-impairing episode could be seen to undermine its objectives. See Human Rights Watch, 'Even a "Big Man" Must Face Justice: Lessons from the Trial of Charles Taylor', 25 July 2011, www.hrw.org/sites/default/files/reports/sierraLeone0712ForUpload.pdf.

10 The trials observed were: *Ferdinand Nahimana et al. v. Prosecutor*, Judgement, Case No. ICTR-99-52-A, 28 November 2007; *Prosecutor v. Ferdinand Nahimana et al.*, Summary, Case No. ICTR-99-52-T, 3 December 2003; *Prosecutor v. Ignace Bagilishema*, Judgement, Case No. ICTR-95-1A-T, 7 June 7 2001; *Prosecutor v. Juvénal Kajelijeli*, Judgement and Sentence, Case No. ICTR-98-44A-T, 1 December 2003; *Prosecutor v. Jean de Dieu Kamuhanda*, Judgement and Sentence, Case No. ICTR-99-54A-T, 22 January 2004; *Prosecutor v. André Ntagerura et al.*, Judgement, Case No. ICTR-99-46-T, 25 February, 2004; *Prosecutor* v. *Laurent Semanza*, Judgement, Case No. ICTR-97-20-T, 15 May 2003; *Prosecutor v. Elizaphan & Gérard Ntakirutimana*, Judgement and Sentence, Case No. ICTR-1996-10 & ICTR-1996-17-T, 21 February 2003; *Prosecutor v. Pauline Nyiramasuhuko et al.*, Judgement and Sentence, Case No. ICTR -98-42-T, 24 June 2011.

11 1945 London Charter of the International Military Tribunal at Nuremberg, 82 UNTS 279; 1946 International Military Tribunal for the Far East [IMTFE] Charter, 4 Bevans 21 (as amended 26 April 1946); SC Res. 955, Annex, UN Doc. S/RES/995 (1994). See E. 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?', (1999) 37 Col. J. Transnat'l Law 851.

both reveal a somewhat static portrait of the performance of international judges. The shortcomings in judicial performance, in particular an incapacity to focus testimonial evidence and manage examinations, are highlighted in both reports.[12] Alongside with the data presented in section 3 of this study, these reports, written 13 years apart, suggest that the development of aspects of day-to-day trial practice is cyclical rather than progressive.

The fact that practitioners, let alone researchers, still cannot rely upon a codification of international trial procedure with sufficiently detailed rules clearly depicting roles within the trial chamber can be explained by the way in which the RPEs have evolved across the tribunals.[13] The discord that one observes in the practice patterns across individual trial chambers in the ad hoc tribunals can be credited to the twin hallmarks of the formal rules: ambiguity regarding the scope and nature of legal roles within the trial, and wide discretion afforded to the judges collectively, as architects of the international justice system, and individually, as presiding judges of international trials.[14] This framework has been inherited by the Rules of the ICC Trial Chamber, and so the quest for a coherent, uniform trial practice is likely to persist. In the creation of the first courts, this latitude, familiar to the more organic features of Anglo-Saxon trial procedure, allowed the bench to adapt practice to respond effectively to the unforeseen challenges that would arise in the first international criminal trials. Ironically, after two decades of trial practice, when most challenges should be well anticipated, the continued codification of a trial practice with ambiguous roles and wide judicial discretion can be seen as a cause of, rather than a solution to, unforeseen trial challenges. A review of the credentials of the judges of the ICC reveals that 13 of the 18 judges have *no* direct experience with international criminal trial practice prior to their assumption of office.[15] This is a telling symptom of both the

12 In the 1999 report on the ad hoc tribunals, the Expert Group noted the need for the bench to better regulate the conduct of counsel. However, there were conflicting perspectives on the appropriate role of the bench in cutting off, limiting, or engaging in witness examinations. Chairman of the Advisory Committee on Administrative and Budgetary Questions, 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, UN Doc. A/54/634 (1999) (hereinafter UN Expert Group Report), paras. 76–77. The 2012 Human Rights Watch report on the lessons of the Charles Taylor Trial criticizes the limited management/interventions in examinations by Trial Chamber II of the SCSL, and recommends that in future trials the bench should focus testimony as this may contribute to more expeditious proceedings without compromising international fair-trial standards, *supra* note 9, at 7, 28.

13 See Rules of Procedure and Evidence (adopted 29 June 1995, as amended), Consolidated Text of 14 March 2008 (hereinafter ICTR Rules); Rules of Procedure and Evidence IT/32/Rev. 37 (6 July, 2006) (hereinafter ICTY Rules); See generally Rules of Procedure and Evidence IT/32/Rev. 37 (6 July 2006) 1998 Rome Statute of the International Criminal Court Art. 1, 2187 UNTS 3, 37 ILM. 999, Art. 64; Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 R. 69, 91, 140 (9 September 9 2002) (hereinafter ICC Rules).

