SYNTHESIS IN TRIAL PROCEDURES? THE EXPERIENCE OF INTERNATIONAL CRIMINAL TRIBUNALS

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CONTEXT OF INTERNATIONALISATION

CRITICAL to analysing the recent synthesis of criminal trial procedures is an understanding of the internationalisation of criminal law and procedure.[1] As well as the creation of international tribunals[2] to investigate and try crimes of world significance, there is emerging an international jurisprudence on criminal law (and procedural hybrids to support and develop this) which require integrated analysis.[3]

It would appear that the present pace and form of such change is largely the product of global political imperatives.[4] The nature of these imperatives[5] has necessitated the operation of penal sanctions within two broad and divergent Western criminal justice traditions (Anglo-American common law and Western European civil law). The speed with which these developments have occurred has meant that the evolution of international criminal institutions and procedures appears expedient

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1. See, Sunga, L. (1997) *The Emerging System of International Criminal Law: Developments in codification and implementation*, The Hague: Kluwer.

2. Exemplified by the International Criminal Tribunal for the Former Yugoslavia (in the Hague), and moves towards an international criminal court see, "A Permanent International Criminal Court" <www.Undp.Org/missions/netherlands/ICC.htm>.

3. The comparative examination of criminal trial procedure within the context of internationalisation might be best achieved through comparative contextual analysis. Such a methodology presents the potential for avoiding many of the pitfalls of the comparative project in socio-legal research. For a discussion of comparative contextual analysis see, Findlay, M. (1999) *The Globalisation of Crime*, Cambridge: CUP pp.6–8.

4. For instance, the need to try war criminals identified as a consequence of more regular global military interventions such as in Bosnia and Serbia. See, Cotic, D. (1994) "A Critical Study of the International Tribunal for the Former Yugoslavia" in *Criminal Law Forum* 5/2–3:223–236. Also note that the recent U.S. opposition to the establishment of an International Criminal Court is founded on the American view of an inextricable connection between any such court and the mandate and interests of the UN Security Council. (See, n.9 below).

5. Driven as they are by the foreign policy concerns of the United States and Western Europe, even more than those of world agencies such as the United Nations. See, Goldstone, R. (1996) "Justice as a Tool for Peace-making: Truth commissions and international criminal tribunals" in *New York University Journal of International Law and Politics* 28/3:485–503.

rather than experimental, rationalised rather than rational.[6] By examining the possibility, nature and extent of procedural synthesis these impressions will be tested. Consequentially it should be credible to suggest ways in which a theory and planned practice of penal sanctioning and criminal procedure should underpin such developments.[7]

The context of the criminal trial has been selected as a focus for procedural comparison because of its essential connection with the negotiation and imposition of penal sanctions, a primary political purpose behind the internationalisation process.[8] The global political push for an international criminal law, and its institutions,[9] recently has relied on the connection between the image of a "just" international military intervention,[10] and the necessity to punish "crimes" which either justified that intervention or were perpetrated by those opposed to it. At the conclusion of the military context, the resolution of these "crimes" is transferred into the courtroom and the trial.[11] Further, the trial is perhaps a slightly less contentious domain where the two principal procedural

6. It is also important to recognise that the structure of these international institutions and the derivation of the procedures under which they will operate have been the subject of intense political lobbying. See, Scharf, M.(1999) "The Politics Behind the U.S. Opposition to the International Criminal Court" in *New England International and Comparative Law Annual* <www.nesl.edu/annual/vol5/scharf.htm>.

7. This is an important policy purpose of a major research project (The International Criminal Trial Project) currently under way in the Centre for Legal Research, Nottingham Law School.

8. Particularly with international war crimes adjudication.

9. Opposition to such developments rests on the preference by countries like the U.S. and China to use their UN Security Council veto to negotiate and control prosecutions, rather than as a general resistance to the concept. While the Americans endorse the court concept they seem unwilling to relinquish their dominance of international institutions through an independent prosecution process, and have put the position that the proposal for an international criminal court will fail without their support. In the U.S. view the connection between political priorities and the rule of law is clear at an international level. See, Schaffer, D (1998) "Address Before the Southern Californian Working Group on the International Criminal Court" in <www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/iccus.html>.

10. This concept of a "just" war not only regularly appeared in the rhetoric of NATO for justifying its hostilities in Kosovo, but has since been implicit in delineating the "crimes" of the Serbians from the necessities of NATO forces – see also, Ulmen, G. (1996) "Just Wars or Just Enemies" in *Telos* 109:99–112.

11. See, Robinson, D. (1997) "Trials, Tribulations and Triumphs: Major developments in 1997 at the International Criminal Tribunal for the Former Yugoslavia" in *Canadian Yearbook of International Criminal Law*, XXXV:179–213.

styles confront one another.[12] The same could not be said, for instance, of the pre-trial phase.[13]

The selection of the trial as a centre for comparative criminal procedure research may be criticised on the basis that in neither procedural style (civil law or common law) is the trial exemplary of criminal justice at work. In common law the vast majority of prosecutions are settled through guilty pleas and never go to trial. In the civil law traditions most prosecutions are diverted or settled through plea during the detailed investigation process preceding the trial. Aligned with this issue of procedural representativeness is a comparative dilemma. Trials differ in form and significance between the two styles. For instance, the adversarial process in common law trial means that the visual theatre of the trial through the examination of witnesses in person may appear in stark contrast to the dossier-led trial in civil law, where most of the action has occurred beyond the court-room.[14]

Recognising these challenges to the comparative project, the value of the trial as the procedural focus for this research remains. Across both procedural styles serious crime is tried. Serious crime is also far more likely to be defended and therefore tried. Serious crimes and their trial have produced many of the procedural safeguards around which criminal justice traditions have grown. In practice there may prove to be less that divides the adversarial from the inquisitorial trial. For instance, the more complex the case the more that the significance of documentary evidence will prevail. And there is little doubt that the ideology of criminal justice in both traditions takes the trial as its manifestation. This is confirmed by the paramount place of the trial in the institutionalisation of international criminal justice.

The internationalisation of criminal trial institutions has necessitated debates about synthesising two western styles of criminal procedure (civil law and common law in origin).[15] This, however, should not be approached as a straightforward, bifurcated consideration of separate criminal justice traditions. Significant derivations within each main style[16]

12. See, Tochilovsky, V. (1998) "Trial in International Criminal Jurisdictions: Battle or scrutiny" in *European Journal of Crime, Criminal Law and Criminal Justice* 6/1:55–59.

13. This is not to downplay the significant differences between civil law and common law evidentiary rules and trial practice, the comparative analysis of which will form the basis of much of the research to follow. See, for instance. Nsereko, D. (1994) "Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia" in *Criminal Law Forum* 5/2–3:507–555.

14. For a discussion of the comparative trial "theatre" in respect of a murder trial see, McKillop, B. (1997) *Anatomy of a French Murder Case,* Sydney: Hawkins Press.

15. See, King, F. & La Rosa, A. (1997) "International Criminal Tribunal for the Former Yugoslavia: current survey—the jurisprudence of the Yugoslavia Tribunal: 1994–1996" in *European Journal of International Law* 8/1:123–179.

