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THE INFLUENCE OF THE COMMON LAW SYSTEM ON THE CONSTRUCTION OF INTERNATIONAL CRIMINAL LAW. SOME PRELIMINARY CONSIDERATIONS

Abstract: The influence of common law on international criminal law is analyzed in this paper. Within the broad spectrum to be analyzed, the paper focuses on the influence of common law on the trend towards judicial creativity in international criminal tribunals. This creativity is reflected, at least, in the determination of customary norms and general principles of law. Similarly, this paper examines the influence of common law on the shaping of rules of evidence and procedure in the various international criminal tribunals existing to date.

Keywords: Common law, international criminal law, international criminal tribunals, judicial creativity, rules and procedures

1. INTRODUCTION

International criminal law has undeniably been influenced by the logics, institutions, and concepts of national criminal law, primarily from the models of common law and civil law. In the construction of international criminal law, concepts and institutions from both legal systems have been combined to provide a different system that cannot be identified in absolute terms with one system or the other. In general terms, it has been a mixture of both systems resulting in a *sui generis* system that adapts characteristics of both systems in an international procedure. Hence, neither should prevail over the other as a reference for defining concepts or categories incorporated into international criminal law.[1]

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1 This is the idea expressed by Judge Antonio Cassese in *Separate and Dissenting Opinion of Judge Cassese, Prosecutor v. Drazen Erdemovic,* Appeals Chamber.

Though accurate, it is evident that the intellectual foundation most pertinent in the early development of international criminal law is rooted in common law.[2] The evolution of international criminal law itself exhibits characteristics more closely aligned with common law logic. It is evident that there is confusion in distinguishing between the components and characteristics of both systems. From basic premises, it is indeed 'superficial' to not specify or make nuances in an absolute identification of civil law with the code, or common law with case law. There is merit in the argument that in the evolution of both systems, it is possible to find elements of both, rendering this ancient distinction incorrect.[3] The same caution must be exercised in evaluating the procedural systems of common law, identified with the adversarial system, and civil law, associated with the inquisitorial system.

The present document consists of preliminary ideas on the influence of common law on international criminal law in two fundamental spheres: in judicial creation through international jurisprudence for the determination of customary norms and general principles of law; and regarding procedural rules constructed from the International Tribunal of Nuremberg, followed by the *ad hoc* tribunals for Yugoslavia and Rwanda, culminating in the Statute of the International Criminal Court.

2. THE "JUDICIAL CREATIVITY" IN THE CONSTRUCTION OF INTERNATIONAL CRIMINAL LAW: THE KEYS TO ITS SIMILARITY WITH THE COMMON LAW METHOD

The development of international law has been identified by several English and American authors with the common law system.[4] The assimilation of common law into international law in the creation of law is related to the inherent characteristics of international law. The unwritten nature of customary norms

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2 Antonio Cassese himself has acknowledged that "for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach". *Ibid.*

3 "No legal system functions today without a heavy reliance on case law, and the common law systems are heavily governed by statute if not necessarily by codes as sophisticated as the German BGB (Civil Code)." G. P. Fletcher, "The Influence of the Common Law and Civil Law Traditions on International Criminal Law", *The Oxford Companion to International Criminal Justice* (ed. A. Cassese), Oxford University Press, 2009, 104.

4 *Vid.*, for example: "International law is, like the Anglo-Saxon common law, a system of customary law, to be determined from accepted international practice, and from treaties, declarations, learned texts, and other sources." T. Taylor, "Final report to the Secretary of the Army on the Nuremberg war trials under control council law no. 10.", *US Government Printing Office*, 1949, p. 9. Also see: H. Waldock, "General Course on Public International Law", *RCADI*, 106/1962, 39; P. Akhavan, F. Mégret, "The Problem of 'Uncertainty' in International Criminal Law and the Common Law 'Method'", *British Yearbook of International Law*, 2023.

in international law has led some authors to consider the similarity of the international legal order to the common law system.[5] There have also been authors who argue that some techniques of common law could be 'beneficial' for international law in terms of judicial precedent.[6] And it is evident that this similarity is further justified when dealing with a regime of international law (such as international criminal law) that is constructed as it is applied.

The development of international criminal law encountered several obstacles from its inception: the problem of the unwritten nature of customary norms and a limited normative framework.[7] This necessitated considerable judicial activism and raised questions about the value of "judicial precedent"[8] and whether it bore any similarity to its value in common law systems. However, in the jurisprudence of international criminal tribunals, the application of a similar formula to the "judicial precedent" of common law has been rejected. Judicial decisions are considered subsidiary means of interpretation under Article 38(1)(d) of the Statute of the International Court of Justice. On the one hand, these judicial decisions help ascertain whether there is an *opinio juris* of a customary norm; and on the other hand, they serve as a means to establish the most appropriate interpretation to be included in a treaty norm.[9]

In the ICTY, in the case of *Kupreškić*, the Trial Chamber considered that "the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions"[10], thus framing judicial decisions within the scope of Article 38(1)(d). At this juncture, we quote extensively

> "Hence, generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical

5 H. Waldock, *op. cit.*, 39.

6 Jenning considered at this point: "I mean in particular the rigorous common-law rules for the extraction of the *ratio decidendi* of the case and its differentiation from *obiter dicta*; and the insistence on the importance of relating statements of legal principle to the facts and to the actual issue formulated in the submissions in the case." R.Y. Jennings, "General course on principles of international law", *RCADI*, 121/1967, 343.

7 A. Cassese, *International Criminal Law*, Oxford University Press, 2008, p. 17. This topic is extensively discussed in: E. Díaz Galán, H. Bertot Triana, "La protección de los derechos humanos en la justicia penal internacional: el caso particular del Tribunal Penal Internacional para la ex-Yugoslavia en relación con el derecho consuetudinario y el principio de legalidad", *Universitas, Revista de Filosofía, Derecho y Política*, Instituto de Derechos Humanos "Bartolomé de las Casas", 29/2019, 70–100.

8 W.A. Schabas, "The Legal Regime of the International Criminal Court", *Essays in Honour of Professor Igor Blishchenko* (eds. J. Doria, H. P. Gasser, M. Ch. Bassiouni), Martinus Nijhoff Publishers, Leiden-Boston, 2009, 100.

9 A. Cassese, *op. cit.*, 26, 27.

10 *Prosecutor v. Kupreškić et al.*, Judgment, Trial Chamber, Case. IT-95-16-T, T. Ch., 14 January 2000, para. 540.

judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (auctoritas rerum similiter judicatarum) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of opinio iuris sive necessitatis and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (non exemplis, sed legibus iudicandum est) also applies to the Tribunal as to other international criminal courts."[11]

In the International Criminal Court, Article 21(2) of the Statute established that "(t)he Court may apply principles and rules of law as interpreted in its previous decisions." This provision has been recognized as a reconciliation of the common law and civil law systems.[12] The acknowledgment of this provision has been interpreted as granting discretionary power to the Chamber, which rejects the *stare decisis* doctrine.[13] However, the Court has specified that departing from its previous decisions has limits:

"(…) the Appeals Chamber is not obliged to follow its previous interpretations of principles and rules of law through binding stare decisis;

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11 *Ibid.*

12 In this regard, but in connection with other articles, also see Article 21.2 (M. M. deGuzman, "Article 21 Applicable law", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos, C.H. Beck, Hart, Nomos, 2016, p. 945): "This provision represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties before the court."