14 For a discussion of the 'constructive ambiguity' of the ICC procedures adopted by the Rome Statute, see C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 JICJ 603, 605–6.

15 As of 11 March 11 2012, of the 18 judges of the ICC, not a single judge had acted as the presiding judge at a trial at any of the ICTs prior to being elected to the bench. Two candidates had served as permanent, but not 'presiding', judges at the ICTY: Judges Van Den Wyngaert (Belgium) and Howard Morrison (UK) (who also served as a judge for the Special Tribunal for the Lebanon); and one as an *ad litem* at the ICTR, Robert Fremr (Czech Republic). Two additional judges have experience as counsel and/or working within chambers at the ICTR and ICTY. Prior to assuming judicial office in The Hague, neither the current president of the ICC, nor the two serving vice-presidents had any prior judicial experience at any of the ICTs. For the biographical notes on current serving judges at the ICC see www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges.

transient nature of international service and the limitations of the selection criteria and political processes of selection. This situation is compounded by the difficulties of maintaining experienced lawyers at the ICTs, with staff retention at the ICC, like that at the ad hoc tribunals, a serious challenge.[16]

The existing rules and the exercise of wide judicial discretion allow individual trial chambers to function as a classic bipolar adversarial model; a tri-polar model with a proactive interventionist role for the bench;[17] and now, within the framework of the ICC, as a multi-polar model, with victim participation introducing yet another axis within the trial.[18]

In the pilot period of this research at the ICTR, the notion of a uniform international practice within the familiar framework of the 'international adversarial trial' soon dissipated, when witnessing the kaleidoscopic approach to the presentation of evidence and the role of the judge across Trial Chambers at the ICTR. The data in section 3 show that, depending upon which Trial Chamber one watched, there was a discernible difference in the roles of the judges and lawyers.

There were two prevailing explanations of this phenomenon at the time, emerging from different approaches to understanding international criminal trial practice.[19]

The first explanation was that the differences between practice in the different Trial Chambers could be attributed to the competency, skill, and style of the presiding judge.

The second explanation was that the variations represented the outcome of different hybrid combinations of the common-and civil-law influences on the trial process within the newly framed international adversarial trial.[20] The contest between the merits of these systemic approaches became a preoccupation of many international criminal legal practitioners. A variant of the prevalent common- and civil-law analysis of day-to-day international criminal trial practice was a discussion focused

16 Bibas and Burke-White, *supra* note 7, 664.

17 See Rome Statute, *supra* note 13, Arts. 64, 69(3). These provisions reflect the developments in the context of the ICTR and ICTY regarding the powers of the judge, in particular Rule 90(G) of the ICTR Rules, and Rule 90(F) of the ICTY Rules, which provide that the Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence. ICTR Rules, *supra* note 13, R. 90(G); ICTY Rules, *supra* note 13, R. 90(F). Rule 98 of the ICTR and Rule 98 of the ICTY Rules grant the chambers the power to order the production of admissible evidence. ICTR Rules, *supra* note 13, R. 98; ICTY Rules, *supra* note 13, R. 98. See generally F. Terrier, 'Powers of the Trial Chamber', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 3 (2002) 1259, at 1272.

18 The Rome Statute provides the possibility for victims to participate personally or through a legal representative in the procedure relating to the trial of accused persons, and provides a right to victims to make an order for reparations against the accused. Rome Statute, *supra* note 13, Arts. 19(3), 68(3), 75; ICC Rules, *supra* note 13, R. 89–99. Similar provisions related to the roles and rights of victims are absent from the statutes and rules of the ICTR and ICTY, aside from the possibility of obtaining restitution for property. ICTR Statute, *supra* note 12, Art. 23(3); ICTY Statute, *supra* note 12, Art. 24(3); ICTR Rules, *supra* note 13, R. 85, 106; ICTY Rules, *supra* note 13, R. 85, 106.