16. Such as between English and American common law, German and French civil law.

(and the political systems they support) make the comparative evaluation and exploration of actual and potential synthesis intricate. Such analysis, in a wider comprehensive context than is possible in this article, will involve more than merely the exploration of broad legal styles. It will require comparative research within the realms of politics, policy and politicisation, at domestic and global levels.[17]

A convincing consideration of internationalised criminal law, procedure and institutions (controversial as this now is[18]) generates the need to disentangle the principal competing procedural styles, to test the nature and location of the important points of difference during the trial, and to speculate on the potentials for synthesis. In order to achieve this the trial process itself may need to be reduced to its significant sites for decision-making, and the manner in which discretion can be exercised should be explored in comparative procedural terms. Discretion could be the key to institutional and procedural harmonisation.

It might be argued that a consideration of competing procedural styles is better mounted from the distinction between accusatorial and inquisitorial traditions, rather than from the origins of common or civil law. Most legal systems now operate procedural hybrids, and it is wrong to assume any artificial atmosphere of commonality between the procedural versions of common law or civil law trial practice. This said, it might be equally misleading to deny the accusatorial dimensions of civil law (particularly at the trial proper) through an over emphasis on its inquisitorial pre-trial stages.[19] It is suggested that the consideration of difference and synthesis of procedural styles need not be limited to origins or to the manner in which evidence is elicited. Both should be appreciated, along with the unique position of different trial models in order to create a more realistic and sympathetic framework for distinction.

Wide-ranging procedural and institutional analysis is beyond the purpose of this paper. What follows will more modestly identify suggestions of procedural synthesis from the documentary foundations of

17. For an analysis of the inextricable association between methods of legal regulation, and domestic and global political interests, see, Findlay, M., (1999) *The Globalisation of Crime,* Cambridge: Cambridge University Press; chap. 1.

18. See for instance the U.S. position on the establishment of a permanent international criminal court, in Everard T (1994) "An International Criminal Court: Recent proposals and American concerns" in *Pace Uni School of Law Int'l Law R* 6:121, also Scharf M. (1995) "The Politics of Establishing an International Criminal Court" in *Duke J of Comp & Int'l Law* 6/1:167.

19. Richard Vogler warns against this in his description of French criminal procedure. See, Hatchard, J., Huber, B. & Vogler, R. (eds.) (1996) *International Criminal Procedure* London: BIICL; chap 1.

important international criminal tribunals.[20] In addition, the procedural direction of certain hearings out of the International Criminal Tribunal for the Former Yugoslavia (ICTY) will face brief analysis in order that suggestions of synthesis in practice are identified. The paper will conclude with some tentative predictions about the future of procedural synthesis and its utility as a focus for trial analysis.

In preparation for the comparative exercise it may be useful to discuss the manner in which concepts such as *synthesis* and *difference* are to be approached. As well, some tentative thoughts on procedural traditions as comparative tools may prove useful.

STYLES[21] OF CRIMINAL TRIAL

CONSISTENT with what will be said about *difference* and *synthesis,* legal styles are conceptualised in what follows, as multi-faceted and dynamic phenomena. We are not working from pure models of common law and civil law trial procedure, nor are we assuming that these logically emerge from single jurisprudential traditions. The concept of *style* is carefully chosen because it elicits notions that are contemporary while built on traditions, dynamic while possessing common components, and influential while being susceptible to influence.

The adoption of style rather than tradition as a way to describe the competing procedural systems in our trial analysis is intended to encompass derivations and hybrids which claim their origins in a particular style, yet manifest a style of their own or a significant recasting of the originating style in question.

Style suggests a way of doing things as much as the thing itself. It tolerates contrary interpretations and tastes. It is not omnipotent or neutral. But above everything else it is a "living" concept, which could equally be said of the criminal trial.

Essential for the procedural comparison is a clear understanding of the differences between the two principal trial procedures, and recent debates regarding their synthesis.[22] From this foundation it should be

20. In particular the *Rules of Procedure* (1994—as amended) of the International Criminal Tribunal for the Former Yugoslavia; the *Rules of Procedure and Evidence* (1999) discussed as Part 6 of the Rome Statute for the creation of an International Criminal Court (ICC). For a discussion of the progress of negotiations about the ICC see, Hall, K. (1998) "The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court" in *American Journal of International Law* 92/2:331.

21. For a discussion of the use of *style* see Findlay, M. & Zvekic, U. (1993) *Alternative Policing Styles,* Deventer: Kluwer. In the present context style enables some movement away from simple distinctions on the basis of origin, or the process for eliciting evidence.

22. In a general sense this knowledge will need to be assumed of the reader. Unfortunately we are not able to recommend a competent single text which adequately identifies the essential features of the two systems for the purposes of comparison. See, Reichel, P. (1999) *Comparative Criminal Justice Systems,* New York: Prentice Hall; Ingraham, B. & Verin, J. (1987) *The Structure of Criminal Procedure,* Conn.: Greenwood.

possible to speculate on the viability of models for international criminal trial procedure and their primary components, such as is evidenced in the aspirations for an International Criminal Court (ICC).

Recent interest in the synthesis between common law and civil law procedures has either emerged from law reform initiatives,[23] or broad theoretical analysis.[24] In addition, there has been political and professional speculation, particularly in the common law world, regarding the managerial potential in adopting elements of the civil law criminal procedure. The largely unsatisfactory nature of debate and inquiry has tended to eulogise one model over another, or suggested the ad hoc transplanting of preferred features from one to the other. As Leigh observes,[25] a productive analysis of criminal procedures with a view to efficiency and effectiveness requires more than a binary comparative analysis. It must be contextual in a detailed sense, and empirical at valid levels of comparison. Further, as we argue for comparative analysis more generally,[26] it must only proceed out of initial detailed research within either context to be compared. This is the essence of comparative contextual analysis, and for the purpose of evaluating distinctly different legal styles it is both instructive and crucial.

Recently identified failings of the criminal justice process[27] have provided a sometimes-political motivation for reconsidering the significance and applicability of foreign justice models.[28] Also, managerialist approaches to the existence and operation of criminal procedure and justice institutions have promoted speculation on reform through "cherry-picking" the other tradition. However, an absence of detailed and contextual knowledge about the way these models operate, and the ideological context within which they exist, have made the debate artificial and abstract. A unique dimension of the comparative project is

23. See Runciman W.G., (1994) *Royal Commission on Criminal Justice 1991–1993,* London: HMSO; also the work of the Australian Law Reform Commission on comparative civil procedure.

24. Damaska, M., (1986) *Two Faces of Justice and Authority: A comparative approach to the legal process,* New Haven: Yale University Press; Zeidler, N., (1981) "Evolution of the Adversary System: As comparison some remarks on the investigatory system of procedure", in 55 Aust Law J 390; Goldstein & Marcus, (1987) "The Myth of Judicial Supervision in the Three 'Inquisitorial' Systems: France, Italy and Germany', in 87 Yale LJ 240; Volkman-Schluk, (1981) "Continental Criminal Procedure: Myth and Reality", in 9 Am J Cr L 1; McKillop, B., (1997) *The Anatomy of a French Murder Trial,* Sydney: Hawkins Press.

25. Leigh, L.,"Liberty and Efficiency in the Criminal Process: The significance of models", in (1977) 26 I.C.L.Q. 516.

26. See Findlay, 1999, *op. cit.* n.3.

27. See Walker, C. & Starmer, K., (1998) *Justice in Error,* London: Blackstone Press; Carrington, K. (et al) (eds.) (1991) *Travesty: Miscarriages of Justice,* Sydney: Pluto Press.