13 "(...) the Single Judge recalls that the usage of the verb 'may' in article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the stare decisis doctrine." *Prosecutor v. Kenyatta*, Pre-Trial Chamber II, 02 May 2011, ICC-01/09-02/11-77, para. 23.

> rather it is vested with discretion as to whether to do so. In this respect, the Appeals Chamber has previously stated that absent "convincing reasons" it will not depart from its previous decisions. Thus, in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions."[14]

The common law, alongside civil law, has been essential in determining state practice in the formation of customary norms, as well as in establishing the existence of general principles of law (within the meaning of Article 38 of the ICJ Statute). This has helped determine the meaning and scope of the norms established in the Statutes and the Rules of Evidence of the International Criminal Tribunal for the Former Yugoslavia[15], as well as for the International Criminal Tribunal for Rwanda.[16]

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14 *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate, Appeals Chamber, 31 July 2015, ICC-02/11-01/15-172, para.14.

15 For example, in determining the definition of "rape" (*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic,* Trial Judgment, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, para. 453-456). Also regarding to "provisions on the prosecution and punishment of offences similar to sexual assault" (*Prosecutor v. Milutinovic et al.* (Judgment) - Volume 1, IT-05-87-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2009, para. 197). At this point, also when referring to "the ability to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so" (*Prosecutor v. Pavle Strugar,* Appeal Judgment, IT-01-42-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 July 2008, para. 52-53); o con respecto a "the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States"; o with regard to "the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States" (*Prosecutor v. Dusko Tadic,* Appeal Judgement, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 224); also to reach the conclusion regarding the requirement of "*mens rea* for establishing liability under Article 7(1) pursuant to ordering" (*Prosecutor v. Tihomir Blaskic,* Appeal Judgement, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004, para. 42.); or with regard to "the *mens rea* for aiding and abetting" en el genocidio (*Prosecutor v. Radislav Krstic,* Appeal Judgement, IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, para. 141). In this sense, also to interpret Rule 67 (A)(ii)(b) in relation to the defendant's diminished mental responsibility as a matter for mitigating the sentence and not for acquittal. *Delalić et al. (Čelebići)*, Appeal Judgement, (IT-96-21-A), 20.02.2001, para. 590.

16 Regarding the ICTR, for instance, when it argued that "(t)he first form of liability set forth in Article 6 (1) is planning of a crime" and that "(s)uch planning is similar to the notion of complicity in Civil law, or conspiracy under Common law, as stipulated in Article 2 (3) of the Statute." (*The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*,

However, it is also true that the methodology employed by international criminal tribunals is not always consistent and coherent. Moreover, the judicial creativity observed in the jurisprudence of some international criminal tribunals has been likened to the judicial creativity of judges in common law systems. This "judicial creativity" has been used in several cases to identify customary international law. Whether because it was not possible to establish state practice or *opinio juris* justifying the existence of a customary norm or the presence of general principles of law.

For example, in *Hadžihasanović*, the ICTY determined that the concept of "command responsibility" applied equally in the course of an internal armed conflict. To reach this conclusion, it considered not only that "to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting opinio juris," but also that "where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle."[17] This reasoning was described as akin to "the creation of judge-made rules of the English common law."[18] Similarly, the ICTY's application of Article 3 of the Statute to both international armed conflicts and internal armed conflicts,[19] after exposing the existence of customary norms prohibiting reprisals against civilians under certain circumstances, follows the same trend.[20]

Unlike the statutes of ad hoc criminal tribunals, the Statute of the ICC establishes the sources of law to be applied by the court in Article 21.[21] Concerns about not violating the principle of legality and avoiding legal gaps were at the

ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, párr. 480). In the same vein, to note that "complicity is viewed as a form of criminal participation" (*Ibid*., para. 527) or "incitement (...) as a particular form of criminal participation, punishable as such» (*Ibid*., para. 552), or regarding complicity in genocide (*The Prosecutor v. Ignace Bagilishema (Trial Judgement)*, ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001, para. 69), as well as the "complicity is a form of criminal participation" (*The Prosecutor v. Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, para. 169), among other judgments like *The Prosecutor v. Alfred Musema,* Judgement and Sentence, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, para. 186, 193; *The Prosecutor v. Juvénal Kajelijeli,* Judgment and Sentence, ICTR-98-44A-T, International Criminal Tribunal for Rwanda (ICTR), 1 December 2003, para. 850.

17 *Hadžihasanović et al*., Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility ('Decision on Command Responsibility'), (IT-01-47-AR72), Appeals Chamber, 16 July 2003, para.12.

18 *Vid*., J.M. Henckaerts, "Civil War, Custom and Cassese", *Journal of International Criminal Justice*, 10/2012, 1103.

19 *Prosecutor v. Tadić,* Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995.

20 *Prosecutor v. Kupreškić et al*., Judgment, Trial Chamber, Case. IT-95-16-T, T.Ch., 14 January 2000, para. 527.

21 M. M. deGuzman, "Article 21 Applicable law", *op. cit*., 933–934.

forefront of the statute's drafting.[22] The ensemble comprising the Rome Statute, Elements of Crimes, and Rules of Procedure and Evidence constitutes a more developed codification compared to *ad hoc* criminal tribunals.[23] First and foremost, the "Statute, Elements of Crimes, and its Rules of Procedure and Evidence" are applied; secondly, "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicto"; and thirdly, "general principles of law derived by the Court from national legal systems of the world, as well as when appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." In *Al Bashir*, the Court specified the frameworks in which the last two sources are applied:

> "(...) the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute."[24]

This more comprehensive codification implies that reference to customary international law is not as frequent, although it serves at times to determine the meaning and scope of the provisions of the Statute.[25] In fact, there is consensus in affirming that the Statute and the Elements of Crimes reflect the status of customary international law on various issues: definition of crimes, principles of criminal responsibility, etc.[26] This reality restricts the judicial "creativity" of the judges and the possibility of assuming "activism" in interpretation. However, it is also true that the interpretative work of the judges, even when the development of codification is greater, always entails problematic positions in some cases. This has been reflected, for example, in the determination of the territorial jurisdiction of the Court, in the interpretation of Article 27 and its relationship with Article 98 of the Statute, as well as in the interpretation of certain crimes such as genocide.[27]

22 *Ibid*.

23 W. A. Schabas, "Relationships Between International Criminal Law and Other Branches of International Law", *RCADI*, 417/2021, 253.

24 *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 04 March 2009, Pre-Trial Chamber I, ICC-02/05-01/09-3, para. 44.

25 W. A. Schabas (2021), *op. cit*., 254.

26 *Ibid*., 255

27 *Ibid*., 255–258. M. M. deGuzman, *op. cit*., p. 936, C. Kress, "The ICC's First Encounter with the Crime of Genocide, The Case Against Al Bashir", *The Law and Practice of the International Criminal Court* (ed. C. Stahn), Oxford: Oxford University Press, 2016, 669–704.