19 Byrne, *supra* note 1, at 255–7.

20 A. Orie, 'Accusatorial v. Inquisitorial Approach in International Law Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, 1439–97; S. Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice', (2004) 2 JICJ 526, 530–1; R. May and M. Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', (1998–1999) 37 Colum J. Transnat'l L. 725; D. M. Amann, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context', (2000) 75 Ind. L.J. 809.

upon the national legal tradition of the participants in international criminal trials and its influence on their performance in the Trial Chambers. While regarded by some scholars as sterile, this approach dominated much of the early international legal writings, and the discourse of many practitioners.[21]

A third potential explanation, which was, however, rooted in socio-legal scholarship rather than international legal commentary, intersected with debates on common and civil law. It focused on the struggles between power and authority invited by respective approaches to trial process.[22] The lens offered by the paradigms of common and civil law easily overshadowed discussions of the more complex contest over the control of the presentation of evidence that is played out through courtroom roles. In any system, as Doran and Jackson illustrate in their seminal work on the Diplock trials in Northern Ireland, implicit in the roles in the courtroom is a foundational allocation of power, between judges and counsel, witnesses, and the accused.[23] Trials are interactive by nature: when rules are changed, there is a shift in the allocation of authority between the parties.[24]

A fourth potential explanation provides a more technocratic prism through which to understand practice developments. Langer's analysis of the 'managerial judge' in international trial chambers of the ICTY during its second stage (1998–2003) comes closest to embracing the role demanded of, if far from realized by, the bench in these trials within a larger procedural paradigm.[25] Managerial judging, a term coined from American civil procedure that Langer transposes to the realm of international criminal justice, is a broader procedural 'system' that 'conceives procedure as a device that the court, with the parties' assistance, wields to expedite process'.[26] Langer's in-depth analysis of the ICTY procedural rules emphasizes the limitations of the optic of adversarial and inquisitorial law for interpreting international criminal trial process. He points out that the adoption of managerial judging was driven by the practical needs of the court, rather than by the dominance of common-over civil-law actors.[27]

In transposing the paradigm of Langer's managerial judge to understanding the trials under way at the ICTR, the variations across Trial Chambers reflect the differing degrees to which a judge is actively managing, and hence expediting, the proceedings. Amongst the initial legacies of the adoption of an adversarial system is the preference for the oral production of evidence. The movement towards managerial judging attempted to address the considerable challenges caused by this for the cumbersome pace and management of international criminal trials.[28] The powers to control the

21 M. Langer, 'The Rise of Managerial Judging in International Criminal Law', (2005) 53 Am. J. Comp. L. 835, 869–70. For an alternative paradigm for international evidentiary processes, see J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Accusatorial–Inquisitorial Dichotomy', (2009) 7 JICJ 17.
22 Byrne, *supra* note 1, 253–5.
23 J. Jackson and S. Doran, (1995) *Judge without Jury: Diplock Trials in the Adversary System*, at 7–8.
24 Ibid., at 207.
25 M. Langer, *supra* note 21.
26 Ibid., at 836, 874–6; see generally J. Resnik, 'Managerial Judges', (1982) 96 *Harvard Law Review* 374.
27 Langer, *supra* note 21, at 837, 857–8.
28 Ibid., at 873–4.

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order and interrogation of witnesses pursuant to Rule 90 are among the many pre-trial and trial procedural mechanisms that allow judges (but do not compel them) to more expeditiously manage trials.[29]

In 2010, five years after the publication of his first article on managerial judging, Langer, with Doherty, completed an extensive empirical assessment of the main procedural innovations introduced to expedite trials at the ICTY. Strikingly, the study concluded that the system of 'managerial judging' had failed to accelerate proceedings, as reforms made proceedings longer

> by introducing new procedural steps, requirements, and work without delivering promised results, such as a lower numbers of incidents under discussion at trial, fewer live witnesses testifying at trial, or fewer interlocutory appeals entertained by the appeals chamber. The reforms did not deliver these promised results because ICTY judges either did not use their managerial powers or used them deficiently, enabling the parties to neutralize the implementation of the reforms.[30]

In effect, this socio-legal research illustrates how managerial powers granted to judges have not been fully exercised to the detriment of reform objectives. Judicial discretion in trial management at the ICTY, as documented by Langer and Doherty, led to the unintended effect of slowing rather than speeding up proceedings. The ICTR research presented in this article addresses more specifically variations in how judges in different Trial Chambers chose to exercise discretion, and the effect that these variations have on trial efficiency.