28. Note the comments of the Woolf Report in relation to the failings of civil justice and their remedy—Woolf, H. (1996) *Access to Justice: Final report to the Lord Chancellor on the civil justice system in England and Wales,* London: HMSO.

its potential to ground aspirations for law reform in an understanding of the criminal trial in its practical context, beyond models and rhetoric.[29]

SYNTHESIS AND DIFFERENCE—IMPORTANT CONCEPTUAL PARADIGMS

IN any comparative exercise several central paradigms will bind the methodology and reverberate through the aspirations for the analysis. These paradigms will no doubt themselves develop meanings and material presence relative to the nature of the comparative project. With *synthesis* and *difference* there is a need for care in the treatment of what appears to be a straightforward dichotomy. At their more complex renditions efforts towards synthesis may expose difference, and the peripheral nature of claims for difference may invite synthesis.

Difference

While seeking to confront and examine procedural difference, the comparative procedural exercise should not be satisfied by (or limited to) simple dichotomies as its object of interest. Here we tend to look at difference as a matter of degree.

Either major legal style has its jurisdictional derivations. These represent commonality and difference. It will be impossible to engage the detail of this within the limits of this paper, particularly with a form of analysis which tends to construct (and rely upon) some general points of difference in order to advance the comparative project.

The treatment of difference must be seen within the wider methodology of comparative contextual analysis. In this regard the internal consistency governing legal procedural styles needs to be recognised and worked within. The creation of difference through the juxtaposition of opposing language and ideology is not of itself helpful where practical outcomes such as the trial are of interest. As actual differences emerge, or where the potential for difference at other levels of comparison is suggested, this will present an opportunity for critical evaluation of synthesis. Other contexts for comparison occur between a particular style and its derivations or hybrids, and then more specifically between the two major legal procedural styles engaging contemporary international debate.

In order to enable comparison, common procedural sites need to be located within trials.[30] Interestingly, this is where the comparative analysis of procedural difference crucially depends on uniformity and

29. A unique opportunity for this is through examining the forces at work in the evolution of the international criminal court and its proposed procedures.

30. Such identification can be achieved through an analysis of enabling documentation and procedural rules, but will be more convincing if tested through examination of trial transcripts and observation of trial practice.

commonality within and across stages of the trial (style to style).[31] These sites will focus on principal points of decision-making in the trial and the players involved. Another common theme to lubricate the exploration of procedural difference in criminal justice is the exercise of discretion. Discretion may also highlight some interesting degrees of difference in the operation of comparable sites for decision-making within different trial environments.

The use of procedural sites (or sites for decision-making) as the comparative context for exploring procedural difference provides a practical opportunity to test the reality of difference. For example, it is suggested that crucial to the role of the prosecution and defence counsel, and the checks and balances of judicial discretion, is the form in which evidence is presented at trial. If, rather than a reliance on oral testimony, the lawyers and the court work largely from documentary evidence wherein lies a common and largely uncontested basis of information, then the professional players in the trial are faced with very different decisions than those before their counterparts in a common law trial. However, is it the form of evidence, or the manner in which legal professionals have traditionally addressed it which produces these differences in roles and decision-making? At the pre-trial phase in inquisitorial procedures, it is important to construct a reliable dossier which prosecution and defence can contest or can use as the basis for preparation for trial. There is a danger that police involvement in constructing this dossier may not be open and transparent and may not be adequately controlled. This may hinder the defence at trial. Prosecutorial or judicial responsibility over the creation of the dossier may not be adequate to cure this. This is not simply, therefore, explained by reference to different evidentiary forms.

The construction of convincing distinctions of difference may need to go beyond the confines of the trial, as well as recognising the manner in which eventual procedural difference is generated and maintained.

Synthesis

Synthesis, in any case, works at several levels, which may make its realisation somewhat illusory. There can be mechanical and administrative synthesis while overriding ideologies remain apart. Synthesis can appear to be achieved in practice through the exercise of discretion in situations where procedural rules are different. Synthesis can be imposed through the creation of new rules which do not necessarily accord with

31. This is particularly the case with terminology and trial language, as well as with the professional presence of the principal trial players.

trial experience.[32] Synthesis may be expected through compromise, whereas the professionals involved in the trial process may regularly return to their original legal styles.

Synthesis is a reflexive referent for difference. Having said this, simple dichotomies between procedural difference and potential harmony might only be arguable at the level of modelling. In analysing synthesis it is important also to be aware of those imperatives which prevent synthesis and mask difference. Failure to achieve synthesis will say as much about competing procedural styles as can models for its achievement.

It may be that the operational reconciliation of procedural difference becomes the real stuff of wider comparative procedural analysis. Reconciliation may tend to also disclose the problematic nature of procedural synthesis at various levels of operation.

Synthesis at the Level of Trial Ideologies

At the risk of moving initially away from the work of the trial, aspirations for a common trial ideology may identify points of practice where synthesis will be difficult to achieve. Often these will exist at sites where the governing ideology is most dogmatic or unconditional. Also, it is common in both procedural styles that prevailing justice ideologies tend to mask contradictions between principle and practice.

Commonly the ideological dissonance (at international procedural levels) is either understated or simply not fully thought through. This may be a factor of the political atmosphere in which the existence of international criminal justice institutions has been negotiated. It also might suggest that, as for both procedural styles, essential elements of their justice ideology are either inconsistent, or difficult to realise. An example is with precedent, the principle on which common law judicial reasoning is said to rest. For instance, it is proposed for the ICC that "the court shall apply principles and rules of law as interpreted in its previous decisions".[33] Complicating with this, the Trial and Appeal Chambers need to recognise those rules of process within their own legislative basis, then applicable treaties and principles of international law, and failing these "general principles of law derived ... from national laws of legal systems of the world ... provided that these are not inconsistent with (the court's statutes and international law)".[34] Add to this the requirement to

32. Despite the fact that, for instance, the *Statute of the International Tribunal (for the Former Yugoslavia)* (SIT) in Article 15 invites its judges to adopt rules of procedure and evidence for the working of the Tribunal, one might suspect that where these rules differ substantially from the experience of any individual judge these may tend to be reinterpreted in practice. An analysis of Trial and Appeal Chamber judgments may reveal this.

33. SIC Art. 21 (2).

34. SIC Art. 21 (1).

interpret law consistent with internationally acknowledged human rights and there will operate a rather qualified version of precedent, if at all. Even if precedent were to govern international judicial decision-making in the criminal jurisdiction it would be essentially influenced by the contesting notions of the law which come before the trial chambers from their origins in different traditions. Consistency then would not be created in any common law sense through a simple application of precedent. And what is to happen to legal interpretation as precedent conventions take time to be set?

Even in those procedural styles which declare governance through the doctrine of precedent, what Norrie refers to as the process of *judicial rationality* shines through.[35] The essential place of judicial discretion in all trial procedures necessitates that judicial efficiency will prevail as a source of authority for trial decision-making.

Criminal trials in both traditions recognise the special position of the accused. The presumption of innocence is testimony to this. The Statute of the International Criminal Tribunal for the Former Yugoslavia (SIT) declares that the accused shall be innocent until proven guilty.[36] As well, the accused is accorded the right to remain silent[37] and he/she is not compelled to testify against himself or confess his guilt.[38] While these protections appear to comply with international instruments such as the International Covenant on Civil and Political Rights, they may be seen as contradictory to the practice of both procedural styles, and may be waived even in the practice of the Tribunal. For instance, in England the right to silence has recently been curtailed.[39] In most civil law traditions, while the presumption of innocence may be accepted, it is expected that the accused will be an initial witness in his/her defence and that his/her testimony will answer the inquisition. With charges relating to crimes where the special knowledge of the accused is recognised, in either tradition the presumption against self-incrimination may be waived.[40] Even for the ICTY, the Rules provide opportunity to require answers which may be self incriminatory, with the provision that on objection the

35. Norrie, A. (1993) *Crime Reason and History: A critical introduction to criminal law*, London: Weidenfeld & Nicolson.