In this regard, one of the problematic issues is the interpretation of Article 25(3) of the Rome Statute. Since the case of *Thomas Lubanga Dyilo*, the ICC adopted the position of the German theorist Claus Roxin and his "theory of control over the organization" to distinguish between perpetrators of and accessories to a crime.[28] However, lawyers and judges reject this theory for several reasons: among them, because it is not widely accepted[29]; in others, because it is problematic to directly import a theory from the German legal system for incorporation into the jurisprudence of the ICC[30]; and in others, due to the particularity of the content of this theory, which creates difficulty in fitting it into the aforementioned Article 25 of the Statute.[31]

3. RULES AND PROCEDURES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE PATH FROM A MONOPOLISTIC TREND OF COMMON LAW TOWARDS A COMBINATION WITH CIVIL LAW

While it was possible to make a clearer distinction in the first half of the 20th century between common law and civil law, based on reflecting an adversarial system versus an inquisitorial system, it is no longer so clear today. The inquisitorial

28 *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 07 March 2014, ICC-01/04-01/07-3436-tENG, para. 1382. The tribunal has referred to this issue in the following terms: "The Chamber notes that all of the pre-trial and trial chambers appear to have hitherto endorsed the criterion of control over the crime in order to distinguish between perpetrators of and accessories to a crime. See, in particular, Decision on the confirmation of charges, paras. 480-486; Lubanga Judgment, para. 994; Decision on the confirmation of charges in Lubanga, paras. 326-341; Decision on the confirmation of charges in Bemba, para. 347; Decision on the Confirmation of Charges in Abu Garda, paras. 152; -349; Decision on the confirmation of charges in Banda and Jerbo, para. 126; Decision on the confirmation of charges in Mbarushimana, para. 279; Decision on the Confirmation of Charges in Ruto et al., paras. 291-292; Decision on the Confirmation of Charges in Kenyatta et al., para. 296; Warrant of arrest issued in Al Bashir, para. 210; Situation in the Libyan Arab Jamahiriya, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", 27 June 2011, ICC-01/11-01/11-1 ("Warrants of arrest in Gaddafi et al."), para. 68."

29 *Prosecutor v. Katanga*, Judgment pursuant to article 74 of the Statute, Trial Chamber II, 07 March 2014, ICC-01/04-01/07-3436-tENG, para. 1374.

30 Vid., for example : *Separate Opinion of J. Fulford, Prosecutor v. Lubanga*, Trial Chamber I, Judgment pursuant to Article 74, 14 March 2012, ICC-01/04-01/06-2842, para. 8, 10 ; *Concurring Opinion of Judge Christine Van den Wyngaert, Prosecutor v. Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, ICC-01/04-02/12-4, para. 5.

31 *Corrected version of partly concurring opinion of Judge Chile Eboe-Osuji, Prosecutor v. Ntaganda*, Appeals Chamber, Appeal Judgment 81 RS - conviction, acquittal, or sentence, 30 March 2021, ICC-01/04-02/06-2666-Anx5-Corr, para. 36 y ss.

system itself in several Roman-Germanic-French traditions gradually incorporated institutions and procedures from the adversarial system. The Roman-Germanic-French tradition has evolved from an inquisitorial system towards an adversarial system, as demonstrated in regions of the world such as Latin America. This reality has been imposed since the procedural legislation in France after the Revolution of 1789. This legislation sought to overcome as much as possible the procedural scheme known as "inquisitorial", characterized by secrecy, non-contradiction, and the absence of orality throughout the process (oral proceedings are fundamental to guarantee the rights and protections of the accused). These harsh realities, rife with many abuses, sought to be reversed with the introduction of an oral trial, with contradiction between parties, an impartial judge, among other measures.

Several authors have pointed out that there are differences between the adversarial and inquisitorial models in how investigations are initiated, how processing and trial proceedings are conducted, as well as how evidence is collected, the composition of the tribunal, the role of the victims, and the active or passive role of the tribunal, among others.[32] There is general consensus on some differentiating features between the two: in the adversarial system, the search for procedural truth rests with the parties, while in the inquisitorial system it is the state agencies that bear this responsibility (for example, the investigating judge).[33] This translates into the fact that in adversarial systems, the parties have a more active role in independently collecting evidence on their own, whether by the prosecution or the defense. On the other hand, in inquisitorial systems, an investigating judge, on behalf of society, gathers evidence provided by both parties and will direct this phase to carry out certain inquiries on this matter.[34] As for trial proceedings, the oral nature of this phase is more relevant in the adversarial system, either because the court is not aware of the documents and testimonies collected by the parties until after the trial has begun. In general terms, this marks the probative value of the evidence to be considered by the tribunal, as it is during the oral trial that this relevance is reached. In adversarial systems, evidence is submitted to the court before the start of the oral trial, which must be debated by the parties and analyzed by the court.[35]

From this perspective, and considering the diverse procedural schemes that incorporate characteristics of one or the other, even in those with a greater emphasis on either, it is possible to analyze the influence of common law and the adversarial scheme in international criminal proceedings. There is consensus among authors that the system constructed since 1945 responds in its broader conception to an adversarial model, which is identified as the procedure implemented by common law countries. The Statute of the International Military Tribunal at Nuremberg has been considered to have implemented this model. However, it was evident that this did not translate into making the common law model predominant in its entirety

32 A. Cassese, 355 y ss.

33 K. Ambos, "International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?", *Third International Criminal Law Review*, 3/2003, 1–37.

34 Vid., A. Cassese, *op. cit.*, 356–357.

35 *Ibíd.*, 358

over the procedural logics of civil law. This was one of the most concerning issues in the negotiations between the delegations of the United States and the United Kingdom versus the delegations of the Soviet Union and France for the establishment of the international tribunal.[36] The result was a procedure "derived both from Anglo-Saxon common law and from continental law" where "it was recognized that a slavish adherence to the evidentiary rules of either legal system alone would be out of keeping with the international character of the proceedings."[37]

This resulted, as Antonio Cassese synthesized, in "the power of the court to play an active role" especially "calling witnesses and questioning witnesses and the accused"; or in "the right of the accused to make an unsworn statement at the end of the trial" which allowed the accused to make a final statement without taking an oath; or regarding the "rules of evidence",[38] as well as the decisive push in discussions to hold trials *in absentia*, in this particular case due to the position of the Soviet delegation.[39] In any case, and despite the prevailing consideration of the importance of common law practice in the functioning of this tribunal,[40] it is true that since then "a genuine 'international procedure'"[41] has been shaping. The Statute of the International Military Tribunal for the Far East, on the other hand, would be drafted by the Americans themselves.[42]

Regarding the rules and procedures of the international criminal tribunals for the Former Yugoslavia and Rwanda, they were constructed with a combination of institutions from both common law and civil law systems. In fact, the majority position is that a "modified adversarial model" was created, which drew from the experience of both systems.[43] Nevertheless, the decisive influence of common law was also acknowledged. As recognized, the reasons for this reality may have been to follow the model of Nuremberg and Tokyo, and the intellectual background stemming from the common law of several of the statute's drafters.[44]

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36 Vid., T. Taylor, *Anatomía de los juicios de Núremberg, Memorias*, Berg Institute, 2022, 117.

37 T. Taylor, "Final report to the Secretary of the Army on the Nuremberg war trials under control council law no. 10.", *op. cit.*, 30

38 A. Cassese, *op. cit.*, 366–367

39 *Ibid.*, p. 367.