2.1. Legitimacy and Trial Process

Perceptions of fairness are the first casualty of distrust over the allocation of power amongst legal actors. This distrust is further exacerbated when, as observers of the International Court of Justice observed many decades ago when it confronted its own confidence crisis involving the newly independent states from the developing world, the conceptual language of the court and its practices are foreign to those that appear before it.[31] On the macro level, familiar assertions of bias in the politicized realm of international criminal justice have focused dramatically on mantras of victors' justice, selective prosecutions, or justice as an instrument of neo-colonialism, to name a few.[32] It is not surprising that these allegations are recast within the international trial chambers to reflect the misgivings of those within the trial process, including the roles and rights that they are designated. The accused, and some among the counsel that represent them, share a conviction that the trial proceedings are but the implementation of a machinery to convict, undermining justice to serve the broader global interests of the 'international community' or the hegemonic powers whose interests the international community is seen to represent. Others may possess a less encompassing theory of conspiracy, but may nonetheless perceive that the equilibrium of the scales of justice is askew at the international criminal

29 Ibid., at 888–9.
30 Langer and Doherty, *supra* note 8, 243.
31 L. V. Prott, *The Latent Power of Culture and the International Judge* (1979), 157.
32 R. Byrne, 'Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda', (2006) 14 *European Review* 485, 487–8.

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tribunals, given inter alia the nature of the atrocities involved, the intense level of international interest in convictions of the accused, and the active engagement of advocacy groups in both observing and assisting the courts.

One of the most visible triggers prompting doubts about even-handed treatment in the trial chamber is the conduct of the judge: for example, the degree and nature of the interventions the bench makes towards the OTP or the defence, or its engagement with the process of the examination of witnesses. However, this conduct is opaque to outside observers, being buried within the thousands of pages of trial transcripts.

One of the primary questions driving this research was that of whether unclear and shifting roles of judges and lawyers across Trial Chambers created distinctive modalities of trial management and if so, what their respective implications might be. Typically, instructions from the bench in relation to trial practice, the presentation of evidence, and appropriate examination techniques are provided somewhat extemporaneously in the course of proceedings.[33] The study observed an extreme variation in the capacity of judges to provide, and of counsel to accept, these guidelines. [34] While efficiency remains at the forefront of discussions of trial management, the inherent struggles that played out in respective Trial Chambers were not detached from underlying matters of authority and power and, consequentially, perceptions of fairness.

2.2. The quest for a neutral means of observation

The common tribunal corridor explanation for most of what occurs in an international criminal courtroom has to do with whether the trial is presided over by a 'good' or a 'bad' judge. The criteria of the ICC for the international criminal law judge relate to character, qualifications for appointment to high judicial office, and specialized expertise.[35] For all of the advocacy efforts to improve the quality of the occupants of these critical posts, there is no measure of how adept any of the candidates might be in the core function most will perform: managing a complex international trial and overseeing the process of eliciting oral testimonial evidence of extreme crimes that will constitute the core evidence entered into the record to render determinations of innocence or guilt. However, it is very difficult to assess the day-to-day performance of the international judge, since the dignity of the office and the secrecy of proceedings in chambers form a formidable ring fence hampering critical engagement. Assessing performance thus tends to rely on formal jurisprudence and informal hearsay amongst various stakeholders.

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33 See generally M. B. Harmon, 'The Pre-Trial Process at the ICTY as a Means for Ensuring Expeditious Trials: A Potential Unrealized', (2007) 5 JICJ 377 (analysing the increasing reliance on the pre-trial process to enhance communication and efficiency in evidentiary and practice-related matters). More formalized approaches emerging from pre-trial conferences include decisions adopting guidelines on the admission and presentation of evidence, as have been rendered in trials by ICTY Trial Chambers I and III. See generally *Prosecutor v. Milan Martić*, Revised Version of the Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and the Conduct of Counsel in Court, Case No. IT-95-11-T, 19 May 2006; *Prosecutor v. Vojislav Šešelj*, Order Setting out the Guidelines for the Presentation of Evidence and the Conduct of the Parties during the Trial, Case No. IT-03-67-T, 15 November, 2007.

34 Byrne, *supra* note 1, 254–5.

35 Rome Statute, *supra* note 13, Art. 36.

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However, unlike municipal lawyers, few of the practitioners who pronounce on the nature of international proceedings have participated in more than one or two trials, given the rotating nature of short-term professional contracts and the length of international proceedings. This makes it difficult to generalize from particularized experiences. Against this backdrop, there is an urgent need for those seeking to understand the culture and dynamics of international criminal trials to engage in the neutral and systematic review of the trials under way.

The quest for neutrality is a challenge for researchers at international tribunals. As important as the classic professional divide between those working for the OTP and those working for the defence are the different procedural perspectives of anglophone and francophone lawyers, and of different regional and national professional communities. Academic researchers who are welcomed into particular communities are exposed to their views and frustrations with the tribunal. These respective orientations – national, professional, linguistic, and personal – shape the presentation and understanding of what transpires within the courtroom and what are perceived as travesties of expected conventions, and the judging of judges.