36. Article 21 (3).

37. Rule 42 (A) (iii). No reference in the Statute or the Rules is made to any inferences which the judge or prosecutor may draw if silence is claimed. See also the SIC Art. 67(1)(g).

38. SIT Art. 21(3)(g).

39. The right to the unsworn "dock statement" has been removed (which is contrary to the proposed protection in the ICC – SIC Art. 67 (1)(h)). Judges are also given some restricted opportunity to make adverse comment on an accused's refusal to answer questions in certain circumstances. See, for instance, *Criminal Justice and Public Order Act*, 1994, ss.34, 36, 37. Also, note the discussion in *Murray* v. *DPP* (1992) 97 Cr. App. Rep. 151; *R* v. *Martinez-Tabon* [1994] 2 All E.R. 90.

40. For a discussion of this in the context of Article 6 of the European Convention see, *Saunders* v. *UK* (1977) 23 E.H.R.R 313.

witness will be protected from criminal prosecution supported by this evidence (except for perjury).[41]

Under article 66(2) of the proposed Statute of the International Criminal Court (SIC) the onus is placed on the prosecutor to prove the guilt of the accused "beyond reasonable doubt". While this is procedurally consistent with the presumption of innocence it will require a significant shift in the inquisitorial role of procurators in civil law traditions.[42] As a universal rule[43] it also stands in contrast with developments in common law jurisdictions to impose the onus of denying guilt on an accused for specific offences, through devices such as presumptions regarding knowledge and possession, or through strict liability.

Independence for trial professionals is a common aspiration within both procedural styles. The construction of international tribunals is said to rest on the independent judiciary.[44] The International Criminal Tribunal for the Former Yugoslavia (ICTY) is constituted by a bench selected through a complex election process designed to ensure the widest representation from UN States.[45] Its statute (SIT) specifically requires "adequate representation of the principal legal systems of the world".[46] Yet where the procedural style has the judiciary elected through a politically initiated ballot, such as this, the independent presence and operational status of the international judiciary might be impugned. For instance, both with the ICTY and the proposed International Criminal Court (ICC), issues of delegated authority and the role of the UN Security Council in facilitating prosecutions and enforcing judgments make the separation from international political instrumentality somewhat illusory.[47]

Another important ideological premise for the criminal trial is that of individual criminal responsibility. The SIT[48] and the SIC[49] each express this principle. Once said, both statutes proceed to allow for vicarious liability, complicity, and to deny the excuse of superior orders or office. A

41. SIT Rule 90 (E).

42. This is taken even further from the civil law tradition when the SIC protects against the imposition on the accused of "any reversal of the burden of proof, or any onus of rebuttal"—SIC Art. 67 (1)(i).

43. *Cf.*, for instance, *Magistrates Courts Act* 1980, s.101, *Misuse of Drugs Act* 1971 s.28 (2); *Public Order Act* 1986 s.6 (5).

44. SIT Art. 12.

45. SIT Art. 13.

46. *Ibid*.

47. The role of the Security Council and the General Assembly in filling casual judicial vacancies, appointing other trial professionals, disciplining professional misconduct, and ensuring the primacy of the tribunal or court against those of national jurisdictions makes the bond a more operational one. Similar criticisms could be raised in relation to the independence of the prosecutor.

48. Art. 7 (1).

49. Art. 25 (2).

practical reason for the ascription to individual liability here is to avoid prosecutions directed against the State or any official capacity.[50]

Either through the definition of the offences covered by the tribunal[51] or by special reference to mental elements required,[52] intention is designated as the mental state required for criminal responsibility. This may appear a logical outcome when the serious offence focus of international tribunals is analysed. However, if for instance the law on complicity in either tradition is to be applied, then liability through common purpose will challenge such a narrow reading of criminal responsibility and capacity.[53]

At a procedural level one of the major ideological hurdles for synthesis appears to be the requirement for fair trial. This obviously emerges from a "rights climate" which is compatible with the international requirements for the criminal trial. But within common law styles, for example, where recognition of the rights of the accused has either proceeded from broad statements of often-contradictory principle,[54] or is constructed against challenges to justice, a coherent representation of the essential elements in fair trial is illusive.

The search for synthesis at the level of ideology (and its impact in practice) seems to reveal:

- some divergence between the ideology of international criminal procedure and that of one or both the competing procedural styles;
- some divergence between the ideology of international criminal procedure and that of one or both styles in practice;
- some inconsistency within the international procedural hybrids; and
- examples of where harmony of procedural ideology may mask temptations for difference in practice.

Synthesis of Trial Personalities

A prominent area of procedural difference between the two styles is the role and function of the prosecutor.[55] In adversarial trial traditions the prosecutor is responsible for the presentation of the case against the

50. For instance, SIT Art. 7. Another indicator of this is the limitation on the jurisdiction of these tribunals only over "natural persons".
51. SIT Arts. 2–5.
52. SIC Art. 30.
53. The grounds for excluding liability as set out in Art 31 of SIC seem to anticipate this.
54. See Norrie, A. (1993) *Crime, History and Reason,* London: Butterworths.
55. The term prosecutor here, while distinctly different in many ways, is used for convenience to also refer to procurators.

accused but may have little to do with the investigation of the matter.[56] Civil law trial traditions are heavily reliant on the production of pre-trial documentary evidence arising from the investigations of the prosecutor. In each setting the prosecutor is crucial to trial process and outcomes.

In the international tribunals the prosecutor is represented as independent and, to confirm this, the office of the prosecutor is empowered to initiate investigations.[57] Even so, it is envisaged that information which would form the basis of an investigation will be passed over to the prosecutor either from local jurisdiction's earlier commenced proceedings, or from other bodies within the international community such as the Security Council.

The international prosecutor is the formal sieve for matters proceeding to further investigation and trial. For instance, proposed for the ICC is the requirement that if the prosecutor initially concludes there is a "reasonable basis to proceed with the investigation" he or she makes application to a Pre-trial Chamber of the court to authorise the investigation.[58] At this stage there is some formal symmetry in the prosecutorial relationship of the court and the prosecutor.[59]

In the international setting the prosecutor is given the right to defer and divert, which is an area of expansion in the authority of the prosecutors in both procedural systems.[60] Article 16 of the SIC interestingly gives the Security Council a limited right of intervention over the investigation, to defer its commencement or processing. The prosecutor also has the right to request (and indeed require) the deferral of local jurisdictional investigations or criminal proceedings.[61] This is usually to enable the precedence of the jurisdiction of the international tribunal.

The powers given to international prosecutors to conduct investigations[62] are largely represented by police powers in common law

56. Obviously, as with so many statements for the purposes of broad comparison, this requires qualification. For example, the offices of the Attorney General, and the District Attorney in U.S. jurisdictions have extensive investigation as well as prosecution functions. In many other common law jurisdictions, in the lower courts prosecutions may be carried out by investigation agencies such as the police.

57. This initiating role is an extension of the powers of the prosecutors in many civil law settings.

58. Art. 51 (1).

59. This is not to be confused with the common law process of committal which concludes after charge and determines whether the prosecution case is fit for trial. This might be seen as a stage at which the court further aligns itself with the protection of the rights of the accused.

60. In certain jurisdictions, such as Scotland, this has progressed to the point of formal determinations of guilt and penalty on consent without proceeding to trial. See Duff, P. (1993) "The Prosecutor Fine and Social Control: The introduction of the fiscal fine in Scotland", *British Journal of Criminology* 33/4: 481.