40 Taylor considered: "numerous fundamental doctrines and practices of Anglo-Saxon criminal law-such as the presumption of innocence, the rule that a defendant must be found innocent unless proved guilty beyond a reasonable doubt, and the practice that it is primarily the advocate's responsibility and not that of the tribunal to elicit testimony froill witnesses-were applied at Nuernberg, and in general it may be said that the practice was more similar to that of the common law than continental law." T. Taylor, "Final report to the Secretary of the Army on the Nuremberg war trials under control council law no. 10.", *op. cit.*, 90.

41 *Ibid.*

42 *Ibid.*, p. 368.

43 M. Ch. Bassiouni, "Principles of Legality in International and Comparative Criminal Law", *International Criminal Law, Volume III International Enforcement* (ed. M. Ch. Bassiouni), Martinus Nijhoff Publishers, 2008, 91.

44 A. Cassese, *op. cit.*, 369. "Key elements of the Tribunal's procedure such as the role of the Prosecutor in investigations and indictments, and the adversarial order and nature of case presentation reflect the Anglo-American Common Law approach."

These characteristics are explained in the case of the ICTY by: 1) the role assigned to the Prosecutor in the Statute as the one responsible for investigation and prosecution (Article 16.1); and 2) the confirmation of prosecution, following the presentation of charges, by a judge of the tribunal (judge of the Trial Chamber) (Article 19).[45] Similar procedural provisions were established in the Statute of the ICTR (Article 15 and following).

The complexity of making civil law and common law compatible in the operation of international criminal tribunals is enormous, resulting in a sort of "hybrid system" as acknowledged by judges serving on these bodies.[46] In both the procedural provisions of the ICTY and the ICTR, the adversarial method, within the framework of common law, was evident with rules that placed the parties in competition. Rather than assisting the court in deciding, the parties were adversaries. This became clear with the conception of the active role of the parties in the process, conducting their own investigations before and during the trial, with the Prosecutor's responsibility in the investigation extending beyond some powers granted to the tribunal, and with the dominance of the parties in presenting the case at trial, among other aspects.[47]

However, it is easy to detect that at times, an exact or absolute division between the two cannot be made. Elements that identify the adversarial system are not exclusive to common law legal systems. It has been rightly argued, for example, that both systems are "inquisitorial" in the sense that "the process is initiated and directed in the pre-trial phase by the state, i.e., the police and prosecution"; and both are "adversarial" because "the prosecution and 'accusation' lie in the hands of an institution different from the pre-trial judge (the Prosecution or the *juge d'instruction*)."[48]

The Statute of the ICTY in its Article 15 delegated to the judges themselves, as did the Statute of the ICTR (Article 14), the adoption of procedural rules[49] with a mixture of various systems. This reality was recognized by the ICTY in cases such as *Prosecutor v. Delalić et al.*:

> "The Tribunal's Statute and Rules consist of a fusion and synthesis of two dominant legal traditions, these being the common law system,

45 *Ibid.*, 369.

46 O. G. Kwon, "The Challenge of an International Criminal Trial as Seen from the Bench", *Journal of International Criminal Justice*, 5/ 2007, 360–376.

47 Vid., for example: J. Jackson, "Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial-Inquisitorial Dichotomy", *Journal of International Criminal Justice*, 7/2009, 24–26.

48 K. Ambos, *op. cit.*, 3. With regard to the provisions of the Statutes of the ICTY and the ICTR regarding the role of the Prosecutor as responsible for investigations, rather than a pre-trial investigating judge, it has been argued that: "A number of civil law countries also allocate the function of pre-trial investigation to a prosecutor whose role is conceived somewhat differently from common law countries as a public official whose task is to look for evidence which will acquit as well as convict the person being investigated." J. Jackson, *op. cit.,* 24.

49 G. Boas, J. L. Bischoff, N. L. Reid, B. D. Taylor III, *International Criminal Procedure International Criminal law*, Cambridge university Press, 2011, 23, 24.

which has influenced the English-speaking countries, and the civil law system, which is characteristic of continental Europe and most countries which depend on the Code system."[50]

But it is evident that the "predominant structure" would be the adversarial system of common law.[51] This was also recognized by 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* in 1999, considering that "(t)he common law adversarial system of criminal trials (...) is largely reflected in the Statutes of the Tribunals and in their Rules of Procedure and Evidence".[52] The tendency towards the prevalence of this adversarial system of common law generated more than one problem in the operation of this tribunal, due to the inherent characteristics of these international processes.[53] The *Expert Group* itself referred to some of these issues as follows:

> "Judges interviewed by the Expert Group in ICTY and ICTR expressed the belief that the prolonged nature of Tribunal proceedings was attributable to a significant degree to not enough control having been exercised over the proceedings by the judges, and also to the manner in which the prosecution and defence presented their cases. To be sure, in common law adversarial criminal proceedings it is the parties who determine the manner in which they will conduct their cases, the number of witnesses and exhibits, and the amount of testimony to be elicited. The extent of cross-examination and rebuttal is also largely in the hands of the parties (...) From the beginning, the judges have been scrupulous in their respect for the distribution of responsibilities implicit in the common law adversarial system and have tended to refrain from intervening in the manner of presentation elected by the parties. This surely contributed to the length of the proceedings and is recognized as having done so by the judges."[54]

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50 *Prosecutor v. Delalic et al.*, Trial Chamber, Judgement, 16 Nov 1998, para. 159.

51 In this regard, it has been argued that "predominant structure gives deference to the adversarial common law system of criminal justice, although they depart from it in many ways. Laced from the start with concepts from the civil law or Romano-Germanic system of criminal procedure, the Rules have evolved through" G. Boas, "A Code of Evidence and Procedure for International Criminal Law? The Rules of ICTY", *International Criminal Law Developments in the Case Law of the ICTY* (eds. G. Boas, W.A. Schabas), Martinus Nijhoff Publishers Leiden-Boston, 2003, 1–34.

52 *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and the ICTR*, 22 November 1999, UN Doc. A/54/634, para. 67.

53 This was acknowledged by the judges themselves. See, for example: O. G. Kwon, "The Challenge of an International Criminal Trial as Seen from the Bench", 5/2007, p. 364; R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2004, 93; W. A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006.

54 *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and the ICTR*, 22 November 1999, UN Doc. A/54/634, párr. 77

Hence, the *Report of the Expert Group* reflected the need to incorporate useful and viable elements from both legal systems to enhance the effectiveness of international criminal proceedings in both *ad hoc* international tribunals.[55] The combination of rules from both adversarial and inquisitorial systems in the procedure is accentuated in the successive modifications of the Rules of Procedure and Evidence.[56] This necessity was reflected in the need to interpret the Statute and the Rules without strict adherence to legal formulas of common law, even when the Rule was an expression of an institution of this legal system. This was expressed, for example, in *Prosecutor v. Goran Jelisić*:

> "In reading and interpreting the text of Rule 98*bis*(B), it has to be borne in mind that the adversarial aspect of the Tribunal's procedure is an important one but not exclusive of other influences. The Tribunal is an international judicial body. Accused persons come from primarily civil law jurisdictions. Judges of the Tribunal come from different legal cultures, as do counsel appearing before it. The Trial Chamber in this case consisted wholly of non-common law judges; account must be taken of that fact in interpreting the language in which their judgement was cast. To require strict conformity with a common law verbal formula would not be appropriate; it is the substance which is important."[57]