While this poses a challenge for researchers, it also raises deeper questions about the proximity between stakeholders, academic commentators on international criminal justice, and practitioners within the system, particularly those coming from North America and Europe. Thakur's observation that scholarly discourse on global governance is dominated by journals and voices from these regions could as easily be extended to the emerging academic and advocacy scholarship focusing on these new courts.[36] Indeed the boundaries between academia, advocacy, and practice are perhaps at their most narrow in this field; international criminal justice is symbolically and uncritically equated in mainstream academia with the triumph of the human rights movement.

One of the early decisions made in this study pertained to whether it should explore the influences upon and motivations of legal actors in this highly complex conflation of legal cultures. It was decided not to do so, on the basis that such an inquiry would have been too complicated. Many practitioners at the international criminal bar have been trained in more than one system, while within each domestic system itself role designations may be vague, overlapping, and organically evolving. Furthermore, the issue of why professionals perform in a certain way inevitably involves subjective considerations. It was therefore decided to focus on the simpler, more objective, and perhaps more important question of how they actually performed within the trial chamber.

Quantitative empirical measurement is one way of answering this question in a neutral manner, providing hitherto undocumented information about trial practice. It is true that quantitative measurement of courtroom activity as measured through judicial interventions and counsel objections offers a crude depiction of trial proceedings. Moreover, the decision as to what one records implicitly

36 R. Thakur, 'Law, Legitimacy and United Nations', (2010) 11(1) Melbourne J. Int'l L. 1.

prioritizes certain aspects of courtroom practice over others.[37] Yet by collecting data on how legal actors in international trials perform their primary roles, this study was able to trace day-to-day international criminal trial practice across different courtrooms. By combining such quantitative measurements with detailed qualitative observation of the trial chambers, an account of international criminal trial practice that is both adequately contextualized and more neutral becomes possible.

3. Trial observation at the ICTR

The consequences of the organic approach to trial practice codified in the RPEs of the main ICTs are apparent daily. There are clear differences in styles between trial chambers: judges skirmish with lawyers to control the proceedings and to get evidence clearly presented and into the trial record; some judges show little life on the bench, others are active and engaged; some trials are marked by pervasive tension, others enjoy a more collective *esprit* among the legal actors. Is there something more fundamental underlying these different approaches to trial management by the bench? This section presents two examples of how quantitative data can help identify different approaches to international criminal trial practice.

3.1. Methodology

Over a two-year period from 2000 to 2002, project researchers examined seven trials across the three chambers of ICTR, and an eighth trial through transcript analysis. Trial observation data were collected from each stage of witness examination, recording all counsel objections and the corresponding judicial rulings, all substantive and procedural judicial interventions to either counsel or witnesses, and all witness interventions directed towards counsel or the bench. It also measured the extent and nature of judicial questioning of witnesses. To place these data in context, the trial observer also reported oral rulings, and submitted a weekly qualitative assessment of courtroom dynamics. Through this combined approach, using both qualitative and quantitative methods, a profile emerged of the dynamics of international criminal trial practice.[38]

Space constraints allow for only a partial account of this research.[39] However, the tables illustrate some of the variations in trial practice encountered. These largely reflect the differing roles assumed by judges, since the broad discretion afforded to judges under the RPEs means that the level and nature of engagement by the presiding judge is critical to the dynamics observed within each of the trials.

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37 The template for trial observation for this study required that both the standard judicial and counsel objections found within common- and civil-law systems be merged for researchers to record activity within the courtroom.

38 These encompassed four single-, one dual-, and three multi-defendant trials, covering 172 witness examinations conducted by 61 trial attorneys over a period of 1200 hours. Reflecting the imbalance in the representation of common- and civil-law counsel in the legal teams appearing in court, the sample contained 19 lawyers from civil-law jurisdictions and 42 from common-law systems. The trial observation was carried out by researchers from either common- or civil-law backgrounds, all of whom had postgraduate training in law.