61. See Rule 9 of SIT. Non-compliance with this request is enforced by the Security Council—Rule 11 SIT.

62. See Rules 39–41 SIT.

jurisdictions. It might be argued that the international (and largely civil law) role of the prosecutor as investigator inhibits the potential for a critical separation of powers between policing and prosecution. However, this might equally be justified on the basis that the prosecutor may better ensure compliance with the rights and protections of the accused.[63]

Another area of difference in relation to the prosecutor is his/her relationship with the judicial officer. In common law traditions (in theory at least) the magistrate or judge should be no more well disposed to either side of the case. Particularly with investigating magistrates in the civil law styles, they also act as prosecutors or could have worked with the prosecutor in the earlier investigation and preparation of the case. This close relationship is envisaged in the workings of the ICC "Pre-trial Chamber". For the ICC it is proposed that a "unique investigative opportunity" may be taken through the facilitation of the Pre-trial Chamber. That chamber may, amongst other things, order measures for recording proceedings, appointing an expert to assist the investigation, and even nominate a judge of the Pre-trial Chamber to "observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons".[64] The Pre-trial Chamber can act on its own initiative regarding investigations. Even in the most intrusive common law pre-trial hearings this would never be envisaged.

This relationship is compounded through the process of settling indictments for international trials. In the ICTY, for instance, once the prosecutor is satisfied that "there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal",[65] an indictment shall be prepared by the prosecutor and sent to the registry for "confirmation by a judge". The confirmation process occurs in trial chambers with the prosecutor addressing the judge. The judge can confirm or dismiss any count in the indictment and dismissal will allow for the introduction of a new indictment with the benefit of additional supporting material. If there is amendment of an indictment after its judicial confirmation leave must be sought from the confirming or trial chamber.[66] Withdrawal of an indictment after confirmation also requires leave.

63. As enunciated, for instance, in Rules 42–43 SIT.

64. Art 52. For a discussion of the functions and powers of the pre-trial chamber see, Art 57.

65. Rule 47 (A). It should be noted that particularly in relation to the Tribunal's early hearings there was some generality in the description of charges in the indictment. This may have been a product of the broad construction of offences in the Statute and the absence of judicial interpretation as to the elements of these offences.

66. Rule 50 (A).

Common to both traditions is the precedence given to the presentation of the prosecution case and the opportunity for the prosecutor to conclude. This depends on the prevailing responsibility for the case against the accused to be established to the satisfaction of the court in order that the accused should be required to answer.[67] In civil law procedure the inquisition is finalised through the trial whereas the role of the prosecutor in an adversarial trial is to establish all elements of the charge within the trial.

Any synthesis of prosecutorial procedure would need to encounter:

— the differing investigative roles, and prosecutorial powers;
— the relationship between the procurator and the tribunal, particularly at the investigation stage;
— the nature of evidence on which the prosecution relies; and
— the pre-eminence of the prosecutor in the theatre of the trial.

Synthesis in the Presentation of Evidence

The form and presentation of evidence before the trial is an area where considerable difference exists between procedural traditions. Except at the committal stage, evidence in common law trials is generally required in the form of oral testimony from witnesses.[68] In the civil law trial the prosecution relies heavily on the written dossier presented as evidence, and consisting of the record of the investigation.[69]

There is a heavy reliance on the oral testimony of witnesses before international criminal tribunals.[70] This is consistent with the desire, for example, of the ICTY to represent the process of trial as publicly as possible.[71] The rules of the ICTY give entitlement to parties to call witnesses.[72]

It is envisaged for the ICC that judges may give directions as to the presentation of documentary evidence accumulated at the pre-trial stage so long as it goes to ensure "that (trials) are conducted in a fair and impartial manner".[73] There is also provision in the Trial Chambers of the

67. This onus on the prosecutor is recapitulated for instance in SIC Art. 66 (2).

68. This may be supported by a written record of interview, and physical or documentary exhibits. However their admission as evidence may depend on the process through which oral testimony is examined.

69. This may include the transcripts of testimony from witnesses, and may be confirmed or elaborated by witnesses examined in person during the trial.

70. It has been suggested that this might reflect the preferred practice of the prosecutors, most of whom seem to have come from a common law tradition.

71. It should be remembered that for this Tribunal, and as proposed for the ICC, there is detailed opportunity for closed hearings, the delivery of testimony through video facilities and the de-identification of witnesses—see, SIC Arts. 64 (7), 68, 69.

72. Rule 85. Such entitlement is qualified in the common law styles and may not exist for the defence at least in certain civil law trial proceedings.

73. SIC Art.64 (8)(b).

ICTY for the taking and introduction of depositions "in exceptional circumstances and in the interests of justice".[74] Such caveats do not necessarily apply to the status and production of depositions as part of the dossier in the civil law trial.

It is envisaged that the Trial Chamber will have the power on the application of any party to rule "on the admissibility and relevance of evidence".[75] The probative value of the evidence and any prejudice such evidence may cause to a fair trial ("or to the evaluation of the testimony of a witness") is also appropriate for judicial consideration in determining admissibility or relevance.[76] Further, the relevance of evidence (particularly documentary in form) may be determined in terms of what the court considers necessary for "the determination of the truth".[77] In fact, unlike the case in many common law settings, the judge is given the power to request the submission of all evidence it deems necessary for this purpose. Finally, evidence obtained by means of a violation of the SIC or of "internationally recognised human rights" shall not be admissible if the reliability of the evidence is cast into "substantial doubt", or admission of the evidence would be "antithetical to and would seriously damage the integrity of the proceedings".[78]

An area where there has developed some interesting innovation within international trial practice is the disclosure of evidence. For instance, in the ICTY the prosecutor shall make available to the accused as soon as practicable after his initial appearance "copies of the supportive material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the prosecutor from the accused or from prosecution witnesses".[79] This would seem to encompass statements which were not to be used by the prosecution in their case, and if so it would go well beyond general common law conventions for the disclosure of the prosecution "brief". Regarding the ICTY, the requirement for the prosecution to disclose extends to the inspection of all documentation and material evidence on which the prosecution will rely or which is material to the preparation of the defence. The prosecutor may resist disclosure if in his/her opinion it would be against the public interest to do so, or it would prejudice an on-going investigation or the security interests of any State. This is determined on application to the Trial Chamber.[80]

74. SIT Rule 71.
75. SIC Art.64 (9)(a). This distinction may suggest that these determinations are not mutually reliant.
76. SIC Art. 69 (4).
77. SIC Art. 69 (3).
78. SIC Art. 69 (7).
79. SIT Rule 66 (A).
80. SIT Rule 66 (C).

It is in the area of reciprocal disclosure where procedures have become unique. The prosecutor is required to notify the defence of the witnesses who will be called to establish their case and to rebut any defences. The defence on the other hand shall notify the prosecution of an alibi and "any special defence (such as diminished responsibility) and the notification shall specify the names and addresses of witnesses upon which the accused intends to rely to establish the special defence".[81] Except in very unusual circumstances this level and detail of disclosure clearly challenges the common law protections of the accused referred to earlier, and is at the heart of the presumption of innocence.[82] Even more extraordinary in this context is the rule that if the defence applies for access to the material evidence on which the prosecution intends to rely then the prosecutor "shall be entitled to" any and all similar evidence in the defence case.[83] Also there is an ongoing duty on both parties to disclose any evidence which later comes to their attention which should have been disclosed under the rules.[84]

There is an overriding duty on the prosecutor to disclose any exculpatory evidence; such that suggests the innocence of the accused "or mitigates the guilt of the accused or *may effect the credibility of the prosecution evidence*".[85] Such an obligation based on the subjective assessment of a party to the proceedings no doubt will generate pre-trial argument. In addition, it is entirely reliant on the integrity of the prosecutor and points to the difficulty of the enforceability of such rules of disclosure.