There is consensus that the ICTY established in its Rules "an adversarial method of presenting evidence" which involved "live examination and cross-examination of witnesses" and that "the production of witnesses and evidence is

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55 "There is a growing consensus among the judges that as the Tribunals develop and mature as international organs, they will have to move in the direction of drawing upon and incorporating into their own jurisprudence the most helpful aspects of the two systems. But this is a slow process, made so in the view of the Expert Group, largely because the legal culture and background of the judges who come from one system tends to make them cautious about quickly or uncritically accepting features of the other system. The Statutes are largely, though not entirely, reflective of the common law adversarial system, and the future evolution of the Tribunals' procedural jurisprudence, while necessarily complying with their Statutes, is apt to adopt aspects of the civil law model. In some respects, it seems to be doing so already. Some civil law models can doubtless deal with criminal law cases more expeditiously than the common law adversarial system." *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY and the ICTR*, 22 November 1999, UN Doc. A/54/634, párr. 82

56 K. Ambos, *op. cit.*, 6. see, for example: "The Trial Chamber notes that paragraph C of Rule 86 was added to that Rule by a decision of the Eighteenth Plenary on 9 July 1998. On that occasion, the Plenary opted to adopt the current unitary system in preference to the bifurcated (trial and sentencing) system prevalent in many common law jurisdictions in trial by jury." *Prosecutor v. Radoslav Brdjanin,* Trial Judgement, IT-99-36-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 September 2004, para. 1079.

57 *Prosecutor v. Goran Jelisic,* Appeal Judgement, IT-95-10-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 July 2001, para. 34

predominantly party-driven."[58] However, successive amendments incorporated mechanisms from civil law into various evidence rules to make the process before the court more viable.[59] It is worth noting that the Rules of Evidence of the ICTY and the ICTR did not exactly follow the model of common law. Rule 89(c) stated that "(a) Chamber may admit any relevant evidence which it deems to have probative value" although "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial" (Rule 89(d)). In this sense, Rule 89(e) also stated that "(a) Chamber may request verification of the authenticity of evidence obtained out of court". Explicitly, the ICTY itself considered that the admissibility of hearsay evidence did not correspond to common law practice:

> "Where such out of court statement is merely hearsay, the common law denies it any value as evidence of the truth of what had been said out of court, and restricts its relevance to the issue of the witness's credit. On the other hand, the civil law admits the hearsay material without restriction, provided that it has probative value; the weight to be afforded to it as evidence of the truth of what was said is considered at the end of all the evidence. This Tribunal has, by its Rules, effectively rejected the common law approach. Rule 89(C) provides: A Chamber may admit any relevant evidence which it deems to have probative value. The application of that Rule was considered at the trial of Tadic, in a decision which was not challenged in the appeal."[60]

In the Rules initially approved, it was stated that "witnesses shall, in principle, be heard directly by the Chambers". However, this reference was eliminated in an Amendment to the Rules in December 2000. A provision was added to the Statute allowing for the receipt of evidence from a witness orally or in writing (Rule 89(f)). *Admission of written statements and transcripts in lieu of oral testimony* was also permitted (Rule 92 *bis*). Similarly, mention should be made of the 1998 Amendment to Rule 94(B), which allows the Trial Chamber to *take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal.*[61]

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58 O. G. Kwon, *op. cit.*, pp. 360-376. 363

59 *Ibid.*, 363.

60 *Prosecutor v. Dusko Tadic*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vajin, IT-94-1-A-R77, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2000, para. 93). This can also be seen regarding the admissibility of "out-of-court statements made by an accused". (*Prosecutor v. Boskoski and Tarculovski,* Appeal Judgment, IT-04-82-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 May 2010, para. 194).

61 Rule 94 B, amended in December 2010, finally establish: "At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."

Other measures were also taken in successive amendments to reduce the size of cases, such as the adoption in July 1998 of Rule 73 *bis* on a Pre-Trial Conference – amended in 1999 and 2003 – for the Prosecutor to determine the number of witnesses to call, as well as the time allowed for presenting evidence, and *to reduce the number of counts charged in the indictment*, etc. Similarly, the adoption of Rule 73 *ter* on a Pre-Defence Conference – amended in November 1999 – referred to the Trial Chamber's possibility to call *the defence to shorten the estimated length of the examination-in-chief for some witnesses*, as well as *the number of witnesses the defense may call*, among others.

However, in the *ad hoc* criminal tribunals, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia, there were rules with a clear imprint of common law. In the ICTY, Rule 98 *bis* established the possibility of rendering a *judgment of acquittal* in any case if there is insufficient evidence to sustain a conviction.[62] This incorporation was made in the ICTY Rules in 1998 and subject to subsequent amendments.[63] Similar provisions, albeit to varying degrees in some cases, can be found in other international criminal tribunals, such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Special Tribunal for Lebanon.[64] Regarding subsection B of Rule 98 *bis*, which was removed in an amendment in 2004 but essentially retained in the sole paragraph of this Rule, the ICTY rightly considered that "this provision reflects the common law concept of 'no case to answer'"[65]. However, in ICTY jurisprudence, the criterion was imposed to determine the legal regime of this rule based on the Statute and the Rules, rather than following the sense assigned in common law.[66]

62 *Rules of Procedure and Evidence, ICTY*, Rule 98 *bis*; G. Boas, J. L. Bischoff, N. L. Reid, B. D. Taylor III, *op. cit.*, 287.

63 The current Rule establish: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."

64 *Vid.*, A. T. Cayley, A. Orenstein, "Motion for Judgement of Acquittal in the Ad Hoc and HybridTribunals. What Purpose If Any Does It Serve?", *Journal of International Criminal Justice*, 8/2010, 575–590.

65 *Prosecutor v. Hadzihasanovic and Kubura,* Decision on Requests for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, IT-01-47-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 September 2004, para. 12.

66 In this regard, it has been specified that "the regime to be applied for Rule 98 bis proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve. That determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will not be controlled by it; and therefore a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth." *Prosecutor v. Dario Kordic, Mario Cerkez*, Appeal Judgement, No.: IT-95-14/2-T, Decision on defence motions for judgement of acquittal, 6 April 2000, para. 9; *Prosecutor v. Pavle Strugar,* Decision on Defence Motion Requesting Judgement of Aquittal Pursuant to Rule 98 *Bis*, IT-01-42-T,

Similarly, the uniqueness of other provisions as expressions of common law is evident. In the ICTY, with respect to Rule 62 *ter* concerning "plea agreements"[67], it was considered as "more frequently used in adversarial common law jurisdictions than in the more inquisitorial civil law jurisdictions, due to the role that judges, prosecutors, and defense counsel play in the respective systems".[68] This institution was reformed on several occasions by ICTY judges, especially after the *Erdemović's case*. Initially, in the early stages of the procedure, the accused was given the right to waive a trial if they pleaded guilty.[69] Thus, the proceedings could continue with the conduct of a trial or a sentencing hearing (in the case of a guilty plea). The Tribunal Chamber in the *Erdemovic case* attempted to define this institution with explicit reference to its origin in common law:

> "The Trial Chamber would first point out that the choice of pleading guilty relates not only to the fact that the accused was conscious of having committed a crime and admitted it, but also to his right, as formally acknowledged in the procedures of the International Tribunal and as established in common law legal systems, to adopt his own defence strategy. The plea is one of the elements which constitute such a defence strategy."[70]

In this regard, another influence of common law on the rules and procedures of ad hoc criminal tribunals is evident in: the order of presenting evidence, where

International Criminal Tribunal for the former Yugoslavia (ICTY), 21 June 2004, para. 12; *Prosecutor v. Slobodan Milosevic,* Decision on Motion for Judgement of Acquittal, IT-02-54-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 June 2004, para. 10 y ss. In the doctrinal field, see: A. Niv, "The Schizophrenia of the 'No Case to Answer' Test in International Criminal Tribunals", *Journal of International Criminal Justice*, 14/2016, 1121–1138.