39 For an expanded overview of the core findings of this research project, see Byrne, *supra* note 1.

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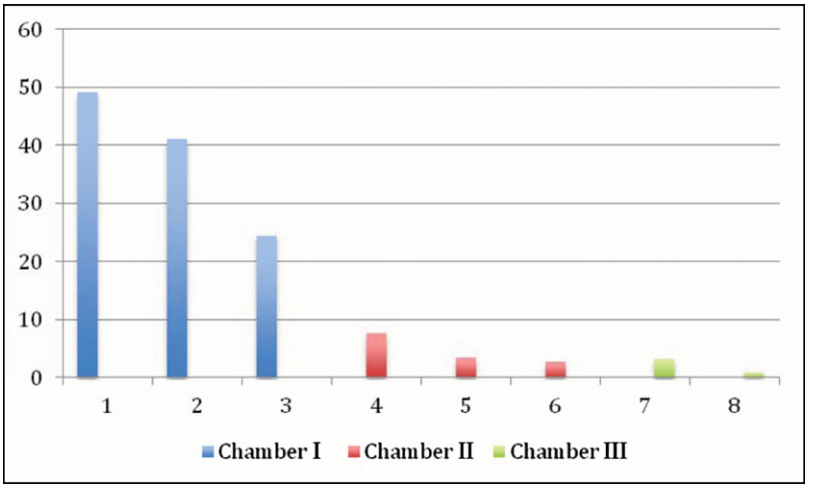

Table 1. (Colour online) Average numbers of questions from the bench to witnesses, by trial
*The respective trials are as follows (from left to right): Trial Chamber I: *Bagilishema*, *Ntakirutimana* (multi-accused although two closely linked indictments, hence involving the fewer trial complications of a single-accused proceeding), Media (multi-accused); Trial Chamber II: *Kajelijeli*, *Kamuhanda*, and *Butare* (multi-accused trial); Trial Chamber III: *Semanza*, *Cyangugu* (multi-accused trial).

3.1.1. Approaches to testimonial evidence

Table 1 shows the average number of questions that the bench posed to witnesses in each of the eight trials studied. The questioning of witnesses by the bench demonstrates different approaches to the engagement of the judges with testimonial evidence across trials. It also suggests a more general difference in the roles assumed by judges and lawyers in the proceedings. The questioning of witnesses from the bench fulfilled many purposes: cleaning up the record; clarifying testimony; supplementing, eliciting, and testing testimony, as well as challenging the credibility of witnesses. In the absence of a pre-trial dossier, the questioning from the bench cannot be equated with the familiar conventions of the inquisitorial trial. Nor, given the complexities of examining victims and witnesses of extreme crimes, and the limited experience of international criminal lawyers with extreme crimes and the culture and language of origin of the witnesses, should it be equated with the process of examining witnesses in an adversarial trial.

As Table 1 demonstrates, the differences across trial chambers in the role of the bench towards eliciting oral testimonial evidence are striking. In the three trials conducted in Trial Chamber I the bench was extremely active in questioning witnesses, directing well in excess of 20 questions per witness, and in one trial an average of almost 50. In sharp contrast, in the five trials in the other two chambers, the bench addressed many fewer questions to witnesses: on average less than ten, and usually less than five. In these trials, questions to witnesses were almost exclusively controlled by the lawyers.

It is worth noting that these two patterns were merely one aspect of the differing approaches of the bench towards the evidentiary process, and differing axes of

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control exercised between the bench and bar over the presentation of evidence.[40] For instance, in some trials judges elicit testimonial evidence directly from witnesses, while in others they do so through directions to counsel. Hence, in the *Ntakirutimana* trial, in Trial Chamber I, approximately 80 per cent of judicial interventions were made directly to the witness, and 20 per cent were made to counsel.[41] In the *Cyangugu* trial in Trial Chamber III, on the other hand, the axes of command and communication were reversed: only 14 per cent of interventions were made directly to the witness, with eighty-six per cent being made to counsel.[42]

These results suggest that the differing approaches of the bench towards eliciting testimonial evidence go beyond mere style, impacting on the formal roles of the bench versus lawyers in the trial process. This has implications for how lawyers are trained to examine witnesses in international criminal trial chambers, as the strategy and skills required for examination-in-chief and cross-examination are different depending upon whether the counsel controls or shares responsibility for the presentation of the evidence. It also raises a number of questions such as: when this responsibility is shared, how can counsel adapt to account for the informational lacunae of judges in the international, as distinct from the inquisitorial, process? How, in turn, can the bench effectively respond to objections made against its own questioning when parts of its examination would be struck off the record if like errors had been committed by counsel?