The issue of disclosure required by the ICTY is further complicated through a detailed set of exclusions.[86] These include internal memoranda about the investigation, and certain information delivered in confidence.[87] Witnesses may be compelled to answer even self-incriminating questions but if so they have immunity from further prosecution on this evidence except for perjury.[88]

81. SIT Rule 67 (A)(ii). Failure to disclose does not limit the right of the accused to utilise the special defence.

82. In this respect it is not only the ideology of original procedural styles which is challenged, but so too consistency with the ideology of the international tribunals.

83. SIT Rule 67 (C).

84. This, of course, highlights a common failing with expectations for disclosure: the party on whom the obligation is placed is also the party likely to have special knowledge of what should be disclosed. Therefore, the enforcement of disclosure obligations as of right from the benefiting party may prove impossible.

85. SIT Rule 68.

86. Rule 70—Matters not subject to disclosure.

87. If such information is required for disclosure, the person providing confidential information cannot be compelled as a witness to answer questions which he declines on the basis of confidentiality—Rule 70 (D).

88. SIT Rule 90 (E). Interestingly, this stands in opposition to rights charters such as the International Covenant on Civil and Political Rights. See how this stands against the protections espoused in Rule 95.

Concerning the presentation of evidence, the international tribunals propose and practice procedures drawn from both original styles. For instance, the ICTY prioritises the prosecution case, allows for evidence in rebuttal and rejoinder, and judicial questioning at any time. Evidence is elicited from witnesses through examination in chief, cross-examination and re-examination. The accused may appear as a witness in his own defence, but is not so required.[89] The decision rests with the accused as does the positioning of his evidence within the defence case. It can be assumed that the evidence of the accused may be presented in any form which is provided for any witness before the Tribunal.

Any synthesis of procedures for the presentation of evidence would need to address:

- the significance of documentary and dispositional evidence as compared with the evidence of witnesses before the Trial Chamber;
- the influence of Pre-trial Chamber decisions over the form and future of evidence;
- the role of the prosecutor and the judge in the production and presentation of evidence;
- the extent and direction of disclosure obligations;
- the compatibility between ideological principles such as the presumption of innocence and the status of disclosure obligations;
- requirements regarding the compellability of witnesses;
- the place of the accused as witness;
- the determination of admissibility against over-arching requirements for fair trial; and
- the purpose of evidence elicited within the trial.

INSIGHTS FROM THE TADIC TRIAL

THE trial of Dusko Tadic before the ICTY provides a unique insight into the procedural integration of trial practice at an international level.[90] It was the first completed full trial for the Tribunal, and one of its longest to date and most complex in a procedural sense. Because of its formative nature the pre-trial and trial deliberations provoked a range of definitional and practical problems which reveal much about the challenge of integration in the early days of a permanent international jurisdiction.

89. SIT Rule 85.

90. The Transcript of this judgment is particularly enlightening from a procedural point of view due to the 10 page procedural background which plots the interactions in the Tribunal through the pre-trial and trial phases.

Reflecting on the purposes for this paper, the Tadic trial (and the pre-trial procedures) reveal the importance of discretion and interpretation for practice, where the different positions of players and their decisions indicate potentials for procedural synthesis, and impediments to its realisation. Original procedures and practices emerged from the necessities of the trial, carrying so many political expectations.

The intervention of the trial chamber was evident and active in the trial and pre-trial phases. Not only did this involve judicial direction and rulings, but more managerial control over the evolution of the trial. For instance, the judges seemed to rely on *status conferences* for the purposes of rule interpretation prior to the commencement of the trial. This went well beyond responding to the intercessions and motions of the parties to the trial. On one occasion, for example, the judges corresponded with the parties setting out a number of points that the chamber wanted considered by them before the trial commenced. As the transcript identifies:

> This being the first full trial conducted by the International Tribunal, and in view of the fact that counsel came from a variety of national jurisdictions, the Trial Chamber sought to involve the parties in discussion of the practical and procedural aspects of the trial.

This was a closed session to discuss matters such as discovery, translation of documents, use of courtroom technology for the display of exhibits, questions of identification, the status of co-accused, the need for pre-trial briefs and the issues they should address, financial arrangements for defence counsel, co-operation of State authorities with both the defence and prosecution, practical arrangements for protected witnesses within the courtroom, and the implication of live broadcasting of proceedings for these witnesses.

Following this status conference the court issued a range of orders concerning the obligations of the parties and these were the subject of motions from both sides. In particular the prosecution filed to compel the defence to disclose their witness statements. This was later denied.

Due to the formative nature of the indictment process, and the charges on which this indictment rested, the parties sought some direction from the judges prior to the trial regarding the elements of the offences and their constituents. Interestingly, the Chamber refused to provide direction as to interpretation, instructing the parties instead that these issues could be dealt with in their opening statements. In this situation the judges chose not to be interventionist.[91]

91. It may be argued that this failure to direct as to the constituent elements of very wide and as yet ill-defined offences may have been a reason for the need to amend the indictment prior to trial, and why there was some criticism of the manner in which the prosecutors were forced to rely on broad time periods for the establishment of certain charges.

An interesting procedural issue revealing the potential influence of division between the two original procedural styles, and the manner in which this can be reconciled, focused on corroboration. The defence contended that in civil law, as distinct from common law, some degree of independent causal corroboration of evidence is required. Further, it was argued that this approach should be applied in cases before the Tribunal in order to meet what the defence asserted were fair and settled standards of proof, rather than developing what they described as "ad hoc standards to enable [the Tribunal] to convict". In answering this submission the Chamber reverted to the Rules enabling the application of any relevant evidence having probative value, unless this value is substantially outweighed by the need to ensure fair trial. The judges then adopted a legalist interpretation of the rules wherein corroboration is only given relevance in the context of sexual assault.[92] They then took the view that the defence assertions regarding the civil law position on corroboration was not an accurate reflection of that position. By examining the position in France, Belgium, Germany, Portugal, the Netherlands and Spain it was established to the Chamber's satisfaction that there was no hard and fast civil law position on corroboration. Rather, the judges concluded that it was a developing principle over time which now largely rested on the discretion of the trial judge, within these traditions. By taking this approach of reading down the argument against the enabling instruments, and the laws of certain jurisdictions, the Chamber avoided ruling on the wider question of whether ascription to a particular procedural style was the way to ensure standards of proof, or whether it was for the Tribunal to create their own procedures and standards. This is certainly a question which will arise again for argument. It is not limited to the interpretation of particular evidentiary issues. Interestingly, in its concluding remarks on this instance, the judges even invoked the position in hybrid procedural systems beyond the civil and common law divide.

> . . . this principle (of corroboration) does not exist in Marxist legal systems, including those of the former Yugoslavia and China, which largely follow the civil law principle of the freedom of evaluation of evidence.

Another significant issue where procedural compromise seems evident arose from what the court considered was a lack of specificity in the charges of the indictment. This might be seen as a factor of the very broad crimes which are the remit of the Tribunal. It also might be due to the novelty of the charges (and the indictment process) in this context. It should be anticipated that as tribunal case experience develops so will the

92. See, Rule 96 (1). The Chamber argued that the impact of this rule went way beyond what is allowed in common law traditions.

accuracy of the language of liability and the appreciation of the necessities of proof which it requires.