67 In the doctrinal field, see: K. McCleery, "Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals. Lessons from Civil Law Systems", *Journal of International Criminal Justice*, 14/ 2016, 1099–1120.

68 Regarding Rule 62 *ter*, the ICTY has acknowledged: "Plea agreements are more frequently used in adversarial common law jurisdictions than in the more inquisitorial civil law jurisdictions, due to the role that judges, prosecutors and defence counsel play in the respective systems." *Prosecutor v. Momir Nikolic,* Sentencing Judgement, IT-02-60/1-S, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 December 2003, para. 47. "The Trial Chamber would first point out that the choice of pleading guilty relates not only to the fact that the accused was conscious of having committed a crime and admitted it, but also to his right, as formally acknowledged in the procedures of the International Tribunal and as established in *common law* legal systems, to adopt his own defence strategy. The plea is one of the elements which constitute such a defence strategy." *Prosecutor v. Drazen Erdemovic,* Sentencing Judgement, IT-96-22-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 November 1996, para. 13.

69 *Vid*., *Rules of Procedure and Evidence, ICTY*, Rule 62 y ss.

70 *Erdemovic*, Sentencing judgement, IT-96-22, Trial Chamber I, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 Nov 1996, para. 13. *Vid*., also: *Separate and Dissenting Opinion of Judge Stephen*, *Erdemovic*, Judgement, Appeal, IT-96-22-A, 07 Oct 1997; Joint Separate Opinion of Judge Mcdonald And Judge Vohrah, *Erdemovic*, Judgement, Appeal, IT-96-22-A, 07 Oct 1997.

the defense follows the prosecution's presentation[71]; the "witness proofing" conducted by both the prosecutor and the defense before testifying in court[72], as can be inferred from the experiences of the ICTY, the ICTR, and the Special Court for Sierra Leone.[73] Similarly, Rules 85 and 90 of the ICTY were considered "largely reflective of the common law system".[74] At this point, it was also considered that their jurisprudence on "abuse of process" was based on a common law institution.[75]

Similarly, in the ICTR, several similar institutions were considered to have roots in common law: for example, "(t)he *voir dire* procedure originates from the common law and does not have a strictly defined process in this Tribunal", and although it was acknowledged that there were no provisions in the Rules for a formal procedure for pre-trial examination, reference was made to Rule 89(b) which "provides that reference may be made to evidentiary rules 'which will best favour a fair determination of the matter'".[76] This same approach can be found regarding Rule 89(C) of the Rules[77], or regarding the opportunity for a witness accused of lying by the defense to hear and respond to this accusation, although it was indeed recognized that it was "a matter of justice and fairness to victims and witnesses, principles recognized in all legal systems throughout the world"[78]. It has also been argued by some authors that the ICTR has developed a "common law of sentencing for genocide and crimes against humanity" in the absence of legal provisions in the Court's Statute.[79]

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71 G. Boas, J. L. Bischoff, N. L. Reid, B. D. Taylor III, *op. cit.*, 278.

72 *Ibid.*, 284.

73 R. Skilbeck, "Frankenstein's Monster. Creating a New International Procedure", *Journal of International Criminal Justice*, 8/ 2010, 457–459.

74 In several matters, the court referred to the origin of various institutions rooted in common law: when it was argued that"while the Tribunal is in no way bound by the rules of the common law and the Rules do not provide clear guidance on the question of impeaching a party's own witness, Rules 85 and 90 are nonetheless largely reflective of the common law system." *Prosecutor v. Vujadin Popovic*, Decision on Impeachment, IT-05-88-AR73.3, International Criminal Tribunal for the former Yugoslavia (ICTY), 1 February 2008, para. 31.

75 "As the parties note, the jurisprudence of the Tribunal has relied in several instances on the common law rooted doctrine of abuse of process." *Prosecutor v. Rodovan Karadzic* (Decision on Karadzic's Appeal of the Trial Chamber's Decision on Alleged Holbrooke Agreement), IT-95-5/18-AR73.4, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 October 2009, para. 45.

76 *Ntahobali & Nyiramasuhuko*, Decision on Voir Dire and Statements of the Accused, ICTR-97-21-AR73, International Criminal Tribunal for Rwanda (ICTR), 27 October 2006, para. 12.

77 *Vid.*, for example: *The Prosecutor v. Elizaphan and Gérard Ntakirutimana,* Appeal Judgement, ICTR-96-10-A & ICTR-96-17-A, International Criminal Tribunal for Rwanda (ICTR), 13 December 2004, para. 145 y ss.

78 *The Prosecutor v. Jean-Paul Akayesu,* Trial Judgement, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, para. 46.

79 R.D. Sloane, "Sentencing for the 'Crime of Crimes'. The Evolving 'Common Law'of Sentencing of the International Criminal Tribunal for Rwanda", *Journal of International Criminal Justice*, 5/2007, 713–734.

The procedural system of the International Criminal Court is considered to incorporate various characteristics of both systems, but in reality, its nature is *sui generis*.[80] Undoubtedly, this greater incorporation of institutions from both systems has among its reasons the reference to the experience of the rules of the *ad hoc* tribunals. As we have seen, these rules were gradually amended to incorporate institutions and mechanisms of the civil law.[81] The negotiations of the Statute saw opposing positions between representatives of both systems on matters related to investigation, prosecution, pre-trial procedures, disclosure, and fair trial issues.[82] These particularities are then expressed in a particular way in the Rules of Procedure and Evidence.

This reality became evident with the combination of an independent Prosecutor and the significance of the parties in driving the trial, but with a notable judicial intervention before and during the trial.[83] Regarding the duties and powers of the prosecutor with respect to investigations under Article 54, it has been considered as "a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems."[84] For example, setting the objective of the Prosecutor as "to establish the truth" is seen as more aligned with civil law, as in common law the Prosecutor is more oriented towards assisting the court in seeking justice.[85] On the other hand, the Pre-Trial Chamber is identified with the inquisitorial model of civil law, albeit with its own peculiarities.[86] This reality

80 C. Stahn, "Introduction", *The Law and Practice of the International Criminal Court* (ed. C. Stahn), Oxford University Press,2015, p. xcvii; B. Broomhall, "Article 51 Rules of Procedure and Evidence", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C.H. Beck, Hart, Nomos, 2016, 1348.

81 *Ibíd*., 1349.

82 *Ibíd*., 1350.

83 *Ibíd*., 1351.

84 M. Bergsmo, P. Kruger, O. Bekou, "Article 54 Duties and powers of the Prosecutor with respect to investigations", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C.H. Beck, Hart, Nomos, 2016, 1382.