The central argument against judicial questioning in the international adversarial trial that emerges from the optic of adversarial versus inquisitorial process centres upon the absence of a dossier, suggesting images of a blind empire unwittingly distorting the presentation of evidence through ill-informed questions. In Langer and Doherty's later work on the ICTY, the insufficiency of information available to the Trial Chamber bench was a critical barrier identified by judges to the exercise of effective 'managerial judging'.[43]

The reticence of some judges to engage with witnesses because of the limited information disclosed in witness statements and testimony in progress does not take into account the nature of oral testimonial evidence of international crimes and the challenges it creates to the compilation of an effective trial record. When questions are unasked by the bench, the quality of the testimonial evidence on record is determined by the examination competencies of counsel. In a system where most counsel are novices to the transcultural, social, psychological, and linguistic obstacles confronted in international criminal trial process, awaiting the ideal model of a fully briefed bench is an example of the perfect being the enemy of the good. Ineffective examination techniques and muddled questions and answers are a hallmark of many trials as lawyers struggle to adapt to international trial

40 For a more detailed analysis see Byrne, *supra* note 1, 271–301.

41 Judge Møse directed 81 per cent of judicial interventions directly to the witnesses, and 19 per cent to the counsel. In the *Ntakirutimana* trial, there were two accused and five trial lawyers: three on the side of the prosecution, and one defense counsel for each of the accused. Byrne, *supra* note 1, at 277, fn. 127.

42 The *Cyangugu* trial involved three accused with nine lawyers representing the parties: three on the side of the prosecution and six representing the accused.

43 Langer and Doherty, *supra* note 8, 274.

practice and the implications for testimonial evidence of extreme crimes.[44] In this context, the striking feature of the data is not so much the proactive role of the bench in examination of witnesses in Trial Chamber I, as the absence of such an approach in Trial Chambers II and III.

This conclusion emerges from witnessing the limited capacity of often traumatized witnesses to communicate clear testimonial narratives, and the diversity and inexperience of counsel in international criminal proceedings. Even with only the limited benefit of a witness statement rather than a pre-trial dossier, corrective intervention should be seen as a measure of effective managerial judging rather than as an exercise of competency, a perversion of adversarial principles of justice, or a usurpation of the roles and authority of the parties in the trial chamber. The extreme vulnerability of witnesses in the process of examination, the barriers of language and culture, and the impact of psycho-social dynamics in the context of atrocity raise the question whether the absence of judicial participation in the process of engaging with the oral testimony produces trial records of differing strengths across chambers. There are clearly many witness examinations that are expertly conducted by counsel, and cases in which the testimony is so straightforward – for instance as related to alibis – that there would be no added value to judicial engagement with the witness. The qualitative trial observations, however, reveal that the challenge of obtaining competent and complete examinations in light of the barriers to eliciting coherent testimony from witnesses were present across all trials. In these *sui generis* proceedings, the approach of the judge to his role has implications for the nature of the record as well the efficiency of the proceedings.

The current ICC Rules continue to leave the resolution of these professional shortcomings to the discretion of the judges. The data suggest that judges exercise such discretion differently, with different results. Unfortunately, the selection process for judges of the ICC suggests that most of the judges themselves are relative novices in the art of examination in relation to international crimes committed in distant jurisdictions, just as was the case for judges serving at the ICTR.[45] Differing approaches by judges to testimonial evidence have often been attributed, perhaps with rough accuracy, to their different legal backgrounds. However, this explanation ignores the importance of individual agency, and the difficulties of adapting prior professional skills to the unique demands of trying extreme crimes.

3.1.2. Evidence and trial management

The issue of efficiency, or more precisely its perceived absence, has plagued all of the ICTs. This is more often than not explained in terms of the highly complex nature of the proceedings, and the talents and weaknesses of the bench, and its capacity to 'control' them. The trial data suggest a crucial distinction between proactive and reactive styles of judging, emphasizing the agency of the presiding judge.

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44 R. Byrne, 'Assessing Testimonial Evidence: Lessons from the International Criminal Tribunals,' (2007) 19 *International Journal of Refugee Law* 609.

45 Byrne, *supra* note 1, at 259, 301 (emphasizing the value of prior international criminal trial experience for judges to effectively anticipate examination questions that compromise witness protection).

	Chamber I			Chamber II			Chamber III	
Primary areas of evidence (including hearsay, scope, witness statements, opinion, admission and representation of evidence)	70.38	67.42	48.61	37.53	37.5	28.89	28.92	29.87
Secondary areas of evidence, form and conduct (including leading question, asked and answered, relevancy, no foundation, unclear/confusing counsel questions)	16.26	17.09	26.73	35.07	32.03	38.19	43.17	47.57
Witness issues (including closed session, harassment, disclosure of witness ID, witness conduct)	2.34	2.64	3.52	5.21	3.91	2.09	5.76	4.87
Exhibits, disclosure, and translation (including authentication, ID exhibit for record, translation, and technical problems)	4.57	5.49	7.32	4.38	12.89	14.99	3.45	7.08
Courtroom management	6.24	7.24	13.48	17.53	13.67	15.75	16.83	9.96

Table 2. (Colour online) Courtroom activity across trial chambers and trials within them. The respective trials are as follows (from left to right): Trial Chamber I: *Bagilishema*, *Ntakirutimana* (multi-accused although two closely linked indictments, hence involving the fewer trial complications of a single-accused proceeding), *Media* (multi-accused); Trial Chamber II: *Kajelijeli*, *Kamuhanda*, and *Butare* (multi-accused trial); Trial Chamber III: *Semanza*, *Cyangugu* (multi-accused trial).