In the situation of the Tadic defence this lack of specificity was recognised as particularly telling. Aggravating this was the common feature of any such investigation: problems with accumulating and verifying evidence from foreign theatres of military conflict where witnesses may be victims and where emotions and loyalties remain fiercely divided.

In the face of almost all the counts of the indictment the accused countered with an alibi defence. The Chamber recognised:

> The difficulty of establishing an alibi defence for those paragraphs [of the indictment] that cover long periods of time is appreciated. In regard to those paragraphs, a major cause of difficulty for the defence lies, however, in the very special character of its alibi defence, which not only has to extend over many months but also does not involve anything like a total absence from the region where the offences are alleged to have occurred.

The Trial Chamber preferred to treat this as a peculiar problem with the Tadic defence. It failed to recognise that the difficulty in invoking any of the limited range of defences available to accused who come before the tribunal will be exacerbated by the breadth of indictments, the nature of the offences, and the concessions required by the terrain and context of the investigation.

The Tribunal identified several problematic evidentiary issues in this case which may also signpost areas of dissonance and synthesis:

- access to evidence
- lack of specificity in charges
- corroboration
- victims of the conflict as witnesses
- identification evidence
- testimony of hostile witnesses
- hearsay.

EUROPEAN FAIR TRIAL JURISPRUDENCE—A CONTEXT FOR SYNTHESIS

RECENT developments from the European Court of Human Rights in the interpretation of Article 6 may further enable internationalised procedural synthesis through an expansion of the notion of fair trial.

Article 6 requires that for the determination of the civil rights and obligations of persons before the criminal courts, or of any criminal charge laid against a person, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". For the Convention the essential components of fairness in a trial are:

- right of access to a properly constituted court;

— a public hearing;
— in a reasonable time;
— with a public pronouncement of judgment;
— a guarantee of the presumption of innocence;
— being promptly informed of the accusations and in a language of the accused's comprehension;
— to have adequate time and facilities to prepare a defence;
— to defend himself or through legal assistance, given free as the interests of justice require;
— to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf, and
— to have the free assistance of an interpreter when required.

The rights endorsed around the fair trial notion in Article 6 take two directions:

1. General principles of procedural fairness supporting the presumption of innocence;
2. Minimum protections for the accused.

There is little in this version of fair trial which relates to participants beyond the accused (such as victims, witnesses, the prosecutor or the judge), despite the assumption that it is for the courts and the community to oversee these essential procedural components. The language of the rights created in the Article anticipates access to justice through the courts, requirements for the conduct and composition of the court, and a set of guarantees concerning the conduct of proceedings.[93] This language incorporates what has been referred to as "traditional civil rights in criminal proceedings"[94] as well as certain contested matters yet to be resolved in case law.

On the issue of rights of access to the court, this appears to be general. The right may be waived, for instance, through plea-bargaining. Access relates to all stages of the legal proceedings although it may be subject to limitations[95] (such as public interest immunity, and retrospective legislation). Obviously the existence and form of legal aid in a jurisdiction will vitally affect the reality of access to trial, and the nature of that access. Article 6(3)(c) seems to provide for free legal assistance when the

93. As enunciated in *Golder* v. *United Kingdom* (1975) 1 E.H.R.R. 524 para.36.

94. Grosz, J., Beatson, J. & Duffy, P., (2000) *Human Rights: The 1998 Act and the European Convention*, London, Sweet & Maxwell, p.221.

95. Any restrictions must not be such that "the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"; see, *Ashingdane* v. *United Kingdom* (1985) 7 E.H.R.R. 528 para.57.

interests of justice so require. However, the circumstances of each case may tend to qualify this right. It is for the court to determine the merits of any application for free assistance.

The tribunal before which the charge is heard must be independent and impartial. These requirements apply as much to jurors as to professional judges.[96] And it is for the judges to ensure this. The requirements concerning independence and impartiality obviously spill over into the pre-trial phase.

The court is generally obliged to conduct proceedings so as to ensure a fair hearing. The difficulty here is that without a definition of a fair trial within the Convention it is unclear how this notion underlies the broad and specific rights contained in Article 6. A trial may not conform to a general standard of fairness even if the minimum rights guaranteed in paragraph (3) have been respected.[97] Interestingly, however, it would appear that the court will not engage in a detailed examination of the paragraph (3) guarantees if it can safely conclude that overall the accused has had a fair or unfair hearing.[98] If the accused's complaint does not invoke any of the specific guarantees then the case as a whole will be considered, even where the disputed incident is the turning point of the claim as to unfairness. This allows for the rejection of procedural flaws that do not produce unfairness, or where the flaw has been cured by a higher court. It may also allow for the aggregation of a series of shortcomings any of which may not constitute unfairness.

The Convention organs have relied on general rights to a fair hearing in order to articulate more specific rights. These include the right to adversarial proceedings, the right to equality of arms, the right to be present, the right to know the grounds on which the court's decisions are based, the rights to remain silent and against self incrimination, and access to necessary information for a defence.[99] Despite the absence of direct reference to the issue in Article 6, the court is also taking a supervisory position on the fairness of taking evidence.

The principle of equality of arms means a person must be afforded a reasonable opportunity of presenting his case to a court under conditions which do not place him at a substantial disadvantage in relation to his opponent.[100] This principle encapsulates the rights of access, information, confrontation, and representation, and has been invoked in the ECHR over issues such as failure to furnish documents to a party, failure to give reasons, refusal to admit evidence, and the use of court appointed experts.

96. *Holm* v. *Sweden* (1994) 18 E.H.R.R 79.
97. *Neilsen* v. *Denmark*, (1989) 11 E.H.R.R 175, Commission's Opinion para. 52.
98. See, *Barbera, Messengue and Jabardo* v. *Spain* (1988) 11 E.H.R.R. 360.
99. Grosz (et al.) *op. cit.* pp.245–246.
100. *Kaufman* v. *Belgium* (1986) 50 D.&R. 98.

The right to remain silent, and the privilege against self incrimination, while not specifically referred to in Article 6, have been implied from recognised international standards as lying "at the heart of the notion of fair procedure under Article 6".[101] They apply to all forms of crime and are not automatically qualified by appeal to the public interest in the prosecution of serious or complex offences. Despite the link with the presumption of innocence, these principles and their violation are considered against the overall fairness of the trial. In essence these rights protect the accused from improper compulsion by the authorities which may lead to miscarriages of justice. The right to silence is not absolute[102] and courts might legitimately draw inferences from the silence of the accused.

The right to a hearing within a reasonable time relies on the determination of reasonableness on a case by case basis. The courts, in making such a determination, will have regard to the complexity of the case, the conduct of the accused and the competent authorities.[103] As for public hearings and the public pronouncement of judgment, rendering the administration of justice as visible is seen to guarantee one of the fundamental principles of a democratic society as conceived by the Convention. Unless there are exceptional circumstances these rights envisage an oral hearing as well. Publicity for judicial hearings are subject to certain specified exceptions such as those pertaining to the trial of young people. This is also the case with the public pronouncement of judgment.

The presumption of innocence has some connection to considerations of the impartiality of the court.[104] Also the presumption is a justification for Article 6(2) placing the onus of proof on the prosecution. The burden of proof here is not clear,[105] and strict liability offences as well as those where the onus may be reversed can be tolerated as exceptions.[106]

Particular procedural rights such as adequate time to prepare a defence; the right to be informed of charges promptly and intelligibly; the right to a personal defence and legal representation; the right to confront witnesses; and the right to an interpreter, substantiate the general right to an adequate defence. This has promoted more specific rights such as

101. *Murray* v. *UK* (1996) 22 E.H.R.R 29 para. 45.