85 *Ibíd*., 1383.

86 "(...) the establishment of a Pre-Trial Chamber stems from the Civil Law tradition, where prosecutorial and investigative activities frequently undergo judicial scrutiny. Nevertheless, it must be emphasized that the Pre-Trial Chamber is not an investigative chamber. In contrast to the 'juge d'instruction' of civil law systems, the Pre-Trial Chamber has no investigative powers of its own nor is it responsible for directing or supervising the investigations of the Prosecutor." F. Guariglia, G. Hochmayr, "Article 57 Functions and powers of the Pre-Trial Chamber", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C.H. Beck, Hart, Nomos, 2016, 1423. El propio tribunal ha sostenido: "The Appeals Chamber recalls that the Court's legal framework combines elements from the Common Law and Romano-Germanic legal traditions. Notably, it contains certain fair trial safeguards that are not typically found in Common Law systems, such as the obligation of the Prosecutor to 'investigate incriminating and exonerating circumstances equally' under article 54 (1) (a) of the Statute and the need for a Pre-Trial Chamber to 'determine whether there is sufficient evidence

applies to some functions and powers of the Trial Chamber under Article 64 of the Statute.[87]

In matters of evidence, it is acknowledged that a greater role was granted to the judicial body in line with "inquisitorial systems". Regarding the evidence regime of Article 69 of the Rome Statute, it has been expressed as a "compromise between different legal views" concerning the presentation of evidence before the Court.[88] The Appeals Chamber in the case of *Jean-Pierre Bemba Gombo* held:

> "(...) the Appeals Chamber observes that, with reference to the discussions held as part of the drafting process of the Statute, commentators explain that the final formulation of article 69 of the Statute was indeed the result of a compromise between common law systems (which 'tend to exclude or weed out irrelevant evidence, and inherently unreliable types of evidence, as a question of admissibility') and civil law systems (in which 'all evidence is generally admitted and its relevancy and probative value are considered freely together with the weight of the evidence'). This final compromise was to 'eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has a discretion to «rule on the relevance or admissibility of any evidence». In particular, it has been explained in this regard that article 69 of the Statute, 'while [it] adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence', also incorporates 'some common law concepts' in that it 'permits the Court «to rule on the relevance or admissibility of any evidence» before considering the question of weight."[89]

Judge Geoffrey Henderson considered that "(t)he Statute's admissibility regime is thus considerably less formal than what exists in most Common Law jurisdictions and offers more flexibility and discretion to the judges".[90] This became

to establish substantial grounds to believe that the persons concerned committed each of the crimes charged' prior to committing the person concerned to trial pursuant to article 61 (7) of the Statute." *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", Appeals Chamber, ICC-01/04-02/06-2026, 05 September 2017, para. 52.

87 G. Bitti, "Article 64 Functions and powers of the Trial Chamber", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C.H. Beck, Hart, Nomos, 2016, 1597.

88 F. Guariglia, "'Admission' v.'Submission'of Evidence at the International Criminal Court. Lost in Translation?", *Journal of International Criminal Justice*, 16/2018, 318.

89 *Prosecutor v. Bemba Gombo et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article, Appeals Chamber, ICC-01/05-01/13-2275-Re, 08 March 2018, para. 590.

90 *Separate Opinion of Judge Geoffrey Henderson, Prosecutor v. Bemba Gombo et al.*, Appeals Chamber, ICC-01/05-01/13-2275-Anx, 08 March 2018, para. 39.

clear when the court was recognized "the authority to request the submission of all evidence that it considers necessary for the determination of the truth" (Article 69.3).[91] In Article 69.4 of the Statute, on the other hand, by noting that the Court "may rule on the relevance or admissibility of any evidence"[92] constitutes "an amalgam of both common law and civil law concepts and does not strictly follow the procedures of either" [93]. This perception has also led to various interpretations of the exception established in Article 69.7 of the Statute.[94]

Another sphere of reconciliation between both systems is evident in the discretion of the Pre-Trial Chamber to hear or not from the Prosecutor before indicating an order or a request for state cooperation, with the exception of Article 53.3 (a)[95], as well as Article 56.1.[96] Reference can also be made to Article 61, concerning confirmation of the charges before trial, which establishes under certain circumstances that the Pre-Trial Chamber, at the request of the Prosecutor or *proprio motu*, may "hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial".[97] Regarding the proceedings on an admission of guilt, and especially the institution of guilty pleas, it is argued that the "solution adopted in article 65 follows such a cautious approach in adopting a third avenue between the classic 'common law' and 'civil

91 D. K. Piragoff, P, Clarke, "Article 69 Evidence", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C.H. Beck, Hart, Nomos, 2016, 1715.

92 For this, it must take into account "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".

93 D. K. Piragoff, P, Clarke, *op. cit.*, 1735.

94 "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." Regarding its exceptional nature, see: *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, ICC-01/04-01/06, 24 june 2009, para. 34. See also: *Separate Opinion of Judge Geoffrey Henderson, Prosecutor v. Bemba Gombo et al.*, Appeals Chamber, ICC-01/05-01/13-2275-Anx, 08 March 2018, para. 39.

95 F. Guariglia, G. Hochmayr, "Article 57 Functions and powers of the Pre-Trial Chamber", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C. H. Beck, Hart, Nomos, 2016, 430.

96 "Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber." On this matter, it has been said: "The concept reflects the civil law category of '*definitive and unrepeatable acts*' or the so-called '*anticipated taking of evidence*', but also the common law tradition of ensuring cross-examination in the case of a witness that will not be available at trial (depositions)." F. Guariglia, G. Hochmayr (2016), *op. cit.*, 1413.

97 W. A. Schabas, E. Chaitidou, M. M. El Zeidy, "Article 61 Confirmation of the charges before trial", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C. H. Beck, Hart, Nomos, 2016, 1486.

law' approaches".[98] This article relates to Article 64.8 (a), which is argued to appeal to an "admission of guilt", constituting "a hybrid between the common law 'plea of guilty' and the civil law formula 'admission of the facts'".[99]

The Court has considered applicable within the framework of the Rome Statute institutions that only have roots in common law systems because they are aimed at ensuring other articles of the Statute, especially in the field of human rights. In this vein, the Court considered compatible with the rights of the accused, the rights of the prosecution, and the rights of the victim the possibility of analyzing the "no case to answer" issue when presented by the Defense, even though it was not recognized in the Rome Statute. It acknowledged that it was an institution rooted in adversarial systems and in the common law tradition[100], but could be accommodated under Articles 64.3, 64(2), and 64(6)(f).[101] Similarly, while considering that "(t)he doctrine of abuse of process, as known to the common law, has no direct parallel in the Romano-Germanic systems of law", it

98 F. Guariglia, G. Hochmayr, "Article 65 Proceedings on an admission of guilt", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C. H. Beck, Hart, Nomos, 2016, p. 1625.