Table 2 gives a breakdown of courtroom activity across trial chambers and individual trials within them. Courtroom activity is narrowly defined as including all judicial interventions and counsel objections. Successive columns provide the percentages of recorded activity for each trial, broken down into core categories of evidence, procedure, and management issues. Activity related to the presentation of evidence is further divided into primary and secondary categories. The primary category includes issues such as hearsay, scope of testimony, admission, and representation of evidence, while the secondary category relates to the form and conduct of the examination (for example, interventions and objections related to leading questions asked and answered, no foundation, unclear or confusing questions, etc.).

In the first two trials in Trial Chamber I One, presided over by Judge Erik Møse (the most proactive judge within the trials observed in the study), courtroom activity was predominantly focused on primary areas of evidence, with only a relatively minor percentage of courtroom time being expended on secondary areas of evidence and matters related to form and conduct. In contrast, in reactive Trial Chambers II and III, a much greater percentage of courtroom activity related to areas of secondary evidentiary importance. Indeed, in Trial Chamber III a significantly greater amount of courtroom time was delegated to these matters than to primary evidentiary matters. The reactive bench delegates greater authority to counsel in the courtroom, which may invite more disputes on less significant evidentiary matters, whereas

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a proactive bench exercises a more controlled focus on the evidentiary issues at hand. The data thus offer an empirical basis to argue that a proactive modality, that can focus between 67 and 70 per cent of courtroom activity onto primary areas of evidence, is more desirable than a reactive modality, where only 28.9–37.5 per cent of activity focuses on primary evidentiary issues.

At present the formal legal framework for the remaining trials of the ad hoc tribunals and the ICC allows multiple modalities of trial practice. The research suggests that the distinction between 'proactive' and 'reactive' approaches to presiding over international criminal trials may have significant implications for the efficient allocation of courtroom activity, and hence time, to the core matters of evidentiary assessment. This distinction depends more on the agency of the judge than on prior systemic loyalties.

4. Conclusion

This selection of data based on ICTR trial practice sheds some light on how differing approaches to judging can affect both efficiency and perceptions of fairness. In an era where the struggle for the legitimacy of the institutions of international criminal justice continues, with much critical scrutiny being focused on performance, socio-legal research may offer legal scholars important insights into what transpires in the international criminal trial chamber, beyond what we can learn from the self-assessment of judges and lawyers operating within the system.

The persistent embrace of multiple modalities of trial practice by the international criminal legal system shows how discretion over how international trial practice lies in the many hands of a rotating, and predominantly politically selected, international judiciary. How these judges engage with the core tasks of allocating power and determining the roles of professionals within the trial chamber, and eliciting testimonial evidence, can only be recorded by those with the resources and capacity to monitor ongoing trials. Empirical research on international criminal trials can lead to a recalibrating of assumptions about the international criminal trial process, and in turn offer an informed basis upon which to improve international trial practice.

In their important empirical study that sheds much-needed light on the opaque state-controlled process of selecting international judges across various international legal regimes, MacKenzie et al. report that stakeholders consider it unlikely that root-and-branch reforms of the provisions of the Rome Statute will occur in the near future to strengthen the mechanisms, rules, and practices of selecting judges for the ICC. However, they argue convincingly that as progressive advances in selection processes are implemented in other legal regimes, such advances may increasingly be perceived as critical to the credibility and legitimacy of ICTs. Changing norms may thus inspire 'light-touch reform'.[46] This vision of progressive change can also be applied to the performance of judges once in office. Performance criteria

46 R. Mackenzie, et al., *Selecting International Judges: Principles, Process, and Politics* (2010), at 172.

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should depart from the preferences of common-and civil-law approaches, and their respective takes on what constitutes good or bad judging and courtroom control. Instead, a template for a proactive trial process would require agency and adaptability as key characteristics of the presiding judge within these new *sui generis* proceedings. 'Light-touch reform' is quite viable in the domain of international criminal justice, given that frequent amendments to the RPEs are commonplace. If procedural amendments were to ensure, rather than allow, a more proactive role for the bench, it would recalibrate the professional understanding of the role of the international criminal law judge. This, as socio-legal research suggests, would enhance the prospects of the efficient delivery of international justice.