102. *Saunders* v. *UK* (1996) 23 E.H.R.R 313, held that the right to silence may not operate to prevent the compulsory obtaining (as opposed to use) of evidence during the investigation of company offences.

103. *Eckle* v. *Germany* (1983) 5 E.H.R.R. 1 para. 80.

104. See, *Saunders* v. *UK op. cit.*, where allegations of a racist jury were said to deny the impartiality of the tribunal and therefore challenge the presumption of innocence.

105. See, *Austria* v. *Italy* (1963) 6 Y.B. 740.

106. See, *Salabiaku* v. *France* (1988) 13 E.H.R.R 379.

prosecutorial disclosure,[107] effective legal assistance,[108] and the right to witness protection.[109] These in turn feature prominently in the foundation instruments of the international tribunals.

PROSPECTS FOR SYNTHESIS?

THE ideology governing international criminal tribunals is that which identifies "fair trial". The "rights-based" language elaborating on "fairness" is consistent and compatible with the political origins of the tribunals,[110] but may not sit well with the recent development of common law and civil law procedural traditions.[111] In both styles there prevails some confusion about rights protection: where do the victim and the accused person stand relative to each other and the interests of the State?

But this is not just an issue where the original procedural styles need to embrace the fair trial notion for synthesis to be possible. Problems exist in the translation of "fairness" even at the international level. For instance, one might assume that access-to-justice issues are synonymous measures of fairness. Yet, beyond general concerns for the representation of the accused, and the presentation of his case, access is not an important feature of the enabling instruments for international tribunals. Further, these instruments (and the trial practice which they promote) are replete with some of the contradictions which challenge access and fairness in the originating styles.[112] As well, international trial practice seems to have created new conditions (such as the extent and obligations for disclosure) which may confuse the status and directions of rights and fairness within the trial context.

There can be no doubt that, in order for synthesis at the level of ideology, the challenge of fair trial requirements must be addressed. And this needs to be done being aware of, and resistant to, the common and civil law procedural practice to speak one language when it comes to principle and to tolerate contradiction without challenging that principle.

Access to justice is a means whereby the "fair trial" formula may be more universal. Fair trial concerns should identify points of connection between the professional and lay participants in the trial, at crucial situations of access. Legal representation and the interaction between the advocate and the accused are examples of this. At the international level

107. *Edwards* v. *UK* (1993) 15 E.H.R.R 417.
108. *Antico* v. *Italy* (1980) 3 E.H.R.R. 1 para. 33.
109. *Dorson* v. *Netherlands* (1996) 22 E.H.R.R 330.
110. Arising as they do out of international organisations and multilateral agreements which similarly foster and rely on rights conventions.
111. The new human rights legislation in England has thrown into stark relief certain investigation and trial practice. The French have recently reviewed their criminal procedure against the European Human Rights Convention and preferred to retain contradictory features.
112. Such as the qualification of the rule against self-incrimination.

the issue may be communication rather than availability of representation and this may inform comparable access debates in local jurisdictions which tend to focus on service availability rather than delivery.

The nature, quality and availability of legal representation are crucial to the fair trial from the perspective of the accused. But representation, or the lack of it, may not merely be evaluated in terms of legal aid mechanisms, or principles of equality of arms. With international tribunals, legal representation is guaranteed, but the divisions of language, culture and experience between the accused and his counsel may qualify the actuality of representation and hence access. In addition, the nature of the charges indicted from international jurisdictions, the limited available defences, and the acceptance of factual generality in establishing either could create conditions where access to the real "defence" of a fair trial may be reduced.

In addition to the perspectives of access, and situations of connection, research must examine features of trial practice considered crucial to access. These would include prosecutorial issues, mode of trial issues, remand issues, and sentencing issues. They then would be subdivided for analysis in both local and international trial settings. For instance, considerations of the prosecution, sufficiency of evidence, public interest and accountability, disclosure protocols, delay, principles of diversion, governance of evidence delivery etc., are likely to be crucial as they impact on access.

Fair trial will be a measure both for the uniqueness of internationalised trial procedure, and the manner in which it merges and elaborates on competing procedural styles. This is already happening when one considers the status and protection of the victim/witness. The development of the internationalised fair trial will be dependant, however, on better actualising many of the accused's rights which are exercising the judicial minds at the ECHR.

Synthesis of institutional and procedural form is a reality in the international tribunals because of the necessity to run trials and to run them in public view using the same professional and lay players who feature in the common law and civil law styles. Interestingly, it seems that in trial practice the synthesis takes the form of compromise, and procedural difference (or claims back to comfort in either of the originating traditions) are arbitrated by the trial chamber. To this extent, synthesis is a necessary feature of trial practice but it operates within an over-riding potential to claim and activate procedural (and interpretative) difference.

The extent to which such difference will feature in international trial practice is modified by both the relative novelty of the process and the limited, unique and generalised indictments which are the substance of the trial. Were the matters before trial chambers to be of the type more

likely to be settled in common or civil law (and the procedure for their prosecution or defence more recognised and clear) then instances of difference would also be more apparent, and no doubt more openly contested.

Synthesis also appears through predominance. In the international criminal trial it is essential (for the symbolic significance of the event at least) that as much of the process as possible be public. For the purpose of the spectacle, and that the interest of the observer should be retained, witnesses rather than documents reveal the evidence in question.

With the predominance of oral testimony as the source of evidence, the rules for its delivery and admissibility are more likely to link back to a procedural style which shares the significance of the witness (the common law). Therefore, the enabling instruments and trial practice of international criminal tribunals seem governed by English/American rules of evidence.

It is difficult to speculate on the "cult" of personality in the process of synthesis. However, two conditions present suggesting that strong judges and prosecutors in particular, from either tradition, will have a major impact on synthesis and difference. First there is the importance of the professional within the trial. International criminal procedure continues to celebrate the place of the prosecutor and the judge in running the trial. International pre-trial and trial practice suggests that interventionist judges in particular are having an impact on what procedural outcomes feature. This is not only because the statutes allow the trial chamber to assume significant governance over the trial. It is anticipated in the way the roles and powers of international judges and prosecutors are constructed that discretion (the second condition) will be as, if not more important than it is in either originating procedural style.

The nature of originating instruments for the international trial institutions should not be ignored as an influence for synthesis. The more pragmatic approach adopted by the ICTY under its relative skeletal Statute and Rules may not be preferred by the ICC with its more detailed and inclusive instruments. Even so, the nature of broad generic offences as the jurisdiction for all internationalised courts, and the enforced blend of procedural traditions, professional preferences and practical experience will generate a common atmosphere of compromise and pragmatism.

The limited observations on procedure and trial practice in this paper suggest that synthesis at the international level is a matter of convenience, or at least compliance rather than any recognition or commitment to a new compatibility. The political imperatives fuelling the international tribunals (and the moves towards an international criminal court) are not tolerant of disparate procedural niceties standing in the way of trial outcomes. Therefore, what now seems to be a triumph for synthesis may

be more reliant on the political moment of internationalisation rather than on any real and significant developments towards a new, fused procedural tradition. Perhaps the test for whether this will occur as a result of internationalisation is the evidence of synthesis within the originating procedural styles as they develop and continue to operate in their home jurisdictions.