99 Regarding this article, the Trial Chamber has expressed: "The solution reflected in the final Article 65 of the Statute follows a 'third avenue' between the traditional common law and civil law approaches. Pursuant to Articles 64(8)(a) and 65 of the Statute, an accused is afforded an opportunity to make an admission of guilt at the commencement of the trial, a procedure which looks not dissimilar to the traditional common law 'guilty plea'. Article 65(5) of the Statute also implicitly authorises discussions corresponding to plea agreements in common law legal systems. However, Article 65 also requires the Chamber to conclude that the admission is 'supported by the facts of the case', specifically requiring it to consider both the admission of guilt 'together with any additional evidence presented'. This is more analogous to a summary or abbreviated procedure traditionally associated with civil law systems." *Prosecutor v. Al Mahdi*, Judgment and Sentence, Trial Chamber VIII, ICC-01/12-01/15-171, 27 September 2016, para. 27. Sobre el artículo 66(3) del Estatuto de Roma se ha hecho notar que el "language is very familiar from the common law standard of proof, which has also been adopted by other international criminal tribunals". S. Smet, "The International Criminal Standard of Proof at the ICC-Beyond Reasonable Doubt or Beyond Reason?", *The Law and Practice of the International Criminal Court* (ed. C. Stahn), Oxford University Press, 2015, p.861. While common law systems reject the Prosecutor's appeal, Article 81 of the Statute does establish it. (I. Tallgren, A. Reisinger Coracini, "Article 20 Ne bis in ídem", *Rome Statute of the International Criminal Court, A Commentary* (eds. O. Triffterer, K. Ambos), C. H. Beck, Hart, Nomos, 2016, p. 913). On its part, the Court refused to allow "witness proofing" considering it to be only found in common law under Article 21(c) of the Statute. (M. M. deGuzman, *op. cit*., p. 944).

100 *Prosecutor v. Ruto and Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), Trial Chamber, ICC-01/09-01/11-1334, 03 June 2014, para. 11.

101 *Ibid*., para. 16-17. Also, see in another context: *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", Appeals Chamber, ICC-01/04-02/06-2026, 05 September 2017, para. 54.

found application to protect the fundamental rights of individuals against violations and to ensure a fair trial.[102] In the same vein, the Court considered that accepting a request for a *voir dire* was at the discretion of the Tribunal, although it acknowledged that it was "a concept originating from the common law, not expressly provided for in the framework of the Statute".[103] The Court also considered that it was not explicitly established in the Court's Statute or as a general principle of law "the possibility of parties preparing witnesses for their testimony", recognized as a "common practice in common law jurisdictions", but that it had discretion to apply it under Article 64 (fair and expeditious trial) and to ensure fundamental rights.[104]

4. CONCLUSIONS

While the Statute of Rome and its Rules must be interpreted according to their own terms, without direct application of any particular legal system's rules[105], it is undeniable that reconciling the perspectives of both systems poses a significant challenge.[106] This has in some cases led to demands for the composition of courts

102 *Prosecutor v. Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution…, Appeals Chamber, ICC-01/04-01/06-1486, 20 October 2008, para. 27-29.

103 *Prosecutor v. Al Hassan*, Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements', Trial Chamber X, ICC-01/12-01/18-1475-Red, 20 May 2021, párr. 17.

104 *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on witness preparation and familiarisation, Trial Chamber I, ICC-02/11-01/15-355, 02 December 2015, para. 15.

105 For example, Article 69.8, concerning *evidence*, clearly states that:: "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."

106 See the separate opinion of Judges Van den Wyngaert and Morrison in *The Prosecutor v. Jean-Pierre Bemba Gombo*: "Although we regret that despite our best efforts, the judges in this Appeal have not been able to reach unanimity, we accept that it is a fact of judicial life that judges do not always agree. This is true for national courts and tribunals, and perhaps even more for international courts, where the panels consist of judges from different legal backgrounds who must interpret and apply a body of the law that is relatively new and often open to diverging approaches and views. The ICC statute is full of 'constructive ambiguities' that have displaced the discussion from the political level (the drafters of the Rome Statute) to the judicial level (the judges of the ICC). Unsurprisingly, some of these discussions remain alive and explain why it is sometimes difficult to reach unanimity. The ICC is far from unique in this respect. Both of us experienced this as judges at the ICTY and one of us also as an *ad hoc* judge at the International Court of Justice. It is not different in the present case." *Separate Opinion of Judge Van den Wyngaert and Judge Morrison, The Prosecutor v. Jean-Pierre Bemba Gombo,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, 08 June 2018, para. 2.

to include representation from all legal systems.[107] In any case, it is true that international criminal law has developed to the point of being considered a *sui generis* system, both in terms of the elements of crimes and the rules of procedure and evidence. The elaboration of the Rome Statute, with its comprehensive framework, has established it as an independent body of law separate from national legal systems. However, even if this is the case, it should not be forgotten that the majority of the institutions, categories, and operating logics established in the Statutes of international criminal tribunals have their origin in the domestic law of States.

This work has highlighted the significant influence of the common law system in the construction of international criminal law. This reality is also related to another equally important discussion: the occasional dominance of one legal system over another to serve as a reference point, especially due to the majority influence or legal hegemonies in international institutions responsible for implementing international mechanisms and processes. However, international criminal law has been resistant to unconditionally incorporate common law formulas. A certain pragmatism has been necessary to justify and legitimize an international institution with ius puniendi. As this branch of international law has developed more fully, it has become "independent" or "separated" in a way from directly incorporating the logic, principles, or rules of a national legal system.

This does not mean that "general principles of law derived by the Court from national laws of legal systems of the world" or "the national laws of States that would normally exercise jurisdiction over the crime" are excluded from their application, as accurately acknowledged by Article 21 of the Rome Statute. With this open possibility, the common law systems continue to play an important role in the application and interpretation of international criminal law under the Rome Statute. This importance is not only due, as mentioned, to the composition of tribunals on occasions by judges originating from these systems but also due to a certain hegemony imposed in international jurisdiction to determine *state practice* or the existence of an *opinio juris* justifying a customary law norm. The same applies to determine the existence of general principles common to all legal systems worldwide.

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107 For example, in *Katanga*, "The applicant submits that the current composition of the Chamber is too narrowly drawn as it includes no judge with a common law background, contrary to the sprit, objectives and the letter of the Statute which give 'high priority to the representation of the principal legal systems of the world in each courtroom'." *Prosecutor v. Katanga*, Decision concerning the Request of Mr Germain Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II, Presidency, ICC-01/04-01/07-757, 21 November 2008, para. 5.

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Summary

The assimilation of common law into international law in the creation of law is related to the inherent characteristics of international law. Hence, several English and American authors have identified international law with the common law system. This particularity is accentuated in international criminal law due to the unwritten nature of customary norms and the limited normative material. This reality has consequences in a growing "judicial activism" in the application of norms of international criminal law and in the shaping of rules of evidence and procedure. Nevertheless, various international criminal tribunals have rejected applying judicial precedent in the same manner as it is applied in common law.

In this regard, common law, as one of the most significant legal systems in the world, has implications in the jurisprudence of international criminal courts to ascertain whether there is an opinio juris of a customary norm and as a means to establish the most appropriate interpretation to be included in a treaty norm. Regarding rules of evidence and procedure, common law has been equally important. Initially, this influence was much more predominant in some cases, especially when common law was identified as an adversarial system. However, in the evolution of rules of evidence and procedure in international criminal courts throughout the 20th century, there was a mixture or combination of rules from the civil law, identified with inquisitorial systems, and common law. Nevertheless, the paper emphasizes that it is not possible today to rigidly apply a differentiation between the two systems. Nowadays, each of the systems has incorporated institutions and mechanisms from the other.